BANCASSURANCE: A LEGISLATIVELY PREMATURE ENTRY INTO ZAMBIA?

BY

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ABSTRACT

In the merging world of financial services, the concept of *bancassurance* has assumed a central role in the strategy of a growing number of financial institutions and insurance companies. This paper recognises that each country's unique circumstances require a different approach for *bancassurance* success. The question is thus entered upon as to whether the approaches attempted in Zambia are supported by the law. The first chapter introduces the concept of *bancassurance* and highlights its characteristics and nature, bringing the problem into perspective. The chapter that follows argues that *bancassurance* is impermissible in Zambia against the backdrop of the statutory definition of "banking business" in the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia as read together with s.399 of the Companies Act, Chapter 388 of the Laws of Zambia. For a deeper insight of the issues being grappled with, a comparative analysis of *bancassurance* as practiced around the world is then presented. The third chapter uses an alternative route to arrive at the conclusion of the previous one by drawing on the anti-trust aspects of *bancassurance*. It assumes bancassurance to be permissible and hypothesises whether, by virtue of such permission, and/or s.9(2) of the Insurance Act No. 27 of 1997 Parliament can be taken to have undermined the Competition and Consumer Protection Act No. 24 of 2010. The last chapter sums up the findings on the legality of bancassurance and its legislative impediments. It goes on to table, in the alternative, several recommendations regarding the workability of *bancassurance*. These involve changes to the definition of banking business; distinguishing between agents and distributors in the Competition and Consumer Protection Act; addressing the incompatibility of the *per se* rules in the Competition and Consumer Protection Act with the market dominance tests that its enforcement requires; and drawing on experiences of others around the world to come up with a comprehensive position of our own.

DEDICATION

To my mother and the memory of my late father.

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Mum, Munsha, Ba Musonda and PC, thanks for the encouragement to re-apply and re-enroll after the mishap with my original UNZA application that incidentally set me back a year.

Uncle Sam, your mentorship puts into perspective things that ordinarily are invisible to the (untrained) naked eye, and your generosity is unparalleled. I am grateful for all this, especially that your belief in me was unshaken by the infamous Contract Law II debacle of the 2007 academic year, that we later learnt would cost a year in terms of progression rate.

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As for my supervisor, I must first of all confess that I took advantage of your reputation and stature by way of name dropping in order to set the tone for some of my interviews. However, those very qualities of yours ensured that this work was prepared much like a pleading, in which each word must earn its keep. By the same token, your guidance and subsequent approval of each chapter served as reassurance that there is a vestige of sense in what I'm rambling on about in this long paper.

Kakungu, Rod, Kawandami, Sepo, Ruth, hmmm... I'm pressed for time and space which are inhibiting all efforts to identify specific contributions. But don't give up on me just yet because I can assure y'all that somewhere in the ordinary course of friendship, you've made an impact leading up to this point.

An extra special word to all the veterans. I need not even say much because by custom of usage, the term "veteran" itself has come to convey volumes. Resisting the urge to get started on another oblig positing that trials and tribulations are the desiderata of a bestseller or Oscar winning movie, the fact of the matter is that we now have the necessary ingredients for a life story worth telling, or even selling. In the words of Kanye, let's now turn tragedy to triumph.

Table of Statutes

Banking and Financial Services Act, Cap 387 of the Laws of Zambia

Companies Act, Cap 388 of the Laws of Zambia

Competition and Consumer Protection Act No. 24 of 2010

Competition and Fair Trading Act, Cap 417 of the Laws of Zambia (repealed)

Insurance Act No. 27 of 1997

Table of Cases

Banbury v Bank of Montreal [1918] AC 626

DHN Food Distributors Ltd and others v Tower Hamlets LBC [1976] 3 All ER 462, CA

Fuji Finance Inc v Aetna Life Insurance Co Ltd [1996] 4 All ER 608, CA.

Passmore v Morland plc [1999] 3 All ER 1005, CA.

Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152

Woods v Martins Bank Ltd [1959] 1 QB 55

Glossary of Acronyms

BFSA – Banking and Financial Services Act, Chapter 387 of the Laws of Zambia

BoZ – Bank of Zambia

CCPA – Competition and Consumer Protection Act No. 24 of 2010

CCPC – Competition and Consumer Protection Commission

PIA – Pensions and Insurance Authority

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CHAPTER ONE

SETTING THE SCENE

1.1 INTRODUCTION

In the merging world of financial services, the concept of *bancassurance* has assumed a central role in the strategy of a growing number of financial institutions[1] and Zambia is by no means an exception. This research paper thus investigates whether the legislation that *bancassurance* affects the operation of is capable of addressing its intricacies. Put differently, the paper generally seeks to establish whether *bancassurance* can be said to have been in the contemplation of the Legislature when it passed as law, those enactments that more closely "regulate" *bancassurance.*

This chapter is meant to foreground the crux of this entire research which is presented in the title "Bancassurance: A legislatively premature entry into Zambia?". It therefore basically introduces the concept of *bancassurance*, delineating its nature and scope for the purposes of the treatise, and goes on to highlight the problem with a breakdown of the method to be used in tackling it.

1.2 A FEW REMARKS ON BANCASSURANCE IN THIS PAPER

Chevaliar, Launey and Mainguy observe that a great many people have tried to come up with a comprehensive definition of the term *bancassurance* but that endeavour has typically been difficult considering the history and practices of all the different *bancassurance* operators around the world.[2] However, there are two aspects that are of particular concern for purposes of this treatise.

The first is that described by Alan Leach as the involvement of banks in the manufacturing, marketing or distribution of insurance products[3] which would necessarily entail a purchaser consciously procuring the underwriting of a particular risk through a bank. The second facet centres on banks administering contracts of insurance in a somewhat collateral manner by

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[1] S Davis, Bancassurance: the Lessons of Global Experience in Banking and Insurance Collaboration, 2007

[2] M Chevalier, C Launey and B Mainguy, 'Bancassurance: Analysis of Bancassurance and its status around the world' Focus Scor Vie, October 2005. Page 6

[3] Munich Re Group, Bancassurance in Practice, Münchener Rückversicherungs-Gesellschaft, Munchen. 2001 Page 2

perking accounts with funeral policies, life, travel, medical, health or other insurance, at times without the knowledge of the account holder.

Industry experts are in agreement that there is no one way to create *bancassurance* success. Each market requires a different approach. Thus *bancassurance* takes different forms that vary from one country to the next and it should be understood from the onset that there is no single pattern to follow in creating a *bancassurance* operation. Its different predominant development models can be divided into three main categories[4]:

(i) **Distribution agreement**: This is the simplest form of *bancassurance*[5] as the bank acts as an intermediary for an insurance company to enable the insurer's distribution channels gain access to the client base of the bank. It usually takes shape through an agreement (which may or may not be exclusive) between a bank and an insurer by which the bank agrees, for a commission or fee, to actively promote the insurance products of its *bancassurance* partner to its customers[6].

The degree of the bank's involvement here ranges from relatively low to high depending on whether the bank merely agrees to distribute promotional insurance material to pre-selected bank customers and is paid a commission for each successful sale closed or its staff offer insurance products to prospective insurance customers identified as 'warm leads' to the extent of providing after sales service[7]. Under this model product offerings may very well be non-credit related. They do however tend to be simple insurance products, including single premium endowment and investment-linked products.

(ii) **Joint venture/referrals**: the bank enters into partnership with one or more insurance companies. This model is a little more involving as an insurer is placed on the panel of a bank for the provision of certain insurance covers (typically credit-related) to the bank's customers. However, the bank is said to be minimally

[4] M Chevalier, Bancassurance: Analysis of. Page 5
[5] Munich Re Group, Bancassurance in Practice. Page 4
[6] Bank Negara Malaysia, 'Development of Bancassurance in Malaysia' Insurance Annual Report, 2004. Page 23
[7] Bank Negara Malaysia, Development of Bancassurance. Page 23

involved for the reason that insurance is consequential and closely tied to financing.[8]

Alternatively, a bank and an insurance company agree to have cross shareholdings between them with the result that a member from each company might join the board of directors of the other company. The amount of interest aroused at board level and senior management level in each organisation can influence substantially the success of a bancassurance venture.[9]

(iii) **Full integration**: integrated front and back end operations between a bank and an insurer to deliver banking and insurance products to customers in a seamless manner.[10] Underlying such arrangements is usually an equity relationship between the bank and its insurance partner that sometimes results in a subsidiary being created.

The bank's involvement is rather immense since it ranges from prospecting of potential clients, closing of insurance sales to claims servicing. The equity relationship or subsidiary nature usually entails common branding of banking and insurance products as well. Cross-ownership arrangements between banks and insurance companies strengthen the bancassurance relationship between the two institutions and expand its scope beyond mere distribution.[11]

According to Barua, the strategy for using the established, entrenched distribution network for one product to market other new products has long existed in the consumer goods sector.[12] Of course the basic premise for this kind of cross selling is the fact that companies keep diversifying their product portfolios, using established 'incumbent' networks to promote and distribute new product lines. Banks too have in the recent past adopted this strategy. They have moved away from the classical model of deposit taking and credit disbursal through their branch networks and have begun to offer a wide range of products and services like security broking facilities and mutual funds. He describes it as the phenomenon of

[8] Bank Negara Malaysia, Development of Bancassurance. Page 23
[9] Munich Re Group, Bancassurance in Practice. Page 4
[10] Bank Negara Malaysia, Development of Bancassurance. Page 23
[11] Paul, Weiss, Rifkind, Wharton & Garrison LLP, Regulatory Foundations for Bancassurance in China, Washington DC, July 2003. Page 3
[12] A Barua, 'Bancassurance: New concept catching up fast in India'. The Chartered Accountant, 2004. Page 1348

"universal banking" that builds on the principle of leveraging existing networks to broaden portfolio offerings.

Corneliu outlines in brief the respective interests of banks, insurance companies and consumers in *bancassurance.*[13] He explains that generally banks regard *bancassurance* as a step to the formation of financial supermarkets where one institution serves all the financial needs of its customers; for insurers it provides a significant opportunity to tap into banks' extensive customer bases thereby escaping the high cost of traditional captive agents whilst for consumers, it is hoped that *bancassurance* will in time increase customer satisfaction to the point where it is possible to pay premiums as well as withdraw and repay cash loans backed by life insurance policies through bank automated teller machines.

1.3 STATEMENT OF THE PROBLEM

The Bank of Zambia (hereinafter called "BoZ") has countenanced importation of the concept of *bancassurance* to the point whereby banks today (i) market various insurance products through their branches and (ii) administer contracts of insurance by offering accounts perked with funeral policies, life, travel, medical, or health insurance. The issue is that importing the *bancassurance* concept is no easy matter because, as has already been noted above, *bancassurance* is applied heterogeneously around the world. Potential importers, therefore, need to be highly adaptable to adjust to local regulatory conditions.[14] Regulatory conditions in this regard, it is submitted, entail the balance of the entire legal framework.

Firstly, the Banking and Financial Services Act[15], (hereinafter called the "BFSA"), ss. 2 (1) and 8 (1) as read with the Companies Act[16], s. 399 appear to prohibit *bancassurance.* In particular, s. 2 (1) of the BFSA defines a Bank as a company that conducts banking business. It further provides that "banking business" means, taking only what is relevant for present purposes, providing financial services. "Financial service" is then described as meaning any one or more of 18 services enumerated therein, at the end of which appears a caveat in these terms: "but does not include- (i) the underwriting, marketing, or administration of contracts of insurance or reinsurance...". By s. 8 (1), a banking licence is taken to authorise its holder to

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[13] B Corneliu, Benefits of Bancassurance, 2008. Page 85
[14] M Chevalier, Bancassurance: Analysis of. Page 3
[15] Chapter 387 of the Laws of Zambia
[16] Chapter 388 of the Laws of Zambia

engage in 12 other activities in addition to banking business, none of which involves the underwriting, marketing, or administration of contracts of insurance or reinsurance.

In spite of the aforementioned, BoZ construes the BFSA in a manner that leads to *bancassurance* approval, in apparent reliance on s. 8 (1), for banks that successfully obtain agency licenses from the Pensions and Insurance Authority (hereinafter called the "PIA"). The question thus arises: can BoZ authorise, or the PIA approve, that which is excluded from the purview of banking business in the BFSA, namely *bancassurance*? Especially considering that s. 399 of the Companies Act by stipulating that "Nothing in this Act shall abrogate or affect any special legislation relating to companies carrying on the business of banking, insurance or any other business" places banks on a different footing from companies properly so called that may be free to venture into various business activities.

Furthermore, it will be observed from the nature of *bancassurance* discussed above that banks may either be manufacturers or distributors in the process, each having different implications. For example, under the Insurance Act[17], s. 9 (2), an insurance agent's licence allows the holder to act as agent for only one registered insurer. It provides as follows: "An insurance agent's licence shall allow the holder of the licence to act as an insurance agent for only one registered insurer named in the licence". In terms of the *bancassurance* models discussed above distribution agreements and joint ventures come into play. The Insurance Act appears to impose a vertical agreement which according to s.2 of the Competition and Consumer Protection Act[18] (hereinafter called the "CCPA") means "an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services". Key regulatory questions regarding anti-competitive behaviour therefore arise at this point because for an insurer without a related bank distribution network, the challenge is to find a major bank prepared to offer access to its retail client base on acceptable terms.[19]

When banks wear the shoes of manufacturers of insurance products through fully owned subsidiaries we are concerned with horizontal agreements which according to s.2 CCPA are

[17] Act No. 27 of 1997
[18] Act No.24 of 2010
[19] S Davis, Bancassurance.

"an agreement between enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market".

These developments have led industry experts to reportedly argue that *bancassurance* is illegal and anti-competitive to the extent that it disadvantages insurance companies and brokers that are unable to knit mutually satisfactory long term alliances with banks. To an objective, or at least inquiring mind, their cries stem from a situation the CCPA, ss. 8, 9, 10 and 12 are seemingly intended to guard against:

> **8.** Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited.
>
> **9.** (1) A horizontal agreement between enterprises is prohibited *per se*, and void, if the agreement—
>
> *(a)* fixes, directly or indirectly, a purchase or selling price or any other trading conditions;
>
> *(b)* divides markets by allocating customers, suppliers or territories specific types of goods or services;
>
> *(e)* provides for collective refusal to deal in, or supply, goods or services.
>
> **10.** (1) A vertical agreement between enterprises is prohibited *per se...*
>
> **12.** Subject to sections *eight, nine* and *ten*, an agreement between enterprises is prohibited if the Commission determines that—
>
> *(a)* the agreement has the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia; and
>
> *(b)* the agreement is not exempted under this Part.

The Competition and Consumer Protection Commission (hereinafter called the "CCPC") however maintains that *bancassurance* is not anti-competitive *per se*, and it provided BoZ with a legal opinion to that effect early in 2009.[20] Yet "*per se*" is specifically assigned a cardinal meaning in the CCPA s.2: "' *per se* " in relation to a prohibited practice, means a practice which is prohibited in all circumstances so that it is not necessary for the Commission to demonstrate that it has anticompetitive effects'. Even failing the preceding statutory provisions, it is important to investigate whether the CCPC has gone so far as to conduct a market inquiry pursuant to ss. 38 and 39 of the CCPA which are couched in this manner:

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[20] Then Zambia Competition Commission Response to Press Query dated 10th December 2009

38. The Commission may initiate a market inquiry where it has reasonable grounds to suspect that a restriction or distortion of competition is occurring—

(a) within a particular sector of the economy; or

(b) within a particular type of agreement occurring across various sectors.

39. The purpose of a market inquiry is to determine—

(a) whether any feature, or combination of features, of each relevant sector and each type of agreement has the effect of preventing, restricting or distorting competition in connection with the supply or acquisition of any goods or services in Zambia; and

(b) whether any of the circumstances referred to in subsection (2) of section *nineteen*, apply to the sector or type of agreement on the same basis as they would have applied to any matter arising under section *sixteen*.

It is apposite to observe at this juncture that this section enjoins the CCPC to continually review the structure of production of goods and services, of which *bancassurance* forms a part, whether or not industry players allege that something is amiss. In the mean time, insurers who tie up with banks operating large networks could effectively keep out potential entrants, it being a basic tenet of competition law and regulation that ownership of large networks is a significant barrier to entry. Summarily put, if firms cannot easily enter a market, incumbent firms enjoying market power may deploy forms of anti-competitive behaviour enabling them to earn supra-normal economic profits by hindering the growth of other firms and impeding the entry of newcomers,[21] without being more efficient than potential rivals.[22]

1.4 RESEARCH OBJECTIVES

It must be to the advantage of each stakeholder in the model, particularly the bank, insurance company, consumer and legislator for the *bancassurance* model to develop successfully.[23] According to Sethi, where legislation has allowed, this has largely been achieved.[24] However, Barua cautions that while the benefits of *bancassurance* appear somewhat clear, *prima facie* to all participants, the potential areas of conflict should not be glossed over.[25] It is this pernicious nature that this dissertation is most concerned with in bringing to the fore some

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[21] R Van den Bergh and P Camesasca, European Competition Law and Economics: A Comparative Perspective, Sweet and Maxwell, London, 2006. Page 106
[22] R Van den Bergh, European Competition Law. Page 142
[23] M Chevalier, Bancassurance: Analysis of. Page 6
[24] N Sethi, Bancassurance- An Emerging Concept in India, Ibexi Solutions, 2005.
[25] A Barua, Bancassurance. Page 1351

regulatory issues that need to be addressed comprehensively for bancassurance to operate smoothly. The broad objectives of the study are as follows:

(a) Determine in the first place whether *bancassurance* in Zambia is legal considering the provisions of the BFSA and Companies Act

(b) Ascertain whether the legislature has provided an enabling environment for the orderly growth and development of *bancassurance* through an appropriate balance between encouraging competition and innovation, while maintaining stability

Following the findings of (a) and (b) above, consider finally if there is a necessary degree of appropriate regulations (to protect for example the right of consumer choice to a wide range of products, service providers and distribution channels[26]) with regard to *bancassurance* to foster confidence in the insurance and banking systems.

1.5 SIGNIFICANCE OF THE STUDY

1.5.1 Theoretical importance of the study

This work will endeavour to contextualise the problem stated above against certain pertinent provisions of the law in a bid to fill the existing research gap between works on *bancassurance* as a concept on its own or *bancassurance* as applied in other jurisdictions and *bancassurance* examined against certain aspects of the current legislative climate in Zambia. As for aspects that will not be covered herein, the hypothesis developed below is intended to permit, *mutatis mutandis*, testing the concept of *bancassurance* against any such area of general legal theory embodied in the Laws of Zambia, thereby sharpening understanding of *bancassurance*'s present *status quo*.

1.5.2 Practical importance of the study

The research problem in question came to light through direct observations and experiences whilst conducting ordinary banking activities in every day life. Since it is not only a significant part of the population that interacts with banks in such a manner but also a cross section of demographics, the findings are bound to be of relevance to any influential or

[26] Bank Negara Malaysia, Development of Bancassurance. Page 26

specially affected people in society, if not all highlighted. The practical value of this discourse would therefore appear to be self evident because it must be to the advantage of each stakeholder in the model (bank, insurance company, consumer and legislator) for the *bancassurance* model to develop successfully.[27]

1.6 METHODOLOGY

This research will employ the legal centralist approach which by its nature concentrates on black letter law. To this end, the research design consists of a two pronged approach to address the problem.

Firstly, the demonstrative or *a priori* method of logical analysis will be used so that the implications of *bancassurance* as defined will be unfolded and juxtaposed with the relevant law in Zambia. It should therefore be kept in mind that this method emphasises logical implications of the premise or validity of the inference rather than its truth value or desirability.[28]

The second step will abstract from the first and assume permissibility of *bancassurance* to examine but a few possible effects of its being carried out, the underlying hypothesis being that if indeed the BFSA allows for *bancassurance*, can parliament be taken, by virtue of such permission and/or the Insurance Act s. 9 (2) for example, to have legislated so as to undermine the provisions of another Act of Parliament (CCPA)?

As is typically the case with legal research, this work will largely be qualitative so that questions of sampling techniques will not arise.

The major method of data collection to be employed will be desk research from books; the Laws of Zambia, particularly the BFSA, Insurance Act, CCPA, Companies Act; the internet; paper presentations; various reports by renowned practitioners; case law and, in one or two instances newspaper articles. The research may also show traces of information gathered by unobstructive measure, for example where reference to the Hansard becomes necessary.

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[27] M Chevalier, Bancassurance: Analysis of. Page 6

[28] R W M Dias, Jurisprudence, Butterworths, London, 1976. Pages 9-10

1.7 CONCLUSION

This chapter has elucidated the title "Bancassurance: A legislatively premature entry into Zambia?" by firstly defining bancassurance and delineating its nature and scope. It then went on to contextualise the legislatively premature aspect against certain pertinent provisions of the law.

CHAPTER TWO

PROHIBITION OF *BANCASSURANCE*

2.1 INTRODUCTION

This chapter is essentially divided into two parts. The first will principally consider whether *bancassurance*, as outlined in Chapter One is permissible in Zambia against the backdrop of the Companies Act, s. 399 as read together with the BFSA. It begins by making a link between the two Acts of Parliament to underscore the nature and importance of their relationship. The relevant aspect of "banking business" as defined in the BFSA is presented against brief authoritative statements on how banking business ought not to be laid down as a matter of law since it changes from time to time. The rationale for the statutory provision on banking business is posited at great length and contrasted with the practice of bancassurance in this jurisdiction. Some situations are instanced to map out the limits of banking business as defined in the BFSA to come up with an informed position on whether BoZ can authorise, or the PIA can approve, that which is excluded from the purview of banking business in the BFSA.

The second part of the chapter, points out the major consideration that sways certain legislatures in their support for or against *bancassurance*. It then presents a perfunctory comparative analysis of how different regulators around the world have dealt with the regulatory problems of *bancassurance* that they were/are faced with.

2.2 SECTION 399 OF THE COMPANIES ACT AS READ TOGETHER WITH SECTIONS 2 AND 8(1) OF THE BANKING AND FINANCIAL SERVICES ACT

One consideration that weighed in heavily for BoZ permitting *bancassurance* is that in pretty much the same way a grocer deals in various products for instance, so too can a bank. However, it appears that s. 399 of the Companies Act does not accord with that view because it places companies carrying on the business of banking on a different footing from other companies. The said section reads "Nothing in this Act shall abrogate or affect any special legislation relating to companies carrying on the business of banking, insurance or any other business."

Ellinger, Lomnicka and Hooley shed light on the need for special legislation regarding companies carrying on the business of banking thus:

> "The business of banking is fraught with dangers, arising principally from the instability of the world economy and from human error or misjudgement. Like any other enterprise, a bank may be overtaken by events or may be governed unwisely. Bank failures are, therefore, no novelty...
>
> Banks face many pitfalls in their daily operations. The better-known examples are unwise investments in questionable industrial projects, lending to countries with unstable economies, hazardous dealings in foreign currencies and the investment of money received on short deposits in long-term transactions. This last dangerous practice has achieved notoriety. When, contrary to expectations, short-term deposits are not renewed, a bank that has lent funds involved on a long-term basis faces a liquidity crisis.
>
> Turbulence in the banking system has an unfavourable effect on the economy. To start with, banks operate largely by investing funds deposited with them by the public. The collapse of a bank has a disastrous effect on the position of its customers, be they individual account-holders or business enterprises. In addition, the collapse of a medium-sized bank or even of a small one- to say nothing of a major bank- can induce a financial panic. A run on any bank by its customers sends ripples throughout the banking system generally...[29]
>
> ...the collapse of a substantial bank spells out serious repercussions for international trade. The banking systems of the western world are interlinked and have to function harmoniously. Money transfers require to be effected promptly. Bankers' drafts and travellers' cheques have to be cashed when presented. Letters of credit need to be issued and confirmed forthwith in every trading country in the world on the instruction of foreign correspondents. In all these cases there is no time to verify the credit-worthiness of the issuing or transmitting bank. In reality, international banking operates on the basis of trust and confidence. When this is shaken, the system loses its versatility and viability."[30]

Ellinger and others posit that two matters have to be constantly watched in order to avoid disruption to the system. The first may be loosely described as the general standing of institutions carrying on banking business and the second is the stability of individual banks. One way of achieving these objectives is to enact special legislation like the BFSA that regulate banking transactions, as well as introduce and enforce measures to ensure that banks are able to meet their liabilities. The maintenance of adequate capital liquidity and other matters of banking prudence are preconditions of obtaining and maintaining authorisation to engage in banking business.[31] It is submitted on this premise that Zambian law, through the BFSA, therefore seeks to safeguard the stability of the banking system by imposing certain controls affecting the two aspects just discussed.

Keeping in mind s.399 of the Companies Act which preserves inviolate special legislation relating to companies carrying on the business of banking, Ellinger and others explain that

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[29] E P Ellinger, E Lomnicka and R J A Hooley. Ellinger's Modern Banking Law, Oxford University Press, New York, 2006. Page 26

[30] E P Ellinger, Ellinger's Modern Banking Law. Page 27

[31] E P Ellinger, Ellinger's Modern Banking Law. Page 28

the common law definition of a bank is based on treating a bank as an institution engaged in banking business.[32] Section 2(1) of the BFSA ought to be taken as describing this business as transacted at present. It defines a Bank as a company that conducts banking business, which it further explains to mean (taking only what is relevant for present purposes) providing financial services. "Financial service" is then described as meaning any one or more of eighteen services enumerated therein, with a caution at the end of the list that "financial service" "does not include- (i) the underwriting, marketing, or administration of contracts of insurance or reinsurance...".

It will be seen later in Chapter Four that the definition of banking business is perhaps the genesis of problems that *bancassurance* faces in Zambia. According to Ellinger and others, there is something disturbing about the business of banking being treated like it is carried on in a uniform manner by banks generally[33], as if in apparent reference to the way s.2 of the BFSA defines banking business. The learned authors suggest that such an approach is misguided because it must be recognised that the meaning of "banking business" can change from time to time. In **Woods v Martins Bank Ltd**[34] the issue was whether the giving of advice on financial matters constituted banking business. Holding that it did, Salmon J observed that:

> "the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly, cannot be treated as if it were a matter of pure law. What may have been true of the Bank of Montreal in 1918 is not necessarily true of Martins Banks in 1958."

The learned authors explain that this was in reference to the case of **Banbury v Bank of Montreal**[35] in which it was held by the Privy Council on an appeal from Canada that the giving of advice on investments did not constitute banking business.

Be that as it may, the rationale for placing a limit on the area of operation of companies carrying on the business of insurance was at least explained in the case of **Fuji Finance Inc v Aetna Life Insurance Co Ltd**[36] as one of the issues facing the English Court of Appeal was a provision of legislation that restricted insurance companies to the business of insurance. It

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[32] E P Ellinger, Ellinger's Modern Banking Law. Page 68
[33] E P Ellinger, Ellinger's Modern Banking Law. Page 69
[34] [1959] 1 QB 55
[35] [1918] AC 626
[36] [1996] 4 All ER 608, CA.

is humbly contended that a parallel may be drawn with banking business based on the similarity of treatment of insurance companies and banks by s. 399 of the Companies Act. In that case, Section 16(1) of the Insurance Companies Act 1982 provided that:

> "An insurance company to which this Part of this Act applies shall not carry on any activities, in the United Kingdom or elsewhere, otherwise than in connection with or for the purposes of its insurance business."

Considerable attention was directed at determining the effect of a breach of the said provision and some very helpful remarks were made about the rationale behind such a provision. Morritt LJ drew on the case of **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat**[37] in which Kerr LJ observed that the section implemented European Union directives designed to limit the business activities of insurance companies[38] and went on to elucidate the law thus:

> "The statutory prohibitions are designed to protect the insured by seeking to ensure that undesirable persons are not authorised to carry on insurance business and that authorised insurers remain solvent.[39]"

Morritt LJ himself had the following to say:

> 'I have already quoted s 16(1) of the 1982 Act. It was enacted to give effect to the European directives which, in their original form, imposed an obligation on member states to require an insurance undertaking to—
>
> "limit its business activities [to the business of insurance] [to the business referred to in this Directive] and operations directly arising therefrom, to the exclusion of all other commercial business ..."'

Hobhouse LJ put it this way:

> "However, the fact remains that this section forms part of a scheme which is intended to protect the assets and solvency of insurance companies and to prevent those assets from being diverted to liabilities which arise from business which is not insurance business."[40]

The scheme in our case is further informed by the BFSA s. 8(1), in which a banking licence is taken to authorise its holder to engage in 12 other activities in addition to banking business. A bank's role as an agent in numerous capacities is provided for in ss. 8(1)(b), (i), and (l) but not as an insurance agent. Furthermore, s. 8(1)(k) allows for arrangement and underwriting of

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[37] [1987] 2 All ER 152
[38] [1987] 2 All ER at 619
[39] [1987] 2 All ER 152 at 175, [1988] QB 216 at 273
[40] [1987] 2 All ER at 619

shares, trade financing, corporate financing and the provision of financial advice but that is all.

Ellinger and others narrate that the precise meaning of "banking" becomes particularly important in the area of bank regulation.[41] Hence, having set out the meaning of banking business in Zambia, it now falls to be determined whether the two aspects identified in the previous chapter at 1.2 are permissible by Zambian law.

Quite plainly, the manufacturing, marketing or distribution of insurance products does not qualify as provision of a financial service. It is in fact expressly excluded as has already been observed above. Taking a positivist stance, it follows that even the somewhat collateral practice of perking accounts with funeral policies, life, travel, medical, health or other insurance is prohibited in as far as it involves marketing and/or administration of contracts of insurance or reinsurance. In the final analysis, to the extent that all three *bancassurance* models discussed at 1.2 above involve underwriting, marketing or administration of contracts of insurance by a bank, they are contrary to Zambian law. The inescapable conclusion is that *bancassurance* in Zambia does not have the blessing of the legislature.

Notwithstanding the aforementioned, BoZ has found somewhere in the BFSA s.8(1), justification for permitting bancassurance subject to PIA approval of concerned banks. It is said that banks are able to purchase insurance so cheaply because they buy it in such bulk. It is this insurance that comes standard with certain accounts, at no extra cost to the account holder. For this reason, a purposive argument is deployed to the effect that banks incur no additional liability because they do not underwrite any risk and thus incur no liability outside that attracted by banking business. While this is plausible under a purposive construction of the BFSA, and perhaps commendable for enhancing the banking experience, it ignores the part of the legislation that talks about administering and marketing.

The two activities do on their own, expose an undertaking to more liability as explained in the **Fuji Finance** case above. To illustrate the point, one may consider what happens when the holder of an account perked with a funeral policy dies. Representatives of the deceased, if they are aware of the funeral policy, must notify the bank which then initiates a process that

[41] E P Ellinger, Ellinger's Modern Banking Law. Page 93

for all intents and purposes can loosely be described as claims servicing. The bank may go about servicing a claim efficiently, or in such an inept manner that liability arises. With time, hundreds of claims could be serviced in a less than satisfactory manner giving rise to problems that are in no way connected with banking business. This is the gravamen of the submission. It is also plausible that s.2 of the BFSA seeks to ensure that a bank's limited business hours are devoted to banking business only.

This may be the appropriate juncture to observe that as far as purposive and expansive interpretations go, if the BFSA s.2 were couched in the broad manner that s.16(1) in the **Fuji Finance** case was, that is to say:

> "shall not carry on any activities... otherwise than in connection with or for the purposes of its insurance business"

a case might have been made for distinguishing non-credit related product offerings from credit related ones. As things stand however, the insurance cover on bank accounts is generally not consequential to banking business or closely tied to financing. *Bancassurance* in Zambia seems to be largely concerned with what are called depositors' products that are designed to attract the public to deposit money with a particular bank.[42] Funeral policies and travel insurance are cases in point. Non-credit related products are undoubtedly distinguishable from finance and repayment products which are born from a bank's concern that, in the event of early death or permanent disability of a borrower, the outstanding loan or credit amount may not be recoverable.[43]

Furthermore, if all that banks do is purchase insurance in bulk and provide it as a freebie of sorts, it is not really clear why BoZ requires that they be licensed with the PIA as agents or otherwise. If person A wants to buy insurance and extend its benefits to persons B, C, D and E, there is no law that enjoins A to take out a licence, agency or otherwise with the PIA.

In any event, one is constrained to question the propriety of a regulatory authority permitting the entity to be regulated to venture into territory that the regulator is not competent to supervise. That there is a regulator in the extended area of operation is cold comfort because the body tasked by law to supervise will in truth be incapable of supervision as regards

[42] Munich Re Group, Bancassurance in Practice. Page 12
[43] Munich Re Group, Bancassurance in Practice. Page 10

matters concerned with the enlarged realm of operations by reason of want of jurisdiction. The Zambian experience of *bancassurance* may be drawn on to illustrate this. Holders of accounts that carry one form or another of insurance are traditionally not provided with policy documents. Many an account holder is therefore said to have insurance, despite being totally clueless as to the rights and duties consequent under that cover. This is deplorable because it is possible that when one tries to capitalise on their insurance, one may be met with a response that by reason of having breached a duty (which one was incidentally unaware of) under the policy, the benefits of the insurance are unavailable. Under what law would BoZ deal with ensuing customer complaint? The question will arise whether the bank was engaged in banking business and after construing ss. 2 and 8(1) of the BFSA the answer may very well be an emphatic no. A likely response is that the PIA is best placed to sort out the issue.

There are at least two inextricably linked reasons why it is undesirable for grey areas regarding bank supervision to arise. The first is that room is created for passing the buck, which undermines accountability. When things go awry it should not be possible for BoZ to point a finger elsewhere. The second reason is that the technocrats at BoZ are deemed by law (the BFSA) to have unparalleled (by any other regulatory authority) competence pertaining to issues to do with banks so that they should not have to defer to the view of the PIA in this field.

It seems therefore, that having a competent authority to oversee a bank's extra curricular/statutory operations where BoZ tentacles do not reach, cannot assuage the impropriety of letting banks stray in the first place. Hence, it is submitted that another reason for the BFSA s.2 restricting banking business is for full and proper supervision to be possible at all times. In other words, banking business as defined in the BFSA encapsulates those areas of business in which BoZ has the requisite expertise to supervise.

In the premises, one of the questions we set out to answer must be returned in the negative, viz. whether BoZ can authorise, or the PIA can approve, that which is excluded from the purview of banking business in the BFSA, namely *bancassurance*? The statutory definition of "banking business" does allow "any custom, practice or activity prescribed by the Bank of Zambia as banking business". In the case of *bancassurance* however, it is not possible for BoZ to deem it as banking business, having been specifically excluded as highlighted above.

2.3 SOME LEGISLATIVE APPROACHES TO *BANCASSURANCE*

Chevaliar and others aptly summed up the legislative considerations of bancassurance:

> "The role of the oversight authorities or of the government itself is to make laws to ensure that the risks taken by their country's financial institutions are actively managed and controlled in such a way as to maintain sound national finances. However, events may occur that are outside the control of individual and national managers, which may impact upon the whole financial system. These risks go under the name of "systemic risk".
>
> For financial institutions, bancassurance can be a means of limiting such systemic risk because it diversifies the bank's sources of revenue, making its business more stable and thereby safer for its customers too.
>
> On the other hand, certain authorities think that deregulating financial systems to excess can increase a country's systemic risk. This is why, in many countries, banks are still unable to exercise activities outside their core business, in order to avoid additional sources of risk.
>
> In addition, certain governments have decided to liberalise the financial system, but progressively, for a more controlled process of deregulation.
>
> In other words, supervisory authorities may see bancassurance as an advantage or, on the contrary, as a potential risk to a country's financial stability."[44]

Emerging markets have very diverse bancassurance penetration rates depending on the local regulatory frameworks, the level of foreign participations and other social and cultural considerations.[45] In Zambia the restrictive position can perhaps be gleaned from Mr Ronald Penza's remarks, Minister of Finance at the time, who had this to say when commencing debate at the second reading stage of the Banking and Financial Services Bill:

> "Mr Speaker, hon. Members of this August House, the Government has decided to establish a modern institutional structure, for the supervision and regulation of the financial sector, with the potential devices, utilised industrial economies, for the safe conduct of financial services.
>
> This is especially timed with the changes which are occurring to the Zambian economy, in particular, those related to the liberalisation and privatisation of the economy. It is essential and important that the revised well-designed and comprehensive Financial Restrictions Law be enacted to promote the prudent operation of financial institutions.
>
> Mr Speaker, the Banking and Financial Services Bill, provides the legal framework for the licencing, organisation, operation and supervision of financial institutions. It contains appropriate provisions for the efficient provision and regulation of financial institutions, and takes into account, the fact that prudential supervision is largely a new activity."[46]

As for Tanzania, funding was sourced from the World Bank to undertake "Consultancy Services on the Development of Appropriate Legal and Regulatory Framework for

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[44] M Chevalier, Bancassurance: Analysis of. Page 7
[45] B Corneliu, Benefits of Bancassurance. Page 88
[46] Zambia, National Assembly, Debates (11th March 1994), Col. 1580

Establishment of Bancassurance in Tanzania". According to a request for expression of interest published by the Bank of Tanzania on May 15, 2009:

> "The consultant will be responsible for review of the existing legal and regulatory framework on banking and insurance and advise on how to harmonise them to pave way for establishment of bancassurance operations. In particular the consultant will study the existing laws in banking and insurance in Tanzania and recommend legislative changes necessary to enable bancassurance to operate effectively, propose the appropriate operational set up of insurance business within the commercial bank, draft legal framework for the operation of bancassurance in Tanzania, and arrange and facilitate workshops for senior insurance and banking executives on operational modalities."[47]

In North America the penetration of *bancassurance* is low in both Canada and the United States, partly reflecting the previously restricted regulations on banks' distribution of insurance. In the USA, the famous Glass Steagall Act of 1933, one of the pillars of the banking laws built a wall between retail banks and investment banks.[48] All American banks had to choose whether to specialise in commercial banking or investment banking. The Glass Steagall Act was reinforced by the Bank Holding Company Act of 1956 whose purpose was to forestall and limit the power of the USA's powerful financial conglomerates. This law created a clear barrier between banks and insurance companies, emphasising the risks of having insurance companies underwritten by banks, which do not enjoy the necessary professional expertise in this area.[49] These restrictions were removed in 1999 by the passing of the Gramm-Leach-Bliley Act.

According to Chevalier and others, the deregulation of the financial services sector in most Latin American countries has paved way for banks to sell insurance products directly.[50] In Chile, banks have been legally allowed to sell life insurance products since 1997 but an authorised intermediary must be present for every insurance sale in a bank. In Brazil, the law requires that an approved broker be involved in all insurance sales, so both insurance companies and banks sometimes have their own brokers but the banks have been active in the insurance market since the 1970s.

Legrand asserts that bancassurance is a major distribution channel in Europe, accounting for over 60 percent of individual life insurance premiums in France, Italy, Portugal and Spain

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[47] http://www.dgmarket.com/tenders/np-notice.do~3948296, site visited on 18th January 2011
[48] A Barua, Bancassurance. Page 1348
[49] M Chevalier, Bancassurance: Analysis of. Page 10
[50] M Chevalier, Bancassurance: Analysis of. Page 30

and over 50 percent in Belgium.[51] In the said five countries, *bancassurers* operate under a fully integrated model in which *bancassurance* companies are fully or partly owned by a bank; have an exclusive distribution agreement with their parent bank and *bancassurance* products are fully integrated in the bank's product range and sold by bank staff along with banking products.[52]

In France, where the term *bancassurance* was coined by combining the two words bank and insurance in French[53], the starting point of the tremendous development of the French *bancassurance* market was the French law of 1984 which enabled credit institutions to widen their activities. Chevalier et al. cite Assurances du Crédit Mutuel and Vie et IARD as having been officially authorised to put into effect their idea to bypass the middleman for loan protection insurance and to insure their own banking customers themselves.[54] In effect, banks could carry out additional and related activities to banking business such as life insurance.[55]

Chevalier and others pin point the 1990 Amato Law and the directives that followed as having made it possible for banks to invest in insurance companies and led to the take off of *bancassurance* in Italy.[56] Some of the conditions are that insurance policies must be drawn up by the insurer and cannot be changed by the bank; bank staff are trained by the insurance company; insurance policies must be easily transmissible to the insurance company, which is directly responsible for the obligations listed in the original policies; the bank's insurance business must be monitored by the insurance company.

Spain's laws prohibited banks from selling life insurance but this legal barrier was removed in 1991[57] and in Belgium, it was only after a 1992 change in the law that bancassurance really began its offensive.[58]

Legrand reports that in Germany and the United Kingdom *bancassurance* tends to be less integrated; fully owned *bancassurance* companies and joint ventures exist, but banks

[51] C Legrand, European Bancassurance Benchmark, Milliman, 2008. Page 4
[52] C Legrand, European Bancassurance Benchmark. Page 4
[53] N Sethi, Bancassurance. Page 4
[54] M Chevalier, Bancassurance: Analysis of. Page 2
[55] Y Bonnet and P Arnal, Analysis and Prospects of the French bancassurance market, 2002.
[56] M Chevalier, Bancassurance: Analysis of. Page 28
[57] M Chevalier, Bancassurance: Analysis of. Page 2
[58] M Chevalier, Bancassurance: Analysis of. Page 28

frequently operate through pure distribution agreements. In Germany distribution agreements are often on an exclusive basis but in the United Kingdom multi-tied *bancassurance* distribution is developing. In both countries life insurance products are often not sold by branch staff directly, but are referred to insurance specialists. For Germany it is because insurance products tend to be more complex than usual, but in the United Kingdom it is due to the regulation under which investment products can be sold only by qualified financial advisors.[59]

Bancassurance in Asia is set to emerge as broad based regulatory reforms and financial deregulation pave the way for banks and insurers to strike strategic partnerships which were formerly restricted by regulation on cross holdings between banks and insurance companies, on the qualities or quantities of the products distributed by the banks and other operational limitations.[60] In Japan the market was partially opened up in April 2001, when banks were authorised to sell non-life insurance products. The financial authorities were moving towards a gradual deregulation scheduled for introduction in 2005 under which banks would be allowed to sell new insurance products but this was postponed to a later date. Chevalier and others attribute the delay to the Financial Services Agency and the Life Insurance Association of Japan re-commencing discussions to find new points of agreement that would allay fears that liberalising *bancassurance* too rapidly would give the banks power that might result in abuses such as forced sales.[61]

In China, some regulatory obstacles to bancassurance were removed under the amended insurance law that took effect in January 2003, removing a prohibition on corporate agents from selling life policies for more than one insurer. Furthermore, the People's Bank of China created a clear framework for banks' intermediary (including insurance agency) businesses through regulations promulgated in July 2001.[62] However, the cross ownership *bancassurance* model is still unworkable in china because under the Insurance Law insurance companies are not allowed to hold equity interests in any company other than an insurance company. Similarly, the Commercial Bank Law prohibits commercial banks from investing in entities other than financial institutions- insurance companies are not deemed to be financial institutions for such purpose.

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[59] C Legrand, European Bancassurance Benchmark. Page 4
[60] Bank Negara Malaysia, Development of Bancassurance. Page 20
[61] M Chevalier, Bancassurance: Analysis of. Page 31
[62] Paul, Weiss, Rifkind, Wharton & Garrison LLP, Regulatory Foundations. Page 1

Chevalier and others also dealt with the case of South Korea. Their status report reveals that *bancassurance* only really began to attract existing Korean banks after government authorisation in 2003. It restructured its financial organisation to eliminate certain barriers between banks and insurance companies. However, deregulation was embarked on as a gradual exercise whereby phase one would authorise banks to deal in pure savings products and loan insurance; phase two accident products and health products; phase three total deregulation so that all life insurance products can be dealt in.[63] However, the Financial Supervisory Service and Ministry of Finance and Economy continue to impose numerous limitations and restrictions: policies from a single insurance company cannot represent more than 49 per cent of a bank's total insurance sales, with plans to reduce the proportion to 25 per cent, and thus put an end to exclusivity agreements; insurance products can only be sold in a specifically assigned area within the bank branch, so that telephone and door to door selling are prohibited; personnel approved to sell insurance products must be qualified for the job and there must be at least one insurance product seller in each branch. *Bancassurance* is thus being structured within the framework of these strict regulations.

Sethi tackles the case of India where obstacles to the development of bancassurance were regulatory barriers cleared with the passage of the Insurance (Amendment) Act, 2002. Prior to this, all the directors of a company wishing to take up corporate agency such as a bank, were technically required to undertake 100 hours of agency training and pass an examination.[64] According to Barua, the Insurance Regulatory and Development Authority has set guidelines regarding licensing of corporate agents, specifying which institutions qualify and setting out the training and/or examination requirements for specified persons on behalf of the corporate agent. Summarily, banking personnel who sell insurance products have to satisfy the same training and examination requirements as insurance agents.[65]

Bank Negara Malaysia offer insight to the development of *bancassurance* in Malaysia. It is being effected through regulatory measures aimed at achieving a cost effective alternative

[63] M Chevalier, Bancassurance: Analysis of. Page 32
[64] N Sethi, Bancassurance. Page 10
[65] A Barua, Bancassurance. Page 1349

channel for the distribution of insurance products to complement banking products in meeting the wealth management needs of consumers.[66]

2.4 CONCLUSION

This chapter was presented in two parts. The first assessed permissibility of *bancassurance*, as outlined in Chapter One against the backdrop of the Companies Act, s. 399 as read together with the BFSA. This it did by drawing a link between the two Acts of Parliament and underscoring the nature and importance of their relationship; zeroing in on the relevant aspect of "banking business" as defined in the BFSA; and positing the rationale for the said definition and contrasting it with the practice of bancassurance in this jurisdiction. It was found that *bancassurance* is prohibited under Zambian law. Situations were then instanced to map out the limits of banking business as defined and the position was taken that neither can BoZ authorise, nor the PIA approve, that which is excluded from the purview of banking business in the BFSA.

The second part of the chapter highlighted systemic risk as the major consideration that sways certain legislatures in their support for or against *bancassurance*. It then took a perfunctory world tour of how different countries have dealt with the regulatory problems of *bancassurance* that they were/are faced with.

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[66] Bank Negara Malaysia, Development of Bancassurance. Page 25

CHAPTER THREE

ASSUMING BANCASSURANCE WAS PERMISSIBLE...

3.1 INTRODUCTION

In practice, selling a new product generates very low marginal costs in a banking network, making banks (potentially) fearsome competitors.[67] Some insurance industry experts have argued that *bancassurance* is illegal and anti-competitive to the extent that it disadvantages insurance companies and brokers that are unable to knit mutually satisfactory long term alliances with banks. Mr Claude Tendil, Chairman of *Generali France*, in an article published by *La Tribune* on February 28, 2005 admitted that he was "still hostile to the bancassurance model" since, in his opinion, "it works in only one direction, to the benefit of the banks".[68] Here in Zambia, the CCPC maintained that *bancassurance* is not anti-competitive *per se*, and it early last year provided BoZ with a legal opinion to that effect. The Executive Director of the CCPC did, however, opine that:

> "it is not far-fetched to hold that when banks engage in providing insurance services, they cross their normal operating environment and that such an engagement is meant to secure their 'selfish' interests. With such a privilege, they may in turn ensure that insurance terms and conditions work in their favour."[69]

This segment of the treatise overlooks what has been said in the previous chapter and instead assumes permissibility of *bancassurance* in Zambia. It will highlight anti-competitive aspects in the practice of *bancassurance* as outlined in Chapter One, to which sentiments of industry experts such as Mr Tendil of *Generali France* and Mr Kaira of the CCPC captured in the opening paragraph herein could be attributed.

First up is the bulk purchase of insurance by a bank, which raises issues of bundling, cross subsidisation and price discrimination, in as far as they are likely to infringe ss 8 and 12 of the CCPA by reason of preventing, distorting or restricting competition. Distribution agreements concluded under the auspices of s. 9(2) of the Insurance Act follow, to determine whether they amount to vertical agreements in terms of s.2 of the CCPA. Joint ventures and/or referrals are then dealt with in the context of large networks, brand equity and

[67] Y Bonnet, Analysis and Prospects.
[68] M Chevalier, Bancassurance: Analysis of. Page 6
[69] Then Zambia Competition Commission Response to Press Query dated 10th December 2009

horizontal agreements. Full integration is covered last, to see whether it similarly falls foul of any anti-trust legislation.

3.2 BULK PURCHASE OF INSURANCE BY A BANK

It will be recalled from the previous chapter that *bancassurance* in Zambia is in some instances carried out by a bank purchasing insurance in bulk and tying it to one or another type of account. This raises several issues.

Firstly, in the case of Barclays Bank Zambia PLC (the "Bank") for example, this was done in such a manner that an account holder could not separate the account from the insurance. Thus, when the author sought to open a stand alone current account, the Bank insisted that insurance was embedded in the account, and inseparably so. It was said that "the Zambian banking industry is a highly competitive market with the different banks offering different products and we are sure your desired product, if not offered by the Bank may be offered by any of the other banks."[70] The author stood fast and presented his case before BoZ which upheld his objection and prevailed upon the bank by underscoring section 41 of the BFSA:

> 41. Any financial service provider that requires any person to contract to receive any financial service as a condition of being permitted to contract with it or any other person to receive any other financial service, or any goods or other service shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one hundred thousand penalty units or imprisonment for a term not exceeding five years, or to both.

BoZ went on to point out that aside from this clear provision against inseparably tying a service to one's account despite one's insistence against the service, the funeral policy bundle was also a breach of some people's conscientious or religious beliefs, an example being Muslims who do not insure limb or life. BoZ thus directed the Bank to amend its account opening form so as to include a check box that a customer may tick if they are interested in a funeral policy, travel insurance etcetera.[71]

Secondly, the phenomenon through which banks offer a consolidated package of products at a single rate, according to Barua often involves cross subsidisation within the package whereby a bank could charge an artificially low premium for an insurance product or perhaps

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[70] Letter dated 3rd November 2009 from Barclays Bank Zambia PLC's Retail Director in response to the author's complaint regarding the bundled product (account)

[71] Letter dated December 21, 2009 and referenced BoZ/EX/DGO/nm/bsup/ak from the Bank of Zambia Deputy Governor- Operations to the author

even provide it "free" and subsidise it through a relatively high charge on say, a credit card or some other service.[72] When quizzed on this possibility, the Assistant Director and Senior Inspector, both of the Bank Supervision Department at BoZ were confident that this does not in fact happen because BoZ allowed and continues to allow *bancassurance* on condition that all bank charges remain as they were before, or are not drastically increased. The central bank further advised that breach of this condition would be easy to detect by auditors. The efficacy of this safeguard remains to be seen in the long run, when one considers that bank charges will inevitably rise in due course.

Thirdly, not only does bundling impede transparency of pricing but it could also lead to unfair advantage for banks offering *bancassurance* vis-a-vis standalone insurers.[73] Van den Bergh and another explain that bundling may lead to entry deterrence in the market of the bundled product if this market is subject to economies of scale.[74] By credibly committing itself to sell independent insurance products only as a bundle, the bank signals to competitors in the insurance market that pricing will be aggressive. Fierce competition in the market of the bundled good may decrease the rivals' profits and force them to exit. However, if the bank is unable to commit itself to the bundling strategy (if it cannot credibly or lawfully threaten to refuse provision of banking and/or financial services to customers who do not want to purchase the bundle), re-entry may be expected if the price of the bundled good is increased. Bundling may also be anti-competitive if it allows the achievement of economies of scale and scope, in which case, the bank may deny entrants the possibility of achieving the minimum efficient scale in the insurance market.[75]

Lastly, there is the issue of price discrimination gleaned from the explanation by BoZ that since banks are able to purchase insurance in bulk cheaply they can afford to provide it free of charge to customers. The import of this is that banks, as buyers obtaining large quantities of insurance, are charged lower prices than small scale consumers which translates into two possibilities:

(i) The first is second degree price discrimination which takes place when different units of output are sold for different prices, even though every individual buying

[72] A Barua, Bancassurance. Page 1351
[73] A Barua, Bancassurance. Page 1351
[74] R Van den Bergh, European Competition Law. Page 269
[75] R Van den Bergh, European Competition Law. Page 269

the same amount of the goods pays the same price. Output is divided into successive batches which are sold for the highest price consumers are willing to pay. Hence, prices differ across the units of the goods but not across people, so that some buyers enjoy consumer surplus. Quantity discounts, that is to say, charging a decreasing average price with increasing use is a form of second degree price discrimination.[76]

(ii) The second possibility is third degree price discrimination which occurs when consumers are segregated into distinctive groups characterised by different elasticities of demand which are explained by exogenous criteria such as location, age, sex or occupation. Different (groups of) buyers pay different prices, but every unit of output sold to a given buyer (or a given group) is sold at the same price. Thus, prices do not differ across the units of the good (as is the case under second degree price discrimination) but between individual (or groups of) consumers. Examples of third degree price discrimination permeate a large variety of industries, ranging from cement producers to law firms; student discounts, lower charges for aged people or senior citizens etcetera making it the most common form of discriminatory marketing.[77] Clearly, the practice is not confined to dominant firms and is as such not anti competitive.

Intervention by a competition authority to guarantee price uniformity becomes necessary if the insurance company engaged in price discrimination possesses substantial market power[78] because economic assessment of discount schemes recognises that they may in this instance exclude rival suppliers and lead to market foreclosure by generating either of two types of exclusionary behaviour: (a) selective rebates offered to banks considering switching to a new entrant may lead to exclusion within the insurance market; and (b) rebates offered to banks in order to discourage them from selling competitor insurer's products may lead to exclusion in a vertically related market.[79] It is submitted that ss.8 and 12 of the CCPA are sufficiently broad for the CCPC to assess the level, if any, of prevention, restriction or distortion of competition arising from price discrimination. They provide:

[76] R Van den Bergh, European Competition Law. Page 256
[77] R Van den Bergh, European Competition Law. Page 256
[78] R Van den Bergh, European Competition Law. Page 257
[79] R Van den Bergh, European Competition Law. Page 263

8. Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited.

12. Subject to sections *eight*, *nine* and *ten*, an agreement between enterprises is prohibited if the Commission determines that—

(a) the agreement has the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia; and

(b) the agreement is not exempted under this Part.

The nature of these provisions requires vigilance on the part of the CCPC as demonstrated by the case of **Passmore v Morland plc**[80] in which a tie agreement was alleged to be in breach of the prohibition on anti-competitive agreements in Article 85(1) of the European Community Treaty whose terms were (omitting the irrelevant):

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices ... which have as their object or effect the prevention, restriction or distortion of competition within the common market ..."

Chadwick LJ delivered the Court of Appeal judgment with which Beldam and Potter LJJ concurred. He propounded the law thus:

"...art 85(1) only prohibits agreements and concerted practices which have a particular offensive economic objective or effect; and that, in order to decide whether it is within the prohibition, each agreement, or clause in an agreement, has to be examined in the factual context in which it is to be operated. The judge was plainly right to hold that, before it was possible to reach the conclusion that, as between the parties, a particular beer supply agreement was prohibited by art 85(1), it was necessary to assess all relevant economic facts, including matters such as the market share of the supplier and the number and the duration of the supply agreements to which it was party, as at the time or times in respect of which the question fell to be decided.

It follows that an agreement which is not within art 85(1) at the time when it is entered into—because, in the circumstances prevailing in the relevant market at that time, it does not have the effect of preventing, restricting or distorting competition—may, subsequently and as the result of a change in those circumstances, come within art 85(1)—because, in the changed circumstances, it does have that effect. Two examples may be taken to illustrate the point. First, it may be that, at the time when the agreement is entered into, there are a sufficient number of beer wholesalers not tied to producers that a new producer can penetrate the market without difficulty by using the sales networks of those wholesalers—see the Delimitis judgment (at 985–986 (para 21)). But, subsequently, that number is significantly reduced; because, say, conditions in the market are such that existing wholesalers find that they must either enter into brewery ties or cease business. So that, at the time in respect of which the question falls to be decided, the market cannot be penetrated without difficulty—leading to the conclusion that the first limb of the test formulated by the Court of Justice in its answer to the question referred in Delimitis is satisfied.

Secondly, it may be that, at the time when the agreement is entered into, the market share of the brewery is so small that the agreements into which it has entered (taken together) make no appreciable contribution to the closing-off (or foreclosure) of the relevant market—see the Delimitis judgment (at

[80] [1999] 3 All ER 1005, CA.

986–987 (para 24)). But, subsequently, the market share of the brewery increases; perhaps as the result of the acquisition of a further block of tied outlets, or following a merger, or as the result of other breweries going out of the market. So that, at the time in respect of which the question falls to be decided, the market share of that brewery is sufficiently large that (taken together) the beer ties in its supply agreements do make an appreciable contribution to the foreclosure of the market—leading to the conclusion that the second limb of the Delimitis test is satisfied.

It must follow, also, by a parity of reasoning, that an agreement which is within the prohibition in art 85(1) at the time when it is entered into—because, in the circumstances prevailing in the relevant market at that time, it does have the effect of preventing, restricting or distorting competition—may, subsequently and as the result of a change in those circumstances, fall outside the prohibition contained in that article—because, in the changed circumstances, it no longer has that effect. The point could be illustrated by examples similar to those already given; but it is unnecessary to do so."[81]

One would surmise that this was the reason section 11 of the now repealed and replaced Competition and Fair Trading Act[82] (hereinafter called the "CFTA") was couched in a manner that enjoined the Zambia Competition Commission (hereinafter called the "ZCC") under it to continually review the structure of production of goods and services, of which *bancassurance* would form a part, whether or not industry players allege that something is amiss. It provided that:

11. (1) The Commission shall keep the structure of production of goods and services in Zambia under review to determine where concentration of economic power exist whose detrimental impact on the economy outweigh the efficiency advantages, if any.

(2) For the purposes of subsection (1) but without limiting the generality thereof, the Commission shall consider whether-

(a) a person controls a chain of distributing units the value of whose sales accounts for a significant portion of the relevant market;

(b) a person, by virtue of controlling two or more physically distinct enterprises which manufacture substantially similar goods, supplies a significant portion of the domestic market at unreasonably low prices;

The obligation of the CCPC to stay on top of things is not so pronounced in the CCPA, not even pursuant to sections 8 and 12 captioned above. Now, under sections 38 and 39 of the CCPA the CCPC ought to suspect a restriction or distortion of competition to carry out a market inquiry. Those sections read:

38. The Commission may initiate a market inquiry where it has reasonable grounds to suspect that a restriction or distortion of competition is occurring—

(a) within a particular sector of the economy; or

(b) within a particular type of agreement occurring across various sectors.

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[81] [1999] 3 All ER 1013-1014

[82] Chapter 417 of the Laws of Zambia

39. The purpose of a market inquiry is to determine—

(a) whether any feature, or combination of features, of each relevant sector and each type of agreement has the effect of preventing, restricting or distorting competition in connection with the supply or acquisition of any goods or services in Zambia; and

(b) whether any of the circumstances referred to in subsection (2) of section *nineteen*, apply to the sector or type of agreement on the same basis as they would have applied to any matter arising under section *sixteen*.

3.3 DISTRIBUTION AGREEMENTS

For insurers, tying up with banks provides extensive geographical spread and countrywide customer access; it is the logical route for them to take.[83] Insurers usually hope this is on an exclusive basis for alignment at the marketing level and in the back office. Conveniently for them, in Zambia the Insurance Act[84] enjoins exclusivity in such a relationship.

Under sub section 2 of section 9, "An insurance agent's licence shall allow the holder of the licence to act as an insurance agent for only one registered insurer named in the licence". The critical issue here is that absolute cost advantages for incumbents arise if some factor of production is denied to potential and/or new entrants and, but for this omitted factor, the latter would be as efficient as incumbent firms.[85] Van den Bergh and another assert that absolute advantages are easy to identify by looking at government regulation. Thus, it is submitted that economies of scale in distribution that result from sub section 2 of section 9 of the Insurance Act, especially when banks get involved, could limit entry into the insurance industry since an entrant may have to come in on a vertically integrated basis.

Distribution agreements effected within the framework of sub section 2 of section 9 of the Insurance Act are likely to raise key regulatory questions regarding anti-competitive behaviour because for an insurer without a related bank distribution network, the challenge is to find a major bank prepared to offer access to its retail client base on acceptable terms.[86] There are at present in Zambia, five long term (life) insurers, three of which have a sibling so to speak, out of the nine general insurers. This means 14 insurance companies against 18 banks, with no rule against any insurer having commercial intercourse with more than one bank, while banks keep it exclusive.

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[83] N Sethi, Bancassurance. Page 4
[84] Act No. 27 of 1997
[85] R Van den Bergh, European Competition Law. Page 142
[86] S Davis, Bancassurance.

Putting the matter into perspective, the Insurance Act s.9(2) imposes:

> "an agreement between enterprises, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services."

The insurance company is at the production level and the bank at distribution level. In terms of section 2 of the CCPA, such an agreement is a vertical agreement, which by section 10 is prohibited *per se*. *Per se*, in as far as it relates to a prohibited practice is defined in section 2 as meaning "a practice which is prohibited in all circumstances so that it is not necessary for the Commission to demonstrate that it has anticompetitive effects".

The sub section 2 of section 9 condition in the Insurance Act is a non price vertical restraint. Van den Bergh and another explain in economic terms the implications of a requirement that agents do not sell competing products:

> "Exclusive dealing can raise search costs for consumers in relation to comparing prices and obtaining price information in the first place... A more general argument, which is particularly popular in the legal literature on antitrust, is that exclusive dealing leads to market foreclosure. If some distributors agree to handle the products of only one supplier, those outlets are foreclosed to other manufacturers. In the economic jargon, long term exclusive dealing contracts foreclose markets by raising rivals' costs. However, one should not immediately jump to the conclusion that exclusive purchasing arrangements raise barriers to entry. First, exclusive purchasing arrangements must last for longer than the normal contractual period, otherwise competing manufacturers have equal opportunities to win distributors at contract renewal time. Second, to condemn exclusive dealing as an entry barrier, a close examination of the market structures involved is needed. An incumbent with market power can make it difficult or impossible for a rival to enter by tying up scarce distribution channels. If the manufacturer attempting to enforce exclusive dealing has a modest market share, the foreclosure effect is minimal. Even if the manufacturer has a substantial market share, an exclusive distribution contract is likely to have little effect on competition if entry into distribution is easy.[87]

While this explanation cautions against jumping to the conclusion that exclusive dealing forecloses markets because firstly, competing insurers in this case may have equal opportunities to win distributors at contract renewal time, and secondly a close examination of market structures may be necessary; the sweeping CCPA *per se* prohibition of vertical agreements leaves no room whatsoever for such considerations. This is undoubted because whereas the CCPA in sub section 1 of section 18 provides for an enterprise to apply for exemption from certain prohibitions, sub section 2 of the same section 18 is categorical in its assertion that sub section 1 of section 18 does not apply to an agreement that is prohibited *per*

[87] R Van den Bergh, European Competition Law. Page 215

se in the CCPA. Given this position of the law, the CCPC is of the view that if the Insurance Act s. 9 (2) indeed amounts to a vertical restraint that suffocates competition, the CCPC cannot possibly intervene because it "is there to regulate the conduct of market players and not other statutes".[88] In the CCPC's view, while *bancassurance* at face value does not raise any competition concerns, the Insurance Act s. 9 (2) would in certain instances render possible market abuse by some market players.

In any event, it is important to also realise that a bank may simply prefer not to grant exclusive access, but with the Insurance Act s. 9 (2), that freedom to choose is curtailed.

3.4 JOINT VENTURES/REFERRALS

It is a basic tenet of competition law and regulation that the ownership of large networks is a significant barrier to entry. Thus, insurers who tie up with banks with large networks could effectively keep out potential entrants.[89] This might not have an immediate impact on the pricing of premiums since the need to penetrate the untapped market might keep premiums low for a bit. However, over the medium to long term incumbent firms enjoying market power may deploy forms of anti-competitive behaviour in the form of high premiums enabling them to earn supra-normal economic profits by hindering the growth of other firms and impeding the entry of newcomers,[90] without being more efficient than potential rivals.[91]

The issue of building brand equity is critical for new entrants into the insurance market. However, tying up with a bank might prove counter productive if this objective is to be achieved. Barua states that a number of surveys in the European market have shown, for instance, that in *bancassurance* partnerships, it is the bank's rather than the insurer's brand that dominates with the result that insurance brands often get stifled.[92]

Barua also reports that various surveys show that various populations regard insurance as a savings product rather than as a risk management product.[93] If the target demographic for

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[88] 31st January 2011 email to the author from Kelvin Kamayoyo of the Competition and Consumer Protection Commission
[89] A Barua, Bancassurance. Page 1348
[90] R Van den Bergh, European Competition Law. Page 106
[91] R Van den Bergh, European Competition Law. Page 142
[92] A Barua, Bancassurance. Page 1350
[93] A Barua, Bancassurance. Page 1348

bancassurance in Zambia views insurance as such, the insurer's products compete directly with term deposit facilities that banks offer. This could mean two things.

Firstly, the contractual arrangements of insurance companies and banks may be marred by a conflict of interests that poses the danger of detriment to the consumer so that branch bankers might not have any incentive to promote insurance products for example.

Secondly, when banks and insurance companies engage in commercial intercourse for purposes of *bancassurance* their arrangements arguably amount to:

> "an agreement between enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market"

These are horizontal agreements in terms of section 2 of the CCPA which are prohibited *per se* by s.9 of the CCPA in the same manner discussed above in respect of vertical agreements. The main difference between the vertical agreements earlier considered, and the horizontal agreements now in question is that but for the contractual arrangement between the insurance company and the bank, the two would normally be actual or potential competitors for the population's savings.

3.5 FULL INTEGRATION

Full integration would appear to be the method of *bancassurance* least likely to run into problems under the current legal regime because section 13 of the CCPA provides that "Sections *eight*, *nine*, *ten* and *twelve* do not apply to an agreement to which all the parties involved are interconnected bodies corporate falling under a single economic unit." In the interests of clarity, "interconnected bodies corporate" and "single economic unit" in s.13 of the CCPA will be taken in turn.

We begin with interconnected bodies corporate which, it is submitted would need to be informed by s.43 of the Companies Act[94] that, taking only what is relevant for present purposes, provides as follows:

> 43. (2) For the purposes of this Act, a company is a "holding company" of another company if the other company is a subsidiary of it under subsection (3).

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[94] Chapter 388 of the Laws of Zambia

(3) For the purposes of this Act, the "subsidiaries" of a company (in this subsection called "the holding company") are the following companies:

(a) any company in which the holding company holds-
(i) more than half in nominal value of the equity share capital, if the company is incorporated in a jurisdiction that has nominal value of share capital; or
(ii) more than half in value of the equity share capital, if the company is incorporated in a jurisdiction that does not have nominal value of share capital;

(b) any company of which the holding company is a member and the composition of whose board of directors is controlled by the holding company;

(c) any subsidiary under paragraph (a) or (b) of a company which is itself a subsidiary of the holding company under paragraph (a) or (b) or by the repeated application of this paragraph.

(5) For the purposes of this Act, a company is "related" to a second company if-
(i) the first company is a subsidiary of the second;
(ii) the first company is a holding company of the second; or
(iii) both companies are subsidiaries of a third company.

(6) For the purposes of this section, the composition of a company's board of directors is controlled by another company if, and only if, in relation to each of more than half of the directorships-

(a) the other company is able, without the consent or concurrence of any other person, to appoint or remove the holder of the directorship; or

(b) a person's appointment to the directorship follows necessarily from his appointment as director of the other company.

Thus, one would surmise that an insurance company and a bank related to each other by virtue of section 43(5) of the Companies Act[95] would, in embarking on *bancassurance*, be in a position to garner the favour of s.13 in the CCPA. In practical terms, with space confining us to the bank's viewpoint, a bank would have to be a member of an insurance company, the composition of whose board of directors should be in its control. Alternatively, a bank would need to set up an insurance company in which it would hold more than half in nominal value of the equity share capital. This would however have to be in compliance with s.75 of the BFSA which is in the following terms:

75. (1) A bank or financial institution shall not invest in an equity interest in any person, property or undertaking in an amount exceeding fifteen per centum of the total of all equity interests in the person, property or undertaking.

(5) Subsection (1) does not apply to an investment or investments by a bank or financial institution in the shares of its subsidiary, if the aggregate of all investments by the bank or financial institution does not exceed twenty five per centum of its regulatory capital.

[95] Chapter 388 of the Laws of Zambia

It is thus seen that the holding by the bank of more than half in nominal value of the equity share capital of the insurance company would need to be subsumed in the aggregate of all investments by the bank, which investments cannot exceed twenty five per centum of the bank's regulatory capital.

Coming now to the concept of a single economic unit, Lord Denning had occasion to consider this in the case of **DHN Food Distributors Ltd and others v Tower Hamlets LBC**[96]. His Lordship opined as follows:

> 'We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group". This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.'[97]

In light of the foregoing, what s.13 of the CCPA is saying is that to the extent that the anti-competitive practices this chapter has found to be so pursuant to ss. 8, 9, 10 and 12 of the CCPA; if the companies involved are all related by virtue of s.43(5) of the Companies Act[98], the law will look instead at the economic entity of the whole group of companies rather than at the companies as separate individuals so as to override the said four sections.

3.6 CONCLUSION

This chapter abstract from the findings of Chapter Two and assumed the permissibility of *bancassurance* in Zambia. It highlighted, on a model by model basis, numerous competition law intricacies that *bancassurance* would face. In the case of bulk purchase of insurance by a bank, bundling, cross subsidisation and price discrimination, were seen as likely to arise and infringe ss 8 and 12 of the CCPA by reason of preventing, distorting or restricting competition. Distribution agreements concluded under the auspices of s. 9(2) of the Insurance Act follow were found to assume the character of vertical agreements in terms of s.2 of the CCPA that are prohibited *per se* in s.10 of the same Act. Joint ventures and/or referrals exhibited brand equity problems as a result of large networks, as well as the trappings of horizontal agreements flowing from the substitutability of insurance products and deposit

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[96] [1976] 3 All ER 462, CA
[97] [1976] 3 All ER 462 at 467
[98] Chapter 388 of the Laws of Zambia

facilities. Finally, full integration was identified as most consistent with the anti-trust legislation, that is to say s.13 of the CCPA and this was explained in the light of s.43 of the Companies Act and s.75 of the BFSA.

CHAPTER FOUR

CONCLUSION: *DE LEGE FERENDA*

4.1 INTRODUCTION

Having come to the end of the road in this journey that posed the question: "Bancassurance: a legislatively premature entry into Zambia?", it is time to take stock of the discourse in the previous chapters with a view firstly to elucidating findings along the way that tend to answer the question and using the findings to suggest remedies to the imperfections in the law.

4.2 THE FINDINGS

The broad objectives of the study (a) and (b), as set out in Chapter One are now returned in the negative as follows:

(a) In Chapter Two a logical analysis of the implications of *bancassurance* was tested against the BFSA and Companies Act. Section 399 of the Companies Act was seen as placing companies carrying on the business of banking (in the BFSA called banks) on a different footing from other companies by preserving inviolate, special legislation applying to them. The special legislation, that is to say the BFSA s.2, was seen as defining banking business, thereby setting apart banks from other companies.

The underwriting, marketing, or administration of contracts of insurance or reinsurance was observed to be outside the scope of banking business, with the inference then drawn that the involvement of banks, collaterally or otherwise, in the manufacturing, marketing or distribution of insurance products and/or administration of contracts of insurance was incongruous with Zambian law, whether or not under the auspices of BoZ and/or the PIA; keeping in mind always that the method employed emphasises logical implications of the premise or validity of the inference rather than its truth value or desirability.

(b) In determining whether the legislature has provided an enabling environment for the orderly growth and development of *bancassurance* through an appropriate balance between encouraging competition and innovation, while maintaining stability, the different models of *bancassurance* were examined in Chapter Three.

With regards to the bulk purchase method, it was observed that the bundling which characterised it may lead to entry deterrence in the market of the bundled product if this market is subject to economies of scale. An issue of cross subsidisation was also touched upon as possibly impeding transparency in pricing. Thirdly, the price discrimination propensity of the same bulk purchase mode of *bancassurance* was highlighted. These three considerations were laid out as likely to put *bancassurance* in conflict with ss. 8 and 12 of the CCPA by preventing, distorting or restricting competition.

It was then canvassed that distribution agreements would have to be concluded within the framework of s.9(2) of the Insurance Act, which would give rise to a vertical agreement (s.2 of the CCPA) prohibited *per se* by s.10 of the CCPA. The hapless situation of a bank that may want to enter into distribution agreements with several insurance companies but for the preclusion in the Insurance Act s. 9 (2), was also considered.

Joint ventures/referrals were seen to have the effect of stifling insurance brands in the likely event that banks and insurance companies formed large networks. In addition, to the extent that some individuals regard insurance as a savings product that competes directly with term deposit facilities on offer by banks, joint ventures were recognised as carrying the potential to amount to horizontal agreements (s.2 of the CCPA) prohibited *per se* by s.9 of the CCPA.

These factors taken together effectively negatived the assumed permissibility of *bancassurance* in Chapter Three based on the underlying hypothesis that if indeed the BFSA allows for *bancassurance*, can parliament be taken, by virtue of such permission and/or the Insurance Act s. 9 (2) for example, to have legislated so as to undermine the provisions of another Act of Parliament (CCPA)?

Following the findings in (a) and (b) above, it is apparent that apart from the favourable case made for full integration at 3.5 above, there are no appropriate regulations with regard to *bancassurance* to foster confidence in the insurance and banking systems operating as one. When the insurance industry operates on its own for example, insurance cover is normally backed by a policy document. When insurance is acquired through the banking industry, policy documents are not normally availed to customers. Generally speaking, the insured is likely to have fuller information transacting directly with the insurance industry.

The findings herein can be generalised to the population at large. One would venture to suggest that *bancassurance* has never been in the contemplation of the legislature because the term alone nowhere appears in the Laws of Zambia. Thus, attempts on the ground to work the concept have in truth been aimed at overcoming a legal straitjacket. Observers point out that where new insights find themselves bottled in old definitions, there is clearly a risk of overall inconsistency. Without parliamentary consideration of *bancassurance*, the interests of the various stakeholders like the bank, insurance company, consumer and legislator are likely to levitate in a state of imbalance. It is imperative therefore that machinery is set in motion to determine how best to incorporate into the Zambian commercial landscape, this heterogeneous concept of *bancassurance*. Such a task was always beyond the scope of this paper, but is enunciated as a recommendation at 4.3.4 below.

4.3 RECOMMENDATIONS

4.3.1 Banking business

Generally, any definition limits rather than expands the scope of what is being defined, and it was seen in Chapter Two from the Finance Minister's commencement of debate at the second reading stage of the Banking and Financial Services Bill that restrictions and limits largely form the spirit of the BFSA. The statutory definition therefore seems a natural hindrance to commercial developments like *bancassurance* that fall outside the part of the definition that enables BoZ to deem as banking business any custom, practice or activity it sees fit. *Bancassurance* and similar innovations specifically excluded from the banking business definition would in the premises require constant amendment of the statutory definition if parliament, having regard to the goals and objects of the BFSA, considers them appropriate.

It was also observed in Chapter Two that the meaning of "banking business" can change from time to time, with the case of **Woods v Martins Bank Ltd**[99] cited as authority for the proposition that banking business ought therefore in each case to be treated as a matter of fact rather than pure law. Accepting that in certain instances the statutory definition presents

[99] [1959] 1 QB 55

obstacles to progress that even BoZ might not be opposed to, a suggestion is to adopt the approach of the law towards partnerships in the Partnership Act 1890[100], which lays down one broad definition of a partnership, based on its key features. The core elements of banking business can similarly be summed up in an all encompassing phrase with a view to conferring on the banking industry the desirable trait of flexibility. Such a definition would be in the lines of "any company engaged in deposit taking, provision of financial services..." and any other broad classification of transactions considered to be central to banking business; each falling to be construed as and when the need arises, in the interests of innovation by commercial men.

There are several advantages to be derived from such an approach, considering the problems illustrated in Chapter Two concerning the unsatisfactory way bancassurance is practiced in Zambia. It would enable supervision by BoZ regarding matters concerned with the enlarged realm of operations of banks. In the event of ensuing customer complaint, the question whether a bank was engaged in banking business will be more of a matter of fact than one of law based on construing ss. 2 and 8(1) of the BFSA. *Bancassurance* being an accepted practice of banks will fall within the realm of banking business even though it is not something that has always fallen within the definition.

Of course a simpler solution is tweaking the definition of banking business to allow for full blown *bancassurance*, or at the very least insurance activities in connection with or for the purposes of the bank's business. Credit related product offerings would by this token become permissible.

Failing legislative approval, it is not without significance that banks have become multifunctional institutions engaged in a wide range of business activities beyond their traditional core activities of deposit taking and lending so that it is now common for them to be engaged in activities as diverse as securities and derivatives trading, investment management, insurance, and pensions. These separate activities are usually carried out by different subsidiary companies within the same banking group rather than by the core bank itself.[101] The full integration model whose permissible workings were described in Chapter Three at 3.5 above is a possible avenue for *bancassurance* in Zambia. Banks could use that

[100] 53 & 54 Victoria, Chapter 39
[101] E P Ellinger, Ellinger's Modern Banking Law. Page 69

exposition to accordingly make equity investments in insurance companies or set up subsidiaries, as the case may be, to handle the insurance aspect of the bank's business; whether distribution agreements, referrals, full integration or even cross holdings between banks and insurance companies. The first advantage of this is that there would be no grey area in terms of supervision. Being purely insurance, PIA would reign supreme over such subsidiary. The second advantage is that which was noted in Chapter Three, that s.13 of the CCPA favours single economic units.

4.3.2 Agent vs. distributor

Agency agreements fall outside the scope of cartel prohibition in European competition law if the agents bear no, or only insignificant, financial and commercial risks, especially when property in the contract goods bought or sold does not vest in the agent.[102] In the opposite situation agents will be treated as independent dealers who must remain free in determining their marketing strategy. Hence, under European competition law, principals may control agents' behaviour but limitations on a distributor's freedom are carefully scrutinised.

A disconnect is thence seen between sub section 2 of section 9 of the Insurance Act and the *per se* prohibition of vertical agreements in the CCPA. The former presumably recognises the distinction between agents and distributors but the latter does not. A possible solution would therefore be to distinguish agents from distributors in the CCPA, if it is felt that s.9(2) of the Insurance Act should be maintained even in the case of *bancassurance.* Adopting this route would require simultaneously addressing the concern that agency agreements rather than distributorships may be used by entrepreneurs to circumvent the burdensome provisions concerning the latter. The harm to the economy would be distorted business decisions informed by the more lenient treatment of a legal form rather than its efficiency return.

If, on the other hand, it is felt that s.9(2) of the Insurance Act should take into account the unique challenge posed by *bancassurance*, it may be amended to except situations where banks are desirous of being agents for more than one insurer or it may, going by Barua's suggestion, enjoin banks to grant access to entrant or all insurers.[103]

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[102] R Van den Bergh, European Competition Law. Page 233
[103] A Barua, Bancassurance. Page 1351

4.3.3 *Per se* prohibitions vs. market power tests

In a bid to understand the CCPA, it would be helpful to reflect on the German theory of freedom of competition (*Konzept der Wettbewerbsfreiheit*). Van den Bergh and another narrate that by this theory, both the market and the process of competition are seen as unique and indivisible since every euro, or indeed kwacha, the consumer spends on buying a certain product cannot be spent on other purchases; consequently, all firms compete with each other to get the largest possible share of the consumer's purchases.[104] Thus, market power or dominance, which focuses mainly on the degree of independence of a powerful firm limiting the individual economic freedom of competitors and consumers, is meaningless since all products compete with all remaining products. It is submitted that this is one of the doctrinal underpinnings of the kind of *per se* rules contained in the CCPA.

Proponents of the freedom of competition school of thought point out that the danger with focusing on dominance of a firm, as is the case in many provisions of the CCPA is that if market definition becomes the goal of the assessment by the CCPC, rather than an instrument to better understand the antitrust problems at hand, decisions in real-world cases may be biased.[105] These scholars go on to argue that defining a market, or the concept of a relevant market is not an end in itself, but is a deliberate attempt, for the sake of workability, to oversimplify the very complex interactions between a number of diversely situated buyers and sellers, each of whom has in reality different costs, needs and substitutes.

What can be gathered from all this is that *per se* rules are bound to prohibit more agreements and practices than a market power or dominance test would. The CCPA however, adopts both standards, with the result that while horizontal and vertical agreements are prohibited *per se*, they are not always void. The quizzically separate question of whether a prohibited horizontal or vertical agreement is void instead largely depends on considerations of a firm's dominance. One is then left to wonder as to the effect, or indeed efficacy of the *per se* prohibition that stops short of making *bancassurance* related horizontal and vertical agreements void.

Furthermore, to the extent that intervention by the CCPC in many instances requires determination that there is substantial market power or dominance of a firm, as was in

[104] R Van den Bergh, European Competition Law. Page 209
[105] R Van den Bergh, European Competition Law. Page 119

Chapter Three found to be the case regarding price discrimination, such provisions of the CCPA are at variance with the *per se* rules contained therein.

In light of the foregoing, the CCPA may be described as a checkerboard statute- one which displays incoherence in principle and that can be justified, if at all, only on grounds of a fair allocation of political power between diametrically opposed parties[106]. In the interests of consistency one standard ought perhaps to be endorsed to justify rejection of the other, depending on the competition policy being pursued by the Zambian government, having regard to *bancassurance*. If a hybrid is nonetheless still preferred, it should be one that suppresses the mutually opposed traits of freedom of competition and dominance.

4.3.4 Develop a comprehensive position on *bancassurance*

The numerous legislative approaches to *bancassurance* explored in Chapter Two at 2.3 can be drawn on to come up with a position that best suits Zambia. This can be done through consultative fora between the insurance and banking industries. The decisions to be made here would be at the basic level of whether or not *bancassurance* is desirable. If so, how do the parties want to go about it? Do banks wish to bypass the middleman for loan protection insurance and insure their own banking customers themselves like in France? Do they want to sell insurance directly? Do insurance companies prefer to fully integrate in the bank's product range? Are distribution agreements favoured? If so, on an exclusive basis or not? The aim would be to gather the possible ways these industry players would wish to have open to them in pursuit of *bancassurance.*

BoZ, the PIA and CCPC (in its dual capacity as competition and consumer protector) can then consider the expressed intentions of the bankers and insurers. They could determine whether or in what instances the bank's insurance business is best monitored by an insurance company, or the PIA; the professional expertise with which insurance products should be handled by a bank, issues to do with availability of policies for example; general and specific areas of supervision; necessary training requirements for specified persons on behalf of the bank as a corporate agent; restrictions, if any, on qualities and quantities of insurance sold by the bank; possibilities of powerful financial conglomerates will need to be addressed; the need for an authorised intermediary always, or in instances of certain covers best dealt with

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[106] M D A Freeman, Introduction to Jurisprudence, Thomson Reuters (Legal) Limited t/a Sweet & Maxwell, London, 2008. Page 725

by insurance specialists; based on the complexities identified as regards different arrangements and products whether operationalisation of *bancassurance* should be gradual or immediate etcetera.

After all that deliberation, the Tanzanian move to develop appropriate legal and regulatory framework as a precursor to *bancassurance* can be adopted, only that in our case it will not simply be a matter of harmonising the insurance and banking legislation. Experts would be engaged to consider the positions arrived at in the preceding two paragraphs and ascertain what pieces of legislation are likely to be affected and suggest how best to harmonise the Statute Book. Parliament can then pick it up from there, traditionally having the final say on what will or will not make it as law.

4.4 CONCLUSION

This research has inferred from the state of the law that *bancassurance* is prohibited in Zambia, but identified several steps that may be taken to land its plane in this jurisdiction. The first would be to enact a supple definition of banking business in the interests of commercial developments that take place over time. Alternatively, but still on banking business, the BFSA s.2 definition may be amended to specifically bring on board *bancassurance*. Either of these alternatives would best be followed by harmonising s.9(2) of the Insurance Act with the CCPA by distinguishing agents from distributors in the latter Act to avoid vertical agreements arising. In addition, measures would need to be taken to reconcile the conflicts in the CCPA between per se prohibitions and market power tests, thereby tailoring the CCPA to recognise the concept of *bancassurance*.

The other possible route, which incidentally requires no legislative action, entails taking advantage of related companies in terms of s.43 of the Companies Act, as read together with s.75 of the BFSA regarding equity investments. *Bancassurance* would in such circumstances steer clear of the CCPA as a result of s.13 of that Act.

The final method was identified as developing a comprehensive position on *bancassurance* through engagement of all stake holders and laborious analysis of everyone's expressed wishes.

All in all, the lack of legislation for the orderly growth of *bancassurance* in Zambia should not be a deterrent to the development of this business product that has immense potential to benefit consumers, banks, and insurance companies. There is need to engage all stakeholders in the manner usual to the legislative process to map out legislation that will adequately balance the respective interests and enable progress of the business community and society at large in this particular area.

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