THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

CAUSE NO. 2018/CCPT/APP/COM/

BETWEEN

INSURERS ASSOCIATIONOF ZAMBIA AND 15 OTHERS — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

CORAM: Mr. Willie A. Mubanga, SC (Former Chairperson), Mrs. Eness C. Chiyenge (Chairperson),Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), and Mr. BuchisaMwalongo (Member)

For the Appellants: Mr. M.Mundashi, SC and Mr. M Nalishuwa of Mulenga Mundashi Legal Practitioners

For the Respondent: Mrs. M.B. Mwanza (Director, Legal & Corporate Affairs), Mrs. M.M. Mulenga (Manager, Legal & Corporate Affairs), Ms. M. Mtonga (Senior Legal Officer) and Ms. N. Pilula (Legal Officer) – Competition and Consumer Protection Commission

JUDGMENT

Chiyenge, E.C., Chairperson, delivered the Judgment of the Tribunal

BACKGROUND

1. This is our judgment in the appeal of the Insurance Association of Zambia and fifteen others against a decision of the Competition and Consumer Protection Commission (hereinafter referred to as "the Respondent") dated 28th August 2018. The background leading to the said decision is that the Respondent commenced investigations pursuant to a Notice of Investigation to the Insurers Association of Zambia (hereinafter referred to as 'the IAZ") and a series of Notices of Investigation to 16 IAZ members (hereinafter collectively referred to as "the IAZ members"), 15 of who are Appellants in this appeal. The Respondent commenced the investigations on its own initiative pursuant to section 55 of the Competition and Consumer Protection Act, No. 24 of 2010 (hereinafter referred to as "the Competition Act").

2. The 16 IAZ members were as follows:

   Goldman Insurance Limited

Professional Insurance Corporation Zambia Plc
Nico Insurance Zambia Limited
Advantage Insurance Limited
Golden Lotus Insurance Company Limited
Veritas General Insurance Limited
A Plus General Insurance Limited
Meanwood General Insurance Limited
Innovate General Insurance Limited
ZSICGeneral Insurance Limited
Diamond General Insurance Limited
Ultimate General Insurance Limited
Africa Pride Insurance (Pvt) Limited
General Alliance Zambia Limited
Focus General Insurance Limited
Madison General Insurance Company Zambia Limited

3. The allegations against the IAZ were that the IAZ met with the said IAZ members, as IAZ members of the General Insurance Council (hereinafter referred to as 'the IAZ General Insurance Council" or "the IAZ GIC"), in December 2016, to discuss increase in motor vehicle insurance. The Respondent alleged that the IAZ General Insurance Council meeting resolved to revise upwards motor vehicle insurance premiums for both private and commercial vehicles. Further, that following that meeting, there were media reports that third party motor vehicle insurance was increased in January 2017. The Respondent further alleged that due to the increase in insurance premiums the Pensions and Insurance Authority (hereinafter referred to as "the PIA") issued a press statement stating that the increment of insurance premiums was illegal. The Responded stated that the IAZ's conduct appeared to be in breach of sections 8 and 9 of the Competition Act.

(See Notice of Investigation and accompanying letter at pages 15-18 of the Respondent's Record of Proceedings)

4. The IAZ responded to the Notice of Investigation by letter dated 9th March 2017, authored by the IAZ Executive Director Christabel M. Banda. **(See pages 19-55 of the Respondent's Record of Proceedings)**

5. It is on record and not in dispute that the meeting, the minutes of which are also on record, arrived at a resolution details of which are subject of our considerations in the main part of the judgment. Members also deliberated about the issues relating to penalties to be applied for non-compliance to the resolutions

6. The gist of the allegations against each of the IAZ members were that the member, whilst being a member of the IAZ General Insurance Council, met with other members of the IAZ General Insurance Council in December 2016 to discuss the increase in motor vehicle insurance. Further, that each member together with other members of the IAZ General Insurance Council resolved to revise upwards motor vehicle insurance premiums for both private and commercial vehicles. Further, that following that meeting, third party motor vehicle insurance was increased in January 2017. Further, that due to the increase in insurance premiums the PIA

issued a press statement stating that the increment of insurance premiums was illegal. The Respondent alleged that it appeared that the conduct complained of was in breach of sections 8 and 9 of the Competition Act. **(See pages 55-88 of the Respondent's Record of Proceedings)**

7. The Respondent interviewed the Executive Director of the IAZ, Mrs. Christabel Banda. The Respondent also interviewed representatives of the IAZ members respectively. The interviews were based on structured questionnaires.

8. The PIA submitted that it issued a statement informing the general public that the increment in third party motor vehicle insurance premiums was void because the PIA did not approve it. Further, that the IAZ General Insurance Council members met where the members made proposals to increase the insurance premiums, and that the IAZ had informed the PIA that they did not know how the discussion leaked to the public. The PIA submitted that its working relationship with the IAZ was that when there were issues in the insurance industry, the IAZ reported the issues to PIA for action. Further, that the PIA met with the IAZ to explain to them that the increase in the minimum rates for third party motor vehicle insurance was not valid.

9. The Respondent prepared a (preliminary) report. The (preliminary) report forms the bulk of the subsequent report that the Respondent prepared in April 2018, and the Staff Paper in August 2018. The Appellants were availed this (preliminary) report and they commented on it, following which the Respondent prepared the April 2018 report which reflected the Appellants' further submissions, to which the Respondent responded. In substance, the Respondent maintained its earlier position with some additional arguments and case law. **(See pages 477-627 of the Respondent's Record of Proceedings)** This report was the basis of the Staff Paper that the Respondent prepared in August 2018 **(see pages 626-804 of the Respondent's Record of Proceedings)** and which was presented before (and lead to the decision of) the Board of Commissioners dated 28th August, 2018, subject of this appeal.

10. The Board of Commissioners' findings subject of this appeal substantially a confirmation of the findings in the (preliminary) report, the report of April 2018 and the Staff Paper.

Consideration of section 8

11. On the basis of findings and analysis in the Staff Paper, it was established that there was an agreement among the IAZ General Insurance Council members to increase the prices of minimum third party motor insurance. That this agreement was made orally in the IAZ meeting which was held on 13thDecember, 2016 and was followed up by written down agreement in form of resolutions of that meeting where members signed to effect the price increment by 1st January, 2017.

12. It was established that after the resolution to increase minimum rates was agreed and signed by members Limited, Ultimate Insurance, A-Plus General Insurance, Advantage Insurance Company, and Innovate Insurance General Insurance Limited increased their third party motor vehicle insurance premiums on 1st January, 2017. All insurance companies that increased their third party motor insurance premiums reversed their decisions after the PIA issued a statement stating that the increment was illegal as it was not formally communicated and approved by the PIA.

13. The conduct by the IAZ members to agree on increasing prices of minimum rates for motor insurance was found to have had the objective of preventing, restricting and distorting competition in the relevant market, hence, violating section 8 of the Competition Act.

Horizontal agreements prohibited per se

14. It was established that there was a horizontal agreement among IAZ members to increase the price of third party motor insurance. This conduct of fixing prices of third party motor insurance premiums among IAZ members distorted the competition process among insurance companies hence, violating section 9 (1) (a) of the Competition Act.

15. The Board directions relevant to this appeal were as follows:

(i) In view of the analysis and determination, the Board directs that the following actions be taken:

(ii) (Not relevant)

(iii) That the IAZ should refrain from using meetings or making any form of communication that would or might have an effect or object of restricting, preventing or distorting competition in the insurance sector pursuant to section 8 of the Competition Act.

(iv) That the IAZ should be fined 10% of its annual turnover for violating section 8 of the Competition Act. This is because colluding enterprises cause greater damage to customers, resulting from the increase in price over levels that would otherwise have obtained, hence, the larger the penalty imposed by the Commission.

(v) That A Plus General Insurance, Madison General Insurance Limited, Madison General Insurance Company Zambia Limited, Professional Insurance Corporation Zambia Plc, Nico Insurance Zambia Limited, Advantage Insurance Limited, Golden Lotus Insurance Company Limited, Veritas General Insurance Limited, Meanwood General Insurance Limited, Innovate General Insurance Limited, ZSIC General Insurance Limited, Diamond General Insurance Limited, Ultimate General Insurance Limited, Africa Pride Insurance (Pvt) Limited, General Alliance Zambia Limited, and Focus General Insurance Limited be fined 10% of their annual respective turnovers for violating section 9 (1) (a) of the Competition Act. The Commission regards violations of all sections of the Competition Act as serious, however, violations of section 9 of the Competition Act are particularly the most serious. This is because colluding enterprises cause greater damage to customers, resulting from the increase in price over levels that would otherwise have obtained, hence, the larger the penalty imposed by the Commission.

(vi) That the Commission should conduct a compliance programme for IAZ and its members to raise awareness of the competition and consumer protection law section 5 of the Competition Act (sic).

(vii) That the Commission should engage PIA in ensuring that in future, there are no competition related issues in the issuance of minimum rate guidelines.

NOTICE OF APPEAL AND HEARING OF APPEAL

16. The IAZ and the 15 IAZ members (collectively referred to as "the Appellants') appealed the decision of the Respondent's Board of Directors. Initially, one of the Appellants had also separately filed a Notice of Appeal, in addition to that filed by Messrs. Mulenga Mundashi Kasonde Legal Practitioners on behalf of all the Appellants, but the anomaly was regularized by consent order consolidating the appeals into one appeal with the legal counsel representing all the sixteen Appellants. The Notice of Appeal filed on 10th October 2019 reads in part, "... *appeal to the Tribunal against the whole decision of the Respondent which decided that the 1st Appellant and its members ... be fined 10% of their respective annual turnovers for violating sections 8 and 9 of the Competition and Consumer Protection Act ... in accordance with section 58 (3) of the Competition Act.*" The grounds of appeal are reflected and dealt with in the part of this judgment in which we have determined the appeal.

17. The Appellants also filed an Affidavit in Support of Notice of Appeal together with the Notice on 10th October 2018. They filed a supplementary affidavit on 7th March 2019, admission of which, as part of evidence before the Tribunal, we granted by consent order dated 5th November 2019. The Appellants are seeking the following relief:

    (i) The decision of the Respondent and the fine imposed be set aside;

    (ii) In the alternative without prejudice to the plea that there was no offence, the penalty should be calculated on the basis that the alleged breach was only for 7 days;

    (iii) Costs; and

    (iv) Any other relief.

18. The Respondent filed an Affidavit in Opposition on 27th March 2019. The Respondent opposed the appeal altogether and filed grounds in opposition, to which the Appellants replied, all of which in our view are part of the parties' respective arguments. We therefore do not dwell on their contents, but may indirectly address them in our consideration of the appeal.

Hearing of the appeal and submissions

19. The Appellants called four witnesses, namely; Mr. Mukaka Mwashika, Executive Director of the IAZ; Mr. Mr. Titus Kabamba Nkwale, Deputy Registrar - Insurance, PIA; Mr. Lupupa Chikonde, Actuary Consultant - Eventus Analytics; and Mr. Chabala Lumbwe, Chief Executive Officer of Madison General Insurance Company Zambia Limited. The Respondent called one witness, namely; Mr. Shadreck Milezhi, Investigator - Competition and Consumer Protection Commission.

20. We heard the appeal on 5th April, 17th June, 18th June, and 19th September 2019 and on 24th June and 25th June 2020. Thereafter, we received submissions from counsel on both sides, the last of which was the submissions in reply filed by counsel for the Appellants on 7th October 2020. We called for another session on 7th December 2020. At this session, we called on the parties to examine the Respondent's Decision (subject of the appeal) in its Record of Proceedings. This was because we found it at variance with that in the Appellants' Affidavit in Support of Notice of Appeal in some aspects, which we said necessitated verification and, if necessary, amendment. Further, having observed that the grounds of appeal outlined in the Appellants' submissions differed from those in their Notice of Appeal filed on 30th October 2018, we

requested counsel for the Appellants to check the records and, if necessary, take corrective steps. We also issued an order for the PIA to produce the instrument or document that set the minimum premium rates for third party motor vehicle insurance in 2011 and the instrument or document that revised the rates in 2013, 2015 and/or any other year. We issued these directions and order pursuant to section 71 (1) (a) and (2) of the Competition Act as a necessary measure towards our determination of the appeal.

21. We held the last session on 25th January 2021, at which we granted an application by the Appellant to amend its final submissions (to which there was no objection). We were also informed that the Respondent had effected an amendment to the Decision of the Board of Commissioners contained in the Respondent's Record of Proceedings by filing an Amended Record of Proceedings separately containing the correct decision (which position was confirmed by counsel for the Appellant).

22. At the same sitting, counsel for the Appellants, Mr. Mundashi, SC, sought guidance on the implications of the fact that the Tribunal panel had since the previous sitting in December 2020 changed, the former Chairperson, Mr. Aubbie W. Mubanga, SC, having left upon expiry of his term of office and a new member, Mr. Buchisa Mwalongo, having now joined the panel. We issued a ruling in which we guided that the Competition Act and our rules of procedure do not require us to hear an appeal *de novo* because of changes in the composition of the panel; that members were part-time members whose terms of office did not coincide, but terminated at different times. And that in essence proceedings including final decisions proceed on the basis of what is on the record.

23. Furthermore, in response to our Order to Produce, a representative of the PIA, Ms Namakau Ntini, Acting Deputy Registrar - Insurance Division - took the witness stand for examination on oath concerning the document the PIA had filed in response to the Order; entitled," **GUIDELINES TO THE INSURANCE INDUSTRY ON THE MINIMUM TERMS AND RATES FOR GENERAL INSURANCE BUSINESS"** issued in April 2015. However, none of the parties or the Tribunal members had any question for the witness. The document contained only guidelines issued in 2015, and in 2018 (being the same guidelines, but with clarifications on the application of the rates. (The Tribunal's Order was for production of all guidelines passed in 2011, reviews in 2013 and 2015, and any other.)

24. We directed the parties to file their (amended) submissions and reserved judgment to be delivered thereafter. Counsel for the Appellants filed the last submissions (in reply) on 15th February 2021.

CONSIDERATION AND DETERMINATION OF APPEAL

25. We are grateful for the spirited arguments of counsel on both sides. We have considered these arguments, as well as the records of proceedings, the affidavit and oral evidence as well as the documentary evidence produced by the PIA. We refer to these in the judgment as we see fit. We have considered some of the grounds of appeal together because they are interrelated. However, before we deal with the grounds of appeal specifically (which we consider under section (D), we find it appropriate to address some issues we have noticed as recurring, directly and indirectly, in the arguments for and against the appeal. These relate to (A)

relevance of legislation and case law of foreign jurisdictions; (B) legal and economic contexts of competition law within the Zambian jurisdiction; and (C) the relevance of *mens rea* and negligence to non-criminal regulatory offences in the Competition Act. We are of the view that it will be tidier to deal with these before we delve into the specific grounds of appeal.

A. RELEVANCE OF LEGISLATION AND CASE LAW OF FOREIGN JURISDICTIONS

26. We have observed that counsel on both sides have relied heavily on case law of foreign jurisdictions, especially the European Union. This is expected, especially that this country's jurisprudence in the area of competition law is still in what may be referred to as the embryonic phase. However, we hasten to caution that reliance on foreign case law places a burden on those seeking to do so to demonstrate that the case law consistently relates to provisions of the Competition Act, in substance and context. In the case of **MRI and others** Appeal No. 2017/CCPT/001/COM (also Nos. 002 and 003 consolidated) (the **MRI case**), we had the following to say (quoting extensively for full appreciation):

> "... we must at the outset state that while noting that our competition laws borrow significantly from other jurisdictions, especially the EU and the Commonwealth, thereby making these laws *pari materia*, we do not lose sight of the fact that the varying statutes among jurisdictions are intended to address peculiar circumstances in their respective jurisdictional contexts. Thus, the immediate context in the interpretation of our statutes is the statute concerned itself, followed by other statutes on the subject matter in the Statute Book, if any, and other relevant material on the subject matter in the national context. Foreign statutory and case law, or other material on the subject, would be persuasive in the interpretation of our laws, but only to the extent that they are consistent with our enactments and the applicable economic context and/or other legitimate considerations. Our Supreme Court in the case of Director of Public Prosecutions v. Ngandu and Others (1975) Z.R. 253 (S.C.) said:
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> "... But as this court has said (see for instance Sinkamba v Doyle [1]) ordinary meanings or dictionary meanings of words or phrases, while they may properly be used as working hypotheses or starting points, must always in the final analysis give way to the meaning which the context requires; and we use the word "context" in its widest sense as described by Viscount Simonds in Attorney-General v H.R.H. Prince Augustus [2] at page 53:
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> > *'. . as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.'*

27. The doctrine of *in pari materia* can, where applicable, be a useful aid to statutory interpretation. However, in interpreting legislation, other statutes or case law can only be considered to be *in pari materia* if they deal with the same subject matter on the same lines. Variations in the adaptation processes of enactments, for instance, take the earlier (adapted) enactments outside of the realm of *pari materia*. One renowned author on statutory interpretation makes the following exposition:

"Where a subject has been dealt with by a developing series of Acts, the courts often find it necessary, in construing the latest Act, to trace the course of this development. By seeing what changes have been made in the relevant provision, and why, the court can better assess the current meaning.

....

If the term was borrowed from different legislation, and had received judicial interpretation in its other context, that processing may be relevant to understanding its meaning in the present Act.

....

In using earlier legislative treatment of a particular mischief as a guide to interpretation, the court must keep in mind changes of approach.

....

....

The sole question is whether, in borrowing the word, Parliament also intended to borrow its previous processing. This can be a very difficult matter to determine. One test is whether the two Acts are *in pari materia*.

.... The following Acts are *in pari materia*.

Acts which have been given a collective title. This is a recognition by Parliament that the Acts have a single subject matter.

Acts which are required to be construed as one. Again here is a parliamentary recognition of a single subject matter.

Acts having short titles that are identical (apart from the calendar year).

Acts which deal with the same subject matter on the same lines. Here, it must be remembered that the Latin word *par* or *paris* means equal, and not merely similar. ...."[1] (Bolding and underline ours)

28. It is possible, nonetheless, that though the law to which foreign case law relates and the facts of the case itself may not be *in pari materia* with provisions of the Competition Act and facts of the case under consideration, there may be similarities between them that are so compelling as to make the case law a persuasive aid in our efforts to determine issues before us. Unfortunately, we often find that counsel make no or little effort to demonstrate that the relevant provisions of the Competition Act and the facts of the case under consideration are on all fours with, or the same in any material particular as, the foreign law and case law they seek to rely on. Unfortunately, this is the situation we find ourselves in presently with the result that, by and large, there is a lack of focus on what may arguably be relevant and persuasive in the Tribunal's efforts to the resolve the issues before it. Of particular concern to us is Article 101 TFEU (including its subsidiary instruments) and the case law that has developed around the Article.

29. We have observed that parts of the language of the prohibitions of restrictive agreements in sections 8 and 9 of the Competition Act are derived from Article 101(1) TFEU[2] and some related subsidiary instruments (regulations, rules and guidelines) made under provisions of

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[1] Francis Bennion, Bennion on Statutory Interpretation, Third Edition (LexisNexis), 1997, at pages 461 – 462.

[2] Article 81 of EC Treaty became Article 101 of the Treaty on the Functioning of the European Union with the entry into force of the Lisbon Treaty on 1 December 2009. Previously, Article 81 was Article 85.

the Treaty. However, the prohibitions in paragraph (1) are couched in general terms. The paragraph prohibits as incompatible with the internal market anti-competitive agreements between undertakings (i.e. enterprises), decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Furthermore, various details and notions such as those relating to categorizations like vertical agreements and concerted practices, and horizontal cooperation agreements, the "effect on trade" criterion, and concepts such as hardcore restraints and appreciability of restraints (i.e. restraints which may have a significant effect on trade between Member States) are to be found in subsidiary instruments, such as Commission Guidelines, which have evolved over time in the implementation and interpretation of the Article[3].The Article in paragraph (3) provides exemptions to the prohibitions in paragraph (1) in specified terms, while details of how these are to be determined and applied are dealt with in subsidiary instruments made under the Treaty.[4] The whole Article 101 reads:

> *"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*
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> - *directly or indirectly fix purchase or selling prices or any other trading conditions;*
> - *limit or control production, markets, technical development, or investment;*
> - *share markets or sources of supply;*
> - *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> - *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.*

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[3]See, for example, Commission Notice on Guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1), Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2). Paragraph 3 of the Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) states that the existing guidelines on vertical restraints, horizontal cooperation agreements and technology transfer agreements(5) deal with the application of Article 81 to various types of agreements and concerted practices. And that the purpose of those guidelines is to set out the Commission's view of the substantive assessment criteria applied to the various types of agreements and practices. See also Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) as well as Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01).

[4] See, for example, Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), various Commission Regulations such as Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices Official Journal L 102, 23.4.2010, p.1-7; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.1.2011, pp. 1-72).

3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

- *any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promotingtechnical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."(Underline ours)

30. It is probably apparent by now, from what we have outlined above, that the interpretation of Article 101 TFEU is heavily governed by subsidiary instruments. Article 103 provides for regulations and directives giving effect to principles set out in Articles 101 (and 102) to be laid down by Council on a proposal by the Commission after consulting with the EU Parliament. Article 104 provides that prior to the coming into force of these instruments, the authorities in Member States are to rule on the admissibility of agreements, decisions and concerted practices in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph (3). Thus the approaches taken by the EU Commission and authorities in Member States in the interpretation of Article 101 TFEU have evolved with the development of these subsidiary instruments. In turn, the development of these instruments themselves has been influenced by the case law that has developed around the subject matters they deal with.

31. We take the view that in seeking to establish what elements, if any, of the Article and its subsidiary instruments and the related case law may be useful aids in the interpretation of sections 8 and 9 of the Competition Act, it is important to understand the similarities and differences between the wording of Article 101 TFEU and that of sections 8 and 9 of the Competition Act. We also need to remember that though some language of the Article's subsidiary instruments and EU case law has been incorporated into section 8 of the Competition Act in particular[5], the subsidiary instruments and the related case law are specifically tailored to the objective of provisions of the Article. Further, that these instruments and case law have been developed and applied to the Article at different times since the coming into force of the Article. The objective of the Article is to protect competition in the EU Community market. Therefore, an assessment of a restrictive object or effect of an agreement, decision or concerted practice in an internal market has to establish that it affects the Community market, apart from meeting other criteria, in order for it to be held as prohibited by the Article. We also note, for instance, that "**Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82[6] of the Treaty**" provides for burden of proof in its article 2 that:"**In any national** or

[5]Section 8 of the Competition Act has also borrowed language from subsidiary instruments relating to Article 101 TFEU, such as "**Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)**" which contains the concept of appreciability in section 2.4.

[6] As earlier outlined, these Articles became Articles 101 and 102 in 2009.

Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or Association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."[7] We also note that "Guidelines on the application of Article 81(3) of the Treaty *C 101, 27/04/2004 P. 0097 – 0118*" make distinctions in the application of analytical assessments in relation to agreements (and decisions and concerted practices) that are restrictive by object compared to those that are restrictive by effect in the following terms:

"2.2.2. The basic principles for assessing agreements under Article 81(1)

17. The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions(20). In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand). Article 81(1) prohibits restrictions of both inter-brand competition and intra-brand competition(21).

18. For the purpose of assessing whether an agreement or its individual parts may restrict inter-brand competition and/or intra-brand competition it needs to be considered how and to what extent the agreement affects or is likely to affect competition on the market. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-brand competition while the second question relates to the impact of the agreement on intra-brand competition. As restraints may be capable of affecting both inter-brand competition and intra-brand competition at the same time, it may be necessary to analyse a restraint in light of both questions before it can be concluded whether or not competition is restricted within the meaning of Article 81(1):

(1) Does the agreement restrict actual or potential competition that would have existed without the agreement? ....

(2) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). ....

19. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a

[7] The burden of proof on the party invoking an exemption per paragraph (3) is repeated in paragraph 41 of the "Guidelines on the application of Article 81(3) of theTreaty *C 101, 27/04/2004 P. 0097 – 0118*".Paragraph 43 of the Guidelines goes on to state that the assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. Furthermore, paragraph103 states, ".... However, the fundamental objective of the assessment remains the same, namely to ascertain the overall impact of the agreement on the consumers within the relevant market. Undertakings claiming the benefit of Article 81(3) must substantiate that consumers obtain countervailing benefits (see in this respect paragraphs 57 and 86 above)." It is therefore apparent that evidence that is by adduced by claimants pursuant thereto is assessed to ascertain whether or not the conditions set by Article 101 (3) TFEU, which are cumulative, are met.

restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-brand competition and/or intra-brand competition.

20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects(25). In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein(26).

21. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

22. The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market(27). In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.

23. Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers(28). As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales(29).

24. If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects(30). In other words the agreement must have likely anti-competitive effects. In the

case of restrictions of competition by effect there is no presumption of anti-competitive effects. For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability(31). Such negative effects must be appreciable. The prohibition rule of Article 81(1) does not apply when the identified anti-competitive effects are insignificant(32). This test reflects the economic approach which the Commission is applying. The prohibition of Article 81(1) only applies where on the basis of proper market analysis it can be concluded that the agreement has likely anti-competitive effects on the market(33). It is insufficient for such a finding that the market shares of the parties exceed the thresholds set out in the Commission's de minimis notice(34). Agreements falling within safe harbours of block exemption regulations may be caught by Article 81(1) but this is not necessarily so. Moreover, the fact that due to the market shares of the parties, an agreement falls outside the safe harbour of a block exemption is in itself an insufficient basis for finding that the agreement is caught by Article 81(1) or that it does not fulfil the conditions of Article 81(3). Individual assessment of the likely effects produced by the agreement is required.

32. Thus, the historical evolution of the subsidiary instruments on application of Article 101 TFEU has had a huge bearing on the development of the case law, in particular the burden and standard of proof expected of the competition authority concerned. One author on the implications of the evolution of the TFEU subsidiary instruments for interpretation of Article 101 TFEU gives an exposition on the treatment of the distinction between object and effect, some aspects of which we find factual, relevant and helpful and quote as follows (with our comments in foot notes)[8]:

> *"1. **Why the important distinction between object and effect remained of little use up to recently?***
>
> *The conjunction "or" in Article 101 (1) TFEU makes clear that an agreement is restrictive by object or by effect, which means that these requirements are alternative and not cumulative. However, the way competition rules were enforced up to recently explains that this important distinction was far less relevant than today. Prior to the modernization of competition rules in 2004, the enforcement of Article 101 (1) TFEU was largely driven by the application of block exemption regulations. These regulations consisted essentially in a check list of provisions designed to secure the exemptions of agreements from the prohibition contained in Article 101 (1) TFEU. They provided a list of clauses that were authorised (so-called "white clauses") or prohibited (so-called "black clauses") and, in some regulations such as the regulations on transfer of technology or R&D, provided clauses that could raise competition concerns or not depending on the context and the nature of the agreement (the so-called "grey clause"). If an agreement did not fall into one of these regulations, it could be notified to the Commission to obtain a decision exempting individually the agreement from the prohibition.*
>
> *(During this period), ... There was no or little assessment of the actual restriction and its effect. It was clear from the block exemption regulations and the case law on cartels that price fixing,*

[8] Bruno Lebrun Thibault Balthazar, "**Definition of restrictions of competition by object: Anything new since 1966?**" on 06/07/2011 and seen on 31/03/2021 at 16:16 hours at https://iclg.com/cdr/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966.

prevention of parallel imports, limitation of production or customers allocation were evil without much analysis of the true rationale behind such a prohibition.

Things changed progressively with the modernised enforcement of EU competition rules that resulted from the adoption in 1999 of the Commission White Paper on Modernization of the rules implementing Articles 85 and 86 of the Treaty (currently, Articles 101 and 102 TFEU) (OJ C 132 of 12.5.1999) as formalized in 2004 with the adoption of Regulation 1/2003 (OJ L 1, 04.01.2003, p.1-25).

This Regulation requires a more economic assessment of agreements. The predominant formalistic mechanics created by the block exemptions and the notification system, were progressively superseded by a system of self-assessment that put the responsibility on companies to determine the compliance of their agreements with Article 101 TFEU.

This modernised environment together with a strong focus by all competition authorities in the EU on busting cartels largely explain in our view that the scope of the notion of restriction by object has resurfaced over the last five years. This notion of object alleviates competition authorities from a sometime difficult burden of proof, in particular when fighting sophisticated cartels that go beyond a mere price fixing scheme. In their investigation, competition authorities have the obligation to demonstrate why the parties' agreement infringes competition rules. The presumption that an agreement did so when its object is restrictive of competition shifts the burden of proof on companies. Suddenly, the technical debate about the restriction by object or by effect has direct and concrete implications for both regulators and companies.

2. *What is a restriction of competition by object?*

As mentioned above, it is settled case law that an agreement may restrict competition either as a result of its object or of its effects. The alternative nature of this requirement leads to a two-stage examination of the agreement as explained by the Court of Justice in Société Technique Minière that also laid down the test to determine the existence of a restriction by object: "The fact that these are not cumulative but alternative requirements, indicated by the conjunction "or", leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article [101 (1)] must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, and for it to be caught by the prohibition, it is then necessary to find that those factors are present which show that competition had in fact been prevented or restricted or distorted to an appreciable extent. "

....

Thus in 1966, the Court had made clear that the analysis of a restriction by object requires to take into account the effect of the agreement but limits this assessment in the context of a restriction by object to the effects that are "sufficiently deleterious" to conclude to the harmful nature of the agreement.

Shortly after, the Court in Consten and Grundig (C- 56/64 and C-58/64) had to decide on a case involving a prohibition of parallel imports and emphasized that some clauses in an agreement may be "of their nature" restrictive of competition (or their "very nature" as it said later; see C-19/77, Miller International v. Commission). An export ban is indeed fundamentally in conflict with the primary purpose of the Treaty, i.e., the creation of the internal market.

These judgments defined the guiding principles of the definition of a restriction by object. Subsequent case law clarified a few points and introduced some nuances even if most cases concerned hard core restrictions, i.e. price fixing, production limitation, prevention of parallel import or customer allocation.

In that respect, it is interesting to note that for such blatant restrictions by object, even the Courts were tempted to ignore the need to define the effects of a restriction by object as defined in Société Technique Minière. For example, in European Night Service (Joined cases T-374/94, T-375/94, T-384/94 and T-388/94), the General Court stated that the assessment of an agreement requires taking into account the economic context, the nature of products or services as well as the structure of the market "unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets [in which case] such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article [101 (3) TFEU]. "At first reading, this statement could mean that it is not necessary to examine the legal and economic context when dealing with obvious restrictions of competition. But the Advocate General in Irish Beef clarified that it cannot be inferred from that statement that the notion of restriction of competition by object is limited to hardcore restrictions but that the consideration of the legal and economic context may be summary for some restrictions (AG Opinion in case C-209/07, paragraph 47, footnote 26).

Also, the Court confirmed that the notion of "restriction by object" is not equivalent to the US per se infringement of competition under Section 1 of the US Sherman Act which are prohibited by law without any further assessment.In many occasions, the Court underlined that the structure of Article 101 TFEU, based on the prohibition contained in paragraph 1 and the possible exemption under paragraph 3, is such that the distinction made in US antitrust law between per se infringement and rule of reason is not applicable. For example, in Montecatini (C- 235/92 P), the Court decided that the regular meetings of the polypropylene producers to set target prices amounted to a restriction of competition by object but was not per se contrary to Article 101 TFEU (paragraph 138) (see also, AG Trstenjak's Opinion in GlaxoSmithKline, para 109).

The various developments of the case law brought about the Commission's position on restriction by object expressed in its Guidelines on the application of Article 101 (3) TFEU (OJ C 101 of 27.04.2004) that nicely summarizes the case law (and may include some policy statements as well)....[9]

The Guidelines show that the Commission relied on the traditional criteria to define a restriction by object but also insisted on the "very nature" of agreements that have a "high potential" of negative effects on competition, which in turn triggers a presumption of illegality. ....

.... In the so-called Bananas decision (Case COMP/39.188, currently under appeal), the Commission found that the exchange of quotation prices between bananas suppliers was a concerted practice which amounted to price fixing and was therefore restrictive by object. It rejected under the cover of a price fixing the arguments from the companies under investigation that the information

[9]The author references paragraphs 21 and 22 of the Guidelines which state that restrictive agreements by object have such high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101] (1) to demonstrate any actual effects on the market and that assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors, which include, in particular, the content of the agreement and the objective aims pursued by it. And further that it may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market). In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object.

exchanged could not have any effect as it related merely to pre-pricing communication that could not influence the actual price charged.[10]....

....

3. *Most recent case law on restriction by object: anything new since 1966?*

These three cases are interesting because they concern essentially different practices than the typical hardcore restrictions, and triggered in-depth analysis by the Advocate Generals involved in these cases.

In Irish Beef (C-209/07), the Court had to decide in a preliminary ruling procedure whether the scheme addressing the structural over-capacity of the beef processing market in Ireland was restrictive by object. Under that scheme, the processing capacity would be reduced by 25% through a system limiting the number of suppliers via a financial compensation to those who commit to exit the market.

Referring to the test under Société Technique Minière, the Court decided that restrictions by object are violations that, by their very nature, are injurious to the proper functioning of normal competition. ....It ruled out the possibility to take into account the fact that the scheme put in place in the Irish processing market was aimed at resolving the effects of a crisis in that sector. For the Court, an agreement may be restrictive by object even if it does not have the restriction of competition as its sole purpose but also pursues other legitimate objectives.[11]

....

In T-Mobile (C- 8/08), a Dutch Court made a reference for a preliminary ruling asking the Court to detail the criteria to assess whether a concerted practice is restrictive by object. That case concerned the one and only exchange of information between all the Dutch mobile telecommunications operators to decrease the standard dealer remunerations for postpaid subscriptions.

The Court decided that such a practice had the potential to harm competition and could therefore be restrictive by object on the basis that : "in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. "The Court added that an agreement restrictive by object is prohibited "even in the absence of anti-competitive effects on the market".

This statement could suggest that the notion of "restriction by object" extends to any agreement capable of harming competition without any consideration of the effects on the market as required under Société Technique Minière. Such an interpretation is wrong. .... The discussion

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[10] On appeal, the EU Court of Justice confirmed the Commission assessment in its entirety in its judgment rendered on 19th March 2015 and confirmed that communications between competitors leading to horizontal price-fixing through a cartel were anticompetitive by their very object and amounted to a violation of EU antitrust rules, without requiring an analysis of their effect on competition in the market.(See EUCJ, case C-286/13 P).

[11] This may be comparable to sections 8 and 9 of the Competition Act in cases where a restriction by object is established per section 8, or where a horizontal agreement in any of the specifications per section 9 is established to exist. It matters not that one or more of its objects may be legitimate.

in GSK confirms the need for that the notion of restriction by object does not encompass agreements just capable of restricting competition.[12]

In GSK (Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P), the Court referred again the test of Société Technique Minière but rejected the additional criterion laid down in first instance by the General Court which found that a restriction of competition by object exists only when final consumers are deprived from the benefit of efficient competition in terms of supply or price. Nothing in the wording of Article 101 TFEU or in the case law supports that view, said the Court, the purpose of Article 101 TFEU being to protect not only the interests of competitors or consumers but also, and more fundamentally, the structure of the market.

But the interest of this case lies also in the Advocate General Trestjak's conclusions that summarize the test to define a restriction by object:

> *"90. The restrictive object must be considered to exist where agreements are by their very nature liable to restrict competition. That can be assumed to be the case where an agreement, having regard to its legal and economic context, has the specific capability and the tendency to have a negative impact on competition.*
>
> *91. In this connection, regard must be had, in particular, to existing experience according to which, in all probability, certain types of agreement have a negative impact in the market and jeopardise the objectives pursued by the Community's competition legislation. Under this approach, the character of the restriction of competition by object as a form of inchoate offence becomes particularly clear, since certain types of agreement (such as price-fixing agreements, customer sharing or resale price maintenance) are classified, on the basis of existing experience, as restrictions of competition by object, without any specific analysis of their effects. This standardised approach certainly creates legal certainty. However, it is always subject to the proviso that the legal and economic context of the agreement to be examined does not preclude application of this standardised assessment. (41)*[13]
>
> *92. The notion of restriction of competition by object is nevertheless not confined solely to certain types of agreement. It also covers agreements where a sufficiently deleterious effect on competition may be presumed on the basis of economic analysis.*

This extract of the Opinion encompasses all the criteria traditionally considered to determine a restriction by object (very nature of the agreement, objective, content, sufficiently deleterious effect, consideration of economic and legal context) together with some nuances reflecting a more economically driven enforcement within the ambit of Article 101 (1) TFEU (all probability, experience, clarity of negative effects and presumption). Quite importantly, this Opinion defines when restrictions, other than hardcore restrictions, can be presumed restrictive by object. A sufficiently deleterious effect on competition may be presumed when the negative interference with

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[12] Meaning that it is always necessary to demonstrate that the restrictive agreement, decision or concerted practice is, in the economic and legal context in which it is intended to be implemented, is capable of resulting in the prevention, restriction or distortion of competition. But this does not require assessments of its actual effect and may be demonstrated merely from its contents or summarily depending on the facts and circumstances of each case. It ought to be remembered, further, that an assessment to establish the actual or potential effect of prevention, restriction or distortion of competition is not required in terms of section 9 of the Competition Act; what is required is merely to establish that a specified restrictive horizontal agreement exists, as the prohibition is *per se* and such an agreement is automatically void.

[13] We opine that the standardised assessment may be ousted if the legal and economic context in which the agreement, decision or practice is to be implemented reveals that the standardised assessment cannot, for some legitimate consideration, be applied.

market conditions is so clear that the agreement can be presumed to restrict competition without a detailed market analysis. This Opinion defines adequately the measure of the determination of the effects of an agreement as required by Société Technique Minière to conclude to the existence of a restriction by object.

4. What to think about restriction by object?

Could there be a list of agreements that restrict competition by object?

The answer is clearly no. In Irish Beef, the Court endorsed the view of the Advocate General that the restrictions by object are not limited to those listed in Article 101 TFUE and that no general conclusion should be drawn from the fact that previous decisions and judgments have been focused on certain specific types of infringements, such as price-fixing, market-sharing or the control of outlets.

However, there are strong indications that some agreements will almost inevitably be considered as a restriction by object. Clauses or agreements that are black listed in block exemption regulations will almost certainly be considered as restrictive by object even if the content, objective, legal and economic context of each agreement must be taken into account. That is the case for price fixing, export ban and limitation of parallel imports, market sharing and limitation of production.

What's new under the most recent case law? A more economic approach of the restriction by object

It is remarkable to note that almost all the cases examined refer to the test in Société Technique Minière back in 1966, which already imposed to consider the sufficiently deleterious effects of an agreement prior to concluding to the existence of a restriction by object.

The most recent cases give some additional guidance on the standard of proof required to determine such sufficiently deleterious effects. They show why and how the analysis of the effects of a restriction by object is more limited than the same analysis for a restriction by effect.

When dealing with hardcore restrictions, the first step is the analysis of the content and the nature of the agreement. Then, the assessment must show that the agreement causes sufficiently deleterious effects even under a summary evaluation. Indeed, such a finding can rely on the experience acquired about certain agreements that make them indisputably restrictive of competition. For example, it is not necessary to demonstrate at length the effects of a price fixing agreement because these effects are known through the experience gained by antitrust authorities worldwide.

For those agreements that are not hardcore restrictions, reference is sometimes made to the high probability of a restriction of competition, the likely effects, or the potential to restrict competition. It is clear, however, that when using those concepts of potentiality, high probability or likelihood, the harm on competition that could result from an agreement must be without doubt, indisputable and unchallengeable based on the summary analysis of the effects defined in Société Technique Minière. It must be certain enough that the likelihood or the probability will materialize. To help measuring such a potentiality, likelihood or high probability, we refer to the Advocate General's statement in Irish Beef that any element in the economic and legal assessment which casts doubt on the existence of a restriction of competition must be taken into account to conclude that there is no restriction by object.

At the end of the day, the effect of an agreement must be taken into account in any event, whether in the definition of a restriction by object or by effect. But the level and depth of the demonstration vary.

When defining a restriction by object, the nature of the agreement in itself indicates that it will cause, or show the high probability to cause, restrictive effects on competition. In such a case, there is a presumption that the agreement is restrictive. This presumption shifts the burden of proof on the investigated companies.....[14]

The economic approach of the enforcement of competition rules in general imposes a higher burden of proof on competition authorities to demonstrate the detrimental effect on competition. It would not be coherent that this requirement would apply loosely when considering Article 101 TFEU. That is why the most recent cases and the Opinions of the Advocate Generals rightly clarify the limited scope of a restriction by object as discussed above. No doubt that this distinction will be at the core of a number of investigations in the future."

33. On the other hand, though the Competition Act provides for the development of regulations and guidelines to aid the implementation of provisions of the Competition Act[15], the regulations and guidelines developed so far do not relate to the two sections in any specific and comprehensive manner (though some aspects may in general terms be applicable to these sections; e.g. Regulation 3 of the Competition and Consumer Protection (General) Regulations, S.I. 97 of 2011 which provides for the determination of a product market (which incidentally also permits the adoption by the Commission of international best practices in so far as they are not inconsistent with the Competition Act and the Regulations and are practical to the Zambian situation)). Given this scenario of scarcity of local subsidiary instruments, recourse to foreign law, including case law, especially the EU competition law, to the extent relevant and necessary, may be helpful. Our view takes account of the fact that the conciseness of the two sections of the Competition Act lends itself to summary determinations in cases the facts and circumstances of which can be evaluated and conclusions can be drawn without the application of rigorous technical assessments. Sections 8 and 9 of the Competition Act state as follows:

"8. Any category of agreement, decision or concerted practice which has 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;

(c) involves bid rigging, unless the person requesting the bid is informed of the term of the agreement prior to the making of the bid;

(d) sets production quotas; or

[14] As a matter of interest, the author argues that *now that competition authorities at both European and national levels have obtained large investigative tools while at the same time applying heavy fines, shifting the burden of proof too easily could question the companies' rights of defence in competition investigation.*

[15] See section 66, empowering the Minister, on recommendations of the Commission, to make regulations to provide for the manner in which investigations under Part VIII are to be carried out; section 84 empowering the Commission to make such guidelines are necessary for the better carrying out of provisions of the Competition Act and providing that such guidelines are binding on all persons regulated under the Competition Act; and section 87, empowering the Minister, on the recommendation of the Commission, to make regulations for the better carrying out of provisions of the Competition Act.

(e) provides for collective refusal to deal in, or supply, goods or services.

(2) A person who contravenes subsection (1) commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both.

(3) An enterprise that contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of its annual turnover.

34. Plainly, the ingredients of the prohibition in section 8 that need to be established are three, namely that: (i) there is an agreement, or decision or concerted practice (the definitions of "agreement" and "concerted practice" are in the Competition Act), (ii) that its object or effect, as the case may be, is the prevention, restriction or distortion of competition (iii) to an appreciable extent in Zambia. In the case of Article 101 TFEU, on the other hand, the ingredients are that (i) there is an agreement between undertakings, decisions by associations of undertakings or concerted practice, and (ii) it may affect trade between Member States, and (iii) its object or effect, as the case may be, is the prevention, restriction or distortion of competition within the internal market. But further than that, where there is a claim of an exemption per paragraph (3) and evidence that the cumulative conditions are met is presented by the claimant, an assessment is made accordingly[16].

35. Comparing the two scenarios, it is apparent that in the case of Article 101 TFEU, not only does it require assessments to establish that the agreement, decision or concerted practice has as its object or effect, as the case may be, prevention, restriction or distortion of competition within the internal market, but also that it may affect trade between Member States appreciably. And further, an accused party may seek to prove that it is exempted by paragraph (3), in which case a further assessment of the party's evidence has to be made accordingly. In the case of section 8, however, primarily, the assessment required is to establish whether there is an agreement, decision or concerted practice by object or effect, and once the restriction is established to be by object, the only evaluation required is whether the object is the prevention, restriction or distortion of competition to an appreciable extent in Zambia. Ultimately, therefore, the question we deal with in such a case is how (i) the existence of a restrictive agreement or decision or concerted practice, and (ii) the appreciability of its prevention, restriction or distortion of competition in Zambia are to be established. If on the other hand, the restriction is established not to be by object, a lot more is required in terms of economic evaluations, i.e. to establish whether it is so by effect, and if so whether the prevention, restriction or distortion of competition is to an appreciable extent in Zambia. And the ultimate question we have to deal with, likewise, once it is established that the restriction is not by object, is how it may further be established whether it is so by effect and if so how it may be established whether the prevention, restriction or distortion of competition is to an appreciable extent in Zambia.

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[16] With the introduction of "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82[16] of the Treaty", once the prosecuting authority establishes the existence of the prohibited agreement prima facie per Article 101 (1), for it to be accorded an exemption per paragraph (3), the burden of proof is on the party invoking the exemption. Paragraph 43 of the "**Guidelines on the application of Article 81(3) of the Treaty** *C 101, 27/04/2004 P. 0097 - 0118*" provides that an assessment to ascertain whether or not the conditions of paragraph (3) are met are carried out within the confines of the relevant market.

36. In the case of section 9 of the Competition Act, any horizontal agreement[17] which falls into any of the specified classifications is prohibited *per se* and void. Our understanding is that an assessment is required to establish whether (i) a horizontal agreement exists per the definition in the Competition Act, and (ii) whether the agreement falls into any of the classifications. As opposed to section 8, no further assessments are required, for instance, as to whether or not they have the object or effect (actual or potential) on competition, whether by prevention, restriction or distortion, let alone to an appreciable extent in Zambia. Serious anti-competitive impact is presumed to be inherent in the kind of horizontal agreements classified in section 9, hence the prohibition *per se*. We note that the classifications are adaptations of the unexhaustive particularisation of agreements, decisions and concerted practices that are prohibited by Article 101 (1) TFEU, which have also been categorized under EU law (subsidiary instruments) as hardcore and, therefore, their treatment as restrictive by object and the presumption of their serious impact on competition.[18]

37. When Article 101 TFEU is compared with sections 8 and 9 of the Competition Act, the position of these two sections stands apart on a number of fronts, not only in what we have already outlined but in addition the following features of the Competition Act:

38. The prohibitions in both sections 8 and 9 do not in themselves provide exemptions that limit the scope of prohibited restrictive agreements. But a restrictive agreement to which all the parties are interconnected bodies corporate falling under a single economic unit is exempted per section 13. This exemption from the application of these sections, which is granted by the Competition Act itself, means that if during the Commission's investigations the corporate status of the parties to a restrictive agreement is found to be covered by section 13, automatically the agreement must be taken to be exempted from the application of sections 8 and 9 (and 10 and 12). Further, the Competition Act also in section 3 (3) makes certain exceptions from the application of the Competition Act, including "concerted conduct designed to achieve a non-commercial objective or similar purpose". We are of the view that the Commission in its investigations may by itself establish circumstances pointing to the existence of such an exception. Where an investigated party invokes such an exception, the Commission has to make an assessment to establish whether or not the exception applies. Sections 3 and 13, are of course, not in issue in the case under consideration; we merely wish to illustrate the point concerning exceptions and exemptions made by the Competition Act itself.

39. We further note that the Competition Act separately provides for authorisation of a restrictive agreement by the Commission, on application by the parties to a restrictive horizontal or

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[17] "Horizontal agreement" is defined by section 2 of the Competition Act as "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 the market".

[18] The categorisation of these restrictions (in both horizontal and vertical agreements) as hardcore means that they receive more severe treatment under the EU law, such as being blacklisted from block exemptions granted by the Commission and being treated as restrictive by object, with the result that they require no further assessment to establish that they affect trade between Member States per Article 101 (1), subject to the test of appreciability of affectation. See, for example, paragraphs 21, 22 and 23 of the **"Guidelines on the application of Article 81(3) of the Treaty** *C 101, 27/04/2004 P. 0097 – 0118"*. In the case of horizontal agreements, restrictions of competition by object include price fixing, output limitation and sharing of markets and customers, while for vertical agreements, these include includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales (See paragraph 23 and Notes 28 and 29).

vertical agreement, under section 14, in circumstances where the specified threshold is met, together of supply or acquisition of thirty percent or more of goods or services of any description in a relevant market in Zambia, in the case of the former category of agreements or, in the case of the latter category, where individually a party supplies or acquires at either one of the two markets that are linked by the agreement, fifteen percent or more of the goods services of any description in a relevant market in Zambia. Such an authorisation may be granted for a restrictive agreement that could otherwise be caught by section 8 or 9 of the Competition Act. An application under section 14 is to be made in the prescribed form and manner.

40. Furthermore, an enterprise may apply to the Commission to be exempted from the prohibition determined as such by the Commission under section 12 of the Competition Act. (Section 12 gives power to the Commission to prohibit restrictive horizontal or vertical agreements other than that falling under section 8 (anti-competitive practice, agreement or decision), section 9 (horizontal agreements prohibited per se), or section 10 (vertical agreements prohibited per se), or any other agreement prohibited *per se* under the Competition Act -by a determination that (i) 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 (ii) the agreement is not otherwise exempted under the Part (Part III – Restrictive Business and Anti-Competitive trade Practices)). The application for exemption from the application of section 12 is required to be made in the prescribed manner and form upon payment of a prescribed fee under sections 18, and according to section 19 where such an application is made, the Commission shall grant an exemption to an agreement that contributes to, or is likely to contribute to, or result in-

    (a) maintaining or promoting exports from Zambia;
    (b) promoting or maintaining the efficient production, distribution or provision of goods and services;
    (c) promoting technical or economic progress in the production, distribution or provision of goods and services;
    (d) maintaining lower prices, higher quality, or greater choice of goods and services for consumers;
    (f) promoting the competitiveness of micro and small business enterprises in Zambia ; or
    (g) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, or is likely to result, from the agreement.

    And the Commission may grant the exemption subject to such conditions and for such period as it considers appropriate. Where the Commission declines to grant the exemption, it is required to inform the applicant and give reasons therefor. The Commission may amend or revoke such an exemption.

41. The Commission may also grant an exemption from prohibition, under section 12, of rules of a professional Associationwhich containa restriction that has the effect of lessening competition in a market. This is according to section 22. The application is required to be made in the prescribed manner and form upon payment of a prescribed fee.

42. The distinctions we have outlined in the foregoing paragraph further contribute to the position that the level or depth of assessments required in the case of sections 8 and 9 of the Competition Act cannot be expected to be the same as assessments under Article 101 TFEU. In

fact, all the distinctions we have identified in our discussion of the subject under consideration could well apply to other competition laws, including case law, of other jurisdictions depending on relevant factors as may apply to the circumstances of each case.

43. In light of above considerations, we conclude on this aspect of our judgment that recourse to foreign case law, especially EU competition law, to the extent relevant, may be a helpful aid in the Tribunal's interpretation of sections 8 and 9 (as indeed other provisions of the Competition Act) and the application of these provisions to cases before the Tribunal. In particular, reliance thereon ought to take into account, as may be appropriate, (i) similarities and/or differences in the provisions ofthe Competition Act on the one hand and those of the foreign law on the other;(ii) the particular facts and circumstances of the case before the Tribunal, including the national economic and legal context; and (iii) the evolution of the foreign case law and, in the case of the EU case law in particular, the subsidiary instruments that have shape it and *vice versa*. We shall accordingly be guided in our consideration of the specific grounds of appeal and counsel's arguments.

B. LEGAL AND ECONOMIC CONTEXTS OF COMPETITION LAW WITHIN THE ZAMBIAN JURISDICTION

44. There are a number of pieces of legislation having a bearing on competition in the country. However, section 3 (1) of the Competition Act provides that, "*Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having an effect within, Zambia.*" (Underline ours) This means that, subject only to the Constitution of the country and the Competition Act itself, it has application notwithstanding provisions of any other law to the contrary. To the extent consistent with the Competition Act, other laws may of course be taken into account in the implementation and enforcement of provisions of the Competition Act, as may be appropriate. Part V of the Competition Act dealing with "MARKET INQUIRIES", devotes a considerable portion to actions to be taken in the event a market inquiry reveals that adverse effect of completion specified in section 39 (a)[19] exist in relation to a sector or a type of agreement and that paragraph (b) of this section[20] does not apply, or applies to a limited extent. Section 41 (2) provides that in such event the Commission shall-

> *(a) in so far as particular practices identified by the inquiry are capable of being addressed as matters falling within section 8, subsection (1) of section 9, subsection (1) of section 10 or subsection (1) of section sixteen, deal with them in accordance with provisions of this Act relating to such matters; or*
>
> *(b) in so far as the adverse effects for competition cannot be remedied under this Act, or are the result of other applicable laws, make recommendations to the Minister for such further action, including amendments to the applicable laws as is required to provide an effective remedy.*

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[19] An inquiry to determine 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.

[20](an inquiry to determine whether any of the circumstances referred to in subsection (2) of section 19 apply on the same basis as they would have applied to any matter arising under section 16 (relating to abuse of dominance)).

45. Furthermore, section 42 of the Competition Act in Part VI dealing with "SECTOR REGULATED ACTIVITIES explicitly provides that *"Subject to section 3[21], the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III"*. It is important here to note that Part III deals with "RESTRICTIVE BUSINESS AND ANTI-COMPETITIVE TRADE PRACTICES" and includes sections 8 and 9. It is also important that this provision, though limited to economic activities falling under statutory regulators, is nonetheless subject to the general provisions of section 3 of the Competition Act which provides for the application of the Competition Act to all economic activity within, or having an effect within, Zambia and in subsection (3) makes exceptions to the application of the Competition Act itself to certain economic activities. Section 43 goes on to state that *"The Commission shall, for the purpose of coordinating and harmonising matters relating to competition in other sectors of the economy, enter into a memorandum of understanding with any regulator in that sector, in the prescribed manner and form."* The insurance sector is regulated by the PIA under the Pensions Scheme Regulation Act; therefore, the economic activities of enterprises in the sector are subject to the requirements of Part III, which includes sections 8 and 9 by virtue of section 42 of the Competition Act, and above all by virtue of section 3 (1) of the Competition Act, the whole Act applies to all economic activities in the insurance sector.

46. It is clear from provisions of the Competition Act, as we have endeavoured to demonstrate, and from the object of the Competition Act as seen in the long title, which states in part, **"An Act to ... safeguard and promote competition; protect consumers against unfair trade practices ...."** that it was the intention of the legislature that the Competition Act should have overriding application above all other legislation having a bearing on competition (including consumer protection) in the country. It is apparent that the Competition Act recognises that there may be situations when other laws may create conflicts that may impede the effectual enforcement of the Competition Act. The Competition Act when taken in its full context makes it clear that the legislature intended that such conflicts be resolved in favour of the Competition Act, including if necessary by amending such other law. In particular, we emphasise that economic activities of enterprises in sectors falling under statutory regulators are subject to the reign of Part III of the Competition Act, to which sections 8 and 9 belong.

47. From the foregoing, it follows that as the law stands, the legal context of sections 8 and 9 of the Competition Act is first and foremost the Competition Act itself, subject only to the Constitution. Any provision of any other law, such as the Insurance Act, the Pensions Scheme Regulation Act or other related law in the case under consideration, is secondary and may be taken into account only to the extent not inconsistent with the Competition Act. For instance, we have found a provision in the Pensions Scheme Regulation Act that is relevant to the present case and which we take into account as we see appropriate. Section 5 (1) (j) of the Act states one of the functions of the PIA as *"to formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industries"*.

48. Further, in terms of legal context, the legal status of the entities involved is examined as should be any other factors hinging on legal issues that may, or may be claimed to, have a bearing on the offence alleged to have been committed. We find that the question of status and functions

[21] Section 3 provides, inter alia, exceptions to the application of the Competition Act.

of the IAZ and its members, and in particular their historical relationship and interactions, were heavily canvassed by the IAZ in their submissions as well as counsel for the Appellants in their submissions in response to the (preliminary) Report of January 2018. In subsequent reports, these submissions were mentioned but were not evaluated in any comprehensive way, as a result of which the issues raised were substantially not dealt with in the ensuing decision.

49. It is a basic expectation that as an adjudicating body, the Respondent has a duty to examine such claims in the context of the Competition Act and with an evaluation of any other law that may, or may be claimed to, have a bearing on the subject matter. Such an examination should lead to reasoned determinations one way or the other. The Appellants failed to furnish the Respondent with any particular provision of the law under which they purported to exercise the power. The PIA also in its submission or recorded interview did not substantiate the claim of the historical relationship and interactions between the two bodies in any significant way as AW2 did at the hearing of the appeal. Our position is that the burden is on a party claiming a statutory defence, or any other defence for that matter, to provide evidence.

50. However, it was not sufficient for the Respondent to simply find that the Appellants usurped the PIA's power of setting minimum premium rates for third party motor vehicle claims. The Respondent should have gone further to consider whether in light of the claimed historical relationship and interactions between the two bodies, the Appellants' alleged conduct could be justified. Or whether such a claim, if proved, could have a bearing on the imposition of fines in terms of section 58 (4) or under the rules pertaining to fines. Such determinations are not only important for the specific case in which they arise, but would also be a useful guide in the Respondent's future conduct of investigations and assessments.

51. Nonetheless, the Tribunal is enjoined to take account of all evidence before it in arriving at its decisions and to reach a finding on each issue of fact or law raised in the proceedings.[22] In this regard, we have determined in our consideration of the subject of relevance of foreign laws, that in the legal context of sections 8 and 9 of the Competition Act, conduct that comes under the realm of these sections can only be taken outside of the realm under provisions of the Act; for example, by way of the exceptions to the application of the Competition Act under section 3 (3) or the exemptions granted by or under Part III. As for any possible implications of those claims on imposition of fines, we address these in our consideration of grounds of appeal relating to section 58 of the Compensation Act and that relating to imposition of fines for offences under the Act in general.

52. The economic context of each case is, as universal a standard in competition law, determined in terms of the relevant market.[23]In respect of the EU laws, **Slaughter and May, authors of "An overview of EU competition rules"**[24], state as follows:

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[22]See Rules 29 and 32 (1) of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012.

[23] The definition of "market" in section 2 of the Competition Act is, *"in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the goods or services"*; There are provisions for determination of "relevant product market" in Regulation 3 of the Competition and Consumer Protection (General) Regulations, S.I. No. 97 of 2011, which permits the use of relevant international best practices (the EU Notice on Market Definition may, for instance be a useful tool).

[24] "A general overview of the European Competition rules applicable to cartels, abuse of dominance, forms commercial cooperation, merger control and state aid", June 2016.

"3.5 In appraising whether a commercial agreement is caught by the article 101(1) prohibition, it is ... necessary to identify the affected markets, taking into account relevant product and geographical market considerations...."

53. It has been said that "relevant market" should not be too broadly or too narrowly defined.[25]The relevant market determined by the Respondent is the economic context. That is, (a) *"The relevant product market is the provision of general insurance service in particular third party motor vehicle insurance."(b) The geographic market ... is the whole of Zambia since the provision third party motor vehicle insurance is done throughout the country although the bulk of the service is provided in urban areas."*The said product market and geographical market have been determined taking into account considerations identified, as prescribed by law, and these considerations are reflected in the analyses in the Respondent's reports that finally led to the decision subject of the appeal. This relevant market definition, in our view, aptly captures the economic context of the case.

54. Against the background set by this definition of relevant market, in our view, investigations such as that under review should establish any relevant economic facts surrounding the case. For instance, the investigative process could have revealed that there were claims by the members of the IAZ GIC that the prevailing minimum rates were too low in view of the economic fundamentals at the time, and that they had not been reviewed for many years, maintaining that this was the reason for the conduct complained of. Counsel for the Appellants also raised these issues.

55. Again, as we said concerning the Appellant's claims hinging on legal issues, the Respondent should have addressed itself to the question whether the claim could have a bearing in the determination of whether or not the Appellants violated sections 8 and 9 of the Competition Act. Or whether such claims, if found to be true, would have a bearing on the determinations of whether or not the Appellants violated sections 8 and 9 of the Compensation Act. We have determined, in our consideration of the subject of relevance of foreign laws, that in the legal context of sections 8 and 9 of the Competition Act, conduct that comes under the realm of these sections can only be taken outside of the realm under provisions of the Act; for example, by way of the exceptions to the application of the Competition Act under section 3 (3) or the exemptions granted by or under Part III. As for any possible implications of those claims on imposition of fines, we address these in our consideration of grounds of appeal relating to section 58 of the Compensation Act and that relating to imposition of fines for offences under the Act in general.

56. More importantly, we find that the emails exchanged by the IAZ members prior to the meeting extended to increasing minimum premiums for comprehensive motor vehicle cover. We also find that these increases were discussed and passed, as reflected in the minutes of the meeting and in the resolutions of the meeting subject of this appeal, both of which, and in particular the resolution, indicated that the revised rates would be effected on 1st January 2017.[26] The only difference we see is that the email of 27th December from the Chief Executive Officer of the IAZ

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[25]Ibid.

[26] See the Respondent's Record of Proceedings, at pages 330-332 ((Preliminary) Report, January 2018); 564-566 (Report, April 2018); and 723-25 (Staff Paper, August 2018).

to all members of the General Insurance Council informed them that the *"resolution on third party minimum rates"* had been carried and that the rates were to be implemented effective 1st January 2017. The Respondent should have addressed itself to the question whether in the circumstances the Appellants' conduct in respect of the discussions and resolutions of the IAZ GIC meeting increasing minimum rates for comprehensive motor vehicle insurance was not captured by sections 8 and 9 of the Compensation Act. Furthermore, we find that the Respondent focused on minimum premium rates leaving out, for instance, increases on minimum Excesses, which rates were reflected in both the minutes and resolutions for third party and comprehensive cover.

C. THE RELEVANCE OF MENS REA AND NEGLIGENCE TO NON-CRIMINAL REGULATORY OFFENCES IN THE COMPETITION ACT

57. The extent to which *mens rea* and negligence are relevant to regulatory offences in the Competition Act has on a few occasions been a subject of appeal before the Tribunal. Presently, the issue has been raised by counsel for the Appellants specifically in Ground 8 of appeal and arguments therefor, in relation to the Appellants' contention that the Respondent's imposition of 10% penalty was inconsistent with the provision of section 58 (4) of the Competition Act which stipulates that the Respondent shall not impose a financial penalty *"unless the breach of prohibition was committed intentionally"*.

58. The Appellants have also raised the question of intention in its arguments variously, in particular under Grounds 1 and 2, and 3 and 6 contending that the Respondent erred when it determined that the conduct of the Appellants was not justified and had the object of preventing, restricting or distorting competition in the relevant market, and when it determined that the resolution passed by the IAZ and its members was a horizontal agreement to increase the price of third party motor vehicle insurance. In this respect, the Appellants have argued that the intention of the Appellants was merely to recommend the minimum price of third party motor vehicle insurance premiums and not harm competition. Counsel for the Appellants have repeated the argument of intention in their submissions under Grounds 4 and 5 in which it is contended that the Respondent erred when it determined that the resolution to increase minimum rates for third party motor vehicle insurance was illegal, and that it erred when it failed to take into account of or due regard of the statutory mandate of the PIA in terms of section 5 (1) of the Pensions Scheme Regulation Act.

59. As expected, the Respondent has responded to the Appellants grounds of appeal and arguments on the two concepts, *mens rea* and negligence. It is in light of the fact that the concepts are somewhat raised in a "cross-cutting" fashion that we at the outset seek to set out in general terms the position of the two concepts in offences under the Competition Act. This approach, we hope, will contexualise and guide our consideration of the specific grounds of appeal in this case, as well as help the Tribunal and parties appearing before it in future.

60. In the case of **Spar Zambia Limited v. Danny Kaluba and the Competition and Consumer Protection Commission 2016/CCPT/009/CON(the Spar case)**,we considered the question whether the alleged contravention of section 51 (1) of the Competition Act is one to which the common law presumption of the requirement of proof of *mens rea* (a guilty mind) applies; and

if so, whether the Appellant's unintentionally committed the act complained of. We observed that distinguishing between offences to which the common law presumption of the requirement of proof of a guilty mind and those to which the presumption does not apply has been subject of court decisions for centuries. We looked at the extensive review by Mr. Charles, J. in the High Court (appeal) case of Chitambala Ntumba v. The Queen(1963-1964) Z. AND N.R.L.R. 132, in which the learned Judge made the observations outlined below, and for full appreciation, we quote at length from our text in the Spar case.

"In 1895, in Sherras v. De Rutzen[1895] 1 Q.B. 918 at page 921, Wright, J, stated the law, as it appeared to have developed by then, in these words:

> "There is a presumption that *mensrea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by words of the statute creating the offence or by the subject matter with which it deals, and both must be considered ."

He then went on to say that the classes of statutes in which the presumption has been found to have been negatived may perhaps be reduced to three:

> *(i) those by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves;*
>
> *(ii) those prohibiting under penalty acts which amount to a public nuisance;*
>
> *(iii) those allowing proceedings in criminal form as a summary mode of enforcing civil rights.*

The learned judge's attempt to classify the statutes in which the common law presumption was commonly found to have been rebutted led many subsequent judges to concentrate more on whether or not a particular statute fitted into one of the categories of exceptions than upon whether or not it was necessary to exclude the presumption in order to achieve effectively the manifest objects of the legislature. As a result the authorities on the subject had become ...confusing by 1943 ...."(Underline ours)

In reviewing the confusion that ensued in the interpretation of the law on the presumption, Charles J cited observations by Jordan, CJ, in R. v. Turnbull(1943) 44 S.R (N.S.W.) 608; 18 A.L.J., of conflicting decisions that ensued from the Sherras v. De Rutzencase. Lord Jordan labelled some of the decisions as decided on conjectures. In his judgment, Charles, J., quoted extensively from decided cases on the subject, which in summary can be said to have formulated the following principles:

> At common law there must always be *mensrea* to constitute a crime; if a person can show that he acted without *mensrea* that is a defence to a criminal prosecution.Unless a statute, either expressly or by necessary implication, rules out *menisrea* as a constituent part of a crime the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.
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> These principles were acted on in several later cases by the King's Bench Divisional Court, presided over by Lord Goddard (for example, in Harding v.Price[1948] 1 All

E.R. 283, 68 T.L.R 111; Reynolds v. G. H. Austinand Sons Ltd. [1951] 1 All E.R. 606; and Gardner v. Akeroyd [1952] 2 All E.R. 306).

In Lim Chin Aik v. Reginam[1963] 1 All E.R. 223, Lord Evershed, in giving the advice of the Board, which consisted of himself, Viscount Radcliffe and Lord Devlin, referred to the dictum of Wright, J, in Sherras v. De Rutzenand quoted the second principle with approval. He then said, of determining the intention of the legislature where a guilty mind as an ingredient of the offence is not expressly ruled out by the legislature:

> 'The adoption of these formulations of principle does not, however, dispose of the matter. Counsel for the respondent, indeed, as their Lordships understood, did not challenge the formulations. But the difficulty remains of their application. What should be the proper inferences to be drawn from the language of the statute or statutory instrument under review . . .? More difficult perhaps still: what are the inferences to be drawn in a given case from the ' subject-matter with which (the statute or statutory instrument) deals '?
>
> Where the subject-matter of the statute is the regulation for the public welfare of a particular activity - statutes regulating the sale of food and drink are to be found among the earliest examples - it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mensrea*. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it was polluted. If that were a satisfactory answer, then as Kennedy, L.J., pointed out in Hobbs v.Winchester Corporation [1910] 2 KB 471 at pages 482-5, the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented. So a publication may be made responsible for observing the condition of his customers - Cundy v. Le Cocq(1884) 13 Q.B.D. 207.
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> But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied

in Reynolds v. G. H. Austin And Sons Ltd(supra) and James and Sons Ltd. v. Smee; Green v. Burnett [1954] 3 All E.R., 273. Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy, L.J., in Hobbs v. Winchester Corporation (supra) and of135 Donovan, J, in R. v. St. Margaret's Trust Ltd. [1958] 2 ALL E.R. 289 at page 293. But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended." (Underline ours)

The learned Judge Charles in concluding his judgment in the **ChitambalaNtumba** case then went on to state:

"It follows, in my judgment, that the rule relating to mensrea as an element of a statutory offence is this: In the absence of express provision for the offence containing a mental element, it is presumed that the legislature intended that the offence can only be committed by persons with knowledge of the existence or occurrence of the facts or circumstances constituting it. That presumption may be negatived expressly or impliedly. It is negatived impliedly if, but only if, the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability, or if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability.

In determining whether absolute liability is necessary to achieve a substantial suppression of the mischief at which the offence is directed regard is to be had to the nature of the offence: to the nature of the mischief to which the offence is directed: to "knowledge" covering actual knowledge, correct belief and deliberate ignorance but not careless ignorance (see as to that, Nkoloso v. The Queen H.P.A. 12763); to the burden of proving knowledge often being lightened by the accused having the burden of adducing evidence of ignorance, as his state of mind is a matter peculiarly within his own knowledge; and to the extent to which the ignorant are likely to indulge in the mischief and defeat its suppression. Even when necessity is revealed for construing the offence as covering the carelessly ignorant, the necessity may not extend to including the ignorant without fault within the scope of the offence. In that case the provision creating the offence is to be construed as if it contained the words " knowing of or with reason to believe " in respect of the facts constituting the offence." (Underline ours)

61. In relation to the **Spar case** that was before us, we observed in conclusion that in reviewing the wide array of authorities on the subject matter, we bear in mind that typically the offences

dealt with in the cited cases would, in our jurisdiction, be categorised as criminal offences and adjudicated upon by criminal courts, though they are not contained in the Penal Code, Chapter 87 of the Laws of Zambia. That in the case before us we were dealing with a non-criminal regulatory offence which is penal. And that neither the 2ndRespondent nor this Tribunal had the jurisdiction to adjudicate on criminal offences in the Competition Act. We, concluded that it is firmly established, as guided by the **Sherras v. De Rutzen** case and subsequent case law, that (regulatory or public welfare) offences by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves, do not carry the common law presumption of the requirement of *mensrea*, if the offence is created in such terms and context as clearly manifests an intention to make it one of absolute liability. One way in which this legislative intention is implied is if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability. Other factors have been cited as the gravity of the penalty.

62. We went on to state that the question therefore in the case before us arose," what is the mischief (public policy) behind the provision in issue? In part, the public policy can simply be stated as found in the title of the Competition Act itself and that of Part VII – "Competition and Consumer Protection". Specifically, s. 51 (1) is intended to protect consumers from paying a higher price from that for which a product or service is offered (as displayed) by the seller. ...."

63. Furthermore, we said, *"we are of the view that the said public policy and the suppression of the mischief behind the provision would be defeated if the offence was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the 2nd Respondent is not privy to the processes by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately, by negligence or honest mistake despite all diligent efforts are matters within the exclusive knowledge of the Appellant. Requiring the 2nd Respondent to prove a guilty intention on the part of a supplier of consumer goods and services in the position of the Appellant would make prosecution of such offences almost impossible and thereby defeat the suppression of the mischief."*

64. The law around the subject of *mens rea* in non-criminal regulatory offences, particularly in competition law, continues to evolve. But at the most, the issue must be determined within the confines of the subject statute. Clearly, in the **Spar case** we arrived at our conclusion on account of the nature of the offence in issue. In the present case, we are dealing with an offence that is different in nature. It has to do with an anti-competitive agreement or decision or concerted practice. While with respect to a concerted practice, the definition in the Competition Act explicitly takes it outside the realm of an agreement[27], concerning 'decision', we concluded in the **MRI case** (supra)[28]that a unilateral decision in terms of section 8 is a decision that involves the concurrence of the wills of other parties. We reasoned and held as here below.

65. "We said, **"In this context, the Bayer AG[29] case and many others have established that unilateral decisions with the concurrence of the other party or parties must be construed as revealing an agreement between undertakings and may therefore fall within the scope of**

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[27] See section 2 of the Competition Act.
[28] Supra.
[29] Supra.

Article 101(1) of the EU Treaty (previously Article 85(1)). In the Bayer AG case (supra), it was partly held in paragraph 71:

> *"Case -law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure and, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1), the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which though adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers."*

66. We continued, *"There is a question raised as whether in the event of a finding that the 2nd Appellant's unilateral decision did not meet with the concurrence of the two selected suppliers, then the conduct would not be captured by section 8. The word "decision" in section 8 of the Competition Act is not qualified, whereas in the case of Article 101(1) of the EU Treaty canvassed by counsel for the Appellants, the wording reads prohibits certain conduct in restrictive terms, "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states". (Underline ours).*

In the context of the Treaty, a unilateral decision without the concurrence of any other party, as is specified in the article, was intended to be captured by Article 102, which deals with abuse of dominant position. It is easy to see that most probably the EU Treaty being concerned with trade between Member States may not concern itself to a micro level with unilateral decisions of an enterprise unless it enjoys a dominant position, in which case it would fall under Article 102. Despite the wider wording employed in section 8 of the Competition Act, in our view, it was indeed not intended to capture a unilateral decision without the concurrence of another party or a concerted practice. As in the case of the EU Treaty, such conduct is (sic) would only be captured by section 16 of the Competition Act, requiring that the conduct amount to abuse of dominance of market power, which can be unilaterally undertaken. In agreeing with the Appellants' position, we opine that a person not enjoying or not acquiring a dominant position of market power by the conduct contemplated by the section undertaking a unilateral decision with the object or effect of preventing, restricting or distorting competition to an appreciable extent in the country is a very remote possibility. As a matter of principle or policy, such situations are not subject of legislation. Secondly, we do not see any sanction in section 58 (which prescribes sanctions for section 8) relating to unilateral decisions, but only agreements. It would be anomalous to enact a prohibition without sanction."

67. In light of our conclusion in the MRI case (supra), we would place 'agreement' and 'decision' in section 8 of the Competition Act at the same level in terms of the question of *mens rea*, while treating 'concerted practice' differently. In our view, the requirement of *mens rea* is implicit in an anti-competitive agreement or decision primarily because of the basic requirement of the meeting of the minds for an agreement, and by extension for a decision, contemplated in section 8 to exist. Commonly, an anti-competitive agreement has been held to exist in the circumstances stated in the EU case of **Bayer v. Commission of the European Communities:**

> **"67 It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct**

themselves on the market in a specific way (Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 86; Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 256).

68 As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, ACF Chemiefarma, paragraph 112, and Van Landewyck, paragraph 86), without its having to constitute a valid and binding contract under national law (Sandoz, paragraph 13).

69 It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."[30]

68. However, beyond the intention required to establish the existence of an agreement or decision, in examining whether there was an intended anti-competitive object or effect, as we have earlier stated, under the EU law, agreements that are restrictive by object are treated more severely. The test applied is not subjective but objective intent, although, where subjective intent is established, it certainly would strengthen the case for a competition authority concerned. In the case of Article 101 TFEU violation assessments, paragraph 22 of the "**Guidelines on the application of Article 81(3) of the Treaty** *C 101, 27/04/2004 P. 0097 - 0118*", states that the way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. (Underline ours) We opine that in the case of the Competition Act, the EU standard applied to agreements that are restrictive by object would apart from being applicable to section 8 agreements by object extend to section 9 types of horizontal agreements. This is because the latter are prohibited *per se* by section 9 of the Competition Act. They also belong to the category of what is universally referred to as hardcore restrictions.

69. In practice, a regulator may, depending on the facts and circumstances of a case, investigate and assess the conduct of an alleged offender in order to establish whether or not they did in fact intend to commit the act complained of, even if a restrictive agreement by object is established. An affirmative finding will enhance the basis of the verdict.

70. In the case of the Competition Act, in particular sections 8 and 9, we opine that the legislative intention for the *mens rea* is the objective standard, whether in relation to restriction by object or effect, or whether the agreement is prohibited *per se* (section 9). We say so because otherwise there would be no need for the Competition Act to make the exception that it makes in terms of imposition of a fine under section 58 (4), which provides that a fine shall not be imposed unless the offence was committed intentionally or negligently. Since we have ruled out that the legislature intended the offences in these section to be strict liability offences primarily because

[30]Case T - 41/96.

of the 'meeting of the wills' element requisite in an 'agreement', the section 58 (4) exception can only make sense if the standard applicable to the intention to commit the offences is objective intent while that in the exception is subjective. We so determine.

71. As for 'concerted practices' occurring in section 8, the term has been defined in the Competition Act as falling short of an agreement, and by its very nature it involves subtle or tacit forms of arrangements between competitors. In view of this, to read *mens rea* as an ingredient into such practices, which are in any case difficult to crack down, would do serious injury to the legislative intention of prohibiting such practices which are common in anti-competitive cartel conduct. Applying the principle in the **Sherras v. De Rutzen case** (supra) and applied in others cases thereafter and by Charles, J in the **ChitambalaNtumba case** (supra), *"One way in which this legislative intention is implied is if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability...."*, we conclude that anti-competitive 'concerted practices' are strict liability offences.

72. We have so far not dealt with 'negligence'. Negligence is not an ingredient in any offence unless the terms of the statute or the nature of the offence require it. The prohibitions in issue do not require negligence to be established. However, we have previously considered two cases in which the questions of *mens rea* or negligence, explicitly provided in the Competition Act, were raised. The first case, **Rumpuns Trading Limited v. Competition and Consumer Protection Commission** Appeal No. 2017/CCPT/019/Com. ((**Rumpuns case**), which concerned section 37 (a), relating to implementation of an unauthorized merger. This section is not in issue in the present case, but we reference it for purposes of the subject matter of the concepts of *mens rea* and negligence. The second case was the **MRI case** (supra) and the issue related to section 58 (4) of the Competition Act, which has been raised by the Appellants in the present case. Subsection (4), read together with subsections (1) and (3), relates to imposition of a fine.

73. In the EU competition law, the rules, from which much of section 58 of the Competition Act was borrowed, give power to the EU Commission to impose fines for intentional or negligent violations of Article 101 and 102.[31] The standard applied to establish 'intention' and 'negligence' is subjective. We have not delved into a discussion of the objective and subjective standards to be applied to 'intentionally' and 'negligently', respectively, at this stage because the purpose of this part of our judgment is merely to provide general guidance to the treatment of the concepts before we embark on the specific grounds of appeal.

D SPECIFIC GROUNDS OF APPEAL

74. We proceed to deal with the specific grounds of appeal in relation to issues raised in the appeal, as we have identified them. This unavoidably means we are not following the order in which counsel for the two parties have respectively grouped and argued the grounds of

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[31] Article 23 (2) of Regulation No 1/2003 confers upon the European Commission the power to impose fines in the following terms: "The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: (a) they infringe Article [81 EC or Article 82 EC]. See also opinion of Advocate General in the case of Schenker & Co. AG and Others, Case C. 681/11.

appeal. In fact, perhaps partly due to the factor of interrelationship among some of the issues raised under different grounds of appeal, counsel, in particular for the Respondent, have argued certain issues under grounds of appeal that, in our view, the arguments do not relate to or they remotely relate to. We believe this has also been caused by the paraphrasing of the grounds in the Respondent's Grounds in Opposition, by which they set the order of their arguments. Counsel for the Appellants have, in particular in their reply, understandably followed the pattern set by counsel for the Respondent. We have endeavoured to consider the arguments under the grounds of appeal to which, we believe, the arguments more appropriately relate. We, however, sound a warning to counsel to, as much as practicably possible, follow the wording of grounds of appeal when making submissions. This is important and is the reason we directed counsel for the Appellants to state the grounds of appeal in their initial submissions in the same words they used in the Notice of Appeal. We now proceed to consider the grounds of appeal as we have grouped them.

(i) *Ground 1: The Respondent erred in law and fact when it determined that there was an oral agreement made at the meeting of 13th December, 2016 by the Insurers Associationof Zambia ("IAZ") and its members to increase the minimum rates for third party motor vehicle insurance, without due regard to the fact that the 13th December, 2016 meeting was a consultative meeting legitimately convened by the IAZ.*

(ii) Ground 2:The Respondent in its decision its decision did not have regard to the fact that IAZ is a statutory institution in terms of section 134 of the Insurance Act No. 27 as amended (**"the Insurance Act"**) and membership by all insurance companies to IAZ is compulsory and to that extent, the consultative meeting of the 13th December, 2016 was a legitimate pursuit by the IAZ and its members and could not ipso facto be an offence as determined by the Respondent.

(iii) Ground 4:The Respondent erred in law and in fact when it determined that the resolution to increase minimum rates for third party motor vehicle insurance was illegal, as this increase was a recommendation in line with the objectives of the IAZ subject to approval by the Pensions and Insurance Authority ("the PIA").

(iv) Ground 5: The Respondent erred in law and fact when it failed to take into account or due regard of the statutory mandate of the PIA in terms of section 5 (1) of the Pensions Scheme Regulation Act for purposes of regulating insurance premiums.

75. Counsel for the Appellants have argued under Grounds 1 that the IAZ is established as an entity that is recognised by statute under section 134 (1) of the Insurance Act as amended by Act No. 26 of 2005. Counsel have further referred us to the Constitution of the IAZ, at page 35 of the Record of Proceedings, and which in article 2 provides that the Constitution is binding on all members of the association. Counsel has outlined article 5 which sets out the objects of the IAZ, and particularly referred to clauses (a) and (c). Further, that the Constitution mandates the holding of annual general meetings while allowing the holding of extraordinary general meetings. That taking into account these outlined factors, the meeting by the IAZ and its members was held in line with the Association's Constitution.

76. Counsel have further referred us to the minutes of the IAZ meeting of 13th December 2026, stating that although the resolution of the IAZ provided that the minimum premium rate would be binding, the minutes show that the minimum rate was to constitute a recommendation to the PIA. Further, that the IAZ consultative meetings and recommendations to the PIA was an established practice which had become and ought to be held to be a recognised custom or practice per the court's guidelines in the case of **Henry v. London General Transport Services Limited** (2001) IRLR 132 (EAT) (the **Henry** case). That although the finding of the Respondent that the IAZ was not the regulator of the insurance sector was correct, the finding fell short of giving recognition to the mandate of the IAZ as recognized by statute. Further, that the Respondent's statement that *"the conduct by IAZ members to meet and resolve to increase minimum rates upwards was outside the ambit of IAZ functions"* was not the correct position, as the IAZ had the mandate to promote the interests of its members and hold meetings to discuss matters affecting the insurance companies including making recommendations to the PIA.

77. Counsel stated that the testimony of the Appellants' 2nd witness (herein AW2), the Deputy Registrar of the PIA, that "The IAZ is very useful as a policy advocacy association. So in each incidence in which the authority has proposed new laws for it was imperative the IAZ and other stakeholders", confirmed that the IAZ consults with the PIA and offers recommendations on various matters affecting the insurance sector. Counsel referred us to the case of **Wouters v. Algemen Radd van Nederlandsche Orde van Advocaten** (2002) 4CMLR 913 (the **Wouters** case) in which Mr. Woulters challenged a rule adopted by the Dutch Bar Council which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers. That it was held by the Court, "However, not every agreement between undertakings or any decision of an Association of undertakings which restricts the freedom of action of the parties or one of them necessarily falls within the prohibition." That the Court in this case held that the rule was not anti-competitive because it was necessary to ensure the proper practice of the legal profession; that similarly, the conduct of the insurance business would be hindered if the consultative meetings that come up with resolutions for recommendations to the PIA are declared as anti-competitive. And that for the IAZ to properly carry out its functions as mandated by the Insurance Act and its Constitution, it was necessary for such meetings to be held to hear the views of the members and make recommendations to the regulator. Counsel further referred us to the case of **Meca Medina v. Commission** (2006) CML 1023, and submitted that the court dealt with whether anti-doping rules of the International Swimming Federation were anti-competitive and that the court applying the rule from **Wouters**concluded that where a regulatory rule has a legitimate objective and is conducted fairly, taking into consideration the safeguarding of its members and the integrity of the entity, such rules will not be held to be anti-competitive. Further, that this is to ensure the proper functioning of the sector.

78. Based on the foregoing arguments, counsel for the Appellants submitted that, therefore, the practice of the IAZ holding the said meetings and making recommendations could not be said to be an offence, and that where an entity exercises a power for a legitimate purpose which is fair and justifiable, such conduct will not be anti-competitive. Finally that the recommendation

was arrived at in a fair and justifiable manner and was agreed upon to safeguard the integrity of the minimum rates which had not been reviewed since 2012.

79. With respect to Grounds 4 and 5 of appeal, counsel for the Appellants has argued that the IAZ and its members intended to obtain approval by the PIA of the resolution to increase the minimum insurance rates in issue. Counsel referred to the Respondent's Record of Proceedings at page 5 where the resolution stated that *"It was resolved that option 1 be carried effected from 01st January 2017, except for where cover has already been place (sic) and premiums have already been charged. The IAZ Board to be quickly asked to make the recommendations to the PIA so that an addendum to the minimum rates guidelines can be issued."* And that this was confirmed by the testimony the Appellants' first, second and fourth witnesses (AW1, AW2 and AW4). Further that the IAZ is tasked with the responsibility to engage the regulator with the recommendations to revise the minimum premium rates and that it acted within the confines of its mandate, being an entity recognised by statute and whose objects are to hold meetings and pass resolutions.

80. Counsel further submitted that the minimum rates, once recommended by the IAZ and its members, are approved by the PIA for members in the insurance sector to abide by, except that each insurer is at liberty to load its expenses to come up with an economical rate. And that this arrangement could not be held to be collusion and an offence as the regulator is the one who periodically reviews the rates per its mandate re section 5 (1) (i) of the Pensions Scheme Regulation Act. Further, that in comparing the situation had the IAZ and its members not met on the 13th December 2016 and the resolution not passed, still the recommendation would have been rendered to the PIA per the duties of the IAZ to represent the interests of its members. Counsel cited the case of **O2 (Germany) & Company, OHG v. Commission** (2005) 5 CMLR 258.

81. Counsel for the Respondent has in response argued under Ground 1 of appeal that even though the IAZ meeting was legitimately convened by the IAZ in accordance with its mandate, the agenda of the meeting to discuss the increment of the third party motor vehicle (minimum insurance premiums) was illegal. That therefore the Respondent was on firm ground when it determined that there was an oral agreement made at the meeting to increase the minimum rates for third party motor vehicle insurance.[32]

82. Under Ground 2 of the appeal, counsel for the Respondent has argued that it did not find the meeting of 13th December 2013 *ipso facto* an offence as the record showed that the object of the meeting was what was found to be in violation of the Competition Act; that is, the object to increase third party motor vehicle insurance premiums. That the said finding was abundantly stated in the Respondent's preliminary report, Staff paper as well as the decision. That while recognising that the IAZ has the mandate to hold meetings with its members in line with their

[32]Leaving out portions of the Respondent's arguments that we consider as relating more appropriately to the question whether there was an agreement in terms of section 8, which we deal with under other appropriate grounds of appeal and limiting the arguments here to those relating to the reason given by the Appellants as to why they allege that the Respondent erred in its decision – that *the Respondent erred ... when it determined that there was an oral agreement made at the meeting of 13th December, 2016 by the Insurers Association of Zambia ("IAZ") and its members to increase the minimum rates for third party motor vehicle insurance, without due regard to the fact that the 13th December, 2016 meeting was a consultative meeting legitimately convened by the IAZ. (Underline ours)*

Constitution, the mandate does not and cannot extend to conduct that is contrary to the law. And that IAZ should not be used as a forum to discuss prices or make decisions that are anti-competitive.

83. We have not considered counsel for the Respondent's arguments under Ground 4 of the appeal here as we consider them to be more appropriately related to other issues considered later in this judgment.[33] Under Ground 5, counsel have argued, referring to section 5 (1) (i) of the Pensions Scheme Regulation Act which states (as among functions of the PIA) *"monitor and periodically review premium rates and scope of cover of policies that provide insurance cover in satisfaction of a legal requirement;"* That the PIA has been clothed with the responsibility of monitoring and reviewing premium rates in the insurance sector. Further that during the investigations, the PIA indicated at a meeting that following the decision of the IAZ to increase the minimum insurance premiums in issue, the PIA issued a statement informing members of the public that the increment was void as the PIA had not approved it. Further, that the IAZ usurped the powers of the PIA when they agreed to increase the premium rates. That despite the AW1 stating at the hearing that because the information was leaked, the process of informing the PIA was curtailed, the Respondent took the view that any recommendation by the IAZ would have been made prior to that and before some members effected the new prices.

84. In reply, counsel for the Appellants have responded to the Respondent's arguments according to the order set by the latter, that is, under each ground of appeal. In general, the arguments are a reiteration of what the Appellants had earlier submitted; therefore, we have found it unnecessary to repeat arguments.

85. Under Ground 1 of appeal, as we did in respect of the Respondent's arguments, we found the bulk of the arguments to be remotely related to the issues raised by the ground of appeal. Accordingly, we consider these in relation to the grounds of appeal that in our view they more appropriately relate to. Counsel for the Appellants have argued by repeating their earlier submissions referencing the **Wouter case** and the **Meca-Medina case**. Under Ground 2 of appeal, counsel have argued that the Respondent's conclusion that it did not find the meeting in issue to be an offence *ipso facto*, but that it was the object of that meeting that it found to be in violation of the Competition Act was faulty. That this was because the Respondent did not take into account the IAZ Constitution, that if they had they would have discovered that discussing prices and making resolutions, in this case recommendations, to the PIA, was one of the functions of the IAZ.

86. As in the case of the Respondent's arguments, we have considered counsel for the Appellants' arguments in reply under Ground 4ofgrounds of appeal to be more appropriately related to other grounds of appeal which are considered later in the judgment.

87. Under Ground 5, counsel have argued that the statement of the Deputy Registrar of the PIA who testified at the hearing (page 39 of our record of proceedings for 17th June 2019) clearly indicated that the PIA sets and approves minimum prices for this insurance in consultation

[33]We limit the arguments to those relating to the reason given by the Appellants as to why they allege that the Respondent erred in its decision – that *the Respondent erred ... when it determined that the resolution to increase minimum rates for third party motor vehicle insurance was illegal, as this increase was a recommendation in line with the objectives of the IAZ subject to approval by the Pensions and Insurance Authority ("the PIA")) (Underline ours).*

with the Appellants. Reiterated that the Deputy Registrar of the PIA's testimony on the PIA's interaction with the IAZ and the role of the IAZ historically as a very useful policy advocacy tool that the PIA consulted each time when changing laws. Further, counsel argued that this interaction was not a price-fixing mechanism but an initiative undertaken by the PIA and the Appellants to allow insurers to recover their expenses. And that the witness stated that the procedure for reviewing the minimum premium rates in issue was that the PIA undertook a technical evaluation in consultation with the stakeholders which includes industry players. Further, that if industry players meet and come up with a resolution to be forwarded to the regulator for implementation, the 'effect' of such process is not to adversely affect competition. In response to the Respondent's assertion that the IAZ usurped the PIA's powers, counsel submitted that this position was without merit and illustrated a lack of understanding of the relationship between the IAZ and the PIA, and that the position would have been different had the Respondent paid particular attention to the IAZ Constitution. Counsel reiterated their reference to the **Henry case**, in respect of a recognised custom.

88. We have seriously considered these grounds of appeal, counsel's arguments and the evidence related thereto. In summary, what is at issue is whether in light of the statutory mandate of the PIA with respect to setting minimum premium rates for third party motor vehicle insurance; the status and membership of the IAZ as reflected in the Insurance Act, and its functions as outlined in the IAZ Constitution, the IAZ and its members' conduct complained of and subject of the appeal is unassailable and cannot be considered to be anti-competitive per sections 8 and 9 of the Competition Act at issue in this appeal.

89. But before we delve into the matter, we hasten to state that we have already determined in our earlier general discussion of the legal context that it was the intention of the legislature that the Competition Act should have overriding application over all other legislation having a bearing on competition (and consumer protection) in the country. Further, that it follows that the legal context of sections 8 and 9 of the Competition Act is first and foremost the Competition Act itself, subject only to the Constitution. And that any provision of any other law, such as the Insurance Act, the Pensions Scheme Regulation Act or other law, is secondary and may be taken into account only to the extent not inconsistent with the Competition Act. And that, in particular, economic activities of other enterprises in sectors falling under statutory regulators (such as the insurance sector) are subject to the reign of Part III of the Competition Act, to which sections 8 and 9 belong.

90. We have also determined that it was not sufficient for the Respondent to simply find that the Appellants usurped the PIA's power of setting minimum premium rates for third party motor vehicle claims. Although the Appellants failed to furnish the Respondent with any particular provision of the law under which they purported to exercise power, the Respondent should have considered whether in light of the claimed historical relationship and interactions between the two bodies, the Appellants' alleged conduct could be justified. Or whether such a claim, if proved, could have a bearing on the imposition of fines in terms of section 58 (4) or under the rules pertaining to fines.

91. That nonetheless, the Tribunal is enjoined to take account of all evidence before it in arriving at its decisions and to reach a finding on each issue of fact or law raised in the proceedings. And

that in this regard, we have determined in our consideration of the subject of relevance of foreign laws, that in the legal context of sections 8 and 9 of the Competition Act, conduct that comes under the realm of these sections can only be taken outside of the realm under provisions of the Act; for example, by way of the exceptions to the application of the Competition Act under section 3 (3) or the exemptions granted by or under Part III. As for any possible implications of those claims on imposition of fines, we address these in our consideration of grounds of appeal relating to section 58 of the Compensation Act and that relating to imposition of fines for offences under the Act in general.

92. The foregoing conclusions we have drawn set the backdrop of our consideration of these grounds of appeal and indeed any others as may be appropriate.

93. We have examined section 134 (1) of the Insurance Act, which counsel for the Appellants have argued gives recognition to the IAZ. This subsection provides, *"Every licensed insurer shall be a member of the Insurers Association of Zambia and shall subscribe to conform with the Association's Code of Conduct."* We have also examined Article 5 of the Constitution of the Association, and in particular the clauses referred to by counsel, namely (a) *"Protect, promote and advance the common interests of Members, including the taking of any necessary measures whenever the business of a member is, or is likely to be, affected by an action or proposed action of any authority, organization, body or person;"* and (c) *"promote the agreement and cooperation among the members on matters of mutual interest;"* We have not seen any provision of the Insurance Act giving the IAZ the statutory power claimed, and counsel for the Appellants have not referred us to any. In fact we examined section 132 (2) as amended by the Insurance (Amendment) Act No. 26 of 2005. It was claimed at the outset of the IAZ resolutions for the increase of the minimum insurance that the resolutions were passed pursuant to this subsection. We found that the provision gives power to the Minister to make regulations with respect to specified insurance matters on the recommendation of the PIA Board.

94. We have also examined the provision of the law, referred to by counsel for the Respondent, pursuant to which the PIA sets the minimum premium rates for third party motor vehicle insurance. Section 5 (1) (i)of the Pensions Scheme Regulation Act Chapter 392 as amended by Act 27 of 2005 reads, *".....monitor and periodically review premium rates and scope of cover of policies that provide insurance cover in satisfaction of a legal requirement;"*In addition, we have taken into account that paragraph (j) of the same subsection, which we consider particularly pertinent in the functions of the PIA in connection to the issues under consideration, provides that the PIA has a function to-*"in consultation with the Competition Commission, formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industries;"*. Furthermore, subsections (o) and (p) go on to state as follows:

> *"(o) set and enforce standards for the conduct of the business of insurance and occupational pension schemes; and*
>
> *(p) undertake such other activities as are conducive or incidental to the performance of its functions under the Act;"*

95. We have also considered the well known fact that the Roads and Road Traffic Act, Chapter 464 provides for compulsory third party motor vehicle insurance. In fact this is reflected among the objects of the Act in the long title and the Act devotes the entire Part IX to this object.

96. The Guidelines by which the PIA set the minimum premium rates for third party motor vehicle insurance in 2015 which were at the material time in force and include private vehicles and commercial vehicles (which were among the subject items in the IAZ resolution in issue) are contained at pages 27-28 of the document that was produced by the PIA in response to our Order to Produce and is entitled **"Guidelines to the Insurance Industry on Minimum Terms and Rates for General Insurance Business"**, issued in April 2015. The guidelines read as follows (relevant parts only):

Minimum Rates
The following rates will apply as minimum rates:

THIRD PARTY ONLY

.....

97. Type of Vehicle	98.	99. Minimum Premium per Annum
100.	101. FTP	102. Act Only
103. Private vehicles	104. K450	105. 75% of FTP Min K100
106. Commercial vehicles	107. K550	108. 75% of FTP Min K150

Notes
These minimum premiums are VAT exclusive.

....

COMPREHENSIVE COVER

109. Type of Vehicle	110. Minimum Rates Individually Rated	111. 112. 113. Fleet Rated
114. Private cars	115. 6%	116. 3.5%
117. Commercial vehicles	118. 7%	119. 4.0%

Notes
These minimum premiums VAT exclusive.

....

....

Minimum Sum insured – K15, 000 for all vehicles ....

EXCESS APPLICABLE ON BOTH TPO AND COMPREHENSIVE

Private cars 10% eel min K500

....

....

Commercial Vehicles 10% eel min K1,000

99. We have looked at the agenda of the meeting of the IAZ and its members, of 13th December 2016, subject of this appeal, as well as the emails exchanged among the IAZ General Council members prior to the meeting. The agenda of the meeting was as follows:[34]

"NOTICE AND AGENDA

For meeting of the General Insurance Council (GIC) of the Insurance Associationof Zambia to be held on 13th December 2016 at 09:30 in the Insurance Associationof Zambia Boardroom, on the 3rd Floor of Finsbury Park Building, Kabwe Road Round-about Lusaka, Zambia.

1. CONSTITUTION OF THE MEETING
   1.1 Apologies
   1.2 Quorum
   1.3 Adoption of the Agenda
2. CHAIRPERSON'S OPENING REMARKS
3. MATTERS ARISING FROM VARIOUS PREVIOUS MEETINGS
4. GENERAL INSURANCE UPDATES
   4.1 Review of Motor Third Party Insurance (Premiums and Limits)

   4.2 Review of Minimum Rates
5. ANY OTHER BUSINESS
6. DATE OF NEXT MEETING"

100. Emails exchanged among the members prior to the calling of the meeting discussed the subject of minimum premiums for third party motor vehicle insurance.[35] In particular, an email from Mr. Aaron Mukaki Kamanga of Madison General Insurance dated 24th November 2016, said, *"The cost of doing business has gone up over the past few years, I propose we open discussions to DOUBLE the premium for third part policies. Let's talk."*A Ms. Irene Muyenga responded in her email of 7th December 2016, *"This is cardinal especially now. Insurance is the only business which does not respond quickly to changes in both macro and micro economic factors. We continue to give discounts on a premium which may not have changed for 3 to 5 years. The statics from the PIA tell a story, there is no real growth. I hope everyone will buy into this."* Mr. Chabala Lumbwe, the IAZ GIC Chairperson, in his email of 24th November 2016, responded:

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[34] Appearing at page 324 of Respondent's Record of Proceedings ((Preliminary) Report), January 2018; page 558 (Report) April 2018; and page 717 of Staff Paper that culminated in the Respondent's Decision subject of the appeal.

[35] *At page 320 – 322 of the Respondent's Record of Proceedings (preliminary) Report), January 2018; page 554 - 556 (Report), April 2018; page 713 – 715 (Staff Paper culminating into the Decision of Respondent's Board).*

"The matter of pricing is top of the agenda for the General Insurance Council. It is not limited to motor TP cover but for comprehensive too. The recent budget pronouncements and tax changes will impact negatively on all of us if we do not act proactively to review our rates upwards. I shall be calling a meeting after 3 December for the GIC to brain storm on this matter. I hope all members will be able to attend." One Jack Kamau of Innovate General Insurance in his email acknowledged Mr. Lumbwe's email and wondered whether the PIA which was concerned with pricing insurance products should not attend, to which Mr. Lumbwe responded, *"Bwana Kamau, PIA will only be informed about our resolution."*[36]

101. The minute of the IAZ General Insurance Council meeting on the item read as follows (quoting only relevant parts):

"4.1 GENERAL INSURANCE UPDATES

4.1 Review of motor third party insurance

Submissions were invited from members on the levels of pricing and limits as follows:

4.1.1 Pricing

Members highlighted various factors to be considered in arriving at an appropriate pricing structure:
Broker commission rates
Risks which in this case relates to underwriting expenses, increased vehicle values and liability limits
Regional comparisons of premiums and rates charged
And secretariat can also provide rating from other countries in the region
Market statistics from all insurers to measure the risk related to third party motor insurance.

Members made the following pricing proposals that would be submitted to the PIA for adjustment as follows (sic):

Option 1
To double the premiums for both commercial and private vehicles to K1,000 and K900 respectively.

Option 2
Commercial vehicles - K1,000
Private vehicle - K750

It was resolved that option 1 be carried effected from 01st January 2017, except for where cover has already been place (sic) and premiums have already been charged.

[36] Ibid, pages 322, 556 and 513 respectively.

The IAZ Board to be quickly asked to make the recommendations to the PIA so that an addendum to the minimum rates guidelines can be issued.

……

Members deliberated about the issues relating to penalties that will be applied for undercutting that was being applied by members, and it was agreed that all members would sign a resolution relating to the changes and that any breaches would be subject to disciplinary action. It was further advised that in accordance with the IAZ Constitution the maximum penalty for disciplinary offences was K6,000 and that this amount could be proposed as part of the submissions to be included in constitutional review that was underway."

4.1.2 Limits

The members discussed this matter at length and it was agreed that that the limits would not be amended as these were statutory and any insurance company had the choice of increasing the limits as they saw fit.

4.1.3 Excess

Members expressed concern about increasing the premiums without also increasing the minimum excesses that applied. It was therefore resolved that the minimum excesses on both comprehensive insurance and third party property damage be double to 10% minimum K1,000 for private vehicles and 10% minimum K2,000 for commercial vehicles."

4.2 Review of Minimum Rates

4.2.2 Comprehensive Motor Minimum Sums Insured

The meeting agreed that since the TP premiums would be increased then comprehensive minimum premiums and sums insured should also be prescribed as follows:

Private Motor
Minimum sum insured – K30,000
Minimum Premium – K1,000

Property Damage Excess – K10% minimum K1,000

Commercial Motor (based on the tonnage of over 2.5 tons)

Minimum sum insured – K80,000
Minimum Premium
Property Damage Excess – 10% minimum K2,000

4.2.3 It was resolved that these revisions be tabled in the Board meeting scheduled for Thursday the 15th December 2016 for approval and thereafter the secretariat would write to IBAZ to seek their support and submit the proposal to the PIA. The public

needed to also be notified of the changes which would take effect on the 01st January 2017."
(See **the Respondent's Record of Proceedings,** Annex 7 pages331-332 (Preliminary) Report, January 2018;565-566 (Report, April 2018) and 724-725 (Staff Paper, August 2018).

102. The resolutions of the meeting, which reflects the above outlined minute, reads as follows:

"Resolution of the General Insurance Council of the Insurers Association of Zambia

Passed on: 13thDecember 2016

At a meeting of the General Insurance Council duly constituted and convened on the 13th of December 2016, the following resolutions were passed, which are binding on all the members of the General Council, operating in Zambia in accordance with the powers vested in the Insurers Association of Zambia by section 132 (2) of the Insurance Act of the Insurance Act 1997 as amended in 2005, effective 1st June 2014. Failure to comply will attract disciplinary action in accordance with Part VI of the Insurers Association of Zambia Constitution.

It is hereby resolved that following revisions will be made with effect from 01st January 2017:

Motor Third Party (Premiums and Excesses)

Minimum Premiums

Private Vehicles - K900
Commercial Vehicles - K1,100

Minimum Excesses (Property Damage)

Private Vehicles - 10% minimum K1,000

Commercial Vehicles - K10% minimum K,2,000

Motor Third Party - Individual lines

All third party Motor policies for individual lines clients will be transacted on cash basis

Comprehensive Motor Insurance - Minimum Sums Insured, Premiums and

Excesses

Private Vehicles

Minimum sum insured - K30,000

Minimum Premium - K1,500

Commercial Vehicles (based on the tonnage of over 2.5 tons)

Minimum sum insured – K80,000

Minimum Premium – K4,800

Excess for property Damage

Private Vehicles – 1% minimum K1,000

Commercial Vehicles – 10% minimum K2,000

UNDERTAKING BY ALL GENERAL INSURANCE COMPANIES

We the members of the General Insurance Council of the Insurance Association of Zambia agreed to the above resolutions and undertake that should our individual companies be found wanting, any member of the Association can lodge a formal complaint to the Association's secretariat and the relevant disciplinary action will be taken against our company. We also undertake to ensure that we report any member of the Association that is in breach of these resolutions.

Signed by the Chief Executive s representing all the members of the General Insurance Council as follows:

(....)[37]

103. We have also looked at the email of 27th December 2016 sent by the Chief Executive of the IAZ to all the members of the General Insurance Council. It reads:

"Compliments of the season to you all.

This is to confirm that the resolution on the third party motor minimum rates was carried and as such you may proceed to communicate to all your members of staff including the ones out of town for all business effective 1st January 2017. Kindly also insure that you advise the brokers that you are dealing with the minimum rates to be charged.

We will do our part with the formal communication, but this should not delay the process since the January business is already being placed. To ensure that the resolution enforcement is accelerated all members are advised to do their part in assisting disseminate the resolved position to all staff, agents and brokers that are issuing cover on behalf of your companies."
(See the Respondent's Record of Proceedings at pages 333-335 (Preliminary) Report, January 2018; 567-569 (Report, April 2018); and 726-728 (Staff Paper, August 2018).

104. Further, we have reviewed the evidence on record, including oral evidence of witnesses that appeared before us. The statement given at an interview held by the Respondent, Mrs.. Christabel Banda, the then Chief Executive of the IAZ, was that the PIA tended to depend on the (insurance) industry in terms of expertise. That the PIA relied on industry submissions before issuing guidelines, and that it was the practice for members to

[37] All the 16 members are listed below the resolutions for signature. For the text of the resolutions, see pages, 336-342, 570-571 and 729-735 of the Respondent's Record of Proceedings.

sit and discuss minimum rates for third party motor vehicle insurance, which would then be submitted to the PIA for approval. Regarding the question of the IAZ power to inform its members to increase the minimum rates, she said the Association operated in such a way that when a resolution was arrived at in a meeting every member had to be compelled to agree so as to enforce the resolution. That the practice was that the members would sign and that the resolutions of that particular meeting were circulated to the members to sign.

105. Mrs. Banda went on to respond that the IAZ engaged actuaries to study the market and that the PIA engaged actuaries in 2017 for the first time. As to why she instructed the members to effect the increase of the minimum rates, she said the PIA would approve all the submission provided that the IAZ submitted all supporting documents. That she sent the email instructing the effecting of the increase because it was confirming the resolution of the meeting, that the resolution be effected on 1st January 2017. The email which she sent to all the members on 27th December 2016 read:

"... this is to confirm that the resolution on third party motor minimum rates was carried and as such, you may proceed to communicate to all your members of staff including the ones out of town for all business effective 1st January 2017. Kindly ensure that you advise brokers that you are dealing with minimum rates to be charged. We will do our part with the formal communication, but this may delay the process since January business is already being placed. To ensure that the resolution enforcement is accelerated, all members are advised to do their part in assisting disseminate the resolved position to all staff, agents and brokers that are issuing cover on behalf of companies ...."

106. The Respondent's Record of Proceedings shows that during the investigations, the PIA submitted that the IAZ GIC members met where the members made proposals to increase the insurance premiums, and that the IAZ had informed the PIA that they did not know how the discussion leaked to the public. Further, that the PIA met with the IAZ to explain that the increase (effected by the IAZ) in the minimum rates for third party motor vehicle insurance was not valid.[38]

107. At the hearing of the appeal, it was confirmed by both AW1 and AW2 that the resolution of the IAZ was not submitted because the PIA got to know of it and issued a public notice that the minimum rates had not been approved by the PIA and were not to be effected.[39] The PIA notice to the public referred to, dated 6th January 2017, read as follows:

"NOTICE TO THE PUBLIC REGARDING MOTOR THIRD PARTY LIABILITY INSURANCE

The Pensions and Insurance Authority (PIA) wishes to advise the general public to ignore the information circulating in the media purporting to announce an increase in premium on compulsory motor third party liability insurance for private and commercial vehicles by 100%.

Such a general adjustment in premiums would have been approved and formally communicated as Insurance Guidelines by the PIA.

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[38] At pages 292 (Preliminary Report), January 2018; 521 (Report, April 2018); and 680 (Staff Paper culminating into the Decision of the Respondent).

[39] See proceedings of the Tribunal for 17th June 2019.

We therefore wish to inform members of the public who may have already paid the unapproved premiums that they must claim refund of the amount in excess. Further, the public must report to the undersigned all instances where such a claim for refund is declined or delayed beyond five (5) working days.

Martin Libinga

Registrar

Pensions and Insurance Authority"

(See page 8 of the Respondent's Record of Proceedings)

108. At our hearing of the appeal, the Registrar – Insurance - at the PIA, Mr. Titus Kabamba Nkwale (AW2) in his evidence explained the rationale for setting of the minimum rates while leaving the insurers to set their actual prices individually according to their respective costing, as follows:

> *"The price is left to Insurance Companies to determine. However, the Authority deems it fit to set the minimum standard on that subject. The Authority saw it fit to set a minimum standard on the subject of Motor Third Party Liability Rate because of the vice to turn insurance into gambling.*
>
> *Gambling. Insurance is not supposed to be gambling. But some service providers would, if there is no minimum rate, turn insurance business into some sort of lottery.*
>
> *Just pose, that is very critical Mr. Nkwale as to one of the reasons why we are here. Just go through that again very slowly.*
>
> *The Authority determined that there is need to have a minimum standard regarding price of this service so as to prevent the materialized or potential vice of running Insurance business as if it is a gambling outfit.*
>
> *.... Insurance by its nature is a promise to indemnify the insured. So under normal circumstances, the Insurance Company must statistically compute the expected loses. But when competition becomes unhealthy, some providers neglect to do that, praying that loses do not materialize.*
>
> *Praying if the insurer neglects to compute the expected loses, then he simply, that's the better way I can put it, simply prays or hopes on good luck that the claims will not materialize. Hence, the need for regulatory standard."(17th June 2019)*

109. The oral evidence of AW1 and AW2 was particular informative on the subject of the relationship and interactions between the PIA and the IAZ and its members on matters of insurance. These witnesses said:

> **AW1 - Mr. NkakaMwashika, Executive Director - IAZ (5th April 2019)**
>
> *"Yes we do have periodic and regular interactions with the regulator and the government because among the objectives are that IAZ or the Insurers Association of Zambia is the consultant on insurance matters for both government and as well as the regulator. So we do*

have quarterly interaction meetings as well as other meetings that are organized or arranged as and when need arises depending on the nature of the matter to be discussed."

AW2 - Mr. Nkwale, Deputy Registrar - Insurance, PIA (17th June 2019)

"As I mentioned, including at particular instance, consultation with the IAZ did happen.
TRIBUNAL: Including what?
2ND WITNESS: In coming up with motor third party liability insurance minimum rates, consultation with the IAZ did happen.
APPELLANT:So on receipt of that information, what did you do?
2ND WITNESS: We issued a circular to the industry and members of the public to disregard what was circulating as authentic rates.
APPEALLANT: Did you have any interactions with the industry in regard to how they had come up with these rates?
2ND WITNESS: Not at that particular time, no.
APPELLANT: When you say not at that particular time, I am suggesting that it was at another time?
2ND WITNESS: The interaction was the exchange of perception and views on the current rates. We hold quarterly meetings with IAZ during that meetings.
TRIBUNAL: Would you go over that again?
2ND WITNESS: Yes, during our routine meetings with industry, views began to be expressed on the rates that was basically the interaction before that event happened.
APPELLANT:So what you are saying is that before this event happened, there was some interactions in regard to the issue of premium rates for third party motor?
WITNESS:Yes but not to the extent of the Authority commissioning a review, discussions, yes.
What we have found useful is exactly what we started, that during the routine meetings, they mention concerns. After initial discussions, they put up the technical paper and submit their recommendations to the Authority.
APPELLANT: And that is how it has been done in the past?
2ND WITNESS: Yes.
APPELLANT: You even include into previous premium rates?
2ND WITNESS: Yes.
APPELLANT:So what has appears here is with regards to 2016. These rates did not come to you?
2ND WITNESS: No they didn't come to the Authority.
TRIBUNAL: They did not come?"

110. We also note the conflicting evidence of AW1 *with respect to the respondent's claim that the rates had not been reviewed for many years.* AW1 stated in paragraph 4 of his Affidavit in Support of the Notice of Appeal that the rates had not been changed for the 10 years prior to 2016 and later in paragraph 8 that there were reviews to the rates in 2013 and 2015. At the hearing, under cross examination, he said, *"Yes, I follow. I think the relationship between 4 and 8, what 8 is trying to bring to the fore is that, of course there was an*

acknowledgement that in the years 2013 and 2015 those revisions took place, but probably the question here was, what we are trying to address is that, you know these rates have been operating below the market rates for more than 10 years. So this is the issue that we are bringing out here to say there have never been brought to the market rates for over 10 years. The revision as we could see there could have been some twinkling here but not really fundamental to bring them to sustainable pricing by the industry." AW2 on the other hand, stated that the first review was conducted in 2011 and the last was in 2018 (that is, after the incident subject matter).

111. First of all, from the aforementioned provisions of the Insurance Act and the IAZ Constitution, and from the Respondent's Record of Proceedings, including the decision subject of the appeal, and the arguments by counsel on the two sides, we conclude that there is no dispute that the Insurance Act provides for mandatory membership of the IAZ by all insurers. There is also no dispute that the IAZ is mandated by its Constitution to hold annual and extraordinary general meetings. Therefore, it is not in question that the Association can convene meetings, discuss matters and pass resolutions. However, it is trite that such discussions and resolutions should be within the confines of the law, as argued by counsel for the Respondent. There is no dispute that the PIA as the regulator of the insurance sector is by law mandated to monitor and periodically review premium rates and scope of cover of policies that provide insurance cover in satisfaction of a legal requirement. And, further, in this regard, that third party motor vehicle insurance is a compulsory requirement of the Roads and Road Traffic Act.

112. The recognition accorded to the IAZ by section 134 (1) of the Insurance Act is in the terms that it requires compulsory membership of all insurers and their compliance with the Association's Code of Conduct. "Code of Conduct" is defined by Black's Law Dictionary as *'A written set of rules governing the behavior of specified groups, such as lawyers, government employees, or corporate employees'*.[40] Our understanding is plainly that the legislative intention of section 134 (1) of the Insurance Act is to secure the formulation or adoption and enforcement of professional rules of ethics and practice in the insurance sector. That the insurance sector would require such a code for the insurers' conduct is obvious and unquestionable. In fact, the IAZ Constitution itself provides for compliance by its members to *"... rules, regulations and code of conduct issued by the association"* (Part III, Article 8) (b)). In Part VI, Article, the Constitution states that *"The Association shall, at a General meeting and on the recommendation of the Board adopt a Code of Conduct which shall bind all the licensed insurers."* The IAZ Constitution is not in itself the Code of Conduct. Further, though the IAZ Constitution outlines its objectives in very wide terms, encompassing promotion and advancement of the members' interests, and promoting the agreement and cooperation among the members on matters of mutual interest, no expertise in law is required to understand that these objectives and the Code of Conduct are only valid and applicable to the extent that the law is not thereby violated.

113. It can be seen from the plain language of the PIA functions stated in section 5 (1), particularly paragraphs (i), (o) and (p) of the Pensions Scheme Regulation Act, that indeed as explained by AW2, the objective of the Guidelines on minimum insurance rates is to protect consumers of insurance services from overly speculative service providers who

[40] 9th Edition, page 293.

may exploit them or seemingly offer competitive prices by under-pricing products and then failing to pay up insurance claims. Under-cutting prices can also undermine the viability and quality of insurance services.

114. In practice, the IAZ and its members were heavily involved in the processes of setting up the minimum rates. This is evident from the facts and circumstances surrounding the case as reflected in portions of the Respondent's Record of Proceedings which we have referred to in the background to the judgment, and the oral evidence before us, some of which we have outlined above in our consideration of the present grounds of appeal.

115. The IAZ and its members' involvement was not only with respect to the conduct in dispute in this appeal, but also historically. This was particularly explicit in the submissions made by Mrs. Christabel Banda, the then Chief Executive Officer of the IAZ; AW1 and AW2 (the latter being the Deputy Registrar - insurance at the PIA). Counsel for the Appellants in their submissions have stated, *"... the minimum rates, once recommended by the IAZ and its members, are approved by the PIA for members in the insurance sector to abide by, except that each insurer is at liberty to load its expenses to come up with an economical rate. And that this arrangement could not be held to be collusion and an offence as the regulator is the one who periodically reviews the rates per its mandate re section 5 (1) (i) of the Pensions Scheme Regulation Act"* Further, that *"in comparing the situation had the IAZ and its members not met on the 13th December 2016 and the resolution not passed, still the recommendation would have been rendered to the PIA per the duties of the IAZ to represent the interests of its members."*

116. In short, the IAZ and its members were always consulted by the PIA on matters such as the subject in this appeal, and that the former made submissions for the latter's approval, whether on its own initiative or on request. The evidence also plainly establishes that the resolutions or submissions from the IAZ, as they were variously referred to, though submitted to the PIA for approval, were intended as *de facto* decisions of the latter because the PIA would approve them automatically. Mrs. Christabel Banda made this position emphatically clear and it was reflected in the minutes of the meeting and the resolution, which made the resolution binding on all the members, and to be enforced effective 1st January 2017. Accordingly, Ms Banda stated that her email of 27th December 2016 to that effect was merely implementing the terms of the resolution. In their submissions, counsel for the Appellants confirmed this position when they stated that *"the minimum rates, once recommended by the IAZ and its members, are approved by the PIA for members in the insurance sector to abide by, except that each insurer is at liberty to load its expenses to come up with an economical rate. And that this arrangement could not be held to be collusion and an offence as the regulator is the one who periodically reviews the rates per its mandate re section 5 (1) (j) of the Pensions Scheme Regulation Act"*. This state of affairs, in our view, is the basis for the finding by the Respondent that the IAZ and its members usurped the authority of the PIA of setting the minimum premium rates subject of the appeal.

117. We note that section 5 (1) (j) of the Pensions Scheme Regulation Act itself requires the PIA to- *"in consultation with the Competition Commission, formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industries;"* The fact that this provision is in the sector regulatory law is cardinal in

our consideration of the legal context of the Appellants' conduct as it is consistent with the objectives of the Competition Act. Yet it has not been mentioned by counsel on either side. (We reserve discussion of any further details as to whether the resolution amounted to an agreement or decision or concerted practice per section 8 of the Competition Act, or whether it amounted to a horizontal agreement per section 9 for our evaluation of these substantive provisions under other grounds of appeal.)

118. Counsel for the Appellants have heavily canvassed the position that the IAZ objectives stated in its Constitution justified the involvement of the IAZ and its members because reviewing the rates to ensure that they align to prevailing economic factors is in the interest of the members. We have noted, as we have earlier stated, the objectives counsel have referred us to, including the one enjoining the Association to *promote the agreement and cooperation among the members on matters of mutual interest.* We have already confirmed in our findings the close interactions between the IAZ and the PIA. And we have noted the evidence of AW1and AW2 to this effect. Counsel for the Appellants have argued the position that the relationship between the two bodies is justified as necessary for the conduct of the insurance business and that proper business conduct would be hindered if the consultative meetings that come up with resolutions for recommendations to the PIA are declared anti-competitive, citing the **Wouters case.** The facts of the case are that the Bar as an association of lawyers had issued a regulation prohibiting multi-disciplinary partnerships of lawyers with members of other professions. The Court ultimately held that "*.... Not every agreement between undertakings or any decision of an Association of undertakings which restricts freedom necessarily falls within the prohibition laid down in Article 85 (1) of the Treaty. For the purpose of application of that provision to a particular case, account must be taken of the over all context in which the decision of the Association was taken or produces its effects, and more particularly, of its objectives, which are here connected with the need to make rules, organisation, qualification, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with necessary guarantees in relation to integrity and experience. It has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.*" We must mention here that the justification offered is typical of inbuilt exemptions Article 101 TFEU.

119. We are yet to consider sections 8 and 9 of the Competition Act substantively. Suffice it to state that the holding in the **Wouter case** did not except the conduct of the Bar association or other professional bodies in similar circumstances from scrutiny for possible violation of Article 101 TFEU. In fact, the Court, before its final determination had to decide a preliminary issue whether Article 101 TFEU was applicable to the conduct of the Bar in issuing the regulation in issue for the practice of the legal profession. The Court affirmed the application of the Article (prohibiting restrictive agreements, decisions of associations of undertakings or concerted practices) in the following terms:

> *"It is, moreover, immaterial that the constitution of the Bar is regulated by public law. According to its very wording, Article 85 of the Treaty applies to agreements between undertakings and decisions by associations of undertakings. The legal framework within which such agreements are concluded and such decisions taken, and the classification given*

to that framework by the various national legal systems, are irrelevant as far as the applicability of the Community rules on competition, and in particular Article 85 of the Treaty, are concerned. It follows that a regulation concerning partnerships between members of the Bar and members of other liberal professions, adopted by a body such as the Bar, must be regarded as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty."

120. The Court continued, *"Moreover, having regard to its influence on the conduct of the members of the Bar on the market in legal services, as a result of its prohibition of multi-disciplinary partnerships, that regulation does not fall outside the sphere of economic activity. That the prohibition is liable to limit production and technical development within the meaning of Article 85 (1) (b) ..."*

121. Counsel also referred us to the **Meca-Medina case**, which, for the reasons we have stated concerning the **Wouter case,** we consider distinguishable in principle, as the case dealt with conduct that was excusable under the Article 101 inbuilt exemptions. In conclusion, we reiterate our finding that the conduct complained of cannot be justified on account of the laws cited by counsel for the Appellants or the IAZ Constitution. As per the finding in the **Wouter case**, the Appellants' conduct does not fall outside the sphere of economic activity contemplated by section 3 (1) of the Competition Act which provides that the *"Act applies to all economic activity within, or having an effect within, Zambia."* Or section 42 which states that *"the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III."* Therefore, the conduct in issue cannot be shielded from scrutiny for possible contravention of sections 8 and 9 of the Competition Act.

122. The perception and stance taken by both bodies, placing the IAZ at the level of consultant to the PIA on matters affecting the insurance industry, and the practice or custom (as counsel for the Appellants put it) of the PIA consulting the IAZ on all insurance matters is legally unhealthy and untenable. This is because the PIA which is the regulator on the one hand and the IAZ and its members on the other are supposed to deal with each other at arms-length, observing their boundaries in areas with potential to put their respective roles in conflict. This is particularly the case when the PIA is dealing with matters that have competition implications. In accessing what is obtaining in the industry for purposes of exercising its mandate of setting minimum premiums, surely the PIA is able to use means other than relying on the IAZ as its consultant. Doing otherwise is most certain to lead both parties on a collision course with the law, especially in matters of competition. It is instructive here that section 5 (1) (j) of the Pensions Scheme Regulation Act, which we have referred to enjoins the PIA to- *"... formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industries"*. Therefore, the argument by counsel for the Appellants concerning established custom or practice and reference to the **Henry case** are misplaced and flies in the teeth of the law.

123. The PIA's mandate of setting the minimum insurance rates is statutorily confined to the regulator for a purpose. The objective of the statutory mandate of the PIA in this regard is beneficial and in the public interest (consumer welfare in particular). This power has to

be exercised and seen to be exercised by the PIA and not the IAZ and its members. Involvement of the IAZ, and its members who are competitors in the relevant market, has the potential to result in prohibited anti-competitive conduct, in contravention particularly of sections 8 and 9 of the Competition Act. This is because there are competition implications for the product pricing, whether minimum or otherwise. For instance, a cursory look will inform that there is potential in the scheme of interactions between the PIA and the IAZ for minimum premium rates to be increasing at the behest of the IAZ and its members for their commercial benefit. Even assuming the claim that the prevailing rates had been overtaken by time was valid, simply asking the PIA to review the rates in view of changed economic fundamentals without stating any rates was as far as the IAZ and its members could go in order to stay within safe limits.

124. As we have indicated, we are not persuaded that the conduct complained of is inherent in the objectives of the IAZ as a professional body, because the IAZ Constitution does not require the Association to make the recommendations of minimum premium rates and the practice has at the very least some undesirable potential anti-competitive tendencies prohibited by the Competition Act. In any case, the IAZ Constitution cannot override the law. We emphasise 'potentiality' of injury to competition because under these grounds of appeal, we are not determining the actual position of the conduct *vis-a-vis* sections 8 and 9 of the Competition Act.

125. The Respondent did not sufficiently interrogate the relationship between the IAZ and its members on the one hand and the PIA on the other, as we have already stated. However, in light of the totality of the evidence before us, and taking into account the legal context, we find that the resolution on the minimum premium rates for third party motor vehicle insurance that came out of the meeting of the IAZ General Insurance Council on 13th December 2016 did amount to a usurpation of the statutory authority of the PIA. Moreover, that though the resolution of the IAZ and its members was called "recommendation", it was meant as the actual (*de facto*) minimum rates intended for adoption by the PIA which, in view of the established custom or practice, was expected to automatically make the adjustment. We have not found any evidence suggesting that the Respondent found the meeting *ipso facto* an offence. The question whether the agenda of the meeting was 'illegal' is not material, the core issue being the discussions and resolutions of the meeting and their implementation, which we deal with further under other grounds of appeal.

126. Accordingly, the appeal fails on grounds 1, 2, 4 and 5. We proceed to consider the 3rd and 6th grounds of appeal:

> *Ground 3: The Respondent erred in law and in fact when it determined that the conduct of the Appellants was not justified and had the object of preventing, restricting or distorting competition in the relevant market.*
>
> *Ground 6: The Respondent erred in law and in fact when it determined that the resolution passed by IAZ and its members was a horizontal agreement to increase the price of third party motor vehicle insurance, which conduct allegedly amounted to fixing prices for third party insurance premiums and distorted the competition process among insurance companies. The CCPC decision did not have due regard to the fact that the resolution passed*

was for an increase in the minimum premium rates which members of the IAZ were mandated to adhere to subject to the approval by the PIA. Members are, however, free to charge more than the prescribed minimum but not below the minimum.

127. Counsel for the Appellants' submissions are summed up below. In respect of horizontal agreement per section 9 (1) (a) of the Competition Act, in so far as the IAZ was concerned, that a horizontal agreement relates to an agreement or decision between competitors. That, however, the subsection needs to be read together with section 8 of the Competition Act.

128. That the prohibition targets an agreement or decisions that have the 'object' or 'effect' of preventing, restricting or distorting competition, which agreement has either been implemented or is intended to be implemented (in reference to the definition of 'agreement' in the Competition Act).

Object of resolution

129. That the key words in section 8 are 'object or effect'; therefore, the need to consider the 'object' test contemplated and to have recourse to judicial interpretation, since the Competition Act does not elaborate on the meaning of the term. That to establish the object of a particular agreement, it is necessary to take into consideration the objectives and economic context as well as the content of the provisions. That in respect of object, due regard must be given to deducing whether the conduct of the IAZ and its members amounted to, or whether the goal of the decision was to, restrict competition or distort the market. That as a principle of competition law, conduct cannot be found to be anti-competitive if the object was a normal commercial response to conditions prevailing in the market. (Citing the South African case of **Shell Company of SA Ltd. v. Gerrans Garage (Pty) Ltd.**[41])

130. Further, that the European Court of Justice held that an agreement is restrictive by object after an analysis of the purpose of the agreement is undertaken, taking into account the clauses of the agreement and the economic context in which it operates, reveals a sufficiently deleterious impact on competition.[42] That in determining whether an agreement is anti-competitive, fixing of the price or trading condition is not sufficient; the Respondent should have given due regard to wider considerations such as the reasonableness of the condition, the context as well as the impact on other insurance providers and consumers. That this is cardinal because it helps in determining the 'object' of the conduct which amounted to anti-competitive behavior as contemplated by section 8 of the Competition Act. (Citing the case of **GlaxoSmithKlineServices (GSK) Limited v. Commission**[43], that is, that it was held that "*regard must be had inter alia to the context of its provisions, the objects it seeks to attain and the economic and legal context*") Counsel invited us to consider the content of its provisions, the objectives it sought to ascertain and the economic

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[41] 1965 (40 SA 752 (GW).

[42] Citing the case of STM (1966) ECR 235.

[43] (2009) ECR 1-929, at para. 58.

and legal context which it formed part. That with respect to the contents, the resolutions were to be approved by the PIA, and if the PIA rejected them, as they did later, the position would revert to the current minimum premium rates.

131. With respect to the objectives sought from the conduct, that this was connected to the economic and legal context. That the minimum rates had not been revised since 2012 and the national economy had changed and the rate of inflation, risk exposure and increasing demand made doing business at that rate unsustainable (referred to evidence of AW3 at pages 16-18 of our record of proceedings for 18th June 2019). Further, that the Appellants' action was driven by the legal backdrop of their role in advocating the rights of its members. That regrettably, the Respondent's investigation was mainly focussed on proving the existence of an alleged agreement and when the Respondent established that the agreement was made by way of a resolution that was sufficient to prove that the Appellants violated the Competition Act. That taking such a narrow approach, the Respondent concluded that the Appellants attempted to limit competition in the market; that by this approach the Respondent failed to make an objective determination on whether the conduct amounted to anti-competitive behavior, based simply on the meeting and the contents of the resolution. That the IAZ and its members had concluded that the minimum rates which were fixed in 2015 needed to be revised on the basis of the prevailing economic context; therefore, they could not be said to have been anti-competitive.

132. That the evidence of AW2 at page 39 of our record of proceedings showed that the PIA approved the minimum premium rates in consultation with the Appellants; thus they were not a price-fixing mechanism, but an initiative undertaken by the PIA and the Appellants to ensure that insurers recovered their costs and that the insurance business was run effectively.

Effect of resolution

133. With respect to the question whether the resolution was anti-competitive by 'effect', it had to be considered whether the resolution had the effect of restricting competition by impact or effect on other traders or enterprises in the same industry. And that in determining effect of prevention, restriction or distortion of competition, the Court of Justice in the case of **Brasserie de Haechtv. Wilkin** (1968) CMLR 26 held that"*... it would be pointless to consider an agreement, decision or practice by reason of its effect if those effects were to be taken distinct from the market in which they are seen to operate, and could only be examined apart from the body of effects, whether convergent or not, surrounding their implementation.*"And, further, that "*... an agreement cannot be examined in isolation from the above context, that is from the factual or legal circumstances causing it to prevent, restrict or distort competition. The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade.*"

134. That in line with the above holding, the Tribunal is enjoined to examine an agreement within the factual and legal context and extensively its effect on the market. That in respect of the legal context, the Appellants had demonstrated that the IAZ is statutorily mandated to represent the interests of its members and that nothing precludes

the PIA from considering recommendations made by the IAZ or its member. (Citing section 5 (1) (i) and (p) of the Pensions Scheme Regulation Act; and referencing the historical relationship between the PIA and the IAZ, particularly as described by AW2 in his oral evidence.) The said provisions read:

> *"(i) monitor and periodically review premium rates and scope of cover of policies that provide insurance cover in satisfaction of legal requirement;"*
> *"(p) undertake such other activities as are conducive or incidental to the performance of its functions under the Competition Act;"*

135. Counsel argued that in view of the historical practice of the PIA conducting technical evaluations of the minimum third party motor vehicle insurance premiums in consultation with stakeholders including the industry players, if the industry met and came up with a resolution for submission to the (PIA) for approval and implementation, the effect of such a process was not to adversely affect competition. Citing the case of **Delimitis v. Henninger Brau AG** (1992) 5 CMLR 210 (the **Delimitis case**, counsel have argued that the Court held that the Court has to determine whether the market has been impeded and that an affirmative determination is a mandatory condition for holding that an agreement had the effect of being anti-competitive; and referenced AW1 evidence under cross examination, that is:

> *"2nd WITNESS: What Mr. Libinga and the Authority held as a view of what circulated, was that they were not valid because they were not issued by the Pensions and Insurance Authority.*
>
> *RESPONDENT: So could you tell this Honourable Tribunal what the correct procedure is when it comes to issuing the minimum rate, what is the correct procedure?*
>
> *2nd WITNESS: A technical evaluation is undertaken, PIA undertakes technical evaluation and in consultation with the stakeholders which includes industry players and relevant authorities. Then PIA finalizes or issues the minimum rate.*
> *RESPONDENT: So is it true that one of the functions of PIA is to review premium rates or fees for insurance premium?*
>
> *2nd WITNESS: Yes it is true to the extent that the authority had that power.*
>
> *RESPONDENT: In your examination in chief, you had testified that there is a useful procedure that you have developed with the insurance companies where you have routine meetings. Do you remember saying that?*
>
> *2nd WITNESS: Yes.*
>
> *RESPONDENT: And that it is at these routine meetings where the insurance companies through IAZ will raise concerns, remember?*
>
> *2nd WITNESS: Yes.*
>
> *RESPONDENT: You further told this Tribunal that after these concerns have been raised or have discussions with yourselves PIA, remember?*
>
> *2nd WITNESS: Yes.*

RESPONDENT: And that a technical paper will be written by them and recommendations brought to PIA. You recall that statement?

2nd WITNESS: Yes.

RESPONDENT: So Mr. Nkwale you are therefore confirming that at times you get information from the insurance association?

2nd WITNESS: Yes most of the times. Just as they also get our information.

RESPONDENT: This information that they give you, is there any information you use to regulate the industry, to help you regulate the industry?

2nd WITNESS: In context, yes.

136. Further, that apart from the Appellants merely making a recommendation, it did not take effect, and that there is no penalty for failure to abide by the minimum rates, indicating that the condition in the **Delimitis case had not been met. Also citing the case of Allianz HugariaBiztositoZrt and Others v. GazdazagiVeresenyhivatalC-32/1**, that it was held that the object must 'injurious to the proper functioning of normal competition', therefore that the conduct of the Appellants could not amount to a an agreement or decision which has the object of restricting or distorting competition because any anti-competitive practice should be aimed at injuring a competitor or competition in the market place. That the said resolutions were merely recommendations which did not take effect and as such could not be said to be injurious to the proper functioning of normal competition. That the case of **Top Gear and Nine Others v. Competition and Consumer Protection Commission** 2012/CCPT/003 (**the Top Gear case**) in which this Tribunal held that the documentation must be clear to satisfy the Tribunal that the conduct contravened section9 (a), and that there was a horizontal agreement when Top Gear and nine other garages agreed to start charging customers for obtaining quotations for repairing vehicles that were insured, could be distinguished.

137. Further, that in the present case, the documentation does not show that the Appellants intended to fix prices as the resolution was a recommendation subject to approval and therefore did not restrict any insurer from charging any price as the rates had to be confirmed by the PIA. That even if the recommendation had taken effect, it did not restrict anyone from charging whatever price they wished. Further, that distinct from the Top Gear case, in the present case, the IAZ and its members were part of a body recognised by statute and mandated to protect the interests of insurance companies and the insurance sector as a whole. That their conduct in holding meetings and making recommendations is common practice, and made *bona fide*, indicating a lack of intention to subvert competition law.

138. Citing the case of **T-Mobile** (2009) ECR 1-4529, counsel argued that the Court held that *"while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the Commission ... or the competent ... judicature from taking it into account"*; that therefore the subjective intention of a party is relevant and can be taken into account. That the evidence on record shows that the subjective intention of the parties was not to subvert the rules of fair competition. That, referencing the **GlaxoSmithKline case**, the Appellants could not be held liable as the conduct was justified

within the economic and legal context. Further, that based on **IAZ International Belgium NV v. Commission** (1984) 3 CMLR 276, a recommendation can only be anti-competitive if it has direct or indirect influence on competition; that in this case this could not be said to be a decision as it had was rejected. Further, that reliance by the Respondent on the case of the **Architects Belges case** C 38549 where architects recommended minimum fees for architects was misguided as it was distinguishable. That in that case, the recommendation was implemented and consistently applied by the architects for many years and had a negative effect on the market which could be clearly seen. That in contrast, in the present case, the recommendation was taken at a single event and was rejected before it had its effect on the market. That the Court had this to say in the **Architects Belges** case:

> *"With regard to the effect on trade within the Community, a decision or agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about. The Association's decision establishing a fee scale applies throughout Belgium and to any architect carrying on an economic activity as an independent practitioner in the country, including nationals of other Member States who are registered with the Association. The projects which under Belgian law require the participation or assistance of an architect are by definition the largest, at least from a financial point of view, so that the interest of foreign architects cannot in any way be considered negligible."*

139. That further in the present case, the insurers are obliged to abide by the minimum rates; so if there is an upward adjustment in such a rate, by parity of reasoning, the effect cannot be to restrict competition.

140. Counsel for the Appellants contested the Respondent's reliance on **European Night Services v. Commission** (supra), concerning which the Respondent' in its decision at page 380 of the Respondent's Record of Proceedings stated:

> *"there is no need to take account of the economic context in which the undertaking operated where the agreement contained obvious restrictions of competition such as price-fixing and market-sharing."*

141. Counsel have argued that, to the contrary, the Court stated that in assessing an agreement, *"account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertaking operates, the products or services covered by the agreement and the actual structure of the market concerned."*Further, that the Court held that *"the Commission must be regarded as not having made a correct and adequate assessment in the contested decision of the economic and legal context in which the ENS agreement were concluded."* That the economic and legal context being directly relevant, counsel had demonstrated how the legal context showed that the Appellants were not acting in any manner calculated to be anti-competitive. That further the economic context is also relevant in that the Appellants' meeting was conducted taking into account that it became untenable to maintain the K450 minimum premium rate. That in the **European Night Services** case, that Court held that *"A hypothesis unsupported by any evidence or any analysis of the structure of the relevant market from which it might be concluded that it represented a real, concrete possibility."*That from the foregoing, it is clear that there is no actual competition and that

there is evidence that there will be no effect on actual competition. That in relation to potential competition, based on the European Night Services case, this is determined by a hypothesis supported by evidence. The evidence clearly indicates that the agreement was never intended to create to penalize any competitor who charges prices below the minimum premium rate.

142. Counsel for the Appellants further made reference to the MRI case (supra) in which we held that "object or effect" do not need to be the sole; in other words, that the anti-competitive object or effect of an agreement or decision or concerted practice could be one of many. That counsel had demonstrated that none of the objects and effects of the Appellants' meeting and resolution had any effect on competition between members of the IAZ. That therefore the conduct in question did not fall foul of sections 8 and 9 (1) (a).

143. In outlining the Respondent's response, we begin by recalling portions of their submissions under Grounds 1 of and 2 of appeal which we believe are more appropriately related to grounds of appeal 3 and 6. Counsel submitted under Ground 1 that section 2 of the Competition Act defines "agreement" as *"any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises."* Counsel went further to state that in determining the existence of an agreement the European Court of first instance stated in the **BAYER case** (supra) that it must be founded upon *"the existence of the subjective element that characterises the very concept of agreement, that is to say a concurrence of the wills between economic operators on the implementation of a policy, the pursuit of of an objective, or adoption of a given line of conduct on the market. The form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention."* Further, that the Appellants' meeting of 13th December 2016 had as part of its objectives a discussion to increase the minimum premiums for third party motor vehicle insurance, which culminated in the IAZ resolution to increase the rates. That this was evidenced by the emails leading to the increase, minutes of the meeting and the directive issued by the IAZ on 27th December 2017.

144. That the aforementioned led to the Respondent's finding, as stated by RW in his evidence, that there was an oral agreement that was subsequently reduced to writing as evidenced by the minutes. That in addition, the 4th Appellant, 7th Appellant and 9th Appellant proceeded to increase their third party motor vehicle insurance on 1st January 2017, which they later reversed when the PIA issued the statement that the increment was illegal as it was not formally communicated and approved by the PIA. That in his evidence, AW1 confirmed that members discussed factors each one of them considered in arriving at the appropriate premium, that this was a further manifestation of a concurrence of the minds during the meeting; orally made and subsequently evidenced in writing as minutes of the meeting. Therefore, even though the meeting was legally convened, the agenda to discuss the increment of the minimum premium rates was illegal. That, therefore, the Respondent correctly found that there was an oral agreement made at the meeting of 13th December 2016 among the IAZ members to increase the minimum rates for third party motor vehicle insurance.

145. Further submitted in counsel for the Respondent's arguments under Ground 2, that, as RW stated during cross-examination, it was wrong for the industry to meet and make a proposal to the Registrar (PIA) for adjustment of the premium rates because the insurance companies involved in the conduct were competitors. That in the emails exchanged prior to the meeting, discussions were that they needed to double the rates and that this is exactly what they did. Quoting the wording of section 8 of the Competition Act, *"Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to a great extent in Zambia is anti-competitive and prohibited."* That in relation to this provision, the relationship of the Appellants was that they were competitors in the provision of general insurance services, in particular third party motor vehicle insurance, hence they were supposed to each make independent business decisions and not collectively agree on the prices of their insurance services. Furthermore, that the IAZ is prohibited from making decisions regarding the price at which its members ought to peg their insurance services, as that is anti-competitive conduct.

146. Under Ground 3, counsel for the Respondent simply reiterated their arguments under Ground 2, that the Appellants' conduct could not be justified as there were legal means of achieving a review by the PIA of the minimum premium rates; for example the submission to the PIA of an actuarial report by an independent consultant.

147. Further, that pages 872 – 879 of the Respondent's Record of Proceedings, particularly paragraphs 302 – 363 of the Board decision, show the prices at which the insurance companies charge for third party motor vehicle insurance. That while the insurers are statute bound to charge a minimum rate, they are under no restriction to independently increase the price according to the prevailing market conditions and costs as independently weathered. That during oral testimony, AW1 was asked as to why insurers charge either the minimum rate or slightly above it if the current minimum rate was uneconomical, in his response he said the Act prescribed the extent a claimant would be paid an insurance compensation. Counsel cited the minimum limits, an excerpt of which is found at page 577 of the Respondent's Record of Proceedings as follows:

> *"The Road Traffic stipulates the following minimum legal limits in respect of third- party bodily injuries in respect of anyone other than the driver injured as a result of using the described motor vehicle on a public road:*
>
> *K30,000 per person*
> *K60,000 per accident"*

148. That when giving oral evidence and upon being referred to the minutes at pages 720 – 726 of the Respondent's Record of Proceedings, specifically item 4.1.1, AW2 stated that an insurer could pay above the lower limit; therefore, the compensation is not fixed and each insurer is free to adjust the premium and the compensation to suit their individual pricing policies. That further, AW1 explained that 'undercutting' meant *"the pricing mechanism where an insurance company charges below the market rates under-pricing ... so undercutting means under-pricing."* That since the meeting resolved on penalties to be applied to undercutting, it was implied that the Association had mechanism by which to penalize members found practicing undercutting that would not amount to collusion. That

in this respect there could be no justification for the Appellants convening a meeting at which they discussed the increment of premiums for third party motor vehicle insurance premiums.

149. That, therefore, the Respondent was on firm ground when it found that the conduct of the Appellants had the object of preventing, restricting or distorting competition in the relevant market.

150. Under Ground 4 of the grounds of appeal, in respect of section 8 of the Competition Act, counsel for the Respondent repeated their reference to the definition of 'agreement' in section 2 of the Competition Act (earlier quoted); and referred to the Oxford English Dictionary for definition of 'decision', that is *"a conclusion , or resolution reached after consideration."* That under the Competition Act, a decision by an association can be defined as a type of agreement according to section 2. That counsel stressed that a decision could take the form of a statement made with an objector effect of influencing the commercial behavior of the association's members and it does not need to be binding. Counsel made reference to the statement that was issued by the IAZ, at page 336 of the Respondent's Record of Proceedings, as follows:

> *"At the meeting of the General Insurance Council duly constituted and convened on 13thDecember, 2016, the following resolutions were passed, which are binding on all members of the General Insurance Council. Failure to comply with these resolutions will attract disciplinary in accordance with Part IV of the Insurers Association of Zambia Constitution. It is hereby resolved that the following revisions will be made with effect from 1st January 2017".*

151. That the statement listed what was agreed in the meeting concerning an increase in the minimum rates in issue as follows:

> *"We the members of the General Insurance Council of Zambia agreed to the above resolutions and undertake that should our individual companies be found wanting, any member or the Association can lodge a formal complaint to the Association and relevant disciplinary action shall be taken against our company. We also undertake to ensure that we report any member of the Association that is in breach of these resolutions,"*

152. That therefore there was an agreement to act upon the resolution of the IAZ by the members and that disciplinary action would be taken on defaulters. That the Respondent further considered **whether the agreement or decision had the object of preventing, restricting or distorting competition to an appreciable extent in Zambia.** Counsel referred to the Black's Law Dictionary for the meaning of 'object' - *"something sought to be achieved or accomplished; an end, goal or purpose"*. That when applied to agreement or decision of an association can be construed as the parties' intention of entering into an agreement. That however, in competition law restriction of competition by object is different altogether, that it refers to an agreement or collusive behavior that, by its very nature, can be injurious to competition conditions.

153. That restriction by object includes coordination of actual prices (price increases or reductions), coordination of quotation prices as opposed to the final prices charged and

market sharing. Citing and quoting the case of **Consten and Grundig** (supra), that a German radio manufacturer and a French distributor agreed to make the French company the sole distributor of Grundig radios in France and limited how the radios would be imported and exported. That Advocate General Roemer in his opinion for the ECJ stated that the agreement did not violate Article 85, reasoning that the agreement allowed for the German producer to enter the French market and had the effect of furthering market integration since a German company now had access to France. That the ECJ did not agree with Advocate General Roemer and held that the agreement violated Article 85 because it had the object of harming competition by limiting which distributors could sell the radios and how the radios could be imported and exported. That in turn, because the agreement had the object of restricting competition, there was no reason to examine the effects on the market. And that the ECJ held that when an agreement has an anti-competitive object, there is no need to examine the concrete effects in the market. In other words, if the object of an agreement is to harm competition, it does not matter if there are beneficial effects to market integration.

154. Counsel further argued that in the case of **European Night Services** (supra), the Court of first instance stated that there was no need to take into account the economic context in which the undertakings operated where the agreement contained obvious restrictions of competition such as price fixing and market sharing. Further, that the object of an agreement will still be considered to restrict competition even if the agreement has proved difficult to apply in practice (and may not, therefore, have had the effect of restricting competition). That it was also stressed that it is no defence that a participant had intended to ignore the terms of the agreement, nor that a participant intended to, or did in fact, cheat on the cartel agreement.

155. That in light of the above stated illustrations, the conduct by the IAZ to meet with its members and issue resolutions which members signed to increase minimum rates for third party motor insurance premiums had the object of preventing, restricting and distorting competition among insurance companies in the pricing of third party motor insurance policies.

156. As to whether the conduct affected competition to an appreciable extent, counsel submitted that the Respondent in its analysis of the conduct looked at the case of **Volk v. Vervaerke Judgment of the Court of 9 July 1969. - Franz Volk V S.P.R.L. ETS J. Vervaecke - Reference for preliminary ruling: Oberlandesdgericht Munchen - Germany. - 5-69.** That the Court of Justice made a judgment on appreciable extent after analysing the market shares of the parties to the agreement and made a conclusion that the agreement had insignificant effects on competition because the market shares of the parties to the agreement were very minimal. That, following the same principle, the conduct by the IAZ to meet with its members and issuance of resolutions and instructions to increase minimum rates of third party insurance by 1st January 2017 affected competition in the relevant market to an appreciable extent. That this was because a combined market share of all the IAZ members was above the thirty percent market share threshold under section 14 (a) of the Competition Act, which provides for authorisation by the Commission *"Where the parties to a horizontal agreement, together supply or acquire thirty percent or more goods or*

services of any description in a relevant market in Zambia; ... the parties shall apply to the Commission for authorization of the agreement in the prescribed manner and form." That in this case, the combined market share was 100% since the agreement involved all the insurance companies in the country. That, however, as the agreement prevented, restricted, or distorted competition by object, there was no need to show the effects it had on competition.

157. Counsel concluded their submissions by stating that the Respondent was on firm ground to conclude that the Appellants had violated section 8 of the Competition Act.

158. Under Ground 6, counsel for the Respondent referred to the definition of 'horizontal agreement' in the Competition Act, *"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"*. That therefore the insurers in this case being competitors entered into a horizontal agreement, contrary to section 9 (1) of the Competition Act which prohibits per se the specified types of horizontal agreements. Counsel referred to the **Top Gear case** (supra) where this Tribunal held that there was a horizontal agreement when Top Gear and nine other garages agreed to start charging customers for obtaining quotations for repairing insured motor vehicles, and that the garages were involved in the cartel to fix quotation prices for repairing motor vehicles. Counsel went on to argue that there was a horizontal agreement among members of the IAZ to increase the minimum rates of third party motor vehicle insurance.

159. Further, that specifically during interviews, Mr. Aaron Kamanga, and Mr. Jack Kamau confirmed that minimum rates on the said insurance premiums were the actual price at which insurance companies sold their insurance policies (reflected at pages 271-292 of Respondent's Record of Proceedings). Counsel further submitted that the minimum rate was K450 (that is, for private vehicles) and that the Respondent established that most insurance companies sold their insurance policies at K450 plus 3% insurance levy making the total price K463.50 per annum and that most insurers rounded it off to K464 or K463. (Citing Table 19 and Figure 3 at pages 302 and 311 of the Respondent's Record of Proceedings) That this showed that the prices were in the same price range as illustrated by the horizontal line in Figure 3 in the premiums.

160. That, therefore, in discussing the minimum premium rates, the insurers were actually discussing the actual prices to which they intended to increase the premiums.

161. Counsel for the Appellants in reply in substance reiterated their earlier arguments, which there is no need to repeat.

162. Under these two grounds of appeal, we have first of all identified the main findings of the Respondent under sections 8 and 9 respectively.[44] We also at the end of the

[44] See (Respondent's) Record of Proceedings in the (Preliminary) Report, January 2018 at pages 303-313; Report, April 2018 at pages 533-546; Staff Paper at pages 692-706; and the Decision in the Amended Record of Proceedings at pages 53-68.

summaries of the findings outlined the related ground of appeal. The main findings were as follows:

(a) **Consideration under section 8 - Whether there was an agreement, decision or concerted practice by the parties - Findings of the Respondent**

(ii) That the IAZ General Insurance Council members agreed and resolved to increase minimum rates for third party motor insurance premium in the meeting on 13th December 2016.

(iii) That the IAZ members held a meeting on 13th December 2016 where all the members concerted to a proposal to increase minimum rates of third party motor insurance of third party motor insurance by 100%. The members' consensus to the increase showed a meeting of the minds among themselves.

(iv) Further, that there was an agreement among IAZ members to increase minimum rates for third party motor insurance by 100%. The agreement was oral and was reached through concurrence of the will in the meeting held on 13th December 2016 where all the members in that meeting discussed and concerted to the increase. The oral agreement was enforced when the IAZ circulated written down resolutions of the meeting to all its members. Further, that IAZ members signed the resolutions to effect the increase. After the resolutions were signed, the IAZ sent an email to inform all its members to implement the new rates on 1st January 2017.

(v) That there was a decision by the IAZ, according to competition law, operated through resolutions passed at the association's meeting or through recommendations.

(vi) The companies were independent companies with no common shareholding; therefore, it was not in order for independent companies who were competitors to meet and discuss insurance premiums under the IAZ umbrella.

(vii) All the participants at the meeting who were interviewed confirmed having discussed and agreed to the increase in the minimum third party motor insurance premium rates by 100%. This confirmation, together with the signed resolutions, was evidence of the existence of the agreement as defined in the Competition Act.

(b) **Whether the object or effect of the conduct was the prevention, restriction or distortion of competition - Findings of the Respondent**

(i) That the words 'object or effect' are read disjunctively, i.e. alternatively and not as cumulative requirements. Thus, if it is determined that in terms of the agreement, its object is found to be restrictive of competition, it is settled; there is no need to establish that it also had restrictive effects. The resolution which

was sent to all the IAZ General Insurance Council evident of object. The evidence of the agreement presented vividly showed that the aim of the IAZ and its members was to increase minimum rates for third party motor insurance. The conduct of the IAZ and its members in meeting and signing a resolution of the increase in the minimum rates had the object of preventing, restricting and distorting competition among insurance companies.

(ii) That the conduct of the IAZ and its members in meeting and passing resolutions where members signed to increase the minimum third party motor insurance premiums had the object of preventing, restricting and distorting competition among insurance companies in the pricing of third party motor insurance policies.

(c) **Whether the conduct on competition is to an appreciable extent in Zambia – Findings of the Respondent**

(i) That the agreement would have an appreciable effect on competition (applying thresholds of market share in section 14 of the Competition Act).

(ii) That all the insurance companies were members of the IAZ. Therefore, any anti-competitive agreement made through IAZ meetings and resolutions had an appreciable efffect because it affected the entire insurance industry. Therefore, the agreement by the IAZ and its members to increase the minimum rates for third party motor vehicle insurance premiums affected competition in the relevant market to an appreciable extent.

163. **The ground of appeal that relates substantively to the Respondent's findings under section 8 is Ground 3:** *The Respondent erred in law and in fact when it determined that the conduct of the Appellants was not justified and had the object of preventing, restricting or distorting competition in the relevant market.*

(d) **Consideration under section 9 (1) (a) - Whether there was a horizontal agreement between the parties – Findings of the Respoindent**

(i) That in competition law, a horizontal agreement is simply defined as an agreement for cooperation between two or more competing businesses operating at the same level. That, horizontal agreements can violate competition law because they may include restrictive clauses such as market-sharing, price-fixing and bid rigging.

(ii) That all the IAZ members who met on 13th December 2016 operated at the same level in the relevant market, thus the agreement they entered into was a horizontal agreement.

(iv) Generally, competition law in Zambia (through the Competition Act) and in other jurisdictions requires that each company establishes prices and other terms on its own, without agreeing with its competitors. When consumers make choices about what products and services to buy, they expect that the price has been determined freely on the basis of costs incurred by the

company, taking into consideration forces of demand and supply, and not by agreement among competitors. That when competitors agree to restrict competition, the result is often higher prices.

(v) There is evidence confirming that the minimum rates on third party motor insurance was the actual (premium) price at which insurance companies sold their insurance. That it was established that most insurance companies sold their third party motor insurance policies at K450 plus 3% insurance levy making the total price K463.50 per year, although most insurance companies rounded the figure off to K464 or K463.

(vi) When the IAZ members met, they were actually discussing the actual prices at which they wanted to increase the third party motor insurance premiums.

164. **The ground of appeal under consideration here which relates substantively to the Respondent's findings under section 8 is** Ground 6: *The Respondent erred in law and in fact when it determined that the resolution passed by IAZ and its members was a horizontal agreement to increase the price of third party motor vehicle insurance, which conduct allegedly amounted to fixing prices for third party insurance premiums and distorted the competition process among insurance companies. The CCPC decision did not have due regard to the fact that the resolution passed was for an increase in the minimum premium rates which members of the IAZ were mandated to adhere to subject to the approval by the PIA. Members are however, free to charge more than the prescribed minimum but not below the minimum.*

165. We have given serious consideration to Grounds of appeal 3 and 6, counsel's submissions and the evidence before us. We have decided to approach our task by following the same format of issues which the Respondent followed in outlining their findings. We have also recalled that since the subject matters of this appeal cannot altogether be separated from one another, some conclusions we have already reached have a bearing on our consideration of these grounds of appeal. In particular, we have dealt with issues of the relevance of foreign laws, including case law, particularly of the EU, to our competition laws and cases. We have arrived at the conclusion that foreign laws and their judicial interpretations, especially EU competition law, to the extent relevant, may be a helpful aid in the Tribunal's interpretation of sections 8 and 9 (as indeed other provisions of the Competition Act) and indeed the application of these provisions and interpretations to other cases before the Tribunal. That in particular, reliance thereon ought to take into account, as may be appropriate, (i) similarities and/or differences between provisions of the Competition Act on the one hand and those of foreign laws on the other; (ii) the particular facts and circumstances of the case before the Tribunal, including the national economic and legal context; and (iii) the evolution of the foreign case law and, in the case of the EU case law in particular, the subsidiary instruments that have shape it and *vice versa*.

166. We have also dealt with the legal context of the Zambian competition law and concluded that the legal context of sections 8 and 9 of the Competition Act is first and

foremost the Competition Act itself, subject only to the Constitution.[45] Any provision of any other law, such as the Insurance Act, the Pensions Scheme Regulation Act or other related law in the case under consideration, is secondary and may be taken into account only to the extent not inconsistent with the Competition Act. For instance, we have found a provision in the Pensions Scheme Regulation Act that is relevant to the present case and which we take into account as we see appropriate. Section 5 (1) (j) of the Act states one of the functions of the PIA as to- *"...formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industries"*. We have also determined that conduct that comes under the realm of sections 8 and 9 can only be taken outside of the realm under provisions of the Act; for example, by way of the exceptions to the application of the Competition Act under section 3 (3) or the exemptions granted by or under Part III.

167. We have also considered the relevance of *'mens rea'* in non-criminal regulatory offences under the Competition Act and arrived at some conclusions that have implications for our evaluation of some issues under the present grounds of appeal. In particular, we have concluded that in light of our conclusion in the MRI case, we would place 'agreement' and 'decision' in section 8 of the Competition Act at the same level in terms of the question of *mens rea*, while treating 'concerted practice' differently. We have said, "In our view, the requirement of *mens rea* is implicit in an anti-competitive agreement or decision because of the basic requirement of the meeting of the wills for an agreement, and by extension for a decision, contemplated in section 8. The principles applied in the EU case of **Bayer v. Commission of the European Communities** to establish the existence of an anti-competitive have set a universal standard and we are satisfied that it is sound authority:

> **'67 It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 86; Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 256).**
>
> **68 As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, ACF Chemiefarma, paragraph 112, and Van Landewyck, paragraph 86), without its having to constitute a valid and binding contract under national law (Sandoz, paragraph 13).**
>
> **69 It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in**

[45] In particular, we have found that per section 42 of the Competition Act, economic activities of sectors that fall under a statutory regulator (such as the insurance sector) are subject to the reign of Part III of the Act, to which sections 8 and 9 belong.

which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.'"[46]

168. In respect of the ingredient of intent required to establish the anti-competitive object or effect, we have concluded in the following terms:

> *"... under the EU law, agreements that are restrictive by object are treated more severely. The test applied is not subjective but objective intent, although, where subjective intent is established, it certainly would strengthen the case for a competition authority concerned. In the case of Article 101 TFEU violation assessments, paragraph 22 of the "Guidelines on the application of Article 81(3) of the Treaty C 101, 27/04/2004 P. 0097 - 0118", states that the way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. (Underline ours) We opine that in the case of the Competition Act, the EU standard applied to agreements that are restrictive by object would, extend to section 9 types of horizontal agreements, in that they belong to the category of what is universally referred to as hardcore restrictions and they are prohibited per se by section 9 of the Competition Act. In practice, a regulator may, depending on the facts and circumstances of a case, investigate and assess the conduct of an alleged offender in order to establish whether or not they did in fact intend to commit the act complained of, and an affirmative finding will enhance the chances of a finding of guilt. In the case of the Competition Act, in particular sections 8 and 9, we opine that the legislative intention for the mens rea test is the objective standard, whether the restriction is by object or effect, or whether the agreement is prohibited per se (section 9). We say so because otherwise there would be no need for the Competition Act to make the exception that it makes in terms of imposition of a fine under section 58 (4), which provides that a fine shall not be imposed unless the offence was committed intentionally or negligently. Since we have ruled out that the legislature intended the offences in these section to be strict liability offences because of the 'meeting of the wills' element requisite in an 'agreement', the section 58 (4) exception can only make sense if the standard applicable to the offences is objective intent while that in the exception is subjective. We so determine."*

169. As for 'concerted practices' occurring in section 8, the Competition Act in section 2 defines the term as *"a practice which involves some form of communication or coordination between competitors falling short of an actual agreement but which replaces their independent action and restricts or lessens competition between them;"* We have earlier determined that the term has been defined in the Competition Act as falling short of an agreement, and by its very nature it involves subtle or tacit forms of arrangements between competitors. In view of this, to read mens rea as an ingredient into such practices, which are in any case difficult to crack down, would do serious injury to the legislative intention of prohibiting such practices which are common in anti-competitive cartel conduct. Applying the principle, *"One way in which this legislative intention is implied is if the substantial suppression of the*

[46]Case T – 41/96.

mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability....", we conclude that anti-competitive 'concerted practices' are strict liability offences."[47]

170. We also considered the legal status and relevant functions of the IAZ and its members, and of the PIA, and the relationship and interactions between the two bodies historically in insurance matters in general and in particular in matters of review of the minimum premium rates in issue. We concluded that there was nothing in the laws referred to that could shield the IAZ and its members from being held answerable for their conduct in terms of sections 8 and 9 of the Competition Act. We also concluded inter alia that the resolutions in issue though labeled 'recommendation' were intended as the *de facto* minimum rates, which the PIA was expected to adopt per the established custom and to this effect they were stated to be binding on all the members and implemented without waiting for the PIA's approval.

171. With the foregoing conclusions we have already reached in mind, we now proceed to address the issues.

Consideration under section 8 - Whether there was an agreement, decision or concerted practice by the parties

172. The starting point is the definition given to 'agreement' in section 2 of the Competition Act, *"any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises;"* 'Decision' is not defined in the Competition Act, but a standard English dictionary defines the term as (a noun) *"a conclusion or resolution reached after consideration."* And similar words are listed as *"resolution", "conclusion", and "determination"*, and others.[48] It has been held in the well known EU case of **Bayer AG** (supra) that proof of an agreement, and by extension in our case, a decision, as we have earlier explained, *"must be founded upon the existence of the subjective element of concurrence of the wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market. The form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."* (Underline ours)

173. There is no dispute that the test required to establish the faithful expression of the parties' intention by the concurrence of the wills is subjective. But the test for faithful expression of the parties' intention required to establish a concurrence of the wills for purposes of determining the existence of an agreement or decision is not the same as the test of intent required to ascertain (once it is established that there is an agreement or decision or concerted practice) whether it had as its object or effect the prevention,

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[47] Reference our discussion of the subject of the relevance of *mens rea* and negligence in non-criminal statutory offences in the Competition Act.

[48] Definitions from Oxford Languages and Google, sighted on internet on 13th April 2021. At 17:10 https://www.google.com/search?q=What+is+decision&sa=X&ved=2ahUKEwjrvafSvPvvAhURhlwKHVoIB6EQ1QIwFXoECBEQAQ&biw=1366&bih=657.

restriction or distortion of competition to an appreciable extent in Zambia. These are separate stages in the assessment process.

174. First of all, counsel for the Appellants have made a statement that sections 8 and 9 have to be read together. Not necessarily, but perhaps for purposes of this case because the conduct in question is the same except that for the IAZ members concerned the conduct has been determined as violating both sections. Moving forward, while counsel for the Appellants have not so much dwelt on the issue of the meeting of the wills in their initial submissions, they have assailed the Respondent's reliance on the Bayer AG case on the question of existence of an agreement or decision, particularly in their submissions in reply, arguing that the meeting of the wills in the present case was not established on the subjective test, citing the **T-Mobile case**, our holding in the **MRI case**, holdings in the **GlaxoSmithKline case, IAZ International Belgium case, the Wouter case**, and others. In our view, the holdings cited by counsel were not dealing with the question of the existence of an agreement or decision but rather an evaluation of its purpose or effect, or its justification in the circumstances as provided by Article 101 TFEU. We have already made ourselves clear that in the context of section 8, justifying conduct in question cannot arise aside the provisions of the Act, that is, for instance, an exception falling under section 3 (3), falling short of the 'appreciability' required within section 8 itself, or an exemption by section 13 or under other provisions of Part III.

175. In terms of the standard of subjective intent for the meeting of the wills required to establish the existence of an agreement or, by extension, a decision, the '*subjective standard*' has been defined by Black's Law Dictionary as *"a legal standard that is peculiar to a particular person and based on the person's individual views and experiences"*. Subjective intentions can only be externally determined by the conduct of the person concerned, by which it is established that they must have intended to enter into agreement or to make a particular decision. Otherwise contracts would not be ascertained one way or the other if courts could not rely on a party's conduct, whether expressed by oral communication or writing or both. In the *Rumpuns case* (supra), we said in respect of *mens rea* for, in our interpretation of the offence of implementing a merger without authorization under section 37, *"The Tribunal notes that the word "intentionally" as used in the foregoing provision connotes subjective mens rea (guilty mind). In terms of subjective mens rea one must intend to commit a wrongful act, i.e. a wrongful act must be accompanied by an overt mental state such as intent or recklessness."*[49] The guilty mind referred to is of course not in terms of knowing or ignorance of the law but in directing one's mind to do the act, as may be seen by the conduct, so as to establish whether the person intended that act. At this stage, we are not dealing with an intended object or effect of the conduct itself but the prior intent of the IAZ and each member subjectively to engage in an agreement or decision.

[49] *Objective Mens Rea and Attenuated Subjectivism: Guidance from Justice Charron in R. v. Beatty*, Palma Paciocco, S.J.D. candidate, Harvard Law School, p.80 available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3586&context=scholarly_works visited on 28/06/2019 at 13:38

176. We have examined the facts and circumstances of the case and are satisfied that the IAZ members exchanged email communications from which it was purposed and put on the Agenda of the IAZ GIC meeting by the Chairperson Mr. Chabala Lumbwe for discussion and resolution to increase the minimum premium rates for third party motor vehicle insurance. Further, that all the members met in the meeting of 13th December 2016 and passed the resolution to double the minimum premium rates for third party motor vehicle insurance for private and commercial vehicles. Further, that all the members agreed to the resolution which was minuted and reduced into writing as resolutions for signature of all the members. Further that the resolutions were couched in terms as to make the rates the *de facto* rates by their binding clause, and the implementation being effective 1st January 2017 prior to approval by the PIA, which was expected to adopt the resolution as a formality, according to the established custom or practice. This custom and or was testified to by the Chief Executive Officer of the IAZ then Mrs. Christabel Banda in her statement to the Respondent and confirmed by the oral testimonies of AW1 and AW2 before us. The practice was also canvassed by counsel in their submissions as justifying the Appellants' conduct.

177. These facts and circumstances surrounding the case are matters we have outlined in the background to this judgment and reviewed in our consideration of Grounds 1, 2, 4 and 5 of appeal and we need not repeat them here. We are also satisfied from the evidence that the formal process of adoption of the resolution by the PIA was curtailed because the resolution for the minimum rates, which were put into effect by then, was leaked to the public through social media, specifically MWEBANTU. It is common cause that this leakage led to the PIA issuing a public statement that the increased rates were void because the PIA had not approved them.

178. In light of the facts and circumstances of this case, we conclude that there was a faithful expression of the parties' intention by subjective concurrence of the wills between and among the IAZ and its members to increase and implement the increased minimum premium rates for third party motor vehicle insurance on the market. We therefore agree with the findings reached by the Respondent under this subhead.

Whether the object or effect of the conduct was the prevention, restriction or distortion of competition

179. Indeed, as the Respondent has stated in their determination under this head and as the plain wording of section 8 indicates, the words 'object or effect' are disjunctive, i.e. alternative and not as cumulative requirements. EU Guidelines make this distinction clear but also bring out the common denominator between the two, that is, circumstances that may have to be evaluated to determine exemptions granted in paragraph (3) of Article 101 TFEU. The Guidelines state as follows:

> *"20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects(25). In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3), on the other hand, does not*

distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein(26).

21. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.[50]

180. In our earlier discussion of the subject of relevance of foreign laws, we identified that the sometimes blurred lines in the distinction between restrictive agreements or decisions or concerted practices by object on the one hand and by effect on the other is caused by the fact that in the EU case law, especially that arising and determined before the introduction particularly starting 1999 of a flurry of regulations and in 2003/2004 of guidelines, the adjudication processes were preoccupied with determining issues of circumstances that might take conduct under cover of the exemptions afforded by paragraph (3) of Article 101 TFEU. Though such evaluations are still undertaken under the current reign of the regulations and guidelines, the burden of proof has shifted to the business entities seeking to invoke and prove the application of the exemption. There is also likelihood in some cases that prevention, restriction or distortion of competition by object may not be clearly established without going into assessment of the concrete impact or effects of the conduct on competition on the relevant market. In the end, it is a matter dictated by the facts and circumstances of each case, including the context of the law. In the context of section 8 of Competition Act, an evaluation going that far may only be necessary if it is needed to establish whether conduct is restrictive of competition by effect. Therefore, we do find the Respondent's proposition that "*in terms of the agreement, if its object is found to be restrictive of competition, it is settled; there is no need to establish that it also had restrictive effects*" valid.

181. We must now look at the meaning of 'object' in section 8 of the Competition Act. Black's Law Dictionary defines the term as '*something sought to be attained or accomplished; an end, goal, or purpose*'.[51] As we have already stated, the standard of the intent, required to establish the object, is the objective standard. Black's Law Dictionary defines 'objective standard' as '*a legal standard that is based on conduct and perception external to a particular*

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[50] Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) *Official Journal C 101, 27/04/2004 P. 0097 - 0118*, paragraphs 20 and 21.

[51] Black's Law Dictionary, 9th Edition, page 1177.

person". An example is given of the law of torts where the standard of a reasonable person is considered an objective standard because it does not require a determination of what the subject person was thinking. Thus, without losing our focus by engaging in unnecessary EU legal jargon, we must look at the evidence before us.

182. We have already outlined the genesis of the conduct in the emails that were exchanged among the members prior to the meeting, which showed that the chairperson, Mr. Lumbwe, and the members intended to discuss the subject matter with the view to coming up with a resolution to increase the minimum insurance rates. One member declared that they must "double" the rates while the chairperson said that "*PIA will only be informed about our resolution*". All the members attended the meeting on 13th December 2016 as the minutes and the resolutions show, and they agreed to the increases being effected effective 1st January 2017. They also made them binding on all the members.

183. Mrs. Christabel Banda explained her email of 27th December advising members to effect the increased rates effective 1st January 2017 while formal communication with the PIA would follow, stating that she was executing the intention of the meeting reflected in the resolutions. She stated that historically, the IAZ and the members passed such resolutions and they were adopted by the PIA. This position was confirmed in particular by AW1 who categorically stated that the IAZ acted as the consultant to the PIA on all insurance matters. AW2 also confirmed the close relationship between the two bodies, which counsel for the Appellants have repeatedly referred us to in their submissions which we dealt with in our consideration of Grounds 1, 2, 4 and 5. Counsel said, "*the minimum rates, once recommended by the IAZ and its members, are approved by the PIA for members in the insurance sector to abide by, except that each insurer is at liberty to load its expenses to come up with an economical rate. And that this arrangement could not be held to be collusion and an offence as the regulator is the one who periodically reviews the rates per its mandate re section 5 (1) (j) of the Pensions Scheme Regulation Act*".

184. The rates set by the PIA are minimum limits, while the actual rates ought to be within the determination of each insurer as dictated by their pricing structure. From a competition point of view, if competitors are involved in the setting up of minimum rates, the economic basis upon which the regulator sets the minimum rates loses objectivity. Given that the regulator is the one mandated by law to set the minimum rates (one obvious reason being the safeguarding of the integrity of competition and fair play in the insurance market for the protection of consumers), the only reasonable inference for the Appellants' motivation for taking it upon themselves to increase the rates is their commercial gain, which they would achieve at the expense of proper functioning of normal competition. This is serious, more so that the evidence collected by the Respondent showed that the minimum rates become the actual prices of the insurance policies charged by the insurers, which fact was confirmed by AW2 who stated to the effect that there was a tendency among insurers to default to the minimum limits as their actual prices.

185. The conduct of the Appellants not only ousted the role of the regulator in setting up minimum rates according to its objective evaluations for the protection of the function of healthy competition and fair play for the protection of consumers. The conduct also undermined competitive pricing in the relevant market and substituted it with their own

arbitrary rates which were double the minimum limits statutorily set by the regulator, and which they sought to enforce by making them binding on the insurers. We conclude that in a subtle way, the Appellants by their resolution had the objective of actually fixing mandatory prices of the insurance products in issue, thereby preventing, restricting or distorting competitive pricing. We agree with the position and arguments advanced on behalf of the Appellants that their conduct was aimed at promoting their business interests. True, and applying the objective standard in evaluating the objectives of the Appellants, we find that these objectives were not legitimate in that they amounted to coordinated anti-competitive conduct with the object of preventing or restricting or, at the very least, distorting competition in the relevant market. If indeed the Appellants' interest was to align the minimum rates (which, in any case, they had no authority to do), they would have simply requested the PIA to conduct a review of the rates. In any case, the minimum rates did not constrain the insurers from setting their own pricing individually, dictated by their own pricing structure.

186. We also reject the notion advanced by counsel for the Appellants that since the minimum rates applied compulsorily to all insurers anyway there was no injury to competition that could result from the conduct of the Appellants, and that no penalties existed for failure to comply with the statutory minimum rates, so each insurer was still free to set their own prices. The argument that minimum rates were mandatory and the contradictory position that the insurers did not need to observe them falls far short of illustrating that the sting the resolutions carried as far as competition was concerned was negatived. To the contrary, it is curious that one of the key objectives of the resolutions was to enforce the minimum rates compulsorily on the insurers. The only reasonable inference that can be drawn is that the Appellants in their resolution had as an objective to achieve the compulsory application of the so-called minimum rates, which were arbitrarily set at 100% higher than the statutory rates, in order to secure prices in the relevant market that were not subject to competition, assuring insurers of a gain that was orchestrated at the expense of the consumers of the insurance products, particularly the compulsory third party motor vehicle insurance. As for the argument that the insurers did not need to observe the binding clause of the resolution, we bear in mind that by definition in section 2 of the Competition Act, an agreement need not be legally enforceable, and this is typically the nature of prohibited anti-competitive agreements.

187. We bear in mind that in fact, even if there had been other legitimate objectives, such as the alleged changed economic conditions, the Appellants' conduct would still be caught by section 8 of the Competition Act. In the **European Night Services** (supra), the Court of First Instance stated that there was no need to take account of the economic context in which the undertakings operated where the agreement contained obvious restrictions of competition such as price-fixing and market-sharing. In the **Irish Beef** (supra), the Court had to decide in a preliminary ruling procedure whether the scheme addressing the structural over-capacity of the beef processing market in Ireland was restrictive by object. Under that scheme, the processing capacity would be reduced by 25% through a system limiting the number of suppliers via a financial compensation to those who commit to exit the market. Referring to the test under **Société Technique Minière** (supra), the Court

decided that *"restrictions by object are violations that, by their very nature, are injurious to the proper functioning of normal competition. ...."* It ruled out the possibility to take into account the fact that the scheme put in place in the Irish processing market was aimed at resolving the effects of a crisis in that sector. The Court upheld the principle that an agreement may be restrictive by object even if it does not have the restriction of competition as its sole purpose but also pursues other legitimate objectives.[52] We also outlined this important feature of section 8 anti-competitive conduct in our decision in the MRI case, that is, 'has as its object or effect' does not mean 'solely the object or effect of', but covers situations where one among many of the objects is found to be anti-competitive per the section. In any case, in the present case, we find that in fact no legitimate object existed. We say so because though the Appellants claimed that the rates had not been reviewed for at least ten years, no proof was adduced. To the contrary, AW 1 in his oral evidence stated that there had been reviews in 2013 and 2015. Furthermore, the outcome of the review that the PIA subsequently conducted in 2018 reaffirmed the same rates, with some clarifications of their application which in substance did not change the rates. The 2018 Guidelines are also contained in the document that the PIA produced in response to our Order.

188. We have also considered some other important principles on the subject upheld in some EU cases, many of which counsel on both sides have cited. In the **IAZ International Belgium case** (supra), it was held that a recommendation by an Association of undertakings can amount to a decision if the recommendation exercises any direct or indirect influence on competition. Also that the fact that the recommendation is not binding upon nor has been fully complied with by its members does not exclude it from violating competition law. In the **European Night Services** (supra), the Court of First Instance stated that there was no need to take account of the economic context in which the undertakings operated where the agreement contained obvious restrictions of competition such as price-fixing and market-sharing. That the object of an agreement would still be considered to restrict competition even if the agreement had proved difficult to apply in practice, and that it was no defence that a participant had intended to, or did in fact, cheat on the cartel agreement.

189. While it has not been seriously contested by counsel for the Appellants that a recommendation by an association can constitute an agreement in terms of sections 8 and 9 of the Competition Act, we note that counsel have heavily canvassed that the resolutions were mere recommendations and that they were not approved by the regulator and were not significantly implemented on the market. We have found that although the resolutions were labeled as 'recommendations', the Appellants intended the minimum rates as the *de facto* minimum rates. Therefore, in the true sense there was an agreement fixing the minimum rates. Furthermore, we uphold the principle in competition law that to establish an anti-competitive conduct by object, it is immaterial that it was not put into effect, or as argued in this case, that it was not significantly implemented. The question of sufficiency comes in when evaluating the appreciability of the prevention, restriction or distortion of

[52] This may be comparable to sections 8 and 9 of the Competition Act in cases where a restriction by object is established per section 8, or where a horizontal agreement in any of the classifications per section 9 is establish to exist. It matters not that one or more of its objects may be legitimate.

the competition on the relevant market. We have also taken into consideration the fact that the coordinated conduct of the Appellants having been of such a serious nature (i.e. price fixing), once that object (price fixing) is established, as we have done, it is treated in competition law as a hardcore restrictive agreement, which is automatically an anti-competitive agreement by object. Thus, requiring no further assessments as to concrete effects on the relevant market.[53]

190. In light of the foregoing evaluations, applying the objective standard to the conduct of the Appellants, we conclude that the Appellants planned, discussed, passed the resolutions in issue and put them into effect with the object of preventing, restricting or, at the very least, distorting competition in the relevant market.

Whether the conduct on competition is to an appreciable extent in Zambia.

191. We have already stated many times in this judgment that an agreement that is restrictive by object need not be assessed in terms of its concrete impact on the relevant market, though if it is findings thereof may be taken account if relevant. In this case, only about four of the insurers put the agreement into effect and only for brief periods of time. The question that needs to be answered is simply whether the objective of the resolutions, which constituted the Appellant's agreement, was to prevent, restrict or distort competition in the relevant market to an appreciable extent in Zambia.

192. We observe as a matter of interest that the EU Guidance on restrictions of competition by 'object'for the purpose of defining which agreements may benefit from the De Minimis Notice (that is, **Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 of the Treaty (TFEU (2014))**. The Guidance starts by identifying restrictive agreements which cannot be considered as having an insignificant effect on trade between Member States. In particular, the Guidance identifies hardcore restrictive agreements in the following terms:

> *"The distinction between "restrictions by object" and "restrictions by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.5 Restrictions of competition "by object" are those that by their very nature have the potential to restrict competition. These are restrictions which in the light of the objectives pursued by the Union competition rules have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) of the Treaty to demonstrate any actual or likely anticompetitive effects on the market. This is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU Union competition rules. In order to determine with certainty whether an agreement involves a restriction of competition "by object", regard must, according to the case law of the Court of Justice of the European Union, be had to a number of factors, such as the content of its provisions, its objectives and the economic and legal context of which it forms a part.6 In addition, 1 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the functioning of the European Union (De Minimis Notice*

[53] In our discussions under the subject of relevance of foreign law, we discussed hardcore restrictive agreements and their consequential treatment.

.... For the purposes of this document, the term "agreements" also includes concerted practices and decisions by associations of undertakings. 5 See the judgment of the Court of .... GlaxoSmithKline [2009] ECR I-9291, paragraph 58, Joined Cases 96/82 to 102/82, 104/82, 4 although the parties' intention is not a necessary factor in determining whether an agreement restricts competition "by object", the Commission may nevertheless take this aspect into account in its analysis.7 The types of restrictions that are considered to constitute restrictions "by object" differ .... In the case of agreements between competitors (horizontal agreements), restrictions of competition by object include, in particular, price fixing, output limitation and sharing of markets and customers. As regards agreements between non-competitors (vertical agreements), the category of restrictions by object includes, in particular, fixing (minimum) resale prices and restrictions which limit sales into particular territories or to particular customer groups.8 .... Types of practices that generally constitute restrictions of competition "by object" can be found in the Commission's guidelines, notices and block exemption regulations. These refer to restrictions by object or contain lists of so-called "hardcore" restrictions that describe certain types of restrictions which do not benefit from a block exemption on the basis of the nature of those restrictions and the fact that those restrictions are likely to produce negative effects on the market. Those so called "hardcore" restrictions are generally restrictions "by object" when assessed in an individual case. Agreements containing one or more "by object" or hardcore restrictions cannot benefit from the safe harbour of the De Minimis Notice."

193. However, the above outlined principle developed in the EU competition law, which has found universal application, cannot be applied in evaluating the question of appreciability in section 8 of the Competition Act. This is because the principle has not been incorporated into the provisions of section 8 of the Competition Act or any other relevant provision thereof. An accused person can only be answerable for an offence as stated in the law. We therefore have to use a standard that is clearly applicable to our law, such as market shares, as it was determined by the Respondent in its decision and argued by counsel in their submissions. Market share is one of the alternative methods applied in the EU competition law to determine the question of appreciability. (See for this principle, e.g., statements in paragraph 47 and others of the **Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)**

194. In the case of **Volk v. Vervarke**(supra), the Court of Justice made a judgment on appreciable extent after analyzing the market shares of the parties to the agreement. The Court found that the agreement had insignificant effects on competition because the market shares of the parties to the agreement were very minimal. Going by that reasoning, which we agree with, we observe that all the insurers selling the product of motor vehicle insurance, including the compulsory third party motor vehicle insurance, were parties to the restrictive agreement (resolutions), all of whom were bound by the resolution to implement the minimum rates. Thus, they comprised 100% of the share of the relevant market in the whole country. We therefore firmly conclude, in agreement with the Respondent, that the agreement had the object of affecting competition to an appreciable extent in Zambia in the terms of section 8 of the Competition Act.

Consideration under section 9 (1) (a) - Whether there was a horizontal agreement between the parties

Whether the agreement fixes, directly or indirectly, a purchase or selling price or any other trading conditions

195. We have already in our consideration of section 8 of the Competition Act concluded that the Appellants' agreement had as an object the fixing of minimum premium rates for third party motor vehicle insurance. We reached this conclusion on account of the conduct of the parties and the contents of the minutes of the meeting and the resolutions, which were focused on setting the minimum rates as the *de facto* minimum rates for implementation and thereafter formal adoption by the regulator (PIA). Counsel for the Appellants have argued, inter alia, that the IAZ forum under which the Appellants conducted the meeting could not be a price-fixing mechanism because, allegedly, they were legitimately pursuing the objectives and mandate of the IAZ. Counsel have forcefully argued that the Appellants did not in their conduct intend any anti-competitive object or effect. We have rejected these propositions under our consideration of various grounds of appeal including in our consideration of section 8. The meeting was, by all reasonable evaluations, used as a price-fixing apparatus under which the Appellants directly or indirectly fixed the minimum and *de facto* premiums for third party motor vehicle insurance, which were double the statutory rates and binding on all members. We have also previously stated that by definition in section 2 of the Competition Act, an agreement need not be legally enforceable, and that this is typically the nature of prohibited anti-competitive agreements.

196. Further, under this subhead, we are required to consider whether or not the agreement was a horizontal agreement. Our task is simple because the Competition Act itself defines 'horizontal agreement'. It states, "Horizontal agreement" *"means 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 the market."* The Act also defines 'enterprise' in terms which capture the IAZ and each of its members who were parties to the agreement. There is no dispute about this so we need not go into the actual wording of the definition. It has been established and there is no dispute that the members of the IAZ were operating at the same level as competitors in the provision of the insurance services in issue. The IAZ itself as an association of insurers, though a party to the agreement, was of course not an actual or potential competitor to any of its members.

197. In the Top Gear case (supra), this Tribunal held that the agreement reached by nine garages that were participating in the provision of repair services for insured motor vehicles, that they should charge a certain price, engaged in a price-fixing agreement prohibited by section 9 (1) (a) of the Competition Act. As expected, counsel for the Appellants have sought to distinguish that case from the present case. We do not see the distinction. And we should mention here that, for the avoidance of doubt, there is no requirement in the law that the price fixed should be the actual price; it is sufficient that it is a price (minimum, maximum or otherwise) which is intended to be applied by the parties to the agreement or the competitors for whom it is intended, provided it is established to be anti-competitive. Nonetheless, we must still repeat that the prices in the present case were intended as the actual.

198. We therefore have no difficulty concluding that the agreement in issue was a horizontal agreement that, directly or indirectly, fixed prices of third party motor vehicle insurance policies per section 9 (1) (a) of the Competition Act. Consequently. Grounds 3 and 6 of appeal fail and we proceed to consider Grounds 7 and 8.

199. As the two grounds of appeal relate to penalties under section 58 of the Competition Act, we will outline the section up to subsection (4) so that we do not lose sight of their relationship to each other. The section reads:

> *"58 (1) The Commission may, where a restrictive agreement falls within the scope of sections eight, nine, ten and twelve, give an enterprise such directions, in writing, as the Commission considers appropriate to ensure that the enterprise ceases to be a party to the restrictive agreement.*
>
> *(2) A direction under subsection (1) may, in particular, require an enterprise to terminate or modify the restrictive agreement concerned within such period as may be specified by the Commission.*
>
> *(3) The Commission may, in relation to a restrictive agreement referred to under subsection (1), in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise not exceeding ten percent of that enterprise's annual turnover during the period of the breach of the prohibition up to a maximum period of five years.*
>
> *(4) The Commission shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.*

200. The grounds of appeal are as follows:

(i) *Ground 7: Without prejudice to the grounds of appeal that there were no offences committed by the Appellants, the Appellants will argue on appeal that the Respondent erred in law and fact by applying the maximum annual penalties as if the alleged breach was continuous for the whole calendar year, when in fact, the proposed premium rates were withdrawn after seven (7) days from the date of the resolution and have not been in force thereafter. The method of applying the penalty is not consistent with section 58 (3) of the Competition Act which stipulates that the fine is only to be imposed "during the continuance period of breach". SECTION 58 (3)*

(ii) *Ground 8: The Appellants will argue further in the alternative without prejudice to the foregoing, that the Respondent erred in law and fact when it did not take into consideration the fact that the consultative meeting of 13th December, 2016 was legitimately held and the resolution passed was not in any way negligently or convened intentionally to commit an offence as it was subject to approval by the PIA. Therefore, the imposition of a 10% penalty was inconsistent with the provision of section 58 (4) of the Competition Act which stipulates that the Respondent shall not impose a financial penalty "unless the breach of the prohibition was committed intentionally or negligently."*

(jj) *Counsel for the Appellants' submissions are, in summary, that the fine imposed by the Respondent exceeded the limits of punishment that could have been imposed in terms of section 58 (1) and (3) of the Competition Act.That the penalty cannot exceed 10% of an enterprise's annual turnover during the period of the breach. That only 4 of the appellants revised their minimum premium rates and only for 7 days. That, therefore, the maximum*

fine that could be imposed was 10% of the turnover realised by an enterprise during the period of continuance of the breach. Further, that in terms of subsection (4) of the Competition Act, the Tribunal in the MRI case (supra), held in relation to intention, that "intention to do an act signifies mens rea, a mental state in which one deliberately violates the law... evidence of one's state of mind especially if that person has not shown any manifestation or overt evidence of the person's state of mind. Accordingly, courts will thus, often have to infer subjective, i.e., where the gist of the offense is in the intent, there must also be some act in the direction of such intent."

201. Counsel have argued that the Tribunal in the **MRI case** (supra) held that where a party is transparent, intent cannot be attributed to their conduct, and that in this case the Appellants had been transparent throughout their consultative meeting, the resolution and their desire to obtain approval from the PIA. That, in addition, the Tribunal in the **MRI** case provided guidance when they held in relation to negligence, *"the word 'negligently', as used in section 37 of the Act, connotes objective mens rea... one need not intend to commit a wrongful act, but that act need only fall below objective standards of behaviour, i.e., a wrongful act that falls below objective standards of behaviour will, without regard to the offender's mental state at the time of the commission of that act, be punished. Negligent acts will fall in this category."* Counsel concluded that the Tribunal's holding was to the effect that ignorance of the law is a defence and that the fact that the local counsel in that case did not review the transaction indicated that the parties were not negligent.

202. Counsel further argued that per the Tribunal's holding in the **MRI case**, the Respondent's directive that the commission should conduct a compliance program for the IAZ and its members to raise awareness of the competition and consumer protection law, and that the PIA be engaged to ensure no future competition-related issues arise was a confirmation that the Appellants were not negligent as envisaged by section 58 (4) of the Competition Act. Further, Counsel reiterated that the appellant's conduct was pursuant to the IAZ's legitimate objects of protecting, promoting and advancing the common interests of its members.

203. In conclusion, counsel urged the Tribunal to set aside the fine, maintaining that the Appellants' conduct was neither intentional nor negligent. And that in the event that the Tribunal finds the conduct intentional or negligent, then the penalty be found to be excessive. In this connection, counsel submitted that in the **Top Gear case** (supra), the conduct of the parties was more blatant, yet they were only fined 1% and 0.5% of their annual turnover. And that in the **MRI case** (supra), the penalty was 1% of the turnover. Further, that in the **Top Gear case**, the Tribunal reduced the fine taking into consideration that the parties were first offenders and had not yet implemented the agreement and, thus, had not derived any benefit from it, which Counsel said was the same situation as the Appellants' case.

204. Counsel went on to describe the make-up of an insurance business' turnover, emphasising that penalising an insurance enterprise by imposing 10% on their total turnover unconfined to the products subject of the offense (i.e. inclusive of turnover from other insurance products) would be an injustice. That, moreover, AW4 testified to the fact that in insurance business, insurance premiums do not form part of the turnover as the premium paid is not income earned by the insurer. That the premium is still owned by the

insured party as it is paid to cover any losses they may incur during the course of the year. Counsel cited the Supreme Court in the case of **Madison General Insurance Company Limited versus Avrill Cornhill and Michael Kakoma**, SCZ Appeal No. 19/2017. That the point was reiterated by AW2's testimony that the turnover of an insurance company is only calculated once the premium is actually earned. Counsel, therefore, urged us that in the event that we uphold the decision of the Respondent, the penalty should take this fact into consideration.

205. The Respondent in response argued that penalties in relation to section 8 of the Competition Act can only be imposed under section 58 of the Act and referred us to subsections (1) and (3) of section 58. Counsel further submitted that in relation to section 9 (1) (a), the Respondent imposed a fine per subsection (3) of the same section and not under section 58. Counsel further argued that in relation to section 58 (3), the Respondent is mandated to impose a fine not exceeding 10% of the enterprise's annual turnover during the period of the breach of the prohibition, up to a maximum of 5 years. That this means the Respondent should take into account the period within which the anti-competitive conduct occurred, so that if, for instance, it occurred for 3 years, then the Respondent is mandated to impose a fine of not more than 10% of the enterprise's annual turnover for each of the 3 years. Counsel further submitted that the breach was committed on 13th December 2016, and that the fine imposed was 10% of an enterprise's annual turnover. And that the period that was being investigated was 2016. And that it is immaterial if the breach lasted for only 7 days, or that parties did not implement the agreement.

206. In respect of Ground 8, counsel for the Respondent reiterated their argument under Ground 2 that the object of the meeting was found to be an increase in the minimum premium, and that the Respondent further argued under Ground 4 that there were disciplinary repercussions that were attached to the agreement for failure to comply. And, therefore, that the Appellants conduct showed some action in the direction of intent.

207. In reply, counsel for the Appellants reiterated the same arguments that they had already advanced in their earlier submissions, which it is not necessary to repeat.

208. We have given consideration to the issues raised and counsel's submissions. We note that section 58 was designed to provide remedies to address a range of anti-competitive offences falling under various sections of Part III of the Competition Act. These are sections 8, 9, 10 and 12. Of these, sections 8 and 12 do not have penalties falling specifically under their provisions. Section 58 is tailored to avail the regulator a range of options in enforcement of the law against anti-competitive conduct, some of which is treated with severity universally, e.g. hardcore restrictive agreements. Thus, the conjunctive 'and' between the sections outlined in subsection (1) can be interpreted cumulatively or disjunctively depending on if the case under consideration falls under a single section or a combination of the sections. Thus the use of the words *"where the agreement falls within the scope of sections"*. Furthermore, holding the word 'and' as referring to a cumulative combination would result in an absurdity, for example, in that two of the sections already have some penalties of their own. These considerations, lead to our conclusion that the conjunctive word 'and' is in reference to any or a combination of the sections. The learned authors of MAXWELL ON THE INTERPRETATION OF STATUTES

make the point that *"In ordinary usage, 'and' is conjunctive and 'or' is disjunctive. But to carry out the intention of the legislature it may be necessary to read 'and' in the place of the conjunction 'or' and vice versa"*.

209. Therefore, we have come to the conclusion that whereas the remedies provided in section 58 (1) (2) and (3) may be applied to a violation of a prohibition under section 8 or 12, occurring separately, the same remedies may be applied to violations in combination of two or more of offences under the specified sections. We have not seen or heard any dispute about this point, but we make the clarification in aid of setting the context of our evaluations and conclusions and for future guidance.

210. In light of the obvious legislative intention to met out punishment for serious anti-competitive conduct, some of which is prohibited *per se*, it would be absurd to hold that the legislative intention of subsection (3) was to impose a fine limited to 10% of an enterprise's annual turnover prorated to the actual period or number of days for which the commission of the offence continued (which in most cases of cartel conduct can only be known by the offender). Such an interpretation would make these serious offences to carry the lightest of all fines under the Competition Act, thereby defeating the legislative intention and making a mockery of the law.

211. We believe that no enterprise would seriously believe that such an interpretation was intended by the legislature. Our view is fortified by the language of the subsection, which does not state, *"annual turnover for the period of the breach"*, but *"annual turnover during the period of the breach"*. We therefore agree with the Respondent that at the very least the fine, based on the annual turnover up to 10% limit, is flat (i.e. simply a percentage of the (latest) annual turnover of the enterprise concerned, as for other offences in the Competition Act. In cases where it is established that the offence(s) continued for prolonged periods of time, the regulator may levy a fine as a percentage of the annual turnover for each of the affected years up to a limit of five years.

212. In respect of subsection (4), as we have previously stated in our consideration of the terms "intentional or negligent", in the **MRI case** (supra), and the **Rumpuns case** (supra) prior to that, the test is subjective in respect of 'intentional' and 'objective' in respect of negligence. The difference in the standards in our conclusions is that there is an implied ingredient of objective *mens rea* in the offences already, as we have earlier discussed in this judgment, and that is why this provision seeks to distinguish those offences committed unintentionally. Otherwise, if we held this intention to be determined according to the objective standard, we would have to infer strict liability for the offences, which we do not believe was the intention of the legislature. Negligence is not implied in the offences; therefore, in subsection (4), it falls to be considered on the objective standard. In any case, in practice, the difference between the two standards is blurred because of the overt act or outward act often present and used to establish the subjective intention of an offender as we earlier stated in our discussion of 'agreement' under section 8 of the Competition Act.

213. We need to make it clear that we did not in any of those two cases hold that an offender is held not to have committed the offence intentionally or negligently if they were ignorant of the law or their conduct showed that they were unaware of the law or unaware that they were committing the offence. It is clear even from the texts counsel for the

Appellants quoted that in the **Rumpuns case** on which we relied in the **MRI** case to determine the issue of intention or negligence, the test we used is subjective and objective respectively (that is, in the case of intention, some overt or outward act in the direction of that intent and in the case of negligence, the test is that of a reasonable man (or woman)). In the case of negligence we held that ignorance of the law does not in itself make alleged conduct unintentional or not negligent. We said, citing authorities:

> *"intention to do an act signifies mens rea, a mental state in which one deliberately violates the law... evidence of one's state of mind especially if that person has not shown any manifestation or overt evidence of the person's state of mind. Accordingly, courts will thus, often have to infer subjective, i.e., where the gist of the offense is in the intent, there must also be some act in the direction of such intent."*
>
> *"the word 'negligently', as used in section 37 of the Act, connotes objective mens rea... one need not intend to commit a wrongful act, but that act need only fall below objective standards of behaviour, i.e., a wrongful act that falls below objective standards of behaviour will, without regard to the offender's mental state at the time of the commission of that act, be punished. Negligent acts will fall in this category."*

214. The context of our holding in the **Rumpuns case** (supra), which was the basis for our holding in the subsequent case of **MRI**, makes clear that we held that counsel was not negligent because the law (i.e. section 24 of the Competition Act) left out the transaction in issue in the definition of "merger", which transaction we then read into the text using the purposive approach. We reasoned that the legislature could not reasonably be held to have intended to exclude the transaction in issue. Taking this into account, we then concluded the parties' conduct of publicly announcing the transaction was a confirmation of its being unaware of the law in fact. We held the view that the Appellants did not have a guilty mind when committing the offence (which we had just read into the law, anyway). We applied the principle that a person can only be charged for an offence which the law makes clear.

215. In fact, under the EU law, the two terms are not necessarily considered separately when evaluating cases for imposition of fines. Furthermore, the subjective standard applied is based on what would be reasonably expected of a reasonable person in the circumstances, not a blanket cheque for reckless conduct. A typical evaluation is illustrated in the case of **Schenker & Co.**[54]:

> *"The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition if it is satisfied that the infringement has been committed intentionally or negligently.183 The CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.184*
>
> *The CAT has defined the terms 'intentionally' and 'negligently' as follows: '...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'.185 6.13.*

[54] ECJ 18 June 2013, C-681/11.

This is consistent with the approach taken by the CJEU which has confirmed: 'the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty.' 186 6.14.

The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.187 Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.188 182 ...'...the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could be unaware of the anticompetitive nature of that conduct'; and paragraph 41: 'It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine'. See also Enforcement (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10. 56 6.15.

....

In any case, at the very least, the CMA finds that each of the Parties ought to have known that the Head Lease Pricing Restriction was capable of harming competition, such that at a minimum, they committed the Infringement negligently. The CMA notes, for example, the following:

(a) As set out in paragraphs 5.24, it is well established that price restrictions are regarded as serious infringements of competition law.

(b) ....

(c) ....

(d) ....

(e) ....

(f) .... However, the CMA considers that it would not be feasible for the relevant personnel including legal advisers involved in the email exchanges to have only been aware of the holiday parking aspect of Clause 22 and not the pricing aspects of Clause 22. 57

(g) There was awareness across the sector that restricting pricing of car parking services was anti-competitive. ....

The CMA therefore finds that the Parties committed the Infringement intentionally or, at the very least, negligently."

216. Following the reasoning in the above outlined EU competition law principles, which we find to be sound, we hold the view that the Appellants committed the offences intentionally or at the very least negligently. We reach this conclusion on the basis of the blatant conduct they displayed, which we have variously outlined in this judgment. We also take into account the fact that the offences are very serious, and that enterprises

conducting business of insurers, or any other business for that matter, ought to be held to have known that their conduct was in violation of the law. It is no excuse if in fact they did not know the law, or if they were misled by their traditional dealings and interactions with the PIA. They must be held responsible for their presumptuous or recklessness behavior. Neither can it be an excuse that they had an objective of aligning the minimum insurance rates to prevailing economic conditions, which we have rejected anyway.

217. Competition law has been in existence in the country since 1994 and the Pension Scheme Regulation (Amendment) Act 27 of 2005 introduced a specific requirement for the PIA to formulate and implement measures to ensure healthy competition and the elimination of unfair practices in the insurance sector. We expect that all players in the sector ought to be aware of the law and at the very least to steer away from any pitfalls. To the contrary, the Appellants, especially the IAZ which should provide expertise on all aspects of insurance business in Zambia to its members, conducted themselves in such a manner as to seriously undermine the proper function of normal competition at the expense of consumers. And, according to their confession, these practices went on for years.

218. No evidence was adduced by the Appellants to illustrate possible effects of the fines on their businesses. The Respondent has also not availed us any specific information on how they arrived at the maximum penalty, apart from the seriousness of the offence. We are aware of are the general guidelines, in particular that offences related to cartel conduct, which the conduct in issue is, attract higher fines.

219. However, in spite of the gravity of the Appellants' conduct and the need for penalties to deter possible future violations by the same offenders or others, we note that the Appellants are first offenders in that they have not previously been found in violation of the offences in issue. Therefore, we are inclined to accept the Appellants' plea that they ought not to have been fined the maximum rate. We therefore redirect the matter to the Respondent to apply some leniency and reduce the fine, while bearing in mind the Respondent's Guidelines on Fines applicable at the time of imposition of the fines, which is 28th August 2018, the date of the Respondent's decision. This is in spite of the fact that the offences occurred in 2016, as rules or regulations or guidelines pertaining to sentencing or imposition of fines are procedural and therefore can be applied retrospectively.

220. On the issue of what should constitute the turnover, the term "turnover" is defined in the Competition Act. We are not privy to how the Respondent applied the penalty provision. Nonetheless we must state that the submissions by counsel for the Appellants relate to business accounting matters to which international standards and best practices should apply. The Respondent has the technical competence to deal with legitimate issues that may be raised in the computation of the fine. In any case, the Appellants did not adduce any accounts to illustrate their claim. We therefore decline to entertain the argument.

221. In conclusion, grounds 7 and 8 succeed partially, that is, only in respect of the issue of leniency in the imposition of the fine for which we have redirected the decision back to the Respondent. We now proceed to consider Ground 9. The ground of appeal states, *"The Appellants will further argue that Respondent erred in law and in fact when it fined IAZ 10% of its*

annual turnover as it failed to recognize and distinguish IAZ as the secretariat in line with its statutory mandate in section 134 (1) of the Insurance Act, which is separate from its members. IAZ does not make guidelines nor decisions for its members but merely communicates the resolutions and decisions made by its members to the PIA."

222. In respect of Ground 9, counsel for the Appellants argued that the IAZ though an entity is recognized in terms of section 134 (1) of the Insurance Act which requires compulsory membership of every insurer, and that it therefore derives its mandate from the statute and has its functions set out in its Constitution and is not engaged in the provision of any commercial activities. Counsel referred to section 58 (3) concerning the imposition of a fine and argued that it applies to an 'enterprise' which is defined in section 2 of the Competition Act as *"a firm, partnership, joint-venture, corporation, company, association, and juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly controlled by them;"*

223. That though being an enterprise according to this definition, the IAZ does not of itself engage in commercial activity; that it is merely a secretariat through which members of the Association communicate resolutions and decisions of the members themselves to the regulator. That the IAZ does not of itself make any decisions, being an entity through which the common interests of the members are advanced. That therefore it was not in order for the Respondent to fail to distinguish between the members of the IAZ and the IAZ itself and to fail to take into account the mandate and functions of the Association. That therefore it was an error to impose a financial penalty of 10% of the IAZ's annual turnover as if the Association is engaged in the business of providing insurance services. That counsel urged the Tribunal to set aside the fine on account of a misdirection in law.

224. Counsel for the Respondent stated that they dealt with this ground of appeal together with Ground 6, in respect of which we have already outlined their submissions.

225. We have given serious consideration to the issues raised in this ground of appeal. While it is absurd for associations not engaged in economic activity to escape penalties, especially that there are tendencies for these forums being used as covers for undertakings violating competition law, the letter of the law as it stands has no provision for imposition of fines on such associations. Apart from the fact that the definition of "enterprise" is restricted to entities engaged in economic activity, and that fines are based on turnover, the definition of "turnover' is couched in the standard description found in the commercial world, i.e. *"the latest audited gross sales of an enterprise."* The Respondent did not address the issue and come up with a finding whether the IAZ was in fact engaged in economic activity, in which case if found in the affirmative the penalty provision would apply. We have looked at the Constitution of the IAZ. Clause 36, Part IV states that:

(i) *The funds of the Association shall consist of such monies as may from time to time be subscribed by members and shall not include any interest thereto and any investments from the funds.*

(ii) ....

(iii) *The Board may invest the funds in a manner determined by the Board.*

226. In the case of the EU competition law, associations are fined flat sums *"since the associations do not have a turnover"*.[55] In the Schenker case, it was held *"Legal framework For the purposes of the Chapter I prohibition, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.120 An entity is engaged in 'economic activity' where it conducts any activity '... of an industrial or commercial nature by offering goods and services on the market ...'.121 The term 'undertaking' designates an economic unit, even if in law that unit consists of several natural or legal persons."* So, it appears it is universally recognized that enterprises that are not engaged in economic activity are fined, though on other basis, not turnover since it is not applicable. This is a matter that requires amendment to the law, in our view. Accordingly, we set aside the fine in respect of the IAZ.

227. In consequence, the decision of the Respondent is upheld save for the following which we order:

(a) the fine in respect of the IAZ is set aside; and

(b) the fine imposed on the 15 insurers is referred back to the Respondent for reduction, in line with the direction earlier outlined in this judgment.

228. In view of the outcome, each party shall bear their respective costs.

Delivered at Lusaka this 16th April 2021.

Mrs. Eness C. Chiyenge - Chairperson

Mrs. Miyoba B. Muzumbwe-Katongo - Vice Chairperson

Mr. Buchisa Mwalongo - Member

[55] See "The Global Competition Law Centre Working Papers Series GCLC Working Paper 03/05 The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments", page 6, Note 21.