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November 30, 2009

Via E-mail and Express Mail

European Commission
Directorate-General for Competition
Antitrust Registry
Ref.: HT.1221 – stakeholder input
1049 Bruxelles/Brussel
BELGIQUE/BELGIE

Dear Director General Lowe:

On behalf of the American Bar Association Section of Antitrust Law, I am pleased to submit the attached comments to the European Commission in response to its request for comments on the revised draft Block Exemption Regulation for Insurance Sector.

Please note that these views are being presented only on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Ilene K. Gotts
Chair, Section of Antitrust Law

Attachment

30 November 2009

EUROPEAN COMMISSION DRAFT REGULATION ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY TO CERTAIN CATEGORIES OF AGREEMENTS, DECISIONS AND CONCERTED PRACTICES IN THE INSURANCE SECTOR

The Section of Antitrust Law (the "Antitrust Section") of the American Bar Association ("ABA") appreciates this opportunity to present its views on the European Commission's draft regulation continuing, with modifications, a block exemption to the application of Article 81(1) to certain agreements, decisions and concerted practices in the insurance sector. Although the Antitrust Section generally opposes exempting particular industries from the application of U.S. antitrust laws, the Section recognizes that the analysis that informs choices for block exemption from Section 81(1) is designed to identify and cover clearly procompetitive conduct and is therefore desirable under the unique features of European Community ("EC") competition law and enforcement procedure. The Antitrust Section believes the existing block exemption regulation has served a useful purpose in the special circumstances of EC competition law and enforcement procedures and commends the Commission for proposing modifications that narrow the scope of the exemption.

These views are presented only on behalf of the Antitrust Section of the ABA. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

REPORT OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION CONCERNING EUROPEAN COMMISSION DRAFT REGULATION ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY TO CERTAIN CATEGORIES OF AGREEMENTS, DECISIONS, AND CONCERTED PRACTICES IN THE INSURANCE SECTOR

These views are presented only on behalf of the Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA"). They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

SUMMARY

The Commission of the European Community (the "Commission) is considering a new regulation (the "Proposed Regulation") continuing, with modifications, a block exemption that declares Article 81(1) of the European Community Treaty (the "Treaty") inapplicable to certain agreements entered into between two or more undertakings in the insurance sector. The Antitrust Section endorses the Proposed Regulation for the reasons and subject to the qualifications set forth in detail below.

With respect to United States antitrust law, the Antitrust Section generally disfavors exempting particular practices of a specific industry from the law's prohibitions absent a rigorous examination that weighs the claimed benefits of exemption against the clear costs of sacrificing competition goals. The Antitrust Section recognizes, however, that unique aspects of the European Community's competition law and enforcement procedures provide the desired rigorous examination and balancing of benefits and costs and therefore make block exemptions desirable. This is especially true because block exemptions in the European Community ("EC") codify safe harbors for non-anticompetitive conduct, rather than remove anticompetitive conduct from the reach of the competition laws. Moreover, to the extent the proposed revisions refine the existing block exemption, further limiting its scope to clearly procompetitive conduct, the Antitrust Section endorses the direction the Commission is taking through enactment of the Proposed Regulation.

BACKGROUND

Regulation (EEC) No. 1534/91 empowers the Commission to apply Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. On 27 February 2003, the Commission adopted Regulation 358/2003 (the "Existing Regulation"), identifying specific agreements, decisions and concerted practices as falling within Article 81(3). The Existing Regulation expires on 31 March 2010.

On 24 March 2009, the Commission adopted and published a report (the "Commission's Report") outlining the Commission's view that two of the four categories of agreements exempted by the Existing Regulation (standard policy conditions and security devices) should not be continued in any new regulation, and that the other two categories of agreements exempted by the Existing Regulation (joint calculations, tables and studies, and co(re)insurance

pools) should be continued.

Since the publication of the Commission's Report earlier this year, the Commission has initiated a public consultation period regarding its review of the competition rules applicable to agreements in the insurance sector. The public consultation period expires on 30 November 2009 and covers all issues dealt with by the Proposed Regulation. These comments are submitted in connection with this public consultation.

DISCUSSION

The Antitrust Section's Policy on Industry-Specific Exemptions from United States Antitrust Laws

The Antitrust Section consistently opposes industry-specific exemptions to the United States antitrust laws.[1] One of the major advantages of the United States antitrust laws is their flexibility. Concerted activities are illegal only if they are "unreasonably restrictive of competitive conditions."[2] With very few exceptions, the United States courts determine when an alleged restraint is unreasonably restrictive of competition by applying the "rule of reason."[3] Under this standard, a United States court will evaluate the impact of a challenged agreement upon competitive conditions in the industry, weighing the anticompetitive harms against the procompetitive benefits of an arrangement.[4] The analysis involves an extended inquiry into the competitive effects of the conduct at issue, and affords firms ample opportunity to demonstrate that their activities do not unreasonably restrain competition.

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[1] *See, e.g.*, Reports of the Antitrust Section on the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1997, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1997, and the Major League Baseball Antitrust Reform Act of 1995 (all available at http://www.abanet.org/antitrust). Other, similar reports on analogous legislation are also available through inquiry to the Antitrust Section. These reports include the Reports of the Antitrust Section on the Malt Beverage Interbrand Competition Act of 1985, the proposed modification of McCarran-Ferguson Act in 1989, and the Petroleum Pricing Legislation of 1992.

[2] *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

[3] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). A very limited set of restraints are treated as "per se" unlawful – that is, unlawful without regard to their effects. *See, e.g., Palmer v. BRG, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). Price fixing is a classic example of a per se unlawful activity, but even price fixing may be lawful where it is undertaken pursuant to a joint venture or other arrangement that involves efficiency-enhancing integration or brings a new product to market that would not otherwise exist. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5-6 (2006); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 18-21 (1979) (issuance of blanket licenses to perform copyrighted musical compositions was not illegal price fixing because negotiating terms of individual copyright licenses would be so difficult as to be cost-prohibitive). Similarly, boycotts – another often mentioned example of per se unlawful conduct – are not actually subject to per se condemnation unless the parties to the boycott possess market power or unique access to a business element necessary for effective competition. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293-98 (1985).

[4] *See Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and purpose or end sought to be attained, are all relevant facts.").

Despite this flexibility in United States antitrust laws, industries frequently appeal to legislators for broad exemptions or immunities from those laws in an effort to protect the industry from competitive pressures. Experience has demonstrated that awarding an exemption without a rigorous assessment and weighing of countervailing claimed benefits and anticompetitive effects can not only reduce consumer welfare, but frequently fails to help the industry that is seeking the protection. As noted in the Report and Recommendations of the U.S. Antitrust Modernization Commission, "the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare."[6] In contrast, antitrust exemptions and immunities in the United States "typically benefit only relatively small interest groups" and "can impose significant costs, which must be weighed against any benefits of an exemption."[7]

<u>The Antitrust Section's Recommendation as to the Insurance Sector Block Exemption</u>

The Antitrust Section recognizes that the EC's laws and procedures for regulating competition differ from those in the United States. Most notably, EC regulations declare agreements in restraint of trade to be void unless they satisfy the conditions of Article 81(3). EC law does not employ the U.S.'s "rule of reason" weighing of pro-competitive and anticompetitive effects as such. Nevertheless, EC law requires satisfaction of the four conditions of Article 81(3) to exempt an agreement or practice that is caught by Article 81(1), and this is essentially a process whereby the economic benefits of an agreement can be demonstrated by structured analysis to outweigh its anticompetitive effects.

Given this regulatory framework, the Antitrust Section recognizes that industry block exemptions, which are designed and implemented to codify safe harbors for demonstrably non-anticompetitive conduct, serve a useful function in the EC context. The Antitrust Section recognizes that EC rules require that care be taken to assure that such exemptions cover only demonstrably procompetitive activities in the particular industry sector. The initial block exemption for the insurance industry, Regulation 3932/92, appears to have achieved this objective.

Indeed, the initial regulation was generally in harmony with the ABA's position on the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (2000), which exempts the business of insurance from certain United States antitrust laws. In 1989, the ABA advocated repeal of the McCarran-Ferguson Act, to be replaced with certain statutory "safe harbors" for defined cooperative activities.[8]

The current Chair of the Antitrust Section, Ilene Gotts, recently submitted written

[5] With respect to the insurance industry, for example, Congress passed the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000), in 1945, at a time when the industry was highly concentrated. The industry became less concentrated over time, but the exemption and regulation persisted.

[6] Antitrust Modernization Commission, Report and Recommendations at 334 (2007). A copy of the report and recommendations may be found at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[7] *Id.*

[8] Testimony of James I. Serota before the Senate Committee on the Judiciary, April 18, 1989.

testimony to and appeared before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Courts and Competition Policy, re-affirming the ABA's position on the McCarran-Ferguson Act.[9] On October 21, 2009, the House Committee on the Judiciary adopted to a great extent the safe-harbor concept recommended by ABA,[10] which the Antitrust Section maintains is the most beneficial approach to the McCarran-Ferguson Act.

The Antitrust Section's non-exclusive list of protected "safe harbor" cooperative activities includes:

- Cooperative collection and dissemination of past loss-experience data,
- Cooperative development of standardized policy forms, and
- Joint ventures to underwrite risks too large for a single insurer to underwrite.

These "safe harbors" appear to closely parallel many of the original block exemption categories in Regulation 3932/92.

The Existing Regulation maintained Regulation 3932/92's block exemption categories, with modifications that fine tuned them. Accordingly, the Antitrust Section in 2002 endorsed adoption of the Existing Regulation.

The Antitrust Section now offers the following specific comments with respect to the public consultation on the Proposed Regulation, which would eliminate two of the four categories of agreements exempted in the Existing Regulation.

Joint Calculations, Tables, and Studies (Article 1(a)-(b) and Chapter II of the Existing Regulation)

The Commission's Report recommends the continuation of these provisions of the Existing Regulation, although no decision has been made yet whether the exemption will be continued in full or in part.

The Antitrust Section favors continuation of the exemption in Article 1(a)-(b) of the Existing Regulation and the related provisions in Chapter II of the Existing Regulation. Because most individual participants in the insurance sector are unable to generate adequate loss data from their own business, pooling of data is an essential insurance function. The Antitrust Section believes the continued exemption for the joint calculation of indicative pure premiums (defined as the average cost of covering specified risks in the past) is appropriate. Article 3 of the Existing Regulation outlines the conditions for this exemption, and Article 4 of the Existing Regulation prohibits agreements to adhere to any joint calculations. The Antitrust Section believes that Articles 3 and 4 of Chapter II ensure that the joint calculation of indicative pure premiums will not facilitate anticompetitive conduct and would favor the continuation of these portions of the Existing Regulation in the Proposed Regulation.

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[9] The Chair's written testimony may be found at http://judiciary.house.gov/hearings/pdf/Gotts091008.pdf.

[10] The proposed bill (H.R. 3596) was voted out of committee and may now be put up for a vote before the full House of Representatives.

On the other hand, collaborative calculation of the costs of insuring future risks ("risk premium") poses an inherent risk of anticompetitive conduct with respect to pricing of insurance coverage. The Antitrust Section believes that the Proposed Regulation should not include any exemption for the joint calculation of risk premiums. As explained in the ABA's position on the McCarran-Ferguson Act, the cooperative projection of loss experience into the future may, under certain circumstances, interfere with competitive pricing. If the joint calculation of risk premiums is not included in the block exemption, then any joint calculations of future risk that are indeed procompetitive may be still exempted from infringement of Article 81(1) if the provisions of Article 81(3) are satisfied.

Standard Policy Conditions and Models (Article 1(c)-(d) and Chapter III of the Existing Regulation)

The Commission's Report does not recommend the continuation of these provisions of the Existing Regulation.

To the extent the exemption in Article 1(c)-(d) and the related provisions in Chapter III of the Existing Regulation are viewed as part of a "safe harbor" for the cooperative development of standardized policy forms to simplify consumer understanding, enhance price competition, and support data collection efforts, the Antitrust Section favors the continuation of Article 1(c)-(d) and Chapter III. As explained above, the ABA's position with respect to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (2000), which exempts the business of insurance from certain United States antitrust laws, favors repeal of the Act and replacement with certain statutory "safe harbors" for certain activities, one of which is the cooperative development of standardized policy forms. As noted in paragraph 32 of the Commission's Report, the Existing Regulation "can be seen as a safe harbour" if its conditions are fulfilled. Standard policy forms can allow insurance consumers to accurately and more easily compare products from different companies. In addition, a decision not to extend this block exemption may create too much uncertainty in the insurance industry and firms may show reluctance to participate in procompetitive collaborations to avoid the risk of expensive litigation.

Common Coverage of Certain Types of Risks (Article 1(e) and Chapter IV of the Existing Regulation)

The Commission's Report recommends the continuation of these provisions of the Existing Regulation, although no decision has been made yet whether the exemption will be continued in full or in part.

The Antitrust Section favors continuation of the exemption in Article 1(e) and the related provision in Chapter IV of the Existing Regulation. The Antitrust Section in 2002 endorsed the addition of certain provisions to the Existing Regulation that became part of Article 8 in Chapter IV. The Antitrust Section believes that the provisions in Article 8 reinforce straightforward principles of competition law and ensure that insurers cannot impose anticompetitive restraints as conditions of participating in a procompetitive co-insurance arrangement.

Security Devices (Article 1(f) and Chapter V of the Existing Regulation)

The Commission's Report does not recommend the continuation of these provisions of

the Existing Regulation.

The Antitrust Section favors elimination of the exemption in Article 1(f) and Chapter V of the Existing Regulation. As noted in the Commission's Report, "agreements in relation to security devices do not appear to be specific to the insurance sector." They also do not appear to fit within the ABA's position with respect to the creation of certain "safe harbors" for the insurance sector.

CONCLUSION

The Antitrust Section endorses, for the reasons and subject to the qualifications stated above, the Proposed Regulation continuing and modifying the Existing Regulation (Regulation 358/2003), the block exemption for certain insurance sector agreements, decisions, and concerted practices. The Proposed Regulation aims at promoting efficiency and consumer welfare by removing potentially chilling legal doubt from well-defined, procompetitive industry behavior. The Antitrust Section commends the Commission for modifying the existing block exemption regulation to further narrow the exemption and more sharply define the activities that fall within its scope.

We thank the Commission for the opportunity to submit comments as part of its public consultation.