

**European Commission - DG Competition, Consultation paper on BER n. 358 dated February 27 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.**

**Comments by ANIA, the Italian Insurance Association.**

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ANIA, the National Association of Insurance Companies, is a voluntary and non-profit making association structured at national level, which has its head-office in via della Frezza, n. 70, 00186 – Rome, Italy.

We wish to remind you that we are a registered Association and our identification number in the Register of Interest is: **4756340957-20**

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The present draft contains ANIA's remarks with reference to the draft Regulation under public consultation until November 30th. With this document ANIA aims at providing considerations on the main problems regarding interpretation and application raised these last years by the BER in order to reach a common position of European insurers within the CEA.

1. Art. 2 of the draft Regulation is entitled “Joint **Compilation**, Tables and studies”. Vice versa, Regulation n. 358/2003 in force, deals with “Joint **Calculation**, Tables and studies”. It is not easy to understand the reasons for the modification introduced.

In fact, it is obvious that, if emphasis were to be given to the new wording introduced in the text, it would be necessary to think of a system where the insurers' Association would just collect data and present them in an aggregate way available for everybody, without carrying out any calculation relative to pure premiums, thus leaving the users of these data to carry out the calculation by themselves.

The illogic feature and the cost of such a system lead us to think that it is just **a simple linguistic disparity** between the draft under consultation and the Regulation in force which should be eliminated during the final drawing-up of the new Regulation.

2. Art. 3, paragraph 2, litt. e), of the draft Regulation establishes that “*except where non-disclosure is justified on grounds of public security, are made available on reasonable, affordable and non-discriminatory terms, to any interested third party such as consumer organisations which requests a copy of them*”.

The Commission should better clarify the meaning of the sentence “...*except where non-disclosure is justified on grounds of public security*...”. ANIA believes that the text could refer to cases where the diffusion of data could trigger mass discriminating behaviours with respect to a certain type/category of risk.

3. As for the modifications in the draft Regulation under consultation relative to co-insurance and co-reinsurance pools, it is observed that:

- we positively evaluate the new definition of “new risk” ex art. 1, paragraph 6, whose extension was clarified and increased compared to the past.
  1. In fact, the draft Regulation under consultation clarifies **that “new risks”** are also those which either did not previously exist or have objectively changed compared to the past thus causing new demand of insurance among final consumers.
  2. While confirming what already established by present Regulation n. 358/2003 in force, the draft Regulation under consultation envisages the possibility to set up a pool for “new risks”, without considering any limit for growth for a limited period of three years.
- The definition of “co-insurance pool” (art. 1, paragraph 4) and that of “co-reinsurance pool” (art. 1, paragraph 5) apparently lead us to think – in a not completely clear way as to arrangements and consequences – that **the single co-insurance or co-reinsurance agreement for the coverage of a single business does not benefit from the exemption unlike what established for a (co-insurance or co-reinsurance) pool set up for the coverage of an indefinite number of risks.**

Besides the difficulty to understand the definitions, all this apparently implies that the single co-insurance agreement is treated in a more restrictive way than a pool.

The consequences arising from the approach proposed by the new Regulation could lead to the following:

1. concerning the risks covered by co-insurance or co-reinsurance pools, in compliance with the Regulation’s limits and conditions, there would not be any problem under the profile of competition, as art. 81, paragraph 1, of the EU Treaty would not be violated;
2. concerning the risks presently covered by *ad hoc* co-insurance (or co-reinsurance) agreements, it would be necessary to make assessments case by case, by checking if such agreements fulfil the above-mentioned conditions provided for by the Regulation.

Vice versa, in the past, the EU Commission, in several official documents, has always affirmed that the single *ad hoc* business written in co-insurance (or in co-reinsurance) did not fall within the scope of art. 81, paragraph 1, of the EU Treaty **as it did not show any problem under the competition point of view.** It is for this reason that both previous Block Exemption Regulation n. 3932/1992 and present Regulation n. 358/2003 in force have never taken into consideration the single *ad hoc* agreement among the cases to be examined under art. 81, paragraph 3, of the EU Treaty.

La bozza di Regolamento in pubblica consultazione elaborata dalla Commissione, inoltre, sembra essere ispirata from a model which is tailored on the specific operating features of certain EU countries. However, as for Italy, the situation is quite different. The role of brokers is absolutely not developed, above all concerning retail customers, who turn to agents of insurance companies much more often. Therefore, the Commission’s model does not seem to be practicable and risks penalizing the operating tool of co-insurance for the coverage of a single risk which companies can currently use for the coverage of risks of any nature and importance.

Considering this last procedure setting up coinsurance (the one set up by a Broker) as the only one complying with antitrust rules seems to be completely inadequate and penalizing for customers themselves, **as its higher efficiency is absolutely not proven under the competition profile.**

In fact, coinsurance directly set up by the leading company – which turns out to be the most traditional system in some markets - can be profitable for customers.

Besides eliminating the brokers' mediation costs, the leading company's direct management offers clear advantages as to facilitating good relationships with customers not only during contract stipulation but also, and above all, during claim settlement.

This stage of the coinsurance contract – which places the leading company in a central position compared to the service performed – is characterised by specific procedures which are internal to the coinsurance companies and which make the relationship with the customer more direct and easy, to the clear and exclusive advantage of the customer. Moreover, the most important element relative to the price of the service for the customer is its overall amount and not its fragmentation into the different shares of risk distributed to the various coinsurers.

Very often, customers prefer this solution. In fact, this type of cover is mainly applied by *business* customers who have relationships of trust and preference with insurance companies (who often globally cover the risks of the company) and such customers are absolutely able to make an aware choice between different kinds of service like the one offered by a broker or to evaluate competing offers coming from different pools of coinsurers.

What above stated leads us to think that it is neither logical or sustainable at an economic and juridical level to discriminate a procedure setting up coinsurance with respect to another one. In any competitive market, it is not wise to limit access typologies to a certain service (in this case, the possibility to stipulate a coinsurance contract) for customers, so as to maintain the *level playing field* with respect to similar situations, thus running the risk of creating dominant positions with time (or even exclusiveness position) by certain parties (for ex., in this case, brokers).

Therefore, it would be better to leave customers to make their aware choices among different operating models without preferring one instead of another under the antitrust profile.

In conclusion, ANIA deems as adequate for the Commission to reconsider their position expressed in the draft Regulation under consultation by confirming, as happened in the past, that the single *ad hoc* coinsurance agreement does not fall within the scope of art. 81 of the EU Treaty, as it does not raise any issue under the competition profile.

- The new draft Regulation establishes that the limits for growth of a co-insurance or co-reinsurance pool (20% and 25% of the product market respectively) are measured by calculating **not only the market share held by the companies participating through the pool but also the one held by the companies themselves, regardless of the pool.**

Therefore, the text proposed seems to take a step backwards compared to the Regulation in force, coming back to a wording partly similar to the one inserted in art. 11 of Regulation n. 3932/1992 which established that – for ordinary risks – the calculation of the pool share **had to consider also the market share acquired** by each participant by itself **outside the pool**. For the so-called aggravated or catastrophe risks, however, art. 11, paragraph 2, stated that “*By way of derogation from paragraph 1, the respective percentages of 10 and 15 % apply only to the insurance products brought into the group, to the exclusion of identical or similar products underwritten by the participating companies or on their behalf and which are not brought into the group, where this group covers catastrophe risks where the claims are both rare and large, aggravated risks which involve a higher probability of claims because of the characteristics of the risk insured*”.

Calculation criteria like the one proposed in the draft Regulation under consultation considering the business collected inside and outside the pool implies that those companies holding important market shares and owning the specific know-how relative to the risk covered will not

be able to access the pool (or will be forced to leave it, in case the limits foreseen are exceeded) thus depriving the other companies of their experience.

Therefore, we propose to return to the wording of present Regulation n. 358/2003 or, otherwise, to a provision similar to the one which can be found in former Regulation n. 3932/1992, allowing the calculation of shares to consider the risks assumed inside and outside the pool for ordinary risks only.

**4.** As for the entry into force of the new provisions, considering the fact that the draft Regulation under consultation has substantially reduced the extension of the exemption, we propose to introduce an adequate transitional period of adaptation, for example three years, for the agreements and the practices provided for by the text of the Regulation currently in force.

Roma, 26 novembre 2009/PN