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## Public consultation on the draft new insurance block exemption regulation (BER)

Assuralia is the representative body for mutual, co-operative and joint-stock insurance companies in Belgium since 1920. We represent more than 98% of the Belgian market.

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### I. Key Messages

1. The European insurance industry, the European Economic and Social Committee<sup>1</sup>, the Supervisory Authorities<sup>2</sup> and the European Parliament<sup>3</sup> are calling on the Commission to prolong Regulation n° 358/2003 (BER) beyond 2010.
2. We welcome the response of the Commission to prolong the BER for agreements on joint compilations, tables and studies as well as agreements on pools after 31<sup>st</sup> March 2010. It shows commitment to safeguard market co-operation that is beneficial for both consumers and insurers.
3. The Commission proposes not to prolong the exemption for standard policy conditions (SPCs) and security devices (SDs). It announces to provide guidelines with regard to the application of horizontal competition

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<sup>1</sup> Opinion of the European Economic and Social Committee on the Proposal for a directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance SOLVENCY II COM(2007) 361 final – 2007/0143 (COD).

<sup>2</sup> Speech by Thomas Steffen, CEIOPS at the Public Hearing with regard to the EU Commission Business Insurance Sector Inquiry, 9 February 2007.

<sup>3</sup> European Parliament, Resolution of 5 June 2008 on the Green Paper on retail financial services in the Single Market (2007/2287(INI)).

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rules instead. The content of these guidelines is very much unknown. We would be happy to provide input on the practical consequences of any draft guidelines.

4. The Commission's Report states that some of the presently exempted forms of co-operation with regard to SPCs and SDs may even give rise to concerns in relation to both competition and the development of the EU's internal market.<sup>4</sup>
5. These circumstances demand for a transitional period. Insurance companies must be able to adapt if the Commission would be changing its approach with regard to agreements that were soundly set up in tempore non suspecto. The new BER would therefore need an article stating that "*the prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 April [2010] to 31 March [2011] in respect of agreements already in force on 31 March [2010] which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EEC) No 358/2003*".<sup>5</sup>

## II. Specific issues

6. There are a number of specific remarks with regard to
  - a. The definition of co-insurance pools
  - b. The definition of new risk
  - c. The disclosure of compilations, tables and studies to third parties
  - d. The calculation of market share

### **a) Definition of co-insurance pools (art. 1, nrs. 4 and 5 new BER)**

7. Contrary to the present BER, the new article 1, nrs. 4 and 5 explicitly excludes "*ad-hoc co-insurance arrangements on the subscription market whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover the remainder*".
8. According to the 1999 Report to the European Parliament and the Council, ad hoc groups covering a specific risk do not cause any concern with regard to competition. The Commission concluded that they therefore do not need an exemption from the BER, in contrast with institutionalized coinsurance groups. Although their added value is clear, the latter were seen as possibly hampering competition and therefore in need of an exemption.<sup>6</sup>

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<sup>4</sup> Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EC) No 358/2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, COM(2009) 138 final, nr. 29.

<sup>5</sup> The text corresponds with the article 11 of the present BER.

<sup>6</sup> Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EC) No 3932/92 of 21 December 1992 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, COM(1999) 192 final, nrs 25 and 26.

9. We trust that the exclusion of ad hoc arrangements from the scope of the new BER is inspired by the same logic: ad hoc co-insurance agreements are out of the scope because they are considered to be harmless, while institutionalized co-insurance agreements with clear added value are protected although they may be hampering competition to some extent.
10. We recall that the added value of ad hoc co-insurance contracts for consumers and the insurance industry is clear. Ad hoc co-insurance contracts enable the insurance industry to offer more and better solutions to business clients' demands because they build financial capacity and spread risk. This has been repeated by the Federation of European Risk Management Associations (FERMA) during the Public Hearing, which represents the consumers' interest in this debate.

**b) Definition of new risk (art. 1, 6, ii new BER)**

11. The new expanded definition of 'new risk' is superior to the existing definition (art. 1 new BER). The nature and dimension of a number of existing risks can change so fundamentally that they do represent new risks to insurance companies. We have seen examples with regard to terrorism and natural catastrophes.
12. The text of article 1, 6, ii) new BER could be improved by deleting the following words: "~~*in exceptional cases,*~~ risks whose nature has, on the basis of an objective analysis, changed so materially that it is impossible to know in advance what subscription capacity is necessary in order to cover such a risk".
13. The words "*in exceptional cases*" are superfluous and add to the complexity of the text. The BER is an exemption from a general rule (article 81 EC Treaty) and its provisions can therefore not be interpreted too broadly already. The different elements of the definition itself prevent any potentially too broad use of the exemption also.

**c) Disclosure of compilations, tables and studies (art. 3, nr. 2, e) new BER)**

14. We do not support the mandatory disclosure of joint compilations, tables and studies to third parties introduced in art. 3, 2, e) new BER. Disclosure of aggregated risk data to third parties (e.g. for academic research) is not connected with the application of EU cartel law (art. 81 EC Treaty) nor does it help consumers.
15. A more refined approach to disclosure is justified. Insurance companies invest considerable means and manpower in making these compilations, tables and studies. Mandatory disclosure to third parties would allow competitors on the insurance market, such as pension funds, to benefit from the efforts of the insurance industry without having to contribute or to apply the same level of transparency. A fair approach would e.g. allow insurers to harvest the results of their work before other parties (timing) and would permit associations to frame the use of these data by third parties on the basis of reasonable terms.

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16. We see added value in the public security exception for access to results of information exchanged, for example with regard to nuclear risks, terrorism and the risk of soldiers sent abroad. There is ground to add other justifications for non-disclosure as well. We refer first of all to the protection of other fundamental rights and freedoms (e.g. studies used in the context of court cases). Secondly, it goes without saying that associations must not be forced to respond to unreasonable requests (e.g. formulated too generally or referring to work that is not yet completed and verified).

**d) Calculation of market share (art. 6, nr. 2 new BER)**

17. The present BER takes into account the insurance products underwritten within the pool by the participating undertakings or on their behalf. The turnovers achieved by the participating companies outside the co(re)insurance pool in the relevant market are not taken into account. For very good reasons, this is different from other competition rules on the assessment of horizontal cooperation.

18. The *raison d'être* of co-(re)insurance pools is to offer insurance cover for risks that an individual insurance company would be reluctant to insure, because of their magnitude or because the underwriting process or claims handling would be too costly (e.g. highly specialized technical expertise that is required in niche markets).

19. The Commission proposes to include the market share of pool-members outside of the pool. With market share ceilings of only 20% and 25%, this would drive most insurance companies with large or even medium market shares out of the existing insurance pools. It is especially true for markets with a relatively high level of concentration (e.g. Belgium).

20. This makes no sense. Insurance pools count on large and medium sized companies for their financial capacity and risk experience, specifically because of their size (i.e. market share). If large and medium sized companies cannot participate in pools any longer, much of the added value of insurance pools for business clients will disappear. This is why FERMA explicitly requested the Commission at the Public Hearing not to overhaul the present method of market share calculation.

21. For these reasons, we urge the Commission to delete the words "and outside" from article 6, nr 2 of the new BER: "*As concerns co-insurance or co-reinsurance pools which do not fall within the scope of the first paragraph, the exemption (...) shall apply (...) on condition that the aggregate market share held by the participating undertakings inside ~~and outside~~ a pool does not exceed: (...)*". An alternative would be to drastically increase the proposed market share ceilings.