

Review of competition rules applicable to agreements in the insurance sector

Response to DG Competition public consultation on draft new insurance block exemption regulation

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1 Introduction

- 1.1 Norton Rose Group welcomes the opportunity to provide comments on the draft new insurance block exemption regulation (**draft IBER**) presented on 5 October 2009.
- 1.2 Norton Rose Group is an international legal practice, with offices in major business and financial centres in Europe, Asia and the Middle East. Our insurance practice marries together expertise from a range of specialist areas including corporate finance, regulatory and competition, pensions, tax and litigation. We have gained sector-specific knowledge of the insurance industry in advising clients in their interactions with the European Commission (**Commission**), National Authorities and Courts. However, this submission represents the position of Norton Rose Group and not any particular client.

2 General Observations

- 2.1 We understand that, in light of its proposal not to renew the block exemption for agreements relating to standard policy terms and conditions and security devices, the Commission intends to publish separate guidelines on the application of Article 81 EC in this area. Such guidance is to be welcomed, as would any guidance on the application of the block exemption itself, something the Commission has in the past suggested it would prepare. Such guidelines are, we consider, necessary since the only other guidance on the Commission's view of how competition law applies to the industry is contained in the sector inquiry report and our feeling is that the Commission's views have evolved since then. For example, what is the Commission's view on pools where one large insurer (which takes the pool over the market share threshold) is involved with a number of smaller ones?
- 2.2 In relation to the draft IBER, we have three main comments:
- It is unclear what the intention is behind allowing access to jointly compiled data to "interested third parties". The obligation goes beyond anything required under general principles of competition law for a legitimate information exchange. Moreover, there are currently no checks and balances on the ability of third parties to request such information.
 - It is unclear why the language of the draft IBER has been amended to refer to "joint compilations" rather than "joint calculations". The use of a different term appears unnecessary and, furthermore, introduces an element of uncertainty to the IBER.
 - There seems to us no justification for the exclusion of ad hoc subscription arrangements from the scope of the IBER. In our view, they give rise to the same efficiencies as pools and should, therefore, be able to benefit from the IBER, subject to members meeting the same market share thresholds and subject to an additional condition that premiums should not be aligned upwards once a lead insurer has been selected. The eligibility for

an individual exemption, based on individual self-assessment, does not seem to address this issue appropriately.

3 Joint compilations, tables and studies

3.1 Obligation to allow access to interested third parties

- 3.1.1 We welcome the Commission's recognition of the value of collaboration among insurance undertakings to compile information allowing the calculation of the average cost of covering a specific risk and to have joint studies assessing the likely impact of an extraneous event on the frequency or scale of claims. In the absence of such co-operation, it is likely that there would be substantial barriers to entry, in particular for small and medium sized companies. However, we are concerned that under the terms of the draft IBER, the exemption will only apply on the condition that access to joint compilations, tables and studies is made available to interested third parties outside the insurance industry, such as consumer organisations, large customers and academics.
- 3.1.2 This condition goes far beyond the case law of the European Courts on legitimate information sharing, which requires only that information be accessible to all undertakings active in the relevant sphere.¹ As undertakings in the insurance industry will have access to joint calculations, tables and studies under the draft IBER, it is not clear to us what type of harm to competition this new requirement is intended to address. In our view, opening up access to this type of information to third parties outside the industry imposes an unnecessary burden on insurance undertakings and we believe that there is a real risk that it may be abused.
- 3.1.3 We suggest that the Commission remove this condition or, at the very least, consider amending the current provision so that third parties (other than insurance undertakings) are required to provide a reasonable justification for all requests for information, without which such requests may be refused. The requirement to justify why access to the data should be granted may also assist insurance companies in determining what terms are "reasonable, affordable and non-discriminatory" in that context - concepts that are, at best, difficult to apply in practice to bodies that are not intending to use the data for commercial purposes. In addition, such organisations must be obliged to treat the data as confidential and we assume that an obligation to preserve confidentiality will always be considered "reasonable".

3.2 Amendment of term to "joint compilations tables and studies"

- 3.2.1 Under the draft IBER, the block exemption will no longer apply to agreements concerning the joint calculation of risk. We understand this to mean that, in future, insurers will not be able to calculate jointly the average cost of covering a specified risk but must limit their collaboration to the sharing of data which would allow such a risk to be calculated. There is no indication in the draft text or in the "*Report and Working Document on the functioning of the Insurance Block Exemption*"² why the Commission intends to reduce the scope of application of the IBER in this way.
- 3.2.2 The calculation of risk from a data set is a mechanical exercise involving the extrapolation of data, meaning that insurance companies working from shared compilations are likely to reach identical results. Recital 10 of the draft IBER recognises that there is no direct link between the results of compilations, tables and studies (i.e. calculations) and the commercial premiums charged by insurance companies. As the Commission is aware, commercial premiums are not purely mathematical, but reflect a number of factors, including an individual insurance company's own philosophy of risk, portfolio balance and cost of capital. There is no suggestion in any of the working documents produced by the Commission on the functioning of the IBER that the sharing of joint calculations of risk is detrimental to competition in the insurance sector.

¹ Case C-238/05, Asnef-Equifax 23 November 2006.

² European Commission, "Report and Working Document on the Functioning of the Insurance Block Exemption Regulation" published on 24 March 2009 and available under http://ec.europa.eu/competition/sectors/financial_services/insurance_ber_working_document.pdf

The logic of excluding co-operation among insurance companies in relation to joint calculations of risk is therefore not immediately clear and introduces an element of uncertainty to the application of the block exemption. The line between compilation and calculation is not always a clear one in practice. In our view this change is unnecessarily restrictive and will not result in any obvious benefits.

4 Common coverage of certain types of risk - “pools”

4.1 Ad hoc arrangements on the subscription market

- 4.1.1 Ad hoc insurance arrangements on the subscription market (**ad hoc arrangements**) are not included in the current IBER because at the time it was drafted the Commission did not believe such arrangements restricted competition. However, during the sector inquiry into business insurance, the Commission found evidence that ad hoc arrangements on the subscription market usually involved premium alignment.³ In the Staff Working Document to accompany the Final Report, the Commission altered its rationale for not including ad hoc arrangements in the block exemption, stating that the IBER should only exempt certain ex-ante standing arrangements set up to cover specific categories of risk.⁴
- 4.1.2 While we recognise the concern that the subscription market may lead to premium alignment, we note that - since publication of the sector inquiry report - the insurance industry has worked together with the Commission to address this concern, developing a set of *‘High level principles for placement of a risk with multiple insurers’* in 2008.⁵ This has been welcomed by the Commission - recognising the efficiencies and consumer benefits that the subscription market can create - and provides useful guidance to the industry.
- 4.1.3 We are therefore not convinced by the logic of distinguishing ad hoc arrangements and institutional pools for the purposes of the draft IBER on the basis of whether the “pooling arrangement” is established to cover risk ex ante or ex post. The Commission has recognised that ad hoc arrangements can generate efficiencies which would justify an exemption under Article 81(3) EC in the same way as pools. In our view, there is no justification for not extending the benefit of the draft IBER to ad hoc arrangements where the market share thresholds that apply to pools are met. This would cover, for example, the situation where a lead insurer invites following insurers to cover a risk on the same terms and premiums as it has negotiated with the insured. We suggest that the draft IBER be amended to extend the safe harbour of the block exemption to include ad hoc arrangements subject to a condition that agreements on premium should not be aligned upwards following selection of a lead insurer.

³ Commission Communication on the Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance (Final Report) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0556:FIN:EN:PDF>

⁴ Commission Staff Working Document accompanying the Sector Inquiry under Article 17 of Regulation (EC) 1/2003 on business insurance (Final Report) available at http://ec.europa.eu/competition/sectors/financial_services/inquiries/final_report_annex.pdf at page 36.

⁵ BIPAR, High Level principles for the placement of a risk with multiple insurers, available at <http://www.biba.org.uk/PDFfiles/BIPARHighLevelPrinciples.pdf>