



RESPONSE TO THE EUROPEAN COMMISSION'S REVISED GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS

EXECUTIVE SUMMARY

1. Whilst the Association of British Insurers (ABI) does not support the Commission approach to apply horizontal guidelines to the areas that were not renewed under the new Insurance Block Exemption Regulation (BER), we welcome the opportunity to comment on the draft horizontal guidelines of the applicability to horizontal co-operation agreements namely standard terms and standardisation agreements.
2. Insurer cooperation on the establishment on standard terms allows for legal clarity and efficiency when dealing with many clients and when considering extending into cross border business. The requirement in proposed guidelines to involve consumer bodies in the process raises many questions around how this is carried out and who is involved. The ABI believes that the conditions already contained in the guidelines regarding transparency and effective access provide suitable and sufficient safeguards for consumers without requiring further consumer involvement in the establishment of the terms.
3. The ABI believes that the current cooperation between to establish non-binding standards regarding security devices and safety equipment allows insurers to manage their risks along with protecting property and life. The additional requirements in the guidelines that cooperation must result in keeping insurance premiums low and that voting rights be apportioned to installers working on the standards, are not founded. These requirements only serve to slow down development and implementation of the standards and possibly lower quality specifications, to the detriment of the consumer.
4. A new requirement for assessment of information exchange in the guidelines, outside the scope of the BER, is of concern to the ABI. This section makes sweeping assertions that transparency in the market can facilitate collusion. This is not the case. No information on individual company pricing is collected by the ABI members, further no aggregated data published by the ABI provides insurers with information on the commercial strategy of any other insurer.
5. As the guidelines are currently drafted, the ABI has concerns about the clarity of the drafting and the applicability to assess cooperation under Article 101 Treaty of the Functioning of the European Union. Further the guidelines place extra and unjustified restrictions on insurer cooperation with no explanation of what the consumer benefit would be.

INTRODUCTION

6. The Association of British Insurers (ABI) is the voice of the insurance and investment industry. Its members constitute over 90 per cent of the insurance market in the UK and 20 per cent across the EU. They control assets equivalent to a quarter of the UK's capital. They are the risk managers of the UK's economy and society. Through the ABI their voice is heard in Government and in public debate on insurance, savings, and investment matters. And through the ABI they come together to improve customers' experience of the industry, to raise standards of corporate governance in British business and to protect the public against crime. The ABI prides itself on thinking for tomorrow, providing solutions to policy challenges based on the industry's analysis and understanding of the risks we all face.
7. The ABI's registration number on the European Commission's Register of Interest Representatives is: **730137075-36**
8. As stated in previous submissions¹, the ABI has not supported the approach to develop guidelines or guidance for the areas that were not renewed under the new Insurance Block Exemption Regulation (BER), specifically standard terms and standardisation agreements. We do not view these alternatives as legally adequate or certain and are concerned that this resulting uncertainty would discourage insurers from continuing to cooperate in these areas. Instead, we have always maintained a preference for self assessment under Article 101(3) of the Treaty of the Functioning of the European Union (Treaty) as we are confident that insurers' activities comply with this provision and there is no need for additional commentary.
9. However, as the Commission wishes to provide further guidance, the ABI welcomes the opportunity to comment on the draft horizontal guidelines of the applicability to horizontal co-operation agreements namely standard terms and standardisation agreements. As the guidelines are currently written, the ABI has concerns about the clarity of drafting and the ability of them to provide sufficient direction to assess the compatibility of cooperation under Article 101 of the Treaty. Further, the guidelines place extra restrictions on insurer cooperation that have not previously existed, with no indication of what the consumer benefit of these approaches would be.

STANDARD TERMS

10. The ABI welcomed the Commissions previous acknowledgments² that standard terms give rise to positive effects for competition in the market and for consumers. Where underwriters are dealing with many clients and with short timeframes, the availability of these is essential for legal clarity and efficiency. Further, where insurers are seeking to enter a new market, the existence of standard terms and policy wordings allow companies without the relevant legal drafting expertise and knowledge of a market's specific context, to adopt the policy wordings that are appropriate to the conditions of that market. This is of great benefit in circumstances

¹ ABI Response to European Commission report on the functioning of 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 – June 2009 and ABI Response to the Draft BER on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector – November 2009

² European Commission report on the functioning of 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 – March 2009

where EU policy is actively to encourage the integration of a single market in sectors such as financial services.

11. However, the decision made not to renew this form of cooperation under the BER was due to the Commission believing that the use of standard terms were not unique to the insurance industry, especially when compared to use of standard terms in the banking sector, which do not require a legislative framework (BER) in order to set these conditions. The ABI has always argued differently, that the provision of insurance is different to banking as it covers a guarantee for future and uncertain risks with unknown timeframes for potential claims.
12. The draft guidelines on standard terms present a number of concerns for the industry, including questions regarding the new requirement to involve a consumer body in the process of setting the terms. The inclusion of such a condition is not explained nor justified by the Commission. The ABI strongly believes that conditions contained in the draft guidelines regarding transparency, effective access, and the requirements that the standard terms are non-binding and allow for comparisons between policies offered by different insurers, provide sufficient and thorough safeguards.
13. Further, it is important to note cooperation in this field is mainly a feature of the wholesale market in the UK. Standard terms provide building blocks for bespoke contracts on complex risks. Retail insurers prefer to use their own wording in standard contracts. Therefore the requirement to involve consumer bodies in the process of establishing standard terms for mainly wholesale risks, raises many questions; namely what consumer body/bodies should be invited and involved in the process? If the consumer body/bodies do not want to be involved in the process, how is this dealt with, is evidence required from the body to justify their lack of involvement and does this impact on the legality of the terms developed? With these uncertainties, insurers would be obliged to take additional advice involving further costs in time, fees and administration and this advice would need to be renewed on a regular basis to ensure compliance. We would ask that this requirement was removed from the guidelines.
14. The statement that involving a consumer association in the process could *'increase the likelihood of efficiencies being passed onto consumers'* is unfounded. The establishment of the standard terms provides efficiency gains for customers, for instance increased comparability and enable switching between insurance companies. The involvement of a consumer association in the process of establishing these standard terms would not increased these efficiencies that already exist under the current method of establishing standard terms.

STANDARDISATION SETTING

15. Co-operation between insurers and other parties regarding security devices and safety equipment enables insurers to better evaluate the risks they cover. This form of voluntary cooperation is beneficial in providing a benchmark to insurers when assessing the extent of the risk they are asked to cover, which depends in part on the quality of security equipment and of its installation and maintenance. Therefore the ABI is pleased with the Commission's recognition in the draft Guidelines that *'standardisation agreements generally have a positive economic effect....and increase competition and lower output and sales costs, benefiting economies as a*

whole.’³ Further we also support the Commission’s previous acknowledgement⁴ that both the insured and insurer have a mutuality of interests in this area.

16. Insurers’ work in this area is aimed at saving lives, protecting property, and to help consumers to reduce their exposure to the risk covered. It is motivated by the characteristic, unique to the insurance industry, of asymmetry of information, where the person or business insuring a property knows much more about it than the insurer. Industry-led agreements on the quality and installation of security devices go some way towards reducing that asymmetry of information, and lead to safer properties.
17. In the UK, cooperation between insurers regarding security devices and safety equipment is conducted on a voluntary basis within the framework of the RISC Authority. This work extends to most fields of security applications including those such as theft and unrelated to damage caused by fire. The Fire Protection Association (FPA), the UK’s national safety fire organisation, provides the administration services and additional technical resource for the RISC Authority scheme. RISC Authority guidelines are not compulsory and cannot be imposed on any of its members or non-members. They are drafted in such a way to allow for new products and new manufacturers to meet the standards, as they do not prescribe specific makes or patented designs. Insurers are free to accept devices and installation arrangements that meet their requirements, but do not have to follow published specifications. The RISC Authority is structured into six working groups that deal with the production of technical guidelines.⁵
18. The ABI is concerned about the new conditions that have been set out in the draft guidelines and has the following concerns contained in example 4 and the additional criteria insurers must meet, including:

The standards aim to assist insurers to manage risk....and keep insurance premiums low’

19. As discussed in paragraph 16, industry-led guidelines produced on the quality of security equipment, installation and maintenance, help to preserve lives and property. They also help to give insurers greater confidence in the security of the insured property, and a greater shared understanding of the risks involved. This is of benefit to consumers making it easier for them to switch insurer, in the knowledge that they are unlikely to incur the expense of changing their security devices. It is not correct to assume or require that cooperation in this area is to keep insurance premiums low. We suggest that this requirement is removed from the draft Guidelines.

‘The insurers have brought the specific need for such standards to the attention of the relevant EU standards body’

20. The ABI understands the need for the relevant EU standards body to be made aware of the need for new standards and the plans the RISC Authority has. What is not

³ Paragraph 258, Page 68 draft Guidelines

⁴ European Commission report on the functioning of 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 – March 2009

⁵ These guidelines are freely available on the RISC Authority website.

certain is how this notice would work in practice. Would the RISC Authority meeting with the relevant standards body, notify them in writing, email them? Further, how does this requirement fit with the conditions set down in Article 101(3) of the Treaty? Currently representatives of the RISC Authority have an active role in proposing and drafting harmonised standards at CEN, and have done so since the process started in 1990. Some of the harmonised standards can be traced back to standards the predecessor insurance organisation to RISC Authority, developed. RISC Authority believes that their involvement at CEN is sufficient to meet the criteria when developing new standards.

'The standards are discussed with the majority of installers...and their views are taking on board prior to the finalisation of the standards'

21. This new requirement to discuss the standards with the 'majority' of installers is currently adhered to and carried out in the UK. The RISC Authority process is both open and transparent, invitations are extended to all installers and comments and input is requested from external stakeholder groups including the police and manufacturer/supplier representatives and other external consultants. For example there is a RISC Authority Active group, which is tasked with producing updated and new standards for the Automatic Sprinkler Rules. Whilst this is mainly for insurers, invitations are extended to BAFSA who represent the sprinkler installers, and manufacturers, plus the operators of third party schemes, which exist to protect the interest of customers. These bodies directly participate in the production of these standards during the drafting process leading to publication.
22. We have major concerns regarding the new requirement for formal voting rights to be attributed in an objective and non-discriminatory manner to all parties and believe this to be an excessive requirement. This would be difficult to implement and may lead to work which is clearly not beneficial to insurers and consumers alike. Further the aim of this additional requirement is not being pursued because of ambiguity in interpretation of the guidelines themselves. This requirement was not included in the previous BER and will only lead to delays and implementation of standards and possibly lower quality specifications, all to the detriment of consumers.
23. The majority of RISC Authority work involves producing recommendations on processes or generic procedures such as fire safety or security management where there are no clear identifiable industry groups available to consult. It should be further noted that insurer's objectives in establishing such codes or standards may differ to those of the installers, manufacturers or other parties consulted as part of the process. Whilst insurers aim for standards to preserve life and property and to assist consumers in switching between insurance providers, installers and manufacturers have a business objective to meet; ie: selling their goods, where price is frequently the major differentiating feature and this could lead to a possible conflict of interest when agreeing to the standards.

INFORMATION EXCHANGE

24. The inclusion in the draft Guidelines of a section on the assessment of information exchange, outside the scope of the BER, is of concern the ABI. This section asserts that the collection and publication of data by insurance associations with an aim to improving market transparency could be used by insurers to become aware of market strategies of their competitors thus restricting competition in the market. In particular paragraphs 73 & 74 that state *'transparency can facilitate collusion by*

enabling companies to reach a common understanding on the terms of coordination,' are extremely worrying for the ABI and its members.

25. The ABI has a large statistics and research team that work on collecting a wide range of data from members.⁶ No information on individual company pricing is collected from members and it is impossible to deduce from the data collected and published, the premiums charged, the commercial strategy utilised or any other business related information. There are several purposes for this collected data but mainly it is used to calculate industry-aggregated statistics (no individual company is identifiable from this) in order to provide companies with a better understanding of where they are situated in the market. It is also used by small and medium enterprises to enter the market and gain a better understanding of how the market works. This data is also used to support lobbying and support a particular point of view for example studies on flooding, insuring older drivers and person injury claims.

CONCLUSION

26. The ABI welcomed the opportunity to comment on the draft horizontal guidelines on the applicability to horizontal co-operation agreements namely standard terms and standardisation agreements. The Association of British Insurers does not support the Commission approach to apply horizontal guidelines to the areas not renewed under the Block Exemption Regulation.
27. As the guidelines are currently drafted, the ABI has outlined concerns about the clarity of the drafting and the applicability to assess cooperation under Article 101 Treaty of the Functioning of the European Union. Further, the guidelines place extra and unjustified restrictions on insurer cooperation with no explanation of what the consumer benefit would be.

ABI
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⁶ Further evidence was provide on this issue in the June 2009 response to the European Commission's request Exchanges of Information for the Purposes of Joint Calculations, Tables and Studies – Questions B- G.