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DG COMPETITION CONSULTATION PAPER

Concerning the review of 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

The views expressed in this document are purely those of Directorate General for Competition at the time of writing and may not in any circumstances be regarded as stating an official position of the European Commission

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I. INTRODUCTION

1. Commission Regulation (EC) No 358/2003¹, the Insurance Block Exemption Regulation (the BER) applies Article 81(3) of the EC Treaty (the Treaty) to certain categories of agreements, decisions and concerted practices in the insurance sector. The European Commission (the Commission) is required, not later than six years after the entry into force² of the BER to submit a report (the Report) to the European Parliament and Council on the functioning of the BER.³
2. The BER will expire by default on 31 March 2010. The intention of the Commission during 2008 is to review the functioning of the BER on the basis of this Consultation Paper as well as targeted questionnaires which will be sent to certain stakeholders. This review will be carried out in co-operation with the ECN. The Commission will then produce the Report together with any proposals for amendment to the BER, by March 2009.
3. Since 1 May 2004, like every other sector, the insurance sector has been subject to the generally applicable provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 (Regulation 1/2003) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Regulation 1/2003 provides that agreements that satisfy the conditions of Article 81(3) are not prohibited, no prior decision to that effect being required. Undertakings and associations must now assess for themselves whether their agreements⁴ are compatible with Article 81 of the Treaty. Only a few sectors currently benefit from a sector specific BER. There have been other sectors for which the relevant BER was not renewed.⁵ The question now arises as to whether there are sufficient grounds to continue to declare by regulation Article 81(3) applicable to certain categories of agreements in the insurance sector. In this respect it is relevant that during the Commission's recent Sector Inquiry into Business Insurance ('the Sector Inquiry')⁶, although the scope was narrower than that of the BER (as it only concerned business insurance) - the Commission received a considerable number of comments on the BER. The Commission concluded that the evidence received suggested that the practices covered by the BER are in most cases unproblematic or even desirable in the market. However, it also noted that this was not by itself a compelling reason to renew the BER, which may also cover some practices which distort competition. A conclusion on this matter was not reached as it was outside the scope of the Sector Inquiry Report. However, the Final Report encouraged market participants to continue their reflection, in advance of the current review, focusing more on the necessity of the legal instrument of the BER itself than on the necessity of the specific forms of cooperation covered by the BER.

¹ Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (Official Journal L 53, 28.02.2003).

² Commission Regulation (EC) No 358/2003 entered into force on 1 April 2003.

³ This requirement was laid down in Article 8 of Council Regulation (EC) No 1534/91 (the Implementing Regulation) empowering the Commission to adopt a block exemption regulation in the insurance sector.

⁴ Wherever the term "agreements" is used in this document, it shall mean agreements, decisions and concerted practices.

⁵ Recent repeal of Council Regulation (EEC) No 4056/86 laying down detailed rules for the Application of Articles 85 and 86 [now named Articles 81 and 82] of the Treaty to maritime transport; and the expiry of Commission Regulation (EC) No 1459/2006 on the application of Article 81(3) to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports.

⁶ On 13 June 2005, the Commission initiated a sector inquiry into the provision of insurance products and services to businesses in the Community, based on article 17 of Council Regulation (EC) No 1/2003. See the Final Report of 25 September 2007 (The Communication from the Commission and The Commission Staff Working Document): http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/business.html

4. The BER applies only in relation to the specific categories of agreements mentioned in the BER and under the conditions set out in the BER. In that context it is important to note (though overlooked by many respondents to the Commission during the Sector Inquiry⁷) that even if a new BER is not adopted, this does not necessarily mean that agreements previously falling under the BER become illegal. An assessment under Article 81(1) and, if applicable, under Article 81(3) rather than under the BER would be required. At the moment, in each case a legal assessment must also be undertaken in order for undertakings to determine whether the forms of cooperation in which they participate fulfil the conditions imposed by the BER.
5. The purpose of this Consultation Paper is primarily information seeking but it also updates and where appropriate summarises the Commission's experience and that of National Competition Authorities (NCAs) with the BER in order to facilitate the primary purpose. It first generally sets out the comments which the Commission received in relation to the BER on the Sector Inquiry. It then goes on to review each exemption under the BER individually setting out the comments from the Sector Inquiry, the comments received from a recent initial consultation of NCAs on the functioning of the BER as well as the Commission's current considerations and case experience in relation to the BER. Finally it asks a number of questions, both in relation to each exemption category and generally.
6. It would be very useful for the Commission to receive replies, substantiated with evidence, to the questions asked throughout this consultation paper from across the EU and all categories of stakeholders. The questions asked in this paper will also assist the Commission in preparing an Impact Assessment during the review process. Replies must be received by no later than **17 July 2008**.

II. SUMMARY OF THE COMMENTS RECEIVED DURING THE BUSINESS INSURANCE SECTOR INQUIRY

7. The Sector Inquiry had a different scope to this review of the BER: first, it concerned only the provision of insurance products and services to businesses in the Community; and second, it was aimed at 'better understanding the functioning of the insurance sector with a view to ultimately identifying any concrete restrictive practices or distortions of competition' whereas the current exercise aims at reviewing the functioning of the BER.
8. Amongst other issues, the Sector Inquiry examined the question of the use of the BER and market participants were invited to express their views on the necessity of the BER. The Interim Report was published on 24 January 2007, with a public invitation to comment on its findings including the application of the BER⁸. The Commission obtained 44 replies from insurance companies, brokers, insurers associations, NCAs, most of which⁹ have been published on the DG Competition's website¹⁰.
9. In their responses, industry stakeholders generally considered that the forms of cooperation and agreements exempted by the BER are pro-competitive and the majority were in favour of renewing the BER.
10. The main arguments put forward by respondents to the public consultation in the Sector Inquiry were:

⁷ As noted in the Final Report, almost all replies failed to make a distinction between the necessity of the forms of cooperation covered by the BER, and the necessity of the BER itself. The primary initial objective of the BER was to exclude certain generic types of agreement from the ambit of Article 81(1) and limit the BER to those agreements for which it can be assumed with sufficient certainty, satisfy the conditions of Article 81(3) - thereby obviating the need for separate and time-consuming individual exemptions (see page 77 of the Final Report and the preamble to the BER).

⁸ See Section XI.3 of the Interim Report.

⁹ With the exception of those labelled confidential in their entirety or for which no non-confidential version was provided.

¹⁰ http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/replies_interim_report/index.html

- 10.1. Legal certainty is required as to the antitrust status of a given practice, in the sense that the BER has a clarifying character as an exemption *ipso jure*.
- 10.2. Costs deriving from the alleged additional administrative burden caused by assessing the legal compliance costs would ultimately be passed on to policyholders, which would trigger an increase in insurance premiums.
- 10.3. Fears were also expressed that without the BER, competition rules would be applied inconsistently across the 27 Member States of the EU.
- 10.4. Market participants also insisted that the variations in the use of the BER across Member States do not mean that the BER is no longer useful. They explained that differences in the use of the BER may originate from different legislation (high number of compulsory insurance policies in some Member States) or from the fact that Member States' insurance markets are at different stages of development (e.g. countries in central and eastern Europe have recently developed from monopolies to competitive markets). Some respondents interpreted the diverging use of the BER as a sign of competition, claiming that the BER is used most in Member States that are mature and highly competitive.
- 10.5. The forms of cooperation allowed under the BER effectively facilitate market entry for insurers with insufficient expertise. If there is better knowledge and accessible risk information, the argument is that this leads to more entry to the market (in particular by insurers with insufficient scale/historical expertise).
- 10.6. Having no BER would cause a larger number of compliance issues with supervisory authorities as a consequence of the fact that insurance companies would develop their activities on markets on which they are not specialised but no longer have the benefit of access to the experience of other insurers.

III. JOINT CALCULATIONS, TABLES AND STUDIES

A. The BER currently exempts¹¹ (subject to certain conditions):

- agreements which relate to the joint calculation of the average cost of risk cover for a specified risk (pure premiums);
- the joint establishment and distribution of mortality tables and tables showing the frequency of illness, accident and invalidity; and
- the joint carrying-out of studies on the probable impact of external factors on the frequency or scale of future claims for a given risk and the profitability of investment.

B. Comments received during the Sector Inquiry in relation to this exemption

11. The main comments put forward by respondents to the public consultation in the Sector Inquiry were:
 - 11.1. The establishment of joint calculations, tables and studies allows better assessment of risks, which results in lower premiums for customers. Otherwise, premiums would increase as they would include high security surcharges.

¹¹ Article 1 of the BER.

- 11.2. Valid risk data that are available for the entire market support a large insurance capacity, which would bring down prices by way of competition.
- 11.3. If an insurer is unable to adapt its pricing structure to the actual risk situation, it will be "selected out of the market" in the course of competition.
- 11.4. The exemption allows insurers to obtain better knowledge on the types of activity implying risks that are not sufficiently numerous for a single insurer to assess (e.g. natural catastrophes risks). This would make it easier for insurers to ascertain their price limits and take new risks.
- 11.5. If the insurance companies cannot show that their funds match their risks, then supervisory authorities would impose high capital requirements, and might even withdraw insurer's permission to trade.
- 11.6. Various participants noted that, access to such data facilitates entry and that without access, entry costs would be higher and entry lower.
- 11.7. The Solvency II project¹² would encourage insurance companies to share technical data.
- 11.8. Joint calculations and studies are not commonplace in one large city market.
- 11.9. The more concentrated the market, the less use is made of this exemption.

C. Comments from NCAs

12. In the recent initial consultation of NCAs on the functioning of the BER the following comments were received:
 - 12.1. The BER is used as a justification for a wide-range of information exchange. This may result in a major restriction of competition. It is necessary to determine to what extent information sharing is really necessary to spread risk. Also, it was observed that co-insurance groups could be used in certain cases as an instrument to coordinate and engage in cartel activity.
 - 12.2. Models for general conditions offered by insurers based on net prices may represent agreements on discounts. These are not binding but they do provide an indication to insurers the kind of discounts that can be offered. Such systematic approaches go beyond the exemptions envisaged by the BER and Article 81(3).
 - 12.3. Exchanges of information are only performed through the National Insurers' Federation and there are no direct exchanges of information between insurance associations.
 - 12.4. The ability to share information as allowed under the BER may decrease premium fees for consumers since insurers may need to tie up less capital if they have more information on risks. This may in turn facilitate entry for smaller insurers and for insurers established in other Member States and decrease administrative and other expenses.
 - 12.5. Companies appear to use the BER for information sharing but only in the retail industry. There does not appear to be any data sharing in more concentrated business markets.
 - 12.6. New entrants to a Member State often use data available to them in other Member States where they are also active.
 - 12.7. A recent Report from EFTA Surveillance Authority concerning its own sector inquiry into the business insurance sector in the EFTA States shows that the business insurance sector in the EFTA countries is highly concentrated and insurers do not rely on shared data to calculate risk for most

¹² The Commission adopted the Solvency II Directive Proposal in July 2007, with the aim of modernising regulation and supervision in the insurance sector.

insurance classes (except for a few cases limited to specific insurance classes typically with a relatively low share of gross premiums written).¹³

D. Commission Case Experience / Considerations

13. Agreements which increase the number of insurers potentially capable of covering a given risk generally increase market access and competition. The fact that major insurers are allowed to engage in cooperation on the calculation of risk cover may enable smaller firms to start to operate. Major insurers can also generally benefit from a broader statistical base, even if their internal statistics would have been sufficient. However, grouped statistics must be justified by similarity of risks, if necessary interpreted sufficiently broadly to reach the minimum size having statistical relevance, but not resulting in the grouping of obviously disparate risks.
14. However, it can also be argued that the blanket block exemption may be too broad in its risk coverage. Certain statistics, such as the production of mortality tables, do not seem to require cooperation since life expectancies are widely known and are not subject to sudden and large changes. Second, more pro-competitive solutions may exist to overcome the information problem in particular instances. If policy holders are rated and this information is communicated to them, they can switch insurance companies carrying this evidence with them. Third, it is not entirely clear to what extent the uncertainty underlying the premium calculation is not a normal business risk.
15. Agreements that set pure and risk premiums have been exempted by the BER¹⁴, as they are not prices, but statistical indicators.¹⁵ The commercial (or gross) premium is the price that the insured person pays to cover a given risk and corresponds to the risk premium plus the administrative costs and the profit margin of the individual insurer. The risk premium reflects the net cost of the cover and is fixed by first determining the pure (or net) premium, which is based on the statistical data concerning the frequency and the average intensity of the risk in the past, and by then applying to it a coefficient which takes account of forecasts of the future occurrence of the risk.
16. On the other hand, agreements that set or recommend uniform commercial premiums have been considered price-fixing agreements falling within Article 81(1)¹⁶ of the EC Treaty and not normally capable of being exempted.

¹³ The EFTA Surveillance Authority acknowledges that the results of the survey are biased towards larger insurers (due to an over-representation of large insurance companies); and that smaller insurers may use external databases to a larger extent.

¹⁴ *Complaint against A.N.I.A and Italy (2007)*: The complainant alleged that the direct settlement system imposed by the Italian legislation requires insurance companies to enter into an agreement whereby claims settlement should be performed on the basis of average costs of risks in the past. The figures for average costs should be calculated annually by a Technical Committee on the basis of claims actually paid during the previous year for accidents covered by the direct settlement system. The complainant argued, *inter alia*, that insurers will set commercial premiums not on the basis of supply and demand but instead on standardised average costs based on the cost of claims borne by all member companies. The complaint was rejected as this type of cooperation falls squarely within the parameters of the BER which allows the joint establishment and distribution of calculations of the average cost of covering a specified risk in the past.

¹⁵ *The Test Achats complaint (1995)*: The case involved the Belgian professional association of insurance companies (UPEA) and had been communicated to the Commission by the Belgian consumer association, *Test Achats*. It had complained, *inter alia*, about a recommendation from UPEA aiming to establish a minimum pure premium for the coverage of hospital expenses in the case of group contracts. There was a uniform premium for contracts with groups containing up to 10 members and reductions for contracts with larger groups. There was nothing to indicate that this recommendation was based on statistical data. The Commission consequently, concluded that the recommendation was not covered by the BER. The recommendation was withdrawn and the file closed.

¹⁶ *Case 45/85 Verband der Sachversicherer e.V.v Commission (1987) ECR 405*: The German Association of Property Insurers recommended increases in commercial premiums for industrial fire and consequential loss insurance in specified circumstances. Although the recommendation was stated to be non-binding, the Court held that it reflected the Association's aim to coordinate the conduct of its members.

17. Also, individual instances of widespread practices¹⁷, when they result from agreements between undertakings, may fall within the scope of Article 81(1).¹⁸
18. In some cases, the infringing recommendations were abandoned and the cases closed.¹⁹ The Commission has sometimes started ex-officio investigations in order to check if some recommendations of insurance associations met all conditions of the BER.²⁰ Insurance associations have also been fined by NCAs²¹ for cooperation infringing Article 81(1).
19. Some agreements between companies not only to set pure premiums, but also to apply them jointly, which were allowed by the Commission before the adoption of the first BER, may be more restrictive than would be allowed under the current BER as the Commission also now considers that calculations on pure-premiums should be non-binding.²²

QUESTIONS AND ISSUES OF SPECIFIC INTEREST:

Note: You are requested to answer the questions with reference to the market or markets in which you are

¹⁷ As a result of the Commission's investigations during the Sector Inquiry, it appeared that widespread practices in both co-reinsurance and coinsurance markets almost always results in an alignment of premiums and other conditions of coverage. Potential co(re)insurers are asked to indicate the share of the cover and the price they would be willing to accept. Once a lead insurer has been determined, the broker will negotiate and agree terms and premiums with this insurer. The broker subsequently approaches the follow market to fill 100% of the cover and advises the following co-insurers the same terms and conditions, including premium, as the ones agreed upon with the lead-insurer.

¹⁸ Paragraph 15 of the Communication of the Commission on the Sector Inquiry of 25 September 2007: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0556:FIN:EN:PDF>

¹⁹ E.g.: Commission Decision 93/3/EEC of 4 December 1992 - *Lloyd's Underwriters' Association and The Institute of London Underwriters OJ L004, 08/01/1993 p.26-31*: The Joint Hull Understandings agreement recommended minimum increases in premiums, fixed the rate of increase in deductibles and fixed the rebate paid for prompt cash payment and for deferred payment. *The notification carried out by UPEA (The Belgian professional association of insurance companies) in 1988*: This case involved a recommendation concerning the calculation of premiums for so-called special risks, concerning fire coverage for properties with a value above a certain amount. Having regard to the considerable divergences between the premiums charged by insurers, the Commission restricted itself to informing the association of the incompatibility of its recommendation with the BER and finally closed the case without further action. *The notification submitted by UNESPA (Unión Española de Entidades Aseguradoras y Reaseguradoras) in 2000*: This notification involved a decision of an association of undertakings (UNESPA) related to the creation of a database containing the history of the contracts signed-up by the policy-holders of motor vehicle insurance, as well as the damages linked with these contracts for previous last five years. The periodic exchange of information, the sensitivity of the information exchanged (lists of clients, price elements) and the homogeneity of the products led the Commission to appreciate that this exchange of information agreement facilitated or encouraged the anti-competitive behaviour of the insurance companies participating in it.

²⁰ In 1997, an ex-officio procedure was started by the Commission in relation to certain A.N.I.A (The Italian Insurers' Association) recommendations. The investigation proved that A.N.I.A did not collect data on commercial premiums, nor recommend commercial premiums. However, the investigation showed that insurance companies based their tariffs on very similar parameters (for instance: bonus/malus; type of fuel; age of the policyholder) to which they attributed similar values. The Italian Competition Authority fined 38 insurance companies for exchange of information by concerted practices in the branch of motor vehicle insurance. The Commission then closed its case.

²¹ Following a general inquiry, the Italian Competition Authority criticised the maintenance of a uniform system of parameters to calculate repairing costs as one of the major causes of the increase in premiums. Although A.N.I.A formally abandoned the system, it continued to encourage the insurance companies to follow the same criteria and was fined for infringing Article 81(1) in 2005.

²² *Commission Decision 84/191/EEC of 30 March 1984 – Nuovo CEGAM, OJL 099, 11/04/1984, p.29-37*: An Italian association of insurers agreed not only to set pure premiums for industrial engineering insurance, but also to apply them jointly. The Commission exempted the agreement as it considered that it brought new competition onto the market (the members of the association collectively had a 26% market share while their largest competitor had a 25% market share).

²³ Entry by insurance companies in a Member State through the establishment of subsidiaries/branches as opposed to the acquisition of insurance companies already existing in that Member State.

or have been active (this could be a single EU Member State or a number of EU Member States). Please always indicate to which Member State your comments relate. Wherever possible, please support your arguments with evidence.

1. (i) How do you evaluate the current functioning of the BER in this area? (ii) What is the impact of this form of cooperation on the demand and supply of insurance and on the pricing of insurance policies? (iii) To what extent is the performance (profitability, solvency) of the insurance industry affected? Please explain your answers.
2. Are there any changes that you believe may be useful in the current BER in order to improve its functioning e.g. differentiating between insurance classes / specific risks (e.g. should the frequency and diversifiability of specific risks play a role in block exempting cooperation among insurers)? Please explain the reasons for your answer.
3. Considering the greenfield market entries in the insurance sector²³ over the last five years to your knowledge (i) did such entrants make use of the joint calculations, tables, and studies envisaged in the BER? (ii) Is there evidence that this exemption has affected entry and if so, how? (iii) Please describe any entry barriers affected by this exemption and provide estimates of the costs involved in overcoming these barriers. Please provide any analysis, report, study or survey to substantiate your views.
4. (i) What do you consider would be the impact if any of the non-renewal of the BER on the scope and level of cooperation in this particular area? Please explain why you would expect this impact. (ii) What do you consider would be the economic effects (e.g. in terms of market structure, entry barriers, competitiveness of smaller insurers, level of customer mobility, etc.) of these changes in cooperation? Please provide any analysis, report, study or surveys to substantiate your claims.
5. Do you consider there to be alternative (pro-competitive) solutions to overcome the information asymmetry problems faced by the industry other than through renewal of the BER as it is currently drafted? Please explain your answer.

IV. STANDARD POLICY CONDITIONS AND MODELS

A. The BER exempts (subject to certain conditions):

- The joint establishment and distribution of non-binding standard policy conditions for direct insurance; and non-binding models on profits.

B. Comments received during the Sector Inquiry:

20. The main comments put forward by respondents to the public consultation in the Sector Inquiry were:
 - 20.1. Standard policy conditions allow the comparison of insurance policies offered by different insurers, which enhances competition. Customers are able to verify the content of guarantees and it is easier to switch when standard policy conditions do not differ.
 - 20.2. Standard conditions drafted in cooperation between insurance companies, various stakeholders and supervisory authorities ensure legal security. Without them, there would be an individual basis assessment, which would be time consuming and expensive. Experts' comments on standard insurance conditions are generally available. Standard policy conditions result in common language/jurisprudence, create legal certainty regarding the interpretation of contracts and have the potential to reduce the number of disputes.
 - 20.3. Standard policy conditions tend to be of greater benefit to smaller companies whose drafting costs would otherwise be as high as those of bigger companies but would have to be passed on to fewer insurance customers. Thus smaller companies gain a greater degree of competitiveness in relation to bigger companies.

- 20.4. New market entrants require sample insurance terms, in particular where a foreign language or a different jurisdiction is involved. This reduces the investment expenditure connected with entry into a new market.
- 20.5. Standard policy conditions can facilitate the insurance of new risks. The joint drafting of standard terms and conditions is required for the purpose of providing a sufficient range of insurance products with regard to newly occurring risks: once non-binding standard policy conditions have been agreed for new risks, even small insurers can include the new product in their product range from the very start of the coverage of the new risks in question.
- 20.6. It is easier for supervisory authorities to verify the legality of the terms and conditions applied by individual insurers. Standard conditions drafted in cooperation between insurance companies, various stakeholders and supervisory authorities would ensure legal certainty, avoid expenses, reduce unnecessary work and avoid contract formation slowing down dramatically. They do not usually lead to any major imbalance between the rights and obligations arising from insurance contracts.²⁴
- 20.7. Under the current BER there is a well balanced market basis to develop standard policy conditions, taking into account all relevant aspects of national legislation and court rulings. Without standard policy conditions established by insurance associations a reverse effect would occur: big market players would set up their own conditions and smaller companies lacking the means and resources would have to follow.
- 20.8. The variation in the frequency of use of standard policy conditions may depend on the national insurance regulations (e.g.: the high level of use of standard policy conditions in some Member States may be explained by the high number of compulsory insurance).
- 20.9. Statements that standard policy conditions are capable of being a hindrance to competition as they may influence the use of restrictive or exclusionary terms were also made.
- 20.10. Also, some respondents recalled that cooperation in respect of standard policy conditions should not be tied to cooperation in the establishment of risk premiums and pure premiums.

C. Comments from NCAs

21. In the recent initial consultation of NCAs on the functioning of the BER the following comments were received:
- 21.1. With regard to information sharing in setting standard conditions, it is sometimes not clear what incentives there are for providing conditions that are favourable to consumers rather than insurance companies.
- 21.2. In some cases there is a problem of obtaining coverage for specific risks (e.g. consultancies) which do not fall within standard conditions.
- 21.3. The establishment of standard policy conditions facilitates better knowledge of risks and easier comparison of contracts.

D. Commission Case Experience / Considerations

22. Standard policy conditions and models on profits are exemptible²⁵ if they are not black-listed (i.e. if they are specifically not covered by the BER and thus fall foul of the prohibition in Article 81(1)) by the BER.

²⁴ A National Ombudsman.

²⁵ *Commission Decision to reject a complaint against DBV Winterthur insurance company and the GDV (the German Insurance Industry Association) (2004)*: The complainant argued that the GDV member companies applied uniform conditions in occupational disability insurance. These standard policies were described as a “cartel” between the GDV members, which applied the same conditions as part of a uniform practice. The complaint was rejected as there were no indications that the relevant standard policy conditions contained clauses which would have been excluded from the BER. Also, the complaint did not contain

The question arises as to whether customers should be involved in a more transparent way in the process of drafting standard policy conditions.²⁶

23. The BER clearly requires standard policy conditions to be non-binding. The Commission may now be less likely to accept a requirement established by insurance associations that derogations from the standard policy conditions should be notified to the associations having set up the standard policy conditions in question.²⁷
24. The Commission has also received notifications for individual exemptions in the past, in relation to clauses which were on the black list of the BER. However, its view has been that the arguments in favour of exemption had to be particularly strong and that it had to be cautious not to open the door for any "softenings" of the black clauses.²⁸

QUESTIONS AND ISSUES OF SPECIFIC INTEREST:

Note: You are requested to answer the questions with reference to the market or markets in which you are or have been active (this could be a single EU Member State or a number of EU Member States). Please always indicate to which Member State your comments relate. Wherever possible, please support your arguments with evidence.

1. (i) How do you evaluate the current functioning of the BER in this area? (ii) What is the impact of this form of cooperation on the demand and supply of insurance and on the pricing of insurance policies? To what extent is the performance (profitability, solvency) of the insurance industry affected? Please explain your answers.
2. Are there any changes that you believe may be useful in the current BER to improve its functioning (e.g. differentiating between insurance classes)? Please be specific and give reasons for your answer.

any evidence that the GDV or its members agreed, or agreed to oblige other undertakings, not to apply conditions other than standard policy conditions.

²⁶ *The Aviation case (2005)*: Commission investigation into the behaviour of providers of aviation war and terrorism insurance in the wake of the terrorist attacks of 11 September 2001 was concluded in March 2005 with a settlement involving several reforms. The reforms foresaw *inter alia* greater transparency and customer involvement in key industry committees based in London, including one that establishes standard wordings for aviation insurance policies and clauses. A new Aviation Insurance Clauses Group would grant customers – previously not involved in the preparation of standard clauses - the opportunity to participate by being consulted and being allowed to make proposals.

²⁷ *Commission Decision 90/25/EEC of 20 December 1989 – Concordato Incendio*, OJL 015, 19/01/1990, p.25-29: The Commission exempted not only standard policy conditions, which members were free to derogate from, but also a requirement that members notify the Concordato of any such derogation that might affect the statistics used to calculate pure premiums. This requirement was considered necessary to guarantee the reliability of the statistics.

²⁸ *The notification of the German Association of Insurers' (GDV's) "Security Device Guidelines for Banks, Building Societies and other financial institutions) (2000)*: These Guidelines contained *inter alia* a general description of the risks and protection requirements, installations for reports of robbery and burglary, installations for optical monitoring of the rooms, special security devices as well as money and value transports. Furthermore, they contained a part dealing with recommended insurance premiums for cover of different types of value containers (such as safes etc) which were dependent on the robustness of the containers. The Commission considered that the recommended level of coverage sums for subscription was a black clause because of an indication of the amount of the cover. Even though the policy-holder could have benefited from the comparability of the conditions of the insurance companies and from the prevention of burglary and robbery in the form of lower insurance premiums and earlier compensation, as GDV argued, they were inevitably confronted with a range of similar products and similar prices. A similar assessment was made in relation to *the notification of the GDV's "Security Device Guidelines for Banks, Building Societies and other financial institutions) (2000)*.

²⁹ Entry by insurance companies in a Member State through the establishment of subsidiaries/branches as opposed to the acquisition of insurance companies already existing in that Member State.

3. Considering the greenfield market entries over the last five years in the insurance sector²⁹, to your knowledge: (i) did such entrants make use of standard policy conditions, clauses, models envisaged in the BER? (ii) Is there evidence that this exemption has affected entry and if so how? (iii) Please describe any entry barriers affected by this exemption and provide estimates of the costs involved in overcoming these barriers. Please provide any analysis, report, study or survey to substantiate your claims.
4. (i) What do you consider would be the impact if any of the non-renewal of the BER on the scope and level of cooperation in this particular area? Please explain why you would expect this impact. (ii) What do you consider would be the economic effects (e.g. in terms of market structure, entry barriers, competitiveness of smaller insurers, level of customer mobility, etc.) of these changes in cooperation? Please provide any analysis, report, study or surveys to substantiate your views.
5. (i) In your experience, how does cooperation on standard policy conditions affect the variety of available insurance policies? (ii) Can cooperation lead to a decreased supply of insurance products?
6. In your experience, how does cooperation on standard policy conditions affect the use of restrictive or exclusionary terms? Please explain your answer.

V. COMMON COVERAGE OF CERTAIN TYPES OF RISKS (POOLS)

A. The BER (subject to certain conditions):

- exempts the setting up and operation of insurance pools (groups of insurance undertakings or groups of insurance undertakings and reinsurance undertaking) for the common coverage of new risks³⁰ for three years from the date of creation (with no market share restriction); and
- may exempt co-insurance or reinsurance pools that have been in existence for three years or that were not created in order to cover new risk, and provide common coverage of a specific category of risks subject to certain conditions, in particular market share thresholds.

B. Comments received during the Sector Inquiry

25. The main comments put forward by respondents to the public consultation in the Sector Inquiry were:

- 25.1. Companies sometimes cannot or do not wish to underwrite alone due to a lack of sufficient capacity (which can result from legal, operational or business policy considerations). Without pools, there would be a decrease in insurance products and thus less protection in particular in smaller markets.
- 25.2. In a number of areas with risks of high intensity, insurers cannot bear the costs alone as they consider them too large. Pools can enable smaller undertakings to compete for business which would otherwise be closed to all except the largest undertakings.
- 25.3. In relation to certain less frequently occurring risks, small and medium-sized insurance companies can lack the knowledge that is required in order to be able to assess the risk properly and, where appropriate, fulfil the contract in the event of a claim. Pools can enable such companies to acquire such knowledge and experience.

³⁰ Defined in Article 2(7) of the Regulation as "risks which did not exist before, and for which insurance cover requires the development of an entirely new insurance product no involving an extension, improvement or replacement of an existing insurance product."

- 25.4. The different levels of use of pools may be explained by the fact that they may be imposed by national legislation so as to ensure an insurance coverage which would otherwise not be available in the free market.
- 25.5. Without the BER, extreme events may no longer be reinsured and therefore may not be insured; there is a risk that the market will fail and the public sector may have to support the private sector by supplying reinsurance/insurance which pools no longer wish to cover.
- 25.6. Non-renewal of the BER would result in a low degree of cooperation for pools which would have a negative effect on the Commission's efforts to create a more integrated insurance industry throughout the EU.
- 25.7. Traditional pooling models along national lines (government backed pools) have less validity with the opening up of a global insurance market and, where possible, insurance pools should be replaced by free market solutions.
- 25.8. Insurance intermediaries or clients have to remain entirely free to place risks outside the pool. Some respondents put emphasis on non-discriminatory access to pools and on the possible existence of barriers to potential new entrants.

C. Comments from NCAs

- 26. In the recent initial consultation of NCAs on the functioning of the BER the following comments were received:
 - 26.1. The exchange of information within insurance pools is frequently justified (though often not correctly) by reference to the BER.
 - 26.2. The concept of 'new risks' can be difficult to define. Innovative products that cover 'old' risks may need to be included in the same pool which is currently not the case.
 - 26.3. In some cases, for certain types of risks, consumers have difficulty obtaining coverage. The concept of "new risks" may be difficult to define. It may be useful if innovative insurance products that cover "old" risks were to be included in the same pool. For new disasters, which are not covered by the notion of "new risks", pools could be useful. This is particularly relevant for agricultural risks in providing guarantees that farmers may not otherwise have available to them.
 - 26.4. Calculation of market shares also has an impact on the thresholds used in the BER in relation to pools. Insurers tend to define markets very broadly with a view to trying to ensure that they come within the thresholds whilst possibly distorting competition.
 - 26.5. Calculation of market shares should include turnover achieved on the relevant market within and outside a pool by all pool members and affiliated companies.
 - 26.6. It is important that smaller insurers lacking the expertise to properly assess large risks can benefit from the experience of larger insurers, in order to preserve market access for less experienced insurers, through co-insurance.

D. Commission Case Experience / Considerations

- 27. The BER does not cover instances of collusion and does not apply to ad hoc co-insurance.³¹
- 28. The BER covers only pools whose members have a limited market share (20% for co-insurance pools and 25% for co-reinsurance pools). As to pools that exceed these thresholds, no matter how high the market

³¹ The co-(re)insurance procedures referred to in the Final Report on the Sector Inquiry (*ad-hoc co-insurance*) are not covered by the BER. Those co-(re) insurance pools covered by the BER are groups set-up ex ante to cover a specified risk category and comply with the conditions stipulated in the BER.

share is, they may be considered not to be anticompetitive as long as pooling is necessary to allow their members to provide a type of insurance that they could not provide alone.³²

29. When it is not objectively necessary for insurers to group together in order to cover a particular risk, pools are prohibited.³³
30. Pools are permitted when they are de minimis. In this respect, market definition is of primary importance³⁴.
31. Pools should be limited to what is indispensable to ensure that capacity is available.³⁵
32. If the nature of the risk and the market are such that two pools can operate, a single pool is unlikely to be authorised. However, it is the Commission's practice to grant the "benefit of a doubt", if it cannot prove that more than one pool can exist.³⁶
33. Co-insurance pools are allowed only if they respect the set of conditions stipulated by the BER (e.g. the interdiction of an "obligation d'apport" clause.)³⁷

QUESTIONS AND ISSUES OF SPECIFIC INTEREST:

Note: You are requested to answer the questions with reference to the market or markets in which you are or have been active (this could be a single EU Member State or a number of EU Member States).

³² *Commission Decision 1999/329/EC of 12 April 1999 – P&I Clubs, Pooling Agreement, OJL 125 of 19/05/1999, p.12-31:* A claim-sharing agreement between insurance mutuals covering 89% of the world market for maritime third party and contractual liability insurance (protection & indemnity - P&I) was not considered to restrict Article 81(1) because the members of the P&I Clubs were not actual or potential competitors, given the fact that they were unable to insure alone the risks covered by the pool (very large maritime liability risks). *The nuclear insurance pool cases (2001):* In January 2001 the Commission closed its investigations into three nuclear insurance pool cases (a Swedish co-insurance and co-reinsurance nuclear pool, an Italian reinsurance nuclear pool and a Spanish pool providing co-insurance to nuclear installations in Spain and co-reinsurance to nuclear risks outside Spain). The Commission concluded that without the pooling agreements there would be no supply of nuclear liability insurance with adequate coverage for the risks involved.

³³ *The German National Competition Authority prohibited insurers' pool covering pecuniary loss liability risks for auditors and chartered accountants (2007):* The German Competition Authority prohibited four insurance companies from continuing to jointly insure the pecuniary loss liability risks of auditors and chartered accountants from 2009 via the insurers' pool. The insurance companies only jointly offered pecuniary loss liability insurance via the insurers' pool. The result was that insurance cover was only provided at standard premiums and terms and that there was no competition between the insurance companies for insurance premiums and conditions or for service quality in claims processing.

³⁴ *The Aviation Pool cases (1998):* In 1998 the Commission closed an investigation into several notifications of aviation pool cases. For the insurance of large aviation risks, the market was international and the market share of each pool was sufficiently small as to benefit from negative clearance under the Commission's *de minimis* notice. For small aviation risks (private and pleasure aviation), for which markets were national the pools in question did not seem to be necessary in order to allow their members to be present on those markets. The Commission found there to be insufficient Community interest to bring proceedings but warned the pools of the possibility of action by national competition authorities.

³⁵ *The Aviation case (March 2005):* The undertakings provided that if an unforeseeable crisis resulting from war or terrorism arises, insurers would limit any co-ordinated action to that which was indispensable to ensure that capacity continued to be available, customers could continue to buy insurance, and the effects on competition from the co-ordinated action were kept to a strict minimum.

³⁶ *The Austrian pool and the German pool (terror pools) (2002):* The Commission received two applications for negative clearance: one concerned an agreement for the creation and operation of a co-insurance group ("Austrian Terrorpool") with the aim of covering the risk of terrorism within insured threats for private customers and small business located in Austria. The second concerned the German Pool Extremus, providing terror risk insurance for risks located in Germany. The Commission considered that due to the highly atypical and more political character of the terrorism risk, the pools would fall within the category of pools for which it is the Commission's practice to grant the "benefit of a doubt", if it is not in a position to clearly demonstrate that the pool is not necessary or could be replaced by more than one pool. Therefore it was concluded that the pools did not fall within the scope of Art. 81(1).

³⁷ Clause obliging members to insure nuclear risks only through the pool, whatever the amount of cover. A nuclear insurance pool case (the *German pool DKVG*) was closed in 2002, following the deletion of such a clause.

Please always indicate to which Member State your comments relate. Wherever possible, please support your arguments with evidence.

1. (i) How do you evaluate the current functioning of the BER in this area? (ii) What is the impact of this form of cooperation on the demand and supply of insurance and on the pricing of insurance policies? (iii) To what extent is the performance (profitability, solvency) of the insurance industry affected? Please explain your answers.
2. Are there any changes that you believe may be useful in the BER to improve its functioning? Please be specific and give reasons for your answer.
3. (i) What do you consider would be the impact if any of the non-renewal of the BER on the scope and level of cooperation in this particular area? Please explain why you would expect this impact. (ii) What do you consider would be the economic effects (e.g. in terms of market structure, entry barriers, competitiveness of smaller insurers, level of customer mobility, etc.) of these changes in cooperation? Please provide any analysis, report, study or surveys to substantiate your claims.
4. (i) Do you consider that the current BER provisions define pro-competitive pools sufficiently? (ii) Are there any exceptions (e.g. pro-competitive pools not exempted, anti-competitive pools exempted)? Please give examples and explain.
5. Do you consider that the BER hinders setting-up pools with innovative policies (e.g. against natural disasters) on the basis that the risks are not new? Please give examples and explain.
6. In what sense, if any would non-renewal / absence of the BER affect the setting-up of cross-border pools? Please explain your answer.

VI. SECURITY DEVICES³⁸ / SAFETY EQUIPMENT

A. The Regulation exempts (subject to certain conditions):

- Agreements with respect to the establishment, recognition and distribution of technical specifications, rules or codes of practice concerning security devices and procedures for assessing and approving the compliance of security devices with such specifications, rules or codes of practice.

B. Comments received during the Sector Inquiry

34. The main comments put forward by respondents to the public consultation in the Sector Inquiry were:
 - 34.1. The approval system helps insurance consumers to select safety equipment and safety systems that meet the requirements imposed by insurers and provide the best protection to property. Many different kinds of standardisation in the market would lead to a lack of orientation to the detriment of the policyholder.
 - 34.2. Insurance companies must know whether and to what extent facilities like sprinklers, fire alarms or burglary/theft alarms actually reduce the relevant risk and prevent losses as only if these facilities actually result in a significant risk reduction can insurers subsequently grant a reduction to their policyholders in the premiums payable. As long as these tests are not carried out in any meaningful manner by institutions that are independent from the manufacturers, such as government bodies or

³⁸ Defined in Article 2 of the BER as "components and equipment designed for loss prevention and reduction and systems formed from such elements."

consumer protection organisations, insurance companies have to carry out these tests themselves. This would result in disadvantages for manufacturers and installation companies, in that their products and/or companies could be tested by not only one but every insurance company.

- 34.3. It is easier for consumers to switch to another insurer when the safety equipment and safety systems are covered by the same approval system. Without the BER, consumers would have no uniform orientation framework and would have to expect that a security device, once installed, would no longer be accepted by a new insurer.
- 34.4. The approval system operated by the insurance industry favours the entry to the market of new safety devices and increases competition in the safety equipment market.
- 34.5. All information on loss prevention, risk reduction and consumer education is stored under one roof. This improves collection of reliable data, which in turn is used for drafting legislation and guidance to consumers and households on questions relating to protection of property and overall security.
- 34.6. Without the BER, smaller insurers would not have the capacity to check security devices on their own.
- 34.7. Some respondents suggested that the BER might inadvertently have led to a diminishing of competition in some downstream related markets such as markets for security devices.

C. Commission Case Experience/Considerations

35. Since the BER only exempts agreements in this area where no Community-level harmonisation of standards is already in place³⁹, this effectively rules out block exemption for agreements concerning security devices themselves since most are covered by such harmonisation. Exemption is thus effectively restricted to the installation and maintenance of such devices.

³⁹ The press release accompanying final adoption of the BER in 2003 stated the reason for this approach: "Where there is Community harmonisation legislation in force, agreements between insurers which effectively impose on security devices higher requirements than those imposed by legislation have a major impact on the market for such devices, as a device which insurers are reluctant to insure will have great difficulty gaining access to the market."

QUESTIONS AND ISSUES OF SPECIFIC INTEREST:

Note: You are requested to answer the questions with reference to the market or markets in which you are or have been active (this could be a single EU Member State or a number of EU Member States). Please always indicate to which Member State your comments relate. Wherever possible, please support your arguments with evidence.

1. (i) How do you evaluate the current functioning of the BER in this area? (ii) What is the impact of this form of cooperation on the demand and supply of insurance and on the pricing of insurance policies? (iii) To what extent is the performance (profitability, solvency) of the insurance industry affected?
2. Are there any changes that you believe may be useful in BER to improve its functioning? Please be specific and give reasons for your answer.
3. (i) Considering the greenfield market entries over the last five years in the insurance sector⁴⁰, to your knowledge, did such entrants make use of the cooperation in the field of security devices envisaged in the BER? (ii) Is there evidence that the BER has affected entry in a positive way in the past?
4. (i) What do you consider would be the impact if any of the non-renewal of the BER on the scope and level of cooperation in this particular area? Please explain why you expect this outcome. (ii) What do you consider would be the economic effects (e.g. in terms of market structure, entry barriers, competitiveness of smaller insurers, level of customer mobility, etc.) of these changes in cooperation? Please provide any analysis, report, study or surveys to substantiate your claims.
5. Did you experience any competition problems in relation to the BER in the following sectors: (i) production of security devices; (ii) evaluation of security devices; (iii) installation and maintenance of security devices? In each case, if so, please explain your answer.

VII. RESPONDING TO THIS CONSULTATION PAPER

36. Interested parties are invited to provide any comments on the BER / replies to this Consultation Paper **by 17 July 2008**. In particular the Commission would be grateful for replies to the questions set out in the sections above and also to the general questions below.
37. Respondents should also include a brief summary of the organisation they represent; the organisation's activity in the insurance sector and a list of the EU Member States in which they are active in the insurance sector.
38. Comments should be provided **in writing** preferably by email or alternatively by letter to the address below. However, we are also willing to take queries by telephone which may be directed to:

Eithne McCarthy at Tel: +32 (0)2 299 4138; or

Laura Stefanescu at Tel: +32 (0)2 298 6569

39. **Replies/comments quoting the reference: "Review of Insurance BER – COMP/D1 HT 1221" should be sent to:**

Email: COMP-GREFFE-ANTITRUST@ec.europa.eu

⁴⁰ Entry by insurance companies in a Member State through the establishment of subsidiaries/branches as opposed to the acquisition of insurance companies already existing in that Member State.

Fax: +32 (0)2 295 0128
Postal address:
European Commission
DG Competition
Review of Insurance BER
Antitrust Registry
Jozef II Street, 70 / Jozef II Straat 70
B-1049 Bruxelles/Brussel

40. It is the standard practice of DG Competition to publish the submissions received in response to a public consultation. However, it is possible to request that submissions, or parts thereof, remain confidential. Should you wish to do so, please (i) indicate clearly on the front page of your submission that it should not be made publicly available; and (ii) include a non-confidential version of your submission for publication.
41. Following closure of the Consultation, DG Competition will assess in fact and law, the submissions, comments and replies received. When reviewing such submissions/comments/replies, the Commission must consider what weight to attach to them. Clearly more weight can be attached to comments when they are supported by evidence such as internal business documents or independent data.

GENERAL QUESTIONS AND ISSUES OF SPECIFIC INTEREST:

Note: You are requested to answer the questions with reference to the market or markets in which you are or have been active (this could be a single EU Member State or a number of EU Member States). Please always indicate to which Member State your comments relate. Wherever possible, please support your arguments with evidence.

1. Do you consider that the business risks or information asymmetries in the insurance industry are special compared to other sectors, such that the proper functioning of the sector requires a BER? Please explain your answer.
2. From your experience, do insurers use the forms of cooperation exempted in the BER? What forms of co-operation are used and why?
3. How do you consider the scope and level of cooperation changed after the BER came into force or the Member State in which you are active, entered the European Union? Please explain your answer.
4. (i) What is the relationship between the scope and level (intensity) of cooperation and the provisions / existence of the current BER? (ii) What other factors (e.g. market structure, maturity of the market, competitiveness, national legislation, etc.) influence the level of cooperation in the insurance industry and how? (iii) How does the level of cooperation influence market structure? Please explain your answer.
5. Please list all greenfield entries in the insurance sector⁴¹ over the past 5 years.
6. If your company entered the insurance sector since the BER came into force, did the forms of co-operation exempted in the BER affect your entry and if so please explain how.
7. Would you expect a change in the current level of cooperation (e.g. that is currently covered by the BER) in the case of non-renewal of the insurance BER? Please explain what change you would expect and why you would expect it.
8. (i) What impact would you expect (e.g. economic, social, etc.) as a consequence of any change in cooperation? Please explain your answer. Please differentiate between any such kinds of impact

⁴¹ Entry by insurance companies in a Member State through the establishment of subsidiaries/branches as opposed to the acquisition of insurance companies already existing in that Member State.

according to stakeholder group. (ii) Please also state if you would expect any impact to affect certain groups of stakeholders more than others and why?

9. In your experience, does the BER give rise to any anti-competitive effects such as reduced supply of insurance products or higher prices due to agreements between competitors? Please provide examples to illustrate your response.
10. (i) How does the BER affect market integration in the insurance sector in the EU? (ii) Does the BER create obstacles to or facilitate cross-border provision of insurance services? Please explain your answer.
11. How do you consider expiration of the BER would affect supervision by supervisory authorities, and competition law enforcement? Please explain your answer.
12. Do you consider that non-renewal of the BER would lead to an inconsistent application of competition rules across EU Member States? Please explain your answer.
13. (i) Which justification for having the current BER (premium calculation argument, standard policy argument, pooling argument, etc.) is most important for you / your company? Please explain your answer. (ii) What percentage of your business is affected by the BER? Please explain how you make this calculation.
14. What specific elements of the BER if any, would you like to see improved if a new BER were adopted? Please explain your answer.
15. Do you think the BER should be more tailored to specific risks, e.g. according to the diversifiability and/or the frequency of the underlying risks? Please explain your answer.
16. (i) Do you think the expiry of the BER would have any cost implications (positive or negative) in the context of the new actuarial and risk management requirements to be imposed under the Solvency II project? (ii) Would the expiration of the BER have an impact on the conduct of quantitative impact studies (QIS)? If so please explain how and why.