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COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**On the functioning of Commission Regulation (EC) No 358/2003 on the application of
Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted
practices in the insurance sector**

{SEC(2009) 364}

1. INTRODUCTION AND BACKGROUND TO THE REVIEW

1. Commission Regulation (EC) No 358/2003¹, the Insurance Block Exemption Regulation (the BER) applies Article 81(3) of the EC Treaty (the Treaty)² 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 force³ of the BER to submit this Report to the European Parliament and Council on the functioning of the BER⁴.
2. The BER will expire on 31 March 2010. During 2008 the Commission reviewed the functioning of the BER over the past six years on the basis of a Consultation Paper as well as targeted questionnaires sent to certain stakeholders⁵. This review (the Review) was carried out in co-operation with the European Competition Network (ECN). The findings of the Review and the Commission's proposals for amendment of the BER are presented in this Report. A longer more detailed Commission Working Document accompanies it and both are published on DG Competition's website.
3. It should be noted that the Report confines itself to presenting the Commission's preliminary views on the functioning of Regulation (EC) No 358/2003 and does not prejudice in any respect a final decision on the outcome of the Review. The Report is one of the steps in a comprehensive consultation process to which all stakeholders were invited to contribute.
4. Since 1 May 2004, like most other sectors, 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 agreements⁶ 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 agreements are compatible with Article 81. Only a few sectors currently benefit from a sector specific BER and there have been other sectors (such as maritime and air transport) for which the relevant BER was not renewed.

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 (OJ L 53, 28.2.2003).

² Wherever Article 81 is referred to in this document, the reference is to Article 81 of the EC Treaty.

³ 1 April 2003.

⁴ This requirement was laid down in Article 8 of Council Regulation (EC) No 1534/91.

⁵ DG Competition opened a Consultation in April 2008 for three months giving a significant time window for those interested to present evidence. Following closure of the Consultation, the Commission sent out further detailed questionnaires in particular to categories of stakeholders from whom it needed further information, namely, smaller insurers, pools and producer federations/associations of security devices.

⁶ Wherever the term "agreements" is used in this document, it shall mean agreements, decisions and concerted practices.

2. MAIN FINDINGS OF THE REVIEW AND ANALYSIS

5. The Commission's analysis as to whether or not to renew the BER addresses 3 key questions in relation to each of the four categories of agreement exempted by the BER namely:
- (a) whether the business risks or other issues in the insurance sector make it "special" and different to other sectors such that this leads to an enhanced need for cooperation amongst insurers;
 - (b) if so, whether this enhanced need for cooperation requires a legal instrument such as the BER to protect or facilitate it; and
 - (c) if so, what is the most appropriate legal instrument (i.e. whether it is the current BER or whether partial renewal, amended renewal, or guidance would be more appropriate).

2.1 Joint Calculations, Tables and Studies

6. Subject to certain conditions, the BER (Article 1(a)) exempts agreements which relate to the joint establishment and distribution of (i) calculations of the average cost of covering a specified risk in the past and (ii) calculations in connection with insurance involving an element of capitalisation, mortality tables, and tables showing the frequency of illness, accident and invalidity (Tables). The BER (Article 1(b)) also exempts (subject to certain conditions) the joint carrying out of studies on the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment and the distribution of the results of such studies.
7. The costs of insurance products are unknown at the time the price is agreed and the risk covered. Calculation of risk is a key issue in pricing all insurance products which appears to be a differentiating factor from other sectors including the banking sector. This makes access to past statistical data in order to technically price risks crucial. Therefore, on the basis of the evidence before the Commission, it appears that cooperation in this area is both specific to the insurance industry and necessary in order to price risks.
8. Agreements which increase the number of insurers potentially capable of covering a given risk generally increase market access and competition. The fact that insurers are allowed to engage in cooperation on the calculation of risk cover may enable the entry of small and medium sized firms. The vast majority of respondents drew attention to the industry need to cooperate on this issue and connected it to the existence of the BER.
9. Many insurers, as well as some supervisory authorities and a risk management federation argued that without the BER, insurers would no longer cooperate on joint calculations, tables and studies or would not share the outcome of the cooperation with smaller or foreign insurers. Indeed some large insurers (who, according to insurance associations, would be able to compile the relevant information alone or by involving perhaps one or two other large insurers) may have no incentive to do so.

The BER requires that when insurance companies enter into these forms of cooperation, they must give access to the information compiled, on a non-discriminatory basis, to other insurance companies. It was argued that in the event of non-renewal of the BER, insurers could cooperate to prevent access by for example, smaller or foreign insurance companies, to the information compiled in order to narrow the market. This would be to the disadvantage of smaller/foreign insurers who would be prevented or discouraged from entering the market. A number of respondents during the Review, in particular small and medium sized insurers, said they could not have entered the market without the use of the data-sharing facilitated by this exemption. It also appears that the newer a market is, the more important it is to have access to such data in order to assist new entrants to accurately assess risk.

10. Some respondents pointed out that alternatives to this horizontal cooperation exist: in particular, if insurers increase research and development staff to analyse the market or governments/public organisations collect and publish data. However the evidence appears to be that the first option is probably not an efficient way to achieve this goal and the second is dependent on public authorities for whom this may not be a priority.
11. The Commission considers that there are therefore good reasons to protect and facilitate cooperation in this area and that the current BER appears to be doing this effectively. Furthermore it appears, at this stage that, the risk (even if it may be low) that such pro-competitive cooperation may diminish should be avoided. The Commission has not yet decided whether to amend the structure or drafting of the current exemption and whether, if concluded that renewal is necessary, it should be total or partial. This will depend on the further input it may receive and on a thorough and specific analysis of all data and information available.

2.2 Standard Policy Conditions

12. The BER exempts (subject to certain conditions), the joint establishment and distribution of non-binding standard policy conditions (SPCs) for direct insurance; and non-binding models on profits.
13. During the Review, several insurers and insurance associations argued that cooperation in order to establish SPCs ensures that the costs incurred by insurers and in turn the premiums they charge to customers are kept low. They argued that without the BER, there would be an increase in insurers' costs resulting from the increased effort required to agree wordings for policies due in particular to the lack of an agreed starting point.
14. The Commission agrees that in many cases SPCs can give rise to positive effects for competition and consumers. However the question for this Review is primarily whether this category of agreements is specific to the insurance sector. The answer to that question appears to be that technically or legally complex agreements in fast changing legal environments are commonplace in a number of sectors. SPCs are used in some such sectors without the cover of BERs. For example in the banking sector to whom the Commission's Services also sent questionnaires, SPCs are agreed between banks in a number of Member States, for services such as money transfer, issuance of cards, use of ATMs, account terms, credit agreements and payments. In addition it has been argued by representatives of the banking sector that it does not

require a legislative framework (such as a BER) in order to set policy conditions and that the absence of such a framework has not caused any tangible difficulties for banks.

15. Some respondents argued in the course of the Commission's Review that the legal uncertainty that would result from non-renewal would lead to less cooperation for fear of a risk that it could be challenged by the Commission or NCAs. The argument continues that in the event of non-renewal there would be an individual assessment which would be time consuming and expensive especially for smaller insurers who would pass on costs to policyholders. However, even under the current regime, a careful legal assessment of SPCs' compliance with the BER must be undertaken. In addition, some national regulations have fixed these standard policy conditions, resulting in a reduced need for cooperation. Moreover, there are cases where the national regulator (e.g. FSA in the UK) challenged market participants to achieve contract certainty and made clear that if the market fails to develop on its own, it will intervene with new rules. Many national associations have also been taking the lead on SPCs for some time, which further supports the view that it is unlikely that SPCs would not continue to be agreed in the absence of a BER and in particular given the Commission's view that in many cases SPCs would not fall foul of Article 81(1) or would not fail to comply with the exemption criteria of Article 81(3).
16. In conclusion, co-operation on SPCs does not appear to be specific to the insurance sector and as such does not necessarily require a sector-specific BER. Nor does there appear to be a significant risk of less or non-cooperation on SPCs in the event of non-renewal of the BER. However, in the event of non-renewal, further guidance may be envisaged by the Commission.

2.3 Common coverage of certain types of risks (pools)

17. The BER exempts⁷ the setting up and operation of co(re)insurance pools for the common coverage of new risks⁸ as well as co(re)insurance pools covering risks which are not new, subject to certain conditions. The BER is based on the premise that any such pools may involve restrictions of competition and that it is therefore appropriate to lay down the circumstances (market share thresholds⁹ and other conditions¹⁰) under which such groups can benefit from the Article 81(3) exemption.
18. The Commission agrees with respondents to the Consultation that risk sharing for certain types of risks (such as nuclear, terrorism and environmental risks), for which individual insurance companies are reluctant or unable to insure the entire risk alone, is crucial in order to ensure that all such risks can be covered. This makes the insurance sector different to other sectors and triggers an enhanced need for cooperation. In terms of whether there is a need for a specific legal instrument such as the BER to cover this form of cooperation, the Commission found the following as a result of the Review:

⁷ For three years from the date of first establishment of the group, regardless of the market share of the group.

⁸ Defined in Article 2(7) of the BER.

⁹ Article 7(2)(a) and (b): more than 20% of the relevant market for co-insurance and more than 25% for co-reinsurance.

¹⁰ Article 8 of the BER.

19. First, a need for consistency arises in relation to the calculation of market shares, which is currently done by taking into account the insurance products underwritten within the pool by the participating undertakings or on their behalf. This means that the turnovers achieved by the participating companies outside the co(re)insurance pool in the relevant market should not be taken into account, which is not in line with other general and sector-specific competition rules on the assessment of horizontal cooperation. Applying different rules on the calculation of market shares in the insurance sector to those applied in other sectors would result in treating the insurance sector in a preferential way. At this stage, there appear to be no reasons to maintain such preferential treatment in relation to other sectors. This would be taken into account if this exemption were to be renewed.
20. Secondly, many co(re)insurance pools currently operating on the market are not actually covered by the BER, for a number of reasons, and therefore renewal or non-renewal of the BER should not affect their legal assessment. Indeed, certain pools do not need a BER to provide a safe harbour because they do not give rise to a restriction of competition in the first place. Pools may be considered not to be anti-competitive, no matter how high their market share, as long as pooling is necessary to allow their members to provide a type of insurance that could not be provided by one insurance company alone. Replies during the Review show that many pools do not consider this possibility in their legal analysis and mistakenly argue that they require the BER for legal certainty reasons, whereas in fact, they are likely to be outside its scope. Other pools, which can be replaced by two or more insurance entities and can give rise to restrictions of competition, may also be outside the scope of the BER, but for different reasons: they exceed the market share thresholds of the BER and/or do not comply with all of the conditions set out in Article 8 of the BER. However, some pools which do comply with market share thresholds and other conditions of the BER could be affected by its non-renewal.
21. Thirdly, many insurers incorrectly use the pool exemption as a "blanket" exemption, without carrying out a careful legal assessment of a pools' compliance with the BER. For instance, it is necessary to carefully define the relevant product and geographic market, as market definition is a prerequisite in order to assess compliance with the market share thresholds¹¹. Replies received in the consultation process indicate a high degree of uncertainty regarding the definition of their relevant markets. Although many respondents emphasised that the BER should clarify the notion of "relevant market", neither the BER nor another legal instrument can define the relevant market, which is a matter that must be individually assessed by pools. The Commission's Notice on the definition of the relevant market¹², together with relevant Commission decisions and comfort letters in the insurance sector can be used as guidance in order for pools to determine the relevant market on which they operate.
22. Therefore, the Commission considers that pools are specific to the insurance sector and in addition, it appears that there is some risk of non-cooperation in this area if the BER were not renewed. Although the risk of non-cooperation may not be significant, the Commission considers that it may be appropriate to keep an exemption under the

¹¹ Concerns were also raised about the definition of "new risks".

¹² OJ C 372, 9.12.1997, p. 5.

BER in place for pools. However, if the Commission does renew this exemption, the chapter on pools will be significantly redrafted in order to ensure consistency with other general and sector-specific legislation and take on board comments received during the Review. Furthermore, the Commission will emphasise in a Communication, the need for a careful individual legal self-assessment, on a case-by-case basis.

2.4 Security devices

23. The BER covers (i) technical specifications, rules or codes of practice regarding security devices and procedures for assessing and approving their compliance with these standards; as well as (ii) technical specifications, rules or codes of practice for the installation and maintenance of security devices and procedures for assessing and approving the compliance of undertakings which install or maintain security devices with such standards. These agreements are covered by the BER in so far as no EU-level harmonisation exists and provided that they fulfil the other conditions set out in Article 9 of the BER.
24. As also argued by respondents to the Review, the Commission considers that there is a mutuality of interests in the insurance sector in relation to cooperation on security devices since insurers actively seek ways to help customers to reduce their exposure to the risk covered. However, agreements on technical specifications for security devices and their installation fall into the general domain of standard setting, which is not unique to the insurance sector. Therefore, the Commission has doubts about whether the BER is required in order to facilitate this cooperation.
25. First, the Commission considered the possibility that manufacturers of security devices and companies providing installation and maintenance services do not comply with technical specifications and compliance assessments commonly established by insurers and are therefore excluded from the market because consumers cannot get insurance for such products. Some of the replies confirmed these concerns, already identified in the Business Insurance Sector Inquiry. Consumers must qualify for insurance acceptance by proving they use approved security devices in order to achieve an acceptable level of prevention, as established by the insurance associations. Difficulties arise where customers wish to switch to suppliers of security devices that do not adhere to the standards. It also appears that the BER encourages the *de facto* adoption of infra-European industry standards, which may be an obstacle to the free movement of goods and services. In most Member States only installation and services from regional or national operating "approved" suppliers, using "approved" devices are accepted by insurance companies usually organised within their national associations. Moreover, the high cost of multiple testing and multiple certification is a significant barrier to marketing new and innovative products in the EU market.
26. Although the Treaty rules on the free movement of goods are not applicable to private undertakings and their associations, agreements which have as their object or effect the partitioning of the common market along national borders have in some instances of established case law been considered as anti-competitive and contrary to Article 81(1). Moreover, the provisions of Articles 39 (free movement of workers),

43 (freedom of establishment) and 49 (freedom to provide services) of the EC Treaty are binding not only on Member States but also on private bodies¹³. The abolition, as between Member States, of obstacles to the free movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles created by associations or organisations not governed by public law¹⁴.

27. Secondly, the remaining scope for possible agreements under the BER is significantly reduced or eliminated since EU harmonisation is now extensive and increasing. For instance, approximately 90 EU harmonised standards (or technical specifications) concerning fire detection and fire alarm systems as well as fixed fire fighting systems have already been published in the EU's Official Journal and at least another 30 EU-harmonised standards are currently under development for categories of construction products.
28. Thirdly, the Commission has always advocated that the standard-setting process should be open to all interested industry participants and the results made available on fair, reasonable and non-discriminatory terms¹⁵. The Review showed that there are many cases where insurers do not involve the manufacturers and service providers concerned when agreeing or reviewing standards. This lack of transparency is likely to be closely linked to the subsequent *de facto* exclusion of certain manufacturers from the market.
29. In conclusion, agreements in relation to security devices do not appear to be specific to the insurance sector and furthermore they appear to give rise to concerns in relation to both competition and the development of the EU's internal market. The Commission therefore favours the option of not renewing this part of the BER. However, insurers will benefit from guidance in terms of applicability or otherwise of Article 81 of the Treaty to their agreements on security devices, afforded by the general standardisation chapter in the Horizontal Guidelines¹⁶ currently under review.

3. CONCLUSIONS AND PROPOSALS

30. The analysis above shows that not all the categories of agreement currently exempted by the BER are specific to the insurance sector. SPCs do not appear to be specific as they are also agreed in other sectors in particular in the banking sector, without the need for a BER. Neither do agreements for security devices and their installation appear to be specific to the insurance sector, as they fall into the general domain of standard-setting, which currently benefits from guidance under the Horizontal Guidelines.

¹³ Cases C-415/93, *Bosman* [1995] ECR I-4921, paras 83 and 84; and C-281/98, *Angonese* [2000] ECR I-4139, para.32; Case 36/74, *Walrave and Koch* [1974] ECR 1405.

¹⁴ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577; C-411/98; *Ferlini v. CHL* [2000] ECR I-8081, para.50.

¹⁵ Commission Notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001); Communication from the Commission to the European Parliament and the Council on the role of European standardisation in the framework of European policies and legislation, 18.10.2004.

¹⁶ Commission Notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001).

31. As regards agreements on SPCs and Security Devices, several respondents argued that there would be much less cooperation between insurers if the BER were not renewed because companies would be less willing or unwilling, to assume the legal risks of cooperating without the BER. The argument is that this reduction in cooperation or failure to cooperate would in turn disadvantage both competition (less market entry) and consumers (higher prices and less choice). If cooperation in the areas exempted is so important to the insurance sector, the Commission would expect that the need to cooperate would take priority over the need for a safe harbour under the BER. This is what happens, in practice, for example in relation to claims settlement agreements and registers of aggravated risks, where insurers do cooperate, even though these two areas are not block exempted. Therefore if there is any less cooperation on the market in the event of non-renewal, it is unlikely this would be the direct consequence of non-renewal.
32. It should be noted that the legal certainty provided by the BER is not absolute and can be a safe harbour (codifying Article 81(3)) only if the conditions of the BER are fulfilled. Many insurers appear to rely on the legal certainty provided by the simple existence of the BER, without carrying out the required careful legal assessment of their compatibility with the conditions of the BER. Furthermore, many insurers appear to mistakenly consider themselves covered by the BER, underestimate the assessment required under the BER and overestimate the self-assessment that would be necessary in the event of non-renewal of the BER.
33. In the event that the BER is not renewed in relation to the two categories of agreements proposed (standard policy conditions and security devices), agreements previously falling under the BER will not necessarily become illegal. On the contrary, a legal assessment under Article 81(1) and Article 81(3) together with the Guidelines on the application of Article 81(3) and/or the Horizontal Guidelines, rather than under the BER, would be required, as is currently the case for the vast majority of sectors. As the European Commission will confirm in a Communication which will be published in the event of non-renewal of any of the current exemptions, most of the criteria used in this BER would remain valuable when applying Article 81(3). Finally, positive effects arising from such agreements and argued by respondents during the Review should be considered within Article 81(1) and, if necessary, Article 81(3) on a case-by-case basis.
34. The Commission's view at this stage is that the two forms of cooperation which appear specific to the insurance sector, namely agreements in relation to joint calculations, tables and studies and co(re)insurance pools should continue to be facilitated by a BER. For the former, the Commission has not yet decided whether to amend the structure or drafting of the current exemption and whether, if concluded that renewal is necessary, it should be total or partial. This will depend on the further input it may receive and on a thorough and specific analysis of all data and information available. As for the latter, it appears, at this stage that, even if the risk of non-cooperation in these areas may be low, the possibility that such pro-competitive cooperation may diminish, should be avoided.
35. A public event will be held on 2nd June 2009 to allow the Commission to hear final representations from industry and stakeholders prior to taking a decision on whether to renew any parts of the BER.