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COMMUNICATION FROM THE COMMISSION

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector

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1. INTRODUCTION AND BACKGROUND

1. Commission Regulation (EC) No 358/2003¹, the previous Insurance Block Exemption Regulation (BER) which expired on 31 March 2010, applied Article 101(3) of the Treaty on the Functioning of the European Union* (the Treaty) to certain categories of agreements, decisions and concerted practices in the insurance sector.
2. Following a lengthy review (the Review) of the functioning of Regulation (EC) No 358/2003, the Commission published its Report to the European Parliament and the Council on the functioning of that Regulation² (the Report) as well as an accompanying Working Document³ (the Working Document) on 24 March 2009.
3. As a result of its findings following the Review, the Commission has now adopted a new insurance BER which renews the exemptions for two of the four categories of agreements exempted in the previous BER; namely: (i) joint compilations, tables and studies; and (ii) common coverage of certain types of risks (pools).

2. FIRST PRINCIPLES ANALYSIS

4. The Commission's original objective when it adopted Regulation (EC) No 358/2003 of reducing the number of notifications it received is no longer relevant since under Regulation (EC) No 1/2003 undertakings can no longer notify their agreements to the Commission, but now must conduct their own self-assessment. In this context, a specific legal instrument such as a BER should only be adopted if cooperation in the insurance sector is "special" and different to other sectors which do not benefit from a BER (i.e. most sectors currently). The Commission's analysis as to whether or not to renew the BER addressed three key questions in relation to each of the four categories of agreements 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;

¹ OJ L 53, 28.2.2003, p. 8.

* With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Communication, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0138:EN:NOT>

³ http://ec.europa.eu/competition/sectors/financial_services/insurance_ber_working_document.pdf

- (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).

3. RENEWED EXEMPTIONS

- 5. On the basis of its Review and consultation of stakeholders which was conducted over a 2 year period, the Commission adopted the new BER [Commission Regulation (EU) No xx/xx of xx/xx/xxxx] renewing (with amendments) the exemptions for two forms of cooperation, namely (i) joint compilations, tables and studies; and (ii) common coverage of certain types of risks (pools).
- 6. When agreements falling within these categories of agreements do not meet all the conditions to benefit from the block exemption, an individual analysis under Article 101 of the Treaty is required. The analytical framework set out in the Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements⁴ (the Horizontal Guidelines) will assist businesses in assessing the compatibility of agreements with Article 101 of the Treaty.⁵

3.1 Joint Compilations, Tables and Studies

- 7. Subject to certain conditions, the previous BER exempted 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) mortality tables and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalisation. It also exempted (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.
- 8. As summarised in the Report, 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, the Commission considers that cooperation in this area is both specific to the insurance industry and necessary in order to price risks.
- 9. The Commission also considers that there are good reasons to protect and facilitate cooperation in this area with a BER and that it is appropriate that the BER be

⁴ See paragraph 7 of Commission Notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, O J C 3, 6.1.2001, p. 2.

⁵ The current Horizontal Guidelines are under review.

renewed for this category of agreements in order to avoid any reduction in such pro-competitive cooperation.

10. However, in renewing the exemption the Commission made the following key changes: (i) the term "joint calculations" was changed to "joint compilations" (which may also include some calculations); (ii) clarification that exchange of information is only allowed where it is necessary; and (iii) access to data shared is now also allowed for consumer organisations and customer organisations (as distinguished from individuals), with a public security exception.

3.2 Common coverage of certain types of risks (pools)

11. The previous BER exempted⁶ the setting up and operation of co-(re)insurance pools for the common coverage of new risks as well as co-(re)insurance pools covering risks which are not new, subject to certain conditions, in particular to market share thresholds.
12. As a result of its Review, the Commission considers 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 cooperation⁷. Therefore, the new BER also exempts pools under certain conditions.
13. In renewing the exemption, the Commission made the following key changes: (i) a change to the approach to market share calculation in order to bring it into line with other general and sector-specific competition rules so that not only gross premium income earned within the pool by the participating undertakings, but also outside the pool will be taken into account; and (ii) an amendment and expansion to the definition of "new risks".
14. In terms of self-assessment it is important to consider that there are three types of pools and determine into which category a particular pool falls. (i) pools which do not require a BER as a safe harbour because they do not give rise to a restriction of competition as long as the pooling is necessary to allow their members to provide a type of insurance that they could not provide alone; (ii) pools which fall under Article 101(1) of the Treaty and which do not comply with the conditions of the new BER but may benefit from an individual exception under Article 101(3) of the Treaty; (iii) pools which fall under Article 101(1) of the Treaty but which comply with the conditions of the BER.
15. For both types (ii) and (iii) 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 thresholds⁸. The Commission's Notice on the

⁶ For three years from the date of first establishment of the group, regardless of the market share of the group.

⁷ An alternative method of covering risks through co-(re)insurance is *ad-hoc* co-(re)insurance agreements on the subscription market, which may be a less restrictive option depending on the analysis on a case-by-case basis.

⁸ Concerns were also raised about the definition of "new risks".

definition of the relevant market for the purposes of Community competition law⁹, 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.

16. However the Review showed that many insurers were incorrectly using the pool exemption in the BER as a "blanket" exemption, without carrying out the required careful legal assessment of a pool's compliance with the conditions of the BER.¹⁰
17. Also, it should be remembered that *ad-hoc* co-(re)insurance agreements on the subscription market¹¹ have never been covered by the BER and they remain outside the scope of the new BER. As mentioned in the Commission's Final Report on the Business Insurance Sector Inquiry of 25 September 2007¹², practices involving an alignment of premium (between co-(re)insurers through *ad-hoc* co-(re)insurance agreements) may fall within the scope of Article 101(1) of the Treaty, but may benefit from the exemption afforded by Article 101(3) of the Treaty.
18. The Commission intends to closely monitor, in cooperation with national competition authorities within the framework of the European Competition Network, the operation of pools to ensure that blanket applications of the BER or Article 101(3) of the Treaty are not occurring. This closer monitoring will be undertaken in line with enforcement cases where pools are found to fall foul of Article 101(1) of the Treaty and/or the BER.

4. NON-RENEWED EXEMPTIONS

19. On the basis of the Commission's analysis set out in the Report and Working Document, as well as in its Impact Assessment of the new BER, two of the four exemptions in the previous BER, namely agreements on standard policy conditions (SPCs) and security devices have not been renewed by the new BER. This is primarily because they are not specific to the insurance sector and therefore their inclusion in such an exceptional legal instrument may result in unjustified discrimination against other sectors which do not benefit from a BER. In addition, although these two forms of cooperation may give rise to some benefits to consumers, the Review showed that they can also give rise to certain competition concerns. Therefore, it is more appropriate that they be subject to self-assessment.
20. Although non-renewal of the BER in relation to these two types of cooperation will inevitably result in slightly less legal certainty, it should be emphasised that the insurance sector will benefit in this regard from the same level of legal certainty as

⁹ OJ C 372, 9.12.1997, p. 5.

¹⁰ In particular in relation to market share thresholds. Furthermore, it is crucial that any pools covering new risks and purporting to fall within the BER ensure that they are in fact covered by the precise definition of new risks in Article 1 of the new BER, as mentioned in the Report and Working Document.

¹¹ Whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover the remainder.

¹² COM(2007) 556 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance (Final Report).

the other sectors which do not benefit from a BER. Furthermore, as outlined below the Commission plans to address both these forms of cooperation in its Horizontal Guidelines.

4.1 Standard Policy Conditions

21. The previous BER exempted the joint establishment and distribution of non-binding standard policy conditions (SPCs) for direct insurance¹³.
22. On the basis of the evidence found during its Review, the Commission no longer considers that a sector specific BER is necessary since cooperation on SPCs is not specific to the insurance sector, but common to many others, such as the banking sector, which do not benefit from a BER. As SPCs are not specific to the insurance sector it is appropriate that any guidance on SPCs is afforded to industry as a whole and in the form of a horizontal instrument.
23. The Commission considers that in many cases SPCs can give rise to positive effects for competition and consumers. For example, SPCs allow the comparison of insurance policies offered by different insurers, allowing customers to verify the content of guarantees more easily and facilitating switching between insurers and insurance products. However, whilst there is a need for comparability between insurance products for consumers, too much standardisation can be harmful for consumers and can lead to a lack of non-price competition. In addition, given that certain SPCs can be imbalanced, it is more appropriate that undertakings conduct their own assessment on the basis of Article 101(3) of the Treaty in the event that Article 101(1) of the Treaty is applicable in order to demonstrate that the cooperation they are part of gives rise to efficiency gains, a fair share of which benefit consumers¹⁴.
24. Accordingly, the Commission is planning to expand its Horizontal Guidelines to also address SPCs for all sectors. These are currently under review and it is planned to publish a draft of the revised Horizontal Guidelines for stakeholder consultation in the first half of 2010.

4.2 Security devices

25. The previous BER exempted (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.

¹³ Article 6(1)(a) to (k) of Regulation (EC) No 358/2003.

¹⁴ Certain of the clauses listed in Article 6(1) of the previous BER, Regulation (EC) No 358/2003, would remain relevant for self-assessment of agreements under Article 101 of the Treaty, in particular those which have an impact on prices and product innovation. Of particular relevance are, for example, clauses which (i) contain any indication of the level of commercial premiums; (ii) indicate the amount of cover or the part which the policyholder must pay himself; or (iii) impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed; (iv) require the policyholder to obtain cover from the same insurer for different risks.

26. However, the Commission considers that the setting of technical standards falls into the general domain of standard setting, which is not unique to the insurance sector. As these kinds of agreements are not specific to the insurance sector, it is appropriate that any guidance is afforded to the industry as a whole and in the form of a horizontal instrument. This is already the case, as Point 6 of the Horizontal Guidelines provides guidance on the compliance of technical standards with Article 101 of the Treaty. Moreover, the Horizontal Guidelines are currently under review and it is planned to publish a draft of the revised Horizontal Guidelines for stakeholder consultation during the first half of 2010.
27. In addition, these agreements were covered by the BER in so far as no harmonisation exists at Union level. The Commission's Review showed that there is reduced scope for the BER, since such harmonisation is now extensive. As regards the limited area where there is not yet Union harmonisation, detailed national rules result in fragmentation of the internal market, reduction of competition between producers of security devices across the Member States and less choice for consumers as consumers do not obtain insurance in the event that their security devices do not comply with standards commonly established by insurers.
28. The Commission has therefore not renewed the BER for these categories of agreements.

5. CONCLUSIONS

29. It will be necessary for undertakings to carefully assess their cooperation on joint compilations, tables and studies and pools under the conditions established by the BER, in order to avoid blanket application of the BER.
30. As regards self-assessment under Article 101(3) of the Treaty for cooperation on SPCs and security devices, undertakings benefit from two legal instruments, namely the Horizontal Guidelines (currently being revised) and the Guidelines on the application of Article 81(3) of the Treaty¹⁵.

¹⁵ OJ C 101, 27.4.2004, p. 97.