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IMPACT ASSESSMENT - HT.4012 - IBER

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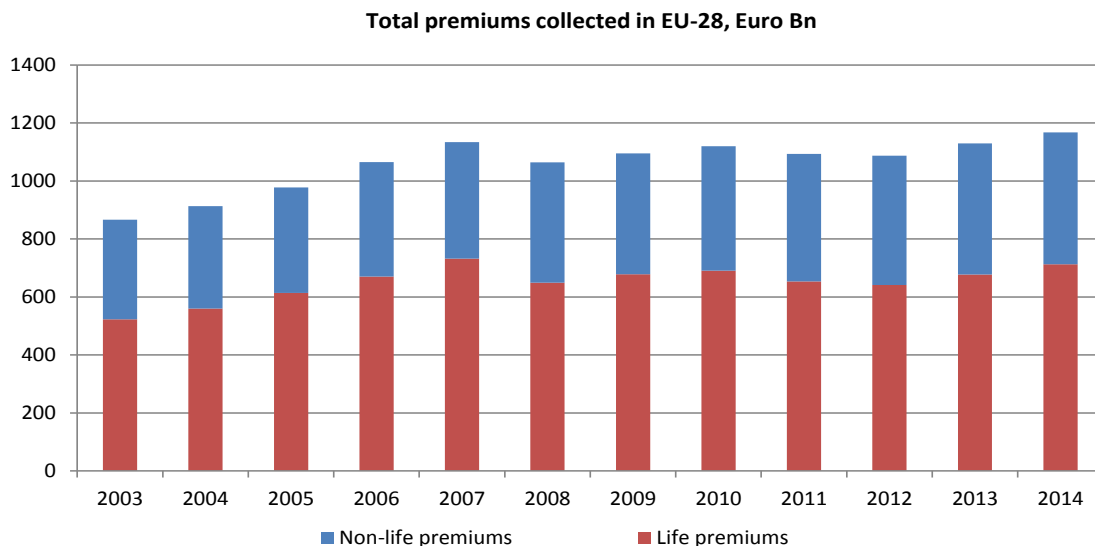
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1. INTRODUCTION

1. The insurance industry is a key component of the European economy by virtue of the amount of premiums it collects, the scale of its investments and, more fundamentally, the essential social and economic role it plays by covering personal and business risks.
2. In terms of market size, approximately 4000 insurance companies are active in the EU¹, operating both in the life² and non-life³ insurance sector, providing employment to close to 1 million employees. It collected over 1 100 billion EUR in insurance premiums (i.e. the amounts paid by consumers for the contract of insurance) in 2014.
3. The amount of premiums (life and non-life) collected has steadily increased until 2007. Since 2007 it has remained stable, as is also the case for the amounts of premiums going to life and non-life insurance.
4. In 2014 the largest national markets in terms of non-life premiums paid by domestic companies were Germany, the United Kingdom and France, representing approximately 55% of non-life premiums written in the EU-28. In 2014 the largest life insurance markets were UK, France and Italy.

Chart 1: Market size in terms of premiums paid



Source: Insurance Europe, structural statistics database

¹ See insurance industry structural data collected by Insurance Europe. Available at: <http://www.insuranceeurope.eu/insurancedata>

² For classes of life-insurance see Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Annex II

³ For classes of non-life insurance see Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Annex I

5. From data provided by Insurance Europe it would appear that SMEs currently employ 2.8% of staff in the insurance sector and collect 0.9 % of the premiums.⁴
6. Competition between insurance companies spurs innovation and price competition, in particular since the liberalisation of the insurance sector in 1994⁵. The preservation of effective competition is essential for market economies, since it enhances business efficiency and boosts innovation, helping to deliver better market outcomes in terms of quality, choice, cost and prices.
7. Article 101 TFEU prohibits agreements and concerted practices between companies which have the potential to restrict or distort competition without creating efficiencies⁶ that benefit policyholders. This prohibition also applies to insurers as the European Court of Justice established in 1987.⁷
8. Insurers are consequently obliged to verify whether co-operations with competitors are restrictive or distortive of competition within the meaning of Article 101(1) TFEU. Agreements, falling under Article 101(1) TFEU, which do not satisfy the conditions of Article 101(3) TFEU, are null and void pursuant to Article 101(2) TFEU. However, if a co-operation is restrictive, it may benefit from an exception if the cooperation fulfils four conditions laid down in Article 101(3) TFEU.
9. Article 101 (3) TFEU applies if the co-operation:
 - a. contributes to improving the production or distribution of goods or to promoting technical or economic progress, while
 - b. allows consumers a fair share of the resulting benefit, and
 - c. does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - d. does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
10. Based on an empowerment from the Council ⁸ the Commission in 1992 adopted a sector specific *Insurance Block Exemption Regulation* (“**IBER**”) which stipulates precisely for certain co-operations between insurers when they can be deemed to meet the four conditions of Article 101 (3) TFEU.⁹ Undertakings must self-assess, without the

⁴ Data from Insurance Europe, see Annex 6, for 11 EU Member States.

⁵ The first initiatives towards the integration of the European insurance market were made at the beginning of the 1970’s and completed in July 1994 by the implementation of the Third Generation of Insurance Directives, i.e. Life Council Directive (92/96/EEC) and Non-Life Council Directive (92/49/EEC).

⁶ Benefits such as risk diversification, knowledge sharing, lower reinsurance and retrocession costs, etc. are called efficiencies in competition law.

⁷ ECLI:EU:C:1987:34 *Verband der Sachversicherer*.

⁸ Council Regulation (EEC) No 1534/91 of 31 May 1991.

⁹ To satisfy Article 101(3) TFEU, an agreement must satisfy four cumulative conditions: It must contribute to the production or distribution of goods or contribute to promoting technical or economic progress, consumers must

involvement of or notification to the Commission, whether their agreements fulfil all conditions of the IBER. Once an agreement fulfils the conditions for being block exempted according to the IBER, it is considered compatible with the EU competition rules and can be put into practise.

11. The IBER¹⁰ still exempts **two categories** of co-operations between competing insurers from the prohibition of Article 101 (1) TFEU, namely:
 - i. the joint compilation and distribution of information necessary for the calculation of average cost of covering a specified risk in the past (“**compilations**”) or the construction of mortality tables and tables showing the frequency of illness, accident and invalidity in connection with insurance involving an element of capitalisation (“**tables**”) (Article 2 (a) IBER); and 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 (“**studies**”), and the distribution of the results of such studies (Article 2 (b) IBER) (together exemption of “**compilations, tables and studies**”); and
 - ii. agreements with respect to the common coverage of certain types of risks by means of co-insurance or co-reinsurance pools (Article 5 IBER) (“**pools**”).
12. Due to the Council Empowering Regulation which requires that an IBER may only be adopted for a limited period of time¹¹, the IBER contains a **sun-set clause** which foresees expiry on 31 March 2017.¹²
13. The Commission conducted an assessment of the IBER from 2014 to 2016 and published its findings in a Report¹³ to the European Parliament and the Council on the functioning and future of the IBER¹⁴ which was complemented by a preliminary assessment regarding its future. For a more detailed description of the review process and the public consultation (see chapter 2.4.5, Annex 1 and Annex 2).
14. The Report was supported by a Staff Working Document which raised two questions: (1) does the insurance sector possess special features compared to other sectors of the economy in the sense that competing insurers have an enhanced need to co-operate with one another in the areas covered by the IBER and (2) if this is the case, is an Insurance

receive a fair share of the resulting benefit, the restrictions must be indispensable to the attainment of these objectives, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

¹⁰ Commission Regulation (EU) No 267/2010 of 24 March 2010, OJ L 83 page 1 of 30.3.2010.

¹¹ Council Regulation (EEC) No 1534/91 of 31 May 1991, Article 2

¹² Commission Regulation (EU) No 267/2010 of 24 March 2010, Article 9.

¹³ Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EU) No 267/2010 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, COM(2016) 153.

¹⁴ http://ec.europa.eu/competition/sectors/financial_services/iber_report_en.pdf.

Block Exemption Regulation still the most appropriate instrument¹⁵ to safeguard this pro-competitive enhanced need for cooperation.

15. Based on this Report, the Commission's preliminary assessment was that although there are indications of an enhanced need for cooperation in the areas covered by the IBER the strict conditions for maintaining an Insurance Block Exemption Regulation seem no longer to be met. Thus, the preliminary conclusion put forward by the Commission in the Report (see paragraph 54) was that a case-by-case self-assessment of co-operations so far covered by the IBER on the basis of the Horizontal Guidelines¹⁶, can ensure that they produce net positive effects for consumers and competition within the meaning of Article 101(3) TFEU.

2. PROBLEM DESCRIPTION

2.1. THE NATURE OF THE PROBLEM

16. A main finding of the March 2016 Report on the functioning of the Insurance Block Exemption Regulation was that the insurance sector presents characteristics different from other sectors such that they lead to an enhanced need for cooperation between market participants.
17. As will be set out in more detail in section 2.1.1., an inverted production cycle is typical for insurance, as premiums must be determined before the cost of insuring a risk are known. The premium is determined based on the probability of the occurrence of claims as calculated by the insurance company and is paid in advance by the contract signatories. As such, quotes in insurance are not the same as in other industries, because a simple calculation cannot be made to determine the cost price. Rather, a stochastic and actuarial analysis must be carried out based on past cost. To assess the future cost of insuring risks today, insurers regularly collect their respective proprietary data on the occurrence of risks and their cost in the past. Such data are then aggregated by data providers or by associations of insurance companies. In life insurance, aggregated data on services make it easier for all companies to assess their prudential situation.¹⁷
18. As will be further developed in section 2.1.2, insurance companies may also sometimes co-operate to jointly insure a certain category of risks. The joint production of insurance products can have potential advantages. It may allow unexperienced insurers to contribute to the insurance of large extraordinary risks which they would otherwise not cover. Policy holders in return may benefit from spreading their counterparty risks among several insurers rather than facing one single insurer, only. Co-operations between insurers to co-insure risks can therefore be beneficial to policyholders by facilitating entry and reducing counterparty risks.
19. The **problem** at stake is how to reconcile on the one hand these needs of competing insurers to cooperate with the need to maintain open markets and ensure a level playing

¹⁵ See also the Commission's Staff Working Paper for the Impact Assessment conducted in 2010 for reviewing the IBER then (C(2010)1746 final) at paragraph 26.

¹⁶ For the meaning of "Horizontal Guidelines" see below in paragraphs 71 – 73, 102 – 116 and Annex 8.

¹⁷ See, for instance, the views of Fédération Française de l'Assurance, letter dated 11 November 2016.

field, as required by Article 101 TFEU, which in principle prohibits any agreements, concerted practices and decision of associations that have as object or effect the restriction or distortion of competition. While the sharing of information for joint compilations, tables and studies and the co(re)insurance in pools may be beneficial for market participants, such co-operations may also bear the risk that the parameters of competition between participating insurers are aligned thereby depriving them of incentives to compete through innovation and price reductions.

20. In the following sections 2.1.1 and 2.1.2, the problem will be set out in more detail. Thereafter, section 2.2 addresses the EU dimension of the problem, section 2.3 the persons affected by the problem and section 2.4 puts the problem in a historic context.

2.1.1. Information exchange on net premiums

21. The costs of insurance products are unknown at the time the premium is agreed upon and insurers consequently price risks on the basis of historic data on the frequency and severity of claims. To reliably assess risk, build stochastic models¹⁸, correctly analyse cost and choose a price by calculating the risk exposure on the basis of historical data (the *net premium*)¹⁹, insurers exchange and merge their proprietary data. The more actuarially reliable the calculation of net premiums, the lower the safety margins which risk-averse insurers need to include in setting their total price. Moreover, the information exchange of historical data may help smaller and/or less experienced insurers to enter new markets by overcoming an information asymmetry.

22. However, it is important to draw a clear line between on the one hand a narrow exchange of historic, anonymised and aggregated cost data to calculate net premiums and on the other hand a more far reaching and granular information exchange which could allow insurers to anticipate how their competitors will set the total price, the *commercial premium*.²⁰ Agreements, concerted practice or decisions to recommend or to fix commercial premiums are violating Article 101(1) TFEU and do not meet the four conditions of Article 101 (3) TFEU.²¹

¹⁸ "Stochastic" means being or having a random variable. A stochastic model is a tool for estimating probability distributions of potential outcomes by allowing for random variation in one or more inputs over time.

¹⁹ The *pure premium* is composed of two elements: on the one hand, the *net premium* which aims at covering the cost of the insured product based on statistical evidence concerning the past (frequency and scale of claims) and, on the other hand, a component which adjusts the net premium either upwards or downwards as it incorporates the results of studies concerning the future (i.e. general circumstances likely to materialize and to have an impact on the frequency or scale of claims). The *commercial premium* is the total price which an insurer charges the insured for the insurance product. This price contains a risk premium which covers the cost of the insured product, (sometimes) a security charge, overheads (such as distribution cost, company tax etc.) and profit.

²⁰ The *commercial premium* – see above footnote 19.

²¹ Agreements between insurers on setting uniform commercial premiums are price fixing within the meaning of Article 101 (1) a TFEU. In *Verband der Sachversicherer* (1984), the Commission condemned such a recommendation from the German association of property insurers to its members concerning the increase of commercial premiums in the field of industrial insurance (Judgment of 27/01/1987, 45/85, *Verband der Sachversicherer / Commission*, (Rec.1987,p.405).

2.1.2 Co(re)insurance of risks

23. Insurance companies sometimes co-operate to jointly insure risks in co(re)insurance pools rather than insuring the risk each individually and in competition with one another.
24. For extraordinary large risks that occur in irregular intervals but may lead to very large damage claims, some form of co-insurance and/or co-reinsurance may even represent the only possibility to cover the risk if no insurer is at all able to cover the risk alone. Even where insurers are in principle able to insure risks in competition with one another, policyholders may prefer to spread their counterparty risk by having more than one single insurer cover a particularly large risk. The policyholder can either request the insurer to reinsure (parts of) the large risk or may, if there are benefits, agree to a co-insurance arrangement between several insurers. Insurers, too, may want to gain knowledge on a new risk by joining an existing risk sharing arrangement between experienced insurers who are in need of additional capital to increase the activities of their pool. If the co-insurance or co(re)insurance scheme is open to newcomers, risk sharing may allow insurers to spread their portfolio and increase liquidity while customers can benefit from a decreased counterparty risk.
25. If no insurer is at all able to insure a given risk alone in competition with others, then the companies participating in a co(re)insurance pool cannot be deemed to be “competitors” and Article 101 (1) TFEU does not apply to the setting up of the pool. For instance, the creation of pools to co-insure third party damage claims resulting from nuclear incidents has in the past been considered to fall outside the scope of Article 101 TFEU as risk pooling was at the time qualified as the only option to ensure the insurance of such risk at all. On the other end of the scale are situations where insurance companies align the prices and conditions for insuring a mass risk by joining a pool although such mass risks could be perfectly insured by every participating insurer alone and although there are no obvious benefits of the joint production and distribution of the insurance product. Such co-operation would likely be prohibited by Article 101 (1) TFEU as they would not fulfil the conditions for an exception according to Article 101 (3) TFEU.
26. In between such extremes are co-operations which have some restrictive effects (by aligning the conditions of insurance) but also produce efficiencies for policy holders who can get a better deal through coinsurance than if risks were insured by one insurer, only. For instance, where insurers join a pool to spread their risk they may be able to offer lower commercial premiums than absent the pool on a stand-alone basis. When a market is sufficiently competitive, pooling can also help new entrants to gain knowledge²² and contribute capital for the insurance of a risk which they are not yet much acquainted with. Consumers may also be interested in spreading their insurance cover and may therefore favour co-insurance above insurance by one insurer, only.

²² See "Different forms of cooperation between insurance companies and their respective impact on competition", Europe Economics (2016), chapter 5.2 Distinctive features of cooperation schemes. Available at: http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf Note that the study maps all categories of efficiencies related to risk pooling but does not analyse its downsides. For instance, while the efficiencies related to low transaction cost are noticed, the harmonisation of insurance premiums and insurance conditions through pooling are not considered in this study.

27. It is widely acknowledged that risk sharing produces efficiencies²³. However such efficiencies²⁴ must be balanced against the distortive effects for competition²⁵ according to the four conditions of Article 101 (3) TFEU. The balancing of the efficiency-enhancing aspects of pooling versus its competition distorting effects must be done either on a case-by-case basis or through a more generic assessment.

2.1.3 The IBER

28. From a policy perspective, there are two approaches to consider these needs of insurers (section 2.1.1 and section 2.1.2) in a competition assessment according to Article 101 (3) TFEU²⁶. The balance of efficiencies and negative effects can be struck either (i) in a Commission Block Exemption Regulation which lists conditions that co-operations of a kind must generally fulfil, or (ii) case-by-case self-assessment of co-operations in the concrete market context.

29. The policy choice bears consequences, both for the nature of the assessment and the competency of national competition authorities to get involved, if they want.

30. Currently, the first approach prevails: The IBER stipulates all conditions which insurers must observe for their co-operations to comply with Article 101 (3) TFEU. Compilations, tables or studies must not identify the insurance undertakings concerned or any insured party, must be non-binding, must not contain any indication of the level of *commercial premiums*²⁷ must be available on fair terms to consumers and insurers alike. Insurers involved in co(re)insurance pools must not hold more than a 20% (co-insurance pools) or 25% (re-insurance pools) market share. Once insurers observe these conditions for a block exemption according to the IBER, they have the legal certainty that the exchange of data or the cooperation to jointly insure risks is legal. If insurers do not fulfil all these criteria they are obliged to conduct a self-assessment of their cooperation agreements.²⁸

31. The second approach (which today already applies to all co-operations between insurers outside the narrow scope of the IBER) is the standard approach of EU competition assessment. If applicable, it implies that insurers must consider the concrete cooperation in the market context to ascertain its net effects for customers. In doing this self-assessment, insurers would be guided through horizontally applicable rules which the Commission adopted in 2011 for co-operations between competitors. These rules are the so-called "Horizontal Guidelines" and will be further explained below in paragraph 71 and following.

²³ "Efficiencies of coinsurance pools", Prof. Dr. Roman Inderst, Goethe University Frankfurt (Main), April 2016. Study commissioned by The German Insurance Association (GDV) and available at: <http://www.en.gdv.de/2016/04/co-insurance-pools-are-efficient/>.

²⁴ Risk diversification, knowledge sharing, lower reinsurance and retrocession cost etc.

²⁵ Alignment of premiums, standardisation of policy conditions, of amounts of cover and of premiums.

²⁶ For Article 101 (3) TFEU see above paragraph 9.

²⁷ See footnote 19.

²⁸ See also Annex 8 with an overview of the assessment under the IBER compared to an assessment according to the Horizontal Guidelines.

32. The choice of instrument has repercussions for competition authorities and customers alike.
33. National competition authorities are currently restrained from investigating co-operations that fulfil the formal conditions of the IBER because the IBER has legally binding effects not only for the Commission but also for national competition authorities.²⁹ A national competition authority would have to prove that a co-operation has specific "effects which are incompatible with Article 101 (3) TFEU in the territory of the Member State concerned" despite meeting all conditions of the IBER.³⁰ The presumption of legality of the IBER therefore creates a high barrier for interventions by national authorities. In practice, it never happened that a national competition authority met this threshold.³¹
34. Getting the balance right also indirectly has repercussions on customers, that is, the policyholders. They can benefit from efficiencies of co-operations (lower premiums, better risk coverage etc.) but they also suffer if co-operations between competing insurers spill-over into anticompetitive practices such as price fixing that have no benefits for consumers.

2.2. THE EU DIMENSION OF THE PROBLEM

35. The evidence gathered during the assessment of the functioning of the IBER would suggest that the co-operations still covered by the IBER are essentially *national* in scope rather than pan-European or regional. This is true both for the co(re)insurance pools and for compilations, tables and studies. The analysis is based upon the information received during the public consultation and from market studies. Due to the variety³² of information sources and data limitations the present Report is based on solid empirical evidence but there are limitations due to the impossibility of obtaining replies from insurers in all EU Member States.

2.2.1. Information exchange on net premiums

36. Insurance Europe, the federation of insurance associations in the European Union, identified approximately 130 compilations/tables/studies in 11 EU Member States which are compiled by members of Insurance Europe, namely national associations of insurers.³³
37. Of these 11 Member States most compilations, tables and studies were conducted in Germany followed by Malta, France, Belgium and The Netherlands.

²⁹ Article 29 Regulation (EC) No 1/2003.

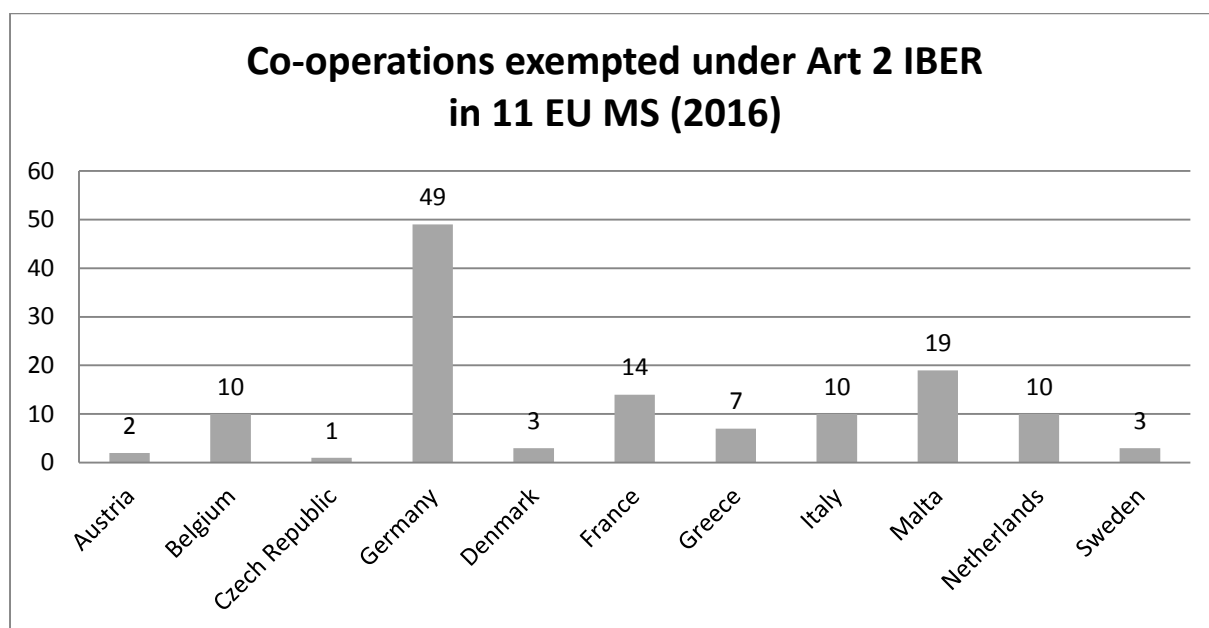
³⁰ Regulation (EC) No 1/2003 Article 29 (2).

³¹ The German Bundeskartellamt for instance lost a case in Court against an insurance pool which could prove that its cooperation met the formal conditions of the IBER. See later in Annex 2 paragraph 13.

³² See Annex 1 and Annex 2 for an overview of information sources used

³³ Note that Insurance Europe provided such data on a best effort basis and that not all members of IE contributed to the reply. It is not to be understood as a comprehensive representation of all the joint compilations and studies undertaken in Europe. It is a representation of the available data, not necessarily the overall actual situation.

Chart 2: Compilations, tables and studies block exempted according to Article 2 IBER



Source: Insurance Europe 2016

38. From the reply of Insurance Europe it would moreover appear that the exemption of Article 2 IBER is predominantly used for the calculation of net premiums (93 out of 130) and to a much lesser extent for compiling mortality tables (21/130) and joint studies (14/130).

2.2.2 Co(re)insurance of risks

39. It is difficult to say exactly how many pools are still covered by the IBER because block exempted co-operations are not notified to the Commission.

40. As set out in the study of Europe Economics³⁴ (see for details also Annex 4), there is no single accepted model for co(re)insurance arrangements in Europe and all forms of co(re)insurance are **heterogeneous** in many aspects.³⁵ An important dimension to

³⁴ http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf

³⁵ See the concurrent findings of three studies: E&Y in 2014 (http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf) at page ii of the executive summary ("The functioning of pools is heterogeneous and each pool requires assessment on its individual merits."); Europe Economics in 2016 (http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf) at page 8 ("Overall, co(re)insurance schemes are highly heterogeneous in terms of their intrinsic mechanisms, which suggests that a more accurate assessment needs to be conducted on a case-by-case basis") and of Prof. Inderst in 2016 whose study was commissioned by the German association of insurers GDV (http://www.en.gdv.de/wp-content/uploads/2016/04/GDV_Study_Pool_Efficiencies_2016.pdf) at page IV ("We note throughout this report, however, that both broker-driven and insurer-driven pools typically exhibit considerable heterogeneity such that the contractual and institutional specificities of a particular pool determine whether the respective efficiency potential is fully exploited").

distinguish between different forms of cooperation relates to their internal functioning rules and, in particular, the allocation of claims and premiums among members.³⁶

41. Of all these many different forms of co(re)insurance co-operations, actually very few qualify as "pools" within the narrow meaning of the IBER. The IBER covers only the few pools which were originally set up by insurance companies (be it directly or indirectly with the support of an insurance intermediary who facilitates their co-operation)³⁷. The best data available so far are drawn from the study of E&Y in 2014 which identified **46 pools** that potentially meet the definition of the IBER.³⁸
42. The majority of the 46 pools are clustered in 6 Member States³⁹ and nearly all pools have a **domestic scope**, they operate in one single EU Member State, only.⁴⁰

³⁶ See http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf at section 4.3.2.

³⁷ Commission Regulation (EU) No 267/2010 of 24 March 2010 Article 1 (4) "*co-insurance pools means groups set up by insurance undertakings either directly or through brokers or authorised agents*" [emphasis added]. A broker may for instance assist pool members in selecting the lead insurer by organising a tender between the pool members. See Annex 7 for a flowchart on the applicability of the IBER to pools.

³⁸ Ernst & Young, "*Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market*", July 2014.

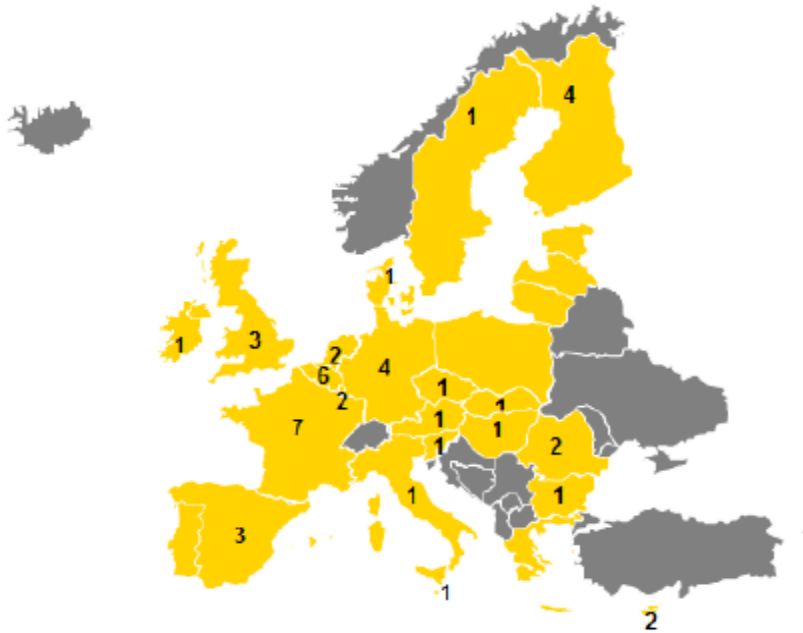
See: http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf

³⁹ France (7), Belgium (6), Finland (4), Germany (4), the UK (3) and Spain (3).

⁴⁰ To the best knowledge of the Commission only pools covering third party liability for nuclear incidents operate on a pan-European scale as far as reinsurance of risks of the national pools is concerned. Even here the pools insure risks of their home country, only, limiting the activity of their pool to one country.

Chart 3: E&Y Study: Co(re)insurance pools in EU 27 (2014)

Figure 3: Number of pools identified per Member State



Source: Ernst & Young, *Study on pools and on ad-hoc co(re)insurance agreements*, July 2014, page 39.

43. These 46 pools in a narrow sense ("set up by insurers") are to be distinguished from pools that are set up by brokers and ad-hoc co(re)insurance agreements on the subscription market such as the Lloyd's market of London or insurance markets in France, Germany or in the Netherlands.
44. The study carried out by *Ernst & Young* (E&Y) in 2014 identified a variety of co(re)insurance agreements outside the IBER.⁴¹ *Europe Economics* in 2016 classified the co(re)insurance agreements in four categories: insurer-led (IBER) pools, broker led pools, mandated pools and ad hoc agreements.⁴²
45. Upon closer look at the 46 pools set up by insurers (IBER pools) as identified in the 2014 E&Y Study⁴³, **several** exceed the market share thresholds of Article 6 IBER (20% / 25%) and therefore **fall outside the IBER despite meeting the definition** for "pool" in Article 2 IBER.
46. Pools participating in the 2014 study by E&Y stated that they had conducted self-assessments under Article 101 TFEU which led them to conclude that their pooling of risks fell entirely outside the scope of Article 101 (1) TFEU. Examples are the terror pool

⁴¹ For more details see Annex 4.

⁴² See Table 3 in Annex 4.

⁴³ E&Y Study, page ii introduction ("*The current study has identified 46 pools, for 42 of which it has been possible to gather information on their characteristics. The 4 pools identified for which it was not possible to gather information declined to participate in the survey due to considerations of commercial confidentiality of the data sought*").

in Austria⁴⁴, a pool in Cyprus⁴⁵, various pools in France⁴⁶ and in Italy⁴⁷ as well as pools for maritime insurance in the UK⁴⁸. To the contrary pools which consider themselves still covered by the IBER apparently exist in Slovakia⁴⁹ Slovenia⁵⁰, Spain⁵¹ and in Sweden⁵².

47. During the assessment of the functioning of the IBER, pools covering nuclear liability risks and certain large environmental risks confirmed to the Commission that the IBER does not apply to them according to their self-assessment.⁵³

2.3. WHO IS AFFECTED?

48. Stakeholders potentially affected by the problem are in the first instance insurance companies whose co-operations currently fall within the scope of the IBER and are deemed to comply with Article 101 TFEU which prohibits agreements/concerted practices and decisions which have as object or effect a restriction of competition.

49. Regarding SMEs, the insurance industry is dominated by large corporations rather than by small and medium sized enterprises. From a sample of 11 EU Member States it appears that SMEs currently employ 2.8% of staff in the insurance sector and collect 0.9 % of the premiums.⁵⁴

50. Indirectly also public authorities are affected as national competition authorities, courts and the Commission are competent to apply Article 101 TFEU to co-operations between insurers that restrict competition.

51. Consumers, including both individual policyholders as well as businesses, are also indirectly affected if the balance is not struck well, both in terms of premiums paid and the variety of insurance products on offer.

⁴⁴ E&Y Study, Section 3 Country Reports, Austria (*"does not restrict competition as defined in Article 101 (1) TFEU"*).

⁴⁵ E&Y Study, Section 3 Country Reports, Cyprus (*"Cyprus Hire Risk Pool is outside the scope of the IBER because [sic] it fulfils the conditions of Article 101 (3) TFEU"*).

⁴⁶ E&Y Study, Section 3 Country Reports, France (*"Many of the respondents indicated that they were not concerned by the IBER"*).

⁴⁷ E&Y Study, Section 3 Country Reports, Italy (*"individual pool members would not be able to cover the risk on a stand-alone basis"*).

⁴⁸ E&Y Study, Section 3 Country Reports, UK (*"The pooling arrangement of the International Group of P&I Clubs does not perform a self-assessment pursuant to the Block Exemption Regulation as the manager and members rely upon an earlier finding by the Commission that the arrangement is not anti-competitive"*).

⁴⁹ E&Y Study, Section 3 Country Reports, Slovakia (*"The interviewee from the only Slovak pool confirmed that self-assessment [under the IBER] had been done"*)

⁵⁰ E&Y Study, Section 3 Country Reports, Slovenia (*"The Pool finds itself exempted from the IBER. Pool did not make any self-assessment as the cost of it would be too high"*).

⁵¹ E&Y Study, Section 3 Country Reports, Spain.

⁵² E&Y Study, Section 3 Country Reports, Sweden.

⁵³ Nuclear and environmental pools participating in the public consultation confirmed this. See the examples quoted in paragraphs 115 and following.

⁵⁴ Data from Insurance Europe, see Annex 6.

2.4. THE PROBLEM IN CONTEXT

52. Between 1962 and 2004, all companies involved in co-operations that could have the effect of restricting competition were legally obliged to **notify** their agreements to the Commission for prior approval under the threat of fines and nullity of the agreement.⁵⁵ Until 1 May 2004, the European Commission was solely competent to declare agreements, concerted practices and decisions of associations exemptible from the prohibition enshrined in Article 101 (1) TFEU.
53. This led to considerable cost for companies and insurance companies in particular as each insurer had to notify any cooperation with competing insurers to obtain legal certainty that agreements were legally valid and co-operations not subject to fines. The Commission, too, incurred significant administrative cost in handling the large number of notifications.
54. It is important to keep this historic context in mind to understand the purpose of the IBER which was for the first time adopted in 1992.

2.4.1 Purpose of the IBER in 1992

55. In 1992 the Council empowered the Commission to adopt a block exemption regulation for the insurance sector to set out under which conditions a cooperation between competing insurers was deemed to meet the exception of Article 101 (3) TFEU.⁵⁶ The purpose of this empowerment was to reduce the administrative burden within the competition enforcement system which at the time was based on **notifications** by companies:

"Whereas in view of the large number of notifications submitted pursuant to Council Regulation No 17 of 6 February 1962 : First Regulation implementing Articles 85 and 86 of the Treaty (5), as last amended by the Act of Accession of Spain and Portugal, it is desirable that in order to facilitate the Commission's task, it should be enabled to declare, by way of Regulation, that the provisions of Article 85 (1) of the Treaty are inapplicable to certain categories of agreements, decisions and concerted practices" [emphasis added]

56. The Commission made use of this empowerment to reduce administrative cost and to concentrate its enforcement only on problematic cases. In 1992 the Commission adopted the first Insurance Block Exemption Regulation ("IBER") for some co-operations covered by the empowerment but not all. A large number of co-operations between insurance companies were never block exempted and insurers always had to self-assess their compliance with Article 101 TFEU in this respect case by case. Non block exempted co-operations involved for instance co-operations on the settlement of claims between insurers or co-operations on joint registers for aggravated risks.

2.4.2 Evolution after 1992

57. The first IBER⁵⁷ has been prolonged twice namely in 2003⁵⁸ and in 2010⁵⁹.

⁵⁵ Council Regulation (EEC) No 17/62 implementing Articles 85 and 86 of the Treaty, OJ 13 1962 of 21 February 1962, p. 204 -, Article 4 (1).

⁵⁶ Regulation (EEC) No 1534/91.

⁵⁷ Commission Regulation (EEC) No 3923/1992 of 21 December 1992, OJ L 398, 31.12.1992, p. 7–14.

58. According to Article 8 of Council Regulation (EEC) No 1534/91 the Commission is required to submit to the Council and the European Parliament a Report on the functioning and future of an IBER, including preliminary views on potential changes, no later than 6 years after its entry into force. Following the adoption of the first IBER by means of Commission Regulation 3923/1992 and its entry into force on 1 April 1993 the Commission published a report on its operation in March 1999.⁶⁰
59. In May 2004, a fundamental reform of EU antitrust enforcement came into effect.
60. As set out above in section 2.4.1, undertakings seeking certainty that their co-operations are compliant with Article 101 (3) TFEU had to notify their co-operations to the Commission before implementing them until 2004.⁶¹ In 2004, the Commission abandoned this "monopoly" for declaring agreements compatible with Article 101 TFEU. Since then, companies must "self-assess" the compliance of their co-operations with competitors and the legal validity of agreements concluded with competitors no longer depends on a formal prior blessing by the Commission. At the same time, national competition authorities were created in all EU Member States which assumed powers and a duty to apply Article 101 TFEU in individual cases in their national markets⁶².
61. The enforcement of antitrust rules therefore also became de-centralised as agreements and co-operations that are confined to a national market should primarily be investigated by a national competition authority rather than the Commission. The European Commission today shares with 28 national competition authorities jurisdiction to decide on co-operations between insurers under Article 101 TFEU in individual cases. In practice, national authorities take the lead on cases which are domestic in scope while the Commission will lead if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States.⁶³ To ensure a consistent interpretation of Article 101 TFEU to the same type of cooperation agreement across the EU, all 28 national competition authorities cooperate with the European Commission and with one another through the so-called European Competition Network.
62. As a consequence of this fundamental change in May 2004, block exemption regulations lost their primary purpose of relieving companies and the Commission from preparing and reviewing notifications of standard agreements to obtain an exemption according to Article 101 (3) TFEU.

⁵⁸ Commission Regulation (EC) No 358/2003 of 27 February 2003, OJ L 53, 28.2.2003, p. 8–16.

⁵⁹ Commission Regulation (EU) No 267/2010 of 24 March 2010, OJ L 83, 30.3.2010, p. 1.

⁶⁰ COM (1999) 192 Final, Report to the European Parliament and the Council on the operation of Commission Regulation No 3923/1992 concerning the application of article 81, paragraph 3, of the Treaty to certain categories agreements, decisions and concerted practices in the field of insurance.

⁶¹ Council Regulation (EEC) No 17/62 implementing Articles 85 and 86 of the Treaty, OJ 13 1962 of 21 February 1962, p. 204 -, Article 4 (1).

⁶² Article 5 Regulation (EC) No 1/2003.

⁶³ See the Commission's Notice on the cooperation between competition authorities in the European Competition Network, paragraph 14

[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN) .

63. In economic terms, the insurance markets also changed after 1992 and in particular since 2010 as the E&Y study suggests.⁶⁴ In particular the number of pools covered by the IBER has been decreasing over the last years as broker driven forms of co(re)insurance are providing viable alternatives for insurer-led pools. Moreover, pools are very heterogeneous in form and function⁶⁵.

2.4.3 The 2010 IBER

64. After the May 2004 reform of antitrust rules the Commission in 2008 started to review the possibility of prolonging the 2003 IBER. Compared to the preceding prolongation of the first IBER in 1999, the Commission undertook a "first principles analysis" to explore whether despite the regulatory changes in 2004 the insurance sector still needed a sector-specific block exemption regulation. The review focused on two key questions, namely:

- Do business risks or other issues in the insurance sector make it "special" and different to other sectors and does this lead to an enhanced need for cooperation?
- Is a special instrument such as a sector specific block exemption regulation still needed today to encourage such cooperation?

65. Building on a public consultation, the Commission concluded that the answer to the above questions varies between the different categories of block exempted agreements. While the co-operations on compilations/tables/studies and on co(re)insurance pools appeared a sector specific peculiarity, the Commission decided against prolonging two other block exemptions, namely:

- the exemption for establishing and distributing standard policy conditions and
- the exemption for co-operations on technical specifications relating to safety equipment.

66. These two exemptions were deemed not specific to the insurance sector and it was considered that their inclusion in a block exemption regulation may result in unjustified discrimination against other sectors which do not benefit from a block exemption. In addition, although these two forms of cooperation may give rise to some benefits to consumers, the Review⁶⁶ showed that they can also give rise to certain competition concerns. Therefore the Commission concluded that it was more appropriate that insurers self-assess these co-operations case-by-case in their concrete market context.

67. However, in 2010 the Commission still prolonged the two block exemptions for joint compilations, tables and studies and risk sharing in co(re)insurance pools for the following reasons.

⁶⁴ See section 2.2.2 and Annex 1 (d).

⁶⁵ See paragraph 131 and Annex 1 (d) paragraph 17 with further references.

⁶⁶ See Communication (2010/C 82/02) 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 at paragraph 19.

68. As regards co(re)insurance pools, the Commission had no empirical basis at the time to determine the number of pools potentially covered by the IBER and there was limited experience with alternative forms of co(re)insurance that could replace pools if dissolved. The Commission consequently found for certain types of risks, for which individual insurance companies are reluctant or unable to insure the entire risk alone, that risk sharing in pools still warrants a block exemption. The exemption was then prolonged for another seven years.⁶⁷
69. As regards joint compilations, studies and tables, the Commission recognised that such data exchanges are specific to the insurance industry and necessary to properly price risks.⁶⁸ In addition, in the framework of the supporting Impact Assessment⁶⁹, the Commission at the time identified adequate legal certainty for undertakings as an incentive affecting such co-operations. The 2001 Horizontal Guidelines on the self-assessment of Article 101 TFEU for co-operations between competitors did not yet contain guidance for competitors how to discern the pro- and anti-competitive effects of an information exchange according to Article 81 EC (now: Article 101 TFEU). Considering all this, the Commission opted to prolong the block exemption for compilations, tables and pools for another seven years.
70. In conclusion, the consideration to prolong two out of four IBER exemptions in 2010 was driven by sector specific considerations building on information available at that time. However, legislative changes after 2010 (see section 2.4.3), new data on market developments affecting co(re)insurance of large extraordinary risks (section 2.2) and recent findings on the heterogeneous nature of co(re) insurance pools (Annex 4 (b)) shed a different light on the need for maintaining the IBER.

2.4.4 The 2011 Horizontal Guidelines

71. On 14 January 2011, the Commission published new Horizontal Guidelines⁷⁰ which replaced the ones of 2001 and set out the Commission's interpretation of Article 101 TFEU in relation to typical forms of horizontal cooperation between competitors across all sectors of the economy.
72. Paragraphs 86 to 94 of the 2011 Horizontal Guidelines also provided for the first time guidance on how competing companies should self-assess whether an *exchange of sensitive information* between them infringes Article 101 TFEU or not and if so is exemptible according to Article 101 (3) TFEU. These guiding principles are of a general

⁶⁷ See paragraph 12, 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, decision and concerted practices in the insurance sector (2010/ C 82/02)

⁶⁸ See paragraphs 8 & 9, 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, decision and concerted practices in the insurance sector (2010/ C 82/02)

⁶⁹ See chapters 6.1.5 & 8.1.5 in Commission Staff Working Document Impact Assessment -Accompanying document to the Commission Regulation (EU) on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decision and concerted practices in the insurance sector, SEC(2010) 325

⁷⁰ Commission Communication - Guidelines on the applicability of Article 101 of the Treaty to horizontal co-operation agreements, OJ C 11 of 14.1.2011.

application and in particular request competing undertakings to exchange data in such way that they cannot predict which price a competitor will set on the market in the future. To ensure this, the Guidelines for instance suggest that data exchanges should be disaggregated and must not allow a company to trace back individual customers of their competitors.⁷¹

73. Since 2011, this guidance on information exchange in the new Horizontal Guidelines and the old sector specific guidance block exemption for compilations, tables and studies overlap and co-exist. The rationale underlying the guiding principles of the 2011 Horizontal Guidelines and the rationale underlying the conditions for a block exemption according to the 2010 IBER is the same and the 2011 Horizontal Guidelines even explicitly refer to banking and insurance.⁷²

2.4.5 The 2016 IBER Report

74. In March 2016 the Commission published a Report⁷³ to the European Parliament and the Council on the functioning and future of the IBER which took the preliminary view that no apparent reasons exist why market participants should still be unable to self-asses compliance with the EU competition rules case-by-case rather than verifying in a more formalistic manner whether a co-operation fits the positive and negative conditions set out in the IBER. The Report was supported by a Commission Staff Working Document⁷⁴ assessing the implementation of the IBER since its adoption in 2010.

75. The preliminary conclusion of the Commission's Report was that there continues to be an enhanced need of insurers to cooperate in relation to risk sharing (pools) and the collection of data (compilations, tables and studies) but the strict conditions for the adoption of a sector-specific BER are no longer met.

76. With respect to the compilation and distribution of joint calculations, tables and studies the Commission's preliminary view was that new Horizontal Guidelines of 2011 already offer guidance for self-assessing this type of cooperation absent the IBER.

77. With respect to co(re)insurance pools, the Commission's preliminary view was the strict conditions for prolonging the IBER were no longer fulfilled because of its limited scope of application and the risk of misapplications.

78. The overall preliminary conclusion of the Report was that a case-by-case self-assessment of both types of co-operations on the basis of the Horizontal Guidelines can ensure that

⁷¹ See below paragraphs 1042 - 116.

⁷² For a comparison of the principles relating to an information exchange under Horizontal Guidelines and under IBER see below in section 5.2 and Annex 8.

⁷³ Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EU) No 267/2010 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, COM(2016) 153

⁷⁴ Commission Staff Working Document SWD (2016) 62 accompanying the document Report from the Commission to the European Parliament and the Council On the functioning of Commission Regulation (EU) No 267/2010 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, COM(2016) 153

they produce net positive effects for consumers and competition within the meaning of Article 101(3) TFEU. Hence, the preliminary view taken in March 2016 was that the IBER should be allowed to expire on 31 March 2017 as foreseen in its Article 9.

3. WHY SHOULD THE EU ACT ?

79. The European Union has the competency to apply Article 101 TFEU to agreements, concerted practices and decisions of associations of undertakings which have as their object or effect the restriction of competition. Based on Council Regulation (EEC) No 1534/91 the Commission may "block exempt" certain co-operations which clearly meet the requirements of Article 101 (3) TFEU. This instrument, the IBER, then strikes the balance between the needs of insurers to cooperate and the needs to protect effective competition.
80. However, the fact that there is a legal basis for addressing a problem by means of a Regulation does not automatically mean that the EU should make use of it. EU action is warranted only when EU policy intervention (here: the adoption of a sector specific block exemption) leads to a clear added value compared to what could be achieved by Member States (here: national competition authorities and national judges) at national and/or regional level.
81. National competition authorities and national courts are competent to review the different forms of cooperation under Article 101(3) TFEU. Furthermore, as described in paragraph 97, mechanisms exist to ensure a consistent application of EU competition law by national authorities. In addition it should be noted that, in particular for joint-compilations, tables and studies, the cooperation seem to have a national (no pan-European) character. As the list of cooperation's and studies submitted by Insurance Europe shows the data exchange and studies take place at a national level. The same is the case for co(re)insurance pools which operate on national markets.⁷⁵ National authorities and courts are well placed to evaluate such domestic co-operations.⁷⁶ Co-operations between competitors in sectors other than insurance are today reviewed at national level by national competition authorities and national judges case-by-case as set out in the Horizontal Guidelines.

4. WHAT SHOULD BE ACHIEVED?

82. The general objective of antitrust legislation and enforcement is to protect competition and maximise benefits for consumers. The preservation of effective competition is essential for the insurance industry, since it enhances business efficiency and boosts innovation, helping to deliver better market outcomes in terms of quality, choice, cost and prices. The general objective of the IBER is set in Recital 5 of the Regulation⁷⁷, i.e. "*...to ensure effective protection of competition while providing benefits to consumers and adequate legal certainty for undertakings...*".

⁷⁵ See paragraphs 37-38 (joint compilations, tables and studies) and 42 (co(re)insurance).

⁷⁶ For a discussion whether the decentralised application of Article 101 (3) TFEU creates risks for the coherent treatment of similar co-operations in the EU, see later at paragraphs 110 & 111.

⁷⁷ Commission Regulation (EU) No 267/2010 of 24 March 2010 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

83. The key specific objective of the IBER review is to verify whether this instrument is still the best approach to strike a balance between the need for effective protection of competition, prices and innovation on the one hand and on the other hand the needs of the insurance industry to continue cooperating with other competing insurers by exchanging sensitive data and co(re)insuring risks. This specific objective reflects the assessment of the 2010 communication⁷⁸ and 2016 report⁷⁹ on the operation of the IBER, namely that the IBER is an exceptional instrument that "*...should only be adopted if cooperation in the insurance sector is 'special' and different from other sectors which do not benefit from a BER currently...*".
84. The ideal policy choice should strike the balance between giving insurance companies adequate legal certainty that their co-operations with competitors will be deemed legal without however writing a "blank cheque" for such co-operations that lead to consumer harm in individual cases.

5. POLICY OPTIONS

5.1 OPTIONS

Option 1: IBER lapses in March 2017 (Baseline Scenario)

85. No further action at EU level is the baseline scenario. Due to a sunset clause in Article 9 IBER, the IBER will automatically expire on 31 March 2017.
86. The expiry of the IBER would **not** imply that co-operations between insurers are from then on prohibited according to Article 101 TFEU. Rather, they would have to be assessed under the same guidance as other sectors, namely the Horizontal Guidelines of 2011.
87. Furthermore following the expiry of the Regulation the Horizontal Guidelines are to guide the case-by-case self-assessment of the different co-operations. The Commission would nevertheless observe the market during a 12-month period to see whether after March 2017 stakeholders experience concrete difficulties in applying the Horizontal Guidelines in their self-assessment of compilations, tables and studies or co(re)insurance pools (for details see Chapter 8).

Option 2: IBER is prolonged for both pools and tables

88. The IBER is prolonged as it stands with a slight change to align the existing exemption more closely to the empowerment in the 1991 Council Regulation.⁸⁰ In Article 2 IBER the words "*or on the profitability of different types of investment*" would be deleted because a

⁷⁸ See Recital 4, 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, 2010/C 82/02

⁷⁹ See Paragraph 5, Report from the Commission to the European Parliament and the Council On the functioning of Commission Regulation (EU) No 267/2010 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, COM(2016) 153

⁸⁰ See paragraph 12.

block exemption for the joint investment of profits is not covered by the powers conferred on the Commission in 1991.⁸¹

89. In addition the profitability of investments is unrelated to the knowledge of an insured risk or to the formulation of risks premiums. Investment decisions are rather part of a company's individual strategy, regardless of the economic sector it is operating in, and impact the company's competitive position in the market. For these reasons, it does not appear at this stage that the insurance sector presents characteristics inherently different from other sectors as to create an enhanced need for cooperation between market participants in the field of studies on the profitability of their different types of investment. The adoption by the Commission of a sector-specific exemption in the field of profitability studies appears irrelevant⁸².
90. Option 2 does not include a proposal to reformulate the definitions of "new risk" and/ or the market share thresholds. While stakeholders suggested⁸³ in the public consultation that these concepts raise difficulties in practice, such difficulties are not due to an ambiguity in the IBER definitions but instead are rooted in the factual complexity of defining relevant markets and of assessing when risks are truly "new". The application of the IBER depends in practice on the facts of each individual case which is a moving target.
91. The new Regulation would under this option⁸⁴ be prolonged until 31 March 2027⁸⁴.

Option 3: IBER is prolonged for tables OR for pools

92. Option 3 presupposes that either (1) a new IBER is adopted exempting solely joint compilations, tables and studies (Article 2)⁸⁵ or (2) a new IBER is adopted exempting solely co(re)insurance pools (Article 5). In the former case the exemption for co(re)insurance pools (Article 5) would lapse on 31 March 2017 and pool agreements

⁸¹ See paragraph 12. Article 1 (1) (a) of Council Regulation 1534/1991 allows the Commission to adopt an exemption in this field only with respect to agreements on "the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims". The purpose of this empowerment is consequently to facilitate collaboration which allows the calculation of the average cost of covering a specified risk in the past taking into account future developments which may impact on the development of that risk. The profitability of future investments of an insurer to the contrary is an element of forward-looking financial decisions unrelated to the knowledge of an insured risk. The words "*or on the profitability of different types of investment*" in Article 2 IBER should therefore be removed if that exemption were to be prolonged.

⁸² For details see paragraph 128 & 129, Commission Staff Working Document (2016) 62 accompanying Commission Report COM(2016) 153 on the functioning of Commission Regulation (EC) No 267/2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector

⁸³ See paragraphs 145 & 162.

⁸⁴ A ten years prolongation seems better than 7 years. In case of a 7-year period of renewal the collection of data for a mid-term evaluation would have to start already in 2019. Stakeholders are less committed to reply to a mid-term evaluation if the Impact Assessment leading to the adoption of the legislative act took place only a few years ago. Furthermore this would run counter to the objective of legal certainty, as the reopening of the IBER in 2019 would again put into question the future of the Regulation.

⁸⁵ But without an exemption for joint studies on the profitability of investments for the reasons set out in the preceding footnote.

would have to be assessed according to the same guidance⁸⁶ as agreements between companies in other sectors. In the latter case the exemption for joint compilations, tables and studies (Article 2 IBER) would lapse on 31 March 2017 and the case-by-case assessment⁸⁷ for joint compilations, tables and studies under Article 101 (3) TFEU would in this respect replace the assessment under the IBER. Both exemptions are not mutually dependent, e.g. one can remain in force without the other. Hence the continuing operation of just one of the exemptions is a realistic scenario, dependent only on the outcome of the impact assessment process. If Option 3 prevails, the chosen exemption would be prolonged until 31 March 2027⁸⁸.

5.2 DISCARDED OPTIONS

93. The Impact Assessment will not consider options related to the expansion of the IBER to cover additional areas, including the re-introduction of exemptions for standard policy conditions and security devices that were removed in 2010.
94. The public consultation included explicit questions to that effect, including Question 25 and 29 asking directly if there are other options that the Commission should consider. Only the insurer Allianz suggested⁸⁹ that model terms and conditions should again be IBER exempted and that the Commission has not yet made use of its powers to issue a block exemption regulation for agreements⁹⁰ in the context of (1) the settlement of claims and of (2) registers/information on aggravated risks. Allianz did not provide evidence of changes to the competitive dynamic in the competition sector that would alter the 2010 Commission assessment that allowed the exemption for model terms and conditions to lapse or instate the exemption for registers on aggravated risks and settlement of claims.
95. No further requests for exemptions were submitted by stakeholders that would point to the necessity of block exempting additional forms of cooperation outside the current IBER. Also further fact-finding in the form of targeted questionnaires, stakeholder meetings or the public hearing did not point to new areas which should fall under the IBER exemptions.
96. During the public consultation, a few stakeholders proposed to broaden the block exemption for pools (Article 5 IBER) by including also pools that were set up by brokers and broker driven ad hoc agreements. This option was discarded for two reasons.

⁸⁶ See paragraph 107 and Annex 8 for details of procedure to be followed in case of a self-assessment for co(re)insurance agreements.

⁸⁷ See paragraph 104 for details for details of procedure to be followed in case of a self-assessment for joint compilations, tables and studies.

⁸⁸ A ten years prolongation seems better than 7 years. In case of a 7-year period of renewal the collection of data for a mid-term evaluation would have to start already in 2019. Stakeholders are less committed to reply to a mid-term evaluation if the Impact Assessment leading to the adoption of the legislative act took place only a few years ago. Furthermore this would run counter to the objective of legal certainty, as the reopening of the IBER in 2019 would again put into question the future of the Regulation.

⁸⁹ See Question 29, http://ec.europa.eu/competition/consultations/2014_iber_review/allianz_se_en.pdf

⁹⁰ See Council Regulation (EEC) No 1534/91, Article 1, Recital (d) and Recital (f). Both forms of cooperation with respect to the settlement of claims (Article 1 (d)) and registers of, and information on, aggravated risks (Article 1(f)) have never been block exempted.

- First and as before⁹¹, the European Commission does not dispose of sufficient own case practice to determine at EU level in an exhaustive manner all conditions necessary for a block exemption of pools that were set up by brokers and broker driven ad hoc agreements.
- Second, according to the experience of national competition authorities, as shared via the public consultation and in the context of regular meetings, ad hoc coinsurance agreements can lead to a pass-on of cost savings from insurers to customers under certain circumstances and assumptions, only, which depend on each individual case.⁹² This speaks in favour of a case-by-case assessment rather than block exempting ad hoc agreements, too.

97. This is further supported by a study conducted by Europe Economics on behalf of the Commission in the framework of this Review that reached the broader conclusion for all types of co-insurance alike (including for insurer led pools, broker led pools and ad-hoc co(re)insurance agreements) that benefits for consumers are maximised if such co-operations are assessed case-by-case: "*Overall, co(re)insurance schemes are highly heterogeneous in terms of their intrinsic mechanisms, which suggests that a true assessment must be conducted on a case-by-case basis*".⁹³ Each type of scheme is associated with several generic benefits and limitations thus creating a trade-off during the placement process of a given risk.

98. The option of broadening the IBER to include all types of co(re)insurance agreements including pools that are set up by brokers and broker driven ad hoc co(re)insurance agreements was therefore discarded.

99. In case of Option 2 and Option 3 shorter periods of validity for the prolonged exemptions, than the 10 years currently advocated, were discarded. The experience with the current period of validity of 7-years has shown that due to the review contingencies contained in the Enabling Regulation the question of prolonging the IBER would quickly resurface throwing again into doubt its future⁹⁴. Similarly a shorter period of validity, i.e. 1 or 2 years, was also discarded as it also goes against the objective of legal certainty.

6. ANALYSIS OF THE IMPACTS OF THE VARIOUS POLICY OPTIONS

6.1 OPTION 1

100. Option 1 is the baseline scenario that means: no further action at EU level and expiry of the IBER on 31 March 2017 according to its Article 9.

⁹¹ See Commission Staff Working Document accompanying the 2009 IBER Report to the European Parliament and the Council. n. 113.

⁹² See the observations by the Dutch competition authority based on a study from TILEC and summarised in Annex 2 (c). For instance the broker must select the lead insurer by means of a tender and the broker must be remunerated by the insured customer rather than by the insurer to prevent conflicts of interest.

⁹³ See chapters 6.6 & 7 of the study "Different forms of cooperation between insurance companies and their respective impact on competition", Europe Economics, August 2016.

⁹⁴ See footnotes 84 & 88 for details.

6.1.1. Impact

101. The expiry of the IBER implies that insurers and competition authorities would in the future assess such co-operations (pools and for compilations, tables and studies) case-by-case in their specific market context as specified in the Horizontal Guidelines rather than by going through the conditions of the IBER. Whether this has consequences cannot be predicted in a general fashion for all co-operations currently covered by the IBER as it depends on the outcome of each individual assessment in the concrete market context according to the Horizontal Guidelines.

(a) Horizontal Guidelines compared to IBER – similar principles

102. The rationale underlying the "checklist" of conditions for a block exemption (IBER) and the guidance in the Horizontal Guidelines is the same, namely the four conditions of Article 101 (3) TFEU. The difference lies in the consideration of the specific market context under the Horizontal Guidelines.

103. The expiry of the IBER in March 2017 (Option 1) or the partial lapse of one of the two IBER exemptions (Option 3) would imply that co-operations must be self-assessed *case-by-case* according to Article 101 (3) TFEU based on the Horizontal Guidelines. The rationale underlying the competition assessment according to the Horizontal Guidelines is however the same as the one of the IBER. Co-operations between competitors are encouraged where they help markets work better provided that the co-operations do not lead to unnecessary restrictions of competition which on a balance harm customers:

104. Paragraphs 77 to 94 of the Horizontal Guidelines provide guidance for a case-by-case assessment of co-operations between insurers for risk sharing and for information exchange for the calculation of pure premiums and the guidance in the Horizontal Guidelines has similarities with the substantive test under the IBER. The Horizontal Guidelines explicitly recognise the aggregation of data⁹⁵ by competing undertakings as beneficial to suppliers and customers if it allows them to get a clearer picture of the economic situation of a sector. "*Such data collection and publication may allow market participants to make better-informed individual choices in order to adapt efficiently their strategy to the market conditions*".⁹⁶ "*For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices*".⁹⁷

105. The Horizontal Guidelines identify two types of anti-competitive effects which an information exchange between competitors must avoid, namely:

⁹⁵ See Communication from the Commission – Guidelines on the applicability of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), Paragraph 89: "*Exchanges of genuinely aggregated data, where the recognition of individualized company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data*".

⁹⁶ See Communication from the Commission – Guidelines on the applicability of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), Paragraph 89

⁹⁷ See Communication from the Commission – Guidelines on the applicability of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), Paragraph 97

- Collusion: the data exchange amounts to collusion on prices and/or facilitates a collusive outcome⁹⁸; and/or
- Foreclosure: the data exchange is exclusive and forecloses third parties⁹⁹.

106. A similar logic underpins the conditions for block exempting joint compilations, tables and studies under the IBER:

- Whereas the Horizontal Guidelines qualify information exchanges on prices as restrictive by object¹⁰⁰, such coordination is “black listed” as non-exemptible under the IBER, too¹⁰¹.
- Whereas the Horizontal Guidelines identify as potential anticompetitive effect of an information exchange foreclosure of third parties, the IBER obliges cooperating undertakings to share their joint compilations, tables and studies with other insurers on reasonable and non-discriminatory terms¹⁰².
- Whereas the Horizontal Guidelines consider that an information exchange in the public is less likely to raise competition concerns, the IBER obliges insurers to share their joint compilations, tables and studies upon request with consumer and customer associations¹⁰³.
- Whereas the Horizontal Guidelines suggest that the exchange of aggregated data is less problematic from a competition viewpoint than individualised data, the IBER makes aggregation of data an explicit precondition for exchanging data under the block exemption¹⁰⁴.

107. In a similar vein, paragraph 184 of the Horizontal Guidelines recognises that the co-operation of competitors to jointly produce goods or services may be efficiency enhancing within the meaning of Article 101 (3) TFEU provided that it does not exceed what is necessary to achieve efficiencies, guarantees consumers a fair share of the ensuing benefits and does not afford the undertakings a possibility of eliminating competition in respect of a substantial part of the products in question.¹⁰⁵ This guidance is of direct relevance for risk pooling. The Horizontal Guidelines acknowledge that joint production

⁹⁸ Horizontal Guidelines paragraphs 65 to 68

⁹⁹ Horizontal Guidelines paragraphs 69 to 7.

¹⁰⁰ A restriction by object is a behaviour of competing undertakings which by its very nature is harmful to consumers, such as price fixing, customer allocation or bid rigging.

¹⁰¹ Horizontal Guidelines paragraph 74 and IBER Article 3 (2) c

¹⁰² Horizontal Guidelines paragraph 70 and IBER Article 3 (2) d

¹⁰³ Horizontal Guidelines paragraph 94 and IBER paragraph 3 (2) e and recital 11

¹⁰⁴ Horizontal Guidelines paragraph 89 and IBER Article 3 (2)

¹⁰⁵ Horizontal Guidelines at paragraph 184

(such as co(re)insurance of a risk) allows parties to increase the number of different types of products and thereby achieve cost savings by means of economies of scope.¹⁰⁶

108. For an overview of key principles in IBER and Horizontal Guidelines see the comparative table in Annex 8.

(b) Legal certainty & decentralised enforcement

109. During the public consultation, some stakeholders raised the concern that the expiry of the IBER could lead to an inconsistent application of EU competition rules to pools or compilations, tables and studies. The Actuarial Association of Europe, for instance stated: *"It cannot be safely assumed that a national competition authority (which in all likelihood would have jurisdiction to review the antitrust admissibility of nationally collected statistics) would apply the same standards for testing the antitrust compliance as the Commission."*¹⁰⁷

110. The Horizontal Guidelines exert a legally binding effect for the European Commission, only, contrary to a Commission Regulation that has a generally binding effect also for national competition authorities. However, when applying Article 101 TFEU, national competition authorities are subject to a consistency check by the Commission. According to the review mechanisms enshrined in Article 11 (4) of Regulation (EC) No 1/2003, every national competition authority must notify a decision for approval to the European Commission prior to adopting it. For co-operations between competitors, the Commission conducts this consistency check by reference to the principles of the Horizontal Guidelines. If a national decision went against the principles of the Guidelines, the Commission could relieve the national authority of its powers to adopt the decision.

111. National courts, too, may seek guidance on the interpretation of Article 101 TFEU from the European Court of Justice under a reference for a preliminary ruling according to Article 267 TFEU. Article 267 TFEU moreover specifies that national courts which act as a final resort, against whose decisions there is no judicial remedy, are obliged to make a reference to the Court of Justice for a preliminary ruling, unless the Court has already ruled on the matter or the interpretation of the EU rule of law in question is obvious.

(c) Impact on pools in particular

112. The number of pools that were set up by insurers dropped to less than 46 by 2014.¹⁰⁸ The most important insurance pools still in existence today (terror, nuclear risks, environmental risks) are hardly covered by the IBER because their market shares typically exceed by far the IBER thresholds (20% for coinsurance and 25% for re-insurance) or because the risk could not be insured absent the pool (no "restriction of competition").

¹⁰⁶ Horizontal Guidelines at paragraph 183, 185 and 186

¹⁰⁷ Reply of Actuarial Association of Europe at question 30; see at http://ec.europa.eu/competition/consultations/2014_iber_review/actuarial_association_of_europe_en.pdf

¹⁰⁸ See E&Y study, Annex 3, Table 4

113. The practical relevance of the IBER for pools is namely limited in three ways: the IBER does not apply to pools set up by intermediaries (brokers), it does not apply to pools set up by insurers with a market share above 20-25% and the IBER is superfluous for pools cover risks which are not insurable absent a pooling agreement.
114. To illustrate this, Annex 7 contains a flowchart for when the IBER applies to co(re)-insurance pools.
115. Nuclear pools, i.e. pools covering third party liability for nuclear reactor accidents, have a 100% market share and therefore fall outside the IBER as they exceed the 20-25% market share thresholds. Most operators of nuclear pools participating in the review process informed the Commission that according to their self-assessment, their pool agreements fall outside the scope of Article 101 (1) TFEU. For instance, during the public consultation, the nuclear insurance pool *Assuratom* and the environmental risk pool *Assurpol* took the view that the IBER did not affect the operation of their pool due to the specific nature of their cooperation¹⁰⁹
116. For these pools it does not matter whether the IBER is prolonged or not because these pools must already today be assessed according to the Horizontal Guidelines. If an agreement underlying a pool does even not fall within the scope of Article 101 (1) TFEU, then the second order question whether such agreements are exemptible according to the IBER does not arise.

6.1.2 Cost

117. The baseline scenario (Option 1) would not cause cost for health, quality of the environment, climate change, education, training, fundamental rights, employment, skills, social inclusion, poverty, IT and ICT etc. because the occurrence of health risks, environmental risks or climate risks does not depend on the availability / the cost of insurance for such risks.
118. Relevant costs are rather of an administrative kind, namely cost related to a legal and economic assessment of co-operations in their concrete market context.
119. During the public consultation insurers raised the concern that their cost for self-assessing compliance with EU competition rules would increase after the expiry of the IBER. By means of example, Allianz suggested

"We would require individual self-assessments to be carried out for each and every joint compilation, table and study we participate in on the basis of the rules set out for information exchanges in the Horizontal Guidelines. This will lead to significantly increased compliance costs. Based upon the result of the self-assessments, we may decide

¹⁰⁹ http://ec.europa.eu/competition/consultations/2014_iber_review/assuratome_en.pdf at question 20 ("Does the IBER affect the business conduct in your daily practice and how? Please describe and give case-specific examples." "No, considering the "specific features" of the coverage of nuclear risks.") http://ec.europa.eu/competition/consultations/2014_iber_review/assurpol_en.pdf question 20 ("As explained (see question 10), ASSURPOL has pro-competitive effects on the reinsurance market. Thus, the IBER does not apply.")

to withdraw from our participation in certain joint compilations, tables and studies if their antitrust compliance cannot be established with sufficient certainty."¹¹⁰

Aviva plc suggested "*Compliance costs would increase*"¹¹¹. Zurich Insurance Company Ltd suggested that if the IBER were not renewed, insurers would have to "*bear the burden of more detailed case by case competition self-assessments to ensure that the cooperation agreement they are engaged in or consider engaging complies with applicable competition law requirements. Insurers would also have to ensure that the arrangement falls outside Article 101(1) or, if not, meets Article 101(3). This is a potentially lengthy and costly exercise which may require an external peer review.*"¹¹²

120. After the IBER expires on 31 March 2017, insurers who participate in IBER exempted pools and information exchanges could incur cost for the self-assessment of their co-operations under Article 101 (3) TFEU by reference to the Horizontal Guidelines. This is true as much as it is true for undertakings operating in other sectors of the economy. However, compared to a self-assessment under the IBER, the cost for a self-assessment under the Horizontal Guidelines will not be significantly higher as in both hypotheses. Both tests are based on Article 101 (3) TFEU and start from the same principles. The only material difference is that under the Guidelines the concrete market context must also be considered.

121. Despite repeated requests to stakeholders during the public or targeted consultations and except for GDV (see below), insurers did not disclose their compliance costs for self-assessing co(re)insurance pools and/or compilations and studies under the IBER. The relevant sections in the public consultation questionnaire asking for a detailed explanation of the changes in business conduct that non-renewal of the exemption might cause, and to quantify and rate the ensuing effects on costs remained notably unanswered by the vast majority of responding stakeholders (see Annex 2).

122. Furthermore, during the stakeholder conference of April 2016 following the publication of the IBER Report in March 2016, the Commission asked all insurers present including those that had submitted written comments on compliance cost to provide data to quantify their current compliance cost under the IBER and to explain why a self-assessment under the Horizontal Guidelines should pose any problems. None of the insurers present however followed upon this request and submitted data or at least estimates.

123. The only compliance cost data provided during the whole IBER review came at a late stage from **GDV**, the German Insurance Association, which in their public consultation replied¹¹³ that the need to self-assess all joint compilations and tables managed by the

¹¹⁰ See Question 33, http://ec.europa.eu/competition/consultations/2014_iber_review/allianz_se_en.pdf

¹¹¹ See Question 34 http://ec.europa.eu/competition/consultations/2014_iber_review/aviva_plc_en.pdf

¹¹² See http://ec.europa.eu/competition/consultations/2014_iber_review/zurich_insurance_company_en.pdf

¹¹³ See Question 31 http://ec.europa.eu/competition/consultations/2014_iber_review/gdv_de.pdf ("*Der GDV schätzt, dass der Aufwand für eine erneute Prüfung sämtlicher Statistiken ohne die Freistellung über 300 Arbeitstage allein beim GDV betragen würde. Auch wäre bei den einzelnen Versicherern mit erheblichen Aufwendungen zu rechnen.*")

association could require as much as 300 mandays at GDV. Breaking the 300 mandays down per member of GDV, the compliance cost for an assessment under the Horizontal Guidelines alleged by GDV is approximately *EUR 1500 per member of GDV*.¹¹⁴ GDV's estimate of 300 mandays was based on past experience. When the IBER block exemption for "standard policy conditions" expired in 2010, GDV re-assessed all such co-operations case-by-case which consumed 300 mandays. Applying this *mutatis mutandis* to the information exchange between GDV members for joint compilations, tables and studies, GDV estimates that a similar workload would arise in a worst case scenario. GDV expects a slight increase in time expenditure for the evaluation of the statistics by "maybe 10-20% "in the months following the end of the IBER, but expects these costs to fall as GDV gains experience with the new basis of assessment (Horizontal Guidelines) . While GDV suggested that members would incur cost in addition to the compliance cost incurred by the association, it remained unclear why competition law compliance of compilations would have to be self-assessed a second time at member level after being done at association level.

124. The French assurance association submitted (after the closure of the public consultation) certain data on the importance of compilations, tables and studies. These were, however, not related to the compliance cost which the association would incur for the competition assessment.¹¹⁵

125. The market definition, which some stakeholders identified as particularly difficult in the insurance sector, is a tool which is required for the assessment of pools both under the IBER¹¹⁶ and under the Horizontal Guidelines. For joint compilations, tables and studies, the IBER does not presuppose a market definition while the Horizontal Guidelines suggest an analysis of market conditions. Yet, the Commission recognised in the past that joint compilations, tables and studies involving even *all* insurers in a market can be pro-competitive because the more data are joined, the more accurate their calculation of pure premiums and the better.¹¹⁷

126. Further considerations on the administrative cost of competition law assessment are:

¹¹⁴ According to the data of Insurance Europe there are approximately 47 compilations and tables in German managed by GDV. Assuming that the cost of a man hour of a lawyer in Germany is somewhere between 200 EUR and 500 EUR, this could mean total compliance cost of EUR 660 000 for the entire association (or EUR 14 000 EUR per compilation). If these cost are divided by the number of members which GDV currently has (in April 2016 GDV had 460 members; see <http://www.en.gdv.de/about-us/gdv-members/>), it amounts to approximately EUR 1500 per insurance company associated in GDV. An assessment requiring 300 mandays equates to 2400 manhours. Assuming that (1) the exercise would require the involvement of both junior (75% of time) and senior staff (25% of time) and (2) average hourly rates for legal junior (200 EUR/ hour) and senior staff (500 EUR/ hour) the total cost for GDV of such an exercise would be 660,000 EUR. Please note that due to the lack of reliable data these calculations must be treated with extreme caution.

¹¹⁵ The data concerned a survey of 78 insurers which were asked to provide a theoretical equilibrium price for two types of risks: environmental pollution and earthquakes. While the data suggest that the correct actuarial calculate of the risk has repercussions on the premium, which the Commission can agree with, the data have no bearing on the question whether a competition assessment under the Horizontal Guidelines is more expensive for industry than the one under the IBER.

¹¹⁶ IBER Article 6 (2) (a) and (b)

¹¹⁷ This Commission practice is referred to in IBER recital 12.

- The guiding principles of the current competition assessment under the IBER and the assessment of Article 101 (3) TFEU under the Horizontal Guidelines build upon the same four conditions Article 101 (3) TFEU (see above section 6.1.1 (a) and the comparative table in Annex 8);
- SMEs would not appear to be particularly affected by the expiry of the exemption for compilations/tables/studies¹¹⁸ because the associations or entities collecting such data from insurers (be they large or small companies) can conduct the competition compliance assessment according to the Horizontal Guidelines on behalf of all insurers involved to avoid a duplication of compliance cost; the magnitude of such compliance cost does not represent a significant entry barrier for SMEs (see Annex 3);
- It is also unlikely that after the expiry of the IBER large insurers would exclude SMEs from access to their compilations, tables and studies because such behaviour would be contrary to Article 101 (3) TFEU as set out in paragraph 99 of the Horizontal Guidelines;
- Many co-operations between insurers involve a sharing of some sensitive information and are already today assessed under the Horizontal Guidelines rather than under the IBER (e.g.: joint development of general conditions, joint setting of standards for security devices, joint compilation of lists for aggravated risks etc.); the public consultation did not adduce elements which would suggest that these other forms of information sharing are by their very nature different from compilations/tables/data that insurers (including SMEs) so that insurers could self-assess their compliance under the Guidelines for one type of information exchange but not for the other one currently covered by the IBER.

127. In view of the above, the costs of such a competition assessment under the Horizontal Guidelines after the expiry of the IBER (Option 1) would not appear to be disproportionate in comparison to the current compliance costs of the insurance industry (Option 2 or 3). At the time the IBER was prolonged in 2010, the Commission came to the conclusion that the compliance cost of a case-by-case assessment are roughly equal to those of an assessment under the IBER.¹¹⁹

6.1.3. Benefits

128. The key benefits of the baseline scenario are related to the principles of competition law enforcement in the European Union.

129. A Block Exemption Regulation must take account of the legal framework which Article 101 (3) TFEU determines. This is because a Block Exemption Regulation qualifies a certain category of agreements to fulfil the cumulative four conditions of Article 101 (3) TFEU irrespectively of concrete market circumstances and case specific circumstances.

¹¹⁸ Apart from the fact that insurance is not a sector where SME play a particularly prominent role. See the data provided by Insurance Europe for some EU Member States which suggest that premiums collected and people employed by SMEs in this industry are marginal (chart 11 and chart 12 in Annex 6).

¹¹⁹ See in this respect already the 2010 Impact Assessment on page 42 ("*However this legal analysis should not be much more difficult or costly than under the BER*") SEC (2010) 325 of 24.3.2010.

130. A Block Exemption Regulation is therefore an **exceptional** instrument and can be adopted/ prolonged only where sufficient certainty exists that a category of agreements / concerted practices produces genuine benefits that are shared fairly with consumers. The exempted restrictions also have to be indispensable¹²⁰, i.e. it would be impossible to achieve the objectives of the cooperation in a manner that is less restrictive of competition. If there are doubts, the default approach is to revert to a case-by-case assessment under Article 101 (3) TFEU. This presupposes that the agreements covered by an IBER are sufficiently homogeneous and their **effects for consumers** sufficiently **predictable in general terms**. Where this certainty does not exist, adopting (or prolonging) a BER is contrary to primary law and harmful for customers.
131. Regarding risk sharing in pools both *Ernst & Young (2014)* and *Europe Economics (2016)* concluded that the existing **pools** are very **heterogeneous**. By assessing the effect of pooling case-by-case, consumer welfare is maximised according to Europe Economics.¹²¹ Co(re)insurance schemes including pools in a narrow sense¹²² are heterogeneous in terms of their intrinsic mechanisms and the degree of competition alignment of their members (premiums, conditions etc.). Irrespective of the market in which these benefits manifest themselves (primary insurance or reinsurance), each type of insurance cooperation scheme is associated with several generic benefits and limitations thus creating a trade-off during the placement process of a given risk, again strengthening the case for a case-by-case assessment¹²³.
132. Knowing today that the (few) pools still covered by the IBER are very heterogeneous, it can no longer be safely assumed that an assessment based merely on a list of conditions in a Regulation is the best way to balance pro- and anti-competitive effects for consumers. The IBER is therefore no longer the best instrument to strike this balance (see problem definition, section 2.1). The expiry of the IBER would guarantee that consumers get the best deal in each and every case.
133. The baseline scenario has a second benefit for stakeholders: The expiry of the IBER would finally establish a **level playing field** not only between the insurance sector and other parts of the economy. It would in particular also level the playing field between pools that are set up by insurers (subject to the IBER) and other pools that are set up by brokers or by the policy holder ("ad hoc" agreements). The more frequent form of co(re)insurance is in fact co(re)insurance agreements on the subscription market which has, however, not been block exempted in the IBER¹²⁴.
134. This uneven "playing field" for the assessment of co(re)insurance risks is not so much related to differences in compliance cost for the respective assessments, they are similar. It concerns rather the type of assessment: Co(re)insurance schemes within the meaning of

¹²⁰ See the fourth condition of Article 101 (3) TFEU.

¹²¹ See section 6.1.2 and Annex 4.

¹²² Within the meaning of the IBER, the 46 pools (max.).

¹²³ See "*Different forms of cooperation between insurance companies and their respective impact on competition*", Europe Economics, 2016

¹²⁴ Because Article 1 (4) IBER explicitly limits the exemption to pools that are "*set up by insurance undertakings*".

the IBER are assessed by reference to a set of conditions while co(re)insurance schemes outside the IBER are assessed by reference to their effects in the concrete market context (see also Annex 8). Option 1 would establish a level playing field in this respect by submitting all forms of co(re)insurance to the same type of assessment, namely the one of the Horizontal Guidelines.

135. Finally, a case-by-case assessment of co-operations between insurers (pools or compilations/tables/studies) taking national specificities into account could improve the accuracy of the substantive assessment. National authorities are well placed to seize the effects of a co-operation on the market concerned. National authorities dispose of **local market knowledge** and are well placed to know the upsides and downsides of national co-operations between insurers for market participants. This would benefit policyholders.

6.2 IMPACT OF OPTION 2

6.2.1. Impact

136. Option 2 consists in prolonging the IBER by another 10 years ¹²⁵ until 2027 for both pools and compilations/tables/studies.

6.2.2. Cost

137. Compared to the baseline scenario, the elimination of the words "*or on the profitability of different types of investment*" in Article 2 would not create cost because according to the Commission's information this part of the exemption has not been used in practice to compile joint research on the profitability of investments.

138. Compared to the baseline scenario, Option 2 would however imply opportunity cost for policy holders who would be deprived of the benefits of Option 1 identified under section 6.1.3.

139. Pools set up by brokers would continue to be discriminated against compared to pools set up by insurers (IBER exempted). Pools currently operating under the protection of the IBER would continue to verify competition compliance by reference to a list of conditions while brokers operating pools would have to ascertain the concrete effects of their co-operations under the Horizontal Guidelines. This inconsistency comes at the cost of legal certainty for insurers as similar co-operations could be assessed under two different approaches.

140. Option 2 would also continue to distort the level playing field between insurers in general and other financial operators such as banks who never had the benefit of an IBER although they, too, need co-operations to jointly produce services and goods (e.g.: loan syndication) or to exchange data (e.g.: databases of banks on credit risks).

¹²⁵ A ten years prolongation seems better than 7 years, only, because the collection of data for an ex post evaluation would have to start already in 2019 if the IBER were prolonged by 7 years, only. Stakeholders are less committed to reply to an ex post evaluation if the Impact Assessment leading to the adoption of the legislative act is only a few years ago.

141. Option 2 would also lead to continued administrative cost for the European Commission, for competition authorities and stakeholders as regards a future evaluation of a prolonged IBER.

142. In the framework of the public consultation the multinational energy operator EDF claimed that the IBER exemption for pools creates market power that is unduly used. EDF notes in particular that the pools of insurers for nuclear risk (a typical catastrophic risk: low frequency + high impact) that exist in each country with nuclear plants remain quasi monopolies. As a result, according to studies carried on behalf of EDF, nuclear insurance is significantly more expensive than other comparable risk cover. In their view, maintaining the pools' exemption could result in 30% higher premiums¹²⁶ for nuclear damage insurance. It should be pointed out however that nuclear pools claimed (see above paragraph 47) that no single insurer would be able to cover the risk in question and that this form of cooperation does not restrict competition within the meaning of Article 101(1) TFEU. Even if it did, however, the IBER would not cover nuclear pools due to the fact that they clearly exceed the market thresholds specified therein.

6.2.3. Benefits

143. For insurers, the benefit of Option 2 is that the administrative cost related to the baseline scenario would not arise (see section 6.1.1 (b)). For a very rough estimate of cost benefits of Option 2 compared to Option 1 see the data of GDV in regards of compilations, tables and studies (see paragraph 123).

144. According to Insurance Europe, prolonging the IBER would maintain legal certainty for insurers which the Horizontal Guidelines cannot provide: *"Unlike the IBER, guidance and guidelines are not legally binding. They would not provide the legal certainty (re)insurers require to engage in cooperation agreements on joint compilations, tables and studies, and on pools. Without the legal certainty that the IBER provides, there is a real risk that insurers may stop cooperating, to the detriment of competition and insurance buyers."*¹²⁷ In the views of Insurance Europe, customers (the buyers of insurance) would therefore benefit from a prolongation of the IBER.

145. Other insurers however remarked during the public consultation that key principles underlying the application of the IBER are still uncertain despite the two prolongations of the IBER since 1992. In particular the notion of *"new risk"* and the definition of *market shares* which are crucial for the pools exemption remain problematic in practice.¹²⁸ Comparing Option 2 to Option 1, the benefits alleged by Insurance Europe in terms of legal certainty of Option 2 therefore appear limited, at least as far as the exemption for pools is concerned.

146. Regarding the IBER exemption for compilations, tables and studies, insurers derive significant benefits from continuing such co-operations also absent the IBER (Option 2).

¹²⁶ See EDF reply, Question 30. http://ec.europa.eu/competition/consultations/2014_iber_review/edf_en.pdf

¹²⁷ See reply of Insurance Europe at Q 22
http://ec.europa.eu/competition/consultations/2014_iber_review/insurance_europe_en.pdf

¹²⁸ See at paragraphs 162 and 163.

As already set out in the Report to the Parliament and Council¹²⁹, the Solvency II Directive on insurance and reinsurance, which came into effect on 1 January 2016, sets out stricter risk-capital requirements and obliges (re)insurers to calculate ‘best-estimate’ liabilities, thus potentially heightening the need for insurers to maintain more precise and accurate information on risks in order to calculate sufficient reserves in their balance sheets. Insurers have therefore an incentive to continue co-operating on compilations, tables and studies even if absent the IBER. Comparing Option 2 to Option 1, it is therefore far from clear why – as Insurance Europe suggests, co-operations compilations, tables and studies should end in the baseline scenario.

147. For competition authorities no benefits of Option 2 are apparent as their hands would continue to be tied by the IBER.

6.3 IMPACT OF OPTION 3

6.3.1. Impact

148. If only the exemption for joint compilations, tables and studies were prolonged, competition law compliance of such co-operations would be assessed by reference to the list of conditions in Article 2 IBER rather than in the concrete market context (Horizontal Guidelines).

149. If the exemption for pools were prolonged, competition law compliance of such co-operations would be assessed by reference to the list of conditions in Article 5 IBER rather than case-by-case in the concrete market context (Horizontal Guidelines).

6.3.2. Cost

150. For insurers, the benefit of Option 3 is that the administrative cost related to a self-assessment would arise only in relation to co-operations that are not exempted under the IBER (see section 6.1.1 (b)).

151. Option 3 would consequently imply lower administrative compliance cost for insurers than Option 1 but higher compliance cost for insurers than under Option 2.

152. For a rough estimate of possible incremental legal compliance cost offered by GDV for the assessment of compilations, tables and studies under the Horizontal Guidelines see above at paragraph 123. For instance, if the exemption for compilations, tables and studies were prolonged but for the exemption for pools, each member of GDV would save EUR 1500 for the exemption of compilations/tables/studies. This rough estimate must, however, be treated with great caution.

153. Compared to the baseline scenario Option 3 would imply opportunity cost for policy holders who would be –partially¹³⁰– deprived of the benefits identified under section 6.1.3. The key cost of Option 3 for policy holders compared to Option 1 would be that insurers would refrain from re-assessing their co-operations case-by-case. The inconsistencies of a sector block exemption within the overall system of antitrust

¹²⁹ At paragraph 17 http://ec.europa.eu/competition/sectors/financial_services/iber_report_en.pdf

¹³⁰ Partially because one of the two exemptions would be allowed to expire under Option 3

enforcement would then at least partially¹³¹ continue. Compared to Option 1, the IBER would under Option 3 also continue to bind the hands of national competition authorities to intervene where this is necessary.

6.3.3. Benefits

154. The benefits of a market based assessment and of removing inconsistencies to the general approach to antitrust enforcement would arise only in relation to the non-prolonged exemption. As regards the precise nature and scope of these benefits, reference is made to the above section 6.1.3.

7. COMPARISON OF THE OPTIONS

155. The key questions which any EU intervention must answer relates to three criteria¹³²:

- Effectiveness: “To what extent will a policy option achieve the objectives?”¹³³
- Efficiency: “To what extent will a policy option be cost effective?”¹³⁴
- Coherence: “To what extent is the intervention coherent with other EU policies?”¹³⁵

156. The Commission's subsequent analysis is based on the outcome of the public consultation¹³⁶. Based on this evidence the following sections will assess whether and to which extent each of the three options identified in Section 6 is effective, efficient and coherent.

7.1 EFFECTIVENESS

157. The question arises how each of the three options achieves the policy objective of striking a balance between the protection of competition and the needs of insurers to cooperate on calculating net premiums and co(re)insuring risks. How would each option achieve this objective?

158. OPTION 1 appears to be a more effective solution to strike this balance than Options 2 and 3 for the following reasons.

159. First, the practical relevance of the IBER has decreased, at least as far as pooling is concerned. Only very few pools actually still fall within the scope of the IBER while the market developments of the last years have shown that insurance outside of pools on subscription markets is possible and thriving (see section 2.2.2 with further references). This speaks again maintaining the IBER and in favour of the baseline scenario (Option 1).

¹³¹ Partially because one of the two exemptions would be allowed to expire under Option 3

¹³² Commission Staff Working Document "Better Regulation Guidelines" SWD(2015) 111 final of 19.5.2015 tool 8 Format of the IA Report Section 6.

¹³³ Commission Staff Working Document "Better Regulation Guidelines" SWD(2015) 111 final of 19.5.2015 Chapter VI, Section 3.2.

¹³⁴ Commission Staff Working Document "Better Regulation Guidelines" SWD(2015) 111 final of 19.5.2015 Chapter VI, Section 3.3.

¹³⁵ Commission Staff Working Document "Better Regulation Guidelines" SWD(2015) 111 final of 19.5.2015 Chapter VI, Section 3.5.

¹³⁶ http://ec.europa.eu/competition/sectors/financial_services/insurance.html

160. Second, the benefit of a block exemption is limited to institutionalised forms of co-insurance (pools) set up by insurers while one-off customised solutions of brokers are not block exempted. The IBER therefore *distorts the level playing field* between different forms of co(re)insurance without an apparent objective justification. This, too, speaks in favour of the baseline scenario (Option 1) to let the IBER lapse.
161. Third, the block exemption of pools follows a *one-size-fits-all approach* to the assessment under Article 101 (3) TFEU although in reality the few pools still covered by the exemption are very heterogeneous which speaks in favour of a case by case assessment. In addition there are many forms of cooperation between insurers or capital providers that completely fall outside of the IBER.
162. Fourth, as legal instrument, the IBER still creates legal uncertainty as industry struggles with fundamental conditions for the pool exemption such as the calculation of market shares and the question whether risks are "new risks" within the meaning of Article 1 (6) IBER or the size of the relevant market and market shares needed to apply the pools exemption of Article 5 IBER. This *uncertainty* further undermines the effectiveness of the block exemption. By way of example, Germany's Gesamtverband der Deutschen Versicherungswirtschaft stated that the definition of the relevant market generally provided difficulties in the insurance sector and for applying the IBER's pool exemption in particular.¹³⁷ The French association of insurers equally saw the market definition, which is required for applying the pools exemption of the IBER, as difficult in practice.¹³⁸
163. Regarding the exemptions of compilations, tables and joint studies (Article 2 and 3 IBER), based on the information available to the Commission, the IBER exemption is used in practice for information exchanges at national level. National conditions can be very different among the Member States and thus, a case-by-case assessment might be more warranted. The national competition authorities are also well placed to assess the individual market conditions. Option 1 (baseline scenario, IBER lapses) is therefore superior to Option 2 (IBER is prolonged) and Option 3 (IBER prolonged only for one of two exemptions) in terms of a competition assessment that is close to market reality and therefore effective. By considering facts of individual cases competition authorities can accurately strike the balance between the needs for competition and the needs of insurers to cooperate.
164. OPTION 1 is the most effective solution followed in declining order by OPTION 3 and OPTION 2.

¹³⁷ Reply of GDV at Q 22 ("*Dass es eine gewisse Rechtsunsicherheit bei der Selbsteinschätzung wie auch bei der Anwendung der Vers-GVO gibt, ist daher nicht verwunderlich.*") http://ec.europa.eu/competition/consultations/2014_iber_review/gdv_de.pdf

¹³⁸ Reply of Association Française de l'Assurance ("*La détermination du marché concerné demeure un sujet complexe et incertain. Par exemple quand le marché est international, ce qui est fréquent dans le domaine des risques professionnels (grands risques, assurance transport,), le chiffre d'affaires des concurrents n'est pas connu, ou de façon très approximative. De plus comme cela a déjà été indiqué la disparition de l'offre de quelques concurrents peut modifier soudainement la part de marché d'un pool.*") http://ec.europa.eu/competition/consultations/2014_iber_review/afa_en.pdf

7.2 EFFICIENCY

165. An efficiency analysis aims at considering which intervention choices achieve the same results at least cost or greater benefits at the same cost.¹³⁹ In the particular context of the competition rules, the efficiency analysis aims at determining whether an individual self-assessment of the relevant cooperation under the existing set of notices, guidelines, communications and regulations already in place would produce similar effects to those of an exceptional instrument such a sector-specific BER.
166. Regarding the pools exemption in Article 5 IBER, an assessment of co(re)insurance agreements on a case by case basis is better suited to maximise welfare as compared to the block exemption.¹⁴⁰ But as set out in section 3.1.3 in more detail, the compliance costs under the IBER and under the Horizontal Guidelines do not significantly diverge amongst others because a market definition is needed under both instruments. Hence, in terms of efficiency, the self-assessment is at least neutral if not more efficient than a block exemption of co(re)insurance pools. OPTION 1 is therefore superior to OPTION 2 and OPTION 3.
167. Regarding the exemption of compilations, tables and joint studies in Article 2 IBER, since the entry into force of the Horizontal Guidelines, a specific chapter sets out the Commission's views on the application of Article 101 TFEU to information exchange between competitors. The principles set out therein provide a good basis to carry out a self-assessment of the admissibility of the joint creation and distribution of compilations, tables and studies.
168. Therefore, in case the IBER lapses, the Commission has already made public equivalent general principles capable of guiding insurers in self-assessing the admissibility of their cooperation. For the same reason, a compliance assessment by the national insurance federations, which are at present the main intermediaries for compiling and disseminating risk data, under the principle of the Horizontal Guidelines should not bring about a significant change in compliance costs, as they are currently already obliged to ensure that the collection and dissemination of risk data in the form of compilations, tables and studies complies with the same substantive provisions as those contained in the IBER.
169. OPTION 1 is therefore superior to OPTION 2 and OPTION 3 because the overlap of two guidance instruments (IBER and Guidelines) is an inefficiency which would eventually be resolved through the expiry of the IBER.
170. OPTION 1 is the most efficient solution followed in declining order by OPTION 3 and OPTION 2.

7.3 COHERENCE

171. In assessing whether the intervention is coherent internally and with wider EU policy¹⁴¹, it must be recalled that block exemption regulations owe their existence to the

¹³⁹ Chapter VI, Section 3.3

¹⁴⁰ See section 6.1.1

¹⁴¹ Chapter VI, Section 3.5

notification system prevailing before the modernisation of EU antitrust enforcement in May 2004 (see section 2.4.2 at paragraph 55 and 56).

172. Under the previous regime, block exemption regulations were introduced as a means of reducing the heavy administrative burden caused by the large number of notifications the Commission received in certain fields. The centralised administrative *ex ante* notification regime was replaced in May 2004 with a decentralised *ex post* enforcement regime based on self-assessment of cooperation agreements and commercial practices by the relevant undertakings. To guide this assessment, the Commission has since also adopted a series of general guidance instruments such as the Horizontal Guidelines that apply to **all sectors**. These guidelines deal with many fields that were previously covered by sector-specific instruments (see section 2.4.2).
173. The above-mentioned changes in the enforcement regime of competition rules rendered some instruments belonging to the prior enforcement regime (including the IBER) incoherent and inconsistent with the new modernised regime.
174. In view of this fundamental change from a centralised to a decentralised control of EU antitrust rules, there are strong doubts whether the Commission should continue to use the powers under Council Regulation (EEC) No 1534/91 for defining in a generalised manner which conditions co-operations between insurers typically fulfil Article 101 (3) TFEU and which ones do not. The value which such an intervention at EU level adds value would appear limited and even problematic due to the incoherence with the general approach to antitrust enforcement in the concrete market context (Horizontal Guidelines).
175. It appears also incoherent to maintain a separate sector-specific information exchange exemption when the new Horizontal Cooperation Guidelines adopted after the current IBER already contain a section providing comprehensive guidance on this type of cooperation; guidance that could be complemented, if appropriate, by means of more flexible and simpler instruments.
176. During the public consultation insurers expressed their preference that the Insurance Block Exemption Regulation remains in force both for the calculation of joint premiums and co(re)insurance pools rather than allowing it to lapse at the end of March 2017 (see Annex 2). However, non-renewal of the IBER exemptions will enhance the self-monitoring by the industry to prevent anti-competitive agreements that are detrimental to social and economic welfare.
177. As regards the coherence of each option with the other EU policy objectives, such as a high level of environmental protection, mitigation and adaptation to climate change or growth and employment there is no reason to expect that any of the three options would impact negatively the attainment of these objectives. Changes in employment levels are unlikely as the different forms of insurance cooperation are not automatically illegal according to Article 101 TFEU when the IBER expires. Although the insurance sector is characterised by low returns, they are more predictable, and hence can serve as an attractive investment proposition drawing additional capital to the insurance market. The

same goes for environmental protection. The Environmental Liability Directive¹⁴² actually encourages the development of financial security instruments and markets to cover the responsibilities of operators under this Directive, further incentivising the development of co-operations between insurers. In addition, the rising unpredictability and severity of insurance events related to environmental degradation or climate change encourages insurers to not only more accurately price these risks, but also better predict their likely consequences. The market based assessment under the Horizontal Guidelines should be more conducive to the development of products and tailored to the particularities of a given risk.

178. In conclusion, OPTION 1 is most coherent with the general framework for antitrust enforcement in the EU followed by OPTION 3 and OPTION 2.

7.4 CONCLUSION

Table 1 Comparison of Options

	Option 1 (IBER lapses)	Option 2 (IBER prolonged)	Option 3 (either compilations or pools prolonged)
Effectiveness	0	--	-
Efficiency	0	--	-
Coherence	0	--	-

Magnitude of Impact as compared to baseline scenario of IBER lapsing 31.3.2017:

++ very strong + strong 0 neutral - negative -- very negative

179. In the light of the above analysis it appears that **OPTION 1**, which is also the baseline scenario, appears to be the most beneficial choice across all criteria. It is therefore the **preferred option**. Following the expiry of the IBER on 31 March 2017, the Commission will observe as part of its ongoing market monitoring whether stakeholders face concrete difficulties in self-assessing compliance with Article 101 (3) TFEU using the Horizontal Guidelines (see right below).

8. MONITORING AND EVALUATION

180. In the preferred baseline scenario, the IBER lapses on 31 March 2017 (OPTION 1). Following the lapse of the IBER the Commission will observe as part of its ongoing market monitoring whether stakeholders face concrete difficulties in self-assessing compliance with Article 101 (3) TFEU using the Horizontal Guidelines.

181. If the monitoring shows that insurers are, contrary to expectations, not in a position to self-assess their co-operations based on the Horizontal Guidelines, the Commission will identify in concrete terms the obstacles insurers face and explore whether it is appropriate

¹⁴² Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Article 14

to adopt guidance to address such uncertainties. Such potential guidance can in principle take different forms, ranging from presentations at industry events, meetings upon request with the affected stakeholders to explicit guidance in documents.

ANNEX 1: PROCEDURAL INFO

1. The European Commission's Directorate General for Competition (DG COMP) is tasked with ensuring fair competition in the Internal Market and is responsible for the management and evaluation of the IBER. DG COMP conducted this impact assessment in cooperation with relevant Commission DGs, i.e. AGRI, CLIMA, ECFIN, ENER, ENTR (now DG GROW), ENV, JUST, JRC, LS, MARKT (now DG FISMA), MOVE, RTD, SANCO (now DG JUST) and SG. They were all members of the Inter-Service Steering Group that was set up for this Impact Assessment Process.

(a) Preliminary Steps

2. As a preliminary step in the review process the Commission commissioned in 2012 from Ernst & Young a *study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market*¹⁴³. The objective was to obtain an in-depth understanding of the operation of these two types of co(re)insurance cooperation frameworks across the EU. The study moreover sought information on the application of the IBER in practice and on whether insurance undertakings participating in co(re)insurance pools self-assess their compliance with the conditions of the IBER. The Commission discussed the findings of the Study with stakeholders in a public workshop on 12 March 2013. In 2014 a new edition of the study was published¹⁴⁴.

(b) Review process of the IBER

3. Pursuant to Article 8 of the Empowering Regulation, the Commission must submit a report on the functioning and future prospects of the IBER no later than six years after its entry into force. While the review of the implementation of the IBER and discussions about its future started already in 2013, a formal review of the use and functioning of the IBER started in February 2014.
4. The following main steps have been taken in the review of the functioning of the IBER:
 - Launch of the Impact Assessment (IA) procedure and the setting-up of the Inter-Service Steering Group (ISG),
 - The consultation of National Competition Authorities (NCAs),
 - The Initial Public Consultation of stakeholders that ran from August to November 2014 and further follow-up questionnaires with stakeholders,
 - Report to the European Parliament and Council on the functioning and future of IBER, March 2016,
 - A dedicated stakeholder meeting to discuss the preliminary findings of the IBER Report, April 2016,

¹⁴³ Available online under http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf

¹⁴⁴ http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf

- Publication of studies on issues pertaining to the insurance production process with regard to the application of the IBER, August 2016.
5. The formal review process of the IBER started in February 2014 with a consultation of the National Competition Authorities (hereafter NCAs) by means of a questionnaire. The questionnaire included 17 questions divided into three main sections respectively on (a) the application of the IBER in practice, (b) the results of the study on co (re)-insurance pools and on ad-hoc co (re)-insurance agreements on the subscription market, (c) their prospective assessment. In addition, in section (d) the NCAs were invited to provide any other information that they consider pertinent. Following the written consultation, the Commission met the NCAs on 13 June 2014 to discuss their feedback.
 6. The review process was presented to the public in more detail with the publication of a Roadmap in May 2014. This roadmap was replaced in August 2015 by an Inception Impact Assessment following the adoption of the Better Regulation Guidelines. The document spelled out the timeline of the review process, what steps the Commission plans to undertake and what options it considers.¹⁴⁵
 7. The public consultation, additional targeted questionnaires and subsequent meetings with stakeholders (on the substance see below Annex 2) allowed the Commission to publish on 23 March 2016 a Communication on the functioning and future of the IBER regulation, the IBER Report. The Communication and attached Staff Working Document set out the Commission's initial assessment of how the IBER is being used in practice. The assessment concluded that although there are indications that the insurance sector may have an enhanced need for collaboration in relation to the compilation and distribution of joint calculations, tables and studies, and the co(re)insurance of certain specific types of risks, the strict conditions for the creation of a sector-specific BER with respect to these categories of agreements seem no longer to be met. The Commission made particular attempts to gather views of the consumers¹⁴⁶ of the products and services offered by the beneficiaries of the IBER exemption.
 8. The Commission discussed the findings of the IBER Report with stakeholders during a public hearing on 26 April 2016. In total 80 stakeholders participated to the event¹⁴⁷, including insurance companies and associations, law firms, pools, consulting firms, etc.

(c) Internal consultations

9. Ever since the initiation of the review process Commission services other than the Commission's DG COMP have been closely involved. A dedicated Inter-Service Steering Group has been set-up to advise DG COMP, as the lead service for the review exercise. The group has met on several occasions from July 2014 to October 2016. The Group has

¹⁴⁵ See http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_comp_001_review_iber_en.pdf

¹⁴⁶ The consumers were defined as entities in need of insurance cover for non-life large risks that they encounter in their business operations. Overall 80 consumers were contacted representing sectors such as chemicals, energy production, farming, waste treatment or transport.

¹⁴⁷ For a list of participants and summary of event please see: http://ec.europa.eu/competition/sectors/financial_services/insurance.html

last met on 7 October 2016 prior to submission of the Impact Assessment to the Regulatory Scrutiny Board.

(d) External expertise

The 2014 Study on co(re)insurance pools

10. A study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market¹⁴⁸ was performed at EU-27 level on the basis of an interview-driven approach. The study concluded that: *“Many pools are established to cover catastrophic risk (nuclear, environmental, terrorism) but are not the sole alternative for such risks, as insurance markets and other mechanisms, such as state-guaranteed insurers, also cover some of these risks. Alongside such pools for major risks, other arrangements between insurers exist to deal with risks that the insurance market does not want, or to take advantage of a market niche where insurers combine to provide capacity in the subscription market”*¹⁴⁹.
11. The number of pools found was significantly lower than initially expected. From 100 arrangements considered to be covered by the IBER definition, 39 were in the end out scoped from the study following interviews¹⁵⁰. 61 pools were actually considered to fulfil the IBER definition; however, 15 of them were identified to be no longer operative, i.e. in “run-off”¹⁵¹. Almost one quarter of IBER pools has hence decided to leave the market. This represents a further decline in the number of pools which could potentially fall under the IBER definition.
12. Regarding the use of the pools’ exemption, the study also indicated that: *“Responses rates to questions relating to self-assessment, relevant market and market shares were disappointing. Some of these pools had not conducted a full self-assessment because they considered themselves exempted for covering new risks or they were confident that their market share was below the 20% threshold. Overall, awareness of the insurance BER appeared mixed, though those pools that had reassessed their position since the issue of the new BER (in 2010) did not report a change in their compliance status”*¹⁵².
13. The study showed in addition that *“There are uncertainties as to the definition, with a risk of mismatch between industry perceptions of pools and the intentions of the BER, which may indicate a need for clarification: these affect both the identification of pools themselves and the definition where pool-like arrangements are set-up by parties other than insurers, particularly intermediaries, which may warrant study outside the scope of*

¹⁴⁸ http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf

¹⁴⁹ See Executive Summary of the Study, p. ii.

¹⁵⁰ Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market at http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf ; page 13 paragraph 59 and page 309, table 2.

¹⁵¹ Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market at http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf ; see Executive Summary of the Study, p. ii. and page 41 paragraph 162 table 13.

¹⁵² Ibid.

*this report*¹⁵³. The study also found that *“the functioning of pools is heterogeneous and each pool requires assessment on its individual merits”*¹⁵⁴.

14. The E&Y study also explored in more detail subscription markets.¹⁵⁵

The 2016 Studies by Europe Economics

15. In 2015 DG COMP contracted Europe Economics to carry out two studies on issues pertaining to the functioning of the IBER that the stakeholders have raised in the context of the public consultation (1) the role of asset-switching in the production of insurance products and (2) the effects of the different forms of co(re)insurance available on the market.

16. The study on asset-switching has shown that there is scope to, at least, switch assets (with a view of increasing production of insurance products) to a **small–moderate** extent in all types of non-life insurance in the short term (6–12 months) in response to changes in demand. There is likely greater scope for the switching of assets to increase production in the ‘more conventional’ of the unconventional risks, i.e. Natural Catastrophe, Large Ecological/ Industrial risks, and Professional Liability, and less in Terrorism/ Nuclear. Switching assets, to increase production of an unconventional insurance product, by a more appreciable degree within a 6-12 month period does not look achievable. Switching production into insurance areas not already covered by an insurer (i.e. market entry) would face additional constraints. For business reasons, underpinned by regulatory practice, entry to a new unconventional risk area (or indeed a more novel conventional one) would require the insurer to incur some sunk costs (e.g. around capability-building and discussions with the local supervisor).

17. The study on different forms of cooperation between insurance companies and their respective impact on competition¹⁵⁶ compared different forms of co(re)insurance agreements, setting out the advantages and disadvantages of each type of cooperative structures for both insurers and clients. It found that co(re)insurance is more frequently used for unconventional and/or emerging risks than for mass risks, such as car accidents or home insurance and identified the following types of co(re)insurance schemes: insurer-led pools, broker-led pools, mandated pools and ad hoc agreements. The study concluded that co(re)insurance schemes are highly heterogeneous in terms of their intrinsic mechanisms and suggested that a more accurate assessment needs to be conducted on a **case-by-case basis**. This finding, together with the fact that most co(re)insurance agreements appear to be ad hoc agreements¹⁵⁷ that are not covered by the IBER, further substantiates the earlier findings that the practical impact of the IBER is limited.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ See Annex 4 with more details.

¹⁵⁶ Study on Different forms of cooperation between insurance companies and their respective impact on competition at http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf

¹⁵⁷ Study on Different forms of cooperation between insurance companies and their respective impact on competition, Chapter 9.1 at http://ec.europa.eu/competition/sectors/financial_services/KD0216918ENN.pdf

(e) Remaining steps until 31 March 2017

18. The Commission submitted the draft Impact Assessment on 12 October 2016 to the Regulatory Scrutiny Board. The Board issued its positive opinion with a recommendation to improve certain aspects of the Report on 08 November 2016. The table below summarizes the key changes suggested by the Regulatory Scrutiny Board and how they were addressed in the Impact Assessment Report.

Table 2: Summary of the recommendations of the Regulatory Scrutiny Board and how they have been taken up in the Impact Assessment Report

Opinion of the Regulatory Scrutiny Board of 08 November 2016	Impact Assessment Report (IAR)
- Reinforce the problem analysis with a more extensive description of the current situation and how it has evolved since the renewal of IBER in 2010	- "Chapter 2.4.3 – The 2010 IBER" has been added explaining the reasons for prolonging the two exemptions for "joint compilations, tables and studies" and "co(re)insurance of risks" in 2010. Option 1 (Chapter 6) explains clearly how the introduction of the Horizontal Guidelines (§101 - §106) as well as changes to the insurance market (Annex 4) make the special conditions that justified the prolongation of the IBER in 2010 no longer relevant.
- Provide more evidence with regard to how compliance costs are likely to evolve. Introduce a cost comparison between the self-assessment under the Horizontal Guidelines and IBER	- "Chapter 6.1.2 – Cost" explains more clearly and quantifies the likely costs of the lapsing of the IBER (§122) by comparing current compliance costs with cost estimates for a self-assessment under the Horizontal Guidelines
- Explain steps that a company must follow for a self-assessment under the Horizontal Guidelines and IBER	- A comparative table has been added in Annex 8
- Provide a view on the magnitude and market significance of alternative ways of co-insuring risks	- Annex 4 (§5) expands the analysis of the largest subscription markets and their customers

- Better explain the impact of the three options on vulnerable customers
- The Report should better explain the provisions foreseen for monitoring the effects of the lapsing of the IBER
- Provide clarification on objectives hierarchy for the IAR and explain differences from the objectives hierarchy in the 2010 IAR
- For Option 3, explain why the 2 sub-options are considered. In light of the Horizontal Guidelines on data exchange, the sub-option of prolonging the exemptions of "joint compilations, tables and studies" should be irrelevant.
- Explain if Option 2 (Renewal of IBER) could address the problems of unclear definitions of "relevant market" and/ or "new risks" as highlighted during the stakeholder consultation process
- Option 2. Why a prolongation of 10 years has been considered, but not a shorter
- The sections analysing the impacts of each Option has been strengthened in this aspect, in particular costs (§123) for insurers, other stakeholders (§126 & §127), and in particular the policyholders (Annex 3, §5). Annex 2 (§9) has been expanded by adding a summary of a meeting with BEUC (The European Consumer Organisation) that was part of the targeted stakeholder consultation (Q4 2014 – Q2 2016)
- The Commission will monitor during a 12-month period whether the expiry of IBER leads to legal uncertainty and provide guidance to insurers if needed. See description of Option 1 (§87) and Chapter 8 (§180 & §181)
- The IAR clarifies (§82 & §83) that the amended hierarchy of objectives is a realignment with the general objectives of competition policy as specified in the TFEU and specific objectives of the IBER, Recital 5 of Regulation 267/2010
- The IAR explains (§92) why, despite the overlap between the Horizontal Guidelines and IBER in case of "joint compilations, tables and studies", the two sub-options are kept (Option 3)
- In description of Option 2 (Chapter 5, §90) explains why a modification of definitions in the IBER would not solved the problem of legal uncertainty. The challenge is not the definition of each term, but rather in the evolving nature of defining markets or what constitutes a "new" risk, hence any reformulation would be only a "temporary fix".
- See Chapter 5.2 Discarded options

duration

- Option 1. Avoid overlaps between sections on "Compliance costs" and "Costs"

- Better explain the notion of the "uneven playing field" caused by the parallel existence of the IBER and the Horizontal Guidelines

- Provide more information about possible entry barriers and explain how the situation for SMEs has changed compared to 2010

- Expand the description of impacts of Option 1 on the affected stakeholder groups identified in Annex 3 (Who is affected and how)

- Discuss the robustness of the analysis given limited data

- Overlaps have been removed by merging the two separate sections

- The IAR clarifies that the uneven playing field is not caused by excessive costs of one assessment over the other, but rather is due to the legal uncertainty faced by insurers as similar cooperations could be assessed under two different approaches

- The change in the regulatory landscape compared to the Impact Assessment Report of 2010 has been added. An explanation has been added of how the incentives of insurers to cooperate, irrespective of size, remain in effect (Solvency 2, incomplete data sets of individual insurers, etc.)

- Annex 3 has been amended, in particular expanding the potential effects of lapsing of the IBER on National Competition Authorities, SMEs and the European Commission

- Chapter 2.2 explains the robustness of data already compiled and the extensive range of additional information sources to support the analysis

ANNEX 2: STAKEHOLDER CONSULTATION

a) Public Consultation (5 August to 4 November 2014)

1. Throughout the review the Commission has extensively consulted various groups of stakeholders regarding the implementation and future of the IBER. The Public Consultation that ran between 5 August and 4 November 2014 was a major step in this process. In August the Commission published an online questionnaire for stakeholders using the Commission's EU Survey platform and DG Competition's website. Stakeholders were invited to provide feedback within a period of 13 weeks in any official EU language either by means of the online questionnaire or by sending contributions by post.
2. The questionnaire comprised 40 questions contained a mix of backward-looking and forward-looking questions. It was divided into five sections gathering information on the following topics: (2.1) Stakeholder Profile (2.2) Market developments; (2.3) Application of the IBER in practice; (2.4) Policy options; and (2.5) Impact of the options. The questionnaire included specific questions inviting insurers to identify the concrete changes that a potential non-renewal of the IBER could produce in their behaviour, as well as to quantify the additional costs they would incur as a result or, at least, to rank the effects on a qualitative scale.
3. The consultation was open to all citizens and organisations, but comments from stakeholders affected by IBER, such as (re)insurers, industry associations, insurance intermediaries, public authorities, customers and consumer organisations were particularly welcome. DG COMP received 37 replies from the following stakeholder categories: 20 industry associations; 4 insurance undertakings; 2 insurance and reinsurance undertakings; 1 insurance intermediary; 1 customer; 3 public authorities; and 6 other entities. All replies have been published on the DG Competition's website¹⁵⁸. The low number of replies may suggest a rather limited interest in the review process considering that close to 4000 insurance companies are active in the EU 28. The 37 stakeholders provided more information on joint tables, compilations and studies than on co(re)insurance pools.
4. The vast majority of respondents highlight that, in the absence of the IBER, the Commission's current Horizontal Guidelines do not provide appropriate guidance for self-assessment, since they do not sufficiently recognise the specificities of the insurance sector.
5. The submissions provide evidence of the utility of the exchange of risk information between insurers. All the respondents put forward that the availability of adequate statistical information on risks is fundamental to the carrying out of operations in various classes of insurance business. Insurance is a product which covers future risks, the cost of which is unknown at the time the insurance contract is concluded. No insurer alone is in the possession of sufficient statistical data on risks to carry out those calculations accurately. This makes the exchange of past statistical data crucial to reliably estimate and price those future risks.

¹⁵⁸ See http://ec.europa.eu/competition/consultations/2014_iber_review/index_en.html

6. Concerning the impact of the policy options, insurers, and the few pools that answered the public questionnaire, are strongly in favour of the prolongation of the IBER. They point out that, if the pools' exemption is removed, not only would there be less legal certainty (e.g. regarding the admissibility of such cooperation) and greater compliance costs for insurers, but this uncertainty would also produce undue caution about entering into certain arrangements that could even lead, in some cases, to the dissolution of the existing cooperation. As a result, insurers would charge higher premiums or even discontinue the offer of certain insurance products such as the cover for aggravated or catastrophic risks.
7. Insurers signal that the definition of "pool" in the IBER is imprecise in that it is unclear whether certain types of cooperation between insurers where an intermediary/broker intervenes are covered by the exemption. They therefore request that the definition of the pool is revised to explicitly cover vertical agreements with intermediaries/brokers, as well as the so-called line slip agreements between insurers led by brokers that build cover for certain risks, and specialty programmes among panels of insurers and reinsurers (classically carried out by Lloyd's in London).
8. The public consultation questionnaire asked participants to assess the overall impact of the non-renewal/ partial renewal of the IBER and the impact it would have on their business conduct. Several respondents argued that in the absence of the IBER the Commission Horizontal Guidelines in their current shape would not provide appropriate guidance for self-assessment, since they do not sufficiently recognise the specificities of the insurance sector. Respondents expressed concerns that, absent the IBER, they would be obliged to carry out a case-by-case assessment of efficiencies under the Horizontal Guidelines. Questions regarding the ensuing effects on compliance costs remained unanswered.

b) Additional questionnaires and meetings (Q4 2014-Q2 2016)

9. Most replies to the public consultation came from industry associations and (re)insurers. The Commission complemented the replies through additional targeted questionnaires to entities active in the areas covered by the IBER. Over 160 questionnaires were sent to co(re)insurance pools, to intermediaries/brokers and mutual insurance associations operating in the nuclear and energy sector being direct competitors of pools as well as to customers and customer associations operating in fields in which co(re)insurance schemes appeared to be prevalent. The objectives were to (i) reach out to specific stakeholder groups that did not participate actively to the public consultation and (ii) to improve the factual information regarding the pools exemption where no replies or superficial replies were given. The Commission consulted BEUC¹⁵⁹ which observed that "*the exemption regulation currently in force already allows companies to achieve common compilations of figures*" but added that "*we cannot say that this is a market that is characterized by a great uncertainty or complexity*". The Commission also reached out to the Financial Services User Group¹⁶⁰ for their views related to the operation of the IBER exemptions but the User Group did not submit comments.

¹⁵⁹ The European Consumer Organisation, see <http://www.beuc.eu/>

¹⁶⁰ The Financial Services User Group, see http://ec.europa.eu/finance/finservices-retail/fsug/index_en.htm

10. In addition the Commission held a series of bilateral meetings and telephone conferences with stakeholders including an actuarial association, pools and national insurance associations. Some of the stakeholders who had submitted observations were also contacted for follow-up interviews in order to clarify their position or address additional questions.
11. On 26 April 2016, the Commission held a stakeholder event¹⁶¹ to present the IBER Report to representatives of the insurance industry and the legal community, and to get their first reactions. A high number (80) of participants attended. Two representatives of law firms referred to the legal difference between the instrument of a Block Exemption Regulation and the Horizontal Guidelines arguing that the IBER provides more legal certainty than the Guidelines. Two representatives of insurance companies underlined the importance of information exchange under Solvency II and wondered if non-renewal of IBER could negatively impact such cooperation. Therefore, some representatives generally prefer to have a legal instrument in place. No insurer or law firm present was able to quantify and illustrate potential negative effects (such as cost increases) and to explain why Article 101 TFEU including the Horizontal Guidelines would be an inadequate basis for their self-assessment which would be carried out under Article 101 instead of the IBER in case of a non-renewal. Participants were invited to submit evidence to support their positions. However, until today, no such submissions were made.

c) Views of National Competition Authorities on IBER

12. The National Competition Authorities were kept informed about the progress and had several opportunities to contribute to the IBER Review process. Most importantly the NCAs were consulted on the preliminary findings of the IBER Review (i.e. the 2016 IBER Report and supporting Staff Working Document) in the framework of the European Competition Network. There appears to be uncertainty on the part of the UK Financial Conduct Authority and of UK market participants whether cooperation agreements between UK insurers labelled as “pools” fall within the narrow scope of Article 5 IBER. Both the UK Competition Markets Authority and the Financial Conduct Authority conclude that “the IBER was not essential to promote the consumer interest associated with insurance pools in the UK”. The UK authorities were informed by market participants that “the wholesale subscription process which does not require insurers to explicitly agree on the terms and conditions for cover provided an alternative and possibly more efficient system for providing cover to most large and new risks”. In circumstances where the formation of a pool was deemed important, firms should be able to self-assess whether there are significant benefits from forming a pool and small chances of competitive harm.
13. The German Bundeskartellamt (“German NCA”) explained that in 2007 it adopted a decision to prohibit a longstanding pooling arrangement for the provision of professional liability insurance between four insurance companies. This prohibition decision assumed that professional liability insurance provided to auditors, lawyers, notaries and accountants are separate markets since the risks pertaining to auditors were different from

¹⁶¹ Minutes of the 25 April 2016 Stakeholder Event, see. http://ec.europa.eu/competition/sectors/financial_services/iber_event_summary_en.pdf

those relating to lawyers, actuaries and notaries. Based on this market definition, the German NCA concluded that the pool exceeded the 20% threshold that would have allowed it to benefit from the protection of the IBER exemption for pools. However, on appeal the German courts concluded that the pool's market share for benefiting from the IBER exemption should be calculated using a broader relevant product market that encompasses all types of professional liability insurance (rather than treating them as individual product markets), because it assumed a high flexibility of product substitutability in the insurance sector from the supply side.

14. The Dutch NCA commissioned the Tilburg Law & Economics Center (TILEC) to conduct a survey into the co-insurance market, which was finalised in October 2011.¹⁶² The study included an attached memorandum where the authority discussed the results of the TILEC study. TILEC investigated a) under which conditions co-insurance results in a lower premium than a 100% cover by a single insurer and, b) how different tendering procedures for coinsurance work. As regards the cover by an insurance pool versus a single insurer, it was concluded that under certain conditions co-insurance results in a lower premium for the policyholder than 100% cover, namely if: a) an open tendering procedure is carried out b) the broker acts in the interests of the policyholder c) insurers are risk-averse and d) there is no alignment between insurers (i.e. no tacit collusion).
15. The Dutch NCA finally adopted a commitments decision on 30 December 2010 against four insurance pools which jointly provide professional liability insurance for liberal professions (notaries, lawyers, accountants, insurance intermediaries and brokers). The pool for notaries accounted for 60% of the market for a long time and only one other insurer offered the same type of insurance. As for the relevant market definition, the Dutch NCA explicitly followed the German Appeal Court's broad product market definition that is "the market for liability insurance for notaries, lawyers accountants, tax consultants, estate agents and financial service providers who mediate or act as authorised agents or sub-agents in insurance matters". In the case at hand, the notaries' pool committed to respecting the market share threshold of 20% in the IBER. Similar commitments were voluntarily offered by the other three pools under investigation.

¹⁶² <https://www.europadecentraal.nl/wp-content/uploads/2013/01/Notitie-MFS-co-assurantie.pdf>

ANNEX 3: WHO IS AFFECTED AND HOW

1. The objective of this Annex is to set out the practical implications of the initiative for enterprises and industry bodies active in the insurance sector, public administrations and consumers. Option 1, the baseline scenario, has been assessed as the preferred option. This signifies that the IBER lapses on 31 March 2017. Under this option the two forms of co-operations between insurers, i.e. (i) joint compilations and distribution of tables and studies and (ii) co(re)insurance of risks will no longer be exempted according to the IBER but rather assessed according to the Horizontal Guidelines. The Horizontal Guidelines provide indications how to assess the different forms of cooperation between competing undertakings according to Article 101 TFEU.
2. The duty to comply with EU competition rules is incumbent on insurance companies both as regards a self-assessment under the IBER and according to the Horizontal Guidelines. Insurers are therefore affected by the IBER Renewal. Assessment of insurer cooperation under the Horizontal Guidelines would not have a negative impact on small- and medium-sized insurers (even though SMEs are not quite as prevalent among insurers compared to other industries). The incentives for cooperation between insurers remain unchanged despite the change of the nature of the assessment. Secondly this cooperation will be assessed by the organizers on behalf of the participants. There is no need for each member of a co-operation to calculate the market shares, analyse the effects on the market etc. The compliance cost of insurers (and of SMEs involved) will therefore hardly increase compared to what they already incur under the IBER.
3. National competition authorities (NCAs) can be considered to be indirectly affected. Under the new competition regime introduced in 1 May 2004, agreements, concerted practices and decisions of associations that are limited to a national market, only, should in the first place be assessed by the national competition authority present in this market. NCAs are well placed to evaluate co-operations between insurers at the national level. As set out previously, the co-operations currently covered by the IBER are largely domestic in scope. In the absence of an IBER, NCAs would gain the power to carry out a more refined assessment of individual cases that takes into account the unique characteristics of the insurance sector in the relevant Member State. The estimated burden of a competition assessment carried out by an NCA in an individual case is 6 man months. The expected burden can also be assumed to fall over time as competition authorities gain greater experience and/ or develop particular self-assessment frameworks that determine how coinsurance arrangements not covered by the IBER, having regard to their particular national features, should be addressed under the EU competition rules. The Dutch Protocol¹⁶³ is an example of such an evolution. At the same time, as specified in Regulation 1/2003 the Competition Authorities of the Member States are not bound¹⁶⁴ to act in individual cases and area free to take no action or decision.
4. As regards the Commission the adoption of the current regulation and in particular the implementation of Regulation 1/2003 has over the years greatly reduced the number of

¹⁶³ See the current Impact Assessment Annex 2, paragraph 15 and/ or the Commission Staff Working Document SWD(2016) 63 paragraphs 115 and 116 for explanation

¹⁶⁴ See Regulation 1/2003 Article 5, "... Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part...".

cases investigated by the Commission. With the lapsing of the IBER an increased workload, at least initially, can be expected as regards the monitoring of the insurance market and potential guidance to the affected undertaking and NCAs. At the same time market monitoring is already within the remit of the Commission and the Impact Assessment foresees monitoring and guidance activities hence the impact in terms of additional workload and on EU budget should be negligible.

5. Consumers (the policyholders) are indirectly affected by the IBER review in the sense that a more accurate case-by-case assessment of co-operations under Option 1 could oblige insurers to remove anticompetitive aspects of their co-operations and compete on some aspects of their business. It is unlikely that insurers would be negative affected in the form of the disappearance of efficiency-enhancing insurance products. If some co-operations had to be dismantled following a more accurate case-by-case assessment in the concrete market context, then this is because the anticompetitive effects outweigh the pro-competitive effects.

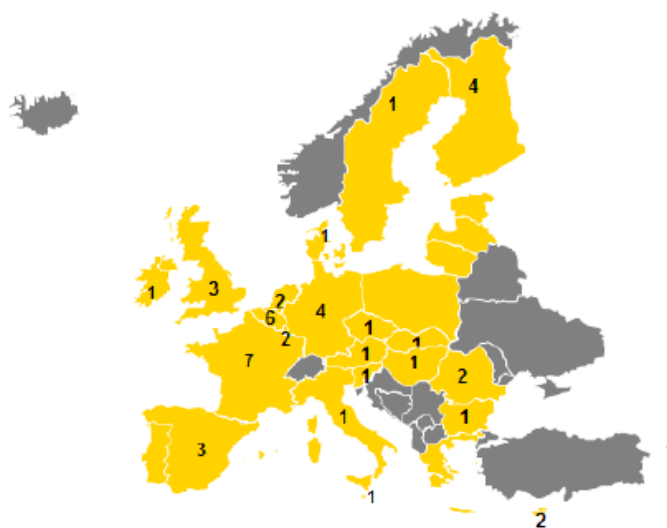
ANNEX 4: CO(RE)INSURANCE POOLS

a) Main finding of the Study conducted by E&Y on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market

1. In 2012, DG COMP commissioned a study with the main objective to obtain an in-depth view of the market focusing on co(re)insurance pools and ad-hoc co(re)insurance agreements on the subscription market, for each EU-27 MS.¹⁶⁵
2. The study identified 46 pools that could potentially fall under the IBER. The results presented for pools based on the information gathered from 42 of these pools, as the remaining 4 refused to participate in the survey.¹⁶⁶ On the other hand, the study also identified representative examples for each Member State of ad-hoc co(re)insurance agreements on the subscription market. Information was gathered from 131 participants in ad-hoc co(re)insurance agreements surveyed across the EU (brokers, underwriters, customers/risk managers).¹⁶⁷
3. According to the study, pools are present in all EU Member States. The highest concentration of pools is in France, Belgium, Finland and Germany.¹⁶⁸

Chart 4: E&Y Study: Co(e)insurance pools in EU 27 (2014)

Figure 3: Number of pools identified per Member State



Source: Ernst & Young, Study on pools and on ad-hoc co(re)insurance agreements, July 2014, page 39.

4. To the contrary, the below picture illustrates the national *subscription* markets according to their size. The most important subscription markets can be found in the UK, France, Germany and the Netherlands.¹⁶⁹

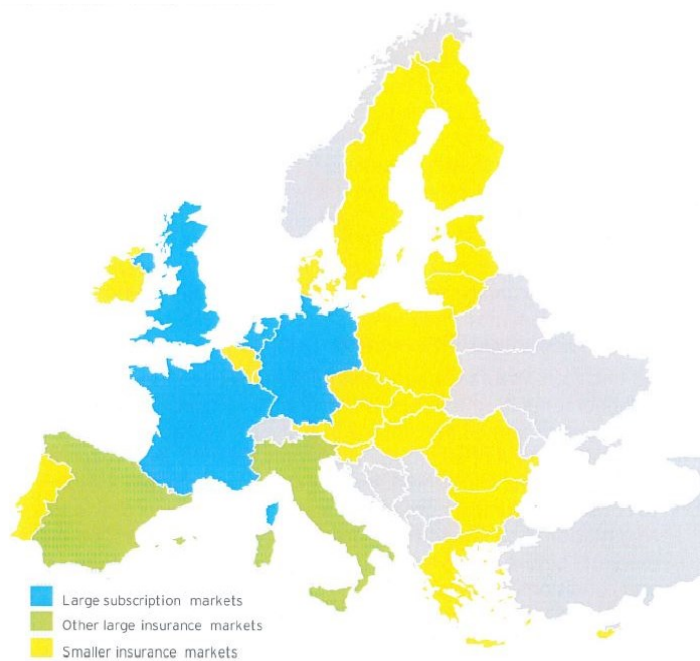
¹⁶⁵ E&Y Study, p. 5

¹⁶⁶ E&Y Study, p. 7

¹⁶⁷ E&Y Study, p. 113

¹⁶⁸ E&Y Study, p. 39

Chart 5: Subscription markets in the EU 27



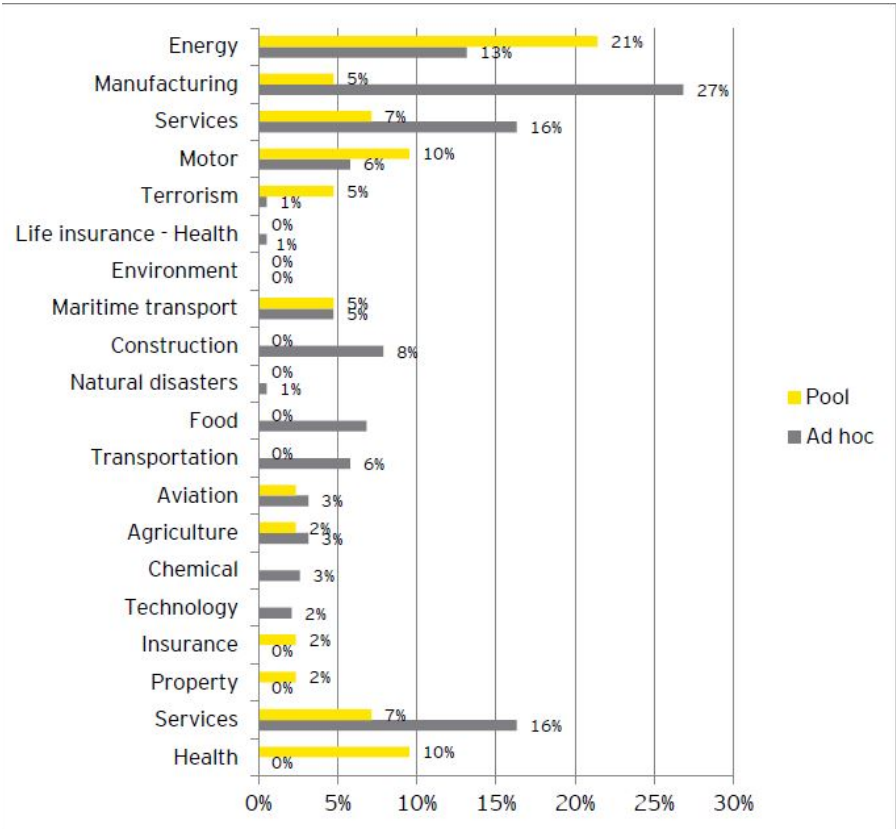
Source: Ernst & Young, July 2014, page 114.

5. According to the E&Y study the four identified major subscription markets account for 67% of the overall general insurance market by gross written premiums (GWP). When Italy and Spain are added the share rises to 83%. Business insurance and reinsurance display an international character, making subscription markets a viable alternative for business consumers regardless of the location of risk. The larger industrial groups are multinational as are the insurers, and the brokers cater to this market with international networks facilitating the placement of risks cross-border.
6. Co(re)insurance on subscription markets ("ad hoc") cover largely the same classes of insurance (see chart 7) as pools which points to a certain substitutability of both forms of risk sharing. Exceptions are nuclear third party liability and terrorism risks which tend to be covered through pools, only. Pools still tend to be the more prevalent form of co(re)insurance in energy (nuclear risks), terrorism and natural disasters whereas ad-hoc co(re)insurance agreements on the subscription market are more present in the manufacturing, construction, food and transport sectors.¹⁷⁰

¹⁶⁹ E&Y Study, p. 114

¹⁷⁰ E&Y Study, p. 163.

Chart 6: Comparison of the industry sectors covered by pools and ad-hoc agreements



Source: Ernst & Young, July 2014, page 159.

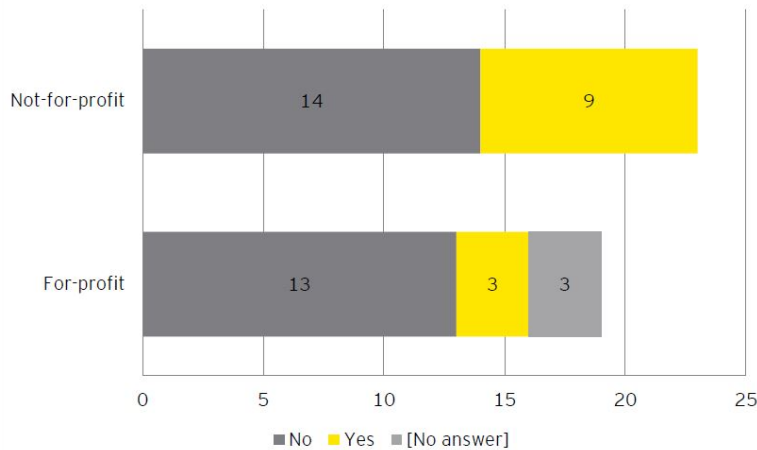
7. Both pools and ad-hoc agreements on the subscription market are created to provide access (or easier access if access is otherwise restricted) to insurance or reinsurance for customers and insurers. Pools are often seen as more suitable for clients willing to cover new risks for which it is difficult to assess the risk and the potential claims, where the market might be unable to provide a solution. The ad-hoc co(re)insurance market is seen as better able to satisfy bespoke needs of clients wishing to cover a specific large risk.¹⁷¹
8. Another difference between pooling and the subscription market is that a good part of the pools surveyed were set up after government intervention or by legislation¹⁷² whereas ad-hoc agreements on the subscription markets emerge without public intervention.
9. The majority of pools identified in the E&Y Study operated not-for-profit, as a service the commercial market was not in a position to provide (e.g. nuclear or terrorism pools), or a

¹⁷¹ E&Y Study, p. vi

¹⁷² E&Y Study, p. 163. A more recent example is the Flood Re pool in the UK which was set up in 2015 based on UK government legislation. The pool receives government support to re-insure risks of direct insurers as far as the flooding of homes is concerned. The pool is a not-for-profit fund, owned and managed by the insurance industry which will operate for 25 years. Flood Re’s aim is to promote the availability and affordability of flood insurance to those who own and live in properties in flood risk areas. Establishing it required Government legislation.

service that for reasons of public policy the state did not wish to leave to the market. The study underlines as a main difference between pools and ad-hoc agreements this profit or not-for-profit nature. The majority of scoped pools are not-for-profit organization while ad hoc agreements on the subscription market are for profit.¹⁷³

Chart 7: Funding of Pools



Source: Ernst & Young, *Study on pools and on ad-hoc co(re)insurance agreements*, July 2014, page 58.

b) Study conducted by Europe Economics on Different forms of cooperation between insurance companies and their respective impact on competition

10. In 2015, DG COMP commissioned a further study to Europe Economics aiming at investigating the different forms of insurance cooperation and discussing the advantages and disadvantages of these (for both insurers and consumers) based on empirical findings and theoretical considerations.¹⁷⁴
11. By difference to the E&Y study, the Europe economic study divided co(re)insurance schemes into four broader categories: insurer-led pools, broker-led pools, mandated pools and ad-hoc agreements. The distinction between insurer-led pools and broker-led pools gives prominence to the party that initiate the formation of the pool.¹⁷⁵

¹⁷³ E&Y Study, p. 158

¹⁷⁴ "Different forms of cooperation between insurance companies and their respective impact on competition", p.5, Europe Economic, 2016

¹⁷⁵ "Different forms of cooperation between insurance companies and their respective impact on competition", p.7, Europe Economic, 2016

Table 3: Insurer led pools (covered by IBER) versus broker led pools, mandated pools and ad hoc solutions¹⁷⁶

Scheme type	Client involvement	Selection of leader	Terms & Conditions	Negotiation on terms & conditions	Conditional acceptance of policies	Premium alignment ³ for a given risk	Knowledge sharing	Involvement and commitment of members
Insurer-led pool	Limited	Insurer with or without tender	Uniform (specified by leader)	Limited	Yes and No	Mainly yes	Intense	Intense
Broker-led pool	Limited	Broker mainly with tender	Uniform (set by broker in discussion with leader)	Limited	Yes and No (DUA)	Mainly yes	Limited	Limited
Mandated pool	Limited	Insurer without tender	Uniform	Limited	No	Mainly yes	Limited or Intense (dependent on pool)	Limited or Intense (dependent on pool)
Ad hoc agreement	Intense	Client or Broker mainly with tender	Mainly uniform	Intense	No	Mainly yes	Limited	Limited

Source: Europe Economics, Study on different forms of cooperation between insurance companies and their respective impact on competition, p. 7

12. In particular, the study highlights that the occasional absence of a tendering process for the identification of followers could result in a concentrated placement of several unconventional risks among few undertakings in the case of insurer-led pools.¹⁷⁷ The presence of a dynamic process for the selection of leaders (i.e. tendering process) results in candidates competing with each other for the attainment of this role. Ultimately, this is expected to increase the efficiency of the scheme and render it more appealing to commercial buyers, relative to alternative options.¹⁷⁸
13. Overall, the study highlights that each type of scheme is associated with several generic benefits and limitations thus creating a trade-off during the placement process of a given risk. This leads to the conclusion that, co(re)insurance schemes being highly heterogeneous in terms of their intrinsic mechanisms, an accurate assessment needs to be conducted on a case-by-case basis¹⁷⁹.

¹⁷⁶ One dimension that can be used to classify cooperative structures is the party that initiates their formation. Thus, co(re)insurance pools can be formed by: (1) insurers or their respective agents (i.e. insurer-led); (2) brokers (i.e. broker-led); or (3) can be mandated by the State (i.e. mandated). In turn, ad-hoc agreements are formed so as to cover bespoke customer needs and may also involve a broker, i.e. ad-hoc agreements differ from pools in terms of their scope. See "Different forms of cooperation between insurance companies and their respective impact on competition", Europe Economics (2016), chapter 1.

¹⁷⁷ "Different forms of cooperation between insurance companies and their respective impact on competition", p.12, Europe Economic, 2016

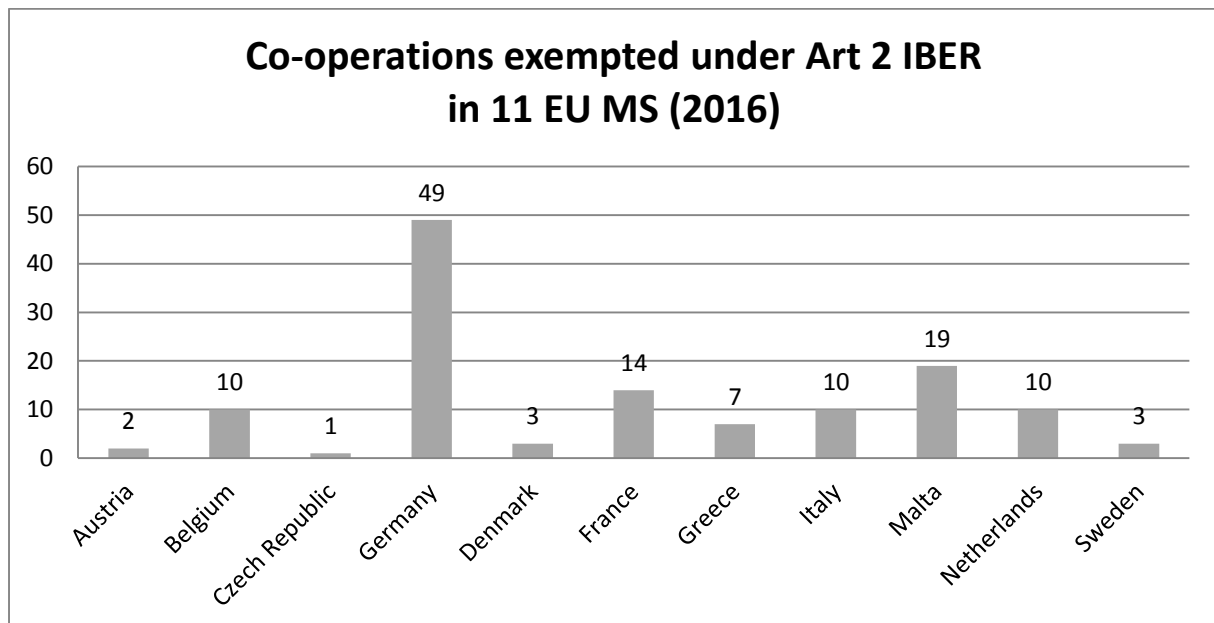
¹⁷⁸ "Different forms of cooperation between insurance companies and their respective impact on competition", Chapter 6.4.4, p. 82, Europe Economic, 2016

¹⁷⁹ "Different forms of cooperation between insurance companies and their respective impact on competition", Chapter 6.6, p. 87, Europe Economic, 2016

ANNEX 5: COMPILATIONS, TABLES AND STUDIES

1. Insurance Europe, the federation of insurance associations in the European Union, identified¹⁸⁰ approximately 130 compilations/tables/studies in 11 EU Member States which are compiled by members of Insurance Europe, namely national associations of insurers.
2. Insurance associations from 11 EU Member States provided data to Insurance Europe in reply to the Commission's inquiry. Of these 11 Member States most compilations, tables and studies were conducted in Germany followed by Malta, France, Belgium and The Netherlands.
3. From the reply of Insurance Europe it would moreover appear that the exemption of Article 2 IBER is predominantly used for the calculation of net premiums (93 out of 130) and to a much lesser extent for compiling mortality tables (21/130) and joint studies (14/130).

Chart 8: Compilations, tables and studies block exempted according to Article 2 IBER



Source: Insurance Europe 2016

¹⁸⁰ Note that Insurance Europe provided such data on a best effort basis and that not all members of IE contributed to the reply. It is not to be understood as a comprehensive representation of all the joint compilations and studies undertaken in Europe. It is a representation of the available data, not necessarily the overall actual situation.

ANNEX 6: SMEs IN THE INSURANCE SECTOR

1. Little data is available regarding the number of SME undertaking operating in the insurance sector. Insurance Europe provided (upon request) data regarding the number of SME insurance undertakings operating within each national domestic market. Although data for all EU Member States was not available the reporting countries nevertheless allow us to paint a picture of the role played by SMEs.

Chart 9: % SMEs operating in the domestic market (absolute numbers)

Country	2014	Country	2014
AT	46.6%	IE	0.0%
BE	57.7%	IT	11.2%
BG	0.0%	LU	0.0%
CY	0.0%	LV	0.0%
CZ	46.2%	MT	0.0%
DE	18.5%	NL	45.5%
DK	0.0%	PL	0.0%
EE	0.0%	PT	39.7%
ES	49.2%	RO	0.0%
FI	7.0%	SE	0.0%
FR	10.7%	SI	66.7%
GR	52.3%	SK	63.6%
HR	48.0%	UK	0.0%
HU	63.3%		

Source: Insurance Europe 2016

2. Small and medium-sized enterprises (SMEs) are the backbone of Europe's economy. They represent¹⁸¹ 99% of all businesses in the EU. However graph 10 shows that SMEs are a much smaller part of companies operating in the insurance sector than is the case for the rest of the EU economy. This would indicate that the sector throughout Europe is dominated by larger national insurance companies or multinational companies and their subsidiaries. This is also confirmed by employment by SMEs in the insurance sector. While SMEs accounted for 67% of total EU28 employment in the EU non-financial business sector in 2014¹⁸², the employment figures for insurance SMEs are clearly lower.

¹⁸¹ See European Commission, DG GROW. http://ec.europa.eu/growth/smes_en

¹⁸² "Annual Report on European SMEs 2014/2015". Report prepared for European Commission, DG GROW. <http://ec.europa.eu/DocsRoom/documents/16341/attachments/2/translations>

Chart 10: % of employees working in SME insurance undertakings

Country	2014
AT	1.7%
BE	0.0%
BG	
CY	0.0%
CZ	4.6%
DE	0.0%
DK	0.0%
EE	
ES	7.3%
FI	0.7%
FR	0.4%
GR	0.0%
HR	7.9%
HU	6.2%
IE	0.0%
IT	0.5%
LU	0.0%
LV	0.0%
MT	0.0%
NL	0.0%
PL	0.0%
PT	4.7%
RO	0.0%
SE	0.0%
SI	12.9%
SK	15.37%
UK	0.0%
EU 27	2.8%

Source: Insurance Europe 2016

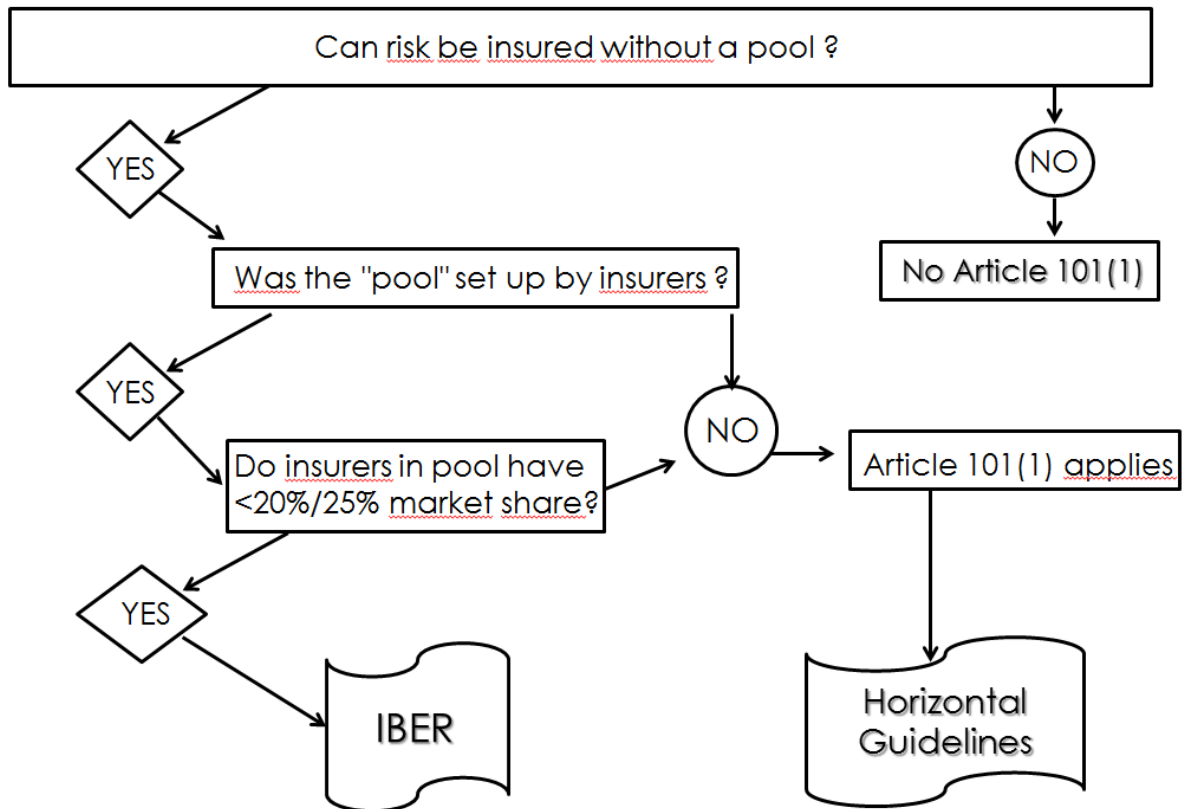
- Also the combined amount of premiums collected shows that these are mostly attributed to insurance undertakings, other than SMEs.

Chart 11: Percentage of Combined Gross premiums, collected by SMEs, in domestic market

Country	2014
AT	3.5%
BE	3.6%
BG	0.0%
CY	0.0%
CZ	3.3%
DE	0.4%
DK	0.0%
EE	0.0%
ES	2.8%
FI	0.2%
FR	0.1%
GR	0.0%
HR	6.2%
HU	12.6%
IE	0.0%
IT	0.2%
LU	0.0%
LV	0.0%
MT	0.0%
NL	1.5%
PL	0.0%
PT	1.6%
RO	0.0%
SE	0.0%
SI	19.0%
SK	11.5%
UK	0.0%
EU 27	0.9%

Source: Insurance Europe 2016

ANNEX 7: WHEN THE IBER APPLIES TO POOLS ¹⁸³



¹⁸³ For the sake of simplicity the flowchart omits the “new risk” exception to the 20%-25% market share thresholds in Article 6 (1) IBER. If a risk is “new”, then the IBER block-exemption applies to the pool irrespectively of market shares up to 3 years. Thereafter, the market share thresholds apply.

ANNEX 8: KEY STEPS IN ASSESSMENT UNDER IBER & HORIZONTAL GUIDELINES

A. Compilations/tables/studies

IBER¹⁸⁴	Horizontal Guidelines¹⁸⁵
<p><u>Scope of the block exemption (Art. 2 IBER):</u></p> <p>the joint compilation and distribution of information necessary for calculating the average cost of a specified risk in the past ("compilations");</p> <p>the construction of mortality tables, and tables showing the frequency of illness, accident and invalidity in connection with insurance involving an element of capitalisation ("tables");</p> <p>the joint carrying-out of studies on the probable impact of general circumstances on the frequency or scale of future claims for a given risk or risk category on the profitability of investments ("studies")</p> <p><u>Key Principles</u></p> <p>Must not facilitate price collusion</p> <p>Compilations must exclude price elements other than historic cost of insuring a risk, namely contingencies, income deriving from reserves, administrative or commercial costs or fiscal or parafiscal contributions, and must not take into account either revenue from investments or anticipated profits.¹⁸⁶</p>	<p><u>Scope of the Horizontal Guidelines</u></p> <p>All forms of information exchange between competing undertakings including also data exchanges between insurers.¹⁹²</p> <p><u>Key Principles</u></p> <p>Must not facilitate price collusion</p> <p>Information exchanges must not include individualised data regarding intended future prices or quantities. This would amount to a cartel.¹⁹³</p>

¹⁸⁴ Commission Regulation (EU) No 267/2010 of 24 March 2010 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

¹⁸⁵ Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01

¹⁸⁶ Article 3 (1) c IBER

<p>No foreclosure</p> <p>The compilations must be made available on reasonable, affordable and non-discriminatory terms to all other insurers ¹⁸⁷ as well as to consumer organisations upon reasoned demand unless non-disclosure is justified on grounds of public security.¹⁸⁸</p> <p>Must not exceed what is indispensable:</p> <p>identify the insurance undertakings concerned or any insured party¹⁸⁹ (anonymity)</p> <p>contain any indication of the level of commercial premiums ¹⁹⁰</p> <p>be compulsory: participating insurers must not oblige themselves (or third parties) to refrain from using joint compilations or tables which differ from those that were jointly compiled; insurers must also be free to depart from the results of a joint study.¹⁹¹</p>	<p>No foreclosure</p> <p>An exclusive exchange of information can lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system.¹⁹⁴ Information exchanges that are genuinely public can benefit consumers by helping them make a more informed choice.¹⁹⁵</p> <p>Must not exceed what is indispensable:</p> <p>For fulfilling the condition of indispensability in Article 101 (3) TFEU, the parties will need to prove that the data's subject matter, aggregation, age, confidentiality and frequency, as well as coverage, of the exchange are of the kind that carries the lowest risks indispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains.¹⁹⁶</p> <p>Exchanges of genuinely aggregated data, that is to say, where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data.¹⁹⁷</p>
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¹⁹² § 97 Horizontal Guidelines refers explicitly to insurance as a sector where data exchanges can enhance efficiencies ("*insurance ... risk characteristics*").

¹⁹³ § 74 Horizontal Guidelines.

¹⁸⁷ Article 3 (2) d IBER

¹⁸⁸ Article 3 (2) e IBER

¹⁸⁹ Article 3 (2) a IBER.

¹⁹⁰ Article 3 (2) c IBER.

¹⁹¹ Article 4 IBER

¹⁹⁴ § 99 Horizontal Guidelines.

¹⁹⁵ § 99 Horizontal Guidelines.

¹⁹⁶ § 101 Horizontal Guidelines.

¹⁹⁷ § 89 Horizontal Guidelines.

B. Co(re)insurance Pools

IBER	Horizontal Guidelines
<p><u>Scope of the block exemption (Art 5 IBER):</u></p> <p>Agreements entered into between two or more undertakings in the insurance sector with respect to the setting-up and operation of pools of insurance undertakings or of insurance undertakings and reinsurance undertakings for the common coverage of a specific category of risks in the form of co-insurance or co-reinsurance.</p> <p><u>Key Principles</u></p> <p>Market power? Except for the co(re)insurance of "new" risks, the combined market share of all insurers in the pool must not exceed 20% of any relevant market co-insurance) or 25% of any relevant market co-reinsurance.¹⁹⁸</p>	<p><u>Scope of the Horizontal Guidelines</u></p> <p>§§ 162-182 HG contain guidance on whether a joint production and joint production / distribution agreement has restrictive effects on the market.</p> <p><u>Key Principles</u></p> <p>Market power? Companies are unlikely to have market power below a certain level of market share. Therefore, unilateral or reciprocal specialisation agreements as well as joint production agreements including certain integrated commercialisation functions such as joint distribution are covered by the Specialisation Block Exemption Regulation if they are concluded between parties with a combined market share not exceeding 20 % in the relevant market or markets, provided that the other conditions for the application of the Specialisation Block Exemption Regulation are fulfilled. Moreover, as regards horizontal subcontracting agreements with a view to expanding production, in most cases it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 20 %. In any event, if the parties' combined market share does not exceed 20 % it is likely that the conditions of Article 101(3) are fulfilled.¹⁹⁹</p>

¹⁹⁸ Article 6 (2) IBER

¹⁹⁹ § 169 Horizontal Guidelines.

<p>Must not exceed what is indispensable:</p> <p>Each participating undertaking must have the right to withdraw from the pool without incurring any sanctions</p> <p>The rules of the pool must not oblige any participating undertaking of the pool to insure or reinsure through the pool and do not restrict any participating undertaking of the pool from insuring or reinsuring outside the pool;</p> <p>The rules of the pool must not restrict the activity of the pool or its participating undertakings to the insurance or reinsurance of risks located in any particular geographical part of the Union;</p> <p>The agreement must not limit output or sales;</p> <p>The agreement must not allocate markets or customers; and</p> <p>The participating undertakings of a <u>co-reinsurance</u> pool must not agree on the commercial premiums which they charge for direct insurance.</p>	<p>Must not exceed what is indispensable:</p> <p>Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a production agreement do not fulfil the criteria of Article 101(3). For instance, restrictions imposed in a production agreement on the parties' competitive conduct with regard to output outside the co-operation will normally not be considered to be indispensable. Similarly, setting prices jointly will not be considered indispensable if the production agreement does not also involve joint commercialisation.²⁰⁰</p>
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²⁰⁰ § 184 Horizontal Guidelines.