Complaint against German insurers withdrawn after Commission preliminary investigations did not reveal sufficient threat of foreclosure through tied agents

Julia PATRICK, formerly Directorate-General Competition, unit D-1

Introduction

On 6 October 2003, the European Federation of Insurance Intermediaries, BIPAR, withdrew its complaint against German insurers Allianz Versicherungs AG, Colonia Versicherungs AG (today AXA Versicherung AG) and the Hamburg-Mannheimer Versicherung AG (today part of the Ergo insurance group) ('the three insurers'). The complaint alleged that the exclusive ties or non-compete clauses in the agreements between the three insurers and their agents were in breach of Article 81(1) of the EC Treaty, by contributing to a cumulative foreclosure effect on the German mass (private) insurance market. The withdrawal of the complaint followed a letter by the European Commission ('the Commission') of 29 July 2003 that set out the results of its examination and the provisional conclusion that the complaint could not be upheld (1). In its legal analysis, the Commission for the first time applied the Guidelines on Vertical Restraints (2) to the insurance sector.

Summary of complainant's arguments

In the context of the Guidelines on Vertical Restraints, the complainant argued that Article 81(1) EC was applicable to the exclusivity ties and non-compete obligations of the German tied agents. Firstly, the complainant claimed that there was a cumulative foreclosure effect of these ties which significantly restricted (or was likely to restrict) entry by insurers to the German mass insurance market and secondly, it argued the agency agreements in question were in any event 'non-genuine' agency agreements.

The facts

The evidence examined by the Commission included a survey of large foreign insurers, statistics, publications and articles, including those submitted by BIPAR. It indicated that the German mass insurance market was characterised by a large number of insurance companies (about 1,800) and insurance intermediaries (about 87,000); a low concentration of insurance companies, with the three insurers holding relatively modest market shares (the highest being between 12 and 18%); a growing share of foreign insurers (around 19%); competition between insurance companies; and a growing variety of insurance products and prices as well as comparisons between different insurers and increased readiness by customers to switch insurers. Whilst the evidence also suggested that a high proportion of mass insurance products in Germany was sold through tied agents (up to about 70%), it indicated that the tied agents system was losing in importance compared to other distribution channels including brokers and banks and, more generally, multi-channel strategies. Moreover, the investigation indicated an increasing competition between different distribution channels, including electronic commerce, as well as sufficient entry possibilities for new and foreign insurers, including direct selling, brokers and multiple agents, the establishment of branches and the takeover of German undertakings.

Legal assessment

The Commission carried out its legal assessment of the facts in the framework of the Guidelines on Vertical Restraints and relevant case law. The question of whether the agency agreements in question constituted genuine or non-genuine agency agreements was left open, since for the purposes of assessing non-compete clauses, the applicability of Article 81 depended on the existence of any foreclosure, regardless of the nature of the agency agreements (3). In this context the Commission considered firstly, whether there was evidence for insufficient inter-brand competition, secondly, whether there was a cumulative foreclosure effect and thirdly, whether the non-compete


(3) See paragraph 19 of the Guidelines on Vertical Restraints.
clauses in question consequently led to an appreciably restriction of competition.

**Relevant market**

The Commission examined the behaviour of the three insurers on the market for mass insurance (private life and non-life insurance) in Germany, to be distinguished from the market for industrial insurance. A further narrowing of the relevant market was not considered necessary, as BIPAR did not argue that a further segmentation of the product market according to different risks would have led to a different assessment.

**Legal assessment of the facts**

Based on the evidence and the particular circumstances of the German market, the Commission reached the following findings:

- The market circumstances, in particular the number of competitors, the market position of individual competitors and the resulting low degree of concentration, the increasing variety in products and prices and comparison by consumers, and the views expressed by the foreign insurers who were questioned, did not indicate insufficient inter-brand competition. Following the Guidelines on Vertical Restraints, in particular paragraphs 6 and 102, the Commission therefore assumed that due to sufficient inter-brand competition the non-compete clauses in question did not appreciably restrict competition.

- Based in particular on the results of the survey of foreign insurers, there was no evidence that the totality of exclusive ties in Germany was the cause of any lack of market entry by foreign insurers on the German mass insurance market or, conversely, that a relaxation of the exclusivity arrangements would lead to increased market entry.

- There was no evidence of a lack of real entry possibilities for new competitors on the German mass insurance market; instead the evidence suggested that the proportion of foreign insurers on the German market was growing.

- In these circumstances, it could not be shown that the proportion of tied agents in Germany or the length of any exclusivity or non-compete clauses created a foreclosure effect.

This assessment led the Commission to the provisional conclusion that it had not been shown that the non-compete arrangements in question created an appreciable restriction of competition under Article 81(1) EC.