A block exemption regulation (BER) allows market players the benefit of a safe harbour from the prohibition on anti-competitive agreements, decisions and concerted practices laid down in Article 101(1) of the Treaty on the Functioning of the European Union (the TFEU), provided they comply with the BER's conditions. If they do, they are ex ante in line with EU competition law. Agreements not covered by a BER are not presumed to be illegal, but must be assessed under Article 101(1) and if appropriate, 101(3) of the TFEU.

Following a lengthy review of the functioning of the previous insurance BER, Regulation (EC) No 358/2003, on 24 March 2010 the European Commission adopted Commission Regulation (EU) No 267/2010, the new insurance BER applying Article 101(3) to two categories of agreements, decisions and concerted practices in the insurance sector, namely agreements in relation to (i) joint compilations, tables and studies and (ii) the common coverage of certain types of risks (pools).

The new Regulation entered into force on 1 April 2010, with a six-month transition period for agreements already in force on 31 March 2010 (2) which do not satisfy the conditions for exemption provided for in the new Regulation but which satisfy the conditions for exemption provided for in the previous BER.

A ‘first-principles’ analysis

The primary original objective of the BER was to facilitate the Commission’s task in view of the large number of notifications submitted for Commission review prior to the modernisation of the competition rules by Regulation (EC) No 1/2003. Since this objective is no longer relevant, and given that BERs are exceptional legal instruments, when considering the issue of whether to renew the BER for the insurance sector, the Commission had to determine whether business risks or other issues made this sector special and different from other sectors that operate without a sector-specific BER (the large majority).

The Commission therefore analysed the matter by asking three questions in relation to each of the four forms of cooperation covered by the previous BER: (i) whether the insurance sector is so special as to give rise to an enhanced need for cooperation in comparison with other sectors; (ii) if so, whether this enhanced need for cooperation requires a legal instrument to protect or facilitate it; and (iii) if so, whether a BER is the most appropriate legal instrument for that purpose.

What the review of the previous BER involved

The Commission began the review of the functioning of the previous BER in November of 2007 by compiling its own experiences with the BER and asking the national competition authorities of the European Competition Network (ECN) for their experiences. The Directorate-General for Competition then launched a detailed public consultation in April 2008 and also sent targeted questionnaires to certain stakeholders, in particular to consumer organisations and national supervisory authorities.

On the basis of the evidence gathered (which also includes replies to several sets of targeted questionnaires), on 24 March 2009 the Commission adopted a report to the European Parliament and Council, which was published on the same day with a detailed accompanying working document. The report examined the functioning of the previous BER and made initial proposals for amending it. DG Competition then held a large public event on 2 June 2009 to hear further representations from the industry and other stakeholders on its findings and proposals.

Over the two and a half year period it took to complete the review and adopt a new BER, the Commission worked closely with national competition authorities in order to incorporate their views and amendments.

Non-renewed exemptions

As a result of the review, the Commission decided not to renew two of the four types of cooperation that the previous BER had covered, namely the exemption of agreements concerning (i) standard policy conditions (SPCs) and (ii) security devices.
This is primarily because the evidence of the review was that these agreements are not specific to the insurance sector and therefore their inclusion in such an exceptional legal instrument may result in unjustified discrimination against other sectors which do not benefit from a BER (such as the banking sector). In addition, although these two forms of cooperation may have some benefits for consumers, the review showed that they can also give rise to competition concerns.

While the use of standard policy conditions can have positive effects, such as facilitating the comparison of insurance contracts, several consumer associations such as Test-Achats in Belgium complained that certain insurance products were excessively standardised because the vast majority of insurers used the same SPCs, which can result in a lack of choice and non-price competition.

As regards security devices, the review showed that the large number of national requirements laid down over time for the insurance industry fragments the European market and may also adversely affect competition in the downstream market for the supply of security devices, in that manufacturers who do not comply with these standards are, de facto, excluded from the market because consumers cannot get insurance for such products. Moreover, the remaining scope of the BER was reduced or eliminated due to existing EU-level harmonisation (a condition of the previous BER was that it did not apply where harmonisation already existed at EU level).

For these types of agreements, the Commission therefore considered it more appropriate to conduct a compliance analysis on a case-by-case basis under Article 101(1) and, if appropriate, Article 101(3). Furthermore, agreements on both SPCs and security devices have been included in the standardisation chapter of the Commission’s new Horizontal Guidelines.

Joint compilations, tables and studies — renewed exemption

Subject to certain conditions, the previous BER exempted agreements which relate to the joint establishment and distribution of (i) calculations of the average cost of covering a specified risk in the past and (ii) mortality tables and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalisation. It also exempted (subject to certain conditions) ‘the joint carrying out of studies of the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment and the distribution of the results of such studies.

The fact that the costs of insurance products are unknown at the time their price is agreed and the risk covered differentiates the insurance sector from other sectors in terms of assessing the risk. This makes access to past statistical data crucial in order to technically price risks. The Commission therefore considers that cooperation in this area is both specific to the insurance industry and necessary in order to assess risks appropriately.

The review also showed that sharing such information currently allows insurers to calculate risks properly, which enables small and medium-sized firms to enter the market (7). Many insurers, some supervisory authorities and a risk management federation all argued that without the BER, insurers would no longer cooperate or would not share the outcome of such cooperation with smaller or foreign insurers. Indeed, some large insurers (who, according to insurance associations, would be able to compile the relevant information alone or by involving perhaps one or two other large insurers) may have no incentive to do so. The BER requires that when insurance companies enter into these forms of cooperation, they must give other insurance companies access to the information compiled. It was argued that in the event of non-renewal of the BER, insurers could cooperate to prevent access to the information by, for example, smaller or foreign insurance companies. This would then narrow the market by hindering or preventing smaller/foreign insurers from entering.

In addition, during the review, agreements on joint calculations, tables and studies were found not to be giving rise to significant concerns and there appeared to be general compliance with the conditions in the BER (for example, that only aggregated, historical information is exchanged and that it is made available on reasonable and non-discriminatory terms).

The Commission therefore decided to renew this exemption, but made several modifications/improvements in the new BER:

First, the draft BER published for consultation included a right of access for consumer organisations and other interested third parties to the joint compilations, tables and studies produced. Grant-
ing access to these categories is important in terms of the analysis of the exemption criteria for Article 101(3), since consumers must be allowed a fair share of the resulting benefits. However, several insurance associations were worried that this access could have adverse effects such as: (i) exposing insurers to reputational risk if actuarial expertise were not used to interpret the data; (ii) requiring insurers to spend too much time answering very vague and broad questions; and (iii) allowing third parties to benefit from their efforts without contributing; and (iv) as a result, discouraging insurers from entering into such agreements.

Balancing the objectives of Article 101(3) with these concerns, the Commission amended the final draft to provide that data should be made available, on reasonable, affordable and non-discriminatory terms, to consumer organisations or customer organisations who request access to them in specific and precise terms for a duly justified reason (\(^\text{1}\)).

Second, a public security exception to access to this data was also included in the new BER. The BER includes two examples of when such an exception may be relevant, namely where the information relates to the security systems of nuclear plants or the weakness of flood prevention systems (\(^\text{2}\)).

As regards the alleged risks of withdrawal from cooperation, when it was discussed during the review whether this type of cooperation should still be exempted under the new BER, insurers argued that this exchange of information is indispensable in order to calculate premiums. Therefore, it is not credible that there would be a significant reduction in cooperation as a result of increased transparency.

Third, to reflect comments during the review that insurers are not jointly calculating but in fact jointly compiling information (which ‘may involve some statistical calculations’ (\(^\text{3}\)), the term has been amended to ‘joint compilations, tables and studies’.

Finally, the new BER clarifies that: (i) the exemption itself allows exchange of information only where it is necessary for the compilations, tables and studies; (ii) data should not only be made available on reasonable and non-discriminatory terms, but should also be ‘affordable’; and (iii) the information exchanged must not contain any indication of the level of commercial premiums.

\(\text{Common coverage of certain types of risks — pools — renewed exemption}\)

The Commission recognises that risk sharing for certain types of risks (such as nuclear, terrorism and environmental risks), for which individual insurance companies are reluctant or unable to insure the entire risk alone, is crucial in order to ensure that all such risks can be covered. This makes the insurance sector different from other sectors and triggers an enhanced need for cooperation.

The BER (previous and new) exempts two main categories of pools, under certain conditions:

(i) (given that it is not possible to know what subscription capacity is required to cover a new risk), newly created pools which cover new risks, for a limited period of three years from the date when the group is first set up, regardless of the market share of the group; and

(ii) pools that provide common coverage of a specific category of risks (e.g. nuclear, environmental, terrorism risks), or that have been in existence for more than three years, subject to certain conditions, in particular market share thresholds.

The main market share thresholds have remained the same as in the previous BER, i.e. 20% for co-insurance pools and 25% for co-reinsurance pools. Although several insurance associations argued in favour of higher thresholds, the Commission did not find any convincing reasons as to why these thresholds should be raised. However, the flexibility market share thresholds have been raised by 3% from 22% to 25% for coinsurance pools and from 27% to 30% for co-reinsurance pools in order to bring them into line with other BERs such as the Specialisation BER. This change allows some additional scope for pools to be covered when their market shares increase.

The new BER, however, significantly changes the approach to market share calculation. The previous BER only took into account the market share of the participating undertakings within the pool. This was not in line with other general and sector-specific competition rules on the assessment of horizontal cooperation. The Commission’s *de minimis* Notice refers to the ‘aggregate market share held by the parties to the agreement’ (\(^\text{4}\)) and not to the market share of the cooperation in question. In addition,

\(\text{1}\) Article 3(2)(e) of Commission Regulation (EU) No 267/2010.
no other BER, be it general (\textsuperscript{7}) or sector-specific (\textsuperscript{8}), bases its calculation of market share on the cooperation rather than on the aggregate share of all companies involved. Moreover, this methodology was more generous (than was allowed for other sectors), as the turnover of the participating companies outside the co(re)insurance group in the relevant insurance market was not counted. Therefore, the draft BER published for consultation provided that market share of participating companies not only within the pool but also outside it should be taken into account.

During the public consultation on the draft BER, several insurance associations pointed out that this new method of calculating market shares would drive most of the large and medium-sized companies out of the pools in which they operate. However, these comments were largely unsupported and did not explain why they consider that the insurance industry requires a different way of calculating market shares to all other sectors, departing from the general rules.

The draft BER published for consultation only provided that when calculating the market share of a pool, the market share of the participating undertakings inside and outside the pool in question should be counted. The final version was revised to make this even clearer by listing exactly what must be counted, i.e.: (i) the market share of the participating undertakings within the pool in question; (ii) their market share within another pool on the same relevant market; and (iii) their market share on the same relevant market outside any pool.

Given that in some Member States, for instance in the Netherlands, there are several overlapping pools which could possibly encourage an anti-competitive exchange of information through networks of pools, the published draft BER also maintained a condition in the previous BER which provided that a pool whose members are also part of another pool does not benefit from the exemption (the double membership prohibition). Many respondents and, in particular, insurance associations strongly opposed this condition, considering that the new method of calculating market share would already significantly reduce the scope of the BER. It was decided, therefore, to delete this clause in the new BER in order to achieve a middle-ground solution.

However, a provision was added in Recital 22 to emphasise that when either the Commission or Member States are considering withdrawal, the negative effects that may derive from the existence of links between participating undertakings within overlapping pools are of particular importance.

As in the previous BER, pools covering new risks benefit from the BER without any market share conditions, for a period of 3 years. In view of several comments received during the review of the BER that the definition of ‘new risks’ was too narrow, this definition was amended to include, in addition to risks which did not exist before, (in exceptional uses) risks whose nature (on an objective basis) has changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them. These could be, for instance, climate change risks or certain types of terrorism risks which have never occurred in the past.

**Six years before the next review**

A serious concern which came to light during the review was that many pools and participating insurers considered that the mere existence of the BER gave them legal certainty and used the pool exemption as a ‘blanket’ exemption, without carrying out a careful legal assessment of a pool’s compliance with the BER. This is clearly not acceptable and Commissioner Joaquín Almunia has stated that ‘The Commission together with the national competition authorities will see to it that the industry does not use the exemption as a blanket protection and will enforce competition rules where and whenever necessary’ (\textsuperscript{11}). The Commission also emphasised in its explanatory communication on the new BER (\textsuperscript{12}) that pools must carry out a careful individual legal self-assessment, on a case-by-case basis.

The Commission is required to prepare a report on the functioning and future of this BER for the European Parliament and Council by March 2016. It will automatically expire in March 2017 unless the Commission considers that any parts of it should be renewed at that time.


\textsuperscript{8} Art. 5(2) of the Liner consortia BER (Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia): ‘For the purpose of establishing the market share of a consortium member the total volumes of goods carried by it in the relevant market shall be taken into account’.

\textsuperscript{11} See IP/10/359.

\textsuperscript{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, decisions and concerted practices in the insurance sector (2010/C 82/02).