

## New competition rules for the insurance sector reduces scope of automatic exemption regime

**The European Commission's new block exemption regulation for the insurance sector entered into force on 1 April 2010. The new regulation renews (with certain amendments) the block exemption of agreements concerning joint compilations, tables and studies, and common coverage of certain types of risk (pools). In contrast, cooperation concerning standard policy conditions and cooperation concerning security devices are no longer block exempted. The changes, coupled with the Commission's plans to closely monitor the insurance sector, mean that insurance companies are well advised to consider their business practices to ensure compliance with the competition laws.**

### INTRODUCTION

On 24 March 2010 the Commission adopted Regulation No 267/2010 (the "BER") exempting certain categories of cooperation in the insurance sector from the general prohibition against restrictive business practices contained in article 101 (1) of the Treaty on the functioning of European Union (the "TEU"). From its entry into force on 1 April 2010 the BER replaces the previous block exemption contained in Commission Regulation No 358/2003. The latter Regulation will however continue to apply in parallel with the BER for a transitory period which will end on 30 September 2010. The BER remains valid until 31 March 2017. It will be included in the Agreement on the European Economic Area ("EEA") and will therefore soon become part of Norwegian law.

Together with the BER, the Commission published an explanatory Communication (the "Communication") explaining the Commission's analysis concerning the decision to renew or not renew the different categories of cooperation and provides some insight into the Commission's future enforcement policy in the insurance sector.

The purpose of this Newsletter is to outline the key changes brought about by the BER and its practical implications for the insurance sector.

### REDUCED SCOPE OF AUTOMATIC BLOCK EXEMPTION

The BER was adopted on the basis of the European Commission's review (the "Review") of the functioning of Regulation No 358/2003. Based on the Review, the Commission decided to renew the block exemption for only two of the four categories of cooperation that was block exempted pursuant to Regulation No 358/2003. The two categories of cooperation that remain block exempted under the BER are the following:

- Joint compilations, tables and studies
- Common coverage of certain types of risks (pools).

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These two categories of agreement will continue to be block exempted provided that they fulfil certain conditions. These conditions are outlined below.

In contrast, cooperation with regard to standard policy conditions ("**SPC**") and cooperation concerning security devices are no longer block exempted. The reason for this new approach is that the Commission reached the conclusion that these two categories of cooperation are not specific to the insurance sector and are therefore no longer deemed suitable for block exemption.

### JOINT COMPILATIONS, TABLES AND STUDIES

The BER continues to block exempt the establishment and distribution of joint calculations (now referred to as "joint compilations"), tables of mortality, frequency of illness, accidents and invalidity, in addition to joint studies. The reason for the exemption is that the Commission considers such cooperation to be necessary in order for insurers to assess and price risks. In other sectors the exchange of price-relevant information will easily fall foul of the prohibition against restrictive business practices in article 101 TEU.

However, insurers must be aware of the fact that the exemption is subject to certain conditions, including the following:

- Cooperation regarding joint compilations, tables and studies is only permitted when it is necessary;
- The BER only exempts cooperation with regard to compilations, tables and study results that are explicitly non-binding and do not contain any indication of the level of commercial premiums; and
- The BER only applies when the compilations, tables and studies in question are made available to all insurance undertakings and (subject to public security) to consumer and customer organisations.

Insurance companies should take due account of the various conditions for the application of the BER and ensure that the cooperation satisfies these conditions.

### INSURANCE POOLS

If the applicable conditions are met the BER continues to cover the setting up and operation of co-(re)insurance pools. The reason for the exemption of this category of cooperation is that the Commission considers risk sharing to be crucial in order to ensure insurance coverage for such risks, which include nuclear, terrorism and environmental risks.

The BER distinguishes between pools for "new risks" (which are defined in broader terms under the BER than under Regulation No 358/2003) and other pools.

According to the BER, the notion of "new risk" comprises (i) risks which did not previously exist and (ii) risks that have undergone such a material change in nature that it is objectively impossible to foresee the extent of the subscription capacity necessary to cover such risk. A pool created exclusively to cover new risks will be block exempted for a period of three years from the establishment of the pool, regardless of its market share.

Pools that are not covered by the "new risk" exemption (i.e. pools for existing risks and pools for new risks that have existed for more than three years) will only be covered by the BER if the combined market share of the participating undertakings within and outside the pool in question does not exceed 20% (in the case of a co-insurance pool) or 25% (in the case of a co-reinsurance pool). The inclusion of market shares outside the pool represents a change compared to Regulation No 358/2003 and means that more pools will fall outside the BER because the members exceed the applicable market share threshold. In a similar way to other block exemption regulations, the BER will continue to apply for a limited period if the market share rises above the 20% or 25% threshold.

It is important to know that the BER only applies if certain specific conditions are met. These conditions correspond to those applicable in relation to other block exemption regulations and include (among others) the following:

- Pool participants must have the right to withdraw from the pool after a reasonable notice period;
- Participants must be free to insure or reinsure outside the pool;
- The agreement must not restrict output or sales or allocate markets or customers; and
- Participants of a co-reinsurance pool must not agree on the commercial premiums they charge for direct insurance.

Before relying on the safe haven afforded by the BER the members of a pool need to carefully assess whether their pool satisfies all the conditions for being block exempted. In the Communication, the European Commission specifically points out that many insurers have incorrectly relied on Regulation No 358/2003 without carrying out the required legal assessment. The Commission also points out that *ad-hoc* co-(re)insurance agreements on the subscription market are not covered by the BER.

### AGREEMENTS FALLING OUTSIDE THE BER

It is important to note that an agreement that is not covered by the BER may still be lawful.

Certain forms of cooperation between insurers do not fall within the prohibition in article 101 TEU in the first place. This may be the case, for example, with regard to co-insurance or co-reinsurance pools that are objectively necessary to allow participating undertakings to offer sufficient cover. In such case the members of the pool may not be viewed as competitors for the purpose of the offer in question and the pool will generally not restrict competition. Article 101 TEU will therefore not apply and the BER is irrelevant.

In addition, the broad prohibition against restrictive business practices in article 101 TEU (and the corresponding provisions in article 53 EEA and section 10 of the Norwegian Competition Act) is supplemented by an individual exemption clause that may bring agreements safely outside the prohibition if they produce net efficiencies. Broadly speaking, an agreement will benefit from such an individual exemption if the cooperation in question results in net efficiency gains of which a fair share benefits the consumers.

From the perspective of an insurer, the problem is that in practice the assessment of whether a given practice is restrictive for competition and whether it satisfies the criteria for individual exemption, can be very complex. Furthermore, since violations of the competition rules may result in serious fines, insurers should not take assessments of this kind too lightly.

The European Commission has published several guidelines that may also provide assistance in relation to self assessments in the insurance sector. For example, there are guidelines concerning the assessment of so-called horizontal cooperation agreements (the "**Horizontal Guidelines**"). Among other things, these guidelines provide guidance for the assessment of technical standards under article 101 TEU which may be helpful when considering the legality of security devices under article 101 TEU. The Horizontal Guidelines are currently being subject to review and the Commission is planning to expand the revised guidelines to also address the issue of SPCs. However, despite the existence of such guidelines, the competition law assessment of a given cooperation is inherently complex.

### MORE INTENSE ENFORCEMENT OF COMPETITION RULES IN THE INSURANCE SECTOR

It is clear both from the Communication itself and from the public statement made by the Commissioner when the BER was published that insurers must expect a more intense enforcement policy from the European Commission in the future. In particular, the Commission intends to closely monitor the application of the BER to avoid the incorrect "blanket" application of the block exemption that has been observed in the past.

In line with past experience it can be expected that increased enforcement activity from the Commission will trigger similar activity from the EFTA Surveillance Authority.

Insurers across the European Economic Area therefore have a clear incentive to carry out a "bullet-proof" self-assessment of their business practices based on the new legal framework well before the expiry of the transitory period on 30 September 2010.

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