

Partially renewed Insurance Block Exemption comes into force today

European Commission Regulation
No. 267/2010
In force: 1 April 2010

The European Commission has completed its investigation into the Insurance Block Exemption Regulation ("BER") and has decided that only a partial renewal is required. The new BER comes into force today but only in respect of two of the four previously covered areas. Insurers are now left to assess for themselves whether co-operation between insurers relating to standard policy conditions and security devices are anti-competitive.

The Block Exemption

The BER has been put in place to protect certain practices in the insurance market which may in other industries be considered to be anti-competitive. These practices are exempt because in the context of the insurance market they can help to increase competition. The previous BER, which came into force in 2003, protected the following:

- i. Information sharing between insurers;
- ii. Co-insurance and reinsurance pool arrangements;
- iii. Standard policy conditions between insurers; and
- iv. The approval, installation and maintenance of security devices.

The new BER, which will remain in force until 31 March 2017, only renews the exemption in respect of the practices at (i) and (ii) above.

Renewed Exemptions

The Commission has maintained the exemption for information sharing between insurance companies. Insurers are therefore free to distribute information relating to the cost of covering a risk, mortality tables, frequency of claims information etc. Access to this information must also be granted to consumer or customer organisations.

This exchange of information is seen as important in the insurance industry because of the large amount of data required to assess the costs of covering risks. It improves the knowledge of risks and facilitates rating which in turn facilitates market entry and benefits to customers.

Similarly, co-(re)insurance arrangements or pools, are also exempt subject to certain limits. They are exempt for risks which are new or which have changed materially such that the amount of subscription capacity required to provide the cover is unknown. Where a risk is not "new" pools are only exempt if the combined market share of the pool participants (whether within or outside of the pool arrangement) is no more than 20% for the insurance market and 25% for the reinsurance market.

Companies entering into pool arrangements therefore need to consider whether they may be engaging in anti-competitive practices prohibited by the Treaty on the Functioning of the EU ("the EU Treaty") if they have a market share

greater than that specified. This is especially important for those insurers who may have an existing market share outside of any proposed pool arrangement.

Non-Renewed Exemptions

Of the two practices that have not been renewed by the Commission, the lack of protection for insurers wishing to put in place standard policy conditions is going to be of most concern. The Commission decided that the establishment of standard policy conditions was not unique to the insurance industry and that it could lead to a lack of competition in relation to price.

Given the drive toward contract certainty over the last few years, not least by the FSA, standard terms are a useful tool in ensuring that full policy terms are agreed at inception. There is an obvious tension between the desire for contract certainty at the inception of a policy and the risk that such terms may be found to be anti-competitive. The Commission has acknowledged that a degree of legal uncertainty is something that the market will have to bear for the sake of increased competition.

What now?

Insurers should be aware that neither of these two practices are automatically anti-competitive. There will be two stages to any self-assessment.

Firstly, an insurer will be required to carry out its own self-assessment exercise to determine whether its existing co-operation practices and agreements fall foul of the anti-competitive restrictions set out in Article 101 (1) of the EU Treaty. For insurers this may occur if the practices led to price fixing or limiting/controlling a particular market.

It must then determine whether or not the practice/agreement is prohibited or falls within the exception in Article 101(3) of the EU Treaty. This exception is engaged where the practice allows the consumer a fair share of the benefit and does not limit competition.

The Commission has said that it will be addressing both non-renewed practices in its Guidelines on the application of the articles of the EU Treaty to horizontal co-operation agreements, which are currently under review. When published the Guidelines will give advice to insurers and reinsurers as to the types of agreement which would fall within the exceptions in Article 101(3).

The Commission has put in place a transitional period for six months to the end of September 2010 for insurers and reinsurers to change any existing practices or co-operation agreements which do not comply with Article 101 of the EU Treaty. Any proposed agreements not yet concluded will have to comply with the Article from the outset.

Each agreement must therefore be assessed individually in accordance with the self-assessment procedure set out above. Until such time as the new Guidelines are produced this may not be an easy process and insurers and reinsurers should seek legal advice if there is any doubt as to whether existing or prospective agreements comply with the EU Treaty.

If you require any further information in relation to the way in which these developments impact upon your business please contact Nicholas Bradley, David Breslin or Viran Ram on 020 7379 0000 at Lawrence Graham LLP.

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