



LITIGATION & REGULATORY ALERT

5 June 2009

Insurance Block Exemption Regulation

Executive summary

The Insurance Block Exemption Regulation (EC) 358/2003 ("IBER") will expire on 31 March 2010. Six years after its entry into force, the Commission was required to submit a report to the European Parliament and Council on its functioning, together with any proposal for amendment in light of experience (which in this instance also includes information gained as a result of the Sector Inquiry into Business Insurance). The Commission submitted its Report with an accompanying Working Document on 24 March 2009. On 2 June 2009 the Commission also held a public hearing to present its current thinking and hear further representations from the industry before deciding whether to renew or partially renew the IBER.

The Commission's provisional view is that a sector specific block exemption continues to be necessary for certain types of exempted agreements, but that other types of co-operation covered by the current IBER are not specific to the insurance industry and do not need to be covered. This is against a background where Commissioner Neelie Kroes has been abolishing sector-specific block exemptions in other industries. The Commission's preliminary conclusions are that co-operation relating to joint calculations, tables and studies and co(re)-insurance pools are areas that are specific to the insurance industry and may warrant a block exemption.

Summary of the Commission's Review

The questions that the Commission has been considering are:

- are there business risks or other issues in the insurance sector that make it "special" and different to other sectors, such that this leads to an enhanced need for co-operation among insurers?
- if so, does this enhanced need for co-operation require a legal instrument such as the IBER to protect or facilitate it?; and
- if so, what is the most appropriate legal instrument to do this? (ie whether it is the current IBER or whether partial renewal, amended renewal, or guidance would be more appropriate).

The Commission's analysis has focused on whether the IBER gives rise to competition restrictions, how much the exemption has been relied on in practice, to what extent existing co-operation between insurers would cease in the absence of a block exemption, whether there are any practical alternative arrangements that could be developed and whether consumers are receiving a fair share of the efficiencies generated by co-operation among insurers.

Joint calculations, tables and studies

The current IBER exempts 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) calculations in connection with insurance involving an element of capitalisation, mortality tables and tables showing the frequency of illness, accident and invalidity, subject to certain conditions. The current IBER also exempts (subject to certain conditions) 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 each claim 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 Commission acknowledges that the calculation of risk is a key issue in pricing all insurance products which appear to be a differentiating factor from other sectors, including banking, and that access to past

statistical data in order to technically price risks is crucial. The fact that insurers are allowed to engage in co-operation on the calculation of risk can facilitate entry, and the competitiveness of small insurers might suffer if such co-operation was not exempt because their size restricts their ability to compile sufficient relevant data for statistical accuracy. In addition, the introduction of Solvency II requirements will require an even greater reliance on accurate data for all insurers.

The Commission is therefore minded to facilitate cooperation in this area which the current IBER appears to be doing effectively. The Commission has not yet, however, decided whether to amend the structure or drafting of the current exemption, and whether, if it concluded the renewal is indeed necessary, it should be total or partial.

Standard policy conditions

The IBER exempts (subject to certain conditions), the joint establishment and distribution of non-binding standard policy conditions ("SPCs") for direct insurance and non-binding models on profits.

During the review, insurers and insurance associations argued that co-operation on SPCs ensures that costs incurred by insurers, and in turn the premiums they charge to customers, are kept low and promotes legal certainty. The Commission agrees that in many cases, SPCs can give rise to positive effects for both competition and consumers. However, the question that has still not been answered satisfactorily is whether this is specific to the insurance sector. Furthermore, in most instances, the agreement on non-binding SPCs would not fall foul of Article 81(1) or would comply with the exemption criteria of Article 81(3) and should therefore not require a block exemption. In view of this, it seems quite likely that the Commission will not renew the IBER in this area. It is more likely to provide further guidance. This may well be done by adding to the Commission's Guidance on Horizontal Co-operation, which is currently also being reviewed.

Common coverage of certain types of risks (pools)

The IBER exempts the setting up and operation of co(re)-insurance pools for the common coverage of new risks as well as co(re)-insurance pools covering risks which are not new, subject to certain conditions including market share thresholds.

With regards to pools, some may not actually fall within Article 81(1) in that the pool participants are either reluctant or unable to ensure the entire risk alone (eg nuclear, terrorism and environmental risks). The Commission recognises that this makes the insurance sector different from other sectors and triggers an enhanced need for co-operation.

In carrying out its review, the Commission found various issues which will need to be addressed in any new exemption or guidance. First there is the need for further guidance in relation to the calculation of market shares. Under the IBER this is done by taking into account the insurance products underwritten within the pool by the participating undertakings on their behalfs. This means that the turnover achieved by the participating parties outside the co(re)-insurance pool in the relevant market does not need to be taken into account. This is not in line with the general approach taken in the assessment of horizontal co-operation. At this stage, the Commission is inclined to believe that there is no reason to maintain such preferential treatment. If this is indeed changed, it will have very significant implications for existing pools as many would then exceed the market share thresholds and fall outside the safe harbour. Furthermore, it requires additional exchange of commercially sensitive information regarding the participants' activities outside the pool.

Secondly, the Commission believes that many of the co(re)-insurance pools currently operating on the market are not actually covered by the IBER and therefore renewal or non-renewal of the IBER should not affect the legal assessment. Some insurance pools do not give rise to a restriction of competition in the first place, regardless of how high their market share, on the basis that the pooling is necessary to allow the members to provide a type of insurance that could not be provided by one insurance company alone. Other pools may be outside the scope of the IBER because they exceed the market share thresholds and/or do not comply with all the conditions set out in Article 8 of the IBER.

Thirdly, the Commission found that many insurers incorrectly use the pools exemption as a "blanket" exemption, without having carried out a careful legal assessment of the pools' compliance with the IBER. One particular area of concern which has been highlighted by the Commission's review is the high degree of uncertainty regarding the definition of the relevant product and geographic market in the insurance industry. The Commission refers to various ongoing cases before the Dutch Competition Authority and the German Supreme Court grappling with the relevant product market definition. The Commission is cogniscent of the fact that there have not been many decisions relating

to insurance pools and that further guidance in this area would be very beneficial.

The Commission recognises that pools are specific to the insurance sector and that there is some risk of a reduction in co-operation in this area if the IBER is not renewed. However, it has also signalled that if it does renew its exemption, the chapter on pools will be significantly redrafted in order to ensure consistency with other general and sector specific legislation and taking on board comments received during the review.

Security devices

IBER covers (i) technical specifications, rules or codes of practice regarding security devices, and procedures for assessing and approving the compliance with these standards; as well as (ii) technical specifications, rules or codes of practice for the installation and maintenance of security devices and procedures for assessing and approving the compliance of undertakings which install or maintain security devices with such standards. These agreements are covered by the IBER insofar as no EU-level harmonisation exists and provided they fulfil the conditions set out in the IBER.

The Commission's preliminary conclusion is that there is no need to renew this part of the IBER given the extensive amount of EU harmonisation of standards (or technical specifications), specifically concerning fire detection and fire alarm systems, as well as fixed fire fighting systems that have already been adopted and published in the EU's Official Journal. During the public hearing, it transpired that much of the standard setting in this area has often been driven by the insurers trade associations who are able to progress on these issues quicker than the legislative process and furthermore, much of the EU harmonisation focuses on technical standard but does not cover installation and maintenance.

While the Commission's preliminary view was that there was no need to renew this aspect of the IBER and that it is not specific to the insurance industry, it is quite possible that the Commission will provide further guidance to ensure that such co-operation is still a necessary and efficient way forward and that it takes place in such a way so as not to lead to a distortion of competition, notably by being open, transparent and EU wide (thereby avoiding current criticism that some of these standards are adopted by national states leading to a fragmentation of the European market).

Next steps

If it is likely that the Commission proceeds to a partial renewal of the IBER, as currently appears, then drafting will begin in the next few weeks. Consultation of such draft will be initiated with the European Competition Network later in the summer with public consultation to start in the autumn.

If a decision is taken not to renew any part of the IBER then a Communication will be published later this year to that effect and one can then assume that there will be some further clarification which will be incorporated into the revised Horizontal Guidelines.

One clear message that Neelie Kroes gave at the public hearing is that during the review, the Commission found that many pools are neglecting to analyse their compliance with the IBER and that it will be "monitoring" and using "strong enforcement where necessary" to ensure pools comply with competition law.

All relevant documents and information are available on the Commission's competition website at:
http://ec.europa.eu/competition/sectors/financial_services/insurance.html

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