NEW BLOCK EXEMPTION REGULATION FOR THE INSURANCE SECTOR – MAIN CHANGES

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Abstract*: The article presents the review process of the Insurance Block Exemption Regulation (BER) No 358/2003, for a period of about two years and a half. It also focuses on the main changes in the new Insurance BER No 267/2010, i.e. the renewal of only two of the four types of cooperation that the previous BER covered, namely agreements concerning (i) joint compilations, tables and studies and (ii) pools. The article explains the main changes regarding these two types of agreements but also gives the reason why the other two, i.e. standard policy conditions and security devices, have not been renewed.*

Summary: 1. Introduction. 2. Review and consultation. 3. The reasoning at the basis of the review. 4. Non-renewed exemptions – agreements in relation to standard policy conditions and security devices. 4.1 Agreements on standard policy conditions (SPCs). 4.2 Agreements on security devices. 5. Renewed exemption: joint compilations, tables and studies – main changes. 5.1 Findings of the review. 5.2 Main change – an access to data right for customer and consumer organisations. 6. Renewed exemption: pools – main changes. 6.1 Findings of the review. 6.2 Main change – a new method of calculating market shares. 6.3 The BER condition related to the prohibition of the double membership was deleted. 6.4 A more extensive definition for "new risks". 7. General changes. 8. Conclusion.

1. INTRODUCTION

The insurance sector has been covered by consecutive sector-specific block exemption regulations (BER) since 1992. A BER allows market players the benefit of a safe harbour from the prohibition in Article 101(1) of the Treaty

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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 instead must be assessed under Article 101(1) TFEU and, if appropriate, Article 101(3) TFEU.

Commission Regulation (EEC) No 3932/92[3], the first BER for the insurance sector, expired on 31 March 2003 and was replaced by Commission Regulation (EC) No 358/2003 (hereinafter "the previous BER")[4]. The previous BER applied Article 101(3) of the Treaty to four categories of agreements, decisions and concerted practices in the insurance sector, namely agreements in relation to (i) joint calculations, tables and studies; (ii) standard policy conditions (SPCs) and models on profits; (iii) the common coverage of certain types of risks (pools); and (iv) security devices. Council Regulation (EEC) No 1534/91[5] would allow the Commission to adopt a BER for two other types of agreements, namely settlement of claims and registers of and information on aggravated risks. Recital 3 of the previous BER stated that the Commission considered that it lacked experience in handling individual cases in these areas in order to make use of this power to adopt a BER in these fields. The situation remains the same for the current BER, the Commission has made no use of the power afforded to it.

Since 1 May 2004, like most other sectors, the insurance sector has been subject to Council Regulation (EC) No 1/2003 of 16 December 2002 (Regulation 1/2003) on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, with the Insurance BER being applicable in parallel to the four categories of agreements specifically mentioned and under the conditions set out in the BER.

Regulation 1/2003 provides that agreements that satisfy the conditions of Article 101(3) are not prohibited, no prior decision to that effect being required. Undertakings and associations must now assess for themselves

3 Commission Regulation (EEC) No. 3932/92 of 21 December 1992 on the application of Art. 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 398, 31.12.1992, p. 7).

4 Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) [now Article 101(3)] of the EU Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (O J L 53, 28.02.2003, p. 8).

5 Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1–3).

whether their agreements are compatible with Article 101. This tendency towards companies' increased responsibility for compliance with the competition rules also extends to the area of BERs. Only a few sectors currently benefit from a sector specific BER[6] and there have been other sectors (such as maritime and air transport)[7] for which the relevant BER was not renewed.

It is against this background that the Commission had to examine whether it was appropriate to renew some or all of the exemptions granted by the previous BER for the insurance sector.

2. REVIEW AND CONSULTATION

In the context where Commission Regulation (EC) No 358/2003 was due to expire on 31st March 2010, 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 (NCAs) of the European Competition Network (ECN) for their experiences. DG Competition then launched a detailed public consultation in April 2008[8], for three months, on the basis of a Consultation Paper, giving a significant time window for those interested to present evidence for renewal or non-renewal of the BER.

Replies were received from a relatively small number of market participants. In order to cover all possible types of market participants, a first round of questionnaires was also sent out to all national consumer organisations associations and to several associations of undertakings representing

6 For example Commission Regulation (EC) No 96/2009 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).

7 Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport. Commission antitrust regulations specific to air transport have been gradually repealed: http://ec.europa.eu/competition/sectors/transport/legislation_air_archive.html.

8 Available at: http://ec.europa.eu/competition/sectors/financial_services/consultation_paper_17042008.pdf.
Report from the Commission to the European Parliament and the Council on the functioning of the Commission Regulation (EC) No 358/2003 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, COM (2009) 138 final: http://ec.europa.eu/competition/sectors/financial_services/insurance.html#review
Further information regarding the public event is accessible under: http://ec.europa.eu/competition/sectors/financial_services/events/insurance_ber.html
http://ec.europa.eu/competition/sectors/financial_services/consultation_paper_17042008.pdf.

customers (large customers and SMEs). In addition, targeted questionnaires were sent to Supervisory Authorities in all Member States, smaller insurers and insurance pools. Furthermore, the Commission's Services held a number of meetings during this review to discuss contributions or raise other questions with NCAs as well as with a range of different market players.

On the basis of the evidence gathered, the Commission adopted, on 24 March 2009, a report to the European Parliament and Council (the Report), which was published on the same day together with a detailed accompanying working document[9]. The Report examined the functioning of the previous BER and made initial proposals for its amendment. DG Competition then held a large public event on 2 June 2009[10] to hear further representations from the industry and other stakeholders on its findings and proposals. Separate panels discussed each of the four categories of agreements previously exempted under the BER.

As a follow-up to the public event and to ensure that all views were heard and to facilitate the highest quality of analysis, the Commission sent out a further round of targeted questionnaires to three groups of stakeholders in the insurance sector, i.e. to small insurers, large insurers and insurers' associations.

On 5 October 2009, following an Advisory Committee with Member States on a draft new BER and another inter-service consultation with other DGs within the Commission, a public consultation was launched for eight weeks on that draft.

Following this thorough review, the European Commission adopted on 24 March 2010 Commission Regulation (EU) No 267/2010, the new insurance BER applying Article 101(3) TFEU 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 exemptions for agreements in relation to standard policy conditions and security devices have not been renewed.

9 Report from the Commission to the European Parliament and the Council on the functioning of the Commission Regulation (EC) No 358/2003 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, COM (2009) 138 final: http://ec.europa.eu/competition/sectors/financial_services/insurance.html#review.

10 Further information regarding the public event is accessible under: http://ec.europa.eu/competition/sectors/financial_services/events/insurance_ber.html .

3. THE REASONING AT THE BASIS OF THE REVIEW

The primary original objective of the BER was to facilitate the Commission's task in view of the large number of notifications submitted for review by the Commission 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 the business risks or other issues make this sector special and different from other sectors that operate without a sector specific BER (i.e. the large majority). By conducting in-depth investigations into this issue, the Commission aimed at ensuring that the resulting instrument does not give undeserved or unnecessary preference to the insurance sector.

Therefore, the Commission's services undertook a first principles analysis, which involved answering three questions in relation to each of the four forms of cooperation covered by the previous BER: (i) whether the insurance sector is special so 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 such as the BER to protect or facilitate it (in comparison to other sectors, for example, where there is a high level of cooperation without such a legal instrument); and (iii) if so, whether the previous BER or an amended version of it was the most appropriate legal instrument.

4. NON-RENEWED EXEMPTIONS – AGREEMENTS IN RELATION TO STANDARD POLICY CONDITIONS AND SECURITY DEVICES

As a result of its findings following the review process, the Commission decided not to renew two of the four types of cooperation that the previous BER covered, namely agreements concerning (i) standard policy conditions (SPCs) and (ii) security devices. This is primarily because the evidence the Commission found during the review indicated that they 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. In addition, although these two forms of cooperation may give rise to some benefits to consumers, the review showed that they can also give rise to certain competition concerns.

In this context, the Commission considered it more appropriate that a compliance analysis for these types of agreements be conducted on a case-by-case basis under Article 101(1) TFEU and, if appropriate, 101(3) TFEU.

The fact that a BER is not renewed, or only partially renewed, regarding a specific category of agreements does not necessarily mean that agreements previously falling under the BER become illegal. An individual assessment under Article 101(1) and, if applicable, under Article 101(3) rather than under the BER would be then required. Both types of cooperation will also be covered by the new Horizontal Guidelines.[11]

4.1. Agreements on standard policy conditions (SPCs)

Technically or legally complex agreements in fast changing legal environments are commonplace in a number of sectors and not specific to the insurance sector. SPCs are used in some of these sectors without the cover of sector specific BERs. For example, in the banking sector to which the Commission's Services also sent questionnaires, SPCs are agreed between banks in a number of Member States, for services such as money transfer, issuance of cards, use of ATMs, account terms, credit agreements and payments. It appears that the banking sector does not require a legislative framework (such as a BER) in order to set policy conditions. Furthermore, the absence of such a framework has not caused any tangible difficulties for banks.

Certain insurers argued that the insurance sector is different from the banking sector for several reasons. However, the Commission's analysis does not deny these differences, but emphasizes that, from the perspective of the use of SPCs in contracts, the banking sector and the insurance one are comparable. The fact that there is no BER as regards SPCs in the banking sector implies that there is no such an indispensable need for such an exception legal instrument in the insurance sector either.

Moreover, although there are positive effects linked to the use of SPCs, such as the possibility to compare insurance contracts, several consumer associations such as Test Achat in Belgium, complained about the excessive standardisation of certain insurance products due to the use of the same SPCs by the vast majority of insurers, which can result in lack of choice for consumers. Even if the SPCs are stated to be non-binding, there are many cases where they do become, *de facto*, binding. Whilst there is clearly a need for comparability between insurance products for consumers, this cannot be at the expense of homogeneous standard conditions which can hinder consumers' ability to find products suited to their needs.

11 Available at: http://ec.europa.eu/competition/antitrust/legislation/horizontal_guidelines_en.pdf .

It has been argued that SPCs can help to reduce the use of restrictive or exclusionary terms. However, there are indications that some imbalanced clauses are still being used by insurers and that consumer associations, as they would wish, are not fully involved in the drafting of such clauses (which would obviously be the ideal scenario in terms of ensuring balance between insurers and consumers).

SPCs are now included in the standardization chapter of the Horizontal Guidelines and, as it results from the insurance specific example which is given in those Guidelines, SPCs do not generally raise competition problems. Indeed, as long as there is no standardization of the insurance products and as long as SPCs are not binding, the conditions provided in Article 101(3) are likely to be fulfilled.[12]

4.2. Agreements on security devices

Agreements on security devices generally enable insurers to better evaluate the risks that they cover, to the advantage of consumers as insurance takers. Insurers consider that they are better placed to offer appropriate levels of premiums when policyholders buy safety equipment corresponding to certain technical specifications. In some cases, better security devices can even prevent damage from occurring in the first place.

However, agreements on technical specifications for security devices and their installation fall into the general domain of standard setting, which is not unique to the insurance sector. Therefore, there is no need for those categories of agreements to be protected by a special legal instrument such as the BER.

Moreover, the review showed that a large number of historically developed national requirements by the insurance have negative effects on competition on the downstream market for the supply of security devices as manufacturers which do not comply with these standards are, *de facto*, excluded from the market because consumers will only buy security devices which conform to the commonly agreed standards. The consequence is that consumers are forced into use of certain devices as only those are accepted by insurers and are denied a wider choice of performance-equal products, which results in less choice for consumers as buyers of security devices.

12 Available at: http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf, par. 343.

There are also cases where detailed national rules result in fragmentation of the internal market and in reduction of competition between producers of security devices across Member States. The existence of national requirements agreed by insurers means that producers of security devices have to comply with different sets of national rules, depending on the Member State in which they sell their products. This seems to result in sales volumes being limited to national/regional markets because of multiple national certification requirements, even in cases where harmonized CEN/CENELEC standards do already exist.

A condition provided in the previous BER was that the exemption did not apply where harmonisation already existed at EU level. The reason behind this is the construction of the EU internal market and the avoidance of any protectionist practices. However, the remaining scope of the BER was consistently reduced or eliminated due to existing EU-level harmonization[13].

Against this background, the Commission considered it more appropriate that a compliance analysis for these types of agreements be conducted on a case-by-case basis under Article 101(1) and, if appropriate, 101(3). Agreements on security devices are now to be assessed on the basis of the new standardisation chapter of the Horizontal Guidelines. To that effect an example specific to the insurance sector was introduced into these Guidelines. In accordance with this example, agreements on security devices could be pro-competitive as long as they do not have effects on the downstream market by excluding manufacturers through very specific and unjustified requests and as long as there is no harmonization in the area[14].

5. RENEWED EXEMPTION: JOINT COMPILATIONS, TABLES AND STUDIES – MAIN CHANGES

5.1. Findings of the review

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

13 For instance, 90 EU harmonized standards concerning fire detection have been published in the EU standards issued by CEN/CENELEC.

14 Available at: http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf, par. 318.

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 on 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 the price is agreed and the risk covered was considered as a differentiating factor of the insurance sector from other sectors in terms of the assessment of risks. This makes access to past statistical data in order to technically price risks crucial.

Indeed, the review showed that sharing such information currently allows insurers to properly calculate risks, which enables the entry of small and medium sized firms.[15] Insurers put forward that a very large number of risks would be required in order to give actuarially acceptable accuracy. Several small insurers considered that in the absence of the BER, they would face such a degree of uncertainty that a security surcharge would be required for them to operate, which would be charged to consumers. Therefore, the Commission considers that cooperation in this area is both specific to the insurance industry and necessary in order to appropriately assess risks.

Moreover, many insurers, as well as some supervisory authorities and a risk management federation argued that, without the BER, insurers would no longer cooperate or would not share the outcome of the cooperation with smaller or foreign insurers, which would narrow the market by hindering or preventing smaller/foreign insurers from entering the market. 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 not incentive to do so. The advantage of the legal instrument of the BER is that it requires that, when insurance companies enter into these forms of cooperation, they must give access to the information compiled to other insurance companies.

15 A number of respondents during the Review, in particular small and medium sized insurers, said they could not have entered the market without the use of the data-sharing facilitated by this exemption.

Also, renewing this exemption avoids possible inconsistency with Solvency II[16], which encourages data exchanges between insurers as Solvency II requires firms to have high quality actuarial data as it imposes a new risk sensitive solvency regime.

Therefore, the Commission decided to renew this exemption, but made several modifications/improvements in the new BER.

5.2. Main change – an access to data right for customer and consumer organisations

On the basis of comments during the review indicating that insurers are not jointly calculating but in fact jointly compiling (which "may involve some statistical calculations"[17]) information, the term has been amended to "joint compilations, tables and studies". This new term has also the merits of dispelling any possible misinterpretations implying that the BER would be a shelter for commonly calculating commercial premiums.

Also, 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 be made available not only 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.

Moreover, the new BER grants an access right to data for customer and consumer organisations. Initially, the draft BER published for consultation included an access right for consumer organisations and other interested third parties to the joint compilations, tables and studies produced. Indeed, granting access to these categories is an important element 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 negative effects such as: (i) exposing insurers to reputational risk if actuarial expertise were not used to interpret the data; (ii) allowing third parties to benefit from their efforts without contributing; and (iii) requiring insurers to spend too much

16 Solvency II is a Commission proposal which will introduce economic risk-based solvency requirements across all EU Member States for the first time. More information is available at: http://ec.europa.eu/internal_market/insurance/solvency/index_en.htm.

17 See Recital 9 of Commission Regulation (EU) No 267/2010.

time answering very vague and broad questions. Some insurance associations, in their replies to the public consultation, even warned that they would withdraw from cooperation because of the access right afforded to consumer and customer organisations.

Given that, on the one hand, the Commission considers transparency to the benefit of consumers important, but that, on the other hand, risks of misinterpretation of the data received did seem indeed plausible, the Commission narrowed down the scope of the data exchange beneficiaries and amended its final draft to provide that data should be made available only to consumer organisations or customer organisations that request access to them, with the exclusion of the large category of "other interested parties".

Some insurers raised the issue of the possible circumvention by associations of this limitation, by way of publishing for instance the whole data they would have access to. However, data should be available on "reasonable terms", which leaves the insurance associations the freedom to regulate in a contract the use that consumer and customer organisations can make of the statistics, including, for instance, the prohibition to publish the raw data as such (as opposed to conclusions based on such data, the publication of which should not be prevented).

Also, data should be made available on "affordable" terms, which means that the access right should not be made impracticable through the request of very high fees for access to data. Indeed, the effort of compiling these data is made anyway by insurers, in their own interest for the purpose of better assessing the risk and more accurately calculating premia. The concrete appropriate level is to be established by insurers or insurers' association in each case. The cost of giving access to the data could be used as a benchmark to that effect.

In order to avoid vague and unjustified requests, as was feared by insurers, the BER provides that access must only be given to consumer and customer organisations which request access to data "in specific and precise terms for a duly justified reason".[18] However, this should not be interpreted by insurers in a way that could transform this condition in an obstacle to the materialisation of the access right itself.

In addition, a public security exception from access to this data was included in the new BER. The BER recitals include two examples where

18 Article 3 2(e) of Commission Regulation (EU) No 267/2010.

this exception may be applicable, namely where the information relates to the security systems of nuclear plants or the weakness of flood prevention systems[19].

6. RENEWED EXEMPTION: POOLS – MAIN CHANGES

6.1. Findings of the review

The Commission recognizes 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 to other sectors and triggers an enhanced need for cooperation.

The new BER exempts two main categories of pools:

(i) pools covering "new risks", under no market share conditions, for a period of three years. Given that it is not possible to know in advance what subscription capacity is required to cover a new risk, the BER exempts pools created in order to cover new risks, for a limited period of three years from the date of first establishment of the pool, regardless of the market share of the pool. If the pool is not newly created in order to cover a new risk, but starts offering coverage for such a new risk while already in place, the three years period will start, by analogy with the previous case, on the date when such coverage for the new risk is afforded by the pool in question; and

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

In terms of competition assessment, there seems to be three main categories of pools:

First category: pools which may be considered not to be anti-competitive, no matter how high their market share, as long as pooling is necessary to allow their members to provide a type of insurance that could not be provided

19 Recital 11 of Commission Regulation (EU) No 267/2010.

by only one insurance company[20]. The replies to questionnaires showed that only a small number of the pools applied this legal analysis, whereas the majority of them preferred to consider that they fulfill the conditions of the BER, without even considering that they might not even need the BER, as their pool might not fall under Article 101(1) in the first place.

A second category of pools is outside the scope of the BER but for another reason: they can give rise to restrictions of competition and they do not fulfill the market shares thresholds and/or do not comply with the other conditions set out in the BER. In these cases, pools were set up, despite the fact that the risks in question could have been covered by several individual insurers rather than a pool and the market share thresholds were exceeded. They could be exempted on the basis of an Article 101(3) self-assessment.

Finally, there is a third category of pools: the ones which do give rise to restrictions of competition, but comply with the market shares thresholds and other conditions established by the BER. They are fine from a competition assessment point of view as they are covered by the BER.

A serious concern which came to light during the Review was that many pools and participating insurers considered that the simple 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 pools' compliance with the BER. The Commission has therefore emphasised in its explanatory Communication accompanying the new BER that pools must carry out a careful individual legal self-assessment, on a case-by-case basis. The Commission intends to closely monitor the pooling of risks going forward, in cooperation with the national competition authorities.

6.2. Main change – a new method of calculating market shares

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

20 Recital 13 of the Commission Regulation (EU) No 267/2010 (the new BER) provides that: "Co-insurance or co-reinsurance pools can, in certain limited circumstances, be necessary to allow the participating undertakings of a pool to provide insurance or reinsurance for risks for which they might only offer insufficient cover in the absence of the pool. Those types of pools do not generally give rise to a restriction of competition under Article 101(1) of the Treaty and are thus not prohibited by it".

these thresholds should be raised. However, the flexibility thresholds[21] 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[22]. This change allows some additional scope for pools to be covered when their market shares increase.

Although the main market share thresholds have remained the same as in the previous BER, the new BER makes a significant change in the approach to market share calculation.

The approach in the previous BER only took into account the combined market shares 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"[23] and not to the market share of the cooperation in question. In addition, no other BER, be it general[24] or sector-specific[25], 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 in other sectors, as the turnovers achieved by the participating companies outside the co(re)insurance group in the relevant insurance market were not counted.

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21 If the market share of a co-insurance pool (initially below or equal to the market share threshold of 20%) increases above the threshold of 20% but does not exceed 25%, the exemption will continue to cover that pool for 2 years. If it rises above 25%, the exemption will continue to cover that pool for only 1 year. If the market share of a co-reinsurance pool (initially below or equal to the market share threshold of 25%) increases above the threshold of 25% but does not exceed 30%, the exemption will continue to cover that pool for 2 years. If it rises above 30%, the exemption will continue to cover that pool for only 1 year.

22 Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 05.12.2000, p. 3).

23 The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p.13) and Guidelines on the effect on trade concept (OJ C 101, 27.4.2004, p.81).

24 Article 4 of the Specialisation BER (Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L 304, 05.12.2000, p. 3) refers to the market share "of the participating undertakings", and Article 3 of the Technology Transfer BER (Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11-17) mentions the "combined market share of the parties".

25 Article 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".

Therefore, the draft BER published for consultation provided that market share of participating companies 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 are operating. 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 and departing from the general rules.

The draft BER published for consultation only provided that when calculating the market share of a pool, market shares 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, to which the participating undertaking is a party; and (iii) their market share on the same relevant market outside any pool.

6.3. The BER condition related to the prohibition of the double membership was deleted

Given that in some Member States, for instance in the Netherlands, there is a significant number of 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 shares would already significantly reduce the scope of the BER. It was decided therefore to delete this clause in the new BER in order to establish a middle-ground solution.

In addition, a provision was added in Recital 22 of the BER 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.

6.4. A more extensive definition for "new risks"

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 throughout the review of the BER on the definition for "new risks" which considered it to be too narrow, this definition was amended to include, in addition to risks which did not exist before, risks the nature of which has, on the basis of an objective analyses, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them[26]. These could be, for instance, climate change risks or certain types of terrorism risks which have never occurred in the past.

This new definition was welcomed by the majority of respondents to the public consultation. A few respondents considered that the exemption period of 3 years was not sufficient for companies to attain adequate knowledge and experience regarding these risks. However, given that no concrete examples or evidence as to why five years would be more appropriate than three, the new BER did not amend this duration.

7. GENERAL CHANGES

The possibility of withdrawal of the benefit of the Regulation was extended to Member States, in addition to the Commission, in respect of the territory of that Member State, where it finds that in a particular case an agreement to which the exemptions apply nevertheless has effects which are incompatible with the conditions laid down in Article 101(3) of the Treaty. The withdrawal powers derive from Regulation 1/2003, which explains why the provision in question was included in the recitals rather than in the articles.

Moreover, the draft for public consultation had no transitional period, since no hardcore restrictions have been added, but merely the scope of the BER has been narrowed down. However, in response to a number of comments requesting a transitional period in order to allow time for notice to be given on agreements where necessary, a transition period has been afforded.

The new Regulation entered into force on 1st April 2010, with a 6 month transition period in respect of agreements already in force on 31 March 2010, 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.

26 Article 1 6 b. of Regulation (EU) No 267/2010.

Moreover, the structure of the entire BER was adjusted to separate the exemptions for the two categories of agreements and follow each of them with its conditions. The aim of this change was to ensure that the conditions immediately follow the exemption with a view to ensuring that they are also examined and facilitate correct self-assessment.

8. CONCLUSION

Although the modernisation of the procedural competition rules with the adoption of Regulation 1/2003 did not abolish the BER system as such, as it offers guidance and legal certainty to stakeholders, there is a tendency of renewing a sector specific BER such as the one for the insurance sector only to forms of cooperation whose specificity triggers an enhanced need for cooperation which deserves to be protected by the exceptional legal instrument of a BER.

The Review showed that certain types of agreements are not specific to the insurance sector and that their inclusion in a BER may result in unjustified discrimination against other sectors which do not benefit from a BER. In addition, although they may give rise to some benefits to consumers, they can also result in competition concerns and, therefore, it is more appropriate that they be subject to self-assessment.

The Commission will cooperate with national competition authorities, which have been closely involved in the BER review exercise, to ensure that insurance companies and in particular pools, assess correctly whether their agreements meet the exemption conditions and do not use the BER as a blanket protection. This is clearly not acceptable and Commissioner Almunia 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"[27].

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

27 See IP/10/359.