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# Making Waves in the Insurance Sector's Safe Harbor: The European Commission Consults on the Insurance Block Exemption

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## **Making Waves in the Insurance Sector's Safe Harbor:**

### **The European Commission Consults on the Insurance Block Exemption**

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**I**t has been clear since the European Commission published its final report in relation to the business insurance sector inquiry in September 2007 that the Insurance Block Exemption Regulation (“the Block Exemption”)<sup>1</sup> was about to come under close scrutiny. Quite apart from the Commission’s legal obligation to submit a report on the functioning and future of the Block Exemption to the Council and the European Parliament by March 31, 2009, the final report revealed that, despite the overwhelming support from the insurance community, the Commission was skeptical about the continued need for the Block Exemption at least as far as business insurance was concerned. The Commission’s view was that, in the light of Regulation (EC) No 1/2003 (which changed the system from one requiring undertakings to notify agreements to the Commission which would decide whether or not to clear them to a system of self assessment), and on the basis of the experience accumulated in relation to the different forms of cooperation permitted under the Block Exemption, market participants no longer needed a form-based sectoral block exemption and should be able to conduct their own self-assessment of the

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<sup>1</sup> Commission Regulation (EC) No. 358/2003 of Feb. 27, 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, 2003 O.J. (L 53) 8.

application of Article 81(3) as in other sectors. The final report concluded that the business insurance sector inquiry had “not produced compelling reasons, as regards business insurance, to prolong [the Block Exemption] beyond 2010.” In light of that assessment, compelling reasons will have to be produced by the insurance industry during the consultation period if it is to retain the benefits of the Block Exemption post 2010.

The nature of the compelling reasons required was suggested by EC Commissioner for Competition Neelie Kroes when launching the public consultation into the functioning of the Block Exemption on April 17, 2008.<sup>2</sup> She stated that she would need to be convinced that the Block Exemption was “justified in terms of bringing real benefits to competition and to consumers.” At the public hearing which formed part of the sector inquiry in February 2007, the Commissioner had emphasized that insurance companies would have to demonstrate that the Block Exemption was justified by the specificities of the insurance sector in order to bring efficiencies to consumers. It seems then that the Commission will be looking for reasons why the insurance sector *in particular* needs a block exemption in order to be able to deliver to consumers. It is clear that the burden is on the insurance sector to show why it is special and needs a block exemption.

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<sup>2</sup> EUROPEAN COMMISSION, CONCERNING THE REVIEW OF THE FUNCTIONING OF 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 (Apr. 2008), *available at* [http://ec.europa.eu/comm/competition/sectors/financial\\_services/consultation\\_paper\\_17042008.pdf](http://ec.europa.eu/comm/competition/sectors/financial_services/consultation_paper_17042008.pdf).

The Block Exemption does not, of course, exempt all agreements<sup>3</sup> in the insurance sector. It provides an automatic exemption from the Article 81(1) prohibition for certain types of insurance cooperation agreement covering:

1. joint calculations, tables and studies;
2. standard policy conditions and models on profits;
3. common coverage of certain types of risks (pools); and
4. security devices or safety equipment.

The consultation document looks at the four types of exempted agreement in turn and for each category sets out comments received during the sector inquiry, comments from national competition authorities and Commission case experience and considerations.

The comments received during the sector inquiry as set out in the consultation document highlight a recurring problem that the industry is likely to encounter when trying to make the case for a continuation of the Block Exemption. In relation to the current exemption of agreements covering joint calculations, tables, and studies, respondents to the sector inquiry stated that the establishment of joint calculations, tables, and studies allows a better assessment of risks which results in lower premiums for customers. The industry claimed that without such exemptions premiums would increase as they would include higher security surcharges. At first sight, this example would appear to meet the Competition Commissioner's desire to see real benefits for competition and consumers flowing from the existence of the Block Exemption. However, while the insurance companies' argument may well be correct, it focuses on the benefit of having agreements in relation to joint calculations, tables, and studies and

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<sup>3</sup> In this statement, the term "agreements" should be taken to include decisions and concerted practices.

not on the benefit of the Block Exemption itself. In a post-1/2003 Regulation world, insurance companies would still be able to exchange information to the benefit of competition and consumers in the absence of the block exemption as long as they considered that the agreements that they were entering into were covered by Article 81(3). The question therefore becomes whether there would continue to be such pro-competitive agreements if the Block Exemption were not in place.

In embarking on the public consultation and in the final report on the sector inquiry, the Commission highlighted the distinction between benefits arising from agreements covered by the Block Exemption and the benefits of the Block Exemption itself. The Commission wants the public consultation to focus on the benefits of the Block Exemption. Responses to the public consultation will need to recognize this issue and focus their comments and evidence on benefits derived from the existence of the Block Exemption itself. However, while such a distinction is easy to make in conceptual terms, it has practical difficulties. It is often difficult to disassociate the benefits of the agreements from the existence of the Block Exemption. In the public consultation document, the Commission acknowledges the benefits of agreements regulating the establishment of joint calculations, tables, and studies although it considers that a blanket block exemption may be too broad a tool. The Commission would no doubt argue that such agreements would continue in the absence of the Block Exemption and would be covered by Article 81(3). However, the reality may be that in the absence of explicit and clear exemption, the industry would abandon such forms of cooperation and simply

increase premiums. In that way, the legal certainty and definitive exemption provided by the Block Exemption is inextricably linked to the benefit of the agreements made under it. Insurance companies, however, may struggle to show that such agreements would not exist in the absence of the Block Exemption.

If arguments relating to the benefits derived from agreements which fall under the Block Exemption are left to one side, the arguments that are left primarily relate to:

1. the special nature of the insurance sector; and
2. the benefits of legal certainty.

The special requirement of a block exemption in the insurance sector would have to set out compelling reasons why the sector is in need of a special form of exemption. Arguments that were canvassed during the sector inquiry as to the sector's specificity were that insurance companies have to face a significant risk exposure in comparison to other industries and that the insurance sector directly impacts the overall economic welfare of other businesses since inadequate insurance or lack of insurance could force companies to exit the market. These arguments were used to caution against any radical change to the existing regulatory framework. Whilst the Commission will no doubt take these factors into consideration, it may consider that they do not provide sufficient justification for a continuation of the Block Exemption post 2010.

Without the operation of the Block Exemption, insurance companies would have to assess whether the agreements they were entering into fell within the scope of Article 81(3) and were thus exempt. The automatic legal certainty and protection against fines for certain forms of cooperation would fall away. The lack of the Block Exemption

would not, however, mean that the agreements entered into as a result of the Block Exemption were illegal. The existence of legal certainty in respect of agreements does, however, confer a significant benefit on the industry and removes the need for often costly and lengthy assessments of agreements. Furthermore, the operation of a Block Exemption in the insurance field since 1993 means that there will be a lack of both Commission decisions and case law on which companies and their advisers can draw in order to assess whether an agreement is likely to fall under Article 81(3). It follows that the non-renewal of the Block Exemption post 2010 would be likely to lead, at least in the short term, to a freezing of, or at least a slow down in, agreements between insurance companies. The public consultation will attempt to reach a conclusion on just how likely such a freeze is and the effect that it would have on competition and consumers in both the short and long term.