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The Case of the Insurance Block Exemption

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The Commission has recently issued a consultation paper regarding the future of Regulation 358/2003, the Insurance Block Exemption Regulation ("IBER")[1] which is set to expire on March 31, 2010.[2] Responses to the consultation are due by July 17, 2008.

While the future of the IBER is itself important, the Commission's approach to the question of whether this exemption should be renewed or allowed to expire is instructive in considering the future of block exemptions generally and, in particular, those which are industry-specific.

This article examines a number of issues relating to the IBER, many of which will be relevant to other industry specific exemptions and indeed to block exemptions generally. These issues include the original rationale for an insurance block exemption,

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[1] 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 [hereinafter IBER], 2003 O.J. (L 53) 8.

[2] 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 [hereinafter Consultation Paper] (Apr. 2008), *available at* http://ec.europa.eu/comm/competition/sectors/financial_services/consultation_paper_17042008.pdf.

the attitude currently adopted by the Commission towards the exemption, the implications of the potential expiry of the exemption, and what kind of evidence may persuade the Commission to retain the exemption.

Origins of the IBER

In common with other block exemptions, both those which are generic and those which are industry-specific, the IBER was originally enacted at a time when, under Regulation 17/62, the Commission had a monopoly on granting exemptions under Article 81(3). The consequences of that monopoly are well-known in that the resources of the Commission were insufficient to deal with the many thousands of notifications made by parties anxious to validate agreements falling within the Article 81(1) prohibition. Starting with Regulation 67/67, therefore, the Commission enacted a series of block exemptions in order to avoid various categories of agreement being notified on an individual basis.

It was not until 1992 that the predecessor to the IBER was enacted, largely in response to the first significant case to reach the European Court of Justice regarding the insurance sector, *Verband der Sachversicherer*.[3] This case and two others, *Concordato Incendio*[4] and *TEKO*[5], led to a large number of notifications of insurance trade association rules, in particular, those relating to the adoption of standard terms.

[3] Case C-45/85, Verband der Sachversicherer eV (Gesamt Verband der Deutschen Versicherungswirtschaft eV intervening) v. EC Commission, 1987 E.C.R. 0405.

[4] Commission Decision of Dec. 20, 1989, Case IV/32.265—Concordato Incendio, 1990 O.J. (L 15) 25.

[5] Commission Decision of Dec. 20, 1989, Case IV/32.408—TEKO, 1990 O.J. (L 13) 34.

The linkage between the number of notifications and the adoption of the original insurance block exemption is referred to in the preamble to the Council Regulation enabling the Commission to enact the original block exemption[6] and is again referred to in the Commission's 1999 Report on the operation of the original block exemption.[7] The purpose of the IBER therefore was to alleviate the Commission's workload rather than to lighten the regulatory burden on the insurance sector.

With the abolition of the individual exemption system in May 2004, the original justification for the insurance block exemption disappeared, leaving insurers in the position that they now need to find an alternative basis on which to justify the renewal of the IBER. This is likely to prove to be a difficult task, and the consultation paper itself concentrates more on the applicability of Article 81(1) and (3) than on the desirability of a block exemption. It is disappointing that the Commission has not taken the opportunity to articulate a new rationale for the IBER or indeed for block exemptions generally and respondents to the consultation are therefore left in some uncertainty as to arguments that might find favor with the Commission in this regard.

The consultation paper requests respondents to provide economic evidence regarding the effects of non-renewal, but it is not clear that any such evidence will be readily available. The next sections consider more broadly what arguments may be

[6] Council Regulation (EC) No. 1534/91 of May 31, 1991 on the application of Article 85(3) to certain categories of agreements, decisions and concerted practices in the insurance sector, 1991 O.J. (L 143) 1.

[7] Report from the Commission to the Council and the European Parliament on the Operation of Commission Regulation No. 3932/92 concerning the application of Article 81 paragraph 3 of the Treaty to certain categories of agreements, decisions and concerted practices in the field of insurance, COM (99) 192 final, at para. 3.

capable of being presented for this purpose, but before doing so, review possible consequences for the industry as a whole should the IBER not be renewed.

The Application of the IBER

Four main types of agreement benefit from the IBER, namely those relating to:

- the sharing of data used for the calculation of the cost of covering certain risks and of the impact of particular circumstances (such as floods or other adverse weather conditions);
- the joint establishment and distribution of standard policy conditions;
- the establishment of insurance and reinsurance pools; and
- the establishment of common rules regarding the approval of security devices.

Attention among U.K. insurers has tended to focus on the application of the IBER to pools and to standard policy conditions and so this article offers only a brief comment with regard to the other two categories of agreement.

Security Devices

The easiest case to deal with relates to security devices as the exemption only covers agreements relating to the technical specifications for security devices which are not subject to harmonized technical requirements at community level and agreements regarding the specifications for installation and maintenance services. In its consultation paper, the Commission suggests that as there is harmonization in relation to security devices at community level, the IBER only applies to the installation and maintenance of security devices. It seems hard to imagine that there is sufficient interest at community

level to justify the continued existence of a block exemption for such a narrow category of agreement.

Data Sharing

In relation to data sharing, it is also unclear whether it will be possible to argue in favor of the continuation of the IBER in the light of the fairly extensive jurisprudence which exists regarding the acceptable limits of information exchange in sectors outside insurance. In its analysis, the Commission refers to a number of notifications made to it regarding this type of information exchange within the insurance sector which do not seem to have resulted in published decisions and it may be that a combination of published guidance from the Commission and analogies from information exchange cases in other sectors could permit insurers to assess the exemptability of this activity in the absence of a block exemption.

Pools

A rather different set of considerations applies to the prospective absence of a block exemption in relation to the creation of insurance and reinsurance pools. To some extent, a number of conditions already limit the potential usefulness of the exemption. The exemption relies on market share thresholds and the application of these depends in part on analyzing whether a risk qualifies as "new" for the purposes of the exemption. In addition, there exists a prohibition on group companies being a member of more than one pool operating on the same relevant market. The removal of the IBER in this area might

therefore have a benefit in that it would remove some of the obvious "strait jacketing" effects of the IBER.

Moreover, in its analysis of the treatment of pools under the IBER, the Commission itself notes that where pooling is necessary to allow insurers to provide a type of insurance that they could not provide alone, it cannot be considered anticompetitive, irrespective of market share.[8] This principle has been applied publicly in the case of the P&I Clubs[9] and the Commission notes that in 2001, it closed an investigation into certain nuclear insurance pools on the basis that there would be no nuclear liability insurance without the pools in question.[10] On the other hand, even if the Commission were to issue guidance based on its experience with the various unpublished cases which are referred to in the consultation paper, it seems plausible that the abolition of the IBER would limit the formation of otherwise beneficial pools.

It is suggested that in the absence of a block exemption defining the acceptable scope of pools, insurers are likely to face significant problems in forming pools which either meet the de minimis thresholds or the exemption criteria. Market share calculations are particularly difficult as, contrary to the position in many other sectors, capacity in the insurance sector is a constantly moving figure as insurers move in and out of different of classes of business according to economic cycles. However, it does also follow that if the

[8] IBER, *supra* note 1, at art. 7(1).

[9] Commission Decision of Apr. 12, 1999, Case IV/D-1/30.373—P&I Clubs, IGA & Case IV/D-1/37.143—P&I Clubs, Pooling Agreement, 1999 O.J. (L 125) 12.

[10] *See* Case COMP/37.363, Svenska Atomförsäkringspoolen; Case COMP/34.985, Pool Italiano Rischi Atomici; and Case COMP/34.558, Aseguradores Riesgos Nucleares.

IBER is to be retained in respect of pools, it would significantly increase the usefulness of the exemption if market share thresholds were eliminated.

Standard Policy Conditions

Similar considerations apply to the element of the IBER which applies to the establishment and distribution of standard policy conditions. This is a very widespread practice in a number of different member states and the preamble to the IBER itself recognizes the pro-competitive aspects of standard policy conditions in that they may, for example, facilitate market entry and permit easier price comparisons by customers who can compare "like with like".

However, in the absence of a block exemption, acute problems arise for insurers which have no obvious resolution and which may prevent their engaging in the beneficial activity of preparing standard terms of business. The application of both Articles 81(1) and 81(3) to the process of agreeing standard policy conditions is particularly obscure. The jurisprudence on standard policy conditions comprises either cases involving price recommendations or those in which the use of a policy wording is recommended by a trade association in both of which cases, a restriction of competition can easily be appreciated. However, there is little guidance on the common situation where trade associations issue standard policy conditions on a "non binding" basis. The Commission seems to regard such activities as falling within Article 81(1) (although it is worth noting that the U.K. Office of Fair Trading takes the view that non-binding recommendations

are less likely to fall within the U.K. equivalent of Article 81(1) than binding recommendations[11]).

Equally, the application of the exemption criteria is not straightforward. The consultation paper suggests that the Commission would not necessarily accept that even the distribution of non-binding, non-price related standard conditions would benefit from the application of Article 81(3) and references are made, for example, to the possible need for customers to be involved in a more transparent way in clause production. The Commission also reports various comments made by national competition authorities which might cast doubt on the availability of exemption for the seemingly innocuous activity of the distribution of standard policy conditions.[12] Abolition of the IBER could therefore limit the production of standard policy conditions, thus denying insurers and their customers the acknowledged benefits of this activity.

Justifying the Continuation of the IBER

It may be the case that the enactment or retention of a block exemption can be justified where there has been little case law to guide business in its analysis of the legal position in a particular sector. But, it seems unlikely that this could, on its own, be sufficient justification given that the general scheme of Article 81(1) and (3) requires self-assessment, regardless of whether there are helpful precedents on which to rely.

An alternative approach would be to consider whether the absence of a block exemption would impose demands on business which might hamper its ability to engage

[11] U.K. OFFICE OF FAIR TRADING, LAW GUIDELINE, TRADE ASSOCIATIONS, PROFESSIONS AND SELF-REGULATING 3.18 (Dec. 2004), *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft408.pdf

[12] Consultation Paper, *supra* note 2, at para. 21.

in pro-competitive behavior. As suggested earlier, this could be the case in a fragmented market such as the insurance market where there is a large number of smaller market participants and where an obligation to go through a full Article 81(1) and (3) analysis for each market sector in which they are involved is unreasonably onerous (in particular where the size of the market and the number of market participants may be difficult if not impossible to calculate with any accuracy and, moreover, may vary markedly from year to year). Equally, in relation to standard policy conditions, the multiplicity of wordings in use and the great variability in the extent of their use make the consistent application of Article 81 extremely difficult.

If, as the Commission apparently believes, the production of standard wordings and, in many cases, the formation of insurance pools are essentially benign activities, it should be possible to create a legal instrument which would validate these activities, leaving the normal application on the Treaty rules to prevent any potentially undesirable effects of such activity.

It remains to be seen whether and to what extent the Commission will give further guidance on the question of the basis on which the enactment or retention of block exemptions can be justified. Insurers and those in other industries which benefit from sector specific exemptions will be very interested to see how the Commission approaches this complex, but important, issue.