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THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

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On April 17, 2008, the European Commission ("Commission") launched a public consultation on the Insurance Block Exemption Regulation (Regulation 358/2003) (the "BER").¹ The ultimate purpose of the consultation is to determine whether there remain sufficient grounds to maintain a block exemption from the application of Article 81(1) EC of certain types of agreements in the insurance sector, on the BER's expiry on March 31, 2010. The Commission has invited comments on its Consultation Paper by July 17, 2008, after which the Commission will draft a report to be submitted to the European Parliament and Council before March 2009.

Based on the Commission's current stance, those companies which currently benefit from the BER and wish to see it or some alternative form of guidance remain in place will need to provide clear and convincing arguments for its retention.

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¹ 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.

Background

Many in the insurance industry will no doubt regard this consultation process as coming at a particularly unwanted time, as the industry has only just emerged from a detailed EU-wide Article 17 sector investigation into competition in the provision of business insurance. Despite this, the Commission has indicated that it intends to contact directly industry players, national regulatory and competition authorities, and consumer groups, against the background that in the Article 17 investigation the Commission did not obtain sufficient evidence to be persuaded that the BER should be retained.

The Insurance BER: An Outdated Tool

Since 1992, the insurance industry has benefited from a specific block exemption from Article 81(1) EC in respect of establishment of standard policy conditions, exchange of certain statistical information, the creation of insurance pools, and specification of security devices. However, it is no secret that the Commission is seriously questioning whether the insurance sector really does still need a sector-specific exemption from the EU competition rules, as the current BER reaches the end of its lifetime. In a public hearing in Brussels during the Article 17 investigation, the EC Commissioner for Competition Neelie Kroes had already indicated she was not persuaded that a renewal was justified. Part of the reason for this is the way in which EC competition law is enforced following the 2004 "modernisation" process, which among other things removed the Article 81 EC notification system. Accordingly, in the context of the gradual abolition of industry-specific block exemptions, Commission officials

claim that block exemptions were never specifically designed for the benefit of their recipients, but to ease the workload on the Commission in dealing with innocuous notifications for clearance under Article 81(1) EC and/or exemption under Article 81(3) EC under the old system.

Yet, according to the many responses to the European Commission's recent in depth sector inquiry into competition in Business Insurance (the "Sector Inquiry"), the BER provides valuable guidance to the insurance industry. Indeed, in the final report on the Sector Inquiry ("Final Report"), the Commission concluded that evidence suggested that current practices covered by the BER are in most cases unproblematic or even desirable in the business insurance market. However, the Commission made a clear distinction between the desirability of the forms of cooperation covered by the BER, and the desirability of the BER itself, noting also that the BER may be too broad, covering some practices which may distort competition. Unofficially, the view in some circles seems to be that the BER gave insurers too much "free space", with insurers having applied the BER too liberally to their practices.

Is Further Guidance Required?

Whatever the truth or otherwise in such an allegation, if the BER is not to be renewed, and this is not a foregone conclusion, many in the insurance industry will have cause to complain that its withdrawal, together with the sometimes unclear positions expressed in Final Report and other ambiguous policy positions, will leave the industry in a state of significant legal uncertainty. The Commission's response to such charges would

no doubt be that the focus of the consultation is on the future of the BER, not on the merits or otherwise of particular practices covered by the BER, or indeed the application of competition law generally within the insurance sector.

On the other hand, it seems that there are arguments for the Commission to consider some kind of informal guidance at least. First, the Final Report in the Commission's Sector Inquiry contains, in respect of some issues, only "provisional" conclusions on the application of Article 81 EC. Second, a cursory glance through the Consultation Paper reveals a number of conflicting policy statements from various sources. For example, in the section dealing with pools, compare the statement: "when it is not objectively necessary for insurers to group together in order to cover a particular risk, pools are prohibited," with "[p]ools are permitted when they are de minimis. In this respect, market definition is of primary importance."

A third argument for considering some form of non-binding guidance is the nature of the insurance function, which exhibits unique characteristics. One of the key differences between the provision of insurance and that of most other goods and services is that the cost of provision is not known until after the event. These costs can be substantial, and in the absence of a clear understanding of the Commission's attitude towards pools, insurers may be reluctant to form pools in circumstances that might be appropriate from an efficiency perspective.

Of course, if the BER is not renewed, practices previously falling under the BER would not automatically be prohibited; companies would instead be required to assess for

themselves whether their agreements and practices are compatible with Article 81 EC. There seems little doubt that the uncertainty which may follow an absence of clear guidance on key substantive matters arising both from the Final Report as well as the BER has the potential to add cost and inefficiency to the insurance industry as a whole, even though there are other generic competition block exemptions that might in principle be applicable to certain practices.