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Is a Safe Harbour for Insurance Still Justified?

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On April 17, 2008, the European Commission launched a public consultation (the Consultation)¹ to examine the functioning of the insurance block exemption regulation (the Block Exemption).² The replies to the Consultation will enable the Commission to determine whether or not to renew the Block Exemption which will expire automatically on March 31, 2010. Following closure of the Consultation on July 17, 2008, the Commission will prepare a report for the European Parliament and Council by March 2009 which will contain any proposals for amendment.³

ORIGINAL JUSTIFICATION FOR THE BLOCK EXEMPTION

The original objective and key justification of the Block Exemption was to facilitate the Commission's task in view of the large number of individual notifications being received prior to modernization of the EC competition rules by Council Regulation (EC) No. 1/2003. However, modernization has now abolished the system of individual

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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.

² 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.

³ The report is required by Council Regulation (EC) No. 1534/91.

notifications and companies must self-assess whether their agreements infringe Article 81(1) of the EC Treaty and, if so, whether they meet the exemption from prohibition criteria of Article 81(3).

As the Consultation points out, only a few sectors currently benefit from a sector specific block exemption regulation and in other sectors block exemptions have expired and not been renewed.⁴ The Commission now needs to consider whether there are sufficient grounds to continue to declare by regulation, Article 81(3) applicable to certain categories of agreements in the insurance sector.

AGREEMENTS CURRENTLY WITHIN THE SAFE HARBOUR

The Block Exemption provides (subject to conditions) a safe harbour from the prohibition of Article 81(1) for certain categories of agreements, decisions, and concerted practices⁵ in the insurance sector which relate to:

- joint calculations, tables, and studies:
 - the joint calculation of the average cost of risk cover for a specified risk (pure premiums), and
 - the joint establishment and distribution of mortality tables and tables showing the frequency of illness, accident, and invalidity
- standard policy conditions and models:
 - the joint carrying out of studies on the probable impact of external factors on the frequency or scale of future claims for a given risk and the profitability of investment, and
 - the joint establishment and distribution of non-binding standard policy conditions for direct insurance and non-binding models on profits

⁴ This is the case, for example, in the maritime and air transport sectors.

⁵ In this article, the term “agreement” also encompasses decisions and concerted practices.

- pools:
 - the common coverage of certain types of risks (pools)
- security devices and safety equipment:
 - the establishment, recognition, and distribution of technical specifications, rules, or codes of practice concerning security devices and procedures for assessing and approving the compliance of security devices with such specifications, rules, or codes of practice.

DOES THE INSURANCE SECTOR DIFFER SUFFICIENTLY FROM OTHER SECTORS TO JUSTIFY A BLOCK EXEMPTION?

One of the fundamental questions the Commission will consider during its review of the Block Exemption is whether there are aspects of the insurance sector that justify sector specific rules to ensure a safe harbour is in place from the prohibition in Article 81(1). Commenting on this issue, some have referred to the very large range of geographic markets across the European Union, the differing degrees of demand and supply across insurance products and Member States, and the differing levels of development of the insurance sector in different countries. Arguments made in favor of renewal of the Block Exemption include the difficulty to compete small insurance companies may face⁶ in the absence of the Block Exemption, rising administrative burdens and costs for insurance providers, possible higher prices for insurance products, and a consequential effect on the rest of the economy. These are all issues the Commission will consider in its review as well as other relevant economic circumstances.

⁶ For example, one of the arguments is that small insurers may need to be able to share information with other insurers in order to use the combined claims experience to calculate risk.

Another related and key issue is how the insurance sector has changed since the current Block Exemption came into force in 2003. There have been many changes to the economic landscape of the European Union since then including the entry of 12 new Member States which significantly adds to the complexity of the Commission's task compared to its review of the previous block exemption regulation. Key questions are how changes in the insurance sector have affected the use of the forms of cooperation under the Block Exemption and whether categories of agreement currently block exempted continue to be pro-competitive and beneficial to consumers.

EVIDENCE REQUIRED AND SPECIFIC AREAS OF INTEREST

In the Consultation Paper, the Commission encouraged interested parties from across the European Union to submit their views and where possible support them with evidence. Areas of specific interest are:

- whether, where, and why the Block Exemption is being used;
- whether it gives rise to any anticompetitive effects which harm consumers; and
- whether non-renewal of the Block Exemption would lead to a heavier burden on supervisory authorities.

It may be that some Member States' insurance markets are more competitive than others and this could affect the answers to questions on how the Block Exemption is functioning.

The Consultation contains a number of questions targeted at stakeholders in all Member States and who may use the forms of cooperation covered by the Block Exemption. One of the reasons for these questions is to facilitate stakeholders' thinking

about the kinds of evidence the Commission is looking for in order to complete its analysis. Considering, for instance, some of those questions:

- one that comes up in each of the sections relates to entry⁷ and asks how entry was affected, if at all, by the use of the particular forms of cooperation in the Block Exemption;
- question 5, in relation to agreements on standard policy conditions, focuses on impact by examining what effect such cooperation under the Block Exemption has on the variety of insurance policies available;
- question 4 in the section on pools relates to possible improvements to the Block Exemption; and
- question 6 also in the pools section relates to how cross-border competition may be affected by the Block Exemption.

Although the questions are broadly focused on a range of effects and issues, it is not expected that respondents answer every question, but rather that they focus on the questions relevant to their particular activities and interests in the Member States in which they are active in addition to providing any other comments on their experiences of the effects of the Block Exemption. The kinds of evidence that best support particular comments or claims is of course a matter for the party making the claim but may range from internal documents to independent surveys, reports, or other supporting material.

On the review of the previous Block Exemption, relatively few comments were received during the Commission's consultation. Bearing this in mind, for the current review, in order to facilitate replies from the maximum range and number of stakeholders, the Commission published the Consultation online in three languages. It

⁷ Consultation, *supra* note 1, at 9, 12 & 17.

also published the press release launching the Consultation in all of the EU's official languages. Furthermore, the Commission has written separately to consumer organizations, supervisory authorities, and certain industry associations with targeted questionnaires. It is also working closely with the European Competition Network (ECN) on this review and has already incorporated in the Consultation the views of national competition authorities (NCAs) after an initial ECN consultation in January 2008.

Once the Commission has obtained the complete factual matrix, it will then be in a position to analyze how the Block Exemption is working and what effect it is having on competition as well as on consumers across different product and geographic markets and the entire European Union.

CONFUSION BETWEEN FORMS OF COOPERATION AND THE LEGAL INSTRUMENT

During the Commission's sector inquiry into business insurance on which the Commission published its final report on September 25, 2007,⁸ a number of comments were made about the Block Exemption. However, these comments failed to distinguish between the necessity of the Block Exemption itself as a legal instrument and the necessity of the forms of agreement allowed under the Block Exemption. This is a key issue which respondents have been encouraged to take into account when replying to the Consultation.

Recital 9 states that the Block Exemption should be "limited to those agreements for which it can be assumed with sufficient certainty satisfy the conditions of Article

⁸ European Commission, Financial services, Sector Inquiries > Business insurance, at http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/business.html (last visited Jul. 15, 2008).

81(3).” It is likely that most of the forms of cooperation currently covered by the Block Exemption would, upon individual analysis, continue to meet the exemption criteria of Article 81(3) even in the absence of the Block Exemption’s safe harbour. However, it is possible, and this is one of the questions the Commission is seeking to answer during its review, that some practices lying within that safe harbour are now unduly restricting or distorting competition and may no longer meet the Article 81(3) conditions.

AN OPPORTUNITY FOR STAKEHOLDERS TO SUBSTANTIATE COMMENTS

Some commentators have referred to the burden the Consultation imposes on stakeholders, in particular following the Commission’s sector inquiry completed last year. However, on the launch of the Consultation, the European Commission’s Competition Commissioner stated that:

Sector specific competition regulations are exceptional legal instruments. If there are to be rules for a particular sector, I need to be convinced that they are justified in terms of bringing real benefits to competition and to consumers.⁹

Arguments such as many of those that were made during the sector inquiry and in other fora (e.g., that the forms of cooperation currently block exempted may be abandoned if the Block Exemption is not renewed) have been largely unsubstantiated prior to this review. The Commission, therefore, has encouraged respondents to support their comments with evidence when replying to the Consultation so as to enable the Commission to assess all facts and evidence before reaching its conclusion on the future of the Block Exemption.

⁹ Press Release, European Commission, Antitrust: Commission examines use of Insurance Block Exemption Regulation (Apr. 17, 2008), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/596&format=HTML&aged=0&language=EN&guiLanguage=en>.

TO RENEW OR NOT TO RENEW: WHAT HAPPENS NEXT?

A legal assessment is currently required for each agreement, decision, or concerted practice in order to determine whether it falls within the safe harbour of the Block Exemption. If the Block Exemption is not renewed, a similar legal assessment would be necessary in order to analyze whether Article 81(1) applies and, if so, whether the exemption criteria of Article 81(3) are met. Such an assessment is currently necessary in all other sectors that do not benefit from a Block Exemption so this requirement in itself would not be unique to the insurance sector. Consistent application of competition rules in the insurance sector following expiry of the Block Exemption and in the event of non-renewal, would be supported through the ECN which facilitates cooperation between NCAs and the Commission.

If the Block Exemption were to be renewed, either in its current or in an amended form, the Commission will consult again on a draft regulation. If, however, it is decided that the Block Exemption will not be renewed, the Commission has stated that it will publish a Communication to that effect during 2009. This should allow stakeholders time to make any adjustments prior to expiry of the Block Exemption in March 2010.