

HEIGHTENED SCRUTINY

The EU's block exemption ruling is likely to be renewed – for some forms of co-operation. But there's still a chance for the industry to have its say before the new ruling becomes law, write **Guy Soussan, Yves Botteman, Angus Rodger and Gavin Coull**.



For the past two decades, the EU insurance industry has enjoyed the benefits of the Block Exemption Regulation (BER), an anti-trust regime that allowed it to enter into various forms of co-operation that otherwise fell under general EU anti-trust law.

In the aftermath of an EU-wide insurance inquiry in 2007, it was thought that the European Commission would not renew the exemption and that insurers would come under the general scope of EU competition rules.

Last year the Commission began consultations with the industry and stakeholders, and indicated that it had no grounds for extending the BER beyond its expiry date. But on 24 March, when it reported its preliminary findings to the European Parliament, it said that it has now found fresh evidence to support renewing the BER for two forms of co-operation: joint calculations, tables and studies relating to the cost of coverage, and co-(re)insurance pools. Its finding is based largely on comments and concern raised by the industry, in particular by large commercial buyers.

However, co-operation on standard policy conditions (SPCs) and standard setting for security devices will not be covered by the next BER as the Commission says neither is specific to insurance.

The report is structured around two key questions. Is the co-operation reviewed specific or special to the insurance industry and, if so, which legal instrument would best protect and foster co-operation among (re)insurers?

SETTING THE SECTOR APART

Calculation of risk is a key issue in pricing insurance and reinsurance products. According to the report, the need for co-operation on the calculation of pure premiums sets the insurance sector apart from other industries and, as such, it should continue to be covered by a block exemption.

When the industry co-operates within the

boundaries of the BER, members have to provide access to jointly generated data to potential new entrants on fair and non-discriminatory terms. Relying heavily on comments of large commercial buyers, the report finds that, without a BER, large insurers may no longer have the incentive to co-operate with smaller players or new entrants. Hence, renewal is intended to avoid risk of anti-competitive exclusion or market abuse.

Solvency II is another reason to extend the BER. The Commission finally recognises that Solvency II encourages insurers to exchange information to improve management of their risk exposure.

The report suggests that the scope and conditions for exemption are likely to be amended. The new exemption could apply to a narrower list of risks (for example, mortality tables may no longer be included) and could be made subject to consumer organisations or private individuals obtaining access to the data exchanged.

Next steps

The European Commission report supports partial renewal of the BER – good news for the industry. Insurers and other stakeholders must now comment on the report and provide input on conditions for exemption under the new BER in relation to information exchange and (re)insurance pools.

The Commission is due to hold a public hearing on 2 June to allow the industry and stakeholders to discuss the future shape of the block exemption. It is likely that the industry will challenge the Commission's finding that SPCs are not specific to insurance and, hence, that a BER is no longer needed. At a minimum, insurers and stakeholders should insist that the Commission's future policy on SPCs be clarified.

Whichever form the BER will ultimately take, the industry is put on notice that an exemption will most likely be granted under stricter conditions and, by the same token, heightened scrutiny.



From top

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INSURANCE POOLS

The Commission recognises the need to pool capacity for certain types of risks (for example, nuclear and environmental risks) without which coverage would not be available.

However, the Commission is expected to take a tougher stance on pools. For example, the report asserts that the BER has been inappropriately used as a “blanket” licence to pool, without members committing the time and resources needed to verify compliance. As a result, (re)insurance companies believed that they were protected by the BER, while, in fact, the pool did not comply with the safe harbour requirements and hence, required careful assessment.

The report also says that the market share test applying to pools that cover existing risks should be re-evaluated. At present it is calculated on the basis of the premiums charged solely by the pool. The Commission says that the premiums each participant charges for policies outside the pool that cover the same risks should also be taken into account.

It has not given any indications if the market share ceiling will be revised (upwards or downwards). The proposed new calculation method – consistent with general competition rules – would inevitably cause pools to breach the ceiling more often, thereby putting them outside the protection of the BER. As a result, it is likely that participating insurers will need to do more self-assessment.

The concepts of “new risk” and “relevant markets” have been a source of confusion. The Commission rejected industry calls for a more flexible approach to new risks — for example to include pollution risks. It is likely that the Commission will maintain a restrictive view while clarifying the definition of a so-called new risk. For market definition, it most likely will use the standard methodology for defining

the relevant market and will explain how existing principles apply to insurance.

So, the Commission says that it will significantly reshape the exemption on co-(re)insurance pools to clarify the existing framework and to provide extra guidance to insurers on self-assessment. It expects that insurers will have to commit more time and resources to ensure that the organisation, structure and conditions under which pools are created are consistent with EC competition rules.

As to security devices, there is a broad recognition that standard setting is not peculiar to insurance and that existing rules on standard setting should fully apply.

The report concludes that renewal of the block exemption is unnecessary for SPCs and standard setting for security devices. SPCs are used in banking and there is no evidence that the lack of a block exemption has reduced co-operation in the sector.

The absence of a block exemption in those two areas means industry members will have to self-assess the compatibility of their co-operation with general competition rules. While it is expected that the current BER will continue to have some value, the industry should press the Commission to provide guidance on compliance.

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