

# Insurance Day

www.insuranceday.com

The best insurance coverage - every day

## European Commission is undecided on BER future

INSURANCE industry representatives and stakeholders met at a public hearing in Brussels on Tuesday to discuss the European Commission's March 2009 report on the functioning of the insurance block exemption regulation (BER).

The existing BER is due to expire on March 31, 2010. In its initial report published in March, the commission indicated it was inclined to renew the BER but to reduce its scope to cover:

- Agreements related to joint calculations, tables and studies; and
- Agreements setting up co-insurance and reinsurance pools (although with a clear message that the scope of the block exemption for pools was likely to be varied).

In opening Tuesday's debate, European competition commissioner, Neelie Kroes, expressed concern about the operation of some pools, saying "we think that there are some alarming practices concerning pools" and emphasising that if this aspect of the BER was renewed it was likely that there would be substantial changes to the scope of the BER and the possibility of enforcement action by the commission.

Kroes also confirmed the commission was minded to remove from the scope of the BER:

- Agreements relating to development and distribution of standard policy conditions for direct insurance; and
- Agreements on technical specifications, rules and codes of practice concerning security devices.

Guy Soussan and Yves Botteman, attorneys in the Brussels office of Steptoe & Johnson LLP, said: "Regarding joint calculations and studies, the commission is now convinced that the BER is necessary not only for smaller players and new entrants but also for large insurers, which do not always have robust and meaningful statistical data on all insurance segments."

"Information exchange is a tool to create a level playing field which increases competition and ultimately lowers premiums for consumers. The commission also understands that access to high-quality data will be key to meeting the regulatory requirements of Solvency II. Accordingly, the scope of the current exemption should not be significantly amended. The industry resisted any suggestion that a distinct regime should be applied to 'high-frequency' risks."

"On standard policy conditions [SPCs], the commission remains unmoved by arguments that co-operation on SPCs is

unique and should continue to benefit from exemption under the BER. The industry call for legal certainty was heard in as much as general guidance on forms of co-operation awaited imminently from the commission will now include a specific section on SPCs. While this will still fall short of a full exemption, any guidelines on SPCs should mirror existing criteria of the BER.

"On pools, the industry received confirmation that a large number of pools do not need a BER because they do not raise any competition concerns. The commission is ready to renew the BER for other pools but under stricter conditions and further rules on the definition of new risks, the relevant market and market share thresholds. Above all, pools are put on notice that they will need to conduct a fresh compliance review under the future rules since the commission has warned of enforcement action in this area."

"While the commission's position on the future scope of the BER is largely settled, it remains to be seen how the draft regulation and accompanying guidelines will reflect the industry call for legal certainty. The commission now needs to deliver a clear

legislative package reflecting long-standing and valuable co-operation in the sector."

Lesley Ainsworth, a partner at Lovells LLP, agreed, saying: "Some of the most interesting debate at the hearing on Tuesday focused on the issue of pools. Commission staff repeated Kroes' warning that pool participants should not assume they can benefit from the protection of the existing or any revised BER without a full legal analysis."

"Other contributors were broadly agreed that pools were vital in many situations and that the BER encouraged such pooling, although views varied widely on how market shares should be determined and built into the BER criteria."

"In relation to information exchanges and standard policy conditions, representatives generally welcomed the commission's factual findings, if not its conclusions on what this should mean for the BER. It was agreed that exchange of statistical data was pro-competitive and should continue to benefit from BER protection."

"While standard policy conditions were agreed to be valuable, there was discussion of whether they still need BER protection or

whether, as the commission has suggested, parties could self-assess the impact of adopting them as they would in any other industry."

"In relation to security devices, representatives of industry bodies continued to disagree with the commission's findings that there were negative effects of the BER's provisions on the single market and the consequent development of differing national standards."

David Strang, a partner at Barlow Lyde & Gilbert LLP, warned: "Kroes set the tone for the public hearing into the future of the insurance BER by declaring that as far as she was concerned, she was opposed to the continuance of the BER, her instinct being to 'trust the market'."

"While this negative perception of the BER was challenged by many of the participants at the hearing, the commission's mind seems to be firmly made up on the essential aspects of reform."

"In relation to standard policy conditions, the commission remains wedded to the view that not only is an exemption not needed for this kind of co-operation, but that co-operation will continue even in the absence of the exemption. This is contrary to evidence submitted in the public consultation and by one of the panel members: Robert Gillies, of the Lloyd's Market Association."

"For better or worse, the commission seems to favour the review of consumer organisations that the production of standard conditions can be positively harmful and should not automatically be exempted."

"Two clear messages have emerged from the hearing. First, the burden of compliance is going to shift decisively towards the insurance sector. Second, basing itself perhaps on the interventionist German competition authorities, the commission is signalling an intention to enforce the law much more actively for example, in respect of pools which do not meet the exemption criteria."

"While a short window remains open for further representations, insurers should be bracing themselves for the new world which will come into being when the current regulation expires in March 2010."

The commission will now consider the points made on Tuesday before deciding whether to renew the BER in whole or in part. If any part of the BER is to be renewed, the commission will begin its internal drafting process within the next few weeks. It will then publish a draft regulation, probably this autumn, for a round of public consultation on the precise scope of any future insurance block exemption.



**'We think that there are some alarming practices concerning pools'**

*Neelie Kroes, European Commission*