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Industry reacts to the EC's proposals for BER changes

ON MONDAY the European Commission published its proposed replacement for the insurance block exemption regulation (BER), due to expire on March 31.

Lawyers at Lovells say the draft closely follows the commission's position outlined in its initial report published in March and at a public hearing in June this year. The commission proposes to renew the BER but to reduce its scope to cover only:

- Agreements related to joint compilations, tables and studies of statistical data; and
- Agreements setting up co-insurance and co-reinsurance pools (with some significant changes to the existing provisions).

The new regulation would no longer cover the other two classes of agreement relating to development and distribution of standard policy conditions for direct insurance and standard profit models for life insurance; and on technical specifications, rules and codes of practice concerning security devices.

Removing such agreements from the protection of the BER does not mean that these sorts of agreements would necessarily infringe the anti-competitive agreements in article 81 EC in future. However, it will be up to companies to self-assess whether exemption under article 81(3) was likely to be available to them.

On co-insurance and co-reinsurance pools, there is explicit recognition that some pools will not involve a restriction of competition under article 81(1), and so will not even need to rely on the block exemption. These are pools covering risks for which there might otherwise be insufficient cover in the market.

For other pools, the core exemption in the existing BER remains substantially the same in the new draft. Pools for new risks will be block exempted for their first three years. In a positive development for pool participants, the commission has expanded the definition of new risks so it would include not only risks that did not exist before but also, in exceptional circumstances, risks that have changed so materially it is not possible to know in advance what capacity is necessary.

Risks or pools that have existed for more than three years may still benefit from block exemption provided the pool falls below certain market share thresholds. The level of these thresholds has stayed the same, at 20% (for co-insurance pools) or 25% (for co-reinsurance pools), with some increase in flexibility for pools briefly increasing their share above these levels.

However, more significantly, the commission has changed the way it calculates such market shares. Under the existing BER, the commission counts only the market share of the pool itself. The new regulation will also take into account any activities of the pool participants in the market outside the pool.

This proposed change has been broadly opposed by the industry. The effect may be to take outside the block exemption some small pools with members that are also active in the same market on their own account. This does not mean such pools will be automatically in breach of article 81, but they are more likely to be so.

The draft regulation also varies slightly the secondary conditions for block exemption of pools. The requirement for participants to be able to leave on one year's notice is replaced by a "reasonable period of notice".

Finally, the new definition of pools makes clear the block exemption does not cover ad hoc co-insurance or co-reinsurance on a subscription market between a leader and one or more followers.

Lesley Ainsworth, partner, competition and European Union law practice, Lovells LLP, says: "The main issue is the change to the treatment of pools. The change to the market share calculation is consistent with the commission's approach in other areas. Pool participants will, however, need to review how they may be affected."

The comment about distinction between pools and ad hoc co-insurance is also an interesting point, she says. "This clarification creates a distinction between pools that are block exempted [where pool members can agree on premium levels for risks covered through the pool] and ad hoc co-insurance and co-reinsurance placed on the subscription market.

"The commission's 2007 sector report on business insurance indicated concerns about the practice of the leader's premium being disclosed to the following market and consequently 'harmonised premiums' – an issue that remains to be resolved but which this draft puts clearly outside the scope of the block exemption."

Guy Soussan and Yves Botteman, of Steptoe & Johnson's insurance and competition practice, add: "While renewal of current exemption is welcome for pools, the commission proposal may be of limited practical significance if most pools operating on the market fail the exemption test.

"The commission makes clear that ad hoc co(re)insur-

ance is excluded from the scope of the exemption. This leaves the allegation of premium alignment between the lead insurers and the followers on the subscription market largely unsettled despite several industry initiatives to introduce transparency vis-à-vis customers.

"The circumstances in which pools will be in a position to claim the benefit of a BER will be fairly limited for the following reasons:

a) The commission maintains its narrow approach that new risks are not subject to a market share test during an initial period of three years. In the definition of new risks however, the commission seems to be prepared but only exceptionally to cover existing risks whose nature has changed dramatically. It remains to be seen whether this definition will capture risks whose frequency and severity are increasing, eg, climate change. In addition, the three-year exemption period seems unduly short for participants to appraise the emergence of alternative capacity and to be subjected to a market share threshold that will inexorably bring them out of the scope of the exemption.

b) For all other risks, the commission will include the turnover achieved by the members outside the pool in the same insurance market. As a result, we should expect

existing pools exceeding the threshold more often than under the old BER.

"In many cases, pools will then fall outside the regime of the exemption. It does not mean that they are automatically illegal. Their compatibility will need to be assessed under general competition rules.

"The individual review will focus on whether any restricting effect resulting from the operation of the pool is outweighed by overriding efficiencies inherent to the pool. In this, and in the absence of further guidance, it is feared pools will receive limited comfort from the commission and national competition authorities."

Meanwhile, lawyers at CMS Cameron McKenna say: "While the industry may welcome the renewal of protection for pools and information exchange, the commission has emphasised it intends to be 'tougher on monitoring and enforcement'.

"Comments on the commission's revised draft block exemption for the insurance sector are requested by November 30. The commission has noted in particular it seeks comments on the expanded definition of new risks, the anticipated functioning of the exemption for pools and the public security exception for access to results of information exchanged."

See the Barlow Lyde & Gilbert column for more reaction



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