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BER revision means pools under pressure to comply

The news last week the European Commission is to change the rules on the insurance block exemption regulation came as little surprise, as legal commentators reveal

ON MARCH 24, the European Commission adopted a new regulation that exempts certain types of agreements in the insurance sector from the European Union's (EU) general prohibition of practices restrictive of competition.

The new block exemption regulation (BER), which will come into force today, renews two of the four categories of agreements exempted at present – namely joint compilations, tables and studies, and co(re)insurance pools – with some amendments. Certain exchanges of information can be justified to allow insurers to assess risks accurately. Pooling is also important to ensure all risks can be covered. These two types of agreements justify a block exemption. Other types of co-operation may also be legal but it will be for insurers to self-assess they comply with the general competition rules. This new regulation will be valid until March 31, 2017.

Speaking as the new rules were announced, Joaquín Almunia, commission vice-president in charge of competition policy, said: "The block exemption continues to be justified for pools and certain types of information exchange necessary for the industry to be able to carry out its business. This is in the interest of consumers and of the economy as a whole."

"The commission, together with the national competition authorities, will see to it that the industry does not use the exemption as a blanket protection and will enforce competition rules where and whenever necessary."

Reaction

Insurers could face increased compliance costs in relation to data sharing and pools following the adoption by the commission of the new BER, Adrian Magnus, a partner in the EU and competition group, and David McCarthy, an associate director in the insurance group, of Berwin Leighton Paisner LLP, warned.

The new BER exempts two of the four categories of agreements exempted and exemption continues for insurers sharing data to help each other assess new risks.

The commission believes certain such exchanges are important for the insurance sector because large amounts of data are required in order for companies to assess the costs of covering risks. It also believes access to such data is crucial to facilitate the entry of new or foreign market players.

The key changes to this exemption are a new right of access for customer and consumer organisations to the results of the information

exchange, except where issues of public security apply, and clarification of the scope of the exchange of information covered by the BER.

The BER also exempts, subject to certain strict conditions, insurance pools that cover either "new" risks or, if below certain market share thresholds, risks that are not "new". Key changes to this exemption are a change to the approach to market share calculation, so not only is gross premium income earned within the pool by the participating undertakings taken into account, but also gross premium income earned outside the pool.

There has also been a broadening of the definition of "new risks" to cover risks whose nature has changed so materially it is not possible to know in advance what subscription capacity is necessary to cover such a risk. The limits on market share remain 20% for insurance and 25% for reinsurance.

Activities no longer specifically exempted are the writing of model contract terms and setting device standards. Those activities will be exempted only if they meet the usual criteria for individual exemption under art 101(3) of the treaty – effectively, the agreement's benefits (particularly for consumers) must outweigh its negative impact on competition.

The new BER will last for five years. The commission has granted existing pools a six-month reprieve until October, so insurers can determine if they still qualify.

Meanwhile, Mark Tricker, a competition law partner at Norton Rose LLP, commented: "The new block exemption significantly reduces the extent to which the insurance industry is sheltered from the application of normal competition rules. The reduction in scope follows on from the European Commission's sector inquiry. I think the message from the commission is clear: insurance companies need to ensure they are compliant with competition laws and they cannot just assume the block exemption provides comfort."

"If history is anything to go by, when the European Commission takes a close look at an industry – for example, energy or pharmaceuticals – enforcement action for any breach of the competition rules is quick to follow."

Stephen Smith, a senior associate in the London antitrust and competition practice at Mayer Brown, said: "The new BER restricts to a considerable extent the types of co-operation arrangements among insurers and reinsurers that are automatically exempt from competition rules prohibiting anti-competitive agreements. As a result, companies will

need to increase the time and resources spent to assess the extent to which their arrangements comply with competition law."

"Among the amendments, changes to the rules on insurance and reinsurance pools that do not cover new risks are likely to mean some pools that were previously exempted will no longer fall within the BER and will need to be assessed in accordance with the stricter general provisions of art 101(3) of the treaty."

"Conversely, pools that are set up to provide innovative policies for risks (ie, those for which there would otherwise be insufficient cover in the absence of a pool) are likely to benefit. In practice, this may offer opportunities provided companies objectively assess whether the risk covered by the pool can genuinely be defined as a new risk. In general, one consequence of the new rules will be to bring the insurance sector more in line with competition rules in general as the scope and scale of benefits under BER has been reduced considerably."

Guy Soussan and Yves Botteman, of Step-toe & Johnson LLP, said: "The new regulation no longer protects standard policy conditions [SPCs] from antitrust scrutiny. SPCs are to a large extent devised by trade associations and are a valuable tool for insurers and risk managers. Without this 'safe harbour', companies participating in drawing up of SPCs will have to have to ensure that they comply with the new rules. Those merely using them will have to be attentive to the conditions under which such SPCs are made available to them."

"The commission clarifies the exemption does not apply to the subscription market, but falls short of providing any view on how the industry ought to deal with its concern regarding premium alignment."

"Before the adoption of the BER, the commission indicated pools did not do enough to ensure compliance with the applicable criteria. The renewed exemption for pools indicates a tougher stance as it will now only be available under stricter market share tests and conditions. The commission is likely to maintain its interest in pooling arrangements and companies participating in pools should review their practices closely."



European Commission: BER renewal likely to see tougher stance on compliance

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This article first appeared in *Insurance Day* and can also be found at www.IDnewscentre.com