

## NEWSSTAND

### **EU: European Commission Adopts New Competition Block Exemption Regulation for the Insurance Sector**

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On 24 March 2010, the European Commission (the Commission) adopted its long-awaited new block exemption regulation for the insurance sector, which will come into force on 1 April 2010. Block exemptions are an instrument of European competition law that remove certain categories of agreement from the prohibition of anticompetitive agreements set out in Article 101 of the Treaty on the Functioning of the European Union (previously Article 81 EC Treaty).

Agreements caught by the prohibition in Article 101 are void and unenforceable. In the most serious cases, parties to an infringing agreement can be fined substantial sums or be sued by parties harmed by the agreement. While restrictive agreements falling outside a block exemption may still be exempt from the prohibition if they deliver specific economic benefits, being covered by a block exemption gives greater certainty over an agreement's legality and hence enforceability. However, the protection offered by a block exemption can come at a cost, in terms of loss of commercial flexibility, as the Commission tends to use such regulations to influence the terms of individual contracts, by tightly specifying the conditions under which the exemption is available.

The current insurance block exemption, which dates from 2003 and expires on 31 March 2010, exempts agreements relating to the compilation and exchange of statistical information for the calculation of risks; the creation and operation of insurance pools; the establishment of standard policy conditions; and specifications for security devices.

As anticipated by the draft regulation, published by the Commission on 5 October 2009 ([see our previous blog here](#)), the new regulation reduces the categories of agreements covered by the exemption from four to two.

Specifically, from 1 April the block exemption will only cover agreements relating to:

- the joint compilation and exchange of information necessary for the calculation of the average cost of covering a specified risk in the past; the construction of tables relating to risks associated with death, illness, accident or invalidity; or joint studies relating to future risks or investment (Article 2); and
- the creation and operation of co-insurance and co-reinsurance pools (Article 5).

Agreements relating to the establishment of standard policy conditions and to specifications for security devices will therefore no longer be block-exempted. Such agreements may nevertheless be individually exemptable, if countervailing benefits can be demonstrated. It is notable that the Commission plans to provide guidance on the assessment of such agreements when it publishes its new Guidelines on horizontal cooperation agreements. Of course, any such agreements may also fall outside the prohibition in Article 101 altogether, if they do not give rise to an appreciable restriction of competition in the first place.

The new regulation makes some other changes, including:

- Two new conditions for exemption of information exchange agreements have been introduced: namely the information must not contain any indication of the level of commercial premiums and, subject to public security considerations, should be made available on affordable and equal terms to consumer and customer groups which request them *'in specific and precise terms for a duly justified reason'*. *In the draft regulation, insurance companies were required to make the information available to 'any interested party such as consumer organisations which requests a copy of them'*. The final wording is substantially narrower than that originally proposed in the draft.
- A number of changes have been introduced in relation to the application of the block exemption to insurance pools:
  - A new definition of pools clarifies that the block exemption does not cover ad-hoc co-insurance or co-reinsurance involving a leader and followers in the subscription market (potentially linked to concerns that the Commission expressed in its business insurance report over the operation of subscription markets).
  - The definition of 'new risks' has been widened to include any risk whose nature, objectively, has changed so materially that it is impossible to know in advance what subscription capacity is needed to cover the risk. Under the new regulation, an exemption is granted to pooling arrangements created for the co-insurance or co-reinsurance exclusively of new risks, for the first three years of their existence.
  - While the market share thresholds below which pools that have existed for over three years may benefit from the block exemption have remained the same, the Commission has changed the way in which the combined market share of the members of a pool is calculated. Under the current regime, only the combined market share within the pool was taken into account. From 1 April, members of a pool will need to consider their combined market share both inside and outside of the pool. In contrast with the draft regulation, the new regulation sets out precisely what this entails. Account must be taken of the market share of each member within the pool itself, the market share each member has within another pool on the same relevant market, and the market share held by each member on the same relevant market outside the pool.

- There has been an increase in the market share bands which determine the grace period, during which the exemption continues to apply, applicable to members of a pool covering non-new risks whose aggregate market share has grown to exceed the maximum threshold.
- Modifications have been made to two of the conditions for the exemption of pools. The notice to withdraw from a pool must be reasonable and is no longer restricted to a maximum of one year. Also the rules of the pool must not 'restrict any participating undertaking from insuring or re-insuring outside the pool'. The original wording in the draft regulation was the rules must not 'oblige any member of the pool not to insure or re-insure'. The new wording seems wider and will capture the more subtle arrangements to prevent members insuring or re-insuring outside the pool.
- One of the conditions for the exemptions of pools under the current regulation will no longer apply. Under the new regulation, it will no longer be prohibited for a member of a pool or an undertaking with a determining influence over the commercial policy of the pool to also be a member of, or have a determining influence over the commercial policy of, another group active on the same relevant market.

Like under the current regime, the benefit of the new regulation may be withdrawn by the Commission, or a national competition authority, if an agreement to which the new regulation applies nevertheless has effects which are incompatible with Article 101. Recital 22 of the new regulation states that the anti-competitive effects that may derive from links between a pool and/or its members and other pools and/or their members on the same relevant market will be of particular importance in deciding whether to withdraw the benefit of the new regulation.

The new regulation, which will remain in force until 31 March 2017, is available by [clicking here](#). It is accompanied by an explanatory communication from the Commission, which is available by [clicking here](#).

Announcing the new regulation, Commission Vice-President for Competition Policy Joaquín Almunia noted that the Commission and 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." It is at least doubtful, however, that action would now be taken against agreements that previously benefited from a block exemption.

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