

NEWSSTAND

The New Insurance Block Exemption Regulation

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On 1 April 2010, a new block exemption regulation for the insurance sector came into force in the EU. The new block exemption reduced the categories of agreements covered by the previous exemption (and therefore protected from the prohibition of anticompetitive agreements) from four to two. It also made a number of changes to the scope of the exemption covering the remaining two categories of agreements. Parties to agreements which are no longer block exempted will now have to make their own assessment of whether such agreements fall foul of EU law or equivalent provisions in the domestic law of an EU Member State.

The Competition Regime

Under Article 101(1) of the Treaty on the Functioning of the European Union (Article 101(1)), previously known as Article 81(1) of the EC Treaty, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are void and legally unenforceable. The European Commission (the Commission), which is responsible for enforcing Article 101, can impose fines on the parties to such agreements of up to 10% of their annual worldwide group turnover. National competition authorities, such as the UK's Office of Fair Trading, may also enforce Article 101, as well as equivalent national law provisions. In addition, third parties that have suffered harm because of an anti-competitive agreement may sue the parties in the courts for damages or other relief.

Agreements that restrict competition, contrary to Article 101(1), may nevertheless be exempt under Article 101(3) if they deliver certain efficiency benefits that outweigh any restriction. Block exemptions are an instrument of European competition law that define certain categories of agreements that are presumed to meet the requirements of Article 101(3) and are therefore automatically exempt from the prohibition set out in Article 101(1). A block exemption in respect of certain types of agreements in the insurance sector was adopted by the Commission in 1992. Following its expiry, a new regulation was adopted in 2003, which expired on 31 March 2010.

An agreement not covered by a block exemption, because it is not of a category of agreement presumed to meet the requirements of Article 101(3), may still be exempt from Article 101(1) if the parties can show that it does in fact deliver sufficient efficiency benefits to satisfy Article 101(3). In addition, a restrictive agreement between small firms, whose market share is below

specified de minimis levels, may not have an appreciable effect on competition and therefore fall outside Article 101(1) altogether.

Since 1 May 2004, firms have no longer been required or able to apply to the Commission for an individual exemption from Article 101(3). Where a firm is party to an agreement not covered by a block exemption, it must form its own view on whether such an agreement may be exempt from or fall outside of Article 101(1), based on the factual circumstances.

From Four to Two

The previous block exemption exempted four categories of insurance agreements, relating to: (i) the compilation and exchange of statistical information for the calculation of risks; (ii) the creation and operation of insurance pools; (iii) the establishment of standard policy conditions; and (iv) specifications for security devices.

As anticipated in the draft block exemption published in October 2009, the new block exemption has reduced the categories of agreements covered by the exemption to two, namely:

- 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; and
- the creation and operation of co-insurance and co-reinsurance pools.

Agreements relating to the establishment of standard policy conditions and to specifications for security devices are no longer block exempted. Under transitional provisions, however, such existing agreements will remain exempt until 30 September 2010, in order to give firms sufficient time to comply with the changed law.

A number of insurance trade associations expressed concern that the removal of agreements relating to standard policy conditions from the block exemption would increase costs for insurers and reduce competition. According to the communication accompanying the new block exemption, the Commission considers that in many cases standard policy conditions can give rise to positive effects for competition, and may therefore be individually exempt. To raise concerns with the Commission or a national competition authority, standard policy conditions would have to restrict competition. In many cases, they will not have this effect, particularly if they do not address terms such as pricing and are not mandatory.

As noted above, agreements that are no longer covered by the block exemption may be individually capable of exemption, if countervailing economic benefits can be demonstrated, or may not give rise to an appreciable restriction of competition in the first place. The Commission has recently published draft guidance on the assessment of such agreements' compatibility with Article 101, as part of its review of its Guidelines on horizontal cooperation agreements.

The Remaining Categories

The new block exemption made a number of changes to the scope of the remaining two categories of exempted agreements.

Information Exchange Agreements

In relation to information exchange agreements, two new conditions for exemption have been introduced. First, the information must not contain any indication of the level of commercial premiums. Second, subject to public security considerations, information must be made available on affordable and equal terms to consumer and customer groups which request it “in specific and precise terms for a duly justified reason”.

Insurance Pools

In relation to insurance pools, the Commission has made a number of changes to the exemption:

- A revised definition of pools clarifies that the new block exemption does not cover ad hoc co-insurance or co-reinsurance involving a leader and followers in the subscription market. This change appears to have been linked to concerns over the operation of subscription markets that the Commission expressed in its report on the business insurance sector inquiry. On the sector inquiry, the Commission has confirmed that it will be sending out questionnaires soon to assess the extent to which the practices that it identified as raising concerns persist on the subscription market.
- Compared with the previous block exemption, 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. As was the case under the previous block exemption, an exemption is granted to pooling arrangements created for the co-insurance or co-reinsurance exclusively of new risks, and only for the first three years of their existence.
- The market share thresholds below which pools that have existed for over three years may benefit from the block exemption remain the same as under the previous exemption. However, under the new block exemption, the Commission has changed the way in which the combined market share of the members of a pool is calculated. Under the previous block exemption, only the combined market share within the pool was taken into account. Under the new block exemption, members of a pool need to consider their combined market share both inside and outside the pool. Account must be taken of the market share of each member within the pool itself, the market share each member has in other pools in the same relevant market, and the market share held by each member in 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 required from members to withdraw from a pool must now 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.

- One of the conditions for the exemption of pools under the previous block exemption no longer applies. Under the new block exemption, it is no longer prohibited for a member of a pool or an undertaking with a determining influence over the commercial policy of the pool also to be a member of, or have a determining influence over the commercial policy of, another group active in the same relevant market.

Withdrawal of the Block Exemption

Agreements covered by a block exemption are presumed to meet the requirements of Article 101(3), although this presumption may be rebutted. The benefit of the new block exemption may be withdrawn by the Commission, or a national competition authority, if an agreement to which the new block exemption applies has effects which are incompatible with Article 101(3). In particular, the recitals to the new block exemption state that the anti-competitive effects that may derive from links between a pool and/or its members and other pools and/or their members in the same relevant market will be of particular importance in deciding whether to withdraw the benefit of the block exemption. This suggests that, while individual agreements relating to pools may meet the requirements of Article 101(3), the cumulative effect of such agreements in the same market may not.

Conclusion

Firms which are parties to agreements no longer covered by the block exemption will now have to make their own assessment of whether such agreements might be caught by Article 101(1) and, if they might, whether they would survive scrutiny by the Commission, a national competition authority or court. In the case of insurance pools, because of the number of changes that have been made, agreements apparently covered by the remaining categories in the block exemption should also be reassessed to confirm that they have not been affected by the changes to the exemption's scope.