TaylorWessing

# Review of the Competition Rules Applicable to Agreements in the Insurance Sector

## Draft Commission Regulation on the Application of Article 81(3) of the Treaty to Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector

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**Response of Taylor Wessing**

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## A. INTRODUCTION

1. Taylor Wessing is a full-service international law firm with offices in Belgium, France, Germany and the United Kingdom, associated offices in Poland and further offices outside of the European Union. Taylor Wessing's Insurance Group covers a wide variety of sectors within the insurance industry in France, Germany and the United Kingdom. Our clients within the insurance industry include insurers, reinsurers, underwriters, agents, brokers and insurance customers.

2. Taylor Wessing welcomes the opportunity to comment on the revision of Commission Regulation (EC) No. 358/2003 ("**BER**") and on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of agreements, decisions and concerted practices in the insurance sector (“**Draft BER**”).

3. The views expressed in this paper are those of Taylor Wessing and do not necessarily represent clients' views.

## B. GENERAL OBSERVATIONS

4. Our experience shows that the BER is instrumental for many different forms of industry-specific forms of cooperation which benefit insurance and reinsurance undertakings as well as insurance customers. Taylor Wessing therefore welcomes the intention of the Commission to enact a new block exemption regulation for the insurance sector ("**New BER**") and to renew the exemption of agreements on joint compilations, tables and studies as well as of agreements on pools in the Draft BER.

5. At the same time we regret that the Commission currently is not considering a renewal of the exemption of standard policy conditions ("**SPCs**") and security devices. Both forms of cooperation yield tangible advantages for insurers and especially for insurance customers. The BER offers clear guidance on the way these forms of cooperation should be organized in order to ensure compliance with competition rules, while at the same time providing legal certainty to all market participants. We appreciate that the Commission intends to continue to provide guidance on the treatment of SPCs and security devices in the general standardisation chapter in its Horizontal Guidelines which are currently being revised. However, the Horizontal Guidelines do not afford the same degree of legal certainty than a block exemption regulation.

6. We have noted that the Draft BER does not contain any transition provisions for insurance undertakings to bring in line with the new block exemption any forms of cooperation that will not meet its requirements. We would advocate for including such transition periods in the New BER. In order to comply with the new regime, insurance undertakings will have to carry out careful analyses of whether or not co-operations to which they are party fall under Article 81(1) EC and, if so, are exempted under the new block exemption regulation or Article 81(3) EC. As a consequence of such analyses it can be expected that agreements about joint calculations, tables and studies, SPCs, pools or security devices will have to be amended or redrafted. Both will be time-consuming exercises for which the new block exemption regulation should afford to insurance undertakings enough time.

## C. JOINT CALCULATIONS, TABLES AND STUDIES

7. Taylor Wessing welcomes the intention of the Commission to renew the block exemption of joint calculations, tables and studies. We concur with the Commission’s findings in the review process so far that cooperation on the calculation of risk cover may enable the entry of

small and medium sized firms.[1] We also agree that there is a risk that especially larger insurance undertakings with both a considerable amount of statistical data for certain insurance markets and the necessary actuarial know-how for the analysis of this data would no longer share their data if antitrust immunity for cooperation in this field would not be renewed. Clearly, this would be to the detriment of smaller competitors.

## *I. Definition of Activity falling under the Block Exemption (Article 2(a) Draft BER)*

**Not only the joint compilation and distribution, but also the joint establishment of calculations and tables should be covered by the new block exemption regulation.**

8. Article 2(a) of the Draft BER exempts agreements between undertakings in the insurance sectors with respect to the joint compilation and distribution of information necessary for calculations and tables, whereas Article 1 BER exempts the joint establishment and distribution of such calculations and tables.

9. To our understanding the new definition of the activity that falls under the block exemption in Article 2(a) of the Draft BER would cover the joint compilation and distribution of relevant data and statistics, but not a collaborative analysis of these data by jointly establishing calculations and tables. The proposed wording suggests that the insurance undertakings will in the future have to produce calculations and tables on their own on the basis of data that may be jointly compiled.

10. We take the position that the definition of the activity that is exempted by the New BER in the context of joint calculations and tables should not be changed. Currently the compilation of statistics and data as well as the establishment of calculations and tables is a task that is often performed by insurance associations for their members. Associations make available such calculations and tables to their members on affordable and non-discriminatory terms.

11. This service is instrumental for existing insurers, insurers that have recently entered a specific market and undertakings that contemplate market entry. Especially small and medium firms benefit from this service. Typically, these firms do not have their own actuarial resources (or at least not to a significant level of expertise). If the New BER were to allow only a joint compilation and distribution of relevant statistical data, this would mean for small and medium firms that they would have to prepare their own calculations and tables. It should be taken into account that the establishment of calculations and tables is a demanding exercise which requires extensive actuarial know-how and resources. Many small and medium firms would have to make considerable investments to obtain the necessary know-how and resources and then incur additional costs. In contrast, larger insurance undertakings that already have the necessary actuarial know-how and resources would not have to make additional investments or at least not of a similar magnitude. Consequently, the proposed change of Article 2(a) would place an appreciably higher burden on small and medium firms than on larger insurers.

12. We submit that this is inconsistent with the main pro-competitive effect of joint calculations and tables, which is the promotion and facilitation of market entry by small and medium insurance undertakings. At the same time it is unclear why the Commission seeks to exclude from the scope of the block exemption the actual establishment of calculations and tables.

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[1] Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EC) No. 358/2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, COM(2009) 138 final, 24.3.2009 ("**Report**"), at paragraph 8.

## *II. Right to Access for Interested Third Parties (Article 2(e) Draft BER)*

**The proposed right to access by interested third parties should not be included in the new block exemption regulation as this would constitute an unjustified limitation of the fundamental right of insurance undertakings to keep confidential their calculations.**

13. We respectfully submit that the Commission should reconsider the proposed disclosure obligation in Article 2(e) of the Draft BER that would require the insurance undertakings to make available upon request joint calculations or tables on reasonable, affordable and non-discriminatory terms to any interested third party such as consumer organisations unless the insurance company can demonstrate that non-disclosure is justified on grounds of public security.

14. Other than the statement in the 12th recital of the Draft BER that access to compilations, tables and studies may be of value to interested third parties, there is no indication why competition would benefit from of the proposed access right. We assume that the proposed right of access is meant to give interested third parties the means to calculate average net premiums in order to compare them to gross premiums available in the market. This would enable interested third parties to determine the margin calculated by any given insurance undertaking that has contributed to the compilation of data. The interested third party could deduct from such an insurance undertaking's gross premiums the average net risk calculated on the basis of jointly compiled data that would have to be made available under the new block exemption regulation. The delta between the gross premium and the average net risk would reflect this insurer's margin of administrative costs and anticipated profits.

15. The proposed right to access would therefore allow a deep insight into internal calculations of insurance undertakings which normally would not exist. Internal calculations typically are business secrets of the insurance undertakings. It is a fundamental right of insurance undertakings that internal calculations remain confidential. This fundamental right is guaranteed by the constitutions of many (if not all) EU Member States.[2] The proposed right to access would significantly encroach on this fundamental right of insurance undertakings.

16. We take the view that the limitation of the fundamental right to protect a company's business secrets such as internal calculations proposed by the Commission is not justified by any legitimate interest of third parties. If their interest was to carry out a meaningful comparison of insurance products on the market, it would be sufficient to compare gross premiums and conditions. There is no need to gain access to administrative costs and profit margins of the insurance undertaking concerned. Furthermore, we note that the adoption of an access right for third parties exposes insurance companies to a significant extent to a potential abuse of such right that should not be ignored.

17. Moreover, comparable obligations to grant access to internal calculations only exist in the context of the control of excessive prices charged by dominant undertakings. There is no indication that insurance markets warrant such level of enforcement, taking into account the strong competitive dynamics by which these markets are characterized. In the absence of any indication of excessive premiums, the level of protection for business secrets of insurance undertakings should not be diminished light-heartedly.

18. The proposal to limit the right of access by reasons of public security in Art. 3(2)(e) of the Draft BER does not suffice to alleviate these concerns. While it is certainly important to pre-

[2] For Germany, see order from the Federal Constitutional Court of 14 March 2006, Deutsche Telekom, BVerfGE 115, 205.

vent access of third parties to information in order to protect interests of public security, this limitation does not address the legitimate interest of insurance companies to keep confidential their calculation as part of their business secrets which do not necessarily concern public safety.

## D. COMMON COVERAGE OF CERTAIN TYPES OF RISKS (POOLS)

### *I. Definition of New Risks (Article 1(6)(b) of the Draft BER)*

**The New BER should clarify in the definition of new risks that if changes of a risk are material and no clear and linear trend for future developments can be discerned, a lack of knowledge of the necessary subscription capacity should be deemed to exist.**

19. We welcome the approach adopted by the Commission in the Draft BER to widen the scope of the concept of new risks. The scope of the current definition has often proved to be overly narrow so that new risks within the meaning of Article 2(7) BER only rarely existed.

20. We would like to draw the Commission's attention to the fact that the definition of new risks in Article 6(b) of the Draft BER in some languages does not appear to be fully coherent with the English text (which we consider to be the working text of the draft). The English version clearly links the requirement of an objective analysis to material changes of a given risk. The text then goes on with the consecutive conclusion ("so materially that") that owing to the material change of the risk, it is not possible to know in advance what subscription capacity is necessary to cover such a risk. In contrast and by example, the German version is not as unambiguous, as the objective analysis can be understood to relate both to material changes of the risk and to the lack of knowledge of the necessary subscription capacity. The English version in our view correctly applies the requirement of an objective analysis only to material changes of the risk concerned and not to the lack of knowledge of the necessary subscription capacity.

21. Material changes of a risk could be demonstrated by joint calculations of risk patterns that would provide a picture of the frequency and the intensity of the risk in the past. By contrast, an objective analysis of a lack of knowledge is hardly conceivable. While the insurance undertakings could try to carry out a joint study on the frequency or scale of future claims for a given risk or risk category as permitted by Article 2(b) of the Draft BER, it would go too far to require the undertakings to carry out such a study and only to allow a joint coverage of a new risk if the study does not produce satisfactory results as to the subscription capacity that will be necessary. This would place on the insurance undertakings the burden that the study is correct.

22. It would be helpful if the New BER provided more guidance on the evidence the undertakings concerned would have to produce to show that there is lack of knowledge of the necessary subscription capacity. We propose that a causal link between the material changes of the risk and the lack of knowledge be included in the regulation to the effect that if these changes are material and no clear and linear trend for future developments can be discerned, the undertakings should be allowed to infer that there is a lack of knowledge of the necessary subscription capacity.

## *II. Method for Calculation of Market Shares (Article 6(2) of the Draft BER)*

**The New BER should renew the method for calculation of market shares of the existing BER and should take into account gross premiums written by the pool only.**

23. We would invite the Commission to reconsider the proposed change of the calculation of market shares. The Commission stated in the Report at paragraph 19 that "applying different rules on the calculation of market shares in the insurance sector to those applied in other sectors would result in treating the insurance sector in a preferential way. At this stage there appear to be no reasons to maintain such preferential treatment in relation to other sectors." We submit that when the current BER was enacted, there have been good reasons for limiting the calculation of market shares to the premiums earned from risks contributed to the pool. In our view these good reasons still prevail and justify a renewal of the provisions on calculation of market shares in the current BER.

24. The calculation of market shares should be viewed in conjunction with the prohibitions contained in Article 7(b) and (g) of the Draft BER. According to Article 7(b) the rules of the pool may not oblige any member of the pool to insure or reinsure through the pool and may not oblige any member of the pool not to insure or re-insure outside the pool in whole or in part, any risk of the type covered by the pool. Article 7(g) provides that no member of the [pool], or undertaking which exercises a determining influence on the commercial policy of the [pool], is also a member of, or exercises a determining influence on the commercial policy of, a different [pool] active on the same relevant market.[3]

25. The prohibition of Article 7(b), which is already included in Article 8(b) of the current BER, seeks to ensure that the members of the pool are and remain free to insure risks outside the pool. Both the current BER and the Draft BER are therefore based on a concept of a market where a pool and its members can be active at the same time and can cover risks separately from each other. Article 7(c), (d) and (e) of the Draft BER provide additional protection for the freedom of members to cover risks outside of the pool. The BER imposes clear safeguards to separate the activities of the pool and its members, thus preventing a coordination or spill-over between the undertakings concerned.

26. The concept of separate activities of pools and their members on the same markets is further corroborated by the fact that the nature of the insurance products which does not make a spill-over likely. The insurance agreements entered into in the context of a pool and separately by a member are legally distinct and the implementation of both agreements is not linked in any way. Hence there is a crucial difference between the joint coverage of risks by insurance undertakings and other forms of horizontal cooperation for example between competing firms in the professional services sector or in the area of production.

27. The same reasoning may be applied to the continued existence of the prohibition contained in Article 8(g) of the BER which the Commission proposes to renew in the Draft BER. When comparing this provision with the clauses of the predecessor block exemption Regulation 3932/92, it becomes apparent that the method for the calculation of market shares is closely connected to the prohibition to be member in more than one pool. Article 11(1) of Regulation 3932/92 took into account gross premiums written by members outside of the pool for the calculation of market shares; there was no prohibition to be member of more than one pool. Article 11(2) of Regulation 3932/92 contained an exception for catastrophe pools, for which only gross premiums written by the pool itself had to be considered. However, for these pools there was a prohibition on their members to be member in another

[3] Article 7(g) of the Draft BER as published on the Commission's web page reads "group", while in the other paragraphs of Article 7 the term "pool" is used.

pool in the same market. The current BER extended the method for calculating market shares in Article 11(2) of Regulation 3932/92 to all pools and, at the same time, applied the prohibition to be member of more than one pool to all pools covered by the BER.

28. We maintain that the prohibition to be member of more than one pool serves as a counter balance to the calculation of market shares on the basis of gross premiums written by the pool only. Regulation 3932/92 used the combined market strength of the members of a pool as reference point, so that there was no need to impose a general prohibition to be member of more than pool. The current BER looks at the market position of the pool and consequently seeks to separate the pool from other activities of its members in the same market. This approach is much better suited to precisely identify competition concerns arising from the operation of a pool on a market. At the same time it allows to strike a balance between the legitimate interests of the insurance undertakings to diversify their risk by agreeing joint coverage on the one hand and the prevention of spill-over effects for competition on the other.

29. It would therefore correspond to the carefully and reasonably drafted regime if the method for the calculation of market shares in the current BER remained unchanged. If, however, the new block exemption should stipulate a method of calculating market shares by taking into account the gross premiums written by members outside the pool, there would be no reason to keep the prohibitions in Article 7(b) and (g) of the Draft BER. Pools should then be allowed to oblige their members to insure or reinsure risks only through the pool and members should be free to join more than one pool in a specific market. However, from a practical perspective, we would have a strong preference to retain the current regime.

30. Another point we would invite the Commission to consider is that the proposed change in the method for calculating market shares would considerably reduce the scope for the block exemption for pools. This reduced scope would be further limited if the prohibitions in Section 7(b) and (g) of the Draft BER would be part of the final regulation. The closer the market share of a given insurance undertaking in the market of the pool is to 20%, the lesser the likelihood that it could join a pool that falls under the block exemption. Moreover, it would make no difference whether insurance undertakings would contribute a large number of risks or not. From the communication of the Commission in the course of the review of the BER it is not clear why the Commission sees the need to restrict the scope of the block exemption of pools. In particular the Commission has not given an indication that it has noticed spill-over problems or similar competition concerns. With a view to the positive effects of a common coverage of risks it would be welcomed if the Commission would not adopt such a restrictive approach to pools.

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