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SUMMARY OF THE IMPACT ASSESSMENT

Accompanying document to the

COMMISSION REGULATION (EU) No ../..

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector

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EXECUTIVE SUMMARY

A INTRODUCTION AND BACKGROUND TO THE REVIEW

1. Block exemption regulations create safe harbours for categories of agreements that are caught by the prohibition in Article 101(1), relieving parties from the need to individually assess whether they can benefit from the exception provided for in Article 101(3). They also contribute to the coherent application of EU competition rules.
2. Commission Regulation 358/2003, the Insurance Block Exemption Regulation (BER) applies Article 101(3) of the Treaty on the Functioning of the European Union (the Treaty) to four categories of agreements namely agreements in relation to (i) joint calculations, tables and studies; (ii) standard policy conditions (SPCs) and models on profits; (iii) the common coverage of certain types of risks (Pools); and (iv) security devices.

B. PROBLEM TO BE ADDRESSED: – THE “WHY”

3. Given that the BER will expire on 31 March 2010, the question arises as to whether there are sufficient grounds to continue to declare by regulation Article 101(3) applicable to certain agreements in the insurance sector.
4. The primary original objective of the BER was to facilitate the Commission's task in view of the large number of notifications submitted for review by the Commission prior to the modernisation of the competition rules by Regulation (EC) No 1/2003¹. Since this objective is no longer relevant the Commission approached the analysis of whether to renew the BER from a first principles perspective by asking the following questions: (i) whether the business risks or other issues in the insurance sector make it "special" and different to other sectors and whether this leads to an enhanced need for cooperation; (ii) if so whether this enhanced need for cooperation requires a legal instrument such as for example, the BER to protect or facilitate it; and (iii) if so, whether the current BER is the most appropriate legal instrument.

C. OBJECTIVES – THE "WHAT"

5. The general objective of the Commission's policy towards horizontal agreements is to ensure effective supervision of markets while simplifying administration and reducing firms' compliance costs in accordance with Article 103(2)(b) of the Treaty.

¹ Since 1 May 2004, like most other sectors, the insurance sector has been subject to the generally applicable provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 (Regulation 1/2003). This regulation on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty. Regulation 1/2003 provides that agreements that satisfy the conditions of Article 101(3) are not prohibited, no prior decision to that effect being required. Undertakings and associations must now assess for themselves whether their agreements are compatible with Article 101.

6. Any policy option should only block exempt agreements which fulfil the four conditions of Article 101(3), taking into account the following specific objectives:

(i) Granting a block exemption only to sector specific types of cooperation

7. Given that the Commission's initial objective of reducing the number of notifications it received is no longer relevant as under Regulation 1/2003 undertakings can no longer notify their agreements to the Commission, but now must conduct their own self-assessment, a specific legal instrument such as the BER should only be adopted if the insurance sector is "special" and different to other sectors which do not benefit from a BER (the large majority currently). Therefore, options score higher or lower depending on the degree to which they adequately safeguard against the risk of granting a block exemption regulation to certain types of insurance agreements which do not have a specificity triggering the need for enhanced cooperation and in addition, protection through the legal instrument of a BER.

(ii) Encouraging pro-competitive cooperation between insurers

8. Insurers generally pointed out their increased need to cooperate, which stems from the specificity of the insurance sector for certain types of cooperation in relation to other sectors and which would require the legal instrument of a BER in order to protect or facilitate such cooperation. In their view, non-renewal of the BER would result in reduced or even elimination of pro-competitive cooperation. The argument continues that this would in turn result in a lack of coverage of risk or choice of insurance products by consumers. This criterion therefore aims at measuring not only the impact of each option on the continuity or otherwise of cooperation between insurers, but also on the "pro-competitive" character of their cooperation.

(iii) Maximising benefits for consumers

9. As regards the Commission's aim of ensuring that the block exemption meets the requirements of Article 101(3), in particular that a fair share of the resulting benefits is passed on to consumers, without affording undertakings the possibility of eliminating competition in respect of a substantial part of the products in question, options score higher or lower depending on how well they enable consumers to benefit from cooperation between insurers.

(iv) Encouraging/facilitating entry by reducing entry barriers for competitors

10. Options rank higher or lower depending upon how well they encourage or facilitate market entry by reducing entry barriers for competitors. Options are assessed not only from the perspective of their effects on the insurance market but additionally from the perspective of the effects on the market for security devices, which appears affected by agreements between insurers concerning security devices.

(v) Providing adequate legal security for undertakings

11. The scores that each option receives will vary depending upon how well they ensure an adequate level of legal certainty, also taking into account the fact that in the absence of the BER there would be the same level of legal certainty as in other sectors which do not benefit from the safe harbour of a BER and in the context where cooperation regarding SPCs and security devices will be covered by the Commission's Horizontal Guidelines (currently under review).

D. POLICY OPTIONS – THE “HOW”

12. In order to determine whether, and if so, to what extent, it is appropriate to adopt a new policy approach, the Commission assessed the options in relation to each category of agreements separately as the impact of the options differs significantly from one category of agreements to another. They are briefly outlined below, and are discussed in further detail in relation to their respective effects on the insurance sector.

- Option 1: Baseline Scenario – renewal of the BER in its current form.
- Option 2: Renewal with modifications of the BER. The key changes to the joint calculations, tables and studies exemptions would be to:
 - narrow the exemption itself to allow exchange of information only where it is necessary;
 - adjust the structure of the entire BER to separate the exemptions and follow each with its conditions and agreements not covered;
 - amend the term to "joint compilations" (which can include some calculations) to more accurately describe these agreements;
 - include access for consumer and customer organisations.

13. The key changes to the pools exemption would be to:

- bring the approach to market share calculation into line with other general and sector-specific competition rules on the assessment of horizontal cooperation;
- raise the flexibility in the market share thresholds by 3 per cent to 25 per cent for co-insurance pools and by 3 per cent to 30 per cent for co(re)-insurance pools in order to make these thresholds consistent with other competition BERs;
- adapt the definition of "new risks" to include risks whose nature has, on the basis of an objective analysis, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them;
- adjust the structure of this exemption in the same way as outlined for joint compilations, tables and studies above.

14. General changes to the BER would be to:

- include the possibility to withdraw the benefit of the BER for Member States;
- add a transition period of six months.
- Option 3: Non-renewal of the BER with the relevant agreements falling under the general regime.

E. ANALYSIS OF IMPACT

15. Each option has been assessed against four groups of criteria. Given that a block exemption regulation lays down detailed rules for the application of Article 101(3) of the Treaty, which is part of the exclusive competence of the Community, the subsidiarity principle does not apply. Therefore, the criteria relating to the necessity and value added of the envisaged options are not discussed. The form of Community action (Commission regulation) is

coherent with the achievement of the objectives. The direct effect and applicability of this regulation is proportionate with the exclusive competence of the Community regarding the establishment of detailed rules for the application of Article 101(3) of the Treaty.

16. The first group of objectives relates to specific competition policy objectives mentioned above and measures the option's ability to ensure effective protection of competition.
17. The second group of criteria ascertains each option's impact in relation to (i) firms' foreseeable compliance costs; and (ii) SMEs' access to insurance markets.
18. The third group of criteria is designed to assess options' likely impact on public administration as regards (i) the use of enforcement resources; and (ii) consequences for the EU budget.
19. The final group reflects the potential impacts of each option on (i) employment and job quality; (ii) public health and safety; and (iii) the environment.
20. The expected impact has been assessed mainly in qualitative terms with Options 2 and 3 scoring from minus 3 to plus 3 in respect of each criterion, the point of reference being the baseline scenario (Option 1).
21. The main findings of the Impact Assessment Report can be summarised as follows in relation to each form of cooperation separately:

E.1. JOINT CALCULATIONS, TABLES AND STUDIES

Economic criteria related to the protection of effective competition

22. It appears that cooperation in this area is both specific to the insurance industry and may be necessary (in at least most Member States) in order to price risks. Some large insurers may have no incentive to do so without the condition in the BER requiring that where such agreements do exist, the resulting calculations, tables and studies must be made available to other insurers on reasonable, affordable and non-discriminatory terms. Under Option 2, non-discriminatory access to this data, including for potential entrants, would continue to be protected. This is not the case with Option 3. Furthermore, consumers could indirectly be harmed if the pro-competitive cooperation amongst insurers would suffer as a result of the non-renewal of the BER. Therefore Option 2 is the preferred option for these objectives.

Other economic objectives – reducing compliance costs and impact on small and medium sized-enterprises (SMEs)

23. Option 3 may lead to a small increase in compliance costs for insurers at least initially. Option 2 in this context is therefore slightly more preferable than Option 3 from this perspective.
24. Option 3 might result in cooperation only between large insurers, with the exclusion of smaller insurers which do not contribute with very significant amounts of data as the former may no longer have the obligation to share the results of their cooperation with all interested parties. This might have the consequence that large insurers might reconsider sharing any data if they could no longer rely on the BER, to the disadvantage of SMEs. Therefore, Options 2 is preferable to Option 3.

Public administration and EU budget

25. The additional clarity brought by Option 2 will assist NCAs and the Commission to better prioritise their cases and resources. Option 2 is preferable to Options 1 or 3 because it allows competition authorities of a Member State to withdraw the benefit of the BER where it finds in a particular case that the agreement to which the BER applies, has effects which are incompatible with the conditions laid down in Article 101(3) in respect of that territory.

Social and environmental objectives

26. We have no reason to expect that Option 2 would result in any change in employment levels. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work.
27. Information exchange between insurers permits them to share information and to gather experience in assessing risks and evaluating environmental damage thus contributing to the development of the environmental insurance market. It may be that exchange of information would also ensure that risks are assessed and priced as realistically and appropriately as possible. Options 1 and 2 are therefore preferable to 3.

E.2. STANDARD POLICY CONDITIONS - THE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED CRITERIA

Economic criteria related to the protection of effective competition

28. Given that there is no specificity concerning SPCs arising in the insurance sector, it is not appropriate to renew a BER for this category of agreements. Option 3 is therefore preferable to either Options 1 or 2 from this perspective.
29. There does not appear to be a significant and real risk of less or non-cooperation under Option 3, Furthermore, many national associations have been taking the lead on SPCs for some time, which further supports the view that it is unlikely that SPCs would not continue to be agreed under Option 3. This is in particular given the Commission's view that in many cases SPCs would not fall foul of Article 101(1) or would not fail to comply with the exemption criteria in Article 101(3). Option 3 may have a slight impact.
30. Although SPCs allow the comparison of insurance policies offered by different insurers, this cannot be at the expense of homogeneous SPC which can hinder consumers' ability to find products suited to their needs. Indeed, too much standardisation can harm consumers by limiting product choice. The objective here is, therefore, to find a balance whereby contractual norms can be efficiently established by market players but without stifling competition through overly standardising all the available products. However it appears clear that a BER does not assist in this objective and Option 3 is therefore preferable.
31. Although it is acknowledged that SPCs can encourage new entry, since it appears that there would be no significant change in the level of cooperation (see above) if the analysis required is under Article 101 rather than under a BER, Option 3 appears to have no materially different impact to Option 2 or the baseline.
32. Although less legal certainty may be a result of Option 3, it is planned to expand the Commission's Horizontal Guidelines in order to address SPCs for all sectors which will provide additional guidance for insurers intending to enter into such cooperation.

Other economic objectives – reducing compliance costs and impact on SMEs

33. Option 2 would not result in any material change in compliance costs for insurers. Option 3 on the other hand may lead to a small increase in the compliance costs of insurers at least initially.
34. Given the comments from consumer associations who complained about excessive standardisation of SPC, leading to a decrease of competition on certain relevant markets, such as the one for car insurance, it may be preferable that the balancing between the positive effects on consumers and possible restrictions of competition should be assessed on a case by case basis, on the basis of Article 101(3). However, in the absence of the BER, given that there is a certain risk of cooperation becoming more difficult because of the costs and resources entailed by self assessment, with the consequence that access for small insurers could be less easy, Option 3 could have, from this perspective, a certain negative impact in comparison with the baseline scenario.

Public administration and EU budget

35. Improving the text of the BER under Option 2 in order for the Commission and NCAs to better prioritise cases and resources does not seem the most efficient approach in this case because the text of the BER does not lack clarity or need improvement. Furthermore, under Option 3 the burden of proof is effectively on insurers to prove that they are exempt under Article 101(3), whereas under Options 1 and 2, competition authorities carry the burden of proof to prove that the BER does not apply. Option 3 may be preferable in terms of public administration.

Social and environmental objectives

36. We have no reason to expect that Options 1 or 2 would result in any change in employment levels. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work either by insurance companies or insurance associations.
37. In relation to SPCs, none of the Options appear to have any impact in terms of the environment.

E.3. COMMON COVERAGE OF CERTAIN TYPES OF RISKS (POOLS) - THE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED CRITERIA

Economic criteria related to the protection of effective competition

38. Given that there is clear specificity in the insurance sector concerning pools, Option 3 is not preferable from this perspective.
39. The only category of pools which would be affected by Options 2 and 3 is pools which currently comply with market share thresholds and other conditions established by the current BER and therefore are within the scope of the current regulation. Participants in these pools may indeed consider retrieving from pools and although this cannot be proved at this stage, the risk in question should be considered, in particular given that the lack of pro-competitive cooperation would not be desirable in the context where risk sharing for certain type of risks is crucial in order to ensure that all such risks can be covered. From this perspective, Option 2 is preferable to Option 3. Option 2 is preferable to Option 1 as it enlarges the definition of new risks, which would foster cooperation between insurers. As regards the new method of calculating market shares under Option 2, while it is possible that

it may deter some insurers from cooperating within pools, it has the merits of ensuring consistency across competition legislation in terms of method of calculating market shares.

40. Given that the current method of calculating market shares is not in line with other horizontal rules, Option 2 foresees a modification to this method, in order to avoid unnecessary discrimination. This Option also leads to more legal certainty for this reason and because the definition of new risks is expanded.
41. Consumers are also better protected under the general rules of calculating market shares. Option 3 may result in reduced cooperation within pools, which, in turn, could result in consumers not being able to obtain the coverage they need for large or specialised risks. In addition, the extension of the definition of new risks maximises the chances of consumers of finding appropriate insurance even for risks which are new and for which there are no data available (which insurers would be reluctant to cover individually). Therefore, from the perspective of maximising benefits to consumers, Option 2 is preferable to Option 3 and Option 1. Also, Option 2 encourages market entry to a much larger extent than Option 3.

Other economic objectives– reducing compliance costs and impact on SMEs

42. Option 3 may lead to an increase in compliance costs in that Pools who were self-assessing under the BER would need to self-assess under Article 101(1) and if appropriate Article 101(3) rather than under the BER. However this legal analysis should not be much more difficult or costly (if at all) than under the BER. Options 1 and 2 have more positive effects for SMEs than Option 3 as they allow small insurers to insure through pools, risks with which they do not necessarily have experience. Option 2 is preferable to the baseline as it improves the definition of new risks, with positive consequences for SMEs, which are therefore able to participate in pools covering new risks.

Public administration and EU budget

43. The additional clarity brought by Option 2 in comparison with the baseline will assist NCAs and the Commission and to better prioritise their cases and resources. In addition Option 2 is preferable to Options 1 or 3 because it allows competition authorities of a Member State to withdraw the benefit of the BER they find in a particular case that the agreement to which the BER applies, has effects which are incompatible with the conditions laid down in Article 101(3) in respect of their territory.

Social and environmental objectives

44. There is no reason to expect that Options 1 or 2 would result in any change in employment levels. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work. However it is likely that pools will more often employ in-house or external lawyers to do regular reviews of compliance under Article 101 and the BER.
45. Option 2 allows for the improvement and expansion of the definition of new risks. These new risks might well be those for which appropriate insurance coverage is essential in order to mitigate contingencies related to public health and safety. Therefore, Option 2 is preferable to Option 1.
46. In relation to environmental impact: the existence of pools covering environmental risks ensures that the contingencies concerning such risks can be covered if and when they arise. Options 1 and 2 are therefore preferable to Option 3. Option 2 is preferable to Option 1 because it allows for the improvement and expansion of the definition of new risks.

E.4. SECURITY DEVICES - THE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED CRITERIA

Economic criteria related to the protection of effective competition

47. Agreements on technical specifications for security devices and their installation fall into the general domain of standard setting which is not unique to the insurance sector. Under Option 3 insurers would benefit from guidance in terms of applicability or otherwise of Article 101 to their agreements on security devices, afforded by the general standardisation chapter in the Horizontal Guidelines. The advantage of Option 3 in comparison with the baseline scenario and Option 2 is that the benefit of a BER is not granted in the absence of sector specificity, therefore avoiding unnecessary differentiation across sectors.
48. It appears that there are two main categories of agreements concerning security devices, i.e. agreements in areas already covered by European standards and agreements in areas which have not been harmonised yet. However, a large portion of agreements on security devices fall into the first category. Given that under the baseline scenario agreements are within the scope of the BER as long as the field concerned is not already harmonised, the scope of the BER is continually being reduced.
49. As regards the limited area where there is not yet EU harmonisation, detailed national rules result in fragmentation of the internal market and in the reduction of competition between producers of security devices across Member States. The existence of different national requirements agreed by insurers means that producers of security devices effectively must comply with different sets of national rules, depending on the Member State where they sell their products. This goes against the development of the internal market as it results in sales volumes being limited to national/regional markets. Therefore, Options 1 or 2 are less preferable than non-renewal under Option 3, albeit balancing against some risk of non-cooperation.
50. As policy holders will only buy security devices that conform to the commonly agreed standards, producers of security devices are obliged in practice, to comply with these standards, which results in less choice for consumers. In this context there is no presumption that a fair share of the benefits of this cooperation is transmitted to consumers, Option 3 seems more appropriate than Option 1 or 2. Indeed, it is more appropriate that undertakings apply the criteria of Article 101(3) through a self-assessment.
51. Given that the protection offered to agreements on security devices within the BER (baseline scenario) is a barrier to entry to the relevant market for producers of security devices, Option 3 is preferable. Option 2 is less appropriate than the baseline scenario as it would prolong a situation which has negative effects in terms of market entry of producers of security devices.
52. Option 3 means a lesser degree of legal certainty than Option 2 or the baseline scenario. However, non-renewal of the BER means that the insurance sector will benefit from the same level of legal certainty as other sectors which do not benefit from a BER and which constitute the general rule. Under Option 3, the insurance sector will benefit from guidance from two legal instruments, i.e. the Commission's Horizontal Guidelines (currently under review) and the Commission's Guidelines on the application of Article 101(3).

Other economic criteria – reducing compliance costs and impact on SMEs

53. Option 2 is unlikely to result in any material change in compliance costs for insurers. Option 3 on the other hand may lead to a small increase in the compliance costs of insurers at least initially. The analysis here is the same as for SPCs above.

54. It appears that multiple requirements increase costs and thereby reduce international market access in particular for small and medium-sized manufacturers. This gives an unfair advantage to larger manufacturers who are better able to cover the large overheads of trying to sell into another market. Therefore, Option 3 is preferable to Options 1 or 2.

Public administration and EU budget

55. As discussed above under this section for SPCs, Option 2 is not necessarily a better option in terms of a better prioritisation of cases and resources because the text of the BER does not lack clarity or need improvement. Under Option 3 the burden of proof is effectively on insurers to prove that they are exempt under Article 101(3), whereas under the baseline scenario, competition authorities carry the burden of proof to prove that BER does not apply. Therefore Option 3 may be preferable in terms of public administration.

Social and Environmental objectives

56. There is no reason to expect that Options 1 or 2 would result in any change in employment levels. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work either by insurance companies or insurance associations. However it is likely that these companies and associations will employ more in-house and external lawyers to do regular reviews of compliance under Article 101.
57. Security Devices (for example fire alarms) could limit the likelihood of or prevent contingencies arising. Standards concerning security devices or their installation can assist in this process by ensuring high quality products and processes/installation. Under the BER the scope for cover is now significantly limited or eliminated in many cases due to extensive harmonisation at EU level. In addition, agreements on security devices may be legal outside the BER. Therefore it is unlikely there would be any significant difference in impact on the environment between any of the options.

F. CONCLUSIONS

58. This comparison of the various policy Options and the characteristics of the underlying specific measures shows that for Joint Calculations, Tables and Studies and separately, Pools, Option 2 scored better overall than the baseline scenario of renewing the current Regulation (EC) No 358/2003 by 7 years and also scored better than Option 3. For SPCs and Security Devices, Option 3 has the greatest potential for achieving the objectives identified, and appears to be the Policy Option best able to meet the general objective of balancing the effective supervision of markets against the need to simplify administration and minimise compliance costs.