A NEW BLOCK EXEMPTION FOR THE INSURANCE SECTOR

The European Commission has adopted a new Insurance Block Exemption Regulation ("IBER"). It came into force on 1 April 2010, replacing the previous block exemption, which expired on 31 March 2010, and will remain in force until 31 March 2017. Insurers and reinsurers have a six month grace period until 1 October 2010 to assess whether their existing agreements and arrangements qualify for exemption under the IBER.

BACKGROUND

A block exemption provides a safe harbour for certain categories of agreement, subject to conditions set down in an EU regulation. The exemption is from the EU prohibition on anti-competitive agreements, in Article 101 of the Treaty on the functioning of the European Union ("TFEU"). Under Article 101, anti-competitive agreements, particularly those involving competitors, are void and unenforceable and the parties can be fined for operating them.

Article 101 sets out the general conditions for exemption of agreements whose benefits outweigh their anti-competitive effect. These conditions require a time consuming detailed economic analysis. The benefit of a block exemption is that it sets out the specific conditions an agreement must satisfy to be exempted, saving the parties a great deal of work.

Insurers and reinsurers have benefited from automatic exemption for various types of co-operation for some time. Successive block exemption regulations have, however, cut down the scope of the exemption.

The new IBER is no exception. It covers only two types of co-operation among insurers and reinsurers, subject to stricter conditions than before.

JOINT COMPILATIONS, TABLES AND STUDIES

Insurers and reinsurers may jointly compile and distribute information needed for costs calculations and the construction of mortality tables, but not cost calculations and mortality tables themselves.

They may also jointly carry out studies on the probable impact of general external circumstances on the frequency or scale of future claims given risks or risk categories, or on the profitability of different types of investment.

The information must not contain any indication of the level of commercial premiums charged. The parties must also make the information available on affordable, reasonable and non-discriminatory terms and conditions to insurance undertakings and, subject to public security considerations, to consumer or customer organisations, but not individuals.

Co-insurance and co-reinsurance pools continue to benefit from exemption, but ad-hoc co-insurance or co-reinsurance arrangements on the subscription market are no longer automatically exempt and have to be assessed individually.

Pools’ initial market shares must not exceed 20 percent (co-insurance) and 25 percent (co-reinsurance), respectively, but if these thresholds are subsequently exceeded, exemption may continue for a limited period. Market share is now calculated on the basis of individual members’ shares of the relevant market outside the pool, as well as the pool’s own market share.

Pools created exclusively to cover new risks are exempt for three years irrespective of their market share. “New risks” includes risks that have changed so materially that it is not possible to identify in advance the subscription capacity necessary to cover the relevant risk.

EXEMPTION WITHDRAWN

The block exemption no longer covers co-operation on standard policy conditions for direct insurance, or technical specifications of security devices. These must be assessed under the general exemption conditions.

THE FUTURE

The new, restricted, IBER in the EU, and similar initiatives in the US, have increased pressure on insurers and reinsurers in both the EU and the US to assess the extent to which their current agreements and practices comply with competition law.