CLIFFORD CHANCE

Briefing note

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European Commission reconsiders insurance sector exemption from antitrust laws

The European Commission (EC) has launched a consultation on the functioning and future of the Insurance Block Exemption Regulation (IBER). The IBER exempts from prohibition under EU antitrust law certain agreements between companies in the insurance sector. The current version of the IBER came into effect in 2010 and is due to expire in March 2017.

The EC will consider whether any parts of the IBER merit renewal, i.e. whether the insurance sector is still sufficiently exceptional to require an industry-specific exemption from competition law. Abolishing or narrowing the scope of the IBER could increase the burden on insurers and reinsurers to self-assess the compliance of certain activity with EU antitrust law.

Key issues

- EC to determine whether IBER still necessary and/or appropriate
- Possible outcomes are full renewal, partial renewal or abolition
- If the IBER did not apply, (re)insurers would need to self-assess compliance
- Could mean increased burden and lower legal certainty for businesses

EC questionnaire

EC has issued a questionnaire seeking stakeholders' views on application of the current IBER, and relevant market developments.

The questionnaire focuses on whether the IBER still serves a purpose, asking (re)insurers questions including: whether the existence of the IBER has actually improved their ability to price risks or enter particular insurance segments; whether the IBER has enhanced competition; whether other legal guidelines and case law provide useful guidance; and what the impact of changes to the IBER would be on (re)insurers.

What is the IBER?

Article 101 of the Treaty on the Functioning of the European Union generally prohibits certain agreements that could restrict competition.

The IBER provides an exemption from that prohibition for certain agreements between (re)insurers that meet set criteria. In particular, it exempts:

- agreements with respect to joint compilations, joint tables and studies; and
- common coverage of certain types of risks (co-insurance or co-reinsurance pools).

These activities are exempted because the EC recognises certain information exchange is justifiable to allow (re)insurers to accurately assess risks, and that pooling helps to ensure that all risks can be covered.

Why is the EC reviewing the IBER?

Industry-specific block exemptions are rare: the insurance industry is one of only three sectors that still benefits from a block exemption (the others being maritime liner shipping and motor vehicle distribution).

The EC therefore regularly reviews the IBER to make sure that the sector still has distinct characteristics that present an enhanced need for cooperation, and that those needs justify a sector-specific competition regime. The IBER was last renewed in 2010.

What could be the outcome of the consultation?

The EC will consider whether the IBER should be renewed, partially renewed or not renewed at all.

For example, the last time the IBER was reviewed, it was only partially renewed (the previous version exempted agreements on standard policy conditions; agreements on security devices; joint compilations, tables and studies; and co(re)insurance pools – only the latter two of these categories were included in the renewed IBER in 2010).

The EC has had long-standing concerns that the industry could use the IBER as a blanket protection for behaviour that does not strictly fall within the scope of the exemption.

For example, in order for pooling activities to benefit from the current IBER, the parties' combined market shares must be below 20% in the case of insurance and 25% for reinsurance.

A study commissioned by the EC and carried out by E&Y in 2013 indicated a perceived failure on the part of the industry to comply adequately with the IBER in relation to pooling, particularly regarding assessment of market share thresholds.

It is therefore possible that the EC might move to amend this aspect of the IBER – although at this stage the EC is keeping an open mind.

How would partial renewal or abolition affect the insurance industry?

If the IBER were no longer to apply to a particular activity, it would not necessarily render the activity unlawful.

However, it would be for (re)insurers to self-assess that the arrangements comply with general competition laws.

This would increase the administrative burden on (re)insurers, as well as removing the legal certainty currently afforded by the IBER.

Next steps

Responses to the EC's questionnaire are due by 4 November 2014. The EC will then carry out an impact assessment of the policy options available and, following further consultation, submit a report with recommendations to the European Parliament and Council by March 2016.

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