

### Insurance services and competition law: An overview of EU and national case law

**Agreement, Block Exemption (Regulation), Exchange of information, Barriers to entry, Foreword, Judicial review, Remedies (mergers), High market shares, Substantive test (mergers), Insurance**

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

Greg Olsen, Daniel Schwarz, e-Competitions | N° 78289, [www.concurrences.com](http://www.concurrences.com)

#### Introduction

This special issue of e-Competition bulletins contains a selection of the key developments in European competition law related to the insurance sector - an area presenting unique and challenging policy considerations. In 1987 the Court of Justice of the EU ("CJEU") stated in *Verband des Sachversicherer* [1] that insurers must operate in a way that is consistent with competition law, despite the need for cooperation and to avoid insolvency. This tension between the need for cooperation and the benefits of competition has characterised the application of competition law to the insurance sector and can be seen in the major developments in recent years.

In the aftermath of the financial crisis, there has been increased regulatory focus, which has impacted the business models of insurers and the environment in which they operate. These developments come at a time when European insurers are facing substantial regulatory changes, with Solvency II having entered into force on 1 January 2016, reforming the prudential regulation and capital requirements of insurers across Europe. This foreword focuses on the review of the Insurance Block Exemption Regulation, investigations into collusive practices by national competition authorities, industry inquiries, and the merger and acquisition activity associated with a trend towards consolidation across Europe.

#### Insurance Block Exemption Reform

The need for cooperation between insurers is acknowledged in the Insurance Block Exemption Regulation ("BER") [2], which allows agreements between insurers to be exempt from the prohibition on anti-competitive agreements in Article 101(1) TFEU [3] if they concern joint compilations, joint tables and studies or common coverage of certain types of risks (co-insurance or

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co-reinsurance pools). Although the BER was renewed by the Commission in 2010, it will expire on 31 March 2017 [4] and the Commission has taken a number of steps to review the merits of the BER in advance of this. In July 2014 the Commission published a study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market [5] as part of its monitoring of the application of the BER. The Commission subsequently consulted [6] stakeholders on the application of the BER and whether any parts of it should be renewed. The Commission is required to submit a report on the functioning and the future of the BER to the European Parliament and the Council by March 2016. In 2010 the Commission narrowed the scope of the BER that was previously in place and therefore further information on the Commission's intentions for the BER will be eagerly awaited.

## Collusive practices

In several instances national competition authorities and courts have penalised those operating in the insurance sector for collusive practices, however in a number of instances co-ordination has been permitted. These cases often demonstrate the difficulties facing the courts and competition authorities in balancing the need for cooperation and the impact on competition in the insurance sector.

On 18th December 2015 the Italian Regional Administrative Court of Lazio annulled a decision in which the Italian competition authority fined Generali Italia and UnipolSai Assicurazioni €12 million and €16 million respectively for agreeing not to participate in public selection procedures relating to the provision of motor insurance for companies responsible for public transport facilities [7]. The competition authority found that the absence of new bidding contractors in relation to public selection procedures forced the companies to extend or renew their motor insurance or to enter new agreements with the existing contractors. However, the Regional Administrative Court found that the competition authority had not established unlawful conduct between the parties and the absence of an alternative logical explanation other than the alleged infringement. Accordingly, the Italian competition authority's fine was annulled in its entirety.

The Italian competition authority accepted commitments on 20 May 2014 from seven major insurance companies to close an antitrust investigation into vertical agreements with their agents [8]. The agency agreements included several clauses to which the Italian competition authority objected: the agents were bound by non-compete obligations; the insurance company could replace the agents as tenants in the lease of their office premises and make them give up their phone if the agency agreement was terminated; in some instances agents were only allowed to use their premises and computer for the purposes of the mandate with their principal; and the fee systems disadvantaged agents acting as an agent or distributor for multiple insurance companies. The insurance companies made commitments to end these practices which the Italian competition authority considered would alleviate their concerns about cumulative foreclosure effects through the network of parallel agreements.

On 8 November 2012 the Serbian competition authority granted two of the three largest insurance companies an exemption from the ban on engaging in restrictive agreements in order for them to submit a joint bid to provide insurance services to the state-owned power company [9]. The competition authority accepted the arguments of the insurance companies that insured assets would create risks which a single insurance company may be unable to manage. In this instance the

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competition authority considered that the benefits of cooperation exceeded the advantages of competition between the two firms.

The *Allianz Hungaria* judgment of the CJEU, and the first instance decision of the Hungarian competition authority have caused great controversy within the insurance community and beyond [10]. The case considered whether agreements between an insurer and either individual car repairers or the car repairers' association, under which the hourly charge paid by the insurer to the repairer for the repair of vehicles which it insured depended on the number of policies taken out with the insurance company through the repairer acting as a broker, were anti-competitive by object within the meaning of Article 101(1) TFEU. The Hungarian competition authority and the CJEU, after having been referred the question by the Hungarian Supreme Court, considered that this constituted an infringement of competition by object. The CJEU's judgement has been widely criticised for blurring the distinction between anti-competitive objects and anti-competitive effects, and therefore the problematic parts of the judgement have not been adopted in later cases, most notably *Cartes Bancaires* [11]. However, the CJEU's decision remains and is relevant to the interpretation of object infringements in the insurance sector and more widely.

## Merger activity

There has been substantial merger and acquisition activity in the insurance sector, driven by regulatory changes such as Solvency II, which has led to multiple decisions by European competition authorities. The European Commission has been active in assessing mergers including Aviva's acquisition of Friends Life [12], Allianz's acquisition of assets from UnipolSai [13], Canada Life's acquisition of Irish Life [14] and Mitsui Sumitomo Insurance's acquisition of Amlin [15], amongst others.

On 9 October 2014 the Lithuanian competition authority cleared the acquisition of Lietuvos draudimas by PZU S.A. subject to commitments [16]. The authority was concerned that the acquisition would lead to a strengthening of the dominant position of Lietuvos draudimas which had a market share exceeding 40%. Accordingly, Lietuvos draudimas made a commitment to divest PZU's Lithuanian business related to the insurance of land vehicles and property insurance which was accepted by the competition authority following market-testing and modifications.

The Italian competition authority cleared the sale of FATA Assicurazioni Danni S.p.A by Generali Italia S.p.A to Società Cattolica di Assicurazioni soc. coop. in March 2014 - a transaction between two of the leading insurance companies in Italy [17]. The case elaborated on the criteria for establishing whether a restraint is ancillary to the acquisition. The competition authority found that the agreement for the supply of administrative services between the target and the supplier and the non-solicitation agreement were ancillary restraints and therefore covered by the decision stating the transaction complies with Italian competition law. In contrast, the agreement under which FATA would exclusively licence its trademark to a Romanian company within the seller's group was not considered an ancillary restraint and as a result it could be assessed by the competition authority separately.

Other national competition authority decisions include the Hellenic Competition Authority's approval of the acquisition of Agrotiki Asfalistikiki S.A. by ERGO International Aktiengesellschaft in October 2014 [18] and the UK Competition and Markets Authority's ("**CMA**") clearance of the acquisition of

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the European operations of Agencyport Software Group by Xchanging plc in April 2015 [19].

## Industry inquiries

European competition authorities have also been increasingly active in industry wide inquiries into insurance. Although, as described below, several investigations have been started, they have led to few major policy changes.

The Commission closed its antitrust investigation into P&I Clubs [20] in the marine insurance sector [21]. The Commission was concerned that the key agreements governing the relationship between the P&I Clubs and their members and sharing insurance claims lessened competition between P&I Clubs and restricted access of other insurers to the relevant markets. However, the Commission's investigation was not sufficiently conclusive to confirm the Commission's preliminary concerns and therefore the matter was closed.

As part of its Private Motor Insurance Market Investigation, the UK CMA was concerned that the system under which the insurer of the "non-fault" driver organises for a replacement car and repair whereas the insurer of the "at-fault" driver pays for this leads to higher costs of replacement cars and repairs which are passed on to at-fault insurers. However, the CMA considered that there were no remedies that represented an effective and proportionate solution to the problems associated with this separation of cost liability and cost control [22]. However, an order was adopted banning agreements between price comparison websites and insurers which prevented insurers from making their products available more cheaply on other online platforms [23]. The Romanian competition authority is currently conducting a review into the auto-insurance market and in its preliminary results has identified concerns regarding barriers to entry and access to distribution channels for liability insurance [24].

Finally, the UK Financial Conduct Authority, which gained concurrent competition powers, launched a Call for Inputs in November 2015 on the use of Big Data in the retail general insurance sector, highlighting the growing importance of technology within the sector and on competition [25].

## Conclusion

In the coming years, legal, regulatory and technological developments will continue to impact insurers and the context in which competition law is applied. Regulatory changes, most notably Solvency II, may lead to further consolidation in the insurance sector, requiring competition authorities to re-evaluate the sector. Advances in technology such as telematics and big data also have the potential to alter the business models of insurers and provide new issues for regulators. The Commission will have to assess the functioning of the insurance sector as it considers the status of the BER which will affect the boundaries of competition between insurers in Member States of the EU. As these changes transform the state of the insurance sector, competition lawyers will face new risks and challenges in the years ahead.

[1] CJEU, January 27th, 1987, *Verband der Sachversicherer e.V. v. Commission*, Case 45/85, [1987] ECR 405

[2] Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements,

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decisions and concerted practices in the insurance sector, Articles 2 and 5.

[3] The Treaty on the Functioning of the European Union. For the purposes of this foreword, the current numbering and institutional terminology under TFEU will be used in relation to all cases.

[4] BER, Article 9.

[5] European Commission, Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market, written by Ernst & Young, July 2014

[6] See European Commission webpage on consultation <http://ec.europa.eu/competition/con...> (accessed 12 January 2016)

[7] See N.06841/2015 REG.RIC - Unipol Assicurazioni v AGCM, N.06969/2015 REG.RIC - Generali Italia v AGCM, and [Daniele D'Alvia, Donato Romano, The Italian Competition Authority imposes a fine for anticompetitive agreement to two of the most important Italian companies in the insurance industry \(Generali Italia / UnipolSai Assicurazioni\), 30 March 2015, e-Competitions Bulletin March 2015, Art. N° 73556](#)

[8] See [Giovanni Scoccini, The Italian Competition Authority closes the antitrust probe into agency agreement in the insurance sector by a commitments decision \(Agenti monomandatari\), 20 May 2014, e-Competitions Bulletin May 2014, Art. N° 68805](#)

[9] See [Mirko Lalatovic, The Competition Authority of the Republic Serbia has exempted for a period of three years two insurance companies from the prohibition on restrictive agreements \(Dunav osiguranje, Delta Generali osiguranje\), 8 November 2012, e-Competitions Bulletin November 2012, Art. N° 50849](#)

[10] See [Andrzej Kmiecik, The EU Court of Justice hands down preliminary ruling on circumstances in which agreements concerning the price of automotive repairs concluded between insurance companies and repair shops may have an anti-competitive object \(Allianz, Generali\), 14 March 2013, e-Competitions Bulletin March 2013, Art. N° 58156](#); [Hans Vedder, The EU Court of Justice rules on the dichotomy between anticompetitive object-effect with respect to bilateral arrangements between car dealers and insurance companies \(Allianz\), 14 March 2013, e-Competitions Bulletin March 2013, Art. N° 58656](#); and [Nicolas Petit, The EU Court of Justice reaffirms the distinction between the anticompetitive effect-object of an agreement caught under the prohibition in Article 101\(1\) TFEU without setting out clearer terms of demarcation between the two disjunctive conditions \(Allianz\), 14 March 2013, e-Competitions Bulletin March 2013, Art. N° 58712](#)

[11] CJEU. September 11th, 2014., Groupement des cartes bancaires v European Commission, Case C-67/13P. See Daniel Schwarz, "Immoveable objects - The evolution of object restrictions after the Cartes Bancaires case", Competition Law Insight, 19 January 2016. See [Daniel Muheme, Greta Juknaite, The European Court of Justice annuls a judgment of the General Court which in accordance with the European Commission held that certain pricing measures adopted restricted competition 'by object' \(Groupement des Cartes Bancaires\), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 72930](#) ; [Matthew O'Regan, The European Court of Justice provides further clarity on when an agreement has the object of restricting competition \(Groupement des cartes bancaires\), 11 September 2014, e-Competitions Bulletin September 2014,](#)

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[Art. N° 69491 ; \*\*Richard Burton\*\*, The EU General Court issues judgment on tariff arrangement within payment card cartel \(Groupement des Cartes Bancaires\), 29 November 2012, e-Competitions Bulletin November 2012, Art. N° 58212 ; \*\*Bertold Bar-Bouyssière\*\*, The European Court of Justice rules on restrictions by object in a case regarding payment card rules \(Groupement des cartes bancaires\), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 70593](#)

[12] Case M.7478 - Aviva/ Friends Life/ Tenet, Commission Decision of 13 May 2015

[13] Case M.7233 - Allianz/ Going concern of UnipolSai Assicurazioni, Commission Decision of 10 June 2014

[14] Case M.6883 - Canada Life/ Irish Life, Commission Decision of 31 May 2013

[15] Case M.7803 - MSI / Amlin, Commission Decision of 15 December 2015

[16] See [Paulius Mencas](#), [The Lithuanian competition authority clears a merger subject to commitments in the insurance sector \(PZU / Lietuvos draudimas\)](#), 9 October 2014, e-Competitions Bulletin October 2014, Art. N° 70046

[17] See [Giorgio Vagnoni](#), [The Italian Competition Authority clears a transaction between leading insurance firms for the acquisition of control of a company operating in the same insurance sector \(Società Cattolica di Assicurazione / FATA Assicurazioni Danni\)](#), 5 March 2014, e-Competitions Bulletin March 2014, Art. N° 65280

[18] See [Hellenic Competition Authority](#), [The Hellenic Competition Commission clears an acquisition of sole control in the insurance market \(ERGO International / Agrotiki Asfalistiki\)](#), 23 October 2014, e-Competitions Bulletin October 2014, Art. N° 69651

[19] See [UK Competition and Markets Authority](#), [The UK Competition and Market Authority formally clears a merger in the insurance sector following an in-depth enquiry \(Xchanging / Agencyport\)](#), 29 April 2015, e-Competitions Bulletin April 2015, Art. N° 72697

[20] P&I Clubs are mutual associations which provide Protection and Indemnity insurance to their members

[21] European Commission Press Release, "Antitrust: Commission closes investigation in P&I Clubs case", 1 August 2012

[22] Competition and Markets Authority, "Private motor insurance market investigation - Final report", 24 September 2014

[23] Competition and Markets Authority, The Private Motor Insurance Market Investigation Order 2015, 18 May 2015

[24] M-lex, "Auto-insurance sector shows inefficiencies, Romanian authority says", 16 December 2015

[25] Financial Conduct Authority, "Call for Inputs: Big Data in retail general insurance", November 2015

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**Greg Olsen | Clifford Chance (London) | greg.olsen@cliffordchance.com**  
**Daniel Schwarz | Clifford Chance (London) | daniel.schwarz@cliffordchance.com**

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