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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**On the functioning of Commission Regulation (EC) No 267/2010 on the application of
Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted
practices in the insurance sector**

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EXECUTIVE SUMMARY

According to Article 1(2) of Council Regulation¹ 1/2003 governing the implementation of the EU competition rules as set out in the Treaty on the Functioning of the European Union (hereafter TFEU), agreements² caught by Article 101(1) TFEU which satisfy the conditions of Article 101(3) TFEU shall not be prohibited, no prior decision to that effect being required. In order to comply with the terms of this directly applicable exemption regime, undertakings must carry out a self-assessment of the effects of their agreements.

There are agreements between undertakings active in the insurance sector that simultaneously ensure the proper functioning of this sector and promote consumer interests. Such agreements may involve a restriction of competition, but are still regarded as compatible with the Internal Market if they promote technical and economic progress and/or improve the production and distribution of goods and services. At the same time, as necessary conditions, these agreements must allow consumers a fair share of the resulting benefits, must not eliminate competition in the concerned markets, and any restriction of competition caused by them must be limited to what is necessary. In the presence of the above-mentioned beneficial effects, the agreements are admissible.

Regulation (EC) No 1534/91 on the application of Article 101(3) TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector³ enables the Commission to declare, by way of Regulation, that the provisions of Article 101(1) TFEU are inapplicable to certain categories of agreements. The relevant Commission's regulation exempts insurance undertakings from making an effects-based self-assessment because the overall net benefits of the cooperation can be presupposed. Based on this Regulation, in 2010, the Commission adopted the Insurance Block Exemption Regulation⁴ (hereafter IBER) which exempts, subject to certain conditions: (1) agreements between (re)insurers to exchange information in the form of joint compilations, tables and studies; and (2) the common coverage of certain types of risks by means of so-called co(re)insurance pools⁵. The IBER exemptions will lapse on 31 March 2017, if the Commission does not decide to prolong or amend them. The exemption for information exchange allows (re)insurers to cooperate in the compilation and dissemination of statistical data in order to predict and price risks more accurately. The exemption for co(re)insurance pools allows pro-competitive cooperation between (re)insurance undertakings that facilitates market entry and appropriate risk cover.

¹ Council Regulation 1/2003/EC on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1, 4.1.2003).

² Wherever the term "agreements" is used in this document, it shall mean agreements, decisions (by associations of undertakings) and concerted practices.

³ Council Regulation (EC) 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).

⁴ Commission Regulation (EU) 267/2010 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 (OJ L 83, 30.3.2010, p.1).

⁵ Commission Regulation (EU) 267/2010 (IBER), Article 5: "[C]o-reinsurance pools' means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or more reinsurance undertakings, with the exception of ad-hoc co-reinsurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of this risk is covered by follow insurers who are then invited to cover that remainder in order to: (a) reinsure mutually all or part of their liabilities in respect of a specified risk category; (b) incidentally accept, in the name and on behalf of all the participants, the reinsurance of the same category of risks."

The decision regarding the future of the IBER is subject to an Impact Assessment. Since early 2014 the Commission has been gathering information on the use and functioning of the IBER exemptions. To date, this has included: a study on the different forms of pools and ad-hoc co(re)insurance arrangements available in the EU; the consultation of the National Competition Authorities; a public consultation that ran from August to November 2014, complemented with targeted questionnaires and meetings with certain categories of stakeholders; and other own-initiative research carried out by the Commission.

As an intermediary step, the Commission is required to submit a Report on the functioning and future of the IBER no later than six years from its entry into force. Based on the in-depth assessment of the evidence gathered so far, the Commission has arrived at the following preliminary views.

Although there are indications that the insurance sector may have an enhanced need for collaboration (compared to other economic sectors) in relation to the compilation and distribution of joint calculations, tables and studies, and the co(re)insurance of certain specific types of risks, the Commission finds at this stage that the strict conditions for the creation of a sector-specific Block Exemption Regulation (hereafter BER) with respect to these categories of agreements seem no longer to be met.

At this stage it seems that the market conditions of the insurance industry no longer appear to necessitate the existence of an IBER for the compilation and distribution of joint calculations, tables and studies. The Guidelines on the application of Article 101 TFEU to horizontal cooperation agreements (hereafter Horizontal Guidelines) already offer guidance for the purpose of self-assessing the admissibility of this type of cooperation. Likewise, the Commission can provide, if necessary, additional legal certainty and guidance to the insurance industry, which is an alternative and far more flexible instrument that can be more easily adapted to changing circumstances.

With respect to co(re)insurance pools, at this stage it seems that the renewal of the IBER is not justified because of its limited use and relevance, the potential risk of misapplication and, overall, the fact that it is not longer possible to presume with sufficient certainty that the type of cooperation covered by the exemption satisfies all the conditions necessary for a finding of compatibility with the Internal Market. This is especially so when considering that the insurance market currently provides a heterogeneous and less restrictive set of alternatives to pools for the purpose of co(re)insuring risks.

Thus, at this stage a case-by-case self-assessment of the arrangements for the setting-up and the functioning of each individual co(re)insurance pool, under the guidance provided by the Commission by means of Horizontal Guidelines, which is the standard in other sectors, seems to be the best way to ensure that co(re)insurance pools produce net positive effects for consumers and competition within the meaning of Article 101(3) TFEU.

In the event that the IBER exemptions are not renewed, the Commission might decide to adopt guidance (replacing the current IBER Communication) on the principles of self-assessment for those agreements that will no longer benefit from a BER.

Following its publication, the Commission intends to organise a stakeholder discussion on the preliminary conclusions of this Report.

The Commission also intends to publish and discuss with stakeholders, where necessary, the conclusions of the two studies on a series of issues pertaining to the functioning of the IBER that are currently underway.

1 INTRODUCTION

1.1 The Review of the Insurance Block Exemption Regulation

- (1) On 24 March 2010 the Commission adopted Regulation (EU) No 267/2010⁶ exempting two categories of agreements in the insurance sector (the Insurance Block Exemption Regulation, hereafter the IBER). The Regulation is accompanied by a Communication⁷ clarifying the conditions of application of the IBER. The IBER expires on 31 March 2017.
- (2) Pursuant to Article 8 of Council Regulation (EEC) No 1534/91⁸ (hereafter, the Empowering Regulation), the Commission is required to submit to the Council and the European Parliament a Report on the functioning and future of an IBER (hereafter the Report), including preliminary views on potential changes, no later than 6 years after its entry into force. For the IBER, this Report must be submitted by 31 March 2016 at the latest.
- (3) Accordingly, in early 2014 the Commission started the Review of the functioning and use of the IBER. By means of this Review, the Commission intends to analyse how competition and consumers in the insurance sector are affected by the IBER.
- (4) In May 2015, the European Commission adopted a new Better Regulation approach aimed at more systematic and transparent consulting of stakeholders, improved impact assessments and drawing lessons learned from past experience. Given that the work on the IBER review started already in early 2014, the process did not follow all the steps set out in the new Better Regulation Guidelines. However, the Review has been conducted in an open, transparent manner and key elements of retrospective evaluation have been respected. Thus, the analysis of the enhanced need for cooperation has allowed the Commission to look at the relevance, while the analysis of the need for a BER has taken into account the coherence, efficiency and effectiveness of such an approach.
- (5) The Review is subject to an Impact Assessment whereby the Commission will evaluate three possible policy options: non-renewal of the IBER, partial renewal (i.e. removing only one exemption) or full renewal. Unless it finds sufficient evidence indicating that a

⁶ 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, decisions and concerted practices in the insurance sector (OJ L 83, 30.3.2010, p. 1).

⁷ Communication from the Commission 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 (OJ C 82/02, 30.03.2010)

⁸ Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 31.5.1991, p. 1)

sector-specific regulation is necessary for the two categories of agreement exempted by the IBER, the Commission will not renew these exemptions and will therefore let the IBER lapse. Details of this process are set out in the Inception Impact Assessment⁹.

1.2 Purpose and Scope of the Report and the Staff Working Document

- (6) The Report presents the preliminary findings and conclusions of the Commission's Review.
- (7) The Report is accompanied by a Staff Working Document (hereafter SWD). The scope of the Report and the SWD covers all 28 Member States.
- (8) It is to be noted that the Report and the SWD confine themselves to presenting the Commission's preliminary views on the functioning and future of the IBER and in no way prejudge the final decision that the Commission will take once the Impact Assessment process has been completed. The Report is one of the intermediary steps in a comprehensive consultation process to which all stakeholders were invited to contribute.

2 BACKGROUND TO THE INITIATIVE

2.1 Enforcement of EU competition rules

- (9) The basic provisions of the EU competition rules are laid down in Articles 101 and 102 TFEU.
- (10) An effective competition policy is vital for maintaining the benefits of the Internal Market. Its aim is to make markets function better in order to provide consumers with the best products and services at the best prices. The preservation of effective competition is essential for market economies, since it enhances business efficiency and boosts innovation, helping to deliver better market outcomes in terms of quality, choice, cost and prices.
- (11) The enforcement system of EU competition rules fundamentally changed on 1 May 2004 with the entry into force of Council Regulation (EC) No 1/2003 of 16 December 2002¹⁰ on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU (hereafter Regulation 1/2003). Regulation 1/2003 introduced a new procedural framework for the application of EU competition rules, introducing a system of decentralised enforcement and parallel competences. This framework allows National Competition Authorities (hereafter NCAs) to fully enforce EU competition rules, because, based on their experience, they are well placed to apply these rules to the unique market conditions prevalent within their national territories.

⁹ http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_comp_001_review_iber_en.pdf

¹⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty (OJ L 1, 4.1.2003, p. 1).

- (12) Regulation 1/2003 provides that agreements that satisfy the conditions of Article 101(3) TFEU are not prohibited, no notification to the Commission and prior decision to that effect being required. Under the resulting enforcement regime, undertakings and associations of undertakings must assess for themselves whether their agreements satisfy the conditions of Article 101(3) TFEU.
- (13) In order to meet the conditions of Article 101(3) TFEU, the relevant agreements must contribute to the promotion of technical or economic progress, or to improving the production or distribution of goods, while allowing consumers a fair share of the resulting benefits. Any restrictions of competition caused by such agreements must also be limited to what is strictly necessary (principle of proportionality), and not eliminate competition in respect of a substantial part of the products or services in question.
- (14) Consequently, undertakings must independently determine whether their agreements are compatible with the Internal Market. Only a small minority of industries still benefit from a sector-specific Block Exemption Regulation (hereafter BER).

2.2 Block Exemption Regulations

- (15) The Commission may adopt regulations declaring that certain categories of agreements are deemed to fulfil the conditions of Article 101(3) TFEU. In particular, through its Empowering Regulation, the Council empowered the Commission to adopt regulations on the application of Article 101(3) TFEU to certain types of agreements between undertakings, decisions of associations or undertakings and concerted practices (hereafter agreements) in the insurance sector. Anti-competitive agreements may be considered exempt under Article 101(3) TFEU if they deliver efficiency gains that outweigh the effects of any restrictions.
- (16) Up to the adoption of Regulation 1/2003, BERs were introduced as a means of reducing the heavy administrative burden caused by the large number of notifications the Commission received in certain fields. Regulation 1/2003 replaced a centralised administrative ex ante notification regime with a decentralised ex post enforcement regime based on self-assessment of their cooperation agreements and commercial practices by the relevant undertakings. To guide this assessment, the Commission has since also adopted a series of general guidance instruments such as the Horizontal and Vertical Cooperation Guidelines¹¹ that apply to all sectors. These horizontal guidelines deal with many fields that were previously covered by sector-specific instruments.
- (17) The insurance sector is only one of three sectors (the other two being maritime liner shipping and motor vehicle distribution) that still benefit from a BER. There have been other sectors (such as maritime and air transport) for which the relevant BER was not renewed.

¹¹ Guidelines on Vertical Restraints (OJ C 130, 19.5.2010)

2.3 The Insurance Block Exemption Regulation

- (18) The first IBER was adopted in 1992 and was renewed with modifications in 2003 and 2010. Based on the Empowering Regulation, on 24 March 2010 the Commission adopted the latest IBER exempting two categories of agreements in the insurance sector.
- (19) The IBER exempts, subject to certain conditions, agreements between (re)insurers to exchange information in the form of joint compilations, tables and studies, and the common coverage of certain types of risks by means of so-called co(re)insurance pools.
- (20) The IBER entered into force on 1 April 2010 and will expire on 31 March 2017. This Regulation aims to ensure effective protection of competition while providing benefits to consumers and adequate legal security for undertakings.
- (21) In 2010, during the latest renewal, the Commission reduced the categories of exempted agreements from four to the current two, and also adopted a Communication providing guidance on the application of the IBER (hereafter the IBER Communication).

2.4 Effects of a Block Exemption Regulation

- (22) BERs automatically exempt certain categories of agreement from the prohibition of Article 101(1) TFEU. If an agreement falls within the scope of the category defined in a BER on the basis of its contents, it is automatically deemed to meet the compatibility conditions of Article 101(3) TFEU.
- (23) By contrast, if an agreement does not fall within a BER and is suspect of violating Article 101(1) TFEU, it is then necessary for the relevant undertakings or association to carry out a self-assessment in order to examine the pro-competitive and anticompetitive effects of the agreement before finding that it complies with the conditions set out in Article 101(3) TFEU, and is thus individually exemptible and, consequently, compatible with the internal market.
- (24) According to Article 103(2) TFEU, the Commission may adopt BERs "taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other". That is to say, when deciding whether or not to adopt a BER and subsequently its scope, the Commission must balance the obligation to ensure an effective supervision of markets against the need to simplify administration and the associated administrative burden put upon the concerned undertakings.
- (25) Prior to the entry into force of Regulation 1/2003 that modernised the enforcement of the EU competition rules, the primary objective of a BER was to reduce the number of notifications made to the Commission. Regulation 1/2003 abolished the system of notifications, but did not do away with BERs. However, the rationale of BERs has in part changed with the modernised EU competition rules. As part of the modernisation process, the Commission has taken a clearer and more detailed framework for the assessment of Article 101(3) TFEU. This can be seen, for instance, in the review of the

block exemption regulations applying to vertical and horizontal agreements, as well as in the Vertical and Horizontal Guidelines adopted by the Commission for assessing such agreements when they fall outside these BERs.

- (26) Therefore, a BER should be strictly limited to those categories of agreements that can be adequately and clearly defined, and which can be assumed with sufficient certainty to satisfy the conditions of Article 101(3) TFEU. Furthermore, under the modernised enforcement system a BER can be considered to be an appropriate instrument of administrative simplification only if it can be proven that it produces an appreciable reduction in compliance costs.
- (27) This restrictive approach was already adopted by the Commission when it last reviewed the functioning of the preceding IBER. As the IBER Communication explains, a sector-specific BER is an exceptional instrument that “should only be adopted if cooperation in the insurance sector is 'special' and different from other sectors which do not benefit from a BER (i.e. most sectors currently)”¹².
- (28) Instead the IBER requires a self-assessment where those agreements fall within two specific categories: information exchange, and cooperation in pools that are defined in the IBER on the basis of their contents. As long as the relevant agreements fall within these definitions and certain other conditions are fulfilled, they are automatically deemed compatible, because the Commission presumes that they produce net pro-competitive effects.
- (29) The IBER exemptions should be designed to cover genuinely beneficial instances of cooperation between (re)insurers by the least restrictive means of cooperation available taking into account the most recent market developments. This cooperation is thus presumed, on the one hand, to facilitate market entry and the underwriting of insurance products that otherwise would not be offered, with the ensuing effect of keeping premiums low and consumer choice large and, on the other, to also effect increased legal certainty and an appreciable reduction in compliance costs (with the competition rules) for (re)insurers. These expected results and direct impacts are considered to ultimately ensure competition between (re)insurers on a level playing field and to enhance innovation and consumer welfare.

3 THE ASSESSMENT CRITERIA AND QUESTIONS

- (30) For this Review, the Commission took the same restrictive approach used in the preceding review. The IBER Communication set the scene for the evaluation and impact assessment by explaining, as previously indicated, that a sector-specific BER is

¹² Paragraph 4, Communication from the Commission 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, COM(2010) 100.

an exceptional instrument that "should only be adopted if cooperation in the insurance sector is 'special' and different from other sectors which do not benefit from a BER (i.e. most sectors currently)"¹³.

- (31) Hence, in order to assess the functioning of the IBER and later determine whether it should be renewed and, if so, to what extent, the Commission proposed to address two basic consecutive and related questions:

Question 1: Is the insurance sector still characterised by distinct features that present an enhanced need of cooperation in those fields in which the remaining IBER exemptions apply?

Question 2: If that is the case, is an exceptional instrument such as a BER still needed in order to protect that enhanced need for cooperation?

- (32) These two elementary questions were also used as evaluation and impact assessment benchmarks in the review of the preceding IBER.
- (33) Therefore, the public consultation that took place during 2014, and the subsequent process of evidence gathering, were structured and carried out in a manner aiming to answer these two questions, and to support the Impact Assessment of the policy options for the future of the IBER.
- (34) In May 2015 the Commission adopted the Better Regulation Guidelines that aim at “designing EU policies and laws so that they achieve their objectives at minimum cost”¹⁴. These Better Regulation Guidelines set a framework for undertaking the different phases of the whole policy cycle, from policy design and preparation, through implementation and application, to the evaluation of policies and laws and their review.
- (35) The Report to the European Parliament and the Council on the functioning and future of the IBER constitutes an interim step in the broader process of the Impact Assessment the Commission is conducting in order to evaluate the possible policy options before the current IBER lapses.
- (36) Naturally, the original information-gathering steps from stakeholders¹⁵ which the Commission undertook (i.e. the consultation of NCAs of the EU Member States, the Public Consultation, as well as the targeted questionnaires to stakeholders also sent in 2014) did not explicitly use the questions set out in the Better Regulation Guidelines, because these Better Regulation Guidelines were adopted later in May 2015.

¹³ See Paragraph 4, Communication from the Commission 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, COM(2010) 100.

¹⁴ Chapter I, Section 2.

¹⁵ See Section 4 below.

- (37) As previously explained, for the purpose of the IBER Review the Commission originally used as primary benchmarks the two questions employed in the preceding review. Around those benchmarks, the Commission then structured more concrete questions in the public consultation and the targeted questionnaires.
- (38) However, the Review has been conducted in an open, transparent manner and key elements of retrospective evaluation have been respected. Thus, the analysis of the enhanced need for cooperation has allowed looking at the relevance, while the analysis of the need for a BER has taken into account the coherence, efficiency and effectiveness of such an approach.

4 METHOD

- (39) This section describes the methods used to gather information for the Review of the IBER. It sets out the formal steps of the review process, as well as the preparatory work undertaken so far.

4.1 Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market and workshop

- (40) As a first preparatory step in the review process the Commission commissioned a Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market. The objective of the Study was to obtain an in-depth understanding of the operation of these two types of co(re)insurance cooperation frameworks across the EU. In addition, the Commission sought to gather information on the application of the IBER in order to understand how pools undertake legal assessments, and to what extent.
- (41) The study provides, at EU-27 level, an overview of the pools and ad-hoc agreements on the subscription market existing after the adoption of a new IBER in 2010. The Study also analyses similarities and differences between these two types of arrangements, and contains detailed factual country-specific reports on both topics. It is a descriptive study and does not include recommendations. A first edition of the Study was published in 2013, a new edition in 2014¹⁶. Following the publication of the first edition, the Commission organised a Workshop on 12 March 2013 at the Commission's premises in Brussels and discussed the findings with stakeholders in two panels dedicated to co(re)insurance pools and ad-hoc co(re)insurance agreements.

4.2 Consultation of NCAs

- (42) The formal review process then started with the consultation of the NCAs¹⁷ in February 2014 by means of a questionnaire.

¹⁶ http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf

¹⁷ This comprised the National Competition Authorities of the 28 EU member states and the EFTA Surveillance Authority.

(43) The questionnaire included 17 questions divided in three main sections respectively on (a) the application of the IBER in practice, (b) the results of the study on co (re)-insurance pools and on ad-hoc co (re)-insurance agreements on the subscription market, (c) their prospective assessment. In addition, in section (d) the NCAs were invited to provide any other information that they might consider pertinent¹⁸. Following the written consultation, a meeting was held on 13 June 2014 at the Commission's premises in Brussels to discuss the feedback received.

4.3 Roadmap and Inception Impact Assessment

(44) The review process was presented to the public in more detail with the publication of a Roadmap in May 2014 on the internet. This roadmap was replaced in August 2015 by an Inception Impact Assessment¹⁹ following the adoption of the Better Regulation Guidelines due to the fact that the review is subject to an Impact Assessment.

4.4 Consultation of stakeholders

4.4.1 Public consultation

(45) A major step in the review process represents the Public Consultation that ran from 5 August to 4 November 2014. In August the Commission published an online questionnaire for stakeholders using the Commission's EU Survey platform²⁰ and DG Competition's website. Stakeholders were invited to provide feedback within a period of 13 weeks in any official EU language either by means of the online questionnaire or by sending contributions by post. The launch of the public consultation was accompanied by a press release²¹ which set out the background for the review process.

(46) The questionnaire comprised 40 questions divided into five sections gathering information on the following topics: (2.1) Stakeholder Profile (2.2) Market developments; (2.3) Application of the IBER in practice; (2.4) Policy options; and (2.5) Impact of the options²². The questionnaire included specific questions inviting stakeholders to identify the concrete changes that a potential non-renewal of the IBER could produce in their behaviour, as well as to quantify the additional costs they would incur as a result of this or, at least, to rank the effects on a qualitative scale.

(47) The consultation was open to all citizens and organisations, but comments from stakeholders affected by IBER, such as (re)insurers, industry associations, insurance

¹⁸ See Annex I.

¹⁹ Following the adoption of the Better Regulation Guidelines the Roadmap was replaced by an Inception Impact Assessment: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_comp_001_review_iber_en.pdf

²⁰ Public consultation questionnaire and specific replies: https://ec.europa.eu/eusurvey/runner/Public_Consultation_Insurance_Block_Exemption_Regulation

²¹ http://europa.eu/rapid/press-release_IP-14-905_en.htm

²² See Annex II.

intermediaries, public authorities, customers and consumer organisations were particularly welcome. Replies were received from 37 stakeholders, including public authorities, insurance undertakings and associations, and published on DG Competition's website.

4.4.2 Targeted questionnaires, bilateral meetings and telephone conferences following the Public consultation

- (48) Given that most of the replies to the Public Consultation came from industry associations and (re)insurers the Commission complemented the Public Consultation by targeted questionnaires sent to stakeholders groups from whom the Commission had received only a limited number of responses. Targeted questionnaires were sent to pools as they are directly affected by one of the IBER exemptions, to intermediaries federations /brokers being both involved in the operations of pools and to mutual insurance associations (hereafter mutuals) operating in the nuclear and energy sector²³ which act as competitors to pools, as well as to customers and customer associations operating in fields in which co(re)insurance schemes appeared to be prevalent.
- (49) In order to improve the quality and relevance of the feedback received through the public consultation and targeted questionnaires, as of November 2014, the Commission held bilateral meetings and telephone conferences with stakeholders, namely an actuarial association, pools and national insurance associations, who are regularly involved in the exchange of information and thus apply the IBER in practice. Some of the stakeholders who had submitted observations were also contacted for follow-up interviews in order to clarify their position or address additional questions.

4.4.3 Data and Information gaps

- (50) While the content of the stakeholder replies and the feedback received from the NCAs will be reported in Section 5 below, this section will give an overview of the data collected by the Commission during the review process and of potential information gaps.

4.4.3.1 Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market

- (51) The Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market identified an overall low number of only 46 institutionalised pools potentially covered by the IBER exemption. The number of pools was found to be lower than initially expected. Of the 100 arrangements considered to be covered by the IBER definition, 39 were in the end outscoped from the study following interviews²⁴. 61 pools were actually considered to fulfil the IBER definition; however, 15 of those were

²³ Energy and nuclear pools is the largest category of pools identified by the referenced "Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market".

²⁴ See page 13 paragraph 59 and page 309, table 2 of the Study.

identified to be no longer operative, i.e. in "run-off"²⁵. Almost one quarter of IBER pools has hence decided to leave the market. This represents a further decline in the number of pools under the IBER definition.

- (52) Information could only be gathered in respect of 42 pools, as four pools declined to participate²⁶. Response rates relating to the questions on self-assessment under the IBER were disappointingly low.

4.4.3.2 Consultation of NCAs

- (53) As regards input from the NCAs, fourteen of them replied to the Commission. Overall, their experience with the IBER in the review period appeared to be limited. It has to be pointed out that NCAs preferred not to take a formal position on the future of the IBER yet. However, it seems that the few NCAs with some experience in the application of the IBER tend to support its non-renewal, while a larger proportion appears to be in favour of renewal.
- (54) The Spanish, German and Dutch competition authorities also submitted detailed information on cases connected with the application of the IBER.

4.4.3.3 Consultation of Stakeholders

- (55) The Public Consultation ran from 5 August 2014 until 4 November 2014, i.e. 13 weeks, giving interested stakeholders sufficient time to participate. 37 replies were received. Almost three quarters of replies came from the insurance industry²⁷. Only one customer participated in the public consultation. The majority of those who completed the questionnaire provided by the European Commission did not answer all of the questions therein. Several of those who responded provided their views in different formats.
- (56) However, to cover a maximum of stakeholders affected by IBER and mitigate the risk of not detecting significant market views additional questionnaires were sent²⁸ to 49 pools, namely all 46 pools scoped under the study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market²⁹ and three other entities³⁰. Furthermore, tailor-made questionnaires were sent to 39 intermediaries/associations of intermediaries, four mutuals as well as to 75 customers/customer associations. The rate of reply was very different across the different categories of stakeholders: 30 replies

²⁵ See Executive Summary of the Study, p. ii. and page 41 paragraph 162 table 13.

²⁶ Two pools from Belgium, a Bulgarian and a Czech pool declined to participate.

²⁷ For details see summary of input from Public consultation in Section 5 below.

²⁸ For details see section State of Play, Summaries of additional questionnaires.

²⁹ http://ec.europa.eu/competition/sectors/financial_services/KD0414707ENN.pdf

³⁰ These concerned: one entity located in Croatia which was not part of the study because the study focussed on EU-27. The other two entities have been determined out of scope by the study, one of them had responded to the public consultation. However, it was unclear whether these two could potentially fall under IBER.

were received from pools, nine replies from intermediaries/associations of intermediaries, two replies from mutuals and 12 replies from insurance customers coming from the chemical, energy, oil & gas and transport sector.

- (57) In addition, the Commission held bilateral meetings and telephone conferences with insurance associations, pools and an actuaries association.
- (58) From a quantitative point of view, the data gathered so far during the present Review can be considered especially significant with regard to insurance undertakings, including insurance associations and pools. The data collected on the exchange of information were comparatively more substantial than those on pools. The overall moderate rate of responses despite the efforts undertaken, as well as the results of the Study suggest above all a limited application of the IBER exemption for pools.
- (59) On the other hand, it should be noted that the limited participation of customers in the Public consultation, and the low rate of responses to the target questionnaire, could be explained by the very technical character of the issues involved in the Consultation. In addition, several pools operate on a reinsurance level, meaning that end customers have no direct contact with those pools.

4.4.4 Further steps

4.4.4.1 Studies on issues pertaining to the insurance production process with regard to the application of the IBER

- (60) In summer of 2015, the Commission launched two studies to clarify some issues pertaining to the process of generating insurance products with regard to the application of the IBER that have been raised by stakeholders in the context of the above-mentioned interactions (i.e. supply-side substitutability³¹ in insurance, and the impact on competition of different forms of cooperation between (re)insurers). These studies will likewise provide additional input for the Commission to gain a comprehensive overview of the market for the purpose of making its final proposals on the future of the IBER.
- (61) The first study concerning the possibility of switching between different insurance products addresses some relevant aspects that might facilitate the application of the guidelines on market definition and market share calculation to the insurance sector. The second study on different forms of cooperation amongst insurance companies, and their respective impact on competition, is complementary to the study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market already published by the Commission. It will discuss the range of benefits and disadvantages deriving from each type of existing or possible alternative insurance

³¹ Supply-side substitutability means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. See Commission Notice on the definition of relevant market (OJ C 372, 9.12.1997), paragraph 20.

cooperation scheme; analyse the different potential effects on market structure and market dynamics deriving from each existing or possible insurance cooperation scheme; make an overall comparison of the different forms of cooperation by focusing on the above findings; and identify and analyse viable alternative (re)insurance instruments to cover risks. Both studies will be completed in the second quarter of 2016.

4.4.4.2 Stakeholder discussion

- (62) In order to further fill possible information gaps, the Commission intends to organise a stakeholder discussion on the preliminary conclusions of the Report. The Commission also intends to publish the above-mentioned studies and considers presenting the studies' findings at that stakeholder discussion, if necessary.

5 STATE OF PLAY

- (63) This section summarises the feedback received by way of the public consultation and the targeted questionnaires to stakeholders, as well as the input provided by the NCAs.

5.1 Public consultation

- (64) 37 replies were received to the public consultation that gathered evidence and views on the functioning and future of IBER. 17 replies came from participants registered in the Transparency Register of the European Commission and the European Parliament, and 17 from non-registered organisations. Three replies came from public authorities located in Austria, France and Germany. Three participants qualified themselves as Small or Medium-sized Enterprises (SMEs).
- (65) The Commission obtained replies from the following stakeholder categories: 22 industry associations; four insurance undertakings (two of which are also reinsurance undertakings) one insurance intermediary; one customer; three public authorities; and six other entities. Among the participants in the public consultation were only four pools within the meaning of the IBER.
- (66) The purpose of the questionnaire was to gather views on the functioning of the IBER and obtain concrete quantitative and qualitative information regarding the potential effects (benefits and disadvantages) of the renewal of the two IBER exemptions on the market.
- (67) Many participants did not elaborate on potential impacts of the different policy options and therefore only provided very general statements.
- (68) Regarding the different topics covered in the questionnaire, the following aspects are the most relevant:

5.1.1 Market developments

- (69) The feedback on market developments revealed mixed views. The majority of insurers and their industry associations claim that markets are competitive. However, the only customer who took part in the public consultation was of the opinion that the market of

nuclear risks was not competitive as a result of the existence of pools of insurers in this segment. This participant highlighted the fact that the pools of insurers for nuclear risks that exist in each country continue to operate within a quasi-monopolistic framework.

- (70) Only very few participants saw no significant changes over the last ten years. Many informed the Commission of the evolution of their national markets, and of certain common trends amongst the European markets. In the latter respect, the emergence of certain risks, e.g. cyber-attacks and climate change, was particularly emphasised. Some stakeholders also highlighted new technological developments in the fields of data collection, storage and analysis, price comparison sites and software houses, which can allow insurers to offer prices on a common platform.
- (71) Several participants in the public consultation signalled the emergence over the last years of certain forms of cooperation, namely the growing use of broker-led co-insurance and intermediary-driven co-insurance.
- (72) Furthermore, insurers stressed that the implementation of the Solvency II Directive³² (applicable from 1 January 2016) reinforces the need for more precise and accurate information on risks. The Solvency II regime sets out stricter risk capital requirements and obliges (re)insurers to calculate best estimate liabilities. The existence of information exchange on risks facilitated by the IBER would allow greater confidence in such best estimate calculations, and therefore help reduce the level of provisions that might otherwise need to be held in reserve, to the benefit of consumers.

5.1.2 Application of the IBER in practice

- (73) The public consultation questionnaire invited stakeholders to provide feedback on the actual use of the IBER provisions, against the background that the above-mentioned Study published by the Commission indicated difficulties in applying some IBER definitions. Many participants did not answer the relevant question on this topic; however, about half of those who answered reported difficulties with the IBER provisions.
- (74) Regarding the definition of "pool", some insurers consider the IBER to be imprecise and unclear, specifically when determining if the exemption covers certain types of cooperation between insurers brought about under the intervention of an intermediary/broker. Another weakness signalled by a few stakeholders is the unclear definition of "new risk" under the IBER; in this regard, the Commission was asked to extend the exemption beyond the current 3-year period.

³² Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II; OJ L 235, 17.12.2009, p. 1).

(75) Furthermore, some participants reported difficulties in defining the relevant market, specifically when applying the market share thresholds established in IBER, and asked for further guidance.

5.1.3 Policy options

(76) All participants that expressed a view on the future of IBER exemptions are in favour of their renewal (with the exception of the above-mentioned customer who opposes the renewal of the pools' exemption for the coverage of nuclear risk damages). The participants took the view that the cooperation forms addressed by the IBER are specific to the sector, and drew the conclusion that there is a need for an IBER. The views provided, however, did not go beyond very general statements and did not contain compelling evidence for renewal.

(77) The majority of participants in the public consultation argue that in absence of the IBER, the application of the Commission's current Horizontal Guidelines³³ would not provide sufficient legal certainty, as they are not binding before the national courts or the NCAs. Furthermore, they would oblige insurers to carry out an assessment of efficiencies using the Horizontal Guidelines. The Horizontal Guidelines were also said not to sufficiently address the distinguishing characteristics of the insurance sector.

5.1.4 Impact of the policy options

(78) Many participants did not elaborate on the potential impact of the policy options, however, several provided some views on the matter, though they did not go beyond very general statements.

(79) In the event of non-renewal of the IBER exemption for exchange of information, many participants fear that the ensuing lack of legal certainty will lead to a potential reduction in the existing collaboration between insurers in this field, which could adversely affect risk knowledge. As a result, they claim that insurance premiums and compliance costs would rise and customer choice, product availability and diversity would decrease. Participants also argued that the availability of adequate statistical information on risks is fundamental to the carrying out of operations in various classes of insurance business. Some reported that the implementation of the Solvency II Directive into national financial regulation will result in stricter risk capital requirements, which would increase the importance of joint compilations, tables and studies. Exchange of risk data would also ensure a level playing field between smaller and bigger insurers. Smaller insurers with a more limited statistical database due to their smaller market presence would face greater difficulties in estimating risks. Non-renewal of the IBER could discourage bigger market players from sharing information with smaller insurers, thereby increasing entry barriers and reducing the number of new entrants.

³³ Communication from the Commission 2011/C 11/01 - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.01.2011, p. 1).

- (80) As regards the cooperation within pools, the majority of stakeholders pointed out that a removal of the exemption would not only result in less legal certainty (e.g. regarding the admissibility of such cooperation) and greater compliance costs for insurers, but that this uncertainty could also lead to undue caution about entering into certain arrangements. This could even lead, in some cases, to the dissolution of the existing cooperation. As a result, insurers might charge higher premiums, or even cease offering certain insurance products, such as the cover for aggravated or catastrophic risks.

5.2 Targeted questionnaires to Stakeholders

5.2.1 Pools

- (81) The Commission sent an additional and tailor-made questionnaire to 49 pools, namely all 46 pools scoped under the study on co(re)insurance pools and ad-hoc co(re)insurance agreements on the subscription market mentioned above, and three other entities³⁴. The questionnaire comprised 22 questions grouped under three sections: description of the pool, relevant market, and impact of the IBER. Some pools did not answer all questions.
- (82) The Commission received a total of 30 replies to the questionnaire: eleven from direct insurance pools, ten from reinsurance pools, and nine from direct and reinsurance pools. Responses came mainly from the energy sector, followed by pools providing insurance for risks relating to terrorism and environmental incidents. The predominant risk categories covered by the responding pools were those against liability and property damage. The majority of the pools are predominantly active in just one Member State. Regarding the requirements of pool membership, most of the pools elaborated on the matter and identified common requirements, for instance the necessity to be a licensed (re)insurer, be financially solvent, adhering to a group agreement and having underwriting experience.
- (83) Some replies referred to additional criteria, such as the availability of specific amounts of capital, or the approval of pool members by the relevant supervisory authority.
- (84) Regarding the question posed by the Commission, i.e. the possible participation of the pool members in other pools, most of the pools confirmed that members are free to join several pools. Moreover, a number of them claimed to provide coverage outside the pool for the same risk type insured by the pool. On the possible involvement of intermediaries, replies were divided as more than half of the pools reported that intermediaries have a role to play within the pool, while others stand for the opposite.
- (85) As for the contractual conditions within the pool, the scope of business as well as the capacities and claims, the responses showed great variety. Regarding the scope of the pools' business activities, the answers ranged from it being prescribed by government

³⁴ These concerned: one located in Croatia, which was not part of the study because the study focussed on EU-27. The other two entities have been outscoped by the study, one of them had responded to the public consultation. However, it was unclear whether these two could potentially fall under IBER.

and set into law, to being determined by the relevant governing bodies. For instance, in one case contractual conditions need to be approved by a ministry, while in other cases this falls to the relevant bodies of the pool. As regards intervention of Member State authorities in the functioning of the pool, more than half of the pools stated that there is no intervention, while a slightly smaller number indicated some form of intervention, such as subsidisation of premiums, approval of scope and price etc.

5.2.1.1 Relevant market

(86) About half of the pools signalled that they are the only participant in the relevant national market, or at least the main participant for certain lines of business. Some of the pools, which regarded themselves as main participants in some lines of business, saw themselves as minor participants for other lines of business offered by them. Several pools claimed to be minor or even insignificant players in the whole market in which they operate. As regards competition, some gave information on the competitive environment and took the view that the market in which they operate is competitive. Respondents highlighted as new developments in the markets they operate for instance new entrants of competitors, Solvency II and change of legislation.

5.2.1.2 Impact of the IBER

- (87) Two thirds, namely 20 pools, consider themselves not to fall within the scope of Article 101(1) TFEU, based on a number of arguments, such as recital 13³⁵ of the current IBER.
- (88) Due to this fact, most of the pools observed that they do not use the exemptions contained in the IBER. Nevertheless, they remarked on the legal certainty and helpful guidance provided by the IBER.
- (89) Indeed, since the majority of the pools consider themselves as falling outside the scope of Article 101(1) TFEU, they do not need to rely on Article 101(3) TFEU. However, several highlighted that if they were within the scope of Article 101(1) TFEU, they would meet the requirements for exemption, having positive effects on the market and on competition.
- (90) A considerable number of pools took the view that the question regarding the possible difficulties in applying the IBER does not apply to them as they fall outside the scope of the IBER. However, eleven pools, among them also pools that regarded themselves as falling outside the scope of the IBER, reported difficulties regarding its application. The definition of the relevant market, as well as the calculation of the market shares in order to determine whether the threshold for exemption is met, were said to represent a challenge. Moreover, one respondent did not feel at ease with the definition of 'pools',

³⁵ “Co-insurance or co-reinsurance pools can, in certain limited circumstances, be necessary to allow the participating undertakings of a pool to provide insurance or reinsurance for risks for which they might only offer insufficient cover in the absence of the pool. Those types of pools do not generally give rise to a restriction of competition under Article 101(1) of the Treaty and thus not prohibited by it”.

and a further two voiced concerns about the new risk section, namely regarding the allegedly insufficient length of the relevant period of exemption, and the lacking clarity regarding the starting point of this period. Ten pools reportedly experienced no difficulties with the IBER.

5.2.2 Customers

(91) The Commission sent 75 questionnaires to customers and customer associations in various sectors³⁶. 12 replies from chemical, energy, oil & gas and transport companies were received. The questionnaire comprised 14 questions relating to: the provision of insurance cover, impacts of the IBER, and potential suggestions for the future of this instrument.

5.2.2.1 Provision of insurance cover

(92) Concerning insurance coverage, all of the customers that responded to the questionnaire provided information about their main insurance scheme, i.e. coinsurance. The majority of them engage the service of global brokers. Most of the customers agree that the market is open, world-wide and competitive. However, customers within the energy sector consider the market to be national, remarking on its lack of competition. Moreover, those engaged in the production of nuclear energy stated that each state has its own local nuclear insurance pool, each of which enjoys a monopoly position.

(93) Most of the customers claim that there is a need for insurers to cooperate. They use cooperation frameworks such as pools and intermediary-led agreements, although the preferred frameworks are ad-hoc agreements.

5.2.2.2 Impacts of the IBER and outlook

(94) Several customers take the view that cooperation under the IBER does not hinder competition and has a rather positive effect on the market. A number of them also pointed out their positive effect on premiums. However, a quarter of the targeted customers, all active in the energy sector, share the opinion that the IBER has a negative impact when it comes to negotiating premiums. Regarding the oil & gas sector, almost half of the customers who responded to the questionnaire considered themselves as falling outside of the scope of the IBER, while the remainder reported stable or marginally falling premiums.

5.2.3 Brokers and Intermediaries' federations

(95) 39 questionnaires were sent to intermediaries/brokers and their associations. Nine replies were received. The questionnaire comprised 34 questions on: insurance

³⁶ Questionnaires were sent to the following sectors: Agriculture, Chemicals, Energy, Oil & Gas, Professional Business Services, Transport and Waste Treatment.

brokerage, the impact of the IBER, and potential suggestions for the future of this instrument.

5.2.3.1 Insurance Brokerage

(96) All of the brokers questioned provide their services world-wide. Most of them are involved in, and lead, a large number of co(re)insurance arrangements. Brokers also believe that these arrangements do not fall under the scope of Article 101(1) TFEU as they are not restrictive of competition. Competition is believed to be vigorous, as brokers compete among themselves and occasionally with agents.

5.2.3.2 Intermediaries' federations

(97) Most of those who replied to the questionnaire remarked on the advantages conferred by pools, be they led by brokers or insurance undertakings. Moreover, they consider that both should be treated in the same manner.

(98) A general consensus exists on the value of using a broker. When it comes to the possible impact of removing the IBER, they also agree that pools would be minimally affected, as they clearly fall within Article 101(3) TFEU.

5.2.3.3 Impact of IBER

(99) All of the brokers and intermediaries federations questioned share the opinion that cooperation under the IBER promotes market entry. The non-renewal of the IBER may cause brokers or (re)insurers to reduce their involvement with pools because participants may erroneously believe that in the absence of the IBER, pools may be considered anticompetitive and thus illegal. Those of the brokers who expressed a view on the impact of the IBER reported it to be a positive instrument.

5.2.3.4 Outlook

(100) Most of the brokers propose an expansion of the scope of the IBER. Likewise, all the participants agree against distinguishing between insurers according to size, and between risk classes.

5.2.4 Mutuals

(101) The Commission sent 4 questionnaires to mutual insurance associations. 2 replies were received. The questionnaire comprised 19 questions relating to: mutual insurance association's operations, relevant market, the provision of insurance cover and potential suggestions for the future of this instrument. The information submitted was claimed to be confidential.

5.2.5 NCA input to the IBER Review

5.2.5.1 General observations

(102) Many authorities did not make any observations, as they lacked practical enforcement experience of the IBER.

- (103) As regards information exchange, those NCAs with experience reported that the relevant exemption is widely used by various stakeholders who collect statistical data information to calculate probability of events happening in key areas such as mortality tables and accident statistics based on driver characteristics. They also mentioned that this kind of information exchanges benefit consumers, as sharing of actuarial information could allow insurers to better understand the underlying risks and may lead to lower premiums.
- (104) Turning to the assessment of the pools exemption, several NCAs indicated that these co(re)insurance arrangements are common in the Member States but in most cases the NCAs have no indication that the IBER is applied as pools can exist without relying on the IBER exemption, because they do not meet its market share thresholds. One NCA took the view that the IBER exemption on pools is not essential to promote the consumer interests. In its view, the wholesale subscription process for co-insuring that exists in some Member States does not require insurers to explicitly agree on the premiums, terms and conditions of cover. Moreover, these more flexible co(re)insurance arrangements provide a viable and possibly more efficient alternative to cover most of the large and new risks.
- (105) Another NCA considered that instead of simplifying the application of the competition rules in their daily enforcement practice, the existence of the IBER rather leads to the result that the NCA can hardly object to certain forms of cooperation, irrespective of whether or not it considers the cooperation to be beneficial. Withdrawing the IBER protection is rarely an option as this would require exceptional circumstances and reasoning.
- (106) Yet another NCA drew the Commission's attention to the difference between the national insurance industry's understanding of "pools" and what is regarded as being a pool under the terms of the IBER. There appears to be uncertainty whether certain cooperation arrangements that are not labelled "pools," would fall within the IBER definition of pools.
- (107) The same NCA also took the view that firms should be able to self-assess whether there are significant benefits from forming a pool and small chances of competitive harm.

5.2.5.2 Decisional practice and case law

- (108) The most relevant decisions and cases of NCAs brought to our knowledge which are relevant to the assessment of the IBER during the Review period are detailed below.

5.2.5.2.1 Germany

- (109) In 2009, following a protracted legal dispute, German's Federal Supreme Court (Bundesgerichtshof) conclusively overturned³⁷ a prohibition decision handed down by the German competition authority³⁸ (Bundeskartellamt, the German NCA).
- (110) The German NCA had taken the decision to prohibit a longstanding pooling arrangement for the provision of professional liability insurance between four insurance companies. This prohibition decision followed from a narrow definition of the relevant market, according to which the markets for professional liability insurance provided to auditors, lawyers, notaries and accountants are fundamentally separate since the risks pertaining to auditors were different from those relating to lawyers, actuaries and notaries. Based on this narrow market definition, the German NCA concluded that the pool exceeded the 20% threshold that would have allowed it to benefit from the protection of the IBER exemption for pools.
- (111) Instead, the German Court of Appeal concluded³⁹ that the pool's market share for benefiting from the IBER exemption should be calculated using a broader relevant product market that encompasses all types of professional liability insurance (rather than treating them as individual product markets), because it assumed a high flexibility of product substitutability in the insurance sector. Consequently the German Court of Appeal annulled the NCA's prohibition decision.
- (112) The Court of Appeal's decision was eventually upheld by the German Supreme Court. Accordingly, in Germany, following this case, co(re)insurance pools regularly do not exceed the corresponding market share of 20% or 25% set out in the IBER for exempting pools.
- (113) In addition, during the Review period the German NCA only dealt with two cases concerning the IBER. The German NCA considers that this small number of cases may be explained by the wide market definition adopted by the Courts in Germany.

5.2.5.2.2 *Lithuania*

- (114) In 2012, the Supreme Administrative Court of Lithuania upheld the decision of the Competition Council of the Republic of Lithuania (CC) of 23 December 2010. In this case, the two largest insurance companies in Lithuania had concluded an insurance pool agreement in the markets of compulsory civil liability insurance for building designers and for constructors. The pool accounted for a market share above the 20% threshold established in the IBER for exemption. The pool members agreed to share risks and to calculate their premiums based a common method of pricing. Holding that the IBER exemption does not extend to the sharing of information on prices, the Court reasoned that cooperation arrangements leading to agreements on the amount of insurance

³⁷ Bundesgerichtshof, BGH, Beschl. v. 23. 06.2009 - KVR 57/08.

³⁸ Bundeskartellamt, BKA, Beschl. v. 10.08.2007 – B4 – 31/05.

³⁹ Oberlandesgerichts: OLG Düsseldorf, Entsch. v. 17.09.2008 – VI-Kart 11/07.

premiums to be charged do not benefit from the IBER, and must be prohibited. As a result, the pool members were fined.

5.2.5.2.3 *Netherlands*

(115) The Dutch insurance industry does not consider coinsurance arrangements established by intermediaries (rather than by insurers) to be pools within the meaning of the IBER. Such arrangements have come to the attention of the Dutch Competition Directorate as being potentially restrictive of competition, resulting in the development of a market protocol for self-assessment by each such intermediary-led pool in the Netherlands. This so-called "Dutch Protocol"⁴⁰ of December 2010 (developed by the Association of Insurers in cooperation with insurance undertakings) has not been formally endorsed by the Dutch Competition Directorate, but is recognised as a viable market solution. The Protocol determines that self-assessment under EU competition law is necessary whenever an insurance pool holds a share equal to or greater than 5% in the relevant market, and/or if the pool covers non-standard risks. Standard risks are defined as being easily placed by an "average intermediary" with an insurer other than one of the members of the pool, without the need of co-insurance. According to the Protocol, participating insurers are not permitted to consult one other with regard to terms and pricing. Instead, all such communication must take place between the broker/authorised agent, and the individual insurers. In addition, pool agreements are limited to a maximum duration of one year, and cannot continue by tacit agreement, but must be renewed expressly. Compliance with the protocol must be recorded both in the pool agreement, and in the agreement between intermediary and insurer.

(116) The Dutch NCA commissioned the Tilburg Law & Economics Center (TILEC) to conduct a survey into the co-insurance market, which was finalised in October 2011.⁴¹ The study included an attached memorandum where the authority discussed the results of the TILEC study. TILEC investigated a) under which conditions co-insurance results in a lower premium than a 100% cover by a single insurer and, b) how the different tendering procedures work. As regards the cover by an insurance pool versus a single insurer, it was concluded that under certain conditions co-insurance results in a lower premium for the policyholder than 100% cover. The Dutch Competition Authority found that if the following conditions are met, they result in cost savings for the insurer and the policyholder: a) an open tendering procedure is carried out; b) the broker acts in the interests of the policyholder; c) insurers are risk-averse; and d) there is no alignment between insurers (i.e. no tacit collusion).

(117) The Dutch NCA adopted a commitments decision on 30 December 2010 against four insurance pools which jointly provide professional liability insurance for liberal

⁴⁰ <https://www.acm.nl/en/publications/publication/6289/NMa-more-competition-among-insurers/>

⁴¹ <https://www.europadecentraal.nl/wp-content/uploads/2013/01/Notitie-MFS-co-assurantie.pdf>

professions (notaries, lawyers, accountants, insurance intermediaries and brokers)⁴². The pool for notaries accounted for 60% of the market for a long time and only one other insurer offered the same type of insurance. As for the relevant market definition, the Dutch NCA explicitly followed the German Appeal Court's broad product market definition, that is "the market for liability insurance for notaries, lawyers accountants, tax consultants, estate agents and financial service providers who mediate or act as authorised agents or sub-agents in insurance matters". In the case at hand, the notaries' pool committed to respecting the market share threshold of 20% in the IBER. Similar commitments were voluntarily offered by the other three pools under investigation.

5.2.5.2.4 Spain

- (118) In 2009 The Spanish Competition Authority (CNMC)⁴³ adopted a decision concerning information exchange between six insurers and reinsurers with regard to building damage insurance. The CNMC took the view that the undertakings concerned had agreed on minimum commercial premiums and standard policy conditions, neither of which is protected under the IBER, whereas the undertakings were of the opposite opinion. The CNMC decided to fine the undertakings in November 2009⁴⁴.
- (119) In January 2013⁴⁵, the Spanish Appeal Court (Audiencia Nacional), quashed the CNMC decision, finding that the objective of the exchange of information between the undertakings concerned was not anti-competitive as it related to the calculation of product costs, and that therefore the behaviour did not fall within the ambit of Article 101(1) TFEU.
- (120) The CNMC appealed to the Spanish Supreme Court (Tribunal Supremo). The Supreme Court held that the conduct did fall within the meaning of Article 101(1) TFEU, and that it was not covered by the IBER. In May 2015⁴⁶, it set aside the appealed judgment, ordering the CNMC to impose a final fine⁴⁷ and redressing the erroneous interpretation of the IBER adopted by the Spanish Appeal Court.

⁴² Decision of the Governing Board of the Dutch Competition Authority, 5998/546.BT55.

⁴³ Previously and until September 2013, CNC ("Comisión Nacional de la Competencia"). Currently and from October 2013, CNMC ("Comisión Nacional de los Mercados y de la Competencia").

⁴⁴ Resolución de la Comisión Nacional de la Competencia de 12 de noviembre de 2009 (Expediente S/0037/08 Compañías de Seguro Decenal).

⁴⁵ Sentencia de fecha 4 de enero de 2013 dictada por la Sección Sexta de la Sala de lo Contencioso Administrativo de la Audiencia Nacional, en el recurso número 864/2009.

⁴⁶ Recurso Casación Nums. 481/2013 y 483/2013 de la Sección Tercera de la Sala de lo Contencioso-Administrativo del Tribunal Supremo.

⁴⁷ The Commission decided to intervene as an amicus curiae in six separate appeals brought before the Spanish Supreme Court by the Spanish CNMC against six judgements rendered by the Spanish Appeal Court.

5.2.5.3 Conclusions

- (121) The above NCAs practice shows that the boundaries of the pools exemption are unclear to them, notably taking into account the very heterogeneous forms of coinsurance currently available on the market. Consequently, the efficacy of the IBER in terms of legal certainty and intended pro-competitive effects is adversely affected by this lack of clarity.
- (122) Furthermore, it appears that the NCAs are well placed to assess both the traditional pools as well as any new forms of cooperation and to establish best suited conditions to promote effective competition in their unique national economic environment. This is exemplified by the development of particular self-assessment frameworks that determine how coinsurance arrangements not covered by the IBER, having regard to their particular national features, should be addressed under the EU competition rules. For instance, the Dutch Protocol applied by the industry to cooperation outside the IBER sets stricter compatibility conditions than the IBER itself.
- (123) Finally, the NCAs practice also appears to indicate that the concepts related to the IBER exemption on information exchange are difficult to interpret, considering the diverging views between the NCAs and the national courts in certain cases.
- (124) In sum, harmonisation in the form of a BER, in an area specially marked by a wide variety of cooperation arrangements rather than a homogenous format, appears to be liable to substantially hinder the NCAs, as well as the national courts, in the effective application of EU competition rules.

6 ASSESSMENT

- (125) In the Report to the European Parliament and the Council, the Commission has to express its preliminary views on the future of the IBER in the light of the information available at this stage of the Impact Assessment process, which is described in Section 5.
- (126) Against this factual background, in order to determine whether and to what extent to renew the IBER, the Commission has proposed to answer the following two consecutive and related questions: Is the insurance sector still characterised by distinct features that present an enhanced need of cooperation in those fields in which the remaining IBER exemptions apply?, and if this is the case, is an exceptional instrument such as a BER still needed in order to protect that enhanced need for cooperation?

6.1 Enhanced cooperation need

6.1.1 Exemption for Compilations, Tables and Studies

- (127) As far as the exemption for information exchange is concerned, the evidence gathered shows that for the purpose of pricing risks, insurers seek to reduce the dispersal between, on the one hand, the real value of claims and, on the other, the premiums that the insured pay. Insurance is a product that covers future risks, the cost of which is

unknown at the time the insurance contract is concluded. Consequently, the availability of adequate and accurate past statistical information on the actual cost of risk classes is fundamental to the carrying out of operations in various segments of the insurance business. Currently no insurer alone appears to be in the possession of sufficient statistical risk data to carry out those calculations accurately. By exchanging information in the form of joint compilations, tables and studies, insurers are able to collate more reliable statistics and develop a better understanding of the evolution of insured risks. This understanding allows them to rate risks more reliably and, as a result, to reduce mark-ups and ultimately the prices paid by consumers. This also makes the exchange of past statistical data crucial to the efficient functioning of the insurance sector. Furthermore, by undertaking those studies jointly, insurers improve the knowledge of the future development of the risks in question.

- (128) Moreover, the implementation of the Solvency II Directive, which sets out stricter risk capital requirements and obliges (re)insurers to calculate best estimates of liabilities, reinforces the need for insurers to maintain more precise and accurate information on risks in order to calculate sufficient reserves in their balance sheets.
- (129) However, there is at present a category of information exchange covered by the IBER for which the insurance sector does not possess distinct characteristics setting it apart from other sectors. The in-depth analysis of the current provisions of the exchange of information exemption shows that one of the categories of agreements exempted under this header, which refers to “the carrying out of studies on the profitability of different types of investments (made by insurers)”⁴⁸, is at odds not only with the powers conferred by the 1991 Empowering Regulation, but also with the justification put forward by the IBER itself for exempting the exchange of information. The 1991 Empowering Regulation allows the Commission to adopt an exemption in this field only with respect to agreements on “the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims”⁴⁹.
- (130) For its part, the IBER justifies “the collaboration ... allowing the calculation of the average cost of covering a specified risk in the past ... to improve the knowledge of the risks and facilitate the rating of risks for individual companies”⁵⁰. The profitability of the future investments an insurer could make is an element of the forward-looking financial decisions it has to adopt, which are entirely unrelated to the knowledge of an insured risk or to the formulation of risks premium tariffs. In fact, the process of identifying, evaluating and selecting between investment opportunities for the free cash-flows a company generates is not exclusive to the insurance sector but common to all undertakings regardless of the sector in which they operate. Furthermore, such decisions

⁴⁸ Article 2 (b), last sentence, of the IBER.

⁴⁹ Article 1, 1(a) of Council Regulation 1534/1991.

⁵⁰ Recital (9) of the 2010 IBER.

should be made independently; one of the most important pillars of the competitive edge of any undertaking lies in making better investment decisions than its competitors. For these reasons, it does not appear at this stage that the insurance sector presents characteristics inherently different from other sectors as to create an enhanced need for cooperation between market participants in the field of studies on the profitability of their different types of investment. The adoption by the Commission of a sector-specific exemption in the field of profitability studies appears irrelevant.

6.1.2 Common coverage of certain types of risks (Pools)

(131) As far as the exemption for pools is concerned, the evidence gathered under the Review confirms that insurers often need to cooperate in order to cover certain large risks. This is the case for large risks, such as terrorism, environmental disasters or nuclear, where risk size and probability dispersion render them more difficult or impossible to insure individually. This is opposed to smaller, conventional and more easily predictable risk classes, such as motor vehicle and life insurance, where insurers usually underwrite risks independently. In case the nature of the risk is such that one insurer alone cannot provide the necessary capacity, co(re)insurance offers a solution by allowing insurers to cover a sufficient number of risks so that the risk profile of the portfolio corresponds to the totality of the relevant risk category.

(132) Nevertheless, so far indications are that, over the last decade, the insurance market has developed more competitive ways to co(re)insure risks, such as broker-led co(re)insurance or line slips. These are viable alternatives to the institutionalised co(re)insurance pools that the IBER exempts. In addition, insurance is not the only sector where undertakings tend to cooperate on specific large projects to spread the costs and risks involved (e.g. for large construction projects). However, in sum, this finding may not entirely negate the existence of a more general enhanced need to cooperate in order to cover large, unconventional risk categories in the insurance sector.

6.1.3 Conclusion

(133) Accordingly, on the basis of the evidence before the Commission, it appears at this stage that, in the two areas covered by the IBER exemptions: information exchange (with the exception of the joint carrying out of studies on profitability) and joint co(re)insurance, the insurance sector presents characteristics different from other sectors such that they lead to an enhanced need for cooperation between market participants.

(134) Therefore, the question whether there are objective reasons to keep these exemptions in place finally depends on whether they need to be protected by an exceptional legal instrument such as a BER, or if appropriate guidance would suffice.

6.2 Necessity of a BER

6.2.1 Exemption for Compilations, Tables and Studies

- (135) Concerning the exchange of information on risks between (re)insurers, after the entry into force of the IBER the Commission adopted new Horizontal Guidelines with a specific chapter on information exchange agreements. Although this chapter does not contain concrete examples for the insurance sector, the principles set out therein provide a good basis to carry out a self-assessment of the admissibility of the joint creation and distribution of compilations, tables and studies. The Horizontal Guidelines explicitly recognise that: “Exchanges of genuinely aggregated data, where the recognition of individualized company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition”⁵¹.
- (136) Furthermore, the Horizontal Guidelines also explain that: “Collection and publication of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation or market intelligence firm may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of a sector. Such data collection and publication may allow market participants to make better-informed individual choices in order to adapt efficiently their strategy to the market conditions. More generally, unless it takes place in a tight oligopoly, the exchange of aggregated data is unlikely to give rise to restrictive effects on competition”⁵².
- (137) In addition, the Horizontal Guidelines acknowledge that: “Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics”⁵³.
- (138) These principles mirror those in the IBER for exempting the exchange of information between insurers. Therefore, in case the IBER lapses, the Commission has already made public equivalent general principles capable of guiding insurers in self-assessing the admissibility of their cooperation; guidance that the Commission could complement

⁵¹ Paragraph 89 of the Horizontal Guidelines.

⁵² Paragraph 89 of the Horizontal Guidelines.

⁵³ Paragraph 97 of the Horizontal Guidelines.

where necessary. For the same reason, a compliance assessment by the national insurance federations, which are at present the main intermediaries for compiling and disseminating risk data, under the principle of the Horizontal Guidelines should not bring about a significant change in compliance costs, as they are currently already obliged to ensure that the collection and dissemination of risk data in the form of compilations, tables and studies complies with the same substantive provisions as those contained in the IBER.

(139) Also, in terms of incentives, the alleged risk of diminished levels of collaboration in joint compilations, tables and studies in the event that the exemption is not renewed appears to be very low. If the cooperation in this area is as indispensable to the insurance industry as is maintained in the public consultation by all its members, it would be highly unlikely that the argued essential need for cooperation would be overridden by the marginal reduction in legal certainty that the removal of the exemption could effect.

(140) Therefore, at present the continued existence of a BER for joint compilations, tables and studies is questionable, notably when there are alternative guidance instruments (such as a communication) that could be used to complement the relevant provisions of the Horizontal Guidelines, if appropriate. Consequently, it is questionable that a specific BER is still the most efficient means of ensuring the proper functioning of the sector and fostering certain types of information exchanges which provide benefits for the consumer while ensuring effective protection of competition.

6.2.2 Common coverage of certain types of risks (Pools)

(141) The submissions on market trends collected during the Review indicate that cooperation between (re)insurers in order to co(re)insure risks is at present very heterogeneous and by no means reliant on the institutionalised pools exempted by the IBER. The Review shows an important, and growing, market trend away from institutionalised pools formed on the insurers' own initiative, towards more competitive ways of cooperation between (re)insurers.

(142) These alternative co(re)insurance arrangements are frequently led by intermediaries/brokers that on their own initiative, or at the request of a customer or insurer, build customer-specific insurance lines or insurance packages, often by means of tendering. Unlike the traditional institutionalised pools, these more competitive ways of co(re)insuring are not covered by the IBER, although they are more likely to produce shared efficiencies on account of their characteristics. Such alternative co(re)insurance arrangements put insurers in competition with one another to different degrees depending on the level of coordination between insurers permitted by the intermediary/broker or customer in the course of the negotiations. By contrast, the current IBER pools' exemption applies only to the most restrictive agreements, whereby competitors agree to align prices or important components thereof. There now exist

alternatives to the pools exempted by the IBER, and consequently their positive effects cannot be presumed in all cases.

- (143) Hence, following an in-depth assessment of the information gathered in the course of the Review, the pools' exemption may not be in line with the strict conditions required for the creation of an exceptional instrument such as a BER. According to this restrictive approach, a BER for a certain category of agreements is only justified when it can be presumed with sufficient certainty that this category genuinely produces benefits that are shared in fair terms with consumers. The exempted restrictions also have to be indispensable, meaning that it would be impossible to achieve the objectives of the cooperation in a manner which is less restrictive of competition. This delicate proportionality assessment can only be achieved by means of a thorough individual self-assessment of the functioning of the pool, as well as of its effects.
- (144) Moreover, the Review also shows that there are serious concerns about the efficacy of adopting a BER for pools in the insurance sector. There is a rapid development in the insurance market of heterogeneous and complex forms of cooperation for co(re)insuring risks. The complexity is further compounded by the intrinsic difficulties of defining relevant markets in insurance on account of the complicated analysis of supply-side substitutability for intangible goods such as insurance. This has the effect of rendering any possible definition of scope for the exemption in terms of type of cooperation and delimitation of market share thresholds ambiguous and uncertain. Actually, the observations of some stakeholders show that the definition of 'pool' is ambiguous and imprecise, or that it is unclear how to define the relevant markets in insurance. Adopting an exemption which is difficult to use because the two elements that are decisive for applying it are uncertain, raises serious doubts about its suitability and existence.
- (145) Furthermore, the evidence gathered in the Review so far indicates that Member States authorities are experiencing difficulties in enforcing their powers in the areas covered by the IBER exemptions. NCAs that act on the basis of their extensive experience and insight into the competitive environment within their jurisdictions are finding their decisions annulled by the national courts which keep referring to the IBER. Furthermore, national courts also struggle to balance the legal and economic realities of any given case with the IBER provisions.
- (146) This problem mainly originates in the previously discussed intrinsic difficulties of developing exemption conditions capable of encompassing the wide variety of nationally prevailing market conditions in the insurance sector. The NCAs are well placed to evaluate the arrangements operating within their jurisdiction, and the effectiveness of their assessment would be greatly enhanced in the absence of an instrument as prescriptive and inflexible as a BER.
- (147) Consequently, the IBER appears to hinder the national authorities' ability to fight agreements in the insurance sector that produce adverse effects for competition and consumers. In the absence of an IBER, NCAs would gain the power to carry out a more

refined self-assessment of individual cases within their jurisdictions that takes into account the unique characteristics of the insurance sector in the relevant Member State. The imposition of EU-wide harmonisation in the rigid form of a BER is possibly counterproductive.

7 CONCLUSIONS

- (148) Accordingly for the reasons set out above, the strict conditions for the creation of a sector-specific BER with respect to the compilation and distribution of joint calculations, tables and studies, and the co(re)insurance of certain specific types of risks seem no longer to be met, although there are indications that the insurance sector may have an enhanced need for collaboration in relation to these types of agreements.
- (149) With respect to the compilation and distribution of joint calculations, tables and studies, the Commission's view at this stage is that the functioning of the insurance industry no longer appears to necessitate the existence of an IBER. The Horizontal Guidelines already offer guidance for the purpose of self-assessing the admissibility of this type of cooperation. Likewise, the Commission can provide, if necessary, specific guidance to the insurance industry, which is an alternative and far more flexible instrument that can be more easily adapted to changing circumstances.
- (150) With respect to co(re)insurance pools, it is questionable whether the renewal of the IBER is justified because of its limited use and relevance, and concrete risks of misapplication. In order for an exemption from competition rules of this kind to be put in place the Commission must with sufficient certainty presume that the type of cooperation covered by the exemption satisfies all the conditions necessary for a finding of compatibility with the internal market, especially in terms of effectiveness and efficiency. At this stage that no longer seems to be the case since the insurance market currently does provide a heterogeneous and less restrictive set of alternatives to pools for the purpose of co(re)insuring risks, potentially at more competitive conditions.
- (151) Thus, a case-by-case self-assessment of the arrangements for the setting-up and the functioning of each individual co(re)insurance pool, is the best way to ensure that co(re)insurance pools produce net positive effects for consumers and competition within the meaning of Article 101(3) TFEU, following the rules set in Horizontal Guidelines, which is the standard in other sectors.
- (152) It should be noted that the lapsing of the exemption for pools does not mean that the pools are prohibited, but just that their assessment under competition rules will be done according to the same standard rules applying to other sectors.
- (153) Furthermore, both the exemption on information exchange, as well as that for pools, appear to be at odds with the discontinuation of the notification system. Since 2004 the modernised competition enforcement system has established general horizontal assessment frameworks, rather than relying on sector-specific rules.

- (154) In the event that the IBER exemptions are not renewed, the Commission might decide to adopt a new guidance (in place of the current Communication, which will become obsolete once the current IBER Regulation lapses) providing additional guidance on the principles of self-assessment for those agreements that will no longer benefit from a BER.
- (155) Following its publication, the Commission intends to organise a stakeholder discussion on the preliminary conclusions of this Report.
- (156) The Commission also intends to publish and discuss with stakeholders, where necessary, the conclusions of the two studies on a series of issues pertaining to the functioning of the IBER that are currently underway.

ANNEX I

QUESTIONNAIRE TO NATIONAL COMPETITION AUTHORITIES

QUESTIONNAIRE TO NCAS – REVIEW OF IBER

I. Introduction

Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83, 30.3.2010 (the "IBER") exempts certain types of agreements between insurers from the application of Article 101 (1) of the Treaty on the Functioning of the European Union ("TFEU") subject to certain conditions. The exemption covers two types of agreements:

- I. Agreements with respect to joint compilations, joint tables and studies;
- II. Common coverage of certain types of risks (co (re)insurance pools).

As explained in the cover letter, the IBER expires on 31 March 2017 and therefore the Commission is now gathering views and market information that will enable it to carry out its review. We would be grateful if you could answer the below questions by sending an e-mail to:

COMP-ECN-IBER-REVIEW@ec.europa.eu

by **04 April 2014**.

In the communication with the Commission please use the following heading:

"HT.4012 Insurance BER Review"

If you have **questions of an administrative nature**, please contact the case secretary:

Ms Tamires FERREIRA – DUTRA
Tel.: +32.2.298.67.91
E-mail: tamires.ferreira-dutra@ec.europa.eu

If you have any further **questions on the substance** of this request, please contact:

Ms Eva KLEIBER
Tel: +32.2.295.00.10
E-mail: eva-maria.kleiber@ec.europa.eu

Ms Michalina ZIEBA
Tel.: +32.2.297.24.38
E-mail: michalina.zieba@ec.europa.eu

Mr Ivan ZALOGUIN
Tel.: +32 229-84603
E-mail: ivan.zaloguin@ec.europa.eu

Your replies to the following questions as well as any other thoughts and information with regard to functioning of the insurance markets are of key importance to the IBER review exercise and would be extremely helpful.

We would be grateful to receive as detailed feedback as possible and propose to correspond in English.

II. Contact details

Please provide name, address, telephone and fax number of the colleague responsible for the preparation of this answer as we might contact this person for further clarifications or additional information.

We would also welcome this colleague's participation in the ECN Subgroup on Insurance which we intend to hold in the second quarter in 2014.

Contact person:
Function:
Telephone:
Postal address:
E-mail:

III. Questions

a) Application of the IBER in practice

1. Did you have any cases (ex officio or complaints) where the application of the IBER has been an issue (for example as a defence)?

2. Is there any relevant case law from the national courts applying the IBER?

3. In your experience, which of the below mentioned exemptions are applied by the (re)insurance undertakings or their associations in your Member State in their daily compliance practice? Please give specific case examples for each of the two types of block-exempted agreements:

(i) Exemption of agreements with regard to joint compilations, joint tables and studies:

(ii) Exemption of agreements with regard to common coverage of certain types of risks ["co(re)insurance pools"]:

4. In your experience, in which way does the IBER promote consumers' interests? Please reason your answer and give case-specific examples.

5. Does the IBER simplify the application of the competition rules in your daily enforcement practice? Please reason your answer and give case-specific examples.

6. In your practical experience, does the IBER provide substantial legal certainty to (re)insurance undertakings in addition to the (directly applicable) exemption of Article 101(3)? Please reason your answer.

7. Have you been presented with specific evidence confirming that the (re)insurers' cooperation in a given pool covered by the BER has generated substantial benefits for the consumer welfare, for example by facilitating market entry of small and medium sized (re)insurance undertakings or the cross-border or cross-market entry of (re)insurance undertakings or by leading to cost savings for either:

(i) (re)insurers?

(ii) consumers?

Please reason your answer and provide examples and data, if available.

8. In your experience, has cooperation in the compilation of information between (re)insurers covered by the IBER proven to be significantly beneficial, e.g. by improving the knowledge of risks, by facilitating market entry, by leading to cost savings for:

(i) (re)insurers?

(ii) consumers?

(iii) others (please specify)

Please reason your answer.

9. In your view, does the existence of the IBER produce negative effects on competition and/or consumer welfare? Please reason your answer.

10. Are you aware of situations where an allegedly block-exempted agreement or practice would have violated one or more conditions for exemption set out in Articles 3 and 7 IBER (for instance standardisation of products, information exchange or collusion on commercial premiums, allocation of markets and customers, limits to output or sales)?

b) Study on co (re)-insurance pools and on ad-hoc co (re)-insurance agreements on the subscription market

In 2013 the Commission published a study on co (re)-insurance pools and on ad-hoc co (re)-insurance agreements on the subscription market (http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3113422). It provides among others an overview of co (re)-insurance pools after the adoption of the new BER. Following the study the Commission held a workshop in March 2013 where the findings of the study were presented and discussed.

Below we present some of the findings of the study and the workshop concerning the BER and would appreciate your feedback on them:

11. According to the study *"Overall, awareness of the Insurance BER appeared mixed, though those pools that had reassessed their position since the issue of the new BER did not report a change in their compliance status"*.

(i) In your view are the (re)insurance undertakings/ (re)insurance associations in your country familiar with the IBER?

(ii) In your experience, is the IBER used as a blanket exemption?

12. The study reports that *"There are uncertainties as to definition, with a risk of mismatch between industry perceptions of pools and the intentions of the BER, which may indicate a need for clarification: these affect both the identification of pools themselves and the definition of the relevant market. There are also questions as to the boundaries of the definition where pool-like arrangements*

are set up by parties other than insurers, particularly intermediaries, which may warrant study outside the scope of this report."

Do you share this view and why? If so, how could the following be improved?

- (i) definition of "pools";
- (ii) determination of the relevant market;
- (iii) calculation of the market shares.

13. In the workshop some market participants took the view that the definition of "new risk" in the BER is too narrow¹.

-What are your views on this matter?

c) Prospective assessment

14. Do you think that a sector-specific regulation such as the IBER is necessary for the insurance sector? Which distinct features of the insurance market make a sector-specific block exemption regulation necessary, in the current enforcement system where the exemption of Article 101(3) is directly applicable by virtue of Article 1 of Council Regulation (EC) No 1/2003? Please explain.

15. Do you think that the IBER could be replaced by another Commission instrument such as guidelines, for example by incorporating the content in the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011* or by a Communication?

16. Which one of the following options do you think would be preferable and why:

- (i) renewal of the BER (in principle with the current content);
- (ii) only partial renewal (which exemption would you renew, which not?);
- (iii) non-renewal?

Please provide reasons for your assessment.

d) Other information/views

17. Please include here any other information and views you consider relevant to the assessment of the functioning of the Regulation. Please attach here any relevant documents, e.g. complaints, decisions, market studies, feedback from market participants.

Thank you for your co-operation!

¹ According to Article 1 point 6 of IBER "new risks" mean:

(a) risks which did not previously exist, and for which insurance cover requires the development of an entirely new insurance product, not involving an extension, improvement or replacement of an existing insurance product; or
(b) in exceptional cases, risks the nature of which 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 such a risk.

ANNEX II

PUBLIC CONSULTATION

QUESTIONNAIRE

Consultation on the Insurance Block Exemption Regulation

1 Context

1.1 Aim of the public consultation

The Insurance Block Exemption Regulation[1] ("IBER") is a sector-specific legal instrument that allows (re)insurers to benefit from an exemption to the prohibition of anti-competitive arrangements laid down in Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). At present, the exemption covers two types of agreements between (re)insurance undertakings:

1. Agreements with respect to joint compilations, joint tables and studies; and
2. Common coverage of certain types of risks [co (re)insurance pools].

The insurance sector is one of three sectors[2] that still benefits from a block exemption regulation, since the concept of the direct applicability of the exemption of Article 101 (3) TFEU was introduced with Council Regulation 1/2003. The IBER expires on 31 March 2017 and the Commission will consider whether any parts of it would merit a renewal. In this regard, the Commission is required to submit a report on the functioning and the future of the IBER to the European Parliament and the Council by March 2016. The Commission is therefore gathering views and market information to carry out its assessment.

[1] 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, decisions and concerted practices in the insurance, OJ L 83, 30.3.2010, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:083:0001:0007:EN:PDF>

[2] The two other sectors are the maritime liner shipping and the motor vehicle distribution sector, cf. Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:256:0031:0034:EN:PDF>, OJ L 256, 29.09.2009, p. 31, and Commission Regulation No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:129:0052:0057:EN:PDF> OJ L 129, 28.05.2010, p. 52

1.2 Target audience of this public consultation

To that purpose the Commission has drawn up the enclosed questionnaire and invites all stakeholders to submit all relevant information on the functioning of the IBER, as well as their views on whether the Commission should renew any of the IBER provisions in a new block exemption regulation. Input from stakeholders will be a key element for the Commission's assessment. The Commission welcomes comments in particular from (re)insurance undertakings, industry associations, insurance intermediaries, public authorities, consumer organisations and customers, as well as competition practitioners, researchers and think tanks. Comments from other stakeholders who have direct experience with the application of the IBER are also welcome.

1.3 Submission of the contribution

You are invited to reply to this public consultation preferably by answering the online questionnaire. To facilitate the analysis of your replies we would kindly ask you to keep your answers concise and to the point -

Not all questions need to be answered. You may include documents and URLs for relevant online content in your replies.

Alternatively, you can send your contribution by post to the following address:

European Commission
Directorate-General for Competition
(for the attention of the Antitrust Registry)
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

using the following reference : "HT.4012 Insurance BER Review".

For your information, you have the possibility to save your questionnaire as "draft" and continue replying later. In order to do this you have to click on "Save as Draft" (see end of questionnaire) and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access again and continue replying to your questionnaire.

1.4 Confidentiality

In the responses to this questionnaire the identity of the stakeholder should be clearly indicated in the "Profile" section. If available, the ID number of the EU Transparency Register should also be provided (For registration please follow this link <http://ec.europa.eu/transparencyregister/info/homePage.do>). The responses received will be published by the Commission on the internet, unless they are claimed to be treated as "anonymous" or clearly labelled "confidential". In case a stakeholder claims anonymity or confidentiality, a non-confidential version of the response should be provided for publication.

Protection of Personal Data http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata

Privacy statement:
Privacy statement.pdf

1.5 Deadline

The consultation runs from 5 August 2014 to 4 November 2014.

Nothing in this questionnaire may be interpreted as stating an official position of the European Commission.

2. Questionnaire

2.1 Stakeholder Profile

1. You are a/an:

Insurance undertaking
Reinsurance undertaking
Industry association
Insurance intermediary
Consumer organisation
Competition practitioner
Public authority
Researcher
Citizen
Insured entity
Other
Please specify briefly:

2. Contact details

Name:

ID in the EU Transparency Register:

Your identification number should be formed of 11 or 12 digits, followed by a dash and then 2 digits.

Contact person:

Telephone:

Postal address:

E-mail:

3. Are you a Small or Medium sized Enterprise (SME)?

Please note: The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

For further information regarding the definition of enterprise, the calculation of staff headcount and the financial thresholds, please see the Commission Recommendation concerning the definition of micro, *small and medium-sized enterprises*.^[3]

^[3] Commission Recommendation (EC) No 361/2003 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Council and Commission documents OJ L 124, 20.5.2003, p. 36, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:EN:PDF>

Yes

No

N/A

4. Do you meet the requirements of Article 4 of Directive 2009/138^[4] to be excluded from the Solvency II regime?

^[4] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) OJ L 335, 17.12.2009, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:335:0001:0155:EN:PDF>

Yes

No

N/A

5. Are you active in more than one State within the EU and/or the EEA?

Yes

No

N/A

Please specify in how many States and in which:

6. Which services do you provide?

a) Non-life insurance

b) Life insurance

c) Reinsurance

d) Other

Please Specify what other services:

Please specify your services in non-life insurance (Classes of non-life insurance as indicated in Annex I of the Solvency II Directive <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:335:0001:0155:EN:PDF> :

Accident	Sickness	Land vehicles
Railway rolling stock	Aircraft	Ships
Goods in transit	Fire and natural forces	Other damage to property
Motor vehicle liability	Aircraft liability	Liability for ships
General liability	Credit	Suretyship
Miscellaneous financial loss	Legal expenses	Assistance

Other information:

Please specify your services in life insurance (Classes of life insurance as indicated in Annex II of the Solvency II Directive

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:335:0001:0155:EN:PDF%20>)

2.2 Market Developments

7. How would you describe the current competitive situation in the (re) insurance markets with particular regard to the segments where you operate/are concerned with? What are the changes in market structure over the last ten years? Have there been any new entries? Are they greenfield? Have they been facilitated by the IBER?

If you have any further information, please upload it here:

8. Has there been any innovation or market development in the insurance sector in the last ten years that could have had an impact on the (re)insurers' cooperation in the area of joint studies, tables and compilations?

If you have any further information, please upload it here:

9. Has there been any innovation or market development in the insurance sector in the last ten years that could have had an impact on the (re)insurers' cooperation in the area of cooperation in (re)insurance pools?

If you have any further information, please upload it here:

10. Has your business strategy or the way you compete (on price, quality, brand, coverage, etc) in the (re)insurance sector evolved in the last ten years and how? If you are not an (re)insurance undertaking: Are you aware of any developments in the conduct of (re)insurance undertakings during the last ten years which are relevant for the review of the IBER? Please describe and provide examples.

If you have any further information, please upload it here:

11. In your view, did the previous IBER[5] or does the current IBER contribute to the evolution described under question (10)? Please state the reasons for this.

[5] Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53/8 of 28.2.2003)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:053:0008:0016:EN:PDF%20>

If you have any further information, please upload it here:

12. In your view, did the previous IBER[6] or does the current IBER hamper the evolution described under question (10)? Please state the reasons for this.

[6] Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53/8 of 28.2.2003)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:053:0008:0016:EN:PDF%20>

If you have any further information, please upload it here:

13. Do you consider that the existence of the IBER has improved your capability to accurately price risks or allowed you to enter any specific insurance segment in which you would otherwise not be active? Has the existence of the IBER provided you with a better footing to penetrate other Member States' markets? Please illustrate your reply with case-specific examples.

If you have any further information, please upload it here:

14. Are there in your view markets that would not exist without the exemptions foreseen in the IBER?

Yes

No

Don't know

Which ones?

If you have any further information, please upload it here:

15. Would premiums be appreciably higher without the IBER exemptions?

Yes

No

Don't know

Please reason your answer and provide examples and data to the extent available.

If you have any further information, please upload it here:

16. Would customer choice and supply diversity be appreciably reduced without the IBER exemptions?

Yes

No

Don't know

Please reason your answer and provide examples and data to the extent available.
If you have any further information, please upload it here:

17. Do you consider that the IBER protects competition and effective innovation in the insurance sector or not? In your view, does the IBER succeed in creating/maintaining a level playing field? Please reason your answer and give case-specific examples if any.

If you have any further information, please upload it here:

18. Do the recent developments in competition rules, e.g. the Commission Horizontal Guidelines[7], and the recent developments in the relevant national/EU case-law affect your commercial behaviour? Please describe and give case-specific examples.

[7] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Council and Commission documents OJ C 11, 14.01.2011, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF%20%20>

If you have any further information, please upload it here:

2.3 Application of the IBER in practice

19. Do you make use of the exemptions foreseen in the IBER?

Yes

No

N/A

Please specify whether it concerns:

Exemption of agreements with regard to joint compilations, joint tables and studies

Exemption of agreements with regard to common coverage of certain types of risks ("co(re)insurance pools")

Please give case-specific examples on how you make use of the respective exemptions.

If you have any further information, please upload it here:

20. Does the IBER affect the business conduct in your daily practice and how? Please describe and give case-specific examples.

If you have any further information, please upload it here:

21. Have you been involved in litigation and/or competition investigations concerning the IBER? Please specify and provide any relevant decisions, reports or other relevant information.

If you have any further information, please upload it here:

22. Study on co (re)-insurance pools and on ad-hoc co (re)-insurance agreements on the subscription market:

In 2013 the Commission published a study on co (re)-insurance pools and on ad-hoc co (re)-insurance agreements on the subscription market and a new edition in 2014 (http://ec.europa.eu/competition/sectors/financial_services/KD04147

[07ENN.pdf](http://ec.europa.eu/competition/sectors/financial_services/KD04147)). It provides among other an overview of co (re)-insurance pools after the adoption of the new BER.

Following the study the Commission held a workshop in March 2013 where the findings of the study were presented and discussed.

Below we present some of the findings of the study and the workshop concerning the IBER and would appreciate your feedback:

The study reports that "*There are uncertainties as to definition, with a risk of mismatch between industry perceptions of pools and the intentions of the BER, which may indicate a need for clarification: these affect both the identification of pools themselves and the definition of the relevant market. There are also questions as to the boundaries of the definition where pool-like arrangements are set up by parties other than insurers, particularly intermediaries, which may warrant study outside the scope of this report.*"

Do you share this view or not? Please explain why and how the following could be improved?

(i) definition of "pools";

(ii) determination of the relevant market.

If you have any further information, please upload it here:

23. Do you encounter any difficulties in applying the IBER rules? Please explain and provide case-specific examples.

If you have any further information, please upload it here:

2.4 Policy options

24. The IBER will expire on 31 March 2017. The Commission is considering the following options (the order does not reflect ranking or any preference):

- (i) Non-renewal of the IBER
- (ii) Partial renewal
- (iii) Renewal of the current IBER

Which one of the abovementioned options is in your view justified for objective reasons and better suited for improving the functioning of the insurance markets, stimulating product innovation and increasing consumer's choice in any specific insurance segment?

Non-renewal

Partial renewal: renewal of the exemption for cooperation in the area of joint studies, tables and compilations

Partial renewal: renewal of the exemption for cooperation in (re)insurance pools

Do not have a view

Please provide a detailed reasoned argumentation for your position.

If you have any further information, please upload it here:

25. Are there in your view other options which the Commission should consider?

If you have any further information, please upload it here:

26. The existence of a block exemption does not relieve undertakings from their obligation to carry out a self-assessment on the admissibility of their cooperation under competition rules.

If the Commission would not renew the IBER, insurers would have to carry out the self-assessment of their cooperation in information exchange and joint commercialisation under the principles of the horizontal cooperation guidelines, instead of under the provisions of the IBER.

Do you consider that sector-specific regulation such as the IBER is necessary for the insurance sector? If so, which distinct features of the insurance market would make a sector-specific block exemption regulation necessary in the current enforcement system where Article 101 (3) TFEU is directly applicable by virtue of Article 1 of Council Regulation (EC) No 1/2003 and where guidance is provided by means of appropriate horizontal instruments?

Please reason your answer and give case-specific examples.

If you have any further information, please upload it here:

27. Were there any developments over the last years that affect the IBER and would require in your view a change in the rules? What are these developments and the necessary ensuing changes? Please explain and provide specific examples.

If you have any further information, please upload it here:

28. Can you provide examples of specific conduct of undertakings that currently fall within the scope of the IBER but which in your view should no longer be subject to a block exemption? Please provide specific reasons for your answer.

If you have any further information, please upload it here:

29. Can you provide examples of behaviour that currently fall outside but which in your view should fall inside? Please provide specific reasons for your answer.

If you have any further information, please upload it here:

2.5 Impacts

For each of the different changes in your conduct and ultimate impacts on the market that you will identify in the answers to the questions contained in this section, please rate their importance according to the following scale: Slight, Moderate, Appreciable.

30. In your view, does the IBER provide additional substantial legal certainty to (re)insurance undertakings on top of the (directly applicable) exemption of Article 101(3) TFEU and the guidance given by the Commission on horizontal cooperation agreements?

Slight
Moderate
Appreciable

Please reason your answer:

If you have any further information, please upload it here:

31. If the IBER was not renewed, would your compliance costs increase?

Slight
Moderate
Appreciable

Please reason your answer and provide a detailed description of such costs compared with those you already incur for your self-assessment, as well as an estimate of their value.

If you have any further information, please upload it here:

32. If the IBER was not renewed, would your compliance costs decrease?

Slight
Moderate
Appreciable

Please reason your answer and provide a detailed description of such costs compared with those you already incur for your self-assessment, as well as an estimate of their value.

If you have any further information, please upload it here:

33. What would be the changes in your conduct if the cooperation between insurers in joint compilation, tables and studies were assessed exclusively under the provisions on information exchange of the Commission guidelines on horizontal co-operation agreements[8]?

Please elaborate on the changes, using a separate box and rating per change you identify.

[8] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.01.2011, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF%20>

Change 1

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Change 2

Slight

Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Change 3

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

34. What would be the changes in your conduct if the cooperation between insurers in pools were assessed exclusively under the provisions on commercialisation agreements of the Commission guidelines on horizontal co-operation agreements[9]? Please elaborate on the changes, using a separate box and rating per change you identify.

[9] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.01.2011, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF%20>

Change 1

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Change 2

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Change 3

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

35. What would be the impacts on the relevant markets of the above-mentioned changes in your conduct if the cooperation between insurers in joint compilation, tables and studies were assessed exclusively under the provisions on information exchange of the Commission guidelines on horizontal co-operation agreements[10]? Please elaborate on the impacts, using a separate box and rating per impact you identify.

[10] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.01.2011, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF%20>

Impact 1

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 2

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 3

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

36. What would be the impacts on the relevant markets of the above-mentioned changes in your conduct if the cooperation between insurers in pools were assessed exclusively under the provisions on commercialisation agreements of the Commission guidelines on horizontal co-operation agreements[11]? Please elaborate on the impacts, using a separate box and rating per impact you identify.

[11] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.01.2011, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF%20>

Impact 1

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 2

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 3

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

37. What are in your view the overall likely impacts of each of the policy options mentioned in Section "2.4 Policy options" above? Are they likely to induce any specific changes in business practices or impact consumers?

Please explain the likely economic effects of such changes in terms of competition, market structure, supply, entry barriers, competitiveness of smaller insurers, customers, level of customer mobility, social and environmental impacts, etc. Please elaborate on the impacts, using a separate box and rating per impact you identify.

Non-renewal

Impact 1

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 2

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 3

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

Partial renewal: renewal of the exemption for cooperation in the area of joint studies, tables and compilations

Impact 1

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 2

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 3

Slight
Moderate
Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

Partial renewal: renewal of the exemption for cooperation in the (re)insurance pools

Impact 1

Slight

Moderate

Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 2

Slight

Moderate

Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 3

Slight

Moderate

Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

Renewal:

Impact 1

Slight

Moderate

Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 2

Slight

Moderate

Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

Impact 3

Slight

Moderate

Appreciable

Please elaborate:

If you wish to comment on more than 3 changes, please create a document and upload it.

If you have any further information, please upload it here:

38. Please rate the importance of the likely overall impact of each of the policy options mentioned in Section "2.4 Policy options".

Non-renewal

Slight

Moderate

Appreciable

Partial renewal: renewal of the exemption for cooperation in the area of joint studies, tables and compilations

Slight

Moderate

Appreciable

Partial renewal: renewal of the exemption for cooperation in (re)insurance pools

Slight

Moderate

Appreciable

Renewal

Slight

Moderate

Appreciable

If you have any further information, please upload it here:

2.6 Other information / views

39. Please provide any other information and/or views which you consider relevant for the Commission's review of the functioning and future of the IBER. Please provide any relevant documents, e.g. complaints, decisions, market studies, administrative practice, court cases and/or arbitration awards, scientific research, workshop reports, etc.

If you have any further information, please upload it here:

40. Please point out any specific competition rules, administrative practice or jurisprudence in non-EU jurisdictions concerning the insurance sector which the Commission in your view should also consider.

If you have any further information, please upload it here:

ANNEX III TARGETED QUESTIONNAIRES

12 December 2014

Questionnaire for Pools

Article 5 of the IBER¹ exempts the setting-up and operation of pools of insurance undertakings and reinsurance undertakings to jointly cover certain types of risk under certain conditions. The scope of the cooperation cannot exceed the market share thresholds set out in Article 6. Furthermore, in order to benefit from the exemption, the relevant cooperation must also comply with the specific conditions set out in Article 7, which contains a blacklist of restrictions.

I. Description of the pool

Purpose / Main activity

- (1) What business does your pool undertake: direct insurance, re-insurance, retrocession?
- (2) What risk categories does your pool (re)insure? In what sectors of the economy?
- (3) Describe the legal form your pool takes: legal entity, contractual arrangement, other?
- (4) In what Member States is your pool active?
- (5) Could you please provide us with (a list of your customers) customer references? (if the pool is active in different members states, preferably with samples of customer in different member states)
- (6) Please provide a policy sample for each category of risk covered by the pool. If your activity comprises both direct insurance and reinsurance, please provide at least one sample of the policy for each of these businesses.

Composition

- (7) What are the conditions to become member of your pool?
- (8) Who are your members and what is their share in the pool? Can your members be a member of another pool? Please indicate for each of your members the other pools in which they are involved.
- (9) Do your members provide risk cover outside the pool for the same classes of insurance?

Functioning of the pool

- (10) What are the governing bodies/committees of your pool? What functions do they have and how do they operate?
- (11) How do insurable risks arrive at your pool? What, if any, role do underwriters, agents, brokers or other intermediaries play in relation to your pool?

¹ 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, decisions and concerted practices in the insurance sector (IBER), JO L 83, 1.

(12) How are the capacity, scope of business and contractual conditions decided in your pool? How are claims dealt with (registration, handling, settlement)? On what basis are claims dealt with in this way?

(13) What arrangements do you have with other pools or reinsurers on the market in which you operate? Are there standard arrangements for cooperation between pools in your sector? Please describe them and provide a copy.

(14) Do Member State authorities intervene in the functioning of the pool? In what way?

(15) Could you please provide a copy of the pool's articles of association, bylaws, shareholder or membership agreements, and/or any management agreement?

II. Relevant market

(16) What is the position of your pool in the markets in which it operates? Is it the main participant? Who are your main competitors? Has there been any important innovation or development in your market in the last ten years that affects the way (re)insurers cooperate within pools?

III. Impact of the IBER

(17) Do you consider that your pool agreements fall outside the scope of article 101(1) TFEU? If so, why?

(18) In what way do you make use of the exemptions provided by the IBER?

(19) If not, why do you consider yourself in compliance with the conditions set out in Article 101(3)?

(20) Do the members of your pool exchange information with insurance undertakings outside of the pool under the IBER exemption for joint compilations, joint tables and studies? Is there any information that is exchanged exclusively within the pool? If yes, is this information made available to unaffiliated insurance undertakings? Please also describe what this information consists of.

(21) Do you encounter any difficulties in applying the IBER rules? In particular, do you encounter any difficulties in the application of the definition of "pools", determination of the relevant market, and/or the definition of "new risk"? If so, why? How could these difficulties be resolved?

(22) Do you foresee your continuing reliance on the IBER? If so, why? Are there any market developments affecting the relevance and effectiveness of the IBER? In light of these developments, are there provisions in the IBER that should be amended? Which ones, and why?

Questionnaire for Customers of coinsurance arrangements / Customers' associations

Article 5 of the IBER² exempts the setting-up and operation of groups ("pools") of insurance undertakings and reinsurance undertakings to jointly cover certain types of risk under certain conditions.

The scope of the cooperation cannot exceed certain market share thresholds set out in Article 6.

Furthermore, in order to benefit from the exemption the relevant cooperation must also comply with the specific conditions set out in Article 7 which contains a list of blacklisted restrictions.

Adequate insurance cover may also be achieved by other alternative forms of cooperation between insurers with or without the intervention of insurance intermediaries, such as ad-hoc agreements, brokerled arrangements, or line slips.

I. Provision of insurance cover

(1) Do you have risks insured that are not covered by a single insurer, but jointly by several insurers, e.g. in the form of a coinsurance pool, ad-hoc co(re)insurance arrangements, broker-led arrangements, line slips or other? Please describe these coinsurance arrangements that you or your members have in place to procure adequate insurance cover.

(2) What procedure do you or your members follow to negotiate these arrangements? How are similar insurance needs to yours covered in other markets by comparable organizations?

(3) Please specify for which type of risk you are using the above described co-insurance arrangements and provide us with concrete examples, e.g. name of risk carrier, name of involved broker etc.

(4) Is the market for the insurance you or your members buy: national, EU-wide, or world-wide? Have you or your members tried to buy insurance cover in another Member State? For what reasons? If you cannot or did not succeed to buy such cover, could you please state the reasons?

(5) How would you describe the current competitive situation in the markets where you or your members buy insurance cover?

(6) Is it necessary for insurers to cooperate to cover your insurance needs or those of your members? Why? In your view, do individual insurers possess sufficient capacity to provide insurance individually in the markets you or your members buy insurance? What cooperation frameworks do insurers use in these markets: pools, ad-hoc agreements, intermediary-led arrangements, other? For what purposes and to what effect? Is this cooperation in your view justified? Why?

(7) What impact on your business does this cooperation between insurers have? Would you say that these views are shared by other market participants in your industry, irrespective of scale of operations?

(8) What would be in your view the most adequate cooperation framework for insurers that would produce in the market where you or your members buy insurance the best effects in terms of customer choice, supply, innovation, and premiums' level? Why?

II. Impacts of the IBER

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, decisions and concerted practices in the insurance sector (IBER), JO L 83, 1.

(9) In the markets you or your members purchase insurance, does the cooperation exempted under the IBER promote or hinder the entrance of new players or the cross-border provision of insurance? Does it produce positive or negative effects on customer's choice, supply diversity, innovation, or premium level?

(10) Does the current IBER exemption for insurance pools allow appropriate competition in the provision of the insurance you or your members buy?

(11) How have the contractual terms and premiums for the insurance you or your members buy evolved over time? Have efficiency gains, if any have occurred, been shared between the insurers and you/your members?

(12) What changes in customer choice, supply diversity, innovation, and premium level would take place if the pools' exemption would not exist? How intense would these changes be: slight, moderate, appreciable?

III. Outlook

(13) What changes in the IBER provisions on cooperation between insurers would you or your members propose to enhance new entrance, cross-border provision of insurance, and a higher degree of innovation and competition?

(14) Should the relevant provisions distinguish between: larger and smaller insurers, insurance and reinsurance markets, conventional or non-conventional/large risks? Should the provisions be different for different cooperation frameworks? How should these provisions be?

Questionnaire for Brokers

This year the European Commission has conducted an initial public consultation on the functioning and future of the Insurance Block Exemption Regulation³ (IBER). The IBER exempts from the prohibition of restrictive business practices under Article 101 TFEU certain cooperation agreements between insurers, among others, and subject to certain conditions, co(re)insurance pools set up by insurance undertakings either directly or through brokers or authorised agents in order to jointly cover certain types of risks.

The IBER defines 'co(re)insurance pools' as follows:

- 'co-insurance pools' means groups set up by insurance undertakings either directly or through brokers or authorised agents, with the exception of ad-hoc co-insurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover that remainder, which:

(a) agree to underwrite, in the name and for the account of all the participants, the insurance of a specified risk category; or

(b) entrust the underwriting and management of the insurance of a specified risk category, in their name and on their behalf, to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;

- 'co-reinsurance pools' means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or more reinsurance undertakings, with the exception of ad-hoc co-reinsurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of this risk is covered by follow insurers who are then invited to cover that remainder in order to:

(a) reinsure mutually all or part of their liabilities in respect of a specified risk category;

(b) incidentally accept, in the name and on behalf of all the participants, the reinsurance of the same category of risks.

Several respondents to the initial public consultation reported the emergence of 'intermediary' or 'brokerled pools' as a significant market development in recent years. However, the European Commission has received a very limited feedback from intermediaries. This questionnaire intends to fill in this gap and understand the role of brokers in their interaction with pools. It is crucial for the European Commission to obtain relevant information in this field. The Impact Assessment that will be carried out in the review of the Insurance Block Exemption Regulation will have to determine how the IBER is being used in the EU insurance markets, whether the current regulation is still necessary, and if and how it needs to be amended. To this end a comprehensive picture of all relevant interactions on the markets served by pools is indispensable.

I. Insurance Brokerage

Main activity

(1) Which industries, risk sizes and risk categories do you provide brokerage services for?

(2) What is your geographical scope of operation?

³ 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, decisions and concerted practices in the insurance sector (IBER), JO L 83, 1.

- (3) How do you acquire new business?
- (4) How do you procure sufficient coverage for any given risk?
- (5) Do you make use of standardised contracts? If yes: whose standard terms and conditions do you use? If not: have you drawn up your own standard terms and conditions? Could you please provide us with a copy the standard terms and conditions you use? If you do not use standard terms and conditions, who drafts the tailored terms and conditions?
- (6) Could you describe the nature and extent of your interaction with insurers?
- (7) Could you describe the nature and extent of your interaction with pools?
- (8) On what basis do you compete with other brokers?
- (9) Do you have cooperation agreements with certain insurance holders?
- (10) Do you predominantly provide brokerage services for large, small or medium-sized clients?
- (11) Please describe your fee structure for insurance contracts brokered with regard to different types of risks or clients. On what basis are your fees calculated? With whom are they negotiated, and by which party are they paid?

Intermediary/broker-led pools

- (12) According to your understanding, do you engage in intermediary/broker-led pools?
- (13) Please describe the interaction between your brokerage and insurers, and the structure of these pools, e.g. were they set up by separate individual vertical agreements between the broker and each of the participating insurers? To what extent, if any, is there horizontal coordination between insurance undertakings in the context of their negotiations with you?
- (14) If you elaborated on the structure of intermediary/broker-led pools: Do you believe that the intermediary/broker-led pools you described fall within the current IBER definition (as quoted in the introduction)? Please provide reasons. If you do not believe them to be covered by this definition, would you recommend subjecting them to the IBER? Please provide reasons.
- (15) Could you provide us with concrete examples of intermediary/broker-led pools?

Market conditions

- (16) Apart from brokerage, how is insurance cover obtained in the risk market in which you operate?
- (17) Who are your main competitors (brokers or otherwise) in the market(s) in which you operate?
- (18) Are there any circumstances (economic, regulatory, market-specific, etc.) that would prevent you from placing a certain risk internationally (i.e. placing a risk from one Member State with an insurer in another)? Please describe what those are.
- (19) Are there any circumstances (economic, regulatory, market-specific, etc.) under which you would decline to procure coverage for a certain risk? Please describe what those are.
- (20) Are there any risk or geographic markets to which you have no or limited access? If so, what are they and for what reasons?

- (21) Do Member State authorities intervene in the functioning of your brokerage? In what way?
- (22) Which format would you choose to cover new risks within the meaning of Art. 1(6) IBER (for example from cyber attacks or new energies)?
- (23) Under what circumstances would you choose to place a large risk with an insurance pool rather than set up an ad-hoc coinsurance arrangement?
- (24) How frequently do you procure reinsurance cover for the same risk for which you also procure direct insurance?
- (25) In what business sectors and for what risk types do you rely on insurance pools to cover large risks? To what extent would the absence of insurance pools from the market influence your ability to find cover for new or large risks?
- (26) When placing risks with insurance pools, which organ of the pool's organisational structure is your negotiating/contracting partner?

II. Impact of the IBER

- (27) To the best of your understanding, do (or should) intermediary/broker-led pools benefit from the IBER exemption? Please give reasons.
- (28) In the market(s) in which you arrange insurance cover, does the cooperation exempted under the IBER promote or hinder the entrance of new players, or the cross-border provision of insurance? Does it produce positive or negative effects on customer choice, supply diversity, innovation or premium levels?
- (29) Does the current IBER exemption for insurance pools allow appropriate competition for the insurance cover you seek to procure? Do you think that the current definition of pools is sufficient, or does it require adaptation? If yes, how?
- (30) What, if any, benefits do clients derive from taking their insurance needs to a broker rather than approaching a pool directly?
- (31) What changes in customer choice, supply diversity, innovation and premium levels would take place if the pools' exemption did not exist? How significant would these changes be: slight, moderate, appreciable?
- (32) Does the IBER have any effect on the range, size and type of insurers able to provide cover for the risks you are looking to place? Please explain.

III. Outlook

- (33) What changes in the IBER provisions on cooperation between insurers would you propose in order to facilitate market entrance and the cross-border provision of insurance, and to facilitate a higher degree of innovation and competition?
- (34) Should the relevant provisions distinguish between: larger and smaller insurers, insurance and reinsurance markets, conventional or non-conventional/large risks? Should the provisions differ for different frameworks of cooperation? What should these provisions entail?

Questionnaire for mutual insurance associations

The European Commission has run this year an initial public consultation on the functioning and future of the Insurance Block Exemption Regulation⁴ (IBER). IBER exempts from the prohibition of restrictive business practices under Article 101 TFEU certain cooperation agreements between insurers, i.e. among others and subject to certain conditions co(re)-insurance pools that are set up by insurance undertakings either directly or through brokers or authorised agents to jointly cover certain types.

"Co(re)insurance pools" are defined by IBER as follows

- "co-insurance pools" means groups set up by insurance undertakings either directly or through brokers or authorised agents, with the exception of ad-hoc co-insurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover that remainder, which:

- (a) agree to underwrite, in the name and for the account of all the participants, the insurance of a specified risk category; or
- (b) entrust the underwriting and management of the insurance of a specified risk category, in their name and on their behalf, to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;

- "co-reinsurance pools" means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or more reinsurance undertakings, with the exception of ad-hoc co-reinsurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of this risk is covered by follow insurers who are then invited to cover that remainder in order to:

- (a) reinsure mutually all or part of their liabilities in respect of a specified risk category;
- (b) incidentally accept, in the name and on behalf of all the participants, the reinsurance of the same category of risks;

During the initial public consultation, the European Commission did not receive any response from mutual insurance associations that according to our information play an important role in offering complementary or alternative insurance capacity in some sectors. This questionnaire intends to fill this information gap.

I. Mutual insurance association's operations

Purpose / Main activity

- (1) What business does your entity undertake: direct insurance, re-insurance, retrocession?
- (2) What risk categories does your entity (re)insure? In what sectors of the economy?
- (3) For what reasons was your entity created?

Composition

⁴ 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, decisions and concerted practices in the insurance sector (IBER), JO L 83, 1.

(4) What are the conditions to become member of your organization? Who are your members and what is their share in the mutual?

(5) What are your main customers? Are all your members also policy holders of the mutual?

Functioning of the mutual insurance association

(6) On what basis and how does your entity decide the insurance cover it offers?

(7) How does your mutual insurance undertaking function? Who is liable to the undertakings insured?

II. Relevant market

(8) What is the position of your entity in the markets in which it operates? Does your entity compete with insurance undertakings or (re)insurers' groupings? In what way? Who are your main competitors? Has there been any important innovation or development in the last ten years that affects the way (re)insurers cooperate for the provision of insurance in your sector?

(9) Do you know other mutual insurance associations in your sector or in other sectors of the economy? What are they?

III. Provision of insurance cover

(10) Is your offer of insurance cover complementary or alternative to that offered by insurance undertakings or groupings of them? In what way?

(11) Please explain the procedure, process and interrelation between your entity and insurance undertakings and their groupings to compile an adequate package of insurance cover for your members.

(12) What cooperation frameworks do insurers use: Broker/Intermediary-led insurance line slips, Adhoc arrangements, pools, other?

(13) Is it necessary in your opinion for insurers to cooperate to cover the insurance needs or do you believe that individual insurers possess sufficient capacity to provide insurance individually? For what purposes and to what effect? Is this cooperation justified economically or socially?

(14) In what Member States are you active? Have you tried to offer insurance cover also others Member States? For what reasons? If you did not succeed to offer such cover, could you please state the reasons?

(15) How would you describe the current competitive situation in the markets where you offer insurance cover?

(16) In the markets you offer insurance, does the cooperation exempted under the IBER promote or hinder the entrance of new players or the cross-border provision of insurance? Does it produce positive or negative effects on your activity?

(17) Does this cooperation framework between insurers have an impact on your business? If yes, please explain.

IV. Outlook

(18) What changes in the IBER provisions on cooperation between insurers would you propose to enhance new entrance, cross-border provision of insurance, and a higher degree of innovation and competition?

(19) Should the relevant provisions distinguish between: larger and smaller insurers, insurance and reinsurance markets, conventional or non-conventional/large risks? Should the provisions be different for different cooperation frameworks? How should these provisions be?