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IMPACT ASSESSMENT

Accompanying document to the

COMMISSION REGULATION (EU) No ../..

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

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This report commits only the Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission.

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1. BACKGROUND

1.1. Introduction

1. This Impact Assessment (IA) Report forms part of the Commission's long-running process of determining what competition policy approach is to be followed in respect of the insurance sector once the current insurance block exemption regulation, Commission Regulation (EC) 358/2003[1] (the BER) expires on 31 March 2010.

2. The Directorate-General for Competition is the lead service on the review of the functioning of the current BER (the Review) and on proposing amendments for the future of policy in this area. The other Directorates-General involved are: DG Internal Market, DG Enterprise, DG Consumer Affairs, DG Economic and Financial Affairs, DG Environment, DG Employment, the Legal Service and the Secretariat-General. The Review is listed in the Commission Legislative and Work Programme for 2010.

1.2. Historical overview

3. As early as 1972, the Commission stated in its Second Report on Competition Policy that the EC Treaty competition rules applied to the insurance industry. The European Court of Justice (ECJ) confirmed that the industry should be subject to the competition rules in the *Verband der Sachversicherer* judgement[2]. The insurance sector has had a sector-specific BER since 1992. Commission regulation (EEC) No. 3932/92[3], the former sector-specific regulation for the insurance sector, expired on 31 March 2003 and was replaced by the current BER, Commission Regulation (EC) No 358/2003[4].

4. The BER applies Article 101(3) of the Treaty to four categories of agreements, decisions and concerted practices in the insurance sector, namely agreements in relation to (i) joint calculations, tables and studies; (ii) standard policy conditions (SPCs)[5] and models on profits; (iii) the common coverage of certain types of risks (pools); and (iv) security devices. Council Regulation 1534/91 allows the Commission to adopt a BER for two other types of agreements namely settlement of claims and registers of and information on aggravated risks. Recital 3 of the current BER states that the Commission considered that it lacked experience in handling individual cases in these areas in order to make use of this power to adopt a BER in these fields. The situation remains the same since 2003. In addition, the Commission did not find any evidence during the Review to change its view on this matter.

5. The BER applies only in relation to these specific categories of agreements[6] under the conditions set out in the BER. In that context it is important to note that even if the BER is not renewed or only partially renewed regarding a specific category of agreements, this does not necessarily mean that agreements previously falling under the BER become illegal. An

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1 Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) now Article 101(3) of the EU Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (O J L 53/8, 28.02.2003).

2 Case 45/85 of 27 January 1987, *Verband der Sachversicherer e.V. v Commission of the European Communities*, ECR 1987 p. 405.

3 Commission Regulation (EEC) of 21 December 1992 on the application of Art. 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 398/7.

4 Commission Regulation (EC) No 358/2003 of 27 February 2003 OJ L 53/8, 28.02.2003.

5 The current BER defines standard policy conditions as "any clauses contained in model or reference insurance policies prepared jointly by insurers or by bodies or associations or insurers".

6 Wherever the term "agreements" is used in this document, it shall mean agreements, decisions and concerted practices.

individual assessment under Article 101(1) and, if applicable, under Article 101(3) rather than under the BER would be required. At the moment, a legal assessment must also be undertaken in each case in order for undertakings to determine whether the forms of cooperation in which they participate fulfil the conditions imposed by the BER.

6. Since 1 May 2004, like most other sectors, the insurance sector has been subject to the generally applicable provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 (Regulation 1/2003) on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty. Regulation 1/2003 provides that agreements that satisfy the conditions of Article 101(3) are not prohibited, no prior decision to that effect being required. Undertakings and associations must now assess for themselves whether their agreements are compatible with Article 101. Only a few sectors currently benefit from a sector specific BER and there have been other sectors (such as maritime and air transport) for which the relevant BER was not renewed. The primary original objective of the BER was to facilitate the Commission's task in view of the large number of notifications submitted for review by the Commission prior to modernisation of the competition rules with Regulation 1/2003. Since this objective is no longer relevant the Commission approached the analysis of whether to renew the BER from a first principles perspective. See Section 2.2 below

1.3. Review and consultation

7. The Commission began the review of the functioning of the current BER (the Review) in November of 2007 by asking the national competition authorities (NCAs) of the European Competition Network (ECN) for submissions on their experiences with the BER. Following that an ECN meeting was held in February 2008 after which DG Competition launched a detailed public consultation in April 2008. It also sent targeted questionnaires to certain stakeholders in particular to consumer organisations and national supervisory authorities.

8. Although around 60 replies were received during the 3 month consultation, there were a number of gaps in the information received, so follow-up questionnaires were sent to a large number of stakeholders in particular to pools (none of whom replied to the consultation), to small and medium-sized insurers, to producer federations and to representative of the banking industry.

9. On the basis of the evidence gathered, the Commission adopted, on 24 March 2009, the Report to the European Parliament and Council on the functioning of Commission Regulation 358/2003 (the Report), which was published on the same day with a detailed accompanying Working Document. DG Competition then organised a large public event on 2 June 2009 to hear final representations from the industry and other stakeholders on the findings and preliminary proposals in the Report and Working Document. Following the public event DG Competition sent out a final round of fact-finding questionnaires to large, small and medium-sized insurers and insurance associations in particular focussing on the joint calculations tables and studies exemption with a view to determining the specific information that insurers exchange and whether there was any scope for narrowing the exemption for example to certain types of risk.

10. DG Competition held an additional extended (also with government ministries) ECN meeting on 29 July 2009 to discuss the results of the Review. An Advisory Committee with NCAs was also held on 26 September 2009 to discuss the draft BER. This draft was published for consultation for a period of 8 weeks until 30 November 2009. 23 replies were received to that consultation.

11. The Commission's contact with the insurance industry has not revealed any particular problems in terms of the links between the BER and the financial crisis. In general insurers consider they are in a good shape to withstand the financial crisis because of a robust start

capital position, effective risk management, recognition of vulnerability to higher claims and effective credit control.

12. The European Parliament was in particular, concerned as stated in its Resolution of 5 June 2008[7] that the Commission should "support cooperation in the insurance industry on promoting market access" and therefore called on the Commission to renew the BER. Although there is no formal consultation process with the **European Parliament** because the BER is a Commission Regulation, the Commission briefed or met several members of the ECON Committee, including the Chair and briefed or met a number of officials prior to and following publication of the draft new BER for consultation. The Parliament reiterated its call in a letter to Commissioner Kroes dated 16 November 2009. The European Parliament's views have been taken into account during this process.

13. The main source of evidence has therefore been through replies to two public consultations as well as a number of follow-up questionnaires. Although quantitative evidence was requested from respondents to questionnaires and the consultations, this was not provided in large majority of replies. Therefore, this impact assessment is primarily qualitative rather than quantitative. Although Annex 3 provides a broad picture of the insurance sector across the EU and recent developments, accurate conclusions cannot be drawn from these statistics in relation to the impact of the BER.

1.4. Elaboration and assessment of future options

14. An inter-service steering group was set up for this Impact Assessment and met on 10 April 2008 and 16 December 2009.

15. A draft of this IA was submitted to the IA Board on 15 January 2010, which duly met on 10 February 2010. In its opinion dated 12 February 2010, the Board found that some improvements were appropriate.

16. The IA Board recommended that further work was needed on a number of important issues. In general the IA Board said that the report should better substantiate the reasons for continuing or not to grant sector specific block exemptions to certain agreements. In particular, the Board suggested that the document should present the problems addressed more clearly and analyse them more extensively and should better substantiate the reasons for continuing or not to grant sector specific block exemptions to certain agreements in the insurance sector, by illustrating the shortcomings identified in the current regulation (Section 2.1). The Board also said that the IA should better explain the content of the individual measures envisaged under option 2 against the background of the expanded analysis of problems suggested above. These problems have been explained more extensively in the impact sections, under the relevant specific objectives, but also in the "How" section, where the description of option 2 has been expanded by better explaining the reasons behind each suggested improvement (Section 4.1.2). In addition, as recommended by the Board, the IA now includes a brief analysis of those options which were discarded early in the policy process such as granting the benefits of a BER to further categories of cooperation (paragraph 4) or using sector specific guidelines rather than regulations (Section 4.1). Also, the IA now better assesses the role that public or private third party arrangements may have in meeting the needs currently seen to justify cooperation among insurers (Sections 7.1.2, 8.3) and provides examples where possible. The main recommendations for improvements of the Board have been incorporated in the document. The Board also recommended that the IA should clarify the reasons for the selection of the preferred option, provide a better analysis of the impacts that the revised policy framework would have on the insurance sector and its

[7] On Retail Financial Services in the Single Market (2007/2287(INI)).

clients and indicate whether there are likely to be any changes in the incentives for cooperation among large insurers (incorporated in Sections 5.4.3, 6.1.2, 6.1.4 and 8.1.4). The IA has also strengthened the analysis of changes in compliance costs (Section 6.2.1). Finally, following the Board's recommendations to strengthen the provisions for monitoring and evaluation, the IA now indicates when an evaluation of the competition policy framework for the insurance sector will be carried out and also identifies the criteria and indicators which will be used to assess the impact of the proposed revision (Section 11).

2. PROBLEM TO BE ADDRESSED: − THE "WHY"

2.1. The expiry of Regulation EC No 358/2003

17. There are no particular shortcomings of the BER as a result of the adoption of Regulation 1/2003 which entered into force on 1 May 2004. However, the legislative and assessment landscape has changed with Regulation 1/2003.

18. As mentioned in paragraph 6 above, since 1 May 2004 insurance undertakings and associations must now carry out the necessary assessment whether their agreements are compatible with Article 101 of the Treaty.

19. In response to complaints or *ex-officio*, the Commission and NCAs may require that the parties to agreements infringing Article 101 bring such infringements to an end, and in case of serious violations they may impose fines upon the infringing parties. Moreover, national courts can apply these provisions directly, for instance in case of actions for damages brought before them.

20. Individual self-assessment can entail expenses for parties to an agreement in terms of legal costs, but also because assessing agreements on an individual basis may carry an increased risk of error in the form of false negatives or false positives.[8]

21. A BER allows market players, the benefit of a safe harbour from the prohibition in Article 101(1) if they comply with the BER's conditions - to enter into agreements they can assume to be *ex ante* in line with EU competition law, enabling them to flexibly conclude or adjust them, while reducing their compliance costs, enhancing legal certainty and contributing to the coherent application of competition rules across the EU. Agreements not covered by a BER are not presumed to be illegal, but instead have to be assessed under Article 101(3).

22. However, only a few sectors currently still benefit from a sector specific BER and there have been other sectors for which the relevant BER were not renewed.[9] As the current BER expires on 31 March 2010, the question arises whether there are sufficient grounds to continue to declare by regulation Article 101(3) applicable to certain agreements in the insurance sector.

23. Although there are no particular shortcomings of the current BER, there are a number of adjustments and improvements which were identified during the Review which can be incorporated in a renewed BER. These will be addressed throughout this Impact Assessment

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[8] i.e. that the assessment will conclude that an agreement complies with Article 101 whereas in fact it does not or vice versa.

[9] Recent repeal of Council Regulation (EEC) No 4056/86 laying down detailed rules for the Application of Articles 85 and 86 [now named Articles 101 and 102] of the Treaty to maritime transport; and the expiry of Commission Regulation (EC) No 1459/2006 on the application of Article 101(3) to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports.

in particular in the Section 4.1.2 below and in the analyses of each exemption under the relevant specific objectives.

24. Although there are no particular shortcomings of the BER, some improvements could be incorporated into a new draft BER and these are discussed in the impacts sections in the "How" section and also under Option 2 below. They are as follows:

- providing an exemption for exchange of information that is wider than is necessary for the compilations, tables and studies in order to properly assess risks is not appropriate for exceptional legal instruments such as the BER;
- given that the BER is sometimes used by Pools as a blanket exemption, restructuring the BER in a more logical and flowing way, encourages careful and correct legal assessment;
- acknowledging the fact that the BER could allow greater transparency for consumer and customer organisations, providing access for such organisation to the data produced from the information exchange ensures greater transparency for these stakeholders;
- recognising that the approach to market share calculation is not consistent with other general and sector-specific competition rules on the assessment of horizontal cooperation, amending the approach to make this approach consistent;
- recognising that the definition of "new risks"[10] may be too restrictive in practice – expanding the definition of "new risks" to cover risks whose nature has, on the basis of an objective analysis, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them; and
- recognising the importance of the possibility for Member States (as well as the Commission) to withdraw the benefit of the BER where agreements covered by it give rise to negative effects – including a reference to this power (which comes from Regulation 1/2003) in a recital.

25. In the event that the exemptions for agreements on SPCs and Security Devices were renewed under the BER the question is whether any modifications of the text of the BER would be appropriate in order to address the problems that such agreements are leading to in some markets. Indeed, as regards SPCs, a key concern is that they may become de facto mandatory, resulting in too much harmonisation of these standards and less choice of insurance products for consumers (See below Section 7.1.3), although the current BER provides that SPCs should not be binding. In relation to security devices, the primary question is whether the simple existence of the BER encourages the adoption of infra-European standards by insurers, which do cooperate even in harmonised fields, although the BER only applies when there is no harmonisation. The concern relating to the fragmentation of the internal market of security devices and anticompetitive effects on the market for security devices is examined below in Sections 9.1.2 to 9.1.4. The issue is therefore whether it would be more appropriate to address these agreements in the Commission's Horizontal Guidelines (currently being revised). This process is still in the early stages and we are therefore unable to disclose specific parts of these Guidelines at this stage.

[10] Article 2(7) in the current BER states that "new risks" means risks which did not exist before 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.

2.2. Is there sector specificity?

26. Given that the original objective of the BER is no longer relevant, the Commission undertook **a first principles approach** to the analysis of whether to renew this BER by asking the following questions:

(i) whether the business risks or other issues in the insurance sector make it "special" and different to other sectors and whether this leads to an enhanced need for cooperation;

(ii) if so whether this enhanced need for cooperation requires a legal instrument such as for example, the BER to protect or facilitate it; and

(iii) if so, whether the current BER is the most appropriate legal instrument. Based on the evidence found, the Commission took the preliminary view in the Commission Report and Working Document of 24 March 2009 on the functioning of the BER that two out of the four categories of agreement were not specific to the insurance sector, SPCs and agreements concerning security devices and their installation and therefore do not require a sector specific BER.

27. When analysing these three questions, the Commission took account of the specific characteristics of the sector, the competitive conditions on the affected markets and the problems and benefits of the forms of cooperation exempt under the BER.

3. OBJECTIVES – THE "WHAT"

28. This section sets out the general and specific competition policy objectives pursued. The Commission's specific objectives in deciding whether to grant a block exemption for the insurance sector, and what form it might take, have always been based on the core requirements of Article 101(3). However, since the legal and factual background to the competition rules is not static, the Commission has analysed whether each of its objectives continues to be valid in the long term, and indeed whether new objectives should be set.

3.1. General objectives

3.1.1. Balancing the effective supervision of markets against the need to simplify administration and minimise compliance costs

29. Block exemptions have as their purpose the creation of a safe harbour within which firms enjoy a degree of certainty as regards the compatibility of agreements between them with Article 101(3) of the Treaty. The principles that rules laid down in application of Article 101(3) must respect are specified in Article 103(2)(b). When adopting such rules, the Council and, by virtue of the enabling regulation, the Commission, must take into account *"the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other"*.

30. All block exemptions should only cover agreements that respect the requirements of Article 101(3) of the Treaty, which imposes two positive and two negative conditions. Such agreements must:

- contribute to improving the production or distribution of goods or to promoting technical or economic progress; and
- allow consumers a fair share of the resulting benefit.

In addition, such agreements must neither:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; nor

- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

31. Thus, the general objectives of the Commission's policy towards these categories of agreements in the insurance sector is therefore to allow them to benefit from a safe harbour while ensuring effective supervision of the markets and doing the maximum to simplify administration and reduce compliance costs in particular in the form of legal compliance costs where for example the substance of the analysis may differ under that BER compared with under Article 101(3).

3.2. The specific objectives for the insurance sector

3.2.1. Granting a block exemption only to sector specific types of cooperation

32. Throughout the review process the Commission's services focussed on the question of whether the insurance sector is special or different to other sectors such that it gives rise to an enhanced need for cooperation. By conducting in-depth investigations into this issue the Commission aimed to ensure that the resulting instrument does not give undeserved or unnecessary preference to the insurance sector. Several insurers and insurers' associations argue that cooperation between them ensures that the costs incurred by insurers and in turn the premiums they charge to customers are kept low. They argue, somewhat predictably, that without the BER there would be an increase in insurers' and brokers' costs resulting from the duplication of efforts.

33. The Commission nevertheless agrees that in many cases such cooperation can arguably give rise to positive effects for competition and consumers. However the question for this assessment is primarily whether this need is peculiar to the insurance sector. The answer to that question appears to vary between the different categories of agreements but there is no doubt that, in its review of the BER the Commission should not give insurers undue lee-way or preferential treatment. This objective is essential for the Commission's overall credibility and authority, so it remains a valid aim to pursue.

3.2.2. Encouraging pro-competitive cooperation between insurers

34. The vast majority of respondents to the consultations and questionnaires drew our attention to the insurance industry's need to cooperate on several issues, and their ability to do so legally seems closely connected to the existence of the BER. One could argue that, given the pro-competitive character of such cooperation, it would, even in the absence of the BER, not fall under Article 101(1) or would be exempted under Article 101(3). However, without the presence of the BER these types of cooperation seem more difficult to manage. In addition, it would become impossible to render them conditional to the specific requirements which currently ensure a level playing field.

35. The need for cooperation in the insurance industry is linked to its peculiarity as a sector and as a business model. The fact that insurance companies do not know the price of their service (i.e. the risk) at the time they undertake to provide it, means that allowing companies to set more realistic prices by protecting cooperation on evaluating and assessing risks is a valid objective for EU legislation.

3.2.3. Maximising benefits for consumers

36. An overall objective of any Commission proposal is to ensure that consumers are given a strong voice and fair share of the bargaining power when it comes to dealings with insurers. Ensuring that there is enough choice in insurance products and security devices together with both strong price and non-price competition should therefore be a key objective of any new insurance BER.

37. Cooperation between undertakings in the insurance sector is to a certain extent desirable to ensure the proper functioning of this sector and may at the same time, promote consumers' interests.[11] By supporting a healthy degree of competition on insurance markets as a whole the Commission can ensure that the competition framework applicable to the insurance sector maximises benefits for consumers. Transparency is key in this regard.

3.2.4. Encouraging/facilitating entry by reducing entry barriers for competitors

38. A key general competition objective is to encourage market entry. Block exemptions in this sector have had a specific target of facilitating market entry in particular by small insurers. For example the current BER provides in its recitals that "the inclusion in such joint calculations tables and studies of information from all insurers on a market including large ones promotes competition by helping smaller insurers and facilitates market entry"[12]. It also states that "pools can help insurance and reinsurance undertakings to acquire experience of risks with which they are unfamiliar"[13].

3.2.5. Providing adequate legal security for undertakings

39. The BER states that it should meet the two requirements of ensuring effective protection of competition and providing legal security for undertakings. The pursuit of these objectives should take account of the need to simplify administrative supervision to as great an extent as possible. One of the original objectives of the BER was to categorise four types of agreements by using certain compliance conditions as a framework for the analysis of whether such agreements were exempt under Article 101(3). This meant that if all such conditions were met by an agreement, companies entering into that agreement could easily self-assess whether their agreement was exempt under Article 101(3) from the prohibition in Article 101(1). This provided legal security and ease of process at a time when companies could still apply (until Regulation 1/2003 came into force) for individual exemptions via the lengthy process of sending their agreements to the Commission for assessment and granting of an individual exemption (or not).

40. The question arises as to whether there remains a case for providing a high level of legal security for certain categories of agreement given that most sectors no longer benefit from a BER.

4. POLICY OPTIONS − THE "HOW"

4.1. Identification of the policy options to be assessed

41. In order to determine whether, and if so to what extent, it is appropriate to adopt a new approach to the insurance sector, the Commission considered the benefits and costs of a

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11 Recital to Council Regulation (EC) No. 1534/91.

12 Recital 13.

13 Recital 18.

range of potential policy options and in particular what improvements could be made to a renewed BER.

42. Given that a BER lays down detailed rules for the application of Article 101(3) of the Treaty, which is part of the exclusive competence of the Community, the subsidiarity principle does not apply. Therefore, the criteria relating to the necessity and value added of the envisaged options are not discussed. The form of the EU action (Commission Regulation) is coherent with the achievement of the objectives. The direct effect and applicability of this regulation is proportionate with the exclusive competence of the Community regarding the establishment of detailed rules for the application of Article 101(3) of the Treaty.

43. These policy options are not only specific options identified in the Commission's Working Document but also options that emerged during the subsequent consultations and discussions. These policy options which are described below will be assessed in relation to each category of agreement which is currently exempted under the BER separately as the impact of the options differs significantly from one category of agreements to another. They are briefly outlined below, and they are discussed in further detail in relation to their respective effects on the insurance sector.

44. We also considered sector specific guidelines instead of renewal of the BER. Agreements which are sector specific to the insurance sector are more appropriately dealt with under the BER which is working well as a legal instrument. Furthermore, feedback during the Review from stakeholders indicated a preference for renewal of the BER rather than an alternative. For agreements which are not sector specific, it is appropriate to address them under the Horizontal Guidelines which apply to all sectors and are currently being revised by the Commission.

4.1.1. Option 1: Baseline Scenario – renewal of the BER in its current form

45. The baseline scenario is the renewal of the exemption of the respective category of agreement in its current form, i.e. the continuation of the *status quo*. It is reasonable to refer to it as the baseline scenario in order to assess other possible options or improvements to the current BER.

4.1.2. Option 2: Renewal with modifications of the BER

46. This option foresees that the BER would be renewed subject to modifications regarding structure and content to reflect the findings on the functioning of the current BER during the Review process.

47. The key changes to the **joint calculations, tables and studies** exemption would be as follows:

- narrow the exemption itself to allow exchange of information only where it is *necessary* for the compilations, tables and studies: the aim of this change was to emphasise that the exchange of information should not go beyond what is necessary in order to achieve the purpose of the exemption;

- adjust the structure of the entire BER to separate the exemptions and follow each with its conditions and agreements not covered: during the Review it appeared that there is a tendency for insurers in some cases to use the BER as a blanket exemption without examining the individual conditions provided in it. The aim of this change was therefore to ensure that the conditions immediately follow the exemption with a view to ensuring that they are also examined and facilitate correct self-assessment;

– on the basis of comments during the Review indicating that insurance associations are not jointly calculating but primarily jointly compiling information. The individual insurers do their own calculations on the basis of the aggregated information as a result of this information exchange. We would therefore amend the term to the more general "joint compilations" (which can include some calculations);

– include in Article 3(2)(d) access for consumer and customer organisations to the data produced from the information exchange: this is with a view to ensuring greater transparency for consumers and customers.

48. The key changes we would make to the pools exemption are as follows:

– bring the approach to market share calculation into line with other general and sector-specific competition rules on the assessment of horizontal cooperation. Until now the approach to the calculation of market shares only took into account the insurance products underwritten within the pool by the participating undertakings or on their behalf. This methodology for calculating market shares made the market share calculation more generous for co(re)insurance pools, as the turnovers achieved by the participating companies outside the co(re)insurance group in the relevant insurance market are not to be considered. It is important to note that this method of calculating market share is not in line with other general and sector-specific competition rules on the assessment of horizontal cooperation. The Commission's *de minimis* Notice[14] refers to the "aggregate market share held by the parties to the agreement"[15] and not to the market share of the cooperation in question. In addition, no other BER, be it general[16] or sector-specific[17], bases its calculation of market share on the cooperation only instead of the aggregate share of all companies involved[18].The change proposed under Option 2 would be that products underwritten by the participating companies outside the co(re)insurance pool in the relevant market will also be taken into account for the calculation of the market shares;

– raise the flexibility in the market share thresholds by 3 per cent (from 22 per cent) to 25 per cent for co-insurance pools and by 3 per cent (from 27 per cent) to 30 per cent for co(re)-insurance pools in order to make these thresholds consistent with other competition BERs such as the Specialisation BER. This is also in response to some comments during the Review requesting an increase to the market share thresholds. Although the general market share thresholds would remain the same as in the current BER, the change to the flexibility thresholds allows some additional scope for pools to be covered when their market shares increase;

– adapt the definition of "new risks"[19] to include risks whose nature has, on the basis of an objective analysis, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them. This change would be made in the context of insurers complaining that the definition in the current BER is too restrictive

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14 The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty, OJ C 368, 22.12.2001, p.13 and Guidelines on the effect on trade concept , OJ C 101, 27.4.2004, p.81.

15 The Commission's Notice on Agreements of Minor Importance referred to above.

16 Article 4 of the Specialisation BER considers that market share "of the participating undertakings", and Article 3 of the Technology Transfer BER considers the "combined market share of the parties".

17 Art. 5 (2) of the Liner consortia BER: "*For the purpose of establishing the market share of a consortium member the total volumes of goods carried by it in the relevant market shall be taken into account*".

18 As also pointed out by a NCA in reply to the Consultation.

19 Article 2(7) in the current BER states that "new risks" means risks which did not exist before 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.

and in fact often does not apply in practice. However the change is limited and can only be used in exceptional cases; and

– adjust the structure of this exemption in the same way (and for the same reasons) as outlined for joint compilations, tables and studies above.

49. General changes we would make to the BER are as follows:

– add the possibility to withdraw the benefit of the BER for Member States as well as the Commission (although this power comes directly from Regulation 1/2003). This change was suggested by a number of competition authorities during the Review;

– add a transition period of six months in order to allow time for insurers to adjust their agreements and ensure compliance of their agreements under a new BER or under Article 101(1) and (3).

50. None of these envisaged changes go beyond what is necessary to achieve the objectives satisfactorily. The fact that all these changes have been discussed and some of them even proposed by the Member States through the National Competition Authorities also shows that the scope of action is proportionate and limited to those aspects that Member States cannot achieve satisfactorily on their own. Moreover, a transitional period is envisaged, in order to diminish any potential obstacles to compliance.

4.1.3. Option 3: Non-renewal of the BER with the relevant agreement falling under the general regime (i.e. Article 101 (Treaty Article and Guidelines) and/or Horizontal Guidelines for horizontal cooperation agreements, currently under review)

51. This option would see the Block Exemption being allowed to expire in March 2010, and the relevant agreements would then fall under the general competition rules currently applicable to the vast majority of the sectors. In addition DG Competition is currently planning to address Security Devices and SPCs in the standardisation chapter of the Commission's Horizontal Guidelines (currently being revised) which will set out guidelines including for the insurance sector on how to self-assess their agreements under Article 101.

5. METHODOLOGY AND IDENTIFICATION OF ASSESSMENT CRITERIA

52. The following section sets out the Commission's assessment of the positive and negative impacts that Policy Options 1 to 3 would be likely to have if implemented, in relation to each of the four different categories of agreements currently exempted under the BER. It is based on DG Competition's own analysis, the result of a broad consultation of stakeholders and industry experts. It looks at the potential impacts of each option in relation to both the general and specific objectives that have been set out in detail above. It then goes on to examine the impact on firms' compliance costs and on the EU budget. Finally, it assesses the potential social, health and environmental impacts of each option.

53. As different options have radically different consequences for each of the four categories of exemption, this analysis has been similarly divided into four sections. Each of the various options will thus be considered and evaluated separately for all four types of exempted agreement.

As to the methodology, the point of reference for the purposes of this assessment is Option 1 – the "Business As Usual" scenario, which foresees the continuation of the *status quo*. Because statistics are often not available, it is not possible to provide financial data or other	**Score**

figures for the likely impact of each policy option. Therefore, for each option, the expected impact has been assessed in qualitative terms, with scores from minus three to plus three in respect of each criterion, the point of reference (score 0) being the baseline scenario (Option 1).**Impact (+ive or -ive)**	
High negative	-3
Moderate negative	-2
Slight negative	-1
None	0
Slight positive	1
Moderate positive	2
High positive	3

5.1. Economic criteria related to the protection of effective competition

54. The following analysis is based on competition-specific criteria reflecting the policy objectives which have been identified in Chapter 3 above.

5.1.1. Granting a block exemption only to sector specific types of cooperation

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

5.1.2. Encouraging pro-competitive cooperation between insurers

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

5.1.3. Maximising benefits for consumers

57. As regards the Commission's aim of ensuring that the BER meets the requirements of Article 101(3), in particular that a fair share of the resulting benefits is passed on to consumers, without affording undertakings the possibility of eliminating competition in respect of a

substantial part of the products in question, options will score higher or lower depending on how well they enable consumers to benefit from cooperation between insurers.

5.1.4. Encouraging/facilitating entry by reducing entry barriers for competitors

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

5.1.5. Providing adequate legal security for undertakings

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

5.2. Other economic criteria

5.2.1. Reducing compliance costs

60. One of the objectives in this area is to provide a degree of legal certainty and clarity for firms. Such a framework makes it easier to predict outcomes, and normally reduces error costs. Policy options will score higher to the extent that they make it easier for economic operators, courts and competition authorities to assess the legal status of agreements.

5.2.2. Impact on small and medium-sized enterprises (SMEs)

61. Options will rank higher or lower depending upon how well they protect the possibility for SMEs to accurately price risks, or to penetrate on a market on which they would otherwise not be active. Options are analysed not only in relation to small and medium-sized insurers but also in relation to small and medium-sized providers of security devices.

5.3. Impact on public administration and EU budget

62. The impact of the different options on the effective use of enforcement resources is not limited to the Commission, but also affects NCAs and relates to the degree to which the enforcement resources can be focused on appreciable restrictions of competition. This policy objective may also have a slight impact on the EU budget, in that if the Commission is able to better allocate its resources, in particular, towards the prosecution of serious breaches of the competition rules, the aggregate level of fines imposed on undertakings may increase. However, any positive impact would be on national budgets as the EU budget is a balanced one and any additional revenues being redistributed back to Member States.

5.4. Social and environmental impacts

5.4.1. Employment levels and job quality

63. Given that low unemployment and high job satisfaction are essential indicators of economic welfare, any possible impact of the respective options on these criteria is relevant.

5.4.2. Public health and safety

64. Being able to obtain appropriate insurance coverage of health and physical integrity can be considered highly valuable, as suffering injuries and in particular the endurance of corporal damages without having adequate insurance coverage impairs the quality of life. Therefore, options will score higher or lower, depending on these possible consequences.

5.4.3. Environment

65. Given that the protection of the environment is an important objective of the EU policy, options will score higher or lower depending on the possibility for insurance customers to obtain insurance coverage for a wide variety of environmental and climate change related risks.

6. JOINT CALCULATIONS, TABLES AND STUDIES - THE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED OBJECTIVES

6.1. Economic objectives related to the protection of effective competition

6.1.1. Granting a block exemption only to sector specific types of cooperation

66. Uncertainty and risk are inherent in any economic activity to a varying degree. In insurance activities, however, uncertainty and risk in itself become tradable commodities. Buying insurance means transferring a risk of a loss. Atypically, it is often the buyer and not the seller that has more information on what is being traded, i.e. the risk of a specific loss. Due to the asymmetry of information and unpredictability of single events, it is not possible for the insurer to calculate the exact cost of the insurance for any *single* transaction. The cost of individual insurance products is therefore unknown to the insurer at the time of agreeing on price and risk covered. Insurance companies therefore operate on the basis of the law of large numbers. According to this theory, even though single events may be random and largely unpredictable, the average outcome of many similar events can be forecasted. The larger number of events, the more accurate the forecast becomes.

67. The current BER in Recital 10, sets out the reasons why it is important to encourage collaboration between insurance undertakings or with associations of undertakings in the calculation of the average cost of covering a specified risk in the past or for life insurance, tables of mortality rates or the frequency of illness, accident and invalidity. Such collaboration makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. This in turn facilitates market entry because insurers can more easily enter the market when they have access to this risk information which allows them to more accurately price risk. This also benefits consumers who should thus have access to more accurately and lower priced cover. The same applies to joint studies on the probable impact of extraneous circumstances that may influence the frequency or scale of claims or the yield of different types of investments.

68. Most respondents to the consultations and targeted questionnaires argued that the availability of this kind of data is very important in order to be able to reliably assess risk, build stochastic models, correctly analyse cost and choose a price by calculating the risk exposure on the basis of historical data.[20]

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[20] For example, ANIA, Dutch Association of Insurers, CEA and GDV in responses to questionnaires, June 2009 and Allianz at Public Event, 2 June 2009.

69. Since calculation of risk is a key issue in pricing all insurance products, this differentiates the insurance sector from other sectors including the banking sector.[21] Insurers in the majority of Member States argue that they cooperate and continue to emphasise the importance of this cooperation in this area for their activities. During the Public Event, Allianz (a large insurer itself) gave the example of the High frequency, fiercely competitive motor liability insurance market in Germany: a minimum of 1 million risks would be required to give actuarially acceptable accuracy (+/- 5%). Only 20% of the companies on the market would have sufficient databases to calculate the total amount of expected claims. Smaller companies would face such a degree of uncertainty that a security surcharge would be required for them to be able to operate. A database of 100,000 risks would allow for an accuracy of +/- 15%, something which applies to 25% of insurers on that market. Not even large companies have sufficient data for the specialised differentiations for risk assessments (e.g. vehicle types).Therefore, on the basis of the evidence before the Commission, it appears that cooperation in this area is both specific to the insurance industry and may be necessary in order to price risks.

70. Like Option 1, Option 2 would result in granting a BER to the categories of agreement which allow insurers to more accurately price risk. Both are therefore preferable over Option 3. Option 2 however narrows the scope of the exemption to information exchange only where it is necessary for the joint compilation, tables and studies. Nonetheless it improves the structure and drafting of the exemption and grants access to the results of the collaboration to consumer and customer organisations. Option 2 is therefore preferable to Options 1 or Option 3.

6.1.2. Encouraging pro-competitive co-operation between affected economic players

71. Agreements which increase the number of insurers potentially capable of covering a given risk generally increase market access and competition. The fact that major insurers are allowed to engage in cooperation on the calculation of risk cover may enable entry of small and medium sized firms. It appears that large insurers can also generally benefit from a broader statistical base, even if their internal statistics may have been sufficient. However, grouped statistics must be justified by similarity of risks, if necessary interpreted sufficiently broadly to reach the minimum size having statistical relevance, but not resulting in the grouping of obviously disparate risks. The vast majority of respondents drew attention to the need to cooperate on this issue and connected it to the existence of the BER.[22] They argue that without the BER, insurers would use their own individual data to price risks and cooperation would cease or at least diminish in this area. If an insurer relies on data which is not actuarially adequate, its premiums could potentially be too low, meaning that in such a position an insurer will generally add an unknown risk levy onto the premium charged – thereby harming consumers.

72. Some respondents to the consultation and questionnaires made clear that alternatives to this cooperation do exist. In particular, insurers could add to their research and development staff in order to conduct market surveys and analyses themselves. Alternatively, best practice may be for governments or public organisations to collect and publish data. However the evidence indicates that the first approach is not an effective (see section 6.1.1 above) or efficient way to achieve this goal. This because for instance, from the perspective of an insurance company, the larger the group of units insured, such as cars for example, the more

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21 Credit registers in the field of banking seem to be a similar feature. However, there are a number of fundamental differences. Credit registers are often run by private companies, they are often only 'negative lists' (i.e. bad clients). Furthermore, Banks can ask for collateral whereas insurance companies have no such option.

22 For example, ANIA, Dutch Association of Insurers, CEA and GDV in responses to questionnaires, June 2009 and Allianz at Public Event, 2 June 2009, AVIVA and Zurich Insurance Company in their replies to Consultation, April 2008, and ABA in their reply to Consultation, November 2009.

accurate the assessment of certain risks (e.g. theft). The second is not necessarily a resource priority for public organisations or governments.

73. The reason for block exempting such cooperation remains the same as in 2003 when the current BER came into force. This has been clearly shown by the evidence gathered during the Review of the current BER.

74. Cooperation purporting to be within the limits of the BER appears to be generally pro-competitive. It can be argued that the pro-competitive cooperation on statistics would, even in the absence of the BER, not fall under Article 101(1) or if it did, would be likely to be exempt under Article 101(3). In that sense Option 3 would be sufficient.

75. However, an argument submitted not only by insurers[23] and their associations[24] but also by some supervisory authorities[25] and a risks management federation[26] is that without the BER, insurers would no longer cooperate on joint calculations, tables and studies or would not share the outcome of any cooperation with smaller or foreign insurers. The BER cannot be used by insurers in order to enter into anti-competitive agreements. In the event that the Commission or NCAs through routine monitoring or complaints discover any such misuse and if such agreements fall foul of Article 101, they will be void and subject to fines.

76. Indeed some large insurers (who, according to insurance associations, would be able to compile the relevant information alone or by involving perhaps one or two other large insurers) may have no incentive to do so without the condition in the BER requiring that where such agreements do exist, the resulting calculations, tables and studies must be made available to other insurers on reasonable and non-discriminatory terms. By complying with the conditions of the BER, insurers including large insurers, obtain the legal certain that the BER provides. Options 1 or 2 are therefore preferable to Option 3 in order to encourage such co-operation.

77. Another argument from some respondents to the consultation was that non-cooperation in this field would hamper the implementation of Solvency II[27], which encourages data exchange between insurers. Solvency II will impose a new risk-sensitive solvency regime and will require firms to have high-quality risk management and actuarial data. Whilst not imposing the use of pooled and external data, it is implicitly accepted in the ongoing Solvency II debate that the use of such data would facilitate compliance with the standards envisaged in the new regime. Again this would not be addressed through Option 3 but would be addressed only by Options 1 or 2.

78. However Option 2 improves on Option 1 from a drafting and structural perspective and also allows access to consumer and customer organisations, which pro-competitively improves transparency.

6.1.3. Maximising benefits for consumers

79. Where forms of cooperation are caught by Article 101(1), the undertakings involved need to ensure that they fulfil the four cumulative conditions of Article 101(3)[28].

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23 AVIVA, AXA Groupe, Zurich Insurance Company in their replies to Consultation, April 2008.

24 CEA, LMA, ABI, FFSA, GDV, Dutch Association of Insurers in their replies to Consultation, April 2008.

25 ISVAP and Direccion General de Seguros y Fondos de Pensiones in their replies to the Consultation, April 2008, Czech National Bank, Latvian Financial and Capital Market Commission in replies to questionnaires July 2008.

26 FERMA (Federation of European Risks Management Associations), reply to Consultation, April 2008..

27 Irish Insurance Federation, ABI, Dutch Association of Insurers and VVO in their replies to Consultation, April 2008.

28 Guidelines on the application of Article 101(3), OJ C 101, 27.4.2004.

80. Any restrictive agreements that fulfil the four conditions of Article 101(3) are covered by its exemption from prohibition. This analysis incorporates a sliding scale. The greater the restriction of competition found under Article 101(1), the greater the efficiencies and the pass-on to consumers must be. It is up to the undertakings involved to demonstrate that their cooperation promotes technical or economic progress in the form of efficiency gains. Consumers must receive a fair share of the efficiencies generated. Under Article 101(3), it is the beneficial effects on all consumers in the relevant market that must be taken into consideration, not the effect on each individual consumer[29]. The pass-on of benefits must at least compensate consumers for any actual or potential negative impact caused to them by the restriction of competition under Article 101(1)[30].

81. Agreements that set pure and risk premiums have been exempted by the BER, as they are not prices, but statistical indicators.[31] The commercial (or gross) premium is the price that the insured pays to cover a given risk and corresponds to the risk premium plus the administrative costs and the profit margin of the individual insurer. The risk premium reflects the net cost of the cover and is fixed by first determining the pure (or net) premium, which is based on the statistical data concerning the frequency and the average intensity of the risk in the past, and by then applying to it a coefficient which takes account of forecasts of the future occurrence of the risk.

82. On the other hand, agreements that set or recommend uniform commercial premiums have been considered price-fixing agreements falling within Article 101(1)[32] of the EC Treaty and not normally capable of being exempted.

83. In practice, both the Commission and NCAs consider the possibility that cooperation is a cover for the anti-competitive exchange of information, as was the case in Italy or, most recently, in Bulgaria. Following a general inquiry, the Italian Competition Authority criticised the use of a uniform system of parameters with similar values to calculate repairing costs as one of the major causes of the increase in premiums. Although A.N.I.A (The Italian Insurers' Association) formally abandoned the system, it continued to encourage the insurance companies to follow the same criteria and was fined for infringing Article 101(1) in 2005. The Bulgarian NCA adopted a decision[33] in July 2008 against insurers who agreed, to define and respect the common minimum risk premium in their activities. Risk premiums established by insurers actually became commercial premiums (final insurance prices) as soon as the parties agreed to "obey the common minimum risk premium…when determining their minimum tariffs and not to allow conclusion of insurance on prices below the thus determined minimum threshold". This was considered price fixing and so was outside the scope of the BER.

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29 Judgement of the Court of Justice of 23 November 2006 in Case C-238/05, *Asnef-Equifax v Asociation de Usuarios de Servicios Bancarios (Ausbanc)*, (2006) ECR I-11125, paragraph 70.

30 Guidelines on the application of Article 101(3), cited above .

31 *The Test Achats complaint (1995):* The case involved the Belgian professional association of insurance companies (UPEA) and had been communicated to the Commission by the Belgian consumer association, *Test Achats*. It had complained, *inter alia*, about a recommendation from UPEA aiming to establish a minimum pure premium for the coverage of hospital expenses in the case of group contracts. There was a uniform premium for contracts with groups containing up to 10 members and reductions for contracts with larger groups. There was nothing to indicate that this recommendation was based on statistical data. The Commission consequently, concluded that the recommendation was not covered by the BER. The recommendation was withdrawn and the file closed.

32 *Case 45/85 Verband der Sachversicherer e.V.v Commission (1987) ECR 405:* The German Association of Property Insurers recommended increases in commercial premiums for industrial fire and consequential loss insurance in specified circumstances. Although the recommendation was stated to be non-binding, the Court held that it reflected the Association's aim to coordinate the conduct of its members.

33 CPC Decision № 576/15.07.2008 on CPC Case № KZK-765/20.12.2007. After the appeal before the Supreme Administrative Court (SAC) the Decision was confirmed by the court which rejected the appeals of all the appellants. The SAC judgment has been appealed before the Court of Cassation.

84. Also, individual instances of widespread practices, when they result from agreements between undertakings, may fall within the scope of Article 101(1)[34]. In some cases, the infringing recommendations were abandoned and the cases closed. The Commission has sometimes started ex-officio investigations in order to determine whether some recommendations of insurance associations met all conditions of the BER[35]. Insurance associations have also been fined by the NCAs[36] for cooperation infringing Article 101(1). The Commission now considers that calculations on pure-premiums must be non-binding.[37]However, cases which concern cooperation on commercially sensitive information are outside the scope of the BER. Option 3 would not be affected by this issue. Option 2 includes a specific prohibition on exchange of data that relates to commercial premiums in order to thus expressly exclude cover from the BER if such competitive information is exchanged. Option 1 does not include this exclusion which indicates that Option 2 is preferable.

85. Option 2 is also preferable to Option 1 because under Option 2, consumer organisations would be granted access on reasonable affordable and non-discriminatory terms to the relevant databases. This provision was added in response to submissions by consumer organisations during the investigation requesting further transparency.[38] The evidence found during the Review showed that this would help consumer organisations to evaluate the different offers from insurers and provide advice to consumers. Consumer organisations would also be able to monitor whether premiums are proportionate to and/or move in line with the risks they cover. This would help them to ascertain whether any resulting benefits of cooperation amongst insurers are being passed onto consumers.

86. Moreover, providing consumer organisations with the means to monitor the cooperation amongst insurers also has the potential to increase the transparency of such cooperation. Increased transparency would reduce the likelihood that the cooperation amongst insurers would go beyond what is permitted under the BER. Under Option 2 consumer organisations would have a stronger ability to monitor the implementation of the BER.

87. Option 3 would not result in any direct change as consumer organisations do not have access to the relevant databases at present either. However, consumers could indirectly be harmed if pro-competitive cooperation amongst insurers would suffer as a result of the lapse of the BER. Therefore, Option 2 is the preferred option for this objective.

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34 Paragraph 15 of the Communication of the Commission on the Sector Inquiry of 25 September 2007: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0556:FIN:EN:PDF

35 In 1997, an ex-officio procedure was started by the Commission in relation to certain *A.N.I.A* (The Italian Insurers' Association) recommendations. The investigation proved that A.N.I.A did not collect data on commercial premiums, nor recommend commercial premiums. However, the investigation showed that insurance companies based their tariffs on very similar parameters (for instance: bonus/malus; type of fuel; age of the policyholder) to which they attributed similar values. Italian Competition Authority fined 38 insurance companies for exchange of information by concerted practices in the branch of motor vehicle insurance. The Commission then closed its case.

36 Following a general inquiry, the Italian Competition Authority criticised the maintenance of a uniform system of parameters to calculate repairing costs as one of the major causes of the increase in premiums. Although A.N.I.A formally abandoned the system, it continued to encourage the insurance companies to follow the same criteria and was fined for infringing Article 101(1) in 2005.

37 *Commission Decision 84/191/EEC of 30 March 1984 – Nuovo CEGAM, OJL 099, 11/04/1984, p.29-37*: An Italian association of insurers agreed not only to set pure premiums for industrial engineering insurance, but also to apply them jointly. The Commission exempted the agreement as it considered that it brought new competition onto the market (the members of the association collectively had a 26% market share while their largest competitor had a 25% market share).

38 FIN-USE, Test Achat (representing also BEUC) at Public Event, 2 June 2009.

6.1.4. Encouraging/facilitating entry by reducing entry barriers for competitors

88. The assessment of risks in a way that is actuarially adequate goes to the core of an insurer's business, and entry onto new product markets would be rendered more difficult by a lack of access to data of sufficient quality and quantity.

89. Agreements which increase the number of insurers potentially capable of covering a given risk generally increase market access and competition. The fact that major insurers are allowed to engage in cooperation on the calculation of risk cover may enable entry of SMEs. It appears that large insurers can also generally benefit from a broader statistical base, even if their internal statistics may have been sufficient. The vast majority of respondents[39] drew attention to the industry need to cooperate on this issue and connected it to the existence of the BER.

90. Under Options 1 and 2 smaller/foreign insurers are encouraged to enter because of the condition which provides access for all insurers to the information shared between any insurers. This applies also to new entrants. Some respondents pointed out that cooperation on joint calculations, tables and studies is necessary in order to allow new entry (in particular greenfield entry) and that the absence of such cooperation would lead to raised entry barriers, a decrease of competition in insurance markets and the supply of insurance products. Consumers in turn would be negatively affected by a reduced range of insurance products, from fewer insurance companies and most likely, higher prices. Insurers also stated that without access to actuarially adequate data they would have to add "unknown risk surcharges" on to their premiums – thereby increasing the price for consumers. This access is protected with Options 1 and 2 but not with Option 3.

91. Whereas Options 1 and 2 require that when insurance companies enter into these forms of cooperation, they must give access to the information compiled, on a non-discriminatory basis, to other insurance companies, it was argued that under Option 3, insurers could cooperate to prevent access by, for example, smaller or foreign insurance companies, to the information compiled in order to narrow the market. In the absence of the obligation to provide non-discriminatory access large and established insurers would not have a strong incentive to share information with potential new entrants.

92. This would be to the disadvantage of smaller/foreign insurers who would be prevented or discouraged from entering the market since assessing risk on the basis of their own tables and studies alone would be insufficient to allow them to cover certain risks. Some respondents pointed out that cooperation on joint calculations, tables and studies is necessary in order to allow new entry (in particular greenfield entry) and that the absence of such cooperation would lead to the creation of entry barriers and a reduction of competition.

93. During the Review, a number of respondents, in particular small and medium sized insurers said the use of the BER assisted their market entry or they could not have entered the market without the relying on this part of the BER.[40] Arguments were also made that (a) competition is increased by the availability of data that small companies can directly and easily find and (b) that transparency of the historical data and the publication of market trends are important tools in the formation of a correct cost related price.

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39 For example, ANIA, Dutch Association of Insurers, CEA and GDV in responses to questionnaires, June 2009 and Allianz at Public Event, 2 June 2009. Also Atlas Insurance Pcc LMD and CBA Vita Spa in their responses to questionnaires December, 2008 and Taylor Wessing in their reply to the Consultation, November 2009.

40 For example, Atlas Insurance PCC Ltd, Sabre Insurance Company, GasanMamo Insurance Ltd in their replies of June 2009.

94. Insurers have also stated that without access to actuarially adequate data they would have to add "unknown risk surcharges" on to their premiums – thereby increasing the price for consumers.[41] This indicates that Option 2 is preferable to Option 3. For potential new entrants without access to actuarially adequate data, the unknown risk would be considerably higher than for established insurers. The surcharge in this case may need to be higher to compensate for these additional risks. With relatively higher prices, potential entrants would also run the risk of adverse selection. The customers willing to pay the higher price are likely to be those customers who would need the insurance most. This would lead to a portfolio of high-risk customers.

95. Furthermore, on the basis of the evidence obtained during the Review, it appears that the newer a market is, the more important it is to have access to the data from joint calculations, tables and studies in order to assist entrants to accurately assess risk.

96. Under Option 2 non-discriminatory access including for potential entrants, would continue to be protected. This is not the case with Option 3.

6.1.5 Providing adequate legal security for undertakings

97. Under Options 1 and 2 the regulatory incentives for cooperation remain unchanged.

98. Option 3, however, could lead to a situation of reduced legal certainty because the conditions under which cooperation on joint calculations tables and studies fulfil the criteria of Article 101(3) would require individual analysis. Insurers argued[42] that the analysis of whether such cooperation would be exempted under Article 101(3) would be more difficult and costly compared to a similar analysis under the BER. However, one leading law firm[43] at the Public Event (broadcast on the Internet) who was uncontradicted by other law firms argued that this would not be the case. It is not clear that smaller insurers would engage competition lawyers to do this analysis and their view that the analysis may be more difficult or costly may therefore be correct from that perspective.

99. Insurers also argued that they would be more unlikely to cooperate to the degree they currently do without a BER out of fear of infringing competition rules. The vast majority of respondents drew our attention to the industry need to cooperate on joint calculations tables and studies and connected it to the existence of the BER. The need to cooperate in this area is of such importance to the insurance industry, that any lack of legal certainty is secondary to the need to cooperate and as such would not significantly restrict it. However it appears that any restriction of such cooperation is undesirable as it would result in an increase in entry barriers and a reduction in competition which are in turn likely to lead to higher prices. Options 1 or 2 are therefore preferable to Option 3. Option 2 is preferable to Option 1 since it improves the drafting and structure and clarifies that only information exchange that is necessary for the joint calculations, tables and studies falls under the exemption.

6.2. Impact assessment for other economic objectives

6.2.1. Reducing compliance costs

100. When stakeholders were asked for detailed information on their costs, they declined to provide them but instead made unsubsantiated statements that the costs would be higher.

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41 Irish Insurance Federation said that "to allow for such increased uncertainty, it is likely that prices would be increased by a margin to compensate."

42 For example, Verband der privaten Krankenversicherung, FNH and Slovak Insurance Association in their replies to the Consultation, April 2008.

43 Addleshaw Goddard at the Public Event on 2 June 2009, speaking in relation to SPCs

Furthermore, replies during the Review, in particular from insurance companies and associations[44], argued that costs for ensuring legal compliance would increase in the event of non-renewal. However, one leading law firm which specialises in the area of competition law, argued at the Public Event of 2 June 2009 (and was not contradicted by other law firms) that a self-assessment under Article 101 (1) and (3) would be no more costly or complex than a self-assessment under the BER.

101. There is no reason why the insurance sector would be in a more difficult position in relation to (a) bearing costs for the analysis of the other agreements on which it cooperates outside the BER; or (b) other sectors who are required to do an analysis for all their agreements under Article 101(1) and (3) and which are outside any BER. In terms of magnitude, the costs associated with an analysis of compliance under the BER or under Article 101(1) and if appropriate 101(3), can vary greatly depending on the complexity of the agreement involved. However, in any event this analysis should not be significantly different under Article 101(1) and (3) compared with under the BER in particular in terms of the share of costs of an agreement such a compliance analysis requires. In addition to the costs considered above, companies may also be concerned about potential costs if either legal analysis is not correct, these are broadly the same – namely, potentially voidance of the agreement and fines.

102. Option 2 would not result in any material change in the compliance costs for insurers. Option 3 may lead to a small increase in the compliance costs for insurers at least initially. Insurers argued[45] that they would need to allocate additional resources in order to ensure that they remain compliant under Article 101(1) and if appropriate Article 101(3) rather than under the BER. However as mentioned above, at the Public Event, it was argued that the legal analysis under Article 101 would be no more difficult or costly than under the BER though this may be different for smaller insurers. Option 3 in this context is therefore slightly less preferable than Option 2 from this perspective.

6.2.2. Impact on SMEs

103. In the context where data from joint calculations, tables and studies is important in order to price risks in the insurance sector, Option 1 and 2 allow smaller insurers the possibility of benefiting from cooperation with larger insurers in order to accurately price risks. Indeed, in accordance with replies from several insurance associations and also small insurers, the latter lack adequate statistical data and therefore could have difficulties competing on the market in the absence of this cooperation.

104. Replies to Questionnaires by smaller insurers showed that the available information is used for the calculation of own (risk) premiums and comparison of the figures against their portfolio of risks. Information from insurance association on statistics of claims costs are an "indispensable basis of calculation"[46], as calculations based on their own portfolio might not be sufficient[47]. In other words, "the need of cooperation is strongly linked with the size of individual portfolio"[48]. Indeed, the law of large numbers applies, i.e. the larger number of events, the more accurate the forecast becomes. As pointed out by a small insurer, "the frequency of damage is an important criterion. If there are not some thousands of claims known for a certain risk, the accuracy of a calculation declines […] Therefore, we are quite

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44 http://ec.europa.eu/competition/consultations/2008_insurance_ber/index.html

45 Zurich Insurance Company, Provincial Nord West Insurance Company, in their replies to the Consultation, April 2008.

46 Reply from Ideal Versicherung (DE), to the Questionnaire of June 2009.

47 "Smaller companies simply don't have the resources nor the data to be able to make reliable risk calculations required to be allowed to sell insurance products (…).Reply from Ideal Versicherung (DE), to the Questionnaire of June 2009.

48 Reply of Helvetia Versicherungen AG to the Questionnaire of 4 December 2008.

conscious of the fact that we have nearly in every domain […] an actuary disadvantage compared to larger rivals".

105. In the absence of such joint data, small insurers might charge an extreme safety margins or refrain from selling certain insurance products, with negative consequences not only for SMEs but also for consumers. Also, some smaller insurers might be forced to step out of some of the relevant markets.[49]

106. It also appears that information is being used for the calculation of "best estimates reserves" (solvency requirements), which will become even more important under the regime of Solvency II.[50] Responses to the Consultation also show that access to joint calculations, tables and studies facilitated entry on the market by smaller insurers [51] as well as their business expansion on new categories.[52] Indeed, they might be reluctant to accept new risks for which they have no experience.[53]

107. Option 3 may result in cooperation only between large insurers, with the exclusion of smaller insurers which do not contribute with very significant amounts of data as large insurers would no longer be obliged (in order to be covered by the BER) to share the results of their cooperation with all interested parties[54]. This may have the consequence that large insurers might reconsider sharing any data if they could no longer rely on the BER[55], to the disadvantage of SMEs.

108. Moreover, several SMEs complained that in the absence of the BER assessing the cooperation in the light of the principles of competition law would not be possible, taking into account the size and resources of their organisation.[56] Therefore, Option 1 and 2 appear to be more advantageous than Option 3.

6.3. Impact on public administration and EU budget

109. Under Option 1, in light of the reduced number of cases involving horizontal restraints that have been investigated by the Commission since the adoption of the current regulation and in particular the implementation of Regulation 1/2003, no increase is expected that would require a major shift or increase of existing administrative resources. Therefore, no impact on the EU budget is expected.

110. Most of the cases that have concerned the current BER have been at national level and addressed by NCAs. The majority of these authorities have their own procedures and criteria for priority setting, which means that like the Commission, they may decide to refrain from an in-depth investigation and from taking a formal decision, for example if the case in hand does not involve an appreciable restriction on competition etc. This allows them to manage their workload and make their enforcement more effective.

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49 Reply of Generali verzekering groep, to the Questionnaire of 4 December 2008.

50 Response from Onderlinge's Gravenhage U.A. (NE) to the Questionnaire of June 2009.

51 CEA's reply to the Questionnaires of June 2009: "Sabre Insurance, a greenfield entry, was facilitated by the use of industry statistical data".

52 "For a small insurer like IDEAL Versicherung AG (…) an expansion of the business on new categories wouldn't have been possible without the statistics of claim costs of the GDV" – Reply from Ideal Versicherung (DE), to the Questionnaire of June 2009.

53 Reply from Ethniki General Insurance ato the Questionnaire of 4 December 2009.

54 See Article 3(2)(c)

55 Reply of Generali verzekering groep at the Questionnaire of 4 December 2008.

56 Reply of Veritas Life Insurance Company and reply of Caisse Mutuelle Marnaise d'assurance at the Questionnaire of 4 December 2008.

111. The additional clarity brought by Option 2 will assist NCAs and the Commission to better prioritise their cases and resources. In addition Option 2 is preferable to Options 1 or 3 because it allows the possibility for the competition authorities of a Member State to withdraw the benefit of the BER where it finds in a particular case that the agreement to which the BER applies, has effects which are incompatible with the conditions laid down in Article 101(3) in respect of that territory. This gives Member States an enhanced power to enforce competition rules. This teamed with the additional clarity provided by Option 2 makes it preferable for Joint Calculations, Tables and Studies. Similarly, given the specificity of Joint Calculations, Tables and Studies, several respondents argued[57] that the BER is required in order to facilitate the enhanced need for cooperation. See section 6.1.2 above. Therefore Option 3 is not preferable from this perspective.

6.4. Social and environmental objectives

6.4.1. Employment levels and job quality

112. The European Insurance and Reinsurance Federation (the CEA) reported that the European insurance sector represents more than 5000 companies employing directly over 1 million people. After ten years of decline caused mainly by consolidation, the number of companies carrying out insurance activities in the CEA countries slightly rose in 2008. Insurers also employ indirectly approximately 1 million agents, brokers and financial intermediaries. Insurers also work with experts, computer firms and prevention experts. According to the statistics published by the CEA in October 2009, employment in the European insurance industry experienced an increase in 2007 after five years of decline, mainly due to mergers and acquisitions, and a slight decrease in 2008. In 2007, 18 % of employees in the financial sector worked in insurance companies, which corresponds to 1.14 million people across the EU[58].

113. There is no reason to expect that Options 1 and 2 would result in any change in employment levels.

114. Option 3 may have an impact if there is any less cooperation which would result in fewer human resources being allocated to this work either by insurance companies or insurance associations. In addition agreements on Joint Calculations, Tables and Studies are most often concluded at the level of the insurance associations. Furthermore, many national associations (meaning the numbers employed in these activities are low) have been taking the lead on these agreements for some time, which further supports the view that it is unlikely that these would not continue to be agreed in the absence of a BER. Option 3 does not mean that these types of agreements are necessarily anti-competitive. They are therefore likely to continue following analysis under Article 101(1) and if appropriate, Article 101(3).

115. However it is likely that law firms will be more often engaged (at least in the short term as the new BER comes into force) in order to analyse compliance of the agreements of insurance companies and associations. Furthermore it is likely that these companies and associations will employ more in-house lawyers to do regular reviews of compliance under Article 101. That means that the impact in terms of employment is unlikely to be significant.

116. The anticipated impact of each policy option on job quality cannot be measured, but we would expect to see continued trends where companies seek more qualified employees

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57 FIN-USE, FFSA, Taylor Wessig, FERMA and French Authorities in their replies to the Consultation, November 2009.

58 European Insurance in Figures, CEA Statistics n°37, Oct 2009.

relevant to precise business needs as the sector develops (in particular in new Member States) and individuals accordingly seek higher levels of training thus increasing job quality.

6.4.2. Public health and safety

117. Public health and safety from an insurance perspective means that consumers have the possibility to obtain insurance coverage which can protect against certain contingencies (affecting life or property) arising.

118. Information exchange between insurers permits them to share information and to gather experience in evaluating damages thus contributing to the development of the insurance market. It may be that exchange of information would also ensure that risks are priced as realistically and appropriately as possible. Options 1 and 2 are therefore preferable to 3 for Joint Calculations, Tables and Studies. There is negligible measureable difference between Options 1 and 2.

119. Under Option 2, it is proposed to add an exception to the disclosure of information exchanged – on public security grounds. This would allow insurers / insurance associations to ensure that certain information (that may relate to public security such as for example in relation to terrorism) is not made public.

6.4.3. Environment

120. Information exchange between insurers permits them to share information and to gather experience in assessing risks and evaluating environmental damages thus contributing to the development of the environmental insurance market. Article 14 of Directive 2004/35/EC on environmental liability (ELD) calls specifically for the development of financial security instruments and markets.[59] Furthermore, certain Member States have included in their national transposition of ELD provisions for mandatory financial security. In relation to Joint Calculations, Tables and Studies concerning environmental risks, it may be that exchange of information would also ensure that risks are assessed and priced as realistically and appropriately as possible. Options 1 and 2 are therefore preferable to 3 for Joint Calculations, Tables and Studies. There is negligible measureable difference between Options 1 and 2.

[59] Recent environmental legislation requiring financial security or similar measures (Waste Framework Directive 2008/98/EC amending Directive 2006/12/EC and Directive 2009/31/EC on the geological storage of carbon dioxide - CCS) is also taking on board the provisions of Directive 2004/35/EC, extending its implementation to other operators and projects/processes.

6.5. Impact - overview

Impact of exemption n°1 - Joint calculations, tables and studies

Criterion	Impact option 2	Impact option 3
1.1. Granting a block exemption only to sector specific types of cooperation	0,0	-2,0
1.2. Encouraging pro-competitive cooperation between insurers	0,0	-1,0
1.3. Maximising benefits for consumers	1,0	-1,0
1.4. Encouraging / facilitating entry by reducing entry barriers for competitors	0,0	-2,0
1.5. Providing adequate legal security for undertakings	1,0	-1,0
2.1. Reducing compliance costs	0,0	-1,0
2.2. Particular impact on SMEs	0,0	-1,0
3.1. Impact on public administration and EU budget	1,0	-1,0
4.1. Employment and job quality	0,0	0,0
4.2. Public health & safety	0,0	-1,0
4.3. Environment	0,0	-1,0

Impact of exemption n°1 - Summary

Criterion	Impact option 2	Impact option 3
1. Competition	2,0	-7,0
2. Other economic impacts	0,0	-2,0
3. Public Administration	1,0	-1,0
4. Social and environmental impacts	0,0	-2,0

7. STANDARD POLICY CONDITIONS - THE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED OBJECTIVES

7.1. Economic objectives related to the protection of effective competition

7.1.1. Granting a block exemption only to sector specific types of cooperation

121. The Commission agrees that in many cases SPCs can give rise to positive effects for competition and consumers (as discussed below).

122. However, technically or legally complex agreements in fast changing legal environments are commonplace in a number of sectors and not specific to the insurance sector. SPCs are used in some of these sectors without the cover of sector specific BERs. For example in the banking sector to whom the Commission's Services also sent questionnaires, SPCs are agreed between banks in a number of Member States, for services such as money transfer, issuance of cards, use of ATMs, account terms, credit agreements and payments. In addition several national Banking Supervisors stated that the banking sector does not require a legislative framework (such as a BER) in order to set policy conditions. Furthermore, the absence of such a framework has not caused any tangible difficulties for banks.[60]

123. Given that there is no specificity concerning SPCs that arises in the insurance sector, it is not appropriate to renew the BER for this category of agreement. Option 3 is therefore preferable to either Options 1 or 2.

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[60] Response to the Questionnaire from Committee of European Banking Supervisors, December 2008.

7.1.2. Encouraging pro-competitive cooperation between affected economic players

124. The BER clearly requires SPCs to be non-binding. In addition, it may be the case that a requirement to notify derogations to establishing associations would also be exempted under Article 101(3). As an example the Commission's Decision in Concordato Incendio to exempt not only SPCs, which members were free to derogate from, but also imposed a requirement that members notify the Concordato of any such derogation that might affect the statistics used to calculate pure premiums. This requirement was considered necessary to guarantee the reliability of the statistics.[61]

125. Having established the pros and cons from an Article 101 perspective and the overall desirability of these agreements, it is important to consider whether cooperation on SPCs would diminish under Option 3. It has been argued by some respondents[62] in the course of the Review that the legal uncertainty that would result from non-renewal would lead to less cooperation for fear of a risk that such cooperation could be challenged by the Commission or NCAs. The argument continues that in the event of non-renewal there would be an individual assessment which would be time consuming and expensive especially for smaller insurers which would pass on costs to policyholders.

126. However, even under Option 1, a careful legal assessment of SPCs' compliance with the BER must be undertaken, in particular to ensure that the conditions are fulfilled and that no prohibited black listed clauses are present. In addition, some national regulators have already fixed these SPCs, which results in a reduced need for cooperation. Moreover, there are cases where the national regulator challenged market participants (e.g. Financial Supervisory Authority in the UK) to achieve contract certainty[63] and made clear that if the market fails to develop its own, it will be forced to intervene with new rules and requirements.

127. Therefore, there does not appear to be a significant and real risk of less or non-cooperation under Option 3, particularly where the national regulator imposes a high degree of contractual certainty. Furthermore, many national associations have been taking the lead on SPCs for some time (for example Lloyds Market Association in the UK), which further supports the view that it is unlikely that SPCs would not continue to be agreed under Option 3. This is in particular given the Commission's view that in many cases SPCs would not fall foul of Article 101(1) or would not fail to comply with the exemption criteria of Article 101(3). Option 3 may have a slight impact.

7.1.3. Maximising benefits for consumers

128. SPCs would, in most cases, be unlikely to fall within the prohibition of Article 101(1). However, there are some categories of agreement on SPCs which will usually fall foul of the prohibition in Article 101(1) in particular the categories of agreement listed in Article 6 (the black list) of the BER.

129. SPCs allow the comparison of insurance policies offered by different insurers allowing customers to verify the content of guarantees more easily and facilitating switching between insurers and insurance products. However, whilst there is a need for comparability between insurance products for consumers, this cannot be at the expense of hindering competition through lack of non price competition.

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61 The Commission Decision 90/25/EEC of 20 December 1989 – Concordato Incendio, OJL 015, 19/01/1990, p.25-29.

62 For example, LMA, ABI and CEA in their replies to Consultation, April 2008.

63 This being with a view to achieving greater certainly for buyers about what they have bought and for insurers about the risks they are covering, whilst also reducing risks for brokers.

130. In the event that an agreement on SPCs were caught by Article 101(1), it may still fall within the efficiency exemption provided by Article 101(3). For example, in the Commission Decision, where the complainant argued that the GDV member companies applied uniform conditions in occupational disability insurance and that this amounted to a "cartel" between the GDV members. The complaint was rejected on the basis that it met the exemption conditions for Article 101(3) as set out in the BER. Furthermore there was no evidence that GDV or its members agreed, to oblige other undertakings to apply the SPCs. [64]

131. The replies from stakeholders during the Review supported the Commission's view and the view of several NCAs' that common SPCs which are not black listed in the BER have advantages for consumers and competition. The variation in the frequency of use of SPCs across EU Member States may depend on the national insurance regulations (e.g. the high level of use of SPCs in some Member States may be explained by the high number of compulsory insurance products).

132. Several insurers and associations of insurers (e.g. the LMA in the UK) argue that cooperation in order to establish SPCs ensures that the costs incurred by insurers and in turn the premiums they charge to customers are kept low. They argue that without the BER, there would be an increase in insurers' and brokers' costs resulting from increased effort required to agree wordings for policies due in particular to the lack of an agreed starting point.

133. It has been argued[65] that SPCs can help to reduce the use of restrictive or exclusionary terms. However, there are indications from the evidence before the Commission that some imbalanced clauses are still being used by insurers and that consumer associations, as they would wish,[66] are not fully involved in the drafting of such clauses (which would obviously be the ideal scenario in terms of ensuring balance between insurers and consumers).

134. Whilst there is clearly a need for comparability between insurance products for consumers, this cannot be at the expense of homogeneous standard conditions which can hinder consumers' ability to find products suited to their needs, a risk highlighted by some respondents. Indeed, too much standardisation can harm consumers by limiting product choice, as pointed out by one consumer association[67] in its reply in relation to motor vehicle insurance. Comments that SPCs are capable of being a hindrance to competition as they may influence the use by insurers of restrictive or exclusionary terms were also made during the Commission's Review.[68] The Belgian Consumer Organisation (Test Achats) said that consumer organisations are not in favour of the SPCs, even if they are stated to be non-binding - because in practice they are binding. Instead they prefer the approach of having minimum legal requirements for insurance policies. Test Achat also stated that there is too much cooperation on SPCs, which, in very concentrated markets, is very dangerous for the consumers and that this is encouraged by the BER. The Italian consumer organisation, Altroconsumo, also said that there are insufficient grounds to justify the block exemption of agreements in the insurance sector.

135. Clearly concerns may arise with SPCs and responses during the Review were divided on whether the overall effect is restrictive of competition. A BER does not therefore appear appropriate since on the basis of the evidence from the Review, an analysis of an agreement

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64 Commission Decision to reject a complaint against DBV Winterthur insurance company and the GDV (the German Insurance Industry Association) (2004).

65 Irish Insurance Federation, VVO and VNAB and AVIVAin their replies to Consultation, April 2008.

66 Test Achats, also representing BEUC at the Public Event 2 June 2009. Test Achats also said here that there "continue to be clauses which are totally unfair."

67 Test Achats, Belgium.

68 Portuguese and Belgian consumer organisations.

on SPCs would need to be undertaken in the context of the product and geographic markets for which it is intended. Option 3 is therefore preferable from this perspective.

136. Consumers are clearly best off when they are in a position to make well-informed choices between different products and may switch between products without incurring high switching costs. This view is in line with the approach to maximising consumer welfare through competition law. Test Achat at the Public Event on 2 June 2009, stated "the insurance industry should have to prove that cooperation on SPCs benefits consumers. The industry's arguments revolve around legal certainty and clarity but these do not always benefit consumers." The objective here is, therefore, to find a balance whereby contractual norms can be efficiently established by market players but without stifling competition through overly standardising all the available products. However, it appears clear that a BER does not assist in this objective and Option 3 is therefore preferable.

7.1.4. Encouraging/facilitating entry by reducing entry barriers for competitors

137. An argument made[69] by some respondents in favour of SPCs is that new market entrants require sample insurance terms, in particular where a foreign language or a different jurisdiction is involved as this reduces the investment expenditure connected with entry into a new market. Furthermore, it was argued[70] that without SPCs established by insurance associations a reverse effect could occur whereby big market players could formulate their own conditions and smaller companies lacking the means and resources would have to follow.

138. Respondents also argued[71] that SPCs can facilitate the insurance of new risks because once non-binding SPCs have been agreed for new risks, even small insurers can include new products in their product range from the very start of the coverage of such new risks.

139. Although it is acknowledged that SPCs can encourage new entry, since it appears that there would be no significant change in the level of cooperation (see above) if the analysis required is under Article 101 rather than under a BER, Option 3 appears to have no materially different impact than Options 2 or the baseline.

7.1.5. Providing adequate legal security for undertakings

140. It has been argued by some respondents in the course of the Review that the legal uncertainty[72] that would result from non-renewal would lead to less cooperation for fear of a risk that such cooperation could be challenged by the Commission or NCAs. The argument continues that in the event of Option 3, an individual assessment under Article 101(1) and if appropriate 101(3) would be required which would be time consuming and expensive. It was argued that this would be particularly the case for smaller insurers who would pass on these additional costs to policyholders.

141. However, even under Option 1, a careful legal assessment of standard clauses' compliance with the BER must be undertaken, in particular to ensure that the conditions are fulfilled and that no prohibited black clauses are present. It was argued at the Public Event that (see section 6.1.5) that an analysis under Article 101(3) should be no more difficult or costly than an analysis under the BER though this may be different for smaller insurers.

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69 ABAM/BVT and GDV in their replies to Consultation, November 2009.

70 VVO and CEFOR in their replies to Consultation, April 2008.

71 ANIA in the reply to Consultation, April 2008.

72 For example, LMA and ABI in their replies to the Consultation, April 2008.

142. Although less legal certainty may be a result of Option 3, it is planned to expand the Commission's Horizontal Guidelines in order to address SPCs for all sectors which will provide additional guidance for insurers intending to enter into such cooperation. Such guidance will reduce any risk of legal uncertainty.

7.2. Impact assessment for other economic objectives

7.2.1. Reducing compliance costs

143. See section 6.2.1 above. Option 2 would not result in any material change in compliance costs for insurers.

144. Option 3 on the other hand may lead to a small increase in the compliance costs of insurers, at least initially. Insurers argue[73] they would need to allocate additional resources in order to ensure that they remain compliant under Article 101(1) and if appropriate Article 101(3) rather than under the BER. However it was argued at the Public Event that the legal analysis under Article 101 would be no more difficult or costly than under the BER (though this may be different for smaller insurers). Furthermore, in many cases, the evidence indicates that the work on SPCs is done primarily at the level of the insurance associations. The impact on compliance costs would only be for these rather than individual insurance companies and would therefore be negligible. Option 3 is therefore only slightly less preferable than Option 2 from this perspective.

7.2.2. Impact on SMEs

145. Replies to questionnaires from small insurers show that, generally, they use the SPCs that insurance associations are drafting which they adapt in accordance with their specific needs and interests. One small insurer emphasises that SPCs "provide a starting point in order to develop their own policy terms rather than developing them from scratch. This applies in particular to SMEs and new market entrants where the cost effect is even more vital because they have to split the costs between fewer clients than larger companies"[74]. However, there are also small insurers which are drafting their SPCs on the basis of their own expertise[75].

146. The majority of small insurers said that they did not feel obliged to use the SPCs drafted by insurance associations, and that they felt that there is competition on the market not only on prices, but also on SPCs. Also, some provisions within the SPCs are stemming from legislation/regulation and in this case some of these SPCs could become obligatory: "In certain situation policy conditions are standard because of laws and/or regulations, thus competition on pricing becomes more relevant". [76]

147. However, some replies showed that in certain cases, these SPCs can lead to a high degree of standardisation, which could result in less competition on the market as regards SPCs: "Some of brokers ask that we subscribe to a common policy wording used by all insurers on their panel. These standard terms and conditions provide a benefit to consumers in that they receive the same policy terms regardless of which insurer is underwriting the policy"[77] or "There are certain wordings that although not imposed by agreement we feel that we should

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73 Verband der privaten Krankenversicherung and BIPAR in their replies to the Consultation, April 2008; and ABI in their reply to the Consultation , November 2009.

74 Reply of MMA Insurance PLC to Questionnaire of 4 December 2008.

75 "The standard policy conditions used by BCR Asigurari de Viata SA were conceived by our company's actuarial department, under the conditions imposed by the Romanian legislation" – Reply of BCR Asigurari de Viata to the Questionnaire of 4 December 2008.

76 Reply of Vittoria Assicurazioni to the Questionnaire of 4 December 2008.

77 Reply of Sabre Insurance Company Limited to the QuestionnaireQuestionnaire of 4 December 2008.

adhere to as they are considered to be proven by experience"[78]. This also corroborates comments from consumers associations such as Test Achat who complained about excessive standardisation of SPCs, leading to a decrease of competition on certain relevant markets, such as the one for car insurance.

148. This means that it might be preferable that the balancing between the positive effects on consumers and possible restrictions of competition should be assessed on a case by case basis, on the basis of Article 101(3). However, in the absence of the BER, given that there is a certain risk of cooperation becoming more difficult because of the costs and resources entailed by self assessment, with the consequence that access for small insurers could become more difficult, Option 3 could have, from this perspective, a certain negative impact in comparison with the baseline scenario.

7.3. Impact on public administration and EU budget

149. As mentioned above under this section for Joint Calculations, Tables and Studies, no impact on the EU budget is expected.

150. In terms of better prioritisation of resources stemming from enhanced clarity of the text, Option 2 is not necessarily a better option than Option 1, as the text of the BER does not lack clarity need improvement. Indeed, although SPCs are often pro-competitive, the BER also makes clear that they should not lead to standardisation of products. However consumer organisations have told us that this is occurring in some markets in practice.

151. Under Option 3 the burden of proof is effectively on insurers to prove that they are exempt under Article 101(3), whereas under the BER, competition authorities carry the burden of proof to prove that BER does not apply. Option 3 may be preferable in terms of public administration.

7.4. Social and environmental objectives

7.4.1. Employment levels and job quality

152. Options 1 and 2 will have no measurable impact on employment levels. We have no reasons to expect that Options 1 and 2 would result in any change in these levels.

153. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work either by insurance companies or insurance associations. Agreements are most often concluded at the level of the insurance associations. Furthermore, many national associations (meaning the numbers employed in these activities are low) have been taking the lead on these agreements for some time, which further supports the view that it is unlikely that these would not continue to be agreed in the absence of a BER. This is in particular given the Commission's view that in many cases SPCs would not fall foul of Article 101(1) or would not fail to comply with the exemption criteria of Article 101(3). Option 3 does not mean that these types of agreements are necessarily anti-competitive. There are therefore likely to continue following analysis under Article 101(1) and if appropriate, Article 101(3).

154. However it is likely that law firms will be more often engaged (at least in the short term as the new BER comes into force) in order to analyse compliance of the agreements of insurance companies and associations. Furthermore it is likely that these companies and

[78] Reply of GasanMamo Insurance at the Comission's questionnaire of 4 December 2008.

associations will employ more in-house lawyers to do regular reviews of compliance under Article 101. This means that the impact in terms of employment is insignificant.

155. The anticipated impact of each policy option on job quality cannot be measured, but we would expect to see continued trends where companies seek more qualified employees relevant to precise business needs as the sector develops (in particular in new Member States) and individuals accordingly seek higher levels of training thus increasing job quality.

7.4.2. Public health and safety

156. Given that cooperation on SPCs is generally allowed under the BER and outside of it, the positive effects of it are preserved under all Options. Furthermore such cooperation does not assist insurers in covering risks or preventing contingencies arising. We do not consider that any of the Options in relation to SPCs have an impact on public health and safety.

7.4.3. Environment

157. In relation to SPCs, none of the Options appear to have any impact in terms of the environment.

7.5. Impact - overview

Impact of exemption n°2 - Standard policy conditions

Criterion	Impact option 2	Impact option 3
1.1. Granting a block exemption only to sector specific types of cooperation	-2,0	2,0
1.2. Encouraging pro-competitive cooperation between insurers	0,0	-1,0
1.3. Maximising benefits for consumers	0,0	2,0
1.4. Encouraging / facilitating entry by reducing entry barriers for competitors	0,0	0,0
1.5. Providing adequate legal security for undertakings	0,0	-1,0
2.1. Reducing compliance costs	0,0	-1,0
2.2. Particular impact on SMEs	0,0	-1,0
3.1. Impact on public administration and EU budget	0,0	1,0
4.1. Employment and job quality	0,0	0,0
4.2. Public health & safety	0,0	0,0
4.3. Environment	0,0	0,0

Impact of exemption n°2 - Summary

Criterion	Impact option 2	Impact option 3
1. Competition	-2,0	2,0
2. Other economic impacts	0,0	-2,0
3. Public Administration	0,0	1,0
4. Social and environmental impacts	0,0	0,0

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

8.1. Economic criteria related to the protection of effective competition

8.1.1. Granting a block exemption only to sector specific types of cooperation

158. Several replies to the Consultation[79] emphasise that the insurance sector is special as regards co(re)insurance as pools permit insurers to cover large risks (such as nuclear, terrorism risks) or less well documented risks (such as environmental risks or risks associated with climate change) which they would not be able to cover independently. Consumers are also of the opinion that there are pools which "are really needed in some areas of activity, where the traditional insurance market is not interested".[80] Therefore, risk pooling appears to be at the core of the insurance business as pools permit insurers to cover risks which would be otherwise impossible or difficult to cover.

159. Like Option 1, Option 2 would result in granting a BER to agreements which, given their specificity as regards the objective of offering coverage which otherwise might not be available, are specific to the insurance sector. Option 3 would entail not renewing the BER, although the specificity of this form of cooperation would warrant a special legal instrument such as the BER. Therefore, Option 3 is not preferable.

8.1.2. Encouraging pro-competitive cooperation between insurers

160. Many respondents mentioned that this form of cooperation would become more difficult or even impossible under Option 3 due to the lack of legal certainty. Respondents emphasise that pools cover areas where a risk might otherwise be declined by insurance carriers unless they are able to co-operate within the parameters set out in the BER[81] and that cooperation through pools might decline. Also, several respondents mentioned that the new method of calculating market shares under Option 3 would restrict the benefit of the BER for pools.

161. However, these statements should not be generalised. First, the fact that this cannot be necessarily the case is demonstrated by several replies showing that a common coverage of certain types of risks through pools is currently put in place even if the pool in question does not benefit from the BER. In other words, the simple existence and operation of pools outside the BER shows that cooperation through pools is possible even outside the BER.

162. Secondly, replies received during the consultation process failed to make any distinctions and described negative effects on cooperation as regards all existing pools. However, it should be pointed out that the risk of non-cooperation within pools due to non-renewal of the BER under Option 3 should not concern pools which are currently outside the scope of the BER, since Option 3 would result in no change in respect of these categories of pools.

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79 CEA's position paper of 17 July 2008, page 7, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/cea_en.pdf; ABI's (Association of British Insurers) response to European Commission report on the functioning of the BER, of June 2009, page 6: "*We agree with the Commission that the use of pools to cover such large and often quite unique risks makes the insurance sector different to other sectors and triggers the need for cooperation under the provisions of the BER*"; FFSA's (French Federation of Insurers) comments of 29 May 2009, page 4: "*Les pools permettent en effet de fournir des services d' assurance concernant des risques pour lesquels la plupart des enterprises d'assurances ne pourraient invididuellement offrir aucune couverture ou seulement une couverture insuffisante*".

80 FERMA's (Federation of European Risk Management Associations) reply to the Consultation of April 2008, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/ferma_bxl_en.pdf

81 Reply of MARSH to the Consultation, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/marsh_en.pdf

163. Indeed, a first category of pools do not need a BER as a safe harbour because they do not give rise to a restriction of competition in the first place. In the P&I Clubs case[82], it was considered that members of the pool were not actual or potential competitors, given the fact that they were unable to insure alone the risks covered by the pool. Therefore, pools, no matter how high their market share, may not be considered anti-competitive as long as pooling is necessary to allow their members to provide a type of insurance that they could not provide alone. This might be the case for nuclear pools for example and this was the approach taken by the Commission in the nuclear insurance pool cases (2001)[83]. The same may apply for pools that are engaged in new types of risk coverage like for instance the financial security and insurance requirements that are established under the Environmental Liability Directive (ELD) or insurance of new risks in the future. Therefore, none of the options should have any effects on this type of pool.

164. A second category of pools are the ones which come within the scope of Art. 101(1) as they can be replaced by two or more insurance entities and can give rise to restrictions of competition[84], such as "the standardisation of policy conditions and even of amounts of cover and premiums"[85], without fulfilling the conditions established by the BER.

165. Some pools are outside the current scope of the BER because their market shares are beyond the general thresholds established by the BER (20% for co-insurance groups and 25% for co-reinsurance groups) and/or do not comply with the other conditions in the BER. The exemption in the BER should be limited to agreements which do not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question. Consumers can benefit effectively from pools only if there is sufficient competition in the relevant markets in which the pools operate. This condition should be regarded as being met when the market share of a pool remains below a given threshold and can therefore be presumed to be subject to actual or potential competition from undertakings which are not members of that pool.

166. Option 1 and Option 3 should not therefore have any concrete effects on this second category of pools as they are in any event outside the scope of the current BER. However, there are two types of modifications brought in by Option 2 which could have some consequences on pools which are outside the BER under the baseline scenario, in the sense that some of them might start benefiting from the BER. The rise in the flexibility market share thresholds[86]

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82 *Commission Decision 1999/329/EC of 12 April 1999 – P& I Clubs, Pooling Agreement, OJL 125 of 19/05/1999, p.12-31*.

83 *The nuclear insurance pool cases (2001)*: In January 2001 the Commission closed its investigations into three nuclear insurance pool cases (a Swedish co-insurance and co-reinsurance nuclear pool, an Italian reinsurance nuclear pool and a Spanish pool providing co-insurance to nuclear installations in Spain and co-reinsurance to nuclear risks outside Spain). The Commission concluded that without the pooling agreements there would be no supply of nuclear liability insurance with adequate coverage for the risks involved.

84 Indeed, in the individual assessment of agreements under Article 101(1), account has to be taken of several factors, and in particular the market structure of the relevant market.

85 Recital 18 of the BER.

86 Flexibility thresholds work as follows:

Co-insurance pools (market share threshold is 20%)

- If the market share of a co-insurance pool (initially below or equal to the market share threshold of 20%) increases above the threshold of 20% *but does not exceed 25%*, the exemption will continue to cover that pool for 2 years (Article 6(4));
- If the market share of a co-insurance pool (initially below or equal to 20%) *rises above 25%*, the exemption will continue to cover that pool for only 1 year (Article 6(5)).

Co-*re*insurance pools (market share threshold is 25%)

- If the market share of a co-reinsurance pool (initially below or equal to the market share threshold of 25%) increases above the threshold of 25% but does not exceed 30%, the exemption will continue to cover that pool for 2 years (Article 6(7));

(which are different from the general thresholds and which remained the same) by 3 per cent (from 22 per cent) to 25 per cent for coinsurance pools and by 3 per cent (from 27 per cent) to 30 per cent for co(re)insurance pools which is being proposed under Option 2 (See Section 4.1.2 above) could have as a consequence that some of the pools which do not benefit from the BER under the baseline option would start benefiting from the BER under Option 2. Also, the extension of the definition of "new risks"[87] might mean that more pools than it is currently the case under the baseline scenario could benefit from the BER under Option 2.

167. The only category of pools which would be affected by Options 2 and 3, including the risk of non-cooperation stemming from Option 3 and from the new method of calculating market shares under Option 2 is the third category, i.e. pools which currently comply with market share thresholds and other conditions established by the current BER and therefore are within the scope of the current regulation. Participants in these pools may indeed consider leaving pools and although this cannot be proved at this stage, the risk in question should be taken into account, in particular given that the lack of pro-competitive cooperation would not be desirable in the context where risk sharing for certain types of risks ensures that all such risks can be covered. From this perspective, Option 2 is preferable to Option 3. Option 2 is preferable to Option 1 as it enlarges the definition of new risks, which would foster cooperation between insurers. As regards the new method of calculating market shares under Option 2, while it might deter insurers from cooperating within pools to a certain extent, it has the merits of ensuring consistency across competition legislation in terms of the method of calculating market shares. Also, this new methodology would be safer for consumers and more in line with Article 101(3) of the Treaty, as there are no reasons why favourably discriminating insurance pools.

8.1.3. Maximising benefits for consumers

168. The benefit of the BER should be limited to those agreements for which it can be assumed with a sufficient degree of certainty that they satisfy the conditions of Art. 101(3) of the Treaty. Under Article 101(3), a fair share of the benefits resulting from the efficiencies should be passed on to insurance customers. The latter can benefit effectively from pools only if there is sufficient competition in the relevant markets in which the pools operate. This condition should be regarded as being met when a pool remains below a given market threshold as it can therefore be presumed that the positive effects of the common coverage of risks through pools will outweigh any negative effects on competition.

169. Otherwise, consumers will not benefit from these efficiencies and will express their concerns, as it was the case in the process of the Consultation, when FERMA complained that there are "pools which have been put in place to solve temporary market problems (terrorism) or to solve specific issues (natural events or "environmental impairments") and which "are quite often kept in place with a monopoly position, with specific rules allowing not competition".[88] The fact that the existence of pools is accepted under strict conditions and provided that insurance intermediaries or the clients remain entirely free to place risks outside the pool is also emphasised by the European Federation of Insurance Intermediaries (BIPAR) in their response to the Consultation.[89]

- If the market share of a co-reinsurance pool (initially below or equal to 25%) rises above 30%, the exemption will continue to cover that pool for only 1 year (Article 6(8)).

87 See section 4.1.2 – "new risks" would include risks whose nature has, on the basis of an objective analysis, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them

88 FERMA (Federation of European Risk Management Association) reply at the Consultation, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/ferma_bxl_en.pdf

89 Available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/bipar_en.pdf.

170. There have been cases in several Member States where pools were set up, despite the fact that the risks in question could have been covered by individual insurers rather than a pool. Therefore, an analysis under the BER and, if the BER was not applicable, under Article 101(3) has been done by NCAs[90], which took into account, on the one hand, the advantages for consumers of the cooperation through pools and on the other hand, the restrictions of competition stemming from standardised level of premiums and conditions. The market structure on the relevant market was also one of the factors taken into account.

171. Given that the current method of calculating market shares is not in line with other horizontal rules, Option 2 foresees a modification to this method, in order to avoid unnecessary discrimination[91]. In addition, it is questionable whether the current method used for calculating market shares under Option 1, is in line with Art. 101(3). As expressed at the Public Event, this could only be so if there were sensible reasons for treating the insurance industry so differently to others. Also, it would be safer for consumers which are better protected under the general rules of calculating market shares[92].

172. Option 3 might result in reduced cooperation within pools, which, in turn, might result in consumers not getting the coverage they need for large or specialised risks. As emphasised by ANIA (Italian Insurance Association), not being able to offer coverage through a pool would imply that the risk would not be insured[93.] This risk has also been emphasised by insurance customers: "Reluctance to cooperate within pools could therefore "prevent some clients from obtaining that insurance at a reasonable price or possibly from obtaining insurance at any price"[94.] In addition, the extension of the definition of new risks goes into the direction of maximising the chances of consumers to find appropriate insurance even for new risks for which there are not data available and insurers would be reluctant to cover individually. Therefore, from the perspective of maximising benefits to consumers, Option 2 is preferable to Option 3 and Option 1.

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90 In 2007, the German NCA prohibited a pool covering pecuniary loss liability risks for auditors and chartered accountants.90 The Bundeskartellamt considered that the relevant market was the market for pecuniary loss liability risks for auditors and chartered accountants. On that basis, the pool largely exceeded the market share thresholds fixed by the BER. Given that insurance cover was only provided at standard premiums and terms and that there was no competition between the insurance companies for insurance premiums and conditions or for service quality in claims processing, four insurance companies were prohibited from continuing to jointly insure the pecuniary loss liability risks of auditors and chartered accountants from 2009 via the insurers' pool.90 Another similar case is currently being investigated in the Netherlands, where the Dutch Competition Authority considers that a pool offering primary professional liability insurance to a certain profession is restrictive of competition and not exemptible. Firstly, members of the pool do not compete with each other regarding the premium or terms, although other insurers already cover this risk independently. This means that two or more competitors could co-exist on the market and that Article 101(1) is applicable in this case. Secondly, due to high market shares, which are beyond the market share thresholds provided by the BER, the pool in question does not benefit from the exemption afforded by the BER.

91 Under the current BER the approach to the calculation of market shares only took into account the insurance products underwritten within the pool by the participating undertakings or on their behalf. Under Option 2, the turnovers achieved by the participating undertakings outside the co(re)insurance pool in the relevant market are also taken into account for the calculation of the market shares.

92 For instance, in the German case mentioned above, if the relevant market was defined more broadly, in order to include other professional liability insurances such as for lawyers and notaries, the pool in question might be below the thresholds established by the BER, but above these thresholds if the general rules on calculating market shares were applicable.

93 Reply of ANIA to the Consultation, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/ania_en.pdf

94 Reply of MARSH to the Consultation, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/marsh_en.pdf

8.1.4. Encouraging/facilitating entry by reducing entry barriers for competitors

173. The current BER provides that pools may "allow their members to gain the necessary experience of the sector of insurance involved". This has been confirmed by several respondents, which consider that participation to pools help insurers to gain necessary experience of risks with which they are unfamiliar. As emphasised by an NCA, pools facilitate market entry for new insurers with insufficient expertise. For instance, an insurer said that they did not have previous experience with professional liability for insurance intermediaries, which is a risk covered by the Cyprus Hire and Rejected Risks Pool, to which they participate[95]. Another one said that they were able to enter the market of consequential loss liability insurance only because they offered it within a pool and that otherwise, they would have had to acquire the necessary knowledge slowly and at considerable expense in terms of finances and human resources[96].

174. Smaller insurers have therefore the possibility of penetrating a market on which they would not be active in the absence of a pool, because they would be unable to cover, on their own, such specialised or large risks. Pools appear therefore facilitating market entry by enabling smaller insurers to compete for business which would otherwise be closed to all except the largest insurers[97], which aim at covering large risks and make use of their large subscription capacity.The observations of MABISZ (the Association of Hungarian Insurance Companies) go into the same direction, as in their view pools are the only possibility for small insurance companies to participate in the insurance Hungarian market[98]. Pollution risks are an example of risks which some smaller insurers would not be able to cover individually, outside of a pool.[99]

175. In this context, Option 2 seems to encourage market entry to a much larger extent than Option 3. Option 2 is more preferable than Option 1 due to the extension of the definition of new risks and to the clarifications that some pools might not be restrictive of competition in the first place, which could encourage market entry.

8.1.5. Providing adequate legal security

176. It appears from many replies during the Review that pools use the BER as a general "blanket" exemption and that they consider the simple existence of the BER enough to provide them with legal security. This is a misconception as the BER offers exemption to pools only in certain conditions, which must be assessed on a case by case basis. Compliance with the BER is being assessed incorrectly in many instances according to the evidence the Commission has found[100].

177. It is essential that all pools undertake a proper legal assessment in order to determine whether they are restrictive of competition or otherwise and whether they are covered by the BER. Given that the BER contains conditions important to apply for pools in order to make their self-assessment, Option 3 could result in a lesser degree of legal certainty. Respondents

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95 Reply of Ethniki General Insurance to the Questionnaire.

96 Reply of Nürnberger Versicherung, at the Consultation, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/nurnberger_de.pdf

97 Reply of Marsh to the Consultation, available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/marsh_en.pdf

98 Available at: http://ec.europa.eu/competition/consultations/2008_insurance_ber/mabisz_en.pdf

99 Reply of Mutuelle de Poitiers Assurances to the Questionnaire.

100 For instance, in the consultation process, we received indications from several pools and NCAs that the geographic product market on which pools operate is often national (in the sense that the risks being covered are situated in the Member State where the pool is located) and have market shares beyond the ones permitted by the BER, with the consequence that they would not be covered by the BER (whereas conclusions of some of these pools where that they were covered by the BER).

emphasised at the Public Event that "the fact that some pools misinterpret the requirements under the BER is not a reason to abolish it". It seems that Option 2 would allow for increased legal certainty through a clarification of the key notions in the current BER and would be therefore the preferred option.

178. As shown in Section 4.1.2 above, there is a need for a consistent approach regarding market share rules. Given that applying different rules on the calculation of market shares in the insurance sector to those applied in other sectors would result in treating the insurance sector in a preferential way, Option 2 appears more appropriate than the baseline scenario, in order to avoid these unjustified differences. In the context where the new rules on calculating market shares will probably result in several pools no longer benefiting from the BER anymore, several insurance associations pointed out that "such a change would de facto drive out all insurers with a large or even medium market share from the pools benefiting from the BER," which would be a "discrimination vis-à-vis large or even medium insurers". In their opinion, a way to avoid such "discrimination" would be to increase the related market share thresholds set out in the BER above 20% for co-insurance groups and above 25% for co-reinsurance groups".

179. However, no justification has been made to show why pools in the insurance sector would warrant special methods of calculating market shares which depart from the general rules. It should also be borne in mind that falling outside the scope of the BER does not necessarily mean that the pool in question is anticompetitive. On the contrary, a pool might not be restrictive of competition in the first place and under Option 2, a relevant recital has been added in order to bring more clarity as regards the assessment of pools being outside the scope of the BER[101]. Further, it is possible that the pool in question fulfils the conditions of Article 101(3) and therefore it would not be considered as anticompetitive. Moreover, pools which used fall within the scope of the BER under Option 1, but will fall outside the BER under Option 2 will have the same level of legal certainty as any other horizontal cooperation taking place in other sectors which do not benefit from the BER.

180. Further for consistency reasons, in order to bring the BER into line with other BERs such as the Research and Development BER, the flexibility market share thresholds have been raised from 22 to 25 per cent for coinsurance pools and from 27 to 30 per cent for co(re)-insurance pools. Option 2 appears therefore as the option which allows the improvement of these provisions from a consistency across legal instruments[102] and legal certainty point of view.

181. As regards the notion of "new risks", several replies to the Questionnaires emphasised the fact that the definition of "new risks" should be extended as the current definition would be too narrow, as only covering an entirely new insurance product[103]. In some respondents' opinion, this would result in the BER hindering the setting-up of pools with innovative policies. This shows that there are situations where pools refrain from innovation as they are reluctant to cooperate on risks which might not be considered "new", with the consequence that their cooperation could fall outside the BER. Therefore, Option 3 and 1 do not seem appropriate from the perspective of legal certainty.

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101 As CEA emphasises in their comment of 2 June 2009, "this is useful guidance and, should this exemption be renewed, we encourage the Commission to include such guidance in the text of the renewed BER, for instance in a recital".

102 Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, Art 6 2 and 3 provides for the same levels, i.e. 25 and 30 %.

103 For instance, one respondent argued that risk of terrorism is not new but that nowadays it is considered new because of the possible impact and geographical scope; some risks may not be new in some markets but totally new in other markets.

182. Some respondents[104] also considered that the definition of the relevant market needs to be improved, in order for the BER to provide for more legal certainty. CEA considers that uncertainty would result in a significant risk of non-cooperation and thus a decrease in insurance capacity. However, the definition of the relevant market is in general an exercise for each undertaking involved in horizontal cooperation on the market, independently of the sector in which it operates. Therefore, the Commission adopted the methodology for its definition of the relevant market in its Notice on the Definition of the Relevant Market for the purposes of EU competition law[105], based on an analysis of the substitutability of demand and supply and applicable to all sectors. Therefore, maintaining the baseline scenario and not giving more guidelines about the relevant market in the BER seems to be the most appropriate approach in terms of consistency with all other sectors which do not benefit from specific guidance. Moreover, available guidance is already offered in the Commission's decisions as well as in the Working Document on the functioning of the BER[106]. A review of the relevant market is attached at Annex IV.

8.2. Impact assessment for other economic objectives

8.2.1. Reducing compliance costs

183. See section 6.2.1 above. Provided pools are doing the careful and complete self-assessment required under the BER, the cost of the analysis (although the rules would change under the BER in particular in terms of market share calculation) should not change significantly. If pools are not doing this careful and complete self-assessment, and provided that would now begin to take their compliance obligations seriously, these pools would need to undertake that analysis which would involve some cost. The evidence from the Review indicated that there were some pools that are not doing a careful and complete self-assessment under the BER but it is difficult to say how many pools in the EU are in this position and therefore the impact of Option 2 from this perspective.

184. Option 3 may lead to an increase in compliance costs in that pools who were self-assessing under the BER would need to self-assess under Article 101(1) and if appropriate Article 101(3) rather than under the BER. However this legal analysis should not be much more difficult or costly than under the BER. At the Public Event, it was argued that there would be no change from this perspective. Pools who were not doing a careful and complete self-assessment under the BER and who now decide to do one under Article 101 will indeed now have a certain additional compliance cost but this is difficult to determine. Option 3 in this context may have a slightly higher impact than Option 2.

8.2.2. Impact on SMEs

185. One of the positive effects of this form of cooperation is that it allows small insurers to enter into and remain in the market by participating in the coverage of risks which they would otherwise not be able to cover individually and also to gain experience of risks with which they are unfamiliar. For example, one small insurer is part of a pool covering, amongst other things, professional liability of insurance intermediaries, which is a risk of which they had no previous experience or exposure[107]. Another SME considers that without pools, they could

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104 For instance, CEA comments on the European Commission's preliminary findingsF on the BER, page 10.

105 OJ C372, 9.12.1997, p.5.

106 http://ec.europa.eu/competition/sectors/financial_services/insurance_ber_working_document.pdf, page 35.

107 Reply of Ethniki General Insurance to the Questionnaire of 4 December 2008.

not support insurance policies for Nuclear Risks or Notaries[108] and another said that without a pool, they would not be in a position to cover certain risks such as pollution risks[109].

186. Therefore, Options 1 and 2 bring more positive effects for SMEs than Option 3. Option 2 is preferable in comparison with Option 1 as it improves the definition of new risks, with positive consequences for SMEs, which are therefore also able to participate in pools covering new risks.

8.3. Impact on public administration and EU budget

187. As analysed above under this section for Joint Calculations, Tables and Studies, no impact on the EU budget is expected..

188. As also discussed above under this section for Joint Calculations, Tables and Studies, the additional clarity brought by Option 2 will assist NCAs and the Commission and to better prioritise their cases and resources. For instance, in the case of the German pool offering insurance liability for accountants, the Court has reached a different conclusion than the NCA as regards the definition of the relevant market, with the consequence that the pools in question would benefit from the BER as within the thresholds. If the general rules on calculating market shares were applicable, even under the Court's relevant definition, the pools would have been above the thresholds.

189. In addition, Option 2 is preferable to Options 1 or 3 because it allows competition authorities of a Member State to withdraw the benefit of the BER where it finds in a particular case that the agreement to which the BER applies, has effects which are incompatible with the conditions laid down in Article 101(3) in respect of that territory. This gives Member States an enhanced power to enforce the competition rules. This teamed with the additional clarity provided by Option 2 makes it preferable for pools.

190. Given the specificity of Pools, several respondents[110] emphasised that the BER is required in order to facilitate the enhanced need for cooperation. For example the CEA's opinion in its reply to the consultation is that in the absence of cooperation through pools, with the consequence that the public sector may have to stand in for the private sector as, for instance, in the case of nuclear pools, "it would become impossible to put in place the legal cover for nuclear installations since no single insurance company is able to put in place the full amount". Therefore, given that Option 3 may mean additional burdens on the public sector / governments, this Option is not preferable for pools.

8.4. Social and environmental objectives

8.4.1. Employment levels and job quality

191. Options 1 and 2 will have no measurable impact on employment levels. We have no reason to expect that Options 1 and 2 would result in any change in these levels. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work either by pools. However it is likely that pools will more often employ in-house or external lawyers to do regular reviews of compliance under Article 101 and the BER.

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108 Reply of Generali verzekeringsgroep N.V. to the Questionnaire of 4 December 2008.

109 Reply of Mutuelle de Poitiers Assurance to the Questionnaire of 4 December 2008.

110 FIN-USE, FFSA, Taylor Wessig, FERMA in their replies to the Consultation, November 2009

8.4.2. Public health and safety

192. There is a possibility that some modifications of the current BER brought about by Option 2 may be relevant for the assessment of the impact on public health and safety concerning pools. This is because the new way of calculating market shares will result in some pools which previously were covered by the BER (under Option 1) now falling outside its scope. However, such pools would then need to be analysed under Article 101(1) and (3) and may be exempt under it. In those circumstances it is possible that certain aspects related to public safety may be taken into account in an Article 101(3) analysis. However, pools which are not restrictive of competition in the first place and pools not complying with the BER's conditions are not impacted by this measure. In addition, there might be more pools covering new risks under the new extensive definition under Option 2. Under this analysis, this would mean that overall there would be no difference between Options 1 and 2 from a public health and safety perspective.

193. Moreover, Option 2 allows for the improvement and expansion of the definition of new risks so as to include "in exceptional cases, risks whose nature has, on the basis of an objective analysis, changed so materially, that it is not possible to know in advance what subscription capacity is necessary in order to cover such a risk". These new risks might well be of those for which appropriate insurance coverage is essential in order to mitigate contingencies related to public health and safety. Overall, therefore in relation to pools we consider that Option 2 is preferable to Option 1. Option 3 would not allow for the improvement of the definition of new risks. This Option is therefore less preferable than the baseline and Option 2.

8.4.3 Environment

194. Various Pools cover environmental risks throughout the EU. The existence of these pools ensures that the contingencies concerning environmental risks (which generally are very large and difficult for individual insurers to cover alone) can be covered if and when they arise. Options 1 and 2 are therefore preferable to Option 3. Option 2 is preferable to Option 1 because it allows for the improvement and expansion of the definition of new risks so as to include "in exceptional cases, risks whose nature has, on the basis of an objective analysis, changed so materially, that it is not possible to know in advance what subscription capacity is necessary in order to cover such a risk". As the CEA emphasised in its reply, this new definition is clearer and covers for instance, natural disasters that are fundamentally changing in nature as a result of climate change but also risks arising for example from new technologies and / or new legal provisions. For example, with Directive 2004/35/EC on environmental liability with regard to the prevention and remedy of environmental damage, new risk coverage needs seem to have arisen in the environmental field.[111]

195. On the other hand, there is a possibility that Option 2 may have an impact on the environment. This is because the new way of calculating market shares will result in some Pools which previously were covered by the BER (under Option 1) now falling outside its scope. Such pools would then need to be analysed under Article 101(1) and (3) and may be exempt under it. Under this analysis, this would mean that there would be no difference between Options 1 and 2 from an environmental perspective. In those circumstances it is possible that certain aspects related to the environment may be taken into account in an Article 101(3) analysis.

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[111] The new needs of coverage include 1) protected species and natural habitats (Article 2.1.a of Directive 2004/35/EC); 2) a new kind of restoration, ie compensatory remediation (Annex 2); 3) administrative law scheme to restore the damages to the environment (Article 7). Source: CEA reply to public consultation of 17 July 2008, pg. 9 available at http://ec.europa.eu/competition/consultations/2008_insurance_ber/cea_en.pdf

196. Overall, therefore we consider that Option 2 is preferable to Option 1. Option 3 would not allow for the improvement of the definition of new risks. This Option is therefore less preferable than the baseline and Option 2.

8.5. Impact - overview

Impact of exemption n°3 - Pools

Criterion	Impact option 2	Impact option 3
1.1. Granting a block exemption only to sector specific types of cooperation	0,0	-2,0
1.2. Encouraging pro-competitive cooperation between insurers	1,0	-2,0
1.3. Maximising benefits for consumers	1,0	-1,0
1.4. Encouraging / facilitating entry by reducing entry barriers for competitors	1,0	-1,0
1.5. Providing adequate legal security for undertakings	2,0	-1,0
2.1. Reducing compliance costs	0,0	-1,0
2.2. Particular impact on SMEs	1,0	-1,0
3.1. Impact on public administration and EU budget	1,0	-1,0
4.1. Employment and job quality	0,0	0,0
4.2. Public health & safety	1,0	-1,0
4.3. Environment	1,0	-1,0

Impact of exemption n°3 - Summary

Criterion	Impact option 2	Impact option 3
Competition	5,0	-7,0
Other economic impacts	1,0	-2,0
Public Administration	1,0	-1,0
Social and environmental impacts	2,0	-2,0

9. SECURITY DEVICES - THE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED OBJECTIVES

9.1. Economic objectives related to the protection of effective competition

9.1.1. Granting a block exemption only to sector specific types of cooperation

197. It appears that there is a mutuality of interests in the insurance sector in relation to cooperation on security devices since insurers actively seek ways to help customers to reduce their exposure to the risk covered.

198. However agreements on technical specifications for security devices and their installation fall into the general domain of standard setting which is not unique to the insurance sector. Under Option 3 insurers would benefit from guidance in terms of the applicability or otherwise of Article 101 of the Treaty to their agreements on security devices, afforded by the general standardization chapter in the Horizontal Guidelines. The advantage of Option 3 in comparison with the baseline scenario and Option 2 is that the benefit of a BER is not granted in the absence of sector specificity, therefore avoiding undeserved differentiation across sectors.

9.1.2. Encouraging pro-competitive cooperation between insurers

199. The current BER subjects the agreements on security devices on several conditions. When no harmonisation has taken place in the field concerned, agreements between insurers are covered by the BER (provided that they also fulfil the other conditions set out in Article 9 of the BER). Agreements are outside the BER where the EU has adopted harmonisation rules in the field concerned – something which has become increasingly common in recent years.

200. The reason behind this harmonisation is the construction of the EU internal market and the avoidance of any protectionist practices. In accordance with the Commission's new approach to technical harmonisation and standardisation[112], legislative harmonisation is limited to essential safety requirements to which products on the market must conform in order to enjoy free movement throughout the EU. For example, safety in case of fire is one of the essential requirements to which construction products must conform, in accordance with the Construction Products Directive 89/106 CE. Public authorities of Member States are obliged to recognise that products manufactured in conformity with harmonised standards are presumed to conform to the essential requirements established by the directive in question. If the producer does not manufacture in conformity with these standards, he has an obligation to prove that his products conform to the essential requirements. The task of drawing up technical standards is entrusted to organisations competent in industrial standardisation, which take the current stage of technological development into account when doing so. The European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC) are the only bodies with the competence to adopt European harmonised standards in the field of security devices/safety equipment, following a mandate issued by the European Commission after consultation of Member States.

201. Several respondents to the Consultation consider that cooperation on security devices would be reduced or even stopped, out of caution, in case of non-renewal of the BER for this type of agreements[113]. However, these statements are general and do not make the appropriate distinctions. Indeed, from replies it appears that an important part of the agreements currently existing in different Member States cover sectors where there is already harmonisation at EU level. The reason behind are that some EU level standards would not provide exhaustive and/or adequate levels of security for the purposes of insurers and policyholders. In insurers' opinion, certain areas regarding protection of property remain unaddressed by CEN/CENELEC standards and thus insurers require more detailed requirements.

202. It appears that there are two mains categories of agreements, i.e. agreements in areas already covered by European standards, as "EU standards do not cover all the requirements needed by insurers" and agreements in areas which have not been harmonised due to a lengthy process, where insurers agree on standards ("If insurers were to wait for European level standards to be developed, fire and thefts would increase, and premiums would need to go up to reflect this")[114]. However, a large part of the agreements are caught by the first category[115].

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112 The aim of completing the internal market at the end of 1992 necessitated a new approach to technical harmonisation and the use of standardisation. In its communication entitled "Technical harmonization and standardization: a new approach" [COM(1985)19 final - Not published in the Official Journal], the Commission therefore proposed that the methods and procedures be revised. The main idea is to develop an approach establishing general rules which are applicable to sectors or families of products as well as types of hazard. This avoids the lengthy decision-making procedures which, in the past, established technical harmonization through very technical and detailed product-specific directives.

113 ABI's response of June 2009 to the Commission's report on the functioning of the BER, page 13.

114 ABI's response of June 2009 to the Commission's Report on the functioning of the BER, page 10.

It appears that this standardisation work covers to a large extent the possible fields of technical harmonisation for these categories of products. Thus, the scope of the BER is being continually reduced[116] and the scope of the agreements which might be affected by non-renewal of the BER under Option 3 is significantly reduced too.

203. As regards the limited sector where there is no EU harmonisation yet, detailed national rules results in fragmentation of the internal market and in reduction of competition between producers of security devices across Member States. The existence of national requirements agreed by insurers means that producers of security devices have to comply with different sets of national rules, depending on the Member State in which they sell their products. This seems to result in sales volumes being limited to national/regional markets because of multiple national certification requirements. It is therefore more appropriate that these negative effects should be rather balanced against any other positive effects of this cooperation under Article 101(3) and not under a BER.

204. Therefore, given the reduced scope of cooperation, the *de facto* binding character of the agreed standards, the negative consequences that this type of cooperation might have not only in harmonized areas but also in non-harmonized sectors, the protection of these agreements through a BER under Option 1 or 2 is less appropriate than non-renewal under Option 3, although there might be some risks of non-cooperation. Possible advantages for consumers and insurers will have to be balanced against restrictions of competition under Art. 101(3) of the Treaty, by insurers entering into such agreements.

9.1.3. Maximising benefits for consumers

205. Several respondents emphasised that this form of cooperation enables insurers to evaluate better the risks that they cover, to the advantage of consumers as insurance takers. Consequently, insurers could calculate more precisely the premium they charge and therefore they would be able to offer appropriate levels of premiums when policyholders buy safety equipment corresponding to certain technical specifications. A uniform approach by insurers regarding security devices makes it easier for policyholders to compare different offers from insurers[117] and to switch to another insurer as they do not have to apply different standards for any equipment they already have in place [118].

206. However, the Consultation process showed that difficulties could arise if customers wished to switch to suppliers of security devices that do not wish to adhere to the standards. As policyholders will only buy security devices that conform to the commonly agreed standards, producers, installers and maintenance providers of security devices are obliged in practice to comply with these standards.

207. One European association of producers of security devices (Euroalarm) argued that consumers as buyers of security devices must qualify for acceptance for insurance by

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115 Approximately 90 EU harmonised standards (or technical specifications) concerning fire detection and fire alarm systems as well as fixed fire fighting systems have been already published in the EU's Official Journal and another 30 EU harmonised standards are under development for different categories of construction products.

116 EU-harmonised standards are listed on this webpage: http://ec.europa.eu/enterprise/newapproach/standardization/harmstds/reflist.html.

117 NMA Insurance PLC's reply to the QuestionnaireQuestionnaire of 4 December 2008: "the fact that we use the same technical specifications definitely makes it far easier for consumers to switch insurers", Generali verzekeringsgroep reply to the QuestionnaireQuestionnaire of 4 December 2008: "the fact that all parties in the Netherlands share the same technical specifications facilitates the possibility of switching for policy holders between insurers", GasanMamo Insurance: "We believe that a uniform approach by insurers on the rating of security devices makes it easier for policyholders to move to another insurers as they do not have to apply different standards for an equipment they already have in place".

118 Reply to Questionnaire of 4 December 2008 of GasanMamo Insurance Ltd.

proving they apply approved security, devices, systems, installations and services for achieving an acceptable level of prevention set by the associations of insurers. As emphasized by this association's representative at the Public Event held by the Commission, "consumers are forced into implementation of certain devices as those are accepted by insurers and are denied a wider choice of performance-equal products". In practice, the effects of these agreements seem to become obligatory: for example, it appears from several replies to the Consultation, that insurers do extensively use the specifications and rules commonly established by the agreement, with the consequence that these agreements become, de facto, mandatory for the security devices producers or the installation and maintenance undertakings. Although insurers deny this *de facto* compulsory effect ("Insurers are free to accept devices and installation arrangements that meet their requirements, but do not follow recommended specifications")[119], it is clear that it is this uniformity which explains the advantage of these agreements consisting in the freedom of consumers to switch easily from an insurer to another.

208. This could result in less choice for consumers as buyers of security devices [120] and to the fragmentation of the internal market, as consumers would not be able to insurance for products which do not comply with the technical specifications and compliance assessments commonly established by insurers at national level. Indeed, given that one of the effects of national standards imposed by insurers is that sales volumes of producers of security devices are limited to national/regional markets because of multiple national certifications requirements, with the consequence that they would not be able to penetrate the relevant markets in another Member States.

209. Another negative consequence appears to be on the innovation plan, as multiple national certification tests and requirements appear to delay innovation by increasing costs and thereby reducing international market access for small and medium-sized manufacturers from where innovation often comes. Therefore, it appears that consumers do not fully benefit from new technological developments because insurer standards lead to testing delays and ads cost to the process of getting products to markets that do not operate under the European system.

210. Respondents also emphasised that consumers would also benefit from greater security because the highest standards for their security devices are guaranteed. However, European standards issued by CEN/CENELEC are appropriate tools not only to keep the internal market for security devices open, but also to guarantee an appropriate level of security for consumers' life, property and business continuity. However, insurers consider that these goals are "not always shared fully with European standardization organizations" or that whereas "the primary purpose of standardisation, as per the DG Enterprise website, is to complete the Single Market", "the primary purpose of agreements under the BER is to preserve life and property".[121]

211. However, the protection of health and human life or the protection of consumers cannot be used by Member States as a means of favouring their national measures when the field in question is completely harmonised and constitute exceptional defenses, strictly interpreted for the ECJ when the sector is only partially or not at all harmonised. In this case, Member States must respect the principle of mutual recognition introduced by the ECJ in *Cassis de Dijon*[122], whereby goods which are lawfully produced in one Member State cannot be

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119 ABI's reply of June 2009, page 11.

120 Public event: "Because the insurers' standards are de facto obligatory consumers do not have a free choice"

121 ABI's response of June to the Commission's report on the BER, page 8.

122 Case 120/78, Judgment of the Court of 20 February 1979 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECR 1979 p. 0064.

banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications different from those applied to its own products. The same logic would apply to similar types of defenses raised by insurers.

212. Therefore, given that there is no presumption that a faire share of the benefits of this cooperation is transmitted to consumers, Option 3 seems more appropriate than Option 1 or 2. It is more appropriate that undertakings apply the criteria of Article 101(3) through a self-assessment, also taking into account competition restrictions on the related market of security devices.

9.1.4. Encouraging/facilitating entry by reducing entry barriers for competitors

213. A respondent from one European security devices association argued that in the most Member States only installations and services from regionally or nationally operating "approved" suppliers, using "approved" devices are accepted by the insurance companies (who are themselves, mostly organised within national associations). According to this respondent, national quality marks based on national certification bodies and test laboratories prevail over national quality marks of different EU Member States even if they are tested against the same standards. This association argued that the high costs of multiple testing and certification are a significant barrier to marketing new and innovative products in to the European market. This respondent considers that CEN/CENELEC European harmonised standards should be applied instead. The Commission also considers that European Standardisation has proven to be a successful tool for the completion of the Single Market for goods[123].

214. It appears that historically developed national, regional or technical requirements fragment the European market and are a growing barrier for efficiency in development, design, manufacturing, installation and maintenance of security devices and systems. A 2004 Report[124] emphasised that a range of obstacles to the free movement of goods continue to exist and these should no longer be accepted: "Free movement continues to be hindered by a range of local rules, often applied arbitrarily and in clear contradiction to the mutual recognition principle that is the cornerstone of the internal market". The estimated cost of the non-application of the mutual recognition principle is around EUR 150 billion. Yet, although the BER is not a direct cause of all these concerns, the simple existence of the BER encourages the *de facto* adoption of infra-European industry standards[125].

215. In this context, it is obvious that the protection offered to agreements on security devices within the BER (baseline scenario) plays as a barrier to entry on the relevant market for producers of security devices. Therefore, Option 3 seems the right response to this situation. Option 2 is less appropriate than the baseline scenario as it would prolong a situation which has negative effects in terms of market entry for producers of security devices.

9.1.5. Providing adequate legal security for undertakings

216. Option 3 may result in a lesser degree of legal certainty than Option 2 or the baseline scenario. However, the non-renewal of the BER means the insurance sector will benefit from

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123 Communication from the Commission to the EP and the Council on the role of European standardisation in the framework of European policies and legislation, 18.10.2004.

124 Report from the High Level Group chaired by Wim Kok: Facing the challenge – The Lisbon strategy for growth and employment, November 2004, p. 26.

125 "There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard" (Paragraph 174 of the Commission notice of 6 January 2001: Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements, Official Journal C 3 of 06.01.2001).

the same level of legal certainty as the other sectors which do not benefit from a BER and which constitute the general rule. Under option 3, the insurance sector will benefit from guidance from two legal instruments, i.e. the Horizontal Guidelines currently under review and The Guidelines on the application of Article 101(3). The guidance on standard setting in the Horizontal Guidelines reduces legal uncertainty.

9.2. Impact assessment for other economic objectives

9.2.1. Reducing compliance costs

217. See section 6.2.1 above. Option 2 is unlikely to result in a material change in the compliance costs for insurers. Option 3 on the other hand may lead to a small increase in the compliance costs of insurers at least initially. The analysis here is the same as for SPCs above.

9.2.2. Impact on SMEs

218. It appears from the replies of small and medium-sized insurers to the Commission's questionnaires that using the same technical specifications for security devices as other insurers facilitates switching for policy holders from one insurer to another.

219. However, Euroalarm (the European association of manufacturers and service providers of electronic fire and security providers) complains about the multiple testing of security devices in different Member States, even where harmonisation at EU level is in place, which has negative effects on producers of security devices and in particular on smaller producers. The problems of multiple testing at least certain markets was also highlighted by smaller insurers: "Testing results from other insurers are not used in Austria. In Austria, there are various technical test centres"[126].

220. Indeed, it appears that these multiple requirements increase costs and thereby reduce international market access in particular for small and medium-sized manufacturers. This would give an unfair advantage to larger manufacturers who are better able to cover the large overheads of trying to sell into another market. Therefore, Option 3 appears more appropriate than Options 1 and 2.

9.3. Impact on public administration and EU budget

221. Under Option 1 as discussed above under this section for Joint Calculations, Tables and Studies, no impact on the EU budget is expected.

222. Regarding the impact on public administration, as discussed above under this section for SPCs, Option 2 is not necessarily a better option than Option 1 because the text of the BER does not lack clarity or need improvement. Indeed the use of it, in particular in the case of security devices gives rise to additional problems for competition authorities (in terms of foreclosure of producer federations from access to consumers who cannot obtain insurance on their products because of private standards) and public regulators in terms of the fragmentation of the internal market.

223. Under Option 3 the burden of proof is effectively on insurers to prove that they are exempt under Article 101(3), whereas under the baseline scenario, NCAs carry the burden of proving that the BER does not apply. Therefore Option 3 may be preferable in terms of public administration.

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126 Reply of Helvetia Versicherungen AG at the QuestionnaireQuestionnaire of 4 December 2008.

9.4. Social and Environmental Objectives

9.4.1. Employment levels and job quality

224. Options 1 and 2 will have no measurable impact on employment levels. We have no reason to expect that Options 1 and 2 would result in any change in these levels.

225. Option 3 may have an impact if there is any less cooperation which would result in less human resources being allocated to this work either by insurance companies or insurance associations. However it is likely that these companies and associations will employ more in-house and external lawyers to do regular reviews of compliance under Article 101.

226. Agreements concerning security devices are most often concluded at the level of the insurance associations. Furthermore, many national associations (meaning the numbers employed in these activities are low) have been taking the lead on these agreements for some time, which further supports the view that it is unlikely that these would not continue to be agreed in the absence of a BER. This is in particular given the Commission's view that in many cases security devices would not fall foul of Article 101(1) or would not fail to comply with the exemption criteria of Article 101(3). Option 3 does not mean that these types of agreements are necessarily anti-competitive. There are therefore likely to continue following analysis under Article 101(1) and if appropriate, Article 101(3). However, the Review produced evidence showing that producers of these devices are being foreclosed from supplying their devices in Member States where national private standards are in place between insurance companies. This means that Option 3 is likely to slightly increase overall the employment level in comparison with the baseline.

9.4.2. Public health and safety

227. When there is harmonisation of standards in the insurance sector at EU level, Member States may not put in place any national measures which have objectives such as those provided for in Article 30 of the Treaty, including the of protection of public health[127]. When there is partial harmonisation or no harmonisation at the EU level, national measures which concern the public health or have the objective of protecting it, are narrowly interpreted by the European Court of Justice in accordance with *Cassis de Dijon*[128] and the subsequent case-law. Therefore, Options 1 and 2 cannot necessarily achieve anything additional to Option 3 since there has been much harmonisation of standards at EU level through CEN/CENELEC standards.

9.4.3. Environment

228. Security Devices for example fire alarms, could limit the likelihood of or help prevent fires. Standards concerning security devices or their installation can assist in this process by ensuring high quality products and processes/installation. Under the BER the scope for cover is now significantly limited or eliminated in many cases due to extensive harmonisation at EU level (Article 1(f) prevents cover from the BER where EU harmonisation is already in place). In addition, agreements on security devices may be legal outside the BER. Therefore it is unlikely there would be any significant difference in impact on the environment between any of the options.

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127 In Case 190/87 (1988), ECR 4689, *Moormann*, the ECJ held that the existence of harmonization measures for poultry health inspections meant that a State could no longer use Article 30 to legitimate national rules on the matter.

128 Case 120/78, Judgement of the Court of 20 February 1979 Rewe-Sentral AG v Bundesmonoppolverwaltung für Branntwein, ECR 1979 p.0064.

9.5. Impact – overview

Impact of exemption n°4 - Security devices

Criterion	Impact option 2	Impact option 3
1.1. Granting a block exemption only to sector specific types of cooperation	-2,0	2,0
1.2. Encouraging pro-competitive cooperation between insurers	-1,0	1,0
1.3. Maximising benefits for consumers	0,0	1,0
1.4. Encouraging / facilitating entry by reducing entry barriers for competitors	-3,0	2,0
1.5. Providing adequate legal security for undertakings	0,0	-1,0
2.1. Reducing compliance costs	0,0	-1,0
2.2. Particular impact on SMEs	-1,0	1,0
3.1. Impact on public administration and EU budget	0,0	1,0
4.1. Employment and job quality	0,0	1,0
4.2. Public health & safety	0,0	0,0
4.3. Environment	0,0	0,0

Impact of exemption n°4 - Summary

Criterion	Impact option 2	Impact option 3
Competition	-6,0	5,0
Other economic impacts	-1,0	0,0
Public Administration	0,0	1,0
Social and environmental impacts	0,0	1,0

10. CONCLUSIONS

229. This comparison of the various Policy Options and the characteristics of the underlying specific measures shows that for Joint Calculations, Tables and Studies and separately, Pools, Option 2 scored better overall than the baseline scenario of renewing the current Regulation 358/2003 by 7 years and also scored better than Option 3. For SPCs and Security Devices, Option 3 has the greatest potential for achieving the objectives identified, and appears to be the Policy Option best able to meet the general objective of balancing the effective supervision of markets against the need to simplify administration and minimise compliance costs.

11. MONITORING AND EVALUATION

230. The consultation exercise that led to the adoption of the BER was very long and extensive. Public consultations and a series of other consultations with stakeholders at Member State and EU levels, including public authorities and prominent practitioners from the private sector, have contributed greatly to the analysis and evaluation of the relevant issues to date.

231. A Report on the functioning of the new BER will be submitted to the European Parliament and Council by March 2016. A review of the new BER will be conducted in advance of this Report in order to obtain evidence on a range of issues including:

(i) whether there is a significant and real risk that there would be less cooperation (i.e. that a category of agreements would not be entered into) in the event of

non-renewal to the disadvantage of both competition and consumers or have other negative consequences;

(ii) whether the BER is being used and if so in which Member States, for which insurance lines and which forms of cooperation are used most intensively;

(iii) whether alternative, reasonable and practicable arrangements could not be made which would create greater benefits to consumers; and

(iv) pro-competitive and consumer aspects of the categories of agreement under the BER.

232. The Commission will continue to monitor the operation of the BER based on market information from stakeholders and NCAs. This will provide the Commission with opportunities to receive feedback from representatives from industry, consumer organisations, law firms and economic consultants. In particular the Commission in conjunction with NCAs will be monitoring the operation of pools across the EU and enforcing where appropriate.

233. The proposed BER will expire 7 years after its adoption. However, the Commission will amend or repeal the BER before its expiry, if its provisions thereof no longer reflect market conditions in the EU, or lead to anti-competitive practices which cannot be exempted under Article 101(3).