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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY Accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL On the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector

Delegations will find attached document SWD(2016) 63 final.

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COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY

Accompanying the document

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

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

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EXECUTIVE SUMMARY

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

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

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

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

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

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

⁴ Commission Regulation (EU) 267/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 83, 30.3.2010, p.1).

⁵ Commission Regulation (EU) 267/2010 (IBER), Article 1, point 5: "[C]o-reinsurance pools' means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or more reinsurance undertakings, with the exception of ad-hoc co-reinsurance agreements on the subscription market, whereby a certain part of a given risk is covered by a lead insurer and the remaining part of this risk is covered by follow insurers who are then invited to cover that remainder in order to: (a) reinsure mutually all or part of their liabilities in respect of a specified risk category; (b) incidentally accept, in the name and on behalf of all the participants, the reinsurance of the same category of risks."

accurately. The exemption for co(re)insurance pools allows pro-competitive cooperation between (re)insurance undertakings that facilitates market entry and appropriate risk cover.

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

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

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

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

With respect to co(re)insurance pools, at this stage it seems that the renewal of the IBER is not justified because of its limited use and relevance, the potential risk of misapplication and, overall, the fact that it is no longer possible to presume with sufficient certainty that the type of cooperation covered by the exemption satisfies all the conditions necessary for a finding of compatibility with the Internal Market. This is especially so when considering that the insurance market currently provides a heterogeneous and less restrictive set of alternatives to pools for the purpose of co(re)insuring risks.

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

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

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

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