Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (Text with EEA relevance)

COMMISSION REGULATION (EC) No 358/2003

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector[(1)], and in particular Article 1(1)(a), (b), (c) and (e) thereof,

Having published a draft of this Regulation[(2)],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 1534/91 empowers the Commission to apply Article 81(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices in the insurance sector which have as their object cooperation with respect to:

- the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims,
- the establishment of common standard policy conditions,
- the common coverage of certain types of risks,
- the settlement of claims,
- the testing and acceptance of security devices,
- registers of, and information on, aggravated risks.

(2) Pursuant to Council Regulation (EEC) No 1534/91, the Commission adopted Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector[(3)]. Regulation (EEC) No 3932/92, as amended by the Act of Accession of Austria, Finland and Sweden, expires on 31 March 2003.

(3) Regulation (EEC) No 3932/92 does not grant an exemption to agreements concerning the settlement of claims and registers of, and information on, aggravated risks. The Commission considered that it lacked sufficient experience in handling individual cases to make use of the power conferred by Council Regulation (EEC) No 1534/91 in those fields. This situation has not changed.

Changes to legislation: *There are outstanding changes not yet made to Commission Regulation (EC) No 358/2003. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(4) On 12 May 1999, the Commission adopted a Report[4] to the Council and the European Parliament on the operation of Regulation (EEC) No 3932/92. On 15 December 1999, the Economic and Social Committee adopted an opinion on the Commission's report[5]. On 19 May 2000, the Parliament adopted a Resolution on the Commission's report[6]. On 28 June 2000, the Commission held a consultation meeting with interested parties, including representatives of the insurance sector and national competition authorities, on the Regulation. On 9 July 2002, the Commission published in the Official Journal a draft of the present Regulation, with an invitation to interested parties to submit comments not later than 30 September 2002.

(5) A new Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate 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. Account must also be taken of the Commission's experience in this field since 1992, and the results of the consultations on the 1999 Report and consultations leading up to the adoption of this Regulation.

(6) Regulation (EEC) No 1534/91 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

(7) Nevertheless, it is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics based approach which assesses the impact of agreements on the relevant market. However, it should be recognised that in the insurance sector there are certain types of collaboration involving all the undertakings on a relevant insurance market which can be regarded as normally satisfying the conditions laid down in Article 81(3) of the Treaty.

(8) For the application of Article 81(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.

(9) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3) of the Treaty.

(10) Collaboration between insurance undertakings or within 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 of the frequency of illness, accident and invalidity, makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. This can in turn facilitate market entry and thus benefit

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consumers. 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. It is, however, necessary to ensure that such collaboration is only exempted to the extent to which it is necessary to attain these objectives. It is therefore appropriate to stipulate that agreements on commercial premiums are not exempted; indeed, commercial premiums may be lower than the amounts indicated by the results of the calculations tables or studies in question, since insurers can use the revenues from their investments in order to reduce their premiums. Moreover, the calculations, tables or studies in question should be non-binding and serve only for reference purposes.

(11) Moreover, the broader the categories into which statistics on the cost of covering a specified risk in the past are grouped, the less leeway insurance undertakings have to calculate premiums on a narrower basis. It is therefore appropriate to exempt joint calculations of the past cost of risks on condition that the available statistics are provided with as much detail and differentiation as is actuarially adequate.

(12) Furthermore, since access to such calculations, tables and studies is necessary both for insurance undertakings active on the geographic or product market in question and also for those considering entering that market, such insurance undertakings must be granted access to such calculations tables and studies on reasonable and non-discriminatory terms, as compared with insurance undertakings already present on that market. Such terms might for example include a commitment from an insurance undertaking not yet present on the market to provide statistical information on claims, should it ever enter the market. They might also include membership of the association of insurers responsible for producing the calculations, as long as access to such membership is itself available on reasonable and non-discriminatory terms to insurance undertakings not yet active on the market in question. However, any fee charged for access to such calculations or related studies to insurance undertakings which have not contributed to them, would not be considered reasonable for this purpose if it were so high as to constitute a barrier to entry on the market.

(13) The reliability of joint calculations, tables and studies becomes greater as the amount of statistics on which they are based is increased. Insurers with high market shares may generate sufficient statistics internally to be able to make reliable calculations, but those with small market shares will not be able to do so, much less new entrants. 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. Given this specificity of the insurance sector, it is not appropriate to subject any exemption for such joint calculations and joint studies to market share thresholds.

(14) Standard policy conditions or standard individual clauses and standard models illustrating the profits of a life assurance policy can produce benefits. For example, they can bring efficiency gains for insurers; they can facilitate market entry by small or inexperienced insurers; they can help insurers to meet legal obligations; and they

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can be used by consumer organisations as a benchmark to compare insurance policies offered by different insurers.

(15) However, standard policy conditions must not lead either to the standardisation of products or to the creation of a significant imbalance between the rights and obligations arising from the contract. Accordingly, the exemption should only apply to standard policy conditions on condition that they are not binding, and expressly mention that participating undertakings are free to offer different policy conditions to their customers. Moreover, standard policy conditions may not contain any systematic exclusion of specific types of risk without providing for the express possibility of including that cover by agreement and may not provide for the contractual relationship with the policyholder to be maintained for an excessive period or go beyond the initial object of the policy. This is without prejudice to obligations arising from Community or national law to include certain risks in certain policies.

(16) In addition, it is necessary to stipulate that the common standard policy conditions must be generally available to any interested person, and in particular to the policyholder, so as to ensure that there is real transparency and therefore benefit for consumers.

(17) The inclusion in an insurance policy of risks to which a significant number of policyholders is not simultaneously exposed may hinder innovation, given that the bundling of unrelated risks can be a disincentive for insurers to offer separate and specific insurance cover for them. A clause which imposes such comprehensive cover should therefore not be covered by the block exemption. Where there is a legal requirement on insurers to include in policies cover for risks to which a significant number of policyholders are not simultaneously exposed, then the inclusion in an non-binding model contract of a standard clause reflecting such a legal requirement does not constitute a restriction of competition and falls outside the scope of Article 81(1) of the Treaty.

(18) Co-insurance or co-reinsurance groups (often called ‘pools’), can allow insurers and reinsurers to provide insurance or reinsurance for risks for which they might only offer insufficient cover in the absence of the pool. They can also help insurance and reinsurance undertakings to acquire experience of risks with which they are unfamiliar. However, such groups can involve restrictions of competition, such as the standardisation of policy conditions and even of amounts of cover and premiums. It is therefore appropriate to lay down the circumstances in which such groups can benefit from exemption.

(19) For genuinely new risks it is not possible to know in advance what subscription capacity is necessary to cover the risk, nor whether two or more such groups could co-exist for the purposes of providing this type of insurance. A pooling arrangement which is for the co-insurance or co-reinsurance exclusively of such new risks (not of a mixture of new risks and existing risks) can therefore be exempted for a limited period of time. Three years should constitute an adequate period for the constitution of sufficient historical information on claims to assess the necessity or otherwise of one single pool. This Regulation therefore grants an exemption to any such group which is newly-created in order to cover a new risk, for the first three years of its existence.

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(20) The definition of 'new risks' clarifies that only risks which did not exist before are included in the definition, thus excluding for example risks which hitherto existed but were not insured. Moreover, a risk whose nature changes significantly (for example a considerable increase in terrorist activity) falls outside the definition, as the risk itself is not new in that case. A new risk, by its nature, requires an entirely new insurance product, and cannot be covered by additions or modifications to an existing insurance product.

(21) For risks which are not new, it is recognised that such co-insurance and co-reinsurance groups which involve a restriction of competition can also, in certain limited circumstances, involve benefits such as to justify an exemption under Article 81(3) of the Treaty, even if they could be replaced by two or more competing insurance entities. They may for example, allow their members to gain the necessary experience of the sector of insurance involved, they may allow cost savings, or reduction of premiums through joint reinsurance on advantageous terms. However, any exemption for such groups is not justified if the group in question benefits from a significant level of market power, since in those circumstances the restriction of competition deriving from the existence of the pool would normally outweigh any possible advantages.

(22) This Regulation therefore grants an exemption to any such co-insurance or co-reinsurance group which has existed for more than three years, or which is not created in order to cover a new risk, on condition that the insurance products underwritten within the group by its members do not exceed the following thresholds: 25 % of the relevant market in the case of co-reinsurance groups, and 20 % in the case of co-insurance groups. The threshold for co-insurance groups is lower because the co-insurance pools may involve uniform policy conditions and commercial premiums. These exemptions however only apply if the group in question meets the further conditions laid out in this Regulation, which are intended to keep to a minimum the restrictions of competition between the members of the group.

(23) Pools falling outside the scope of this Regulation may be eligible for an individual exemption, depending on the details of the pool itself and the specific conditions of the market in question. Considering that many insurance markets are constantly evolving, an individual analysis would be necessary in such cases in order to determine whether or not the conditions of Article 81(3) of the Treaty are met.

(24) The adoption by an association or associations of insurance or reinsurance undertakings of technical specifications, rules or codes of practice concerning safety devices, and of procedures for evaluating the compliance of safety devices with those technical specifications, rules or codes of practice, can be beneficial in providing a benchmark to insurers and reinsurers when assessing the extent of the risk they are asked to cover in a specific case, which depends on the quality of security equipment and of its installation and maintenance. However, where there exist Community-level technical specifications, classification systems, rules, procedures or codes of practice harmonised in line with Community legislation covering the free movement of goods, it is not appropriate to exempt by regulation any agreements among insurers on the same subject, since the objective of such harmonisation at European level is to lay down