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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
C(XXXX)

Draft

COMMISSION REGULATION (EC) No XX/XX

of [XX/XX/XXXX]

**on the application of Article 81(3) of the Treaty to certain categories of agreements,
decisions and concerted practices in the insurance sector**

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on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector

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 81(3)¹ of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector², and in particular Article 1(1)(a), (b), (c) and (e) thereof

Having published a draft of this Regulation³,

After consulting 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 (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3)

¹ The title of Council Regulation (EEC) No 1534/91 has been adjusted to take account of the renumbering of the Articles of the EC Treaty in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty.

² OJ L 143, 7.6.1991, p. 1.

³ OJ C [To be inserted].

of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector⁴. Regulation (EC) No 358/2003, expires on 31 March 2010.

- (3) Regulation (EC) No 358/2003 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. Furthermore, although Regulation (EC) No 358/2003 granted an exemption for the establishment of standard policy conditions and the testing and acceptance of security devices, this Regulation does not do so since the Commission's review of the functioning of Regulation (EC) No 358/2003 revealed that it was no longer necessary to include such agreements in a sector specific block exemption regulation.
- (4) Following a public consultation launched on 17 April 2008, the Commission adopted, on 24 March 2009 a report to the European Parliament and the Council on the functioning of Regulation (EC) No 358/2003⁵ (the Report) . In the Report and its accompanying Working Document preliminary proposals for the amendment of Regulation (EC) No 358/2003 were made. On 2 June 2009, the Commission held a public meeting with interested parties, including representatives of the insurance sector, consumer organisations, and national competition authorities, on the findings and proposals in the Report and Working Document. [On [insert date if this happens], the European Economic and Social Committee adopted an opinion on the Commission's report [insert reference as endnote]. On [insert date if this happens], the Parliament adopted a Resolution on the Commission's report [insert reference as endnote].] On [insert date] 2009, the Commission published a draft of this Regulation in the *Official Journal of the European Union*, with an invitation to interested parties to submit comments not later than [insert date] 2009.
- (5) A new Regulation should meet the requirements of ensuring effective protection of competition while providing benefits to consumers and adequate legal security for undertakings. The pursuit of these objectives should take account of the Commission's experience in this field since 1992, and the results of the 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 continue the approach taken in Regulation (EC) No 358/2003 by placing the emphasis on defining categories of agreements which are exempted up to a certain level of market share and on specifying the restrictions or clauses which are not to be contained in such agreements.

⁴ OJ L53, 28.2.2003, p. 8.

⁵ COM (2009) 138 final.

- (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 must 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 compilation of information allowing 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 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 in particular that agreements on commercial premiums are not exempted; indeed, commercial premiums may be lower than the amounts indicated by the results of the compilations, tables or studies in question, since insurers can use the revenues from their investments in order to reduce their premiums. Moreover, the compilations, tables or studies in question should be non-binding and serve only for reference purposes. The exchange of information not necessary to attain the objectives set out in this recital is not covered by this Regulation.
- (11) Moreover, the narrower the categories into which statistics on the cost of covering a specified risk in the past are grouped, the more leeway insurance undertakings have to differentiate their commercial premiums when they calculate them. It is therefore appropriate to exempt joint compilations 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, access to such compilations, tables and studies is necessary both for insurance undertakings active on the geographic or product market in question and for those considering entering that market. Similarly access to such compilations, tables and studies may be of value to interested third parties, such as consumer organisations, large customers or academics. Insurance undertakings not yet active on the market in question and interested third parties must be granted access to such compilations 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 compilations, 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.
- (13) The reliability of joint compilations, 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 compilations, but those with small market shares may not be able to do so, and new entrants are even less likely to be able to generate such statistics. The inclusion in such joint compilations, tables and studies of information from all insurers on a market, including large ones, in principle 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 compilations and joint studies to market share thresholds.

- (14) It is recognised that co-insurance or co-reinsurance pools can, in certain limited circumstances, be necessary to allow a pool's members to provide insurance or reinsurance for risks for which they might only offer insufficient cover in the absence of the pool. These types of pools do not give rise to a restriction of competition under Article 81(1) of the Treaty and are thus not prohibited by it.
- (15) Co-insurance or co-reinsurance pools can allow insurers and reinsurers to provide insurance or reinsurance for risks even if pooling goes beyond what is necessary to ensure that such a risk is covered. However, such pools 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 pools can benefit from exemption.
- (16) 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 pools 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 without a market share threshold. 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 pool which is newly-created in order to cover a new risk, for the first three years of its existence.
- (17) The definition of "new risks" clarifies that only risks which did not exist before or, exceptionally, 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 are included in the definition.
- (18) For risks which are not new, it is recognised that co-insurance and co-reinsurance pools which involve a restriction of competition can, in certain limited circumstances, involve benefits so 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 commercial premiums through joint reinsurance on advantageous terms. However, any exemption 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. It is necessary to exclude from the block exemption pools between undertakings whose combined market share exceeds a certain level.

- (19) This Regulation therefore should grant an exemption to any such co-insurance or co-reinsurance pool which has existed for more than three years, or which is not created in order to cover a new risk, on condition that the aggregate market share held by the participating undertakings inside and outside a pool does not exceed the following thresholds: 25 % of any relevant market in the case of co-reinsurance pools, and 20 % in the case of co-insurance pools. The threshold for co-insurance pools is lower because co-insurance pools may involve uniform policy conditions and commercial premiums. These exemptions however should only apply if the pool 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 pool. An individual analysis would be necessary in such cases, in order to determine whether or not the conditions set out in this Regulation are fulfilled.
- (20) Pools falling outside the scope of this Regulation and *ad-hoc* co-insurance or co-reinsurance arrangements on the subscription market, which may fall under Article 81(1) of the Treaty, may be eligible for an individual exemption, based on Article 81(3) of the Treaty, depending on the details of the pool itself and the specific conditions of the markets in question. Considering that many insurance markets are constantly evolving, an individual self-assessment would be necessary in such cases in order to determine whether or not the conditions of Article 81(3) of the Treaty are met.
- (21) In order to facilitate the conclusion of agreements, some of which can involve significant investment decisions, the period of validity of this Regulation should be fixed at seven years.
- (22) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁶, where it finds in a particular case that an agreement to which the exemptions provided for in Articles 2 or 5 apply nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice. This could apply for example where, in relation to the common coverage of certain types of risks to which the exemption in Article 5 applies, the setting-up or operation of a pool results, in the sharing of the markets for the insurance products concerned or for neighbouring products.
- (23) Article 29(2) of Regulation (EC) No 1/2003 empowers the competition authorities of a Member State to withdraw the benefit of this Regulation in respect of the territory of that Member State, where it finds in a particular case that an agreement to which the exemptions provided for in Articles 2 or 5 apply nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice, in the territory of that Member State.
- (24) This Regulation is without prejudice to the application of Article 82 of the Treaty.
- (25) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application

⁶ OJ L 1, 4.1.2003, p.1.

throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,

HAS ADOPTED THIS REGULATION:

CHAPTER I

Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

1. 'Agreement' means an agreement, a decision of an association of undertakings or a concerted practice;
2. 'Participating undertakings' means undertakings party to the agreement and their respective connected undertakings;
3. 'Connected undertakings' means:
 - (a) undertakings in which a party to the agreement, directly or indirectly:
 - (i) has the power to exercise more than half the voting rights, or
 - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - (iii) has the right to manage the undertaking's affairs;
 - (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
 - (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
 - (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
 - (e) undertakings in which the rights or powers listed in (a) are jointly held by:
 - (i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
 - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

4. 'Co-insurance pools' means groups set up by insurance undertakings either directly or through brokers or authorised agents, with the exception of *ad-hoc* co-insurance arrangements on the subscription market whereby a certain part of a given risk is covered by a lead insurer and the remaining part of the risk is covered by follow insurers who are invited to cover the remainder, which:
 - (a) agree to underwrite in the name and for the account of all the participants the insurance of a specified risk category; or
 - (b) entrust the underwriting and management of the insurance of a specified risk category in their name and on their behalf to one of the insurance undertakings, to a common broker or to a common body set up for this purpose;
5. 'Co-reinsurance pools'" means groups set up by insurance undertakings either directly or through broker or authorised agents, possibly with the assistance of one or more re-insurance undertakings, with the exception of *ad-hoc* co-reinsurance arrangements 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 in the re-insurance of the same category of risks;
6. 'New risks' means risks which:
 - (a) 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; or
 - (b) 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.
7. 'Commercial premium' means the price which is charged to the purchaser of an insurance policy.

CHAPTER II

JOINT COMPILATIONS, TABLES, AND STUDIES

Article 2

Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, Article 81(1) of the Treaty shall not apply to agreements entered into between two or more undertakings in the insurance sector with respect to:

- (a) the joint compilation and distribution of information necessary for the:
 - (i) calculation of the average cost of covering a specified risk in the past (hereinafter ‘compilations’);
 - (ii) construction of mortality tables, and tables showing the frequency of illness, accident and invalidity in connection with insurance involving an element of capitalisation (hereinafter “‘tables’”);
- (b) the joint carrying-out of studies on the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment (hereinafter ‘studies’), and the distribution of the results of such studies.

Article 3

Conditions for exemption

1. The exemption provided for in Article 2(a) shall apply on condition that the compilations or tables:
 - (a) are based on the assembly of data, spread over a number of risk-years chosen as an observation period, which relate to identical or comparable risks in sufficient numbers to constitute a base which can be handled statistically and which will yield figures on (inter alia):
 - (i) the number of claims during the said period,
 - (ii) the number of individual risks insured in each risk-year of the chosen observation period,
 - (iii) the total amounts paid or payable in respect of claims that have arisen during the said period,

- (iv) the total amount of capital insured for each risk-year during the chosen observation period;
 - (b) include as detailed a breakdown of the available statistics as is actuarially adequate;
 - (c) do not include in any way elements for contingencies, income deriving from reserves, administrative or commercial costs or fiscal or para-fiscal contributions, and take into account neither revenues from investments nor anticipated profits.
2. The exemptions provided for in both Article 2(a) and Article 2(b) shall apply on condition that the compilations, tables or study results:
- (a) do not identify the insurance undertakings concerned or any insured party;
 - (b) when compiled and distributed, include a statement that they are non-binding;
 - (c) do not contain any indication of the level of commercial premiums;
 - (d) are made available on reasonable, affordable and non-discriminatory terms, to any insurance undertaking which requests a copy of them, including insurance undertakings which are not active on the geographic or product market to which those compilations, tables or study results refer;
 - (e) except where non-disclosure is justified on grounds of public security, are made available on reasonable, affordable and non-discriminatory terms, to any interested third party such as consumer organisations which requests a copy of them.

Article 4

Agreements not covered by the exemption

The exemption provided for in Article 2 shall not apply where participating undertakings enter into an undertaking or commitment among themselves, or oblige other undertakings, not to use compilations or tables that differ from those established pursuant to Article 2(a), or not to depart from the results of the studies referred to in Article 2(b).

CHAPTER III

COMMON COVERAGE OF CERTAIN TYPES OF RISKS

Article 5

Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to agreements entered into between two or more undertakings in the insurance sector with respect to the setting-up and operation of pools of insurance undertakings or of insurance undertakings and reinsurance undertakings for the common coverage of a specific category of risks in the form of co-insurance or co-reinsurance.

Article 6

Application of exemption and market share thresholds

1. As concerns co-insurance or co-reinsurance pools which are created in order exclusively to cover new risks, the exemption provided for in Article 5 shall apply for a period of three years from the date of the first establishment of the pool, regardless of the market share of the pool.
2. As concerns co-insurance or co-reinsurance pools which do not fall within the scope of the first paragraph, the exemption provided for in Article 5 shall apply as long as this Regulation remains in force, on condition that the aggregate market share held by the participating undertakings inside and outside a pool does not exceed:
 - (a) in the case of co-insurance pools, 20% of any relevant market;
 - (b) in the case of co-reinsurance pools, 25% of any relevant market.
3. For the purposes of applying the market share thresholds provided for in paragraph 2, the following rules shall apply:
 - (a) the market share shall be calculated on the basis of gross premium income; if gross premium income data are not available, estimates based on other reliable market information, including insurance cover provided or insured risk value, may be used to establish the market share of the undertaking concerned;
 - (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
4. Where the market share referred to in point (a) of paragraph 2 initially is below or equal to 20% but subsequently rises above that level without exceeding 25%, the

exemption provided for in Article 5 shall continue to apply for a period of two consecutive calendar years following the year in which the 20% threshold was first exceeded.

5. Where the market share referred to in point (a) of paragraph 2 initially is below or equal to 20% but subsequently rises above 25%, the exemption provided for in Article 5 shall continue to apply for a period of one calendar year following the year in which the level of 25% was first exceeded.
6. The benefit of paragraphs 4 and 5 may not be combined so as to exceed a period of two calendar years.
7. Where the market share referred to in point (b) of paragraph 2 initially is below or equal to 25% but subsequently rises above that level without exceeding 30%, the exemption provided for in Article 5 shall continue to apply for a period of two consecutive calendar years following the year in which the 25% threshold was first exceeded.
8. Where the market share referred to in point (b) of paragraph 2 initially is below or equal to 25% but subsequently rises above 30%, the exemption provided for in Article 5 shall continue to apply for a period of one calendar year following the year in which the level of 30% was first exceeded.
9. The benefit of paragraphs 7 and 8 may not be combined so as to exceed a period of two calendar years.

Article 7

Conditions for exemption

The exemption provided for in Article 5 shall apply on condition that:

- (a) each participating undertaking having given a reasonable period of notice has the right to withdraw from the pool, without incurring any sanctions;
- (b) the rules of the pool do not oblige any member of the pool to insure or re-insure through the pool and do not oblige any member of the pool not to insure or re-insure outside the pool in whole or in part, any risk of the type covered by the pool;
- (c) the rules of the pool do not restrict the activity of the pool or its members to the insurance or reinsurance of risks located in any particular geographical part of the European Union;

- (g) no member of the group, or undertaking which exercises a determining influence on the commercial policy of the group, is also a member of, or exercises a determining influence on the commercial policy of, a different group active on the same relevant market.

CHAPTER IV
MISCELLANEOUS PROVISIONS

Article 8

Period of validity

This Regulation shall enter into force on 1 April 2010. It shall expire on 31 March 2017.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
Neelie Kroes
Member of the Commission