Public consultation on review of the competition rules applicable to agreements in the Insurance sector – draft new Insurance BER 5.10.09

INTRODUCTION

FERMA, the Federation of European Risk Management Associations, welcomes this new opportunity to comment on the proposed draft Insurance BER. FERMA's comments and reactions below are in line with the previous submissions made by FERMA.

Since the Business Insurance Inquiry, FERMA actively followed the Commission consultations on the functioning of the current BER, which started at the end of 2007. In particular, FERMA responded to information requests in 2008 and commented on the Report and Working Document on the functioning of the Insurance BER that the Commission issued in March 2009. Then, FERMA participated in the Hearing organised by the Commission on 2 June 2009. Marie Gemma Dequae, [President of FERMA], participated in the panel discussion on common coverage of certain types of risks (pools).

FERMA welcomes the fact that the draft regulation confirms some important improvements to the Insurance BER. On the other hand, FERMA also notes some shortcomings and too narrow improvements which could affect legal certainty. Those limitations could jeopardize some forms of highly valued and beneficial cooperation between insurers and the risk management community.

FERMA provide below its comments on the draft Insurance BER.

1. **FERMA welcomes the extension of the exemption for pools, subject to the following observations:**

1. a) Scope of exemption in relation to the nature of risk covered:

According to the Commission, some pools do not fall within the scope of Article 81.1 of the EC Treaty and, hence, do not need to benefit from the BER for the simple reason that its members would not be able to provide the necessary capacity for the reinsurance of these risks. It is alleged that these pools are so necessary that they do not need exemption in the first place.

The necessity test has to be a permanent assessment test and not a test carried out only once, at the formation of the pool. It is of utmost importance to take into account the evolution in insurance markets. Absence of insurance capacity in the commercial insurance market today can change rather rapidly over time. Being created in a period of capacity shortfall, pools may not restrain the commercial insurance market from growing into that risk. The insurance market has to remain dynamic and competitive.

Avenue Louis Gribaumont, 1 / B4 – 1150 Brussels – Belgium
Phone : +32 2 761 94 32 – Fax : +32 2 771 87 20 - Email : info.ferma.eu – www.ferma.eu

Therefore, the status of pools has to be checked regularly against market reality. The definition of aggregate market share, including participating undertakings' shares inside and outside a pool, can be a useful indicator for evaluating the necessity of pools.

1. b) Other pooling arrangements failing the necessity test, require exemption subject to certain conditions.

FERMA acknowledges the inclusion in the market share calculation of individual shares held by the participating undertakings outside of a pool.

FERMA is in favour of an increase of the market share thresholds set out in the BER (above 20% for co-insurance groups and above 25% for co-reinsurance groups) in order to provide exemption to co-insurance or co-reinsurance pools comprising large and medium sized companies. In the absence of an increase in the thresholds, FERMA believes that a number of large and medium sized companies will be reluctant to either participate in pools or remain within existing pools. These large and medium sized companies often contribute most to the building of financial capacity and risk experience.

FERMA also supports the amendment in art.7 a) where the term of one year has been taken out, and as such creates more flexibility getting out of the pool upon short notice and, hence, supporting competition.

FERMA also supports the amendment in art.7 b) whereby pool members are allowed to insure or re-insure outside the pool and as such competing against the pool.

1. c) Definitions of <u>relevant market</u>:

Market definition is a prerequisite in order to assess the applicability of the Insurance BER. A clearer definition of the relevant market for the purposes of Article 7(2) of the Insurance BER has been requested, for a long time, by different parties (including the CEA and the members of the panel at the hearing on 2 June).

The absence of guidance on market definition in the insurance sector creates uncertainty. Such uncertainty would result in a significant risk of non-cooperation and thus a decrease in insurance capacity.

FERMA is asking for more guidance providing a clearer definition of the relevant market for the purposes of Article 7(2).

1. d) Scope and definition of <u>new risks</u>:

Concerning the scope, FERMA observes that the coverage of new risks can be exempted without market share threshold for a period of three years.

As suggested by the CEA, FERMA proposes that this exemption period in Article 6(1) of the draft insurance BER be extended from three to five years in order to enable insurance and reinsurance undertakings acquire sufficient experience of risks with which

Avenue Louis Gribaumont, 1 / B4 – 1150 Brussels – Belgium
Phone : +32 2 761 94 32 – Fax : +32 2 771 87 20 - Email : info.ferma.eu – www.ferma.eu

they are unfamiliar. Five years constitutes an adequate period for the constitution of sufficient historical information on claims and to ascertain the potential damages in a new risk environment.

FERMA acknowledges the extension in definition of new risks in art. 1.6 but would welcome interpretative guidance in this area.

According to FERMA, new risks should include:

- Risks with increasing frequency and severity (e.g. terrorism, climate change, etc.)

- Risks that have not previously been covered: e.g. new scheme required by the Environmental Liability Directive (claimant is the environmental authority instead of a private damaged third party, insured is subject to mandatory notification of the facts to the public authority, duties to be covered on behalf of the responsible insured include repairing natural resources, temporal scope of claims development,…)

- Risks no longer insurable due to more (and new) exclusions appearing in general conditions: e.g. EMF (electromagnetic fields), nanotechnology, toxic mould… Such risks equally need adequate insurance coverage.

FERMA would appreciate receiving further guidance and confirmation that the new definition encompasses the above new risks.

1. e) On recital 20 concerning '<u>ad hoc co-insurance or co-reinsurance arrangements on the subscription market</u>'.

FERMA is concerned that this recital can restrict the operation of the subscription market and thereby reduce market capacity (or make access to market capacity more difficult) to the disadvantage of insurance buyers. These concerns are also shared by the insurance market itself.

FERMA acknowledges that ad hoc co-insurance and co-reinsurance arrangements fall outside the scope of this Regulation. This is understandable as these structures are not pools. The absence of an exemption nevertheless leaves open the continuation and justification of this practice. This practice is part of the basic functioning of the insurance market in Europe (both the London and the Continental European markets). As this practice has been working properly so far and proved its benefits, it should not be hindered. Rather, it should be permitted and allowed to continue. In this respect, FERMA considers that ad hoc arrangements bring cognizable efficiencies under Article 81.3 of the EC Treaty.

Following the insurance sector inquiry, FERMA has noted a lot of initiatives of associations (insurers, brokers and risk managers) to address the limited concerns of the Commission. Those initiatives are not only intended to further promote competition in this area but also to introduce more transparency toward corporate insureds.

Avenue Louis Gribaumont, 1 / B4 – 1150 Brussels – Belgium
Phone : +32 2 761 94 32 – Fax : +32 2 771 87 20 - Email : info.ferma.eu – www.ferma.eu

For the foregoing reasons, FERMA respectfully submits that any reference to ad hoc co-(re)insurance arrangements in the future Regulation would be misplaced. .

2. FERMA welcomes the exemption on joint compilations, tables and studies.

2. a) FERMA acknowledges the extension of exemption for joint compilations, tables and studies, responding to a continued need for a BER in this area.

FERMA welcomes the transparency initiative which would allow insurance buyers and all stakeholders (incl. academics) to take part in and to have access to data jointly generated by insurers, within boundaries and limited to valuable information.

Joint calculation on the actual cost of risk is crucial to market access by new entrants. Joint calculations and statistics are important for large insurance buyers as this information is an important tool in benchmarking and searching improvement in their risk management. However, granting access to joint calculations and statistics may not be effective in all situations. This is because actuarial data generated for certain insurance products are very complex and difficult to exploit without actuarial expertise.

2. b) Public security exception for denying access to results of joint studies:

FERMA looks forward to and welcomes the access of compilations, studies and tables in order to improve our risk management results. FERMA has not identified any situation where disclosure would pose a threat to public security.

FERMA expects that the Commission will explain and strictly define the non-disclosure exception on grounds of public security and asks, as a stakeholder, for further guidance on circumstances in which they could legitimately be invoked.

3. FERMA is concerned by the non-renewal of the SPC's (standard policy conditions).

FERMA shares the same concerns as the CEA and considers cooperation on SPCs very valuable as it helps to create transparency in the insurance market. For large commercial buyers, it reduces transaction costs, facilitates the comparison between policy conditions and provides better contract certainty.

The existence and evolution of new risks will influence standard terms and conditions of insurance policies. Since the definition of new risks has been extended in the draft, it would be logical to have SPCs covering such risks being protected by the insurance BER. Non-renewal will increase significantly the risk of non-cooperation and legal uncertainty.

FERMA believes that, to the extent that SPCs will fall outside of the BER, the Commission should, at the very least, issue guidance so as to provide sufficient comfort and legal certainty as of March 2010.

Avenue Louis Gribaumont, 1 / B4 – 1150 Brussels – Belgium
Phone : +32 2 761 94 32 – Fax : +32 2 771 87 20 - Email : info.ferma.eu – www.ferma.eu

4. FERMA acknowledges the non-renewal of BER for security devices.

Security devices reduce the level of uncertainty and enable the insurers to better assess the risk so as to calculate more precisely the premium.

It is FERMA's experience that the insurers have the tendency to adopt security requirements going beyond what is strictly necessary and, hence, could operate without this extension.

Avenue Louis Gribaumont, 1 / B4 – 1150 Brussels – Belgium
Phone : +32 2 761 94 32 – Fax : +32 2 771 87 20 - Email : info.ferma.eu – www.ferma.eu