COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL REGULATION (EEC)
on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector

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(presented by the Commission)

Explanatory Memorandum

I. Reasons for the adoption of a regulation

In its judgment of 27 January 1987 (German Fire Insurance, Case 45/85)[1] the Court of Justice stated that the insurance sector was fully subject to Articles 85 and 86 and to Regulation No 17, thus clearly rejecting the view, which at times had been expressed in the past, that the prohibition of Article 85(1) was not applicable to the insurance sector until an implementing regulation based on Article 87 paragraph 2(c) had been adopted.

Pursuant to discussions between the Commission and the "Comité Européen des Assurances", most insurers and their associations decided to notify their agreements and recommendations. Approximately 300 notifications have been received so far by the Commission; this number may be expected to increase in the near future.

An examination of these notifications has shown that only a few of them remain outside the scope of application of Article 85(1), either because they are to be regarded as neutral with respect to competition law (for instance certain codes of conduct for the prevention of certain forms of unfair competition) or because they are covered by the Commission's Notices of July 1968 concerning agreements, decisions and concerted practices in the field of cooperation between enterprises[2] or of September 1986 concerning agreements of minor importance.[3] The other notifications concern agreements, decisions and concerted practices which fall within the scope of application of Article 85(1). They consist to a large extent of typical agreements or standardised terms of business used regularly and in large numbers by insurance companies when concluding insurance contracts with policy holders or as a basis for cooperation with other insurance companies.

(1) (1987) ECR 405, 447.

(2) OJ C 75, 29.7.1968, p. 3.

(3) OJ C 231, 12.9.1986, p. 2.

In view of the quantity of notifications which poses serious problems regarding the individual treatment of each case, the Commission envisages a general solution in the form of group exemption. The adoption of such group exemption would have the advantage of providing for a legal framework which would leave the insurance companies concerned a sufficient degree of flexibility regarding the drafting of their contracts. Moreover, such exemption would give the parties the benefit of the highest possible degree of legal security. In the present case, the material prerequisites for the establishment of group exemptions are found to exist. The notifications received by the Commission show the existence of a number of frequently occurring groups of agreements and concerted practices defined on the basis of abstract criteria, which are eligible for a general exemption from the prohibition of cartels.

II. Orientations with respect to the future contents of the envisaged group exemption

The Commission proposes to adopt a group exemption once it has, through the treatment of individual cases, gained sufficient experience to comprehensively assess the relevant restrictions of competition under Article 85(1) and (3).

The Commission's practice has already led to a clarification of a number of important questions. In its decisions "Nuovo Cegam"(4) and "Fire Insurance",(5) the Commission clearly expressed its view that cooperation between indemnity insurers in which loss statistics are jointly analysed and in which common risk premium tariffs based on common accident statistics, excluding any loading instruments such as administrative costs, intermediation costs and profits (pure premiums) are elaborated and applied, may be acceptable. However, such would in

(4) OJ L 99, 11.4.1984, p. 29; 14th Report on Competition Policy (1984), point 76.

(5) OJ L 35, 7.2.1985, p. 20; 14th Report on Competition Policy (1984), point 75.

principle not be the case where the cooperation led to the elaboration of commercial premium tariffs (i.e. the premiums actually charged to policy holders comprising the above-mentioned loading instruments).(6) This position has been confirmed by the Court of Justice in the above-mentionsd "German Fire Insurance" case.(7) In its decision "Protection and Indemnity Clubs"(8) the Commission considered agreements on mutual insurance to be eligible for exemption under certain circumstances. Moreover, the Commission will soon adopt two further exemption decisions concerning respectively a reinsurance pool(9) and cooperation in the field of industrial fire insurance.(10)

The Commission intends to deal with additional individual cases by way of formal decision, or administrative 'comfort' letter after publication of the main contents of the agreements. With a view to preparing this programme, the Commission has undertaken an examination and evaluation of the pending notifications which permits the following conclusions to be drawn regarding the contents of the future group exemption.

It is proposed that this cover types of agreements, decisions and concerted practices concerning:

- the elaboration and application of common risk premium tariffs based purely on collectively ascertained statistics or loss experience and/or of standard policy conditions;
- cooperation in the field of co-insurance and reinsurance, in particular in the forms of groups and pools;
- cooperation in respect of claims settlement procedures;
- cooperation in respect of testing and acceptance of security devices;
- cooperation in respect of registers of and information on aggravated risks.

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(6) See also Notice pursuant to Article 19(3) of Council Regulation No 17/62, oj C 259, 12.10.1989, p. 3 "Concordato Italiano Incendio".

(7) See reference No 1.

(8) OJ L 376, 31.12.1985, p. 2; 15th Report on Competition Policy (1985), point 69.

(9) Notice pursuant to Article 19(3) of Council Regulation No 17/62, OJ C 203, 8.8.1989, p. 2 "Teko".

(10) See reference No 6.

Basically, the conditions under which such agreements could be exempted are the following :

- Common risk premium tariffs based purely on collectively ascertained statistics or loss experience may only be elaborated if they constitute common actuarial calculations based on joint loss statistics with the aim to provide a technical balance on which the insurance industry can operate, to the exclusion of any loadings for instance for intermediairies' commissions, administrative costs or profits. As the Court of Justice found in its above-mentioned ruling, an exemption may in principle not be granted for commercial premium tariffs, i.e. tariffs that include not only the cover of costs incurred in relation to claims insured, but also such supplementary loadings as described above. Such tariffs should furthermore only be exempted if they are established as non-binding recommendations, leaving the participants free to depart from them.

- Standard policy conditions, although positive in the sense that they permit a comparison of the extent of coverage and prices, thus contributing towards transparency for consumers, should only be exempted if they are issued as recommendations leaving the participating companies free to depart from the standard to meet individual customers' needs. Furthermore, standard policy clauses should not unduly restrict competition, for example by uniform recommendation of a very long contractual duration without corresponding economic advantages, thus unduly preventing policy-holders from seeking cover with competing companies, or by generally recommending standard conditions systematically excluding particular types of cover, (e.g. for natural catastrophes or nuclear accidents). This exemption cannot, and does not, affect Member States' right to enact and apply their own consumer protection legislation in this area, provided this remains within the limits set by Community law.

- Agreements, decisions and concerted practices, by which insurance companies cooperate to set up co-insurance or reinsurance (or mixed co-insurance and reinsurance) arrangements, especially in the form of pools or groups, merit positive consideration in particular where they open the market for companies which otherwise could not easily enter it alone, due to limited capacity or expertise, or if they lead to a coverage of such risks that are not usually covered by individual companies. Although such schemes may restrict competition between the participating companies in the reinsurance and/or in the direct insurance field, they could be exempted under the condition that effective competition on the market is guaranteed.

  However, such agreements should not be exempted if there is a danger of monopolization of the market or if their rules would enable a participant to abuse its economic power. Additionally, they should not be construed in such a way as to make parties lose their autonomy completely and they should not entirely prevent parties from seeking reinsurance cover or participating in a co-insurance arrangement elsewhere.

- Regarding arrangements on accelerated and simplified procedures for the settlement of claims, especially in the case of damages covered by several insurance contracts, such arrangements do not, as a rule, restrict competition. Nevertheless, they should not be applied in a way detrimental to the interests of policy-holders.

- Cooperation arrangements in the field of testing and acceptance of security devices have the advantage of facilitating underwriting by eliminating the need for individual examination in each particular case. They can be considered eligible for exemption if the approval systems themselves are open to all manufacturers or fitters, are based on purely objective and qualitative criteria and do not dissuade persons from submitting to this system by way of disproportionate cost. Such arrangements are frequently accompanied by recommendations aimed to ensure that the granting or refusal of approval is reflected in some way in the participating companies' underwriting or rating policies. Recommendations of this kind would only be acceptable if they remain purely non-binding terms of reference, leaving the companies free to depart from those standards.

- Cooperation between insurers with regard to registers of or information systems on aggravated risks can help to prevent fraud. Although in general not aimed at a restriction of competition, participation in such systems should not be obligatory and should not deprive companies of the possibility to insure such risks at their own evaluation. Further, they should not be operated to the detriment of the consumer.

In the group exemption regulation, an 'opposition procedure' should be foreseen, so that companies may notify their arrangements in cases of doubt of legality of certain provisions with regard to the regulation. The benefit of this procedure should be accorded to provisions which have not been explicitly exempted but which nevertheless do not fall under the category of unacceptable or 'black' clauses.

III. Procedural aspects

Before the Commission may establish a group exemption, it is necessary that the Council adopt an enabling regulation under Article 87(2)(b) of the EEC Treaty, empowering the Commission to declare, pursuant to Article 85(3), that Article 85(1) does not apply to certain categories of agreements, decisions and concerted practices in the insurance sector.

The proposal annexed hereto takes into account the orientation described above. The draft Council regulation is conceived along the lines of Regulations No 19/65 and No 2821/71.