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REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

ON THE OPERATION OF COMMISSION REGULATION N° 3932/92 CONCERNING THE APPLICATION OF ARTICLE 81 (EX-ARTICLE 85), PARAGRAPH 3, OF THE TREATY TO CERTAIN CATEGORIES OF AGREEMENTS, DECISIONS AND CONCERTED PRACTICES IN THE FIELD OF INSURANCE.

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(Text with EEA relevance)

Notice: this report uses the new numbering of the EC Treaty articles, following the entry into force of the Amsterdam Treaty on May 1, 1999. The old numbering is nevertheless still shown in brackets.

INTRODUCTION

1. By Regulation N° 1534/91 of 31 May 1991[1], the Council empowered the Commission to adopt a Regulation on the application of Article 81-3 (ex-Article 85-3) of the EC treaty to certain types of agreements between undertakings, decisions of associations of undertakings and concerted practices (hereafter agreements) in the field of insurance. This empowerment concerns in particular agreements concerning a) the joint establishment of tariffs of risk premiums based on collective statistics or on the number of claims, b) the establishment of standard insurance conditions, c) the joint coverage of certain types of risks, d) settlement of claims, e) verification and approval of safety equipment and f) registers and information systems concerning aggravated risks.

   It is worth recalling that agreements having the aim or effect of restricting competition within the meaning of Article 81-1 (ex-Article 85-1) of the treaty can be authorised under Article 81-3 (ex-Article 85-3) if they contribute to promoting technical or economic progress or to improving production or the distribution of insurance products and if insured persons derive benefit from them, provided that the restrictions are limited to what is strictly necessary (principle of proportionality) and that they do not entirely eliminate competition on the market in question.

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[1] OJ N° L.143 of 07.06.1991, p. 1.

2. Basing itself on the empowering Regulation of the Council, the Commission adopted on 21 December 1992 its Regulation N° 3932/92 aiming to exempt four of the six types of above-mentioned[2] agreements. This Regulation covers the agreements on calculation of premiums, on the establishment of policy conditions, on the joint coverage of certain types of risk and on security equipment. The Commission considered it did not have sufficient experience as regards treatment of agreements on the settlement of claims and registers of aggravated risks to include these agreements in the field of its Exemption Regulation (hereafter the Regulation).

Under Article 8 of the Council empowering Regulation, the Commission has to submit to the European Parliament and to the Council a report on the functioning of its Regulation and formulate, if necessary, draft amendments. The Commission has to submit this report no later than six years after the entry into force of the Regulation (1 April 1993).

This report complies with that request. It includes a first part on the application of Article 81 (ex-Article 85) to the four types of agreements covered by the Regulation and a second part (significantly shorter) on the application of Article 81 (ex-Article 85) to the two types of agreements not covered by the Regulation. For each type of agreement, the Commission presents a number of considerations of a general nature, describes its practical experience and mentions possible future developments. The report does not contain adopted proposals for modifications. It does however contain a number of forward-looking ideas on which the Commission wishes to receive comments from regulatory and competition authorities of the Member States and from interested parties.

3. Before going into details, it is worth making some general comments.

First of all, the Regulation aims, like any other exemption Regulation, to free the Commission from examining a large number of similar agreements and to allow it to devote its resources to the examination of cases which deserve a specific analysis. Before the entry into force of the Regulation, the Commission's services (DG IV) were apprised of several hundred notified agreements. As from the entry into force of the Regulation, the notifying parties were invited to specify if they wished to maintain their notification(s) or if, on the other hand, they insisted on a formal position from the Commission on the compatibility of the agreements notified with Article 81 (ex-Article 85). The Commission moreover indicated that in the event of silence six months after receipt of this invitation, they would proceed to close the cases without further action. This approach allowed the reduction of the number of current notifications to a few dozen. The majority of these in fact concerned agreements aiming to create co-insurance or co-reinsurance groupings (hereafter pools). It should be stressed immediately that the evaluation of these agreements in the light of the provisions of the Regulation (Title IV) is by far the most complex one and will continue to be a priority for the Commission in the years to come.

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2 OJ N° L.398 of 31.12.1992, p. 7.

Like any other exemption Regulation, the Regulation contributes to decentralised application of Community competition law. Indeed, both national jurisdictions and national competition authorities are themselves competent to check if an agreement meets the conditions for application of the Regulation and benefits, consequently, from an exemption. Since the entry into force of the Regulation, the Commission, in addition, has laid down the methods of co-operation between itself and these jurisdictions and national authorities[3]. In the field of insurance, however, the Commission does not have a full list of the cases in which national jurisdictions or authorities have implemented the Regulation. It considers that it would be useful to have such a list before formulating precise proposals for amendments to the Regulation. Consequently it invites the national competition authorities to provide it with such lists. These might constitute a base for a discussion, within the Consultative Committee on agreements and dominant positions, on the application of the Regulation.

Since the entry into force of the Regulation, the Commission's services have twice had the opportunity of providing explanations on the implementation of this Regulation to the monitoring authorities of the Member States, within the framework of the Committee on Insurance which meets under the chairmanship of DG XV.

FIRST PART

THE CATEGORIES OF AGREEMENTS COVERED BY THE REGULATION

I. Calculation of premiums (Title II)

A. General information

4. The commercial (or gross) premium is the price that the person insured pays for the covering of a given risk. This price comprises an element which reflects the net cost of this cover. This is the risk premium. It is fixed according to the size (the intensity) of the insured risk as well as to the frequency with which this risk occurs. Insurers fix the risk premium by first determining the pure (or net) premium, which is based on the statistical data concerning the frequency and the average intensity of the risk in the past, and by then applying to it a coefficient which takes account of forecasts of the future occurrence of the risk. The commercial (or gross) premium corresponds to the risk premium plus the administrative costs and the profit margin of the individual insurers.

5. The Regulation permits insurers to co-operate with a view to calculating a uniform pure premium corresponding to the average cost of covering the risks.

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3 See its communications of 1993 (OJ N° C.39 of 13.02.1993, p. 10) and of 1997 (OJ N° C.313 of 15.10.1997, p 9).

Article 2.a specifies that co-operation has to be limited to what is necessary to create reliable statistical data on the intensity and the frequency of claims in the past. Insurers can also jointly carry out studies with a view to making forecasts on the frequency or the extent of claims in future (Article 2.b) without however calculating jointly the security charge which aims to take account of these forecasts (Article 3.b). Co-operation between insurers cannot lead to joint calculation either of administrative expenses or of insurers' profit margins (*ibidem*).

6. The *ratio legis* of Title II is as follows. Each individual risk is specific. It varies according to a series of parameters. For example, the intensity and the frequency of the automobile third-party liability risk incurred by an individual person insured will depend on a combination of factors, such as the type of car (model, engine power), the place of registration, the driver's personal profile (age, profession), etc. An insurer will seek to avoid (or at least to reduce as much as possible) the "dispersal", i.e. the divergence between, on the one hand, the real value of a claim for which the person insured has to be compensated and, on the other hand, the premium which the person insured has paid. To this end, the insurer will group similar risks and will calculate their average cost. The dispersal will decrease as a) the grouped risks are more homogeneous and b) the number of such risks is higher. Article 2.a) permits insurers to carry out precisely this grouping of risks. It is the job of actuaries and statisticians to determine the sufficient number for each type of risk. Article 2.b) enables insurers to complete their statistical data by jointly undertaking studies on the future development of the risk in question. Such co-operation makes it possible to improve knowledge of the risks and facilitates their evaluation by individual companies (see recital 6).

In this respect, it is worth adding a nuance. The question of to what extent an insurer needs really to co-operate with its competitors as regards calculation of premiums, will depend on its size. Thus, one cannot rule out that a large insurer might on its own have a sufficient size to cover sufficient similar risks to obtain reliable statistical data. In such cases, any co-operation within the meaning of Title II would have the purpose - from its point of view - not of improving its own knowledge of the risks, but rather that of its competitors whose size is not sufficient to cover enough similar risks. At that moment, the virtue of such a co-operation changes. It establishes a certain solidarity between insurers of different sizes and thus creates a level playing field to the benefit of smaller insurers [4].

B. Practical experience

7. The Commission has not had to examine in detail agreements providing for joint premium calculation in the field of life insurance. On the other hand, it has considered a number of agreements of this type in the field of non-life insurance.

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[4] Title II thus goes beyond the decisions *Nuovo Cegam* (OJ N° L 99 of 11.04.1984, p. 29) and *Concordato Incendio* (OJ N° L 15 of 19.01.1990, p. 25) by which the Commission exempted agreements on premium calculation. In those two cases, the parties to the agreement represented only a part of the market (respectively 26% and 50%) and the Commission had justified the exemption while referring to the difficulties that members would have encountered in entering the market without such an agreement.

All these cases involved recommendations emanating from insurers' national associations. In other words, co-operation as regards calculation of premiums extended to (almost) all the active operators on the national market concerned.

In two cases (one involving the German association VdS, the other the Belgian association UPEA), the examination took place without any formal procedure. A third case concerned a notification carried out by UPEA. The last two cases (pertaining to recommendations from the Italian association ANIA) were the subject of a *ex officio* procedure.

8. The German case concerned the compilation of statistics concerning third party liability risks for cars. The association *Verband der Sachversicherer* (VdS) had set itself the goal of determining the average cost of covering the risks (average pure premium) according to the engine output as well as claims rates in the various regions. In Germany, there are 400 regions for car registrations. The VdS had claimed that it was necessary to have at least approximately thirty thousand risks to calculate in a reliable way the regional claim rate. This is why the VdS had included neighbouring regions and had used 320 regions covering each one at least thirty thousand risks. It had informally asked the Commission's services whether it could further group the 320 pure premiums resulting from this first classification into ten overall regional classes. At the end of 1995, the Commission's services answered in the negative, commenting that this second grouping exceeded the limits laid down by Article 2a) of the Regulation. Indeed, the number sufficient to constitute "the population which can be handled statistically" within the meaning of this provision had been reached with the reduction to 320 regions. It was therefore for the individual insurers to reduce this number still further and to make their own wider classes.

9. The case involving the Belgian professional association of insurance companies (UPEA) had been communicated to the Commission's services by the Belgian consumers' association *Test Achats*. It had complained, *inter alia*, about a recommendation from UPEA aiming to establish a minimum pure premium for the coverage of hospital expenses in the case of group contracts. There was a uniform premium for contracts with groups containing up to 10 members and reductions for contracts with larger groups. There was nothing to indicate that this recommendation was based on statistical data. The Commission's services, consequently, concluded that the recommendation was not in conformity with Title II and they informed *Test Achats* and UPEA. The matter was then pursued before national jurisdictions. The Commercial Court and then the Brussels Court of Appeal both followed the informal standpoint of the Commission's services[5]. Currently, the case is being dealt with by the Supreme Court (*Cour de Cassation*).

10. The other case involving UPEA involved a recommendation concerning the calculation of premiums for so-called special risks, concerning fire coverage for movable and immovable properties with a value above a certain amount, and thus in particular numerous industrial properties. UPEA had already notified this recommendation in 1988, well before the entry into force of the Regulation.

5 - Judgement of the President of the *Tribunal de Commerce* of Sept. 1, 1995, upheld by the Brussels Court of Appeals on May 24, 1996.

Instead of recommending an average pure premium, UPEA encouraged its members to increase or decrease the "basic commercial premium", that is, the basic pure premium plus the administration and distribution expenses of each individual insurer. The choice of this base already placed the recommendation outside the scope of the Regulation. Moreover, each aggravating or mitigating factor was expressed as a percentage increase or reduction (typically 10%) which did not appear to be founded on any statistical exercise - a further reason to conclude that the recommendation was not covered by the Regulation. This conclusion was finally corroborated by a declaration of UPEA itself according to which the premiums actually charged by the insurers were generally appreciably lower than those which would result from the application of the recommended tariff. Having regard to the considerable divergences between the premiums charged by insurers, the Commission's services restricted themselves to informing UPEA of the incompatibility of its recommendation with Title II and finally closed the case without further action.

11. Finally the Commission's services launched two "*ex officio*" (own initiative) cases to examine recommendations from ANIA.

The first recommendation concerned the application by insurers of surcharges to marine cargo insurance premiums. Since these surcharges were added to the (gross) commercial premiums, the recommendation of ANIA resembled the one by the VdS that the Commission had formally condemned in 1987 and the Regulation seemed obviously inapplicable to it. Following the sending of a formal statement of objections, ANIA explained at the oral hearing (and then confirmed in writing) that the surcharges were expressed in percentage terms of the value of the assets ensured (and not of the commercial premium) and that all these percentages had a statistical base. Under these conditions, the Commission's services decided to close the case without further action as soon as ANIA has furthermore clarified that its recommendation is purely indicative and does not commit its members at all (See Article 3a).

In 1997, the Commission's services initiated an "own initiative" procedure with the aim of checking if some other recommendations of ANIA really meet all the conditions for application of Title II of Regulation 3932/92. This involves *inter alia* recommendations or databases as regards motor insurance (including general risks, theft, fire, and third party liability)[6] . This procedure again confronts the Commission's services with the difficult task of checking the compatibility of an agreement with Title II. The examination currently in hand aims to check, on the one hand, if the data that each insurer has to provide to ANIA is limited to what is necessary to determine the average frequency of the claims and the average cost of cover and, on the other hand, what effect the recommendation produces on the commercial premiums that insurers charge in practice.

6 At the beginning of 1993, ANIA had certified that the recommendation on various car insurance risks (theft , fire) would be modified in the light of the provisions of Title II of the Regulation. The Italian competition authority (the Autorità) then challenged the validity under Italian competition law of this recommendation as well as of other recommendations, for the reason that it led the insurers to apply uniform commercial premiums. The Autorità adopted a prohibition decision and imposed a fine on ANIA, but the latter obtained the annulment of the fine first by the Latium court and then by a decision of the Council of State.

C. Future prospects

12. The legality test stated in Title II is clear : co-operation as regards premium calculation has to remain within the limits of what is necessary to form groups of comparable risks in sufficient number to constitute a population capable of being handled statistically (Article 2.a). Each insurer must have free choice as to the setting-up of other groups. It will make its choice on the basis of criteria related to statistical technique but also of other criteria related to its commercial policy.

If the legality test is clear, its implementation is not easy. The risk grouping permitted by the Regulation is a technical exercise that insurers entrust to actuaries and that the Commission's services are not in a position to analyse and to evaluate in detail. In addition, if they started such an effort, the Regulation would lose its *raison d'être*, namely to make it possible to insurers to have their agreements benefit from an exemption without having to notify them to the Commission.

The Commission's services will therefore restrict themselves to examining whether the body instructed to calculate the average pure premium only a) collects from insurers the data necessary from a statistical point of view to calculate this premium and b) then passes on to them only this aggregated data (namely the total number of claims during the period of observation and the total of the payments made or due in respect of the claims which have occurred during this period).

If they experience difficulties in checking whether the conditions of application of Title II of the Regulation are met, the Commission's services will examine what concrete effect the co-operation as regards calculation of the premiums produces on the market in question. If insurers depart from the joint calculations of the average pure premium and/or apply different commercial premiums, the Commission's services will have to evaluate the extent of the departure and/or the differences with a view to judging if the agreement in question restricts competition in an appreciable way. If that is not the case, it will not be necessary to intervene.

II. Standard policy conditions (Titre III)

A. General

13. Title III exempts agreements which have as their object the establishment and distribution of standard policy conditions for direct insurance (Article 5-1) as well as common models illustrating the profits to be realised from an insurance policy involving an element of capitalisation (Article 5-2).

These agreements restrict competition insofar as they tend to lead to uniform conditions being offered by insurers, and therefore to limit customer choice. However, they "have the advantage of improving the comparability of cover for

the consumer and of allowing risks to be classified more uniformly" (recital 7). As full standardisation would not leave customers much to choose from, the exemption only applies to standard conditions or common models which indicate explicitly that they are purely illustrative, i.e. that they are established for guidance only (Article 6-1 and 6-2). Furthermore, insurers are not allowed to agree among themselves that the standardised policy conditions are the only ones to be applied by them (Article 7-2).

14. Since the entry into force of the Regulation, the Commission's services have not had to handle any cases related to common models. The present Report will therefore focus on the scope of Articles 7 and 8 regarding policy conditions.

15. Article 7 contains a list of conditions which insurers cannot agree to impose on their customers. These (under the Regulation) unexemptable standard conditions are known as « black clauses ». By and large, they fall into three categories.

The first category comprises the clauses featuring in Article 7-1 sub a to d. These all concern the extent of the cover. Those excluding from the cover certain risks belonging to the class of insurance concerned (sub a), making the cover of certain risks subject to specific conditions (sub b) or imposing comprehensive cover for risks to which a significant number of policyholders is not simultaneously exposed (sub c) are unexemptable unless they indicate that insurers remain free to derogate from them. The clause sub d indicating the amount of the cover or the « excess » (i.e. the amount not covered) is « black » under all circumstances (i.e. even if insurers can derogate from it).

A second set of clauses (sub e to i) deals with the duration of the policy and aims at avoiding insurers creating too captive a customer base. Two of these clauses are nevertheless exemptable under the Regulation if their application is made subject to the express consent of the policyholder (sub e and f). The others are unexemptable without further qualification.

The third series of clauses (sub j and k) concerns forms of tying . One requires the policyholder to obtain cover from the same insurer for different risks whereas the other one requires the person acquiring a risk from the policyholder to take over the latter's insurance policy.

16. Moreover, according to Article 8, the block exemption does not apply to agreements whereby insurers undertake to exclude cover for certain risk categories because of the characteristics associated with the policyholder. Article 8 does, however, allow them to establish specific insurance conditions for particular social or occupational categories of the population.

B. Practical experience

17. Many notifications made prior to the entry into force of the Regulation, were subsequently withdrawn by the parties because they considered the notified agreements to be in line with the Regulation. Some other notifications were maintained because the parties saw room for interpreting the provisions of the Regulation, especially those listing the « black » clauses and sought the

Commission's services' assurance that the notified clauses were indeed exemptable. Occasionally, the Commission's services have also been called upon to clarify the scope of Article 7 outside the framework of a formal notification. In one such instance, it was an informal complaint that prompted them to do so (see below).

18. In some cases, the *raison d'être* itself of Article 7-1 sub a has been called into question for certain allegedly « uninsurable » risks . Insurers submitted that they should be allowed to exclude by common agreement such risks from any cover. For instance, flood risks in the Netherlands, in particular from salty water (a substantial part of the country lies below sea level), are said to be uninsurable. The national organisation of insurers (VvV) had decided to prevent insurers from offering cover for flood risks (from salty as well as from fresh water). The Commission's services queried why there was any need for such a decision if insurers considered the risks to be uninsurable anyway. The VvV defended the decision by emphasising the unique situation in the Netherlands. In some other countries, a number of different catastrophic risks (flood, fire, etc.) are incurred by different regions. This enables the government to impose solidarity on the entire population and insurers to offer a global insurance for all these risks. This was impossible in the Netherlands. In this respect, the VvV referred to the plan to have an insurance pool for fresh water flood risks in which the insurers as well as the government would take part. The Dutch State Council, however, had blocked the project on the ground that it was unreasonable to have six million fire insurance policies subsidise the 200,000 policies of households really incurring that risk. Eventually, the VvV brought its binding decision in line with Article 7.1 sub a by simply converting it into a non-binding recommendation, leaving each insurer free to extend cover to flood risks.

    In another case, a common agreement to exclude war risks from marine hull insurance was at stake. This was not considered by the Commission's services as contrary to Article 7-1 (a) in so far as this provision only aims at the exclusion from cover of losses « normally » relating to the class of insurance concerned. The term « normally », however, does not appear in all language versions. This issue will have to addressed when the Regulation expires.

19. The exact meaning of Article 7-1 (d) has also been discussed several times. As a matter of fact, the only complaint which the Commission's services have received in connection with Title III concerned this provision. The (informal) complaint was lodged by Test Achats, a Belgian consumers' organisation, and was directed against *inter alia* the recommendation issued by UPEA concerning a standard cover and the above-mentioned standard excess for hospitalisation costs (for the aspects regarding Title II see above paragraph 9). UPEA proposed to limit the cover to twice the amount of the costs which the insured could recover as an affiliate of a basic social security institution, and to set the excess at 10% of that cover (with a ceiling of 20,000 BF). The Commission's services took the view that this recommendation violated Article7-1 sub d.[7]

[7] As indicated above (paragraph 9), the matter was pursued further in the national courts.

The formally notified German *Gliedertaxe* also raised an issue of interpretation with regard to Article 7-1 sub d. As in the war risk case above, the interpretation problem is due to a lack of concordance between the various language versions of this provision. According to the German text, the block exemption is inapplicable not only if insurers agree on the amount of cover but also if they agree on any other indication (« *Angabe* «) related to cover. A recommendation issued by the German association of insurers (GDV) regarding general accident insurance spells out invalidity degrees for people who have lost a body part (e.g. limbs) or a sense organ. These indications have an impact on the level of cover offered by the insurers. While declaring Article 7-1 sub d applicable, the Commission's services nevertheless saw enough reason for issuing a comfort letter to the GDV in September 1998. They were indeed unable to rebut the argument that the absence of uniform invalidity degrees would lead to such a lack of market transparency that the insured would not be in a position to profit from competition between insurers. Moreover, the Commission's services took into account the fact that the invalidity degrees were based on medical experience and that insurers in any event were allowed to derogate from the *Gliedertaxe*.

In 1996, the standard « 3/4ths collision liability » clause in marine hull insurance (which is essentially a property insurance) was also looked at under Article 7-1 sub d. The question was whether the remaining ¼ liability had to be considered as a uniform excess in violation of Article 7-1 sub d. However, there appeared to be separate cover for that remaining ¼ liability (offered either by the hull insurer or by P. & I. Clubs). In other words, there was no genuine excess. In any event, the Commission's services obtained from the Institute of London Underwriters (ILU) and the Lloyd's Underwriters' Association (LUA) that they clarified that the ¾ liability clause was not a binding one.

20. Finally, Article 7-1 sub e has been discussed a few times. The Commission's services had to comment on GDV standard policy conditions allowing insurers to maintain the policy in the event that they increase the premium without changing the cover (*in casu* car insurance) or cancel part of the cover (*in casu* piracy risk in marine insurance). Such policy conditions are unexemptable under the Regulation unless they provide for the express consent of the policy holder that the policy be maintained. In both cases, the Commission's services nevertheless accepted the standard policy conditions in so far as they provided for an adequate notice period (requiring the policy holder to express his dissent)

21. Pursuant to Article 8, the Regulation is inapplicable to agreements which exclude the coverage of certain risk categories because of characteristics pertaining to the policyholder. A standard policy clause excluding from general accident insurance people who permanently require extensive care or who are mentally ill was declared contrary to Article 8. The fact that the exclusion would occur only some time after the conclusion of the insurance contract was considered irrelevant.

C. Future prospects

22. As some of the examples commented above illustrate, discordance between the different language versions of the Regulation has occasionally proved to be a source of interpretation problems. This Report provides the Commission with an

opportunity to invite all interested parties to signal other discordances which have led to a lack of clarity and to suggest ways to amend the current texts.

23. As previously mentioned, three standard clauses enumerated in Article 7-1 are considered to be unexemptable under the Regulation unless they indicate that each individual insurer remains free to derogate from them. This is the case for the clauses set forth in Article 7-1 sub (a) to (c). The rationale for this qualification needs to be revisited.

    First of all, Article 6-1 already provides that the Regulation only applies to « white » clauses, if « they are established and distributed with an explicit statement that they are purely illustrative », i.e. only if they leave each insurer the freedom to derogate from them. The qualification added in Article 7-1 sub a to c therefore in effect blurs the distinction between "white" and "black" clauses. Secondly, whether or not particular standard policy conditions contain an explicit statement that insurers are not bound by them, what matters is whether these conditions constitute the « faithful reflection » of the insurance association's resolve to co-ordinate the conduct of its members on the market[8]. This would be the case if in practice insurers all implement the association's recommendation. Thirdly, Article 7-1 sub d and Art .8 refer simply to « black » policy conditions (i.e. even if insurers remain free to deviate from them). And yet, these conditions are generally not more harmful to the insured than those mentioned in Article 7-1 sub a to c.

24. As we have seen, the Regulation is not applicable to agreements whereby insurers commit themselves individually not to offer cover for certain risks (see Article 7-1 sub (a) and Article 8). The question is whether this should still be the case if these insurers have decided to offer such cover in common by setting up a pool within the meaning of Title IV and if that pool is in accordance with the requirements contained therein (see below).

III Common coverage of certain risks (Titre IV)

A. General

25. Title IV concerns agreements whereby insurers set up co-insurance and co-reinsurance pools for the purpose of covering « an unspecified number of risks » (recital 10). In other words, it only concerns institutionalised pools for the common coverage of a specific category of risks (or « groups » in the parlance of the Regulation), not pools which insurers create *ad hoc* in order to cover a specified risk. The latter do not create any competition concerns at all.

26. On the other hand, the current Regulation is based on the premise that any institutionalised grouping is in itself restrictive of competition. However, a pool can benefit from the block exemption if the market share of its members (or that of the grouping itself where catastrophic or aggravated risks are concerned) does not exceed a certain threshold.

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8 See ECJ judgement in *Verband der Sachversicherer*, # 32 – Case 45/85, ECR 1987, p. 405.

In fact, pursuant to Article 11-1, a pool is exemptable under the Regulation when the market share of its participating members does not exceed 10% (in the case of co-insurance) or 15% (in the case of co-reinsurance). The market share comprises the members' global turnover in the relevant insurance market, irrespective of whether they do their business through the pool or independently. In this context, it must be noted that the requirement that all risks be brought into the pool (the so-called *obligation d'apport*) is considered as an excessive, unexemptable restriction of competition (recital 13).

Article 11-2 specifies that the market share to be taken into account in the case of coverage of catastrophic or aggravated risks only relates to « the insurance products brought into the group », i.e. the members' turnover made through the pool (subject to two conditions which are not repeated here).

The correct application of Article 11 hinges on a proper definition of the relevant product and geographic market. In a recent Notice, the Commission defines the relevant market as comprising all products which exercise competitive constraints on the product under consideration[9]. It identifies the three main constraints : demand substitutability, supply substitutability and potential market entry . Since each insurance policy is unique, and therefore demand substitutability is theoretically zero, supply substitutability is particularly important in insurance market definition. As for potential competition, this is not taken into account for the market definition but is taken into account at a later stage, to evaluate the position of the undertakings on this market (see Article 24 of the Notice)

27. The other provisions of the Regulation, in particular Articles 10-3 and 10-4 as well as Article 12 and Article 13 indicate which restrictions of their freedom of action the participants in the pool may subscribe to without the pool losing the benefit of the exemption under the Regulation. Some of these restrictions appreciably restrict competition between the participants : e.g. the obligation to use identical policy conditions and premiums (risk premium in the case of co-reinsurance, commercial premium in the case of co-insurance) or the obligation to submit claim settlements to the pool for approval. Nevertheless, these restrictions are considered to be inherent to a pooling agreement. Hence, they do not raise competition concerns on condition that the market share thresholds laid down in Article 11 are not exceeded.

B. Practical experience

28. Since the entry into force of the Regulation, the Commission's services have developed their approach with regard to pools. Conceptually speaking, they apply a three-tier legality test to find out whether a pool falls within the scope of Article 81-1 (ex-Article 85.1). The second step of this test is new, in the sense that the Regulation does not explicitly provide for it.

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[9] O.J. n° C.372 of 09.12.1997, p. 5.

a) The first question is whether the pool (or its membership) meets the market share test set forth in Article 11. One of the main difficulties encountered thus far is the adequate definition of one or more relevant product and geographic markets and, subsequently, the accurate measurement of market shares. This is due to the fact that the insurance sector organises its business along the lines of insurance risk branches (annex to the Commission's first non-life directive[10]) and that these branches do not necessarily correspond to the notion of a relevant product market. Another difficulty is that a pool often covers catastrophic or aggravated risks at the same time as normal risks. This requires an examination of the pool under Article 11-1 as well as under Article 11-2.

b) The second question only arises if the pool does not (or not entirely) meet the criteria of Article 11, in particular if it exceeds the thresholds. This question is whether such a pool is necessary to allow its members to operate in a specific market. In all areas of insurance, an insurer must, in order to be present on a market without incurring excessive risk, insure a sufficient number of risks so that the risk profile of its portfolio corresponds to the average for the totality of risks in the category. There therefore needs to be a strong probability that the real level of claims incurred by the insurer will be the same as the average level of claims of all insurers. This strong probability can only be obtained above a certain number of risks covered by the insurer. This is called the minimum dimension. Certain catastrophic risks may be such that no individual insurer is capable of insuring it alone. In such a case, the pooling of capacity does not restrict competition. If anything, the pool strengthens competition since it allows several insurers who are unable alone to provide cover for the risk at hand to put their resources in common and create a new competitor for the benefit of customers in need of such cover. It could be added that even for non-catastrophic risks, small insurers may need to group together in pools in order to attain the necessary minimum dimension. In any event, the Commission will consider that pools, no matter how high their market share is, are not covered by Article 81-1 (ex-Article 85-1) when they are necessary to allow their members to provide a type of insurance they could not provide alone.

c) If the pool is not necessary for coverage of the risks, a third question arises, namely whether or not pool members are under a contractual obligation to bring all or part of their insurance products into the pool. If there is such an *obligation d'apport*, Article 81-1 (ex-Article 85-1) definitely applies. If there is no such obligation, Article 81-1 (ex-Article 85-1) is likely to apply if the participating members do not have an commercial interest in offering their products outside the pool (see §33 *in fine*).

29. This new approach towards insurance pools (especially the second step regarding a pool's contribution to reaching a certain minimum dimension) in fact gives to Article 11 of the Regulation the effect in practice of a *de minimis* rule. It has already been applied to a claim-sharing arrangement between insurance mutuals (the equivalent of a pool in the non-profit insurance sector). In the *P&I Clubs* case (Protection and Indemnity insurance) the Commission concluded that a

[10] Council Directive n° 73/239of 24 July 1973, concerning access to the activity of direct insurance other than non-life insurance, and to its exercise. OJ n° L 228/3 of 16 August 1973.

claim-sharing agreement between mutuals covering 89% of the world market for maritime contractual and third party liability insurance is not caught by Article 81-1 (ex-Article 85-1) when it is necessary to allow its members to offer the level of cover they now offer ($US 4.25 billion). An in-depth market enquiry involving the main brokers and re-insurers operating in the P&I insurance market as well as the P&I Clubs themselves had indeed revealed that no entity or group with less than 50% of the market was currently able to offer such a level of cover. The Commission also exempted the quotation procedures which prevented Clubs from undercutting each other's prices (expressed in so-called rates per ton). It did so by analogy with Article13 of the Regulation which allows the setting of uniform risk premiums in co-reinsurance pools, but not that of commercial premiums. Indeed the amended quotation procedures will only apply to the Clubs' costs which are related to the insured risks (including – for case-specific practical reasons – the retention costs). These procedures no longer apply to the Clubs' administrative costs. For further details, this Report refers to the recently adopted Commission decision.

30. Moreover, in September 1997, the Commission's services also undertook an enquiry into the market for aviation risk insurance in order to find out whether the (notified and other) pools operating in the Community fell within the scope of Article 81-1 (ex-Article 85-1). This enquiry showed that for most risks the relevant geographic market is international because the customers (e.g. airline companies owning a large fleet of aircraft) are large companies who are able to look for the best available conditions of insurance around the world. In this market, none of the pools holds a share that even comes close to the ceilings set forth in Article 11 of the Regulation. Therefore, none of these pools appreciably restricts competition within the meaning of Article 81-1 (ex-Article 85-1) in this market (see first step of the approach). In contrast, for small, non-catastrophic risks (which represent low insured values in relation to the other aviation risks of the same branch), a national market appears to exist. Customers include smaller aircraft owners, flying clubs or parachutist clubs who have limited opportunities of looking for better insurance conditions abroad. In these national markets, the pools hold a market share which exceeds by far the Article11 thresholds (first step). Moreover, they do not seem to be necessary for the coverage of the risks (second step). However, the Commission's services decided not examine this question further. Their market enquiry had indeed shown that the coverage of these small risks accounted for a very minor share of world-wide turnover. Under those circumstances, the Commission's services concluded early in 1999 that there was no sufficient Community interest to find possible infringements of the EC Treaty's competition rules and terminated the investigation by sending administrative comfort letters to the insurers who had notified their aviation pools. These letters included a *caveat* in relation to the national markets, pointing out that national authorities could intervene against the pool's anti-competitive structure or anti-competitive behaviour by its members if they considered it appropriate. In two cases, there appeared to be no need any more for a comfort letter because, since the notification, the parties had decided to either dissolve the pool (Italy) or transform it into a company which would offer aviation risk cover in its own name (Netherlands). For reasons of proper administration, the Commission's services also informed in writing the insurers who had not notified

their pools but had also been subject to the market enquiry of the outcome of the enquiry.

31. Some further points concerning the Commission's practical experience with pools need to be made.

Firstly, it might happen that insurers consider a grouping as necessary at one time, but not thereafter. This might be because after some time the insurers gain the minimal capacity or expertise to insure these risks alone. It is also possible that the size or nature of the risks covered by the pool changes in such a way that the pool members can insure them alone. The Dutch *Invaliditeitscentrale* (IVC) co-reinsurance pool for disability risks, which was set up in 1955, provides a telling example. Initially, insurers operated all their business through the pool and were unwilling to provide cover alone because they had insufficient experience with such risks. The IVC pool was the major market player in the Netherlands. But as time passed by, insurers acquired more experience and began to compete among each other. In 1983, the pool's share had already come down to 25%. In 1993, it had dropped to even less than 5% and in 1994 insurers decided to bring no new insurance policies into the pool. The pool only remained in existence for the settling of existing policies. The pool will fade away as insured parties reach retirement age or die. In this case, the block exemption Regulation could not apply, given that the participants in the grouping together held a market share which was distinctly over the threshold of 15% laid down in Article 11-1. The Commission's services nevertheless sent an administrative comfort letter under Article 81-3 (ex-Article 85-3). They observed in particular that the risk that the participants would co-ordinate their competitive behaviour outside the grouping (the risk of "spillover") could clearly be ruled out without further market analysis, given the completely negligible market share of the grouping itself. Obviously, in other cases where the pool proves to be no longer necessary but still holds a substantial market share, the outcome will be different. For instance, in the P&I Clubs case (see above), the Commission has reserved the right to withdraw the exemption which it has granted to the quotation procedure (see above §29), should the claims-sharing arrangement at some point in time no longer be necessary for its members to offer the level of cover they then offer.

Secondly, in some pools cases, the Commission's services have issued comfort letters on the ground that the global turnover generated by the pool was so small that a further examination was not warranted. The turnover figures in question were clearly well below those allowed for SMEs in the Commission's *de minimis* notice[11]. Some Dutch pools covering professional risks (notaries, real estate agents, etc.) have benefited from this pragmatic approach. In some other cases, the insignificant level of the turnover led the Commission's services to clear the case for lack of effect on interstate trade (see e.g. Dutch pool for caravan fire insurance) or to close the case without formalising the finding of an infringement within the meaning of Article 81-1 (ex-Article 85-1) (see German car insurance

[11] However, although this notice could not be relied on as such because the insurance companies participating in the pool cannot be considered as small or medium sized undertakings within the meaning of that notice.

pool for third country owners of cars who do not show adequate liability insurance at the border).

Thirdly, in some cases, the Commission's services have applied straightforwardly the *"de minimis"* rule contained in Article 11, thereby defining the relevant product or geographic market in a broad way (e.g. an Austrian pool for international transport risks which appeared to obtain around a third of its turnover from customers abroad was considered to operate on a geographic market which was wider than Austria, the market share of another Austrian pool dealing with the insurance of Volkswagen-type cars was determined with reference to the wider product market for car insurance, an Italian pool providing entrepreneurs or contractors with insurance against late delivery of their work was considered to operate in competition with financial institutions providing such companies a bank guarantee against the same event).

C. Perspectives for the future

32. The Commission's services have just launched their investigation into co-insurance or co-reinsurance pools dealing with environmental risks and nuclear risks. Several of those pools have been notified (the French environmental pool Assurpol was actually granted an exemption in 1991. This exemption expired last year[12]). All these pools will be assessed in light of the three tier legality test spelled out above (§28).

33. A number of further points concerning the future application of the Block Exemption to pools can be made.

Firstly, the Commission recognises that for certain highly atypical risks (satellites and spacecraft, for example), it may not be possible to determine with any certainty the minimum portfolio necessary for entry to the market, and as a consequence, the necessity or otherwise of the pool for its members cannot accurately be evaluated. In such cases the Commission intends to give the benefit of the doubt to the pool and clear it, unless any other specific factors preclude a clearance.

Secondly, it is possible that a pool whose members differ greatly in size may be necessary for some members but not for others, who could be present on the market without recourse to the pool. In such cases, the Commission does not intend to break up a pool if that deprives the former totally of the chance to be present on the market. However, if the size of the pool is so large that it could be replaced by two or more pools in competition with each other, the Commission will insist that it reorganise itself in such a way.

Thirdly, the Commission is aware of the fact that insurers may set up co-insurance or co-reinsurance pools for reasons other than to create for themselves the possibility to operate in a specific market. The pool may be created as a vehicle to permit cross-subsidisation between different types of risks, to jointly purchase reinsurance, to increase the technical capacity of its members or to

12 O.J. n° L 37 of 14.02.1992, p. 16.

simplify the administration of the insurance of different risks. At this stage of their analysis, the Commission's services take the view however that insurers can achieve these objectives without having to pool their business, in other words by devising alternative methods which are less restrictive of competition (see §28 *in fine*).

IV. Safety equipment (Title V)

A. General information

34. Title V allows insurers to fix by mutual agreement a) technical specifications relating to safety equipment and procedures to check if this equipment corresponds to these specifications (Article 14 first indent) and b) conditions of approval for fitters or repairers and procedures making it possible to assess whether they meet these conditions (Article 14 second indent). This co-operation enables insurers to evaluate better the risks that they cover and to calculate more precisely the premiums that they receive. It also encourages the manufacturers of safety systems to improve them and therefore to minimise the insured risks. In theory, the person insured benefits from this because if he buys powerful safety equipment, his risk decreases and his insurance premium falls.

35. As regards the technical specifications relating to safety equipment, the Regulation is in line with the Commission's new approach on technical harmonisation and standardisation and as regards the approach on certification and tests.[13] This policy advocates a harmonisation process based on the one hand on legislation laying down essential requirements, and on the other on work by recognised European standardisation organisations, involving all market operators. Accordingly, Article 14 refers " in particular " to technical specifications "which are intended to become European standards" (See also recital 16). The words "in particular" show however that technical specifications established by insurers (or their associations) on a national scale (and therefore lacking a European vocation) are also exemptable under the Regulation on condition (*inter alia*) that they "are technically justified " (Article 15 sub a). Specifications must in particular include classification according to the performance level obtained (Article 15 sub e). Article 15 thus subjects the exemptability of these specifications to "*Cassis de Dijon*" conditions of legality applicable to State measures resulting in restriction of free movement of goods within the meaning of Article 28 (ex-Article 30) of the treaty.

36. Regarding the rules of approval of fitters and repairers, Article 14 includes no reference to a European vocation. It is enough that these rules be "objective", be applied in a non-discriminatory fashion to the undertakings involved, and concern " the professional qualifications of these companies " (Article 15 sub b).

B. Practical experience

[13] See Council Resolution of 7 May 1985 (OJ C.136/1 of 4 June 1985), Communication of the Commission of 15 June 1989 (OJ C.267/3 of 19 October 1989) and Directive 98/34 of Parliament and of the Council of 22 June 1998 (OJ C.204/37 of 21 July 1998).

37. The Commission's services have only had to examine a few cases involving Title V. Apart from a number of informal complaints relating to alarm systems in motor vehicles, they received some notifications from national associations of insurers relating to safety equipment to combat burglary. In addition, the European Insurance Committee (EIC) informed the Commission's services of some isolated initiatives for the sector aiming to set up systems "with a European vocation" (fire-fighting systems, common minimum rules for approval of fitters). It pointed out that on the other hand, in the field of anti-theft or anti-intrusion alarms, few European standards have so far been established.

38. In their assessment of the systems in question, the Commission's services make a distinction between two situations. Either the Community legislator has adopted harmonisation directives in the field concerned. That is the case for motor vehicles, for which an EC approval procedure exists, and for the warning systems installed in these vehicles, for which optional harmonisation rules are also in force[14]. Or no harmonisation has taken place. This is the case for other safety equipment. The "low tension" and "electromagnetic compatibility" Directives only in fact cover some aspects of this kind of equipment. In the absence of harmonisation, member States are nevertheless obliged to notify their draft national technical rules to the Commission and to other member States[15]. It cannot but be admitted that the voluntary harmonisation work by recognised European standardisation bodies (in particular the technical committee TC 79 of Cenelec) has hardly progressed, owing to specific national regulations and specifications.

39. In the first situation (e.g. vehicle alarm systems), the Directives in question aim at an optional harmonisation: while permitting the Member States to enact stricter rules for equipment manufactured on the national territory, they forbid them to oppose the marketing of imported equipment if it respects the provisions of the directives. It follows *mutatis mutandis* that Article 81 (ex-Article 85) forbids the insurers' national associations to issue recommendations obstructing freedom of movement of equipment which conforms to the harmonisation directives. Indeed, what the official authorities of a Member State are not permitted to do, private companies cannot do either[16].

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14 See for the warning systems Council Directive n°74/61, OJ N° L42 of 23 February 1970, as codified by Commission Directive n°95/56, OJ L286 of 29 November 1995.

15 See Parliament and Council Directive 98/34, OJ n° L 204 of 21 July 1998, which codifies Council Directive 83/189, OJ L109 of 26 April 1983, which provides for an information procedure in the field of technical standards and regulation.

16 See Reply to the parliamentary question N° E-0021/98 of Mr von Wogau : «... Council directive 74/61, as last amended by Commission directive 95/56 (...) provides for harmonised technical requirements concerning vehicles fitted with alarm systems and the alarm systems intended for such vehicles. Therefore, since 1 January 1997, Member States may not refuse to grant Community-type approval to vehicles thus equipped, or those alarm systems. The insurance companies are also required to comply ».

For example, if the directive lays down a determined colour for cabling wires of warning systems, insurers could not oppose the marketing of equipment of which the wires have the colour laid down by the directive. More generally, nor could they submit equipment accompanied by an certificate of conformity within the meaning of the directive, to a (additional) national evaluation procedure to check if this equipment respects the national technical specifications. The infringement of the competition rules would be all the more patent if the insurers' association applied a different treatment to alarm systems installed as standard in different makes of vehicles.

40. In the second situation (e.g. anti-theft or anti-burglary security systems), it is worth noting as a preliminary that one cannot rule out *a priori* that recommendations emanating from national associations of insurers establishing technical specifications are subject to the provisions of the directive envisaging an information procedure in the field of technical standards and regulations[17]. Regarding the conditions for application of Article 81 (ex-Article 85), it follows from Article 15 of the Regulation that these have to be linked to those relating to the application of Article 28 (ex-Article 30) (free movement of goods) and Articles 43 (ex-Article 52) and 49 (ex-Article 59) (free movement of persons and of services). Unless there is objective justification, insurers established in a Member State have to respect the principle of mutual recognition. They could not therefore place obstacles in the way of the marketing of safety equipment legally manufactured and marketed in another Member State, or the activities of fitters or repairers whose professional qualifications were recognised in another Member State. That means that, when this equipment or fitters/repairers have already been the subject of evaluation procedures in the Member State of origin, they could not be subject to such additional procedures in the host Member State.

In the context of its notification of a recommendation concerning anti-burglary safety equipment for buildings, SKAFOR (the Danish insurers' association) subscribed to this principle of mutual recognition. It nevertheless asked the Commission's services to permit it to apply an " intelligent " method making it possible to test the performance of the safety equipment in question (manufactured in Denmark or coming from another Member State.). This method would apply both to mechanical equipment (e.g. a metal grid behind the front door of a building) and to electronic warning systems. Instead of testing the degree of resistance of this equipment against various forms of violence, the "intelligent" method aims to check to what extent this equipment can be overcome by the burglar. The Commission's services considered that this method is acceptable. Article 15(e) enables the insurers to establish technical specifications which include "classification according to the performance level obtained". But the "intelligent" method has the aim of measuring in a more appropriate way the level of performance of the various safety equipment. Moreover, SKAFOR committed itself to entrusting a new independent body with the task of testing, according to this method, how well the equipment resists disactivation. Under these conditions, the Commission's services have just closed the case by administrative letter.

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17 Cit. Note 15.

C. Future prospects

41. As the reference of Article 14, first indent, to " European standards" indicates, Title V not only permits insurers to agree on specifications, provided that these do not obstruct the integration of national markets, but also encourages them to provide a Community basis for genuine European standards which contribute actively to this integration. In this respect, the experiment was disappointing. In fact, to the knowledge of the Commission's services, up till now no document originating from associations of insurers has formed a basis for European standardisation work. Any revision of Title V of the Regulation should go together with reflection on the application of the Community approach in the field of technical harmonisation based on European standards. In order to create a real common market, the Commission is thinking of asking European bodies, in a well defined framework, to work out European standards in collaboration with all interested parties.

SECOND PART

CATEGORIES OF AGREEMENTS NOT CONCERNED BY THE REGULATION

I. Settlement of claims

A. General information

42. As regards claims settlement, agreements between insurers typically cover two aspects. These two aspects can be presented separately or together. The first aspect concerns direct compensation for the person insured. Such an agreement will enable the persons insured to address themselves directly to their own insurer with a view to being compensated without having to await the outcome of any legal proceedings to establish responsibility. The advantage of such an agreement consists in the speed with which the claim is settled. The second aspect concerns the allocation between insurers of compensation costs; this allocation can be determined on a flat-rate basis or according to a scale of the responsibilities of the persons insured. An agreement of this type enables the insurers to reduce their overheads, which should in theory be reflected in the level of the premiums.

B. Practical experience

43. At the time of the adoption of the Regulation, the Commission had not gained sufficient experience to include claim settlements agreements in the Regulation. Six years later, the experience has hardly become richer. The Commission's services have had to examine some notified agreements concerning the direct compensation of persons insured, or the allocation between insurers of the costs of this compensation, or a combination of these two aspects. In all these cases, they were able to send an administrative letter to the notifying parts confirming that the agreements did not raise any problem from the point of view of Article 81 (ex-Article 85).

44. It should be stressed that the scope of these agreements was always limited. They concerned claims giving rise to relatively limited compensation. Thus, an agreement by which insurers had agreed each to pay 50% of the payments resulting from a collision between ships flying different flags on inland waterways in the Netherlands (without determining responsibility), was limited to compensation claims not exceeding ten thousand Swiss francs. The scope of a Spanish agreement covering at the same time the principle of flat-rate distribution of compensation costs between insurers and that of direct compensation of the persons insured in the field of car third party liability insurance was for its part, limited to maximum claims of one million pesetas. The Commission's services considered that the advantages resulting from these settlement agreements, which cover claims for which the financial stake is limited (speed of settlement, savings on overheads) made up for the possible disadvantages (a certain degree of cross-subsidisation between the premiums paid by the persons insured not assuming any responsibility and those due by the persons insured who incurred responsibility).

45. More recently, the Commission's services - for the first time - received a complaint concerning a claim settlement agreement. The complainants advance that the agreement leads to an unjust increase in their premium and to a phenomenon of unjust cross subsidy between persons insured. The examination of this complaint is in hand.

C. Future prospects

46. In view of the relatively new character of the complaint of negative effects on persons insured of agreements on the settlement of claims, the Commission will have to examine fully the above-mentioned complaint and, if necessary, of other cases which might be brought to its attention, before being able to envisage extending the scope of the Regulation to this category of agreements.

II. Registers of and information systems on aggravated risks

A. General information

47. Agreements on keeping registers or exchanging information on aggravated risks have the aim of making it possible for insurers to know better the nature of the risks to be insured. They are in particular used for motor insurance, where such registers or specific information mechanisms allow, for example, to know the history of "bad" drivers or "bad" payers or to account for stolen cars.

These agreements do not fall normally within Article 81-1 (ex-Article 85-1) if they restrict themselves to giving information on aggravated risks. This evaluation is without prejudice to measures applicable for the protection of personal data. In any case, a simple exchange of information on the nature of a risk does not appear to have the aim of restricting competition between insurers. It is different if the exchange of information is accompanied by an agreement aiming to adopt a common attitude with regard to the risks in question. For example, recommendations to refuse to cover the aggravated risks in question or to raise the risk premiums for these risks (whether it is the simple principle of such an increase or of a percentage or fixed amount of increase) fall clearly within the scope of Article 81-1 (ex-Article 85-1) and do not appear exemptable under the terms of Article 81-3 (ex-Article 85-3) (See. already Title II and III of the Regulation).

B. Practical experience

48. Since the entry into force of the Regulation, the Commission has only been notified of three agreements on keeping registers or exchanging information on aggravated risks. In only one case (in Spain), the Commission's services had to insist on the abolition of a clause going beyond the legitimate object of these agreements. This clause compelled insurers to impose a minimum supplement on the premiums of "bad" drivers. In the three cases, the Commission's services declared Article 81-1 (ex-Article 85-1) inapplicable, by administrative comfort letter. They specified that this conclusion was without prejudice to measures applicable for the protection of personal data.

More complex is the question if it would be appropriate to intervene with regard to agreements aiming to establish registers of bad risks if these would systematically lead insurers to refuse to cover those risks. In the absence of a formal commitment of the insurers to do this or of a recommendation from their association aiming to encourage them no longer to insure these risks, Article 7.1(a) of Title III (prohibiting any clause which excludes damage involving the risk branch concerned from the cover) would not apply. In any event, the Commission's services do not have for the moment evidence suggesting that insurers carry out such parallel behaviour

C. Future prospects

49. Agreements limited to keeping registers and to exchanging information on aggravated risks not appearing likely, apart from exceptional cases, to fall under the scope of Article 81 (ex-Article 85). Agreements going further will in theory have to be assessed with respect to Titles II and III of the Regulation. The Commission does not think, at this stage of its experience, that it is timely to adopt in this connection a block exemption mechanism.

CONCLUSION

50. The Regulation applies to two types of agreements concerning competition parameters which, at the time of the adoption of the Regulation, had just been the subject of deregulation at the Community level, namely premiums and policy conditions. The objective of the Regulation was to accompany this process of deregulation and to ensure that the newly-created competition would not be restricted by self-regulation initiatives exceeding the limits of what was justified by the characteristics of the insurance sector.

    The question is whether the Regulation has achieved this objective. Experience shows that the implementation of Title II concerning the calculation of premiums is not easy. Owing to the technicality of the matter, the Commission's services have difficulties in checking whether or not co-operation as regards risk premiums is compatible with the Regulation. However, in the few cases where they collected data concerning the (gross) commercial premiums charged by the insurers, the Commission's services were reassured by the range of these premiums. With regard to policy conditions (Title III), the experience emphasises a different type of application problem. Among the so-called "black" clauses, the most harmful for competition, there are several which become, under the very terms of Article 7, exemptable since their authors declare that they do not commit insurers.

51. The examination of joint co-insurance or co-reinsurance groupings ("pools") under Title IV of the Regulation will remain a priority. The economic approach to be followed has been determined (see paragraph 28) and already applied to pools covering aviation risks. It will be necessary to modify the provisions of Title IV in the light of this approach and its application to the families of pools currently notified to the Commission.

    Each stage of the economic approach in question raises a question for which the answer depends on the actual facts. The question if the pool benefits from the *de minimis* rule of Article 11 of the Regulation depends on the definition of the market concerned (first stage). The question of checking if the pool is necessary for the coverage of the risk depends on the minimum size (second stage). And the question concerning the restrictive character of a pool for which there is not a *obligation d'apport* requires that one examines up to what point insurers have an economic interest in providing cover outside the pool (third stage).

52. The agreements involving Title V (safety equipment) as well as those mentioned in the Council's empowering Regulation (claims settlement and registers of bad

risks) have not so far occupied a leading place in the administrative practice of the Commission. It will act only in the event of complaints and then solely insofar as the jurisdictions or national competition authorities are not better placed to examine them.

53. This Report gives the Commission an opportunity not only to inform interested authorities and undertakings of the way in which its services have implemented the Regulation, but also to collect facts, comments and suggestions for improvements from these authorities and undertakings. In this respect, if necessary, a hearing could be envisaged.

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35