Kluwer Competition Law Blog

Risk Confusion: Flawed Report Threatens Insurance Block Exemption Renewal

Bill Batchelor, Jan Kresken (Baker & McKenzie) · Saturday, April 23rd, 2016

The insurance block exemption regulation (IBER) protects statistical cooperation and certain joint insurance arrangements (*inter alia* line slips, pools, consortia, joint binding authorities). The EU report examining the IBER's renewal concludes it is either superfluous or superseded. But the report leaves many practitioners scratching their heads. The report miss-describes industry fundamentals and omits essential practices benefitting from the IBER. Challenging a sectoral exemption is an old sport. But it must be done based on facts, not supposition. One may expect a robust industry response.

Exemptions

Joint compilations, tables and studies
The regulation exempts agreements on joint compilations, joint tables and studies for certain purposes, including the calculation of the average cost of covering a specified risk. Sharing of data is important in the insurance industry. The better the information available on claims or risks, the more efficient and accurate the rating process. Competition and consumers benefit. The Commission states that industry-specific protection is not required to protect these benefits. The Guidelines on Horizontal Cooperation already offer guidance on information sharing between competitors. Why would the insurance sector require greater protection? The report states that, at most, it might supplement general guidance on competitor information sharing with an insurance-specific communication.

Practitioners are likely to take issue with this appraisal. The general guidance starts from the unspoken premise of bricks-and-mortar industries where any price-related information sharing is regarded with suspicion as an adjunct to cartel-type activity. The exchange of risk premium information (the average cost of underwriting a risk based on historic claims), in particular, has no analogue in traditional industry information exchange. Under the general guidance, it could all too easily be branded price-related information likely to have an adverse effect on competition.

Co-insurance and co-reinsurance pools
The insurance industry relies on being able to pool capacity quickly and nimbly. This responds to customer demand for expanded capacity or new or improved insurance products (eg, bloodstock, cyberterrorism, or other niche or evolving areas of risk). An entrepreneurial underwriter or broker who sees an opening in the market can quickly gather a group of likeminded insurance carriers to add capacity or offer a new or improved product. The names given to the arrangements (eg, joint

binders, pools, consortia, line slips and panels) are diverse and differ from market to market. However, they all involve some form of capacity pooling.

However, the report concludes that regulatory protection is no longer necessary for pools. First, it says that institutional pools often fall outside the IBER's conditions because they tend to exceed the market-share threshold. This is difficult to understand in light of the regulation's recitals explaining that co-insurance of these large atypical risks commonly falls outside Article 101(1) TFEU altogether. If the state-backed pool becomes the last-resort insurer, it demonstrates that there was never any individual insurer competition for these risks in the first place.

Confusingly, the report adds that other types of pool (eg, line slips or other broker-led arrangements) are alternatives to institutional pools. Hence, there is no need for protection.

However, this is a fundamental misunderstanding of the regulation's terms, which plainly cover any type of intermediary or insurer-led form of co-insurance group. Nowhere in the IBER are pools labelled 'institutional' or 'non-institutional'. Rather, the definition is broad – namely, a group of insurers underwriting risks directly, through a lead insurer or via intermediaries. Any type of joint arrangement falling short of subscription market placement (eg, consortia, joint binders, line slips and other intermediary-led arrangements) falls under the IBER.

The second reason given for dispensing with protection is still less credible. The report states that the insurance sector is not the only sector in which undertakings tend to cooperate on specific large projects to spread the costs and risks involved (eg, large construction projects). The report does not evidence why construction and insurance services may be lumped together. More fundamentally, it fails to understand why and how insurers engage in joint insurance arrangements hitherto protected by the IBER.

The third reason is also difficult to understand. Market definition in the insurance industry is said to be complex and national competition authorities find the rules difficult to apply. The report refers to the Federal Cartel Office's (*Bundeskartellamt*) well-publicised reversal before the appeal courts which criticised the *Bundeskartellamt's* prohibition of a professional services insurance pool based on market definition. Market definition is central to competition law – this includes guidelines and block exemptions in every other field. The report cannot seriously be saying that market definition poses an insuperable barrier for this one industry.

Consequences of non-extension

If the IBER lapses this would not mean that statistics cooperation and co-insurance will be prohibited. Rather they would have to be assessed under the same general EU competition law principles as other sectors.

Insurers involved in co-insurance or statistical exchanges would have to assess whether the scheme is restrictive under Article 101(1) of the TFEU and, if so, assess whether it generates pro-competitive benefits of a scope and kind to satisfy Article 101(3) of the TFEU. This is no easy task. It calls for economic appraisals and proof of unknowables – for example, is there a less restrictive means of achieving the co-insurance arrangement (with fewer insurers or different insurers) or statistical exchange? And would other data sources or a less comprehensive data set be just as effective? The burden falls on the insurer to prove that benefits outweigh the restriction.

Comment

The insurance industry is unusual in antitrust terms. Cooperation is wide-ranging and essential to allow for efficient rating and underwriting of risks. It enables smaller players to compete effectively with larger rivals. Those facets of the industry are recognised in special legal regimes, not just in Europe – via the regulation – but also in the United States (through the McCarran-Ferguson Act) and elsewhere.

The IBER report is regrettable – it challenges legitimate practices based on flawed reasoning and partial data. Rather than asking whether the IBER's quarter-century of application has harmed competition, the presumption is that any sector-specific block exemption should be removed. However, there is no suggestion that markets are uncompetitive due to the IBER.

If it lapses, companies could conclude that abandonment of co-insurance arrangements or statistical exchanges is the only way to de-risk these projects. Perhaps more practically, compliance departments will tell underwriters that a co-insurance or statistics arrangement can be approved only after an expensive and lengthy legal review, by which time the commercial opportunity will have passed.

Perversely, this would be to the detriment of competition. Insurers able to underwrite the entirety of a risk without co-insurers would no longer face competition from pools abandoned or delayed due to compliance risks. Insurers with a self-generated data set to inform their underwriting strategy will have an edge over those denied access to jointly compiled data because – post the IBER's demise – it is considered legally too risky.

Policymakers often say stakeholders' pleas for legal certainty mask narrow sectoral interests and special pleading. In the insurance industry – which both needs competitor cooperation to function effectively and is intensely litigious – the need for legal certainty cannot be so easily dismissed. Without the IBER, the industry would face a materially less secure legal environment. As demonstrated in the past, in every cycle downturn there can be a strong incentive for counterparties to turn to competition law to avoid commercially unattractive agreements or claims.

The industry would be better served by a thorough review of the need to continue the exemption or, indeed, to conduct a full overhaul if amendments are required. The report does not do this.

Next steps
On April 26 2016 the Commission will organize a meeting with stakeholders to provide an opportunity to discuss the report's findings. The Commission will later decide on the extension of the regulation, due to expire on March 31 2017.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

Kluwer Competition Law

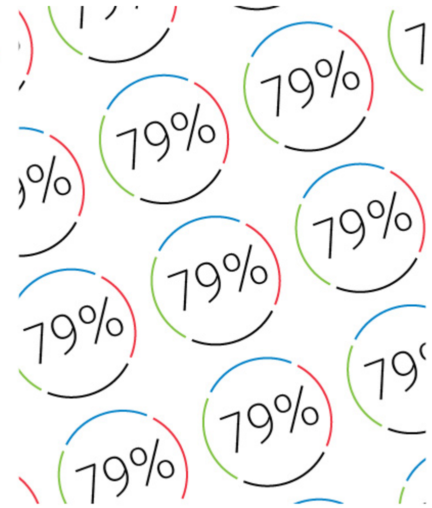
The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased

volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Saturday, April 23rd, 2016 at 12:00 am and is filed under Source: OECD“>Antitrust, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.