The application of EU competition rules to the insurance sector. Past developments and current priorities

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Introduction

The full application of EU competition policy to the insurance sector is relatively recent. It was only around ten years ago when the European Commission started seriously to confront anti-competitive arrangements between insurance undertakings. Since then, however, the Commission has increasingly intervened in this sector and a substantive legal framework has been developed. This article attempts to illustrate how the main principles of EU Competition policy have been applied to the insurance sector and what the Commission's current priorities are in this field.

Until now the Commission has mainly been confronted by agreements between insurers. It has, therefore, principally had to apply article 85.1 of the EC Treaty, which prohibits agreements between undertakings restricting competition in a substantial part of the common market. It has considered, for example, that agreements on fixing gross premiums seriously distort competition and are always prohibited by article 85.1. The detection and prohibition of such agreements, which are particularly prejudicial to the consumer, is the Commission's first priority in this sector.

The Commission has also recognised that certain characteristics of the insurance sector require a degree of co-operation between insurers. Article 85.3 of the EC Treaty allows it to grant exemptions to agreements that would otherwise have been prohibited, when they improve economic conditions of a particular sector and provide benefits to consumers. Most of the Commission's work in relation to the application of competition rules to the insurance sector has been devoted to the definition of the types of agreements that could benefit from this exemption. Since 1992 several categories of agreements between insurers benefit from a block exemption granted by Commission Regulation 3932/92 (Regulation of 21 December 1992, JO L398). The development of the principles of this Regulation, and the definition of other types of agreements which also merit an exemption continues to be one of the Commission's main tasks in this field.

The process of applying competition rules to the insurance sector has been parallel to the creation of the Single Market. In the insurance field, the Single Market program involved not only the elimination of barriers to intra-community trade but also an important liberalisation process, which should substantially increase competition between insurers from different Member States. Competition rules will contribute to enhancing cross-border competition by prohibiting agreements which impede insurers from freely operating in Member States other than their own.

Finally, the Merger Regulation, adopted in 1989, granted the Commission power to control concentrations with a community dimension which could restrict competition in the common market. Since the adoption of the Regulation, the Commission has cleared 44 concentrations in the insurance field. The relatively unconcentrated nature of most insurance markets may probably explain why no concentration has been prohibited up until now. This also explains why, until now, other EU competition rules, such as article 86 of the EC Treaty, which prohibits the abuse of a dominant position, have not been applied to this sector.

Agreements contrary to Article 85 (1) of the EC Treaty

An agreement between insurers on commercial premiums is prohibited by EU competition rules. This belongs to the category of price fixing agreements, which are always contrary to article 85.1 of the EC Treaty and cannot be exempted. In 1984 the Commission condemned a recommendation from the German Association of Property Insurers to its members to increase their commercial premiums by a fixed percentage (Decision of 5 December 1984, Verband der Sachversicherer, OJ L35/21). The Court of Justice upheld the Commission's decision (Judgement of 27 January 1987, 45/85).

Agreements exempted pursuant to Article 85 (3) of the EC Treaty

In 1992 the Commission adopted a block exemption regulation in the insurance field (hereinafter Regulation 3932/92). This Regulation was based on the criteria developed in individual exemption decisions which had been granted in previous years. The four types of agreements exempted by this Regulation are ones which have as their object:

- the establishment of common risk-premiums tariffs based on collectively ascertained statistics on the number of claims
- the establishment of standard policy conditions
- the common coverage of certain types of risks
- the establishment of common rules on the testing and acceptance of security devices.

It must be remembered that the Council Regulation which allowed the Commission to adopt an exemption Regulation in the insurance field (Council Regulation 1534/91, of 31 May 1991, OJ L143), mentioned two other types of co-operation between insurers, namely:

- agreements on the settlement of claims
- the establishment of registers and exchange of information on aggravated risks

At that time the Commission had not acquired sufficient experience in handling individual cases relating to these two categories of agreements and did not include them in Regulation 3932/92. Since then, however, it has dealt with several of these agreements and the main criteria for the assessment of their compatibility with competition rules are now well established.

The main conditions required for the exemption of these six types of agreements, included either in Regulation 3932/92 or in formal decisions, will be described below. There will be special emphasis on the problems of interpreting Regulation 3932/92 the Commission had to resolve since taking effect as well as on the criteria developed to assess the two types of agreements mentioned previously which were not finally included.

Concertation on common risk premium tariffs

To determine its premium, an insurer needs to know statistical data concerning the frequency and the volume of claims made in the past. Often insurers are not in a position to collect a sufficient amount of reliable data on the basis of their own business alone and agree with others insurers to exchange data in order to draw reliable statistics.

Regulation 3932/92, in its Title II, deals with this type of agreement. It first exempts agreements for the common calculation of net premiums (premiums which only take past experience into account). These agreements should be limited to an exchange of actual statistical information on categories of identical or comparable risks, such as mortality tables or tables showing the frequency of illness or accidents. Two Commission Decisions adopted before the Regulation took effect, Nuovo Cegam (Decision of 30 March 1984, OJ L99) and Concordato Incendio (Decision of 20 December 1989, OJ L15), are good examples of such agreements.

It must be noted that in the application of the Regulation, the Commission clarified that the exchange of data which is more detailed than necessary to calculate net premiums would not be allowed. In addition, the exchange of information aggregated in such a way that it becomes meaningless from a statistical point of view and attempts only to harmonise prices between insurers, would also not be covered by this Title of Regulation 3932/92.

Regulation 3932/92, in its Title II, also exempts "the common carrying-out of studies of the probable impact of general circumstances external to the insurers to the frequency or scale of claims". These studies, such as the analysis of the evolution of car repair costs or of medical costs, are necessary to adjust the pure premium in light of future developments. This adjusted pure premium is normally referred to as risk premium. It should be noted that any co-operation on the calculation of premiums going further than determining the risk premium, (e.g. any exchange of information on administrative or commercial costs) could not be exempted.

In any event, the exchange of data in order to elaborate on common statistics will only be exempted if one additional condition is fulfilled: insurers exchanging data should not be obliged to use the statistics obtained for the calculation of their premiums. In relation to this condition, jointly produced statistics should always indicate that they are purely illustrative.

Standard policy conditions

Measures to increase market transparency and the comparability of different products offered should be encouraged in sectors presenting asymmetries of

information between demand and supply, such as the insurance sector. Standard policies of insurance in principle facilitate consumers to compare the conditions offered by each insurer and could therefore enhance competition. Nevertheless, excessive harmonization of insurance products could also reduce competition as well as the flexibility of insurers to meet their clients' needs.

Regulation 3932/92, in its Title III, attempts to reach a balance between these two objectives. Firstly, it only exempts standard non-binding policy conditions, leaving any insurer free to depart from the agreed conditions should it be considered appropriate. The same line had already been followed by the Commission in its Concordato Incendio decision which, in addition to exempting the setting of pure premiums, exempted a non binding recommendation of the association of Italian Industrial Fire Insurers including standard conditions. Secondly, Regulation 3932/92 draws a "blacklist" of standard clauses. These clauses, which cannot be included in standard policy conditions, concern, among others, the extent of the insurance cover or the duration of the policy.

Co-reinsurance and co-insurance pools

In order to provide insurance for a specific type of risk, an insurer must normally cover a minimum number of units against this same kind of risk. This minimum number of units will enable a spread of risks large enough to reduce the volatility of claims. If the insurer is not able to reach this minimum number of units alone, one option is to agree with other insurers to cover these risks in common. This is the basis of a co-insurance or a co-reinsurance pool.

The main principle when assessing the compatibility of insurance pools with competition rules is that a pool cannot be considered anti-competitive when it is necessary to reach the minimum dimension required to cover a specific type of risk. If anything, the pool strengthens competition since it allows insurers who would otherwise not have been able to provide such cover, to put their resources in common and create a new player. The preamble of Regulation 3932/92 already supported this position in its 10th recital which states that "the establishment of co-insurance or co-reinsurance groups designed to cover an unspecified number of risks must be viewed favourably in so far as it allows a greater number of undertakings to enter the market and, as a result,

increases the capacity for covering, in particular, risks that are difficult to cover because of their scale, rarity or novelty". A similar line of reasoning had been followed by the Commission in its decisions Teko (Decision of 20 December 1989, OJ L13) and Assurpol (Decision of 14 January 1992, L37).

Regulation 3932/92, however, does not exempt all pools which are necessary to reach the minimum dimension required to cover a specific type of risk. In order to offer increased legal security the Commission indicated a maximum market share that a pool must hold in order to be exemptable. This threshold was set at 10% of the market for co-insurance pools and 15% for co-reinsurance pools. Pools which exceed these thresholds will have to be individually assessed according to the criteria explained in the previous paragraph.

In cases where a pool appears to be necessary to allow its members to operate in a specific market, the restrictions on competition between the members of the pool which are indispensable to the proper functioning of that pool, should be allowed. Normally, there are two main restrictions which are indispensable to the proper functioning of a pool: the agreement on insurance conditions and the concertation on fixing the premiums (commercial premiums in the case of co-insurance pools and pure premiums in the case of co-reinsurance ones). This is recognised by articles 12 and 13 of Regulation 3932/92 which allow those restrictions to be imposed on members of the pools which do not exceed the thresholds set by the Regulation.

Other clauses normally included in insurance pools, such as the common purchase of reinsurance or the prohibition to members of the pool to insure alone risks of the type covered by the pool, are not indispensable to their functioning and should be examined on their own merits. It must be noted, nevertheless, that with regard to pools which do not exceed the thresholds of Regulation 3932/92, only the former clause is allowed.

Establishment of common rules on the testing and acceptance of security devices

The installation of security devices is often a condition required by insurers to cover specific types of risks or to grant particular insurance conditions.

Regulation 3932/92 allows insurers to agree on technical specifications and on procedures for assessing and certifying the compliance with such specifications of security devices, their installation and maintenance.

These agreements will rarely restrict competition in the insurance sector, but could have a significant impact on competition between manufacturers of security equipment or undertakings installing and servicing such equipment. Firstly, one of these undertakings could benefit over others simply by the insurers choice. To avoid this discrimination, Regulation 3932/92 requires insurers to adopt objective criteria and to apply them in a non-discriminatory matter.

Secondly, insurers normally agree on technical specifications of security devices at a national level, neither attempting to harmonise these criteria at the European level nor mutually recognising security devices agreed in other Member States. This could have negative consequences in relation to the freedom of circulation of these products or the freedom to provide installation and maintenance services across Europe. The Commission is currently examining the differences between Member States in this respect and has not excluded adopting necessary measures to force insurers either to recognise security devices agreed in other Member States or to demonstrate that their own criteria pursue legitimate objectives that could not be achieved by mutual recognition.

Settlement of claims

In several insurance branches, it is common practice for insurers to enter into agreements in order to simplify the settlement of claims between them. This simplification can take two different forms. Certain agreements establish methods of sharing the cost of damages arising from disasters in which their clients are involved. For instance, car insurers may agree each to pay 50% of damages suffered by the parties without inquiring whose client is guilty. Other agreements include rules of direct indemnisation depending on whether each insurer compensates its clients directly. Both types of agreements may also be combined.

These agreements may represent a restriction of competition within the meaning of Article 85 (1). They set uniform conditions to reimburse damages

and reduce the advantages that a single insurer can obtain by more efficient handling of their clients' claims. Nevertheless, they are exemptable according to Article 85 (3). Indeed, they reduce the administrative burden linked to the settlement of claims, which allows insurers to reduce their costs. For instance, agreements on the sharing of claims avoid costly enquiries on the insured guilty party.

The Commission has not yet adopted a formal decision on these categories of agreements but several cases were closed in 1996 on an informal basis. It must be noted that all the agreements exempted until now concerned settlement of claims of a limited amount. These were cases where, on balance, the benefits drawn from costs savings linked to a simplified settlement of claims outweighedt he restrictions of competition.

Registers of and exchange of information on aggravated risks

The asymmetries of information existing in the insurance sector do not always play against the consumer, as is the situation mentioned before where there is a lack of comparatibility between insurance products. They can also prejudice the insurer, particularly in relation to the lack of information on the real risk that some of their potential clients bear. To remedy this lack of information, insurers may exchange information on aggravated risks and create specific registers for such purpose. Typical examples of these registers can be found in car insurance, where all drivers with more than a fixed number of accidents are being listed.

The exchange of information on aggravated risks does not seem to involve a restriction of competition among insurers. It simply allows them to easily recognise aggravated risks and to charge premiums accordingly. Nevertheless, this is only the case where the establishment of the register does not include additional restrictive rules. Two rules which would not be allowed in any event should be mentioned. Firstly, the exchange of information on aggravated risks should not lead to the exchange of more sensitive information which could restrict competition between insurers. Secondly, there cannot be any condition attached to the fact that an insurer decides to offer cover for one of the items or persons listed in the register. This, for instance, would be the case if a clause obliged an insurer to penalise a driver listed in this register through their premium.

Until now the Commission has not adopted any formal Decision concerning this type of agreement but, in order to clarify its position, it may have to do so in the future. In any event it must be noted that the compatibility of these registers with competition rules does not preclude their being contrary to national laws protecting the confidentiality of personal data.

Merger control

The Merger Regulation (Council Regulation 4064/89 of 21 December 1989) grants powers to the Commission to assess whether concentrations with a Community dimension are compatible with the common market. A concentration is deemed to have a community dimension where the aggregate world-wide turnover of all the undertakings concerned is more than ECU 5000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned has more than ECU 250 million, unless each of the undertakings concerned achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The Merger Regulation specifies that in the insurance sector turnover is to be measured in terms of gross premiums.

It must be noted that on 13 September 1996 the Commission submitted a proposal to the Council to amend the existing Merger Regulation and to lower the thresholds defining a concentration of Community dimension. This proposal is currently being examined by the Council. If it is approved without any modifications, the thresholds will be lowered to ECU 3000 million and to ECU 150 million respectively. Moreover, concentrations falling between these new thresholds and ECU 2000 million and ECU 100 million respectively will also be considered with Community dimension where they would be deemed to qualify for examination in at least three Member States. This last proposal is intended to reduce the costs for companies to comply with competition rules by preventing them from having to submit their concentrations to approval by several national competition authorities.

Up to March 1997, 44 concentrations in the insurance sector have been notified to the Commission. All of them were cleared in the first phase of the investigation. It should be remembered that concentrations are cleared in one month if no serious doubts are raised as to their compatibility with the

common market, that is if they do not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market. If serious doubts are raised, a second phase of four months is opened, which can result in a decision prohibiting the operation or otherwise declaring it compatible with the common market, which could include conditions to modify the original concentration plan.

The key question of the assessment under the Merger Regulation is the definition of the relevant market. As regards the product market, the Commission has normally distinguished between re-insurance, direct life insurance and direct non-life insurance. It has never found necessary to determine whether these categories could be subdivided in as many product markets as types of risks to be insured (see, particularly, Decision IV/M.862 AXA/UAP, of 20 December 1996). Indeed, until now under neither of the two possibilities have the concentrations assessed revealed excessively large market shares.

Regarding the geographic market, the Commission considers that, in general, markets for life and non-life direct insurance still have a national dimension, even if they should gradually be opened to intra-community competition. This conclusion is clear for insurance offered to individuals but may have to be qualified in relation to insurance offered to companies with the ability and resources to compare conditions offered in several different countries. The market for re-insurance is considered to have a world-wide scope.

Conclusion

In applying EU competition rules to the insurance sector the Commission tries to reach a balance between two objectives. On the one hand it has to ensure that agreements between insurers do not restrain competition and that the establishment of a single market in a liberalised insurance sector is not undermined. On the other hand it has to contribute to improving the competitivity of the European insurance industry by setting a secure legal environment and allowing methods of co-operation between insurers that benefit the sector as a whole as well as the consumers.
It has been explained before how these two objectives have been pursued during the last ten years as well as the Commission's current priorities in this

sector. To conclude briefly it should be indicated that in the near future it is likely that these priorities will remain in substance essentially the same. Attention will be particularly devoted to the mid term review of Regulation 3932/92, which is due in 1999. This will be an opportunity that should not be missed to clarify publicly the Commission's policy in the insurance sector .

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