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EU LAW AND AGREEMENTS BETWEEN INSURANCE COMPANIES

Expiry on 31 March 2017 of the EU Block Exemption 267/2010 should be taken seriously by insurers

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Insurance groups have entered into a wide variety of agreements with competitors over the past years. This increasing tendency is obviously supported by very legitimate reasons. The stringent requirements laid down by Solvency 2 force in some ways companies to mutualize their strengths in order to meet the ratios resulting from the new regulations and to continue being able to diversify their risks and portfolios. New risks have occurred, which also induce insurers to face them in a collective or aggregate fashion.

When agreements take the form of mergers, acquisitions of controlling powers or full-function joint ventures, the legal constraints are fairly easy to cope with. The transaction will most certainly be notified to the relevant competition authority for the purpose of obtaining a priori clearance under the applicable merger control regulations. In such cases, the primary concern stems from timescales, as pre-filing may require numerous exchanges with the authorities, further to the identification of multiple relevant markets. Insurance groups must anticipate this in their prospective agenda. However, at the end of the day, the transaction will be approved unconditionally. We have indeed no knowledge of mergers in the insurance sector having faced substantive obstacles from EU authorities to date, given the still fragmented nature of the industry.

What if a transaction falls outside the ambit of merger control regimes, since it is fundamentally cooperative and not concentrative? That is where the issue becomes more complex.

THE DELICATE REGIME APPLIED TO COOPERATIVE AGREEMENTS

First, cooperative agreements do not require any EU filing. This constraint (which was also a valuable means for companies to secure their situation before completion of any transaction) was removed in 2004 by the enactment of Regulation 1/2003.

Second, insurers may not rely on safe harbors any longer. The EU Block Exemption 267/2010 ("**IBER**"), the scope of which had been already gradually narrowed since the enactment of the initial Regulation 3932/92 of 21 December 1992, was not renewed in 2017. Incidentally, the reasons for the European Commission's decision to not renew hardly qualify as clear or convincing.

The IBER covered joint compilations, tables and studies, on the one hand; and co-insurance or co-reinsurance pools, on the other hand. In the latter case, it expressly provided that the exemption would apply to pools that were created in order to exclusively cover new risks, irrespective of the pool's market share. The IBER was, therefore, an important tool towards providing insurers and reinsurers with flexibility and safety when they considered undertaking a coordination of behaviors and exchange of information, which are key to the enhancement of the service provided.

However, the Commission expressed the view, throughout the public consultation it organized, that there was no need to maintain the IBER, notably in consideration of the extensive scope of the 2011 Guidelines on horizontal co-operation agreements, and held that the rules needed to be "simplified".

Yet, one may wonder to which extent a binding Regulation may be replaced by mere guidelines, which are deprived of full legal effects. One may also question the announced willingness of the Commission to simplify the existing framework, since the 2011 Guidelines constitute a challenge when it comes to construing a text which is based on economic reasoning and makes market power one of the main criteria to appraise the legality of agreements.

Does this evolution ultimately reflect an appetite of the antitrust authorities vis-à-vis the insurance sector? This is clearly a possibility, in light of three circumstances which need to be recalled. One, the inquiry which was conducted by the Commission on business insurance between 2005 and 2007 did not support any additional initiative. Two, the authorities may rely on an ECJ ruling which concluded in the Verband case (45/85) that EU antitrust laws are fully applicable to the insurance sector. However, this ruling dates back to 1987, which means that some authorities could now find it useful to provide updates through an exemplary new case. Three, the antitrust authorities are likely to be very well aware, by using different mediums such as the insurance network of the ECN, of the extent and variety of the partnerships within the industry. One may add that now neither the Commission nor any national competition authority has to take any account of antitrust rules and exceptions specific to the insurance sector.

PREVENTING THE RISK

Facing the perspective of bringing justifications required by competition authorities, the companies active in the insurance industry should take precautionary measures. These may take different patterns, driven by a unique rationale, called self-assessment. This is precisely what the reform materialized by Regulation 1/2003 aimed at promoting.

It is more than ever in the best interest of two (or more) competing (re)insurers negotiating the terms of an agreement to ask themselves the right questions. Is the contemplated agreement likely to have an anticompetitive purpose of restrictive effects? If that is so, what are the efficiency gains resulting from said agreement and are the restrictions envisaged proportionate in consideration of the objectives which the parties want to attain? What unnecessary restrictions may or should be removed in order to satisfy both compliance with antitrust regulations and the commercial intent/ chief interests pursued by the parties?

The fact that the right questions should be addressed corresponds to the first virtuous step; the second step consists in putting into words in the agreement itself (or in contemporary side-documents) the assessment which the parties have conducted under competition rules and the decisions which have been taken accordingly. Far too often companies neglect to explain why the restrictive provisions they are putting in place are indispensable to the agreement and do not raise concerns in the context which is defined by the structure of the market. Collecting and exchanging information necessary to the calculation of pure premiums, for example, if done in a way which does not penalize the smaller competitors, does not violate any rule. Why then refrain from recalling precisely in the preamble of the agreement what the parties have intended to implement and the limits that they have imposed upon themselves? It will most certainly be much more helpful to be proactive and transparent rather than trying to reconstitute the whole story when asked to do so by competition authorities years later.

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Our Competition team represents clients in highly regulated industries in fields of practice including cartels/ anti-competitive practices, merger control, state aids under EU and French regimes and works in permanent coordination with comparable foreign law firms throughout the world. It acted recently as joint counsel of the insurance groups AG2R La Mondiale and Matmut for the filing of the most important concentration in the insurance sector in France.

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