COMMISSION REGULATION (EEC) No 3932/92

of 21 December 1992

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [1],

Having published a draft of this Regulation [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

(1) Regulation (EEC) No 1534/91 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices in the insurance sector which have as their object :

(a) cooperation with respect to the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims ;

(b) the establishment of common standard policy conditions ;

(c) the common coverage of certain types of risks ;

(d) the settlement of claims ;

(e) the testing and acceptance of security devices ;

(f) registers of, and information on, aggravated risks.

(2) The Commission by now has acquired sufficient experience in handling individual cases to make use of such power in respect of the categories of agreements specified in points (a), (b), (c) and (e) of the list.

(3) In many cases, collaboration between insurance companies in the aforementioned fields goes beyond what the Commission has permitted in its notice concerning cooperation between enterprises [3], and is caught by the prohibition in Article 85 (1). It is therefore appropriate to specify the obligations restrictive of competition which may be included in the four categories of agreements covered by it.

(4) It is further necessary to specify for each of the four categories the conditions which must be satisfied before the exemption can apply. These conditions have to ensure that the collaboration between insurance undertakings is and remains compatible with Article 85 (3).

(5) It is finally necessary to specify for each of these categories the situations in which the exemption does not apply. For this purpose it has to define the clauses which may not be included in the agreements covered by it because they impose undue restrictions on the parties, as well as other situations falling under Article 85 (1) for which there is no general presumption that they will yield the benefits required by Article 85 (3).

(6) Collaboration between insurance undertakings or within associations of undertakings in the compilation of statistics on the number of claims, the number of individual risks insured, total amounts paid in respect of claims and the amount of capital insured makes it possible to improve the knowledge of risks and facilitates the rating of risks for individual companies. The same applies to their use to establish indicative pure premiums or, in the case of insurance involving capitalization, frequency tables. Joint studies on the probable impact of extraneous circumstances that may influence the frequency or scale of claims, or the yield of different types of investments, should also be included. It is, however, necessary to ensure that the restrictions are only exempted to the extent to which they are necessary to attain these objectives. It is therefore appropriate to stipulate that concerted practices on commercial premiums — that is to say, the premiums actually charged to policyholders, comprising a loading to cover administrative, commercial and other costs, plus a loading for contingencies or profit margins — are not exempted, and that even pure premiums can serve only for reference purposes.

[1] OJ No L 143, 7. 6. 1991, p. 1.
[2] OJ No C 207, 14. 8. 1992, p. 2.
[3] OJ No C 75, 29. 7. 1968, p. 3 ; corrigendum OJ No C 84, 28. 8. 1968, p. 14.

(7) Standard policy conditions or standard individual clauses for direct insurance and standard models illustrating the profits of a life assurance policy have the advantage of improving the comparability of cover for the consumer and of allowing risks to be classified more uniformly. However, they must not lead either to the standardization of products or to the creation of too captive a customer base. Accordingly, the exemptions should apply on condition that they are not binding, but serve only as models.

(8) Standard policy conditions may in particular not contain any systematic exclusion of specific types of risk without providing for the express possibility of including that cover by agreement and may not provide for the contractual relationship with the policyholder to be maintained for an excessive period or go beyond the initial object to the policy. This is without prejudice to obligations arising from Community or national law.

(9) In addition, it is necessary to stipulate that the common standard policy conditions must be generally accessible to any interested person, and in particular to the policyholder, so as to ensure that there is real transparency and therefore benefit for consumers.

(10) 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.

(11) However, so as to ensure effective competition it is appropriate to exempt such groups subject to the condition that the participants shall not hold a share of the relevant market in excess of a given percentage. The percentage of 15 % appears appropriate in the case of co-reinsurance groups. The percentage should be reduced to 10 % in the case of co-insurance groups. This is because the mechanism of co-insurance requires uniform policy conditions and commercial premiums, with the result that residual competition between members of a co-insurance group is particularly reduced. As regards catastrophe risks or aggravated risks, those figures shall be calculated only with reference to the market share of the group itself.

(12) In the case of co-reinsurance groups, it is necessary to cover the determination of the risk premium including the probable cost of covering the risks. It is further necessary to cover the determination of the operating cost of the co-reinsurance and the remuneration of the participants in their capacity as co-reinsurers.

(13) It should be legitimate in both cases to declare group cover for the risks brought into the group to be subject to (a) the application of common or accepted conditions of cover, (b) the requirement that agreement be obtained prior to the settlement of all (or all large) claims, (c) to joint negotiation of retrocession, and (d) to a ban on retroceding individual shares. The requirement that all risks be brought into the group should however be excluded because that would be an excessive restriction of competition.

(14) The establishment of groups constituted only by reinsurance companies need not be covered by this Regulation due to lack of sufficient experience in this field.

(15) The new approach in the realm of technical harmonization and standardization, as defined in the Council resolution of 7 May 1985 [1], and also the global approach to certification and testing, which was presented by the Commission in its communication to the Council of 15 June 1989 [2] and which was approved by the Council in its resolution of 21 December 1989 [3], are essential to the functioning of the internal market because they promote competition, being based on standard quality criteria throughout the Community.

(16) It is in the hope of promoting those standard quality criteria that the Commission permits insurance undertakings to collaborate in order to establish technical specifications and rules concerning the evaluation and certification of the compliance of security devices, which as far as possible should be uniform at a European level, thereby ensuring their use in practice.

(17) Cooperation in the evaluation of security devices and of the undertakings installing and maintaining them is useful in so far as it removes the need for repeated individual evaluation. Accordingly, the Regulation should define the conditions under which the formulation of technical specifications and procedures for certifying such security devices and the undertakings installing or maintaining them are authorized. The purpose of such conditions is to ensure that all manufacturers and installation and maintenance undertakings may apply for evaluation, and that the evaluation and certification are guided by objective and well-defined criteria.

(18) Lastly, such agreements must not result in an exhaustive list; each undertaking must remain free to accept devices and installation and maintenance undertakings not approved jointly.

[1] OJ No C 136, 4. 6. 1985, p. 1.
[2] OJ No C 267, 19. 10. 1989, p. 3.
[3] OJ No C 10, 16. 1. 1990, p. 1.

(19) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), as interpreted by the administrative practice of the Commission and the case-law of the Court of Justice, the Commission must have the power to withdraw the benefit of the block exemption. This applies for example where studies on the impact of future developments are based on un-justifiable hypotheses; or where recommended standard policy conditions contain clauses which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract; or where groups are used or managed in such a way as to give one or more participating undertakings the means of acquiring or reinforcing a preponderant influence on the relevant market, or if these groups result in market sharing, or if policyholders encounter unusual difficulties in finding cover for aggravated risks outside a group. This last consideration would normally not apply where a group covers less than 25 % of those risks.

(20) Agreements which are exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in cases of doubt notify their agreements pursuant to Council Regulation No 17 (1), as last amended by the Act of Accession of Spain and Portugal,

HAS ADOPTED THIS REGULATION:

TITLE I

General provisions

Article 1

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements, decisions by associations of undertakings and concerted practices in the insurance sector which seek cooperation with respect to:

(a) the establishment of common risk-premium tariffs based on collectively ascertained statistics or on the number of claims;

(b) the establishment of standard policy conditions;

(c) the common coverage of certain types of risks;

(d) the establishment of common rules on the testing and acceptance of security devices.

(1) OJ No 13, 21. 2. 1962, p. 204/62.

TITLE II

Calculation of the premium

Article 2

The exemption provided for in Article 1 (a) hereof shall apply to agreements, decisions and concerted practices which relate to:

(a) the calculation of the average cost of risk cover (pure premiums) or the establishment and distribution of mortality tables, and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalization — such tables being based on the assembly of data, spread over a number of risk-years chosen as an observation period, which relate to identical or comparable risks in sufficient number to constitute a base which can be handled statistically and which will yield figures on (*inter alia*):

— the number of claims during the said period,

— the number of individual risks insured in each risk-year of the chosen observation period,

— the total amounts paid or payable in respect of claims arisen during the said period,

— the total amount of capital insured for each risk-year during the chosen observation period,

(b) the carrying-out of studies on the probable impact of general circumstances external to the interested undertakings on the frequency or scale of claims, or the profitability of different types of investment, and the distribution of their results.

Article 3

The exemption shall apply on condition that:

(a) the calculations, tables or study results referred to in Article 2, when compiled and distributed, include a statement that they are purely illustrative;

(b) the calculations or tables referred to in Article 2 (a) do not include in any way loadings for contingencies, income deriving from reserves, administrative or commercial costs comprising commissions payable to intermediaries, fiscal or para-fiscal contributions or the anticipated profits of the participating undertakings;

(c) the calculations, tables or study results referred to in Article 2 do not identify the insurance undertakings concerned.

Article 4

The exemption shall not benefit undertakings or associations of undertakings which enter into an undertaking or commitment among themselves, or which oblige other undertakings, not to use calculations or tables that differ from those established pursuant to Article 2 (a), or not to depart from the results of the studies referred to in Article 2 (b).

TITLE III

Standard policy conditions for direct insurance

Article 5

1. The exemption provided for in Article 1 (b) shall apply to agreements, decisions and concerted practices which have as their object the establishment and distribution of standard policy conditions for direct insurance.

2. The exemption shall also apply to agreements, decisions and concerted practices which have as their objeect the establishment and distribution of common models illustrating the profits to be realized from an insurance policy involving an element of capitalization.

Article 6

1. The exemption shall apply on condition that the standard policy conditions referred to in Article 5 (1):

(a) are established and distributed with an explicit statement that they are purely illustrative; and

(b) expressly mention the possibility that different conditions may be agreed; and

(c) are accessible to any interested person and provided simply upon request.

2. The exemption shall apply on condition that the illustrative models referred to in Article 5 (2) are established and distributed only by way of guidance.

Article 7

1. The exemption shall not apply where the standard policy conditions referred to in Article 5 (1) contain clauses which:

(a) exclude from the cover losses normally relating to the class of insurance concerned, without indicating explicitly that each insurer remains free to extend the cover to such events;

(b) make the cover of certain risks subject to specific conditions, without indicating explicity that each insurer remains free to waive them;

(c) impose comprehensive cover including risks to which a significant number of policyholders is not simultaneously exposed, without indicating explicitly that each insurer remains free to propose separate cover;

(d) indicate the amount of the cover or the part which the policyholder must pay himself (the 'excess');

(e) allow the insurer to maintain the policy in the event that he cancels part of the cover, increases the premium without the risk or the scope of the cover being changed (without prejudice to indexation clauses), or otherwise alters the policy conditions without the express consent of the policyholder;

(f) allow the insurer to modify the term of the policy without the express consent of the policyholder;

(g) impose on the policyholder in the non-life assurance sector a contract period of more than three years;

(h) impose a renewal period of more than one year where the policy is automatically renewed unless notice is given upon the expiry of a given period;

(i) require the policyholder to agree to the reinstatement of a policy which has been suspended on account of the disappearance of the insured risk, if he is once again exposed to a risk of the same nature;

(j) require the policyholder to obtain cover from the same insurer for different risks;

(k) require the policyholder, in the event of disposal of the object of insurance, to make the acquirer take over the insurance policy.

2. The exemption shall not benefit undertakings or associations of undertakings which concert or undertake among themselves, or oblige other undertakings not to apply conditions other than those referred to in Article 5 (1).

Article 8

Without prejudice to the establishment of specific insurance conditions for particular social or occupational categories of the population, the exemption shall not apply to agreements decisions and concerted practices which exclude the coverage of certain risk categories because of the characteristics associated with the policyholder.

Article 9

1. The exemption shall not apply where, without prejudice to legally imposed obligations, the illustrative models referred to in Article 5 (2) include only specified interest rates or contain figures indicating administrative costs;

2. The exemption shall not benefit undertakings or associations of undertakings which concert or undertake among themselves, or oblige other undertakings not to apply models illustrating the benefits of an insurance policy other than those referred to in Article 5 (2).

TITLE IV

Common coverage of certain types of risks

Article 10

1. The exemption under Article 1 (c) hereof shall apply to agreements which have as their object the setting-up and operation of groups of insurance undertakings or of insurance undertakings and reinsurance undertakings for the common coverage of a specific category of risks in the form of co-insurance or co-reinsurance.

2. For the purposes of this Regulation :

(a) 'co-insurance groups' means groups set up by insurance undertakings which :

— agree to underwrite in the name and for the account of all the participants the insurance of a specified risk category, or

— entrust the underwriting and management of the insurance of a specified risk category in their name and on their behalf to one of the insurance undertakings, to a common broker or to a common body set up for this purpose ;

(b) 'co-reinsurance groups' means groups set up by insurance undertakings, possibly with the assistance of one or more re-insurance undertakings :

— in order to reinsure mutually all or part of their liabilities in respect of a specified risk category,

— incidentally, to accept in the name and on behalf of all the participants the re-insurance of the same category of risks.

3. The agreements referred to in paragraph 1 may determine :

(a) the nature and characteristics of the risks covered by the co-insurance or co-reinsurance ;

(b) the conditions governing admission to the group ;

(c) the individual own-account shares of the participants in the risks co-insured or co-reinsured ;

(d) the conditions for individual withdrawal of the participants ;

(e) the rules governing the operation and management of the group.

4. The agreements alluded to in paragraph 2 (b) may further determine :

(a) the shares in the risks covered which the participants to not pass on for co-reinsurance (individual retentions) ;

(b) the cost of co-reinsurance, which includes both the operating costs of the group and the remuneration of the participants in their capacity as co-reinsurers.

Article 11

1. The exemption shall apply on condition that :

(a) the insurance products underwritten by the participating undertakings or on their behalf do not, in any of the markets concerned, represent :

— in the case of co-insurance groups, more than 10 % of all the insurance products that are identical or regarded as similar from the point of view of the risks covered and of the cover provided,

— in the case of co-reinsurance groups, more than 15 % of all the insurance products that are identical or regarded as similar from the point of view of the risks covered and of the cover provided ;

(b) each participating undertaking has the right to withdraw from the group, subject to a period of notice of not more than six months, without incurring any sanctions.

2. By way of derogation from paragraph 1, the respective percentages of 10 and 15 % apply only to the insurance products brought into the group, to the exclusion of identical or similar products underwritten by the participating companies or on their behalf and which are not brought into the group, where this group covers :

— catastrophe risks where the claims are both rare and large,

— aggravated risks which involve a higher probability of claims because of the characteristics of the risk insured.

This derogation is subject to the following conditions :

— that none of the concerned undertakings shall participate in another group that covers risks on the same market, and

— with respect to groups which cover aggravated risks, that the insurance products brought into the group shall not represent more than 15 % of all identical or similar products underwritten by the participating companies or on their behalf on the market concerned.

Article 12

Apart from the obligations referred to in Article 10, no restriction on competition shall be imposed on the undertakings participating in a co-insurance group other than :

(a) the obligation, in order to qualify for the co-insurance cover within the group, to

— take preventive measures into account,

— use the general or specific insurance conditions accepted by the group,

— use the commercial premiums set by the group ;

(b) the obligation to submit to the group or approval any settlement of a claim relating to a co-insured risk;

(c) the obligation to entrust to the group the negotiation of reinsurance agreements on behalf of all concerned;

(d) a ban on reinsuring the individual share of the co-insured risk.

Article 13

Apart from the obligations referred to in Article 10, no restriction on competition shall be imposed on the undertakings participating in a co-reinsurance group other than:

(a) the obligation, in order to qualify for the co-reinsurance cover, to

— take preventive measures into account,

— use the general or specific insurance conditions accepted by the group,

— use a common risk-premium tariff for direct insurance calculated by the group, regard being had to the probable cost of risk cover or, where there is not sufficient experience to establish such a tariff, a risk premium accepted by the group,

— participate in the cost of the co-reinsurance;

(b) the obligation to submit to the group for approval the settlement of claims relating to the co-reinsured risks and exceeding a specified amount, or to pass such claims on to it for settlement;

(c) the obligation to entrust to the group the negotiation of retrocession agreements on behalf of all concerned;

(d) a ban on reinsuring the individual retention or retroceding the individual share.

TITLE V

Security devices

Article 14

The exemption provided for in Article 1 (d) shall apply to agreements, decisions and concerted practices which have as their object the establishment, recognition and distribution of:

— technical specifications, in particular technical specifications intended as future European norms, and also procedures for assessing and certifying the compliance with such specifications of security devices and their installation and maintenance,

— rules for the evaluation and approval of installation undertakings or maintenance undertakings.

Article 15

The exemption shall apply on condition that:

(a) the technical specifications and compliancy assessment procedures are precise, technically justified and in proportion to the performance to be attained by the security device concerned;

(b) the rules for the evaluation of installation undertakings and maintenance undertakings are objective, relate to their technical competence and are applied in a non-discriminatory manner;

(c) such specifications and rules are established and distributed with the statement that insurance undertakings are free to accept other security devices or approve other installation and maintenance undertakings which do not comply with these technical specifications or rules;

(d) such specifications and rules are provided simply upon request to any interested person;

(e) such specifications include a classification based on the level of performance obtained;

(f) a request for an assessment may be submitted at any time by any applicant;

(g) the evaluation of conformity does not impose on the applicant any expenses that are disproportionate to the costs of the approval procedure;

(h) the devices and installation undertakings and maintenance undertakings that meet the assessment criteria are certified to this effect in a non-discriminatory manner within a period of six months of the date of application, except where technical considerations justify a reasonable additional period;

(i) the fact of compliance or approval is certified in writing;

(j) the grounds for a refusal to issue the ceritifcate of compliance are given in writing by attaching a duplicate copy of the records of the tests and controls that have been carried out;

(k) the grounds for a refusal to take into account a request for assessment are provided in writing;

(l) the specifications and rules are applied by bodies observing the appropriate provisions of norms in the series EN 45 000.

TITLE VI

Miscellaneous provisions

Article 16

1. The provisions of this Regulation shall also apply where the participating undertakings lay down rights and obligations for the undertakings connected with them. The market shares, legal acts or conduct of the connected undertakings shall be considered to be those of the participating undertakings.

2. 'Connected undertakings' for the purposes of this Regulation means:

(a) undertakings in which a participating undertaking, directly or indirectly:

— owns more than half the capital or business assets, or

— has the power to exercise more than half the voting rights, or

— has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking, or

— has right to manage the affairs of the undertaking;

(b) undertakings which directly or indirectly have in or over a participating undertaking the rights or powers listes in (a);

(c) undertakings in which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the participating undertakings or undertakings connected with them have directly or indirectly the rights or powers set out in paragraph 2 (a) shall be considered to be connected with each of the participating undertakings.

Article 17

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of 1534/91, where it finds in a particular case that an agreement, decision or concerted practice exempted under this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the EEC Treaty, and in particular where,

— in the cases referred to in Title II, the studies are based on unjustifiable hypotheses,

— in the cases referred to in Title III, the standard policy conditions contain clauses other than those listed in Article 7 (1) which create, to the detriment of the policyholder, a significant imbalance between the rights and obligations arising from the contract,

— in the cases referred to in Title IV:

(a) the undertakings participating in a group would not, having regard to the nature, characteristics and scale of the risks concerned, encounter any significant difficulties in operating individually on the relevant market without organizing themselves in a group;

(b) one or more participating undertakings exercise a determining influence on the commercial policy of more than one group on the same market;

(c) the setting-up or operation of a group may, through the conditions governing admission, the definition of the risks to be covered, the agreements on retrocession or by any other means, result in the sharing of the markets for the insurance products concerned or form neighbouring products;

(d) an insurance group which benefits from the provisions of Article 11 (2) has such a position with respect to aggravated risks that the policyholders encounter considerable difficulties in finding cover outside this group.

Article 18

1. As regards agreements existing on 13 March 1962 and notified before 1 February 1963 and agreements, whether notified or not, to which Article 4 (2) (1) of Regulation No 17 applies, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

2. As regards all other agreements notified before this Regulation entered into force, the declaration of inapplicability of Article 85 (1) of the Treaty contained in this Regulation shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is later.

Article 19

If agreements existing on 13 March 1962 and notified before 1 February 1963, or agreements covered by Article 4 (2) (1) of Regulation No 17 and notified before 1 January 1967, are amended before 31 December 1993 so as to fulfil the conditions for application of this Regulation, and if the amendment is communicated to the Commission before 1 April 1994, the prohibition in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication shall take effect from the time of its receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

Article 20

1. As regards agreements covered by Article 85 of the Treaty as a result of the accession of the United Kingdom, Ireland and Denmark, Articles 18 and 19 shall apply, on the understanding that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

2. As regards agreements covered by Article 85 of the Treaty as a result of the accession of Greece, Articles 18 and 19 shall apply, on the understanding that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

3. As regards agreements covered by Article 85 of the Treaty as a result of the accession of Spain and Portugal, Articles 18 and 19 shall apply, on the understanding that the relevant dates shall be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963 and 1 January 1967.

Article 21

This Regulation shall enter into force on 1 April 1993.

It shall apply until 31 March 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 December 1992.

For the Commission

Leon BRITTAN

Vice-President