

British
Insurance
Law
Association

Competition Law for Insurers and Insurance Lawyers

Bill Batchelor, Baker & McKenzie, Brussels

BILA Lunchtime Lecture

Hot Topics in Insurance and Antitrust

Bill Batchelor and Paul Johnson
Baker & McKenzie

17 July 2015



Baker & McKenzie International is een Zwitserse Verein waarvan vennootschappen over de gehele wereld lid zijn. In overeenstemming met de in de professionele dienstverlening gebruikelijke terminologie wordt met de term "partner" bedoeld personen die partner zijn van een dergelijke vennootschap of een daaraan gelijkwaardige functie bekleden. De term "kantoor" wordt gebruikt om te verwijzen naar een vestiging van een dergelijke vennootschap.

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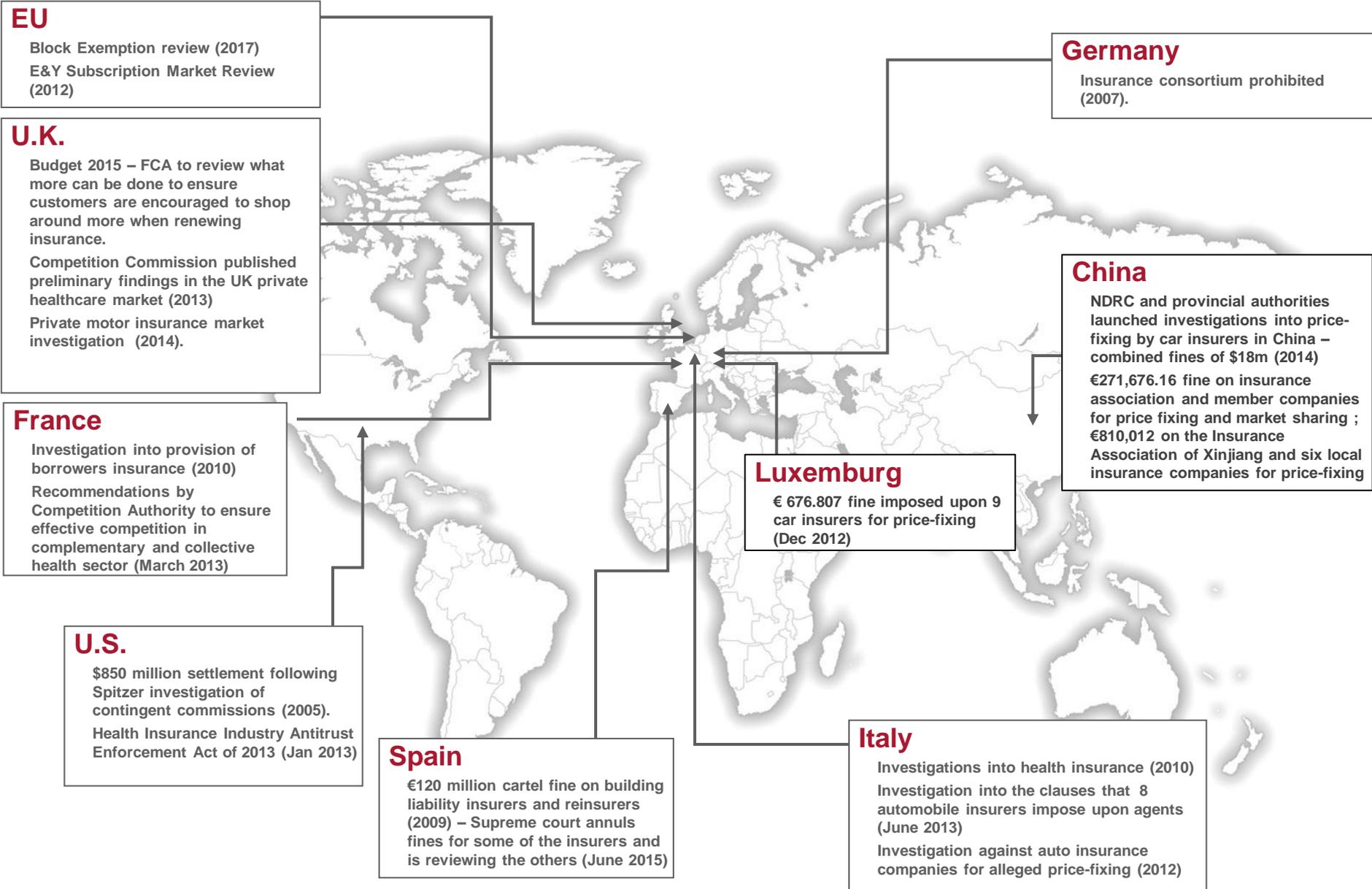
Agenda

- Regulators' Radar
 - FCA
 - EU
- Cartels and information exchange
- Lineslips and subscription markets
- “Wide” and “narrow” most favoured nation clauses, second bites of the cherry

“A *firm* must notify the *FCA* if it has or may have committed a significant infringement of any applicable competition law.”
SUP 15.3.32R to SUP 15.3.35G
(15 July 2015)

Regulators' Radar

The Insurance Industry Under Investigation



FCA

- Competition powers – 1 April 2015
 - “[T]he FCA must consider whether it would be more appropriate to proceed under the Competition Act 1998.”*
 - s234K(1) FSMA
- c.100 antitrust lawyers, economists, policy specialists, and counting
- “Pipeline team” looking for cases
- Market Studies - focus on consumers and SMEs
- Obligation to report violations...

Market Studies So Far...

- Six Market studies to date
- Principal focus:
 - Pricing of products
 - Switching between products
- What's next?
 - Remedies in general insurance add-ons
 - Use of technology and big Data;
 - identify potential risks and benefits for consumers; and
 - regulatory regime v. innovation

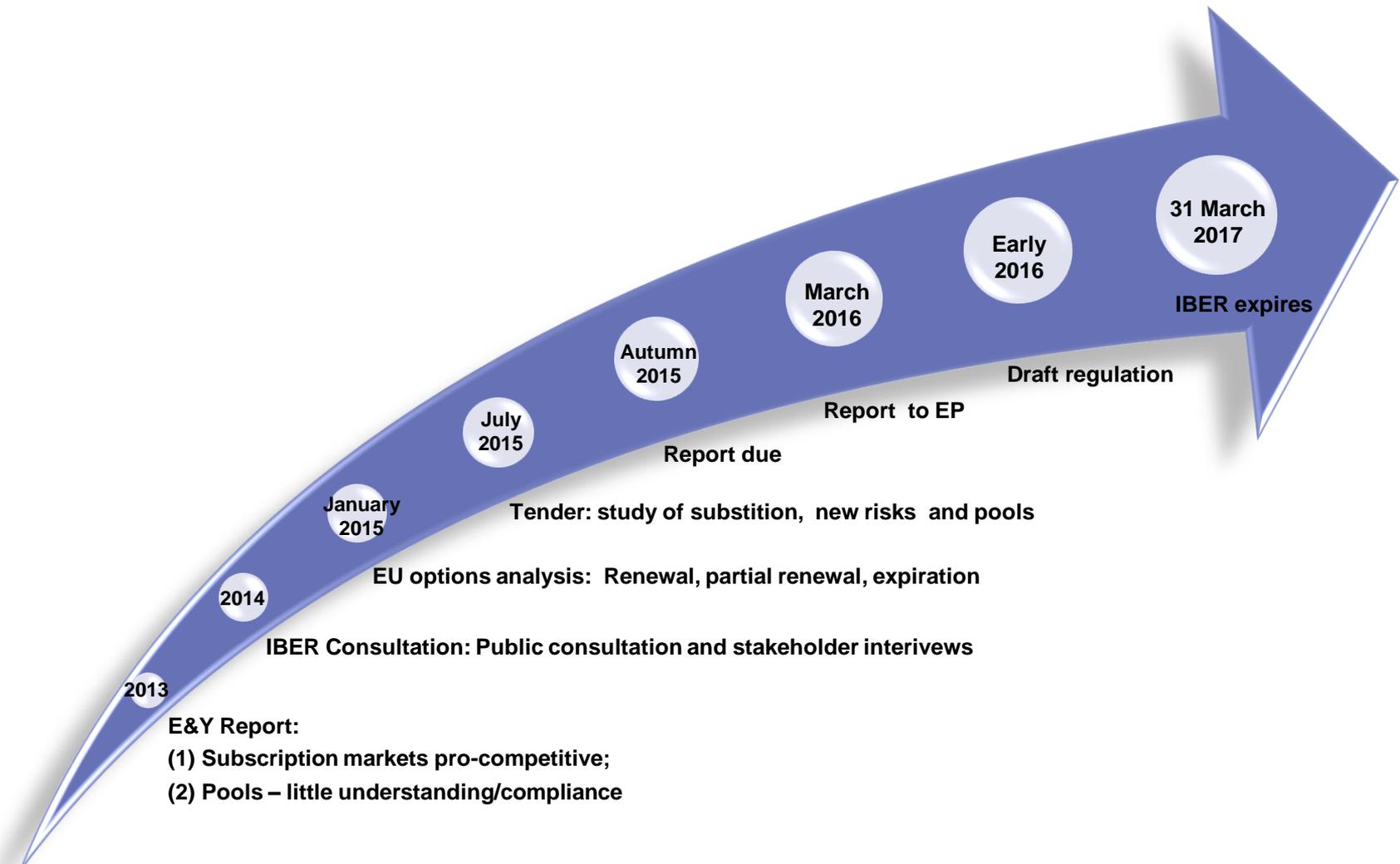
Actively Looking for Enforcement Cases...

- New handbook provision – SUP 15.3.32R to SUP 15.3.35G
 - **Reporting obligation:** A **firm** must notify the **FCA** if it has or may have committed a significant infringement of any applicable competition law.
 - **“Significance”:** a **firm** should have regard to the actual or potential effect on competition, any customer detriment, and the duration of any infringement and implications for the **firm’s** systems and controls
 - **Notification:** as soon as it becomes aware – written or oral application

“Do you consider that sector-specific regulation such as the IBER is necessary for the insurance sector? If so, which distinct features of the insurance market would make a sector-specific block exemption regulation necessary...?” IBER Consultation (2014)

EU – Fate of Insurance Block Exemption

Timeline



Will It Survive?

Regulation 39332/92 and 358/2003	Regulation 267/2010	E&Y (2013)/ Consultation (2014)/ EU Study (2015)
Joint calculations/pure risk premiums	Joint calculations/pure risk premiums	Key issue: why does insurance need sector specific rules for information exchange?
Coinsurance/pools	Coinsurance/pools	Key issues: (1) How are “new risks” identified? (2) What kinds of co-insurance exists? (3) Is the IBER too complex to apply/is there a lack of compliance awareness?
Standard terms	Removed	And finally: Why has the EU asked for a study on supply side substitution (or “asset switching”) in insurance markets?
Security device standards	Removed	

“Rates need to rise 10% for the under-pressure private motor market to sustain adequate profitability,” says general insurance managing director. “I’m expecting, perhaps at this half year or the year-end, people will start to see some negative news emerging from their balance sheets and rates will have to rise. I do expect rates will rise in the second half of this year. They need to go up by 10%.”

Managing Director, quoted in Insurance Times.

From Information Exchange to Cartel

Awareness of Antitrust Risks

Companies have at least monthly contact with competitors	64%
Businesses contacted their competitors directly to find out their prices	7%
Businesses had had senior level discussions about competition law	19%
Respondents thought it was OK to fix prices	16%
Didn't know whether illegal to fix prices	28%
Didn't know that price-fixing could lead to imprisonment	44%
Either thought it was OK to discuss prospective bids with competing bidders or didn't know whether that was illegal	53%
Thought that it was OK to allocate customers	31%
Didn't know whether illegal to allocate customers	28%

Source: Competition & Markets Authority commissioned awareness survey (2015)

Zero Tolerance for Information Exchange...

- Unlawful where reduces competitive uncertainty
 - **“By object”**: future price or quantity information (Horizontal Guidelines, para. 72).
 - **“By effect”**: consider concentration, market context, type of information, frequency, strategic nature (Horizontal Guidelines, para. 75)
 - **Insurance BE**: joint studies, statistics and reports, subject to strict limits (Insurance BE Article. 3)
- ECJ in *Bananas* confirms zero tolerance (March 2015):
 - “they discussed banana price-setting factors, that is to say, factors relevant to the setting of quotation prices for the forthcoming week, or discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week.”
 - “exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted” Case C-286/13 P *Dole v Commission*

... Now Being Extended to Signalling

EC – Case 39850 Container Shipping - ongoing

- Regular price announcements in new releases, trade press
- Public well before implementation
- EU alleges collusion
- Companies settling on basis of pro-forma announcement letter

UK - Aggregates, cement and ready-mix concrete market investigation 2014

- Cement manufacturers send price lists to customer which is unit of vertically integrated competitor or request competitor price lists via customers
- CC orders template customer letter and finds practice reduces competition to the extent that it orders divestment of assets.

Dutch ACM – Case 13.0612.53 November 2013

- KPN director announced KPN contemplating connection fees at “Telecom Time” conference. T-Mobile and Vodafone internal documents propose connection fee referring to KPN signal. Within six months, three mobile operators introduce connection fees.
- KPN interview with specialist telecoms magazine. “New market strategies are needed. KPN will focus on market value rather than market share.”

Cases for Your Compliance Training...

– CMA (OFT) - RBS (January 2011)

- RBS fined £29 million
- RBS disclosed future pricing information to Barclays at social and industry events including pub lunches and bowling.
- **“you’re always wanting to know what everyone else is doing – and we’d take that into consideration when pricing”**

– Tourism Committee of the Confederation of Spanish Industries (CEOE) (Sept 2012)

- Joan Gaspart Solves (a CEOE executive and former president of FC Barcelona) stated in a speech that Spanish hotels needed to raise their prices. Speech covered by press, and broadcast on TV and radio
 - A hotel price increase in 2011 of 6-7% seemed reasonable to him, compared to hotels in London, Paris and Rome, adding that the prices (in 2011) were **“20% lower than those of 2007”**.
- CEOE fined EUR150,000 and Mr. Gaspart EUR50,00 (first personal fine in Spain).

– Case C-74/14 Eturas (AGO 16 July 2015) the accidental travel agents website cartel.

- Travel agents liable for automated message from external online booking site to 35 travel agents recommending discounts restricted to 3%, even if they had not seen or acted on it

Particular risks in the insurance industry

- Cheap talk – slippery slope from general market conditions to price intentions
- Spill-over in subscription market/consortia
 - Renewals
 - Unrelated business
- Statistics
 - IBER not immunity – strict conditions for joint studies
 - Consultants, web-portals and aggregators
- “Signalling” at industry presentations, press briefings

Platforms/Portals/Aggregators

- Common terms:
 - Payment for place on limited panel
 - Best terms offered *via* panel
 - Contribute marketing funds
 - Paying for “second bite” to match/better price of best insurer
- Information exchange:
 - ✓ Feedback on win/loss to each insurer
 - ✓ Feedback on price to beat (but not identity) to “second bite” insurers
 - ? Benchmarking surveys
 - ✗ Feedback on rivals’ quotes or price methodology.

Beitrag	Versicherer	Tarifnote	Weitere Informationen
<input checked="" type="checkbox"/> 203,39 € jährlich	 DirektVersicherung Tarif: AutoStart	 Tarifnote 2,4 gut	<input checked="" type="checkbox"/> Wechselservice weiter »
Tarifleistungen	Testberichte	Kundenmeinungen (7.845) ★★★★★	
<input checked="" type="checkbox"/> 205,20 € jährlich	 Confidon Tarif: Klassik Kasko Clever	 Tarifnote 1,4 sehr gut	<input checked="" type="checkbox"/> Wechselservice weiter »
Tarifleistungen	Testberichte	Kundenmeinungen (12.270) ★★★★★	
<input checked="" type="checkbox"/> 205,63 € jährlich	 Continental Tarif: Basis Sorglos Kasko	 Tarifnote 2,9 gut	<input checked="" type="checkbox"/> Wechselservice weiter »
Tarifleistungen	Testberichte	Kundenmeinungen (1.631) ★★★★★	
<input checked="" type="checkbox"/> 205,71 € jährlich	 DirektVersicherung Tarif: AutoBasis	 Tarifnote 2,4 gut	<input checked="" type="checkbox"/> Wechselservice weiter »
Tarifleistungen	Testberichte	Kundenmeinungen (7.845) ★★★★★	
<input checked="" type="checkbox"/> 206,26 € jährlich	 Barmenia Versicherungen Tarif: Europa-Deckung mit Werkstattservice	 Tarifnote 1,5 sehr gut	<input checked="" type="checkbox"/> Wechselservice weiter »
Tarifleistungen	Testberichte	Kundenmeinungen (145) ★★★★★	
<input type="checkbox"/> 206,26 € jährlich	 ADCURI.DE Tarif: Kfz-Spezialtarif mit Werkstattservice	 Tarifnote 1,6 sehr gut	<input checked="" type="checkbox"/> Wechselservice weiter »
Tarifleistungen	Testberichte	Kundenmeinungen (1.306) ★★★★★	
<input type="checkbox"/> 207,20 € jährlich	 direct line Tarif: Basis	 Tarifnote 2,4 gut	<input checked="" type="checkbox"/> Wechselservice weiter »

The Aon-Berkshire sidecar at Lloyd's: a glimpse into the future of underwriting?

Cobelias

Constitué en 1942, Cobelias (Consortium Belge pour l'Assurance de la Responsabilité Professionnelle des Intermédiaires d'Assurances) réunit actuellement neuf compagnies d'assurances parmi lesquelles se trouvent les plus importantes du marché belge.

S'agissant d'un groupement d'entreprises, il ne dispose pas de la personnalité juridique.

Son objet est de couvrir la responsabilité que celle des intermédiaires d'assurances.

Sa composition est actuellement la suivante:

1. AXA
2. AON INSURANCE
3. ALLIANZ
4. BERKSHIRE ASSURANCE



Article 6 General Authority of the Consortium Leader

6.1 The Consortium Leader is hereby empowered for and on behalf of the Consortium Members to solicit and receive submissions, proposals and/or applications, to negotiate, underwrite, accept, bind and sign the Contracts and whenever necessary in connection therewith execute, sign, issue and deliver contracts, including endorsements thereto, renewals and cancellations thereof.

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News

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Underwriters under pressure to secure facility deals to remain in London market

Lineslips and Subscription Markets

Different Intermediary Facilities

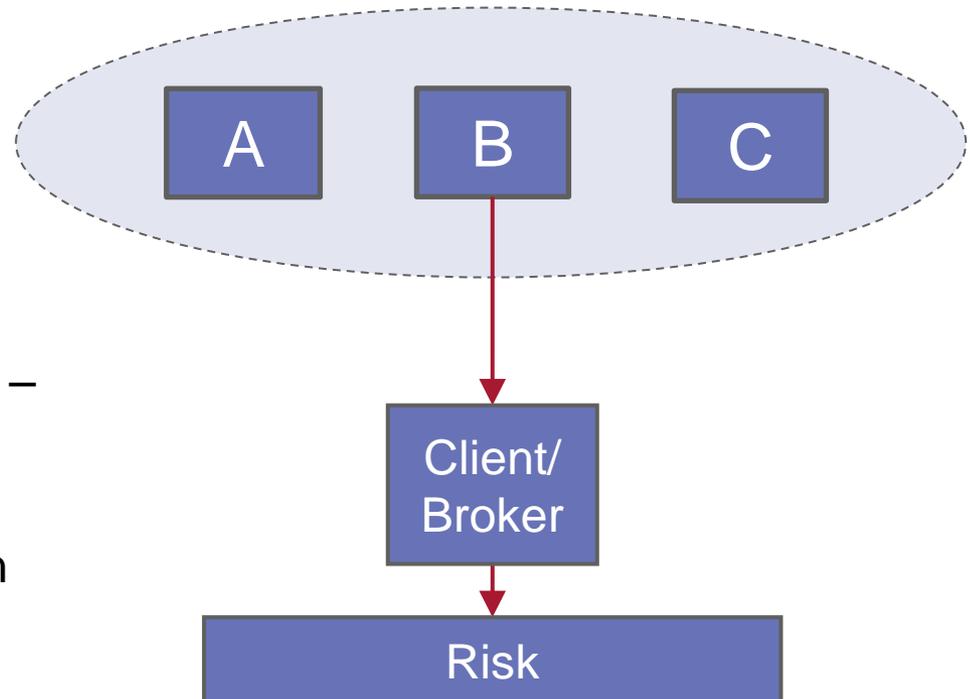
- **Pools**: permanently established groups typically covering big risks, often with state encouragement/participation or legislation: eg nuclear, terrorism, etc.
- **Consortia**: group of insurers agree that one will write insurance for the group at agreed rates or rates chosen by the lead insurer.
- **Insurers deal jointly via client's agent (broker) eg line slips**: intermediary agrees with a group of insurers that they will collectively underwrite business presented by the intermediary on behalf of its clients provided that the price is agreed to by the lead insurer on the slip (or, frequently, two co-leads).
- **Insurers deal jointly via insurers' agent (coverholder) eg joint binder**: Insurers jointly appoint intermediary as their agent to write business meeting agreed rates parameters.
- **Not a closed list**: split stamps, “preferred carriers”

... Same Competition Issue

Key Criterion: joint selling or rate setting by competing insurers, either to pre-agreed tariff or to follow price set up another insurer/agent

Compare:

- “Preferred Carrier” panels or participation in web aggregators – no agreement on price.
BUT check the rules.
- *Ad hoc* coinsurance/subscription markets – series of bilateral agreements with client/broker.



Counselling on Pools Not Complex But....

- Insurance Block Exemption permits if
 - Market Share < 20% (inside AND outside the pool)
 - No restriction on ex-pool business
 - Withdrawal on reasonable notice
 - No restrictions on output, allocation of customers or territorial restrictions
- If outside BER: lawful if non-competitors (e.g. lack of experience or capacity)
- Key cases, e.g.
 - *Aviation Pool* (EU closes case but refers pooled smaller risks to national authorities)
 - *Versicherungsstelle Wiesbaden* (German auditors case – high share of market, but reversed on appeal)
 - *Dutch Notaries* investigation (substantial non-compliance among intermediary lead pools)

... Often Goes Wrong

- **Limited or late awareness:** Few underwriters or brokers think to check compliance risks with lineslips/joint binders. Or compliance check too late in process.
- **Inadvertently high market shares:**
 - niche lines, local markets
 - cross-participations between pools
- **Bad habits:** intermediaries seek to negotiate blacklisted clauses, eg non-competes, exclusivity
- **Ex-block exemption analysis:** market shares, innovative business concepts, efficiencies of lead's/intermediary's skills combined with carriers' capacity

E&Y Report (2013)

“Overall, awareness of the Insurance BER appeared mixed, though those pools that had reassessed their position since the issue of the new BER did not report a change in their compliance status”
(318)

Dutch Notary Pools Investigation (2010)

- Four pools for professional liability insurance were investigated by the Nma - (i) notaries, (ii) lawyers, (iii) accountants, (iv) real estate brokers and insurance agents/intermediaries.
- Possible issues were identified in the pool for notaries and NMa issued SO: 60% of the market was represented by the pool and (for a long time) only one other insurer offered the same type of insurance.
- Commitment offered after SO: notaries pool would not exceed 20% market share.
- Similar commitments were voluntarily offered for the other three pools.
- NMa accepted the commitments and closed the investigation by means of a commitment decision.
- Resulted in self-regulation through trade association: The Protocol on Intermediary Pools (2011) requires self-assessment if pool has a share in the relevant market of 5% or more, and/or if pool covers other than standard risks.
 - no communication about terms and pricing between participating insurers (different from BER), intermediary to choose leader and decide terms together with leader, BIPAR principles apply.
 - pool agreement has a maximum duration of 1 year and can only be explicitly renewed.

Are Subscription Markets Still an Issue?

- EU Insurance Communication, para. 17:
“practices involving an alignment of premium (between co-(re)insurers through ad hoc co-(re)insurance agreements) may fall within the scope of Article 101(1)”
- E&Y Report (2013), para. 427
“[subscription market follower-to-leader] alignment reflects intensive competition in the market for the selection of the leader and hence for the corresponding initial determination of premiums, such that there is no further efficiency to be squeezed out of the following market.”
- Commission will “take account of” findings in IBER renewal process.

Compliance Checklist for Business

- Raise awareness of types of arrangement that need legal review
 - obvious: consortia, pools
 - less obvious: lineslips, other arrangements
- Self-check tool for business
 - Arrangement – is it a relevant “pool”?
 - Do other insurers compete?
 - If so, what % share, what geographic scope?
 - Check for restrictive terms, information sharing





Most Favoured Nation ("MFN") Clauses

“Wide” and “narrow” MFNs

- Price comparison websites (“PCW”) use:
 - “Wide” MFNs - insurer promises no better price on **own and any PCW site**
 - “Narrow” MFNs – insurer promises no better on **own site** but can be lower on third party sites
- Challenged in many online business models: hotels, books, Amazon market place
 - If industry wide, suppliers fear any price reduction will spark industry wide retaliation
 - NB also “second bites” – preferred insurer (for a fee) can have second bid on PCW presented risk

Private Motor Insurance Market Investigation (CMA, September 2014)

- 91% of motor policies sold via websites covered by MFN
- Price parity clauses in contracts between PCWs and insurers prohibit insurers from making their products available more cheaply on other online platforms.
- Effect of restricting competition and leading to higher car insurance premiums overall
- Ban on ‘price parity’ agreements between PCWs and insurers applicable from 19 April 2015

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**BILA would like to thank
Bill Batchelor**