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Competition and Related Regulation Issues in the Insurance Industry

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**COMPETITION AND RELATED REGULATION ISSUES IN THE INSURANCE
INDUSTRY**

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition and Related Regulation Issues in the Insurance Industry which was held by the Working Party n°2 of the Committee on Competition Law and Policy in June 1998.

This compilation, which is one of several published in a series named "Competition Policy Roundtables", is issued to bring information on this topic to the attention of a wider audience.

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les questions de concurrence et de réglementation dans le secteur de l'assurance qui s'est tenue en juin 1998 dans le cadre du Groupe de travail n° 2 du Comité du droit et de la politique de la concurrence.

Cette compilation qui fait partie de la série intitulée "les tables rondes sur la politique de la concurrence" est diffusée pour porter à la connaissance d'un large public, les éléments d'information qui ont été réunis à cette occasion.

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EXECUTIVE SUMMARY

Note by the Secretariat

In the light of the written submissions, the background note and the oral discussion, the following points emerge:

- *The insurance industry is not a single market governed by a single regulatory regime, but a number of separately regulated, related markets. Most regulatory regimes broadly distinguish four classes of insurance: life insurance; health insurance; property and casualty insurance; and reinsurance. The level of regulation and competition in each class can differ markedly.*

Some insurance products, especially life products compete with products offered in other segments of the financial sector, most notably products produced by superannuation funds. Some insurance products compete with “self-provision” of insurance, particularly by large corporations. Differences in the regulatory and taxation treatment of competing products will lead to distortions to competition.

There is not a single regulatory regime governing the entire insurance industry. Although a bulk of insurance regulation is common to all classes, regulatory regimes typically apply different rules to different classes of insurance. Broadly speaking we may distinguish four classes: life, health, property and casualty insurance and reinsurance. It is not uncommon, for example, to find specific rules applying, for example, to the health insurance industry. In particular, there may be rules limiting the ability of health insurers to insure individual consumers and limiting the information that can be taken into account in establishing the premium (such as a “community rating” requirement) or requiring them to provide certain benefits. In some countries life insurance products are subject to disclosure regulations similar to other securities. With the broad category of property and casualty insurance, there may be special rules applying relating to marine or aviation insurance or insurance for workplace accident liability.

Although there are typically few substitutes for non-life products (with the exception of self-provision, which is often an option for large corporations or groups of consumers), life insurance products, which typically include a savings component, compete with other long-term savings products including superannuation and pension funds. Differences in tax or regulatory treatment of these products can have important effects on competition.

- *The insurance sector in OECD countries remains a very heavily regulated sector. The primary public policy concern underlying this regulation relates to concerns over the willingness and ability of consumers to observe and monitor the financial health of their insurer, especially when insurance is made compulsory. In the past, this led to a variety of policy interventions designed to restrict competition. Deregulation has involved a lifting of these restrictions on competition, a refocusing of regulation on prudential controls and consumer protection issues, and a focusing of regulation on consumer product lines.*

Public policy in the insurance sector primarily seeks to overcome consumers’ difficulties in observing and monitoring the financial health of their insurer, both before and during the

lifetime of the insurance contract. Even if consumers were willing to do so, there is a concern that a competitive market does not make the information available in a form which consumers could understand. Furthermore, where insurance is compulsory, to the extent that the requirement forces consumers to purchase insurance that they otherwise would not have purchased, consumers face little incentive to observe and monitor the financial health of their insurer. As a result, there is a concern that competition between insurers would lead to deterioration in the financial health of insurers, bankruptcies and a lack of coverage for consumers.

A second, lesser, regulatory concern relates to concerns over the ability of consumers to understand and compare the various terms and conditions in insurance contracts. Competition between insurers, it is argued, will therefore be ineffective and will lead to adverse surprises for consumers.

These concerns are not as strong for those lines of (voluntary) insurance which are purchased primarily by large businesses (such as reinsurance and insurance covering industrial risks).

As a result of these concerns, regulation has traditionally taken the form of limiting the extent of competition between insurers, through controls on entry, on prices (particularly price floors), on the methods for calculating premiums, on terms and conditions and, in some cases, through the explicit promotion of cartels. These regulations may not be effective at preserving the financial health of insurers, however, if they merely divert competition away from, say, prices and into other dimensions of service quality. If the regulations are effective at restricting competition, they may have the usual undesirable effects of limiting incentives for efficiency and innovation.

Deregulation has therefore involved: First, the targeting of insurance regulation to those markets in which the primary consumers are individual citizens and away from markets in which the primary consumers are large businesses; second, a trend away from controls which limit competition between insurers (such as statutory monopolies, controls on premium prices and policy terms and conditions, the fostering of cartels), to controls on the financial position of insurers; third a trend away from requirements for prior approval of terms and conditions of insurance contracts, to reliance on general prohibitions against certain terms, industry agreements and general consumer protection laws; and finally, moves to enhance the quantity and quality of information that insurers must disclose relating to their financial position and attempts to increase the responsibility of directors and managers regarding to prudential health of their company.

In a few cases price controls have acted as a ceiling (rather than a floor) on insurance premiums (particularly in response to consumer concerns over premium growth in health and motor vehicle insurance). This results in a withdrawal of coverage for certain risks, which typically leads to pressure for further intervention in the form of an insurer-of-last-resort. Experience shows that removing regulations on insurance prices typically expands coverage.

- *All OECD countries licence entry into the insurance business. The licencing procedures are seldom trivial and in some countries can be both lengthy and involve considerable documentation. Although there are attempts for streamlining licencing procedures in the US, at present there are no initiatives underway for harmonisation or mutual recognition of licencing by the individual states. A few countries retain statutory monopolies over individual lines of*

insurance business. Provided the insurance regulatory regime is sound, incentives for efficiency and innovation can be enhanced by relaxing such constraints on competition.

In general, concerns over the ability of trade in insurance services to undermine domestic regulation limit opportunities for cross-border trade in insurance products or the establishment of branches of foreign insurance firms. Conversely, trade liberalisation where it has occurred (especially in the EU) has been an important driver of domestic deregulation.

All countries indicated that entry to the insurance business requires a licence. The procedures for obtaining a licence can be lengthy and burdensome. Entry is typically licenced for particular lines of business only. In line with the deregulatory trends mentioned above, there has been a trend away from approval of the individual tariffs, terms and conditions that a company offers towards a focus on the financial position of the insurer.

Within the EC, the regulatory entry burden has been somewhat mitigated by the “single passport” system, which permits a firm licenced to operate in one state, to conduct business in any other member state. Although there initiatives to streamline licencing procedures are underway, at present, entry into the insurance business in the United States requires a separate licencing process in each state. The resulting regulatory compliance costs can be large. BIAC notes: “As a practical matter there may be higher costs and more hurdles for insurers to do business in the United States than in many other countries.”

Some countries maintain statutory monopolies for certain forms of insurance, often in compulsory lines of insurance. It is clear, however, that provided an adequate regulatory regime is in place, it is possible to maintain healthy competition in compulsory insurance lines. The UK reports that there are more than 80 companies offering compulsory motor vehicle insurance operating in the UK.

Liberalisation of trade in insurance services, if not supported with other policies, could undermine the regulatory concerns outlines above. Many countries have, therefore, until recently placed strict limits on cross-border trade in insurance services. Hungary still does not allow nationals to sign insurance contracts with foreign insurers. Since trade liberalization is a threat to domestic regulation, liberalisation of trade in insurance services is linked with the establishment of minimum common standards, governing issues such as the financial position of insurers, etc. Particularly in Europe, measures to expand international trade in insurance services have been key drivers in domestic deregulation. Outside the EC, entry of foreign countries into a domestic market typically requires the establishment of a subsidiary. The right to operate through a branch and/or the right to offer services on a cross-border basis is typically highly restricted. Further liberalisation is likely to take the form of further extensions of the principle of mutual recognition and harmonisation. To an extent, cross-border trade in insurance services is limited by differences in culture, consumer protection laws, taxation, and the need to establish a local presence to process claims and handle administration. The state-level regulation in the US is likely to be a barrier to substantial international trade liberalisation.

- *Despite a trend away from the controls of tariffs, many countries retain such controls, in the form of requirements to obtain prior approval of rates, or through the specification of a band within which rates can move. Many countries retain the power of ex post control over premium rates. Some countries require ex ante approval of policy terms and conditions, in part as a consumer protection measure.*

Many countries restrict the lines-of-business in which insurers may engage. However, most OECD countries allow insurers to form a part of larger financial conglomerates, limiting the economic effect of the line-of-business restrictions. Several countries impose ownership restrictions on insurers or financial conglomerates, in part to limit contagion effects. In a few countries, the government is itself an owner in the insurance sector.

There is a clearly discernible trend towards deregulation of controls on insurance premiums. However, many countries retain such controls in various forms. Until recently, many rates in Japan were fixed by groups of insurers, in the form of rating organisations.

Many countries continue to restrict the lines of business that insurance companies (and other financial institutions) can engage in. However, in practice, the effects of this regulation are limited as insurance companies are, in most countries, allowed to form part of conglomerates with other financial institutions.

Several countries impose restrictions on the ownership of insurance companies (and other financial institutions). The objectives of these restrictions are to limit the control of other parts of the economy (such as the manufacturing sector) over the financial sector and to limit the contagion effects that might occur if the owner of a major bank were to become insolvent. However, these rules also limit the normal corporate governance controls for ensuring the profitability and efficiency of the insurance company.

- *In most countries, a proportion of insurance is sold through insurance “intermediaries”. In many countries these do not attract specific regulation beyond occupational licencing and consumer protection regulation. In the past, regulatory ceilings on commission levels sought to prevent intermediaries from capturing some of the rents that arose from regulatory restrictions on competition. In a deregulated market statutory controls on private agreements over commission levels appear unnecessary.*

In regard to insurance intermediaries, in most countries these do not attract regulation specific to the insurance sector, but are a form of more general consumer protection legislation. Examples include occupational licencing restrictions, requirements concerning disclosure to consumers before purchase, requirements to ensure the “suitability” of the product to a consumer before sale, restrictions on door-to-door selling, and so on.

When competition between insurers was limited due to regulation, brokers in some countries were in a position to capture some of the resulting rent by bidding up commissions. This resulted in many countries in regulations specifying maximum commission levels. Several countries reported experience with deregulating maximum commission levels regulations. The Netherlands is seeking to reform a law which prevents insurance brokers from being remunerated directly from consumers (at present they can only be remunerated directly from insurers).

- *Most countries noted that the competition law applies, in principle, to the insurance sector. However, specific features of the insurance sector need to be taken into consideration when applying the antitrust law. Examples include agreements for information sharing and agreements for co-insurance or co-reinsurance. Such agreements, only in so far as they are beneficial to the development of the market, should not in general be considered restrictive.*

Although most countries reported that the competition law applies to the insurance sector, the nature of the business of insurance is such that in certain cases, co-operation between competing insurance companies can yield efficiency benefits. The classic examples are cooperation for the purposes of sharing information on the magnitude of risks, and cooperation for the sharing of large risks. These practices, to the extent that they promote competition and are beneficial to insurance policyholders and insureds, should be allowed. This is not typically a problem for countries with modern or recently updated competition laws, which allow a case-by-case approach.

Countries with older competition laws tend to have older, overly-broad legislative exemptions for the insurance sector. Reform in such countries will involve replacing these broad exemptions with targeted, case-by-case approach on the same basis as occurs in other industries. In the US, the McCarran-Ferguson Act exempts the business of insurance from the federal antitrust laws to the extent that it is regulated by the states. Insurers in the US must still comply with state antitrust laws.

- *In most OECD countries, the insurance market is competitive. Some countries, especially those that have recently reformed this sector, noted that the level of competition in the insurance sector is not strong. The last few years has witnessed considerable consolidation in the insurance industry, particularly in the US and Europe, including large mergers of banks and insurance companies. Despite the single market programme of the EU, the geographic boundaries of markets within the EU and in other countries are typically national boundaries, especially for insurance products sold to consumers and small businesses.*

The extent of competition in the insurance market seems to vary significantly from product to product and from country to country. Although several countries reported having a highly competitive insurance industry (particularly the UK, Netherlands and the USA), concerns over the level of competition were also raised in many countries. For example, Germany notes: “The insurance industry continues to be very highly cartelised”. In Italy: “In the experience of the Antitrust Authority, price competition seems to be extremely weak”. Similarly, in Korea: “given the short history of insurance premium liberalization in Korea, a complete form of competition on insurance premium is yet to be developed”. Given the strong historic tradition surrounding various forms of industry cooperation throughout many OECD countries, sustained vigorous competition law enforcement is necessary to establish sound patterns of compliance with competition rules.

A large number of insurance mergers have occurred over the last few years, particularly in the US and Europe. These mergers have become increasingly international and, in some cases, merge firms across the financial sector. Examples include the Citigroup/Travelers, Berkshire/General Re and Aetna Life/US Healthcare mergers in the US, Royal Insurance/Sun Alliance and Commercial Union/General Accident in the UK, AXA and UAP in France and the Credit Suisse/Winterthur merger in Switzerland.

- *Responsibility for regulatory approvals of mergers and agreements amongst insurers is usually shared between the competition authority and a sector-specific regulator. This implies a need to cooperate and can give rise to conflicts. There is a trend towards reserving exclusive jurisdiction over competition matters to the competition authority.*

Financial sector convergence (the increasing tendency for a variety of financial products to be produced by the same company) may enhance competition in the insurance sector. More generally, the process of convergence is giving rise to a trend towards regulatory bodies with broader, functional-based responsibility (i.e., across the entire financial sector or across the entire economy, as in the case of a competition regulator).

In the insurance industry (as in other parts of the financial sector), the sector-specific regulator typically has some form of authority over mergers and agreements among competitors. This can lead to conflict with the competition authority, especially when the jurisdiction of the regulator extends to judgment on competition issues. Although the possibility for conflict can be minimised through explicit cooperation agreements (such as in Norway), it appears that the most appropriate arrangement is through a clear separation of responsibilities, with responsibility for competition analysis delegated to the competition authority. Recent institutional reforms in Australia and the Netherlands have granted exclusive competition jurisdiction to the competition authority in both countries.

The underlying (information processing and risk management) technologies used by banks and insurance companies are essentially similar, giving rise to economies of scope in the joint production of these products. Where entry by banks into the insurance business (and vice versa) is allowed, banks can become important competitors for traditional insurance companies. In any case, the increasing tendency for financial firms to produce a full range of financial products (including both banking and insurance products) is giving rise pressure to adjust regulatory institutions. In particular, there is a trend towards broader regulatory institutions with responsibility for financial institutions across the financial sector (or, as in the case of the competition authority, across the economy as a whole).

SYNTHÈSE

Note du Secrétariat

Les points suivants ressortent des contributions écrites, de la note de référence et du débat oral :

- *Le secteur de l'assurance n'est pas un marché unique soumis à un régime réglementaire unique, mais il se compose d'un certain nombre de marchés liés, mais assujettis à des réglementations distinctes. La plupart des régimes réglementaires distinguent de façon générale quatre branches d'assurance : assurance vie, assurance maladie, assurance dommages et réassurance. Dans chaque branche, l'importance de la réglementation et de la concurrence peut présenter des différences marquées.*

Certains produits d'assurance, notamment de la branche vie, concurrencent des produits proposés dans d'autres compartiments du secteur financier, notamment les produits des organismes de retraite. Certains produits d'assurance concurrencent en outre la pratique de l'auto-assurance, notamment des grandes sociétés. Les disparités de traitement par la réglementation et la fiscalité de ces produits concurrents vont entraîner des distorsions de concurrence.

Il n'y a pas de régime unique de réglementation s'imposant à l'ensemble du secteur de l'assurance. Bien que l'essentiel de la réglementation des assurances s'applique à toutes les branches, les différents régimes soumettent normalement les diverses branches à des règles différentes. De façon générale, on peut distinguer quatre branches : assurance vie, assurance maladie, assurance dommages et réassurance. Il n'est pas rare, par exemple, de trouver des règles spécifiques s'appliquant au secteur de l'assurance maladie. En particulier, il peut y avoir des règles restreignant la possibilité pour les assureurs de cette branche de couvrir des consommateurs à titre individuel ou limitant les renseignements qui peuvent être pris en compte pour déterminer la prime (comme une obligation de "tarification collective") ou leur imposant de fournir certaines prestations. Dans certains pays, les produits d'assurance vie sont soumis à des règles de publicité analogues à celles qui prévalent pour les valeurs mobilières. Dans la vaste catégorie des assurances dommages, il peut y avoir des règles spéciales portant sur l'assurance maritime ou aviation ou encore sur l'assurance de la responsabilité en matière d'accidents du travail.

Alors qu'il n'y a normalement que peu de substituts des produits des branches non-vie (hormis l'auto-assurance qui est souvent une solution adoptée par des grandes sociétés ou des groupes de consommateurs), les produits d'assurance vie, qui comportent normalement une composante d'épargne, concurrencent d'autres produits d'épargne longue, y compris ceux des caisses de retraite et des fonds de pension. Les différences de traitement par la fiscalité ou la réglementation de ces produits peuvent avoir des effets considérables sur la concurrence.

- *Le secteur de l'assurance dans les pays de l'OCDE reste un secteur très fortement réglementé. A travers cette réglementation, les pouvoirs publics se préoccupent avant tout de la volonté et de la capacité des consommateurs à effectuer un suivi et un contrôle de la santé financière de leurs assureurs, notamment lorsqu'il s'agit d'assurances obligatoires. Par le passé, cela a*

conduit à diverses mesures d'intervention des pouvoirs publics destinées à limiter la concurrence. La déréglementation a permis la levée de ces entraves à la concurrence, un recentrage de la réglementation sur le contrôle prudentiel et la protection du consommateur, ainsi que sur les produits destinés aux particuliers.

L'action des pouvoirs publics dans le secteur de l'assurance vise avant toute chose à surmonter les difficultés qu'éprouvent les consommateurs pour effectuer un suivi et un contrôle de la santé financière de leur assureur, aussi bien avant que pendant la durée de vie de leur contrat d'assurance. Même si les consommateurs avaient la volonté d'effectuer ce suivi, on peut craindre que le marché ne mette pas à leur disposition les renseignements nécessaires sous une forme compréhensible. De plus, lorsque l'assurance est obligatoire, dans la mesure où ce caractère obligatoire les oblige à acquiescer à des assurances qu'ils n'auraient pas sollicitées autrement, les consommateurs n'ont guère d'incitation à surveiller et contrôler la santé financière de leur assureur. En conséquence, on peut craindre que la concurrence entre assureurs n'aboutisse à une détérioration de la santé financière des assureurs, à des faillites et à un manque de couverture des consommateurs.

La deuxième préoccupation, un peu moindre, porte sur la capacité des consommateurs à comprendre et comparer les diverses conditions et clauses figurant dans les contrats d'assurance. La concurrence entre assureurs, affirme-t-on, est dès lors inefficace et entraîne des mauvaises surprises pour les consommateurs.

Ces craintes ne sont pas aussi fortes pour les produits d'assurance (volontaire) qui sont acquis avant tout par les grandes entreprises (comme la réassurance ou l'assurance des risques industriels).

En raison de ces craintes, la réglementation a traditionnellement consisté à limiter la concurrence entre assureurs, par des contrôles à l'entrée, sur les prix (notamment les prix planchers), sur le mode de calcul des primes, sur les conditions contractuelles et, dans certains cas, elle a explicitement favorisé les ententes. Ces règlements risquent cependant de ne pas protéger efficacement la santé des assureurs, s'ils se contentent de détourner la concurrence du terrain des prix, par exemple, vers d'autres dimensions de qualité du service. Si la réglementation restreint efficacement la concurrence, elle peut avoir comme d'habitude pour effet indésirable de décourager l'efficacité ou l'innovation.

C'est la raison pour laquelle la déréglementation a eu les objectifs suivants : premièrement, orienter la réglementation de l'assurance vers les marchés sur lesquels les consommateurs primaires sont des citoyens et non plus des grandes entreprises ; deuxièmement, engager un mouvement tendant à abandonner les mesures de contrôle qui freinent la concurrence entre assureurs (comme les monopoles réglementaires, les mesures d'encadrement des primes ou des conditions des polices, les encouragements donnés aux ententes) au profit de mesures permettant de contrôler la situation financière des assureurs ; troisièmement, délaisser les prescriptions imposant une approbation préalable des conditions des contrats d'assurance, pour s'en remettre à des mesures générales d'interdiction de certaines conditions, à des accords avec la profession et à des textes législatifs généraux sur la protection des consommateurs ; enfin, engager un mouvement visant à accroître la quantité et la qualité des informations que les assureurs sont tenus de rendre publiques à propos de leur situation financière et tenter de renforcer la responsabilité des dirigeants et administrateurs quant à la santé prudentielle de leur société.

Dans quelques cas, les mesures de contrôle des prix ont abouti à plafonner (au lieu de servir de plancher) les primes d'assurance (notamment face aux craintes des consommateurs quant au risque de gonflement des primes d'assurance santé ou automobile). Cela se traduit par un retrait de couverture de certains risques, ce qui suscite généralement des pressions en faveur de nouvelles interventions des pouvoirs publics en tant qu'assureur en dernier ressort. L'expérience montre que la levée des mesures sur les prix des produits d'assurance aboutit normalement à une extension de la couverture offerte.

- *Tous les pays de l'OCDE appliquent une procédure d'agrément à l'entrée sur le marché de l'assurance. Ces procédures sont rarement de pure forme et dans certains pays, elles peuvent être laborieuses et exiger la communication d'une documentation considérable. Bien qu'il y ait des tentatives pour simplifier ces procédures d'agrément aux Etats-Unis, aucune initiative n'a été prise pour harmoniser ces procédures ou pour instaurer la reconnaissance mutuelle de l'agrément dans les différents Etats de ce pays. Quelques pays conservent un monopole réglementaire sur certaines branches d'assurance. Dès lors que le régime de réglementation de l'assurance est sain, on peut encourager l'efficacité et l'innovation en assouplissant ces contraintes pesant sur la concurrence.*

En général, les craintes de voir le commerce international de services d'assurance porter préjudice à la réglementation nationale amènent les autorités à limiter les possibilités d'échanges transnationaux de produits d'assurance ou l'établissement de succursales de sociétés d'assurance étrangères. A l'inverse, la libéralisation des échanges, lorsqu'elle a été mise en œuvre (notamment au sein de l'UE), a constitué un élément moteur de la déréglementation nationale.

Tous les pays ont indiqué que l'entrée sur le marché de l'assurance nécessite un agrément. Les procédures d'obtention d'un agrément peuvent être laborieuses et lourdes. L'agrément n'est généralement imposé que pour certaines branches d'assurance. Conformément à la tendance à la déréglementation évoquée précédemment, on a observé un mouvement de désengagement vis-à-vis de l'approbation des barèmes individuels de primes, des conditions générales qu'une société d'assurance propose, au profit d'un suivi de la situation financière de l'assureur.

Dans le cadre de la CE, les contraintes réglementaires à l'entrée ont été un peu atténuées par le système du "passeport unique", qui permet à une société agréée pour exercer son activité dans un Etat, de l'exercer dans n'importe quel autre Etat membre. Bien que des initiatives soient en cours pour simplifier les procédures d'agrément aux Etats-Unis, l'entrée sur le marché de l'assurance dans ce pays impose de suivre une procédure d'agrément dans chaque Etat. Le coût de respect de la réglementation qui en résulte peut donc être considérable. Comme le note le BIAC : "Sur le plan pratique, cela peut amener les assureurs à subir plus de coûts et à devoir franchir plus d'obstacles pour opérer aux Etats-Unis que dans de nombreux autres pays."

Certains pays conservent des monopoles réglementaires pour certaines formes d'assurance, notamment en matière d'assurance obligatoire. A l'évidence cependant, dès lors qu'un régime de réglementation convenable a été mis en place, il est possible de préserver une saine concurrence dans ces branches d'assurance obligatoire. Le Royaume-Uni indique que plus de 80 sociétés proposant des assurances automobiles obligatoires opèrent actuellement dans ce pays.

La libéralisation du commerce international de services d'assurance, si elle ne s'accompagne pas d'autres mesures, peut porter préjudice à l'action entreprise par les pouvoirs publics pour répondre aux préoccupations que l'on vient d'évoquer. Récemment encore, de nombreux pays fixaient donc des limites strictes aux échanges transnationaux de services d'assurance. C'est ainsi que la Hongrie n'autorise pas encore ses ressortissants à signer des contrats d'assurance avec des assureurs étrangers. Comme la libéralisation des échanges constitue une menace pour la réglementation nationale, cette libéralisation dans le secteur des services d'assurance est liée à la définition de normes minimales communes, portant sur des aspects comme la situation financière des assureurs, etc. En Europe en particulier, les mesures visant à développer les échanges internationaux de services d'assurance ont été un élément moteur de la déréglementation nationale. En dehors de la CE, l'entrée de sociétés de pays étrangers sur le marché national, suppose normalement la création d'une filiale. Le droit d'opérer par l'intermédiaire d'une succursale et/ou le droit de proposer des services de façon transnationale est généralement fortement limité. La poursuite de la libéralisation va vraisemblablement passer par de nouvelles extensions du principe de la reconnaissance mutuelle et une harmonisation. Dans une certaine mesure, les échanges transnationaux de services d'assurance sont limités par des différences d'ordre culturelle, de législation sur la protection des consommateurs, de fiscalité ainsi que par la nécessité d'établir une présence locale afin de pouvoir traiter les demandes d'indemnisation et régler les problèmes administratifs. La tutelle exercée aux Etats-Unis au niveau des Etats risque de faire obstacle à une véritable libéralisation des échanges internationaux.

- *Bien qu'ils aient généralement tendance à abandonner l'encadrement des tarifs, de nombreux pays conservent de tels dispositifs, en imposant une approbation préalable des taux de primes, ou en définissant une marge de fluctuation des taux de prime. De nombreux pays conservent la possibilité de contrôler ex post les taux de prime. D'autres imposent une approbation ex ante des conditions générales des polices à titre de mesure de protection des consommateurs.*

De nombreux pays limitent les branches dans lesquelles les assureurs peuvent travailler. Cela étant, la plupart des pays de l'OCDE autorisent les assureurs à faire partie de grands conglomerats financiers, ce qui limite les incidences économiques de ces restrictions sur les branches. Plusieurs pays imposent des conditions sur le contrôle du capital des sociétés d'assurance ou des conglomerats financiers, en partie pour limiter les effets de contagion. Dans quelques pays enfin, les pouvoirs publics possèdent eux-mêmes des sociétés d'assurance.

On peut nettement discerner une tendance au démantèlement des mesures de contrôle des primes d'assurance. Toutefois, de nombreux pays conservent de tels dispositifs sous diverses formes. Récemment encore, de nombreux taux de prime au Japon étaient fixés par des groupements d'assureurs, sous forme d'organismes de fixation de primes.

De nombreux pays continuent de limiter les branches dans lesquelles les sociétés d'assurance (et les autres institutions financières) peuvent travailler. Toutefois, dans la pratique, les effets de ces règlements sont limités, car les sociétés d'assurance sont, dans la plupart des pays, autorisées à faire partie de conglomerats avec d'autres institutions financières.

Plusieurs pays imposent des restrictions sur le contrôle du capital des sociétés d'assurance (et d'autres institutions financières). Il s'agit ainsi de limiter la prise du contrôle du secteur financier par d'autres secteurs de l'économie (notamment l'industrie de transformation) et de limiter les effets de contagion susceptibles de se produire si le propriétaire d'une grande banque venait à

être insolvable. Toutefois, ces règles restreignent aussi les mesures normales de contrôle dans le cadre du gouvernement d'entreprise qui permettent de veiller à la rentabilité et à l'efficacité de la société d'assurance.

- *Dans la plupart des pays, une partie des assurances est vendue par des "intermédiaires" d'assurance. Dans de nombreux pays, cela ne nécessite pas l'application de règlements spécifiques, en dehors des règles relatives à l'agrément des professionnels ou à la protection du consommateur. Dans le passé, le plafonnement réglementaire des niveaux de commissions visait à empêcher les intermédiaires de bénéficier d'une partie des rentes découlant des mesures réglementaires de limitation de la concurrence. Sur un marché déréglementé, les mesures officielles de contrôle ou les conventions de droit privé sur le niveau des commissions semblent inutiles.*

Dans la plupart des pays, la situation des intermédiaires d'assurance ne nécessite pas l'application de règles spécifiques au secteur de l'assurance, mais constitue un aspect de la législation plus générale sur la protection du consommateur. Il s'agit, à titre d'exemple, des restrictions en matière d'agrément de professionnels, des prescriptions relatives à l'information des consommateurs avant l'achat, de celles qui veillent à ce que le produit soit "conforme aux attentes" du consommateur avant sa vente, des restrictions sur le démarchage à domicile, etc.

Lorsque la concurrence entre assureurs était limitée par la réglementation, les courtiers de certains pays pouvaient bénéficier d'une partie de la rente résultant de la surenchère en matière de commissions. Cela a abouti dans de nombreux pays à l'adoption de règlements précisant le niveau maximum des commissions. Plusieurs pays ont fait part de leur expérience du démantèlement de ces mesures de plafonnement des commissions. Les Pays-Bas cherchent à réformer une loi qui empêche les courtiers en assurance d'être directement rémunérés par les consommateurs (actuellement, ils ne peuvent l'être que directement par les assureurs).

- *La plupart des pays ont noté que le droit de la concurrence s'applique, en principe, au secteur de l'assurance. Toutefois, il convient de tenir compte des spécificités de ce secteur lors de l'application des lois antitrust, notamment lorsqu'il s'agit d'accords de partage d'informations ou de conventions de co-assurance ou de co-réassurance. De tels accords, s'ils sont bénéfiques au développement du marché, ne doivent pas être considérés de façon générale comme des entraves à la concurrence.*

Bien que la plupart des pays aient indiqué que le droit de la concurrence s'applique au secteur de l'assurance, la nature du métier d'assureur est telle que, dans certains cas, la coopération entre sociétés d'assurance concurrentes peut aboutir à des gains d'efficacité. Les exemples classiques sont la coopération en vue d'un partage d'informations sur l'ampleur des risques ou la coopération pour le partage de grands risques. Ces pratiques, dans la mesure où elles favorisent la concurrence et où elles sont avantageuses pour les porteurs de police et les assurés, doivent être autorisées. Cela ne pose normalement pas de problème pour les pays dotés d'un droit de la concurrence moderne ou récemment mis à jour qui autorise une approche au cas par cas.

Les pays dotés de textes plus anciens ont tendance à prévoir des exemptions particulièrement larges pour le secteur de l'assurance, comme on le faisait par le passé. Les réformes dans ces pays vont aller de pair avec le remplacement de ces exemptions larges par des approches ciblées au cas par cas, de la même façon que pour d'autres secteurs d'activité. Aux États-Unis, le McCarran-Ferguson Act exempte l'activité d'assurance de la législation fédérale antitrust dans

la mesure où ce secteur est placé sous la tutelle des Etats. Néanmoins, les assureurs des Etats-Unis doivent se conformer aux lois antitrust de ces Etats.

- *Dans la plupart des pays de l'OCDE, le marché de l'assurance est soumis à la concurrence. Certains pays, notamment ceux qui ont récemment réformé ce secteur, relèvent que la concurrence n'est pas très intense dans ce secteur. Au cours des dernières années, on a assisté à une consolidation considérable du secteur de l'assurance, notamment aux Etats-Unis et en Europe, avec en particulier de grandes opérations de fusion entre banques et sociétés d'assurance. Malgré le marché unique de l'UE, les limites géographiques des marchés au sein de l'UE ainsi que dans les autres pays correspondent normalement aux frontières nationales, en particulier pour les produits d'assurance vendus aux consommateurs et aux petites entreprises.*

L'intensité de la concurrence sur le marché de l'assurance semble varier sensiblement d'un produit à l'autre et d'un pays à l'autre. Bien que plusieurs pays aient indiqué qu'ils étaient dotés d'un secteur de l'assurance en proie à une vive concurrence (notamment le Royaume-Uni, les Pays-Bas et les Etats-Unis), de nombreux autres pays ont fait part de leur préoccupation devant le manque de concurrence. C'est ainsi que l'Allemagne note que "le secteur de l'assurance continue d'être très cartellisé". Pour l'Italie, "d'après l'expérience des autorités antitrust, la concurrence sur les prix semble extrêmement faible". De même, pour la Corée, "compte tenu de la libéralisation très récente des primes d'assurance en Corée, il reste du chemin à parcourir avant d'avoir instauré une véritable concurrence sur les primes d'assurance". Compte tenu de la forte tradition historique de coopération au sein de ce secteur dans de nombreux pays de l'OCDE, il faut mettre en œuvre une politique d'application durablement vigoureuse du droit de la concurrence pour instaurer de bonnes habitudes de respect des règles de la concurrence.

Ces dernières années, un grand nombre de fusions sont intervenues dans le secteur de l'assurance, notamment aux Etats-Unis et en Europe. Ces fusions deviennent de plus en plus internationales et, dans certains cas, concernent des entreprises des divers compartiments du secteur financier. A titre d'exemple, on retiendra les fusions Citigroup/Travelers, Berkshire/General Re et Aetna Life/US Healthcare aux Etats-Unis, Royal Insurance/Sun Alliance et Commercial Union/General Accident au Royaume-Uni, AXA et UAP en France ou Credit Suisse/Winterthur en Suisse.

- *La responsabilité de l'approbation officielle des fusions et des accords entre assureurs est généralement partagée entre l'autorité de la concurrence et un organisme de tutelle spécifique au secteur. Cela appelle une coopération et cela peut donner lieu à des conflits. On observe néanmoins une tendance à réserver la compétence exclusive des questions de concurrence à l'autorité de la concurrence.*

La convergence dans le secteur financier (c'est-à-dire la tendance croissante à produire tout un éventail de produits financiers dans le cadre de la même société) peut renforcer la concurrence dans le secteur de l'assurance. Plus généralement, ce processus de convergence tend à susciter la création d'organismes de tutelle dotés de compétences plus larges et à caractère fonctionnel (c'est-à-dire couvrant l'ensemble du secteur financier ou l'ensemble de l'économie, comme c'est le cas de l'autorité de la concurrence).

Dans le secteur de l'assurance (comme dans d'autres compartiments du secteur financier) l'autorité de tutelle du secteur détient normalement une certaine compétence en matière de fusions ou d'accords entre concurrents. Cela peut donner lieu à des conflits avec l'autorité de la

concurrence, notamment lorsque la compétence de l'autorité de tutelle lui permet de prendre des arrêts sur des questions de concurrence. Bien que les risques de conflit puissent être minimisés par des accords explicites de coopération (comme c'est le cas en Norvège), il semble que le dispositif le plus convenable consiste à séparer clairement les responsabilités, celle de l'analyse de la concurrence étant attribuée à l'autorité de la concurrence. Les récentes réformes institutionnelles en Australie et aux Pays-Bas ont accordé une compétence exclusive sur les affaires de concurrence à l'autorité de la concurrence de ces deux pays.

Les technologies fondamentales (de traitement de l'information et de gestion des risques) utilisées par les banques et les sociétés d'assurance sont pour l'essentiel identiques, ce qui permet des économies d'envergure lors de la production conjointe de leurs produits. Lorsque l'intervention des banques dans le secteur de l'assurance (et vice versa) est autorisée, les banques peuvent devenir des concurrentes importantes face aux sociétés traditionnelles d'assurance. Quoi qu'il en soit, la tendance croissante des entreprises financières à produire une gamme complète de produits financiers (notamment à la fois des produits bancaires et des produits d'assurance) vient exercer des pressions en faveur d'un ajustement des institutions de tutelle. Plus précisément, on observe une tendance à la création d'institutions de tutelle dotées de compétences plus étendues sur les institutions financières de l'ensemble de tutelle (ou, comme c'est le cas pour l'autorité de la concurrence, sur l'ensemble de l'économie).

COMPETITION ISSUES ARISING IN THE INSURANCE AND FINANCIAL SERVICES INDUSTRIES

Background Note

This paper looks at competition issues affecting the insurance industry in two main ways. First, we focus exclusively on the insurance industry and examine issues that arise from the application of competition law. We highlight features of the insurance industry which may facilitate anti-competitive behaviour and which may confront competition authorities as they seek to enforce competition law in this sector of the economy.

The second part of the paper looks at how particular regulations may influence competition in the markets in which the insurance industry competes. We discuss how, in many instances, insurance products compete with products produced in other sectors of the financial industry. Therefore, it is useful to consider a broader perspective, incorporating the financial industry as a whole, of which the insurance industry forms just one part. We focus on capital-adequacy regulations, which are applied to most sectors of the financial industry, and examine whether the way these regulations are applied may affect competition between financial products and between financial institutions.

The paper concludes with several questions as the basis for further discussion.

Issues In The Application Of Competition Law In The Insurance Sector

This section of the paper seeks to address two questions:

- Are there particular features of the insurance industry which favour collusion or other anticompetitive practices? Is standard competition law adequate for controlling these practices? and
- Are there particular practices (such as horizontal or vertical agreements) in the insurance industry which might fall within the jurisdiction of competition law, but which may yield efficiency benefits? Can these practices be designed in such a way as to minimise any anti-competitive effects?

In particular, we address the following practices:

- Agreements on the sharing of information on losses;
- Agreements for cooperation in the insuring of large risks; and
- Agreements on standardised policy terms and conditions.

Sharing Of Loss Information

It is common for insurers to cooperate by sharing “loss statistics” - information on the number and size of claims and the characteristics of the claimants. This is justified as follows:

“The loss statistics which individual companies possess would fall a long way short of what is needed for proper rating of risks. Co-operation between insurance companies would therefore be necessary. After a collective analysis of loss statistics practical guidance for the writing of policies can be obtained. This kind of co-operation would make the calculation of the necessary technical reserves possible and ensure that income and expenses balance so that there is no risk of insolvency. Hence, the argument goes that co-operation with respect to premium calculation contributes to an improvement in the provision of services... Especially if claims are relatively infrequent and risk categories are relatively numerous, the larger the firm, the better the actuarial calculations based on internal claims experience. There is a clear incentive for firms either to merge or to cooperate in the pooling of claims experience.”¹

Armentano (1989) describes this process as follows:

“A pool of historical data that encompasses a large number of relatively homogeneous units of risk exposure can provide a high degree of predictive accuracy with respect to future cost. And since individual firms are unlikely to have a large enough loss-experience base for accurate anticipation of future costs, the pooling of loss experience is essential for efficient cost estimation and rate-making. The more extensive the pooling, the greater the accuracy (presumably) in predicting costs, and the more efficient the industry will be (presumably) in tending toward an equilibrium price and output”.²

The sharing of loss information between insurers may therefore be pro-competitive. In the absence of such cooperation, small insurers would be placed at a disadvantage relative to large insurers. Small insurers would not be able to offer as many separate risk categories and would need to incorporate a larger “risk premium” into their prices.

Such cooperation may also facilitate collusion, particularly if:

- (a) The information is not available on fair, reasonable and non-discriminatory terms to all existing and potential insurers;
- (b) The shared information includes information on actual prices charged (or mark-ups over costs, commissions payable to intermediaries or other mechanisms for calculating prices) or forecast what prices or commissions will be in the future;
- (c) The shared information facilitates the division of the market between insurers on geographic or other lines; or
- (d) The institutional arrangements supporting the sharing of information act as a vehicle for the formation of wider agreements.

In regard to the availability of the information, it is clear that the shared information should be available to all existing and potential insurers (and, indeed, non-insurers) on non-discriminatory terms. Where certain competitors (such as foreign insurers or new entrants) can be excluded from the

information sharing arrangements, competition will be constrained. In addition, for many large companies self-insurance is a good substitute for insurance services available in the market. For these companies, the availability of loss information would greatly facilitate both the accurate pricing of self-insurance and the evaluation of the self-insurance option in comparison with alternatives. Therefore the shared information should be made available to non-insurers on the same terms and conditions.

Similarly, where the shared information contains information on prices charged to customers, insurers will be able to more easily sustain a cartel agreement because they will be able to more easily detect and punish deviation from an agreed schedule of prices. Even where the information shared simply corresponds to so-called “pure premiums”³, collusion may be facilitated if, as a result, insurers need only come to agreement on a single figure (the common percentage “mark-up” over pure premiums) and not on an entire schedule of prices.

The sharing of information may also facilitate market-sharing agreements, such as agreements to divide markets geographically or by product line. If the shared information permitted the identification of the insurer supplying the information, other insurers would be able to more easily detect violations of such agreements and could more easily enforce collusion. In addition, we may note that information on the identity of the company that submitted the information is not essential for the intended purpose of the shared information (the forecasting of future losses).

In addition, it should be noted that in the case of some risks, forecasts of expected future losses are *not* based on historic loss information. In these cases the sharing of information is unnecessary. Examples might include the insuring of risks based upon, say, stock market movements or the insuring of risks based upon weather patterns (in both cases a substantial amount of risk information is already available).

These considerations suggest the following check-list of questions that might be considered when analysing an application for approval of a horizontal information sharing arrangement in the insurance industry:

- (a) Does the agreement only cover the sharing of loss information for risks for which historical loss data is essential for forecasting future losses?
- (b) Will participation by insurers in the information sharing agreement be voluntary or mandatory?
- (c) Does the agreement provide that the information will be made available to all who request it at fair, reasonable and non-discriminatory terms?
- (d) Will the shared information include information on premiums charged by insurers or on commissions payable to intermediaries, or would it permit the calculation of those prices?
- (e) Will the shared information permit the identification of individual insurers who submitted the information?⁴

Co-operation In The Insurance Of Large Risks

As we saw in the previous section, for a broad class of risks, insurers typically seek to reduce their exposure to risk through reliance on the principle of the “law of large numbers” which states that for a sufficiently large number of independent risks, the expected loss will, with a high probability, be very close to the average. However, in the case of insurance of very large risks it may not be possible for any one insurer to underwrite enough independent risks to rely on the law of large numbers to reduce the overall risk. The risk to any one insurer can be reduced, however, by sharing the risk over a large number of independent insurers. By undertaking joint underwriting of these large risks, a co-operative arrangement between insurers may be able to sufficiently diversify risks to provide insurance that could not be written by one firm at all. Co-operation, therefore, may permit services to be provided that could not otherwise be provided.⁵

However, of course, co-operation may not always be essential to provide new services. Indeed, in the absence of co-operation there may be other firms (such as other large insurers or re-insurers) who may be in a position to adequately diversify the risk. In addition, such an agreement might restrict competition, by including more firms than is strictly necessary to adequately diversify the risk. Alternatively, the agreement might limit further new entry by extending to include all likely future competitors.

These considerations suggest the following checklist of questions that might be considered when analysing an application for approval of a co-operative arrangement in the insurance industry:

- (a) Is the co-operation for the purpose of providing services that could not be provided in the absence of co-operation?
- (b) Does the agreement include more firms than is necessary? (*i.e.*, could the services be provided with fewer parties to the agreement?)
- (c) Does the agreement extend to provisions that are not strictly necessary for competing in this market (such as agreement on co-operation in other markets)?

Agreements Related To Policy Terms And Conditions

In many OECD countries, the terms and conditions of insurance policies are explicitly regulated by the state. In other cases (such as in the EU), insurance companies are granted an exemption from competition law in order to facilitate agreement on common terms and conditions of insurance contracts.

It is sometimes argued that the market for the supply of insurance services lacks transparency so that consumers are unable to compare insurance policies offered by competing insurers. Where consumers are unable to easily compare insurance policies, competition is hindered. Consumers are unable to determine which of two policies is a better deal, or whether a new product introduced to the market offers better value than existing products.

Furthermore, consumers may be reluctant to purchase where they cannot be sure that the insurance contract covers their needs and does not contain hidden surprises. “Policies containing sharply formulated exclusions, of which the exact implications can only be assessed by a specialised lawyer, might be difficult to read for an average consumer.”⁶

These observations typically do not apply in the area of industrial and commercial insurance. In this arena insurers are confronted with sophisticated, well-informed buyers who negotiate in detail over each of the terms and conditions of each contract. This lack of transparency, to the extent that it exists, primarily arises therefore in the case of “mass” or consumer insurance products.

Agreements to standardise contract terms and conditions (or regulations to achieve the same effect) may have several drawbacks. First, such agreements may facilitate collusion. Standardising contracts not only facilitates price comparison by consumers, but also by competitors who may, as a result, be in a better position to detect violations of a cartel agreement. In addition, a successful cartel agreement which fixes prices will typically simply re-direct competition into non-price areas, such as the terms and conditions of contracts. The attempt to standardise contracts can therefore be seen as a necessary support or corollary to successful collusion on price.

More importantly, such agreements may restrict product variety. Up to an point, consumers are made better off with more variety as they can choose a product more closely suited to their needs.⁷ Therefore “standardization of policy conditions has the disadvantage that it does not allow for enough risk differentiation and makes it difficult to take into account the individual risk of the insured.”⁸ In an extreme case, standardisation of insurance contracts may prevent insurers from profitably insuring certain unusual risk classes, causing insurers to withdraw from these markets entirely.

In addition, standardisation of insurance contracts will restrict innovation. By limiting deviation from established standards consumers may be forced to forego the benefits of innovative new products employing a completely different approach.

Some of these drawbacks can be offset if the standardised contracts are non-binding on insurers (perhaps with a requirement on insurers who choose not to offer standard contracts to disclose this fact to consumers). Alternatively, standardisation might apply only to some part of the overall insurance contracts. Either approach would both make collusion more difficult and would permit continued development of new and innovative products.

There are alternative means of promoting the efficiency of insurance markets without standardising insurance products. In many countries consumers are protected against adverse contractual terms and conditions through consumer protection laws. In addition, where consumers have trouble comparing insurance contracts they may be prepared to pay to have this task done for them by, for example, an independent insurance broker. Lastly, regulations may enhance comparability of products by mandating standards for presentation of key pieces of information (rather than the contractual terms themselves).

These considerations suggest the following checklist of questions might be considered when analysing an application for approval of a co-operative insurance industry arrangement to standardise contractual terms and conditions in the insurance industry:

- (a) Does the agreement relate only to consumer products?
- (b) Is the agreement binding on all insurers?
- (c) Does the agreement relate to entire contracts or only to part of overall contracts?

- (d) Will the agreement prescribe certain contractual terms or simply proscribe the use of undesirable terms?
- (e) Would the agreement make it difficult to introduce new and/or innovative products in the future?

Other Issues

Agreements Related To The Settlement of Claims

It is generally recognised that the use of the legal system to settle claims can be extraordinarily costly, especially for small disputes. Therefore, insurers may be able to reduce their overall costs (to the benefit of consumers) by mutually agreeing to avoid use of the legal system, through the use of alternative dispute resolution mechanisms, or through devices which do not allocate fault at all. For example, car insurers may agree to each pay 50 per cent of the total damages incurred, without inquiring whose client was guilty.

Although devices which do not take account of fault discriminate against careful drivers, such agreements do not seem to raise competition concerns and, provided they are not binding on all insurers, do not seem to raise public policy concerns at all.

Co-operation On Risk-Reducing Activities

Insurers may seek to reduce their exposure by undertaking various sought of activities to reduce loss. For example, fire insurers may inspect premises for the presence of fire-extinguishers or flame-retardants. In most cases the benefits of these activities can be fully captured by the insurer, but in some cases they cannot. For example, any one insurer could not expect to capture the benefits of a national publicity campaign encouraging drivers to slow down. As a result, not enough of such activities will be undertaken. As before, co-operation between insurers may therefore permit a reduction in risk and should, in certain circumstances, be encouraged.

Maintaining Registers Of Information On Risks

In general, the more information that an insurer has about a potential risk, the more accurately it can price the insurance. However, in certain cases, individuals who are bad risks can conceal this fact. This raises insurance costs and therefore prices for individuals (such as new drivers) who cannot demonstrate a clean record. In such cases, it is possible that overall welfare is improved if insurers could distinguish bad risks from drivers without any driving history. This could be achieved if insurers jointly maintained registers of information on drivers with a certain number of accidents.

Moreover, in the absence of mechanisms for credibly demonstrating a claims record, individual drivers may be reluctant to change insurers as this might mean foregoing any benefits of bonuses from a lower-than-average number of claims. Although insurers can and do regularly provide certificates of claims histories, competition between insurers might be enhanced if such information were available easily to all insurers at the time of application of a prospective customer. Again, this could be achieved if insurers jointly maintained registers of information on the claims records of all drivers.

Provided the same conditions that were discussed above apply (*i.e.*, provided participation is voluntary; provided the information will be available to all interested parties; provided the information

does not allow the identification of individual insurers, etc.), these forms of agreements do not seem to raise competition concerns.

Re-Insurance And Vertical Arrangements

Another common practice in the insurance industry, is for insurers to shift a proportion of their risk to a reinsurer. Indeed, reinsurance is an alternative to cooperation (discussed in the previous section) as a mechanism by which insurers may be able to offer competitive cover for risks that are too large for an ordinary insurer to offer.

However, as in other industries, the vertical relationships that arise through reinsurance may act to facilitate collusion. In particular, a situation might arise where the upstream reinsurance market is relatively concentrated. In this circumstance the downstream insurers may be able to utilise the reinsurer as a tool for enforcing collusive arrangements. For example, the insurers (via the reinsurer) argue that “uniformity of premiums and policy conditions is required to make the calculation of the tariffs for reinsurance possible”.⁹ The reinsurer, by enforcing tariff uniformity (at the cartel price) becomes the mechanism by which collusion is enforced.

Compulsory Membership of a Guarantee Fund

Many states of the US and countries in the EU require membership in some form of joint insurance fund. These funds may have a number of different roles, such as seeking to compensate policyholders in the event of bankruptcy of their insurer or seeking to compensate victims of uninsured or unidentified drivers.

These arrangements may, in some circumstances, restrict competition. If the requirements for membership in the fund are strict, new entry may be deterred. The EU notes:

“In some cases, insurance undertakings which want to offer motor insurance products in another member state without an establishment there are discouraged from doing so because of specific requirements concerning joining the Motor Insurance Bureau and the Guarantee Fund ... The Commission has contacted the member states concerned to assess the compatibility of their national law with Community Law”.¹⁰

Armentano notes that participation in the Guarantee Fund may be a mechanism for obtaining information on (and, in some cases, control over) rivals:

“Guaranty funds, mandated in many states, allow some insurers to monitor the economic performance of other insurers in order to determine whether their financial condition is ‘hazardous’ and merits state remedial action. Such coordinated activities, where competitors can make recommendations concerning the economic solvency of rivals, and where they can make recommendations for governmental intervention, may well contain some inherent antitrust difficulties”.¹¹

Selected Competition Effects Of The Regulation Of Insurance Companies Within Financial Conglomerates

We turn now from a discussion of competition enforcement issues in insurance to a discussion of the competition effects of certain types of regulation that affect the insurance industry. As we will see, in many markets insurance products compete alongside products produced in other sectors of the financial industry such as banks or pension funds. Therefore, in examining the competition effects of regulations affecting the insurance industry it is useful to take a wider perspective and to focus on regulations affecting the financial industry as a whole, of which the insurance sector represents just one part.

In addition, as we shall see, the ability of insurance companies to compete will depend upon factors such as, firstly, whether or not insurers are able to take advantage of any economies of scale that might arise from merging with other financial sector firms (such as banks) and, secondly, how the financial sector regulation is applied to that merged financial “conglomerate”. Therefore, a major focus of this part of the paper are the rules governing what insurance companies and other financial sector firms are allowed to produce and how regulations are applied to financial conglomerates.

We will highlight just three distinct stylized regulatory approaches governing these “line-of-business” restrictions and the manner in which regulation is applied to financial conglomerates:

- (a) Under the first approach, which we might call the “pillars” approach, there exist separate and distinct regulatory regimes for each of the major traditional categories of financial sector institutions (*e.g.*, retail banks, investment banks, insurance companies, pension funds, mutual funds). The opportunities for these pillars to compete in each others’ markets is restricted through line-of-business and ownership restrictions. In addition, there may exist restrictions on the ability of firms in one sector to distribute products produced in another. Each “pillar” of the financial industry is regulated by its own distinct regulator enforcing its own laws.

With recent regulatory developments in OECD countries, this regulatory approach is now rare, being found only (to varying degrees) in the US, Japan, Iceland, Finland.

- (b) Under the second approach, which we might call the “conglomerate” approach, there exist separate and distinct regulatory regimes for the traditional categories of financial sector institutions. However, relaxation of ownership restrictions permits the formation of cross-sector financial conglomerates (through the use of subsidiaries or holding companies). The separate legal entities of the conglomerate (although they are operated as a single economic entity)¹² are each separately regulated. There may also be some relaxation of the line-of-business restrictions, permitting the separately-regulated sectors to produce (and at least distribute) competing products.

This approach is by far the most common among OECD countries.

- (c) Under the third approach, which we might call the “co-ordinated” approach, the separate and distinct regulatory regimes for the parts of the conglomerate still exist, but are combined with regulatory and supervisory practices which explicitly take into account the conglomerate nature of the regulated institution. For example, the separate sectoral oversight could be combined with a degree of inter-sectoral coordination and co-operation so that the overall regulatory requirement for the firm more closely reflects the overall firm’s risk (as in the so-called “solo-plus” approach).

This approach, although relatively new, is practiced in several OECD countries.

Throughout this part of the paper we will focus primarily on regulation of the *capital adequacy* of financial firms. We will not focus on the myriad of other forms of regulation including other forms of prudential regulation (such as regulation of the portfolio of assets that can be held by financial institutions, “fit and proper” requirements on directors and managers, large exposure limits, or limits on “connected” lending) or on regulations governing business conduct (such as regulations governing methods of selling or mandating disclosure of certain information) or on differences in tax treatment. These other regulations are clearly important and can, themselves, have important competition effects. This paper will, however, focus primarily on capital-adequacy regulation.

We will use the term *regulatory capital requirement*¹³ to refer to the level of capital required of a financial institution by its regulatory regime. We will use the term *sector* to refer to one of the separately-regulated components of the overall financial *industry*. Most OECD countries separately regulate the following sectors: banks (and sometimes near-banks, such as credit unions or building societies), securities firms, life insurers, general insurers, pension funds and mutual funds/unit trusts.

We may summarise the remainder of this paper as follows:

First, we consider what level of capital adequacy regulation is appropriate, *i.e.*, the level of capital adequacy regulation that would not induce competition distortions and would lead to a “level playing field” between different products. In theory, the capital-adequacy requirements for financial industry firms should depend only on the risk of the producing financial institution as a whole. Of course, the risk of a financial institution would depend, in turn, on the products that it provides and on the portfolio of assets and liabilities that it holds.

The paper notes some examples that illustrate that where the capital adequacy (and other regulatory requirements) are not appropriately set between two products that compete in the same market, there may be competitive distortions. In general products with similar risk characteristics should face similar regulatory requirements independent of the sector in which they are produced.¹⁴ This is sometimes known as the “functional” approach to financial sector regulation.

This part of the paper goes on to show that even where the regulatory requirements within each sector are set appropriately (so that there would be no competition distortions for products produced by firms that operate in only one financial sector), there may be distortions to competition between financial institutions that arise from the manner in which the capital-adequacy regulations are applied to conglomerates.

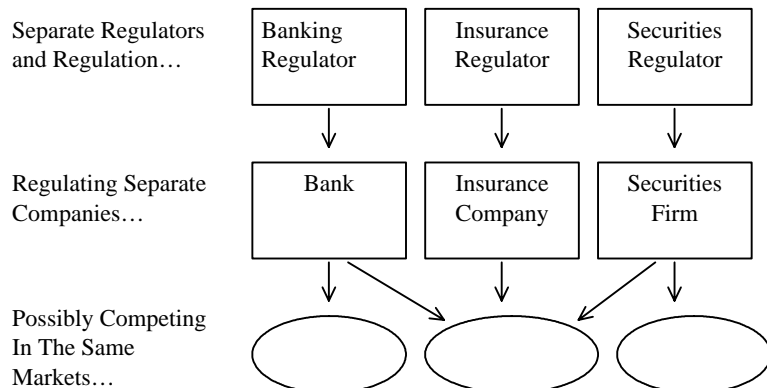
To illustrate this issue, the paper considers each of the stylized approaches introduced above in turn. In each case, it is assumed that the capital-adequacy regulation is properly applied in the context. The important issues raised (as summarised in table 1) are as follows:

- Under the pillars approach, the capital-adequacy requirements may accurately reflect the risk of each sectoral institution, so there is no necessary distortion of competition between financial institutions. However, the line of business and ownership restrictions limit the exploitation of economies of scope in production, thereby raising prices. In addition, they increase the costs of bundling products that cross sectoral boundaries and limit the ability of firms to introduce new products which combine elements which cross regulatory boundaries.

- Under the “conglomerate” approach the conglomerate may exploit economies of scale in production, may bundle cross-sectoral products together and may introduce cross-sectoral innovative products. However, the sectoral approach to regulation in the conglomerate approach will typically overlook inter-sectoral correlation in the portfolio of the financial firm. As a result, the capital-adequacy regulation may not be properly applied and there may arise a distortion in competition between financial institutions.
- The “co-ordinated” approach, supplements the conglomerate approach with cooperation and coordination between regulator bodies to ensure that the overall capital requirement on the conglomerate takes some account the risk of the financial institution as a whole. As a result, this approach is more likely to ensure that the overall capital requirements of the financial institution is matched to its the institution’s overall risk. The coordinated approach has the disadvantage of possible duplication of regulatory effort. In addition, accurate assessment of firm-wide risk may prove impossible, forcing reliance on arbitrary rules and assumptions.

Table 1. Summary of Approaches

Pillars Approach



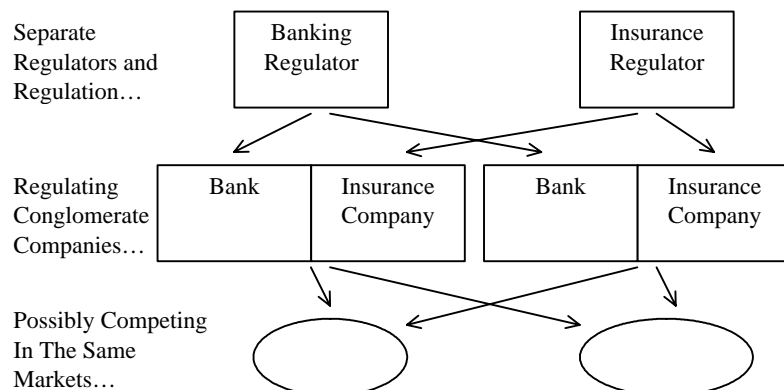
Advantages:

Capital-Adequacy regulation may be straightforward (if each separate sector represents a homogeneous risk class)

Disadvantages:

Does not allow for exploitation of economies of scope or easy development of innovative cross-sectoral financial products

Conglomerate Approach



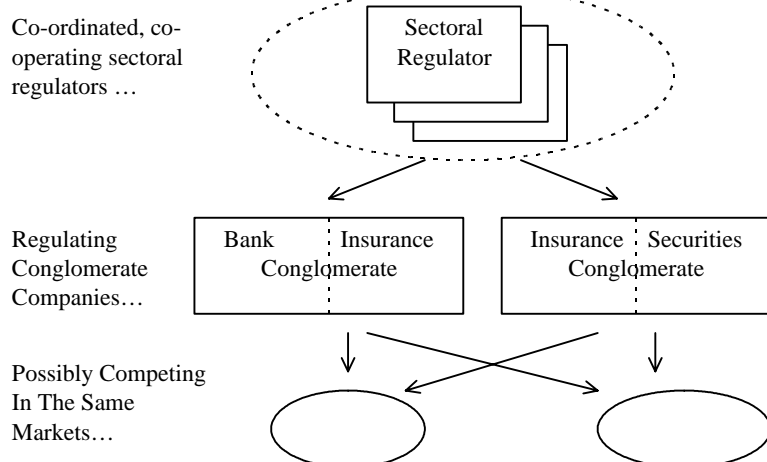
Advantages:

Permits exploitation of economies of scope and easy development of innovative cross-sectoral financial products

Disadvantages:

Separate sectoral capital requirements means that capital requirements may not properly reflect risk distorting competition between financial institutions

Co-ordinated Approach



Advantages:

Regulatory requirements may properly reflect overall risk of combined institution; permits exploitation of economies of scope and easy development of innovative cross-sectoral financial products.

Disadvantages:

In practice, determining the risk of a diversified firm producing many different products in many different markets may be difficult, leading to reliance on arbitrary assumptions for assessing risk.

Background

By way of background to the discussion in the subsequent sections, this section seeks to summarise aspects of the current OECD financial sector regulatory regimes related to cross-sectoral operations. We also seek to identify the key industry developments that are increasing pressure on those regulatory regimes.

OECD Financial Sector Regulation

Virtually all OECD countries choose to impose a separate prudential regulatory regime on each of the major components of the financial services industry. It is not at all uncommon, for example, to have different regulatory rules governing, for example, commercial and investment banking¹⁵, life and non-life insurance, mutual funds and pension funds. The separation of these regulatory regimes is ensured through line of business restrictions and (in some cases) by restrictions on cross-sectoral ownership.

We will focus first on the line of business restrictions. These regulations may prevent, for example, banks from directly producing insurance products (or vice versa) or may prevent mutual funds from offering banking services (and vice versa). Table 2 illustrates line of business restrictions between banks and insurance companies as of 1992¹⁶ (the situation will have changed somewhat since this information was collected). It is clear from the table that with virtually no exceptions banks in OECD countries were not allowed to directly produce insurance products and vice versa.

It is also interesting to note the asymmetry in the regulatory position of banks and insurers. Although most OECD countries allow banks to distribute (but not produce) insurance products, in general insurers are not allowed to distribute banking products.

Of course, the line-of-business restrictions could be relatively easily circumvented if financial institutions under one regulatory regime were allowed to either (i) own subsidiaries, or (ii) be owned by other companies, or (iii) be part of a conglomerate with other companies that carry out the forbidden business. Therefore, line-of-business restrictions are in some cases combined with ownership restrictions.

As the table 3 shows, broadly speaking the OECD countries fall into two categories in their attitude towards ownership restrictions. A few countries virtually completely prohibit the formation of subsidiaries operating in other sectors of the financial industry. However, most OECD countries allow the formation of subsidiaries or conglomerates provided that each firm in the conglomerate is separately subject to the regulatory regime for financial firms operating in that sector.

| Table 2. Illustrative 1992 Regulatory Restrictions Related To Direct Production And Distribution By Banks Of Insurance Products And Vice Versa | | | | |
|--|-----------------------------------|--------------------------------------|------------------------------|--------------------------------------|
| Member Countries | Direct Production | | Direct Distribution | |
| | By a bank of an insurance product | By an ins. company of a bank product | By a bank of an ins. product | By an ins. company of a bank product |
| Australia | ■ | ■ 1 | □ | ■ |
| Austria | ■ | ■ | □ | ■ |
| Belgium | ■ | ■ | □ | ■ |
| Canada | ■ | ■ | ■ | ■ |
| Denmark | ■ | ■ | □ | ■ |
| Finland | ■ | ■ | ■ | ■ |
| France | ■ | ■ | □ | ■ |
| Germany | ■ | ■ | □ | ■ |
| Greece | ■ | ■ | ■ | ■ |
| Iceland | ■ | ■ | □ | ■ |
| Ireland | ■ | ■ | □ | ■ |
| Italy | ■ 2 | ■ | □ | ■ 3 |
| Japan | ■ | ■ | ■ | ■ |
| Luxembourg | ■ | ■ | ■ | ■ |
| Netherlands | ■ | ■ | □ | ■ |
| New Zealand | - | - | - | - |
| Norway | ■ | ■ | □ | ■ |
| Portugal | ■ | ■ | ■ 4 | ■ |
| Spain | ■ | ■ | □ | ■ |
| Sweden | ■ | ■ | □ | ■ |
| Switzerland | ■ | ■ | □ | ■ |
| Turkey | ■ | ■ | □ | ■ |
| United Kingdom | ■ | ■ | □ | ■ |
| United States | ■ | ■ | ■ | ■ |

| | |
|---|-------------|
| ■ | Forbidden |
| ■ | Exceptional |
| ■ | Limited |
| □ | Allowed |

Notes:

- (1) In this column, direct production by an insurance company of a banking product is forbidden in principle, except when the products are considered as connected to the insurance activity.
- (2) With the exception of the Banca Nazionale delle Comunicazioni
- (3) Restrictions do not apply to intermediaries
- (4) Regulations distinguish between insurance intermediaries and insurance companies.

Prior authorisations are also frequently required. Source: OECD (1992).

Table 3. Illustrative 1992 Ownership Restrictions On Banks With Respect to Insurance Companies And Vice Versa

| | Creation of | | Shareholding of | | Financial group in which a bank or an insurance company is the parent company or a company of the group |
|----------------|-----------------------------------|---|--------------------------------|---------------------------|---|
| | An insurance subsidiary by a bank | A banking subsidiary by an ins. company | A bank in an insurance company | An ins. company in a bank | |
| Australia | Forbidden | Forbidden | Limited | Forbidden | Limited |
| Austria | Limited | Limited | Limited | Limited | Limited |
| Belgium | Forbidden | Limited | Forbidden | Limited | Limited |
| Canada | Forbidden | Forbidden | Forbidden | Forbidden | Limited |
| Denmark | Limited | Limited | Limited | Limited | Forbidden |
| Finland | Forbidden | Forbidden | Forbidden | Forbidden | Forbidden |
| France | Limited | Limited | Limited | Limited | Limited |
| Germany | Limited | Limited | Limited | Limited | Limited |
| Greece | Limited | Limited | Limited | Limited | Limited |
| Ireland | Limited | Limited | Limited | Limited | Limited |
| Iceland | Forbidden | Forbidden | Forbidden | Limited | Forbidden |
| Italy | Limited | Limited | Limited | Limited | Limited |
| Japan | Forbidden | Forbidden | Forbidden | Forbidden | Forbidden |
| Luxembourg | Limited | Limited | Limited | Limited | Limited |
| Netherlands | Limited | Limited | Limited | Limited | Limited |
| New Zealand | - | - | - | Limited | - |
| Norway | * | * | Limited | Limited | * |
| Portugal | + | Limited | Limited | Limited | Limited |
| Spain | Limited | Limited | Limited | Limited | Limited |
| Sweden | Limited | Limited | Limited | Limited | Limited |
| Switzerland | Limited | Limited | Limited | Limited | Limited |
| Turkey | Limited | Forbidden | Limited | Limited | Forbidden |
| United Kingdom | Limited | Limited | Limited | Limited | Limited |
| United States | Forbidden | Forbidden | Forbidden | Forbidden | Forbidden |

| |
|------------------|
| Forbidden |
| Strictly Limited |
| Limited |
| Allowed |

Notes:

* through a holding company only

+ regulations distinguish between intermediaries and insurance companies

Prior authorisations are also frequently required. Source: OECD (1992).

Key Industry Developments

Regulatory regimes in OECD countries have come under pressure as a result of the following underlying industry developments:

- (a) technological change which is facilitating the development of new, innovative financial products and is enhancing economies of scope;
- (b) important developments in deregulation, liberalisation of trade in financial services and foreign investment;
- (c) increasing competition from substitute financial products subject to differing regulatory regimes; and
- (d) globalisation and increasing sophistication of financial industry customers, leading to a greater demand for more sophisticated financial products including products that span regulatory regimes.

We consider each of these in turn:

Technological Change and Economies of Scope

Over the last two decades the rapid decrease in the cost of computing and communication facilities has had a major impact on the financial sector. Information technology has greatly facilitated the handling and processing of information. This has had several consequences including:

- An increase in the range, sophistication and complexity of financial products.
- An increase in the economies of scope arising from the production of financial products.

The increase in the range of financial products has blurred the boundaries between the traditional “pillars” of financial regulation. For example, financial risk-management products such as derivatives (puts, calls etc.) and credit derivatives are little more than forms of insurance - insurance against adverse market movements. These products blur the traditional regulatory distinction between insurance and traditional financial products.

More generally, many commentators have noted that the primary business of financial institutions across the financial services sector is the management of risk. Thus, in one sense, the entire financial industry can be viewed as competing in one market - the market for risk management services. In any case, risk management tools and processes that are developed for application in one sector of the financial services industry (such as in assessing credit risk) can usually be modified to address risk-management issues in other sectors (such as insurance). Therefore economies of scale and scope can be exploited in producing cross-sectoral products.

The Wallis Report in Australia notes:

“Diversification across traditional sectors of banking, life insurance, funds management and securities can provide economies of scale and scope. Efficiencies or cost savings are likely to be achieved through infrastructure and administrative rationalisation, information technology

savings and marketing synergies. At the same time, such structures may facilitate more efficient exploitation of customer databases (within the requirements of privacy laws)”¹⁷

Writing in 1992, the OECD report notes:

“Only a few studies have been made on the issue of economies of scope, but the conclusion seems to emerge that there are complementarities of cost in banking and insurance. ...

More generally, it would appear that there is an incipient public demand for ‘financial supermarkets’ - which provide the possibility for several needs being met at one go (‘one-stop shopping’) - in many ways similar to the pattern of demand which led to the introduction of supermarkets in the mass consumption field. ... [A] gradual shift can also be observed in household demand towards the provision of financial services rather than products. The availability of these services (including advisory services) may permit to meet a wider range of financial requirements in banking and/or insurance through active management of the whole (or a very significant part) of the household’s assets, including the coverage of physical, material or financial risks”.¹⁸

Increasing economies of scope increases the costs of regulatory restrictions on cooperation and on ownership, leading to pressure on the regulatory regime for a relaxation of these restrictions.¹⁹

Deregulation and Liberalisation

The last decade has witnessed at least three important regulatory developments:

- First, a relaxation of regulatory controls on prices;
- Relaxation on ownership, permitting the formation of financial conglomerates;
- An erosion of the functional boundaries between different types of financial institutions.²⁰

Over the past two decades the opportunities for international trade in financial services has increased significantly, due primarily to the activities of the OECD, EU, NAFTA and the WTO. More information on this can be found in the chapter on Financial Services in the OECD Report on Regulatory Reform²¹

Note that, to an extent, these two developments (deregulation and liberalisation) are reinforcing. Increasing trade in financial services exposes and highlights difference in regulatory treatment of competing products, leading to pressure for harmonization of regulatory regimes, usually in the direction of deregulation.

Inter-Sectoral Competition

As noted above, technological developments and deregulation have increased the range of financial products available. This has increased the possibility that separately-regulated products will compete in the same markets.

Consider first the markets for savings and insurance products. We may broadly identify the following savings and insurance markets.²²

- (a) the market for transaction accounts and services (including EFTPOS, chequing and credit card facilities);
- (b) the market for short-term financing (savings) facilities (including bank savings accounts, short-term term deposits, short-term commercial loans, money-market accounts etc.);
- (c) the market for long-term low-risk financing (savings) facilities (including, *e.g.*, defined-benefit pension plans, life products with pre-determined payouts, long-term bonds, etc.)
- (d) the market for long-term higher-risk financing (savings) facilities (including *e.g.*, defined contribution pension plans, mutual funds, life products, and possibly including financial risk management techniques such as exchange-rate hedging, portfolio insurance, credit derivatives and so on); and
- (e) the markets for the various classes of general insurance (*e.g.*, fire, liability, life, etc.).

There are a number of separately-regulated classes of suppliers into these markets, such as banks, building societies and credit unions, mutual funds, pension funds, general insurers, life insurers and friendly societies. In addition there are a number of non-regulated suppliers, such as other forms of assets (*e.g.*, tradable securities, art and/or real property). The interaction between the separate regulatory regimes and the markets is illustrated in table 4.

It is clear from table 4 that in each of the markets identified above at least two different separately-regulated sectors of the financial industry supply competing products. In the case of the market for long-term high-risk savings, 6 different regulatory regimes may produce competing products.

| Table 4. Competing Products In Savings And Insurance markets | | | | | | |
|---|-------------------------------|----------------------|-----------------------|---------------------------|----------------------------|-------------------|
| Financial Institution (with separate, distinct regulatory regime) | Financial Product | Transaction Services | Short-Term Facilities | Long-Term Low Risk Saving | Long-Term High Risk Saving | General Insurance |
| Banks | Cheque Accounts | | | | | |
| | Savings Accounts | | | | | |
| | Term Deposits | | | | | |
| Credit Unions & Bldg Socs | Cheque Accounts | | | | | |
| | Savings Accounts | | | | | |
| | Term Deposits | | | | | |
| Mutual Funds | Cheque Accounts | | | | | |
| | Mutual Funds | | | | | |
| Pension Funds | Defined Benefit Scheme | | | | | |
| | Defined Contribution Scheme | | | | | |
| Securities | Derivatives | | | | | |
| | Currency Hedges | | | | | |
| | Credit Derivatives | | | | | |
| Life Insurers | “Pure” Life Insurance | | | | | |
| | “Whole” Life Products | | | | | |
| Gen Insurers | General Insurance | | | | | |
| Friendly Socs | General Insurance | | | | | |
| | Life Products | | | | | |
| Markets | Traded Equities | | | | | |
| | Traded Bonds | | | | | |
| Non-Markets | Equities | | | | | |
| | Bonds | | | | | |
| | Other Assets (e.g., Property) | | | | | |
| Self Provision | Self Insurance | | | | | |

| | |
|--|---------------------|
| | = likely to compete |
| | = may compete |

As discussed further below, the presence of different regulatory regimes for competing products raises the possibility that differing regulatory requirements will distort competition. This may lead to calls for a “leveling of the playing field” and further general pressure on the regulatory regime.

For example, in the case of Australia, the Australian Insurance and Superannuation Commission has noted:

“Developments in the finance sector have also resulted in separate prudential regimes applying to retail savings products with similar functional characteristics. For example, banks and life offices have different capital requirements, even though deposits are regarded by some as akin to short-term, capital guaranteed life policies. Capital and custodian requirements for life insurance, superannuation and collective investments also vary depending on the type of product, the institution offering it and the applicable supervisory regime”.²³

In a similar manner we may consider the markets associated with consumer and business credit facilities. It is important to note however that consumer and business credit does not raise the same prudential concerns as savings and investment. Therefore the regulatory restrictions on the operators in these markets are lighter and in many cases largely irrelevant to market outcomes. We may distinguish the following broad markets:

- (a) Personal consumer credit (including overdrafts and term loans, secured and unsecured);
- (b) Home Loans;
- (c) Small business credit (including overdrafts and term loans, secured and unsecured);
- (d) Small business equity
- (e) Corporate financing (both equity and debt, which we may, to an extent, view as substitutes).

As before, we also ask what are the key, distinct regulatory regimes competing in these markets. In addition to the financial institutions identified earlier (banks, credit unions, mutual funds, pensions funds, insurers) we may add other sources of credit such as finance companies, venture capitalists, retailers and personal contacts. The interaction between the separate regulatory regimes and the markets is illustrated in Table 5 (overleaf).

Table 5. **Competing Products In Credit / Financing markets**

| Financial Institution (with separate, distinct regulatory regime) | Financial Product | Consumer Credit | Home Loans | Small Business Credit | Small Business Equity | Corporate Financing |
|---|-------------------|-----------------|------------|-----------------------|-----------------------|---------------------|
| Banks | Overdrafts | | | | | |
| | Term Loans | | | | | |
| | Credit Cards | | | | | |
| | Home Loans | | | | | |
| | Commercial Loans | | | | | |
| Credit Unions & Bldg Socs | Overdrafts | | | | | |
| | Term Loans | | | | | |
| | Credit Cards | | | | | |
| | Home Loans | | | | | |
| Mutual Funds | Commercial Loans | | | | | |
| | Personal Loans | | | | | |
| | Home Loans | | | | | |
| Pension Funds | Personal Loans | | | | | |
| | Home Loans | | | | | |
| Finance Cos | Personal Loans | | | | | |
| | Home Loans | | | | | |
| Retailers | Term Loans | | | | | |
| | Credit Cards | | | | | |
| Life Insurers | Personal Loans | | | | | |
| | Home Loans | | | | | |
| Venture Capital | Equity | | | | | |
| Markets | Bond Issues | | | | | |
| | Stock Issues | | | | | |
| Private Contact | Private Loans | | | | | |
| | Private Equity | | | | | |
| Self Provision | Private Equity | | | | | |

| | |
|--|---------------------|
| | = likely to compete |
| | = may compete |

Carosio (1990) notes:

“In most Western countries, the structures regulating financial markets and intermediaries remained relatively stable and unchallenged after the thirties. In recent years, however, as the twin developments of financial innovation and the international integration of markets have begun to undermine the very foundations of regulatory frameworks, the need for change has become apparent and major reforms have been set in train.

By modifying the nature of bank’s activities and the competitive environment in which they operate, the proliferation of new financial instruments and the growth of non-bank intermediaries have resulted in far-reaching changes in the sources and scales of bank risks. They have also led to the blurring of frontiers between markets and between categories of intermediary, not only because most of the new financial instruments are not exclusive to one type of intermediary, but also because innovation has frequently involved contractual forms, such as securitization and insurance-like commitments, that straddle several markets. Long-standing regulations have suddenly begun to appear inadequate.”²⁴

To summarise, this section has raised the question of the extent to which financial market developments have led to both relaxing of line-of-business restrictions a proliferation of new financial products which straddle traditional markets. This raises the issue of whether or not different regulatory treatment for competing products might be distorting competition.

Capital-Adequacy Regulation

At first sight, the different regulatory regimes for the different sectors of the financial industry appear to be quite different. However, on closer inspection, there are important elements in common. The underlying rationales for prudential regulation²⁵ are essentially similar across the financial sector. In particular, the regulation of capital adequacy in each of these sectors may be viewed as requiring a minimum level of “equity” or “regulatory capital” to provide a buffer against adverse shocks and to enhance the incentives of the shareholders of the firm to act in a prudent manner.²⁶

The higher the level of regulatory capital required by the regulatory regime, the higher the costs of the regulated institution. It is clearly important therefore, that the regulatory capital requirement not be higher than strictly necessary for prudential purposes.

In general, the regulatory capital requirement should depend on the risks of the regulated institution, which depends, amongst other things, on the products which the institution provides.²⁷ For example, a bank which offers nominally-fixed on-demand deposits exposes the depositor to more risk than a mutual fund when it offers products whose liabilities vary with assets. A defined-benefit pension scheme exposes the policy-holder to more risk than a defined-contribution pension scheme. Other things equal, therefore, the regulatory capital requirements for banks should be higher than that for mutual funds. Similarly, the regulatory capital requirements for defined-benefit schemes should be higher than for defined-contribution schemes.

The risk of a financial institution will obviously depend upon the risks of the assets and liabilities which it holds (and the correlation between them). For example, some banks (especially those which are predominantly financed through long-term loans) have relatively low variability in the value of their liabilities (deposits) but may have much larger variability in the value of their assets. On the other

hand, insurers may have relatively low variability in the value of their assets but much higher variability in the value of their liabilities (due to the insurance risks which they cover).

Mutual funds provide a clear illustration of the importance of correlation. Although the market value of the assets of a mutual fund is highly uncertain (just like the assets of a bank), the value of the liabilities of a mutual fund are usually perfectly correlated with its assets. As a result, a mutual fund attracts a much smaller capital requirement than a bank.

It is clear that where the capital-adequacy regulation does not properly reflect the overall risk of the financial institution as a whole, there may be important effects on competition. We may distinguish two such effects:

- First, where the regulatory requirement does not reflect the risk of the institution as a whole, there will not be a level playing field between financial institutions. Institutions with higher lower risk will not have those risks reflected in lower costs. As a result competition will be distorted in favour of higher risk institutions.
- Second, where the change in the regulatory requirement as a result of adding another product to the overall portfolio does not reflect the change in the risk of the institution as a whole, there will not be a level playing field between financial products.²⁸ Those products with lower prudential risks will not be able to compete effectively with products that have higher prudential risks.

As an example of the first effect, suppose that the regulatory capital requirements on banks associated with lending did not distinguish between lenders. In this circumstance, banks would have an incentive to seek the lender which provides the highest return without regard for the risk involved. As another example, until relatively recently, the capital requirements for insurance companies in the US were, in some cases, fixed (and independent of the size or risks of the insurer). Under these conditions, since there is no marginal increase in the regulatory costs as a result of writing new insurance business, the insurers have an incentive to increase size indefinitely.²⁹

As an example of the second effect, suppose that for an insurer, the regulatory capital requirements for defined-benefit and defined-contribution pension schemes were the same. In this case competition would clearly be distorted in favour of the higher risk, defined-benefit plans. In some cases, pension funds produced by pension companies are subject to lower regulatory requirements than pension plans produced by insurers. Again, competition would be distorted in favour of pension funds. As a general principle, products with similar risk characteristics should face similar regulatory capital requirements.

In addition, of course, other forms of regulation should also be careful to not introduce competitive distortions. In particular, tax policy should be careful to ensure that differences in tax treatment does not introduce regulatory distortions.³⁰ Nor should other regulatory requirements, such as rules about disclosure or about the manner in which products can be sold.

The box on the next page provides an example of alleged distortions in competition arising from regulatory requirements in the pension industry in the EU.

Before concluding this brief discussion of the competition effects of imperfect capital-adequacy regulation, we may note two further points:

- First, in practice, there are practical limits on the extent to which regulators can assess the overall risk of a financial institution and, therefore, to an extent, all capital-adequacy regulation is “imperfect”. Given the range of potential products produced by each financial institution (even within a single sector) and given the range of possible types and forms of assets and instruments (and their correlations), assessing the overall risk by an external regulator may simply be too complex. Writing in 1990, King notes:

“Capital adequacy requirements should be related to the risk involved. Yet the BIS convergence agreement for banks implies a rather simple approach in terms of [capital-adequacy regulation]. In securities markets, the capital-adequacy requirements are sometimes very much more sophisticated and based on explicit numerical measures of the risks involved. They cover both position risk (associated with changes in the values of assets and liabilities) and counterparty risk (when another party defaults on a transaction). Even here, however, the measures often seem simple in comparison with recent developments in portfolio theory. Often the covariance between different assets and liabilities is ignored, and little allowance made for the offsetting nature of the risks taken by different divisions within a firm. Only the capital adequacy regime in the UK merits the description ‘sophisticated’ and is regarded by many in Europe as excessively complicated”.³¹

- Second, despite these problems, there is a discernible move towards regulatory models which seek to better reflect the risks of financial products and the overall risk of financial institutions (at least within each sector of the financial industry). The move to “risk-based capital requirements” in the insurance sector (mentioned above) is one example of this. A better example is the move towards reliance on banks’ in-house models of risk in the banking sector. Indeed, the Basle Committee recently approved the use of qualifying bank internal models³² to generate regulatory capital requirements for banks.

THE EFFECT OF REGULATION ON PENSION FUND AND LIFE INSURANCE COMPETITION IN THE EU

The EC has recently released a discussion paper entitled “Supplementary Pensions in the Single Market” which seeks to further the single market with regard to provision for retirement. This paper is interesting in that it emphasises the extent to which life insurance products compete with pension fund products in the market for the provision of long-term savings and at the same time highlights the differences in regulatory treatments of these two categories of products within the EU.

The paper distinguishes between employment related pensions (so-called “pillar 2” schemes) and private personal pension arrangements (“pillar 3” schemes). The majority of private personal pensions are provided by life insurers. However, the situation in regard to employment related pensions is more mixed. The proportion of these pensions that are provided by life insurers (as opposed to pension funds) ranges between 5 per cent in the UK and 81 per cent in Sweden. It would appear that, at least for employment related pensions, life products and pension plans are good substitutes.

However, problems arise due to differences in regulatory treatment. These differences relate to both the assets and the liabilities side of the balance sheet. Consider for example the rules regulating what assets pension funds and life insurers may purchase. Over a period of 20-25 years (the typical length of a pension arrangement), such rules may have a very important impact on the overall performance of the scheme as even very small differences in average rates of return can have a significant cumulative long-term impact. There are similar important differences in the regulatory treatment of the liabilities side of the different institutions.

The Competition Effects Of The Choice Of Regulatory Approach

Having noted that imperfect capital-adequacy regulation *may* give rise to competition distortions, we now move on to show how the three broad approaches to regulation of financial institutions that were identified earlier may, in certain circumstances, give rise to problems in capital-adequacy regulation but may also have certain offsetting benefits. The results of this section were summarised, earlier, in table

Approach 1: Separate Pillars

Under the “pillars” approach the financial industry is divided up into sectors which are each subject to separate and distinct capital-adequacy regulation. Competition across the sectors is restricted through both line-of-business and ownership restrictions. Only a few OECD countries maintain regulation of this form (US, Japan, Iceland and Finland), and even in these countries, the ownership restrictions between financial sector firms are being relatively quickly eroded.

Advantages

From the perspective of this paper, the primary advantage of the pillars approach is that, by dividing the overall financial sector up into categories of institutions with similar risk profiles, it is easier to apply the regulatory requirements. Rather than dealing with, say, institutions which provide a range of savings, commercial lending, securities trading and insurance products, by separating these categories of products it may be simply to determine the overall regulatory profile and therefore to determine the appropriate level of regulatory capital.

Disadvantages

However, the enforced separation between these sectors, introduces its own costs. In particular the pillars approach may both

- (a) restrict entry and restrict the ability of financial firms to exploit economies of scope; and
- (b) restrict the ability of financial firms to offer innovative bundles of financial products to consumers.

It is clear that the pillars approach may limit the number of potential entrants into each financial product market, thereby restricting competition. For example, regulatory restrictions may limit the ability of:

- life insurers to offer “on demand” access of investors to their funds;
- banks to offer medium-to-long term retirement savings products;
- banks to offer insurance products; or
- supermarkets or public utilities to offer banking or investment services.

In addition, line-of-business restrictions may prevent non-financial firms from taking advantage of a particular market situation to offer, say, insurance. For example, an automobile manufacturer may be in a good position to forecast the cost of car repairs and therefore may be in a strong position to offer automobile insurance (perhaps as a form of warranty). In a similar way, a construction firm, knowing in detail the construction materials and processes of its buildings may be in a strong position to offer, say, fire or earthquake insurance. Certain supermarkets, taking advantage of large volumes of customers may be able to offer certain, simple, banking products more cheaply than traditional banks.

Lastly, such restrictions may prevent firms from exploiting any economies that exist from joint production of financial products. For example, a bank might be restricted in its ability to use the information it has on customers in marketing, say, insurance or retirement savings products.

Line of business restrictions (coupled with restrictions on cooperation or on distribution) may limit the ability of financial institutions to offer bundles of products which combine features which would normally be subject to different regulatory regimes. Examples of such products include:

- A mortgage or other form of consumer loan for which the debt obligation ceases upon the death of the mortgagee (*i.e.*, a life insurance product tied to a mortgage product);
- Other forms of consumer loans for which the loan repayments may be temporarily suspended or terminated in the event of some external occurrence (such as the unemployment of the debt holder);
- Consumer loans combined with insurance elements, such as a mortgage combined with home/contents insurance, auto loans combined with auto insurance, credit card loans associated with travel insurance and so on.
- Savings products which are linked with life insurance (or health insurance, or unemployment insurance);

- Insurance products combined with savings elements (*e.g.*, long-term fire insurance combined with a savings component, as occurs in Japan).

There are many other possibilities of products that could be offered to business customers. One example might be a generalised income protection for farmers that would combine crop insurance with a forward contract on the value of the crop (or a forward exchange rate where the crop is sold on foreign markets). A small manufacturer might seek a product combining accounts-receivable insurance with traditional general (property and casualty) insurance.

Approach 2: Financial Conglomerates

As we saw earlier, over the last ten years many countries have sought to relax certain regulations, to eliminate regulatory inconsistencies, to relax the line-of-business restrictions and to permit firms to exploit economies of scope. Perhaps the most important development, for our purposes, has been the relaxation of ownership controls, permitting the formation of financial conglomerates.

However, the separate, distinct regulatory regimes governing the important subsidiaries of the conglomerate are retained. The overall capital requirements of the conglomerate are often (but not always) just the sum of the capital requirements of the individual subsidiaries.

“Broadly speaking, and subject to particular legal provisions in some countries, banking and insurance regulations ‘know’ only the enterprise that forms part of the conglomerate and not the conglomerate per se. Similarly, the supervisory authorities of one sector have in principle powers with respect to enterprises of that sector only.”³³

Advantages

The “conglomerate” approach has several advantages over the “pillars” approach, including permitting the exploitation of certain economies of scope; encouraging competition through entry and facilitating the innovative packaging and bundling of financial products.

That the economies of scope may be significant can be seen in the comment by US Treasury Secretary Robert Rubin who, in a speech in 1997 advocating liberalisation of the pillars system in the US, noted that financial modernisation could save consumers as much as \$15 billion of the nearly \$300 billion a year they spend on financial services.³⁴

Disadvantages

However, these reforms do not solve all of the problems identified above. Under the conglomerate approach, the capital-adequacy requirements on the financial institution may not accurately reflect overall risk. If so, financial institutions will face higher or lower costs than is appropriate and competition will be distorted.

Under the conglomerate approach, the capital-adequacy requirements for the firm are simply the sum of the capital-adequacy requirements of the individual separately-regulated components of the conglomerate. However, as was emphasised earlier, focusing on the individual components separately neglects any benefits (or harm) that might arise due to a correlation between the risk of the individual component and the conglomerate as a whole.

This may be illustrated with a simple example. Under the “pillars” approach, for example, a fire insurer may be required to set aside 4 cents in regulatory capital for every \$1 of potential liability. A fire insurer with a total exposure to, say, \$1 million worth of potential fire losses, would be required to have \$40 000 in regulatory capital. Similarly, a bank with a portfolio of home mortgages may be required to set aside, say, 8 cents for every \$1 lent. So, if the bank has outstanding loans worth \$1 million, it must maintain \$80 000 in regulatory capital.

Under the “conglomerate” approach, the bank and the insurer may combine under a holding company to form a single company. The regulatory capital required, based upon the business of each subsidiary is now \$40 000+\$80 000=\$120 000.

The problem is that this amount does not necessarily reflect the true risk of the conglomerate because it ignores any correlation between the liabilities of the bank and the insurer. For example, it may be that a fire raises the probability of default on a home loan (if, say, the workers at a factory that is burnt down are laid off). In this case, the liabilities on each side will be positively correlated and the total required regulatory capital should be higher.

Similarly, it is easy to imagine examples where the regulatory capital required of the conglomerate is less. For example, a crop insurance firm might merge with a financial firm offering forward contracts on future crop prices. In this case a large storm might simultaneously lead to claims against the crop insurance subsidiary and increase the expected profits of the financial subsidiary. Since the two liabilities are negatively correlated, one would expect that the regulatory capital required would be lower.³⁵ In general, in the case where there is no correlation across the sectors of the conglomerate, the conglomerate, being more diversified, carries less overall risk than the sectors considered separately and therefore should face a lower regulatory capital requirement.

By neglecting any correlation between the components of the conglomerate, the overall capital requirements may be either too strict or too lax. As a result, competition may be distorted with other unregulated products. For example, as we saw before, life-insurance products compete with, say, (largely unregulated) mutual funds. By ignoring the correlations within the conglomerate it is possible that the regulatory requirements on the life product could be too strict or too lax in contrast with the true underlying risk and therefore the life-insurance product may be placed at an advantage or a disadvantage with respect to competing products such as mutual funds.

Approach 3: Co-ordinated Regulation

Some of these problems are addressed through a “co-ordinated” or “consolidated” approach to financial sector regulation. By supplementing the sector-by-sector regulation of the conglomerate approach with consideration of the risk of the overall financial institution as a whole, it is possible to move towards a regulatory capital requirement that more closely reflects the total risk profile of the organisation, taking into account any correlation between the liabilities that it holds and between the liabilities and assets.

Clearly, the implementation of such an approach would require careful co-ordination and co-operation between the sectoral regulation agencies. Through a process of co-ordinated information gathering and exchange it may be possible to reach a common view on any adjustments that may be necessary to the sectoral regulatory capital requirements to reflect the appropriate regulatory requirements for the firm as a whole. Indeed, where the cross-sectoral correlation is weak this approach might, in fact, be close to optimal as the appropriate capital requirement for the institution as a whole might differ little from the sum of the capital requirements of the individual firms.

In addition, of course, the process of regulation might be both simplified and enhanced by allowing the capital requirements to be determined by an approved “in-house” risk model. In this case, regulatory responsibility would be limited to approving the model itself, which could be carried out by any of the individual sectoral regulators.

Advantages

If the regulatory requirements could be set correctly - *i.e.*, if the necessary information could be made available to regulators in a timely way and if regulators can assess the respective risk levels and apply and enforce the capital requirements - then, in principle, a “co-ordinated” approach to capital-adequacy supervision could alleviate many of the remaining competitive distortions identified above. The capital requirements would correctly reflect underlying risks and would allow firms to make use of whatever techniques are available for minimising overall firm risk and therefore their overall regulatory compliance costs.

The suggestion of a “consolidated” approach to risk measurement and the determination of regulatory capital is not novel. This theme is, for example, taken up by the Institute for International Finance in the “Report of the Task Force on Conglomerate Supervision”. Using somewhat opaque language, this report notes that:

“Increasingly, global financial firms are centralizing their risk profiles and risk management processes across products, without regard to the location or the legal entity in which a type of risk is incurred. Analysis and management of similar risk types on a global basis permit firms to offset risks in order to arrive at a consolidated risk assessment for the firm. Financial institutions at the cutting edge of innovation are even beginning to integrate their credit and market risk analysis. These advances enable financial firms to maximise portfolio diversification benefits and to manage their risks more efficiently than in the past. ...

These changes in risk management reflect a recognition that financial businesses generally incur certain types of risks (*e.g.*, credit risk, contingent credit risk, market risk, liquidity risk, model risk, operational risk, etc.). Of course, different financial institutions will hold different proportions of these risks, depending on the product mix in their portfolios. For example, insurance-based businesses will tend to have a higher proportion of contingent credit risk relative to other risks in the portfolio than other financial firms. While the management process applicable to such contingent risks differs significantly from the process applicable to managing market risk, the components of contingent credit risk will remain the same across products and institutions.

The Task Force believes that supervisory approaches must recognise and adapt to these developments. In order for financial oversight structures to supervise financial markets and firms effectively, they must incorporate advances in learning and best market practices. In the context of globalisation, this means that oversight at the international level at least should seek to harness analytical advances in financial market practice. This will require a shift toward emphasising firms’ exposures to risk and their management of those risks.”

On a much smaller scale, there is some agreement, at least, for the need to consider a wider perspective at least as a complement to conventional sectoral approach to regulation. In 1995 the Tripartite Group of banking, securities and insurance regulators noted:

“Fundamentally, the Tripartite Group agreed that supervision of financial conglomerates cannot be effective if individual components of a group are supervised on a purely solo basis. The solo supervision of individual entities continues to be of primary importance, but it needs to be complemented by an assessment from a group-wide perspective”.³⁶

Disadvantages

Although incorporating even some consideration of the overall risk of a financial institution is an improvement over the sector-by-sector process of the conglomerate approach, the amount of information necessary to assess the overall risk of a financial conglomerate is likely to be sizeable. In principle, risk and correlation information would be needed, on a continuous basis, on the entire portfolio of assets and liabilities of the financial institution including both traded and untraded assets. The practical difficulties associated with such a “full” implementation therefore would be immense. As a result, reliance must be placed on broad assumptions and “rough and ready” rules and guidelines. These practical difficulties are emphasised by Carosio (1990):

“Given the very large volume of assets, liabilities, off-balance-sheet contracts, maturities and currencies to be considered, the differences in accounting conventions, and the limited availability of statistical data, it is clear that the real issue is not to consider all the correlations, but to choose where to simplify so that a viable balance can be struck between feasibility and accuracy.

This kind of problem tends, of course, to become more and more complicated as [financial institutions] diversify their activities. Monitoring costs incurred by the supervisor are an element that is often neglected when evaluating alternative modes of regulation and which may heavily in favour of restricting the range of activities. In fact, the concept of asymmetries of information also applies to the relationship between the regulator and regulated and would suggest that the balance between price-based mechanisms of risk limitation and outright prohibitions should also take account of the cost of assessing and monitoring the incremental risk of any additional activity by a particular [financial institution]”.³⁷

Nevertheless, several countries are currently developing their own variants on the “co-ordinated” approach at the present time.

Concluding Questions

The preceding remarks raise the following questions for discussion:

- How should financial product markets be defined? Is there one market for savings products, or should there be separate savings markets defined according to the risk preferences and/or time horizon of the consumer? Do defined benefit products (which limit the risk exposure of the saver) compete, in a significant way with riskier products, such as mutual funds?
- Amongst those products that do compete, what are the worst examples of regulatory-induced distortions to competition? What is the source of those competition distortions? Is it due to

taxation differences? Differences in rules governing the way the product is packaged, or sold? Or differences in the capital-adequacy rules?

- Which countries (if any) have explicitly adopted a “functional” approach to regulation (which would require that products which are similar would face equivalent regulation, independent of the sector in which those products are produced)?
- Why do there commonly exist limits on cross-distribution of products? Why are insurers, typically forbidden from distributing banking products, for example?
- What happens to the insolvency risk of an insurer as it increases in size (*i.e.*, underwrites more business)? Should the regulatory capital requirement be proportional to the amount of business that the insurer writes? Or less than proportional?
- What is the typical magnitude of the cross-sectoral correlation in assets and liabilities of financial conglomerates? Is this small (so that the “conglomerate approach” is approximately efficient) or is it essential, for prudential reasons to also take into account the wider risk of the firm as a whole?
- Is it possible to rely to a greater extent on firm’s “in-house” models of risk in the insurance sector, as is becoming increasingly popular in the banking sector? Would it be possible to rely on such models to assess the overall risk of a financial conglomerate?
- Is it possible to relax the remaining line-of-business restrictions that exist in the “conglomerate approach” so that all financial institutions can produce a full range of financial products? What problems would arise for regulators if financial institutions were able to produce banking products and insurance products “off the same balance sheet”?
- Is it possible to rely primarily or exclusively on the capital-adequacy requirement to ensure financial system stability or are additional regulations (governing, for example, the portfolio of assets that can be held by the financial institution) necessary?

NOTES

- 1 Faure and Van den Bergh (1995), p. 68.
- 2 Armentano (1994), p. 736.
- 3 *I.e.*, the pure expected claim losses, and not including administrative, commercial and other costs and a profit margin.
- 4 We may note that the EC (in Commission Regulation 3932/92) has exempted certain information sharing agreements among insurers on the condition (amongst other things) that the information shared not identify the insurance undertakings concerned, that the distributed information contain a statement that it is purely illustrative and that the use of the information be voluntary in the sense that insurers or groups of insurers can choose to use alternative sources of information.
- 5 The Preamble of EC Regulation 3932/92 exempting such forms of co-operation from EC competition law 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”.
- 6 Faure and Van den Bergh (1995), p. 73.
- 7 “Up to a point” because, arguably, oligopolistic markets may yield “too much” product differentiation, partly as a barrier to entry.
- 8 Faure and Van den Bergh (1995), p. 73.
- 9 Faure and Van den Bergh (1995), p 72.
- 10 EC (1997).
- 11 Armentano (1989), p. 740-741.
- 12 For the purposes of this paper we will make the simplifying assumption that a financial conglomerate, although comprising separate legal entities, is operated as a single economic entity.
- 13 See, for example, BIS (1998), p. 6.
- 14 This general principle may, in principle, need to be modified in its application. The capital adequacy requirements relate to the risk of the producing institution, not to the risk of the product. Therefore, in principle, it is possible that two institutions producing the same product in different sectors of the financial industry may face different regulatory capital requirements if the risks of the producing institutions are different.
- 15 In those countries with a “universal” banking system, these two roles are combined.

16 OECD (1992), p. 24.

17 Wallis Report (1997), p. 342.

18 OECD (1992), p. 47.

19 A recent example of such pressure can be seen in the recently announced merger of Citibank (a banking group) with Travellers Inc. (an insurance group) in the US. Although such a merger is not currently legal, the merging parties have made it clear that they expect their decision to add momentum to the current government deliberations on relaxing line of business restrictions.

20 “The most obvious [regulatory] change, certainly in the UK, but also in other major markets, has been the ending, where it existed, of separation of commercial from investment banking. In the US, the effect of the Glass-Steagall Act is being steadily eroded and preparations are in train for amending the corresponding statute in Japan which would permit the re-joining of commercial and investment banking”. Coakley (1998), p L1.

21 OECD (1997), p. 69.

22 In addition, of course, the markets will have a geographic dimension, which we will put aside for the moment.

23 ISC (1996), p. 37.

24 Carosio (1990), p. 578.

25 Briefly, the objectives of financial sector regulation may be summarised as correction of the effects of the information asymmetry of the purchaser of a financial product with regard to the future solvency of the producing financial institution.

26 In the context of the banking sector, in most countries, following the recommendations of the Basle Committee, the regulatory capital requirement depends upon the portfolio of loans held by the bank, according to a risk-weighted formula under which safe loans have a lower associated required capital than riskier loans.

27 In the case of the insurance sector, the following categories of risk have been identified: (a) Asset risk - including such factors as default and decline in market value, interest rate and liquidity; (b) Underwriting risk - including pricing, reserve adequacy and catastrophic events; (c) Credit risk - including nonpayment of premium and reinsurance receivables; (d) Off-balance sheet risks; and (e) Risks not otherwise reflected, including risks of adverse legislation, judicial rulings or regulatory actions.

28 From an economic perspective, it must be that the marginal regulatory requirement as a result of adding a new product to the portfolio reflects the marginal risk imposed by that product.

29 More recently there has been a move towards more directly risk-based capital requirements for insurers.

30 Unless there are clear public policy reasons for doing so.

31 King (1990), p. 574.

32 Such models are also known as “value at risk” models.

33 OECD (1992), p35. In practice, most countries make at least some attempt to also consider the position of financial conglomerates as a whole, perhaps by examining consolidated accounts.

34 Source: OECD note on “Recent Developments” in the insurance industry.

35 As argued earlier, it is also important to also consider the correlation between the assets and the liabilities of the financial institution as a whole.

36 BIS (1995), p. 64.

37 Carosio (1990), p. 586.

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PROBLEMES DE CONCURRENCE DANS LES SECTEURS DES SERVICES FINANCIERS ET DES ASSURANCES

Note de référence

La présente note examine les problèmes de concurrence affectant le secteur de l'assurance essentiellement sous deux angles. Tout d'abord, du point de vue de l'application du droit de la concurrence exclusivement dans le secteur de l'assurance, en mettant en lumière les caractéristiques de ce secteur qui sont susceptibles de faciliter des comportements anti-concurrentiels et auxquelles les autorités chargées de la concurrence peuvent être confrontées dans l'application du droit de la concurrence dans ce secteur de l'économie.

Dans la seconde partie de l'étude, on examine l'influence de certaines réglementations particulières sur la concurrence sur les marchés sur lesquels opère l'industrie de l'assurance. On observe que très souvent, les produits d'assurance concurrencent les produits d'autres branches des services financiers. Il est donc utile de se placer dans une perspective plus large englobant le secteur financier dans son ensemble dont l'assurance ne représente qu'une partie. On examinera plus particulièrement l'incidence de l'application des réglementations relatives aux normes de fonds propres qui s'appliquent à la plupart des secteurs des services financiers sur la concurrence entre institutions et produits financiers.

La note se conclut par plusieurs questions restant à examiner.

Problèmes posés par l'application du droit de la concurrence dans le secteur des assurances

Deux questions seront abordées dans cette section:

- Certaines caractéristiques de l'industrie de l'assurance favorisent-elles les pratiques de collusion ou d'autres pratiques anticoncurrentielles? La législation sur la concurrence classique est-elle adaptée à la lutte contre ces pratiques.
- Existe-t-il dans le secteur de l'assurance des pratiques particulières (telles que les ententes horizontales ou verticales) qui tombent sous le coup du droit de la concurrence mais qui peuvent présenter des avantages du point de vue de l'efficacité? Ces pratiques peuvent-elles être conçues de manière à minimiser les effets contraires sur la concurrence?

On abordera, en particulier, les pratiques suivantes:

- Accords relatifs à l'échange d'informations sur les sinistres;
- Accords de coopération pour la couverture de grands risques;
- Accords sur l'harmonisation des termes et conditions des polices.

Echange d'informations sur les sinistres

Les assureurs ont l'habitude d'échanger des statistiques sur les sinistres, à savoir des informations sur le nombre et le montant des sinistres et les caractéristiques des assurés concernés. Cette pratique est justifiée comme suit:

“Les statistiques en matière de sinistres que possède chaque société sont tout à fait insuffisantes pour permettre une évaluation correcte des risques. Une coopération entre les sociétés d'assurance est donc nécessaire et permet après une analyse collective des statistiques de sinistres, d'établir des directives pratiques pour la rédaction des polices. Ce type de coopération rendrait possible le calcul des réserves techniques nécessaires et permettrait d'assurer un équilibre entre les recettes et les dépenses afin d'éviter le risque d'insolvabilité. La coopération en matière de calcul des primes contribuerait donc, selon cet argument, à améliorer la prestation des services. En particulier si les sinistres sont relativement peu fréquents et les catégories de risques relativement nombreuses, plus la firme est importante meilleurs sont les calculs actuariels basés sur l'expérience interne des demandes d'indemnisation. Il existe une incitation évidente pour les sociétés à fusionner ou à coopérer pour mettre en commun leur expérience en matière de sinistres”¹.

Armentano (1989) donne la description suivante de ce processus :

“Un recueil de données chronologiques couvrant un grand nombre d'unités relativement homogènes d'exposition au risque peut fournir des prévisions de coûts futurs d'une grande exactitude. Dès lors que les firmes n'ont probablement pas à leur niveau une expérience en matière de sinistres pouvant constituer une base suffisamment large pour permettre d'anticiper avec exactitude les coûts futurs, la mise en commun de ces expériences est essentielle pour établir de manière efficiente une estimation des coûts et des barèmes de primes. Plus le champ couvert est étendu, plus sera (probablement) grande l'exactitude de la prévision des coûts et plus le secteur sera (sans doute) efficient dans la recherche d'un prix et d'une production d'équilibre”².

L'échange d'informations sur les sinistres entre assureurs peut donc être favorable à la concurrence. En l'absence d'une telle coopération, les petits assureurs seraient désavantagés par rapport aux grandes sociétés d'assurance: ils ne seraient pas en mesure de couvrir autant de catégories de risques et seraient obligés d'incorporer une “prime de risque” plus importante dans leurs tarifs.

Cette coopération peut également faciliter la collusion, en particulier si :

- (a) L'ensemble des assureurs existants et potentiels n'a pas accès à l'information dans des conditions équitables, raisonnables et non discriminatoires;
- (b) Les informations échangées concernent notamment les tarifs effectivement pratiqués (ou les marges par rapport aux prix de revient, les commissions versées aux intermédiaires ou d'autres mécanismes de calcul des tarifs) ou une prévision de l'évolution des tarifs ou des commissions;
- (c) L'échange d'informations facilite la répartition du marché entre les assureurs sur des bases géographiques ou selon d'autres critères;

- (d) Le dispositif institutionnel servant à l'échange d'informations sert de support à la constitution d'ententes de portée plus large.

S'agissant de l'accès à l'information, il est clair que les données échangées doivent être mises à la disposition de l'ensemble des assureurs existants et potentiels (et même des non assureurs) dans des conditions non discriminatoires. La possibilité d'exclure certains concurrents (comme les assureurs étrangers ou les nouveaux arrivants) des accords sur les échanges d'informations constitue une restriction de la concurrence. Par ailleurs, l'auto assurance constitue pour nombre de grandes sociétés une bonne solution de rechange aux services proposés sur le marché. Pour ces sociétés l'accès à des informations sur les sinistres faciliterait grandement la tarification exacte de l'auto assurance et l'évaluation de l'intérêt qu'elle présente par rapport à d'autres solutions possibles. Les informations échangées devraient donc être mises à la disposition des non assureurs dans les mêmes termes et conditions.

De même, lorsque sont échangées des informations sur les tarifs pratiqués, les assureurs seront mieux à même de faire respecter une entente puisqu'ils pourront plus facilement détecter et sanctionner le non respect du barème agréé. Même si les informations échangées correspondent seulement à des "primes pures et simples"³, les pratiques de collusion peuvent être facilitées si les assureurs n'ont besoin de se mettre d'accord que sur un seul chiffre (le pourcentage commun de marge par rapport aux primes) et non pas sur un barème complet de tarifs.

L'échange d'informations peut également faciliter la conclusion d'accords de partage du marché par exemple sur une base géographique ou par ligne de produits. S'il permettait d'identifier les assureurs qui fournissent les informations, les autres assureurs seraient en mesure de détecter plus facilement les violations de ces accords et de faire respecter la collusion. On peut noter, par ailleurs, qu'il n'est pas indispensable, du point de vue de l'objectif de l'échange d'informations (la prévision des sinistres futurs), de connaître l'identité des sociétés qui ont fourni les informations.

Il convient de noter, par ailleurs, que pour certains risques, les prévisions de sinistres ne sont pas basées sur les informations rétrospectives, ce qui rend inutile l'échange d'informations. On peut citer comme exemples les risques fondés sur les mouvements des cours de la bourse ou l'assurance des risques basés sur les conditions climatiques (dans les deux cas on dispose déjà d'informations substantielles sur les risques).

Ces considérations suggèrent la liste de contrôle suivante de questions à examiner lors de l'analyse d'une demande d'autorisation d'un accord horizontal sur un échange d'informations dans le secteur des assurances:

- (a) L'accord porte-t-il uniquement sur l'échange d'informations concernant des risques pour lesquels les données rétrospectives sont essentielles pour prévoir les sinistres futurs?
- (b) La participation des assureurs à l'accord sur l'échange des informations est-elle facultative ou obligatoire?
- (c) L'accord prévoit-il que les informations sont mises à la disposition, dans des conditions équitables, raisonnables et non discriminatoires de tous ceux qui les demandent?
- (d) L'échange d'informations couvre-t-il les informations sur les primes perçues par les assureurs ou sur les commissions payables aux intermédiaires ou permet-il de calculer ces tarifs?

(e) L'échange d'informations permet-il d'identifier les assureurs qui ont fourni les données?⁴

Coopération en matière d'assurance des grands risques

Comme on l'a vu dans la section précédente, les assureurs cherchent pour une large catégorie de risques à réduire leur exposition en faisant appel à la "loi des grands nombres" selon laquelle pour un nombre suffisamment important de risques indépendants, il existe une forte probabilité que la perte soit très proche de la moyenne. Toutefois, en matière d'assurance des très grands risques, il est possible qu'aucun assureur ne puisse couvrir un nombre de risques indépendants suffisant pour que la loi des grands nombres puisse jouer. Le risque supporté par un assureur peut, toutefois, être réduit s'il est partagé entre un grand nombre d'assureurs indépendants. En permettant d'assurer conjointement ces grands risques, un accord de coopération entre assureurs peut permettre de diversifier suffisamment les risques pour offrir une assurance qui ne pourrait pas être proposée par une seule firme. La coopération peut donc permettre de fournir des services qui ne pourraient pas l'être par ailleurs.⁵

Il est évident, toutefois, que la coopération n'est pas toujours indispensable à la fourniture de nouveaux services. En fait, en l'absence de coopération il peut se trouver d'autres entreprises (telles que d'autres grands assureurs ou réassureurs) qui sont en mesure de diversifier adéquatement le risque. Par ailleurs, les accords de ce type peuvent limiter la concurrence s'ils incluent davantage de firmes qu'il est strictement nécessaire pour diversifier le risque de manière adéquate. Ces accords peuvent également aboutir à limiter de nouvelles entrées en étant étendus à l'ensemble des futurs concurrents probables.

Ces considérations suggèrent la liste de contrôle suivante des questions à examiner lors de l'analyse d'une demande d'approbation d'un accord de coopération dans le secteur de l'assurance:

- (a) La coopération a-t-elle pour objet de fournir des services qui ne pourraient pas être fournis en son absence?
- (b) L'accord couvre-t-il davantage d'entreprises que nécessaire (autrement dit, les services pourraient-ils être fournis si les parties à l'accord étaient moins nombreuses?)
- (c) L'accord comporte-t-il des dispositions qui ne sont pas strictement nécessaires pour opérer sur ce marché (par exemple concernant la coopération sur d'autres marchés?)

Accords relatifs aux termes et conditions des polices

Dans un grand nombre de pays de l'OCDE, les termes et conditions des polices d'assurance sont expressément réglementés par l'Etat. Dans d'autres cas (comme celui de l'UE), les sociétés d'assurance sont exemptées de l'application du droit de la concurrence afin de faciliter les accords sur des termes et conditions communs des contrats d'assurance.

On accuse parfois le marché de l'offre de services d'assurances de manquer de transparence ce qui ne permet pas aux consommateurs de comparer les conditions offertes par les assureurs concurrents. Si les consommateurs ne sont pas en mesure de comparer facilement les polices d'assurance la concurrence est restreinte. Il n'est pas possible de déterminer, entre deux polices, celle qui est la plus avantageuse ni si un produit nouveau introduit sur le marché est meilleur que les produits existants.

Par ailleurs, les consommateurs hésiteront à contracter une police s'ils ne peuvent pas s'assurer qu'elle répond à leurs besoins et qu'elle ne dissimule pas de mauvaises surprises. "Les polices qui comportent des clauses d'exclusion dont les conséquences ne peuvent être appréciées que par des spécialistes du droit peuvent poser des difficultés de lecture au consommateur moyen".⁶

Ces remarques ne s'appliquent pas, en général, dans le domaine des assurances industrielles et commerciales où les assureurs ont affaire à des acheteurs sophistiqués et bien informés qui négocient en détail chacune des conditions de tous les contrats. Le manque de transparence, lorsqu'il existe, concerne donc principalement les produits d'assurance "de masse" destinés aux particuliers.

Les accords visant à harmoniser les conditions des contrats (ou les réglementations ayant le même objet) peuvent comporter plusieurs inconvénients. En premier lieu, ils risquent de faciliter la collusion. L'harmonisation des contrats facilite les comparaisons de tarifs non seulement par les consommateurs mais aussi par les concurrents qui peuvent, de ce fait, détecter plus facilement les violations des ententes. Par ailleurs, une entente efficace concernant la fixation des tarifs aura généralement pour effet de reporter la concurrence sur d'autres aspects tels que les termes et les conditions des contrats. L'effort d'harmonisation des contrats peut donc être perçu comme une contribution nécessaire à la réussite d'une entente sur les tarifs ou comme un corollaire de cette dernière.

Un inconvénient plus important de ces accords est toutefois qu'ils risquent de limiter la diversité des produits offerts. Les consommateurs bénéficient jusqu'à un certain point de cette diversité en pouvant choisir un produit plus adapté à leurs besoins.⁷ "L'harmonisation des conditions des produits présente, donc, l'inconvénient de ne pas permettre une différenciation suffisante des risques et de rendre difficile la prise en compte du risque individuel de l'assuré".⁸ Dans un cas extrême, l'harmonisation des contrats d'assurance peut empêcher les assureurs de couvrir de manière profitable certaines catégories de risques inhabituelles et les amener à se retirer complètement de ces marchés.

Par ailleurs, une uniformisation des contrats d'assurance va limiter l'innovation. S'il n'est pas possible de s'écarter des normes établies, les consommateurs risquent de devoir renoncer à bénéficier de nouveaux produits innovants utilisant une approche complètement différente.

Certains de ces inconvénients peuvent être évités si les assureurs ne sont pas obligés d'utiliser les contrats types (peut-être en étant tenus d'informer le consommateur de cette non utilisation). Une autre solution consisterait à n'appliquer l'harmonisation qu'à une partie du contrat d'assurance. L'une ou l'autre approche rendraient la collusion plus difficile et permettraient de continuer à élaborer des approches nouvelles et innovantes.

Il existe d'autres moyens de promouvoir l'efficacité des marchés de l'assurance sans harmoniser les produits. Dans un grand nombre de pays, la législation sur la protection du consommateur régit les contrats d'assurance et interdit l'insertion de clauses défavorables aux assurés. Par ailleurs les consommateurs peuvent faire appel (moyennant finances) à des courtiers d'assurance indépendants pour les aider à comparer les contrats. Enfin, la réglementation peut renforcer la comparabilité des produits en fixant des normes obligatoires pour la présentation d'éléments d'information essentiels (plutôt que pour les termes du contrat eux-mêmes).

Ces considérations suggèrent la liste de contrôle suivante de questions à examiner lors de l'analyse d'une demande d'approbation d'un accord de coopération visant à harmoniser les termes et les conditions des contrats d'assurance:

- (a) L'accord s'applique-t-il seulement aux produits destinés aux particuliers?
- (b) L'accord s'impose-t-il à l'ensemble des assureurs?
- (c) L'accord s'applique-t-il à l'ensemble du contrat ou seulement à une partie de ce dernier?
- (d) L'accord prescrit-il l'utilisation de certaines conditions contractuelles ou se borne-t-il à interdire le recours à des clauses indésirables?
- (e) L'accord aurait-il pour effet de rendre difficile l'introduction de produits nouveaux et/ou innovants dans l'avenir?

Autres questions

Accords relatifs au règlement des sinistres

On admet généralement que le recours au système judiciaire pour régler les demandes d'indemnités peut être extrêmement coûteux, en particulier pour les petits sinistres. Les assureurs peuvent donc réduire leurs coûts globaux (au bénéfice du consommateur) en convenant de ne pas faire appel au système judiciaire en utilisant soit d'autres mécanismes de règlement des différends, soit des solutions n'impliquant aucune détermination de responsabilité. Par exemple, en matière d'assurance automobile, chaque assureur peut convenir de régler 50 pour cent du total des dommages sans chercher à déterminer le responsable de l'accident.

Bien que les systèmes sans recherche de responsabilité soient discriminatoires à l'encontre des bons conducteurs, les accords de ce type ne semblent pas susciter de préoccupations du point de vue de la concurrence et, sous réserve qu'ils ne s'imposent pas à l'ensemble des assureurs, ils ne posent pas semblait-il de problème du point de vue des autorités publiques.

Coopération en matière d'activités visant à réduire les risques

Les assureurs peuvent chercher à réduire leur exposition au risque par diverses mesures visant à diminuer les sinistres. Par exemple, en matière d'assurance incendie, ils peuvent inspecter les locaux pour s'assurer de la présence d'extincteurs ou de coupe-feu. Dans la plupart des cas, ces activités profitent à l'assureur mais il n'en est pas toujours ainsi. Par exemple, aucun assureur ne peut espérer recueillir lui-même les bénéfices d'une campagne nationale de publicité incitant les automobilistes à réduire leur vitesse, ce qui explique l'insuffisance du nombre de ces campagnes. Comme précédemment, une coopération entre les assureurs permettrait donc une réduction du risque et devrait donc, dans certaines circonstances, être encouragée.

Tenue de registres d'informations sur les risques

En règle générale, plus un assureur dispose d'informations sur un risque potentiel, plus il peut calculer précisément ses tarifs. Dans certains cas, toutefois, des individus qui sont de mauvais risques peuvent dissimuler ce fait, ce qui aggrave les coûts de l'assurance et par conséquent les tarifs applicables à ceux qui (comme les nouveaux conducteurs) ne peuvent pas faire état d'antécédents favorables. Dans des cas de ce genre, il est possible d'améliorer le bien être général en distinguant les conducteurs représentant des mauvais risques des conducteurs sans antécédent. Ce résultat peut être atteint si les

assureurs tiennent collectivement des registres d'informations sur les conducteurs ayant eu un certain nombre d'accidents.

Qui plus est, en l'absence de mécanismes permettant de démontrer avec crédibilité leurs antécédents, les conducteurs hésiteront sans doute à changer d'assureur de peur de perdre le bénéfice de bonus attribués du fait d'un nombre de sinistres inférieur à la moyenne. Bien que les assureurs puissent fournir et fournissent effectivement des certificats récapitulatifs de sinistres, la concurrence pourrait être renforcée si l'ensemble des assureurs avait accès à ces informations au moment où un client potentiel présente une demande de police. Ce résultat pourrait être obtenu si les assureurs tenaient collectivement des registres retraçant les sinistres de l'ensemble des conducteurs.

Sous réserve du respect des conditions mentionnées ci-dessus (participation facultative, informations mises à la disposition de toutes les parties intéressées, préservation de l'anonymat des assureurs etc.) les accords de ce type ne semblent pas soulever de problèmes du point de vue de la concurrence.

Réassurance et ententes verticales

Une autre pratique courante dans le secteur de l'assurance est celle consistant pour l'assureur à transférer une proportion du risque à un réassureur. La réassurance est en fait une solution de rechange à la coopération (examinée dans la section précédente) puisqu'elle permet aux assureurs de proposer une couverture compétitive pour des risques trop importants pour être couverts par un assureur ordinaire.

Toutefois, comme dans d'autres secteurs, les relations verticales qui résultent de la réassurance peuvent faciliter la collusion, en particulier si le marché d'amont de la réassurance est relativement concentré. Dans ce cas, les assureurs situés en aval peuvent être en mesure d'utiliser le réassureur comme un instrument pour renforcer les ententes. Par exemple, les assureurs affirment (via le réassureur) que "l'uniformité des primes et des conditions des polices est requise pour rendre possible le calcul des tarifs de la réassurance"⁹. Le réassureur en faisant respecter l'uniformité des tarifs (au prix fixé par l'entente) devient le mécanisme par lequel la collusion est mise en oeuvre.

Adhésion obligatoire à un fonds de garantie

Un grand nombre d'états des Etats-Unis et de pays de l'Union Européenne exige l'adhésion à un fonds collectif de garantie qui peut avoir plusieurs fonctions telles que l'indemnisation des titulaires de polices en cas de faillite de leur assureur et l'indemnisation des victimes de conducteurs non assurés ou non identifiés.

Ces dispositifs peuvent, dans certains cas, avoir pour effet de limiter la concurrence. Si les obligations d'adhésion au fonds sont strictes, elles peuvent avoir un effet dissuasif sur l'entrée sur le marché. L'Union Européenne note:

"Dans certains cas, les entreprises d'assurance qui souhaitent offrir des produits d'assurance automobile dans un autre Etat membre où elles ne disposent pas d'un établissement sont découragées de le faire en raison d'obligations spécifiques concernant l'adhésion au Bureau de l'Assurance Automobile et au Fonds de Garantie... La Commission a contacté les Etats membres concernés afin de vérifier la compatibilité de leur législation nationale avec le droit communautaire"¹⁰.

Armentano note que le Fonds de Garantie peut constituer un mécanisme permettant d'obtenir des informations (et dans certains cas d'exercer un contrôle) sur les concurrents:

“Les fonds de garantie obligatoires dans certains Etats, permettent aux assureurs de contrôler les performances économiques des autres assureurs afin de déterminer si leur situation financière est “hasardeuse” et justifie une action correctrice de l'Etat. Ces activités coordonnées permettant aux concurrents de formuler des recommandations concernant la solvabilité économique des concurrents et en faveur d'une intervention gouvernementale peuvent comporter certaines difficultés intrinsèques au regard de la législation antitrust”.¹¹

Effets du point de vue de la concurrence de la réglementation des sociétés d'assurance appartenant à des conglomérats financiers

Après les problèmes d'application du droit de la concurrence dans le secteur de l'assurance, nous examinerons maintenant les effets en termes de concurrence de certains types de réglementations affectant ce secteur. Comme on le verra, les produits d'assurance sont en concurrence, sur de nombreux marchés, avec les produits d'autres branches du secteur financier telles que les banques ou les fonds de pension. Par conséquent, pour étudier les effets sur la concurrence des réglementations affectant le secteur de l'assurance, il est utile d'adopter une perspective plus large qui englobe les réglementations affectant le secteur financier dans son ensemble dont le secteur de l'assurance ne représente qu'une partie.

Par ailleurs, comme on le verra, la capacité concurrentielle des sociétés d'assurance va dépendre de facteurs tels que, d'abord, leur aptitude à tirer profit des économies d'échelle pouvant résulter de la fusion avec d'autres entreprises du secteur financier (telles que les banques) et ensuite des conditions d'application de la réglementation du secteur financier à ces «conglomérats» financiers fusionnés. Cette partie de la note sera donc principalement consacrée à l'étude des règles qui régissent les types de produits susceptibles d'être élaborés par les sociétés d'assurance et les autres entreprises financières et à l'examen des conditions d'application de la réglementation aux conglomérats financiers.

On mettra en lumière seulement trois types distincts d'approches de la réglementation qui gouverne ces genres d'activités et les conditions d'application de la réglementation aux conglomérats.

- (a) Dans une première approche que l'on peut qualifier de technique des “piliers” (ou de la séparation fonctionnelle), il existe trois régimes réglementaires distincts et séparés pour chacune des principales catégories traditionnelles d'institutions du secteur financier (par exemple les banques de détail, les banques d'investissement, les sociétés d'assurance, les fonds de pension, les fonds commun de placement), la possibilité pour chacun de ces piliers d'opérer sur les marchés des autres piliers étant limitée par des restrictions concernant le genre d'activité et la propriété du capital. Par ailleurs, il peut exister aussi des restrictions affectant la possibilité pour une entreprise d'un secteur de distribuer des produits élaborés dans un autre secteur. Chaque “pilier” du système financier a sa propre autorité réglementaire distincte qui applique ses propres réglementations.

Cette approche se rencontre rarement à l'heure actuelle dans les pays de l'OCDE à la suite des évolutions récentes de la réglementation: on la trouve seulement (à des degrés divers) aux Etats-Unis, au Japon, en Islande et en Finlande.

(b) Dans la deuxième approche que l'on pourrait appeler l'approche "du conglomérat" il existe des régimes réglementaires distincts et séparés pour les catégories traditionnelles d'institutions financières mais l'assouplissement des restrictions concernant les participations au capital permet la constitution de conglomérats financiers trans-sectoriels (à travers des filiales ou des sociétés holding). Les entités juridiques distinctes qui composent le conglomérat (qui sont toutefois exploitées comme une entité unique)¹² sont chacune soumises à une réglementation distincte. Les restrictions concernant le genre d'activité peuvent également être assouplies, ce qui permettrait à des secteurs soumis à des réglementations distinctes d'élaborer (et au moins de distribuer) des produits concurrents.

Cette approche est de loin celle qui est la plus courante dans les pays de l'OCDE.

(c) En vertu de la troisième approche, que l'on pourrait appeler approche "coordonnée" les parties du conglomérat restent soumises à des régimes réglementaires séparés et distincts mais qui sont combinés avec des pratiques de réglementation et de contrôle qui prennent en compte de manière explicite le fait que l'institution réglementée constitue un conglomérat. Par exemple le contrôle distinct par secteur peut être combiné avec une certaine coordination et coopération intersectorielle afin que les obligations globales imposées à l'entreprise par la réglementation reflètent plus étroitement le risque global de la firme (comme dans l'approche dite "solo-plus").

Cette approche, quoique relativement nouvelle, est pratiquée dans plusieurs pays de l'OCDE.

Tout au long de cette partie de l'étude on se concentrera principalement sur la réglementation concernant l'adéquation des fonds propres des entreprises financières. On n'abordera pas les multiples autres formes de réglementations, notamment prudentielles (telles que la réglementation du portefeuille d'actifs qui peut être détenu par les instructions financières, les exigences de "compétence et d'honnêteté" concernant les administrateurs et les dirigeants, les limites de l'exposition aux risques importants ou concernant les prêts "connectés") ni les réglementations régissant l'exercice des activités (telles que celles concernant les méthodes de vente ou imposant la divulgation de certaines informations) ni les différences de régime fiscal. Ces autres réglementations sont évidemment importantes et peuvent avoir des effets importants sur la concurrence. La présente note se concentre, toutefois, sur la réglementation concernant les ratios de fonds propres.

On utilisera le terme "ratio réglementaire de fonds propres"¹³ pour désigner le niveau des fonds propres exigé d'une institution financière par la réglementation qui lui est applicable. On utilisera le terme "secteur" pour désigner chacune des composantes de l'ensemble du système financier. Les secteurs suivants sont soumis à une réglementation distincte dans la plupart des pays de l'OCDE: les banques (et parfois les autres établissements de type bancaire comme les caisses de crédit mutuel et les caisses de crédit au logement (building societies), les maisons de titres, les sociétés d'assurance vie, les sociétés d'assurances générales et les organismes de placement collectif.

On peut résumer de manière suivante les développements qui suivent:

On examinera en premier lieu la question du niveau adéquat de la réglementation concernant les ratios de fonds propres, ce niveau étant celui qui ne créerait pas de distorsion de concurrence et qui correspondrait à une égalité de conditions de la concurrence entre différents produits. En théorie, les exigences en matière de fonds propres concernant les entreprises financières devraient dépendre uniquement des risques de l'institution financière productrice dans son ensemble. Le risque d'une

institution financière dépend lui même, évidemment, des produits qu'elle offre et du portefeuille d'actifs et d'engagements qu'elle détient.

On présentera certains exemples qui illustrent les distorsions de concurrence pouvant résulter de différences dans la réglementation en matière de fonds propres (et d'autres obligations réglementaires) entre deux produits qui sont en concurrence sur le même marché. En général, les produits qui présentent des caractéristiques similaires du point de vue du risque devraient être soumis aux mêmes obligations réglementaires quel que soit le secteur dans lequel ils sont élaborés¹⁴. C'est ce que l'on appelle parfois l'approche "fonctionnelle" de la réglementation du système financier.

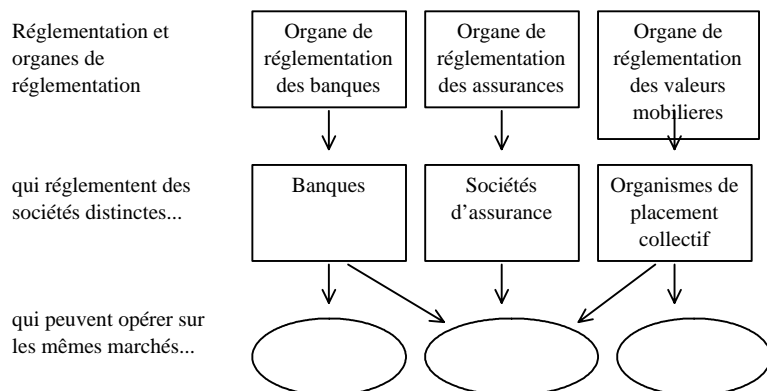
On montrera ensuite que même si les obligations imposées par la réglementation sont bien conçues (afin qu'il n'existe aucune distorsion de la concurrence entre les produits élaborés par des entreprises qui opèrent dans un seul secteur), il peut exister des distorsions de la concurrence entre les institutions financières du fait des modalités d'application de la réglementation aux conglomérats.

Pour illustrer ce point, on examine tour à tour chacune des approches présentées ci-dessus. Dans chaque cas, on suppose que la réglementation concernant le ratio de fonds propres est appliquée correctement. Les principales questions soulevées sont les suivantes:

- Dans l'approche de la séparation fonctionnelle (des "piliers"), les règles concernant les ratios de fonds propres peuvent refléter exactement les risques des institutions de chaque secteur si bien qu'il n'existe pas nécessairement de distorsion de concurrence entre les institutions financières. Les restrictions concernant le genre d'activité et la propriété du capital limitent toutefois l'exploitation des économies de gamme en matière de production, ce qui entraîne une hausse des prix. Par ailleurs, elles ont pour effet de rendre plus coûteux le groupage de produits de secteurs différents et limitent la possibilité pour les entreprises d'introduire des produits nouveaux qui combinent des éléments appartenant à des secteurs soumis à des réglementations différentes.
- Dans l'approche du "conglomérat", ce dernier peut exploiter les économies d'échelle dans la production, procéder à des groupages de produits de secteurs différents et mettre au point des produits innovants dépassant les frontières sectorielles. Toutefois, l'approche sectorielle de la réglementation va généralement négliger la coordination intersectorielle au sein du portefeuille de l'entreprise financière. De ce fait, l'application de la réglementation en matière de fonds propres peut se traduire par une distorsion de la concurrence entre institutions financières.
- L'approche "coordonnée" complète l'approche du conglomérat par une coopération et une coordination entre les organismes chargés de la réglementation afin de faire en sorte que les exigences en matière de fonds propres au niveau de l'ensemble du conglomérat prennent en compte le risque de l'institution financière dans son ensemble. Elle est donc mieux à même de faire en sorte que les exigences globales de fonds propres de l'institution financière soient ajustées au risque global supporté par cette dernière. L'approche coordonnée présente l'inconvénient d'entraîner une possible duplication de l'effort de réglementation. Par ailleurs, il peut s'avérer impossible d'évaluer le risque pour l'ensemble de la firme ce qui oblige à s'en remettre à des règles et à des hypothèses arbitraires.

Tableau 1. **Résumé des Approches**

Approche des piliers



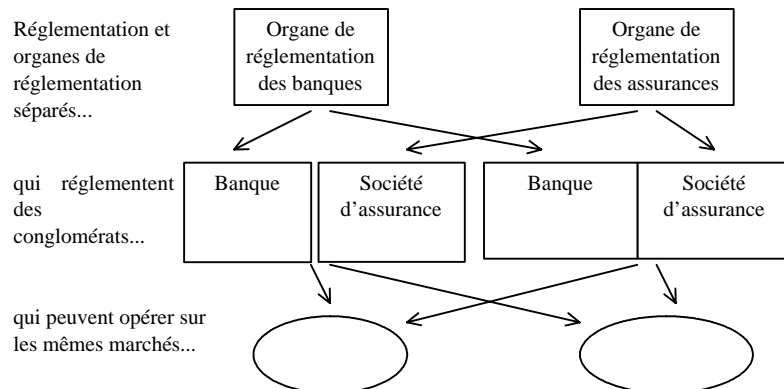
Avantages :

Simplicité de la réglementation des fonds propres (si chaque secteur correspond à une catégorie de risque homogène).

Inconvénients :

Ne permet pas d'exploiter les économies de gamme et ne facilite pas la mise au point de produits financiers innovants couvrant plusieurs secteurs.

Approche du conglomérat

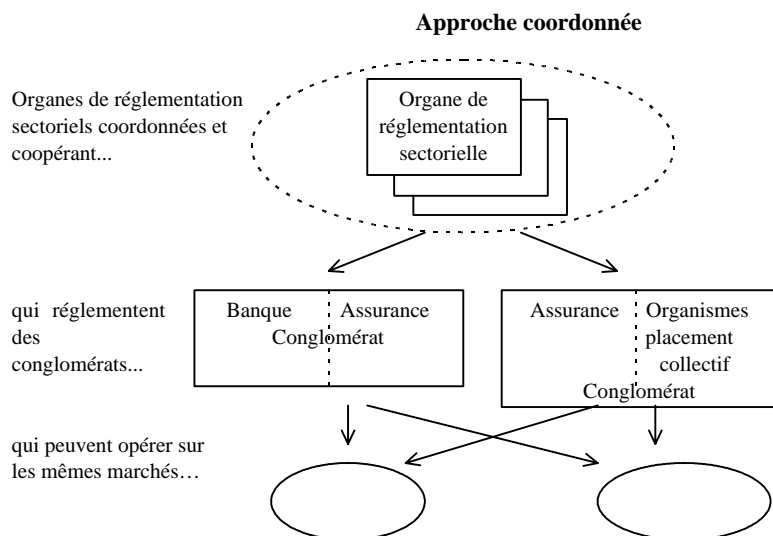


Avantages :

permet d'exploiter les économies de gamme et facilite la mise au point de produits financiers innovants couvrant plusieurs secteurs.

Inconvénients :

Les exigences distinctes en matière de fonds propres ne reflètent pas nécessairement les risques encourus, ce qui entraîne des distorsions de la concurrence entre les institutions financières.



Avantages :

Les exigences de la réglementation peuvent refléter correctement le risque global de l'institution combinée. Permet d'exploiter les économies de gamme et facilite la mise au point de produits financiers innovants pluri-sectoriels.

Inconvénients :

La détermination du risque supporté par une firme diversifiée produisant un grand nombre de produits différents sur de nombreux marchés différents peut être difficile en pratique, ce qui conduit à s'en remettre à des hypothèses arbitraires pour évaluer le risque.

Contexte général

A titre de contexte général de l'analyse des sections suivantes on résumera ici les aspects des régimes réglementaires actuels du secteur financier des pays de l'OCDE qui concernent les opérations couvrant plusieurs secteurs. On cherchera aussi à détecter les principales évolutions affectant le secteur financier qui exercent des pressions croissantes sur ces réglementations.

La réglementation du secteur financier au sein de l'OCDE

Les pays de l'OCDE ont, dans leur quasi totalité, adopté une solution consistant à appliquer des réglementations prudentielles distinctes à chacune des grandes composantes du secteur des services financiers. Il n'est pas rare par exemple que les banques commerciales et les banques d'investissement¹⁵ les assurances vie et non vie, les fonds communs de placement et les fonds de pension soient soumis à des réglementations différentes. La séparation de ces régimes réglementaires est assurée par des restrictions concernant le genre d'activité pouvant être exercé et (dans certains cas) par des restrictions affectant les participations dans des entreprises d'autres secteurs.

On examinera tout d'abord les restrictions affectant le type d'activité, qui peuvent par exemple empêcher les banques de produire directement des produits d'assurance (ou vice-versa) ou les fonds communs de placement de proposer des services bancaires (et vice versa). Le tableau 2 indique les restrictions affectant les activités pouvant être exercées par les banques et les sociétés d'assurance en vigueur en 1992¹⁶ (la situation a quelque peu changé depuis que ces informations ont été collectées). Il montre clairement que dans les pays de l'OCDE et pratiquement sans exception les banques n'étaient pas autorisées à produire directement des produits d'assurance et vice versa.

Il est intéressant de noter par ailleurs l'asymétrie qui existe entre la position des banquiers et des assureurs vis-à-vis de la réglementation. Alors que les banques sont autorisées à distribuer (mais non à

produire) des produits d'assurance dans la plupart des pays de l'OCDE, les sociétés d'assurance ne sont généralement pas autorisées à distribuer des produits bancaires.

Les restrictions affectant le type d'activités susceptible d'être exercé peuvent évidemment être assez aisément tournées si les institutions financières placées sous un régime réglementaires donné sont autorisées soit (i) à posséder des filiales, soit (ii) à être détenues par d'autres sociétés soit (iii) à faire partie d'un conglomérat avec d'autres sociétés qui exercent les activités interdites. Les restrictions affectant les activités sont donc combinées dans certains cas avec des restrictions affectant les prises de participation.

Comme le montre le tableau 3, les pays de l'OCDE se divisent en gros en deux catégories au regard de l'attitude adoptée vis-à-vis des restrictions affectant les prises de participation dans des entreprises d'autres secteurs des services financiers. Un petit nombre de pays interdisent totalement la constitution de filiales opérant dans d'autres secteurs. Toutefois la plupart des pays de l'OCDE autorisent la création de filiales ou de conglomérats à condition que chacune des entreprises faisant partie du groupe soit soumise à la réglementation applicable aux entreprises financières opérant dans son secteur.

| Pays membres | Production directe | | Distribution directe | |
|------------------|--|--|--|--|
| | Par une banque d'un produit d'assurance bancaire | par une société d'assurance d'un produit | Par une banque d'un produit d'assurance bancaire | par une société d'assurance d'un produit |
| Australie | ■ | ■ 1 | □ | ■ |
| Autriche | ■ | ■ | □ | ■ |
| Belgique | ■ | ■ | □ | ■ |
| Canada | ■ | ■ | ■ | ■ |
| Danemark | ■ | ■ | □ | ■ |
| Finlande | ■ | ■ | ■ | ■ |
| France | ■ | ■ | □ | ■ |
| Allemagne | ■ | ■ | □ | ■ |
| Grèce | ■ | ■ | ■ | ■ |
| Islande | ■ | ■ | □ | ■ |
| Irlande | ■ | ■ | □ | ■ |
| Italie | ■ 2 | ■ | □ | ■ 3 |
| Japon | ■ | ■ | ■ | ■ |
| Luxembourg | ■ | ■ | ■ | ■ |
| Pays-Bas | ■ | ■ | □ | ■ |
| Nouvelle-Zélande | - | - | - | - |
| Norvège | ■ | ■ | □ | ■ |
| Portugal | ■ | ■ | ■ 4 | ■ |
| Espagne | ■ | ■ | ■ | ■ |
| Suède | ■ | ■ | □ | ■ |
| Suisse | ■ | ■ | □ | ■ |
| Turquie | ■ | ■ | □ | ■ |
| Royaume-Uni | ■ | ■ | □ | ■ |
| Etats-Unis | ■ | ■ | ■ | ■ |

| | |
|---|--------------|
| ■ | Interdit |
| ■ | Exceptionnel |
| ■ | Limité |
| □ | Autorisé |

Notes:

1. Dans cette colonne, la production directe par une société d'assurance d'un produit bancaire est interdite en principe sauf lorsque ces produits sont considérés comme liés à l'activité d'assurance.
2. l'exception de la Banca Nazionale delle Comunicazioni.
3. Les restrictions ne s'appliquent pas aux intermédiaires.
4. La réglementation distingue souvent les sociétés d'assurance et les intermédiaires d'assurance.

Une autorisation préalable est, par ailleurs, fréquemment requise. Source: OCDE (1992)

| Tableau 3. Illustration Des Restrictions En Vigueur En 1992 Affectant Les Participations Des Banques Dans Les Sociétés D'assurance Et Vice Versa | | | | | |
|--|--|--|---|---|--|
| | Création | | Participation | | dans lequel une banque ou une société d'assurance est la société mère ou une société du groupe |
| | d'une filiale d'assurance par une banque | d'une filiale bancaire par une société d'assurance | d'une banque dans une société d'assurance | d'une société d'assurance dans une banque | |
| Australie | | | | | |
| Autriche | | | | | |
| Belgique | | | | | |
| Canada | | | | | |
| Danemark | | | | | |
| Finlande | | | | | |
| France | | | | | |
| Allemagne | | | | | |
| Grèce | | | | | |
| Irlande | | | | | |
| Islande | | | | | |
| Italie | | | | | |
| Japon | | | | | |
| Luxembourg | | | | | |
| Pays-Bas | | | | | |
| Nouvelle-Zélande | - | - | - | | - |
| Norvège | * | * | | | * |
| Portugal | + | | | | |
| Espagne | | | | | |
| Suède | | | | | |
| Suisse | | | | | |
| Turquie | | | | | |
| Royaume-Uni | | | | | |
| Etats-Unis | | | | | |

| | |
|---|--------------------|
| ■ | Interdit |
| ■ | Strictement limité |
| ■ | Limité |
| ■ | Autorisé |

Notes:

* Par l'intermédiaire d'une société holding seulement

+ La réglementation distingue les intermédiaires et les sociétés d'assurance

Une autorisation préalable est par ailleurs fréquemment requise. Source: OCDE (1992)

Principales évolutions du secteur financier

Les régimes réglementaires des pays de l'OCDE ont été soumis à certaines pressions à la suite des évolutions suivantes qui ont affecté le secteur financier:

- (a) le changement technologique qui facilite la mise au point de produits financiers nouveaux et innovants et qui renforce les économies de gamme;
- (b) les évolutions importantes intervenues en matière de déréglementation, de libéralisation du commerce des services financiers et des investissements directs;
- (c) le renforcement de la concurrence de produits financiers de substitution soumis à des réglementations différentes;
- (d) la mondialisation et la sophistication croissante des clients des services financiers qui ont conduit à une demande accrue de produits financiers plus sophistiqués, notamment de produits relevant de plusieurs régimes réglementaires.

On examinera successivement chacun de ces facteurs:

Changement technologique et économie de gamme

Au cours des vingt dernières années, la diminution rapide du coût des matériels informatiques et de communication a eu une incidence majeure sur le secteur financier. Les technologies de l'information ont grandement facilité la manipulation et le traitement des informations, ce qui a entraîné plusieurs conséquences, notamment:

- Un accroissement de la gamme, de la sophistication et de la complexité des produits financiers.
- Une augmentation des économies de gamme résultant de la production de produits financiers.

L'élargissement de la gamme des produits financiers a brouillé les frontières entre les "piliers" traditionnels de la réglementation financière. Par exemple les produits financiers de gestion du risque tels que les produits dérivés (puts, calls, etc.) et les dérivés de crédit ne sont guère autre chose que des formes d'assurance contre des mouvements défavorables du marché. Ces produits brouillent la distinction traditionnelle opérée par la réglementation entre les produits d'assurance et les produits financiers classiques.

Plus généralement, un grand nombre de commentateurs ont noté que la principale activité des institutions financières dans l'ensemble du secteur financier est la gestion du risque. On peut donc considérer que l'ensemble du secteur financier opère sur un seul marché, celui des services de gestion du risque. En toute hypothèse, les outils de gestion du risque qui sont élaborés pour être appliqués dans un secteur des services financiers (par exemple pour l'évaluation du risque de crédit) peuvent habituellement être modifiés pour pouvoir traiter des problèmes de gestion du risque dans d'autres secteurs (tels que l'assurance). La production de produits couvrant plusieurs secteurs permet donc d'exploiter des économies d'échelle et de gamme.

En Australie, le rapport Wallis note:

“La diversification des activités des secteurs traditionnels de la banque, de l’assurance-vie, de la gestion de fonds et des valeurs mobilières peut permettre des économies d’échelle et de gamme. Des améliorations de l’efficacité ou des économies de coûts seront probablement obtenues par une rationalisation des infrastructures et de l’administration, des économies liées aux technologies de l’information et des synergies dans le domaine de la commercialisation. Dans le même temps, ces structures peuvent faciliter un renforcement de l’efficacité de l’exploitation des bases de données des clients (en respectant les obligations de la législation en matière de protection de la vie privée)”¹⁷

En 1992, le rapport de l’OCDE note:

“Il n’existe que peu d’études concernant les économies de gamme. La conclusion qui semble cependant généralement s’en dégager est qu’il existe des complémentarités de coûts dans la banque et dans l’assurance. ...

Plus généralement, il semblerait également qu’une demande des particuliers se développe vers la création de “supermarchés financiers” permettant de ne faire qu’une démarche dans la recherche de la satisfaction de plusieurs besoins (one-stop shopping). Cette demande correspondrait, d’une certaine façon, à celle qui a débouché sur la création des grandes surfaces commerciales. ... Par ailleurs on assiste également à un déplacement progressif de la demande des ménages vers la fourniture de services financiers plutôt que de produits, la disponibilité de ces services (intégrant la prestation de conseils) pourrait permettre de couvrir la satisfaction d’une gamme plus étendue de besoins financiers, qu’ils soient bancaires ou d’assurance et permettrait une gestion active du patrimoine entier du ménage (ou d’une partie très significative de celui-ci) que cela soit au niveau de la couverture de risques physiques, matériels ou financiers.”¹⁸

L’augmentation des économies de gamme aggrave les coûts des restrictions imposées par la réglementation à la coopération et aux prises de participation, ce qui conduit à un renforcement des pressions qui s’exercent sur les autorités en faveur d’un assouplissement de ces restrictions.¹⁹

Déréglementation et libéralisation

Les dix dernières années ont connu au moins trois évolutions importantes sur le plan de la réglementation:

- En premier lieu, un assouplissement des contrôles sur les tarifs;
- Un assouplissement des règles de participation en capital permettant la formation de conglomérats financiers;
- Une érosion des frontières fonctionnelles entre différents types d’institutions financières.²⁰

On a assisté au cours des 20 dernières années, à un développement significatif des échanges internationaux de services financiers résultant principalement des activités de l’OCDE, de l’UE, de l’ALENA et de l’OMC. On trouvera des informations supplémentaires sur ce point dans le chapitre sur les services financiers du Rapport de l’OCDE sur la réforme de la réglementation.²¹

On notera que ces deux évolutions (la déréglementation et la libéralisation) ont tendance à se renforcer mutuellement. Le développement des échanges de services financiers expose et met en lumière la différence de régime réglementaire entre les produits concurrents, ce qui conduit à une pression en faveur de l'harmonisation des régimes de réglementation, généralement dans le sens de la déréglementation.

Concurrence intersectorielle

Comme on l'a noté ci-dessus, les évolutions technologiques et la déréglementation ont conduit à un élargissement de la gamme de produits financiers disponibles ce qui a renforcé la possibilité de voir des produits soumis à des réglementations différentes proposés sur les mêmes marchés.²²

Considérons tout d'abord les marchés des produits d'épargne et d'assurance. On peut identifier à cet égard les marchés suivants:

- (a) le marché des comptes et des services de règlement des transactions (notamment les transferts électroniques de fonds, les comptes chèques et les cartes de crédit);
- (b) le marché du financement (et de l'épargne) à court terme (les comptes d'épargne bancaires, les dépôts à court terme, les crédits commerciaux à court terme, les comptes du marché monétaire etc.);
- (c) le marché des instruments de financement (et d'épargne) à long terme à faible risque (plans de retraite à prestations définies, produits d'assurance vie à prestations garanties, obligations à long terme etc.);
- d) le marché des instruments de financement (et d'épargne) à long terme et à risque plus élevé (plans de retraite à contributions définies, fonds commun de placement, produits d'assurance vie pouvant inclure des techniques de gestion du risque financier telles que les couvertures de change, l'assurance de portefeuille, les produits dérivés de crédit etc.);
- e) les marchés de catégories diverses d'assurances générales (incendie, responsabilité, vie, etc.).

Un certain nombre de prestataires de services soumis à des réglementations distinctes opèrent sur ces marchés: les banques, les caisses de crédit immobilier et les mutuelles de crédit, les fonds communs de placement, les fonds de pension, les sociétés d'assurances générales, les assureurs vie et les associations d'entraide. Par ailleurs, il existe un certain nombre de prestataires non réglementés offrant d'autres types d'actifs (titres négociables, oeuvres d'art et/ou biens immobiliers). L'interaction entre les régimes réglementaires distincts et les marchés est illustrée par le tableau 4.

Le tableau 4 montre clairement que sur chacun des marchés mentionnés ci-dessus, au moins deux secteurs financiers différents soumis à des réglementations distinctes proposent des produits concurrents. Dans le cas du marché de l'épargne à long terme à risque élevé, six régimes de réglementation différents peuvent produire des produits concurrents.

| Institution financière (soumise à un régime réglementaire séparé et distinct) | Produit financier | Services de transferts | Instruments à court terme | Epargne à long terme à faible risque | Epargne à long terme à faible risque | Assurance générale |
|---|-------------------------------------|------------------------|---------------------------|--------------------------------------|--------------------------------------|--------------------|
| Banques | Comptes chèques | | | | | |
| | Compte d'épargne | | | | | |
| | Dépôts à terme | | | | | |
| Crédit Mutuel et Building societies | Compte chèques | | | | | |
| | Compte d'épargne | | | | | |
| | Dépôts à terme | | | | | |
| Fonds communs de placement | Comptes chèques | | | | | |
| | Fonds commun de placement | | | | | |
| Fonds de pension | Système à prestations définies | | | | | |
| | Système à cotisation définies | | | | | |
| Maison de titres | Produits dérivés | | | | | |
| | Instruments de couverture | | | | | |
| | Dérivés de crédit | | | | | |
| Assureurs vie | Assurance vie "pure" | | | | | |
| | Produits vie "intégraux" | | | | | |
| Assurances générales | Assurances générales | | | | | |
| Associations d'entraide | Assurances générales | | | | | |
| | Produits vie | | | | | |
| Marchés | Actions négociables | | | | | |
| | Obligations négociables | | | | | |
| Hors marchés | Actions | | | | | |
| | Obligations | | | | | |
| | Autres actifs (par ex. immobiliers) | | | | | |
| Auto prestation | Auto assurance | | | | | |

| | |
|--|------------------------|
| | = concurrence probable |
| | = concurrence possible |

Comme on le verra plus en détail ci-dessous, la présence de régimes réglementaires différents pour des produits concurrents peut se traduire par des exigences différentes qui risquent de fausser la concurrence. Cette situation peut conduire à des demandes “d’égalisation des conditions de la concurrence” et à des pressions générales supplémentaires sur la réglementation.

Par exemple, la Commission australienne de l’assurance et de la capitalisation a noté:

“Les évolutions qu’a connues le secteur financier ont également entraîné l’application de régimes prudentiels séparés à des produits d’épargne destinés aux particuliers présentant des caractéristiques fonctionnelles similaires. Par exemple, les banques et les sociétés d’assurance vie sont soumises à des ratios de fonds propres différents même si les dépôts sont considérés par certains comme similaires à des polices d’assurance vie à court terme à capital garanti. Les exigences en matière de fonds propres et de conservation applicables à l’assurance vie, à la capitalisation et aux organismes de placement collectif diffèrent également selon le type de produit, l’institution qui la propose et le régime de contrôle applicable”.²³

On peut examiner de même les marchés des instruments de crédit à la consommation et de crédit aux entreprises mais il est important de noter que ces marchés ne soulèvent pas les mêmes problèmes de nature prudentielle que l’épargne et les placements. Les restrictions imposées par la réglementation aux firmes opérant sur ces marchés sont donc plus légères et très souvent sans incidence sur les résultats du marché. On peut distinguer, les principaux marchés suivants:

- (a) prêts personnels et crédit à la consommation (y compris les découverts et les prêts à durée déterminée, avec ou sans garantie);
- (b) prêts immobiliers;
- (c) crédit aux petites entreprises (y compris les découverts et les prêts avec et sans garantie);
- (d) financement en capital des petites entreprises;
- (e) financement de haut de bilan (en fonds propres et sous forme de dette qui peuvent être considérés dans une certaine mesure comme substituables).

Comme ci-dessus, la question est celle des principaux régimes réglementaires différents qui sont concurrents sur ces marchés. Aux institutions financières déjà identifiées (banques, mutuelles de crédit, fonds communs de placement, fonds de pension, assureurs) on peut ajouter d’autres sources de crédit comme les sociétés financières, les organismes de capital risque, les détaillants et les contacts personnels. L’interaction entre les régimes réglementaires distincts et les marchés est illustrée par le tableau 5 (ci-après).

| Institutions financières (soumises à un régime réglementaire distinct) | Produits financiers | Crédit à la consommation | Prêts au logement | Crédit aux petites entreprises | Fonds propres des petites entreprises | Financement des sociétés |
|--|-----------------------------|--------------------------|-------------------|--------------------------------|---------------------------------------|--------------------------|
| | | | | | | |
| Banques | Découverts | | | | | |
| | Prêts à échéance fixe | | | | | |
| | Cartes de crédit | | | | | |
| | Prêts au logement | | | | | |
| | Crédits commerciaux | | | | | |
| Mutuelles de crédit et Building Societies | Découverts | | | | | |
| | Prêts | | | | | |
| | Cartes de crédit | | | | | |
| | Prêts au logement | | | | | |
| Fonds communs de placement | Crédits commerciaux | | | | | |
| | Prêts personnels | | | | | |
| | Prêts au logement | | | | | |
| Fonds de pension | Prêts personnels | | | | | |
| | Prêts au logement | | | | | |
| Sociétés financières | Prêts personnels | | | | | |
| | Prêts au logement | | | | | |
| Détaillants | Prêts à échéance fixe | | | | | |
| | Cartes de crédit | | | | | |
| Assureurs vie | Prêts personnels | | | | | |
| | Prêts au logement | | | | | |
| Capital risque | Fonds propres | | | | | |
| Marchés | Emissions d'obligations | | | | | |
| | Emissions d'actions | | | | | |
| Contacts privés | Prêts privés | | | | | |
| | Actions - placements privés | | | | | |
| Auto financement | Actions - placements privés | | | | | |

| | |
|--|------------------------|
| | = Concurrence probable |
| | = Concurrence possible |

Carosio (1990) note:

“Dans la plupart des pays occidentaux, les structures de réglementation des marchés et des intermédiaires financiers sont restées relativement stables et non contestées après les années 30. Toutefois, au cours des années récentes, sous l’influence de la double évolution qu’ont constituée l’innovation financière et l’intégration internationale des marchés qui ont commencé à miner les fondations mêmes du cadre réglementaire, la nécessité du changement est devenue apparente et des réformes majeures ont été mises en train.

En modifiant la nature des activités des banques et l’environnement concurrentiel dans lequel elles opèrent, la prolifération des nouveaux instruments financiers et la croissance des intermédiaires non bancaires ont entraîné des changements de grande portée dans les sources et l’échelle des risques bancaires. Elles ont également conduit à brouiller les frontières entre les marchés et entre les catégories d’intermédiaires non seulement parce que la plupart des nouveaux instruments financiers ne sont pas l’apanage exclusif d’une catégorie d’intermédiaires mais aussi parce que l’innovation a fréquemment revêtu des formes contractuelles telles que la titrisation et les engagements de type assurance qui sont à cheval sur plusieurs marchés. Les réglementations en vigueur depuis longtemps ont soudain commencé à apparaître inadéquates”.²⁴

Pour résumer, la présente section a abordé la question de la mesure dans laquelle les évolutions du marché financier ont conduit à la fois à assouplir les restrictions affectant le genre d’activités autorisé et à permettre une prolifération de nouveaux produits financiers qui chevauchent les marchés traditionnels. Ceci soulève la question de savoir si un régime de réglementation différent pour des produits concurrents pourrait fausser la concurrence.

Réglementation relative à l’adéquation des fonds propres

A première vue, les réglementations applicables aux différentes branches du système financier semblent tout à fait différentes. A y regarder de plus près, toutefois, on observe d’importants éléments communs. Les raisons qui justifient l’existence des réglementations prudentielles²⁵ sont essentiellement similaires dans l’ensemble du secteur financier. En particulier, la réglementation concernant l’adéquation des fonds propres applicable à chacun de ces secteurs peut être considérée comme exigeant un niveau minimum de “capital social” ou de “fonds propres réglementaires” destiné à constituer un amortisseur contre les chocs négatifs et à inciter les actionnaires de la firme à faire preuve de prudence.²⁶

Plus le niveau des fonds propres exigés par la réglementation est élevé, plus les coûts imposés à l’institution soumise à la réglementation le sont également. Il est donc important que les exigences en matière de fonds propres ne soient pas supérieures à ce qui est strictement nécessaire à des fins prudentielles.

En général, le ratio réglementaire de fonds propres devrait dépendre des risques de l’institution en cause qui dépendent, entre autres choses, des produits qu’elle fournit.²⁷ Par exemple, une banque qui propose des dépôts à vue à valeur nominale garantie est exposée à un risque plus élevé qu’un fonds commun de placement qui offre des produits dont la valeur est variable en fonction de celle des actifs. Un système de retraite à prestations définies est exposé à un risque plus élevé qu’un système à cotisations définies. Toutes choses égales par ailleurs, le ratio de fonds propres réglementaire devrait donc être plus élevé pour les banques que pour les fonds communs de placement et pour les systèmes de retraite à prestations définies que pour les systèmes à cotisations définies.

Le risque auquel est exposé une institution financière dépend, évidemment, des risques que présentent ses actifs et ses engagements (et de la corrélation entre eux). Par exemple, certaines banques (en particulier celles qui se financent essentiellement par des emprunts à long terme) ont des engagements (dépôts) dont la valeur varie faiblement tandis que leurs actifs ont une valeur beaucoup plus variable. En revanche, les assureurs ont des actifs dont la valeur est relativement stable tandis que la valeur de leurs engagements est beaucoup plus variable (en raison des risques qu'ils couvrent).

Les fonds communs de placement illustrent clairement l'importance de la corrélation entre les créances et les dettes. Bien que la valeur de marché des actifs d'un fonds commun de placement soit très incertaine (tout comme celle des actifs d'une banque) la valeur de ses engagements est en général parfaitement corrélée à celle de ses actifs. De ce fait, un fonds commun de placement a un ratio de fonds propres beaucoup plus faible qu'une banque.

Il est évident que si la réglementation en matière de fonds propres ne reflète pas correctement le risque global de l'institution financière dans son ensemble, il peut en résulter des effets importants sur la concurrence. On peut distinguer à cet égard deux types d'effets:

- En premier lieu, si les exigences de la réglementation ne reflètent pas le risque de l'institution dans son ensemble, il n'y aura pas d'égalité face à la concurrence entre les institutions financières. Les institutions dont les risques sont faibles ne bénéficieront pas de coûts réduits par rapport à celles dont les risques sont plus élevés. La concurrence sera donc faussée en faveur de ces dernières.
- En second lieu, si les modifications apportées aux exigences de la réglementation des fonds propres du fait de l'addition d'un produit nouveau au portefeuille global ne reflètent pas la modification du risque de l'institution dans son ensemble, il n'y aura pas d'égalité face à la concurrence entre les produits financiers.²⁸ Les produits présentant un risque plus faible du point de vue prudentiel ne pourront pas concurrencer efficacement ceux qui présentent des risques plus élevés.

A titre d'exemple du premier effet, supposons que les exigences en matière de ratios de fonds propres concernant les prêts bancaires ne fassent aucune distinction entre les prêteurs (emprunteurs?). Dans ce cas, les banques seraient incitées à rechercher le prêteur (l'emprunteur) qui offre le rendement le plus élevé sans se préoccuper du risque qui en découle. Un autre exemple est fourni par les exigences réglementaires en matière de fonds propres des sociétés d'assurance aux Etats-Unis qui jusqu'à une date relativement récente, étaient fixes dans certains cas (et indépendantes de l'importance des risques de l'assureur). Dans ces conditions, dès lors que la réglementation n'impose aucun coût marginal supplémentaire en cas d'augmentation de l'activité, les assureurs sont incités à accroître indéfiniment la dimension de leurs entreprises.²⁹

A titre d'exemple du second effet, supposons que pour un assureur les exigences réglementaires en matière de fonds propres soient les mêmes pour des systèmes de retraite à prestations définies et à cotisations définies. Dans ce cas, il y aurait à l'évidence une distorsion de la concurrence en faveur des systèmes à prestations définies qui sont plus risqués. Dans certains cas, les fonds de pension des caisses de retraite sont soumis à des exigences réglementaires moins strictes que les systèmes de retraites des sociétés d'assurance. Ici encore, la concurrence sera faussée en faveur des fonds de pension. A titre de principe général, les produits qui présentent des caractéristiques similaires du point de vue du risque devraient être soumis aux mêmes exigences en matière de ratio de fonds propres.

Par ailleurs, les autres formes de réglementation doivent également faire en sorte de ne pas introduire de distorsions de la concurrence. En particulier, du point de vue de la politique fiscale, il faut éviter que les différences de régime fiscal créent des distorsions.³⁰ Il en est de même pour d'autres réglementations comme celles concernant la publication d'informations ou les modalités de vente des produits.

L'encadré de la page suivante fournit un exemple de distorsions de la concurrence qui résulteraient des exigences de la réglementation relative au secteur des retraites dans l'UE.

Avant de conclure cette brève analyse des effets sur la concurrence d'une réglementation inadéquate des normes de fonds propres, on peut noter deux points supplémentaires:

- En pratique la possibilité pour les organes chargés de la réglementation d'évaluer le risque global d'une institution financière est limitée et toute norme de fonds propres est donc dans une certaine mesure "imparfaite". Compte tenu de la gamme de produits qu'est susceptible d'élaborer chaque institution financière (même à l'intérieur d'un seul secteur) et du grand nombre de types et de formes d'actifs et d'engagements possibles (et de leurs corrélations), il est sans doute trop compliqué, pour un organe de réglementation extérieur d'évaluer le risque global. Ecrivain en 1990, King notait:

"Les ratios de fonds propres devraient être reliés au risque encouru. Pourtant l'accord de la BRI sur la convergence bancaire adopte une approche assez simple en la matière. Sur les marchés de valeurs mobilières, les exigences en matière de fonds propres sont parfois beaucoup plus sophistiquées et reposent sur des indicateurs chiffrés explicites des risques encourus. Elles couvrent à la fois le risque de position (lié aux variations de la valeur des actifs et des engagements) et le risque de contrepartie (qui concerne la défaillance éventuelle de l'autre partie à la transaction). Même dans ce cas, toutefois, les indicateurs semblent souvent trop simples par rapport aux évolutions récentes de la théorie du portefeuille. On ignore souvent la covariance entre différents actifs et engagements et on ne tient guère compte de la compensation entre les risques pris par des divisions différentes de la même firme. Seul le régime de ratio de fonds propres du Royaume Uni, qui est considéré souvent en Europe comme excessivement compliqué, mérite le qualificatif de "sophistiqué".³¹

- En second lieu, en dépit de ces problèmes, on observe une nette évolution vers des modèles de réglementation qui cherchent à mieux refléter les risques des produits financiers et le risque global des institutions financières (au moins au sein de chaque secteur du système financier). L'évolution vers des "exigences de fonds propres basées sur les risques" dans le secteur de l'assurance (qui est mentionnée ci-dessus) en fournit un exemple. Un meilleur exemple est celui de l'adoption de modèles internes de risque dans le secteur bancaire. En fait, le Comité de Bâle a approuvé récemment l'utilisation de modèles internes³² pour la définition de ratios réglementaires de fonds propres pour les banques.

**L'EFFET DE LA RÉGLEMENTATION DE LA CONCURRENCE SUR LES FONDS DE PENSION
ET L'ASSURANCE VIE DANS L'UNION EUROPÉENNE**

La CE a diffusé récemment une note de réflexion sur “les régimes complémentaires de retraite dans l'Union Européenne” qui vise à faire progresser le marché intérieur en ce qui concerne la préparation de la retraite. Cette étude est intéressante dans la mesure où elle met l'accent sur le degré de la concurrence entre les produits d'assurance vie et les produits des fonds de pension sur le marché de l'épargne à long terme tout en soulignant les différences entre les régimes réglementaires auxquels sont soumis ces deux catégories de produits au sein de l'UE.

L'étude distingue les retraites professionnelles (régimes dits du “2ème pilier”) et les régimes de retraite privés “3ème pilier” qui sont proposés en majorité par les sociétés d'assurance vie. La situation est plus mitigée en ce qui concerne les retraites professionnelles. La proportion de ces retraites qui est gérée par les sociétés d'assurance vie (par opposition aux fonds de pension) va de 5 pour cent au Royaume-Uni à 81 pour cent en Suède. Il semblerait qu'au moins pour les retraites professionnelles, les produits d'assurance vie et les régimes de retraite sont de bons produits de substitution.

Les différences de régime de réglementation qui concernent à la fois l'actif et le passif du bilan posent toutefois certains problèmes. Considérons par exemple les règles qui gouvernent les actifs que les fonds de pension et les sociétés d'assurance vie peuvent acquérir. Sur une période de 20 à 25 ans (qui correspond à la durée type d'un système de retraite) ces règles peuvent avoir une influence très importante sur la performance globale du système dans la mesure où une différence même minime de taux de rendement moyen peut avoir une incidence cumulée significative à long terme. Il existe des différences importantes de nature similaire dans le régime réglementaire du passif des différentes institutions.

Les effets sur la concurrence du choix de l'approche à l'égard de la réglementation

Ayant noté que la réglementation concernant les ratios de fonds propres peut donner naissance à des distorsions de la concurrence nous examinerons maintenant comment les trois grandes approches de la réglementation des institutions financières qui ont été décrites plus haut peuvent, dans certaines circonstances soulever des problèmes au regard de la réglementation des ratios de fonds propres mais peuvent aussi avoir des avantages qui compensent ces difficultés. Les conclusions de la présente section ont été résumées auparavant dans le tableau 1.

Approche 1 : Séparation fonctionnelle

Dans l'approche de la séparation fonctionnelle (dite “des piliers”), les services financiers sont divisés en secteurs dont chacun est soumis à une réglementation séparée et distincte en matière de fonds propres minimum. La concurrence entre secteurs est limitée par des restrictions affectant le genre d'activités autorisées et les prises de participations dans d'autres secteurs. Seul un petit nombre de pays de l'OCDE (Etats-Unis, Japon, Islande et Finlande) applique encore une réglementation de ce type et même dans ces pays les restrictions affectant les participations entre firmes de secteurs différents subissent une érosion relativement rapide.

Avantages

Du point de vue qui nous occupe, le principal avantage de cette approche est qu'elle facilite l'application de la réglementation en divisant l'ensemble du secteur financier en catégories d'institutions ayant un profil de risque similaire. Il est plus facile, en séparant les catégories de produits, de déterminer

le profil général et le niveau approprié des fonds propres d'institutions qui n'offrent qu'une catégorie de produits que d'institutions qui proposent toute une gamme de produits d'épargne, de crédits commerciaux, de négoce de valeurs mobilières et d'assurances.

Inconvénients

La séparation entre secteurs imposée par cette approche comporte, néanmoins, ses propres coûts. L'approche de la séparation fonctionnelle peut, en particulier, à la fois:

- (a) limiter l'entrée sur le marché et la capacité des firmes financières à exploiter les économies de gamme et
- (b) limiter la possibilité pour les entreprises financières de proposer des formules groupées de produits financiers innovants aux consommateurs.

Il est évident que cette approche est susceptible de limiter le nombre d'entrants potentiels sur le marché de chacun des produits financiers, et de ce fait, de réduire la concurrence. Par exemple, la réglementation peut limiter la possibilité:

- pour les assureurs vie d'offrir aux investisseurs un faculté de retrait "à vue" de leurs fonds;
- pour les banques d'offrir des produits d'épargne à moyen et long terme en vue de la retraite;
- pour les banques d'offrir des produits d'assurance et
- pour les grandes surfaces ou les entreprises publiques de proposer des services bancaires ou de placement.

Par ailleurs, les restrictions affectant le genre d'activité pouvant être exercé peuvent empêcher les entreprises non financières de tirer profit d'une position particulière sur le marché pour offrir, par exemple, des produits d'assurance. Par exemple, un constructeur automobile qui est probablement bien placé pour prévoir le coût des réparations de voitures peut être en bonne position pour offrir des assurances automobiles (peut être sous la forme d'un certain type de garantie). De même, une entreprise de bâtiment qui connaît dans le détail les matériels et les procédés de construction peut être bien placée pour offrir une assurance incendie ou une assurance contre les séismes. Compte tenu du grand nombre de leurs clients, certaines grandes surfaces peuvent être en mesure de proposer certains services bancaires simples à moindre coût que les banques traditionnelles.

Enfin, ces restrictions peuvent empêcher les firmes d'exploiter les économies susceptibles de résulter de la production conjointe de produits financiers. Par exemple, une banque ne pourra pas utiliser les informations dont elle dispose sur ses clients pour distribuer, par exemple, des produits d'assurance ou d'épargne en vue de la retraite.

Les restrictions affectant le genre d'activité pouvant être exercé (couplées à des limitations de la coopération ou de la distribution) peuvent empêcher les institutions financières d'offrir des formules groupées de produits combinant des éléments qui sont normalement soumis à des régimes réglementaires différents. Parmi les exemples de tels produits, on peut citer:

- Un prêt immobilier ou un autre type de prêt à la consommation dont l'obligation de remboursement est éteinte en cas de décès de l'emprunteur (combinaison d'une assurance vie et d'un prêt immobilier);

- D'autres formes de prêts à la consommation dont le remboursement est temporairement suspendu ou cesse en cas de survenance d'un événement extérieur (tel que le chômage de l'emprunteur);
- Des prêts à la consommation combinés avec des éléments d'assurance par exemple un prêt au logement combiné avec une assurance habitation/mobilier, un crédit pour l'achat d'une automobile combiné à une assurance automobile, des prêts par utilisation d'une carte de crédit combinés à une assurance voyage etc.;
- Des produits d'épargne combinés à une assurance vie (ou une assurance maladie ou une assurance chômage);
- Des produits d'assurance combinés à des éléments d'épargne (par exemple une assurance incendie à long terme combinée à un élément d'épargne selon une formule existant au Japon).

Il existe un grand nombre d'autres produits qui peuvent être offerts à la clientèle des entreprises, par exemple une protection générale du revenu des agriculteurs combinant une assurance des récoltes et un contrat à terme portant sur la valeur de la récolte (ou une couverture de change à terme si la récolte est vendue sur les marchés étrangers). Un petit industriel pourrait rechercher un produit combinant une assurance des comptes à recevoir et une assurance générale (des biens et de la personne) traditionnelle.

Approche 2 : Les conglomérats financiers

Comme on l'a vu plus haut, un grand nombre de pays ont cherché au cours des 10 dernières années à assouplir certaines réglementations afin d'éliminer les incohérences réglementaires, de relâcher les règles limitant l'exercice de certaines activités et d'autoriser les firmes à exploiter les économies de gamme. L'évolution qui est peut être la plus importante, du point de vue qui nous occupe, a été l'assouplissement des contrôles sur les prises de participations qui a permis la constitution de conglomérats financiers.

Toutefois, les filiales importantes du conglomérat restent soumise à des régimes réglementaires distincts (si elles appartiennent à des secteurs différents). Les ratios globaux de fonds propres du conglomérat sont souvent (mais pas toujours) simplement égaux à la somme des ratios des différentes filiales.

“De façon générale et sous réserve de dispositions législatives particulières de quelques pays, les réglementations du secteur bancaire et de celui des assurances ne visent cependant que l'entreprise faisant partie du conglomérat et non le conglomérat lui-même. De même les autorités de contrôle d'un secteur n'ont en principe compétence que sur les entreprises de ce secteur”.³³

Avantages

L'approche du conglomérat présente plusieurs avantages par rapport à celle des “piliers” notamment parce qu'elle permet d'exploiter certaines économies de gamme, qu'elle encourage la concurrence par l'entrée sur le marché et qu'elle facilite la constitution d'ensemble innovateurs de produits financiers.

L'importance des économies de gamme peut être significative comme le montrent les déclarations du Secrétaire au Trésor Robert Rubin qui dans un discours de 1997 où il préconisait la

libéralisation du système de séparation fonctionnelle aux Etats-Unis notait que la modernisation financière pouvait faire économiser aux clients quelque 15 milliards de \$ sur les 300 milliards de \$ qu'ils dépensent chaque année dans les services financiers.³⁴

Inconvénients

Ces réformes ne permettent pas, toutefois, de résoudre tous les problèmes identifiés ci-dessus. Dans l'approche du conglomérat, les normes de fonds propres des institutions financières peuvent ne pas refléter exactement le risque global et, les institutions financières subiront de ce fait des coûts plus élevés ou plus faibles que nécessaire, ce qui entraînera des distorsions de la concurrence.

Dans cette approche, les normes de fonds propres de la firme correspondent simplement à la somme des normes des différentes composantes du conglomérat qui sont soumises à des réglementations différentes. Comme on l'a déjà souligné, cette solution néglige toutefois les avantages (ou les désavantages) qui peuvent résulter de la corrélation entre les risques des différentes composantes et le conglomérat dans son ensemble.

On peut illustrer ce point par un exemple simple. Dans l'approche des "piliers" par exemple, une société d'assurance contre l'incendie peut être obligée de mettre en réserve 4 cents de fonds propres pour chaque dollar de dette potentielle. Une compagnie d'assurance incendie dont le risque de sinistres potentiel est de 1 million \$ serait tenue de disposer de 40 000 \$ de fonds propres réglementaires. De même une banque qui serait tenue de mettre en réserve 8 cents pour chaque dollar prêté sous forme de prêts immobiliers devrait détenir 80 000 \$ de fonds propres si l'en cours de ses prêts était de 1 million \$.

Dans l'approche du conglomérat, la banque et la société d'assurance peuvent créer une société holding pour constituer une seule société. Le montant des fonds propres exigé sur la base de l'activité de chaque filiale est de $40\,000 + 80\,000 = 120\,000$ \$.

Le problème est que ce montant ne reflète pas nécessairement le risque réel du conglomérat parce qu'il ignore les corrélations qui peuvent exister entre les dettes de la banque et celles de l'assureur. Par exemple, il est possible qu'un incendie entraîne un risque de défaillance des bénéficiaires de prêts immobiliers (si, par exemple, le personnel de l'usine qui a brûlé est mis au chômage). Dans ce cas, il existera une corrélation positive entre les engagements des deux filiales et le total des fonds propres nécessaires devrait être plus élevé.

De même, il est facile d'imaginer des exemples dans lesquels le niveau des fonds propres exigé du conglomérat devrait être plus faible. Par exemple si une société d'assurance de récoltes agricoles fusionne avec une firme financière proposant des contrats à terme sur les prix de la récolte, une tempête pourrait conduire simultanément à des demandes d'indemnisation auprès de la filiale d'assurance et à une augmentation des bénéfices prévus de la filiale financière. La corrélation entre les deux engagements étant négative, on peut penser que les fonds propres exigés devraient être inférieurs.³⁵ En général lorsqu'il n'existe aucune corrélation entre les secteurs du conglomérat, ce dernier qui est plus diversifié supporte un risque global plus faible que les secteurs considérés séparément et devrait donc être soumis à des normes de fonds propres réduites.

Si l'on ne tient compte d'aucune corrélation pouvant exister entre les composantes du conglomérat, on peut aboutir à des normes de fonds propres trop strictes ou trop laxistes, ce qui peut entraîner des distorsions de concurrence avec d'autres produits non réglementés. Par exemple, comme on l'a vu plus haut, les produits de l'assurance vie sont en concurrence avec ceux du fonds commun de

placement (qui sont largement non réglementés). En ignorant les corrélations qui existent au sein du conglomérat, la réglementation peut imposer des exigences trop strictes ou trop laxistes au regard du véritable risque sous jacent et le produit d'assurance vie peut être avantageé ou désavantageé par rapport à des produits concurrents comme ceux des organismes de placement collectif.

Approche 3: Réglementation coordonnée

Certains de ces problèmes sont traités par une approche "coordonnée" ou "consolidée" de la réglementation du secteur financier. En complétant la réglementation secteur par secteur de l'approche du conglomérat par une prise en compte du risque de l'institution financière dans son ensemble, il est possible d'évoluer vers une norme réglementaire de fonds propres qui reflète plus étroitement le risque total de l'organisation en tenant compte des corrélations qui peuvent exister entre ses engagements et entre son actif et son passif.

Il est évident que la mise en oeuvre d'une telle approche exige une coordination et une coopération attentives entre les organismes chargés de la réglementation des différents secteurs. Une procédure coordonnée de collecte et d'échange d'informations devrait permettre d'aboutir à une vision commune des corrections à apporter aux normes de fonds propres des différents secteurs pour refléter les normes à appliquer à la firme dans son ensemble. En fait, si la corrélation entre les secteurs est faible, cette approche pourrait être proche de l'optimum dans la mesure où les normes de fonds propres appropriées pour l'institution dans son ensemble diffèreraient peu de la somme des normes applicables aux firmes individuelles.

Par ailleurs, le processus de réglementation pourrait, évidemment, être à la fois simplifié et renforcé s'il était possible de déterminer les normes de fonds propres au moyen d'un modèle de risque "interne" agréé. Dans ce cas, la responsabilité des autorités chargées de la réglementation se limiterait à l'approbation du modèle lui-même qui pourrait être mis en oeuvre par l'un des organes de réglementation sectoriels.

Avantages

Si les exigences de la réglementation peuvent être déterminées correctement c'est-à-dire si les informations nécessaires peuvent être mises à la disposition des organes de réglementation dans des délais corrects et si ces organes sont en mesure d'évaluer les niveaux de risque respectifs et d'appliquer et de faire respecter les normes de fonds propres, une approche "coordonnée" du contrôle des ratios de fonds propres pourrait, en principe, atténuer un grand nombre des distorsions de la concurrence qui subsistent et qui ont été mentionnées ci-dessus. Les exigences en matière de fonds propres refléteraient correctement les risques sous jacents et permettraient aux firmes de recourir à l'ensemble des techniques disponibles pour réduire autant que possible le risque global de l'entreprise et donc les coûts totaux que lui impose l'application de la réglementation.

La suggestion d'utiliser une approche "consolidée" de l'évaluation du risque et de la définition des normes de fonds propres n'est pas nouvelle. Ce thème est, par exemple, abordé par l'Institute for International Finance dans le rapport du groupe d'étude sur le contrôle des conglomérats. Utilisant un langage quelque peu opaque, ce rapport note:

"De plus en plus, les firmes financières opérant à l'échelle mondiale centralisent leurs profils de risque et leurs procédures de gestion des risques pour l'ensemble de leurs produits sans se préoccuper de la localisation de la personne juridique au sein de laquelle un risque est encouru. L'analyse et la gestion de risques de type similaires au niveau mondial permettent aux firmes

d'opérer une compensation des risques afin d'arriver à une évaluation consolidée du risque. Les institutions financières qui sont à la pointe de l'innovation commencent même à intégrer l'analyse de leur risque de crédit et de leur risque de marché. Ces avancées permettent aux entreprises financières de maximiser les avantages de la diversification de leur portefeuille et de gérer leurs risques de manière plus efficiente que dans le passé...

Les changements qui ont affecté la gestion des risques reflètent la reconnaissance du fait que les activités financières supportent généralement certains types de risques (risque de crédit, risque de crédit conditionnel, risque de marché, risque de liquidité, risque de modèle, risque opérationnel, etc.). Les différentes institutions financières sont évidemment exposées de manière inégale à ces risques, en fonction de la composition de leurs portefeuilles. Par exemple, la proportion des risques de crédit conditionnel sera plus forte par rapport aux autres catégories de risque pour les activités basées sur l'assurance que pour les autres firmes financières. Bien que le mode de gestion de ces risques conditionnels diffère de manière significative de celui applicable au risque de marché, les composantes du risque de crédit conditionnel restent les mêmes entre les produits et les institutions.

Le Groupe d'Etude estime que les méthodes de contrôle doivent reconnaître ces évolutions et s'y adapter. Pour contrôler efficacement les marchés des capitaux et les firmes financières, les structures de contrôle doivent incorporer les progrès de la connaissance et les meilleures pratiques des marchés. Dans le contexte de la mondialisation, ceci implique que la surveillance au niveau international devrait au moins chercher à maîtriser les avancées de l'analyse des pratiques des marchés financiers, ce qui exigera de mettre davantage l'accent sur l'exposition des firmes aux risques et leur gestion de ces risques”.

A une échelle beaucoup plus modeste, on s'accorde au moins sur la nécessité d'adopter une perspective plus large pour compléter l'approche sectorielle conventionnelle de la réglementation. Le Groupe tripartite des organismes de réglementation des activités bancaires, de valeurs mobilières et d'assurance notait en 1995:

“Fondamentalement, le Groupe tripartite a convenu que le contrôle des conglomérats financiers ne pouvait pas être efficace si la surveillance des différentes composantes d'un groupe n'était effectuée qu'individuellement. Le contrôle individuel des différentes entités continue de présenter une importance primordiale mais il doit être complété par une évaluation effectuée au niveau du Groupe dans son ensemble”.³⁶

Inconvénients

Bien qu'une certaine prise en considération du risque global d'une institution financière constitue un progrès par rapport à l'approche secteur par secteur qui est celle de la méthode du conglomérat, le volume des informations nécessaire pour évaluer le risque global d'un conglomérat financier est probablement important. En principe, des informations sur les risques et la corrélation seraient nécessaires sur une base permanente sur l'ensemble du portefeuille d'actifs et d'engagements de l'institution financière, y compris les actifs négociables et non négociables. Les difficultés pratiques soulevées par une mise en oeuvre “intégrale” seraient donc considérables. C'est pourquoi on est contraint de se fonder sur des hypothèses générales et sur des règles et directives assez peu efficaces. Ces difficultés pratiques sont soulignées par Carosio (1990):

“Compte tenu du volume très important des actifs, des engagements, des contrats hors bilan, des échéances et des devises à prendre en compte, des différences de conventions comptables et de la disponibilité limitée des données statistiques, il est évident que le vrai problème n’est pas d’examiner l’ensemble des corrélations mais de choisir les simplifications à apporter pour trouver un équilibre viable entre la faisabilité et l’exactitude.

Les problèmes de ce type tendent, évidemment, à devenir de plus en plus compliqués avec la diversification des activités des institutions financières. Les coûts du contrôle constituent un facteur souvent négligé lorsque l’on évalue les différents modes de réglementation possibles et qui peut jouer fortement dans le sens d’une restriction des activités. En fait le concept d’asymétrie de l’information s’applique aussi à la relation entre l’auteur de la réglementation et celui auquel elle s’applique et laisse penser que l’équilibre entre des mécanismes de limitation des risques fondés sur les prix et une interdiction pure et simple devrait aussi tenir compte du coût de l’évaluation et du contrôle du risque supplémentaire résultant de toute activité additionnelle d’une institution financière donnée”.³⁷

Néanmoins, plusieurs pays élaborent actuellement leurs propres variantes de l’approche “coordonnée”.

Conclusions en forme de questions

Les remarques qui précèdent soulèvent les principales questions suivantes pour examen:

- Comment faut-il définir les produits financiers? Existe-t-il un seul marché des produits d’épargne ou faut-il prévoir des marchés de l’épargne distincts définis en fonction des préférences pour le risque et/ou de l’horizon de temps du consommateur? Les produits à prestations définies (qui limitent l’exposition au risque de l’épargnant) concurrencent-ils de manière significative les produits plus risqués tels que les fonds communs de placement?
- Parmi les produits concurrents quels sont les pires exemples de distorsions de la concurrence créées par la réglementation? Quelle est l’origine de ces distorsions? Sont-elles dues à des différences de régime fiscal, à des différences tenant au mode de présentation ou de vente du produit ou à des différences concernant les normes de fonds propres?
- Quels sont les pays (s’il en existe) qui ont adopté de manière explicite une approche “fonctionnelle” de la réglementation en vertu de laquelle les produits similaires se verraient appliquer une réglementation équivalente quel que soit le secteur dans lequel ils sont élaborés?
- Pourquoi existe-t-il couramment des limitations concernant la distribution des produits entre secteurs? Pourquoi est-il généralement interdit aux assureurs de distribuer des produits bancaires, par exemple?
- Que devient le risque d’insolvabilité d’un assureur lorsque sa taille augmente (c’est-à-dire lorsqu’il accroît les garanties offertes)? Les fonds propres exigés par la réglementation doivent-ils être proportionnels ou moins que proportionnels au volume de l’activité?

- Quelle est généralement l'importance de la corrélation intersectorielle des actifs et des engagements des conglomérats financiers? Est-elle faible (de telle sorte que l'approche "du conglomérat" est à peu près efficiente) ou est-il essentiel pour des raisons prudentielles de prendre en compte le risque de la firme dans son ensemble?
- Est-il possible de s'en remettre davantage dans le secteur des assurances à des modèles "internes" du risque dont l'usage se développe de plus en plus dans le secteur bancaire? Serait-il possible d'utiliser ces modèles pour évaluer le risque global d'un conglomérat financier?
- Est-il possible d'assouplir les restrictions affectant le genre d'activités pouvant être exercé qui subsistent dans l'approche du conglomérat afin que toutes les institutions financières puissent produire une gamme complète de produits financiers? Quels problèmes rencontreraient les responsables de la réglementation si les institutions financières avaient la possibilité de produire des produits bancaires et des produits d'assurance "à partir du même bilan"?
- Est-il possible de s'en remettre uniquement aux normes de fonds propres pour assurer la stabilité du système financier ou est-il nécessaire de faire appel à des réglementations supplémentaires (régissant par exemple les actifs susceptibles d'être détenus dans le portefeuille de l'institution financière)?

NOTES

- 1 Faure et Van den Bergh (1995), p. 68
- 2 Armentano (1994) p. 736.
- 3 C'est-à-dire la prime correspondant uniquement à l'indemnisation du sinistre à l'exclusion des frais administratifs, commerciaux et autres et de la marge bénéficiaire.
- 4 On peut noter que la CE (dans la réglementation de la Commission 3932/92) a exempté les accords d'échange d'informations entre assureurs à condition (notamment) qu'ils n'identifient pas les entreprises d'assurances qui fournissent les informations, qu'il soit entendu que les informations diffusées le soient exclusivement à titre d'illustration et que l'utilisation de ces informations soit facultative dans le sens où les assureurs ou groupes d'assureurs ont la possibilité d'utiliser d'autres sources d'information.
- 5 Le préambule de la Réglementation 3932/92 de la CE qui exempte ces formes de coopération de l'application du droit de la concurrence de la CE stipule que l'établissement de groupes de coassurance ou de co-réassurance destinés à couvrir un nombre de risques indéterminé doit être considéré favorablement dans la mesure où il permet à un nombre plus grand d'entreprises d'entrer sur le marché et où il accroît de ce fait la capacité de couverture en particulier de risques qui sont difficiles à couvrir en raison de leur dimension, de leur rareté ou de leur nouveauté.
- 6 Faure et Van den Bergh, p. 73.
- 7 "Jusqu'à un certain point" parce qu'on peut soutenir que les marchés oligopolistiques peuvent comporter une différenciation "excessive" des produits, en partie en tant qu'obstacle à l'entrée.
- 8 Faure et Van den Bergh, p. 73.
- 9 Faure et Van den Bergh (1995), p. 72.
- 10 CE (1997).
- 11 Armentano (1989), p. 740-741.
- 12 Pour les besoins de la présente note nous retiendrons l'hypothèse simplificatrice selon laquelle un conglomérat financier bien que comprenant des entités distinctes fonctionne comme une entité économique unique.
- 13 Voir par exemple BRI (1998) p. 6.
- 14 Ce principe général devra, peut-être, être modifié dans son application. Les normes de fonds propres se rapportent au risque de l'institution productrice et non pas au risque du produit. Il est donc possible, en principe, que deux institutions produisant le même produit dans des secteurs financiers différents soient soumises à des normes de fonds propres différentes si leurs risques sont différents.
- 15 Ces deux rôles sont combinés dans les pays qui connaissent un système de banque "universelle".

- 16 OCDE (1992), p. 24
- 17 Rapport Wallis (1997), p. 342
- 18 OCDE (1992) p. 49-50.
- 19 Un exemple récent d'une telle pression est celui de la fusion annoncée récemment entre la Citibank (un groupe bancaire) et Travellers Inc. (un groupe d'assurance) aux Etats-Unis. Bien que cette fusion ne soit pas actuellement légale, les deux parties ont fait clairement savoir qu'elles attendaient que leur décision accélérerait les délibérations du gouvernement concernant l'assouplissement des restrictions affectant l'exercice des activités.
- 20 "La modification la plus évidente (sur le plan réglementaire) certainement au Royaume-Uni mais aussi sur d'autres marchés importants a été la fin de la séparation entre les activités de banque commerciale et de banque d'investissement. Aux Etats-Unis, l'effet de la loi Glass-Steagal subit une érosion constante et le Japon se prépare à modifier la loi correspondante, ce qui permettrait la réunion des activités de banque commerciale et de banque d'investissement" Coakley (1998) p. L1.
- 21 OCDE (1997) p. 69.
- 22 Bien entendu, les marchés ont, par ailleurs, une dimension géographique que nous n'aborderons pas pour le moment.
- 23 ISC (1996), p. 37.
- 24 Carosio (1990) p. 578.
- 25 En résumé, les objectifs de la réglementation du secteur financier sont de corriger les effets de l'asymétrie des informations de l'acheteur d'un produit financier en ce qui concerne la solvabilité future de l'institution financière qui le produit.
- 26 Dans le cas du secteur bancaire, l'exigence réglementaire en matière de fonds propres dépend, dans la plupart des pays, à la suite des recommandations du Comité de Bâle, du portefeuille de prêts détenu par la banque par application d'une formule pondérée en fonction du risque selon laquelle les prêts offrant une plus grande sécurité sont assortis d'un coefficient de fonds propres inférieur à celui des prêts plus risqués.
- 27 Dans le cas du secteur des assurances, les catégories de risque suivantes ont été identifiées: (a) risque de portefeuille résultant de facteurs tels que la défaillance de l'emprunteur et la baisse de la valeur de marché, du taux d'intérêt et de la liquidité (b) risque de l'assurance tenant notamment au niveau des tarifs et des réserves techniques et aux catastrophes (c) risque de crédit, notamment du fait du non paiement des primes et des indemnités de réassurance (d) risques hors bilan et (e) risques divers notamment en raison d'effets négatifs de la réglementation, de décisions judiciaires ou de mesures réglementaires.
- 28 Du point de vue économique, l'exigence marginale imposée par la réglementation lorsqu'un nouveau produit est ajouté au portefeuille doit refléter le risque marginal résultant de ce produit.

- 29 Plus récemment, on a observé une tendance à imposer aux assureurs des exigences en matière de fonds propres plus directement basées sur les risques.
- 30 Sauf si ces différences sont justifiées par des motivations claires de politique publique.
- 31 King (1990), p. 574.
- 32 Ces modèles sont également connus sous le nom de modèles de la “valeur exposée au risque”.
- 33 OCDE (1992, p. 35. En pratique, la plupart des pays s’efforcent aussi de prendre en compte la situation des conglomérats financiers dans son ensemble, peut être en examinant les comptes consolidés.
- 34 Source: OCDE. Note sur les “Evolutions récentes” du secteur de l’assurance.
- 35 Comme on l’a déjà fait valoir, il est important de prendre en compte également la corrélation entre les actifs et les passifs de l’institution financière dans son ensemble.
- 36 BRI (1995) p. 64.
- 37 Carosio (1990), p. 586.

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AUSTRALIA

Overview

Reform of the Financial System – Impact on Regulation and Competition for Life Insurance and General Insurance

In March 1997, the Government received the final report of the Financial System Inquiry¹. In September 1997, the Government announced a comprehensive set of financial system reforms in response to the recommendations of the Financial System Inquiry². The reform package provides financial system safety and stability by better focusing regulation on its underlying objectives, minimising restraints on entry and competition, and ensuring that regulation applies in a competitively neutral way. The reform package also provides more harmonised regulation of financial products and consumer protection. The key element of the reform package is a new organisational framework for the regulation of the financial system that is objectives based.

Legislation to give effect to the first stage of the reform measures has been introduced into Parliament and, subject to passage, is intended to be in place from 1 July 1998 or as soon as possible thereafter³. Relevant reforms for the insurance industry are discussed below.

Further legislation, covering a second stage of reforms will be introduced later this year subject to the agreement of the States and Territories. This stage includes transferring to the Commonwealth the regulatory responsibility for credit unions, building societies and friendly societies. Reforms proposed under the Corporate Law Economic Reform Program (CLERP) relating to financial markets and investment products, will create a consolidated licensing, market conduct and disclosure regime for the financial system (draft legislation will be available for comment by mid-year).

New Regulatory Framework for Insurance

Two new statutory authorities, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC), will regulate different aspects of the life and general insurance sector as part of broader regulatory roles in the financial system. The new regulatory authorities will take on, respectively, the prudential and consumer protection functions presently undertaken by the insurance and superannuation specific regulator (the Insurance and Superannuation Commissioner⁴), as well as some of the present functions of other regulators, including the Reserve Bank of Australia (RBA) and the Australian Competition and Consumer Commission (ACCC).

- APRA will be responsible for prudential regulation of deposit-taking institutions, life and general insurance, superannuation funds⁵ and retirement savings accounts⁶. This will provide for more efficient and competitively neutral regulation across all of the prudentially regulated sectors. APRA will have comprehensive powers, including for licensing and regulation of the institutions authorised to provide financial services.
- ASIC will be responsible for the market integrity and consumer protection functions across the financial system. It will take on the existing functions of the Australian Securities Commission (ASC) and the consumer protection functions of the Insurance and

Superannuation Commission (ISC). In addition, the ACCC's functions in providing consumer protection in the financial system will be taken on by ASIC. This will provide specialised regulation of conduct, disclosure and consumer protection functions for financial service providers and financial markets. The amalgamation of consumer protection functions in a single regulator will promote competitive neutrality and permit better comparability by consumers of different financial products and services.

The Bills establishing APRA and ASIC will transfer responsibility for the administration of existing laws from the ISC to ASIC and APRA. However, for the most part, the transfer will not seek to alter the rules applying in this area (which are described in the remainder of this document). The prudential parts of the legislation relating to life and general insurance companies will be administered by APRA, and the parts of those regimes dealing with market integrity and disclosure requirements will be administered by ASIC⁷.

Ownership Rules

Reform measures will streamline existing legislation and rules governing ownership and acquisitions in the financial system⁸, increase consistency in the application of rules and procedures governing shareholdings in financial conglomerates and simplify procedures for regulating ownership in non-operating holding companies.

The measures subject all prudentially regulated financial sector companies, including insurance companies, to a 15 per cent shareholding limit by any one person and their associates, or such higher percentage as the Treasurer may determine is in the national interest. In exercising this power, the Treasurer will take into account, but not be limited by, advice from the ACCC in relation to competition considerations, and the advice of the prudential regulator on prudential considerations. The Bill provides for the imposition of conditions on approvals of stakes higher than 15 per cent.

The proposed laws relating to financial sector shareholdings is applied for prudential, competition and other national interest purposes. Acquisitions and mergers in the financial sector, as for other economic sectors, separately and additionally remain subject to competition regulation by the ACCC under the Trade Practices Act 1974 (TP Act) and the foreign investment policy and laws.

Regulatory Rules

Life and General Insurance

The primary legislation applicable to the life and general insurance industry are:

- The Insurance Act 1973 - primary legislation for the prudential supervision of general insurers.
- The Life Insurance Act 1995 - primary legislation for the prudential regulation of life insurance companies in Australia.
- The Insurance (Agents and Brokers) Act 1984 – seeks to improve the stability of, and increase public confidence in, the intermediary distribution system for insurance products by making insurers responsible for the actions of their agents, promoting the financial stability of insurance brokers and establishing competition with other distribution methods.

- The Insurance Contracts Act 1984 – simplifies the law governing insurance contracts. The objectives of the Act are:
 - to improve the flow of information from insurers to policyholders to enable policyholders to make an informed choice and to be fully aware of the terms and limitations of insurance policies; and
 - provide a uniform and fair set of rules to govern the relationship between insurers and policyholders.
 - The Insurance Acquisitions and Takeovers Act 1991 – sets out rules for compulsory notification to the Treasurer and screening of proposals relating to:
 - acquisition or issue of significant shareholdings (ie, 15 per cent or more) in Australian insurance companies;
 - acquisition or leasing of a significant portion (ie, 15 per cent or more) of the assets of Australian insurance companies; and
 - entering into of agreements relating to the directors of Australian insurance companies⁹.
- The General Insurance Supervisory Levy Act 1989, Life Insurance Supervisory Levy Collection Act 1989, and Insurance Supervisory Levies Act 1989 empowers the ISC to collect a levy from general and life insurers to help fund supervisory activities.¹⁰

The primary legislation generally provides for regulations to be made to support the prudential regulation of the insurance industries. For example, actuarial standards for life insurance are disallowable instruments and thus have the force of law. In addition, the Insurance and Superannuation Commissioner issues non-statutory guidelines that establish expectations on the behaviour of the insurance industries.

- For example, the Code of Practice for Life Insurance and the Disclosure Requirements for Promotional Material in the Life Insurance Industry are non-statutory guidelines issued by the Commissioner.

A self-regulatory Code of Practice for general insurers was introduced on 1 July 1995. The Code of Practice deals with standards of good practice required from general insurers, training and supervision of employees and agents, policy documentation, claims handling and dispute resolution mechanisms. The Code requires general insurers writing consumer and domestic classes of insurance business to implement a compliance plan, which includes internal dispute resolution. Insurers are also required to subscribe to the industry claims review panel scheme. The Code was developed by the Insurance Council of Australia (the leading industry body), has been approved by the ISC and has strong industry and consumer support. To date, industry's assessment of the effectiveness of the Code of Practice has been positive overall¹¹.

Most forms of life and general insurance are not mandatory. The exception is compulsory third party insurance (protects owners and drivers of motor vehicles against injury claims caused by their motor vehicles) which is required by the States and Territories as part of motor vehicle registrations.

Private Health Insurance

The two main pieces of legislation affecting private health insurance in Australia are:

- The *National Health Act 1953* that covers the provision of pharmaceutical, sickness and hospital benefits, and medical and dental services provided by private insurers; and
- The *Health Insurance Act 1973* that relates mainly to the Government's Medicare Benefits Scheme, although it does contain some restrictions on payment that affect private health insurers.

Each Act has regulation made under it that expand on certain aspects of the Act.

The impact of these Acts is that the Government regulates the industry to protect the system of community rating.

There is no form of mandatory private health insurance.

Regulatory Institutions

Life and General Insurance

As noted in the earlier section on Financial System Reform, bills presently before Parliament seek to change the regulatory framework for the financial system including that applying to the insurance industries. The new framework could commence on 1 July 1998 or as soon as possible thereafter. The description of the present arrangements is subject to the earlier explanation of the reform measures, but will remain relevant to the post reform system to the extent that the market-based approach to regulation will continue to be pursued.

The ISC was established in 1987 as a financial regulator for the insurance and superannuation industry. It is directed by a Commissioner (who is a statutory office holder) and is responsible directly to the Treasurer. The ISC is funded through direct outlays from Consolidated Revenue. However, these are recouped by the Commonwealth through annual levies on regulated life, general and superannuation industry entities. The ISC's responsibilities include the supervision of the life and general insurance industries in the interest of policyholders.

A market-based prudential approach to the regulation of insurance companies is used. This seeks to minimise interference in commercial activities except for prudential and other public interest reasons. It also places primary responsibility for prudent management of policyholders' assets on the insurers requiring them to have adequate risk management policies and internal controls in place.

The regulator has powers to take remedial action in respect of life companies and general insurers. This includes powers of direction and replacement of management. If, as a last resort it is necessary to liquidate a life company statutory fund, policyholders have priority over other creditors.

With respect to life insurance, the responsibility for prudent management of the institution rests with the board and management. The regulator's approach is based on the analysis of financial and statistical returns lodged by companies; on-site inspection of life companies and life insurance advisers;

the audit of promotional material distributed by life insurance companies; and the gathering of market intelligence.

With respect to general insurance, the regulatory approach is to set minimum standards for solvency and longer-term capacity, but otherwise limit regulation to a minimum with significant reliance on self-regulation. The Insurance Council of Australia is central to the self-regulatory role (see above).

Private Health Insurance

The key regulator is the Minister for Health and Family Services. The Minister's role is to enforce the previously mentioned legislation and to put forward proposed amendments. The Private Health Insurance Administration Council is a statutory body funded by the industry that administers the system of reinsurance and collects information from the funds on their financial affairs.

Reinsurance underlies community rating, and registered funds must participate in reinsurance. Under the reinsurance arrangements, the hospital claims of all people aged 65 years and over, and those with more than 35 days of hospitalisation in any one year, are to a large extent shared by all health funds. Funds contribute/or receive from the reinsurance pool the amount by which their benefits paid for each reinsurance group differs from the industry average.

Industry Structure

Nature of Business

Life Insurance

Life insurance business comprises long period contracts for savings and/or risk cover for death and disability. The majority of life insurance business is wholesale funds management for superannuation funds¹². Life insurance companies are also able to provide retirement savings accounts (RSAs), which are capital guaranteed contracted policies provided through the statutory fund and subject to similar prudential and retirement income rules as superannuation products¹³. Life reinsurance business is also undertaken by companies registered as life insurance companies and subject to the same prudential arrangements.

General Insurance

General insurance provides protection against the risk of monetary loss caused by accidents, catastrophes and other misfortunes. Contracts tend to be short, generally for one year. General insurance covers a wide range of commercial and domestic insurance, including motor vehicle, fire, marine, householders and employer and public liability. Australian general insurers are also active in overseas insurance and reinsurance markets. The Insurance Act 1973 authorises the following: direct underwriters of general insurance products directly to Australian consumers; professional reinsurers accepting underwriting risks from both Australian and foreign insurers; lenders' mortgage insurers; insurers of limited groups of associations; and captive insurers owned by large corporations for the purpose of insuring their own risks.

Number of Firms

Life Insurance

There were 52 life insurance companies registered under the Life Insurance Act 1995 as at 30 June 1997¹⁴. Of these, 7 specialise in life reinsurance. During the year to 30 June 1997, the 3 largest life insurance companies held 52 per cent of the total industry assets (the top 10 companies held around 79 per cent of assets).

General Insurance

There were 170 general insurance companies registered as at 30 June 1997¹⁵ with just over half the companies forming part of a related group of companies. Of these, 27 are specialist general reinsurers. During the year to 30 June 1997, the 5 largest general insurance groups held 45 per cent of the total industry assets (the top 10 groups held 64 per cent of total assets). The largest 10 reinsurers held 77 per cent of the assets of the reinsurance market.

Private Health Insurance

The private health insurance industry undertakes the business of providing benefits for hospital, medical and ancillary care. There are currently 44 registered health benefits organisations. The five largest funds have 73 per cent of the market.

Regulation And Competition Issues

Barriers to Entry

Life Insurance

Entry into the life insurance market is restricted to companies registered under the Life Insurance Act 1995. A company may make an application for registration under this Act in accordance with regulations, which include a requirement to lodge specified documents and provide information relating to matters relevant to the application. In considering the application, the regulator assesses the company's ability to meet its obligations, to comply with the regulatory provisions, and the impact of other forms of business. The regulator may refuse to register a company that has capital of less than \$10 million (or a higher amount fixed by regulations) and the value of assets (other than policyholders' assets) must exceed liabilities by \$5 million. This is a continuing capital requirement and is in addition to the solvency and capital adequacy requirements.

The Life Insurance Act 1995 makes no provision for foreign branches to operate life insurance business in Australia¹⁶. Consequently, foreign life insurance companies must establish an Australian subsidiary to operate in the Australian market. The rationale for this is to secure protection for Australian policyholders through the solvency and capital adequacy provisions that are applied to the statutory funds of a life insurance company. Australian consumers are free to purchase policies from a foreign life insurer, but the transaction will be subject to the regulatory and disclosure provisions of the other jurisdiction, rather than those applying to Australian life insurers.

General Insurance

The Insurance Act 1973¹⁷ restricts the right to carry on general insurance business to authorised companies who meet certain financial conditions and Lloyd's underwriters. The regulator may grant an authority if satisfied that, amongst other things, the company meets capital or asset requirements¹⁸, has reinsurance arrangements, and is able to meet liabilities and comply with the provisions of the Act. The application for authority must provide specified information as set out in the legislation.

In addition to the requirements specified in the previous paragraph, foreign branches are able to operate in the general insurance industry provided an Australian resident is appointed as an agent.

Foreign investment approval would be required, under policy, on all occasions involving foreign persons establishing a life insurance business. However, foreign investment approval for the establishment of a general insurance business would only be required where the initial investment was valued at \$10 million or more.

Private Health Insurance

Prospective health insurers must have reserves of at least \$1 million. Foreign firms are not treated differently to local firms.

Competition with Substitutes

Life and General Insurance

Competition for life insurance savings products occurs within the larger savings and investment market, including the provision of superannuation products, unit trust products and deposits. Although there is substitution between product types, the largest life insurers are part of financial conglomerates which offer a spectrum of savings and investment products through the subsidiaries of the group¹⁹, including retail superannuation funds and unit trusts. Life insurance and savings products are also offered by friendly societies²⁰.

Competition for risk products occurs within the broader risk market, although the direct substitutability of the products depends on the similarity of their characteristics and terms. By definition, most life and general insurance products provide risk cover in different circumstances. An overlap exists in the supply of accident and disability policies, though these contracts may apply for different durations, *i.e.* contracts that have a duration of less than one year are not life insurance policies.

At present, differences (described broadly below) exist in the tax treatment of life insurance, general insurance and other savings products. The Government has indicated its intention to improve the efficiency, equity and certainty of the taxation treatment of life insurance as part of the broad taxation reform process²¹.

- The taxation base for life insurers is narrower than for general insurers, financial intermediaries and other funds managers. In particular, it excludes some underwriting and management fee income.

- Similar economic activities are subject to different tax rates depending on whether a policy is issued by a life insurance company, friendly society or general insurance company.
- Investment income derived on behalf of policyholders could be taxed at a higher or lower rate than the individual's marginal tax rate, particularly if the policy is held for more than ten years. This tax treatment differs from that applying to competing savings products and investments.

Barriers to Exit

Life Insurance

In deciding whether to de-register a life insurance company, the regulator must be satisfied that the company has no outstanding policy liabilities. Therefore, in practice, a company may have to transfer its existing business to another life insurance company before being able to exit the industry. The same process would be followed if a life insurance company wanted to exit from a particular line of business, although it would also have the option of closing its books to new policies and running down the existing policies over their life. The Life Insurance Act 1995 establishes a process for the transfer or amalgamation of the life insurance business of one life insurance company to another which generally includes a requirement that the terms of the agreement for the transfer be confirmed by the Court.

General Insurance

In deciding whether to cancel the authority of a general insurer to carry on insurance business, the regulator must be satisfied that the insurer has no liabilities in respect of insurance business carried on by it in Australia. In practice, this means that insurers wishing to withdraw from the market must either 'run-off' their outstanding insurance liabilities, or transfer those liabilities to another authorised insurer. Unlike the Life Insurance Act 1995, while the Insurance Act 1973 does not establish a process for the transfer of business to another authorised insurer, in practice, the regulator is closely involved in such transfers in order to be satisfied that there are no outstanding insurance liabilities.

Control of Prices

Life and General Insurance

The regulatory regimes for life and general insurance do not directly impose any conditions on the pricing of insurance policies. However, there are some indirect influences including the possibility that pricing will seek to recover the cost of regulation and the requirement that fees be identified in life insurance policy disclosure documents.

Private Health Insurance

The Minister for Health and Family Services can disallow price changes where they contravene community rating. All premium increases are scrutinised by the Minister, the Treasurer and the Prime Minister.

Control of Products

Life and General Insurance

Life insurance companies are required to undertake life insurance business, as defined in broad terms in the Life Insurance Act 1995. For instance, life insurance business includes a range of risk policies contingent on life, annuities, continuous disability policies and investment products. There are no impediments to the introduction of new and innovative products that fall into the general description of life insurance business, and the regulator has authority under the Act to declare business to be life insurance business.

The meaning of insurance business for the purposes of the Insurance Act 1973 is very broad and allows scope for general insurers to be innovative in the products offered. There are restrictions, by way of monopolies by some State and Territory Governments, in relation to compulsory third party motor vehicle accident insurance and workers compensation. These monopoly arrangements are due to be reviewed under the provisions of the Competition Principles Agreement²² that will be guided by the principle that legislation not restrict competition unless it can be demonstrated that the benefits of doing so outweigh the costs.

Private Health Insurance

All products must fit within the community-rating framework; that is, insurers cannot discriminate based on age, sex or health status.

Control of Ownership & Forms of Business

Life and General Insurance

The section on Reform of the Financial System provides details on new ownership and acquisitions requirements being introduced as part of the package of financial system reform measures. If this Bill receives passage and proclamation, it will in part replace the Insurance Acquisitions and Takeovers Act 1991 although the new requirements involve little change for insurance companies.

In addition, the ACCC administers the economy wide competition laws²³ with respect to the financial sector. This role has been confirmed as part of the financial system reform announcements.

The legislative requirements for ownership and control in the financial system are also subject to policy guidelines by the Government. On 9 April 1997, the Government announced that it would end the 'six pillars' policy that involved a blanket ban on any mergers among the four major banks and the two largest life insurance companies. The Government further decided that mergers among the four major banks would not be permitted at this time, but that it will review this position when it is satisfied that competition in the financial industry, particularly in respect of small business lending, has increased sufficiently²⁴.

The insurance industry is not considered to be a sensitive sector under the Government's foreign investment policy; however, the industry is subject to the notification provisions of the Foreign Acquisitions and Takeovers Act 1975 and the Government's foreign investment policy.

All investment proposals by foreign interests in the insurance sector, above certain thresholds, need prior approval and therefore need to be notified. The notification thresholds are over \$5 million for acquisitions of substantial interests in other existing businesses; \$10 million or more for the establishment of new businesses; and \$20 million or more for offshore takeovers.

The Government normally raises no objections to insurance proposals above the notification thresholds where the relevant total assets/total investment is below \$50 million. The Government examines in more detail proposals to acquire existing businesses (with total assets of \$50 million or more) or establish new businesses (with a total investment of \$50 million or more) and raises no objections to those proposals unless they are contrary to the national interest. Offshore takeovers do not generally raise national interest issues.

Private Health Insurance

Medibank Private, the largest insurer, is owned by the Commonwealth Government. There are no restrictions on foreign ownership, nor on the ownership structure of insurers, nor whether the insurers are for-profit or not-for-profit.

Control of Marketing & Distribution

Life and General Insurance

The section on the Reform of the Financial System provided an explanation of the reform measures for market integrity and consumer protection, including the comprehensive responsibilities of ASIC and the second stage reform proposals to rationalise the licensing and disclosure regimes for financial instruments. As noted in the earlier section, ASIC will assume sole responsibility for the following legislation:

- The *Insurance Contracts Act 1984* provides for appropriate disclosure of information from life and general insurers to policyholders and provides a uniform set of rules to govern the relationship between insurers and policyholders.
 - To ensure that the objectives of the Act are achieved the general insurance industry has developed a self-regulatory Code of Practice which promotes industry awareness of the legislative rights and obligations.
 - The Life Insurance Code of Practice²⁵, applies to life companies and life brokers and includes a requirement for a needs analysis to be prepared before a consumer is sold a life insurance policy. It also sets out standards of advice, status disclosure, competencies and dispute resolution mechanisms.
- The *Insurance (Agents and Brokers) Act 1984* defines relationships between intermediaries in the life and general insurance industries²⁶ and imposes certain responsibilities upon them. For example, the Act makes insurers responsible for the actions of their agents who must meet fiduciary requirements, restricts the right to carry on insurance broking business to registered brokers who meet fiduciary and other requirements, and provides rules governing the behaviour of agents, brokers and insurance company employees.

At present an ISC disclosure regime²⁷ requires the production of full information disclosure documents for life insurance products. The regime prescribes the information that must be provided to consumers and includes the requirement for a Key Features Statement, containing a description of the

major features of the products. Information must be presented in a prescribed manner to enable comparisons between similar products.

Banks may apply to establish general and life insurance subsidiaries, but cannot sell insurance products directly from their own balance sheet. The approval process for the establishment of an insurance subsidiary is described below.

- Foreign investment approval may be required if the bank is a foreign person and the establishment of the new subsidiary is considered to be establishment of new business.

Private Health Insurance

The community rating principle means that all products must be offered at the same price to all members.

The National Health Act 1953, Health Insurance Act 1973 and Banking Act 1959 do not restrict banks from becoming a registered health insurer or from owning a subsidiary health insurer. However, a bank may require the approval of the prudential regulator to undertake private health insurance.

Solvency, Investment Regulation

Life and General Insurance

Life insurance companies are subject to solvency and capital adequacy standards that are determined by the independent Life Insurance Actuarial Standards Board²⁸. In general, the investments of a statutory fund of a life insurance company are not restricted by legislation provided the investment is not otherwise prohibited, *e.g.* by regulations. However, a life insurer cannot have a holding greater than 2.5 per cent of the shares in a related company unless approval is attained from the regulator.

The solvency margin of a general insurance company is expressed as an excess of assets over liabilities. For a company incorporated in Australia, the total assets must exceed total liabilities by not less than \$2 million, 20 per cent of premium income or 15 per cent of outstanding claims, whichever is the greatest. In addition, all companies, including foreign branches operating in Australia must apply a similar test with respect to liabilities in Australia, premium income in Australia or outstanding claims in Australia. In general, investments of general insurers are not restricted by legislation. However, while investments in related bodies are not prohibited, unless approved by the regulator, such assets do not count for the purposes of meeting the solvency test.

Banks

The RBA's prudential supervision of banks largely relies on each bank's own risk management systems. Furthermore, the RBA announced in April that no formal Prime Asset Ratio (PAR) will apply. This reflects the RBA's view that it is no longer appropriate to mandate a common ratio or minimum holdings of liquid assets for all banks, as such an approach does not adequately take account of the different structure of banks' businesses, both on- and off-balance sheet.

Banks are required to meet a range of prudential statements. As part of the prudential statement on liquidity management, the RBA will agree with each bank a liquidity policy that will cover both the bank's day-to-day liquidity management and a bank-specific crisis.

Superannuation

Key principles underlying the prudential supervision of superannuation are to:

- protect, but not guarantee or underwrite, the security of members' benefits;
- ensure trustees accept their sole responsibility for the viability and prudent operation of superannuation funds; and
- ensure that taxation concessions for superannuation are used for approved purposes.

A superannuation fund must make an irrevocable election to become a regulated superannuation fund and comply with the requirements of the Superannuation Industry (Supervision) Act 1993 (SIS). Compliance with the operational and prudential requirements of SIS constitute one of the conditions for a superannuation entity to qualify as a complying superannuation fund and be eligible for the taxation concessions. These requirements relate to matters that include:

- the sole purpose test which requires the fund to be maintained solely for the provision of benefits upon the member's retirement age or death;
- investment standards, *e.g.* formulating and giving effect to an investment strategy that has regard to the entity's circumstances²⁹; restrictions on borrowings, restrictions in the acquisition of assets from, or making loans to, members; and restrictions on investing in in-house assets;
- the preservation of benefits; and
- the disclosure of information to members and other parties, including annual audited reporting requirements to the prudential regulator.

Private Health Insurance

Solvency and investment regulations do not affect competition.

Competition Law & Enforcement Issues

Agreements between Insurers

Insurers are subject to the full range of prohibitions under Australia's national competition statute, the Trade Practices Act 1974. Under this statute there is a general prohibition on agreements with the purpose or effect of substantially lessening competition, which may encompass market sharing and primary boycotts. Price fixing is deemed, under the statute, to substantially lessen competition. Agreements which purport to 'recommend' prices but which in reality fix prices are prohibited, although some joint ventures and collective buying groups are excluded from this prohibition.

However, the Australian Competition and Consumer Commission (ACCC) has power to grant immunity from legal proceedings, by way of an authorisation, for some agreements that might otherwise

contravene the prohibitions referred to above. Authorisation is available where the ACCC is satisfied that the public benefit arising from an agreement or conduct would outweigh the anticompetitive detriment.

Regulatory Conflict

The ACCC is the only competition regulator in the insurance industry. When the ACCC considers any merger or acquisition, it welcomes and takes into account all submissions made to it from the market and will make market inquiries within the industry to determine whether the merger or acquisition is likely to contravene the competition statute³⁰. Such inquiries may, for example, encompass industry regulators, customers, competitors, suppliers, other government departments or agencies, industry associations, overseas agencies, consumer groups or trade unions.

The ACCC will also seek submissions from interested parties in relation to any authorisation application made to it for immunity for otherwise anti-competitive behaviour (discussed above). The ACCC may also seek information or assistance from technical regulators in the insurance sector in respect of other investigations into anti-competitive conduct within that sector.

Antitrust Enforcement

In the past couple of years, the ACCC has instituted Court proceedings against participants within the insurance sector in relation to allegations of anticompetitive conduct. The most common forms of anticompetitive conduct within the insurance industry concern exclusive dealing and third line forcing. The ACCC has also taken consumer protection cases arising from complaints involving misrepresentations and harsh or unconscionable conduct or contracts.

The ACCC has only examined one merger matter within the insurance sector since Australia changed its merger test from one of dominance to one of 'substantial lessening of competition' in 1993. This involved a proposed merger of the life insurance and funds management businesses of National Mutual and Lend Lease / MLC in Australia and New Zealand. The ACCC examined a number of possible markets in the financial services industry and found that, even if a narrow market definition was to be adopted, the merger would not be likely to result in a substantial lessening of competition. Taking a relatively broad definition, where the relevant markets were considered to be wholesale funds management, life insurance, superannuation and retail investment products, the ACCC also concluded that the merger would not be likely to breach Australia's competition laws. Because the decision did not hinge on the precise definition of the market, the ACCC did not conduct detailed market inquiries that would otherwise have been necessary for the ACCC to draw conclusions about the specific market boundaries.

NOTES

- 1 Financial System Inquiry (FSI) Final Report (Wallis Report), March 1997. This Report and related documents are available on the Internet at <http://www.treasury.gov.au/FSI/Default.asp>.
- 2 A copy of the announcement can be found on the Treasury Internet Home Page at <http://www.treasury.gov.au>.
- 3 A copy of the legislation can be found on the Treasury Internet Home Page.
- 4 The position of Insurance and Superannuation Commissioner is being abolished by the legislation that establishes APRA.
- 5 Self-managed superannuation funds will be subject to minimal prudential regulation. Non-prudential regulation will be transferred to the Australian Taxation Office from 1 July 1999.
- 6 The prudential regulation by APRA of credit unions, building societies and friendly societies requires a transfer agreement by the States and Territories. Similarly, ASIC will become responsible for the consumer protection of these financial entities if there is State and Territory agreement.
- 7 The following insurance legislation presently administered by the ISC will be split between APRA and ASIC: the *Life Insurance Act 1995* and the *Insurance Act 1973*. The administration of the following insurance legislation will be transferred solely to ASIC: the *Insurance Contracts Act 1984* and the *Insurance (Agents and Brokers) Act 1984*.
- 8 The *Finance Sector (Shareholdings) Bill 1996* which will replace the *Banks (Shareholdings) Act 1972* and the relevant parts of the *Insurance Acquisitions and Takeovers Act 1991*.
- 9 See previous endnote.
- 10 As part of the Government's reform of the financial system, a series of new levy Bills have been introduced into Parliament that will impose a levy on those industries prudentially regulated by APRA. These levies will fund both APRA and the cost of additional consumer protection functions in the financial system undertaken by ASIC. The levies will be charged according to a percentage of assets held by the entity, subject to a minimum and maximum levy amount. The Bills will replace existing levy Acts. In relation to insurance, the principal Bills are the *Life Insurance Supervisory Levy Imposition Bill 1998* and the *General Insurance Supervisory Imposition Bill 1998*. In addition, the *Financial Institutions Supervisory Levies Collection Bill 1998* will enable the collection of the levies imposed by each levy bill.
- 11 Although one small insurer failed to participate in the arrangements.
- 12 75 per cent of the total assets of life insurers are held for superannuation funds. This represents around 36 per cent of all superannuation funds' assets. The prudential and retirement income regulation of superannuation is not dealt with in this paper.
- 13 Legislation for RSAs took effect from 1 July 1997. RSAs offered by a bank, building society or credit union are held on the balance sheet of the provider.

- 14 Mutual based friendly societies also undertake life insurance business, but are not required to be registered under the *Life Insurance Act 1995* because they are presently regulated by State Supervisory Authorities. As part of the financial system reform package State and Territory agreement is being sought for the regulation of friendly societies to be transferred to the Commonwealth to ensure neutrality with the regulation of life insurance companies. The regulatory arrangements for friendly societies are not discussed in the paper.
- 15 There were 16 Commonwealth or State owned or controlled general insurers not subject to supervision by the Insurance and Superannuation Commission.
- 16 At the time this Act came into effect, replacing earlier legislation, there were three branches of foreign life insurance companies operating in Australia which were allowed to continue to operate as registered life insurance companies. One has since become incorporated and the remaining two have very small assets in relative industry terms.
- 17 The Act does not apply to State Government insurance organisations or to health insurance providers.
- 18 For a company that has share capital, paid-up share capital of at least \$2 million and for other companies, total assets exceeding liabilities by at least \$2 million. This is also an ongoing capital requirement.
- 19 For example, all four major banks have life insurance subsidiaries and a major life insurance company group has recently been given a banking licence.
- 20 See endnote 14.
- 21 Treasurer's Press Release, No 18 of 1998, released 23 February 1998 a copy of the press release can be found at <http://www.treasury.gov.au>.
- 22 Reached between the Commonwealth and the States and Territories in April 1995.
- 23 The *Trade Practices Act 1974*.
- 24 Treasurer's Press Release, No 28 of 1997, released 9 April 1997 a copy of the press release can be found at <http://www.treasury.gov.au>.
- 25 Code of Practice for Advising, Selling and Complaints Handling in the Life Insurance Industry is issued as a circular by the Insurance and Superannuation Commissioner and does not have the force of law.
- 26 At 30 June 1997, there were 121 life insurance brokers registered and 1,021 general insurance brokers registered under this Act.
- 27 Life Insurance Circular No G.I.1 which does not have the force of law.
- 28 The following standards were in place as at 31 December 1997: Actuarial Standard 1.01 (Valuation of Policy Liabilities), Actuarial Standard 2.01 (Solvency Standard) and Actuarial Standard 3.01 (Capital Adequacy). Actuarial Standard 4.01 (Paid-Up and Surrender Values)

applies from 30 June 1998 and Actuarial Standard 5.01 (Investment Performance Guarantee) has applied from 31 December 1997.

- 29 For example, the risk, likely return from, and liquidity of, investments must have regard to the cash flow requirements.
- 30 Section 50 of the *Trade Practices Act 1974* prohibits mergers or acquisitions which would have the effect, or likely effect, of substantially lessening competition in a substantial market for goods or services.

CZECH REPUBLIC

Overview of Legislation and Regulations in the Insurance Industry

The basic legal regulation setting out conditions for doing business in the insurance industry and the activities of state supervision in this area within the Czech Republic is contained in Law no. 185/1991 Coll., on the insurance industry, as amended.¹

Civil law regulations relating to insurance are set out primarily in the Civil Code (Law no. 40/1964 Coll., as subsequently amended).

Separate legal rules provide for statutory insurance and compulsory contractual insurance. In the Czech Republic, there still remains statutory insurance covering both motor vehicle third party liability and insurance covering employer liability for accidents occurring at the work place or for work-related illness. Compulsory contractual insurance covers various areas and the specific activities of some professions such as auditors, lawyers and doctors as well as special types of liability in relation to products, operation of nuclear equipment, operating air traffic, etc. Drafted legal provisions will further introduce compulsory contractual insurance in other areas, such as the draft law on the travel industry.

Statutory insurance is provided by specified insurance companies.² These companies are not exposed to competitive pressures, thus the position of individual insurance companies on the insurance market is distorted. Attempts to adapt the insurance market in the Czech Republic to conditions similar to those found in the EU should include the removal of statutory insurance. The Ministry of Finance has prepared a bill on compulsory contractual insurance for third party motor vehicle liability. This draft law specifies that motor vehicle operators will be obliged to enter into insurance contracts with insurance providers who have obtained permit from the Ministry of Finance to operate.

The law on the insurance industry specifies that the Ministry of Finance is the state supervisory and regulatory body. Based on law no. 15/1998 Coll., on the Securities Commission, insurance companies as investors on the capital market are now also subject to state supervision performed by this Commission.

In addition to the two statutory forms of insurance, the Ministry of Finance does not interfere in the prices set for insurance products. This would only be considered as a consequence of measures taken by this body to renew the financial stability of an insurance company.

According to the law on the insurance industry, a permit issued by the Ministry of Finance is required for doing business in the insurance industry. The conditions for granting a permit are the same for foreign insurance companies as for domestic companies. However, foreign companies can only do business in the Czech Republic through a registered office located in the Czech Republic or by establishing a subsidiary within the Czech Republic. The activities of insurance companies outside the Czech Republic are not restricted. As far as the activity of an agent is concerned, this can only be performed by an individual or legal entity living or based in the Czech Republic. If this activity is performed by a foreign insurance company, the agent who performs this activity must have a permit from the Ministry of Finance.

An amendment is currently being prepared to the law on the insurance industry, the object of which is to approximate the legislative framework in the insurance industry to EC legislation.

Comparison of conditions for granting permits in line with existing and proposed provisions:

Current Situation

- legal status - a joint-stock company, a state-owned company or a co-operative;
- payment of a deposit of 10 million Czech Crowns to the blocked account of the Ministry of Finance; and
- submission of an application containing a proposal of general insurance conditions/terms, a business plan and a plan covering the first three years of activity. The general commercial conditions are subject to the Ministry of Finance's approval.

Proposed Situation

- legal status - a joint-stock company or a co-operative (it is envisaged in the future that the legal status of a mutual insurance association will be introduced);
- a minimal amount of registered capital based on the extent of operational activities;
- approval of persons in the company's statutory and supervisory bodies, *chief clerks* and owners with significant voting rights; and
- submission of an application containing a business plan with specified information including the model process of insurance, the development of technical reserves and solvency and a plan to cover the first five years of activity.

The proposed legislation will establish a system whereby all-inclusive approval of general insurance conditions and the introduction of new insurance products will no longer be required. The proposed legislation will remove the requirement of obtaining prior approval for performance of agency activities for foreign insurance companies.

As far as insurance company ownership is concerned, there are no restrictive rules (other than the requirement that an insurance company founded by a foreign person be a joint-stock company) and the proposed law will not introduce any further restrictions other than requiring integrity, trust-worthiness and the guarantee of safe management of the insurance company.

As far as the state's share of ownership in insurance companies is concerned, the state only holds a majority stake in the former state-owned insurance company, Ceska pojistovna hereinafter "CP". The government is currently discussing the privatisation of their stake.

As far as private insurance companies are concerned, the current legislation does not stipulate any special rules regarding agreements between insurance companies. In the future, provisions on so-called coinsurance are expected, *i.e.* spreading risk between several insurance companies which will be in line with the requirements of EC directives. In this connection, Commission Regulation (EEC) No. 3932/92, on the application of Article 85(3) to certain categories of agreement, decisions and concerted practices will be considered.

The current tax system and the existence of state contributions into both supplementary pension schemes and building society savings distort competition on the market. Life insurance, *i.e.* including pensions, is treated less favourably due to the lack of tax benefits. Life insurance is a matter of little interest among people in the Czech Republic compared to other countries.

The purpose of the proposed changes is a shift from material supervision towards financial supervision. The objective is to introduce the largest possible supervision of the financial health of insurance companies so that cases of inability to meet their liabilities will be kept to a minimum. At the same time, this objective should be achieved with as little distortion of competition as possible. The draft legislation envisages the defining of conditions with respect to handing over insurance portfolios, mergers, transformation and winding up of insurance companies. New rules should also ensure the greatest possible protection for consumers.

Competitive Environment Developments

There are 39 insurance companies currently active in the insurance market. The insurance market is characterised by the large share held by CP as the legal successor to the former state-owner insurance company. This share is approximately 60 per cent on average based on insurance premiums billed. Another strong company is Ceska Kooperativa holding approximately a 10 per cent market share. NATIONALE-NEDERLANDEN, IPB Pojistovna and Allianz Pojistovna have about a 5 per cent share and the Moravskoslezska KOOOPERATIVA has a 4 per cent share of the market. These five largest companies operating in the insurance market in the Czech Republic hold a total of 88 per cent of the market share.

Thirty insurance companies grouped in the Ceska asociace pojistoven³ (the Czech Association of Insurance Companies) had premium billing amounting to 47 000 million CZK in 1997 (about \$US 1.4 billion), which represented a rise of 17.6 per cent as compared to 1996. Non-life insurance represents a 73 per cent share of the total insured premiums billed, with life insurance amounting to 27 per cent.

The Development of the Number of Competitors in the Insurance Industry in the years 1993-1997

| Insurance Services | Number of Insurance Companies | | | | |
|--|-------------------------------|------|------|------|------|
| | 1993 | 1994 | 1995 | 1996 | 1997 |
| Private Motor Vehicle Accident Insurance | 7 | 3 | 7 | 15 | 16 |
| Company Vehicle Accident Insurance | | 8 | 9 | 15 | 17 |
| Household Insurance | 3 | 10 | 11 | 16 | 18 |
| Life Insurance | not monitored | 14 | 15 | 14 | 18 |
| Personal Accident Insurance | | | | 14 | 18 |

The Office for the Protection of Economic Competition monitored the situation of the competitive environment for selected segments of the insurance market in 1997:

- On the Market for Private Motor Vehicle Accident Insurance the joint market share for the two largest companies, CP and Allianz pojistovna, a.s., fell to 60 per cent compared to 74 per cent in 1996. Two other competitors have a joint market share of 15 per cent. Other insurance companies do not hold a market share in excess of 5 per cent on the market for private motor vehicle accident insurance. This market is gradually developing, although presently there is still little competition.
- As far as Company Vehicle Accident Insurance is concerned, the three strongest companies have a joint market share of 84 per cent. None of the other players offering insurance for company vehicles reach a market share of more than 5 per cent. This market still has little in the way of a competitive market environment.
- The relevant market for Household Insurance has little competition and is still influenced by the continuing dominant position of CP which has an 84 per cent share of this market jointly with two other companies as compared to 91 per cent in 1996.
- The market for Personal Accident Insurance is still marked by an oligopolistic structure with the continuing dominant position of the CP, which has an 84 per cent share jointly with the two strongest companies.
- The three strongest insurance providers in 1997, held a joint share of 87 per cent of the Life Insurance Market. None of the other companies offering life insurance achieved more than a 4 per cent share. From the point of view of protecting economic competition, this market still has little in the way of a market environment.

The situation in the insurance industry was influenced significantly by the floods across extensive parts of Moravia in 1997. The impact of these events were seen in most insurance institutions from the increased number of insurance claims and in particular in the amount of claims settled.⁴

In view of the above, it can be said that the market for commercial insurance services in the Czech Republic is still developing, the number of competitors is growing and the competitive environment is being gradually strengthened.⁵

The Application of Competition Law and Enforcement

In the Czech Republic, economic competition is governed by Act no. 63/1991 Coll., on the protection of economic competition, Act no. 495/1992 in the Coll. and Act no. 286/1993 Coll. (henceforth only "the Act"). This Act covers all areas of the economy without exemption. It follows from the above that the stipulations of the Act are fully applicable to the insurance industry.

The body responsible for economic competition in the Czech Republic is the Office for the Protection of Economic Competition of the Czech Republic (hereinafter "the Office"). The enforcement of the Act in the insurance industry is within the exclusive competence of the Office.

As far as the relations between the Office and the regulatory body are concerned, the latter is always invited to express its views on issues that are subject of a particular administrative proceedings. The regulatory body may submit its comments at any stage of the administrative proceedings. A decision

on infringement of the Act and the amount of a fine to be imposed on an insurance company, respectively, is within exclusive competence of the Office.

Due to a small number of cases, the Office has only limited experience in applying competition law in the insurance industry. However, in the framework of its activities, the Office is carefully monitoring developments in the sector.

Agreements

The administrative proceedings in the area of company motor vehicle accident insurance

In 1996, the then Ministry for Economic Competition conducted administrative proceedings for the alleged prohibited distortion of competition by six insurance companies in accordance with Article 3 of the Act (agreements distorting competition).

Further to the complaint and the ensuing investigation, indications were found that the above companies were providing company motor vehicle accident insurance tied to the condition of purchasing insurance for further commercial risks. As part of the investigation, the relevant market was defined as the market for the provision of company motor vehicle accident insurance. The analysis showed that these six insurance companies have a 75 per cent share of the relevant market. The facts led to the suspicion that the above-mentioned insurance companies were applying anti-competitive concerted practices in the sense of Article 3 (1,2d) of the Act.⁶

In the framework of the initiated proceedings, the Ministry issued a preliminary measure committing the participants to the proceedings to refrain from tying the company motor vehicle accident insurance to other types of insurance. The Ministry made further investigations involving also the Czech Association of Insurance Companies. No contacts between parties to the proceedings were proved that would indicate a co-ordinated approach to setting conditions in providing the company motor vehicle accident insurance. It was not proved that the parties involved engaged in concerted practices leading to a distortion of economic competition, nor that they engaged in anti-competitive practices in the sense of Article 3 (1,2d) of the Act. The proceedings was stopped and the preliminary measure was revoked.

Abuse of a Dominant Position

Administrative procedures in matters concerning the abuse of CP's dominant position in the area of motor vehicle accident insurance

Procedures were commenced after the former Ministry for Economic Competition came to the conclusion in preliminary findings that the announced increase in rates for motor vehicle accident insurance represented an abuse of CP's dominant position.

As part of the administrative procedure preliminary measures were taken in July 1993, in order to protect the public interest.

After analysing the main principles generally considered necessary in EU countries with traditional insurance industries for bringing success to the insurance market, the Ministry assessed the approaches used by insurance companies in the area of motor vehicle accident insurance. Based on that analysis the Ministry concluded that CP's losses in the area of accident insurance can be eliminated or at least substantially reduced by applying the following approaches that were not being use at the time of the administrative procedures:

- the application of extra charges to insurance premiums “maluses”;
- a significant increase in the deductible amount;
- spreading the risks of accident insurance for motor vehicles;
- introducing non-standard insurance on the basis of the personal requirements of a client;
- verifying the effectiveness of settling insurance claims; and
- setting up an institute for integral franchising.

During the proceedings CP had not demonstrated that they had exhausted all avenues for restricting losses in the accident insurance of motor vehicles in the spirit of the above approaches. The Ministry thus succeeded in preventing the proclaimed aim of CP to raise insurance premiums for accident insurance to the originally-declared level and the proposed premiums were reduced on average by 20 per cent. When announcing an increase of the said insurance by January 1994, CP had accepted some of the above-mentioned criteria recommended for reducing losses.

Green Cards

In 1996, the Office commenced administrative procedures in relation to a possible breach of law by CP, who had applied dissimilar conditions when issuing “green cards”, internationally-valid documents demonstrating statutory insurance of motor vehicles, to clients holding a motor vehicle accident insurance policy with CP and those applicants that did not.

After assessing all the facts, the Office classified this dissimilar treatment by CP as an abuse its dominant position because CP offered advantageous conditions only to their clients holding a vehicle accident insurance. CP is the state authorised monopoly provider of third party liability insurance and the only company authorised to provide green cards. Clients holding a vehicle accident insurance policy with CP were offered green cards free of charge, while other applicants for green cards were required to pay a fee. The cost of this free service was covered from the insurance premiums of vehicle accident policy holders. A fine of 1 000 000 Czech Crowns was imposed on CP for breaching its legal obligations.

The High Court repealed the above decision and sent the matter back to the Office for further procedures. The decisive factor for the court was that not enough evidence had been provided to prove that the offer by CP to clients of vehicle accident insurance taken out with them to pay for green cards was done to threaten the competitive environment to the detriment of other consumers.⁷

CP has voluntarily decided to issue green cards for free to all clients for 1998.

Concentrations

The Office has not yet handled any concentrations in the insurance industry. The reason is mainly due to the existing structure of the insurance market in the Czech Republic. No other company has actually obtained a 30 per cent share of the overall turnover related to any of the products offered apart from CP.⁸ There have not been any mergers linking CP with other insurance institutions.

Health Insurance

Provisions and Regulations for Health Insurance

The structure of the system of health insurance companies and the organisation of health insurance is laid out predominantly in Laws no. 551/1991 Coll., on the General Health Insurance

Company of the Czech Republic (hereinafter “VZP”), Law no. 280/1992 Coll., on professional, sectoral and other health insurance companies and Law no. 48/1997 Coll., on public health insurance.

The following companies provide health insurance:

- (a) VZP,
- (b) professional, sectoral, and any other insurance companies (henceforth only employee insurance companies)

General Health Insurance is provided by VZP if this insurance is not offered by the employee insurance companies. VZP is a state-run legal entity, monitored by the Ministry of Health with participation from the Ministry of Finance.

Apart from general health insurance, the employee insurance companies also offer other contractual health insurance and extra insurance over and above the framework of health care required in the predefined health insurance plan. Permission for providing contractual insurance is required according to Law no. 185/1991 Coll., on the insurance industry.

Employee insurance companies are legal entities run according to private law principles and are registered in the Companies Registry. Permission to operate is required from the Ministry of Health upon the Ministry of Finance's pronouncement for it to be established. Only a legal entity with its head office in the Czech Republic submitting a proposal of the first health and insurance plan can apply for approval. The monitoring and regulatory bodies are the Ministry of Health and the Ministry of Finance.

Health insurance companies may not manage and operate health equipment or do business with funds that come from general health insurance. They are therefore obliged every year to submit their proposals for health insurance plans via the Ministry of Health for governmental approval. The proposal of the VZP health and insurance plan is approved by the Parliament of the Czech Republic. Apart from VZP and in addition to general health insurance, health insurance companies can also provide contractual health insurance and extra insurance outside the framework of medical care required.

Everyone has a right to freely choose a health insurance company, doctor, specialist or health care facilities that are in the contractual agreement with the respective health insurance company. They also have a right to health care without direct payments and to the provision of medicine without direct payments. If required care is not provided, individuals have recourse to the manager or operator of health facilities, to the Ceska lekaøska komora (The Czech Chamber of Doctors) or to the appropriate health insurance company.

Status and Development of a Competitive Environment

- In 1996, 25 health insurance companies were active on the market. However, as a result of an abolition of a statutory coverage of non-standard care from the general health insurance, the insolvency and indiscipline of payers of insurance premiums, there was a significant reduction in their number in 1997, through closure or merging with other health insurance companies.⁹ There are currently 10 health insurance companies active in the market.
- VZP continues to hold a privileged position and had a 76 per cent share of the market in 1997. None of the other insurance companies attained a share of 5 per cent. The health insurance market can be characterised as lacking competition for the above reasons.

The Application of Competition Law and Enforcement

Abuse of a Dominant Position

The VZP's conduct when it refused to conclude a contract with a dentist on the provision and coverage of dental care even though in a particular region such care is not provided for, qualified as an abuse of a dominant position in a decision by the Office Chairman (a second instance decision).

The High Court in Olomouc confirmed the decision of the then Ministry for Economic Competition in its judgement. It mentioned in its judgement that the refusal to sign a contract with a doctor for the provision and payment of dentistry care in a village by the VZP in a case when the administrative body (the Office) showed sufficiently the interest of the village in his continuing presence constitutes an abuse of the dominant position of the above-mentioned insurance company (High Court judgement dated of November 7, 1996).

The High Court rejected VZP's appeal of this decision holding that the plaintiff together with the other insurance companies are dividing the health insurance market amongst themselves and the argument that this behaviour is necessary due to the task of devising and implementing a budget so that costs do not exceed income in the budget year in question has no merit. VZP objectively contributes to the creation of a competitive environment through its activities. In this way, the VZP is moving towards a comparable position with other competitors, not excluding businessmen. The influence of the law, therefore, has a full impact on the negotiations of the VZP and neither Law no. 551/1991 Coll. (the above-mentioned special law covering the obligations of insurance companies to budget income and costs in a balanced way) nor any other provision allows for an exemption for VZP from the Act on the protection of economic competition.

Concentrations

In the VZP/ICEBERG case, whereby VZP acquired 51 per cent of the shares in the pension fund Penzijni fond Slavie, a.s., the Chairman of the Office held in the second decision that VZP had breached Article 8 of the Act by not applying to the Office for an approval of a concentration.

VZP's objections that the share of the merging companies on the relevant pension extra insurance market was marginal were not accepted. It was held that this concentration is a conglomerate concentration and that from the standpoint of fulfilling the purpose of the law, even this kind of concentration has to be judged in accordance with the same principles applied to horizontal or vertical concentrations. In other words, a concentration between undertakings whose share exceeds 30 per cent of the overall turnover of the relevant market is subject to approval of the Office and notification, respectively.¹⁰

Competition advocacy

In comments on the bill on public health insurance and the law on health care, the Office recommended that the rights of the insured to choose a doctor are given priority when defining the rights of the insured. This choice should be made on the basis of the doctors specialised abilities and the confidence the insured has in him, not whether he is the contractual doctor of the insured's insurance company. The Office further deems it essential that regulations state transparent indicators and criteria which the insurance companies will adhere to when concluding an agreement with those providing health care and other services. The Office does not agree with an attachment to the exclusive supply of contractual health insurance only with health insurance companies. The exclusive provision of this

insurance would have a negative impact on the competitive environment in the relevant market of that insurance product and will give some competitors an advantage to the detriment of others.

NOTES

- 1 This law does not apply to entities that provide health and social security (insurance) and to the provision of general health insurance. This law applies appropriately and to a limited extent to the provision of contractual health insurance and supplementary insurance by the Vseobecna zdravotni pojistovna CR (The General Health Insurance Company of the Czech Republic) or by other health insurance companies. Due to the variety of concepts and regulatory provisions, health insurance will be treated in a special chapter in this contribution.
- 2 1) Ceska pojistovna a.s. has a monopoly position in providing motor vehicle third party liability insurance in line with legal regulations (Decree of the Ministry of Finance of the Czech Republic no. 492/1991 Coll., which stipulates the extent and conditions of statutory insurance for motor vehicle third party liability).
2) Statutory insurance covering employer liability for damages arising out of an accident at work or a work-related illness is provided by three companies (Ceska Pojistovna, Ceska Kooperativa, druzstevni pojistovna, a.s. and Moravskoslezska KOOPERATIVA, druzstevni pojistovna, a.s.), whose competence is limited in time and the area covered. This insurance is provided in line with the Decree of the Ministry of Finance of the Czech Republic no. 125/1993 Coll., which stipulates the conditions and rates for statutory insurance covering the liability of an employer for damages during an accident at work or a work-related illness.
- 3 The Czech Association of Insurance Companies is a professional interest association of insurance companies in the Czech Republic. The association currently has 30 members and this base represents 99 per cent of premiums billed.
- 4 As a result of these floods, the insurance company Moravia lost its licence to operate because the losses it suffered substantially exceeded the level of their registered capital. Since the insurance company had not taken out any reinsurance, it was struggling with late settlements of insurance claims from the disaster of the floods. The state supervisor intervened to strengthen the health of the insurance company back in 1996, when the insurance company suffered smaller losses caused by low insurance premiums and the costs of providing technical services. The supervisory body had exhausted all options provided for in the law on the insurance industry (measures to remove irregularities to ensure compliance with legal regulations and conditions resulting from the permit to operate; suspension on concluding further insurance contracts or extending already accepted liabilities).
- 5 The insurance industry was one of the fastest growing industries in the Czech Republic in 1996.
- 6 In accordance with this provision, prohibited are agreements containing obligations on the part of at least one party to the agreement to conclude contracts with buyers subject to supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

- 7 According to regulations in Article 9 (3) of the law, a monopoly or dominant position may not be misused by a competitor to the detriment of other competitors or consumers, or even against the public interest.
- 8 Only concentrations which distort or can distort economic competition are subject to the Office's approval. Competition is deemed to be distorted if the concentration between undertakings results in a share of more than 30 per cent of the overall turnover of the relevant market.
- 9 In 1996, several health insurance companies merged, whose health insurance plans had not been approved. The state offered loans for the primary payment of debts to those insurance companies who had taken on liabilities of the wound-up companies. These mergers did not require the Office's permission since the market share of the associated companies was far from exceeding 30 per cent both before and after the merger. The merging process also continued in the following year. Some insurance companies were wound-up since their indebtedness exceeded the limits at which other insurance companies would be willing to merge with them.
- 10 Within the actual subject-matter proceedings, the Office approved of the above transaction. This decision has not yet come into force.

GERMANY

Overview

Regulatory Rules

- Insurance Supervision Law - revised version of 17 December 1992, as amended on 22 October 1997, plus several subordinated regulations;
- Insurance Contract Law - revised version of 31 December 1963, as amended on 21 July 1994;
- Law of General Contract Terms - of 9 December 1976, as amended on 21 July 1994;
- Law concerning the Establishment of a Federal Insurance Supervisory Authority - revised version of 31 December 1963, as amended on 29 April 1997;
- First Implementing Regulation for the Law concerning the Establishment of a Federal Insurance Supervisory Authority - revised version of 31 December 1963, as amended on 29 March 1983;
- Third Implementing Regulation for the Law concerning the Establishment of a Federal Insurance Supervisory Authority - revised version of 31 December 1963, as amended on 18 February 1986;
- Regulation concerning the Capital Resources of Insurance Undertakings - revised version of 24 July 1990, as amended on 16 April 1996;
- Commercial Code - revised version of 31 December 1963, as amended on 24 June 1994;
- Insurance Accounting Regulation - revised version of 8 November 1994;
- Law concerning Compulsory Insurance for Motor Vehicle Keepers - of 5 April 1965, as amended on 26 May 1997;
- Members of certain professions must also conclude compulsory third party liability insurance.
- Regulation concerning Insurance Coverage in Motor Vehicle Liability Insurance - of 29 July 1994;
- Road Traffic Licensing Regulation - revised version of 28 September 1988, as amended on 9 December 1994.

Regulatory Institutions

- Federal Insurance Supervisory Authority;
- Insurance Supervisory Institutions of the Federal States;
- Ministry of Finance;
- Ministry of Justice;
- Insurance Advisory Council - The 60 members of the council advise the Federal Insurance Supervisory Authority in the preparation of important decisions. The council shall include a sufficient number of insurers of each class of insurance, as well as competent policyholders and delegates from relevant professional and social circles.

Industry Structure (as of 1996)

- 125 life assurance undertakings (market share of the largest five : 30,8 %);
- 139 Pensionskassen (market share of the largest five : not relevant);
- 56 funeral funds (market share of the largest five : not relevant);
- 57 health insurance undertakings (market share of the largest five : 50,8 %);
- 277 property/casualty insurance undertakings (market share of the largest five : 23,7 %);
- 36 professional reinsurance undertakings (market share of the largest five : 70,7 %).

Only active insurance undertakings are taken into consideration. Not included are insurance undertakings of minor importance under supervision of the Federal States.

Insurance undertakings may not carry on business other than insurance business.

Regulation And Competition Issues

Barriers To Entry

Insurance undertakings must be authorized by the supervisory authority or in case of branches of insurance undertakings from non-EU States by the Ministry of Finance. The authorization is granted for each class of insurance separately. The applicant undertaking must fulfil certain requirements with respect to the legal form, capital resources, management and identity of shareholders and must submit certain informative material. Prior approval of technical calculation principles and policy conditions is required in case of insurance undertakings carrying on substitutional health insurance, Pensionskassen and funeral funds. In case of compulsory insurance the policy conditions must be approved. If all requirements are fulfilled the applicant undertaking shall have a public right to be granted the authorization.

Foreign insurance undertakings from EU States need not be authorized in Germany. Foreign insurance undertakings from non-EU States must establish a subsidiary or a branch.

Competition With Substitutes

Competition exists with respect to pension schemes, other life-assurance products including savings elements and suretyship insurance. Competitors are banks and investment companies which in each case are supervised according to different patterns.

Tax privileges exist only with respect to certain life-assurance products and Pensionskassen.

Barriers To Exit

The supervisory authority may withdraw authorisation for certain classes of insurance or for the entire business in case of serious shortcomings.

If an insurance undertaking is no longer able to meet its liabilities in the long run, the supervisory authority may give the necessary orders if it seems to be in the best interest of the insured to avoid bankruptcy.

Only the supervisory authority may file a petition in bankruptcy.

Supervision is extended to the liquidation of an undertaking and the discharge of existing insurance contracts if business operations are prohibited or voluntarily discontinued or if the authorisation to carry on business is withdrawn.

Control Of Prices

For certain insurance classes prior approval of the tariffs is required (cf. remarks to *Barriers To Entry*).

The supervisory authority may give an order to adjust the technical bases for tariff calculation if it seems to be in the best interest of the insured to avoid bankruptcy.

However as a matter of fact, there is effective price competition in Germany.

Control Of Products

Prior approval of policy conditions is required in the case of the substitutional health insurance, Pensionskassen, funeral funds and compulsory insurance.

In any other cases the insurer is free to determine its choice of products (unless they infringe public morality or the interest of the general good).

Control Of Ownership And Forms Of Business

An authorization may only be granted to joint-stock companies, mutual societies, corporations and institutions under public law and branches of foreign insurance undertakings (the latter applies only to insurance undertakings from non-EU States which do not establish subsidiaries).

The government is not an important owner in the insurance industry.

Ownership (domestic as well as foreign) is not restricted unless the holders of a participation are not able to guarantee a prudent and sound management.

Control Of Marketing And Distribution

The advertising behaviour of insurance companies is monitored by the supervisory authority. The advertising may not be misleading nor infringe public morality. Comparative advertising is generally not allowed.

Insurance intermediaries are not under supervision.

Banks are allowed to sell insurance products.

Solvency, Investment Regulation

Solvency and investment regulations do not affect competition between insurance undertakings. These regulations seek to ensure that the obligations under the insurance contracts will be met at any time.

Competition law and enforcement issues

The insurance industry is an area exempt from the Act against Restraints of Competition (ARC) in that the general provisions of the ARC are applicable to a limited extent only. In this respect German competition law has already been closely adjusted to European competition law. Since in most cases the individual German insurance markets at the same time make up a substantial part of the respective insurance markets of the Common Market and the restraints of competition are consequently likely in most cases to perceptibly affect trade between Member States Section 102 of the ARC is applicable together with Article 85 (1) of the EC Treaty. Since 1 April 1993 the insurance industry has been subject to 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 limits to co-operation among insurance groups, co-reinsurance groups, exchange of information and recommendations of general insurance conditions can be gathered therefrom.

The Act on the Supervision of Insurance Companies and Building Societies (Insurance Supervision Act) contains provisions applicable to certain merger situations subject to the ARC, *e.g.* the assignment of insurance contracts or the conclusion of control agreements. Such merger projects need to be cleared in such cases by both authorities, who decide independently of each other. Restraints of competition caught by Section 102 of the ARC are subject to the special provision of Section 102 (5) of the ARC; so far this provision has not been of importance in practice.

Restraints of competition in the insurance industry have been subject to control under the ARC only gradually and progressively. The crucial changes were associated with the 1990 revision of the ARC and the Block Exemption Regulation. As a result of the ARC revision, abuse control was replaced with a notification requirement. Furthermore, Bundeskartellamt decisions have now to be made only in consultation with the Federal Supervisory Office for Insurance Companies instead of in agreement with this Office, as was formerly required.

The insurance industry continues to be very highly cartelised, however. Of particular importance are the regulations that differ from the general ban on recommendations incorporated in the ARC. For instance, in the insurance sector non-binding recommendations may even concern the insurance product itself over and beyond terms and conditions. While this enhances transparency (insofar as this term is appropriate at all in this context considering the extensive sets of terms and conditions for the consumer as well), it reduces the willingness to generate company-specific product innovations. Possibly a relevant new trend is emerging as regards automobile liability insurance.

Merger control does not pose special problems. Concentration has been increasing because mergers are frequent between the giants of this sector rather than between small insurance companies. Mergers are becoming increasingly international in nature, *i.e.* the insurance groups extend their regional base by acquisitions in countries where they have no (or in sufficient) presence as yet (see the recent proposed mergers of Allianz/AGF and Generali/Aachen as well as the particularly heavily affected credit insurance segment).

There have not yet been any cases of abuse of a market-dominating position.

Otherwise, reference is made to the Bundeskartellamt's Activity Reports for the relevant enforcement practice.

HUNGARY

Overview

The most important legal instrument governing insurance is the Act XCVI of 1995 on Insurance Institutes and Insurance Activities, which - inter alia - determines the conditions for market entry and operation of insurance entities, and establishes the insurance supervision authority (The State Insurance Supervision, hereinafter: Supervisor). In addition to this Act, several legal rules (Government and Ministerial Regulation) cover the activities of insurance market participants, such as Government Regulation 260/1997 (XII.21.) on Characteristics of Annual Reporting and Accounting Obligations of Insurers, Ministerial Decree of the Ministry of Finance 49/1996 (XII.30.) on Internal Order and Content of Data Supply of Insurers, and Ministerial Decree of the Ministry of Finance 12/1996 (IV.24.) on Formation and Use of Insurance Reserves.

The provisions of Act IV of 1959 on the Civil Code of the Hungarian Republic, especially the Chapter on Insurance, constitutes the basis for the regulation of insurance private law. Additional legal rules affect the content of insurance legal relationships, *e.g.* the obligatory elements of insurance contracts and regulations governing the insurer's obligation to provide information to the customer at the time of contracting.

Separate legal rules provide for compulsory motor vehicle third party liability insurance, especially Government Regulation 58/1991. (IV.13.). Third party insurance is also compulsory in the case of certain professions (*e.g.* private practising, legal consulting and accounting).

The insurance profession is also subject to self-regulation, which is set out in the Code of Conduct of the Association of Hungarian Insurance Companies. There are own initiatives of the Insurance Brokers' Association that influence the behaviour of companies.

The most important participants in the regulation of the insurance sector are as follows:

- (a) Parliament of the Hungarian Republic (which enacted the Insurance Act and its amendments, and other insurance related statutes, *e.g.*, the Civil Code, Competition Act, acts on taxes, etc.),
- (b) Government of the Hungarian Republic (which issues certain enforcement regulations under the Insurance Act and other legal rules relating to insurance activity),
- (c) Ministry of Finance (which elaborates and submits insurance related rules, issues certain enforcement regulations of the Insurance Act, and is the superior authority of the State Insurance Supervisor),
- (d) State Insurance Supervision (which is the state administration organ responsible for supervising the insurance market, and which participates in the elaboration of insurance related legal rules through expressing its opinion, etc.),

- (e) Professional interest groups and industry organisations (the Association of Hungarian Insurance Companies and Association of Hungarian Non-profit Insurance Societies play an active role in elaboration of legal rules, influencing their content through their opinions, proposals, and in particular they have important role in elaboration and approval of certain general contractual conditions).

20 insurance companies limited by shares and 28 insurance societies are currently operating on the Hungarian insurance market (the market share of the latter is quite small, it does not reach one per cent). The vast majority of insurance companies are either fully or partly in foreign ownership. The market share calculated on premium income of the first five insurance companies in the life insurance sector is 88.5 per cent, in the non-life insurance sector 88.8 per cent.

A large proportion of the insurance companies in the market are “composite” insurers. Two insurance companies may pursue only life insurance activity and three insurers may pursue only non-life insurance activity. Since 1996 no new composite insurer may enter the market.

Premium income of the insurers in 1997 amounted to HUF 198 billion (\$US 9,9 million, approximately) it increased by 28,9 per cent in comparison with the previous year. Premium income from life insurance products accounted for 32.8 per cent of the total premium revenues.

Regulation and competition

In compliance with the principle of “sectoriality” insurance activity (under the scope of the Insurance Act) may be performed only with the licence of the Supervisor, and an insurer may pursue only insurance or a directly related insurance activity.

The conditions to be fulfilled for market entry are set out in the Insurance Act. The most important of them are as follows:

- a) an insurer may only adopt the institutional forms provided for in the Act (company limited by shares, association, co-operative, branch office in Hungary of companies domiciled abroad);
- b) an application for a licence to undertake insurance activity should contain the following:
 - the statutes (deed of foundation),
 - a certification of the availability of capital required for commencing the insurance activities
 - a business plan
 - a certification of the existence of personal and material condition,
- c) additional rules provide for the conditions of property acquisition in an insurer.

There is no distinction between Hungarian and foreign investors during the course of licensing.

Since 1st January 1998 it has become possible for insurers based abroad that fulfil the conditions specified in the acts to establish a branch in Hungary. The rule under which Hungarian nationals may not conclude insurance contracts with foreign insurers (with the exceptions specified by the law) is still in force.

In the case of savings-type insurance products, insurers have to cope with several competitors: on the one hand with the traditional competitors of this field, with the banks, and on the other hand with the newly established pension funds. Activity of the latter is regulated by Act XCVI of 1993 on Voluntary Mutual Pension Funds.

In the competition of investment-type insurance products, taxation rules play special role. At present, the income tax of private persons may be reduced by an amount equal to 20 per cent of the premium paid in the tax year for life and pension insurance concluded with an insurer based in Hungary. The tax law favours the services of the voluntary pension funds. In this case, taxpayers may deduct 50 per cent of their membership fee from their income tax. It can be mentioned that particularly from this year insurers may gain an increasing role in the fields of voluntary pension funds and private pension funds as a result of pension reform.

Prior approval of the Supervisor is required for termination of insurance activity (*i.e.* for withdrawing from the insurance market). The Supervisor may not refuse the licence if the insurer has fulfilled all the obligations stemming from its insurance activity, particularly portfolio transfer and cancellation of insurance contracts.

Liquidation proceedings may take place, *e.g.*, if the insurer is not able to fulfil its payment obligation due to lack of coverage within 5 working days or if its debts permanently exceed its equity.

In the case of insurance products that are subject to license, in the course of licensing the Supervisor examines the acceptability of the premium calculations of the insurer. The Supervisor licenses the premium calculation for these products in compliance with the principle of minimum premium.

According to the principle (stipulated in the Insurance Act) of minimum premium the insurers shall set at a minimum a premium, which will foreseeably provide cover all obligations undertaken in the insurance contract given the risk community of the given product, as well as all costs and expenditures of undisturbed business.

In the case of license-free insurance products, the insurers are not bound to provide ex post information about the insurance premium and the premium calculation respectively. During its supervising activity the State Insurance Supervisor may check whether the insurer meets the principle of minimum premium.

The Supervisor may take measures if in its views the premium applied by the insurer does not meet the obligations prescribed by the law, especially the principle of minimum premium. There were precedents for this in the past.

Besides the principle of minimum premium other factors also influence decisions relating to insurance premiums, such as *e.g.* the maximum allowable technical rate of interest, established by the Ministerial Decree of the Minister of Finance and prescriptions of legal rules for refund of excess yield. Outside the scope of insurance law, taxation rules also may have an effect on certain insurance premiums.

In the case of compulsory motor vehicle third party liability insurance, premiums are set by the Minister of Finance, but the insurer may deviate from insurance premiums determined by the Minister of Finance by 10 per cent both upwards and downwards. Termination of this system of premium setting by the Minister is under way. It is likely that within one or two years insurers will freely decide on the level of insurance premiums.

On certain parts of the Hungarian insurance market real premium competition has developed.

According to the general rule in force since 1996 application for prior approval from the Supervisor is not required for the distribution of certain insurance products, although this rule does not come into force (for certain insurance products) until 31st December 1998. Until this date life, accident and health insurance must be licensed. During the licensing proceedings (*e.g.* until the end of this year) the Supervisor examines the general contracting conditions of the given insurance product, premium calculation, and data (*e.g.* expected premium revenues, costs) relating to distribution of the product for a period of 3 years.

A licence of the Supervisor is required for the application of so-called standard conditions, as well. Standard conditions are general contracting conditions issued either by the Supervisor or approved by the Supervisor after elaboration by the professional insurance organisations. Insurers may use the standard conditions without prior approval.

In the case of insurance products for which a licence is not obligatory, the insurer shall notify the Supervisor prior to commencing the distribution of the product, and send the general contracting conditions and the most important data forecasting the future of the product.

If the State Insurance Supervisor observes either in the product or in the circumstances of its distribution any law infringement it shall call upon the insurer to discontinue the infringement without delay. If the insurer fails to comply with the notice within 15 days from its receipt, the Supervisor may suspend the distribution of the product and shall publish its decision in two national daily papers.

If the Supervisor notices that the insurer distributes the product in a manner different from what has been licensed, it shall call upon the insurer to carry out its activities in accordance with the product approved, it may suspend the distribution of the product or withdraw the decision issued with regard to the licensing of the product.

As regards contracts, the insurer may freely determine the content of the general contracting conditions to be applied. Mandatory contracting conditions are not stipulated by the Supervisor or any other authorities or regulations (with the exception of compulsory motor vehicle third party insurance, where contractual conditions are provided by a statute). Legal rules belonging to the insurance public law, especially the insurance law (which does not contain insurance private law provisions, *i.e.* rules relating to the insurance contract as civil law contract) contain provisions concerning the content of the insurance contract only in a limited circle as follows:

- (a) it sets out those issues that should be referred to in every insurance contract;
- (b) it contains requirements on the obligation to be undertaken by the insurer towards its client to provide information prior to conclusion of a contract;
- (c) it contains special rules about legal protection insurance.

The State Insurance Supervisor is authorised to issue standard conditions which are contractual conditions that can be used freely by insurers. The Supervisor has elaborated two standards so far for agricultural insurance associations.

Those who intend to acquire a share in an insurer above the minimum level (10 per cent) of the influencing share, or a higher integral multiple thereof in comparison with the previous share, shall obtain the prior approval of the Supervisor. The application shall contain the name of the insurer, the proportion of the shares intended to be acquired and data required to establish the prerequisites specified in the Act.

It is a condition of share acquisition that the investor has

- a) a capital amount sufficient for the payment of the issued capital or the value of proprietary shares;
- b) good business reputation;
- c) appropriate economic results over the three years preceding the submission of the application; and, furthermore
- d) the part of the contribution in cash of its capital required for commencing the Insurance Activities shall be placed at a financial institution registered in the Republic of Hungary.

The Supervisor may prohibit the property acquisition if the applicant

- a) has been previously convicted, or his legal status is not clarified;
- b) his owner's background is not clarified, or cannot be established;
- c) his financial and business status is not stable;
- d) has violated seriously and repeatedly the provisions of the Insurance Act, or any other legal rule applicable to insurers; or
- e) has no good business reputation.

No other limitation exists beyond the above for the owners of the insurer. Concerning foreign investors no special rule applies.

The Hungarian state owns 100 per cent of the shares of the Hungarian Export Credit Insurance Plc. that carries out a special activity. The Hungarian state does not own shares in any other insurer. The impact of state ownership on this market is insignificant.

No special rules apply concerning the distribution of insurance products. Insurers shall distribute their products in compliance with the legal rules (*e.g.* information of the clients about the contracting conditions). The Supervisor may not influence the distribution methods, although it follows with attention whether distribution complies with the rules. In the case of infringement of the law the Supervisor may act against the insurer or the insurance broker, possibly even prohibiting the further distribution of the product.

According to the Insurance Act insurance intermediary's activities may be performed by insurance brokers or insurance agents, but insurance brokers may not pursue agent's activities.

Based on a licence of the Supervisor, insurance broker's activities may only be performed by a company limited by shares, or a limited liability company having a primary capital of at least

HUF 5 million (\$US 25 000 approx.) on continuous basis, which performs the above activities exclusively. In order to secure its liability to avoid malpractice, entities pursuing insurance broker's activities shall always have a third party liability insurance of the amount of at least HUF 25 million (\$US 125 000 approx.), or a financial security of HUF 25 million for each claim they cover. Beyond this, insurance brokers shall meet specified personal and material conditions.

A natural or legal person insurance agent performs its insurance intermediary's activities on the basis of a contract of agency concluded with the insurer or within the framework of employment established with the insurer. The licence of the Supervisor is not required to pursue this activity. The insurer shall be held liable for any damage caused by the insurance agent in his agent's capacity.

The general agent is an agent of the insurer whom the insurer vests with full rights to perform all authorities required for the management of the business of the insurer, including the conclusion of contracts, the issue of policies and the receipt of insurance premiums. The insurer is obliged to report the general agency to the Supervisor.

The banks (as agents) may distribute insurance products. Insurers are also allowed to distribute banking products.

Competition Law and Enforcement Issues

Since 1st January 1991, Act No LXXXVI of 1990 on the Prohibition of Unfair Market Conduct has laid down the competition rules applied to the whole economy, including the insurance industry. The competition Supervisor in three fields, namely in banking, insurance and security markets, was referred by the Act to the competence of respective supervisory authorities. With regard to insurance industry this situation was changed by Act No XCVI of 1995 on Insurance Institutes and Insurance Activity, which entered into force on 1 January 1996. From that time on, the Office of Economic Competition ("OEC") has been empowered to enforce the norms of the Competition Act in the insurance industry as well.

The experience gained in law enforcement, the changes in the structure of the economy and the requirement to bring the Hungarian legislation in line with that of the EU made it necessary to elaborate a new Competition Act. Act No LVII. of 1996 on Prohibition of Unfair and Restrictive Market Practices entered into force on 1 January, 1997. Similarly to the previous one, the new Competition Act also covers unfair market practices, unfair manipulation of consumers' choice, restrictive agreements, abusive practices in dominant position and merger control. One of the most important new elements in the Act is the prohibition of all kinds of restrictive vertical agreements. The extension of the territorial scope of the new Competition Act with the introduction of effect doctrine in respect of antitrust matters was another essential change.

Article 16 of Act No. LVII. of 1996 on Prohibition of Unfair and Restrictive Practices authorises the Government to adopt regulations exempting certain types of agreements from the general prohibition of Article 11. On the basis of this authorisation, the Government issued its Regulation No 50/1997 on the Exemption from the Prohibition on Restriction of Competition of Certain Groups of Insurance Agreements.

The Regulation permits co-operation between insurance undertakings in four fields:

(a) the calculation of net insurance premiums;

- (b) the establishment of standard policy conditions;
- (c) the common coverage of risks in the form of co-insurance or co-reinsurance;
- (d) the common testing and qualification of security devices.

The Regulation provides for the conditions of exemption in the four fields together with disqualifying conditions.

As far as the calculation of the net insurance premium is concerned, the Regulation puts a limit on the scope of data which can be collected and processed jointly. It lays down as a precondition of exemption that the calculation and assessment should be of an informative character, and must not make possible the identification of any of the participating undertakings and must not contain commercial and profit elements of the insurance premium.

With regard to co-operation of standard policy conditions, the Regulation lists those contract terms which preclude the agreement from benefiting from the exemption. The binding nature of the agreement is a reason for preclusion.

The regulation of the agreements for co-insurance and co-reinsurance lays down the conditions which may be agreed upon without preclusion from exemption. It establishes upper limits for the joint market share of the undertakings participating in co-insurance and co-reinsurance agreements, which are 35 per cent and 45 per cent, respectively. The exemption shall not apply, when the joint share of the group on the relevant market exceeds the above limits.

The exemption provided for in the Regulation applies also to agreements, which have as their object the joint establishment and use of technical specifications of security devices, procedures for assessing and certifying the compliance with these specifications and with the rules of the installation and maintenance of security devices and rules for evaluation and approval of undertakings performing the installation and maintenance of these devices.

The Regulation was motivated by a number of factors. The interest of policy holders and the public interest linked with sustaining the solvency of insurers justify the co-operation of insurers in collecting and analysing data on losses, thereby improving their risk assessment and the calculation of the risk premium. The establishment of standard policy conditions enhances the ability of consumers to compare products. Co-operation in the field of co-insurance and co-reinsurance creates a supply for the insurance of catastrophic and aggravated risks, which would exceed the capacity of an individual insurer and at the same time gives opportunity to enter the market for insurers which otherwise would not be capable to do so.

The Act, itself, grants exemption from prohibition for agreements of minor importance and for those concluded between undertakings which are not independent of each other. Besides, the insurance institutes may apply for individual exemption from prohibition under the Act.

The Office of Economic Competition decides independently upon competition matters (including merger cases), on the basis of Act No. LVII. of 1996. This does not exclude, of course, the possibility of consultation with the Supervision Authority. The participating undertakings are obliged to apply for authorisation under the Act, when the aggregate net turnover of the undertakings concerned - the gross premium income should be taken into account in case of an insurance institute - exceeds HUF 10 billion (\$US 5 million, approximately).

As mentioned earlier, Act XCVI. of 1995 on Insurance Institutes and Insurance Activity stipulates that those who intend to acquire a share in an insurer which reaches a specified minimum level, or a higher integral multiple thereof in comparison with the previous share, shall obtain the prior approval of the Supervisor.

The procedure of OEC and that of the Supervisor Authority are carried out separately and independently.

In shaping the competitive conditions of the insurance industry, the OEC acts in two ways, through its general advocacy role in the legislative process and by the means of competition supervision proceedings.

In the course of the past two years, the number of proceedings started against insurance undertakings amounted to 24, one was initiated against a pension fund. In 1997, we started 7 proceedings under the new Competition Act. Out of them, 4 proceedings were launched *ex officio* for suspected infringement of Chapter III. regarding prohibition of unfair manipulation of consumers' choice. 2 cases related to abuse of dominance and 1 case was initiated by application for exemption from the prohibition of restrictive agreements. We did not have any cases relating to merger control. In one case, however, a syndicate group acquiring control over a commercial bank was led by an insurance institute.

As an illustration of the activity of OEC in the field of insurance industry the following two cases are presented:

- (1) The OEC launched competition supervision procedures *ex officio* against Hungária Insurance Co. - in 1996, under the previous Act - because it was suspected that the company had abused its dominant position in the market for motor vehicle insurance when establishing the premium payment terms of the insurance product. Those policy holders, who made their insurance offers before the 15th day of a month were obliged to pay premium from the beginning of that particular month, while those, who made their offer in the second half of the month had to pay their premium from the beginning of the next month.

The investigation defined the relevant market as that for casco motor vehicle insurance products covering the whole territory of Hungary. It was established that the insurer, with its market share exceeding 50 per cent, had a dominant position on this market.

The Competition Council established that the insurer's practice disrupted the unity of performance and return promise, when making the initial date of the consumers' obligation to pay the premium dependent on the date of making the insurance offer and imposing by this extra charges for one consumer group for the benefit of the other group. The market behaviour of the insurer ignored the general principle, that the consumer should pay the value of the service rendered. The premium payment system differing from those applied by other insurers on the market and resulting in discrimination of consumers could be enforced due to the insurer's dominance.

The Competition Council established that the conduct of the insurer had been unjustified and provided him with a one-sided advantage. As the conduct was therefore unlawful the Competition Council prohibited the continuation of the conduct, and imposed a fine of 1 million Forints on the insurance undertaking.

- (2) The Hungária Insurance Co. and 10 other insurance undertakings made an application concerning their agreement concluded for co-insurance and co-reinsurance of Hungarian nuclear risks and providing reinsurance coverage for nuclear risks outside Hungary. The insurance institutes applied for qualification (a) that their agreement did not restrict competition, or (b) that their agreement was exempted under Regulation 50/1997 from prohibition. In case neither of the two qualifications could be granted, the undertakings applied for individual exemption.

The agreement provided joint coverage for both material damage and third party liability insurance in connection with nuclear projects. It also allowed other insurers to join the group.

The investigation defined the relevant market as the market for entrepreneurial property insurance and general third party liability insurance. The insurers concerned had a market share exceeding 90 per cent of the relevant market.

Taking into consideration the restrictive character of the agreement and the substantial combined market share of the participating undertakings, the Competition Council refused the applications according to (a) and (b), and considered the conditions for individual exemption.

It established that due to the scope of risk, the amount involved in the international practice regarding reinsurance of this type of risks, the joint coverage of TPL obligations for nuclear projects by Law was justified and necessary. From this point of view, the agreement contributed to a more reasonable organisation of distribution and it allowed the consumers a fair share of the resulting benefit, as the insurance holder could conclude the insurance contract with such an insurance pool, which was able to undertake the insurance risk and to reinsure it. The conclusion of the associated property insurance with the pool may be regarded as advisable, in this field other insurers could also enter outside the pool. The restriction of competition did not exceed the extent necessary to attain economically justified common goals.

On the basis of the above, the Competition Council exempted the agreement of the insurance undertakings from the prohibition.

Taking into consideration the nationwide character of both the distribution of insurance products and the undertakings which provide insurance services, in competition proceedings relating to the insurance industry the relevant geographical market is generally defined as the whole country. When defining the relevant product the specific characteristics of each case are taken into consideration, it might be a particular product or a group of products. Referring back to the previous two cases, the investigation defined the relevant market as the nation-wide auto vehicle insurance market in the first, while in the second, the market was defined through the relevant product groups, entrepreneurial property insurance and third party liability insurance.

Besides the activities described above, the OEC also called upon the Association of Hungarian Insurance Companies to revise their Code of Conduct, because it contained restrictive elements prohibited by the Competition Act. The AHIC modified the Code accordingly.

ITALY

Regulatory Rules

The insurance legislation is mainly based on the Testo Unico (consolidated legislation), approved by Presidential Decree February 13 1959, n. 449. Following the EC Directives of the third generation (92/49/CEE for non life insurance and 92/96/CEE for life insurance) the original legislative body has been deeply modified by Legislative Decree March 17 1995, n. 174 and Legislative Decree March 17 1995, n. 175.

Following the EC approach, the regulation is now based mainly on solvency coefficients and does not impose any quantitative limits to the number of firms allowed to enter the market, neither does it fix, or indicate, the prices of insurance services (compulsory insurance included).

As far as self-regulation is concerned, almost all insurance companies belong to ANIA (National Association between the Insurance Undertakings). Among the purposes of this association, according to section 2 of the Statute, there are the following: to provide the resolution of technical, economic, financial, administrative, fiscal, social, juridical and legislative problems, to collect and elaborate all news and data about the sector, to furnish an assiduous assistance to the partners and to favour, co-ordinate and promote their mutual collaboration. In practice the main duties of the association is to prepare common behavioural and procedural norms and to collect statistical data in order to provide aggregate information on pure risks.

With exclusion of public pensions, the main forms of compulsory insurance are third party liability for motor vehicles and health insurance against work accidents. With around 19 000 billion of Italian Lire in 1996 (approx \$US 11 billion), motor vehicle third party liability insurance represents almost half of total non-life insurance premiums (42 000 billion or approx \$US 245 billion). The activity of insurance companies in this area is regulated by Law December 24 1969, n. 990, and following the Third EC Directive prices are market determined. Law March 17 1988, n. 80, has introduced a compulsory system of health insurance against work accidents. Now such an obligation has a constitutional recognition under articles 32 and 38 of the Italian Constitution. The present regulation is based on Presidential Decree June 30 1965, n. 1124. In 1996, INAIL the legal monopolist in insuring such risks, has realised 12000 billion Lit. (\$US 7 billion) of revenues originating from premiums: such data are not generally included in the statistics for the Italian insurance sector.

Regulatory Institutions

The insurance sector, which until 1982 was supervised by the Ministry of Industry, is now almost entirely regulated by a supervisory authority, the Institute for the supervision of private insurance undertakings (ISVAP), established by law August 12 1982, n. 576. ISVAP controls the technical, financial and property management of Italian and non-EU foreign undertaking activities in Italy, monitors the budgets of these firms and makes sure that all the operators of the insurance sector, agents and brokers included, comply with the rules.

It is up to ISVAP to conduct market analysis, to verify the conditions of distribution, to adopt the necessary provisions for the compulsory liquidation of companies, as well as to promote forms of co-operation with regulators of other EC countries.

With the increasing role of ISVAP, the Ministry of Industry has been relieved of some its former duties: the Ministry according to Law April 18 1994, n. 385, keeps some functions of supervision on the insurance companies when in financial distress. Namely, on the proposal of ISVAP, the Ministry approves recovery plans, short term financing, revocation of the authorisation, opening of the procedures of the liquidation and administrative compulsory sell-out.

Industry Structure

At the end of March 1998 the number of insurance companies under the supervision of ISVAP was 222. This figure includes 4 branches of reinsurance companies with headquarters in an EU country and 6 branches of non-EU companies. Among the remainder 212 companies, 108 have an authorisation to provide non-life insurance (of which 96 are authorised to provide motor vehicle third party liability insurance), 77 for life insurance, while 21 have a mixed authorisation. At the end of 1997, there were another 37 companies (30 non-life and 7 life) operating in Italy under the supervision of other EU regulators (under the freedom of establishment regime).

In the following tables we provide some information about the size of each market and the shares of the largest 5 insurance groups. Such data, for 1996, do not include the premiums of INAIL or premiums collected under freedom of service regime (which are extremely limited).

Table 1: Life Insurance

| Group | Premium (bln lit.) | % |
|--------------|---------------------------|----------|
| Generali | 6.507 | 24,9 |
| INA | 3.133 | 12,0 |
| Allianz-RAS | 2.603 | 10,0 |
| Fondiaria | 1.203 | 4,6 |
| Mediolanum | 1.190 | 4,6 |
| Total market | 26.060 | 100,0 |

Table 2: Non-Life Insurance

| Group | Premium (bln lit.) | % |
|--------------|---------------------------|----------|
| Allianz-RAS | 6.057 | 14,5 |
| Fondiaria | 4.860 | 11,7 |
| Generali | 4.711 | 11,3 |
| SAI | 3.808 | 9,1 |
| INA | 3.520 | 8,4 |
| Total market | 41.693 | |

Table 3: Motor Vehicle Third Party Liability Insurance

| Group | Premium (bln lit.) | % |
|--------------|---------------------------|----------|
| Allianz-RAS | 3.055 | 16,1 |
| Fondiaria | 2.331 | 12,3 |
| SAI | 2.007 | 10,6 |
| Generali | 1.446 | 7,6 |
| INA | 1.329 | 7,0 |
| Total market | 18.977 | |

Table 4: Motor fire, theft, etc. insurance

| Group | Premium (bln lit.) | % |
|--------------|---------------------------|----------|
| SAI | 0.619 | 13,9 |
| Allianz-RAS | 0.595 | 13,4 |
| Fondiaria | 0.548 | 12,3 |
| Generali | 0.283 | 6,4 |
| FIAT-Toro | 0.269 | 6,1 |
| Total market | 4.443 | |

Table 5: Fire insurance (non motor)

| Group | Premium (bln lit.) | % |
|--------------|---------------------------|----------|
| Generali | 0.705 | 17,7 |
| Allianz-RAS | 0.535 | 13,4 |
| Fondiaria | 0.455 | 11,4 |
| INA | 0.323 | 8,1 |
| Reale Mutua | 0.237 | 6,0 |
| Total market | 3.975 | |

Table 6: Personal accident insurance

| Group | Premium (bln lit.) | % |
|--------------|---------------------------|----------|
| Allianz-RAS | 0.5708 | 14,5 |
| INA | 0.510 | 13,0 |
| Generali | 0.508 | 12,9 |
| Fondiaria | 0.409 | 10,4 |
| SAI | 0.233 | 5,9 |
| Total market | 3.937 | |

In order to better evaluate the real structure of the insurance market, it is necessary to keep in mind that some of the most important companies are linked to each other, mainly through minority shareholdings. Namely, Generali owns 5.9 per cent of Fondiaria. Mediobanca, the main shareholder of Generali, owns 13.8 per cent of Fondiaria. Furthermore Mediobanca owns 15.2 per cent of Compart, the

main shareholder of Fondiaria (with a share of 31.8 per cent). Generali also owns 3.4 per cent of SAI. Mediobanca is the SAI merchant bank, holding 2.3 per cent of its capital. In turn SAI owns 10.7 per cent of Eurolux, one of the main shareholders (4.8 per cent) of Generali.

Barriers to entry

Following the third generation of EU directives, there are no important barriers to entry. A new entrant on the Italian insurance market has to get a specific authorisation, subject to the requirements of personal integrity and financial stability.

Companies with headquarters in Italy have to meet detailed conditions of access and of conduct (separating life and non life branches, maintaining solvency ratios and technical reserves). If an Italian firm wants to open a new branch in another EU country it has to apply to ISVAP, which, before transmitting such an application to the regulator of the EU country, verifies the financial stability of the undertaking and the integrity and capability of its foreign representative. The Italian firm cannot establish its foreign branch and start operations before having received a communication of assent from the control Authority of the concerned EU country or, in case of no reply, before sixty days from the date of the sending of the documentation to ISVAP. Finally, an Italian firm in order to operate in a regime of freedom of establishment and/or of services in non-EU countries is required to give prior notice to ISVAP, which can refuse the authorisation if the company is not financially sound.

An EU company willing to start its activity in Italy has to follow the same procedure as that required for an Italian company entering other EU countries. To operate in Italy, non-EU companies have to get authorisation from ISVAP.

One of the greatest problem for a new entrant in the Italian market is access to distribution channels. In Italy, insurance products are distributed through different channels. The traditional systems - based on agents and brokers - have been supplemented in recent times, primarily in the life branches, by banks and financial promoters. Telephone sales are still marginal and limited to extremely standardised products (such as motor vehicle third party liability insurance).

Law 7 February 1979, n. 48, and Law 28 November 1984, n. 792, assign the distribution of insurance products to agents and brokers. Agents are generally bound on an exclusive basis to a single company. Brokers operate mainly for big customers (companies and public administrations).

The progressive diversification of distribution channels was enhanced by the following regulatory amendment. The Ministry of Industry has allowed¹ the distribution of insurance products by entities other than the companies themselves, agents and brokers, but only in the case of standardised products, provided that there is a contractual relationship with an agent, a broker or an insurance company. Furthermore the Italian Stock and Exchange Regulation Agency (Consob), has allowed the distribution of insurance products by financial promoters (deliberation n. 5386 of July 2nd 1991). Finally, ISVAP has allowed banks to have a purely executive role while distributing insurance standardised life products (note n. 241 of March 29th 1995).

1 See the Ministry of industry notes n. 502 of February 3rd 1986 and n. 921820 of June 15th 1993.

Competition With Substitutes

Excluding a few products which are not very important on the Italian market (*e.g.* credit insurance) there are no substitutes to non life insurance products. On the contrary there are various alternatives to life insurance. This branch is also strongly influenced by public intervention. Before the so-called “Amato reform”, the State guaranteed an old age pension almost equal to 80 per cent of the average salary of the last 5 years. As a result, private pensions or life insurance were rare.

Demographic evolution and public deficits have brought to an end the system based only on the public pension and a new model, based on three “pillars, is developing”: (*a*) public pensions (less valuable than in the past); (*b*) private pensions; (*c*) individual life insurance. In recent years, there has been an exponential growth of life insurance (in 1997, for the first time, total life insurance premiums were larger than non life premiums). Private pensions, although established by a 1992 law, have not yet started, due to the complexity of procedures. Besides, all the different forms of fund management (bonds, shares, common funds, etc.) are in some way in competition with life insurance but differentiated with respect to risk, the scheduling of payments, the tax treatment.

It is not possible to provide an exhaustive overview of the different tax regimes of financial instruments which can compete with life insurance. However, some tax advantages exist for pension funds and, to a lesser extent, for life insurance. Life insurance premiums are tax deductible up to a maximum of 2.5 million lira (\$US 1400) every year. On the contrary, the other forms of financial savings are entirely taxable.

Barriers to Exit

Ordinary exit from the market, selling a company or transferring its portfolio, has to be approved by ISVAP, which looks at the terms of transfer and at the integrity and financial stability of the buyer.

In the event of insolvency and/or of administrative compulsory liquidation, the present legislation protects the insured persons, and, in some cases, insurance agents. Legislative Decree n. 174/95 and Legislative Decree n. 175/95 regulate the procedures of administrative compulsory liquidation in life and non life insurance. The compulsory liquidation provisions are invoked by the Ministry of Industry, having previously acquired the advice of ISVAP. The same Ministry names the liquidator, choosing from a list of names provided by the ISVAP, which supervises the liquidation procedures.

With respect to the insured portfolio of liquidating companies, existing regulation allows for an extended validity of insurance contracts up to sixty days after liquidation. The assured person has the right to recede from the contract. Finally, the liquidator can transfer the portfolio of the company in liquidation to other insurance activity.

As far as insurance companies dealing with motor vehicle third party liabilities are concerned, under Law February 26 1977, n. 39, when transferring their liquidated portfolio, the liquidator can oblige the firms receiving this portfolio to hire a quota of the total labour force of the liquidated company.

Control of Prices

Following the third generation EC directives, every form of price control has been formally eliminated. However, a form of control on the determination of life insurance rates has been

surreptitiously introduced in section 22 of the Legislative Decree n. 174/95. Under this article, premiums must be calculated on the basis of suitable actuarial hypotheses, that allow the undertakings to fulfil their obligations towards policy-holders. These actuarial hypotheses must respect not only general provisions concerning actuarial principles (allowed under the 3rd EU life directive, section 5) but also specific applied methods provided by ISVAP. ISVAP is also allowed to fix the maximum interest rate that can be guaranteed to the policy-holder when he subscribes to a life insurance contract. These rules can lead to a substantial homogeneity of prices and discourage the search for innovative rate formulas.

In the experience of the Antitrust Authority, price competition seems to be extremely weak. A large proportion of antitrust cases have dealt with price agreements among insurance companies. Recently, however stronger price competition has emerged, although limited to distribution. This competition has mostly concerned life products distributed through banking channels and motor vehicle insurance sold over the phone.

Controls of Products

The goal of existing regulation is to guarantee conditions of transparency in the supply of insurance contracts, both for life and non life insurance. There is no product control.

Control of Ownership and Forms of Business

Italian legislation does not impose any particular restriction on the shareholding of insurance companies. With respect to state controlled companies, the privatisation process of the INA, the largest company of this kind, is about to be accomplished. This has required some reshaping of specific insurance activities carried out by the State: a new state-owned insurance firm has been established (CONSAP) and SACE will be transformed from a department of INA to a separate public corporate body, subjected to the direct control of the Treasury Department.

The state-owned insurance undertakings, all operating under a legal monopoly, are currently:

- (a) INAIL, in charge of the legal monopoly of the health insurance against work accidents;
- (b) SACE, which manages public insurance for the political and catastrophic risks related to exports;
- (c) CONSAP which has several tasks: (a) the management of a very limited shares of risks (life insurance and motor vehicle third party liability); (b) the management of several public funds (victims of road accidents, victims of hunting accidents, victims of extortion); (c) reinsurance of special agricultural risks;
- (d) SPORTASS which insures sport accidents and sport third party liability.

Control of Marketing and Distribution / Solvency, Investment Regulation

Solvency and investment regulations strictly follow EC legislation.

Agreements Between Insurers

The insurers association, ANIA, plays an important role both in the gathering of information and in the preparation of contract models. This activity has some value because the exposure to unexpected risks is reduced. However, it has to be emphasised that some of the activities carried out by ANIA are not explicitly authorised by current legislation.

Under the Italian legislation there is no specific antitrust exemption to agreements in the insurance sector. However, under EU law, insurance companies are subject to the exemption regulation n. 3932/92. This Regulation exempts under section 85, paragraph 3, of the Treaty:

- (a) the establishment of common risk-premium tariffs based on collective statistics or on the number of claims;
- (b) the establishment of standard policy condition;
- (c) the common coverage of certain types of risks;
- (d) the establishment of common rules on testing and acceptance of security devices.

As far as point sub (a) is concerned, the Italian Antitrust Authority has made the distinction between the establishment of the pure premiums based on mere information collection and the pure premiums established without a statistical analysis or based on subjective estimates of future events (decision ANIA). Also the establishment of increase percentages of pure premiums can be considered as a restriction to competition when the loading rate is constant across companies: in this case the agreement amounts to agreement over commercial premiums.

Regulatory Conflict

According to section 20, paragraph 4 of law n. 287/90 “in the case of operations involving insurance companies, the measures shall be adopted by the Antitrust Authority after hearing the advice of ISVAP, which shall be issued within 30 days of receiving the documentation on which the measure is based.

This article aims at balancing the protection of competition with that of stability, keeping in mind the specificity of the insurance sector.

Antitrust Enforcement

The Antitrust Authority has intervened quite extensively in the insurance sector, particularly against restrictive agreements. All horizontal agreements investigated aimed at restricting competition among insurance companies, fixing prices and sharing markets. As far as vertical agreements are concerned, the Authority has opened up several investigations arising from banking distribution of insurance products. Such agreements, as a consequence of exclusive clauses, were able to block access to the market, preventing the entry of new operators. In one case, the Antitrust Authority has considered that a distribution agreement was restrictive, considering that the setting up of a joint venture by the bank and the insurance company represented an implicit exclusivity clause (*Generali/Unicredito*).

The most important horizontal cases are the following:

- (1) *ANIA* and *Rischi di Massa*, two cases related to the motor fire, theft, etc. insurance market;
- (2) *Assicurazione rischi agricoli*, in the market for agricultural insurance against damage produced by hail (case followed by other cases in the same market);
- (3) *Consorzio Italiano rischi aeronautici*, in the market for aeronautical insurance;
- (4) *Assicurazione rischi di Milano*, on bid rigging in public procurement for insurance services.

Ania

The investigation started because Ania, the association to which virtually all insurance companies belong, addressed letters to member companies containing indications regarding the general terms and conditions of motorcar fire and theft policies. More specifically, the letters suggested substantial increases in the pure premium rate and a considerable extension in the use of excess clauses.

The relevant market affected by the agreement was identified as the market for motorcar insurance policies covering risks other than motor vehicle third party liability. The indications set out in Ania's letters were not related exclusively to a statistical service aimed at enabling the companies to improve their risk estimates. Moreover, these letters were sent at irregular intervals, only when the situation on the market was becoming critical. The Authority ruled that Ania's indications were restrictive of competition.

Rischi di Massa

In 1994, following a complaint filed by a consumer association, the Authority completed its investigation into the sixteen main insurance companies in relation to an alleged agreement directed to standardise contractual terms, conditions and premiums for non-life insurance policies.

It was ascertained that the insurance companies had met periodically between the beginning of 1990 and the first few months of 1993 in order to exchange information on their activities and to establish common policies regarding a number of standard non-life insurance products. In particular, the Authority found that the companies had co-ordinated their conduct with reference to commercial premium rates and excess clauses for certain categories of general risks. The companies had also agreed not to compete when certain insurance contracts for industrial risks would have been renewed.

Considering the gravity and the duration of the offences, the Authority fined the insurance companies 1 per cent of their turnover.

Assicurazione rischi agricoli

In 1994, the Authority took action against *Consorzio Italiano Rischi Agricoli Speciali - CIRAS*, which is a mandatory consortium to which all the hail damage insurers belong. The Authority found that, even though recent legislation had removed monopoly rights from the market and a number of competing consortia were being established, the commercial co-ordination of the associated insurance companies' behaviour carried out by CIRAS was thwarting the liberalisation process in the industry, substantially restricting competition in violation of section 2(2) of the Competition Act.

The Authority, however, considered that CIRAS should be given a one-year exemption because the restriction on competition seemed to be closely connected with the transitional nature of the statutory situation at the present time.

In 1995, CIRAS requested the Authority to renew the exemption on the grounds that the structural reform of the sector was still not completed. The Authority pointed out that CIRAS's previous operations had restricted competition without any tangible improvement in the conditions of supply or any substantial benefits to consumers. Furthermore, it stressed that the law governing the hail damage insurance market had changed substantially, since insurance companies were no longer required to organize their activity through mandatory consortia. Therefore, the Authority ruled that there were no reasons for renewing the exemption.

Consorzio Italiano rischi aeronautici

In April 1995, the Authority began an investigation into alleged violations of section 2(2) of the Competition Act by Consorzio Italiano di Assicurazioni Aeronautiche-CIAA, the main aeronautical insurance companies association.

The Authority ascertained that CIAA distributed a tariff list to the members in order to co-ordinate their policies in terms both of the premiums charged and the contractual terms and conditions applied. Moreover, the Authority examined the conditions under which small aeronautical risks were reinsured. The companies belonging to CIAA assigned aeronautical risks which they had underwritten to the consortium, which then reinsured them. During the investigation it emerged that the retrocession quota of the various companies were calculated using fixed amounts and not on the basis of premiums actually paid to them.

The Authority found the conduct of the CIAA to be restrictive and in violation of section 2 (2) of the Competition Act.

Assicurazione rischi di Milano

In 1997, the Authority completed an investigation into an alleged agreement among the five main insurance companies in order to co-ordinate their behaviour relating to tenders, called by the municipality of Milan, for the provision of insurance services in the years 1995-98. More specifically, the companies had agreed not to compete individually at the tender but to share the risk among themselves through a co-insurance offer. The companies would have been able to participate individually at the tender. Therefore, the Authority considered the agreement restrictive of competition.

JAPAN

Introduction

With the enforcement of the amended Insurance Business Law in April 1996, deregulation of the insurance industry in Japan has taken place in such areas as the mutual entry by life insurance companies and non-life insurance companies in each others' business fields through subsidiaries, and the relaxation of the system by which life insurance sales personnel must be exclusively affiliated to a single company.

In addition, the Insurance Council examined institutional reform of the insurance industry as part of larger reform within the financial system and submitted its report in June 1997. A proposed amendment of the Rating Organization Law is now before the Diet as part of an omnibus bill to reform the financial system based on the report's recommendations. The proposed amendment calls for reform of rating organizations through adoption of the advisory pure premium rate system, abolition of the compulsory use of calculated rates, and promotion of mutual entry between insurance companies and other financial businesses.

The Fair Trade Commission is currently conducting a survey on the insurance business from the viewpoint of competition policy. The survey adopts two perspectives; firstly, it examines issues from the perspective of deregulation in order to ascertain the present situation of competition in the insurance industry under regulations on entry, products, rates, etc. Secondly, it examines issues from the perspective of inter-company transactions ("keiretsu", or affiliated group transactions) in order to ascertain the present situation of transactions between insurance companies and corporate policy holders.

Issues concerning regulation and competition in the insurance business

To conduct insurance business, a license issued by the Minister of Finance is required. The company in question must submit an application to the Minister of Finance, providing its articles of association and also documentation detailing its business methods, insurance products, policy agreements and its method of calculating insurance premiums including premium rates. The company must then undergo an examination. When an insurance company wishes to change the content of its insurance products, rates, etc., it must obtain approval from the Minister of Finance. When granting a license or approval, the Minister assesses the application according to the three principles: the rates must be "not excessively high", "not inadequately low", and "not unfairly discriminatory". Under the amended Insurance Business Law, it has become possible to change the insurance established by Ministry of Finance ordinance only by advance notification (with the authority to order change and withdraw) in view of the possibility of inadequate policyholder protection. The insurance established by Ministry of Finance ordinance includes non-life insurance (ship insurance, cargo insurance, aviation insurance, etc.), and life insurance (group insurance such as Pension Welfare Service Public Corporation Act and Welfare Pension Insurance Law, etc.).

There are two types of premium rates: legally approved rates that are calculated by each insurance company in accordance with the Insurance Business Law and approved by the Ministry of Finance and the rates of rating organizations (RO), which are calculated by rating organizations in

accordance with the Rating Organizations Law and which are subject to advance notification and examination by the Minister of Finance.

There are three types of legally approved rates: range rates that can be revised within a fixed range in accordance with the risk situation, etc., of each separate insurance objective; standard rates that can be revised without establishing a fixed range in accordance with the risk situation, etc.; and discretionary rates, namely, rates that are determined in accordance with the risk situation each time a contract is finalized and without reference to a standard rate. Unlike the rates of rating organizations that are set within a certain range, margin rates do not have an upper limit and are subject to high levels of variation.

At present, rating organizations calculate the gross premium rates for five types of insurance: fire insurance, accident insurance, earthquake insurance, automobile insurance and automobile liability compulsory insurance. Insurance companies that are members of a rating organization are obliged to use the rates that are calculated by a rating organization and communicated to the Minister of Finance. For fire insurance, accident insurance and automobile insurance, each member company may set its rates in a flexible manner within a range of 10 per cent above or below the rate calculated by the rating organization. The Minister of Finance examines the rates of the rating organization on the basis of the three principles as mentioned above.

Issues concerning agreements between insurers and the enforcement of competition laws

Exemption of concerted conduct between entrepreneurs on the basis of the Insurance Business Law

According to the Insurance Business Law, concerted conduct between non-life insurance companies in the business of aviation insurance, nuclear power insurance, automobile liability compulsory insurance, and earthquake insurance are, in principle, exempt from the Antimonopoly Act.

In terms of other types of insurance business, only the following concerted conduct regarding joint reinsurance is exempt from the Antimonopoly Act: (1) deciding the content of insurance agreements (excluding those concerning insurance rates); (2) deciding the damage assessment method; (3) deciding the other party and volume of reinsurance; (4) deciding reinsurance rates and the commission on reinsurance.

However, this conduct is not exempt from the Antimonopoly Act when involving unfair trade practices and/or substantial restraint of competition in a particular field of trade, thereby causing undue infringement of the insurance policyholders' interests and those of the insured. Furthermore, entrepreneurs must receive approval from the Minister of Finance in order for such conduct to be exempted from the Antimonopoly Act, and before the Minister of Finance grants approval he must have the consent of the Fair Trade Commission. Even after the Ministry of Finance's approval is obtained, the Fair Trade Commission can request that the Minister of Finance take measures such as cancelling the approval if the Fair Trade Commission recognizes that the conduct no longer meets the conditions for being granted such an exemption.

Under the amended Insurance Business Law of 1995, the exemption systems based on the Insurance Business Law were reduced in scope, and provisions were set on procedures between the Fair Trade Commission and the Ministry of Finance regarding the Finance Minister's approval of the exempted conduct.

Exemptions from the Antimonopoly Act for the activities of the Non-Life Insurance Rating Organization established on the basis of the Law concerning the Non-Life Insurance Rating Organization

The proper conduct of the Non-Life Insurance Rating Organization (trade associations made up of non-life insurance companies) under the “Law concerning Non-Life Insurance Rating Organization” are exempt from the Antimonopoly Act under the Antimonopoly Act Exemption Act.

At present, rating organizations calculate gross insurance premiums for five types of insurance, and insurance companies that are members of the rating organizations are obliged to use the rates calculated by the rating organizations which are communicated to the Minister of Finance.

A report by the Insurance Council in June 1996 on the current rating organization system recommended reform of rating organizations such as the adoption of an advisory pure premium system and the abolition of the compulsory use of calculated rates. These recommendations are incorporated in a bill to amend the “Law concerning Non-Life Insurance Rating Organization” which has been submitted to the ordinary session of the Diet as part of an omnibus bill to reform the financial system. If the bill is passed, it will be enforced on July 1, 1998.

Under this amendment, rating organizations will calculate the pure premium rate as an advisory for only fire insurance, accident insurance, and optional automobile insurance and member companies are not obliged to use the rate calculated by rating organizations.

In terms of actuarial mathematics (in particular, the law of large numbers) and the reduction of calculation costs, calculation of the pure premium rate by a rating organization is recognized as generally reasonable and information on pure premium rates is indispensable for newly joining companies. Furthermore, premium rates calculated by rating organizations are limited to pure premium rates that are calculated objectively on the basis of actuarial mathematics and member companies will not be obliged to use them. For this reason, calculating the advisory pure premium rate itself does not present a problem under the Antimonopoly Act, and the exemption system for these types of insurance will therefore be abolished.

However, earthquake insurance and automobile liability compulsory insurance are managed under special laws and effectively function as a public form of insurance with a reinsurance system undertaken by the government. As such, rating organizations will continue to calculate the gross premium (standard premium: member companies will not be obliged to use) and exemption from the Antimonopoly Act will be limited and continued with respect to the Antimonopoly Act, Section 8, (1)and(4).

Violations of the Antimonopoly Act in the Insurance Business

Warning issued to the Marine and Fire Insurance Association of Japan (MFIJ)

In the non-life insurance industry, when the repair costs are calculated for a damaged automobile for which an insurance claim payment is made under optional automobile insurance, numerical values are determined, indicating the standard work time for detachment/attachment, replacement, sheet metal, and paint work on major domestic passenger car models, in order to make the calculation method clear and reasonable. For the numerical values for repair work, the MFIJ of Japan employs a formula (hereafter referred to as “numerical value formula”) which multiplies the numerical value by a fixed amount per hour (hereafter referred to “corresponding unit price”) and it strives for wider implementation of this

formula. With respect to calculated the calculation of repair costs for detachment/attachment and replacement work, the numerical value formula has become widely adopted. As such, with regard to the corresponding unit price used in the numerical value formula when its members calculate the repair costs for damaged automobiles, the Marine and Fire Insurance Association has for some time been suspected of determining standard unit prices on both a nationwide and regional levels and enforcing these corresponding unit prices upon its members.

With respect to the above-mentioned conduct, on October 24, 1994, the Fair Trade Commission issued a stern warning to the Marine and Fire Insurance Association for possible violation of Section 8, (1) 1 of the Antimonopoly Act, calling for the necessary measures to be taken to eliminate this suspected conduct and instructing the MFIAJ not to engage in such activities in the future.

Decision on Union Machinery Insurers of Japan (UIAJ)

The UIAJ decided the content of the approval applications to be made by each member firm with regard to insurance premiums for machinery insurance and assembly insurance. The UIAJ also established various provisions which determine premium rates, etc., as uniform standards to be used when underwriting machinery insurance. The UIAJ also implemented a system by which member firms request calculations of premium rates from the UIAJ, thereby making their member firms underwrite machinery insurance and assembly at fixed rates. As such, the UIAJ was found to have placed considerable restrictions on competition in the field of machinery insurance and assembly insurance.

On October 19, 1996, the Fair Trade Commission issued a recommendation to the UIAJ to eliminate the above-mentioned conduct as violation of Section 8 of the Antimonopoly Act (decision made by the Fair Trade Commission on February 5, 1997).

The concerted conduct of the 25 full member companies of the UIAJ relating to reinsurance was found to have substantially restricted competition regarding premium rates in business areas involving underwriting insurance and reinsurance, causing potentially unjust harm to the policyholders' interests, etc. The Fair Trade Commission therefore requested that the Union of Machinery Insurers of Japan undertake fundamental reforms to substantially ensure competition regarding premium rates in business involving underwriting insurance and reinsurance. Considering that most of the firms which are members of the UMIJ are also members of the MFIAJ, the Fair Trade Commission requested that the MFIAJ direct its member firms to refrain from any conduct violating the Antimonopoly Act.

KOREA

In Korea, there are more than 12 different regulations relating to the insurance industry including the “Insurance Act”, and the “Insurance Supervision Regulation”. Such regulations exist to guarantee the rights of clients and to promote sound growth of the insurance sector.

According to Article 17 of the Insurance Act, authorization from the Financial Supervisory Commission is required for insurance companies to conclude mutual agreements. As of the end of March 1998, there are 12 mutual agreements including agreements on national security, risk dispersion and management efficiency.

Separate from the regulations mentioned above, there are 18 different Acts which require mandatory insurance for 12 categories of risks

The regulatory agencies for the insurance industry are the Ministry of Finance and Economy, the Financial Supervisory Commission, and the Insurance Supervisory Board. The Ministry of Finance and Economy draws up general policies regarding the insurance sector, enacts new regulations as well as revising the existing regulations, and is in charge of approving or revoking insurance business licenses. The Financial Supervisory Commission is in charge of approval and authorization of insurance companies' business activities, and is responsible for the enactment of more specific regulations relating to the insurance sector. The Insurance Supervisory Board is in charge of auditing insurance companies, settling insurance disputes, registering of insurance agencies, and granting licenses to insurance brokers.

The agencies related to the regulation of the insurance sector in Korea are the Korea Life Insurance Association (KLIA), the Korea Non-life Insurance Association (KNIA) and the Korea Insurance Development Institute (KIDI). KLIA and KNIA are in charge of receiving and cancellation of insurance solicitor registration, and KIDI is responsible for the inspection of new insurance products.

Currently, there are 50 insurance companies in operation. Of these 50 companies, 33 are life insurers, 17 are non-life insurance companies, 2 are surety insurance companies, and one is a reinsurance company. For the 1996 business year, the total income from premium for the 50 companies was 51 trillion Won (approx \$US 38 billion), and the current total assets are approximately 110 trillion Won (\$US 82 billion). Currently, the combined market shares of the top five life insurance companies and for the top five insurance companies are 74.2 per cent and 64.6 per cent respectively.

Life insurance companies deal in life insurance, retirement insurance, and personal pensions. Non-life insurance companies deal in shipping, fire, car, insurance on cargo as well as personal pension insurance. Banks are prohibited from directly developing or marketing insurance products.

In order to run an insurance business, an approval by the Minister of Finance and Economy is required. For a Korean insurance company, the minimum working capital is set at thirty billion Won (\$US 22 million) compared with three billion Won (\$US 2.2 million) for a Korean branch of foreign insurance company. The Ministry of Finance and Economy screens potential insurer's applications for knowledge, experience and investment capacity, and reaches a decision on whether to issue a provisional approval or not. An insurer with a provisional approval may apply for a full approval. The verification process may take up to two months.

When developing a new insurance product, insurance companies are required to file either a pre-development notification or a post-development report with the Insurance Supervisory Board.

Products subject to pre-development notification are:

- a product that is tax-related,
- a product that is related to other financial sectors,
- a product that uses a new risk rate not approved by the public authorities,
- a product with a different interest rate than the rate used by the existing insurance companies,
- compulsory insurance and car insurance products and
- a product developed in a manner not in line with the product development standards.

Products subject to post-development reporting are:

- products that are developed not fulfilling the product development standards
- a product that does not use a standardized contract conventionally used internationally
- a product with a slight modification of a standardized contract which does not reduce the welfare of consumers and
- a product similar to a product on sale, which has been the subject of a declaration.

A foreign insurance company interested in establishing a local business office may set up a local operation, a joint venture or a branch office with the approval of the Minister of Finance and Economy. Foreign insurance companies are treated equivalently to Korean insurance companies in terms of minimum asset requirement, items to be examined for approval and the examination period for approval.

The following are the products in which a foreign insurance company without a place of business can deal:

- life insurance,
- loading/unloading insurance,
- aviation insurance,
- travel insurance,
- insurance for ships,
- long term damage insurance,
- reinsurance,
- insurance which has been rejected by more than three domestic insurance companies,
- an insurance product which currently is not taken up in Korea, and an insurance which is difficult to be concluded with an insurer and classified as an insurance that needs special authorization by the Financial Supervisory Commission.

These insurance companies can sell their products only through means of communication such as internet and fax. They are not allowed to be sold through dealers or brokers.

Because the financial sector is divided into different business domains, *i.e.*, banking, securities, and insurance, there are no financial products in direct competition with insurance products. Moreover, an insurance company, in principle, cannot concurrently deal in both life and non-life insurance. However, an insurance company can concurrently deal in accident insurance and reinsurance. In the case of personal

pension products, insurance companies are in competition with other financial institutions, such as banks, investment and trust companies, and mutual trust funds.

The competition among different financial institutions with regard to personal pension products is not distorted by the taxation system.

An insurance company is required to obtain the approval of the Minister of Finance and Economy to exit from the insurance market through dissolution or complete transfer of its insurance contracts. This control of exit of insurance companies is to protect consumers from non-performance of duties by insurance companies. However, insurance companies are not completely banned from exiting the market. They are allowed to transfer their shares, and insurance companies with poor financial status may also be liquidated upon recommendation or order of the insurance supervisory authority.

Currently, there are limited number of government regulations on the determination of insurance premiums for auto and life insurance products. With auto, life, and non-life insurance, insurance companies can set premiums freely within a range. In the case of other insurance products, insurance companies can freely set the premiums.

The supervisory authority has the power to order an ex post change in an insurance premium. Nevertheless, there have been virtually no cases in which a change in premium has been ordered. This is due to the fact that insurance premiums have been under government control until recently.

The fact that insurance companies are either fully or partially free to determine their insurance premiums is evidence that there is competition among insurance companies regarding insurance premiums. However, given the short history of insurance premium liberalization in Korea, a complete form of competition on insurance premium is yet to develop.

With respect to the development of new insurance products, insurance companies are obliged to file a pre-development notification or a post-development report with the Insurance Supervisory Authority. All insurance companies are ordered to use the standardized terms of contract required by the Financial Supervisory Commission (FSC). An insurance company wishing to use a different set of terms other than the standardized terms of contract must notify the FSC in advance. In practice, the FSC's standardized terms of contract are applied to almost all insurance contracts. Insurance companies interested in modifying the terms of compulsory insurance must file a report with the FSC before any modifications are actually made.

An insurance company must take the form of one of the following:

- i)* a joint-stock company;
- ii)* mutual company; or
- iii)* local branch office of a foreign insurance company.

There is no limit to the number of shareholders for joint-stock companies. There are, however, some limitations on the ownership of shares in insurance companies by the five largest business groups. The five largest business groups in terms of total assets pursuant to the Fair Trade Act can become a shareholder of an insurance company only in the event that the group acquires or merges with a failing insurance company, until March 31, 2003.

The government does not own any insurance company.

There are no restrictions preventing foreigners from acquiring an existing insurance company. However, only insurance companies are allowed to establish a new insurance company.

An insurance broker is a person who intermediates a client and an insurance company in concluding a contract. To become an insurance broker, one needs to:

- i)* complete courses run by training institutions, such as the Insurance Training Institute;
- ii)* pass the examination given by the Insurance Supervisory Institute;
- iii)* obtain a license issued by the Insurance Supervisory Institute.

The insurance brokerage systems is yet to take root in Korea as its history is short. (This system was implemented for insurance for loss in April 1997, and April 1998 for life insurance.)

An insurance agent refers to a person who acts on behalf of an insurance company to conclude an insurance contract. To become an insurance agent, one needs to:

- i)* complete a training course by a training institution, and
- ii)* register at the Insurance Supervisory Institute.

Although the regulations on insurance brokers and agents are different, it is too early to discern the effect the difference in the regulations has on the sales of insurance products given the short history of the insurance brokerage system in Korea.

Though banks are barred from direct sales of insurance products they may sell insurance products indirectly by establishing a subsidiary. Insurance companies are not allowed to sell banking products (*e.g.* a bank deposit).

An insurance company needs to meet the standards on payment capabilities set forth by the Insurance Supervisory Authority. A company which has failed to do so will be regulated by the supervisory agency and the size of its shortfall in payment capabilities will be publicly announced. Such public announcement will weaken clients' faith in the company and as a result, the company will be at a disadvantage in competing with other insurance companies. Moreover, if a company is faced with limitations in its business activities due to the shortfall in its payment capabilities, its position will be further weakened. The requirement on payment capabilities does not put insurance companies at a disadvantage in the competition with banks as the products they offer are different from those offered by insurance companies. Nevertheless, because banks also sell personal pensions, those insurance companies with poor payment capabilities may face difficulties competing with banks.

In Korea, insurance companies are constrained by regulations on asset management such as the investment ceiling for each investment category. However, such regulations are equally applied to all insurance companies irrespective of payment capacity or total asset, and therefore, such regulations do not restrict competition among insurance companies. As it has previously been explained, regulations on investment in insurance companies do not restrict competition between insurance companies and banks, as there are no overlapping products between banks and insurance companies except personal pension.

All of the existing mutual agreements among insurance companies have been authorized by the relevant supervisory authorities. An insurance company interested in signing, changing or cancelling a mutual agreement must receive an authorization by the FSC. The FSC needs to consult with the Korea Fair Trade Commission prior to granting authorization.

For the purpose of sharing of information, the "Agreement on Overseas Insurance Information Sharing" has been enacted. Based on the Agreement, insurance companies share information on the current status of overseas branches, monthly reports by the overseas employees, reports on business trips by employees, on overseas insurance market, etc. The cost of managing the gathered information is shared equally by the parties to the Agreement. The cost of collecting information upon a special request by a specific insurance company participating in the Agreement will be paid by that insurance company.

Insurance regulatory authorities do not intervene in the acquisition of an insurance company by any specific party. Insurance regulators can recommend liquidation or merger of insurance companies with poor payment capabilities. As of yet, there has been no such case, so there have been no problems caused by mergers of insurance companies. Therefore, a review must be conducted on the issue of establishing guidelines on mergers among insurance companies and of determining the relevant market based on the substitutability of insurance products.

The Korea Fair Trade Commission enforces the relevant regulations against concerted acts, unfair trade practices and false advertisements by insurance companies. The Korea Fair Trade Commission had issued a warning to 11 non-life insurance companies, and three automobile mutual-aid associations for abuse of dominance in November 1997. These companies and associations had made payments 5 per cent short of the original amount. In 1995 the KFTC issued a recommendation for correction on 11 non-life insurance companies. The KFTC ruled that their agreement to jointly determine auto insurance premiums and auto repairing charges constituted a price cartel. In 1997 the KFTC judged that an advertisement by First Life Insurance was likely to mislead customers and that it violated Article 3, Paragraph(1), Subparagraph 6 of the Fair Trade Act. A corrective measure, including suspension of the act in question, was ordered by the KFTC.

The competition authority needs to examine and improve systems related to insurance, such as the criteria for entrance and exit, the substitutability of products and mutual agreements among insurance companies. The competition authority also needs to examine at regular intervals whether there are anti-competitive elements to the existing laws and regulations and take appropriate measures to improve such laws and regulations, and strengthen the enforcement of the competition laws.

NETHERLANDS

Overview

Regulatory Rules

The existing regulations are contained in the Insurance Business Supervision Act 1993 (“Wet toezicht verzekeringsbedrijf 1993”, hereafter to be referred to as WTV 1993) of 9 March 1994 and in a series of Royal Decrees. This Act, which entered into force on 1 July 1994, has replaced the Insurance Supervision Act of 18 December 1986 and implements the third generation EU-insurance directives. The insurance supervisory authority (“Verzekeringkamer”), instituted by Act of 1922, derives its legal basis from the WTV 1993. Since 1993 the WTV 1993 and its Royal Decrees are under a continuous process of revision. Not only as a result of the implementation of EU-directives, *i.e.* the BCCI-directive of 29 June 1995, but also due to changes in national legislation.

The Competition Act (Statute Book 1997, 242) took effect on 1-1-1998. Three main elements of the Competition Act are:

- prohibition of competition agreements, except in case of exemption or dispensation. Up to 31-3-1998 competition agreements, in force before 1-1-1998, could be submitted to the Dutch Competition Authority for dispensation. Around 150 requests for dispensation have been filed with the NMa.
- prohibition of abuse of dominant positions (other than in connection with the performance of tasks of general economic interest).
- preventive supervision of concentrations. A concentration is not deemed to arise where insurance companies hold on a temporary basis securities in an undertaking. Up to 1-1-2000 the provisions on concentrations of the Competition Act will not apply to concentrations involving only banks or insurance companies.

The Competition Act applies to all sectors in the economy, including the insurance sector. There are no special exemptions for the insurance industry, except for the EU block exemption on insurance (Regulation 3932/92) which also applies in Dutch competition law. The notion behind “universal coverage” of general competition law is that all market sectors should be subject to competitive forces, leading to efficient allocation. Any specific considerations of public interest should be dealt with by establishing minimum legal standards, not by granting sectors specific exemptions in the competition law. In the case of the insurance industry this means that where prudential supervision entails specific regulation, this is to take the form of specific legal minimum provisions.

Regulatory Institutions

The Ministry of Finance is responsible for law and policy making. The Insurance Supervisory Board is the regulator at arm’s length of the ministry and enforces the insurance prudential supervision laws.

As for the Competition Act, the Dutch Competition Authority (NMa) is the general enforcement authority. NMa is at arms' length of the minister of Economic Affairs. The NMa is exclusively competent for the Competition Act. An across the board consistent application of competition rules means that proliferation of supervision is not desirable.

Industry Structure

In the - internationally oriented - Netherlands insurance market 111 supervised life- and 397 supervised non-life insurance companies (1997) are active. Approximately 25 per cent of the premium income in the Netherlands life and non-life insurance market is written by foreign companies (Netherlands subsidiaries and Netherlands branch offices of foreign companies).

The larger Netherlands insurance companies/groups (ING Group, Fortis, AEGON) are also strongly represented outside the Netherlands. In 1996 31 billion guilders (approx \$US 31 billion) of the gross life insurance premium income and 16 billion guilders (\$US 8 billion) of the non-life insurance premium income of these three companies was generated abroad. In comparison, in the same year the total gross life premium income received in the Netherlands market amounted to 33 billion guilders (\$US 16 billion) and the total gross premium income in non-life insurance to 28 billion guilders (\$US 14 billion).

Table 1 below provides some information concerning market concentration in the Netherlands insurance market. Market concentration in the life insurance sector is higher than in the non-life insurance sector. The three largest life insurance companies are ING Group, AEGON and Achmea; the three largest non-life insurance companies are Achmea, ING Group and Ohra.

In the life insurance sector no significant mergers or acquisitions have occurred in recent years. In the non-life insurance sector, however, significant mergers have occurred especially in the field of health care insurance. This is due to the fact that public health funds ('ziekenfondsen') have been authorised to start, or to co-operate with, private health insurance companies. In fact two of the largest non-life insurance companies are also the largest health care insurers (Ohra and Achmea).

Most of the merger & acquisition activities within the Netherlands financial sector take place, however, in the "all-finance" sector. Insurance companies start (AEGON) or buy (Achmea) a bank and banks start or buy insurance companies. At the moment the two largest financial conglomerates in the Netherlands are ING Group and Fortis.

Because of the introduction of the Euro and in reaction to the creation of the EU-single market large Netherlands insurance groups are also expanding within Europe by acquiring foreign companies (e.g. ING recently acquired Belgium Banque Bruxelles Lambert). On the other hand companies such as AEGON and ING are also expanding into developed markets like the United States and into less developed markets in Eastern Europe, Latin America and South East Asia.

Table 1: Market share of insurance companies in 1994-1996, in % of total gross premium income

| | 1994 | 1995 | 1996 |
|-----------------------------|------|------|------|
| Life insurance | | | |
| 3 largest | 48,7 | 49,7 | 47,3 |
| 5 largest | 65,7 | 63,8 | 61,1 |
| 8 largest | 78,4 | 78,8 | 76,4 |
| Non-life insurance | | | |
| 3 largest | 38,1 | 29,7 | 29,0 |
| 5 largest | 41,6 | 40,7 | 39,3 |
| 8 largest | 55,6 | 53,7 | 52,1 |
| Life and non-life insurance | | | |
| 3 largest | 38,1 | 38,8 | 37,6 |
| 5-largest | 50,8 | 51,0 | 49,5 |
| 8 largest | 65,1 | 65,0 | 63,0 |

Table 2 shows that profit performance in the life insurance sector is better than in the non-life insurance sector. In the latter sector insurance lines like liability insurance markedly under-perform. The non-life insurance sector is characterised by a cobweb cycle: providers come and go and prices go up and down. The life insurance sector is growing steadily and is relatively profitable. The high and growing demand for fiscally driven products and the demographic trend are the main causes for the favourable developments in this sector.

Table 2: Performance: Net profit in % of gross premium income, 1994-1996

| | 1994 | 1995 | 1996 |
|----------|------|------|------|
| Life | 9,2 | 10,5 | 10,9 |
| Non-life | 2,9 | 5,5 | 5,3 |

Competition is strong in the Dutch insurance market. This can be attributed to several factors. Firstly, there are four different channels through which insurance products are distributed in the Netherlands viz. insurance brokers (60 per cent market share), tied agents (5 per cent), direct writers (20 per cent) and banks (15 per cent). Because of the existence of a brokerage system it is not necessary for foreign insurers to build up a distribution system to enter the Netherlands insurance market.

Competition is also enhanced through the increasing supply of insurance products. There is a marked tendency for pension funds, public health fund organisations and other semi-public organisations to engage in private insurance activities, in reaction to the privatisation activities of the national government in the social sector.

Another factor which has contributed to a high degree of competition in the Netherlands insurance sector is the system of ex post insurance supervision which was introduced in the European Union in 1994, but which has existed in the Netherlands since the introduction of insurance supervision in the 1920's. All this has led to a competitive insurance market characterised by a large number of

innovative insurers, national as well as foreign, offering products at premiums that - according to various studies *e.g.* by the Bureau Européen des Unions des Consommateurs - belong to the lowest in Europe.

Regulation and competition issues

Barriers to entry

In conformity to EU legislation it is prohibited to carry on insurance business from an establishment in the Netherlands without a licence obtained from the supervisory authority. Licences are granted for each class of insurance. When applying for the first time the applicant has to submit to the supervisory authority a certified copy of the memorandum of association, a copy of the articles of association and a list of names and addresses of directors and members of the supervisory board. Motor vehicle third party liability insurance licences can only be obtained if the applicant also has submitted documentary proof of affiliation to the Green Card Bureau referred to by the Motor vehicles liability act and that his policy conditions comply with the requirements set forth in the latter act.

Competition with Substitutes

Pension plans compete with group insurance. These products are taxed under the same regulation (EET-system¹) for personal income tax. Insurance companies are subject to corporation tax; pension funds are exempt from this tax.

Most branches of industry have pension funds with compulsory affiliation of all employers within the branch. This part of the market is not directly accessible to insurance companies.

Individual pension provision may compete with individual life insurance products. These products are subject to different tax legislation, but in practice the same (EET-) system is applied. There is a difference in playing field because of the already mentioned different corporation tax regimes for insurance companies and for pension funds.

Capital insurance is only provided by insurance companies, not by pension funds, and are - within limits - subject to a TEE-taxation system.

Some investment and savings products of financial institutions other than insurance companies or pension funds, may compete with insurance products. The products of these institutions (mortgages excluded) are subject to a TTE-system of taxation. These institutions are subject to corporation tax.

Barriers To Exit

Decisions of insurers to exit or withdraw are not influenced by the regulatory regime (of course such insurers are obliged to fulfil all their obligations originating from the policies they issued). A special regime applies to insolvent insurers. The court authorised the Insurance Supervisory Board to take the necessary steps to sell the portfolio of the insolvent insurer to one or more other insurers; consequently the rights of policyholders will be protected as much as possible. During this period the Insurance Supervisory Board exercises most of the powers of the management of the insolvent insurer.

1 EET-system: Way of describing the tax-system. The relevant sequence of taxable products is: Contributions, Returns, Benefits. E= Exempt from taxes; T = Taxed.

Control Of Prices

The insurance supervisory regime obliges life assurance companies to set premiums for new products which are sufficient to allow the company to meet all its obligations. However, this does not imply that an assurance company may not sell any products below cost. From a supervisory point of view it may sell products below cost, provided the overall financial situation of the company is not endangered.

In order to ensure compliance with the above mentioned rule life assurance companies must submit ex post to the Insurance Supervisory Board (ISB) the technical (not the commercial) details of new life assurance products, including a profit test. For non-life insurance business no formal rules are in force regarding the calculation of premiums. Both in case of life and non-life business pricing decisions are influenced indirectly by the necessity to set adequate provisions for liabilities arising from insurance contracts.

In the Netherlands no systematic approval of premiums ex ante nor ex post is in force. In case the overall financial situation of an insurance company should be endangered, the ISB has the power to oblige an insurance company to take the measures necessary to improve this situation. As a principle the Dutch supervisory regime holds the view that the freedom to conduct its own business implies that the insurance company in the first place should choose how it is going to meet supervisory requirements. In the end, if the measures chosen by the company are not adequate, the ISB will prescribe the measures to be taken. Such a measure may include the adjustments of premiums. Occasionally this situation has occurred.

As for the degree of effective price competition in the important insurance markets, generally speaking, there seems not to be an issue of concern here.

As the Competition Act applies to the insurance sector, this law provides the instruments in case there should be anticompetitive practices on pricing or other competition issues.

Control Of Product

No systematic approval or notification ex ante or ex post of insurance products takes place. Nor are standard forms required. In case of life assurance products the company must disclose to a client, before concluding, the contract certain information, such as the name and address of the company, the duration of a policy, the surrender and paid up values, details about profit sharing, the applicable law, the fiscal treatment of the product and the cooling-off period applicable to the policy. The regulatory regime requires every life assurance product with a policy duration of at least six months to include a cooling-off clause enabling the policyholder to cancel the contract within two weeks after concluding it.

As to the question to what extent the controls on terms and conditions are linked with the requirements that certain forms of insurance is mandatory, the answer is that no systematic controls take place.

Control of Ownership and Forms of Business

A share of 10 per cent or more in an insurance company requires prior approval of the Minister of Finance. If an insurance company forms part of a group structure this structure must be transparent in order not to hamper effective supervision.

The government itself has no significant share (>1 per cent) in insurance companies.

There are no restrictions on foreign ownership.

Control Of Marketing And Distribution

As mentioned above, in the Netherlands insurance products are distributed through four different channels. The regulatory regime contains no specific rules. For insurance intermediaries (insurance brokers and banks) a special regime applies. An intermediary is only allowed to act as such if he meets requirements concerning professional competence and good repute; he also has to be registered. Banks are only allowed to sell insurance products as intermediaries; they are treated as insurance brokers.

Regulatory reform: the Insurance Intermediary Industry Act

In 1995, the cabinet launched the Competition, Deregulation and Legislative Quality project. This project assesses the need, effectiveness and enforceability of legislation. One of its sub-projects dealt with the Insurance Intermediary Industry Act (Wet Assurantiebemiddelingsbedrijf).

The Insurance Intermediary Industry Act contains regulations governing professional standards, registration requirements, portfolio rights, the right to commission, a ban on brokerage fees for settling claims and a ban on cash incentives for consumers. Furthermore, remuneration shall consist only of the commission which the insurer pays to the intermediary.

The Cabinet plans to abolish regulations pertaining to remuneration for the following reason: No other economic profession operates under legal remuneration rules. The Consumer Association has stated that it finds the current remuneration system outdated. Abolishing regulations will allow for remuneration to be based on the service provided. Because abolition of the statutory remuneration regulations could have major consequences and lead to strategic changes, the Cabinet has proposed that the process should be phased, with the abolition of the ban on cash incentives implemented as soon as possible and the abolition of the other remuneration regulations in 2002.

In 1991, the statutory maximum commission has been abolished, as has the so-called CUPO scheme by which maximum commissions are fixed under private law (see below). Free remuneration will lead to price competition throughout the entire column of intermediary insurers and intermediaries. The Cabinet feels that this will go a considerable way to promoting fair trade and will give both intermediaries and insurers a greater incentive to prepare for the forthcoming abolition of the remaining remuneration rules.

In the Cabinet's opinion, the proposed reform will not reduce the positive characteristics of the insurance market. It will extend the possibilities for insurers and consumers to arrange insurance (with or without the services of an intermediary) which matches consumer requirements. Price competition between intermediaries will assist this process.

The reform proposal has given rise to considerable opposition in the profession itself and in parliament that has yet to vote on the reform bill.

Solvency, Investment Regulation

- Competition between insurance companies:

Since there is no differential treatment between insurers as regards solvency and investment regulations, competition between insurers is not affected by these regulations.

- Competition between insurance companies and banks:

Banks and insurance companies/pension funds do not compete directly. Banks are not allowed to conclude insurance and/or pension contracts for their own risk. They are only allowed to act as intermediaries to distribute products of insurance companies and pension funds.

- Competition between insurance companies and pension funds:

Insurance companies and pension funds are supervised by the same authority (Insurance Supervisory Board). Solvency rules for insurance companies are laid down in the Insurance Business Supervision Act 1993. Those for pension funds are settled by analogy by the supervisor. Consequently there is no influence on competition from this point of view. Investment regulations for insurance companies are in accordance with EU legislation, which implies, inter alia, quantitative restrictions on investment in equities and on foreign investments. Pension funds are subject to the prudent person principle; no quantitative investment restrictions are in force (except for investments in the sponsoring company = self-investment). The difference in regulation will restrict competition to the market for Netherlands and EU-bonds.

Competition Law and Enforcement Issues***Agreements Between Insurers***

In the approach taken by the Competition Act, the European block exemptions are 'built into' the competition rules. For the insurance sector this means that the insurance block exemption 3932/92 is also applicable on the Dutch markets that fall outside the scope of article 85/86. The block exemption provides safe-harbours on actuarial principles regarding net premiums.

Apart from Regulation 3932/92, the Dutch Competition Act does not provide for sectoral exemptions in the insurance industry. This means that any agreement on co-operation that falls within the scope of article 6, *i.e.* the general prohibition provision, being the equal of article 85(1), would have to be individually scrutinized. Only if the cumulative criteria of article 85(3) for exemption apply, dispensation could be granted.

Regulatory Conflict

As on anticompetitive agreements and abuse of dominant positions, the Competition Act fully applies to the insurance industry. The Dutch Competition Authority is exclusively attributed with the powers to enforce the Competition Act and does not need approval from other agencies, nor does it have to seek advice from other bodies.

As for concentrations, there is a sectoral concentration provision in the prudential supervision laws. This means that the Minister of Finance - on advise from the sectoral regulators (the central bank and the Insurance Supervisory Board) - has to approve concentrations in the financial sector. This approval procedure includes all relevant aspects of public policy: prudential supervision and competition effects. In practice, these two 'checks' are intertwined : there is one single decision.

As from January 1st, 2000, the concentration paragraph of the Competition Act will apply to the financial sectors (banks, insurance). This means that from then on, there will be two separate approval procedures: one on prudential policy issues and - entirely complementary - the other one on competition effects. Presently, a procedure is being developed on cooperation and exchange of information between regulators, as to facilitate and speed up the two-track procedure. Inter alia, a speedy procedure by all regulators has to be provided in case concentrations are prompted by insolvency of financial institutions.

Antitrust Enforcement

CUPO-agreement on intermediaries' fees in non life insurance

Under the now repealed Act on economic competition - the forerunner of the new Competition Act - a general ban on price fixing was declared in July 1993. The insurance industry filed for dispensation for an industry-wide agreement on maximum fees for intermediaries in the field of non life insurance: the so-called CUPO-agreement (CUPO is the body administering the agreement).

Since 1956, the insurance industry has collectively set fees that are payable from insurers to intermediaries. This so-called "transitional agreement" (*sic*) sets maximum fees for the conclusion, the continuation and the prolonging of non life policies. In practice, the maximum fees were in fact uniform fees, therefore price setting between insurance companies and intermediaries as regards intermediaries' services was limited. Competition between insurance companies regarding the remuneration of intermediaries was limited. (It should be noted that intermediaries under the current law are not allowed to charge other parties than insurers for their services.)

The Minister of Economic Affairs, who in the pre-NMa era was the competent competition authority, decided against granting dispensation on the grounds that the criteria of 85(3), which have been declared leading in deciding such matters, were not fulfilled. The main issues were the following:

- CUPO claimed that the agreement contributes to the distribution. If insurers were to compete against each other on intermediaries' fees, the independence of intermediaries would evaporate. Intermediaries would then sell policies to consumer from the highest bidding insurer.
- CUPO further claimed that higher fees would imply higher premiums for consumers.

If independence of intermediaries is the key to their success, intermediaries would benefit from long term package relations with their consumer-customers. In this perspective, it would be realistic for intermediaries to provide added value to consumers, rather than to provide consumers with policies they do not want from insurers that offer only the best deals for intermediaries.

Under competitive conditions, higher fees do not automatically entail higher premiums. Perhaps at the outset, the fee level may be rather strongly influenced by the need for insurers to have access to market, which may have a fee raising effect in the short run. In the longer run anyhow, in the overall picture, intermediaries as a distribution channel must put up value against their fee income, at the risk of

being substituted by other means of distribution. In summary, there is no upfront hard indication that allowing dispensation for the CUPO agreement would be beneficial to distribution.

CUPO has appealed against the Minister's decision not to grant dispensation. The Business Appeals Court has not yet ruled on this case.

Requests for dispensation

Under the Competition Act, which came into force on 1st January 1998, thus far 150 requests for dispensation from insurance companies have been filed with the NMa.

About 100 requests have been filed by public health care insurers (ziekenfondsen) and pertain to model contracts with health care providers (e.g. physiotherapists, general practitioners). Recently, legal obligations on public health insurers to contract with any health care provider have been abolished. Public health care providers now may freely choose with which parties they want to deal. In many instances, public health care insurers do have a dominant position in their region of operation. For this reason, a thorough assessment of insurers' selection criteria will have to be made.

Furthermore, a number of requests have been filed with regard to "steering indemnity claims": this term refers to car indemnity insurance companies that are doing business with selected repair companies (garages, car glass retailers) in order to control amount of damages. In many instances, different car insurers are contracting with the same repair companies. These selection mechanisms might well hinder market access and or opportunities for competing repair companies.

NORWAY

Overview

Regulatory Rules

The relevant legislation is as follows:

- Act of 10 June 1988 No. 39 on Insurance Activity: Lays down core principles under which the insurance company should be organised, entry requirements, and the activities of the company.
- Act of 10 June 1988 No. 40 on Financing Activity: Restrictions on holdings, co-operation agreements between financial institutions, stakes in controlling bodies of another financial institution, capital adequacy requirements, product packages; Financial groups, organisational set-up, intra-group transactions.
- Act of 16 June 1989 no. 69 on Insurance Contracts: Obligation of the company to provide information to consumers, general conditions for the company's liability, premiums, third party's rights, settlements of claims.
- Act of 7 December 1956 No. 1 on Supervision of Credit Institutions, Insurance Companies and Securities Trading etc.: Legal basis for the supervisory body in Norway.

The insurance industry has, in co-operation with the Consumer Ombudsman established an arbitration tribunal handling complaints from the consumers.

No specific insurance classes are mandatory for companies. Third-party liability insurance is mandatory, *e.g.* for car drivers.

Regulatory Institutions

The Banking, Insurance and Securities Commission (the BISC) is the sector specific supervisory body for insurance undertakings in Norway. A board of five members appointed by the King manages the BISC. The BISC is subordinated and reports to the Ministry of Finance. The BISC shall ensure that the institutions it supervises operate in an appropriate and proper manner in accordance with law and provisions issued pursuant to law and with the intentions underlying the establishment of the institution, its purposes and articles of association.

The costs of the BISC are levied on the regulated institutions according to their size.

Industry Structure

Insurance undertakings incorporated in Norway may be involved in insurance activities and activities related to such business only. It may form part of a financial conglomerate. Reinsurance is subject to licensing. Life and non-life insurance must be carried out in separate legal entities. Furthermore,

credit insurance may only be concluded by separate credit insurance companies. All categories of insurance undertaking may be part of the same group. A bank and/or investment fund manager may also be part of such groups, but the insurance undertaking itself can not conclude banking activities.

Subject to exemptions, no single shareholder or group of shareholders may hold more than 10 percent of the share capital in a financial institution.

There are 10 life insurance companies and 6 companies offering unit-linked contracts in Norway as of the end of 1997. Furthermore, there are 53 non-life insurance companies, 18 local marine insurance associations, 39 local fire-insurance associations, 136 private pension funds, 104 private pension schemes, and 29 municipal pension funds.

The market shares of the biggest life insurance companies are as follows (figures as of 31 December 97 in mill NOK).

| Company | Total assets | % |
|-------------------|----------------------------|-------------|
| <i>Storebrand</i> | 90 908 | 32,0 |
| <i>KLP</i> | 66 071 | 23,6 |
| Vital | 49 556 | 17,5 |
| Gjensidige | 43 235 | 15,2 |
| Norske Liv | 10 234 | 3,6 |
| Total | 283 714¹ | 91,9 |

The market shares of the biggest non-life insurance companies are as follows (figures as of 31 December 97 in mill NOK).

| Company | Total assets | % |
|-------------------|--------------------------|-------------|
| <i>Storebrand</i> | 6972 | 38,9 |
| <i>Gjensidige</i> | 5206 | 29,0 |
| Vesta | 3261 | 18,2 |
| Vår (Samvirke) | 1364 | 7,6 |
| Zürich Protector | 303 | 1,7 |
| Total | 17943² | 95,4 |

After Norway's entry into the EEA, 5 companies covering life insurance and 9 companies covering non-life insurance have established branches in Norway. During the same period, 31 companies covering life insurance and 170 companies covering non-life insurance have informed the BISC about their intention of providing services from their head-office in the EEA on a cross-border service basis.

1 Approximately \$US 36 billion.

2 Approximately \$US 2.2 billion.

Regulation and Competition Issues

Barriers to Entry

An insurance company shall have an initial capital of approx. ECU 3,8 mill (NOK 30 mill). In order to receive a license, the application should cover a plan of operation showing an overview of the insurance contracts the company intends to offer. Furthermore, information about the capital situation, budgets and prognosis for the first three years, the principles for stipulation of premiums and plans for reinsurance arrangements shall be provided. The management of the company is subject to fit and proper requirements. There are no fees or other direct costs connected to the handling of the applications.

Foreign insurance companies may establish a subsidiary in Norway, provided that Norwegian companies have a corresponding access to conduct business in the parent companies' home country.

Companies registered in an EEA country may conduct business in Norway on a branch basis or provide services on a cross-border basis. Undertakings registered outside the EEA can operate in Norway through a branch. The main difference between the two categories is that non-EEA companies are to be in possession of a capital similar to the minimum requirements for technical reserves. The capital shall be deposited with a Norwegian bank.

Companies registered in Norway are licensed to write insurance in the different insurance classes according to EU's insurance directives. A company must extend its license in order to expand operation into new classes. Such extended license would be granted if the company has the relevant capital and shows knowledge of the risks involved. The authorities do not judge whether or not there is a need in the market for the services offered, thus the company will get a license if it meets minimum requirements.

Competition with Substitutes

The market for long-term savings include bank deposits, savings in funds, stocks and bonds as well as parts of life insurance. Insurance companies used to have taxation advantages compared to the other suppliers, but these advantages have now by and large been levelled out.

Control of Prices

Life insurance companies are required to file their principles for pricing with the BISC when introducing a new product. The BISC will examine the material in order to determine whether the premiums used are in reasonable proportion to the risk undertaken and to the economic situation of the company. The BISC would approximately once or twice a year ask for alteration of the premium tariffs. Such measures are normally not used in respect of non-life insurance companies. For insurance classes 1 and 2 (accidents and sickness at work, *i.e.* workmen's compensation insurance) the policy term must be forwarded to the BISC prior to the offering of such cover.

Competition Law and Enforcement Issues

Agreements Between Insurers

The Norwegian Competition Authority (the NCA) has granted exemptions from the prohibition of price fixing for several co-operative arrangements between insurance companies. First, exemptions

have been granted for exchange of information, *e.g.* health related information in connection with life insurance. Information exchange is deemed to be necessary in order to produce the relevant cost basis for calculating premium rates. Second, exemptions have been granted for joint calculation systems, *e.g.* index regulations of fire insurance cover. The calculation systems provides economies of scale in the cost calculations, while the companies remains free to compete on premium rates etc. Third, exemptions have been granted for certain pool arrangements for large and special risks, *e.g.* damages caused by an act of nature. The arrangements provide necessary risk sharing in order for companies to offer insurance. It is necessary because the potential disbursement of the insurance cover means that it is too risky for an individual company to supply the insurance.

The exemptions have been authorised under the Competition Act. The BISC has not commented on the arrangements.

Regulatory Conflict

A license is required for entering the insurance sector, including a license for establishing a new company as a result of merging two or more existing companies. Licenses are granted by the BISC on the basis of inter alia effects on competition. However, the regulator probably gives particular weight to solidity while competition policy considerations are given less weight.

A co-operation agreement has been established between the BISC and the NCA. The two agencies have joint meetings twice a year in addition to continuous exchange of information about issues of common interest. The NCA receives all license applications for mergers. A common understanding of the respective fields of competence has been established, for instance that the NCA may intervene against a merger which has been granted a license from the BISC. The regulator and the competition authority have been vested authority under different laws and a common understanding and recognition has developed about the agencies independent assessments based on their respective fields of expertise. Thus, the co-operation agreement encompasses mainly exchange of information and has only limited influence on the agencies' assessments and decisions.

Antitrust Enforcement

Enforcement of the Competition Act in the insurance sector has primarily dealt with mergers, exemptions from the prohibitions (cf. C1), and certain distribution agreements concerning joint sales of banking and insurance products. Several mergers have been analysed the last year, both between insurance companies and between insurance companies and banks. Increased merger activities were one of the reasons why the NCA prepared a paper on the delineation of relevant markets in banking and insurance.

There are two main categories of insurance markets: life insurance and liability insurance. These categories are further divided into the following sub-categories:

Life Insurance

- Consumer sector
 - The market for credit insurance
 - The market for interests and pensions insurance

- Enterprise sector
 - The market for collective pensions insurance
 - The market for group life insurance

The NCA considers the life insurance markets to be national in geographical scope. The four sub-categories of life insurance cover different needs of the end users. However, there are important substitution possibilities between the consumer and the enterprise sector, since an employee may choose between taking part in a collective arrangement or taking out an individual life insurance.

Liability Insurance

- Fire combined insurance
 - Large enterprises
 - Small enterprises
 - Consumers
- Automobiles
- Sea, transportation and oil

In most instances demand substitution is impossible between sub-categories, due to different insurance requirements, insurance cover and clients' characteristics. There has been an increasing use of insurance brokers, in particular with respect to fire combined insurance for large enterprises.

SPAIN

Regulatory Rules

Law 30/1995, of 8th November, on Regulation and Supervision of Private Insurance, adapts Spanish legislation to the Community Directives that are applied in the EU and in the EEA which require that public regulation and supervision of the insurance activities be shaped by market rules and free competition.

Approval of the associated regulation for the enforcement of this law is expected shortly.

Insurance is compulsory for a large number of activities, including:

- Civil liability in motor vehicles
- Civil liability for hunters
- Pleasures boats (in planning stage)

Regulatory Institutions

In Spain the regulatory and supervising institution is the General Directorate for Insurance (DGS), which is administratively attached to the Ministry of Economy and Finance. In addition to this institution, there are two public bodies: The Insurance Compensation Consortium (CCS) and the Settlement Commission of Insurance Companies (CLEA).

The General Directorate for Insurance (DGS) is a body of the Ministry of Economy and Finance and has supervision and regulatory functions.

The Insurance Compensation Consortium (CCS) is an entity of public law with its own juridical status and full capacity of action to meet its ends. It has a budget independent of that of the State and it adjusts its activities to private legal regulations. The CCS is attached to the Ministry of Economy and Finance.

The Consortium has among its functions those of underwriting risks of catastrophes and of forming a guarantee fund. In order to comply with community rules, in 1990 it lost its monopoly in the coverage of extraordinary risks in Spain.

CCS functions are divided into private and public:

Private functions

Extraordinary risks on persons and goods (Art. 6 and on, of the Legal Statute)

Prior to Law 21/1990, extraordinary risks insurance operated as a form of additional coverage, over and above "ordinary" insurance and funded through an additional charge on the premium of ordinary insurance, collected by other insurance companies on behalf of CCS. The extraordinary risks insurance

was operated as a monopoly by the CCS. The risk over a good was covered by the insurance company when it was due to ordinary causes, and by the CCS in case of extraordinary causes.

Law 21/1990 eliminated the monopoly. Now any insurance company is legally eligible to offer extraordinary risk insurance. In addition this insurance can be obtained as an autonomous insurance, without it having to be connected to the underlying ordinary insurance.

The change has required a new definition of CCS' functions in this field. The system of compulsory additional charge remains. Its use, however, will be different. If there is no extraordinary risks insurance contract voluntarily subscribed with an insurance company, that insurance will be automatically contracted in favor of the CCS and the additional charge will be considered as an insurance premium. If a contract voluntarily subscribed with the insurance company exists, the additional charge will allow the CCS to act as a guarantee fund covering the risk of insolvency of the insurance firm with whom the extraordinary risks insurance has been contracted.

Thus, art. 6 of the Legal Statute establishes that the "CCS will have the aim, as regards extraordinary risks, of compensating the losses caused by extraordinary events occurred in Spain and concerning risks in its territory".

The statute determines which are the risks considered extraordinary and which are the goods located in Spain.

The CCS is obliged to pay the indemnities due to losses caused by extraordinary events to an insured who, having paid the additional charges to the CCS, is in one of the following situations:

- (a) the extraordinary risk covered by the CCS is not covered by the insurance policy.
- (b) although the risk is covered by the insurance policy, the obligations cannot be satisfied by the insurance company for it having been adjudicated bankrupt, being under stop of payments, in a situation of insolvency, being the company subject to an audited settlement procedure, or the policy had been assumed by the CLEA.

In the first case, the CCS acts as direct insurer, and in the second, as a guarantee fund.

In any case, CCS' obligations will necessarily and exclusively protect the same persons and goods and for the same sums established in the insurance policy.

Concerning the insurance for nuclear risks (art. 9)

The CCS will assume the coverage of the civil liability risk caused by nuclear accidents occurred in Spain as follows:

- (a) If the total coverage of the insurance companies do not reach the limit of the minimum civil liability prescribed by Law 25/1964 on regulation of Nuclear Energy, the CCS will participate in the coverage assuming the gap up to the established limit.
- (b) It will act as reinsurer in the form and size established by the Ministry of Economy and Finance.

Concerning the combined agricultural insurance (art. 10)

The CCS will cover risks in combined agricultural insurance, in the form and size established by the Ministry of Economy assuming:

- (a) that the total of the insurance firms do not reach the total coverage stipulated by the Combined Agricultural Insurance Act.
- (b) acting as reinsurer.

Concerning the compulsory civil liability insurance for the use of motor vehicles. (Art.11)

Within the limits of indemnities established for compulsory civil liability insurance for use of motor vehicles, the CCS will exclusively assume the following functions:

- (a) The coverage contract of obligations arising from State civil liability and from that of Regional Governments, Local Corporations and Autonomous Organisms or Public Law Entities attached to any of the former, if they ask to contract this insurance with the CCS. These entities do not need to make a contract with that organism.

The CCS can also assume the coverage exceeding the limits of the compulsory insurance for motor-vehicles.

- (b) Contracting the risk coverage not accepted by insurance companies

The CCS also implements the duties entrusted by art. 8 of the Law on Civil Responsibility and Insurance for Motor Vehicles. These duties are established within the territory, up to the quantitative limit of the compulsory insurance. They are the following:

- (a) personal damage compensation as a result of accidents taking place in Spain when the guilty vehicle is unknown.
- (b) personal damage and goods damage compensation when the guilty vehicle is registered in Spain and is not insured.
- (c) personal damage when the vehicle is registered in Spain, and insured, but it has been stolen.
- (d) personal damage and goods damage compensation in the cases included within the scope of the compulsory insurance of the previous assumptions, if a controversy should arise between the CCS and the insurance company about who has to pay the indemnity to the insured. Nevertheless, if it were subsequently agreed to compensate the underwriter, the later will reimburse the CCS the compensatory amount, plus the legal interests increased by 25 per cent of the amount.
- (e) personal damage and goods compensation when the Spanish insurance company is declared bankrupt, ordered to stop payments, insolvent after its dissolution, subject to an audited settlement procedure or when the policy has been assumed by the CLEA.

Concerning compulsory voyage insurance

Within the limits of indemnities established for the compulsory voyage insurance, the CCS will assume the following duties:

- (a) to cover the risks not accepted by insurance companies.
- (b) to pay the obligations of the aforementioned companies when these were declared bankrupt, ordered to stop payments, being insolvent, were subject to an audited settlement procedure or when the CLEA had assumed the policy.
- (c) to pay the indemnity for bodily damages caused to passengers during transport when the transport company, illegally, does not have the corresponding compulsory passenger insurance.

Concerning the compulsory insurance of civil liability for hunters

Within the limits of indemnities established for the compulsory insurance on civil liability for hunters, the functions assumed by the ICC are the following: (a) To cover the risks not accepted by the insurance companies; (b) To pay the obligations of the aforementioned companies when they were declared bankrupt, ordered to stop payments, were insolvent, were subject to an audited settlement procedure, or when the CLEA had assumed the policy.

Furthermore, and also within the limits of the compulsory insurance, the CCS will have the following duties: (a) To compensate the victims or their beneficiaries of accidents with bodily damage occurred in Spain when hunting with firearms, and when the person causing the damage is not insured or is unknown; (b) To compensate for bodily damages caused by hunting with firearm when the economic compensation cannot be paid through the means regulated in the legislation on compulsory insurance for civil liability of the hunter.

Public functions

Relations with the Settlement Commission of Insurance Companies (CLEA)

The Consortium grants subsidies to the settlement Commission to finance the total of its annual budget as far as CLEA is not able to cover its finance by its own means. These subsidies originate in the surcharge on the premium fees charged by the insurance companies, which today is established at 5 per 1.000 of the premium quantities.

This surcharge is compulsory for all branches of insurance except life- insurance and export-credit insurance. The reason for these exceptions is the low degree of risk in these two kinds of insurance and, therefore, the settlement arrangements do not present great problems.

The Settlement Commission of insurance companies (CLEA)

CLEA is a public law body with its own juridical personality and full capacity to act to meet its aims. CLEA counts with its own budget, independent from that of the General Administration of the state. The Commission pays off the insurance companies according to the orders of the Ministry of Economy and Finance, through its General Directorate for Insurance.

The Commission is governed by a board of directors, consisting of a chairman and a maximum of eight members. The Chairman and the members are appointed by the Minister of Economy and Finance, after hearing the proposal of the General Director for Insurance.

The Commission is charged with the settlement of the payments in certain cases, including them: (a) Simultaneously to the liquidation of an insurance company; (b) when, once an insurance company is liquidated, there have not been appointed liquidators within 15 days after the liquidation has taken place; (c) When the liquidators do not fulfill the conditions established by law for the protection of the insured; (d) When an insurance company requests the settlement, having justified its reasons.

Industry Structure

The insurance sector is extremely atomized, as there are 392 companies. The following tables show the distribution of the market in 1997, the concentration of the sector (both in the branches of life and non-life insurance's) and the classification of the insurance companies according to the premiums.

Distribution Of The Insurance Market In 1997

| | (%) | | |
|--------------------------------------|----------------------------|----------------------------------|-----------------|
| | Number of companies | Percentage of the premium | |
| | | Life | Non-Life |
| Multiproduct insurance | 13,5 | 16,2 | 44,9 |
| Specialized in life | 19,4 | 82,6 | 0,3 |
| Specialized in vehicles | 12,0 | 0,3 | 24,4 |
| Specialized in health | 26,5 | 0,0 | 14,0 |
| Specialized in death | 9,2 | 0,9 | 7,7 |
| Specialized in multirisks (*) | 8,8 | 0,0 | 4,9 |
| Others | 10,6 | 0,0 | 3,8 |

(*) Includes the companies specialized in fires and other damages.

Concentration Of The Sector (Life And Non- Life)

| | 1995 | | 1996 | | 1997(*) | |
|---------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| | % over total companies | % over volume of premiums | % over total companies | % over volume of premiums | % over total companies | % over volume of premiums |
| 5 First Companies | 1,30 | 17,42 | 1,37 | 17,30 | 1,47 | 15,22 |
| 10 First Companies | 2,59 | 28,05 | 2,75 | 27,79 | 2,94 | 25,84 |
| 15 First Companies | 3,89 | 37,39 | 4,12 | 37,28 | 4,41 | 35,11 |
| 25 First Companies | 6,48 | 50,04 | 6,87 | 50,50 | 7,35 | 49,56 |
| 50 First Companies | 12,95 | 70,52 | 13,74 | 70,98 | 14,70 | 71,41 |
| 75 First Companies | 19,43 | 80,62 | 20,60 | 81,24 | 22,06 | 82,45 |
| Total Companies | 100,00 | 100,00 | 100,00 | 100,00 | 100,00 | 100,00 |

Companies classified by the volume of premiums issued

(*) Estimated Data.

**Classification Of The Insurance Companies According To The Volume Of Premiums
(1997)(*)**

| Turnover (Premiums issued - Direct Insurance) | % over total of companies | % over total of premiums |
|--|--------------------------------------|-------------------------------------|
| More than 10.000 millones pts. | 26,18 | 86,36 |
| Between 5.000 y 10.000 | 12,65 | 7,43 |
| Between 2.500 y 5.000 | 10,00 | 2,93 |
| Between 1.250 y 2.500 | 13,53 | 1,99 |
| Between 750 y 1.250 | 8,24 | 0,66 |
| Between 250 y 750 | 12,65 | 0,49 |
| Between 125 y 250 | 7,06 | 0,11 |
| Between 50 y 125 | 3,82 | 0,02 |
| Less than 50 millones de pts. | 5,87 | 0,01 |

(*) Estimated Data

Regulation And Competition Issues

Barriers To Entry

Insurance companies must apply for an administrative license to the DGS. To do so, they must fulfill some conditions in relation to its minimum social capital and programme of the activities. The authorization is granted by the Minister of Economy for a specified branch; it allows the firms to carry out that activity in the European Economic Area. Insurance companies based on EEA countries other than Spain can operate in Spain if they have got authorization in any of those countries.

In the case of insurance companies based in non-EEA countries, they will have to produce a certificate by the supervising authority of their country to prove that they comply with their own legislation.

Competition With Substitutes

The new draft law on the Personal Income Tax aims to eliminate the existing tax exemptions for life insurance. If these measures are finally implemented, consumers could switch to other forms of saving such as investment funds or pension schemes.

Barriers To Exit

There are no barriers to exit, unless the insurance company is in bankruptcy or going into liquidation. In that case, the company must comply with the Spanish legislation.

Control Of Prices

According to article 24 of the law, premium tariffs must be high enough to cover the risks they face (the “sufficiency principle”). Tariffs must be ready available for the DGS, who can prohibit (control ex post) tariffs which do not comply with law 30/1995 or do not respect the “sufficiency principle”. The DGS, by an administrative procedure, can request insurance companies to adjust their tariffs to the requirements mentioned above.

It is important to point out that Law 16/1989 on The Protection of Competition is applicable in all the situations.

Control Of Products

Law 50/1980, of 8th October, on The Insurance Contracts, contains a number of conditions and clauses as regards contracts under which all insurance companies operate.

In the case of compulsory insurance there is a greater control since the policy forms must be, according to article 24.5, controlled by DGS. This means that all policy form models have to be forwarded to DGS.

Control Of Ownership And Forms Of Business

Business links between insurance companies and other individuals or corporate bodies should be transparent and should not hinder the supervising of the insurance firms (art. 8).

All the information regarding the control of ownership has to be provided to the DGS.

Control Of Marketing And Distribution

The basic regulation regarding intermediation activities is contained in Law 9/1992, of 30 April, on Mediation in Private Insurance.

It is important to distinguish between:

- (a) Insurance Agents, who do not require the authorization of the DGS and
- (b) Insurance brokers, who do require to be authorized by DGS and should fulfill the conditions established by Law 9/1992.

The Insurance Agents, however, follow training courses organized by the Insurance Companies and supervised by the DGS if necessary. Banks are also allowed to sell insurance products.

Solvency Investment Regulation

These requirements could act as a barrier to entry but they are completely justified. Nevertheless, there have not been complaints about them from the Banking and Insurance sectors.

Competition Law And Enforcement Issues

Agreement Between Insurers

Articles 24.3 and 6.8 of Law 30/1995 allow the possibility of exchanging statistical information and the sharing of risk (co-insurance). Furthermore, the insurance companies can establish registers with personal data for statistical and actuarial purposes. This information is an important tool in the prevention of fraud and the liquidation of damages. Nevertheless, these exchanges of information should comply with Law 16/1989 on the Protection of Competition.

Regulatory Conflict

The Spanish Competition Authorities (The Service for the Protection of Competition and the Tribunal for the Protection of Competition) enforce Law 16/1989 on the Protection of Competition with respect to restrictive practices, single exemptions and merger control.

On the other hand, the Ministry of Economy and Finance, through the DGS, can prevent the completion of a merger (art. 22 and 23).

While the aim of the competition authorities, when considering an operation of concentration, is the maintenance of an effective competition in the market, the DGS takes care that the operation does not involve an excessive risk of solvency or could jeopardize the smooth functioning of the system.

Insurance companies need, therefore, both authorizations -due to the different nature of the competition and insurance controls- in order to carry on with the operation.

Until the present time, there has not been any case of conflict of jurisdiction between the insurance and the competition authorities.

Antitrust Enforcement

In 1994 a complaint was filed before the Service for the Protection of Competition against three insurance companies for having fixed the price for the cautionary payment insurance for land transport. The Service decided not to act on the case, as it considered the agreement was a form of co-insurance and, as such legal according to the Law of Insurance Contracts and EU-Directive 88/357. The decision was appealed and the Tribunal for the Protection of Competition (TDC) re-examined the case. The TDC in its Resolution of 7 April declared the existence of a “co-insurance” and, therefore, there was no violation of the Competition Law.

The juridical reasoning of the TDC was the following:

- The nature of the co-insurance makes necessary the existence of an agreement between the insurance companies, in order to share the covering of certain risks.
- Co-insurance is primarily established in two cases:
 - (a) When the risks involve large sums of money
 - (b) When the risk is new (this was the case in the dossier)
- It was not proven that the Insurance Companies had made an agreement to share the market.
- The geographic market was Spain
- There was no abuse of dominant position in the market.

Neither the Spanish competition law nor the European Community Law prohibit having a dominant position in the market, which has been obtained following the rules of free competition. A different matter is to obtain a dominant position through illegal means or to act in an abusive way from a dominant position.

UNITED KINGDOM

Introduction

This paper, while briefly discussing the regulatory framework within which the United Kingdom insurance industry operates, concentrates on issues of competition. The fiduciary and prudential regulation of the industry is carried out by HM Treasury, in the interests of maintaining stability and public confidence in the market. The Office of Fair Trading (OFT) is principally a competition authority, with responsibilities for assessing mergers and taking necessary action against anti-competitive arrangements and practices, and against abuse of market power. It also has responsibilities for consumer protection and, therefore, has an interest in such codes of behaviour and good practice as the industry may draw up. As a general rule (subject to the exception noted later in this paper) the insurance industry is treated for purposes of competition exactly as any other.

Regulation

The principal statute governing the United Kingdom insurance industry is the Insurance Companies Acts 1982, together with associated Statutory Instruments. These set out the licensing, financial and other conditions which insurance companies must meet in order to be authorised to trade. It should be noted that for companies established in EU member states native authorisation is recognised in the United Kingdom for this purpose. The requirements are designed principally to ensure capital adequacy and the prudential control of commercial ventures which could endanger the soundness or stability of insurance companies. This is essentially for the purpose of protecting the public from financial loss attributable to default or malpractice, not, it should be stressed, from the effect of injudicious investment or the purchase of inferior products.

The principal regulator is HM Treasury, although until the beginning of 1998 that responsibility lay with the Department of Trade and Industry. The transfer of responsibility involved no change in the regulatory system. The general insurance trade association - the Association of British Insurers - has no regulatory responsibilities as such. However, it seeks to ensure that its members follow good practice in their dealings with their customers. To that end, it operates a non-statutory (and purely voluntary) code of practice for the selling of general (which includes medical, property and liability) insurance. The Insurance Brokers Registration Council is a body established by statute for the regulation of insurance brokers. Only a broker licensed by the Council is permitted to use the title "Insurance Broker". However, other intermediaries, performing exactly the same functions but under other designations, may operate without licences.

Business in insurance policies which are investments, such as endowment and unit linked policies, is regulated by the Financial Services Act 1986. Anyone carrying on business such as selling, managing, or advising on the purchase of such policies must be authorised by the Financial Services Authority (previously the Securities and Investments Board and the Personal Investment Authority).

The Authority is charged with the protection of investors. It makes rules about the standards of integrity, competence, and financial resources which a business must meet to be authorised, and about the way in which it must conduct its business. The rules are scrutinised by the Director General of Fair

Trading (DGFT). If he finds any which he believes restrict, distort, or prevent competition to a significant extent, he sends a report to the Treasury. The Treasury may direct that the rules be revoked or altered if it decides that the anti-competitive effect is greater than is necessary for the protection of investors.

The only form of insurance required directly of individuals by Government is motor insurance. The minimum requirement is for insurance to compensate those who are injured, or whose vehicles are damaged, by a third party in an accident. Motor insurance to compensate oneself for loss in similar circumstances is not required. Some forms of professional indemnity insurance are required by professional bodies, in particular by those governing the medical and legal professions. The insurance requirement on lawyers, although enforced and maintained by their professional bodies, derives from statutory authority.

Insurance of real estate may be mandatory in some circumstances, not as a result of Government action or requirement, however. It is, nevertheless, invariably the practice of those who advance loans on the security of real estate, whether for purchase or not, to require borrowers to take out suitable insurance to reinstate the fabric of the property should the need arise.

Size and structure of market

At the end of 1995, the total net premium income of the United Kingdom insurance industry (including foreign contracts and the insurance of foreign risks) was about £88 bn, of which £56.2 bn derived from long-term insurance, and £31.8 bn from general insurance. Long-term insurance is broadly life insurance, annuities, personal pensions, and certain forms of health insurance. General insurance covers motor, property, various forms of loss insurance, and certain forms of specialist insurance, such as private medical insurance and employers' liability insurance.

Purely United Kingdom business was worth just over £71 bn, of which £44.9 bn derived from long term business, and £26.3 bn from general business. Against this, the private medical insurance market was worth about £1.7 bn, and that for structural warranties rather less than £30 m.

The United Kingdom insurance industry is fragmented, to the extent that there are many participants, and even the largest companies do not enjoy very substantial shares of the market. Some companies are very large, and may, particularly by reason of the scope of their activities, exercise considerable influence within the industry. None, however, falls within the United Kingdom statutory definition of monopoly, by enjoying a share of the overall market of 25 per cent or more.

In some particular sectors, however, companies do enjoy shares of 25 per cent or more. The most important of these is the market for private medical insurance. There are several companies in the market, but two in particular have large shares of it. One, historically until comparatively recently virtually the only provider, has a market share of about 40 per cent, which represents a reduction from a peak of something more like 60 per cent some years ago (1985). Its principal rival, which has grown mainly at its expense, has a share of the market of about 30 per cent. It should be noted that the market for private medical care in the United Kingdom is still comparatively small.

Another example can be found in the market for structural warranties (a special form of insurance taken out by builders against defects in properties built by them). That market is dominated (roughly 80 per cent of the market) by one company. This, again, is almost entirely for historical reasons, since it was for many years the only company in the market. Its only serious competitor entered the market about 10 years ago. There may be other specialist sectors of the insurance market where

companies enjoy large shares, but we are not aware of them. There are no monopolistic market shares in the popular sectors of the market: motor, property, household contents insurance.

The provision of various forms of insurance by banks is a comparatively recent development in the United Kingdom.

Competition and regulation

The United Kingdom insurance industry is fragmented, with many participants in the market. Our experience of issues requiring active competition regulation and enforcement is small; it is confined mainly to the scrutiny of mergers and acquisitions. We have conducted no studies of the effects of fiduciary and prudential regulation on the competitiveness of the market. However, the regulatory régime is applied in a way which keeps the market open to entry by new United Kingdom and foreign competitors, and competition appears healthy.

Clearly, regulation creates barriers to entry, and exit is controlled to the extent necessary to protect the interests of customers of the company. This does not mean that companies are prevented from leaving the market, but they must take appropriate steps, most usually by means of disposal to, or other arrangements with, another insurance company, to ensure that policyholders' rights and expectations are properly maintained. However, we have no evidence to suggest, or even reason to suspect, that these have had any significant effect on competition.

We are not aware of any products which compete with general insurance (property and liability). However, some consumers choose not to insure, for instance, personal property. Insofar as long-term insurance is a form of saving, it faces competition from pension plans, interest-paying savings accounts, and a range of other investments managed personally by individuals (with or without the help of advisers) or by investment management companies. We are not aware of any significant effects of tax or other regulatory regimes.

For practical purposes, direct regulation is confined to fiduciary and prudential aspects of the industry. Prices are not controlled; nor, generally, are products, contracts, terms and conditions of business, ownership, or the structure of companies. Insurance companies as such may provide only insurance, but subsidiary companies in the same group may provide any other products. Although contracts, and terms and conditions of business, are not regulated as such, they are subject to the EU Directive on Unfair Terms in Consumer Contracts. (The OFT has a team to administer the Regulations which give effect to the Directive, and powers to prevent the continued use of such terms.) The regulatory regime can be expected to influence these aspects of the industry to a greater or lesser extent. However, without considerable new research, we could not comment on the extent or significance of such influence.

Except for a particular scheme related to the guaranteeing of credit for export purposes, and a very small number of other special arrangements where the Government may act as insurer of last resort, the United Kingdom government does not participate in the insurance industry. Beyond the requirement to obtain the necessary authorisation, there are no restrictions on foreign ownership of United Kingdom insurance companies, or on foreign insurers' setting up business in the United Kingdom. As has been noted, EU authorised insurers may trade in the United Kingdom under that authorisation.

Competition and enforcement

It is important to keep in mind from the start that, with the exception described below, competition legislation in the United Kingdom applies to the insurance industry (including brokers and other intermediaries) in the same way as to other industries. The industry and individual participants are subject to scrutiny by the DGFT and the Monopolies and Mergers Commission (MMC) under the Fair Trading Act 1973. These investigatory powers are discretionary, and may be used in cases of possible exploitation or abuse of market power, or of possible collective anti-competitive behaviour whether by agreement or not. Similar powers are available under the Competition Act 1980, but can be invoked only against anti-competitive conduct by a single company. Moreover, the powers under this Act are ordinarily used only when an anti-competitive practice can be specifically defined, and is narrowly confined to a single issue. No company can be investigated under either of these Acts unless it enjoys at least 25 per cent of an economically and geographically definable market in the United Kingdom. A company must also have a turnover of at least £10m before it can be investigated under the Competition Act.

The Fair Trading Act also contains the United Kingdom provisions for scrutiny of mergers and acquisitions. These may be invoked only if the combined enterprises account for 25 per cent or more of a market in the United Kingdom or in a substantial part of it, or if the total worldwide assets of the target enterprise are at least £70m. Mergers which raise concerns about competition or the public interest may be investigated by the MMC at the direction of Secretary of State for Trade and Industry, following (although not necessarily in accordance with) advice from the DGFT.

The Restrictive Trade Practices Act (RTPA) provides for the scrutiny by the DGFT of agreements between United Kingdom companies, under which two or more of the parties accept restrictions on their commercial freedom. Designed to enable the competition authorities to combat cartel-like arrangements, such as price-fixing and market-sharing, the statute is detailed and complex and, crucially, applies only to agreements of particular forms. The initial application of the statute to an agreement does not depend on its likely effect on competition.

An effect of this has been that the Act applies to many agreements of negligible effect on competition. Agreements to which the Act applies, and which contains provisions likely to affect competition significantly, may be referred to the Restrictive Practices Court, which may strike down provisions which it considers to be contrary to the public interest.

Companies providing insurance are exempt from the RTPA. The exemption is strictly defined, and does not apply to insurance intermediaries or to any activities peripheral to the provision of insurance. It applies only when the only participants in an agreement are companies authorised under the Insurance Companies Acts and the restrictions accepted by them relate only to the provision of insurance.

This has the effect of allowing insurance companies, in principle, to co-operate in various ways - *e.g.*: information exchange, risk sharing - where necessary for the appropriate working of the industry. In principle, it could allow them to standardise terms and conditions, and fix premiums. However, the exemption from the RTPA does not extend to other competition statutes. Agreements to fix prices, or to share markets, or which in other ways significantly affected competition or amounted to unacceptable collective behaviour, could be investigated and controlled under the provisions of the Fair Trading Act.

Thus, although the exemption from the RTPA permits insurance companies to co-operate, such behaviour is not, under United Kingdom competition law, specifically authorised. There are no specified limits on the type or level of co-operation. However, the DGFT would be able to investigate arrangements

involving 25 per cent or more of the industry, and could be expected to do so if they appeared to have an adverse effect on competition.

A new Competition Bill, due to come into force in just over a year's time, subject to its passage through Parliament, will introduce into the United Kingdom a competition régime very similar to that which applies under EC competition law. There will be a general prohibition of anti-competitive agreements, and a similar prohibition of the abuse of a dominant position. The OFT will have wider powers of investigation, including the right to carry out "dawn raids" similar to that already enjoyed by the EC competition authorities. Moreover, the DGFT will be able to fine businesses up to 10 per cent of their turnover for breaches of the prohibitions.

The Act will repeal the RTPA. Much of the Competition Act 1980 will also go. The existing merger provisions of the Fair Trading Act will remain, as will the complex monopoly provisions of that Act, which allow the DGFT to investigate practices widespread in an industry, which may adversely affect competition, but which do not amount to the abuse of a dominant position by a single company. The Act will replace the MMC with a Competition Commission. In addition to taking on the role of the MMC, the Commission will act as a Tribunal to hear and decide on appeals against decisions by the DGFT.

The situation in respect of insurance specifically will not change. As noted earlier, the Treasury's regulatory function is to be transferred shortly to the Financial Services Authority. Insurance companies will be subject to the prohibition of abuse of a dominant position. Although no one company is likely to be in a dominant position, the insurance industry collectively will still remain subject to the complex monopoly provisions of the Fair Trading Act. Insurance companies will also remain subject to the mergers provisions of that Act.

Since, as has been said, the United Kingdom market is comparatively fragmented, with few companies with shares even of particular sectors of the market of 25 per cent, our experience of competition regulation has been small. Such as it has been, it has come principally from the scrutiny of proposed mergers. Most of the mergers scrutinised have been trivial, and none has raised issues requiring investigation by the MMC. It is not uncommon for mergers between insurance companies to satisfy the assets test for scrutiny under the Fair Trading Act; rarely, if ever (and certainly not during the last two or three years), do they satisfy the market share test.

We approach the assessment of mergers in this industry in the same way as we do those in other industries. In assessing the likely effect on competition, we take account of separable sectors of the overall insurance market, concentrating on those sectors which the companies share and in which, as a consequence of the merger, they will cease to compete. We also take account, and assess the effect, of any vertical links which the merger may create or reinforce. In principle, this is no different from the approach which we take to mergers in other service industries or in manufacturing industries.

In only one sector of the market - that for structural warranties for new homes - has it been necessary for the DGFT to seek an investigation by the MMC of an issue of possible abuse of market power. It appeared that the dominant company (historically for many years the only provider, and with the market share of nearly 100 per cent) was, by means of its rules, foreclosing the market to potentially competing companies. The company concerned offered its services to members only. A requirement was that all members (builders and construction companies) should register with the company for structural warranty purpose all their domestic buildings. This meant that, if a builder wanted to sample the services of a competing structural warranty company, he had either to resign his membership, or to register his buildings with both companies. Moreover, by virtue of another rule, members who resigned, on the occasion of their re-joining should they have wished to, lost all the benefits, principally financial, of their

previous membership. The MMC found the operation of these rules to be both anti-competitive and contrary to the public interest. The Government accepted the recommendations, and the rules of the leading company have since been changed. They may not be changed further in any way which might vitiate the freedom of members to register some of their houses with other structural warranty companies, or their freedom to resign and re-join, without the consent of the DGFT.

Conclusion

The United Kingdom insurance industry is fragmented, except in certain small specialised sectors. No one company is dominant or even has significant power over the market. A certain amount of co-operation is acceptable, but collective anti-competitive behaviour can be addressed under the DGFT's powers if necessary. Mergers are subject to the same controls as they are in other industries. Consequently, the structure of the market is such that it is unlikely that competition problems, problems of dominance or abuse of market power, could develop easily. On only one occasion have the DGFT's powers been used, and that in a small, highly specialised, sector of the market. In that sector, and in the market for private medical insurance (also comparatively small and specialised), we keep a close watch on developments.

UNITED STATES

The McCarran-Ferguson Act

In 1945, Congress passed the McCarran-Ferguson Act, which reserved to the states the power to regulate and tax the business of insurance. Under the Act, the Sherman, Clayton, and Federal Trade Commission Acts apply “to the extent that such business is not regulated by State Law,” except that agreements or acts of boycott, coercion, or intimidation remain subject to the Sherman Act.

Litigation regarding the scope of the federal antitrust exemption has involved the meaning of the terms “business of insurance” and “regulated by state law,” and the question of what constitutes a “boycott.” Supreme Court decisions regarding the scope of the phrase “the business of insurance” focus on three elements: the “spreading and underwriting of a policyholder’s risk,” the direct connection of the activity to the contractual relationship between the insurer and insured, and whether the allegedly anticompetitive practice is “limited to entities within the insurance industry.” Regulation by the state has been held to mean regulation of the relationship between the insurance company and the policy-holder, and not regulation of other aspects of the insurer’s business. The degree of regulation required is less than the “active supervision” with “intent to displace competition” required for the state action¹ doctrine to apply. The Supreme Court has held that general prohibitions against unfair practices, combined with authorized enforcement, constituted sufficient regulation under the Act.² A “boycott” need not be an absolute refusal to deal on any terms, but can “be conditional, offering its target the incentive of renewed dealing if and when he mends his ways;” the boycott must extend beyond the targeted transaction, so that “unrelated transactions are used as leverage to achieve the terms desired.”³

The FTC has ruled, and two lower courts have held,⁴ that the McCarran-Ferguson Act does not exempt mergers from antitrust review. The business of insurance also remains subject to state antitrust laws. In addition, as noted in ¶210.1 of P. Areeda and H. Hovenkamp, *Antitrust Law* (1997 Supp.),

Even repeal of the McCarran-Ferguson Act need have no enormous impact on insurance practices, for three reasons. First, many of those practices are already subject to the antitrust laws because insufficiently regulated by the states, too ‘interstate’ in character to be subject to regulation by any one state, or an undoubted boycott. Second, many recently challenged practices need no immunity because they do not violate the antitrust laws. Third, to the extent that the insurer’s practices are actively supervised by state regulators pursuant to a state policy to substitute regulation for market competition, the insurer would enjoy a ‘state action’ immunity under the *Parker* doctrine.

Reform of McCarran-Ferguson Act

The need for regulation to ensure the trustworthiness, solvency, and character of an insurance company, and the fairness of its practices, marketing, and disclosure, is well recognized. The need for broad exemption of the sector from the federal antitrust laws has been questioned over the years, however. There has been enormous development and increased sophistication of legal and economic analysis under the antitrust laws in the half century since the Act was passed. Consideration of procompetitive effects and careful economic and competitive analysis is now deeply ingrained in the relevant jurisprudence. Not only do the cases provide guidance that joint ventures can be procompetitive, such as when they involve,

for example, risk sharing or activities that cannot be undertaken as efficiently separately, but similar guidance is also reflected in business review letters issued by the DOJ and in DOJ/FTC antitrust guidelines relating to the health care sector.

The DOJ has been on record in support of narrowing the McCarran-Ferguson antitrust exemption for a number of years. Indeed, in 1977 the DOJ issued a report which concluded that “the insurance industry should be able to conduct its business within the federal antitrust laws without any special exemption. Antitrust precedent indicates that insurance companies could pool their loss experience consistent with federal antitrust standards. Moreover, the federal antitrust laws would not prohibit the trending of future losses on a composite basis by advisory organizations that were independent of the companies they were serving. Likewise the antitrust laws would not prohibit those voluntary risk-sharing arrangements, such as insurance pools and reinsurance agreements, that were either necessary to the conduct of business or served some other legitimate business purpose without substantially lessening competition.” Over the past twenty years, Congress has considered numerous proposals to repeal or narrow the exemption.

FTC Enforcement in the Insurance Sector

The FTC has brought cases in the insurance sector to halt anticompetitive conduct that is not exempted by McCarran-Ferguson Act. In 1986, the FTC charged the Independent Insurance Agents of America, Inc. and two of its affiliate organizations with urging their members to boycott insurance companies that sold low-cost policies directly to consumers. The charges were settled by consent orders that prohibited the anticompetitive conduct.⁵

Commission enforcement also has helped to clarify the scope of the McCarran-Ferguson exemption. Two cases narrowed the definition of what constitutes “the business of insurance.” In *American General Insurance Co. v. FTC*, a federal district court declined to enjoin the FTC’s challenge of a merger of two companies engaged in the business of insurance and to declare that the McCarran-Ferguson Act barred the FTC’s exercise of subject matter jurisdiction. The court agreed with the FTC position that the “business of insurance” does not include mergers since it does not concern the regulation or protection of the relationship between the insurance company and the policyholder. In *Ticor Title Insurance*, the FTC successfully established that the services provided by title insurance companies do not qualify as the “business of insurance” under the “three-prong test” established by the Supreme Court⁶ and prohibited six title insurance companies from collectively establishing through private rating bureaus uniform rates for title search and examination services and settlement services.⁷

NOTES

- 1 Under the state action doctrine, private action taken pursuant to a clearly articulated policy of one of the U.S. states to displace competition and subject to the active supervision of the state is immunized from antitrust liability.
- 2 The Court has said that the Act's requirement is satisfied as long as the state statute is not a "mere pretense" at regulation. However, regulation by a state of the activities of its domiciliary insurance companies outside the state is insufficient to allow the Act to preempt federal law since the Act contemplates regulation by the state in which the activity is practised and has its impact. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, on remand, 298 F.2d 820 (8th Cir. 1962).
- 3 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).
- 4 *American General Insurance Co. v. FTC*, 359 F.Supp. 887 (S.D. Tex. 1973); *Maryland Casualty Co. v. American General Insurance Co.*, 1964 Trade Cas. 71,188 (D.D.C. 1964).
- 5 *Independent Insurance Agents of America, Inc.*, Docket C-3197, 108 F.T.C. 87 (August 25, 1986); *Independent Insurance Agents and Brokers of California, Inc.*, Docket C-3198, 108 F.T.C. 93 (August 25, 1986); *Independent Insurance Agents Association of Montana, Inc.*, 108 F.T.C. 99 (August 25, 1986).
- 6 359 F. Supp. 887, 896 (S.D. Tex. 1973). The Court also held, as did the Commission in its interlocutory order, that the McCarran-Ferguson Act does not preclude federal antitrust scrutiny of insurance company mergers, even when those mergers are regulated by the relevant states, because the territorial limits on the individual state's regulation make that regulation inadequate to review the effects of mergers whose impact is felt beyond the borders of the regulating states. *Id.* at 894-96.
- 7 *Ticor Title Ins. Co.*, [FTC Complaints & Orders -- 1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,744 (FTC Oct. 19, 1989), vacated, 922 F.2d 1122 (3d Cir. 1991), rev'd 504 U.S. 621 (1992), on remand, 998 F.2d 1129 (3d Cir. 1993), cert. denied, 510 U.S. 1190 (1994); *see also* *First American Title Insurance Co.*, Docket No. 9190 (May 6, 1987) (consent order). The antitrust exemption under the state action doctrine also was an issue in that case. The court upheld the Commission's order prohibiting the companies from fixing prices except in two states where the elements of the state action doctrine were fulfilled and thereby insulated the companies from antitrust liability.

EUROPEAN COMMISSION

Part I

Competition Law and Enforcement issues

Introduction

In applying the competition rules of the EC Treaty to the insurance sector 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 have otherwise 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 Members 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 51 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 between insurers

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 ascertain ed 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 that the Commission has 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.

Agreements 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

volume of reliable data on the basis of their own business alone and therefore seek to 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 agreements. 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 that is more detailed than what it is 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 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, common statistics should always indicate that they are purely illustrative.

Standard policy conditions

Measures to increase the 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 the comparison of 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 client's 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 “black list” 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 the 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 per cent of the market for co-insurance pools and 15 per cent 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 the 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 agreement 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 to pay each 50 per cent of damages suffered by the parties without inquiring whose client is guilty. Other agreements include rules of direct reimbursement 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 handling more efficiently 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 outweigh the 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 comparability 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 its premium.

Until now the Commission has not yet 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.

Until April 1998, 51 concentrations in the insurance sector have been assessed by 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. Regarding 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 competitiveness 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 past as well as the Commission's current priorities in this sector. As to the near future, the Commission has the duty to submit a report to the Council and to the Parliament on the functioning of Regulation 3932/92 in 1999. This mid term review of the Insurance Block Exemption Regulation will certainly launch a debate on the Commission's policy in the insurance sector and on the changes in this policy that may appear necessary in the light of experience and in view of new market conditions and recent developments in this sector.

EUROPEAN COMMISSION

Part II

Implementation of the Single Market Programme in the Insurance Sector

Introduction

The basic legal framework for the single insurance market has been created by three generations of life and non-life Directives and the Insurance accounts directive. Although it is all too easy to look around and see the imperfections in the single insurance market, it is important not to forget what has already been achieved. The single insurance market is probably one of the most liberal insurance markets in the world.

First Generation of Directives

The first life and non-life Directives¹ were adopted in the 1970s and provided for the free exercise of the right of establishment. Insurers could establish branch offices throughout the EU under a stream-lined procedure without being subject to substantial barriers or excessive restrictions in the host Member State.

Such a system needed to operate on a basis of mutual confidence. Supervisors had to be certain that insurers, wherever they were located in the Community, were able to meet their contractual liabilities. It was essential that insured and third parties were adequately protected by requiring insurance undertakings to establish certain minimum financial guarantees. Consequently, insurers writing business in the EU were obliged to constitute a common solvency margin² and a minimum guarantee fund to act as a financial buffer to the adverse fluctuations in their business experience. At the same time a system permitting close co-operation between the different national supervisory authorities was instituted.

Second Generation Directives

Although the general freedom of provision of services, was theoretically permitted under the terms of Article 59 of the Treaty of Rome, in practice the cross-border sale of insurance proved much more difficult for a variety of reasons. Very simply, under the freedom of services, a customer would be able to purchase insurance cover on a cross-border basis using a policy whose specific contractual conditions and terms might be illegal, if the same policy were marketed directly in the host country. Obviously if the freedom of services was to have real value, then it would require a much greater degree of mutual confidence and recognition by national supervisory authorities.

Clearly Member States were concerned that an overly liberal application of the principle of freedom of services might be prejudicial to the protection of national consumers interests. The discussions were difficult and it was only after a further 10 years that real progress was possible, spurred on by a number of landmark court decisions taken by the European Court of Justice at the end of 1986.

The essential result of the Court's rulings was confirmation that not all customers required the same degree of protection. A distinction could be drawn between industrial and mass risks. In the former

case, knowledgeable professionals were buying insurance products on a business-to-business basis. They did not require the same degree of protection as uninformed, individual consumers buying mass risk products.

Therefore under the second non-life Directive³, for industrial risks in a host country, insurance could be purchased under freedom of services using a policy subject to only home country supervision. The insurer would of course be obliged to inform the supervisory authorities in the host country through a formal notification procedure but, unlike the previous situation, there would be no prior control of policy conditions and premiums by the host country authorities.

This approach was also extended to the case of passive sales in the area of life insurance. Here the insurance undertaking was taking a purely passive role and the customer was making a conscious choice to seek out and purchase a life insurance product marketed in another Member State. But given the desire to afford a general protection to all consumers in the host country, such approval could not be granted for active sales by the home country insurer.

Third Generation Directives

The third generation of life and non-life Directives⁴ ushered in the single passport system whereby a company approved to conduct business by the insurance supervisory authorities in any Member State automatically was entitled to engage in the same business in any other Member State. Obviously, at the supervisory level this gave real effect to the creation of a single insurance market.

Insurance companies could now sell freely across national borders without any prior approval of tariffs and policy conditions⁵. The principle of mutual recognition enshrined in the single passport system represented a considerable strengthening of the acceptance by national supervisory authorities of the mutual recognition principle.

To gain approval from all Member States, further harmonisation was required under the Third Directives. This related to matters such as: the establishment of technical reserves, the valuation of assets, more detailed rules for the existing solvency margin requirement, the 'fit and proper' nature of managers and the identity of the shareholders of an insurance company. Furthermore, the fact that insurance undertakings could now freely sell on a cross-border basis meant the dismantling of some national monopolies for the sale of insurance.

The Consolidated Insurance Accounts Directive

Mention should also be made of the Consolidated Insurance Accounts Directive⁶ adopted in 1991. This established harmonised provisions relating to the preparation of consolidated accounts, the determination of profits and the evaluation of technical provisions. This Directive improved transparency and facilitated the comparison of the financial position of an insurance undertaking in the single insurance market, although in fairness, the position is complicated by the range of options open to Member States.

Insurance Intermediaries

A Directive on insurance intermediaries was adopted as long ago as 1976. The Directive facilitates, to a certain extent, cross-border market access by intermediaries by providing for the mutual recognition of professional experience, good repute and non-bankruptcy. Currently the Commission is conducting a review of this Directive⁷.

Reinsurance

Reinsurance generally is not regulated at EU level although the very first Directive in the insurance field which dates back to 1964 provided for the non-discriminatory access by reinsurers to Member States' markets, both on a freedom of establishment or provision of services. The basic Commission philosophy at the moment is that reinsurance is a specialist activity undertaken by knowledgeable professionals, where consumers are not directly concerned. It does not therefore require specific EU legislation.

Conclusion

In conclusion, the three generations of life and non-life Directives have created the basic framework for the creation of the single insurance market has been established. In our view the basic foundation is in place and many of our current activities centre on improvements to the existing regulatory framework. However, in closing, there are two points to note:

First, the focus today is competition and the mere adoption of legislation is not sufficient to bring a new market into existence. The Commission is aware that other barriers to a truly fully integrated single insurance market still exist. For example cultural differences, although intangible, can be significant, distribution patterns can and do vary by Member State and a local presence may be vital to serve customers, process claims and generally handle administration. Moreover, other barriers in relation to subjects such as contract law, taxation and national consumer protection exist and the advent of the EURO will throw a spotlight on these.

Secondly and lastly, there are many regulatory challenges ahead, including globalisation, information technology, EU enlargement and financial services integration.

NOTES

- 1 First non-life Directive 73/239/EEC, OJ L 228 16.8.73 and first life Directive 79/267/EEC, OJ L 63 13.5.79.
- 2 Calculated on the higher of a premium or alternative claims basis for non-life business or on the mathematical provisions and capital at risk for life business.
- 3 Second non-life Directive 88/357/EEC, OJ L 172 4.7.88 and second life Directive 90/619/EEC, OJ L 330 29.11.90.
- 4 Third non-life Directive 92/49/EEC, OJ L 228 11.08.92 and third life Directive 92/96/EEC, OJ L 360 9.12.92.
- 5 This did not apply for compulsory insurance, *e.g.* in the social security field.
- 6 Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of Insurance Undertakings, OJ L 374, 31.12.91.
- 7 Council Directive 77/92/EEC, OJ n° L 26/14 of 31.1.1977.

BIAC

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Competition And The Regulation Of Insurance In The United States

Introduction

At the outset, it is important to note that there is no single “insurance industry” or “insurance market” in the United States. Rather the business of insurance is comprised of a variety of varied products that take all or part of the risk of a particular event or course of conduct. These insurance products often are grouped into the following major categories: (1) life insurance, (2) health insurance, and (3) liability insurance. Within these major categories are numerous different insurance products. For example, within liability insurance there can be general liability insurance, directors and officers insurance or specific liability insurance, such as automobile, aviation or maritime. And within these specific coverages there may be a variety of products. Moreover, the number of insurers offering coverage varies greatly from product to product.

Nevertheless there are two critically important common features of insurance regulation in the United States. First, most insurance regulation is state-based rather than the subject of national (“federal”) regulation. Although there is considerable cooperation and a fair amount of uniformity across states, the United States does not have “United States insurance regulation” in the same way that it has “United States securities regulation” and “United States environmental regulation.”

The fact that the business of insurance is state regulated, rather than federally regulated, is the product of the United States “federalism” scheme of government rather than a conscious decision to favor state by state regulation over national regulation. Under United States federalism, the Constitution recognizes two sovereigns, the state and the national government. The presumption is that the state sovereign governs unless there is a nexus with interstate commerce. First in 1868 and then twice thereafter, the United States Supreme Court held that the business of insurance was not interstate commerce, but rather local commerce to be governed by the states. As a consequence, the states were free to regulate and tax insurers. By the 1940s, taxation of insurers was the single largest source of revenue to the states. Thus, when the Supreme Court reversed itself in 1944, ironically in an antitrust action under the federal Sherman Antitrust Act, and held that the business of insurance was “in or affecting interstate commerce”, the states faced the loss of a significant source of revenue. Utilizing their own trade association, the National Association of Insurance Commissioners (the “NAIC”), the states drafted and the next year with a few modifications Congress enacted legislation, the McCarran-Ferguson Act, exempting the business of insurance from federal antitrust laws to the extent regulated by state law. Since 1945 the states in the United States have continued to be the regulators of insurance even as taxation of insurance has declined as a relative source of revenue to state treasuries. Attached hereto as Appendix A is a summary of the McCarran-Ferguson Act and of recent judicial decisions interpreting the Act.

1 The author with gratitude acknowledges the assistance in the preparation of this paper of his colleagues Kenneth S. Abraham and James D. Wareham.

Second, over time, and often at the same time even within the same state, states oscillate between two regulatory models. The first of these is a *competition* model, under which the operative assumption is that a competitive insurance market will generate optimal prices and insurance products that satisfy consumer demand. Where this model dominates, the principal regulatory focus is on determining whether and where there is adequate competition, and regulating only in those areas where competition is inadequate. The second model is a *public-utility* model, under which the operative assumption is that insurance is so affected by the public interest that insurance markets cannot be trusted to generate optimal prices or to satisfy consumer demand for insurance products. Where this model dominates, the regulatory focus is on scrutinizing premium rates to assure that they are not “excessive”, and on mandating and constraining the terms and conditions of coverage.

Thus, although considerable generalization about “United States insurance regulation” is warranted, such generalization must always be with a note of caution. The United States has fifty systems of regulation, not one. This diversity of regulatory regimes means that making the United States a full partner in the globalization of insurance poses a special challenge. Domestic and non-domestic insurers face fifty different state regulatory regimes when entering the United States market. As a consequence, there is a unique transactional cost that insurers pay to do business in the United States. Thus, as a practical matter there may be higher costs and more hurdles for insurers to do business in the United States than in many other countries.

Against this background, this paper provides a statistical and structural overview of the United States insurance industry, discusses state regulation schemes, describes the judicial role in the determination of the rights and duties of insurers in the United States, and concludes with an assessment of the current state of United States insurance regulation.

The Nature of United States Insurance Markets

Structure and Performance

Insurance plays a major role in the economy of the United States. Gross premiums exceeded \$431 billion in 1988 and approached \$600 billion in 1996. Indeed, nearly 40 percent of all premiums paid worldwide are paid by United States insureds. The market capitalization of large insurance companies varies from state to state and from line to line of insurance. For example, the largest property and casualty insurer in 1990, State Farm, had a market capitalization of \$27 billion and the largest life insurer in 1990, Metropolitan Life, had a market capitalization of \$7 billion. The insurance industry has been profitable in recent years, but not excessively so, in light of the performance of other major industries in the United States. The United States insurance industry has been dominated by consolidation in the 1990's. Indeed, in 1997 life, health and property and casualty insurers closed 38 transactions larger than \$25 million and the total value of these 32 transactions was \$20.2 billion.

In short, based on these indicia of structure and performance, the insurance industry in the United States overall is highly competitive. Recent mergers of insurers in the United States appears to be driven predominantly by the need to be more competitive by becoming more efficient, rather than by any concerted plan to restrain trade by monopolizing market share. For example, competition in the health insurance and high-volume liability insurance markets is so vigorous that over time only the most efficient insurance enterprises are likely to thrive, or even survive. As a consequence, current and future merger activity in these and other lines is most likely to represent the natural process of consolidation that takes

place in an industry comprised of companies with varying degrees of efficiency that are responding to market forces.

In addition, certain mergers between insurers and related financial services companies reflect the ongoing disintegration of the distinction between companies providing different kinds of financial services, such as insurance and banking. Such mergers have the potential to generate economies of scale and scope that will ultimately benefit consumers as competition forces the efficiencies to be passed on to consumers. Of course, any merger of sizable insurers benefits competition only as long as the merged company continues to have strong competition from other companies in both of the industries in which the new company will do business.

Related Product Markets

Banks

The United States banking industry is involved in the field of insurance in several ways at present and may reach even greater levels of involvement in the coming years. The current regulatory system allows banks to participate in the insurance industry only in a limited manner. However, pending federal legislation may extend banks' ability to participate in the insurance market in the future.

As the boundaries between the products and services offered by banks, security firms, and insurance companies blur, United States lawmakers are realizing that the regulatory system may need to be altered. At present a bill which would reform the system of regulation awaits hearings in the Senate, having passed in the House by a narrow margin of one vote. The bill would allow the combination of banking, insurance and securities companies as affiliates under a holding company structure, although banks would not be allowed to establish subsidiaries to underwrite insurance. The bill would establish specific guidelines concerning the insurance products banks and other financial institutions could offer, and would preempt state laws prohibiting affiliations between insurance companies and banks. The bill would create a functional form of regulation to replace the current industry specific system. States would regulate all insurance-related activities of banks, as long as the regulations do not "significantly interfere" with the banks' ability to sell insurance. Courts would resolve disputes over whether new products were insurance, to be regulated by the states, or financial products subject to other regulatory standards.

The prospects for enactment of this bill are uncertain. President Clinton has threatened to veto the legislation because it does not allow bank subsidiaries the same powers as affiliates under a holding company. Further, some banks are displeased with the current form of the legislation and are lobbying against it.

Health Care

Health care insurance, including managed care, are regulated by the states and somewhat by federal law. Traditional insurance reimbursement-based systems, and managed care, including prepaid plans such as HMOs or limited access networks such as PPOs, are generally regulated by the individual state insurance authorities. However, various federal laws impose conditions on health insurance policies and federal laws governing employee benefit plans also regulate the providing of health care services in some instances preempting state law.

The regulatory scheme is further complicated when health care is provided by an employer. Most employer-provided health care is governed by the federal Employee Retirement Income Security

Act, or “ERISA”. ERISA was enacted to protect the interests of employee benefit plan participants and beneficiaries by requiring the disclosure and reporting of financial and other information and by providing remedies, sanctions, and access to the federal courts. ERISA establishes standard rules for employer-provided health plans by broadly preempting “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. However, the law's “savings clause,” providing that “nothing in [ERISA] shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities,” effectively creates two distinct regulatory schemes. One set of rules applies to health care plans provided through an insurance policy by an employer, and the other set applies to health care paid for or provided directly by the employer.

Health care provided through an insurance policy paid for by the employer is considered insurance and must comply with all state laws that regulate insurance, in addition to complying with ERISA rules regarding plan administration. Health care paid directly by the employer (“self-funded” care), on the other hand, is generally exempt from compliance with state insurance laws. In many cases, self-funded plans may contract with an insurer or other entity, which manages medical care in an administrative capacity under the plan. Such contractual arrangements do not jeopardize the exempt status of the plan.

Some employer health plans are basically self-insured but purchase an insurance policy to protect against catastrophic loss. Courts are split over the application of the ERISA preemption to these plans; some courts have found them to be insured and therefore subject to state regulation, and others have ruled that state regulations do not apply.

Insurers and their representatives generally prefer ERISA federal law application over state law, while insureds are not as pleased with the system. Benefits of ERISA application include federal court jurisdiction, no right to a jury trial, limitation on causes of action and preemption of most state law claims, no extra-contractual or punitive damages, and a more lenient standard of review. On the other hand, many areas of ERISA law, particularly where the relationship between ERISA and state law is concerned, are unsettled at present. Courts currently are split over many issues, creating an uncomfortable situation for insurers which today have to face such uncertainty and a lack of predictability in doing business.

State Regulation of Insurers Doing Business in the United States

Administrative Regulation

Each state in the United States has the authority to license insurers doing business within its borders, and to regulate rates, solvency, policy terms, and anticompetitive activity by these insurers. In most states, in addition, a “surplus” lines market of unlicensed insurers is permitted to operate largely outside the confines of state regulation. Surplus lines insurers -- including captives and other insurers domiciled offshore -- are permitted to market insurance coverage in lines where coverage is not otherwise readily available from licensed insurers. But licensed insurers have the advantage of direct access to potential consumers as well as the imprimatur of state licensing and regulation.

Typically, regulation occurs under the authority of an administrative agency, headed by an “Insurance Commissioner.” States often cooperate in the regulation of multi-state insurers, however, under the auspices of the NAIC. Cooperation is especially strong in the regulation of the financial condition of insurers in order to assure solvency. But as noted earlier, the existence of fifty different regulatory regimes inevitably increases the cost of doing business in the United States.

Information Sharing

In the United States the property/casualty insurance industry shares information regarding past losses and costs, through an organization known as the Insurance Services Office (“ISO”). ISO is the successor of the “rate bureaus” that once dictated prices, until this practice was held to be “in or affecting” interstate commerce and thus subject to the Sherman Antitrust Act in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). ISO is not a rate bureau and its activities have been closely scrutinized by federal and state antitrust enforcers.

The sharing through ISO of data on past losses and costs has pro-competitive effects. First, insurers can use this data to decide what rates to charge for coverage. Small insurers especially may find the availability of such data a necessary condition of doing business in multiple lines of coverage. Second, even the largest insurers may not have sufficient data on losses and claims in certain lines of coverage to support accurate, reliable pricing. With industry-wide data available, however, insurers may have more confidence entering markets that they would otherwise avoid. The result is reduction, or even the complete elimination, of this barrier to entry into such markets. Finally, the insurance policies issued by property/casualty insurers are standard-form policies. That is, these policies contain identical, or nearly identical provisions. If this were not so, the sharing of past loss information would be meaningless, because the information would concern losses paid under different kinds of policies. The combined use of standard-form policies and the sharing of information about losses under those policies makes possible comparison price-shopping by policyholders. If standard-form policies were not the norm, such comparison shopping would be impossible, and vigorous price competition would be impeded.

There is no parallel system of information sharing within the health and life insurance industries. Inasmuch as health insurance is mainly employment-based, employers provide different, non-uniform forms of coverage that renders information sharing less significant. And the mortality data that is so essential to life insurance is already available from other sources. For both reasons, the property/casualty lines engage in far more such information sharing than life and health lines.

The Politics of Regulation

There is consideration regulation in many states of rates and policy forms in certain high-volume consumer markets. Auto insurance is the principal example. Even here, robust competition is the major means by which rates are kept at an optimal level. Health insurance -- another high-volume line -- is provided largely, though not entirely, on a group insurance basis in association with one's employment. Sizable employers have considerable market power and are therefore able to shop for competitive packages of health insurance coverage for their employees. However, many states have enacted “mandated benefits” laws requiring every health insurance policy to provide certain specified forms of coverage (*e.g.*, maternity benefits or coverage of AIDS-related treatment). The cost of satisfying these requirements may sometimes result in small employers being unable to provide health insurance for their employees.

Thus, often there is an overlay of local consumer issues impacting insurance in individual states. This leads to a diversity of regulatory treatment of the same phenomenon rather than uniformity. Occasionally there is even electoral involvement in insurance regulation. In California in 1987, “Proposition 103” was enacted by direct vote. Among other things, this measure mandated a twenty-percent reduction in all insurance premiums within the state. Similarly, the 1997 election for

Governor in the state of New Jersey turned heavily on the candidates' proposals for containing the cost of auto insurance.

Judicial Regulation

Even after a state insurance commissioner has approved (or declined to disapprove) an entire insurance policy, substitute provision, or endorsement, the courts may play a major role in regulating the terms and conditions of coverage. Judicial "regulation" of a sort occurs in insurance coverage disputes that end up in lawsuits. In such suits, courts frequently interpret the meaning of contested policy provisions, occasionally even invalidating provisions that violate public policy or the reasonable expectations of the majority of policyholders.

These lawsuits are governed for the most part by the common law of insurance in each state, even when the suits are brought in federal courts because of the parties' diversity of state citizenship. For example, there has been considerable litigation in the United States courts over the scope and meaning of health insurance exclusions of coverage for "experimental" treatment for breast cancer and other diseases. There have also been massive lawsuits brought by major industrial corporations against dozens or even hundreds of Commercial General Liability ("CGL") insurers over asbestos and other toxic tort liabilities, as well as the cost of coverage for cleanup of hazardous waste deposit sites under the "Superfund" Act. In each instance, the court -- sometimes in a case tried before a jury -- must interpret and apply the individual insurance policies at issue.

The result is an ongoing dialog among the courts, insurance companies, and Insurance Commissioners over the scope of coverage provided by insurance policies. The courts are highly interventionist, although judicial activism has leveled off. Many judges now have a greater trust of the insurance market than in the past, and a greater appreciation that judicial intervention can produce unanticipated side effects that the courts cannot control, such as the disappearance of coverage.

Conclusions

There is a stable equilibrium in the United States in the allocation between the states and the national government of regulatory authority over insurance. With the possible exception of scrutiny of inter-industry mergers (such as between banks and insurers), that is unlikely to change in the foreseeable future. Most insurance regulation will continue to occur at the state level.

At present, robust competition is employed as the principal means the states use to regulate premium rates, and to a lesser degree, the terms and conditions of coverage. The managed care revolution in the health insurance industry of the last decade is a prime example of market forces at work. Much tighter control over cost increases and quality of care has been achieved, without significant governmental intervention or regulation. Although some new regulation, primarily in the area of consumer and patient welfare, may occur, overall "competition" will continue to predominate. Market forces have been permitted to substantially shape the contours of the United States health care system over a decade now with the consequence that the increase in health costs is declining and the health care delivery system in the United States is much more efficient. In contrast, governmental regulation is the principal means of assuring the financial reliability and solvency of insurers.

The United States regulatory structure, however, has paid relatively little attention to the international-financial, or extraterritorial-legal, implications of global changes in the insurance business.

The United States has no central regulatory mechanism in place for doing so. The state-by-state approach is an inherently weak means of addressing international considerations. And the absence of a base of regulatory experience at the national level makes a systematic federal initiative unlikely.

Therefore, insurers and other business whose activities intersect the international insurance markets are likely to face a patchwork quilt of ad hoc domestic and overseas regulatory hurdles and considerations as they attempt to do business. Given the willingness of the United States judicial system to engage in quasi-regulation, it is distinctly possible that not only business planning, but also litigation avoidance and/or strategy will become a necessary feature of the calculations that businesses in this position must make.

Recommendations

There should be a presumption in favor of competition over regulation. Experience demonstrates that competition is a more efficient regulator and market forces with antitrust/competition laws as a referee produce a more efficient industry. In the end, consumers benefit by having a greater number of choices at lower prices. That is not to say that governmental regulation has no place. Clearly regulation of consumer welfare needs that competition is unlikely to protect is warranted. Thus, for example, regulation requiring insolvency insurance may be appropriate.

There are a number of areas where United States and OECD country cooperation may have promise.

- Development of reciprocity arrangements for certain forms of regulation
- Regularization of regulatory procedures
- Consolidation of data collection efforts

In these and possibly other areas of mutual interest, efforts at bringing the different approaches to insurance regulation into greater harmony could lay the groundwork for a truly global insurance system.

The McCarran-Ferguson Act

Enacted in 1945, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), exempts the business of insurance from the federal antitrust law to the extent such business is regulated by state law. But the McCarran Act is limited by its own exception that the exemption does not extend to “any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.” 15 U.S.C § 1013(b).

The “business of insurance” requirement

In *S.E.C. v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court found that the McCarran Act, even apart from the boycott exception, did not exempt from federal regulation all activities of insurance companies. The McCarran Act exempted the “business” of insurance, not insurance companies. Not all acts of insurance companies were the business of insurance. The Court considered what constitutes the business of insurance and determined that the relationship between insurer and insured was at the “core” of the business of insurance. The Court enumerated certain acts which clearly were the business of insurance: fixing of rates between insurer and insured, selling and advertising of policies, and licensing of companies and agents. Beyond those enumerated acts, the determination must be based upon the relationship between insurer and insured. Acts within the scope of that relationship or closely related to that relationship are within the business of insurance.

The Supreme Court has made clear that not all aspects of a third-party provider contract are within the McCarran Act. In *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979), aff'g 561 F.2d 262 (5th Cir. 1977), the Supreme Court found that fixing of prices between Blue Shield and participating pharmacies did not involve an insurance relationship between insurer and insured. Plaintiffs challenged Blue Shield's prepaid prescription drug policy which entitled insureds of Blue Shield to purchase drugs from any pharmacy. Blue Shield had entered into agreements with pharmacies to provide pharmaceutical services. If the insured purchased from a participating pharmacy, the insured paid only two dollars, the policy deductible amount. If the insured used a non-participating pharmacy, the insured paid full price, and then was reimbursed to the extent of 75 percent of the price exceeding the two dollar deductible amount. Blue Cross limited its payment to participating pharmacies to two dollars above the pharmacy's cost. This two dollar markup was called a “professional dispensing fee.” Blue Shield argued that the fixing of prices was directly related to its relationship with insureds, in that, it contained costs, thereby reducing premiums. The Supreme Court rejected the cost containment argument.

Similarly, in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), the Court held that the use of a peer review committee to determine the reasonableness of chiropractic charges did not constitute the “business of insurance” within the meaning of the McCarran Act. The Court reiterated the three criteria, outlined in *Royal Drug*, said to be relevant in determining whether a particular practice is part of the “business of insurance” (*i.e.*, whether the practice has the effect of transferring or spreading a policyholder's risk, whether the practice is an integral part of the policy relationship between the insurer and the insured, and whether the practice is limited to entities within the insurance industry), and found that the peer review procedure met none of the criteria.

A recent pre-Pireno Federal Trade Commission opinion letter, however, advises that a peer review plan would not violate antitrust laws if certain safeguards are followed. Advisory Opinion Letter to Peter M. Sfikas, 99 F.T.C. 648 (1982). Among the suggestions included are the selection of a consumer representative to be on the panel, stressing the voluntary and advisory nature of the peer review process, and making clear that no preferred status is conferred upon participants or non-preferred status conferred upon non-participants.

The Blue Cross/Blue Shield system of contracting to provide health care services, rather than indemnifying costs of health care services, has been found to be the business of insurance. *Ocean State Physicians' Health Plan v. Blue Cross and Blue Shield of Rhode Island*, 883 F.2d 1101, 1108 (1st Cir. 1989), cert. denied, 110 S. Ct. 1473 (1990); *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1028 (8th Cir. 1988); *Frankford Hospital v. Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104, 1106 (E.D. Pa. 1976), aff'd per curiam, 554 F.2d 1253 (3d Cir.), cert. denied, 434 U.S. 860 (1977).

The “regulation by state law” requirement

The Supreme Court has suggested that this requirement is satisfied by general standards set by the state. See *Federal Trade Commission v. National Casualty Co.*, 357 U.S. 560, 564-65 (1958).

Lower courts have applied the “general standards” requirement fairly broadly. See *Ocean State*, 883 F.2d at 1109 (state did not have to approve specific elements of HMO and adverse selection policy); *In re Workers' Compensation Antitrust Litigation*, 867 F.2d 1552, 1559 (8th Cir. 1989), cert. denied, 492 U.S. 920 (1989) (“The fundamental issue is whether a general prohibition providing an insurance commissioner with authority under a state unfair method of competition or unfair practices act is regulation under the McCarran-Ferguson Act.”), cert. denied, 493 U.S. 818 (1989); *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419, 421 (4th Cir. 1984) (“A body of state law which proscribes unfair insurance practices and provides for administrative supervision and enforcement satisfies the state requirement of the exemption.”).

The “boycott, coercion, or intimidation” requirement

Much of the case law interpreting this provision focuses on the “boycott” rather than the “coercion or intimidation” aspect of the exception. See, e.g., *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993) (complaint sufficiently alleged statutory boycott exception); *St. Paul Fire and Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978). The holding of these decisions is that a boycott is a refusal to deal in aid of achieving a purpose unrelated to that refusal to deal. In effect, a boycott is a tactic designed to coerce a target into cooperating in connection with a separate transaction. The effect of these decisions is to confirm that much insurance industry activity that might otherwise violate the U.S. antitrust laws is in fact exempt from those laws.

“Coercion” does not generally include situations where options have not been entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive. See *Ocean State* (attempt to lure subscribers from competing HMO by offering favorable rates for traditional indemnity coverage did not amount to coercion); *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir. 1983), cert. denied, 464 U.S. 822 (1984) (policy that insureds use provider's pharmacy to receive benefits did not constitute coercion where insureds were not precluded from using other pharmacies). In *Feinstein v. NettleShip Co. of Los Angeles*, 714 F.2d 928 (9th Cir. 1983), cert. denied, 466 U.S. 972 (1984), it was held that a medical association's agreement with

insurers to offer malpractice insurance through an exclusive broker to association members was not a boycott where the agreement did not restrict members from dealing with other insurers, even though participation in the plan was restricted to members only.

Recent opinions of lower courts, as well, indicate that the McCarran-Ferguson insurance exemption will be narrowly construed. In *Hahn v. Oregon Physicians Service*, 689 F.2d 840 (9th Cir. 1982), cert. denied, 462 U.S. 1133 (1983), the court held that the exclusion of podiatric services from health plan coverage could not be justified by risk-related reasons and was therefore not at the core of the business of insurance. In *Portland Retail Druggists Association v. Kaiser Foundation Health Plan*, 662 F.2d 641 (9th Cir. 1981), cert. denied, 469 U.S. 1229 (1985), the court held that contractual arrangements and conditions by which HMOs acquired drugs from manufacturers, wholesalers, and distributors were not within the business of insurance, thereby rendering the requirement that customers buy HMO drug plans in order to obtain health plans amenable to suit as a tying arrangement. In *Nurse Midwifery Associates v. Hibbett*, 549 F. Supp. 1185 (M.D. Tenn. 1982), the court held that the concerted activities of defendant obstetricians and a provider of malpractice insurance effectively denying coverage to physicians who associated with nurse midwives was not the business of insurance. In *Kartell v. Blue Shield of Massachusetts*, 542 F. Supp. 782 (D. Mass.), appeal dismissed, 687 F.2d 543 (1st Cir. 1982), the court held that an arrangement between Blue Shield and participating doctors, whereby the doctors would accept stipulated amounts as payment in full, involved some risk, in that the doctors would only receive a pro rata share if funds were insufficient, but was not enough to qualify as the business of insurance. In *Blue Cross of Washington and Alaska v. Kitsap Physicians Service*, 1982-1 Trade Cas. (CCH) ¶ 64,588 (W.D. Wash. 1981), the court held that a bylaw of a health insurance provider, denying membership to any surgeon or physician who contracts to provide services to any health care provider which utilizes a closed panel, was not exempt from antitrust scrutiny under the McCarran Act.

COMITE EUROPEEN DES ASSURANCES

Questions qui se posent en matière d'application de la législation de la concurrence dans le secteur des assurances

Une certaine coopération entre assureurs - notamment à travers leurs organisations professionnelles - est indispensable, dans l'intérêt même des consommateurs, au bon fonctionnement du service d'assurance. Il faut en définir la juste mesure, pour garantir le maintien d'une réelle transparence des marchés, sans pour autant fausser ni la concurrence, ni lui apporter de restriction substantielle.

Dès juillet 1987, la Commission européenne (DG IV) a déterminé en très étroite concertation avec le CEA les formes de concertation et les pratiques professionnelles qui appelaient un traitement particulier au regard des règles de la concurrence.

La Commission avait en effet reçu des Associations nationales d'assurance plus de 300 notifications par les Associations nationales d'assureurs. Leur examen a fait apparaître que le traitement individuel de chaque cas était très lourd matériellement et disproportionné au regard du but poursuivi : une large part des accords notifiés était en effet susceptible de bénéficier - malgré leur effet restrictif de concurrence - d'une exemption aux termes de l'article 85, par. 3 du Traité¹. Une réponse globale devait pouvoir se substituer, dans une certaine mesure, à des réponses au cas par cas ; il convenait pour cela de définir les types d'accords pouvant bénéficier d'une exemption automatique, ainsi que les conditions attachées à ce régime.

Il s'agissait d'abord de permettre aux Associations et groupements professionnels de se mettre en règle avec les dispositions communautaires de la concurrence en notifiant les accords, recommandations et décisions qui liaient les assureurs sur leur marché et qui, bien que justifiés par la technique de l'assurance, étaient susceptibles d'être considérés comme une entrave à la libre concurrence dans l'espace communautaire. Ensuite, les assureurs souhaitaient présenter à la Commission une argumentation technique expliquant ces pratiques professionnelles (meilleure appréciation des risques, meilleure comparabilité des produits, augmentation de la capacité de souscription, etc.).

L'objectif était d'aboutir à un Règlement d'exemption par catégories - au titre de l'article 85, par. 3 du Traité - spécifique à l'assurance. Il a été adopté le 21 décembre 1992² et est entré en vigueur le 1er avril 1993.

Le règlement d'exemption du 21 décembre 1992 réalise un bon compromis entre les approches et préoccupations des différents milieux concernés. La grande complexité et la technicité de la matière faisaient la difficulté d'un tel arbitrage. Les assureurs européens l'ont accueilli positivement : la réglementation adoptée donne en effet un cadre juridique et une légitimité reconnue à une série d'accords, de décisions et de pratiques concertées indispensables au bon exercice de l'assurance ; elle permet également de faire l'économie d'une notification systématique des accords qui entrent dans le cadre ainsi défini.

Le règlement vise quatre types d'accords, classiques en matière d'assurance, qui bien qu'entrant dans le champ de l'article 85 al.1 du Traité³, sont de nature à bénéficier d'une exemption par catégories aux termes de l'article 85 al.3. Les accords, décisions et pratiques concertées répondant aux conditions

fixées par le Règlement sont automatiquement exemptés, sans devoir être notifiés - en cas de doute, les entreprises peuvent toutefois notifier leurs accords. Ces conditions doivent répondre aux principes énoncés à l'article 85 al.3 : amélioration du progrès économique et technique ; bénéfique pour le consommateur ; caractère indispensable de la restriction de la concurrence pour atteindre l'objectif recherché ; maintien d'une concurrence effective sur les marchés concernés.

L'établissement en commun de tarifs de primes de risque et de conditions-types d'assurance bénéficie d'une exemption automatique à condition qu'il s'agisse de simples recommandations, dont les destinataires sont libres de ne pas tenir compte. Les calculs en commun de primes ne peuvent en outre reposer que sur des statistiques collectives ou sur le nombre de sinistres; en aucun cas, ils ne peuvent intégrer les commissions payables aux intermédiaires.

La constitution et le fonctionnement de groupements d'entreprises d'assurance ou d'entreprises de coréassurance et d'entreprises de réassurance pour la couverture en commun d'une catégorie de risques bénéficient d'une exemption automatique à condition que les produits effectivement souscrits par les entreprises participantes ne représentent pas dans le(s) marché(s) concerné(s) plus de 10 pour cent de l'ensemble des produits d'assurance identiques ou considérés comme similaires du point de vue des risques couverts ou des garanties offertes pour les groupements de coassurance (plus de 15 pour cent pour les groupements de coréassurance). Chaque entreprise participante doit être autorisée à se retirer du groupement moyennant un préavis ne pouvant excéder six mois et sans encourir de sanctions. La liste des clauses pouvant figurer dans un accord de groupement est énumérée limitativement.

L'établissement en commun, la reconnaissance et la diffusion de règles concernant la vérification et l'acceptation d'équipements de sécurité bénéficient également de l'exemption automatique à condition d'être, notamment purement indicatives. Elles doivent concerner des spécifications techniques, en particulier destinées à devenir des normes européennes, ainsi que des procédures relatives à l'évaluation et à l'attestation de la conformité des équipements de sécurité et de leur installation et entretien et doivent alors être précises, techniquement justifiées et proportionnelles aux performances à atteindre par l'équipement de sécurité concerné. Les règles pour l'évaluation d'entreprises d'installation ou de maintenances ont également visées, à condition qu'elles soient objectives, relatives à la qualification professionnelle de ces entreprises et appliquées de façon non discriminatoire.

Pour chaque catégorie d'accords visée par le Règlement, la Commission a fixé avec précision des modalités destinées à écarter tout risque d'entrave excessive à la concurrence ; dans ce domaine, la Commission surveille notamment les risques d'homogénéisation des produits, de fidélisation abusive de la clientèle, de monopolisation du marché, d'abus de position dominante...

Le règlement d'exemption est applicable 10 ans, soit jusqu'au 31 mars 2003. La Commission doit faire parvenir au Parlement européen et au Conseil au plus tard le 31 mars 1999, un rapport sur le fonctionnement du Règlement d'habilitation (cf. article 8), accompagné, le cas échéant, de "propositions de modifications qui apparaîtraient nécessaires en fonction de l'expérience acquise". Elle pourrait à cette occasion envisager l'introduction de nouvelles catégories d'accords, notamment les conventions de règlement des sinistres ainsi que les registres et l'information sur les risques aggravés, pour lesquels elle avait estimé en 1992 ne pas disposer d'une expérience suffisante pour faire usage de son habilitation d'exemption.

Une sélection des effets concurrentiels sur la réglementation des compagnies d'assurance au sein de conglomérats financiers

Le CEA préparera en temps utile une prise de position sur le document de consultation relatif à la surveillance des conglomérats financiers, préparé par le groupe "Conglomérats financiers" (Comité de Bâle + Organisation internationale des Commissions de bourse + Association internationale des contrôleurs d'assurance), présenté en février 1998. Il se prononcera notamment dans ce cadre sur le principe du "Capital adequacy".

En ce qui concerne les conditions d'exercice des opérations de retraite du deuxième pilier, domaine dans lequel assureurs vie et fonds de pension sont placés en situation de concurrence, le CEA a proposé en 1995 dans le Schéma prudentiel pour les opérations de retraites professionnelles une approche centrée sur l'opération (approche "fonctionnelle") plutôt que sur l'opérateur (approche "institutionnelle") -soumettre une opération de retraite professionnelle donnée, comportant un niveau d'engagement donné (engagement de résultat/engagement de moyen) et un niveau donné de risques (risques techniques/risques financiers) à des règles homogènes, quels que soient le support de financement et les modalités de gestion de l'opération- qui offrirait à tous les intervenants des conditions de concurrence équivalentes.

La reconnaissance de ce principe par les milieux intéressés et la Commission européenne s'est manifestée lors de l'audition sur le livre vert *Les retraites complémentaires dans le marché unique* organisée par la Commission européenne le 21 avril dernier. Elle implique que des conditions de concurrence égales ("level playing field") soient garanties en ce domaine : des opérations de retraite similaires peuvent être pratiquées par des intervenants organisés selon des raisons juridiques différentes - assureurs vie et fonds de pension, notamment ; ils n'en doivent pas moins être régis par des règles identiques.

Cette analyse a été confirmée par le commissaire Monti, qui a annoncé le 19 mai dernier son intention de présenter une directive visant à mettre en place un cadre communautaire approprié pour les régimes de retraite du deuxième pilier ; il a précisé à ce titre que des règles prudentielles identiques devraient s'appliquer à des produits équivalents, "qu'ils soient proposés par un organisme de retraite, par une compagnie d'assurance ou par un autre établissement financier".

NOTES

- 1 Exemption de l'interdiction des accords qui "contribuent à améliorer la production ou la distribution des produits ou à promouvoir le progrès technique ou économique, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte".
- 2 Règlement n°3932/92 de la Commission (JOCE n°L 398 du 31 décembre 1992) pris en application du règlement d'habilitation n°1534/91 du Conseil du 31 mai 1991 (JOCE, n° L143 du 7 juin 1991).
- 3 Interdiction des "accords entre entreprises, décisions d'associations d'entreprises et pratiques concertées susceptibles d'affecter le commerce entre Etats membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun".

QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

We would like the country submissions to focus primarily on providing an overview of how insurance regulation affects competition in this sector. There are, of course, many different forms of insurance, which may be regulated differently. From a regulatory perspective, four broad forms of insurance may be distinguished: (a) Property and Liability insurance (which includes, amongst other things, automobile, marine, aviation, homeowners, commercial, fire, workplace accidents and general liability insurance); (b) Life Insurance (including “whole” and “term” life insurance); (c) Health Insurance and (d) Reinsurance. For the purposes of the responses below it would be helpful if you could indicate where the regulatory regimes differ for each of these broad categories of insurance.

In some countries the sheer volume and complexity of the insurance regulation may prohibit complete answers to the questions below. If so, you may like to adopt either or both of the following approaches:

First, feel free, in answering the questions, to make reference to existing summaries of your regulatory regime (for example, country-specific information on solvency supervision may be found in the publication *Insurance Solvency Supervision*, OECD, 1995; country-specific information on international trade in insurance services can be found in the reservations to the OECD Codes of Liberalisation).

Second, in answering each question, you may wish to focus on those elements of the regulatory regime which are, in your opinion, most in conflict with competition (and explain how and why).

QUESTIONS

(A) *Overview*

Regulatory Rules

(A1) To provide an overview for the answers that follow, briefly describe the title, date and main purpose of any other relevant legislation (including subordinate legislation, *i.e.*, regulations). Are there any other important influences on firm behaviour such as industry self-regulatory arrangements or codes-of-conduct? Which forms of insurance are mandatory?

Regulatory Institutions

(A2) Who are the key regulatory actors in the insurance industry? (Include any relevant government ministries, independent or quasi-independent regulatory agencies, private industry associations, and so on). Briefly describe their functions and roles.

Industry Structure

(A3) Briefly summarise the key features of the insurance industry - how many firms are there? which services (both insurance and non-insurance, *e.g.* banking) do they provide? What is the market share of the largest five in each of the important markets (if known)?

(B) Regulation And Competition Issues

Barriers To Entry

(B1) Briefly describe in what ways the regulatory regime directly influences the entry decisions of firms or decisions to introduce new products into a particular market. Your answer should include a summary of any important entry requirements, costs, delays and processes that must be fulfilled for a new or existing firm to enter the insurance industry or for an existing firm to introduce a new product.

Is your answer different for firms from other countries? (or from other states of the US/member countries of the EU?) Summarise the ways in which foreign firms without a domestic “establishment” (*i.e.*, foreign firms offering insurance services on a cross-border basis) are treated differently from domestic firms? What are the main ways that foreign firms are treated differently for the purposes of establishment?

Competition With Substitutes

(B2) Which products offered by other sectors compete with insurance products? (*e.g.*, pension plans may compete with some life insurance products) In what ways does the existence of different tax or regulatory regimes distort the “playing field”? You may wish to distinguish between different rules for the products themselves and different regulatory regimes for the institutions that produce and/or market the competing products. If necessary, focus attention on the most important differences in the regulatory and tax regimes.

Barriers To Exit

(B3) Briefly describe how the regulatory regime for insurance influences decisions of firms to exit the industry or to withdraw from a particular market (in some markets the ability of firms to withdraw is restricted; in many cases there is a special regime governing insolvencies in this sector).

Control Of Prices

(B4) In what ways does the regulatory regime influence the pricing decisions of firms? Where there is not *ex ante* approval of prices, does the insurance regulator have the power to change prices *ex post*? has it done so? Is there currently effective price competition in the important insurance markets?

Control Of Products

(B5) In what ways does the regulatory regime influence the choice of the products and services that firms offer? (*i.e.*, must contracts be approved before introduction? are there mandated standard form contracts? are there required terms and conditions? prohibited terms and conditions?) Are there impediments to the introduction of new and innovative products? To what extent are the controls on terms and conditions linked with the requirement that certain forms of insurance is mandatory?

Control Of Ownership and Forms of Business

(B6) In what ways does the regulatory regime influence the ownership structure of insurers? (*i.e.*, both the “form” of the company and the size, number and identity of its shareholders). Is the government an important owner in this industry? What effect does government ownership have on competition? Are there restrictions on foreign ownership?

Control Of Marketing And Distribution

(B7) In what ways does the regulatory regime influence the marketing and distribution arrangements of insurers and, in particular, insurance intermediaries (*i.e.*, insurance brokers and agents)? Are banks allowed to sell insurance products (either directly, or through a subsidiary), and vice versa?

Solvency, Investment Regulation

(B8) Briefly summarise the main ways in which the solvency and investment regulations affects competition between insurance companies and between insurance companies and (i) banks and (ii) pension funds?

(C) Competition Law and Enforcement Issues

Agreements Between Insurers

(C1) In many countries insurers are permitted to cooperate in particular ways. For example, amongst other things, insurers may be permitted to cooperate:

- to exchange claims information with one another so that each company is able to obtain a more accurate picture of underlying risks;
- to share insurance risks, particularly in the case of insurance of very large risks (also called “coinsurance”)
- to standardise contractual terms and conditions.

Is this behaviour explicitly authorised under the insurance regulatory regime, or the competition law? What limits are placed on this cooperation? In the case of information sharing, what information is allowed to be shared? At what level of aggregation? What trade-offs were taken into account when these rules were established? What other forms of cooperation are authorised?

Regulatory Conflict

(C2) Does the insurance-sector regulator have an influence in competition decisions (such as mergers or acquisitions)? If so, how are conflicts resolved?

Antitrust Enforcement

(C3) What experience has your country had of enforcement of competition law in this sector? In particular, what issues have you dealt with relating to mergers, horizontal and/or vertical arrangements, abuse of dominance and so on? In each case, describe any particular market definition issues.

QUESTIONNAIRE SOUMIS PAR LE SECRETAIRE

Nous aimerions que les contributions des pays s'efforcent, dans la mesure du possible, de donner un aperçu de la manière dont la réglementation des assurances affecte la concurrence dans ce secteur. Il existe bien sûr différentes formes d'assurances, lesquelles peuvent être soumises à des réglementations différentes. D'un point de vue réglementaire, on peut distinguer quatre grandes catégories d'assurances : (a) l'assurance IARD (qui comprend notamment l'assurance automobile, les assurances pour la marine et l'aviation, l'assurance des logements, assurances commerciales, l'assurance contre l'incendie et l'assurance responsabilité civile) ; (b) l'assurance vie (qui comprend l'assurance vie temporaire et l'assurance vie entière) ; (c) l'assurance maladie, enfin (d) la réassurance. Lors de vos réponses aux questions ci-dessous, il serait utile d'indiquer les cas où les régimes réglementaires diffèrent selon ces grandes catégories d'assurances.

Dans certains pays, il peut arriver que le volume et la complexité de la réglementation des assurances vous empêchent d'apporter des réponses complètes aux questions qui suivent. Si tel est le cas, vous pourrez adopter l'une des approches suivantes (ou les deux) :

D'une part, lorsque vous répondrez aux questions, n'hésitez pas à faire référence à toute synthèse existante de votre régime réglementaire (par exemple, des informations spécifiques à chaque pays en ce qui concerne la surveillance de la solvabilité figurent dans la publication de l'OCDE intitulée "Le contrôle de la solvabilité de l'assurance" (1995) ; on trouvera par ailleurs des informations spécifiques à chaque pays sur le commerce international des services d'assurance dans les réserves aux Codes de la libération de l'OCDE).

D'autre part, vous pourrez souhaiter vous attacher principalement aux caractéristiques du régime réglementaire qui, de votre point de vue, sont le plus en contradiction avec la concurrence (et expliquer en quoi et pour quelle raison).

QUESTIONS

(A) Aperçu général

Textes réglementaires

(A1) Afin de replacer dans leur contexte les réponses qui suivent, indiquez brièvement le titre, la date et le principal objet de toute législation pertinente (y compris les règlements). D'autres facteurs exercent-ils une influence importante sur le comportement des compagnies, par exemple accords d'auto-réglementation ou codes de conduite édictés par le secteur de l'assurance lui-même ?

Institutions de réglementation

(A2) Quels sont les principaux acteurs de la réglementation des assurances ? (Mentionnez le cas échéant les ministères, organismes de réglementation indépendants ou quasi-indépendants, associations professionnelles privées, etc.) Décrivez brièvement leurs fonctions et leur rôle.

Structure du secteur de l'assurance

(A3) Résumez les principales caractéristiques du secteur de l'assurance : combien y a-t-il de compagnies ? Quelles sont les services qu'elles offrent (assurance et autres services, bancaires par exemple) ? Quelle est la part de marché des cinq plus grandes compagnies sur chacun des grands marchés (si elles sont connues) ?

(B) Questions ayant trait à la réglementation et à la concurrence

Obstacles à l'entrée

(B1) Décrivez brièvement de quelle manière le régime réglementaire influence directement les décisions d'entrée sur le marché prises par les compagnies ainsi que les décisions d'introduire des produits nouveaux sur un marché donné. Veuillez donner dans votre réponse une synthèse, s'il en existe, des critères d'entrée importants, des coûts, des délais et des procédures qui doivent être suivies pour qu'une compagnie existante ou nouvelle puisse entrer sur le marché de l'assurance ou pour qu'une compagnie existante puisse introduire un nouveau produit.

La réponse est-elle différente selon qu'il s'agit de compagnies nationales ou de compagnies d'autres pays ? (ou d'autres Etats des Etats-Unis/Etats membres de l'UE ?) Indiquez brièvement en quoi les compagnies étrangères ne possédant pas "d'établissement" dans votre pays (c'est-à-dire les compagnies étrangères offrant des services d'assurance sur une base transfrontalière) sont traitées différemment des compagnies nationales. Quelles sont les différences de traitement appliquées aux compagnies étrangères en matière d'établissement ?

Concurrence avec d'autres produits

(B2) Quels sont les produits offerts par d'autres secteurs qui entrent en concurrence avec des produits d'assurance (par exemple, des plans de retraite peuvent entrer en concurrence avec certains produits d'assurance vie) ? En quoi l'existence d'un régime fiscal ou réglementaire distinct a-t-il un effet de distorsion sur les "règles du jeu" ? Vous pouvez établir une distinction entre les différentes règles qui s'appliquent aux produits eux-mêmes et les régimes réglementaires distincts dont relèvent les institutions qui offrent et/ou commercialisent les produits concurrents. Si nécessaire, soulignez les différences les plus importantes existant dans les régimes réglementaires et fiscaux.

Obstacles à la sortie

(B3) Décrivez brièvement de quelle manière le régime réglementaire applicable aux assurances influence les décisions des compagnies de quitter le secteur de l'assurance ou de sortir d'un marché particulier (sur certains marchés, la possibilité de retrait offerte aux compagnies est limitée ; dans de nombreux cas, un régime spécial régit les faillites dans ce secteur).

Contrôle de la tarification

(B4) De quelle manière le régime réglementaire influence-t-il les décisions de tarification des compagnies ? Lorsqu'il n'existe pas de mécanisme d'approbation préalable des prix, l'instance de réglementation des assurances a-t-elle le pouvoir de modifier les tarifs a posteriori ? L'a-t-elle déjà fait ? Existe-t-il actuellement une concurrence réelle au niveau des prix sur les grands marchés d'assurance ?

Contrôle des produits

(B5) De quelle manière le régime réglementaire influence-t-il le choix des produits et des services offerts par les compagnies ? (Par exemple, les contrats doivent-ils être approuvés avant leur introduction ? Existe-t-il des formulaires standard obligatoires pour les contrats ? Existe-t-il des termes et conditions obligatoires ? Des termes et conditions interdits ?) Existe-t-il des obstacles à l'introduction de produits nouveaux et innovants ? Dans quelle mesure les contrôles exercés sur les termes contractuels sont-ils liés au fait que certaines formes d'assurance sont obligatoires ?

Contrôle des structures de détention et des formes juridiques

(B6) De quelle manière le régime réglementaire influence-t-il la structure de détention des compagnies d'assurance ? (ceci concerne aussi bien la "forme" de la compagnie que la taille, le nombre et l'identité de ses actionnaires). L'Etat est-il un actionnaire important dans le secteur de l'assurance ? Quelles sont les conséquences de la participation de l'Etat sur la concurrence ? La participation étrangère est limitée d'une manière quelconque ?

Contrôle de la commercialisation et de la distribution

(B7) De quelle manière le régime réglementaire influence-t-il les accords de commercialisation et de distribution des assureurs et, en particulier, des intermédiaires en assurances (par exemple courtiers et agents) ? Les banques sont-elles autorisées à vendre des produits d'assurance (soit directement, soit par le biais d'une filiale), et inversement ?

Réglementation en matière de solvabilité et de placements

(B8) Résumez brièvement les principales caractéristiques de la réglementation en matière de solvabilité et de placements qui affecte la concurrence entre compagnies d'assurances d'une part et d'autre part entre les compagnies d'assurances et (i) les banques et (ii) les fonds de pension.

(C) Droit de la concurrence et questions liées à son application

Accords entre assureurs

(C1) Dans de nombreux pays, il est permis aux assureurs de coopérer selon des modalités spécifiques. Par exemple, les assureurs peuvent être notamment autorisés à coopérer pour :

- échanger des informations relatives aux sinistres de façon à ce que chaque compagnie puisse avoir un tableau précis des risques sous-jacents ;

- partager des risques d'assurance, particulièrement lorsqu'il s'agit de l'assurance de risques très importants (ce qu'on appelle aussi la "co-assurance") ;
- normaliser les termes et conditions contractuels.

Ce comportement est-il explicitement autorisé par le régime réglementaire de l'assurance dans votre pays, ou par le droit de la concurrence ? Quelles sont les limites fixées à cette coopération ? Dans le cas de l'échange de renseignements, quelles informations les compagnies sont-elles autorisées à échanger ? A quel niveau de complexité ? Quels sont les différents facteurs qui ont été mis en balance lorsque ces règles ont été établies ? Quelles autres formes de coopération sont-elles autorisées ?

Conflits réglementaires

(C2) L'instance de réglementation des assurances exerce-t-elle une influence sur les décisions en matière de concurrence (fusions et acquisitions par exemple) ? Si oui, de quelle manière les conflits sont-ils résolus ?

Application du droit de la concurrence

(C3) Quelle est l'expérience de votre pays en matière d'application du droit de la concurrence dans ce secteur ? En particulier, quelles sont les problèmes auxquels vous avez été confrontés du point de vue des fusions, accords horizontaux et/ou verticaux, abus de position dominante, etc. ? Le cas échéant, décrivez à chaque fois les problèmes de définition de marché rencontrés.

AIDE MEMOIRE OF THE DISCUSSION

Part I: Competition and Regulation Issues

Introduction

The roundtable commenced with outlines by relevant international organizations of their work in the liberalization and deregulation of the insurance sector:

A member of the **OECD** secretariat summarised the work of the OECD's Insurance Committee and emphasised the role of the two OECD Codes of Liberalization. The first concerns capital movement and the second invisible transactions. Generally speaking, the objective of the codes is the progressive liberalisation of trade in financial services. The codes enumerate a list of obligations relating to insurance (and other services). Member countries may take out reservations to these obligations. These reservations are regularly examined¹ and, at each examination, if the country withdraws one of the reservations the country cannot re-introduce the reservation in the future. By this mechanism there is a progressive elimination of the reservations of member countries over time.

A substantial number of member countries still have important reservations relating to life insurance and certain non-life products. Generally speaking there are fewer reservations relating to insurance for industrial risks than for insurance purchased by ordinary individuals. In the case of industrial risks, where the consumers are essentially large enterprises, it is generally considered that the need for protection for these consumers is less than for insurance purchased by individuals.

The liberalization work of the OECD is not only related to the codes, but also to the identification of barriers to trade, regulatory barriers to competition, and also, to an increasing extent, identification of market practices which restrict trade and competition in the insurance market. In numerous cases, even where the regulatory regime itself is not discriminatory, market and regulatory practices may introduce competitive distortions.

Liberalization of trade in insurance services requires the development of a sound regulatory structure in the trading countries. An appropriate level of regulation imposes certain minimum prudential regulations and permits an adequate level of competition, both between domestic firms and between domestic and foreign firms. Recently, the Insurance Committee organized a conference with a number of non-member countries. This conference approved 20 insurance guidelines for countries in transition. These guidelines enumerate a list of regulatory principles for countries in transition and set out a level of regulation of the insurance sector which permits an adequate level of liberalization and competition.²

A delegate from the **European Commission** explained the activities of the EC in the insurance field. The basic legal framework for the single insurance market has been created by three generations of life and non-life directives and the "Insurance Accounts Directive". As a result of these directives, the insurance market in Europe is probably one of the most liberal insurance markets in the world.

The first life and non-life directives were adopted in the 1970's. These provided for the free exercise of the right of establishment. As a result of these directives, insurers could establish branch

offices throughout the EU under a streamlined procedure without being subject to substantial barriers or excessive restrictions in the host member state. At the same time, these directives imposed a common solvency margin and a minimum guarantee fund to act as a financial buffer against adverse fluctuations.

The second generation of life and non-life directives were adopted at the end of the 1980's. They dealt with the general freedom of provision of services. In particular, a distinction was drawn between "industrial" and "mass" risks. The former involved knowledgeable professionals buying insurance products on a business-to-business basis. They did not require the same degree of protection as uninformed individual consumers buying mass risk products. Indeed, insurance for industrial risks was liberalised under the freedom of services policy, subject only to home country supervision. The insurer would, of course, be obliged to inform the supervisory authority in the host country through a full notification procedure, but unlike the previous situation, there would be no prior control of policy conditions and premiums by the host country authorities.

The third generation of directives, in turn, ushered in a "single passport" system whereby a company approved to conduct business by the insurance supervisory authorities in any member state in the EU was automatically entitled to engage in the same business in any other member state. Insurance companies can now sell their policies freely across national borders without any prior approval of tariffs or policy conditions.

In order to gain approval of these directives from all member states, further harmonisation was required. These related to matters such as the establishment of technical reserves, the valuation of assets, more detailed rules for the existing solvency margin requirements, requirements for the "fit and proper" nature of managers and the identity of shareholders of an insurance company. Furthermore, the fact that insurance undertakings could now freely sell on a cross-border basis meant the dismantling of some national monopolies for the sale of insurance.

In regard to the regulation of insurance intermediaries, a directive relating to insurance intermediaries was adopted as long ago as 1976. This directive does not provide intermediaries with a single passport system, but it does facilitate, to a certain extent, cross-border market access by intermediaries by providing for the mutual recognition of professional experience, good repute, and non-bankruptcy across the member states. Currently, the Commission is conducting a review of this directive.

In regard to reinsurance, in general this is not regulated at the EU level (although the very first EC directive in the insurance field, which dates back to 1964, provided for the non-discriminatory access by reinsurance to member states' markets, both on a freedom of establishment and on a freedom of services basis). The basic Commission philosophy with regard to reinsurance is that this is an activity undertaken by knowledgeable professionals where consumers are not directly concerned. Therefore it is not the subject of specific EU regulation.

The foundations for the single insurance market are now in place and the current efforts of the Commission are primarily directed at improvements to the existing framework. The mere adoption of legislation is not sufficient to bring a fully integrated market into existence. There are many other barriers to a fully integrated single insurance market. For example cultural differences can be significant, distribution patterns vary by member states and a local presence is often necessary to serve customers, process claims and generally handle administration. More importantly, other barriers, such as contract law, taxation, national consumer protection are also very important. The introduction of the euro as of 1 January 1999 will throw a spotlight on these barriers.

The representative from the **IAIS** (International Association of Insurance Supervisors) outlined the history and work of the IAIS. The IAIS is the younger sister of the Basle Committee on Banking Supervision and the International Organization of Securities Commissions (“IOSCO”) which are already well-known. The objectives of the IAIS are to develop principles and standards on prudent insurance supervision and to give guidance to emerging markets countries and countries in transition.

The IAIS was set up and incorporated in 1994 as a not for-profit corporation of the state of Illinois. Originally, the objective of the IAIS was restricted to the sharing of experience and information between insurance supervisors. It was soon recognised that exchange of information did not fully cover what was needed. Therefore the objectives of the association were broadened and are now to: (a) cooperate to ensure improved supervision of the insurance industry in order to maintain efficient, safe, stable insurance markets for the benefit and protection of policyholders; (b) to unite efforts to develop practical standards for supervision of insurance; (c) to cooperate with other relevant entities, especially with IOSCO and the Basle committee; and (d) to provide mutual assistance to safeguard the integrity of markets. The development of standards and principles is currently the most important objective.

Four papers were published last year: a paper on insurance supervisory principles (this paper identifies subject areas which should be addressed in the legislation or regulation of each jurisdiction); a paper entitled “Guidance on Insurance Regulation of Emerging Market Economies”; a paper on cross-border issues; and a paper on memoranda of understanding. The IAIS is currently working on a paper on licencing, a paper on onsite inspections and a paper on derivatives. The IAIS is also dealing with issues surrounding electronic commerce and solvency standards.

A representative from **BIAC** provided an overview of the complex nature of insurance regulation in the United States. Historically, the business of insurance in United States had been held by the US Supreme Court in the 1850’s to not be subject to federal regulation but be subject to the States. That became a very powerful financial and regulatory incentive for the States, so that by the 1940s, the taxation of foreign and domestic insurance companies by the States was the single biggest source of revenue to the States³. In what was ironically an antitrust case under the US Sherman Act, involving a rate-setting bureau in 1944, the Supreme Court reversed itself and held that the business of insurance was interstate commerce, thereby, under the commerce clause of the Constitution, making it subject to federal regulation. Given the importance to the States of regulating and, more particularly, taxing insurance, the National Association of Insurance Commissioners (the representative trade association of the insurance departments of the 50 States, the District of Columbia and the four United States Territories) authored a bill that was widely accepted with some modification in Congress in 1945 and in the next session of Congress was passed as the McCarran Act. The McCarran Act, because of the origins of the Supreme Court finding interstate commerce in an antitrust case, is posed in the guise of an antitrust act. Its main thrust was to restore to the States the right to regulate and tax insurance companies.

The insurance industry in the United States is unique, therefore, in that there is no federal insurance regulation and in that there is a statute, the McCarran Act, which exempts the business of insurance from the federal antitrust laws to the extent that that business is regulated by the individual states.

The McCarran Act was passed at a time when the US Supreme Court (in a case called *Parker v. Brown*) was in the process of creating a general exemption for state regulation. However, the courts have interpreted over the years that the amount of regulation necessary under the McCarran Act is not as large as the amount of regulation required under the *Parker* doctrine. Generally, the courts have deferred, under the McCarran exemption, to limited amounts of state regulation. From the States’ perspective, the

McCarran Act permits the States to implement and/or allow rate sharing and information sharing agreements that they consider would not be allowed under federal antitrust laws.

It is important to note that California and New York, are both vigorous in their enforcement of their antitrust laws and do not have an insurance exemption. As a result many insurance companies, because of the size of those two markets, do not view the McCarran Act as particularly important. They keep their activities in line with competition laws in order not to attract state-level antitrust enforcement.

There is a general movement away from regulation and towards competition. Although there is a role for regulation, there is a general recognition that regulation should be limited to solvency and consumer protection issues, as opposed to rate regulation and pervasive review of insurance companies, which was the historical norm.

The ease of entering markets in the United States is very dependent upon the individual regulations of the individual states. Despite deregulatory moves, there remains a significant regulatory compliance burden to entering the insurance business in the United States, because there are more than 50 different regulatory jurisdictions. This state-based regulatory framework is somewhat inconsistent with the regime for securities regulation and the supervision of financial institutions, which are both primarily applied at the federal level. The state-based nature of the regime is an historical anomaly that is unlikely to change in the near or long-term future.

Barriers To Entry and Exit

The **Chairman** introduced the discussion on barriers to entry and exit, noting that, according to the submissions, entry of firms into this sector in all OECD countries requires a licence. The licencing procedures can, in some cases, be quite onerous, involve many months and a substantial amount of documentation. This can act as a barrier to entry and a barrier to the introduction of new products. Furthermore, some countries retain statutory monopolies on some forms of insurance.

The **UK** delegate was invited to summarise the authorization process for insurance companies in the United Kingdom. In the United Kingdom, an insurance company must be authorized by the insurance supervisory authority before it can carry on insurance business in the UK (except in the case of companies authorised in other member states from the European Economic Area⁴). The authorisation process is neither automatic, simple or quick. Under United Kingdom law, as a result of a requirement of the EU, a decision must be taken on an application for authorisation within six months of the application being lodged. In practice, this length of time has not proven to be sufficient and insurers are encouraged to consult quite closely with the insurance supervisory authority during the process of formulating a formal application.

In considering the application, the primary concern of the supervisory authority is to ensure that the company will be soundly and prudently managed. The authority looks at the structure and organization of the company and the types of business that it will conduct; the assets that represent the initial capital of the company and its opening reserves; the reinsurance arrangements that the company proposes to enter into; financial projections for the first three years of the companies business; and, the fitness of the shareholders and the senior management of the company to ensure there is adequate experience of the insurance business among the senior management of the company.

The UK supervisory authority (in line with EC directives) does not review the scales of premiums that the company proposes to charge. There is no attempt to approve the terms and conditions

that the company proposes to apply in its insurance contracts. Neither does the authority conduct a test of market need before determining whether to grant authorisation. The authority will determine whether it has the management experience to conduct the new business that it wishes to move into. Once the authorisation has been granted the supervisory authority may impose conditions on the company for the first few years of business. For example, the company may be required to submit quarterly accounts or a limit may be imposed on the total premium that may be earned during the first few years of its life. This process is repeated if an existing insurance company wishes to enter a new class of business.

In regard to compulsory insurance, the delegate noted that a line of insurance can be highly competitive even if it is compulsory. In the United Kingdom there are in excess of 80 companies actively competing in the compulsory motor business. They compete on premium levels, no claims bonus rates, additional benefits provided with the minimum compulsory cover, distribution methods, claims handling methods, the speed of handling claims, and they may provide benefits such as a courtesy car while the policyholder's car is being repaired.

An insurance company which wishes to withdraw from the UK market may apply for its authorization to conduct business to be withdrawn. It remains subject to supervision by the supervisory authority until all its liabilities have been extinguished or transferred to another company. A company from outside the European Union must lodge a deposit if it wishes to conduct insurance business in United Kingdom and that deposit will not be repaid until all its liabilities have been extinguished.

The situation in the UK was contrasted with that in **Japan**. In order to enter the insurance market in Japan, a license, issued by the Minister of Finance is required. In its application to the Ministry of Finance a company must include its Articles of Association and various documents describing its business methods, insurance products, policy agreements and the methods used to calculate the insurance premiums and premium rates. The Ministry of Finance requires that the proposed premium rates not be "excessively high", "excessively low", or "unfairly discriminatory".

Following the implementation of the amended business law on April 1996, life insurance companies and non-life insurance companies have been able to enter each other's business through subsidiaries. The omnibus financial sector reform bill which has only just been adopted by the Diet removes lines of business restrictions on insurance companies and other financial businesses.

The delegate from the **Czech Republic** noted that current legislation governing insurance matters dates from 1991, but has become inadequate. The Minister of Finance is currently preparing a draft of new legislation. The overall objective is to place a greater emphasis on the financial health of insurance companies. Important changes are also envisaged with respect to the powers of the insurance supervisor. At present, the insurance supervisory body does not have sufficient powers when facing a situation of an insurer in financial difficulty. This would change under the new amendment; powers like compulsory administration and reduction in registered capital will be established.

In the Czech Republic there remain statutory monopolies in two areas. The first is motor vehicle third party liability insurance, which is provided by the former Czech State Insurance company. The Minister of Finance is currently preparing amendments to the law changing this statutory insurance into a compulsory contractual insurance. The other statutory insurance relates to the liability of employers with respect to workplace accidents, or work-related illnesses.

The delegate from **Italy** discussed the unusual rules that apply to the winding up of insurers in Italy. There is freedom of entry into the Italian insurance market - all the EC directives have been fully applied. But there is a slight restriction on the freedom of exit. When an insurer is liquidated, as in other

countries, as a protection of the customers of the company, there is the possibility for the portfolio of the company to be taken over by a different, viable institution. In this case, there is a provision in the law that the viable institution should also take a share of the failing company's workers. This has not been widely applied. The Italian Competition Authority signaled to Parliament that it leads to a form of discrimination against Italian insurance companies (because this statute cannot be applied to insurance companies operating from abroad under the freedom of services provisions).

There is a state monopoly over workplace insurance. This is an important insurance market with premium revenues equal to about 20 per cent of all insurance premiums. In addition, there is a system of statutory insurance in the agricultural sector. This sector has had a tradition of "single pooling" insurance arising from a desire to control the price of the insurance and as a way of administering state aid, which amounts to around 50 per cent of the total insurance premium. The antitrust authority has considered this single pooling insurance a restrictive agreement. As a result there are now a number of such pools, each providing agricultural insurance.

The delegate from the **United States** spoke on entry conditions into the US insurance market. As was stated earlier, the insurance business in the US is regulated through the 50 State Commissioners along with the Commissioner for the District of Columbia and the four United States Territories. There is a great variation among the states in the details of the regulation, but each state requires a licence to do business in that state. A program was recently undertaken by the NAIC to make it easier to obtain entry. The NAIC has developed a common application form, which allows a company seeking to do business in a particular state or in all 50 states to submit the same application to all of the states. Each state still takes responsibility for doing its analysis and issuing its own certificate if authority is granted. This is now available in nine states and work is underway to extend this more broadly throughout the country.

There are no mutual recognition initiatives underway under which a certificate of authority issued in one state would be accepted in another. Each of these states believes that they bring a unique knowledge and experience of the market that exists in that state. There has not been a serious attempt to implement a single nationwide approval process. On the other hand, there is a lot of acceptance of financial solvency monitoring of other states. In fact, through the NAIC accreditation program, most states will defer to the domestic (*i.e.*, home state) carrier for the extensive solvency monitoring, and merely review the financial statements on an annual basis.

In response to a question from Sweden on whether or not there was large variation in the state-level regulation and whether or not there were moves towards harmonization and/or mutual recognition, the US delegate responded that the NAIC is working towards more consistency and uniformity among the various states' regulations. On the specific topic of rate regulation, for example, although virtually all states would subscribe to the principles (mentioned by Japan) that rates should not be inadequate, excessive, or unfairly discriminatory, different states have different ways of applying this. Some states require prior approval over rates before they can be used. Some states have a "file-and-use" requirement; some states have "use-and-file". Some states have adopted rating flexibility within a range. For certain types of insurance, some states do not require any filing of the rates.

In summary, there is a great deal of variation among the states, however, there is also a great deal of movement towards more uniformity, and certainly a movement towards greater deregulation. Most states have acknowledged that the era of prior approval is antiquated and are trying to move towards a "file-and-use" or "use-and-file" system.

In response to a question from the OECD Secretariat, the US delegate noted that although there are no studies of the costs involved in obtaining approval for business in all 50 States, in Pennsylvania the

approval process for a foreign company takes approximately 60 days, while for a domestic company, approval takes approximately 6 months. Time frames for approval, however, vary widely amongst the 50 states. It is not a long and extensive process, although there are substantial documentation requirements.

Controls On Prices and Insurance Terms and Conditions

The **Chairman** then moved the discussion to focus primarily on price control and on the regulation of insurance terms and conditions.

The **UK** delegate, responding to the question whether control of terms and conditions of insurance policies was necessary, answered definitely no. In the United Kingdom (and, indeed, throughout the European Union as a result of the EC directives) prior approval of insurance tariffs, terms and conditions has been abolished. The United Kingdom has for a long time operated under the principle of “freedom with publicity”. Under this policy an insurance company has the freedom to set its own terms and conditions in accordance with its own commercial judgment, subject only to a high level of disclosure of the company’s financial position. Insurers operating in the UK are required not only to produce the same accounts and reports for shareholders that any company is required to under company law, but also to produce very detailed returns designed specifically for the purposes of the supervision of the insurance business. These returns must be prepared on a more cautious and conservative basis than the accounts prepaid for shareholders. These returns are prepared annually, except in the case of new companies, or companies which have undergone a change of control, where the supervisor may require more frequent returns. A copy of these supervisory returns are placed on public record and are available for inspection by any interested party.

There are a number of interests who scrutinize these returns, including, in particular, the rating agencies and the major firms of insurance brokers, who undertake their own analysis of the security of insurance companies that they are considering placing business with. It is likely to become known quite quickly if a company is in financial difficulty. Insurance companies often also wish to analyze the financial returns of their competitors. Indeed, they have an incentive to do so because under the policyholder protection scheme in the United Kingdom, all companies in the market are required to contribute a levy which covers the liabilities (to personal policyholders and policyholders in compulsory insurance classes) of insurance companies which fail.

The position in the UK is similar to that in the **Netherlands**. The Netherlands has a long tradition of the “normative” system of supervision under which insurance companies are in principle free to conduct their own business and to set premiums at levels that each company thinks is proper subject to supervision to ensure the company engages in “sound business practices”. This freedom extends to the freedom to choose the actuarial method for the calculation of premiums and technical provisions.

In particular, the approach of the insurance supervisor is to focus on the overall financial situation of a life insurance company.

As in the UK, The Netherlands requires annual accounts and returns for monitoring the financial situation of an insurance company on a year by year basis. This may be not sufficient if an insurance company is going down very rapidly. The insurance supervisor is currently developing early warning systems, especially for application in the non-life business.

The delegate from **Japan** then elaborated on the system of premium controls that applies in Japan. In Japan there are two types of premium rates. On one hand there are the rates that are set by each

insurance company in accordance with the insurance business law and approved by the Ministry of Finance. On the other hand, there are the rates that are determined by rating organizations in accordance with the rating organization law. These rating organization rates are subject to advance notification and examination by the Ministry of Finance.

The insurance business law allows three types of rates: first, "range" rates, *i.e.*, rates that can be chosen with a fixed range; second, standard rates; and third, discretionary rates. Discretionary rates are determined in accordance with the risk situation applying each time a contract is finalized, without reference to standard rates. There are rating organizations for five lines of insurance: fire insurance, accident insurance, liability insurance, automobile insurance, and automobile compulsory liability insurance. Insurance companies that are the members of the rating organizations are obliged to use the rates that calculated by the rating organization. However, for fire insurance, accident insurance and automobile insurance, the member insurance companies may choose rates within a range of 10 per cent above or below those calculated by the rating organization. The Finance Ministry examines the rates of the rating organizations on the basis of the three principles mentioned earlier: the rate must not be excessively high, inadequately low, or unfairly discriminatory. The conduct of rating organizations is exempted from the Anti-Monopoly Act of Japan.

A report by the insurance council in June 1996 on the current rating organization system recommended reforms such as the adoption of the advisory pure premium rate system and the abolition of the requirement to adopt calculated rates. These recommendations are incorporated in the bill to amend the rating organizations law which was adopted by the diet last week. These reforms of the rating organizations will come into effect from 1 July 1998. However, in the case of earthquake insurance and automobile compulsory liability insurance (which are managed under special laws and effectively function as a public form of insurance, where the reinsurance is undertaken by the government) rating organizations will continue to calculate the gross premium.

The delegate from **Korea** expressed the view that the government should approve the terms and conditions of insurance contracts for consumer protection reasons. The terminology and drafting of insurance contracts can be difficult for the ordinary consumer to understand. For this reason the Korean government checks the contents of all new contracts.

The delegate from **Germany** explained that Germany is another country which, until recently, had a system of premium controls. Prior to July 1994 Germany had a comprehensive system of prior approval of tariffs. At that date all systematic tariff control was abolished with some exceptions relating to "substitutional health insurance", "Pensionskassen" (a type of occupational pension fund), and funeral funds. For these insurance classes, the calculation basis must be approved before application. In life insurance the technical calculation principles must also be submitted for approval but only after they have been adopted.

The effects of price competition has been observed in the compulsory motor vehicle third party liability insurance market. Prior to 1994 insurance companies were required to calculate the tariffs according to a given calculation scheme. The result was that price competition only occurred over operating costs and the main differentiating factor was service. Following the abolition of the tariff calculation decree severe price competition has arisen. In some cases the premiums may not even cover the technical expenses less investment income. There may be cases of bankruptcy. In former times, under price regulation, tariffs were stable and there were no companies in danger of bankruptcy.

Regulation of Solvency and Ownership

The delegate from **Australia**, noting that the regulatory regime in Australia does not restrict pricing, acknowledged that there was a limit of 15 per cent on the ownership of a single person in a single company. However, this is not an absolute restriction. The Australian Treasurer can permit an individual to acquire a stake larger than 15 per cent if he deems it appropriate. It is considered there are advantages in having a spread of ownership and that it is undesirable for companies in the financial sector to be directly associated with a single shareholder due to the risk of contagion. The arguments for a 15 per cent limit for insurance companies is not as strong as it is for banks. Nevertheless the limit has been retained. Both life and general insurers in Australia are subject to minimum standards for solvency and capital adequacy. However, their investments are not generally restricted and primary responsibility for prudent management rests with the companies themselves.

The delegate from **Norway** noted that the ownership regulations in Norway are similar across the insurance and the banking sector. In fact, in Norway these two sectors are regulated very similarly and are regulated by the same supervisory body. As an example, insurance undertakings in Norway are subject to the same capital adequacy requirements as banks.

In regard to ownership regulations, no single shareholder can hold more than 10 per cent in a single entity. This does not prevent insurance undertakings from taking part in financial conglomerates, but, in this case, the financial restrictions are applied at the holding company level, so that no single shareholder can hold more than 10 per cent of the group. The main purpose of these regulations has been to prevent the mixing of the interests of a financial group with the interests of other businesses. It is also had the purpose of preventing problems in one institution from affecting the solvency of other institutions. This can give rise to a corporate governance problem, as there is no major share holder with money at risk in the company who has the power to control the company. It is the view of Norway that this is less of a problem than the problems that could arise from the mix of financial interests with other interests.

Regulation Of Insurance Intermediaries; Competition With Substitutes and Regulatory Institutions

The **Chairman** then introduced the last session on regulatory topics, which covered the issues of competition with substitutes for insurance products, regulation of insurance intermediaries and the regulatory institutions operating in this sector.

The manner in which the distribution of insurance products is organized in different countries can be an important obstacle to competition. For example, where the retail distribution of insurance is dominated by exclusive relationships with insurers, it can be difficult for a new firm to enter. This has particularly been a problem in Italy.

The delegate from **Italy** explained that historically, the main channel for the distribution of insurance in Italy has been the individual agent who is closely linked to a single insurance company. The system of independent intermediaries or “brokers” has not been widely developed. In the last couple of years the main developments in this area has been the use of banks as outlets for insurance products, especially standard, off-the-shelf, life insurance products.

In response to a question from the Chairman, the Italian delegate went on to explain the relationship between the insurance regulator and the bank of Italy (the banking regulator). In regard to changes of ownership, it is the nature of the company which is the “main mover” (*i.e.*, the initiator of a merger or take-over) which determines which of the two regulators has authority. In the case of

distribution channels, it depends on the nature of the products sold; for instance, the new financial intermediaries (which sell mutual funds, bonds, debentures and so on) are subject to the regulation of the central bank, whereas the system of insurance agents is under the control of the ministry of industry and, to some extent, the supervisor of the insurance market. If an insurance company would like to set up bank branches, they must follow the regulation of the central bank. In regard to the regulation of transparency and the provision of information to consumers, there is some overlap. The offer of financial products to consumers is controlled by the authority that supervises the stock exchange market whereas the offer of insurance products to consumers is subject to the supervisor of the insurance sector.

The **Netherlands** delegate noted there are, in general, no major concerns regarding market access arising in the distribution sector of the Dutch insurance market. There are a lot of so-called direct writers (companies which sell insurance products directly to the public without intermediaries) and the majority of intermediaries in the Netherlands are of the broker type (that is, they are act for more than one insurance company).

However, although there is no direct price regulation on insurance products themselves, intermediaries are not allowed to charge consumers directly for their services, they may only charge insurers for their services. In addition, intermediaries are not allowed to give cash incentives for consumers to encourage them to purchase. They may not give consumers a rebate or give back part of the fee which the intermediaries receive from the insurer.

The rationale for this rule dates back to the '50s. The belief was that placing a ceiling on the fee structure would prevent intermediaries from pursuing aggressive selling practices. It is considered now that it is not necessary to regulate the prices or the fee structure in order to have a well-functioning market for intermediaries' services. When consumers are able to make specific arrangements on prices with intermediaries, there will be incentives for intermediaries to add value to their services and to act as an independent party, distinct from the insurer. Under current regulations, consumers cannot reward intermediaries for offering superior service, so there is no real incentive on intermediaries to add value, or to differentiate the quality of their services to the consumer. In addition, by allowing individual deals between intermediaries and consumers, the cost of intermediaries will be transparent, as a separate item for the consumer to pay.

This reform has yet to be implemented. There is a lot of opposition from Parliament, because it affects small businesses and relates to issues of consumer protection. However, the largest consumer organization in the Netherlands feels that the current structure is outdated and that reform would be good for consumers.

The Chairman asked **Australia** to explain proposals for a new cross-financial sector regulator in Australia. These proposals stem from the very substantial review of Australia's financial system regulation that was conducted under the leadership of Mr Wallis⁵. The objective of the review was to examine the regulatory regime for the entire financial services sector. There were two main issues addressed. The first was the state of competition in the industry. There was a general attempt to remove laws and regulations that, in any way, restricted competition. More of this is discussed in the report on banking for the last roundtable.⁶ The second objective was a thorough review and reform of the overall regulatory structure for the financial sector in the light of convergence.

The idea proposed by the report was to move from regulation that was based on primarily on separate regulation of separate financial sectors, to what might be called "functional" regulation. The separate regulation for banks, insurers and building societies was becoming rather inappropriate in an era

of convergence when banks were carrying out insurance, insurer's were offering banking, building societies were offering both and so on.

The philosophy of the proposals currently before Parliament was to reorganize regulation along functional lines. The Reserve Bank handles monetary policy. There is a new prudential regulator which handles all prudential regulations across the financial services sector (including both insurance and banking). There is a competition regulator, the Australian Competition and Consumer Commission which regulates competition. There is also a new financial consumer regulator, the Australian Securities Commission, which regulates both consumer and investor protection issues.

The underlying objective was to achieve as few distortions to competition as possible. That is, to put financial institutions offering the same functions on the same regulatory footing with regard to both consumer and prudential regulation. In practice of course the circumstances of the different parts of the financial sector vary. The actual prudential rules will differ for different sorts of investments and different sorts of financial business. However, it is felt that if all prudential regulation is carried out in one body, then there is a greater likelihood that competitive distortions will be minimized.

Conclusion

The **Chairman** concluded the session on regulatory issues with some summarising remarks.

In particular, referring to the Secretariat background note, the Chairman noted that there are different approaches to regulation: a "pillars" policy, in which, amongst other things, there are restrictions on the lines of business that could be undertaken by the different components of the financial services sector; a "conglomerate" model, in which the barriers to conglomerate activity are reduced or eliminated; a "coordinated" model in which the different regulator(s), through cooperation, act as a single unit. Australia is one country that has moved to the "coordinated" approach in regulation. Most other countries have moved from the "pillars" approach in which there are line-of-business restrictions between banks and insurance companies and securities firms, to the "conglomerate" approach where a banking regulator regulates banking activity irrespective of who does it.

The Secretariat note shows that in most OECD countries, line-of-business restrictions remain. In almost no jurisdiction can a bank produce insurance products directly or an insurer produce banking products directly. On the other hand, most countries allow the direct distribution by banks of insurance products produced elsewhere, although some restrictions remain on the distribution of banking products by insurance companies. This situation is not symmetric. In regard to ownership, however, in most countries, there is the possibility of the creation of an insurance company by a holding company which also owns bank. In other words, even though there are line of business restrictions, these are not matched with ownership restrictions.

The discussion has shown that in addition to some important prudential regulations, there is also extensive regulation of the behavior of insurance companies. Many countries continue to impose extensive tariff and rate regulation.

Overall, looking at the submissions and the ensuing discussion, the insurance sector comes across as a heavily regulated sector. In some cases, especially in the case of certain forms of prudential regulations, there are good reasons for maintaining a regulatory structure. It is not clear, however, why a system of rate regulation, or regulation of terms and conditions of contracts is needed. These forms of regulation create a homogeneous price and product structure within the industry, impede new product

development (as the UK delegate clearly expressed), impede innovation in the industry and impede competition in the market.

Part II: Competition Law Enforcement Issues

The **Chairman** then turned to the second session of the discussion, relating to competition law enforcement issues. He noted that there are important issues arising in the application of competition law to the insurance sector. One of the distinctive features of the insurance sector is that, in order for an insurance company to set its rates and to understand the risk, there needs to be quite extensive information sharing among insurance companies. Information sharing is however, often viewed by antitrust enforcers as a sign of collusive behavior. There needs to be a balance in this industry between information sharing which is pro-competitive and pro-consumer and, information sharing which facilitates collusion.

Coverage and Exemptions

From the submissions, it is quite clear that in almost all countries competition law applies in full. There is only one exception, the US. However, even though in principle competition law applies to this industry, there are relatively few cases in which competition law has indeed been applied and enforced, especially when we focus on the most pervasive type of restrictive behavior, horizontal cooperation between insurers. The EU has played an important role in through its block exemption for certain types of behaviour in the insurance sector (EC regulation 3932/92).

The **EC** delegate described the agreements which are the subject of an exemption from the competition laws and explained the reasons why these agreements are exempted. Article 85 of the Treaty prohibits agreements that restrict competition but admits that certain of these agreements can be the object of an exemption if they contribute to economic progress and benefit the consumer. Agreements can be individually exempted by a decision of the Commission or by broad category by means of a regulation.

In applying the competition laws in the field of insurance, it rapidly became evident that certain agreements that would be considered clearly anticompetitive in other sectors, are, in this sector necessary for the good functioning of the industry and benefit the consumer. The Commission initially handled these agreements through individual exemptions, but when it had acquired sufficient experience in the field, it proceeded to adopt a broad regulatory exemption which was adopted in December 1992.

The first type of agreements which are exempted by the regulation are agreements on the “pure premium”. Insurers need to know various statistical information in order to price the risks that they insure and, in most cases, they cannot obtain this data individually. Therefore, cooperation in the gathering, exchange and elaboration of risk statistics is foreseen and exempted in the regulation. The exemption is limited to information necessary to calculate the “pure premium”, (*i.e.*, that part of the premium that reflects historic risk) and the “risk premium” (*i.e.*, adjustments to the pure premium in view of forecast future developments in the sector). All agreements that go beyond this (for example, agreements on the commercial premium) will not be covered by the exemption and will be considered contrary to article 87 of the Treaty. In any case, the distributed statistics on the pure premium and the risk premium must be always only recommendations. There must be no obligation on insurers to use the calculated premiums.

The second type of agreements which are covered by the block exemption are agreements on standard policy conditions and on model insurance policies. These agreements are exempted because adopting standard policy conditions increases the transparency of the sector and permits consumers to

more easily compare different products. Again, these agreements are only exempted if they are limited to recommendations. If the use of certain terms and conditions are obligatory, the agreement is not exempted and in general would be prohibited.

The third type of agreements which are covered by the regulation, are agreements for covering risks in common, *i.e.*, co-insurance pools and co-reinsurance pools. In essence, this relates to groups of insurers who decide to cover certain risks in common. These groupings create problems for competition because the members of a pool must come to agreement on the common parameters of competition - the conditions of the insurance offered; the limits of coverage offered; and even the relevant tariffs. However, these pools can, in certain cases, be justified. In the case of the insurance of large risks, the justification is the following. For reasons of probability, the insurers must cover a minimal number of homogeneous risks. If they cannot do so, the probability that the size of the risks they cover will be larger than the mean, increases considerably. In this context, insurance pools allow individual insurers to attain this minimal dimension. When cooperation of this sort is necessary to cover certain risks it is not restrictive of competition. The individual insurers could not compete in this market if they could not participate in the pool. One can even go as far as saying that the agreement is pro-competitive because it permits a new operator to compete in the market. However, each case must be considered on a case-by-case basis and it is rather difficult to formulate into a broad exemption. This is why the Commission has decided in the regulation to simply exempt all pools which do not exceed a certain market share (10 per cent for co-insurance pools and 15 per cent for co-reinsurance pools). For pools exceeding these shares decisions are taken on a case by case basis.

Finally, the regulation covers agreements on the approval of security devices. In several insurance fields insurers come to agreements to decide which security devices (*e.g.*, alarms) will be accepted by them when offering a particular type of insurance. Here the relevant competition restriction is not in the insurance market, but in the market for security devices. If insurers agree to approve certain devices and not others, the producers of the later are automatically excluded from the market. This is something which is easily resolved through standardization at the level of the European Union, but, in waiting for this standardization, the regulation foresees that insurers can come to agreements on security devices provided they are on basis of objective and non-discriminatory criteria.

Finally, in addition to these four types of agreements, the enabling regulation approved by the Council foresees that the Commission may also exempt two additional types of agreements, essentially relating to registers of aggravated risks, and agreements on the control of accident risks. At the time, the Commission did not have enough experience in these fields and did not decide to include these additional types of agreements in the regulation, but these agreements may form part of a block exemption in the future.

In response to a question from the Chairman, the EC delegate noted that the regulation does not distinguish between types of institutions which may gather the relevant risk statistics. In practice, it is normally carried out by the relevant national association of insurers. However, any other organization may also do it. The statistics must be presented in such a fashion that it is not possible to distinguish the market shares of individual enterprises that have supplied the data.

The delegate from **Japan** explained that, in principle, the Antimonopoly Act applies to the insurance sector. However, there are certain exemptions to this general rule. The exemptions have been radically reduced in recent years. As an example, as a result of a 1995 amendment to the insurance business law there is now a limited exemption for certain agreements between non-life insurance companies in the business of aviation insurance, nuclear power insurance automobile compulsory liability insurance and earthquake insurance. However, concerted conduct is not exempted from the Antimonopoly

Act when unfair trade practices or a substantial restraint of competition in a particular field of trade is involved, causing undue infringement of the interests of insurance policyholders and those of the insured. Furthermore, approval from the Minister of Finance is necessary before receiving an exemption from the Antimonopoly Act and the Minister of Finance must obtain the consent of the Fair Trade Commission before giving such approval. Even after the Minister of Finance's approval is obtained, the Fair Trade Commission can request that the Minister of Finance take measures including cancellation of the approval if the JFTC recognizes that the conduct no longer meets the conditions for exemption.

The JFTC is currently conducting a survey of the insurance business from the viewpoint of competition policy. This survey has two objectives. The first is to highlight the potential for further deregulation. The second, is to ascertain the present situation of transactions between insurance companies and corporate policyholders. The Japanese written submission sets out a couple of cases in which the Antimonopoly Act has been applied in the insurance sector.

The delegate from the **United States** was asked to explain the contours of the antitrust exemption set out in the McCarran-Ferguson Act. The delegate began by emphasising that although there is a federal exemption, 48 or 49 of the individual states have their own antitrust laws and the insurance sector remains subject to those laws in each state. The purpose of the 1945 McCarran-Ferguson Act was not so much directed at antitrust issues as it was at ensuring or returning to the states the power to control the insurance industry because of the importance of the revenue from taxing this industry. This was sparked off by a Supreme Court decision that appeared to remove this state control over the business of insurance and that led Congress to take action to return the power to regulate the insurance industry to the states, adding the antitrust exemption. Congress is, of course, free to remove that exemption at any time and there have been many attempts to do so over the last twenty years.

Looking at the exemption itself, there has been a lot of litigation over the years which has narrowed the breadth of the exemption significantly. They basically focus on two issues: first, attempts to define the "business of insurance". That has been fairly narrowly defined. The second question is, what does "regulated by the states" mean. In this context, mergers have been held to *not* be included in the McCarran-Ferguson exemption. The reason being that regulation by the state does not cover "extra-territorial" practices. In the case of a merger of two companies from different states, neither state has full regulatory power over the merging companies and therefore neither one is regulating the transaction and therefore the merger itself still needs to be notified under the Hart-Scott-Rodino Act.

The US delegate concluded by noting that the NAIC is not in favour of a simple repeal of the McCarran-Ferguson Act as this would expose the insurance industry to considerable short-term uncertainty surrounding the legality of a number of common practices currently carried out in the insurance sector.

Competitive Conditions and Competition Law Enforcement

The delegate from **Italy** noted that the insurance industry in Italy continues to be prone to collusive behaviour. Competition is not yet sufficient to benefit consumers. The Italian antitrust authority is actively enforcing competition law in this field. One case involved a group of companies that came to an agreement to co-insure particular risks. In the view of the antitrust authority the agreement was not necessary for the coverage of the risks involved. In addition, a couple of the companies involved were fined as there was also some evidence of a side agreement not to participate in an auction for insurance, with associated compensation.

The view of the Italian antitrust authority is that co-insurance can be both beneficial and pro-competitive, within limits. The idea that all the players in a market can co-insure together is, however, unacceptable.

The **Czech Republic** described an abuse of dominance case involving the former Czech state insurance company, the sole provider of statutory motor vehicle liability insurance and a strongly dominant player in other insurance markets. The Czech state insurance company also issues “green cards”. These are internationally valid documents proving the existence of third party liability insurance. In 1996 the Office for the Protection of Competition found that the state insurance company was issuing these cards under different conditions to different clients. While, the clients that had contracted with the monopoly provider for the compulsory car accident insurance were given green cards free of charge, other applicants had to pay a fee. The Office found this conduct to be an abuse of a dominant position on the grounds that the monopoly provider offered its own clients an advantage stemming from its third party liability insurance monopoly. The decision was reversed by the High Court as a consequence of a judicial review procedure brought by the Czech insurance company.

The delegate for the **United Kingdom** started by discussing the exemption for insurance from the Restrictive Trade Practices Act. The Act requires all restrictive agreement to be registered, even if the restrictions do not have a significant effect on competition. Without the exemption, numerous agreements for information exchange and the sharing of risk could be caught by the Act and require registration, even though they would not be proceeded against. However, the complex monopoly provisions of the Fair Trading Act could still be applied to other collusive behaviour which had anticompetitive effects, such as agreement on premiums or the dividing of markets.

The UK delegate went on to explain an abuse of dominance case from the UK relating to building warranties. The market for building warranties is highly concentrated. At the moment, apart from the company that was investigated, there is only one other company offering warranties on newly-built properties. At that time, the organization that organised the scheme had a market share approaching 100 per cent. It offered its services only to its members -- the members being builders and construction companies. They had to register with the company for warranty purposes on their new domestic buildings. So, if a builder wanted to consider warranties from other companies, they had to either resign or sign up to both. If they did resign, they lost some or all of the benefits, many of which were financial, accruing from their previous membership. The original ruling was that the offending association had to change its rules and that if it made any subsequent changes it would have to return to the Director-General.

The **European Commission** has issued some negative decisions in the field of insurance. Of particular note is the decision that was taken against the Association of German Property Insurers in which the commission condemned an agreement to increase the commercial premiums by a fixed percentage. It was a clear case of price fixing.

The delegate from **Switzerland** also highlighted enforcement activity of the Swiss antitrust authority. In 1988 the Cartel Commission, which no longer exists, led an investigation against an insurance cartel and requested the elimination of the cartel. The effects of eliminating the cartel have been difficult to judge. Some have pointed out that the price was immediately raised, which is partially true, but the number of accidents also increased and it is difficult to separate these two effects. On the other hand, it is certain that the elimination of the cartel stimulated competition in the field, with new products that have been very quickly introduced in the market.

The delegate from **Ireland** commented on a particular case in which all of the life insurance companies had an agreement as to the commissions they would pay their intermediaries. The Ministry had the power to introduce regulations governing commissions but had never done so.

The Irish competition authority thought that it was necessary to introduce a system requiring disclosure of commission rates so that consumers could exercise some judgment as to whether they were genuinely receiving independent advice from such intermediaries. The conundrum for the antitrust authority was that while an exemption to the agreement between the companies could be refused, the authority could not introduce legislation to require disclosure.

The exemption was refused and, so far, no regulations requiring transparency have been introduced. If commissions are bid up and consumers lose out, the authority may have to take responsibility.

The **United Kingdom** delegate raised a similar case in the UK. In the 1980s, the Life Assurance and Unit Trust Organisation, a self-regulatory organisation (SRO), had commission scales in effect. With the introduction of the Financial Services Act 1986, under which SROs became part of the regulatory regime, the Director General of Fair Trading was required to examine their rules for potential anti-competitive effects. As a result, the commission scales were abandoned. In order to avoid the problem identified by the Irish delegate, a number of other rules were introduced, including a clear distinction between tied agents and independent financial advisers offering the full range of products, together with transparency and “best advice” requirements.

The **Netherlands** raised a related case of its own. In 1993, when the Netherlands introduces a ban on horizontal price fixing, the casualty insurance industry, which had an agreement on maximum commissions for intermediaries filed the agreement for dispensation under the former Act. The argument was that maximum commissions would be very useful because in their absence insurers would bid against each other for commissions and premiums for consumers would go up. This argument was declined. In regard to mandated disclosure of the commissions, it was considered that as long as the consumer does not directly pay the commission to the intermediary, it is not wise to disclose the commissions, because this implies asking the business community to disclose a cost item, which might facilitate collusion. It was considered that it would be better to only require disclosure when the consumer directly pays the commission, which is an objective of the present Netherlands’ regulatory reform project.

Competition Enforcers and Regulatory Conflict

The Chairman then introduced the final part of the roundtable on the relationship between competition enforcers and insurance regulators. Norway appears unique in that it is one of the only countries which has an explicit cooperation agreement between regulators.

The delegate from **Norway** explained that in Norway the competition act applies to the insurance sector and it is enforced by the competition authority. In addition there is a sector-specific regulator, which administers the sector-specific laws.

There is some overlap in the activities covered by these two laws. In the case of mergers, the competition authority may intervene against mergers which restrict competition. The insurance regulator also may regulate mergers, through its powers to grant licenses for entering into the insurance business and for merging or combining licenses. In the case of restrictive business practices, the competition authority may, on a case-by-case basis, grant exemptions from these conditions. The insurance regulator

also grants licenses for cooperation agreements. The objective of the competition act is efficient competition and economic efficiency. The objective of the sector specific law, is related to market structure, the competitive effects on the market, prudential issues and stability. There is clearly strong overlap with respect to the objectives and enforcement of the two laws.

For that the reason, in 1996 the two respective Ministries appointed a working group to draft a report concerning better coordination of procedures of the two agencies with respect to competition analysis. The result was an agreement which was signed by the two Director-Generals. The aim of the agreement is to avoid unnecessary duplication of work and to draft modes of cooperation. There are guidelines for cooperation - the regulator is required to forward applications for licenses to the competition authority; the agencies are to inform each other when a case is opened or when a case is handed over to the Board of the Commission; the competition authority informs the regulator about exemption cases and so on. Lastly, there are regular meetings between the Director-Generals, twice a year.

The experience of the competition authority is that this agreement works well. The agreement has established a common understanding of the respective fields of competence. For instance, the important principle has been established that the competition authority can intervene against mergers which have been granted a license from the Insurance Commission. There have been no instances of conflict that have needed to be resolved.

The solution is not totally satisfactory. Some possible problems remain. For example, the Commission may refuse a license because it considers that there are anticompetitive effects arising from a merger or restrictive business practice. The competition authority may disagree and may consider that the practice is pro-competitive or efficiency enhancing. Alternatively, the Commission may grant a license because it considers there are no anticompetitive effects and the competition authority may disagree on the basis that the practices are anticompetitive. A possible solution to these conflicts is to have a more profound or a more distinct division of tasks between the agencies, and to clarify the legitimate concerns of the two agencies.

The delegate from **Korea** noted the potential for conflict between the KFTC and the insurance regulator. According to the insurance act an insurance company interested in signing, changing or cancelling a mutual agreement must receive an authorisation from the financial supervisory commission ("FSC"). As at the end of March 1998, there are 12 such mutual agreements, including agreements on national security, risk divergence and management efficiency. Once an agreement is approved by the FSC, it is regarded as a lawful action supervised by laws other than competition laws. As a result, approved agreements are exempt from the application and enforcement of the competition law.

The KFTC is considering a close review of these approved agreements in terms of their legal implications from the competition law perspective. The KFTC has been considering narrowing the scope of such agreements from the application and enforcement of the competition law to the greatest extent possible.

Conclusion

The **Chairman** concluded by noting that the last part of the roundtable made it clear that antitrust laws do have an important role to play in the insurance industry, even though in this industry cooperation between competitors is sometimes essential. It appeared from a number of interventions that there was a belief that applying antitrust rules to the insurance field would eliminate the possibility of beneficial agreements. The experience of Italy and Switzerland shows that even when there is a general

ban on restrictive agreements, this does not imply that information sharing agreements are *per se* prohibited. They are prohibited only when they have the effect of restricting competition in the market. Applying antitrust law in this sector does not lead to the elimination of beneficial agreements. The roundtable showed that there remains a lot of scope for further enforcement of the antitrust laws in the insurance sector for the benefit of consumers and users of insurance products.

NOTES

- 1 The last examination was in 1992, which was the sixth examination of the reservations of the member countries in matters relating to insurance.
- 2 These guidelines can be found in the OECD publication "Insurance Guidelines for Economies in Transition", 1997.
- 3 In the jargon of United States, a "foreign" insurance company was not an international insurance company, but was one from another state. For example, a Virginia company doing business in Maryland was considered a foreign insurance company.
- 4 The 14 states of the European union plus Norway, Iceland and Liechtenstein.
- 5 Financial System Inquiry (Wallis Report), March 1997.
- 6 See OECD, "Enhancing The Role Of Competition In The Regulation Of Banks", published in September 1998, "Series Roundtables on Competition Policy", No.17.

AIDE-MEMOIRE DE LA DISCUSSION

Partie I : Problèmes de concurrence et de réglementation

Introduction

La table ronde commence par des exposés des organisations internationales concernées sur leurs travaux dans le domaine de la libéralisation et de la déréglementation du secteur de l'assurance :

Un membre du Secrétariat de l'**OCDE** résume les travaux du Comité des assurances de l'OCDE et souligne le rôle des deux Codes de libéralisation de l'OCDE. Le premier porte sur les mouvements de capitaux et le second sur les opérations invisibles. De façon générale, l'objectif de ces deux codes réside dans la libéralisation progressive des échanges de services financiers. Les codes dressent une liste d'engagements relatifs aux assurances (et aux autres services). Les pays Membres peuvent inscrire des réserves vis-à-vis de ces obligations. Ces réserves font l'objet d'examens réguliers¹ et, lors de chaque examen, si un pays retire l'une de ses réserves, il ne peut plus la réintroduire. Par ce mécanisme, on obtient une élimination progressive des réserves des pays Membres au fil du temps.

Un nombre substantiel de pays membres maintiennent des réserves importantes concernant l'assurance vie et certains produits d'assurance non-vie. En général, il y a moins de réserves en ce qui concerne l'assurance des risques industriels que pour ce qui est des assurances acquises par des particuliers. Dans le cas des risques industriels, dans lesquels les consommateurs sont pour l'essentiel de grandes entreprises, on considère en effet généralement que la nécessité de protéger ces consommateurs est moindre que dans le cas d'assurances contractées par des particuliers.

Les travaux de l'OCDE en faveur de la libéralisation ne portent pas uniquement sur les codes, mais aussi sur la mise en évidence des obstacles aux échanges, des obstacles dressés par la réglementation face à la concurrence et, de plus en plus, sur la détection des pratiques des entreprises qui restreignent les échanges et la concurrence sur le marché de l'assurance. Dans de nombreux cas, même lorsque le régime de réglementation n'est pas discriminatoire, les pratiques commerciales et réglementaires peuvent fausser la concurrence.

La libéralisation des échanges dans le secteur des services d'assurance passe par l'élaboration de structures saines de réglementation dans les pays partenaires. Une bonne réglementation impose certaines normes prudentielles minimales et autorise une concurrence convenable, aussi bien entre entreprises nationales qu'entre entreprises nationales et étrangères. Récemment, le Comité des assurances a organisé une conférence avec un certain nombre de pays non membres. Cette conférence a approuvé 20 principes directeurs en matière d'assurance à l'intention des pays en transition. Ces principes directeurs dressent une liste de principes de réglementation destinés à ces pays et définissent un niveau de réglementation du secteur de l'assurance qui permette une libéralisation et une concurrence convenables.²

Un délégué de la **Commission européenne** explique les activités de la CE dans le domaine des assurances. Le cadre juridique de référence du marché unique de l'assurance a été tracé par trois générations de directives sur l'assurance vie et l'assurance non vie, ainsi que par la Directive sur les

comptes des sociétés d'assurance. Par suite de ces directives, le marché européen de l'assurance est sans doute l'un des plus libéraux au monde.

Les premières directives sur l'assurance vie et l'assurance non-vie ont été adoptées dans les années 1970. Elles prévoyaient le libre exercice du droit d'établissement. Sous l'effet de ces directives, les assureurs ont pu établir des succursales dans toute l'UE en suivant une procédure simplifiée et sans heurter à des obstacles importants ou à des limitations excessives de la part des Etats membres d'accueil. Parallèlement, ces directives ont imposé une marge de solvabilité commune et un fonds minimum de garantie afin de servir d'amortisseur financier contre des fluctuations préjudiciables.

La deuxième génération de directives sur l'assurance vie et l'assurance non-vie a été adoptée à la fin des années 1980. Elles traitaient de la liberté générale de prestation de services. Plus précisément, elles établissaient une distinction entre risques "industriels" et risques de "masse". Les premiers concernent des professionnels avisés se portant acquéreurs de produits d'assurance dans le cadre d'une relation d'entreprise à entreprise. Ils ne nécessitent pas une protection aussi intense que des consommateurs mal informés achetant des produits de masse. De fait, l'assurance des risques industriels a été libéralisée dans le cadre de la politique de libre prestation de services, moyennant simplement une surveillance par le pays d'origine. L'assureur doit bien entendu informer l'autorité de tutelle du pays d'accueil par une procédure de notification complète, mais contrairement à la situation antérieure, les autorités du pays d'accueil n'exercent plus de contrôle a priori des conditions et des primes des polices d'assurance.

La troisième génération de directives, par la suite, a abouti à un système de "passeport unique", grâce auquel une société habilitée à exercer son activité par les autorités de tutelle des assurances d'un Etat membre quelconque de l'UE est automatiquement habilitée à exercer les mêmes activités dans n'importe quel autre Etat membre. Les sociétés d'assurance peuvent désormais vendre librement leurs polices par-delà les frontières nationales sans se soumettre à une approbation préalable de leurs tarifs ou des conditions de leurs polices.

Pour obtenir l'approbation de ces directives par l'ensemble des Etats membres, il a fallu prendre d'autres mesures d'harmonisation. Ces mesures ont porté sur des questions comme la constitution des réserves techniques, l'évaluation des actifs, la mise en place de règles plus précises sur les normes en vigueur en matière de marge de solvabilité, les obligations d'honorabilité et de compétence des dirigeants et l'identité des actionnaires d'une société d'assurance. De plus, le fait que les entreprises d'assurance peuvent désormais vendre librement leurs produits au-delà des frontières est synonyme de démantèlement de certains monopoles nationaux de vente de produits d'assurance.

En ce qui concerne la réglementation des intermédiaires d'assurance, une directive traitant ce dossier a été adoptée dès 1976. Cette directive n'accorde pas aux intermédiaires le régime du passeport unique, mais leur facilite, dans une certaine mesure, l'accès transnational aux marchés en prévoyant la reconnaissance mutuelle de leur expérience professionnelle, de leur bonne réputation et de leur absence d'antécédents en matière de faillite entre les Etats membres. La Commission procède actuellement à une révision de cette directive.

En ce qui concerne la réassurance, elle n'est en général pas réglementée au niveau de l'UE (bien que la toute première directive de la CE dans le domaine de l'assurance, qui remonte à 1964, ait prévu l'accès non discriminatoire pour les entreprises de réassurance aux marchés des Etats membres, aussi bien sur la base de la liberté d'établissement que de la libre prestation de services). La philosophie de la Commission en matière de réassurance consiste essentiellement à dire qu'il s'agit d'une activité concernant des professionnels avisés qui ne concerne pas directement les consommateurs. C'est pourquoi elle ne fait pas l'objet de règlements spécifiques de l'UE.

Les fondations du marché unique de l'assurance sont désormais en place et les efforts actuels de la Commission visent principalement à améliorer le cadre existant. La simple adoption d'un texte législatif ne suffit pas à donner corps à un marché pleinement intégré. Il y a bien d'autres obstacles à cette intégration. Par exemple, les différences culturelles peuvent être sensibles, les modes de distribution varient selon les Etats membres et il faut souvent en passer par une présence locale pour desservir la clientèle, traiter les sinistres et régler les tâches administratives. Mais surtout, il y a d'autres obstacles d'importance comme le droit des contrats, la fiscalité, la protection nationale des consommateurs. L'introduction de l'euro à compter du 1er janvier 1999 va placer ces obstacles sous les feux de la rampe.

Le représentant de l'**IAIS** (Association internationale des autorités de contrôle de l'assurance) retrace l'histoire et les travaux de l'IAIS. L'IAIS est la petite sœur du Comité des règles et pratiques de contrôle des opérations bancaires de Bâle et de l'Organisation internationale des commissions de valeurs (OICV) connus de plus longue date. Les objectifs de l'IAIS consistent à élaborer des principes et des normes de surveillance préventive des assurances et à donner des conseils aux pays émergents ou en transition.

L'IAIS a été créée et constituée en société sans but lucratif de l'Etat d'Illinois en 1994. Initialement, son objectif consistait simplement à partager des expériences et des informations entre autorités de tutelle des assurances. Mais rapidement, il est apparu que l'échange de renseignements ne correspondait pas vraiment aux besoins. En conséquence, les objectifs de l'association ont été élargis et consistent désormais à : (a) coopérer pour parvenir à une meilleure surveillance du secteur de l'assurance et maintenir l'efficacité, la sécurité et la stabilité des marchés au profit des porteurs de police et de leur protection ; (b) unir leurs efforts pour élaborer des normes pratiques de surveillance des assurances ; (c) coopérer avec les autres entités concernées, notamment l'OICV et le Comité de Bâle ; enfin, (d) apporter une assistance mutuelle en vue de sauvegarder l'intégrité des marchés. C'est actuellement l'élaboration de normes et de principes qui constitue le principal objectif de l'association.

Quatre documents ont été publiés l'an dernier sur les principes de surveillance de l'assurance (le présent document s'attachera aux thèmes qui devraient être traités par la législation ou la réglementation de chaque juridiction) ; un document intitulé "Guidance on Insurance Regulation of Emerging Market Economies" ; un document sur les questions transnationales ; enfin un document sur les mémorandums d'entente. L'IAIS travaille actuellement sur un document sur l'agrément, un autre sur les inspections sur place et enfin, un troisième sur les instruments dérivés. L'IAIS traite également des dossiers touchant au commerce électronique et aux normes de solvabilité.

Un représentant du **BIAC** présente un aperçu de la nature complexe de la réglementation des assurances aux Etats-Unis. Historiquement, la Cour suprême a considéré dans les années 1850 que les activités d'assurance devaient être soumises, non pas à une réglementation fédérale, mais à la tutelle des Etats. Ce secteur est ainsi devenu un très puissant levier financier et réglementaire pour les Etats, de sorte que dans les années 1940, l'imposition des sociétés d'assurance étrangères et nationales par les Etats était devenue leur principale source de recettes.³ A l'occasion d'un épisode qui constituait paradoxalement une affaire antitrust aux termes du Sherman Act, avec la mise en place d'un bureau de fixation des tarifs en 1944, la Cour suprême changea son fusil d'épaule en considérant que les opérations d'assurance constituaient des activités commerciales inter-Etats et relevaient donc de la clause constitutionnelle relative au commerce et par là-même de la réglementation fédérale. Compte tenu de l'importance pour les Etats de leurs prérogatives de réglementation et plus précisément d'imposition des assurances, la National Association of Insurance Commissioners (association professionnelle représentative des départements des assurances des 50 Etats, du District de Columbia et des quatre Territoires des Etats-Unis) a rédigé un projet de loi, largement repris par le Congrès en 1945, moyennant quelques modifications et c'est ainsi que le McCarran Act a été promulgué au cours de la session suivante du Congrès. Ce McCarran Act,

tenant compte de la conclusion de la Cour suprême sur le caractère inter-Etat des opérations d'assurance dans le cadre d'une affaire d'antitrust, se présente sous l'apparence d'une loi antitrust. Son principal objectif consistait en fait à rendre aux Etats le droit de réglementer et d'imposer les sociétés d'assurance.

En conséquence, le secteur américain de l'assurance est unique en son genre, puisqu'il n'y a pas de réglementation fédérale et qu'il existe un texte de référence, le McCarran Act, qui exempte les opérations d'assurance de la législation fédérale antitrust dans la mesure où ce secteur est placé sous la tutelle des différents Etats.

Le McCarran Act a été adopté à une époque où la Cour suprême (dans l'affaire *Parker v. Brown*) était en train d'instituer une exemption générale pour la réglementation des Etats. Toutefois, les tribunaux ont estimé, dans leur jurisprudence, que l'ampleur de la réglementation nécessitée par le McCarran Act n'est pas aussi grande que celle qu'exige la doctrine *Parker*. De façon générale, les tribunaux ont accepté, aux termes de l'exemption prévue par le McCarran Act, une réglementation limitée de la part des Etats. Du point de vue des Etats, le McCarran Act leur permet d'appliquer ou de permettre des accords de partage des primes ou de partage d'information que la législation fédérale antitrust n'autoriserait pas.

Il convient de noter que les Etats de Californie et de New York, font appliquer tous les deux avec vigueur leur législation antitrust et n'ont pas prévu d'exemption pour les assurances. En conséquence, de nombreuses sociétés d'assurance, compte tenu de la taille de ces deux marchés, ne considèrent pas le McCarran Act comme un texte particulièrement important. Elles alignent leurs activités sur le droit de la concurrence afin de ne pas subir les rigueurs de la législation antitrust au niveau de l'Etat.

On observe un mouvement général vers la concurrence, aux dépens de la réglementation. Même si la réglementation a un rôle à jouer, on admet généralement qu'elle doit se limiter aux questions de solvabilité et de protection des consommateurs, par opposition à une réglementation des taux de prime ou à un contrôle envahissant des sociétés d'assurance, comme c'était la règle dans le passé.

La facilité d'accès aux marchés des Etats-Unis dépend fortement de la réglementation de chaque Etat. Malgré le mouvement de déréglementation, entrer dans le secteur de l'assurance reste soumis à d'importantes charges de respect de la réglementation dans ce pays doté de 50 territoires de compétence réglementaire. Ce régime Etat par Etat est peu compatible avec le régime de réglementation des valeurs mobilières ou de surveillance des institutions financières qui s'appliquent principalement à l'échelle fédérale. Le régime américain des assurances constitue une anomalie historique qui n'a guère de chances de changer à court comme à long terme.

Les obstacles à l'entrée et à la sortie

Le **Président** introduit la discussion sur les obstacles à l'entrée et à la sortie, notant que, d'après les contributions remises, l'entrée d'entreprises dans ce secteur suppose un agrément dans tous les pays de l'OCDE. La procédure d'agrément peut, dans certains cas, être très lourde et exiger de nombreux mois et la communication d'un volume important de documents. Cela peut constituer un obstacle à l'entrée ou à l'introduction de nouveaux produits. De plus, certains pays conservent des monopoles réglementaires sur certaines formes d'assurance.

Le délégué du **Royaume-Uni** est invité à présenter de façon succincte la procédure d'agrément des sociétés d'assurance dans son pays. Au Royaume-Uni, une société d'assurance doit être agréée par l'autorité de tutelle des assurances avant de pouvoir exercer ses activités dans le pays (sauf pour les sociétés agréées dans d'autres Etats membres de l'Espace économique européen⁴). La procédure

d'agrément n'est ni automatique, simple ou rapide. Conformément à la législation britannique et par suite d'une prescription de l'UE, la décision concernant une candidature doit être prise dans les six mois après son dépôt. Dans la pratique, ce délai ne s'est pas avéré suffisant et les assureurs sont encouragés à consulter soigneusement l'autorité de tutelle lorsqu'elles établissent leur dossier de candidature.

Lors de l'examen des dossiers, la préoccupation première de l'autorité de tutelle consiste à vérifier si la société est gérée sainement et prudemment. L'autorité examine la structure et l'organisation de la société ainsi que les types d'activités qu'elle va exercer, les actifs représentatifs du capital de départ de la société et ses réserves initiales ; les mécanismes de réassurance que la société se propose de mettre en place ; des prévisions financières pour les trois premières années d'activité de la société ; enfin, la compétence des actionnaires et des dirigeants de la société de façon à vérifier que la direction de la société dispose de l'expérience convenable des opérations d'assurance.

L'autorité britannique de tutelle (conformément aux directives de l'UE) ne contrôle pas les barèmes de primes que la société se propose de facturer. Elle ne cherche pas à approuver les conditions que la société entend appliquer à ses contrats d'assurance. De même, l'autorité de tutelle n'applique pas de critère de nécessité économique avant de décider d'accorder son agrément. Elle évalue si la direction a l'expérience suffisante pour gérer la nouvelle activité dans laquelle la société compte se lancer. Une fois l'agrément accordé, l'autorité de tutelle peut imposer des conditions à la société pour ses premières années d'activité. La société peut par exemple être tenue de soumettre des compte rendu trimestriels ou le total des primes qu'elle peut encaisser durant ses premières années d'existence peut être plafonné. Ce processus peut être renouvelé si une société d'assurance déjà agréée souhaite se lancer dans une nouvelle branche d'assurance.

En ce qui concerne l'assurance obligatoire, le délégué note qu'une branche d'assurance peut connaître une concurrence intense alors même qu'elle est obligatoire. Au Royaume-Uni, il y a plus de 80 sociétés en concurrence active dans la branche de l'assurance obligatoire des automobilistes. La concurrence porte sur les primes, les taux de bonus pour les bons conducteurs, les avantages supplémentaires ajoutés à la couverture minimale obligatoire, les méthodes de distribution, les méthodes de règlement des sinistres, la rapidité de ce règlement ou l'octroi d'avantages comme la fourniture d'un véhicule de remplacement lorsque le véhicule du porteur de police est en cours de réparation.

Une société d'assurance qui souhaite se retirer du marché peut demander le retrait de son agrément. Elle reste soumise à la surveillance de l'autorité de tutelle jusqu'à l'extinction de tous ses engagements ou leur transfert à une autre société. Une société d'origine extérieure à l'Union européenne doit effectuer un dépôt de garantie si elle souhaite exercer ses activités au Royaume-Uni et ce dépôt n'est pas remboursé en cas de sortie, tant que l'ensemble de ses engagements ne sont pas éteints.

A titre de comparaison, l'examen passe ensuite à la situation au **Japon**. Pour entrer dans le marché de l'assurance au Japon, il faut un agrément, délivré par le ministère des Finances. La société candidate doit faire figurer dans son dossier d'agrément ses statuts et les divers documents décrivant ses méthodes de travail, ses produits d'assurance, les contrats et les méthodes utilisées pour calculer les primes et les taux de primes. Le ministère des Finances impose que les taux de prime proposés ne soient pas "excessivement élevés", "excessivement faibles" ni "injustement discriminatoires".

A la suite de l'application de la loi amendée sur les sociétés d'avril 1996, les sociétés d'assurance vie et non-vie sont autorisées à exercer les activités de l'autre branche, par l'intermédiaire de filiales. Le projet de loi de réforme générale du secteur financier qui vient d'être adopté par la Diète supprime les restrictions à l'exercice dans certaines branches d'assurance pour les sociétés d'assurance et autres entreprises financières.

Le délégué de la **République tchèque** note que la législation en vigueur sur l'assurance remonte à 1991, mais qu'elle est devenue inadaptée. Le ministère des Finances élabore actuellement un nouveau projet de loi. Son objectif général consiste à mettre plus fortement l'accent sur la santé financière des sociétés d'assurance. D'importantes modifications sont également envisagées en ce qui concerne les prérogatives de l'autorité de tutelle des assurances. Actuellement elle n'a pas suffisamment de pouvoirs pour faire face à des situations de difficultés financières d'un assureur. Il en irait autrement avec le nouveau texte qui va doter l'autorité de pouvoirs d'administration ou de réduction du capital inscrit.

En République tchèque, il reste des monopoles réglementaires dans deux domaines. Le premier est la responsabilité civile des conducteurs, dont est chargée l'ancienne Société d'assurance de l'Etat tchèque. Le ministère des Finances prépare actuellement des amendements à la loi pour faire de cette assurance réglementaire une assurance contractuellement obligatoire. L'autre domaine réglementaire concerne la responsabilité des employeurs en matière d'accidents du travail ou de maladies professionnelles.

Le délégué de l'**Italie** évoque les règles inhabituelles qui s'appliquent à la liquidation des assureurs en Italie. L'entrée sur le marché italien de l'assurance est libre – l'ensemble des directives de la CE ayant été intégralement transposées. Il existe en revanche une légère limitation de la liberté de sortir du marché. En cas de liquidation d'un assureur, comme dans les autres pays, et à titre de protection des clients de la société, il est possible que le portefeuille de la société soit repris par une autre institution, viable. Dans ce cas, il existe une disposition de la loi qui prévoit que l'institution viable reprenne une part des salariés de la société défaillante. Cette disposition n'a été que rarement appliquée. L'Autorité italienne de la concurrence a signalé au parlement que cette disposition introduisait une forme de discrimination à l'encontre des sociétés italiennes d'assurance (cette règle ne pouvant s'appliquer à des sociétés d'assurance opérant à partir de l'étranger aux termes de la libre prestation de services).

Il existe un monopole réglementaire dans le secteur de l'assurance du lieu de travail. Il s'agit d'un marché important où les recettes de primes représentent environ 20 pour cent de l'ensemble des primes d'assurance. En outre, il existe un système d'assurance réglementaire dans le secteur agricole. Ce secteur a eu une tradition de mise en "dans un seul pot commun" des assurances par souci de contrôler les prix de l'assurance et pour administrer l'aide de l'Etat qui représente environ 50 pour cent du total des primes d'assurance. L'Autorité de la concurrence a considéré que ce système du pot commun constituait un accord de restriction de la concurrence. En conséquence, on compte désormais plusieurs dispositifs de mise en commun, chacun fournissant des assurances agricoles.

Le délégué des **Etats-Unis** évoque les conditions d'entrée sur le marché américain de l'assurance. Comme on l'a indiqué précédemment, le métier d'assureur aux Etats-Unis est réglementé par l'intermédiaire des 50 Commissaires aux assurances des Etats ainsi que par le Commissaire aux assurances du District de Columbia et des quatre Territoires des Etats-Unis. Dans le détail, la réglementation varie considérablement selon les Etats, mais chacun impose un agrément des sociétés opérant sur son territoire. Un projet a récemment été lancé par la NAIC pour faciliter l'obtention de cet agrément. La NAIC a élaboré un formulaire commun de candidature qui permet à une société souhaitant opérer dans un Etat ou dans l'ensemble des 50 Etats de soumettre le même formulaire à tous les Etats. Chacun d'entre eux prend ensuite la responsabilité d'analyser le dossier et de délivrer son propre agrément si besoin est. Ce formulaire est désormais disponible dans 9 Etats et des travaux sont en cours pour le diffuser plus largement dans l'ensemble du pays.

Il n'y a pas d'initiatives en cours pour instaurer la reconnaissance mutuelle entre Etats des certificats d'agrément. Chaque Etat estime être dépositaire d'une connaissance et d'une expérience propre au marché de cet Etat. Il n'y a jamais eu de tentative sérieuse pour imposer une procédure nationale

d'agrément. Cela étant, les Etats reconnaissent souvent le suivi de la solvabilité financière d'autres Etats. En fait, d'après le projet d'accréditation de la NAIC, la plupart des Etats vont s'en remettre à la tutelle "interne" (c'est-à-dire de l'Etat d'origine) pour le suivi approfondi de la solvabilité et se contenteront de vérifier chaque année les comptes de la société.

En réponse à une question de la Suède sur l'existence ou non d'une ample disparité de la réglementation des Etats et sur l'existence d'un mouvement d'harmonisation ou de reconnaissance mutuelle, le délégué des Etats-Unis répond que la NAIC cherche à parvenir à une plus grande cohérence et uniformité des réglementations des divers Etats. Sur le thème spécifique de la réglementation des taux, par exemple, pratiquement tous les Etats souscrivent normalement aux principes (évoqués par le Japon) selon lequel les taux ne doivent pas être inadaptés, excessifs ou injustement discriminatoires, même si les Etats ont des façons différentes de les appliquer. Certains Etats imposent une approbation préalable des taux avant qu'ils ne puissent être appliqués. Certains ont adopté le système "déclaration, puis vente", d'autres le régime "vente, puis déclaration". Certains Etats ont adopté une flexibilité des barèmes à l'intérieur d'une fourchette, d'autres n'imposent aucun enregistrement des taux.

Bref, on observe une grande diversité entre les Etats ; toutefois, on observe aussi un mouvement considérable vers une plus grande uniformité et certainement vers une plus grande déréglementation. La plupart des Etats ont en effet admis que l'ère de l'approbation préalable était dépassée et s'efforcent d'aller vers un système "déclaration, puis vente" ou "vente, puis déclaration".

En réponse à une question du Secrétariat de l'OCDE, le délégué des Etats-Unis note que malgré l'absence d'étude des coûts subis pour obtenir une approbation en vue d'exercer une activité dans l'ensemble des 50 Etats, la procédure d'approbation en Pennsylvanie pour une société étrangère demande approximativement 60 jours, tandis que pour une société nationale, il faut compter près de 6 mois. Les délais d'approbation varient cependant substantiellement entre les 50 Etats. Ce n'est pas une procédure longue et lourde, bien qu'elle nécessite la communication d'une documentation importante.

Contrôle des prix et des conditions d'assurance

Le **Président** passe ensuite à l'examen du contrôle des prix et de la réglementation des conditions d'assurance.

Répondant à une question sur l'utilité d'un contrôle des conditions des polices d'assurance, le délégué du **Royaume-Uni** estime que ce contrôle n'est certainement pas nécessaire. Au Royaume-Uni (et en fait dans toute l'Union européenne, par suite des directives de la CE) l'approbation préalable des tarifs et des conditions d'assurance a été abolie. Le Royaume-Uni applique depuis longtemps le principe de la "liberté moyennant publicité". En d'autres termes, une société d'assurance est libre de définir ses propres conditions conformément à sa propre conception commerciale, simplement sous réserve de donner des informations de qualité sur sa situation financière. Les assureurs opérant au Royaume-Uni sont tenus non seulement de produire les mêmes comptes et rapports que toutes les autres sociétés aux termes du code des sociétés, mais aussi de fournir des déclarations très précises conçues spécialement en vue de la surveillance des activités d'assurance. Ces déclarations doivent être établies de façon plus prudente que les comptes destinés aux actionnaires. Il s'agit de déclarations annuelles, sauf dans le cas de nouvelles sociétés, ou de sociétés qui ont connu un changement de la composition du capital, auxquelles l'Autorité de tutelle peut demander des déclarations plus fréquentes. Un exemplaire de ces déclarations est placé dans des archives publiques et est disponible pour vérification par toutes les parties intéressées.

Divers groupes d'intérêts examinent ces déclarations à la loupe, notamment les agences de notation et les grandes entreprises de courtage en assurance, qui procèdent à leur propre analyse de la sûreté des sociétés d'assurance dont elles envisagent de placer les contrats. La nouvelle des difficultés financières d'une société a toutes les chances de se répandre très vite. Les sociétés d'assurance souhaitent aussi souvent analyser les déclarations financières de leurs concurrents. Elles ont même intérêt à le faire, puisque le mécanisme britannique de protection des porteurs de police impose à toutes les sociétés du marché de payer une cotisation qui couvre les engagements (vis-à-vis des particuliers porteurs de police et des porteurs de police des branches d'assurance obligatoire) des sociétés d'assurance défailtantes.

La situation du Royaume-Uni est analogue à celle des **Pays-Bas**. Les Pays-Bas appliquent depuis longtemps un système "normatif" de surveillance, aux termes duquel les sociétés sont en principe libres de mener leurs propres activités et de fixer des primes aux niveaux que chaque société estime convenable, sous réserve d'une surveillance vérifiant que la société a des "pratiques commercialement saines". La liberté s'exerce jusqu'au choix de la méthode actuarielle de calcul des primes et provisions techniques.

Plus précisément, l'approche de l'Autorité de tutelle consiste à s'attacher à la situation financière globale d'une société d'assurance vie.

Comme au Royaume-Uni, les Pays-Bas impose la communication de comptes annuels et de déclarations de suivi de la situation financière de la société d'assurance d'année en année. Comme cela risque de ne pas être suffisant en cas de détérioration très rapide de la situation d'une société, l'autorité de tutelle est en train d'élaborer des mécanismes d'alertes, notamment à destination des branches non-vie.

Le délégué du **Japon** évoque ensuite le système de contrôle des primes qui s'applique dans son pays. Au Japon, il y a deux types de taux de prime. D'une part, il y a les taux qui sont fixés par chaque société d'assurance conformément au code des assurances et en accord avec le ministère des Finances. D'autre part, il y a les taux définis par des organismes de fixation des taux conformément à la loi correspondante. Ces organismes sont soumis à une procédure de notification préalable et de contrôle par le ministère des Finances.

La loi sur les opérations d'assurance autorise trois types de taux : premièrement les "fourchettes" de taux, c'est-à-dire les taux qui peuvent être choisis à l'intérieur d'une fourchette préétablie ; deuxièmement, les taux normalisés ; et troisièmement, les taux discrétionnaires. Les taux discrétionnaires sont déterminés en fonction de la situation de risque correspondant au moment où un contrat est finalisé, sans référence à des taux normalisés. Il existe des organismes de fixation des taux dans cinq branches d'assurance : incendie, accident, responsabilité civile, automobile et responsabilité civile obligatoire des conducteurs. Les sociétés d'assurance adhérentes des organismes de fixation des taux sont tenues d'appliquer les taux calculés par l'organisme. Toutefois, pour l'assurance incendie, l'assurance accident et l'assurance automobile, les sociétés d'assurances peuvent choisir leur taux dans une fourchette de 10 pour cent au-dessus ou en dessous du taux calculé par l'organisme de fixation des taux. Le ministère des Finances examine les taux des organismes en fonction des trois principes évoqués précédemment : les taux ne doivent pas être excessivement élevés, inutilement bas, ni injustement discriminatoires. Les organismes de fixation des taux sont exemptés de l'application de la Loi anti-monopole du Japon.

Un rapport du Conseil des assurance de juin 1996 sur le système actuel des organismes de fixation des taux a recommandé des réformes comme l'adoption du système de taux de prime pur conseillé et l'abolition de l'obligation d'adopter les taux calculés. Ces recommandations sont intégrées dans le projet de loi d'amendement de la loi sur les organismes de fixation des taux qui a été adopté par la Diète la semaine dernière. Ces réformes des organismes de fixation de taux entreront en vigueur au

1er juillet 1998. Toutefois, dans le cas de l'assurance tremblement de terre et de l'assurance obligatoire de la responsabilité civile des conducteurs (administrés par des textes spéciaux et qui fonctionnent en fait comme une forme publique d'assurance dans laquelle l'Etat intervient en tant que réassureur) les organismes de fixation des taux vont continuer de calculer les primes brutes.

Le délégué de la **Corée** pense que le gouvernement devrait approuver les conditions des contrats d'assurance pour des raisons de protection des consommateurs. La terminologie et le libellé des contrats d'assurance peuvent être difficiles à comprendre pour le consommateur ordinaire. Pour cette raison, le gouvernement coréen vérifie le contenu de tous les nouveaux contrats.

Le délégué de l'**Allemagne** explique que son pays a également été doté, jusqu'à une période récente, d'un système de contrôle des primes. Jusqu'en juillet 1994, l'Allemagne avait recours à un vaste dispositif d'approbation préalable des tarifs. A cette date, l'ensemble des contrôles systématiques ont été supprimés, à quelques exceptions portant sur l'assurance complémentaire maladie, les "Pensionskassen" (sorte de caisses de retraite professionnelles), et les fonds d'assurance funéraire. Pour ces branches d'assurance, la base de calcul doit être approuvée avant application. Dans l'assurance vie, les principes de calcul technique doivent aussi être soumis pour approbation, mais après avoir été adoptés.

Les effets de la concurrence par les prix ont été constatés dans l'assurance obligatoire de la responsabilité civile des conducteurs. Jusqu'en 1994, les sociétés d'assurance étaient tenues de calculer les tarifs en fonction d'un système donné de calcul. En conséquence, la concurrence par les prix n'intervenait que sur les coûts d'exploitation et le principal facteur de différenciation résidait dans les services fournis. Par suite de l'abolition du décret relatif au calcul des barèmes de taux, on a assisté à une intense concurrence par les prix. Dans certains cas, les primes peuvent ne pas même couvrir les charges techniques diminuées des revenus de placement. Il peut y avoir des cas de faillite. Auparavant, dans le régime de réglementation des prix, les taux de prime étaient stables et aucune société n'était menacée de faillite.

Réglementation de la solvabilité et du contrôle du capital

Le délégué de l'**Australie**, tout en notant que le régime réglementaire de son pays n'impose pas de restriction en matière de tarification, admet qu'une même personne ne peut détenir plus de 15 pour cent du capital d'une société donnée. Toutefois, ce n'est pas une restriction absolue. L'Australian Treasurer peut autoriser un particulier à détenir plus de 15 pour cent s'il le juge convenable. On considère que la diffusion du capital présente des avantages et qu'il n'est pas souhaitable pour une société du secteur financier d'être directement associée à un actionnaire unique en raison des risques de contagion. L'argumentation en faveur du maintien du plafond de 15 pour cent pour les sociétés d'assurance n'est pas aussi convaincante que dans le cas des banques. Néanmoins, ce plafond a été conservé. Les sociétés d'assurance vie et d'assurance générale en Australie sont soumises à des normes minimales de solvabilité et de fonds propres. Toutefois, leurs investissements ne sont généralement pas soumis à des restrictions et il appartient aux sociétés elles-mêmes de gérer leurs affaires avec prudence.

Le délégué de la **Norvège** note que la réglementation des participations en Norvège est la même dans les secteurs de l'assurance et de la banque. De fait, ces deux secteurs sont soumis à des réglementations très voisines et sont placés sous la tutelle du même organisme. A titre d'exemple, les entreprises d'assurance en Norvège sont soumises aux mêmes normes de fonds propres que les banques.

En ce qui concerne la réglementation des participations, aucun actionnaire ne peut détenir plus de 10 pour cent du capital d'une même entité. Cela n'empêche pas les entreprises d'assurance de faire

partie de conglomerats financiers, mais en ce cas, les restrictions financières s'appliquent au niveau de la société holding, aucun actionnaire ne pouvant détenir plus de 10 pour cent du capital du groupe. Le principal objectif de cette réglementation est d'empêcher la confusion des intérêts d'un groupe financier avec ceux d'autres entreprises. Elle visait en outre à empêcher les problèmes d'une institution d'affecter la solvabilité d'autres institutions. Cela peut poser un problème de gouvernement d'entreprise, dans la mesure où il n'y a aucun actionnaire important ayant engagé des fonds dans la société qui détienne le pouvoir de la contrôler. Pour la Norvège, c'est moins grave que le problème qui pourrait résulter de la confusion des intérêts financiers avec d'autres intérêts.

Réglementation des intermédiaires d'assurance ; concurrence avec les produits de substitution ; institutions de réglementation

Le **Président** introduit ensuite la dernière session consacrée aux thèmes de la réglementation et plus précisément aux questions de concurrence avec les produits de substitution des produits d'assurance, la réglementation des intermédiaires d'assurance et les institutions intervenant dans la réglementation de ce secteur.

La façon dont est organisée la distribution des produits d'assurance dans les différents pays peut constituer un obstacle important à la concurrence. Par exemple, lorsque la distribution des assurances auprès des particuliers est dominée par des relations d'exclusivité avec des assureurs, il peut être difficile pour une nouvelle entreprise d'entrer sur le marché. Cela a posé un problème particulier en Italie.

Le délégué de l'**Italie** explique que, traditionnellement, le principal canal de distribution des assurances en Italie a été l'agent individuel étroitement lié à une seule société d'assurance. Le système des intermédiaires indépendants ou "courtiers" n'est pas très répandu. Ces dernières années, la principale évolution dans ce domaine aura été le recours aux banques comme points de vente de produits d'assurance, en particulier les produits d'assurance vie normalisés immédiatement disponibles.

En réponse à une question du Président, le délégué italien explique la relation entre l'autorité de tutelle des assurances et la Banque d'Italie (autorité de tutelle des banques). En ce qui concerne les changements dans la propriété du capital, c'est la nature de la société qui est "à l'initiative principale" (c'est-à-dire l'initiatrice d'une fusion ou d'un rachat) qui détermine l'autorité de tutelle compétente. Dans le cas des canaux de distribution, cela dépend de la nature des produits vendus ; par exemple, les nouveaux intermédiaires financiers (qui vendent des parts de fonds communs de placement, des obligations garanties ou non, etc.) sont soumis à la tutelle de la banque centrale, tandis que le système des agents d'assurance est placé sous le contrôle du ministère de l'Industrie et, dans une certaine mesure, sous celle de l'autorité de tutelle du marché des assurances. Si une société d'assurance souhaite créer des succursales bancaires, elle doit se conformer à la réglementation promulguée par la banque centrale. Pour ce qui concerne la réglementation de la transparence et les dispositions relatives à l'information des consommateurs, il existe un certain chevauchement des compétences. L'offre de produits financiers aux consommateurs est contrôlée par l'autorité de tutelle de la Bourse, alors que l'offre de produits d'assurance aux consommateurs est soumise à la surveillance de l'autorité de tutelle des assurances.

Le délégué des **Pays-Bas** note que le secteur de la distribution du marché néerlandais des assurances ne pose généralement pas de difficultés. Il existe un grand nombre de souscripteurs dits "directs" (sociétés qui vendent directement les produits d'assurance au public sans passer par des intermédiaires) et la majorité des intermédiaires aux Pays-Bas sont de type "courtier" (travaillant pour plusieurs sociétés d'assurance).

Toutefois, même s'il n'y a pas de réglementation directe des prix des produits d'assurance eux-mêmes, les intermédiaires ne sont pas autorisés à facturer leurs services directement auprès des consommateurs, mais doivent les facturer aux sociétés d'assurance. En outre, les intermédiaires ne sont pas autorisés à accorder des avantages pécuniaires aux consommateurs pour les inciter à acheter des produits. Ils ne peuvent pas leur accorder de rabais ou leur rétrocéder une partie de la commission qu'ils perçoivent de l'assureur.

La justification de cette règle remonte aux années 1950. On pensait qu'un plafonnement de la structure des commissions empêcherait les intermédiaires d'avoir des pratiques de vente agressives. On considère désormais qu'il n'est pas nécessaire de réguler les prix ou la structure des commissions pour assurer le bon fonctionnement du marché des services d'intermédiaires. Lorsque les consommateurs seront en mesure de prendre des dispositions spécifiques avec des intermédiaires, ces derniers auront intérêt à donner une valeur ajoutée à leurs services et à intervenir en tant que partie indépendante, distincte de l'assureur. Dans le cadre de la réglementation actuelle, les consommateurs ne peuvent pas rémunérer les intermédiaires pour la qualité supérieure de leurs services, de sorte que les intermédiaires ne sont pas incités à apporter une valeur ajoutée et à différencier la qualité de leurs services au consommateur. En outre, en autorisant des opérations personnalisées entre les intermédiaires et les consommateurs, les coûts des intermédiaires deviendront transparents, sous forme d'une composante spécifique du service que les consommateurs devront payer.

Cette réforme n'est pas encore appliquée. Elle se heurte à une forte opposition au parlement, parce qu'elle affecte les petites entreprises et touche à la question de la protection du consommateur. Toutefois, la plus grande association de consommateurs des Pays-Bas estime que la structure actuelle est dépassée et que la réforme serait favorable aux consommateurs.

Le Président demande à l'**Australie** de commenter le projet de mise en place d'une nouvelle autorité de tutelle générale du secteur financier. Ce projet résulte d'une refonte très substantielle de la réglementation du système financier de l'Australie qui a été menée sous la direction de M. Wallis.⁵ L'objectif de la révision consistait à examiner le régime de réglementation de l'ensemble du secteur des services financiers. Deux dossiers principaux ont ainsi été traités. Le premier porte sur l'état de la concurrence dans ce secteur. On a assisté à un mouvement général de suppression des lois et règlements entravant de multiples façons la concurrence. On trouvera plus de précisions à cet égard dans le compte rendu de la dernière table ronde.⁶ Le second objectif consistait à procéder à un examen approfondi et à une réforme de la structure réglementaire générale du secteur financier dans un souci de convergence.

L'idée avancée dans le rapport était de passer d'un régime fondé principalement sur la réglementation distincte de compartiments séparés du secteur financier, à une réglementation que l'on peut qualifier de "fonctionnelle". En effet, les réglementations distinctes des banques, des assurances et des sociétés de crédit hypothécaire était devenue assez inadaptée à une époque de convergence où les banques font de l'assurance, les assureurs font de la banque, les sociétés de crédit hypothécaire se livrent aux deux activités, etc.

La philosophie des propositions soumises au parlement consiste à réorganiser la réglementation par grandes fonctions. La Banque de réserve traite de la politique monétaire. Une nouvelle autorité de surveillance prudentielle traite l'ensemble de la réglementation prudentielle de l'ensemble du secteur des services financiers (dont les assurances et la banque). Il existe une autorité de tutelle de la concurrence l'Australian Competition and Consumer Commission. Il existe aussi une nouvelle autorité de tutelle des services financiers aux consommateurs, l'Australian Securities Commission, qui est chargée du dossier de la protection du consommateur et de l'investisseur.

Il s'agit ainsi de parvenir à fausser le moins possible la concurrence. En d'autres termes, il s'agit de placer les institutions financières présentant les mêmes fonctions sur un pied d'égalité vis-à-vis de la réglementation aussi bien du point de vue du droit des consommateurs que de la réglementation prudentielle. Sur le terrain, la situation des différentes composantes du secteur financier est variable. Les règles prudentielles concrètes vont être différentes pour les diverses sortes de placements et d'entreprises financières. Cela étant, on estime que si l'ensemble de la réglementation prudentielle est confiée à un organisme unique, on aura plus de chances de minimiser les distorsions de la concurrence.

Conclusion

Le **Président** conclut la session sur les problèmes de réglementation par quelques éléments de synthèse.

Plus précisément, évoquant la note de référence du Secrétariat, le Président relève qu'il existe plusieurs approches de la réglementation : une politique des "piliers" dans le cadre de laquelle il existe des restrictions sur les types d'activités auxquelles les différentes composantes du secteur des services financiers peuvent se livrer ; un modèle "congloméral" dans lequel les obstacles aux activités des conglomérats sont réduites ou éliminées ; un modèle "coordonné" dans lequel les différentes autorités de tutelle, par leur coopération, agissent comme une entité unique. L'Australie est l'un des pays qui est passé à cette approche "coordonnée" de la réglementation. La plupart des autres pays sont passés de la politique des "piliers" comportant des restrictions sur les activités des banques, des sociétés d'assurance et des sociétés de Bourse, à l'approche "conglomérale" dans laquelle l'autorité de tutelle bancaire surveille les activités bancaires quelle que soit l'institution concernée.

La note du Secrétariat montre que dans la plupart des pays de l'OCDE, des restrictions sur les activités demeurent. Dans pratiquement aucun pays, une banque peut vendre directement ses propres produits d'assurance. Cela étant, la plupart des pays autorisent la distribution directe par les banques de produits d'assurance conçus par d'autres entités, bien que certaines restrictions subsistent sur la distribution de produits bancaires par les sociétés d'assurance. Cette situation n'est pas symétrique. En matière de propriété du capital, en revanche, la plupart des pays prévoient la possibilité de création d'une société d'assurance par une société holding possédant également une banque. En d'autres termes, même s'il existe des restrictions sur les activités, elles ne s'accompagnent pas de restrictions sur la propriété du capital.

La discussion a montré qu'en dehors d'un certain nombre de règlements prudentiels importants, on observe aussi une réglementation importante du comportement des sociétés d'assurance, de nombreux pays réglementant fortement les barèmes et les taux de prime.

Dans l'ensemble, si l'on se réfère aux contributions et à la discussion qui s'est ensuivie, le secteur de l'assurance apparaît comme un secteur lourdement réglementé. Dans certains cas, notamment pour certaines formes de réglementation prudentielle, il y a de bonnes raisons de maintenir la structure actuelle de la réglementation. En revanche, on ne sait pas très bien pourquoi on aurait besoin d'un système de réglementation des taux de prime ou des conditions des contrats. Ces formes de réglementation aboutissent à une homogénéisation de la structure des prix et des produits dans le secteur, elles entravent l'élaboration de nouveaux produits (comme l'a nettement indiqué le Délégué du Royaume-Uni), et elles empêchent l'innovation dans le secteur et la concurrence sur le marché.

Partie II : Problèmes d'application du droit de la concurrence

Le **Président** passe ensuite à la seconde session de la discussion, qui porte cette fois sur les problèmes d'application du droit de la concurrence. Il note que des problèmes importants se posent à cet égard dans le secteur de l'assurance. L'une des caractéristiques distinctives du secteur de l'assurance tient au fait que pour pouvoir fixer ses taux et analyser les risques, une société d'assurance a besoin de recourir à un large partage d'informations avec les sociétés du secteur. Ce partage d'informations passe cependant souvent aux yeux des responsables de l'antitrust comme une marque de collusion. Il faut trouver dans ce secteur un équilibre entre le partage d'informations qui favorise la concurrence et les consommateurs et le partage d'informations qui facilite les collusions.

Couverture et exemptions

Il ressort clairement des contributions que dans presque tous les pays, le droit de la concurrence s'applique pleinement. Il n'y a qu'une exception, les Etats-Unis. Toutefois, même si en principe, le droit de la concurrence s'applique à ce secteur, on ne compte que relativement peu de cas dans lesquels le droit de la concurrence a été effectivement appliqué et respecté, notamment lorsque l'on songe à la forme la plus répandue de pratique restrictive, la coopération horizontale entre assureurs. L'UE a joué un rôle important à travers l'exemption en bloc qu'elle a accordée à certaines pratiques du secteur de l'assurance (règlement CE 3932/92).

Le délégué de la **CE** décrit les accords qui font l'objet d'une exemption du droit de la concurrence et explique les raisons de cette exemption. L'article 85 du Traité de Rome interdit les accords de limitation de la concurrence, mais admet que certains de ces accords puissent bénéficier d'une exemption s'ils contribuent au progrès économique et s'ils sont avantageux pour le consommateur. Des accords peuvent faire l'objet d'une exemption individuelle de la Commission ou donner lieu à une exemption par grande catégorie au moyen d'un règlement.

Avec l'application du droit de la concurrence au domaine de l'assurance, on s'est aperçu rapidement que certains accords qui passeraient manifestement pour anticoncurrentiels dans d'autres secteurs, sont dans le secteur de l'assurance nécessaires à son bon fonctionnement et bénéfiques pour les consommateurs. La Commission a commencé par traiter ces accords à travers des exemptions ponctuelles, mais une fois qu'elle a acquis suffisamment d'expérience dans ce domaine, elle est passée à l'adoption d'une exemption plus large par la voie réglementaire, le texte étant adopté en décembre 1992.

Le premier type d'accord exempté par le règlement sont les accords sur les "primes pures". Les assureurs ont besoin de connaître divers renseignements statistiques afin de tarifer les risques qu'ils couvrent et, dans la plupart des cas, ils ne peuvent obtenir ces données à titre individuel. En conséquence, la coopération pour la collecte, l'échange et l'analyse des statistiques de risques est prévu et il est exempté du droit de la concurrence par le règlement. Cette exemption ne porte que sur les renseignements nécessaires au calcul de la "prime pure" (à savoir la part de la prime qui reflète le risque rétrospectif) et pour la "prime de risque" (à savoir les corrections de la prime pure tenant compte de l'évolution attendue du secteur). Tous les accords qui vont au-delà (par exemple, les accords sur la prime commerciale) ne sont pas couverts par l'exemption et sont considérés comme contraires à l'article 87 du traité de Rome. En tout état de cause, les statistiques diffusées sur la prime pure et la prime de risque doivent toujours ne constituer que des recommandations. Il ne doit pas y avoir d'obligation pour les assureurs d'utiliser les primes ainsi calculées.

Le second type d'accords couverts par l'exemption en bloc sont les accords sur les conditions normalisées des polices et sur les modèles de polices d'assurance. Ces accords sont exemptés parce que l'adoption de conditions normalisées des polices améliore la transparence du secteur et permet aux consommateurs de comparer plus facilement les différents produits. Là encore, ces accords ne sont exemptés que s'ils se limitent à des recommandations. Si l'utilisation de certaines conditions sont obligatoires, l'accord ne bénéficie plus de l'exemption et il est en général frappé d'interdiction.

Le troisième type d'accords couverts par le règlement sont ceux qui couvrent des risques de façon commune, à savoir les groupements de coassurance et de réassurance. Pour l'essentiel, il s'agit de groupes d'assureurs qui décident de couvrir certains risques en commun. Ces groupements posent des problèmes de concurrence parce que les membres d'un groupement doivent parvenir à un accord sur les paramètres communs de concurrence - les conditions de l'assurance proposée ; les limites de la couverture proposée ; et même, les tarifs correspondants. Toutefois, ces groupements peuvent dans certains cas être justifiés. Dans le cas de l'assurance des grands risques, la justification est la suivante. Pour des raisons de probabilité, les assureurs doivent couvrir un nombre minimal de risques homogènes. S'ils ne peuvent le faire, la probabilité que la taille des risques qu'ils couvrent soit supérieure à la moyenne, augmente considérablement. Dans ce contexte, les groupements d'assurance permettent aux différents assureurs d'atteindre cette dimension minimale. Lorsqu'une telle coopération est nécessaire pour couvrir certains risques, elle n'entrave pas la concurrence. Les différents assureurs ne pourraient pas participer à la concurrence sur ce marché, s'ils ne peuvent pas participer au groupement. On peut même aller jusqu'à dire que l'accord est favorable à la concurrence puisqu'il permet à un intervenant nouveau d'entrer dans la concurrence sur le marché. Toutefois, il convient d'examiner ces dossiers au cas par cas et il est assez difficile d'intégrer cet aspect dans une exemption large. C'est la raison pour laquelle la Commission a décidé dans le règlement d'exempter simplement tous les groupements qui ne dépassent pas une certaine part de marché (10 pour cent pour les groupements de coassurance et 15 pour cent pour les groupements de réassurance). Pour les groupements dépassant ces parts, les décisions sont prises au cas par cas.

Enfin, la réglementation couvre des accords sur l'approbation des dispositifs de sécurité. Dans plusieurs domaines, les assureurs passent des accords pour décider des dispositifs de sécurité (par exemple, des alarmes) qu'ils acceptent lorsqu'ils proposent des types particuliers d'assurance. En l'occurrence, l'entrave à la concurrence n'intervient pas sur le marché de l'assurance, mais sur celui des dispositifs de sécurité. Si les assureurs conviennent d'approuver certains dispositifs, mais pas d'autres, les fabricants de ces derniers se trouvent automatiquement exclus du marché. On peut facilement résoudre ce problème par la normalisation à l'échelle de l'Union européenne, mais, en attendant cette normalisation, le règlement prévoit que les assureurs peuvent conclure des accords sur les dispositifs de sécurité, à condition qu'ils reposent sur des critères objectifs et non discriminatoires.

Enfin, outre ces quatre types d'accords, le règlement d'application approuvé par le Conseil prévoit que la Commission peut aussi exempter deux autres types d'accords, portant pour l'essentiel sur les registres de risques aggravés et les accords sur la maîtrise des risques d'accidents. A l'époque, la Commission n'avait pas suffisamment d'expérience dans ces domaines et n'avait pas inclus ces deux types d'accords dans le champ de couverture du règlement, mais ces accords pourraient être couverts à l'avenir par une exemption en bloc.

En réponse à une question du Président, le délégué de la CE note que le règlement n'établit pas de distinction entre les types d'institutions susceptibles de collecter les statistiques de risques concernées. Dans la pratique, ce travail est normalement effectué par l'association nationale d'assureurs compétentes. Toutefois, n'importe quel autre organisme peut également le faire. Les statistiques doivent être présentées de telle façon qu'il ne soit pas possible de distinguer les parts de marché des différentes entreprises ayant fourni les données.

Le délégué du **Japon** explique qu'en principe, la Loi anti-monopole s'applique au secteur de l'assurance. Toutefois, il existe certaines exemptions à cette règle générale. Ces exemptions ont été radicalement limitées ces dernières années. A titre d'exemple, il y a désormais une exemption limitée applicable à certains accords entre sociétés d'assurance vie dans le secteur de l'assurance aviation, l'assurance des risques nucléaires, la responsabilité civile obligatoire des conducteurs et l'assurance des tremblements de terre. En revanche, les comportements concertés ne sont pas exemptés de la Loi anti-monopole lorsqu'on se trouve en présence de pratiques commerciales anticoncurrentielles ou d'une limitation substantielle de la concurrence dans un domaine particulier de la profession, de nature à porter inutilement préjudice aux intérêts des porteurs de police et des assurés. De plus, l'approbation du ministère des Finances est nécessaire avant de bénéficier d'une exemption de la Loi anti-monopole et le ministère des Finances doit obtenir lui-même l'accord de la Fair Trade Commission avant de donner son approbation. Même une fois que le ministère des Finances a donné son accord, la Fair Trade Commission peut lui demander de prendre des mesures pouvant aller jusqu'à l'annulation de l'approbation si la Commission estime que la conduite visée ne répond plus aux conditions d'exemption.

La JFTC mène actuellement une étude sur les opérations d'assurance du point de vue de la politique de la concurrence. Cette étude a deux objectifs. Le premier consiste à mettre en relief les possibilités de poursuite de la déréglementation. Le second est de faire le point sur la situation actuelle des transactions entre sociétés d'assurance et entreprises assurées. La contribution écrite du Japon présente quelques cas dans lesquels la Loi anti-monopole a été appliquée au secteur de l'assurance.

Le délégué des **Etats-Unis** est invité à expliquer les contours de l'exemption de la législation antitrust prévue par le McCarran-Ferguson Act. Le délégué commence par souligner que malgré l'existence d'une exemption fédérale, 48 ou 49 Etats sont dotés de leur propre législation antitrust et le secteur de l'assurance reste soumis à ces législations locales. L'objet du McCarran-Ferguson Act de 1945 ne portait pas tant sur le dossier de l'antitrust que sur la question d'assurer ou de rendre aux Etats le pouvoir de contrôle du secteur de l'assurance en raison de l'importance des recettes fiscales prélevées dans ce secteur. L'origine de ce texte réside dans une décision de la Cour suprême qui paraissait supprimer le contrôle des Etats sur les activités d'assurance, ce qui avait amené le Congrès à prendre des mesures pour rétablir le pouvoir de réglementation des assurances par les Etats, en y ajoutant une exemption de la loi antitrust. Le Congrès est bien entendu libre de supprimer à tout moment cette exemption et il y a eu de nombreuses tentatives en ce sens au cours des vingt dernières années.

Si l'on examine l'exemption proprement dite, on observe qu'il y a eu beaucoup de procès au fil des années qui ont réduit sensiblement la portée de cette exemption. Ils portent essentiellement sur deux questions : premièrement, les tentatives de définir les "activités d'assurance". Ce concept a été défini de façon assez restrictive. La seconde question est de savoir ce que l'on entend par "regulated by the states" ("placées sous la tutelle des Etats"). A cet égard, on a considéré que les fusions *n'entraient pas* dans le champ d'application de l'exemption McCarran-Ferguson. En effet, la réglementation par l'Etat ne couvre pas les pratiques "extraterritoriales". En cas de fusion de deux sociétés d'Etats différents, aucun Etat ne détient pleinement la tutelle des sociétés qui fusionnent, donc aucun ne réglemente la transaction ce qui implique que la fusion elle-même doit être notifiée conformément aux termes du Hart-Scott-Rodino Act.

Le délégué des Etats-Unis conclut en indiquant que la NAIC n'est pas favorable à une simple suppression du McCarran-Ferguson Act dans la mesure où cela exposerait le secteur de l'assurance à une incertitude immédiate considérable quant à la légalité d'un certain nombre de pratiques actuellement courantes dans ce secteur.

Conditions de concurrence et mise en œuvre du droit de la concurrence

Le délégué de **l'Italie** note que le secteur de l'assurance en Italie continue d'être porté à des pratiques de collusion. La concurrence n'est pas encore suffisante pour être bénéfique pour les consommateurs. L'Autorité antitrust italienne fait activement appliquer le droit de la concurrence dans ce domaine. Une affaire a par exemple concerné un groupe de sociétés qui avaient passé un accord de coassurance de certains risques. Du point de vue de l'autorité de la concurrence, cet accord n'était pas nécessaire pour la couverture de ces risques. En outre, quelques sociétés concernées ont été frappées d'une amende à la suite de la mise à jour de certains éléments tendant à prouver l'existence d'un accord annexe pour ne pas participer à l'adjudication d'une opération d'assurance, moyennant dédommagement.

L'Autorité italienne de la concurrence considère que la coassurance peut être à la fois bénéfique et favorable à la concurrence, mais dans certaines limites. L'idée que l'ensemble des intervenants d'un marché puissent se co-assurer est en revanche inacceptable.

La **République tchèque** présente un cas d'abus de position dominante concernant l'ancienne société tchèque d'assurance, société publique et seul prestataire de l'assurance obligatoire de la responsabilité civile et intervenant exerçant un rôle dominant sur d'autres marchés de l'assurance. Cette société établit également les "cartes vertes", qui servent d'attestation internationale de l'assurance de la responsabilité civile des conducteurs. En 1996, l'Office de protection de la concurrence a constaté que la société publique d'assurance délivrait ces cartes à des conditions différentes selon les clients. Alors que les clients qui s'étaient adressés à ce prestataire en position de monopole pour obtenir une assurance obligatoire accident automobile obtenaient la carte verte gratuitement, les autres demandeurs devaient payer une commission. L'Office a estimé que cette conduite constituait un abus de position dominante au motif que le prestataire en position de monopole accordait à ses propres clients un avantage provenant de son monopole sur l'assurance responsabilité civile des conducteurs. La Haute Cour est revenue sur cette décision à la suite d'un recours introduit par la Société tchèque d'assurance.

Le délégué du **Royaume-Uni** commence par évoquer l'exemption dont bénéficie l'assurance vis-à-vis du Restrictive Trade Practices Act. Cette loi impose l'enregistrement de tous les accords de restriction, même s'ils n'ont pas d'effet sensible sur la concurrence. Sans cette exemption, de nombreux accords d'échange d'information et de partage de risques pourraient tomber sous le coup de la loi et nécessiteraient un enregistrement même s'ils ne devaient pas donner lieu à des poursuites. Toutefois, les dispositions complexes sur les monopoles du Fair Trading Act pourraient tout de même s'appliquer aux autres collusions ayant des effets anticoncurrentiels, comme un accord sur les primes ou un accord de répartition des marchés.

Le Délégué du Royaume-Uni poursuit en présentant un cas d'abus de position dominante au Royaume-Uni concernant des garanties de construction. Le marché des garanties de construction est très concentré. Actuellement, en dehors de la société ayant donné lieu à une enquête, il n'y a qu'une autre société proposant des garanties sur les constructions immobilières neuves. A l'époque, l'organisme qui avait monté le mécanisme détenait une part de marché proche de 100 pour cent. Il ne proposait ses services qu'à ses adhérents -- les adhérents étant des entrepreneurs et des sociétés de BTP. Ils devaient s'inscrire auprès de l'association pour obtenir des garanties sur les bâtiments neufs qu'ils construisaient au Royaume-Uni. Si un entrepreneur voulait s'adresser à d'autres sociétés, il devait soit résilier son inscription, soit s'inscrire auprès des deux sociétés d'assurance. En cas de résiliation, il perdait tout ou partie des avantages, souvent financiers, attachés à son adhésion antérieure. La décision initiale sur ce dossier a consisté à imposer à l'association contrevenante de modifier ses règles et de soumettre toute modification ultérieure au Directeur général de l'autorité de la concurrence.

La **Commission européenne** a pris quelques décisions négatives dans le domaine de l'assurance. On retiendra en particulier la décision prise contre l'Association des assureurs immobiliers allemands, la Commission ayant condamné un accord de relèvement des primes commerciales d'un pourcentage fixe. Il s'agissait manifestement d'un accord de fixation des prix.

Le délégué de la **Suisse** souligne également les activités de mise en œuvre du droit de l'autorité antitrust. En 1988, la Commission des cartels, qui n'existe plus a mené une enquête sur une entente entre sociétés d'assurance et demandé l'élimination de cette entente. Il est difficile de juger des effets de l'élimination de cette entente. Certains observateurs ont souligné que les prix avaient immédiatement augmenté, ce qui est partiellement vrai, mais le nombre d'accidents a aussi augmenté et il est difficile de distinguer ces deux effets. Cela étant, il est certain que l'élimination de l'entente a stimulé la concurrence dans le domaine, avec l'introduction très rapide sur le marché de nouveaux produits.

Le délégué de **l'Irlande** évoque un dossier particulier dans lequel l'ensemble des sociétés d'assurance vie avaient passé un accord sur les commissions qu'elles devaient verser à leurs intermédiaires. Le ministère avait le pouvoir d'introduire des règlements relatifs aux commissions, mais ne l'a jamais fait.

L'Autorité irlandaise de la concurrence a pensé qu'il convenait d'introduire un système imposant la publicité des taux de commission de façon à permettre aux consommateurs de se faire une opinion quant à savoir s'ils bénéficiaient véritablement d'un conseil indépendant de la part de ces intermédiaires. Le dilemme pour l'autorité antitrust teint au fait que s'il lui est possible de refuser une exemption à l'accord entre les sociétés, elle n'a pas le pouvoir d'introduire un texte législatif imposant la publicité.

L'exemption a été refusée et, jusqu'ici, aucun règlement imposant la transparence des commissions n'a été introduit. Si les commissions se renchérissement et que les consommateurs y perdent, l'autorité risque de devoir en assumer la responsabilité.

Le délégué du **Royaume-Uni** évoque un cas analogue dans son pays. Dans les années 1980, la Life Assurance and Unit Trust Organisation, organisation professionnelle de marché, avait des barèmes de commission. Avec l'introduction du Financial Services Act de 1986, aux termes duquel les organisations de marché ont été intégrées au régime de réglementation, le Directeur général de la Fair Trading Commission a été amené à vérifier si leurs règles de fonctionnement n'étaient pas susceptibles de produire des effets anticoncurrentiels. Par suite de cet examen, les barèmes de commission ont été abandonnés. Pour éviter le problème évoqué par le délégué irlandais, un certain nombre d'autres règles ont été introduites, notamment une distinction nette entre agents liés et conseillers financiers indépendants offrant tout l'éventail des produits, ainsi que des prescriptions en matière de transparence et de qualité des conseils.

Les **Pays-Bas** évoquent un cas du même ordre dans ce pays. En 1993, lorsque les Pays-Bas ont interdit les accords horizontaux de fixation des prix, le secteur de l'assurance dommages, qui avait un accord sur les commissions maximales des intermédiaires a déposé une demande de dispense d'application de la loi pour son accord. Selon l'argumentation des sociétés d'assurance, les commissions maximales étaient très utiles, car sinon les assureurs se livreraient à des surenchères concurrentes sur les commissions de sorte que les primes payées par les consommateurs s'envoleraient. Cet argument a été rejeté. En ce qui concerne la publicité obligatoire des commissions, on a considéré que tant que le consommateur ne paie pas directement la commission à l'intermédiaire, il n'est pas judicieux d'en faire publiquement état, parce que cela reviendrait à demander aux entreprises de rendre public un élément de leurs charges, ce qui pourrait faciliter la collusion. On a considéré qu'il valait mieux n'imposer la

publicité que lorsque le consommateur paie directement la commission, ce qui est l'objectif du projet actuel de réforme de la réglementation des Pays-Bas.

Autorités d'application du droit de la concurrence et conflits de compétence

Le Président introduit ensuite la dernière partie de la table ronde consacrée aux relations entre autorités chargées de faire appliquer le droit de la concurrence et autorités de tutelle des assurances. A cet égard, la Norvège semble connaître une situation unique en son genre puisque c'est un des seuls pays dans lequel il existe une coopération explicite entre autorités de tutelle.

Le délégué de la **Norvège** explique que dans son pays la loi sur la concurrence s'applique au secteur de l'assurance et elle est mise en œuvre par l'autorité de la concurrence. Il existe en outre une autorité de tutelle propre au secteur qui administre l'application des textes spécifiques au secteur.

Il existe un certain chevauchement des activités couvertes par ces deux ensembles de textes. En cas de fusion, l'autorité de la concurrence peut intervenir à l'encontre de fusions de nature à restreindre la concurrence. L'Autorité de tutelle des assurances peut aussi réglementer les fusions, par son pouvoir de délivrer un agrément pour entrer sur le marché de l'assurance et pour fusionner ou combiner des agréments existants. En cas de pratiques commerciales restrictives, l'autorité de la concurrence peut, au cas par cas, accorder des exemptions vis-à-vis de ces conditions. L'Autorité de tutelle des assurances donne aussi des autorisations pour des accords de coopération. L'objectif de la loi sur la concurrence est l'efficacité de la concurrence et l'efficacité économique. L'objectif de la loi spécifique au secteur porte sur la structuration du marché, les effets de la concurrence sur le marché, les questions prudentielles et la stabilité. Il existe à l'évidence un chevauchement important entre les objectifs et l'application de ces deux ensembles de textes.

Pour cette raison, les deux ministères concernés ont désigné en 1996 un groupe de travail chargé de rédiger un rapport sur l'amélioration de la coordination des procédures des deux organismes en matière d'analyse de la concurrence. Ce rapport a abouti à la signature d'un accord par les deux directeurs généraux. Cet accord vise à éviter les doubles emplois inutiles et à formuler des modalités de coopération. Il s'agit de principes directeurs de coopération - l'autorité de tutelle est chargée de transmettre les demandes d'agrément à l'autorité de la concurrence ; les deux organismes doivent s'informer mutuellement de l'ouverture d'un dossier ou de sa transmission au Conseil de la Commission des assurances ; l'autorité de la concurrence informe l'autorité de tutelle des cas d'exemption, etc. Enfin, il y a des réunions régulières, deux fois par an, entre les directeurs généraux.

L'expérience de l'autorité de la concurrence tend à montrer que cet accord fonctionne bien. L'accord a permis aux deux organismes de mieux comprendre le champ de compétence de leur partenaire. Par exemple, un principe important a été établi pour permettre à l'autorité de la concurrence d'intervenir des fusions qui ont reçu le feu vert de la Commission des assurances. Il n'y a eu aucun cas de conflit à résoudre.

Pour autant, cette solution n'est pas totalement satisfaisante. Certains problèmes peuvent demeurer. Par exemple, la Commission peut refuser une autorisation si elle considère qu'une fusion ou une pratique commerciale restrictive peut avoir des effets anticoncurrentiels. L'Autorité de la concurrence peut ne pas être d'accord et considérer que la pratique est favorable à la concurrence ou améliorer l'efficacité. A l'inverse, la Commission peut délivrer une autorisation parce qu'elle considère qu'elle n'a pas d'effet anticoncurrentiel, alors que l'autorité de la concurrence peut au contraire juger les pratiques anticoncurrentielles. L'une des solutions envisageables à de tels conflits peut consister à avoir une

division plus profonde et plus nette des missions des deux organismes et à mettre en évidence leurs préoccupations légitimes.

Le délégué de la **Corée** évoque les risques de conflits entre la KFTC et l'autorité de tutelle des assurances. Aux termes de la loi sur les assurances, une société d'assurance souhaitant signer, modifier ou annuler un accord mutuel doit y être autorisée par la Commission de surveillance financière ("FSC"). A la fin du mois de mars 1998, il existait 12 accords mutuels de ce type. Une fois un accord approuvé par la FSC, il est considéré comme une initiative légale relevant d'autres textes que le droit de la concurrence. En conséquence, les accords approuvés sont exemptés de l'application du droit de la concurrence.

La KFTC envisage un réexamen attentif de ces accords approuvés du point de vue de leurs conséquences juridiques au regard du droit de la concurrence. La KFTC envisage de restreindre dans toute la mesure du possible le champ de l'exemption de ces accords vis-à-vis de l'application du droit de la concurrence.

Conclusion

Le **Président** conclut en notant que la dernière partie de cette table ronde a démontré que la législation antitrust a effectivement un rôle important à jouer dans le secteur de l'assurance, même si, dans ce secteur, la coopération entre concurrents est parfois essentielle. Il ressort d'un certain nombre d'interventions la conviction que l'application des règles antitrust au domaine de l'assurance éliminerait la possibilité d'accords avantageux. L'expérience de l'Italie et de la Suisse montre que même lorsqu'il y a une interdiction générale des ententes restrictives, cela ne veut pas dire que les accords de partage d'informations doivent être interdits *per se*. Ils ne sont interdits que lorsqu'ils ont pour effet de restreindre la concurrence sur le marché. Appliquer la législation antitrust à ce secteur n'entraîne donc pas l'élimination d'accords avantageux. La table ronde a montré qu'il reste des perspectives considérables d'application de la législation antitrust dans le secteur de l'assurance au bénéfice des consommateurs et utilisateurs de produits d'assurance.

NOTES

- 1 Le dernier examen est intervenu en 1992 ; il s'agissait du sixième examen des réserves de spays Membres sur des questions touchant à l'assurance.
- 2 On trouvera ces principes directeurs dans la publication de l'OCDE "Insurance Guidelines for Economies in Transition", 1997.
- 3 Dans le jargon des Etats-Unis, une société d'assurance "étrangère" n'est pas une société internationale d'assurance, mais une société d'un autre Etat. Par exemple, une société de Virginie opérant dans le Maryland est considérée comme une société d'assurance étrangère.
- 4 Les 14 autres Etats de l'Union européenne plus la Norvège, l'Islande et le Liechtenstein.
- 5 Financial System Inquiry (Wallis Report), mars 1997.
- 6 Voir OCDE, "Renforcement du rôle de la concurrence dans la réglementation du secteur bancaire", publié en 1998, "les tables rondes sur la politique de la concurrence", N° 17.

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