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Modernisation of the EU Competition Law regime - impact on the International Group's arrangements

There has previously been some lack of clarity in reporting in the press about the current status under competition law of the International Group Agreement ("IGA") and the International Group Pooling Agreement following the expiry of the Group's second 10 year exemption on 20 February 2009. There has also been some confusion regarding the relevance to the International Group's arrangements of the Insurance Block Exemption Regulation (the "Block Exemption"). The European Commission has carried out a public consultation to assist in determining whether or not the Block Exemption should be renewed on its expiry in March 2010. This summary is intended to clarify the position.

Current status of the Group's arrangements

The IGA has benefited from a decision of the European Commission granting it exemption under Article 101(3) of the Treaty on the Functioning of the European Union (previously Article 81(3) EC). The European Commission first granted a 10 year exemption for the IGA in 1985, following a notification by the International Group. A second exemption was granted by the European Commission in 1999, again following a request by the International Group. This exemption was also for a 10 year period, expiring on 20 February 2009. The Commission's 1999 decision also confirmed that the International Group's Pooling Agreement did not infringe Article 101(1) (and therefore did not require an exemption) given that the P&I Clubs that are members of the International Group are unable individually to insure the risks covered by the Pool.

With effect from 1 May 2004, a new EU Competition Law regime has been in force. The new regime changed the procedures by which Article 101 of the TFEU is applied and enforced, but did not change the substance of Article 101. The main features of the new regime are that the procedures for notifying agreements to the European Commission in order to obtain an exemption have been abolished and that an exemption now applies "automatically" to any agreement that meets the criteria of Article 101(3) without the need for notification to, or decision by, the European Commission. Under the new regime, businesses make their own assessment as to whether their arrangements are compatible with Article 101.

From the perspective of the International Group, the effect of the new regime means that, in practice, following the expiry of the 1999 exemption in February 2009, the IGA continues to benefit "automatically" from exemption under Article 101 as long as there are no material changes in the way in which the International Group is structured and operates and there are no major changes in the basic structure of the P&I market.

The International Group submits a report each year to the European Commission providing an update on relevant changes in the Group's structure and operation and developments in the P&I market. The European Commission is invited to raise any issues on which further assistance or clarification is required. The European Commission has been carrying out a general review of the insurance industry, including the P&I sector, and has recently made requests for some background information from the International Group (including information on the number and value of claims and the impact of Limitation rights on claims values and information relating to the Group's reinsurance programme) to assist in that review. The requests for information are being addressed by the Group in discussion with the European Commission.

Review of the Insurance Block Exemption

The Block Exemption regulation is entirely separate and distinct from the individual exemption granted to the IGA. It is of general application to certain specified types of insurance co-operation and collaboration arrangements, providing them with a "safe harbour" from the competition rules. The European Commission questioned the continued usefulness of the Block Exemption during its sector inquiry into business insurance. The European Commission has carried out a public consultation process focused solely on the Block Exemption regulation. This does not include any review or consultation in relation to the individual exemption granted to the IGA or the International Group's Pooling Agreement.

The European Commission's report on the functioning of the Block Exemption published in March 2009 noted that "certain pools do not need a BER to provide a safe harbour because they do not give rise to a restriction of competition in the first place. Pools may be considered not to be anti-competitive, no matter how high their market share, as long as pooling is necessary to allow their members to provide a type of insurance that could not be provided by one insurance company alone" (para 20). The accompanying Staff Working Document refers explicitly to the International Group's Pooling Agreement in this context and states: "Certain catastrophic risks may be such that no individual insurer is capable of insuring them alone. In the *P&I Clubs* case it was considered that members of the pool were not actual or potential competitors, given the fact that they were unable to insure alone the risks covered by the pool. The so-called P&I Clubs doctrine currently applies in relation to pools on markets where no coverage outside the pool is possible. In accordance with this doctrine, pools, no matter how high the market share, may be considered not to be anti-competitive as long as pooling is necessary to allow their members to provide a type of insurance that they could not provide alone" (para 124).

In summary, the current review being undertaken by the European Commission in relation to the insurance Block Exemption is not focused on, and does not, and will not, impact on or affect the International Group's Pooling Agreement or the IGA.

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