

# PUBLICATION

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## Insurer Antitrust Exemption in Europe in Jeopardy

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In the United States, the McCarran Ferguson Act provides insurers with an exemption from the federal antitrust laws. Enacted in 1945, the Act provides that conduct that constitutes the "business of insurance" is outside the scope of the federal antitrust laws to the extent that the conduct is (1) subject to state regulation and (2) does not constitute an act of "boycott, coercion or intimidation." While there have been frequent calls for the Act to be repealed (particularly with respect to health insurance), the exemption continues to provide the insurance industry with significant protections from antitrust scrutiny.

In Europe, insurers enjoy a somewhat similar industry-specific exemption called the "Insurance Block Exemption." First adopted in 1992, the exemption currently exempts insurers from the EU competition laws when they are (1) exchanging data in furtherance of the creation of joint compilations, tables and studies, or (2) participating in co-insurance or reinsurance pooling agreements. However, unlike the McCarran Ferguson Act, which has no "sunset" clause, the Insurance Block Exemption must be renewed by the European Commission on a periodic basis to remain in effect. Most recently renewed in 2010, the Insurance Block Exemption will sunset in 2017 absent an affirmative decision for it to be renewed.

With this in mind, the Commission began a review of the Block Exemption in 2014, seeking to determine whether it had outlived its usefulness. On March 17, the Commission issued its initial views on the subject, stating that its "preliminary view is that it is no longer necessary to maintain a sector-specific block exemption in insurance." In support of that conclusion, the Commission explained that guidelines issued by the Commission since the Block Exemption was last renewed now offer guidance on how to assess data exchanges generally, and thus the need for a blanket exemption for insurer data exchanges was "questionable." Moreover, the Commission indicated that, if necessary, it could provide "complementary specific guidance" on data exchanges specifically for the insurance industry, and that this would be "more flexible than a Block Exemption" and "could more easily be adapted to changing circumstances." With respect to pooling agreements, the Commission stated that its investigation had determined that few pools currently avail themselves of this exemption, and that in any event, it was not clear that an exemption for these pools was either (1) necessary, or (2) resulted in consumer benefit.

While the Commission's preliminary report may signal the beginning of the end for the Block Exemption, on April 26, the Commission offered the insurance industry an opportunity to express its views on whether the Block Exemption should be renewed. The Commission's final report and recommendation is due later this year in advance of the current March 2017 sunset date for the Block Exemption. Should the Block Exemption not be renewed, critics of the McCarran Ferguson Act will undoubtedly add this development to the list of reasons why they contend McCarran should be repealed. Stay tuned.