

COMPETITION LAW

Newsletter

German Cartel Office publishes new de minimis notice and new leaflet on co-operation between small- and medium-sized enterprises

In March 2007 the German Federal Cartel Office (Bundeskartellamt) published a new notice on agreements of minor importance (de minimis) and a new information leaflet on co-operation between small- and medium-sized enterprises. This is intended to more closely define the framework for co-operations and agreements admissible under German antitrust law (as revised in 2005) and to facilitate the self-assessment of cases relevant under antitrust law, in particular, for small- and medium-sized enterprises.

1. The new De minimis notice

The de minimis notice (No. 18/2007) replaces the previous rules which were adopted in 1980 and specifies discretionary principles for the assessment of anti-competitive agreements by the Federal Cartel Office on the basis of market share thresholds. In this respect the notice makes a distinction between agreements between actual or potential competitors (horizontal agreements) and agreements between enterprises operating at different market levels (vertical agreements).

Market Share Thresholds

Due to their minor anti-competitive effects, the Federal Cartel Office will generally not take action against horizontal agreements if the aggregate market share held by the enterprises involved does not exceed 10% in any of the markets affected. As far as vertical agreements are concerned, this threshold is a joint market share of 15%. If it is uncertain whether an agreement is to be classified as horizontal or vertical, the 10% threshold will apply. A lower market share threshold of 5% will apply in cases where there is a suspicion of cumulative market foreclosure. This is generally assumed if 30% or more of the affected market is covered by parallel networks of agreements entered into by suppliers or dealers, where those agreements have a similar effect on the market.

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Not applicable to Hardcore Restrictions

The de minimis thresholds do not apply to agreements containing so-called "hardcore" restrictions. In particular, they do not apply to agreements which fix prices or allocate markets. Notwithstanding any quantitative effects, arrangements of this kind are generally considered as appreciable restraints of competition and, thus, as infringements of the general cartel prohibition (Section 1 German Act against Restraints of Competition ("ARC") and Article 81 EC).

These de minimis thresholds are in line with the practice of the European Commission and are not limited to small- and medium-sized enterprises. Accordingly, agreements between large groups can also fall under the de minimis rule unless the specified market share thresholds are exceeded.

No absolute legal certainty

It should be noted that the de minimis notice constitutes a discretionary rule for the Federal Cartel Office and does not offer any absolute legal certainty in assessing agreements under German antitrust law. In particular, cartel and civil courts are not bound by these rules and may deviate when assessing the admissibility of an agreement under antitrust law. In individual cases, even when the relevant market share thresholds are not exceeded, the Federal Cartel Office itself may conclude that a particular agreement constitutes an appreciable restriction of competition. This is possible, for example, when the agreement is expected to give rise to a deterioration of the terms of trade in the affected market as a whole. In such cases the Federal Cartel Office will, however, not initiate administrative proceedings.

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but grant the parties a reasonable transition period in which to abandon the practices objected.

2. The new leaflet on cooperation between small- and medium-sized enterprises

Notwithstanding their undisputed efficiency, medium-sized enterprises often suffer from structural competitive disadvantages vis-à-vis large groups. In order to compensate for such disadvantages, co-operations between medium-sized enterprises are exempted under certain conditions from the general cartel prohibition, pursuant to Section 3 of the ARC. This rule, however, only applies to co-operations which do not affect trade between Member States. This leaflet on cooperation between small and medium-sized enterprises, which has been recently revised by the Federal Cartel Office, explains admissible and inadmissible forms of co-operation and gives suggestions regarding the scope of Section 3 ARC, as well as with respect to so-called purchasing cartels. Various examples are used to help explain the relevant issues.

The relative concept of SME

The Federal Cartel Office's definition of the term 'small and medium-sized enterprises' (SME) is based on a relative concept of SMEs that is depends to some extent on the respective market structure. The absolute size of an enterprise (e.g. annual turnover, number of employees) is not the sole decisive criterion. Instead, the size of the enterprise in proportion to the largest enterprises active in the same sector will be taken into account. Accordingly, depending on the circumstances, even a company with an annual turnover of EUR 100 million can be regarded as an SME in a market in which companies with sales in their billions are also competing. On the other hand, in a market characterized by a great number of small enterprises, a company of this size would no longer be regarded as SME. In principle, groups are considered as a whole, i.e. subsidiaries of larger companies are viewed as part of the group and, as a rule, cannot be regarded as SMEs.

Not applicable to cases with EU relevance

The interpretation guidelines set out in the Federal Cartel Office's leaflet expressly apply only to co-operations which do not fall within the scope of European competition law (Article 81 EC). The assessment pursuant to Section 3 ARC of an agreement or practice involving medium-sized enterprises must first exclude the presence of an appreciable impact on trade between Member States. According to the rulings of the European Court of Justice, an effect on trade between Member States exists if the agreement or practice has a direct or indirect, actual or potential impact on the trade between Member States and objective, legal or actual reasons can be given to establish sufficient probability of that impact. According to the Federal Cartel Office's view, agreements with merely local significance will normally not have an appreciable effect on trade between Mem-

ber States. In this respect it is irrelevant whether the local market is located in a border region. The central criterion for the judgment is the question of the appreciability of the impairment. The leaflet therefore contains specific review criteria. These criteria comply with the so-called Interstate Guidelines of the Commission.

Interpretation of Section 3 ARC

Using examples, the leaflet also explains the individual requirements of the exemption set out in Section 3 ARC. First of all, it has to be noted that the exemption applies only to horizontal restraints of competition, i.e. restraints between competitors.

Rationalisation of Commercial Transactions

In order to be eligible for the exemption under Section 3 ARC, the purpose of the agreement must be the rationalisation of commercial transactions by inter-company co-operation. This includes co-operative measures in the field of production, research and development, financing, administration, advertising, purchase and distribution. Agreements which are not primarily aimed at rationalisation, but at the exclusion of competition are generally not eligible for the exemption. Therefore, mere price-fixing or quota arrangements will be inadmissible. Cooperation in the distribution sector on the other hand, which limits the award of contracts depending on the freight costs incurred in order to reduce expenses, will be admissible.

No Substantial Impediment of Competition

Section 3 (1) No. 1 ARC requires that competition will not be adversely affected by the co-operation. In order to assess whether or not this is the case, the market position of the companies involved, the kind of co-operation it is and any co-operations already existing in the respective market must be taken into consideration. According to present practice, the Federal Cartel Office assumes a critical threshold of a combined market share of the parties of between 10 and 15%. This is particularly true for agreements on material competitive parameters.

Improving the Competitiveness of SMEs

The exemption provision of Section 3 ARC is aimed at improving the competitiveness of SMEs. This competitiveness may be evidenced by an extension of production, an increase in quality, the diversification of the product range, rationalization of distribution or purchase or a joint advertising measure. In exceptional cases, the involvement of a major enterprise in a co-operation may be admissible if it is essential to bring about the competitiveness of the SME.

Special Case: Purchasing Co-operations

Under the old system which applied prior to the 7th revision of the ARC in 2005, special positive rules applied to purchasing co-operations.

tions between SMEs. This continues to be the case, with both the Federal Cartel Office and the EU Commission viewing purchasing co-operations positively if the joint market share of the enterprises involved in the markets concerned does not exceed 15%. This also results from the EU Commission's Horizontal Guidelines.

Right to a No-action Decision

If a co-operation between SMEs fulfils the requirements of Section 3 (1) ARC and the application of Article 81 (1) EC is excluded, the enterprises involved have a right – by way of the exception – to a so-called no-action decision from the Federal Cartel Office pursuant to Section 32 c ARC, if they can substantiate a considerable legal and economic interest. Such a considerable legal and economic interest is given, in particular, if

- no practice or experience for such a co-operation exists at the cartel authority;
- the co-operation sets a precedent for many other cases;
- considerable investments are to be made in connection with the agreement.

The leaflet contains detailed information about the data which are required for a no-action request.

Expiry of the Special Rule

The special rule according to which SMEs – under certain conditions – are entitled to a no-action decision pursuant to Section 32 c ARC will expire on 30 June 2009. Accordingly, SME co-operations which are currently able to benefit from this special rule pursuant to Section 32 c ARC will in the future be subject to the same conditions applicable to all other co-operations. In other words, after 30 June 2009 SMEs will not have the right to claim a no-action letter but will be subject to the same rules with regard to no-action letters as other companies (Section 2 (1) ARC or Article 81 (3) EC).

Useful Guidance for Antitrust Practice

Both the de minimis notice and the leaflet for SME-co-operation provide enterprises and advisers with valuable guidance when assessing agreements under antitrust law. Although many specific questions remain open and it will still be possible that courts and other cartel authorities will deviate from these rules, they remain an important and useful means of facilitating the systematic and substantive adjustment of German antitrust law to European standards.

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