

EUROPEAN COMMISSION PUBLISHES NOTICE

ON DE MINIMIS AGREEMENTS

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The Commission has published a notice on agreements of minor or de -minimis importance (the "Notice")¹. Article 81(1) of the EC Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. It has been established in a number of cases decided by the European Court of Justice ("ECJ") that an agreement or concerted practice will only infringe Article 81(1) if the agreement or practice has an appreciable effect on competition and trade between Member States.²

The former Commission notice on agreements of minor importance was published in 1997 ("1997 Notice")³ and its main focus lay in determining the market shares of the parties stipulating that an agreement will not appreciably affect competition and trade between Member States where the aggregate market shares of the parties do not exceed the following thresholds:

- (a) Where the agreement is made between undertakings operating at the same level of production or marketing ("horizontal agreements"), the aggregate market shares of the parties is 5%; and
- (b) Where the agreement is made between undertakings operating at different economic levels ("Vertical Agreements"), the aggregate market shares of the parties is 10%.

The 1997 Notice specified that in the case of a mixed horizontal/vertical agreement or where it was difficult to classify the agreement as either horizontal or vertical, the 5% threshold was applicable.

The new Notice increases the thresholds for the application of the de minimis principle. The Notice states that an agreement which affects trade between Member States will not appreciably restrict competition in the following situations:

- (a) If the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement where the agreement is made between undertakings which are actual or potential competitors on any of these markets; or
- (b) If the market share held by each of the parties to the agreement does not exceed 15% on any relevant market affected by the agreement where the agreement is made between undertakings which are not actual or potential competitors on any of the affected relevant market.

The Notice makes it clear that in cases where it is difficult to classify an agreement as falling under (a) or (b) above, the 10% threshold is applicable. The Notice makes it clear that the Commission is of the view that the concept of de minimis applies even if the above market share figures are exceeded by no more than 2% during two succeeding calendar years.

The Notice is confined to examining the issue of appreciability in the context of competition and not trade between Member States (although some analysis of this aspect of appreciability is made in the Notice in the context of small and medium sized enterprises discussed below). The Commission states that the Notice does not “quantify what does not constitute an appreciable effect on trade”. The Commission in the Notice is making it clear that if an agreement does appreciably restrict competition it may fall outside of the Article 81(1) net if it does not appreciably affect trade between Member States.

The Notice specifies that agreements between small and medium – sized undertaking, as defined in Commission Recommendation 96/280/EC, are “rarely capable of significantly affecting trade between Member States” and that therefore, as a general rule, they are not caught by the prohibition in Article 81(1) (“Commission Recommendation 96/280”). Commission Recommendation 96/280 defines small or medium sized enterprises as those enterprises which have the following characteristics:

- Less than 250 employees; and
- An annual turnover not exceeding €40,000,000 or an annual balance sheet total not exceeding €27,000,000; and
- Independent, meaning not owned as to 25% or more of the capital or the voting rights by one enterprise or jointly by several enterprises. This 25% threshold may be exceeded if:
 - the enterprise is held by public investment corporations, venture capital companies or institutional investors provided no control is exercised either individually or jointly; or
 - in situations in which the capital is spread in such a way that it is not possible to determine by whom it is held and if the enterprise formally declares that it is not owned as to 25% or more by one enterprise or jointly by several enterprises and therefore falls outside the definition of a small or medium sized enterprise.

The 1997 Notice expressly disappplied the benefit of the notice where competition in a relevant market is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers. In the *Delimitis* case,⁴ the ECJ examined the concept of de minimis in the context of markets characterised by parallel networks of similar agreements and it set out the following two tests:

- It is necessary to examine all similar contracts entered into on the relevant market and the other factors which are relevant to the economic and legal context in which the contract at issue must be examined and if the above shows that those agreements do not have the cumulative effect of denying access to that market to new national or foreign competitors,

the individual agreements comprising the bundle of agreements in the market cannot be held to restrict competition within the meaning of Article 81(1);

- If on the other hand, the above examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements in question contribute to the cumulative effect produced in that respect by the totality of similar contracts found on the market. The agreement in question must make an appreciable contribution to the closing off of the market and if the agreement in question contributes to an insignificant extent to the cumulative effect, the agreement will not fall under the prohibition in Article 81(1).

A significant aspect of the Notice is that it specifies that it is applicable where competition in an affected relevant market is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market). The relevant market share threshold for this purpose is to be 5% for both agreements between competitors and for agreements between non competitors. The Notice states that individual suppliers and distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect. The Notice points out that a cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel networks of agreements having similar effects.

The Notice provides that if an agreement contains one or more of the following hardcore restrictions, the benefit of the Notice does not apply:

- (1) Agreements between competitors which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the fixing of prices when selling the products to third parties, the limitation of output or sales or the allocation of markets or customers.
- (2) Agreements between non competitors which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
 - (a) The restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.
 - (b) The restriction of the territory into which, or the customers to whom, the buyer may sell the contract goods or services except the following restrictions which are not regarded as hardcore:
 - A restriction on active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, provided such a restriction does not limit sales by the customers of the buyer;

- A restriction on sales to end users by a buyer operating at the wholesale level of trade;
 - A restriction on sales to unauthorised distributors by the members of a selective distribution system;
 - A restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.
- (c) The restriction on active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.
- (d) The restriction on cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade.
- (e) The restriction agreed between the supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair and servicing of its goods.
3. Agreements between competitors where the competitors operate for the purposes of the agreement at a different level of the production or distribution chain that contain any of the hardcore restriction listed above.

The Notice makes it clear that if an agreement is covered by the Notice, the Commission will not institute proceedings either upon application by a third party or on its own initiative. The Notice further provides that where the undertakings assumed in good faith that an agreement is covered by the Notice, the Commission will not impose fines.

Although Commission notices are not binding, they provide a useful insight into the Commission's current thinking on a subject and provide guidance to the national courts and the authorities of the Member States in their application of Article 81.

An agreement may fall within the terms of the Notice but still appreciably restrict trade and competition between Member States and consequently be caught under Article 81(1) of the EC Treaty. As a result, an agreement which falls within the scope of the Notice but is still considered appreciably to restrict competition and trade between Member States may be challenged in the national courts.

The concept of appreciability has been the subject of a number of decisions of the ECJ and the Court at First Instance ("CFI"). In the Pioneer⁵ case, the ECJ held that an agreement did appreciably restrict competition and trade between Member States in situations where the combined market shares of the parties was well below 5% (3.38% and 3.18% in France and the UK

respectively) which was the then market share threshold for horizontal agreements set out in the 1997 Notice. The ECJ found that the agreement was not of de minimis importance as the market was very fragmented and the parties had the highest market shares in the relevant market.

The European courts have also held that an agreement can escape the prohibition on Article 81(1) of the EC Treaty in situations where the combined market share of the parties exceeded the former 5% threshold. In the European Night Services case,⁶ the CFI concluded that “the mere fact that the [5%] threshold may be reached or exceeded does not make it possible to conclude with certainty that an agreement is caught by Article [81(1)]”.

It is clear from the European case law that appreciability involves an analysis of various factors including the following:

- The market shares of the parties;
- The level of concentration in the market;
- Whether the agreement is horizontal or vertical;
- Whether there are similar contracts existing in the relevant market and whether there are other factors relevant to the economic and legal context and whether that shows that the agreements in question have the cumulative effect of denying access to that market to new national and foreign competitors and if the above examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the parties in question contribute to the cumulative effect produced in that respect by the network of the similar contracts found in the market.
- Other factors which may be responsible for the lack of appreciable effect such as national laws precluding competition or the nature of the product or service.⁷

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¹ OJ 2001 C368/13.

² This principle was first established in Case 5/69 Völk -v- Vervaeke [1969] ECR 295.

³ Commission notice of December 9, 1997 on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty established in the European Community (1997 O.J. C372/3).

⁴ C – 234/89 Delimitis [1991] ECR I – 935.

⁵ Cases 100/80 etc. Musique Diffusion Française 1983 ECR 1825.

⁶ Case 374/94 etc. ENS -v- Commission ECR II-3141.

⁷ In *Salonia -v- Poidomani and Giglio* (1981) ECR 1563 it was held in the context of the Italian newspaper market that the availability of other channels of distribution for publication from other Member States and the rigidity of demand was relevant to assessing appreciability.