DE MINIMIS RULES (ALL INDUSTRIES): COMMISSION NOTICE

Subject: De minimis rules

Industry: All industries

Source: Commission Statement IP/02/13, dated 7 January 2001; text of Notice in C.369 of 2001

(Note. In the January 2002 issue we carried a brief note on the introduction of the new guidelines on the application of de minimis rules to cases otherwise covered by Article 81(1) of the EC Treaty on restrictive agreements. In the following report, there will be found a summary of the aims and content of the new guidelines, together with the full text of the Notice. The new Notice replaces the 1997 Notice.)

Summary

Article 81(1) of the EC Treaty prohibits agreements 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. The Court of Justice of the European Communities has clarified this provision by saying that it does not apply where the impact of the agreement on intra-community trade or on competition is not "appreciable". In the new Notice, the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition: that is to say, what is *de minimis* and thus outside the prohibition under Article 81(1). The new Notice reflects an economic approach and has the following key features.

The *de minimis* thresholds are raised to 10% market share for agreements between competitors and to 15% for agreements between non-competitors. The previous Notice had fixed the *de minimis* thresholds at respectively 5% and 10% market share. The new Notice raises these thresholds to respectively 10% and 15%. Competition concerns can in general not be expected when companies do not have a minimum degree of market power. The new thresholds take account of this while at the same time staying low enough to be applicable whatever the overall market structure looks like. The difference between the two thresholds takes into account, as before, the fact that agreements between competitors in general lead more easily to anti-competitive effects than agreements between non-competitors. It specifies for the first time a market share threshold for networks of agreements producing a cumulative anti-competitive effect.

The previous *de minimis* Notice excluded from its benefit agreements operated on a market where "competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers." This meant in practice that firms operating in sectors like the beer and petrol sector could usually not benefit from the *de minimis* Notice. The new Notice

introduces a special *de minimis* market share threshold of 5% for markets where there exist such parallel networks of similar agreements.

It contains the same list of hardcore restrictions as in the horizontal and vertical Block Exemption Regulations. The new Notice defines in a clearer and more consistent way the hardcore restrictions, i.e. those restrictions, such as price fixing and market sharing, which are normally always prohibited irrespective of the market shares of the companies concerned. Hardcore restrictions can not benefit from the de minimis Notice. For agreements between non-competitors the new Notice has taken over the hardcore restrictions set out in Block Exemption Regulation 2790/1999 for vertical agreements. For agreements between competitors the new Notice has taken over the hardcore restrictions set out in Block Exemption Regulation 2658/2000 for specialisation agreements.

Agreements between small and medium-sized enterprises are in general *de minimis* . The new Notice states that agreements between small and medium-sized enterprises (SMEs) are rarely capable of appreciably affecting trade between Member States. Agreements between SMEs therefore generally fall outside the scope of Article 81(1).

In cases covered by the new Notice, the Commission will not institute proceedings either upon application or on its own initiative. Where companies assume in good faith that an agreement is covered by the Notice, the Commission will not impose fines. Although not binding on them, the Notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

Full Text of Notice (Endnotes in Square Brackets)

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [1]

I

1. Article 81(1) prohibits agreements between undertakings 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. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.

2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1). [2]

3. Agreements may in addition not fall under Article 81(1) because they are not capable of appreciably affecting trade between Member States. This notice does not deal with this issue. It does not quantify what does not constitute an appreciable effect on trade. It is however acknowledged that agreements between small and medium-sized under-takings, as defined in the Annex to Commission Recommendation 96/280/EC [3], are rarely capable of appreciably affecting trade between Member States. Small and medium-sized undertakings are currently defined in that recommendation as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million.

4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

5. This notice also applies to decisions by associations of undertakings and to concerted practices.

6. This notice is without prejudice to any interpretation of Article 81 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

II

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):

(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 (agreements between competitors) [4]; or

(b) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors). In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10% threshold is applicable.

8. Where in a relevant market competition 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 market share thresholds under point 7

are reduced to 5%, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect. [5] 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.

9. The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10%, 15% and 5% set out in point 7 and 8 during two successive calendar years by more than 2 percentage points.

10. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the notice on the definition of the relevant market for the purposes of Community competition law. [6] The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

11. Points 7, 8 and 9 do not apply to agreements containing any of the following hardcore restrictions:

(1) as regards agreements between competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object [7]:

(a) the fixing of prices when selling the products to third parties;

(b) the limitation of output or sales;

(c) the allocation of markets or customers;

(2) as regards agreements between non-competitors as defined in point 7, restrictions 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 of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:

- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to

another buyer, where such a restriction does not limit sales by the customers of the buyer,

- the restriction of sales to end users by a buyer operating at the wholesale level of trade,
- the restriction of sales to unauthorized distributors by the members of a selective distribution system, and
- the 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 of 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 of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

(e) the restriction agreed between a 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 or servicing of its goods;

(3) as regards agreements between competitors as defined in point 7, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the hardcore restrictions listed in paragraph (1) and (2) above.

12. (1) For the purposes of this notice, the terms "undertaking", "party to the agreement", "distributor", "supplier" and "buyer" shall include their respective connected undertakings.

(2) "Connected undertakings" are:

(a) undertakings in which a party to the agreement, directly or indirectly:

- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
- has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
- one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

(3) For the purposes of paragraph 2(e), the market share held by these jointly held undertakings shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).

Endnotes

[1] This notice replaces the notice on agreements of minor importance published in OJ C 372, 9.12.1997.

[2] See, for instance, the judgment of the Court of Justice in Joined Cases C-215/96 and C-216/96, *Bagnasco v Banca Popolare di Novara and Casa di Risparmio di Genova e Imperia*, points 34-35. This notice is also without prejudice to the principles for assessment under Article 81(1) as expressed in the Commission notice "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", OJ C 3, 6.1.2001, in particular points 17-31 inclusive, and in the Commission notice "Guidelines on vertical restraints, OJ C 291, 13.10.2000, in particular points 5-20 inclusive.

[3] OJ L 107, 30.4.1996, p. 4. This recommendation will be revised. It is envisaged to increase the annual turnover threshold from EUR 40 million to EUR 50 million and the annual balance-sheet total threshold from EUR 27 million to EUR 43 million.

[4] On what are actual or potential competitors, see the Commission notice "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", OJ C 3, 6.1.2001, paragraph 9. A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply-side substitutability). A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices.

[5] See also the Commission notice "Guidelines on vertical restraints", OJ C 291, 13.10.2000, in particular paragraphs 73, 142, 143 and 189. While in the guidelines

on vertical restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this notice all market share thresholds refer to total market shares.

[6] OJ C 372, 9.12.1997, p. 5.

[7] Without prejudice to situations of joint production with or without joint distribution as defined in Article 5, paragraph 2, of Commission Regulation EC/2658/2000 and Article 5, paragraph 2, of Commission Regulation EC/2659/2000, OJ L 304, 5.12.2000, pp. 3 and 7 respectively. ■

Cisal v INAIL (Meaning of "Undertaking")

There is a large body of case law on the meaning of "undertakings" – that is, the persons, firms or other entities, – covered by the rules on competition. In its recent judgment, delivered on 22 January 2002, in Case C-218/00, the Court of Justice had to consider whether Italy's National Institute for Insurance against Accidents at Work (INAIL) was an undertaking within the meaning of Articles 81 and 82 of the EC Treaty. It referred briefly, in paragraphs 22 and 23 of the judgment, to the principal cases. "According to settled case-law, the concept of an undertaking in competition law covers any entity engaged in economic activity, regardless of the legal status of the entity or way in which it is financed (see, in particular, Joined Cases C-180/98 to C-184/98, *Pavlov and Others*, paragraph 74)... In that regard, it has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85, *Commission* v *Italy*, paragraph 7; Case C-35/96, *Commission* v *Italy*, paragraph 36; and *Pavlov*, cited above, paragraph 75)."

Applying these principles to INAIL, the Court summarized the position in paragraphs 44 and 45 of the judgment. "In summary, it is clear from the foregoing that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them... In conclusion, it may be stated that in participating in this way in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, the INAIL fulfils an exclusively social function. It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 [sc 81 and 82] of the Treaty."