



Bundeskartellamt

**Information leaflet  
of the Bundeskartellamt  
on the possibilities of cooperation  
for small and medium-sized enterprises**

(as of March 2007)

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## A. Preliminary remarks

- 1 This information leaflet replaces the information leaflet of the Bundeskartellamt on small-business cooperation agreements under the Act against Restraints of Competition of 16 December 1998.<sup>1</sup>
- 2 This revised edition was prompted by the coming into force of the Act against Restraints of Competition (ARC) following its seventh amendment on 1 July 2005<sup>2</sup> and the coming into force of EC Regulation No. 1/2003 on 1 May 2004 (Regulation 1/2003).<sup>3</sup>
- 3 Since Regulation 1/2003 came into force, the competition authorities have been under an obligation to apply Article 81 of the Treaty establishing the European Community (EC Treaty) if trade between Member States may be appreciably affected (Article 3 (1) of Regulation 1/2003). In cases where both German and European law are applicable, the application of European law takes priority. Thus, the application of German law may not lead to an outcome that contradicts European law. This information leaflet therefore also provides information on when European law applies, i.e. in cases likely to result in trade between Member States being affected (on this, see paras 19 ff.).
- 4 Another reason to discuss the distinction between European and German law lies in Section 3 of the ARC. Whereas Section 2 of the ARC (which is modelled on the Community rule of Article 81 (3) of the EC Treaty) represents an exemption rule applicable to all undertakings, Section 3 of the ARC makes a more generous provision for small and medium-sized undertakings. This provision is applicable where Article 81 (1) of the EC Treaty does not apply.<sup>4</sup> In such cases, Section 3 (2) of the ARC also gives the members of a small or medium-sized business cooperation the right to obtain a decision from the competition authority pursuant to Section 32 c of

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<sup>1</sup> The details on recommendations previously also included in the information leaflet lapse. The Bundeskartellamt may issue a statement on the legal classification of recommendations at a later date.

<sup>2</sup> Announcement of the new text of the Act against Restraints of Competition of 15 July 2005, Federal Law Gazette I 2005, pp. 1954 ff.

<sup>3</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal of the European Communities No. L 1 of 4 January 2003, p. 1.

<sup>4</sup> A special rule for small or medium-sized business cooperations comparable with that of Section 3 Paragraph 1 of the ARC does not exist in European competition law.

the ARC (see here paras **43** ff.), provided they demonstrate a significant legal or economic interest in such a decision.<sup>5</sup>

- 5** Irrespective of which law applies, the Bundeskartellamt or the *Land* competition authorities are usually competent to examine these cases (see here paras **40** ff.).
- 6** In the 7<sup>th</sup> Amendment to the ARC, the provision concerning purchasing cooperations by small and medium-sized enterprises (Section 4 (2) (2) of the old version of the ARC) was deleted. Information is therefore provided under section E.IV. below of this information leaflet (paras **38** ff.) on the criteria according to which the Bundeskartellamt will judge such cooperations in the future.

### **B. Agreements of minor importance to competition**

- 7** The notice of the Bundeskartellamt on the Non-Prosecution of Cooperation Agreements of Minor Importance<sup>6</sup> applies to all agreements between enterprises. If its conditions are fulfilled, the Bundeskartellamt as a rule does not initiate proceedings against such agreements even if they do not meet the exemption criteria of Section 3 (1) (1) of the ARC according to the principles of this information leaflet.

### **C. The exemption rules applying to all undertakings**

- 8** Regardless of the size of an undertaking that is party to an agreement, there are far-reaching possibilities for exemption under German and European law under Article 81 (3) of the EC Treaty and Section 2 of the ARC, respectively. The Block Exemption Regulations (BER) applying under German and European law are of particular significance in this connection. These are regulations exempting certain groups of agreements from the prohibition of Article 81 (1) of the EC Treaty and / or Section 1 of the ARC.
- 9** In the case of small or medium-sized business cooperations, it is in particular the Block Exemption Regulation on categories of specialisation

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<sup>5</sup> This provision expires on 30 June 2009, Section 3 (2), Sentence 2 of the ARC.

<sup>6</sup> This requires that the combined market share of the undertakings involved in an agreement does not exceed 10 per cent in any one of the relevant markets covered by the agreement and that no so-called hardcore restrictions are contained in the agreement. Details on the Bundeskartellamt's exercise of discretion can be found in its notice on agreements of insignificant effect on competition.

agreements<sup>7</sup> as well as the Block Exemption Regulation on categories of research and development agreements<sup>8</sup> that may be applicable in this connection. If the conditions for block exemption are met, they are deemed to be legitimate independently from Section 3 of the ARC. If the small-business agreement does not fall under a BER, the question of whether an agreement with anticompetitive content is exempted is directly subject to Article 81 (3) of the EC Treaty or Section 2 of the ARC.

- 10** Information according to which the Commission judges the legal permissibility of horizontal cooperations (i.e. cooperations between current or potential competitors) in its direct examination of Article 81 (3) of the EC Treaty, are to be found in the so-called Horizontal Guidelines,<sup>9</sup> in the *de minimis* notice<sup>10</sup> and in the guidelines on the application of Article 81 (3) of the EC Treaty.<sup>11</sup> While these texts are not binding on the German competition authorities and courts, they may serve to give guidance.

#### **D. Small and medium-sized enterprises (SMEs) as the target group of this information leaflet**

- 11** A wide range of small and medium-sized enterprises (small businesses/*Mittelstand*) is indispensable for an efficient market economy. Experience has shown that on account of their flexibility, small and medium-sized enterprises (hereinafter referred to as SMEs) are able to stand their ground even when competing against large undertakings. They are, however, at a disadvantage compared with large firms in situations where size is associated with regular advantages in purchasing, production, marketing and distribution. Cooperations between small and medium-sized enter-

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<sup>7</sup> Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of specialisation agreements, Official Journal of the European Communities No. 305, p. 3.

<sup>8</sup> Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of research and development agreements, Official Journal of the European Communities No. L 304, p. 7.

<sup>9</sup> Commission notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (“Horizontal guidelines”), Official Journal of the European Communities No. C 3 of 6 January 2001, p. 2.

<sup>10</sup> Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty (*de minimis* notice), Official Journal of the European Communities No. C 368 of 22 December 2001, p. 13.

<sup>11</sup> Commission notice – Guidelines on the application of Article 81 (3) of the Treaty, Official Journal of the European Communities No. C 101 of 27 April 2004, p. 97.

prises can take account of these size-related disadvantages without unjustifiably restricting competition.

### **I. SMEs in German competition law**

- 12** The Bundeskartellamt bases its presumptions on a relative definition of SMEs that is guided by the respective market structure. Thus, the question of whether an undertaking is an SME cannot be answered on the basis of absolute parameters (e.g. annual turnover, number of employees). Rather, it depends on the relative size of the firms in the sector of the economy concerned. What is decisive for the concept of SMEs is above all their size in relation to the large enterprises in the industry concerned in relation to which the small firms' competitiveness is to be improved by means of co-operations. The competitors of the firms involved in the cooperation arrangement are to be taken into consideration in this context. A firm with an annual turnover of EUR 100 million may be regarded as medium-sized in some circumstances, for example, in a market where some of the other firms have sales in the billion euro range. In another industry with a different competitive structure, however, a firm having the same turnover figures is not necessarily to be considered small or medium-sized.

### **II. Definition of corporate group**

- 13** In considering the question of when an undertaking is to be regarded as an SME, the Bundeskartellamt applies the attribution rule of Section 36 (2) of the ARC. According to this provision, affiliated companies within the meaning of Sections 17 and 18 of the German Stock Corporation Act are to be regarded as one single undertaking. In cases where a subsidiary of a large firm participates in the cooperation agreement, this subsidiary therefore cannot usually be regarded as an SME.

## **E. Small or medium-sized -business cooperations**

### **I. Overview of the new legal situation**

- 14** The latest amendment of the ARC predominantly adapts the provisions of the ARC on business cooperations to European law, with the exception of Section 3 of the ARC.

- 15** The new German and European competition legislation gives undertakings greater room for manoeuvre and the prerogative to carry out their own appraisal, which also leads to firms themselves taking over greater responsibility. The old national legislation prohibited any agreements that restricted competition. However, the competition authority exempted certain anti-competitive agreements from this prohibition after prior notification. Section 4 (1) of the old version of the ARC was one of these exemption provisions. This provision remains in the amended legislation in Section 3 (1) of the ARC and is the only exemption that deviates from European law.
- 16** Anticompetitive agreements under Article 81 (1) of the EC Treaty and Section 1 of the ARC are automatically exempted, i.e. without prior notification, if the conditions for exemption specified in the law in Article 81 (3) EC Treaty, or Section 2 (1) or Section 3 (1) of the ARC are fulfilled.

*Example: Undertakings A and B, which are to be defined as SMEs, manufacture concrete components. They have two plants each, located near Flensburg and Lübeck. They intend to conclude a cooperation agreement according to which their marketing activities for concrete components are to be merged. According to the cooperation agreement, they are limiting their cooperation to Germany, i.e. it does not cover any foreign business activities.*

*In contrast to earlier legislation, this cooperation agreement is no longer to be notified to the competition authority. It is incumbent upon the undertakings concerned to examine whether their agreement is compatible with German or European competition law. The undertakings may also approach the competition authority informally for clarification or make an application pursuant to Section 3 (2) in combination with Section 32c of the ARC.*

## **II. Applicability of European and German competition laws**

- 17** Whenever business cooperation is likely to appreciably affect trade between Member States, the priority of European law takes effect. Priority means that the application of German law may not contradict an outcome that would have been reached if European rules had been applied to the same facts. Section 3 (1) of the ARC is therefore only relevant for making a legal assessment of small or medium-sized business cooperations if it has previously been ruled out that the cooperation is likely to affect trade between Member States or if it has been ruled out that the effect is “appreciable”.
- 18** Thus, whether European law applies depends on two conditions:

- the agreement must be likely to affect trade between Member States (see here paras 19 ff.) and to do so
- appreciably (see here paras 21 ff.).

In assessing whether these two conditions have been fulfilled, the guidelines on the effect on trade between Member States of the European Commission (hereinafter referred to as the Commission) may be used for orientation purposes.<sup>12</sup> The examination aspects of “likelihood” and “appreciability” are closely intertwined and are in practice very difficult to separate in individual cases.

### 1. Likelihood to appreciably affect trade between Member States

- 19** The concept of trade is to be understood in a broad sense and covers all cross-border economic activities including establishing a business.<sup>13</sup> Trade between Member States is also affected if the competitive structure of the market is affected by agreements or practices, for example by eliminating (or threatening to eliminate) a competitor operating within the EU.<sup>14</sup>

According to a ruling by the ECJ, the measure of whether trade may be affected is a prognosis according to which the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, and that there are objective factors of law or fact to substantiate sufficient probability.<sup>15</sup> Purely abstract or even speculative effects do not suffice. Rather, it must be possible for an alleged restraint of competition to affect cross-border trade according to general life experience.<sup>16</sup>

*In our example case in para. 16, a cross-border effect would be ruled out if the concrete components manufactured by A and B could not be supplied to other Member States, here specifically to Denmark, for technical or economic reasons.*

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<sup>12</sup> Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Official Journal of the European Communities No. C 101 of 27 April 2004, p. 81 (“Guidelines on the effect on trade between Member States”). These guidelines are not binding on German competition authorities and courts; cf. Düsseldorf Higher Regional Court, WuW/DE-R 1610, 1613 “*Filigranbetondecken*”.

<sup>13</sup> See Guidelines on the effect on trade between Member States (footnote 12), paragraph 19.

<sup>14</sup> Guidelines on the effect on trade between Member States (footnote 12), paragraph 20.

<sup>15</sup> European Court of Justice (ECJ), judgement of 30 June 1966, Case 56/65, [1966] ECR English special edition 235 “*Maschinenbau Ulm*”.

<sup>16</sup> ECJ, judgement of 14 December 1983, Case 319/82[1985] ECR 4173 “*Kerpen und Kerpen*”.



*Thus, it would be irrelevant if A and B were to limit their cooperation contractually to Germany. It is the potential likelihood alone, not the contractually-agreed “area of application” that is of relevance to the question of likelihood. Accordingly, limiting the geographically relevant market to the domestic market does not necessarily mean that there is no effect on cross-border trade<sup>17</sup>.*

- 20** As a rule, a likelihood that trade between Member States will be appreciably affected is to be negated when agreements are of *purely local significance*, whereby it is irrelevant whether the local market lies in a region close to a national border.<sup>18</sup> European law does not apply in such cases.

*Example: If A or B supply primarily to purchasers in Schleswig-Holstein (Germany), but it is technically possible for them to supply to Denmark, and this also would not be clearly unprofitable, the examination as to whether Community law applies would continue with the examination of appreciability.*

## **2. Examination of appreciability**

- 21** It is not only the likelihood that cross-border trade would be affected that is of relevance for the application of European law. This effect must also be “appreciable”. The criterion of “appreciability” is intended to ensure that European law is only applied to restraints of competition that are likely to cause cross-border effects of a certain dimension. The Commission uses two presumption rules to judge appreciability.

### **a. Principles for examination**

#### **aa. Negative presumption**

- 22** “Appreciability” is regularly to be negated (“negative presumption”) <sup>19</sup>, if
- the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 per cent **and**

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<sup>17</sup> Guidelines on the effect on trade between Member States (footnote 12), paragraphs 22 and 91.

<sup>18</sup> Guidelines on the effect on trade between Member States (footnote 12), paragraph 91.

<sup>19</sup> Guidelines on the effect on trade between Member States (footnote 12), paragraph 52.

- the aggregate annual Community turnover<sup>20</sup> of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million.<sup>21</sup>

*Example: In order to clarify whether the negative presumption applies, it has to be examined first of all whether the total cumulative annual turnover of the participating undertakings A and B with concrete components within the EU does not exceed EUR 40 million. Then, the relevant product and geographic market are to be defined. If the market share of A and B in the relevant market is below 5 per cent, it would be necessary to state that there was no appreciability. The consequence would be that only German law would apply to the cooperation in the presumption.*

### **bb. Positive presumption**

**23** If the conditions of the negative presumption are not fulfilled, the Commission makes the refutable presumption (positive presumption)<sup>22</sup> that the effect on trade is appreciable in the case of the following agreements (positive presumption):<sup>23</sup>

- agreements relating to imports or exports within the Community,<sup>24</sup> or
- agreements that relate both to imports from and exports to third countries,<sup>25</sup>
- agreements covering a number of Member States; or
- hardcore cartel agreements that cover a whole Member State.<sup>26</sup>

*Example: In the example case, the conditions for a positive presumption would be fulfilled if A and B agreed that on account of possible parallel imports, the volume of supplies by A and B to Denmark so far should only be*

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<sup>20</sup> In the case of purchasing cooperations: annual purchasing volume.

<sup>21</sup> The negative presumption does not apply to the special case of the “new markets” that are coming into existence; here an individual examination is always required, cf. Guidelines on the effect on trade between Member States (footnote 12), paragraph 52.

<sup>22</sup> Guidelines on the effect on trade between Member States (footnote 12), paragraph 53.

<sup>23</sup> The agreements would then be ones that are by their nature likely to lead to an appreciable effect on trade between Member States.

<sup>24</sup> This does not apply to agreements that concern only *exports* to countries outside the EU, as long as such agreements do not lead to a limitation of competition within the Community, cf. Guidelines on the effect on trade between Member States, paragraph 103.

<sup>25</sup> Cf. Guidelines on the effect on trade between Member States (footnote 12), paragraph 103.

<sup>26</sup> Cf. Guidelines on the effect on trade between Member States (footnote 12), paragraph 78.

*increased by mutual agreement and if the turnover of A and B with concrete components within the EU exceeds EUR 40 million.*

### **cc. In-depth individual examination on the basis of qualitative criteria**

**24** If the applicability of European law cannot be ruled out already on the basis of the negative presumption (para. 22) or presumed on account of the positive presumption (para. 23), the question of “appreciability” is to be decided by means of an in-depth individual examination. The following criteria, among other things, are to be taken into account here<sup>27</sup>:

- the effects of the agreement on competition,
- the market position of the parties concerned,
- the type and quantity of the goods concerned or the type and quantity of the services concerned,
- the legal environment (e.g. liberalisation processes or requirements to obtain official approval),
- the quantity of exports by the cooperating undertakings of the goods and services concerned to another Member State.

### **b. The special case of regional markets<sup>28</sup>**

**25** With regard to SMEs, agreements concerning only part of a Member State (regional markets) deserve special attention.<sup>29</sup> Such agreements are not subject to the positive presumption on account of their limited geographical scope. What is also to be examined here in the first instance is whether

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<sup>27</sup> Guidelines on the effect on trade between Member States (footnote 12), paragraph 59 in combination with paragraphs 29 and 30.

<sup>28</sup> As already mentioned under para. 20 above, there is no likelihood that agreements of purely local significance will affect trade between Member States, so that European law does not apply and an examination of appreciability need not be carried out.

<sup>29</sup> In the view of the Commission, agreements between SMEs are rarely likely to appreciably affect trade between the Member States. The Commission argues that “the activities of SMEs are normally local or at most regional in nature.” However, agreements between SMEs could be subject to the application of Community law if these companies operate internationally, Guidelines on the effect on trade between Member States (footnote 12), paragraph 50.

In contrast to the Bundeskartellamt, the Commission is guided by absolute dimensions in defining SMEs. This definition derives from State aid legislation and covers companies that have a maximum of 250 employees and that have an annual turnover of a maximum of EUR 50 million or a total annual balance of a maximum of EUR 43 million. See Article 2 (1) of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Official Journal of the European Communities No. L 124 of 20 May 2003, p. 36.

the application of European law cannot be ruled out already on account of the negative presumption (para. 22). If this is not the case, an appreciable effect on cross-border trade is probable if the **market is foreclosed** and<sup>30</sup>

- aa. the turnover concerned comprises a considerable share of the total turnover of the good within a Member State or
- bb. the turnover attained in the foreclosed regional market with the goods belonging to the product market is considerable in comparison with the turnover attained within the whole Member State.

*In a case dealt with by the Bundeskartellamt's First Decision Division<sup>31</sup> the market concerned covered large areas of southern Germany. It was not possible to establish the existence of a foreclosure effect. A negative answer was given to the question of appreciability since*

- a) *the cartel area covered an area that was less than half the size of the Federal Republic of Germany both geographically and in terms of volumes;*
- b) *the parties to the agreement had a joint market share of less than 10 per cent in the regional markets concerned and*
- c) *the parties to the agreement had only an insignificant market position abroad.*

However, on the basis of the specified thresholds being exceeded, appreciability could not be (positively) presumed.

### **III. The evaluation of small or medium-sized business cooperations according to Section 3 of the ARC**

#### **1. General remarks**

- 26** Section 1 of the ARC prohibits agreements between undertakings or associations of undertakings and concerted practices which have as their object

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<sup>30</sup> The Guidelines on the effect on trade between Member States probably also apply in this sense (footnote 12), paragraph 90.

<sup>31</sup> Decision of 25 October 2005, B1 - 248/04, "Mein Ziegelhaus GmbH & Co. KG", available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell05/B1-248-04.pdf>. In this case, the First Decision Division saw no reason to take action on account of its minor importance; a general statement on the permissibility of the far-reaching restraints to competition on which this case is based was not intended, however.

or effect the prevention, restriction or distortion of competition. The conditions according to which an agreement between SMEs is exempt from the prohibition of Section 1 ARC are to be found in Section 3 (1) of the ARC. If the conditions of Section 3 (1) of the ARC are not fulfilled, there is only the possibility of exempting the cooperation from the prohibition under Section 1 of the ARC according to Section 2 (1) of the ARC. The burden of proving that the conditions specified in Section 2 (1) as well as in Section 3 (1) of the ARC have been fulfilled lies with the undertakings.

**27** In accordance with Section 3 (1) of the ARC, agreements are exempt from the ban of Section 1 of the ARC if they

- are concluded between undertakings that are in competition with one another (that is why Section 3 (1) of the ARC may only be applied to exempt restraints on competition that have a horizontal effect);
- have as their purpose the rationalisation of economic activities through inter-company cooperation;
- do not significantly impair competition in the market as a result and
- serve to improve the competitiveness of small or medium-sized enterprises.

## **2. Rationalisation of economic activities**

**28** This involves measures which improve the ratio of the operational input for economic activities to the output (calculated per unit of production) for every participating small or medium-sized enterprise.

**29** These include cooperative measures in the areas of

- production,
- research and development,
- financing,
- administration,
- advertising,
- purchasing and
- marketing.

- 30 The inter-company cooperation may take the form of coordination as well as the spinning off and pooling of one or a number of corporate functions.
- 31 The “rationalisation of economic activities” criterion precludes such cooperation from the scope of application of Section 3 (1) of the ARC that is directed primarily at the elimination of competition rather than the success of rationalisation. At the same time, core restrictions not exempt under Section 2 of the ARC may be permissible under Section 3 of the ARC.
- 3332** Mere **price agreements**, however, are impermissible in any case, since they do not result from an improvement in the input-output ratio within an enterprise. Only if there is a direct inherent connection between cooperation aimed overall at increasing competitiveness can agreements on prices or parts of prices be permissible in exceptional cases if these serve the purpose of rationalisation. This may be the case in particular in a joint advertising or marketing venture by small and medium-sized enterprises. The obligation to sell exclusively via a joint sales agency (so-called obligation of exclusive supply) may be the object of an agreement according to Section 3 (1) of the ARC if and insofar as it involves rationalisation.
- 33 Sales cooperations are permissible if they are limited to awarding contracts depending on the freight costs incurred with a view to minimising costs. However, the Bundeskartellamt judges sales cooperations whose main purpose is to maintain a quota arrangement to be impermissible. When there are overcapacities in the market, sales quotas generally impede rationalisation as they greatly impede the award of contracts on the basis of low freight levels, optimal capacity usage, specialisation of the cooperating parties etc. Under such circumstances, **quota agreements** do not serve – even indirectly – the “rationalisation of economic activities” and as a rule cannot therefore be the object of a cooperation between SMEs. This is all the more the case when the quota arrangement is linked with a compensation payment where quotas are exceeded. The aim of spreading the economic effects of a reduction in overcapacities across the entire cooperation is inherently incompatible with Section 3 (1) of the ARC. Insofar as agreements concluded to this effect were exempted from the ban under Section 1 of the ARC in the past, this practice will not be continued.

### 3. Significant effect on competition in the market

34 According to Section 3 (1) Item 1 of the ARC, an exemption from Section 1 of the ARC depends on competition not being significantly affected. This can only be determined by an overall assessment of the effects of a cooperation agreement on the conditions of competition in any relevant market. The following main criteria have to be taken into account when assessing the effects on competition:

- the market positions, and in particular the market shares of the firms participating in the cooperation;
- the nature of the inter-company cooperation, particularly the extent to which competition is thereby restricted and
- any existing cooperation in the market.

35 On the basis of its present administrative practice, the Bundeskartellamt presumes that the critical threshold of a significant effect on competition as a rule is reached if the cartelised market share amounts to 10 to 15 per cent. Such a market share threshold certainly applies in the case of agreements on major competitive parameters such as the setting of sales prices, discounts or other pricing components. However, if the cooperation concerns qualitatively less significant parameters, the parties' market share may be above the 15 per cent threshold.

### 4. Improving the competitiveness of small and medium-sized enterprises

36 In the exemption rule of Section 3 (1) of the ARC, the legislator aims to improve the competitiveness of SMEs. Cooperation among enterprises is an appropriate means to improve the competitiveness of the firms involved when its aim is, for example, to increase output or enhance quality, to broaden the range of products, to shorten routes or periods of delivery, to streamline the purchasing or selling structures or to provide for the common use of advertising.

37 The text rules out cooperations between large firms alone. However, according to the rulings of the Federal Court of Justice, large firms may take part in a cooperation agreement along with SMEs in isolated cases.<sup>32</sup> In

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<sup>32</sup> Federal Court of Justice WuW/E BGH 2321, 2325 "*Mischguthersteller*"; WuW/E DE-R 1087, 1090 "*Ausrüstungsgegenstände für Feuerlöschzüge*".

such cases it is decisive whether the efficiency of small and medium-sized enterprises can only be improved by large enterprises also being involved in the cooperation. This may be the case if the purpose of a cooperation among small and medium-sized enterprises cannot be achieved without the participation of large firms or cannot be achieved with the same effectiveness, for example when one or several small and medium-sized enterprises obtain improved purchasing or sales opportunities through an agreement with a large firm. In such cases, however, special attention is to be paid to examining whether there is a substantial impairment of competition in the market. In particular, the participation of large firms is not possible when it involves additional restraints to competition that influence the market situation to a not inconsiderable extent to the advantage of the participating large firms.

#### **IV. The treatment of purchasing cooperations**

- 38** In the seventh amendment to the ARC, the provision on purchasing cooperations among small and medium-sized enterprises (Section 4 (2) of the old version of the ARC) has been deleted. Thus, information is provided here concerning the criteria on which the Bundeskartellamt will judge such cooperations in the future.

As well as Section 3 of the ARC, the general exemption criteria of Article 81 (3) of the EC Treaty or Section 2 of the ARC also apply to purchasing cooperations, which are of particular significance in this connection.

In European legal practice, purchasing agreements by SMEs<sup>33</sup> are regarded as "normally pro-competitive".<sup>34</sup> Thus, the European Commission regards the infringement of Article 81 (1) of the EC Treaty as unlikely in the case of purchasing agreements that have a joint market share of less than 15 per cent in the purchasing or sales market concerned or at least regards exemption under Article 81 (3) of the EC Treaty as likely.<sup>35</sup> The Bundeskartellamt is not bound by these guidelines. Nevertheless, the

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<sup>33</sup> On the Commission's deviating definition of SMEs, cf. footnote 29.

<sup>34</sup> Horizontal guidelines (footnote 9), para. 116.

<sup>35</sup> Horizontal guidelines (footnote 9), para. 130. In addition, the Commission interprets Article 81 of the EC Treaty in its de minimis notice (footnote 10) in such a way that purchasing cooperations covering a market share of less than 10 per cent in the purchasing market are not appreciable and Article 81 (1) is therefore not contravened, see de minimis notice, paragraph 7. According to paragraph 11 of the notice, this does not apply in case of the agreement on hardcore restrictions beyond the mere setting of purchasing prices.



Bundeskartellamt also presumes that exemption under Article 81 (3) of the EC Treaty or Section 2 of the ARC is likely if the specified thresholds are not reached.<sup>36</sup>

However, an agreement involving an obligation to purchase may often be problematical with regard to the indispensability criterion referred to in Article 81 (3) of the EC Treaty and Section 2 of the ARC.<sup>37</sup>

## V. The significance of Section 3 of the ARC for particular forms of cooperation

- 39** Agreements on joint **research and development** where restraints to competition are imposed on the companies concerned in their marketing of the results of their research or development may be exempt under the European Block Exemption Regulation on research and development cooperation agreements under Section 2 (2) of the ARC.<sup>38</sup> Section 3 (1) of the ARC goes even further insofar as impermissible core restraints may be exempt under Article 81 (3) or Section 2 of the ARC (possibly in combination with Block Exemption Regulations) (see para. 32 above).

In the case of **production agreements**, an examination is to be undertaken first of all concerning whether an exemption from the ban on cartels under Section 2 (2) of the ARC in combination with the Block Exemption Regulation on specialisation agreements is possible. If this Block Exemption Regulation does not apply, particularly on account of the lack of a joint production firm, Section 3 of the ARC provides for further-reaching exemption possibilities.

In the past, **cooperation on logistics and joint advertising** were of greater importance in the Bundeskartellamt's practice, applying Section 4 (1) of the old version of the ARC, which is identical to Section 3 (1) of the ARC:

*No objections were raised to an agreement among specialised wholesale traders in the beverages market, which included the concentration of stor-*

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<sup>36</sup> Above the 15 per cent thresholds, an individual examination on the basis of Section 2 of the ARC is required.

<sup>37</sup> In the Commission's view, an obligation to purchase may be necessary in individual cases in order to reach the purchasing volume required to gain economies of scale, cf. horizontal guidelines (footnote 9), para. 117.

<sup>38</sup> See footnote 8.

age facilities, joint marketing efforts in the beverage retail sector and the exchange of information and experience on process optimisation. This was on account of the fact that these measures resulted in a considerable reduction in freight costs in particular and there were rationalisation effects in marketing.

*In the inland passenger shipping sector, the Bundeskartellamt regarded as permissible a cooperation that aimed to achieve the scheduled interconnection of line services, the harmonisation of the terms of carriage and joint marketing. This cooperation enabled the participating firms to serve on longer routes for the first time, thereby moving as a new competitor into a market in which they had not previously operated and which they also would not have been able to open on their own.*<sup>39</sup>

*The Bundeskartellamt also regarded the following agreement between thirteen small and medium-sized manufacturers of construction components with a joint market share of significantly less than 15 per cent as permissible: The participating undertakings founded an agency to centrally accept orders. This agency awarded incoming orders on the basis of the firms' suitability (specialisation) and – to a lesser extent – according to their capacity utilisation. In addition, purchases, transport and storage facilities were coordinated. Compensation payments or other sanctions for non-observance of the criteria for awarding contracts were not envisaged.*

In addition, Section 3 (1) of the ARC may also apply in the case of an agreement on a joint **customer and repair service** where the participating firms commit themselves contractually not to set up or maintain an independent customer or repair service of their own.

## **VI. Competent competition authorities**

- 40** The Bundeskartellamt or the *Land* competition authorities are competent to apply German competition law (see addresses in the appendix). The application of European law is also incumbent upon the Commission (principle of parallel competences). In the vast majority of cases, however, the Bundeskartellamt or the competent *Land* competition authority will take charge of the procedure since cooperations between small and medium-

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<sup>39</sup> A detailed description of the case may be found in the Bundeskartellamt's Activity Report 1999/2000, p. 154 (Bundestag publication 14/6300; it may be downloaded from the internet at <http://dip.bundestag.de/btd/14/063/1406300.pdf>).

sized enterprises usually exclusively or very predominantly concern Germany or parts of Germany.<sup>40</sup>

- 41** The Bundeskartellamt rather than the *Land* competition authorities is competent to deal with a case in principle if the effect of the anticompetitive practice extends beyond the territory of one *Land* (Section 48 (2) of the ARC). Competence deviating from this principle may be agreed between the Bundeskartellamt and the *Land* competition authorities (Section 49 Paragraphs 3 and 4 of the ARC).
- 42** *If in the example referred to at the outset, firms A and B supply their concrete components both within Schleswig-Holstein and to Lower Saxony, the Bundeskartellamt would be competent to deal with the case under Section 48 (2) of the ARC.*

#### **VII. Rights under Sections 3 (2) and 32c of the ARC and informal advice**

- 43** Under Section 3 (2) of the ARC, undertakings or associations of undertakings have a right to apply for a decision under Section 32c of the ARC if the conditions of Article 81 (1) of the EC Treaty are not fulfilled. This requires that the undertakings can demonstrate a “substantial legal or economic interest” in such a decision.
- 44** The concept of “significant legal or economic interest” is not defined in the law. However, it is not to be interpreted in isolation from the fundamental decision of the legislator to abolish the old notification system. A significant interest is to be presumed in particular if
- a) the forms of cooperation or types of agreement involved as such were not yet the object of the competition authority’s practice,
  - b) the assessment of the cooperation under competition law is significant for a large number of cases (precedents) or
  - c) considerable investments are to be made in connection with the cooperation agreement.

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<sup>40</sup> Cf. paragraph 8 of the Commission Notice on cooperation within the Network of Competition Authorities (the “Network Notice”), Official Journal of the European Communities C 101 of 27 April 2004, p. 43.

If these conditions are not met, it companies can be expected to make a self-assessment, taking the Bundeskartellamt's practice into account. In such cases, there is no entitlement to a decision under Section 32c of the ARC.

**45** In making a decision under Section 32c of the ARC, the Bundeskartellamt makes a self-commitment. If the Bundeskartellamt has taken a decision under Section 32c of the ARC, it subsequently may only take action against the cooperation if new information becomes available. It is therefore in the interests of the applicant to provide all the facts of relevance for the assessment of the cooperation according to Section 3 (1) of the ARC. As well as the cooperation agreement itself, the following information should be provided to the Bundeskartellamt:

- a) presentation of the legal and economic background to the agreement;
- b) total turnover and turnover in the relevant product and geographic market<sup>41</sup> for all the enterprises involved in the cooperation;
- c) information on the total turnover in the relevant product and geographic market. Insofar as that such information is not available, estimates may be made including details of the bases of the estimates;
- d) names of the most important competitors in the relevant market and information on the competitors' "size";
- e) presentation of the expected rationalisation effect;
- f) details as to the extent to which the planned restraint to competition will lead to increased competitiveness;
- g) information as to whether there are already other cooperations in the relevant market;

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<sup>41</sup> If there are difficulties in defining the relevant product and geographic market or if there is uncertainty concerning the market definition, this should be discussed and clarified in advance with the competent Decision Division.

- h) enterprises' own legal assessment of the agreement (including an examination of the cooperation's effect on trade between Member States).

**46** The provision according to which undertakings have a right to a decision under Section 32c of the ARC will expire on 30 June 2009. Thereafter, the same conditions as those applying to all the other cooperations falling under Article 81 (3) EC Treaty or Section 2 (1) of the ARC will also apply to SME cooperation arrangements with regard to a decision under Section 32c of the ARC.

Notwithstanding a claim deriving from Section 3 (2) of the ARC there is (still) the possibility of addressing the Bundeskartellamt informally and requesting an assessment of the cooperation under competition law. In such a case, the request in writing by the participating enterprises should contain a detailed description of the facts and should include the cooperation agreement and the enterprises' own comprehensive appraisal under competition law. If there is no evidence of anticompetitive conduct, the Bundeskartellamt can then exercise its discretion within the framework of Section 32 of the ARC and refrain from carrying out an in-depth examination, and can inform the enterprises concerned accordingly.

**Appendix**Federal and Land competition authorities

Bundeskartellamt Kaiser-Friedrich-Str. 16 <u>53113 Bonn</u> Tel.: 0228/9499-0 e-mail: info@bundeskartellamt.de	Wirtschaftsministerium -Landeskartellbehörde- Postfach 103451 <u>70029 Stuttgart</u> Tel.: 0711/123-0
Bayerisches Staatsministerium für Wirtschaft, Infrastruktur, Verkehr und Technologie -Landeskartellbehörde- <u>80525 München</u> Tel.: 089/2162-01	Senatsverwaltung für Wirtschaft, Arbeit und Frauen als Landeskartellbehörde <u>10825 Berlin</u> Tel.: 030/9013-0
Ministerium für Wirtschaft des Landes Brandenburg als Landeskartellbehörde <u>14460 Potsdam</u> Tel.: 0331/866-0	Der Senator für Wirtschaft und Häfen Bereich Wirtschaft -Landeskartellbehörde- Postfach 101529 <u>28015 Bremen</u> Tel.: 0421/361-0
Freie und Hansestadt Hamburg Behörde für Wirtschaft und Ar- beit als Landeskartellbehörde Postfach 112109 <u>20421 Hamburg</u> Tel.: 040/42841-0	Hessisches Ministerium für Wirtschaft, Verkehr und Landesentwicklung - Landeskartellbehörde - Postfach 3129 <u>65021 Wiesbaden</u> Tel.: 0611/815-0
Wirtschaftsministerium Mecklenburg-Vorpommern als Landeskartellbehörde <u>19048 Schwerin</u> Tel.: 0385/588-0	Niedersächsisches Ministerium für Wirtschaft, Arbeit und Ver- kehr - Landeskartellbehörde - Postfach 101 <u>30001 Hannover</u> Tel.: 0511/120-0

<p>Ministerium für Wirtschaft und Arbeit des Landes Nordrhein-Westfalen Landeskartellbehörde <u>40190 Düsseldorf</u> Tel.: 0211/8618-50</p>	<p>Ministerium für Wirtschaft, Verkehr, Landwirtschaft und Weinbau als Landeskartellbehörde Postfach 32 62 <u>55022 Mainz</u> Tel.: 06131/16-0</p>
<p>Ministerium für Wirtschaft und Arbeit Landeskartellbehörde Postfach 10 09 41 <u>66009 Saarbrücken</u> Tel.: 0681/501-00</p>	<p>Sächsisches Staatsministerium für Wirtschaft und Arbeit als Landeskartellbehörde Postfach 10 03 29 <u>01037 Dresden</u> Tel.: 0351/564-0</p>
<p>Ministerium für Wirtschaft und Arbeit des Landes Sachsen-Anhalt Landeskartellbehörde Postfach 39 11 44 <u>39043 Magdeburg</u> Tel.: 0391/567-01</p>	<p>Ministerium für Wissenschaft, Wirtschaft und Verkehr des Landes Schleswig-Holstein -Landeskartellbehörde- Postfach 7128 <u>24171 Kiel</u> Tel.: 0431/988-0</p>
<p>Thüringer Ministerium für Wirtschaft, Technologie und Arbeit als Landeskartellbehörde Postfach 900225 <u>99105 Erfurt</u> Tel.: 0361/3797-999</p>	