

## The Swiss Competition Commission adopts a "de minimis" Notice

**Switzerland, Anticompetitive practices, De minimis, Effect on trade , Economic efficiency, All business sectors**

Swiss Competition Commission, 19 december 2005, Communication on agreements with a limited effect on the market (SME Communication) (Communication relative aux accords dont l'impact sur le marché est restreint (Communication PME)

Text in English not available.

French ; German ; Italian

On December 19th, 2005, the Swiss Competition Commission (the "SCC") issued a notice in relation to small and medium-sized enterprises ("SMEs") and micro-enterprises, entitled Communication on agreements with a limited effect on the market ("SME Communication"). The SME Communication is analogous to the Commission notice, of 22 december 2001, on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) ; (OJEU C 368, 22 december 2001, p. 13-15).

The SME Communication is based on Art. 6 para. 1 lit. e Cartel Act ("ACart") (a provision that took effect after the 2003 revision of the Acart), which allows such communications to be published by the SCC with respect to "agreements with the purpose of improving the competitiveness of small and medium-sized enterprises, in so far as they have only a limited effect on the market".

Part A of the SME Communication (§ 1 SME Communication) identifies the types of agreements to which the SME Communication applies (§ 1(3) SME Communication). Specifically, Part A identifies the circumstances in which the SCC would not, in principle, institute formal proceedings based on Swiss antitrust law. This is first of all the case in circumstances where an agreement (a) has the "purpose of improving competitiveness", and (b) has "only a limited effect on the market" (§ 1(1) SME Communication), such that it is in principle consistent with Art. 5 ACart [1].

This is also the case in circumstances where an agreement "only involves micro-enterprises" (§ 1(2) SME Communication), such that it does not significantly affect competition on the relevant market and is in principle consistent with ACart.

According to Part B of the SME Communication (§§ 2-3 SME Communication), an agreement aims at "improving competitiveness" if it (i) enables the realization of economies of scale or economies of scope, through measures that increase productive efficiency and favour innovation, or (ii) stimulates sales activity in the downstream markets. Such improvements may in particular result from agreements having as their object the enhancement of production (e. g., via product diversification or quality improvement), R&D, administration, financing and accounting, advertising and marketing, or logistics and distribution, or the facilitation of market entry of new products or new undertakings.

The extent of an agreement's effect on the relevant market is assessed in the first place by reference to market share thresholds, and in the second place according to the object of the agreement (§ 3 SME Communication).

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The SCC holds the view that agreements between undertakings have a limited effect on the market (a) if the aggregate market share held by the parties to a horizontal agreement [2] does not exceed 10% on any relevant market affected by the agreement or (b) if the market share held by each of the parties to a vertical agreement [3] (in particular distribution agreements) does not exceed 15% on any relevant market affected by the agreement (§ 3(1) SME Communication).

In contrast, according to the SCC, an agreement has more than a limited effect on the market, and is therefore not exempted, if (a) a horizontal agreement has as its object the direct or indirect fixing of prices, the limitation of the quantities of goods or services to be produced, bought or supplied, or the allocation of markets, geographically or according to trading partners ; or (b) if a vertical agreement has as its object the implementation of fixed or minimum sale prices or of absolute territorial protection (§ 3(2) SME Communication).

Part C of the SME Communication is dedicated to agreements between micro-enterprises (§§ 4-5 SME Communication). § 4 SME Communication defines a micro-enterprise as an undertaking having (a) less than 10 staff (*i. e.*, employees, owners or partners) or full-time equivalents (§ 8 SME Communication) and (b) an annual turnover in Switzerland not exceeding CHF 2 Mio [4].

The SCC holds the view that no market-share threshold analysis is required for agreements involving only micro-enterprises. In order for such agreements to be exempted, the SME Communication requires only that they comply with certain conditions relating to their object. Specifically, agreements involving only micro-enterprises do not in principle significantly affect competition in the relevant market, unless (a) a horizontal agreement has as its object the direct or indirect fixing of prices, the limitation of the quantities of goods or services to be produced, bought or supplied, or the allocation of markets, geographically or according to trading partners; or (b) if a vertical agreement has as its object the implementation of fixed or minimum sale prices or of absolute territorial protection (§ 5 SME Communication).

The SME Communication will be re-evaluated no later than two years after its adoption (§ 10 SME Communication) . According to Art. 6(3) ACart, it will be published in the Federal Bulletin by the SCC (§ 11 SME Communication).

[1] This provision, which is very similar to Art. 81 EC Treaty, prohibits agreements that significantly affect competition in the relevant market and which are not justified on grounds of economic efficiency.

[2] Horizontal agreement are defined under § 7(2) SME Communication as binding or non-binding agreements and concerted practices between two or more enterprises at the same level of the market, which are actual or potential competitors on that market.

[3] Vertical agreements are defined under § 7(3) SME Communication as binding or non-binding agreements and concerted practices between two or more enterprises at different levels of the market, which concern the commercial terms on which the relevant enterprises may purchase, sell or distribute goods or services.

[4] For the determination of the annual turnover, see § 9 SME Communication, which refers to Art. 4-8 Ordinance on the Control of Mergers of Enterprises of 17 June 1996 (RS 251.4).

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