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GENERAL CARTEL BANS: CRITERIA FOR EXEMPTION FOR SMALL AND MEDIUM-SIZED ENTERPRISES

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FOREWORD

This document comprises proceedings in the original languages of a roundtable on General Cartel Bans: Criteria for Exemption for Small and Medium-Sized Enterprises which was held by the Committee on Competition Law and Policy in April 1996.

It is published as a general distribution document under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

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PREFACE

Ce document rassemble la documentation dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur “L’interdiction des ententes : critères d’exemptions pour les petites et moyennes entreprises” qui s’est tenue en avril 1996 dans le cadre du Comité du droit et de la politique de la concurrence.

Il est mis en diffusion générale sous la responsabilité du Secrétaire général de l’OCDE afin de porter à la connaissance d’un large public, les éléments d’information qui ont été réunis à cette occasion.

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BACKGROUND NOTE

(by the German Delegation)

Exemption for horizontal co-operation agreements for small and medium-sized enterprises (SME) from general cartel ban

I. The economic role of SME

A minimum number of small and medium-sized enterprises (SME) is considered not only a guarantee, but also a constituent part of a market economy system. A decentralised competitive organisation of the market is conditional on the presence of a sufficient number of independent decision-makers. Given the necessary motivation, there will be a growing number of decentralised attempts at solving economic problems and introducing innovations.

There are several ways in which the economic role of SME can be assessed: On the one hand they are said to involve a high degree of creativity and readiness to take risks. They increase competition, contribute to a comprehensive and varied supply of goods and services, give customers and personnel a wider choice, put new ideas to the test and speed up the dissemination of new economic knowledge. Economic dynamism, in the form of both moves into new economic territory and capacity cuts in line with declining demand as well as structural adjustment, largely results from the activity of SME.

The foundations and often the motives for the SME's economic action are considered to lie in the close association between the firm and its proprietor, i.e. the combination of capital ownership (including liability) and management which is quite common in SME. The unity of risk and ownership (i.e. the scope for action) influences in particular the legal form and the source of finance and contributes to a manageable organisation able to respond flexibly. The latter is helped by the SME's independence of lengthy decision-making and co-ordination processes. Moreover, many SME are only active in a limited geographic market and/or hold only comparatively small market shares.

On the other hand, SME are considered self-sufficient and hardly inclined to jeopardise a possibly adequate earnings situation by investing and risk-taking. The fact that the SME's survival as a rule is threatened sooner than that of large firms may result in an exaggerated readiness to adjust their market behaviour and a trend toward friendly co-operation.

II. Classification criteria for SME

SME are not easily identifiable by clear-cut criteria. SME may be active in nearly all markets and nearly all sectors of the economy. The forms of SME are therefore equally diverse, ranging from single proprietorship to a firm with several hundred employees or an internationally known successful and leading speciality supplier filling a market niche.

As the term suggests, SME are distinguished from other business units mainly by size criteria..

As a rule size is measured in terms of quantitative criteria, e.g. number of staff, turnover, balance sheet total, capital intensity, R&D intensity or market share. But the firms covered by the term SME are not a homogeneous group. Rather, they include firms in a variety of industries, trade, craft, manufacturing, the professions and agricultural and forestry firms, etc.

The number of staff, for example, is not necessarily a very meaningful indicator of a firm's size. Rather, it depends inter alia on an industry's or a firm's degree of mechanisation and the availability of skilled labour. Categorising large firms and SME by turnover figures across industries may also be misleading. For example, the turnover of a trading company will lead to different conclusions about its size, and will often be higher in absolute terms, than turnover of a craft business.

In practice, which has to rely on some sort of classification for many different purposes, certain criteria - as a rule turnover and number of staff - are combined. In Germany, as a rough classification and for further analysis of size-specific problem areas, the Institut für Mittelstandsforschung (SME Research Institute) for example uses the following criteria at national level:

Institut für Mittelstandforschung:

	Staff	Turnover in DM/p.a.
Small enterprises	under 9	under 1 million
Medium-sized enterprises	10 - 499	1 to 100 million
Large enterprises	over 500	over 100 million

As the EU Commission has pointed out, a generally accepted definition of SME is not possible, because the term is defined differently depending on the industry and country concerned. Bearing this in mind, the EU at supranational level - for example for the purpose of establishing a Community frame of reference for state aid - defines as SME those firms which meet all of the following criteria at a time:

Staff	turnover (ECU)	Ownership
under 250	either - annual turnover under 20 million or - balance sheet total under 10 million	no more than 25 % of capital owned by large firm[1]

Which criteria are actually used for the purpose of classification depends mostly on the perspective and purpose of the analysis. The classification varies depending on whether structural, regulatory, labour market, fiscal or competition policy issues are being addressed. Generally applicable interdisciplinary criteria have so far been rejected by policy-makers and business as well as theorists and practitioners.

For the purposes of competition law enforcement, SME are not as a rule classified according to absolute size criteria like, e.g., turnover and/or number of staff, but in relation to the remaining firms in the relevant market. Therefore, market structure is a decisive factor.

Despite a substantial turnover, a firm may be classified as SME, because it is active in a market in which several other competitors record significantly higher turnovers. In a different market a firm with the same turnover might be considered a large firm in comparison with competitors in that market.

Whether firms have scope for action in a particular market, whether they are independent in deciding on the use of competitive parameters and whether they are controlled by competitors is largely determined by their position and size in relation to their competitors.

The relative position of a firm is measured on the basis of an overall assessment of the competitive parameters and conditions in the relevant market. Apart from turnover, market share, capital resources, number of staff, selling space, and possibly composition of the product range and many other market-specific criteria may be considered. As a result of defining SME in relative terms, the line between SME and large firms is drawn at totally different turnover figures in different markets. This flexibility allows the distinctive features of a particular market structure to be taken into account.

In the case of multi-product firms relative size cannot be measured only by the turnover recorded in the relevant market. Even a largely independent plant or subsidiary cannot be considered in isolation. What has to be considered ultimately is that the company as a whole will benefit from the advantages derived from internal co-operation. Consequently, firms in which large firms hold a significant share cannot be treated as SME, even if they are active to an insignificant extent only in one relevant market. The same applies, if a large firm has a share in several cartel members, or acquires a share in them during the period of exemption. In those cases, the restrictions of competition inherent in the co-operation agreement have to be re-examined (cf. III.2 for the participation of large firms in co-operation agreements of SME).

III. Special treatment of SME under competition law - exemption from general ban on cartels

1. Reasons for special treatment under competition policy

Arguments for facilitating SME co-operation

The survival of SME may be threatened inter alia by processes of structural change, intensifying competition based on efficiency and anticompetitive practices or abusive conduct by large firms, whether competitors, suppliers or buyers. Co-operation agreements among SME are often assessed from the perspective that SME have no chance of survival in competition with large firms if the latter use economies of scale. Where competitive disadvantages result from relatively small size only, attempts are often made to compensate for those disadvantages by other means. Close co-operation among SME is then considered a means of ensuring survival and offsetting structural disadvantages.

While the group of SME is heterogeneous, the following broad statements can be made - although there may be a few examples to the contrary -: One of the purely size-induced disadvantages of SME vis-à-vis large firms is poor access to the capital market. Owing to their relatively small size, SME have little or no access to certain sources of finance. Since SME are often single-product firms, the possibilities of risk-spreading and compensatory pricing are as a rule very limited, which raises their sensitivity to cyclical and structural fluctuations. Owing to their manufacturing conditions, which are marked as a rule by small lot and batch sizes, SME can only take limited advantage of cost savings in the production process. As SME purchase smaller volumes than large firms, their terms and conditions tend to be less favourable. In addition, they are often less likely to attract highly qualified staff. As a result of the above disadvantages, even their international competitiveness is generally thought to be inferior to that of large firms.

By contrast, it is considered the SME's specific advantage over large firms that, being closer to the market, they are more ready to take risks and able to more quickly respond and make adjustments. Time-consuming processes of co-ordination and decision-making can often be dispensed with so that SME can quickly respond to market processes. Direct contact with buyers and greater closeness to the market often allows them to better meet specific customer needs. SME moreover often are firms with a high degree of specialisation.

By co-operating rather than merging, SME remain in the market as legally and economically independent actors. In that respect, co-operation agreements among SME tend to be assessed positively in certain circumstances. Co-operation agreements intended to help SME offset some or all of the economies of scale of competing large firms, e.g. by increasing the SME's efficiency, are of great importance to economic and competition policy. It has been argued that they can contribute to improving competitive structures and in that case are even considered desirable from a competition policy perspective. In this context it is also argued that it is often the very co-operation agreement that enables SME to enter into competition with large firms. In such cases competition is indeed made possible by the SME's co-operation, and calls for promoting co-operation among SME may be considered justified on that basis.

Arguments against facilitating SME co-operation

The opposite view is that efficiencies are more likely to be promoted by competition than by co-operation. It is argued that seeking efficiencies is a constituent part of the competitive process, rather than a distinctive feature of co-operation agreements.

Co-operation among individual firms, including SME, restricts the scope for initiative. As has been shown above (Cf.I), the importance of SME - as well as their promotion - is explained by the large number of alternatives they offer and by the decentralised decision-making process. Facilitating co-operation results in those characteristics, which are so important to the market economy, being pooled and jeopardised. Alternative problem-solving approaches and strategies are combined and unified.. In addition, there is a danger that co-operation agreements get out of hand because they often involve additional co-ordination effects.

Rather, SME should be allowed to use their specific advantages, e.g. a comparatively high degree of creativity and flexibility, without government interference. Owing to their closeness to markets and buyers, SME, in particular, have ample chances of success through specialisation and their readiness to meet individual customer's special needs. Therefore, as specialists SME can as a rule be particularly successful in the market place.

The proponents of this line of argument consider that, instead of facilitating SME co-operation, it would be better if the structural advantages for large enterprises were removed. They cite complicated government and procedural regulations that are accessible for SME only through expensive outside experts, for example regulations concerning the granting of subsidies, and call for the streamlining of fiscal, social, labour and administrative provisions.

Under no circumstances are SME entitled to survival guarantees, special treatment and exemption for their own sake.

2. Forms of and limits to SME co-operation

There are forms of co-operation among SME which do not in any way affect their scope of competitive action and parameters. In the absence of exclusivity arrangements, co-operation in the fields of training, common quality control or the sharing of transport (car pool) does not necessarily involve restraints of competition. Such co-operation may often take the shape of cartel-free co-operation agreements.

Forms of co-operation whose sole purpose and intent is the restriction of competition are not to be exempt from a general ban on cartels. Therefore, no price agreements - not even among SME - should

be permitted. Nor can co-operation among large firms only be permitted on the ground that the co-operation agreement is intended to benefit SME.

Problems do arise, however, when it comes to assessing anticompetitive effects of SME co-operation and weighing them against potential positive effects, or to defining the limits to co-operation and laying down suitable criteria.

Where to draw the line for a particular co-operation agreement in a specific market, however, can only be determined by an examination of every single case.

Inter-company co-operation which covers production, R&D, finance, management, administration, purchasing and/or selling as a rule involves diverse types of anticompetitive effects. In practice, the anticompetitive effects have to be weighed against the positive effects (e.g. efficiencies in the firms involved, competitiveness vis-à-vis large firms) to see whether they are acceptable.

Nearly all forms of co-operation may enhance efficiency: conceivable are expansion of production, measures to improve the quality of products, extend the product range, shorten delivery channels and dates, reduce freight cost, share means of advertising or research facilities, streamlined purchasing or selling. Production shutdowns or closure, however, cannot be considered to enhance efficiency. Common purchasing or selling which involves exclusivity arrangements often results in a considerable restriction of the freedom of action and choice of the parties concerned or the opposite side of the market and may amount to a serious restraint of competition in a particular case which may outweigh the positive effects of the co-operation agreement and lead to prohibition.

The assessment and possible legalisation of co-operation agreements also depends on who the parties to the agreement are. One question that arises is whether participation of large firms or their affiliates in SME co-operation agreements is acceptable. In particular, if they belong to the top group of firms in a specific market the idea of offsetting structural disadvantages will have to be disregarded. On the other hand, participation of large firms, e.g. in the form of shared construction and use of a large-scale project, may be indispensable to the completion of an order. If a large firm participates, the restriction of competition linked with the co-operation agreement can be expected to affect the market appreciably.

The limit to co-operation among SME has to be set where substantial anticompetitive effects are felt in the relevant market. In actual practice it is difficult to determine whether and to what extent competition has increased or decreased as a result of a SME co-operation agreement. An initial evaluation may be based on the combined market share of the parties. However, an overall assessment of the facts of each case can never be dispensed with, because the anticompetitive effect substantially depends on the quality, nature and intensity of co-operation. It always remains to be considered which competitive parameters are pooled, which ones continue to be used independently by the parties, how many outsiders are left and what their position in the market is.

IV. Possibilities of exemption for co-operation agreements of SME in Germany

Co-operation agreements involving a restriction of the participating companies' individual freedom of competitive action violate the German ban on cartels, the ban on concerted action or the ban on issuing recommendation[2]. However, in certain cases the German Act against Restraints of Competition (ARC) provides for exemption from the ban on cartels[3] and recommendations[4], in some cases explicitly for SME[5].

The possibilities of co-operation provided by German competition law for SME are based on the idea of "structural equalisation", i.e. they intend to make up, in favour of SME, for competitive advantages that large firms have owing to their mere size and thereby to improve the structural conditions of competition.

1. De minimis Cartels

Violations of the ban on cartels and concerted action (Section 25 (1) of the ARC) are not challenged if a co-operation agreement between SME has only insignificant effects on the market[6]. The co-operation agreement must involve efficiency-promoting inter-enterprise co-operation as a result of the co-ordination of enterprise functions, only a small number of legally and economically independent SME must take part in them, and the combined market share must not exceed five per cent. Price, quota and territorial agreements are not regarded as means of efficiency-promoting inter-enterprise co-operation, i.e. they do not come under this exemption.

The self-restraint of the Federal Cartel Office (FCO) has the purpose of preventing unnecessary bureaucratic red tape from obstructing co-operation agreements between SME that are as a rule admitted. In case a co-operation agreement which otherwise meets the conditions of exemption from the cartels ban results, exceptionally, in a significant deterioration of market conditions, the competition authority may still make use of its powers of instituting proceedings.

2. Small-business cartels[7]

Under German competition law, binding agreements between SME are admissible if their object is the rationalisation of economic activities (other than specialisation, for which there is a separate provision[8]) and if competition on the market is not thereby substantially impaired[9]. The agreement must also serve to promote the efficiency of SME. The borderline between admissible co-operation and objectionable co-ordination of conduct can only be established on a case-by-case basis. Co-operation agreements may therefore cover all forms of inter-company co-operation including production, research and development, financing, administration, advertising, purchasing and distribution[10]. Inter-company co-operation may take the form of co-ordination or the hiving-off of one or several enterprise functions[11]. But co-operation that is not primarily directed to the promotion of efficiency but rather to the elimination of competition, e.g. a mere price-fixing agreement, does not come under the exemption.

The FCO has considered inter-company co-operation to be likely to improve the efficiency of the participating enterprises if it is designed, for example, to increase output or enhance the quality of output, to extend the range of products, to shorten delivery routes or periods, to streamline purchasing or selling arrangements, to direct orders so as to cut freight costs, or to provide for the joint use of high-cost advertising media. Other forms of co-operation that can be legalised include agreements on joint R&D, after-sales maintenance and repair services, advertising, and longer-term co-operation in the form of consortia[12].

The possibilities of exemption of SME have been widely used in Germany. Since their introduction into the ARC in 1973, more than 143 small-business cartels with more than 1 400 participating companies have been legalised. They mainly concerned the non-metallic minerals as well as the asbestos products and abrasives industries and, at regional level, craft enterprises. The principal form of inter-company co-operation used is the common sales agency, which is the easiest way of achieving economies of scale independently of plant size. Until the introduction of a new exemption into the ARC (see IV.3.), purchasing associations were of particular importance. Like all the other legalised forms of co-operation, legalised small-business cartels are subject to abuse supervision by the FCO[13].

Sometimes, even large companies may participate in a co-operation agreement with SME. In such cases it is decisive that the increase in the efficiency of the SME is only made possible by the participation of the larger companies. The effects on competition are mainly assessed in view of the market position as well as the type of inter-company co-operation and the quality of the restraint of competition. As regards agreements on prices, rebates or other price components, a combined market share of 10-15 per cent is as a rule assumed to be the critical limit.

3. Purchasing associations

Since the 5th amendment of the ARC in 1990, joint purchasing by SME has been exempt from the general ban on cartels, if the participating companies are not compelled to purchase, if competition on the relevant market is not substantially impaired and if the agreement serves to promote the competitiveness of SME[14]. The pooling of demand (e.g. in trade) is to allow SME to obtain purchasing prices and conditions that are as favourable as those granted to large companies, and to rationalise their purchasing arrangements.

The exemption covers all activities connected with purchasing, from inquiries and business negotiations to closing and performing contracts. This includes agreeing on terms and conditions, and on improvements in conditions, channelling the goods to the members of the association, settlement in the form of central clearing as well as the conclusion of framework agreements.

However, the members must not be obliged to purchase through the association. This includes legal as well as factual obligations to purchase. The association members must remain free to choose their suppliers. Nevertheless, membership in a purchasing association will often cause the associated companies to use the services offered by the association. But this does not yet constitute an illegal obligation to purchase[15].

As long as the participation of a large firm is in a particular case likely to improve the competitiveness of SME, individual large firms may be members of such a legalised purchasing association. However, membership of companies which belong to the leading group in the relevant market concerned is ruled out.

4. Case study: purchasing associations

The FCO takes a favourable view of purchasing associations of independent traders because most of the small and medium-sized companies affiliated to them would not be able to compete with large enterprises and large-scale forms of enterprise without the broad range of services offered by a central association. However, the participation of large and even very large concerns in purchasing associations of

mainly small and medium-sized companies defeats the object of such associations, the large companies using them only to reinforce their competitive advantages.

In May 1985, i.e. before a separate exemption of purchasing associations was introduced into German competition law, the FCO prohibited S+T Bundeszentrale Selex + Tania Handels AG ("S+T") from operating as a purchasing association in its present form and in view of its actual membership for violating the ban on cartels.

The Selex + Tania group was a purchasing association combining more than 100 food wholesalers and retailers. The member companies' sales to outside customers amounted to about DM 18 billion, of which about DM 8 billion were handled through S+T. S+T had concluded supply and clearing contracts with more than 1000 firms of the food and nonfood industries. The contracts provided that suppliers would settle all their accounts from trade with member companies through S+T and pay an agreed fee to S+T. S+T also held annual talks with suppliers at which the various rebates and discounts[16] as well as conditions for special marketing activities[17] were agreed upon. The suppliers had to grant the agreed rebates to all member companies. The member companies sent their chosen representatives to various bodies and committees (e.g. marketing committee) which laid down the general framework for the negotiations of the purchasing association with suppliers. Besides the basic conditions determined by S+T, (association conditions), the member companies could negotiate individually with the suppliers about further conditions, the so-called house conditions.

An overall assessment of the S+T contracts showed that market conditions were affected in an intolerable manner, as far as the purchasing of the member companies was concerned. As a result of the handling of a substantial part of the purchasing negotiations by S+T, the member companies' freedom of action was substantially restricted. The conditions agreed by S+T led to largely uniform behaviour of the member companies and, besides the pooling of demand, to a concerted policy on assortments and promotions. In view of the considerable sales volumes of the members and the participation of large trading companies in the contract system, the FCO prohibited S+T from implementing the contracts.

The Berlin Court of Appeals upheld the prohibition order on the grounds that as a result of the co-operation the member companies did no longer constitute independent alternative marketing outlets for the suppliers. Moreover, more favourable conditions of purchase could also be obtained without contractual obligations to purchase. The court held that the basic conditions negotiated between S+T and the suppliers could not be improved on by further individual negotiations and that the S+T purchasing price had thereby gained the status of a binding maximum price. Since its membership also included large food retailers, S+T could not invoke the co-operation facilities for SME.

S+T was eventually dissolved. The co-operation between food companies within the successor firm (Markant AG) was not objected to because the co-operation with leading trading firms or their subsidiaries had been terminated.

V. Legal provisions and enforcement practice in various other countries

1. EU

The EU competition rules do not allow explicit exemptions of SME. However, agreements whose effect on competition or trade between Member States are negligible are not caught by the general cartel ban (Article 85 (1) of the EC Treaty). In its notice *de minimis* communication the Commission clarified this view, stating that agreements are not subject to the general cartel ban if the annual world-

wide turnover of participating undertakings does not exceed ECU 300 million and their market share does not exceed five per cent[18]. The vast majority are (horizontal and vertical) agreements among SME.

SME also benefit from block exemption regulations; for example, the general cartel ban is not applicable to non-reciprocal exclusive distribution or purchasing agreements among manufacturers, if (inter alia) at least one party to the agreement has a total annual turnover of no more than ECU 100 million. Those provisions also apply to beer supply agreements and service station agreements which are subject to special provisions in some other respects. For the purpose of those provisions, the economic importance of the parties to such agreements is determined on the basis of their annual turnover.

Certain types of co-operation[19] in the air transport sector and among SME in the road and inland waterway transport sector[20] may be exempted. To benefit from the exemption, combined turnover must not exceed ECU 400 million p.a. for air transport undertakings, whereas quantitative restrictions apply to road and inland waterway transport undertakings. The individual capacity of each undertaking belonging to a grouping must not exceed 1 000 tonnes in the case of road transport or 50 000 tonnes in the case of transport by inland waterway. There is also an upper limit to the total carrying capacity of such groupings, namely 10 000 tonnes in the case of road transport and 50 000 tonnes in the case of transport by inland waterway.

2. Japan

In Japan certain types of behaviour of SME are fully exempt from the Anti-Monopoly Act. They include cartels intended to prevent excessive competition, rationalisation cartels, joint economic businesses and special contracts. The legal basis of exemption is the Small and Medium-Sized Enterprise etc. Co-operative Act[21]. The Act defines, by industry, which associations of firms may be exempted: in the case of activities in the fields of production, mining, transportation etc. the member firms' capital must not exceed Y 100 million and the number of staff must not exceed 300. For wholesale companies the following thresholds apply: capital up to Y 30 million and a maximum of 100 employees, whereas in the retail trade and services the thresholds are Y 10 million and 50 employees.

The above forms of behaviour are also exempt if practised by a commercial and industrial association whose membership includes mostly SME. Larger firms may join, within limits.

3. USA

Certain narrowly defined agreements between small "independently owned and operated" firms which are not dominant in their sphere of activity may be exempted from antitrust provisions under the Small Business Act. In addition to joint R&D agreements, agreements that in the US President's opinion contribute to national defence may also be exempted. However, little, if any, use has been made in practice of the exemptions provided for by the Small Business Act.

4. Other countries

The majority of competition laws of other countries do not include explicit exemptions of SME from the general cartel ban. However, with a view to preventing a host of de minimis cases, the laws as a rule do lay down certain thresholds, mostly for market shares and/or turnover. Cartel proceedings are initiated only when those thresholds are reached or exceeded. SME in particular are the beneficiaries of those thresholds (cf. IV.1). The United Kingdom and Sweden may be cited as examples:

In the United Kingdom, the Competition Act 1980 applies to behaviour of firms recording a turnover of at least £10 million and holding a market share of 25 per cent[22].

In Sweden, too, the competition act is only applicable to agreements that appreciably restrict, distort or prevent competition. Agreements where the combined market share of the parties is below 10 per cent and each party's turnover does not exceed SKr 200 million are not subject to the cartel ban. If the individual parties' turnover is below SKr 10 million, a market share of up to 15 per cent is not deemed to be appreciable.

VI. Conclusions

Divergent views have been presented on the subject of facilitating co-operation agreements among SME and exempting them from the general cartel ban. On the one hand it is argued that but for co-operation agreements SME would be unable to compete with large firms; on the other hand the majority of co-operation agreements are thought to involve restrictions of competition.

A generally valid assessment is ruled out, not only because of the differences in classification, legal form, sphere of activity and market result of SME, but also because of the variety of co-operation facilities available and the restrictions of competition involved, the competition law provisions allowing co-operation as well as the practice of firms and competition authorities.

The following points should be borne in mind before exempting SME from the general cartel ban:

-- co-operation agreements may enable SME to realise economies of scale without changing their plant sizes. The probably less favourable alternative option would be merging as it entails the loss of the firms' freedom of action and decision-making;

-- facilitating co-operation by granting exemptions from the cartel ban may not increase the co-operating firms' efficiency, but contribute to the protection of market structures and firm sizes and thus curb the dynamics of the economic process. Co-operation facilities undermine the firms' sense of self-assertion and initiative, thus primarily reducing the intensity of competition:

  - moreover, it cannot be ruled out that entire markets will increasingly be characterised by all-pervasive co-operation agreements and that genuine "spirals of co-operation" will develop. Lawful forms of co-operation act as barriers to market entry by other SME;

  - where economies of scale are offset by diseconomies of scale, the development of an efficient firm size and an innovative company organisation may be prevented;

  - direct confrontation with large firms in a market that offers large corporate units special structural advantages leaves SME little chance of survival. Allowing SME to compete with large firms via co-operation agreements tends to prevent them from developing independent strategies and focusing their attention on (possibly size- and) plant-specific advantages;

  - efficiency-enhancing co-operation agreements among SME with insignificant effects on competition, should not place unnecessary bureaucratic burdens on the co-operating firms.

NOTES

1. Exception: State-owned holding companies, venture capital companies and - if no control is exercised - institutional investors

2. Sections 1, 25 (1), 38 (1) No. 11 of the ARC

3. Sections 2 - 8 of the ARC

4. Section 38 (2) of the ARC

5. Sections 5b, 5c, 38 (2) No. 1 of the ARC. Under certain conditions, associations of SME may also issue recommendations. The recommendations must serve to promote the efficiency of the companies involved vis-à-vis large enterprises or other large-scale forms of enterprise and thereby improve the conditions of competition. They must be expressly declared to be non-binding, and no economic, social and other pressure must be exerted to enforce them (see Section 38 (2) No. 1 of the ARC; for further details see Merkblatt über die Anwendungsmöglichkeiten der neuen Mittelstandsempfehlung of 5 December 1974 (guidelines concerning the use of the new small-business recommendation)). Strictly speaking, this provision constitutes an exemption from the ban on issuing recommendations, see Section 38 (1) Nos 11 and 12 of the ARC.

6. Bekanntmachung 57/80 des Bundeskartellamtes über die Nichtverfolgung von Kooperationsabreden mit geringer wettbewerbsbeschränkender Bedeutung (pronouncement of the FCO on not taking action against co-operation agreements having minor restrictive effects), of 8 July 1989, published in Federal Gazette No. 133 of 23 July 1980.

7. Section 5 b of the ARC, introduced by the 2nd amendment of the ARC in 1973

8. See Section 5a of the ARC (specialisation cartels)

9. There is no absolute market share threshold above which small-business co-operation would be inadmissible but, as a rough guide, a market share of about 10-15 per cent has been used in the past. The combined market share of the co-operating companies may be the higher, the less serious the effects of the co-operation on competition are.

10. See in the following: Merkblatt über die Kooperationserleichterungen für KMU nach § 5b GWB (guidelines concerning co-operation facilities for small and medium-sized enterprises under Section 5 b of the ARC)

11. The creation of joint ventures is scrutinised under both the ban on cartels with its exemptions and the merger control provisions

12. However, such co-operation agreements can only be legalised if certain conditions are met. The cannot be legalised, for example, if they impose restrictions on the participating companies as to the

exploitation of the R&D results, the establishment of an independent maintenance and repair service, the manner and extent of their own advertising, or the submitting of independent tenders.

13. See Section 12 of the ARC

14. Section 5 c of the ARC. Section 5 b of the ARC cannot in all cases be invoked in legalising purchasing associations: The mere obtaining of more favourable terms and conditions through greater bargaining power resulting from the pooling of demand does not constitute an improvement of efficiency within the meaning of Section 5b of the ARC.

15. See Regierungsbegründung zur 5. GWB-Novelle, Drucksache 11/4610, (explanatory memorandum accompanying the 5th amendment of the ARC), p. 15

16. E.g. discounts, rebates on increased sales, special contributions to advertising costs etc.

17. E.g. special promotions, fairs etc.

18. Commission notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community (86/C231/02) as revised on 23 December 1994 (94/C368/06)

19. Exemption is available for the constitution and operation of groupings of road and inland waterway transport undertakings and the joint financing or acquisition of transport equipment or supplies needed by those groupings.

20. Article 4, Regulation No. 1017/68 applying rules of competition to transport by rail, road and inland waterway.

21. Law No. 181 of 1949, as amended

22. Anti-Competitive Practices (Exclusion) Order 1980 (SI 1980/979) as amended by the Anti-Competitive Practices Order 1994 (SI 1994/1557)

NOTE DE REFERENCE

(par la Délégation allemande)

Interdiction des Ententes:
Critères d'Exemptions pour les Petites et Moyennes Entreprises

I. Le rôle économique des PME

Un nombre minimum de petites et moyennes entreprises (ci-après PME) est considéré comme une garantie, voire l'élément constitutif de l'ordre économique libre. L'organisation concurrentielle décentralisée du marché suppose l'existence d'un nombre suffisamment important de décideurs indépendants. La motivation adéquate de ces acteurs accroît le nombre d'innovations et de tentatives décentralisées pour trouver des solutions aux problèmes économiques.

Ceci étant, les opinions divergent sur le rôle économique des PME. D'une part, on leur attribue un haut degré de créativité et le goût du risque. Elles animent la concurrence, assurent une offre complète et variée de produits et de services, multiplient les possibilités de choix pour la clientèle et les employés, testent les nouvelles idées et contribuent à propager rapidement le nouveau savoir-faire économique. Le dynamisme économique sous forme soit d'exploration de terre vierge économique, soit de démantèlement de capacités de production ne répondant plus à la demande, ou d'adaptation structurelle, est en grande partie imputable aux PME.

Le lien étroit entre l'entreprise et son propriétaire, c.-à-d. la combinaison fréquente dans les PME entre propriété du capital (y compris la responsabilité) et gestion de l'entreprise, est considéré comme étant la base et souvent aussi la motivation de l'action économique des PME. Le fait que le risque et la propriété (possibilités de décision) sont étroitement liés à des conséquences notamment sur la forme juridique de ces entreprises, leurs possibilités de financement et leur organisation. Celle-ci se caractérise par un haut degré de flexibilité résultant de l'indépendance des PME qui ne sont pas soumises à de longs processus de décisions et de concertations. En outre, une grande partie des PME n'opère que sur un marché géographique limité et/ou ne détient qu'une part de marché relativement restreinte.

D'autre part, les PME sont souvent considérées comme autarciques et peu disposées à mettre en cause leur situation jugée satisfaisante en réalisant des investissements et en prenant des risques accrus. Le fait que l'existence des PME est plus facilement menacée que celle des grandes entreprises peut les inciter à se conformer trop aux conditions du marché et à adopter un comportement de coopération "pacifique".

II. Les critères pour définir les PME

Les PME ne constituent pas un groupe d'entreprises homogène facile à identifier sur la base de critères bien définis. Les PME opérant sur la quasi-totalité des marchés et dans presque tous les secteurs économiques peuvent se présenter sous des formes des plus variées: une société d'une personne, une entreprise occupant plusieurs centaines de salariés ou encore une entreprise spécialisée, connue à l'échelle internationale et leader dans une niche déterminée de marché.

Comme la notion de PME l'indique, ces entreprises se distinguent des autres notamment par le critère de taille.

Les critères quantitatifs permettant de définir la taille des entreprises sont, en règle générale, les suivants: effectif, montant du chiffre d'affaires, total du bilan, facteur capital, intensité en matière de recherche et de developpement ou part de marché détenue. Les PME appartiennent aux secteurs les plus divers: distribution, artisanat, industrie, professions libérales, entreprises agricoles et forestières etc.

L'effectif d'une entreprise n'est pas le critère décisif pour déterminer la taille d'une entreprise. Les facteurs tels que le degré de technicité d'une branche ou d'une entreprise ou l'existence d'un personnel qualifié sont tout aussi importants. La prise en compte du seul chiffre d'affaires, en négligeant d'autres critères sectoriels, peut également fausser l'appréciation de la taille d'une entreprise. Ainsi faut-il prendre en considération que, par exemple, le chiffre d'affaires réalisé par un distributeur est souvent supérieur, en chiffres absolus, à celui d'une entreprise artisanale.

Pour définir les entreprises, on s'appuie sur plusieurs critères: en règle générale, le chiffre d'affaires et l'effectif. En Allemagne, l'Institut für Mittelstandsforschung (Institut de recherche en matière des PME) part des critères suivants pour définir les grandes lignes et à titre préliminaire, la taille des entreprises nationales:

Source: Institut für Mittelstandsforschung:

	Effectif	Chiffre d'affaires annuel (en DM)
Petites entreprises	9 au plus	1 million au plus
Moyennes entreprises	10 à 499	1 à 100 millions
Grandes entreprises	500 et plus	100 millions et plus

La Commission européenne, elle, considère qu'une définition généralement reconnue des PME n'est pas possible étant donné que cette notion diffère d'un secteur et d'un pays à l'autre. Ainsi l'Union européenne, pour fixer, à l'échelle supranationale, le cadre communautaire des aides d'Etat a qualifié comme PME les entreprises qui répondent aux trois critères ci-après:

Effectif	Chiffre d'affaires	Capital
250 au plus	Chiffre d'affaires annuel : 20 millions au plus, ou Total du bilan : 10 millions au plus	25 % du capital au plus détenu par une grande entreprise[1]

La question de savoir lesquels des critères sont pris en compte pour définir les PME dépend, dans la plupart des cas, de la perspective et de l'objectif de l'analyse. Les critères varient selon qu'il s'agit de questions structurelles, régulatrices, fiscales, concurrentielles ou de l'emploi. Jusqu'ici, les acteurs aussi bien politiques et économiques que théoriques et pratiques, ont toujours refusé de définir des critères interdisciplinaires généralement valables.

Dans la pratique concurrentielle les PME sont, en règle générale, identifiées non pas à l'aide de critères absolus comme le chiffre d'affaires et/ou le nombre de personnel, mais selon leur position par rapport aux autres entreprises opérant sur le marché en cause. C'est donc la structure du marché qui est décisive.

Une entreprise, bien que réalisant un chiffre d'affaires substantiel, peut appartenir au groupe des PME si elle opère sur un marché où d'autres concurrents réalisent des chiffres d'affaires supérieurs. En

revanche, sur un autre marché ladite entreprise pourrait - avec le même chiffre d'affaires - être qualifiée de grande entreprise par rapport aux concurrents présents sur le marché.

La marge de manoeuvre d'une entreprise sur le marché, sa liberté de déterminer ses paramètres concurrentiels et le contrôle exercé par les autres concurrents dépendent dans une large mesure de sa position et de son poids par rapport aux concurrents.

La position relative d'une entreprise est déterminée sur la base d'une appréciation globale des paramètres et conditions concurrentiels applicables au marché en cause. Outre le chiffre d'affaires, ce sont notamment la part de marché, la dotation en capital, l'effectif, la surface de vente et, le cas échéant, l'assortiment et maints autres critères spécifiques du marché. Le caractère relatif de la définition des PME a pour effet que les seuils de chiffres d'affaires séparant les PME des grandes entreprises varient d'un marché à l'autre. Cette flexibilité permet de prendre en compte les particularités structurelles de chaque marché.

S'agissant des entreprises à fabrication multiple, la taille relative d'une entreprise ne peut pas être identifiée sur la base du seul chiffre d'affaires réalisé sur le marché en cause. Une unité économique ou filiale largement autonome ne peut pas non plus être vue de façon isolée. Il faut, en effet, tenir compte du fait que les avantages résultant d'une coopération profitent à l'entreprise toute entière. Une entreprise dans laquelle une grande entreprise a pris une participation importante n'est pas une PME, même si l'activité qu'elle exerce sur l'un des marchés en cause est insignifiante. Il en est de même si une grande entreprise a des participations dans plusieurs des entreprises parties à une entente ou qu'elle y participe au cours de la période d'exemption. Dans ces cas, les restrictions de concurrence inhérentes à la coopération doivent être analysées à nouveau (voir aussi III.2 concernant la participation de grandes entreprises aux coopérations entre PME).

III. Traitement particulier des PME dans le cadre du droit de la concurrence - exceptions à l'interdiction générale des ententes

1. Motifs du traitement particulier dans le cadre de la politique concurrentielle

Arguments en faveur de facilités de coopération pour PME

L'existence des PME peut être menacée, entre autre, par des processus de mutations structurelles, l'intensification de la concurrence ou les pratiques anticoncurrentielles de la part des grandes entreprises qu'il s'agisse de concurrents, de fournisseurs ou de clients. L'appréciation d'une coopération entre PME part souvent de l'hypothèse que les PME confrontées à la concurrence des grandes entreprises n'ont guère de chance de survivre si ces dernières utilisent les avantages tirés de leur taille. Lorsqu'un désavantage concurrentiel est uniquement le résultat de la taille relativement faible d'une entreprise, on cherche souvent à y remédier par d'autres mesures. La coopération étroite entre PME est alors considérée comme l'un des moyens permettant de sauvegarder leur existence et de compenser leur inconvénient structurel.

Bien que le groupe des PME soit hétérogène, on peut cependant - sous réserve de quelques exemples contraires - constater *grosso modo* ce qui suit: un des désavantages des PME par rapport aux grandes entreprises est leur difficulté à accéder au marché des capitaux. En raison de leur taille relativement faible, les PME ne peuvent guère ou pas du tout profiter de certaines facilités de financement. Etant souvent des entreprises mono-produit, elles n'ont, en règle générale, que des possibilités très limitées pour répartir leurs risques et faire des calculs de compensation ce qui les rend vulnérable aux fluctuations conjoncturelles et structurelles. En raison du caractère de leur production - le plus souvent fabrication en petites séries et en petits lots - les PME ne peuvent que rarement profiter des avantages d'une production économique. Le volume de leurs achats étant moins important que celui des grandes entreprises, elles

obtiennent en général des conditions d'achat moins favorables. En outre, leur force d'attraction vis-à-vis d'un personnel hautement qualifié est beaucoup moins importante. Du fait de ces inconvénients la compétitivité internationale des PME est, en général, moins appréciée que celle des grandes entreprises.

En revanche, on reconnaît aux PME des avantages spécifiques qui les distinguent des grandes entreprises: leur goût du risque et une meilleure faculté d'adaptation et de réaction en raison d'une plus grande proximité du marché. Etant donné que les PME sont rarement soumises à de longs processus de décision et de concertation, elles sont en mesure de réagir spontanément aux processus du marché. Le contact direct avec le consommateur et la proximité du marché leur permettent de mieux répondre aux besoins spécifiques de la clientèle. En plus, les PME sont souvent hautement spécialisées.

En coopérant, sans fusionner, les PME conservent leur rôle d'acteurs juridiquement et économiquement autonomes sur le marché. Cela explique la tendance à donner, dans certaines conditions, une appréciation positive à la coopération entre PME. Les coopérations permettant aux PME d'augmenter leur efficience et de compenser ainsi, en tout ou en partie, les avantages que les grands concurrents tirent de leur taille, ont une importance considérable pour l'économie et la concurrence. Selon certains, cette coopération serait de nature à contribuer à l'amélioration des structures concurrentielles servant ainsi les intérêts de la concurrence. Dans ce contexte, on avance aussi l'argument que souvent seule la coopération permet aux PME de concurrencer les grandes entreprises. Les coopérations au niveau des PME seraient donc l'un des moyens pour développer la concurrence, d'où certaines exigences de promouvoir ces coopérations.

Arguments contre les facilités de coopération pour PME

D'un autre côté, on fait valoir que c'est la concurrence plutôt que la coopération qui améliore l'efficience d'une entreprise. L'effort d'efficience serait l'élément constitutif par excellence du processus concurrentiel et non pas la caractéristique essentielle de la coopération.

Les coopérations au niveau des entreprises, y compris les PME, peuvent aussi limiter les initiatives des entreprises concernées. Comme il a déjà été exposé ci-dessus (voir I), l'importance des PME et de leur promotion s'explique notamment par la multitude d'alternatives qu'elles offrent et leur processus décisionnel décentralisé. En facilitant la coopération, on risque de mettre en cause ces avantages si importants pour l'économie de marché. Les approches alternatives des PME en vue de trouver des solutions individuelles ainsi que leurs stratégies d'action sont centralisées et uniformisées. Il existe en outre le risque d'extension des coopérations qui engendrent souvent une concertation supplémentaire.

On devrait plutôt permettre aux PME de mieux valoriser leurs avantages spécifiques comme par exemple. le degré relativement élevé de leur créativité et flexibilité, au lieu de restreindre leur action par des mesures d'Etat. Etant plus proches des marchés et de leurs clients, les PME ont, en effet, bien des chances de réussir grâce à leur spécialisation et leur possibilité de satisfaire, dans le plus petit détail, les demandes et exigences spécifiques de leurs clients. En tant qu'entreprises spécialisées les PME obtiennent, en règle générale, des résultats particulièrement positifs.

A l'appui de cette argumentation on souligne qu'au lieu de faciliter la coopération des PME il serait plus utile de réduire les avantages structurels accordés aux grandes entreprises. Dans ce contexte, on évoque parex.emple les règlements administratifs et publics trop compliqués qui obligent les PME à faire appel à des spécialistes externes ce qui côute cher. Cela vaut, entre autres, pour l'autorisation des subventions, la simplification du régime fiscal, la législation sociale et du travail et les règlements administratifs.

En aucun cas, les PME n'ont droit à la garantie de leur situation, ni à un traitement spécial, ni à d'autres exceptions dues à leur statut.

2. Les formes et limites de la coopération entre PME

Les PME peuvent coopérer sans que cela affecte leurs marges de manoeuvre et paramètres concurrentiels. Des coopérations engagées p. ex. dans des domaines tels que la formation et le perfectionnement du personnel, le contrôle commun de la qualité des produits ou encore l'utilisation en commun des moyens de transport, coopérations ne prévoyant pas de clause d'exclusivité, n'ont, en général, pas d'effet restrictif de concurrence. Elles se réalisent souvent sans recourir à la conclusion d'une entente.

Les accords de coopération dont l'unique objectif est de restreindre la concurrence ne doivent pas faire l'objet d'une exemption à l'interdiction générale des ententes. Les ententes de prix pures et simples ne seraient donc guère admissibles même entre PME. Une coopération entre grandes entreprises ne serait pas non plus acceptable pour la raison qu'elle profiterait aux PME.

La question qui se pose est la suivante: Comment apprécier les restrictions de concurrence résultant d'une coopération entre PME et quels effets positifs pourront éventuellement compenser l'inconvénient? Où sont les limites de la coopération et quels sont les critères d'appréciation?

Ceci étant, il est clair que la limite d'une coopération concrète sur un marché donné ne saurait être définie qu'au cas par cas.

La coopération interentreprise qui va de la production jusqu'à la distribution, en passant par la recherche et le développement, le financement, l'administration, la publicité et l'achat, est, en règle générale, liée à toutes sortes de restrictions de concurrence. Dans la pratique, il faut décider si, compte tenu des effets positifs de la coopération (efficience accrue des parties concernées, meilleure compétitivité par rapport aux grandes entreprises), l'atteinte à la concurrence peut être tolérée.

Il apparaît que presque toutes les formes de coopération sont susceptibles d'améliorer l'efficience des entreprises, qu'il s'agisse de l'extension de la production ou de mesures destinées à augmenter la qualité des produits, à élargir l'assortiment, à réduire les trajets et les frais de transport ainsi que les délais de livraison, à utiliser en commun les moyens de publicité ou les établissements de recherche ou à organiser de façon rationnelle l'achat et la distribution. Par contre, on voit mal que l'abandon ou l'arrêt d'une activité puisse conduire à une amélioration de l'efficience. Dans de nombreux cas, la réalisation en commun de l'achat ou de la vente comportant des clauses d'exclusivité aboutit en même temps à une restriction considérable des libertés d'action et de choix pour les parties à l'accord ou les acteurs du côté opposé du marché et peut engendrer, le cas échéant, de graves restrictions de concurrence. Celles-ci peuvent absorber les effets positifs de la coopération et conduire à son interdiction.

La composition des parties concernées est également importante pour l'appréciation et l'autorisation éventuelle d'une coopération. A ce propos, on peut s'interroger aussi sur le seuil de tolérabilité de la participation de grandes entreprises ou de leurs filiales à une coopération entre PME. S'il s'agit d'une entreprise qui figure parmi les premières sur un marché donné, le critère de compensation d'un désavantage structurel ne compte plus. D'autre part, la participation d'une grande entreprise à une coopération en vue de réaliser et d'utiliser en commun une unité de grande taille peut s'avérer indispensable à l'exécution de la commande. Il faut aussi prendre en considération le fait que la participation d'une grande entreprise à une coopération rend sensible la restriction de concurrence qui en résulte sur le marché.

La limite d'une coopération entre PME est atteinte au plus tard lorsque la coopération conduit à une restriction substantielle de concurrence sur le marché en cause. Dans la pratique, il est difficile de trouver la méthode adéquate pour apprécier si et à quel point la concurrence se développe ou se réduit dans un cas concret de coopération entre PME. On peut obtenir une première réponse en s'appuyant sur le critère de l'addition des parts de marché. Cependant, on ne saurait renoncer à l'appréciation globale de tous les paramètres d'un cas concret, la gravité de l'atteinte à la concurrence dépendant pour l'essentiel de la qualité, du caractère et de l'intensité de la coopération. Ceci étant, il faut connaître aussi les paramètres concurrentiels qui sont égalisés et ceux qui peuvent être décidés indépendamment par les parties à la coopération, ainsi que le nombre d'entreprises non-participantes restant sur le marché et leur position.

IV. Possibilités d'exemption pour les coopérations entre PME en Allemagne

Conformément à la loi allemande relative aux restrictions de concurrence (GWB)[2], les coopérations ayant pour effet de restreindre la liberté d'action individuelle au regard de la concurrence constituent une infraction à l'interdiction des ententes, des actions concertées et des recommandations. En même temps, la loi prévoit pour certains cas des exceptions à l'interdiction des ententes[3] et des recommandations[4], ainsi que des dispositions explicites applicables aux PME[5].

Les facilités de coopération que la loi allemande de la concurrence accorde aux PME sont toutes dictées par l'idée de la compensation du désavantage structurel. Il s'agit de contre-balancer en faveur des PME les avantages concurrentiels dont bénéficient les grandes entreprises pour la seule raison de leur taille et d'améliorer ainsi les conditions structurelles de la concurrence.

1. Ententes de minimis

Les infractions commises à l'interdiction des ententes et des actions concertées (art. 25 (1) GWB) ne font pas l'objet de poursuites si la coopération entre PME n'a qu'un faible impact sur le marché[6]**.** C'est le cas, par exemple, d'une coopération interentreprises qui vise à améliorer l'efficience coordonnant certaines fonctions de l'entreprise, et qui ne regroupe qu'un nombre restreint de PME juridiquement et économiquement indépendantes dont les parts de marché additionnées sont inférieures à cinq pour cent. Les ententes de quota et de répartition de marché ne constituent pas une coopération interentreprises susceptible d'améliorer l'efficience et ne peuvent donc pas bénéficier d'une éventuelle exemption.

L'approche du Bundeskartellamt veut éviter que les formes généralement admissibles de la coopération entre PME ne soient alourdies par des règlements bureaucratiques inutiles. Dans le cas exceptionnel où une coopération donnée qui a rempli toutes les susdites conditions requises pour l'exemption de l'interdiction des ententes aurait abouti à une détérioration substantielle des conditions de marché, l'autorité de concurrence peut se saisir du cas et ouvrir la procédure.

2. Ententes entre PME[7]

Le droit allemand de la concurrence admet des accords contraignants entre PME pourvu qu'ils soient destinés à rationaliser les processus économiques (à l'exception de la specialisation réglée ailleurs[8]) et qu'ils n'affectent pas la concurrence substantielle sur le marché[9]. En plus, l'accord doit servir à promouvoir l'efficience des PME. La limite entre une coopération à autoriser et une coordination de

comportements soulevant des doutes sous l'angle de la concurrence ne pourra être trouvée que par l'examen du cas d'espèce. La coopération entre entreprises pourra se manifester dans la production, la recherche et le développement, le financement, l'administration, la publicité, l'achat ou la distribution[10]. Cela peut se réaliser sous forme de coopération ou de filialisation de quelques-unes ou de plusieurs activités de l'entreprise[11]. Des coopérations dont l'objet premier n'est pas l'augmentation de l'efficience, mais l'élimination de la concurrence, telles les ententes sur les prix, sont incompatibles avec cette possibilité d'exemption.

L'extension de la production, l'augmentation de la qualité, l'élargissement de l'assortiment, la réduction des voies et délais de livraison, un aménagement des commandes apte à réduire les frais de transport, l'utilisation en commun des moyens publicitaires coûteux etc. sont considérés par le Bundeskartellamt comme coopération entre entreprises susceptible d'augmenter l'efficience des PME y participant. Pourront être exemptés les accords portant sur l'organisation en commun de R&D, le service après vente et la réparation, la publicité et la coopération à long terme au sein de communautés d'offrants et de groupes de travail[12].

En Allemagne, les PME ont largement utilisé cette possibilité d'exemption. Depuis l'introduction dans la loi de l'article pertinent (1973), plus de 143 ententes avec plus de 1 400 entreprises parties ont été légalisées. Il s'agissait en premier lieu des secteurs de minerais non métalliques, de produits d'amiante et d'abrasifs et, au niveau régional, d'entreprises artisanales. La forme la plus répandue de la coopération entre entreprises est la communauté de distribution qui permet d'obtenir facilement des bénéfices d'échelle indépendamment de la dimension de l'entreprise. Jusqu'à l'introduction d'un nouveau fait légal d'exemption (voir IV.3), les communautés d'achat avaient une importance particulière. Comme tout autre forme légalisée de coopération, les ententes légalisées entre PME font l'objet du contrôle des abus exercé par le Bundeskartellamt[13].

De grandes entreprises peuvent également adhérer à un accord de coopération entre PME, si l'augmentation de l'efficience des PME n'est possible que grâce à cette participation. L'effet concurrentiel produit est apprécié en premier lieu moyennant la position sur le marché, notamment la part commune de marché, le type de coopération entre les entreprises et la qualité des restrictions à la concurrence. Pour ce qui est des ententes sur les prix, les remises et autres éléments de prix, la limite critique est, en règle général, une part de marché de 10 à 15 pour cent.

3. Communauté d'achat

Depuis le cinquième amendement du GWB (1990), la communauté d'achat entre PME est exemptée de l'interdiction des ententes, pourvu qu'elle ne soit pas liée à une obligation d'approvisionnement pour les entreprises participantes, que la concurrence sur le marché en cause n'en soit pas substantiellement affectée et qu'elle serve à améliorer la compétitivité des PME[14]. Le regroupement de volumes de demande (par exemple dans le commerce) doit permettre aux PME d'obtenir des conditions et prix d'achat favorables comparables à celles des grandes entreprises et de rationaliser leurs activités d'approvisionnement.

L'exemption s'applique à toute activité liée à l'approvisionnement de marchandises, à commencer par la préparation de l'affaire jusqu'à sa complète réalisation, en passant par les négociations et la conclusion de l'accord. Cela veut dire, entre autres, fixer les conditions, conclure des accords pour améliorer ces conditions, organiser le flux de marchandises en direction des parties à la coopération, compenser par une comptabilisation centrale, conclure des accords-cadres.

Mais les membres du groupement de coopération ne doivent pas être contraints à l'approvisionnement. Cela vaut pour les obligations d'approvisionnement *de jure* et *de facto*, les parties à la coopération devant rester libres de choisir leurs fournisseurs. Or, la seule appartenance à une communauté d'achat crée souvent un effet d'entrainement économique parmi les entreprises participantes, ils recourent aux services de la coopération. Cela ne constitue pas une obligation d'approvisionnement interdite[15].

Tant que dans le cas d'espèce la participation d'une grande entreprise est susceptible d'améliorer la compétitivité des PME, celle-ci peut se joindre à la coopération d'achat exemptée. L'affiliation d'entreprises qui sont parmi les leaders du marché en cause est en tout cas exclue.

4. Etude de cas: communautés d'achat

Le Bundeskartellamt est d'avis que les coopérations d'achat entre entreprises commerciales indépendantes méritent une appréciation positive, car sans la large gamme de services offerte par la centrale de coopération la plupart des petites et moyennes entreprises y participant ne sont pas compétitives vis-à-vis des grandes entreprises ou exploitations. Cette option est cependant déjouée par la participation de grands ou très grands distributeurs à ces communautés d'achat d'origine PME. La participation de grandes entreprises ne fait que cimenter l'avantage concurrentiel de celles-ci.

En mai 1985, avant même qu'une exemption des coopérations d'achat soit introduite dans le droit allemand de la concurrence, le Bundeskartellamt, se référant à l'interdiction d'ententes, avait interdit à la S+T Bundeszentrale Selex + Tania Handels AG (ci-après nommée S+T) d'agir en communauté d'achat vu sa forme et sa composition concrète.

Le groupe Selex + Tania était une association d'achat qui regroupait plus de 100 entreprises du commerce de gros et de détail dans le secteur alimentaire. Les entreprises membres réalisaient un chiffre d'affaires d'environ 18 milliards de DM dont environ huit milliards furent réglés à travers la S+T. Cette dernière avait conclu des contrats de livraison et de compensation avec plus de 1 000 entreprises de l'industrie alimentaire et non alimentaire. Ces contrats prévoyaient que les fournisseurs réglaient à travers la S+T toutes les factures provenant d'opérations commerciales avec les entreprises membres et payaient à S+T, en contrepartie, une compensation convenue. En plus, S+T menait avec les fournisseurs des entretiens annuels au cours desquels on convenait des différentes remises[16] et conditions-cadres pour les activités spéciales de vente[17]. Les fournisseurs devaient accorder ces remises à toutes les entreprises parties à la communauté d'achat. Plusieurs organismes et comités (comité marketing, comité qualité-fraîcheur etc.) composés de représentants élus des entreprises membres ont établi le cadre de référence pour les négociations de la centrale d'achat avec les fournisseurs. Le seuil fixé par S+T dans les conditions générales mis à part, les entreprises participantes pouvaient négocier individuellement avec les fournisseurs des conditions supplémentaires dites conditions maison.

L'appréciation globale des accords S+T a montré que la situation des entreprises membres sur le marché du côté de la demande était affectée d'une façon intolérable. Etant donné que les entreprises membres ne menaient plus elles-mêmes l'essentiel des négociations d'achat, mais en avaient chargé S+T, leur liberté d'action fut considérablement restreinte. Les conditions négociées par S+T ont amené les entreprises membres à adopter, dans leur propre intérêt économique, un comportement largement unitaire et ont abouti non seulement à une concentration de la demande, mais aussi à une politique concertée d'assortiment et d'action. Vu le chiffre d'affaires élevé réalisé par les membres et la participation de grandes entreprises commerciales à ce système contractuel, le Bundeskartellamt a interdit l'application des accords conclus par S+T.

La Cour d'appel a confirmé cette interdiction. Elle a constaté que par leur coopération les entreprises membres ne laissaient plus d'alternatives concurrentielles indépendantes aux fournisseurs et qu'une amélioration des conditions d'achat pourrait bien être obtenue sans obligation contractuelle d'approvisionnement. La Cour a établi l'impossibilité de descendre, dans les négociations d'achat individuelles ultérieures, au-dessous du seuil que S+T avait négocié avec les fournisseurs, et que le prix d'achat S+T valait donc un prix maximum contraignant. Vu le fait que parmi les entreprises membres figuraient en plus de grandes entreprises du commerce alimentaire - d'où l'avis de la Cour - S+T ne pouvait pas non plus réclamer les facilités accordées aux coopérations d'achat PME.

La S+T finit par être dissolue. La coopération des entreprises du commerce alimentaire au sein de la société successorale Markant AG ne fut plus contestée après que la coopération avec les entreprises commerciales leaders et leurs filiales eut été résiliée.

V. Normes et pratique dans d'autres pays

1. Union européenne

Le droit de la concurrence européen, il est vrai, ne prévoit pas d'exceptions explicites pour les PME. Mais les accords n'affectant pas de façon substantielle la concurrence et le commerce entre les Etats membres, sont considérés comme ne pas tombant pas sous le coup de l'interdiction générale des ententes (art. 85 (1) du Traité CE). Dans sa communication *de minimis*, la Commission a précisé cette position en déclarant que les accords entre entreprises dont le chiffre d'affaires total sur le plan mondial réalisé au cours d'un exercice ne dépasse pas 300 millions d'écus et dont la part de marché n'est pas supérieure à cinq pour cent ne tombent pas sous le coup de l'interdiction générale des ententes[18]. Dans la plupart des cas, il s'agit d'accords (horizontaux ou verticaux) entre PME.

Les PME profitent aussi du Règlement concernant l'exemption par catégories. L'interdiction générale des ententes ne s'applique pas, par exemple, à des accords de distribution et d'achat exclusifs non réciproques entre producteurs si au moins un des partenaires réalise un chiffre d'affaires annuel de 100 millions d'écus ou moins. Ces normes valent également pour les accords sur la livraison de bière et les accords sur les stations d'essence dont une partie fait l'objet de normes spéciales. Le chiffre d'affaires annuel est donc la mesure de l'importance économique des entreprises membres.

Des facilités ont été introduites pour certaines formes de coopération[19] dans le transport aérien ainsi qu'entre PME opérant dans le transport par route ou par voie navigable[20]. Tandis que dans le transport aérien les entreprises participantes ne doivent pas dépasser un chiffre d'affaires commun de 400 millions d'écus par an pour bénéficier de la règle d'exception, des limites de charges transportées - signes de l'importance de l'entreprise - ont été fixées pour chaque entreprise adhérant au groupement de coopération: un maximum de 1 000 tonnes pour le transport par route et de 50 000 tonnes pour le transport par voie navigable ; une limite a été également fixée pour la capacité de chargement totale du groupement de coopération: 10 000 tonnes pour les transports par route et 50 000 tonnes pour les transports par voie navigable.

2. Japon

Au Japon, certaines formes de comportement des PME sont totalement exemptées de l'application du Anti Monopoly Act ; parmi elles, les ententes destinées à empêcher une concurrence excessive, les ententes de rationalisation, "joint economic buisinesses" et des accords spéciaux. La base juridique de ces exemptions est le "Small and Medium Sized Enterprise etc. Cooperative Act"[21]. Cette loi

définit, secteur par secteur, les groupements qui peuvent se réclamer de cette exemption. Dans les secteurs production, industrie minière et transports, les entreprises adhérant aux groupements ne peuvent disposer d'un capital supérieur à 100 millions de yens et leur effectif ne peut dépasser 300 personnes. Pour les entreprises de vente en gros la limite est un capital de 30 millions de yens et un effectif de 100 au maximum; pour le commerce de détail et les entreprises de services la limite est un capital de dix millions de yens et un effectif de 50.

Les susdites formes de comportement sont également exemptées quand elles sont pratiquées par la Fédération de commerce et d'industries à laquelle les PME sont, en règle générale, affiliées. Les grandes entreprises peuvent y adhérer de façon limitée.

3. USA

On peut recourir aux normes du “small business Act” pour exempter de l'application du droit anti-trust certains accords strictement définis entre petites “independently owned and operated” entreprises qui n'occupent pas de position dominante. Parmi ces accords sont, outre la recherche et le développement, des accords qui, de l'avis du président américain, contribuent à la défense nationale. Or, ces possibilités d'exemption aux termes du “small business act” ont été rarement, sinon jamais, exploitées par les entreprises.

4. D'autres pays

Les lois de la concurrence de la plupart des autres pays ne contiennent pas de normes prévoyant une exemption explicite des PME de l'interdiction générale des ententes. Pour éviter, entre autres, un excédent de procédures *de minimis*, les lois déterminent des seuils de sensibilité, le plus souvent sous forme de parts de marché et/ou de chiffres d'affaires. Ce n'est qu'en cas de réalisation ou de dépassement desdits seuils que des procédures anti-trust sont engagées. Les PME sont les premières à profiter de ces seuils (voir IV.1). Exemples: le Royaume-Uni et la Suède.

Au Royaume-Uni le “Competition Act” de 1980 n'est appliqué qu'aux entreprises réalisant un chiffre d'affaires d'au moins dix millions de livres et une part de marché de 25 pour cent[22]. Certaines entreprises de transports font l'objet de règles de procédure particulières.

En Suède, la loi de la concurrence est appliquée uniquement aux accords entraînant des restrictions ou distorsions sensibles de la concurrence ou même l'excluant. Les accords où la part de marché globale des parties est inférieure à dix pour cent et où le chiffre d'affaires individuel ne dépasse pas 200 millions de couronnes suédoises sont exemptés de l'interdiction. Au cas où le chiffre d'affaires individuel est inférieur à 10 millions de couronnes suédoises, une part de marché de 15 pour cent est considérée comme non sensible.

VI. Conclusions

Les accords de coopération entre PME et leur exemption de l'interdiction générale des ententes ont suscité un débat controversé: tandis que les uns argumentent que souvent seule la coopération permet aux PME de concurrencer les grandes entreprises, les autres soulignent l'effet restrictif à la concurrence que comporte la majorité des cas de coopération.

Une appréciation universelle et généralement valable paraît impossible non seulement parce que la façon de classer les PME diffère et que ni la forme juridique et les activités de ces entreprises, ni le

succès qu'elles remportent sur le marché ne sont les mêmes, mais aussi à cause du caractère très variable des possibilités de coopération et de restriction de concurrence en découlant, des conditions dans lesquelles elles se réalisent conformément au droit de la concurrence et finalement des pratiques des entreprises et des autorités de concurrence.

Quand il est question d'exempter les PME de l'interdiction générale des ententes, les aspects suivants doivent être pris en considération :

-- les accords de coopération permettent aux PME de réaliser des économies d'échelle sans modifier leur taille. La coopération aurait pour seule alternative la fusion qui signifie l'abandon total des libertés d'action et de décision. Alors la question se pose: Doit-on interdire un projet de coopération donnée dans le cas où la fusion au niveau des mêmes entreprises serait autorisée ?

-- les facilités de coopération sous forme de l'exemption de l'interdiction des ententes, au lieu d'améliorer l'efficience des entreprises participantes, peuvent avoir pour résultat de conserver les structures du marché et la taille des entreprises concernées freinant ainsi leur dynamisme économique. Les facilités de coopération aboutissent à l'affaiblissement de la volonté d'autodétermination et de l'initiative propre des entreprises réduisant notamment l'intensité de la concurrence :

- il n'est pas exclu que des marchés entiers finissent par être la cible de coopérations et être confrontés à de véritables "spirales de coopération". Une coopération autorisée constitue pour d'autres PME une barrière à l'entrée au marché ;

- une compensation totale des désavantages et avantages tirés de la taille des entreprises peut, le cas échéant, bloquer la voie vers le développement d'une taille efficiente et d'une organisation innovative de l'entreprise ;

- la confrontation directe aux grandes entreprises sur un marché qui offre des avantages structurels particuliers aux grandes entités ne laisse aux PME qu'une faible chance de survie. Dans un tel cas, le fait de permettre aux PME de coopérer afin de pouvoir concurrencer les grandes entreprises empêche plutôt les PME de développer leurs propres stratégies et de se concentrer sur leurs avantages spécifiques (y compris ceux tirés de leur taille) ;

- s'agissant, par contre, de coopérations entre PME visant à améliorer leur efficience et n'ayant qu'un faible impact sur la concurrence, il faudrait réduire la charge bureaucratique trop lourde pour les entreprises qui participent à la coopération.

NOTES

1. Exception : sociétés de participation publiques, sociétés de capitaux à risque et, en cas d'absence de contrôle, investisseurs institutionnels.

2. Voir art. 1, 25 (1), 28 (1), p.11 GWB

3. Voir art. 2 - 8 GWB

4. Voir art. 38 (2) GWB

5. Voir art. 5b, 5c, 38 (2), point 1 GWB
Dans certaines conditions, les associations de PME peuvent formuler des recommandations dans la mesure où celles-ci sont destinées à stimuler l'efficience des participants par rapport aux grandes entreprises ou à d'autres formes d'exploitation à grande échelle, améliorant ainsi leur situation concurrentielle. Ces recommandations doivent être présentées comme dépourvues de tout caractère obligatoire, et aucune pression d'ordre économique, social ou autre ne doit être exercée (voir art. 38 (2), point 1 GWB, et plus en détail: Merkblatt über die Anwendungsmöglichkeiten der neuen Mittelstandsempfehlung vom 5. Dezember 1974 (notice sur les possibilités d'application de la nouvelle recommandation aux PME du 5 décembre 1974). Ce règlement constitue proprement dit une dérogation à l'interdiction des recommandations, voir art. 38 (1), points 11 et 12 GWB)

6. Voir Bekanntmachung des Bundeskartellamtes über die Nichtverfolgung von Kooperationsabreden mit geringer wettbewerbsbeschränkender Bedeutung vom 8. Juli 1980 (Avis du Bundeskartellamt sur la non-poursuite des accords de coopération n'ayant qu'une faible importance anticoncurrentielle) (Bekanntmachung Nr. 57/89, publié au Bundesanzeiger Nr. 133 du 23.7.1980)

7. Voir art. 5b GWB, introduit par le second amendement, 1973

8. Voir art. 5a GWB, ententes de spécialisation

9. Il n'y a pas de seuil absolu de parts de marché dont le dépassement rendrait illicite la coopération entre PME. Dans le passé, la valeur d'orientation était grosso modo une part de marché entre 10 et 15%. Moins l'effet de la cooperation sur la concurrence est grave, plus la part de marché du groupe de coopération pourra être élevée.

10. Voir "Merkblatt über die Kooperationserleichterungen für KMU nach §5b des GWB (notice sur les facilités de coopération pour PME selon l'art. 5b du GWB)

11. La création d'une entreprise commune est sujet d'un double contrôle sous l'angle et de l'interdiction des ententes avec ses exceptions et des normes du contrôle des concentrations.

12. Les coopérations sont susceptibles d'être autorisées à condition qu'elles respectent certaines conditions. Elles ne le sont pas si elles imposent aux parties des restrictions quant à la commercialisation des résultats de R&D ou l'obligation de renoncer à un service après vente indépendant et de limiter leur propre effort de publicité.

13. Voir art. 12 GWB

14. Art. 5c GWB
L'art. 5b n'est pas en tout cas un point de référence pour légaliser les coopérations d'achat: Obtenir des conditions plus favorables grâce à une plus forte position de négociateur due au regroupement de volumes, *n'étant pas* une augmentation de puissance au sens de l'art. 5b GWB.

15. Voir Regierungsbegründung zur 5.GWB Novelle, Drucksache 11/4610, p. 15

16. Remises de compte, remises pour augmenter le chiffre d'affaires, aides aux charges publicitaires etc.

17. Actions spéciales, bourses, foires etc.

18. Communication de la Commission en date du 3 septembre 1986 sur les accords d'importance mineure n'entrant pas dans le champ d'application de l'article 85 (1) du traité instituant la Communauté économique européenne (86/C231/02), actualisé le 23 décembre 1994 (94/C368/06)

19. Exemption pour la création et l'activité de communautés d'entreprises opérant dans le transport par route et par voie navigable ainsi que le financement ou l'acquisition en commun de matériel ou de fournitures de transport nécessaires au bon fonctionnement de la communauté.

20. Art. 4 du Règlement 1017/68 portant application de règles de concurrence aux secteurs des transports par chemin de fer, par route et par voie navigable.

21. Law n° 181 of 1949, as amended

22. Anti-Competitive Practices (Exclusion) Order 1980 (SI 1980/979) comme amende par “l’Anti-Competitive Practices Order 1994“ (SI 1994/1557)

CANADA

Criteria For Exemption For Small And Medium-Sized Enterprises From General Cartel Bans

I. The Economic Role and Definition of SME's

Small and Medium-Sized Enterprises ("SME") play an important role in the Canadian economy, providing significant employment, innovation, variety and competition in many different sectors. This role is recognized in section 1.1 of the Competition Act ("Act"), which states that the general aim of the Act is to maintain and encourage competition in Canada in order to ensure, among other things, that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy. Although this is a stated goal of Canadian competition law, there are no specific exclusions or special rules applicable to such enterprises. However, because of their relatively small size, SME's may fall below the anticompetitive thresholds necessary to trigger the application of many of the provisions of the Act including the general prohibition against conspiracies in section 45. A further consideration is whether enforcement action against a particular agreement between SME's is justified according to the Competition Bureau's enforcement priorities and case screening criteria.

For the purposes of competition analysis generally, it is not useful to define what is or is not an SME on the sole basis of absolute size criteria (such as annual revenue, personnel or output) below which a firm might be considered an SME. Instead, competition analysis is concerned with the ability of a firm or group of firms to act independently of the rest of the competitors in a particular market. This type of comparative analysis of the relative market power of firms in a particular market make absolute criteria a poor benchmark for determining whether a firm is an SME in a particular market. For instance, a firm that might be considered to be large in terms of revenue, personnel and output in a particular industry and market might be considered to be an SME in comparison to the much larger firms that exist in a different market. Definition of the relevant product and geographic markets is key since the larger the relevant market, i.e. the greater the number of firms producing substitutable products and geographic area in the market, the less likely that a firm will have the market power necessary to cause substantial anticompetitive effects. Markets are typically defined in terms of the smallest group of products and geographic area in which participants could impose a significant and non-transitory price increase (generally a price increase of five per cent is considered significant and a one year period to be non-transitory). In assessing the relevant markets in conspiracy cases, it is important to note that the parties to the alleged agreement may have already exercised market power and thus any observed willingness by customers to switch or new competitors to enter may overstate their competitive significance.

II. Application of Section 45 - the Undueness Test

Section 45 is the general anti-conspiracy provision in the Act and takes the approach that agreements between competitors are unacceptable only where they cause, or are likely to cause, substantial anticompetitive effects in the relevant market if carried into effect. Specifically, the prosecution must show that the agreement does or would affect competition "unduly", which the Supreme Court of Canada has interpreted in the *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, as having a serious or significant effect on competition as determined by a two stage examination.

The first stage is to determine if the parties to the agreement have market power in the relevant market, which is the ability to unilaterally affect industry pricing. Market share alone, although a significant factor, is not sufficient to demonstrate market power; other important factors include the number of competitors and concentration of competition and barriers to entry.[1] The Supreme Court has noted that possession of even a moderate amount of market power may support a finding of undueness.[2] If a group of conspiring SME's do not together have power in the relevant market, they will not contravene this provision. The Supreme Court has stated that absent such power, agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures.

The second stage requires the court to look at the parties' behaviour to determine whether some behaviour likely to injure competition has occurred, or is likely to occur.[3] It is a combination of market power and behaviour that makes a lessening of competition undue; particularly injurious behaviour may trigger liability even if market power is not considerable.[4] This undueness analysis has been characterized as a "partial" rule of reason approach, since it involves consideration of the anticompetitive effects of an agreement unlike a *per se* offence, but does not consider efficiencies of the agreement as would a full rule of reason analysis. Therefore, even those forms of cooperation whose sole purpose is to restrict competition, such as price fixing, are not illegal unless they have the requisite economic impact in the relevant market, without which their conduct should be subject to discipline by existing competitors and potential new entrants.

While the general anti-conspiracy provision might not apply to an agreement among SME's in which the participants cannot unduly affect competition, bid-rigging is the one type of conspiracy which is expressly treated as *per se* illegal under section 47 of the Act. This different treatment is due to the fact that bid-rigging has historically been treated more harshly because it was considered similar to fraud.

III. General Exceptions to Section 45 available to all Sizes of Firms

Agreements on certain subject matter are excepted from the application of the general anti-conspiracy provision: the exchange of statistics or credit information; the defining of product standards; the defining of terminology used in a trade, industry or profession; cooperation in research and development; restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media; the sizes or shapes of packaging containers; the adoption of the metric system; or measures to protect the environment.[5] An agreement in these areas might actually assist SME's to improve efficiency and their competitive position while reducing risks. These exceptions do not apply where such an agreement is, or is likely to (1) lessen competition unduly with respect to prices, quantity or quality of production, markets or customers, or channels or methods of distribution, or (2) restrict the entry into or expansion of a business in a trade, industry or profession.[6]

Agreements, whether between SME's or larger firms, that relate solely to the export of products from Canada benefit from a defence from the conspiracy provisions of the Act[7]. This defence applies provided that they do not, or are not likely to, reduce or limit the real value of exports of a product, restrict any person from entering into or expanding the business of exporting, or lessen competition unduly in the supply of services facilitating exports from Canada.[8]

In the event that a conspiracy involving SME's were to have market power and would otherwise contravene the anti-conspiracy provision, the agreement might also be exempted if it amounts to a specialization agreement and is registered with the Competition Tribunal.[9] An agreement will be

registered provided efficiency gains will be realized that offset any prevention or lessening of competition. It must be shown that the gains in efficiency would not likely be attained if the agreement were not implemented. Factors which the Tribunal shall consider in determining whether an agreement is likely to bring about gains in efficiency include whether those efficiency gains will result in either a significant increase in the real value of exports or a significant substitution of domestic products for imported products.[10]

IV. Enforcement Priorities and Case Screening Criteria

A further consideration is whether or not a particular case involving SME's is of sufficient priority to justify enforcement action. Even if an agreement between SME's does satisfy the undueness test and other elements of the offence under section 45, the Bureau might still not initiate enforcement action if the case is not considered to be a Bureau priority. Case screening criteria are used to rank the enforcement priority of each case in order to most effectively allocate the Bureau's limited resources.

While the enforcement of the anti-conspiracy provision is generally treated as a priority, other factors may militate against enforcement where SME's are involved. For example, an important factor is the volume of commerce affected by the agreement, which is not likely to be particularly high since SME's generally do not have a high volume of commerce in absolute revenue terms. Therefore, while an agreement among SME's may have an anticompetitive effect in a relevant market, the relevant market may be too small to justify the allocation of the necessary resources which might be better used on higher priority cases involving larger sectors and markets. However, other factors such as whether the anticompetitive behaviour was directly aimed at the public, such as agreements affecting price, are also considered.

V. Conclusion

SME's are considered to be vulnerable in comparison to larger companies, although no specific form of protection from competitive market forces is provided for under the Competition Act. In fact, limited cooperation among SME's may be desirable to overcome some of the risks and diseconomies associated with their small size compared to larger companies.

The general anti-conspiracy provision has been interpreted using a flexible partial rule of reason approach which requires that the conspirators not only agree to anticompetitive behaviour but must also have market power sufficient to substantially affect competition. Without market power, any attempt to affect competition will be subject to discipline by market forces. It follows that the small size of SME's may preclude them from the application of the general prohibition against conspiracies. Enforcement decisions against SME's must also take into account whether each case meets the enforcement priorities of the Bureau.

NOTES

1. *Ibid.*, at 653.
2. *Ibid.*, at 654.
3. *Ibid.*, at 655.
4. *Ibid.*, at 657.
5. subsection 45(3).
6. Section 45(4).
7. Section 45(5).
8. Section 45(6).
9. Sections 85 to 90.
10. Section 86(2).

JAPAN

I. Introduction

The free economic system on which Japan is founded is based on the belief that activities carried out by entrepreneurs at their own discretion, will bring about: active economic growth, a larger scope of choices for consumers, and a more prosperous life for the people. The principal objective of the economic policy is to maintain and promote free and fair competition among entrepreneurs. From this standpoint, the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade **(**the Anti-Monopoly Act) doesn't differentiate according to enterprises' sizes nor trade associations, in terms of the size of the number of member enterprises.

However, small and medium sized enterprises (SMEs) are in a relatively weak position in terms of business transactions and are thus often forced into accepting business conditions which are unfavourable to them. To improve such conditions, heighten competitiveness, and increase the ability of SMEs to resist pressures from larger enterprises, there are certain cases in which it is appropriate to allow SMEs to act in concert within a certain limit, without running counter to the intent of the AMA.

Furthermore, since certain SMEs are founded on frail operational bases, they are easily affected by recessions and have a difficult time adjusting to them. Therefore, there are occasions when it is necessary to take measures to stabilise the operations of the SMEs.

Therefore, the Japanese Anti-Monopoly Act system has built into it, an exemption system for certain activities undertaken by organisations made up of small scale enterprises. This type of exemption system may be divided largely into two categories: the first is the one based on the Anti-Monopoly Act itself, and the second on laws other than the AMA.

The following is an overview of these two types of exemption systems:

II. The exemption System in the Anti-Monopoly Act (Section 24 of the Anti-Monopoly Act)

1. The intent of Section 24 of the Anti-Monopoly Act:

Section 24 of the Anti-Monopoly Act stipulates exemptions of certain actions taken by specific co-operative unions from the Act. These stipulations were already incorporated in the original 1947 Anti-Monopoly Act and are based on the recognition of specific merits of the system of co-operative unions from the point of view of the AMA. In other words, by forming a co-operative union, small-scale enterprises, that find it difficult to effectively compete with large-scale enterprises become part of an effective unit of competition in the market, and thereby actively contribute to the maintenance and promotion of the fair and free competition order as set out in the Anti-Monopoly Act. The actions of such unions, other than those specified in the Act, are exempt from the Act.

2. Outline of Section 24 of the Anti-Monopoly Act:

Article 24 of the Anti-Monopoly Act stipulates that the actions which can be taken by unions fulfilling the following conditions, and established under specific laws, are exempt from the Anti-Monopoly Act, except in the cases listed in the proviso of the same section:

(i) The co-operative union shall aim for the mutual benefit of small-scale enterprises and for the mutual co-operation among consumers.

(ii) The co-operative union shall be established voluntarily and its members can join and leave voluntarily.

(iii) All co-operative union members shall have equal voting rights.

(iv) If the profits of the co-operative union are to be divided among members, the limit of the amount to be divided shall be established either by laws or in the bylaws of association.

A representative example of the "Law" mentioned above is the Small and Medium sized Enterprise, etc., Co-operative Act (SME Co-operative Act). The relationship between this law and the Anti-Monopoly Act is addressed in C below.

The Article 24 provision is invoked when a union resorts to unfair trade practices or takes actions which, by substantially restricting competition in a relevant market, may result in unjustifiable price increases.

Past violations of the AMA include such cases as: one in which a co-operative union established under the SME Co-operative Act, resorted to concerted action in spite of the fact that it had failed to meet the conditions listed above; or one in which such a co-operative union resorted to unfair trade practices.

3. The Relationship Between Section 24 of the Anti-Monopoly Act and the Small and Medium Sized Enterprise, etc., Co-operative Act

The co-operative unions established under the SME Co-operative Act are treated as the co-operative union that fulfil the requirement [of III, 2., (1)] of Section 24 if the AMA, if all the member enterprises fulfil one of the below criteria:

(i) The working capital or the amount of contribution of the member is less than ¥ 100 million (¥10 million for enterprises whose principal business is in retail or services, ¥30 million for enterprises whose principal business is in wholesaling).

(ii) Enterprises employ less than 300 people on a continual basis (50 employees for retail or service industry enterprises, 100 employees for wholesalers).

When a co-operative union has a member who does not meet either of the above criteria, the question of whether or not the union fulfils the requirements stipulated in Section 24, Item 1 of the Anti-Monopoly Act needs to be decided on a case-by-case basis. The jurisdiction for making this decision is held by the Japan Fair Trade Commission (JFTC) (Section 7, Paragraph 2 of the SME Co-operative Act). In previous cases, the JFTC's decisions have been based on enterprises' working capital, total assets, number of permanent employees, number of plants, production capacity, sales performance, etc.

Since the substantive decision-making on this matter is conducted by the JFTC, co-operative unions with a member that exceeds the limits stipulated by the regulations (1) and (2) above are required to notify the JFTC of that fact, in accordance with a set procedure as detailed in Section 7, Paragraph 3, of the SME Co-operative Act. Furthermore, if the JFTC determines that a co-operative union member employing more than 100 people on a continual basis is not a small-scale enterprise in its substance, then

the JFTC may remove that enterprise from the union following a set procedure. (Section 107 of SME Co-operative Act).

III. The Exemption System based on Laws other than the AMA

The Essence of the System

Certain Laws other than the AMA provide for conditions of exemption from the Anti-Monopoly Act. They include "the Small and Medium sized Enterprise Organisation Act", "the Act Concerning Improvement of Operation of Business Relating to Environmental Sanitation", and "the Fishery Production Co-operation Association Act".

As previously mentioned, Anti-Monopoly Act exemptions are established for SMEs because their operational bases are often frail, making them more vulnerable to recessions and thus less capable of surviving them than their larger counterparts. Therefore, to stabilise the operation of SMEs, and to achieve certain other policy objectives as well, these acts prescribe legal exemptions from the Anti-Monopoly Act, thus allowing the operation of certain cartels by business associations. All of these individual exemptions were established between 1945 and 1965.

Today, because integrating the Japanese market more fully into the world market has become an important issue, and because of concern that the Anti-Monopoly Act exemption systems impede normal market mechanisms, successive Cabinet decision have been taken to review the exemption systems with a view towards actively developing further competition policy.

The exemptions based on "the Small and Medium sized Enterprise Organisation Act" is a typical example from the broader exemption system, since the law is applicable to SME associations in all industrial sectors. Following are the outlines of the exemption system as well as the historical changes in the number of cartels allowed under the system:

The number of cartels exempted from the AMA and individual laws tended to decrease since 1965. There are a limited number of exempted cartels currently in effect.

NORWAY

Under the Norwegian Competition Act certain practises are prohibited *per se*: price fixing, bid-rigging and market sharing. With a few general exceptions these prohibitions apply to all kinds of arrangements, regardless of their effects on competition and economic efficiency.

Since the prohibitions are *per se* rules they may also encompass collaborations that are not detrimental to competition and economic efficiency. Therefore, the Norwegian Competition Authority may upon individual scrutiny grant exemption from the prohibitions provided that:

- the collaboration will increase competition in the relevant market;
- increased efficiency must be expected to more than compensate for the loss due to restriction of competition;
- the collaboration have little competitive significance; or
- there are special circumstances (public interest test).

I. Exemption policy towards small and medium sized enterprises

It is acknowledged that collaboration between small and medium sized enterprises may generate economies that enable the enterprises to compete more efficiently against larger rivals. Such collaboration may very well enhance rather than decrease market competition, and exemptions are granted quite frequently applying criteria a or c. There are however, no provisions in the legislation that are designed specifically to protect the interests of small and medium sized enterprises.

Criterion c may be used if it is unlikely that collaboration will decrease market competition. It is not necessary to demonstrate that the arrangement has any positive efficiency effects. This policy reflects the philosophy of the Competition Authority to refrain from intervening in market processes, unless it is likely that effective market competition is at stake. As long as efficient competition remains, it is neither necessary nor desirable to try to reassess or regulate the decisions made by the various enterprises in a market. If the collaboration is unlikely to decrease market competition, it must be presumed that the intention is to create efficiencies. The Authority probably grants exemptions to non-efficient collaborations as well, but these arrangements are unlikely to survive in competitive markets.

Normally, the Competition Authority will not apply criterion c if the combined market share of the collaborating enterprises is larger than 15 percent. If the market share is below this threshold, an exemption may be granted provided that the supply from other competitors is not concentrated.

If an exemption is not granted under criterion c, the parties may still obtain an exemption under criterion a if the effect of the collaboration is enhanced competition. It is unlikely that the Competition Authority will apply criterion a if the combined market share of the collaborating enterprises is larger than 40 percent. In addition to an assessment of the market concentration the Authority will analyse whether there are other market characteristics that indicate that the collaboration is unlikely to have anti-competitive effects.

Anti-competitive effects are less likely if:

-- The strength of the restraints is limited. Market sharing is a particularly strong restraint on competition, since it may eliminate all aspects of competition between the parties involved. Price fixing may be less severe if the parties agree only upon recommended prices, the duration of the collaboration is short or if the collaboration concerns only a limited number of the products offered by the participants.

-- Oligopolistic interaction is not likely, for instance due to a lack of market transparency, infrequent transactions of large size, or sophisticated buyers that have powers to counteract any attempt to decrease competition.

-- Entry into the market is easy.

Lastly, for an exemption to be granted under criterion a it is required that the prohibited collaboration is necessary for an integration of the activities of the parties, leading to obvious cost reductions or creation of better products. These efficiencies may be due to utilisation of complementary assets in order to create better products, economies of scale or scope in purchasing or distribution, or reduced duplication of marketing costs. The consumers may benefit from the collaboration if the parties are induced by these efficiencies to compete more vigorously for increased market shares.

The exemptions being granted under criteria a and c often concern collaboration on sales campaigns of short duration, and collaboration between groups and chains of enterprises typically marketing their products under a common brand name. Such groups and chains may be called franchising, although the Act does not define franchising or any other type of special business arrangements.

Exemption criteria b and d may also apply to small and medium sized firms. In these cases the collaboration is not expected to increase market competition. Exemptions are either granted because total economic efficiency is enhanced (criterion b) or because of other political considerations (criterion d).

Criterion b will not be applied unless the restraint itself is of minor importance. One example is market-wide standardisation of terms of delivery, e.g. the scope of possible price changes due to altered costs in the period between the agreement was entered into and the goods are delivered. Economic efficiency may increase because of reduced asymmetric market information, while the anti-competitive effects are negligible.

Criterion d may be used to promote goals other than competition and economic efficiency. The criterion is seldom applied. The most important example is from the market for books. An agreement between the Norwegian association of publishers and the Norwegian association of book dealers has been granted an exemption. The agreement includes fixing the wholesale and retail prices of books. The exemption was granted to protect small book stores in the regional parts of Norway from possible bankruptcy because of ruinous price competition, and also to stimulate the production of non-commercial literature.

The Competition Authority may impose conditions for exemptions. Quite frequently we demand that the parties shall limit their co-operation to recommended prices or maximum prices. The Authority may also limit the duration of the arrangement.

II. Administrative costs

In 1995 the Competition Authority handled 176 exemption applications. Total resources spent on these cases amounted to seven man-labour years, or two man-labour weeks per case. Exemptions were granted in 163 cases. There were 109 exemptions for horizontal price fixing, 44 for market sharing, and 14 for collaboration on tenders. 73 of the exemptions concerned co-operation in groups and chains (franchising). In several of the cases the exemption were granted on conditions intended to reduce the possibility of detrimental effects upon market competition. Exemptions were refused in six of the cases, while five former exemptions were repealed.

The reason for the relatively low "refusal-ratio" is probably the wide scope of the per se prohibitions. A *de minimis*-exemption was proposed introduced in the new Competition Act, which entered into force 1 January 1994. Such a group exemption was eventually not introduced, due to the uncertainty of market definition. Alternatively a *de minimis*-rule could have been based on the total turnover of the parties concerned. The problem with such a rule is that it might also exempt parties with considerable shares of markets with small total turnover.

Instead the Act contains the aforementioned individual exemption criterion for collaborations that have little competitive significance. The collaborating enterprises are obliged to apply for an exemption, but a decision may be reached with minimal resources and time spent on each case.

Even though exemption criterion c enables us to economise on the resources spent on each case, the large number of cases still means that total resources spent on exemption applications are considerable. In order to reduce the administration costs, we have worked out certain group exemptions that encompass arrangements that normally has no anti-competitive effects. One example is market sharing arrangements in connection with sales of real property. We are now considering to introduce a group exemption for price collaboration between dentists sharing the same facilities.

Whether these group exemptions will in fact reduce administration costs depends on our ability to define objective and unambiguous criteria. Little is gained compared to the system of individual exemptions, if resources are shifted to complex interpretations of whether the collaborations fall within a group exemption or not.

Furthermore, group exemptions should not totally replace individual exemptions. If a policy is adopted that only accepts collaborations that satisfy the criteria stipulated in the group exemption, there is a risk of inhibiting innovations. Competition laws should secure that competition and consumer preferences shape the structure of businesses, not that businesses are shaped to fit the competition laws.

III. An example from the grocery market

The Norwegian grocery market has undergone dramatic changes during the last decade. Small retailers have joined retail chains, and the retail chains have integrated vertically with wholesalers forming large purchasing groups. 97 percent of the retail sales is now allocated through four large purchasing groups. Moreover, the market share of retail chains carrying a limited number of low priced brands (discount chains) has increased from close to zero to more than 30 percent.

Vertical integration between wholesalers and retailers may realise a more efficient distribution system and improve store management and other joint services for the operation of the shops. The

bargaining position towards producers of groceries has been improved. Especially if producers believe that there is a possibility of being rejected, the result may be fiercer competition between producers for access to shelf space.

On the other hand, the loss in product variety due to fewer brands in each store will tend to lower welfare. Also, a higher seller concentration in the retail sector may potentially induce higher retail prices. In addition there is a risk that entry barriers will be enhanced if the distribution channels are closed for independent operators. If these potential negative factors dominate, increased integration and concentration will be detrimental to welfare.

The Competition Authority has so far not intervened in the restructuring of the grocery market. Retail chains have been granted exemptions for price collaboration. The reason for this permissive policy is strong indications that consumers have gained in the form of lower prices. Competition between the retail chains have been strong enough to outweigh the potential negative effects.

However, the Authority will be restrictive towards further increases of market concentration. We will counteract any attempts of co-operation between the chains. In 1994 the retailer chains were imposed an obligation to notify larger structural changes in the grocery market.

This example illustrates the difficult trade-off problem between competition and efficiencies. An additional aspect is the dynamic nature of the problem; what seems to be competitive market structures today may turn out to be anti-competitive in the long run, when the chains can no longer hope to gain a competitive advantage in the form of cost reductions.

COMMISSION OF THE EUROPEAN UNION

I. THE APPLICABLE LAW

1. Restrictive Agreements and Practices.

Article 85 of the Treaty of the European Community relates to anticompetitive behaviour by two or more undertakings and prohibits agreements or other practices which distort competition and which are liable to affect trade between Member States. The prohibition of Article 85 (1) applies both to horizontal agreements between enterprises or undertakings at the same level of commercial activity (in other words, between competitors) and to vertical agreements, such as agreements between manufacturers and the distributors of their goods.

Pursuant to Article 85(2) of the Treaty, agreements falling under Article 85(1) are null and void under civil law.

The prohibition of Article 85(1) can be declared inapplicable by the Commission if the harmful effects of a restrictive agreement or practice are sufficiently counter-balanced by a number of beneficial elements. Article 85(3) of the Treaty lists four conditions (economic advantages, consumers' fair share of the benefits, indispensability of the restrictions, non-elimination of competition) which must all be met before an agreement or practice is authorised or "exempted". Exemptions can be granted either on an individual basis or by way of so-called "group (or block) exemptions". For the European Commission to be able to grant an exemption in an individual case, the parties must normally first have notified their agreement to the Commission, on a special form. On the other hand, agreements need not be notified and nonetheless benefit from exemption if they fulfil the requirements contained in block exemption regulations which exist with respect to certain categories of agreements[1]. Block exemptions apply, in principle, to enterprises of all sizes, provided, of course, that the conditions for the application of Article 85(1) of the Treaty and the conditions for the application of the relevant block exemption are fulfilled.

EC exemptions are not exceptions to the applicability of EC competition rules; rather, they are one of the ways of applying competition rules, by means of Article 85(3) of the Treaty. Agreements which do not fall within the scope of Article 85(1) - e.g. because there is no appreciable restriction of competition or effect on trade between Member States - are neither exempted nor excepted : they are simply not prohibited. This will be more often the case for SMEs.

2. Abuses of a Dominant Position

Article 85 relates to restrictive practices between undertakings; as long as there is an appreciable restraint upon competition and an effect on interstate trade, such agreements are prohibited, regardless of the size of the undertakings concerned.

Article 86 is directed at a different problem, namely the behaviour of undertakings which are in a dominant position. Having a dominant position is not in itself prohibited. Unlike 85, which is based on a general principle of prohibition, Article 86 only attacks the abuse (not the existence) of a dominant position, when an effect on interstate trade is involved.

Given the nature of dominance, it is safe to say that it is difficult to envisage Article 86 ever being applied to individual SMEs, and, although joint dominance by several undertakings is not to be excluded, it would take a large number of SMEs acting in concert to achieve the necessary economic power.

Article 86 is nevertheless of great indirect and indeed favourable importance to SMEs, who may depend for their growth or even their very survival on the behaviour of undertakings in a dominant position. In this sense, SMEs can benefit from actions by virtue of Article 86 to prevent abusive practices by dominant firms. As in the case of Article 85, victims can invoke Article 86 directly before national courts in order to put an end to the abusive behaviour. Also, complaints can be made to the Commission.

3. Merger Control. Joint Ventures

Council Regulation 4064/89[2] sets up a system of merger control at EU level for EU-scale mergers. The basic concept underlying the regulation is to establish a clear allocation between EU-scale mergers, for which the Commission is responsible, and those whose main impact is in the territory of a Member State, for which the national authorities are responsible.

In its scope, the new regulation covers mergers having a EU dimension, which are defined on the basis of three criteria, namely:

(i) A threshold of at least ECU 5 000 million for the aggregate world-wide turnover of all the undertakings concerned. This figure reflects the aggregate economic and financial power of the undertakings involved in a merger. In the case of financial institutions and insurance companies, specific criteria are laid down;

(ii) A threshold of at least ECU 250 million for the aggregate EU-wide turnover of each of at least two of the undertakings concerned. Thus, only undertakings with a specified level of activity in the EU are covered by the regulation;

(iii) A transnationality criterion. EU merger control does not apply if each of the undertakings concerned achieves two-thirds of its turnover within one and the same Member State. This criterion allows mergers whose impact is mainly national to be excluded from the EU merger control system.

EU-scale mergers have to be notified to the European Commission pursuant to Commission Regulation 3384/94[3]. The Commission has published several interpretative notices which deal with specific aspects of EU merger control[4].

Given the high turnover thresholds for a merger to be considered of EU dimension, it is difficult to envisage Regulation 4064/89 ever being applied to mergers between SMEs.

Within the context of the merger regulation, a distinction was drawn between concentrative joint ventures, which are subject to Regulation 4064/89, and co-operative joint ventures which are subject to standard competition rules[5].

The Commission developed its ideas on co-operative joint ventures in a further notice on the assessment of this type of agreements pursuant to Article 85 of the EC Treaty[6], and informed enterprises about both the legal and economic criteria which guide it in the application of Article 85(1) and (3) to this form of co-operation.

The assessment of co-operative joint ventures pursuant to Article 85(1) and (3) does not depend on the legal form which the parents choose for their co-operation. The applicability of the prohibition of restrictive practices depends, on the contrary, on whether the creation or the activities of the joint venture may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market. The question whether an exemption can be granted to a joint venture will depend, on the one hand, on its overall economic benefits and, on the other hand, on the nature and scope of the restrictions of competition it entails.

In view of the variety of situations which come into consideration it is impossible to make general comments on the compliance of joint ventures with competition law. For a large proportion of joint ventures, whether or not they fall within the scope of application of Article 85, depends on their particular activity[7]. For other joint ventures, prohibition will occur only if particular legal and factual circumstances coincide, the existence of which must be determined on a case-by-case basis[8]. Exemptions from the prohibition are based on the analysis of the overall economic balance, the results of which can turn out differently[9]. Co-operative joint ventures can, however, be divided into different categories, which are each open to the same competition law analysis.

The notice on co-operative joint ventures may be of interest for SMEs, if ever their agreements fell foul of Article 85(1) of the Treaty.

4. Activities Which do not Run Foul of the Competition Rules

The European Commission provides for a procedure enabling parties to an agreement to seek a declaration from the Commission that their activities do not come within the scope of the competition rules and are therefore 'safe'. Such 'negative clearances', as these declarations are called, can be given in individual cases, provided the parties have notified their agreement to the Commission.

Furthermore, a number of notices (which, in a way, are like 'block' negative clearances) exist for certain activities which either because of (1) the size of the undertakings involved, (2) the relationship between those undertakings or (3) the nature of the activity are not deemed to be an infringement of the competition rules. For certain of these activities, the European Commission has issued a number of notices to provide some guidance to businessmen as to what course of action they can pursue without getting into trouble with the competition rules.

When doubt remains as to whether an agreement falls within one of the following categories, parties can of course apply for individual negative clearance.

Agreements of minor importance (the 'de minimis rule')

SMEs are not considered to violate the competition rules when the economic effect involved is not significant enough. This can be measured by market share and turnover.

As a guideline, the European Commission has issued a notice[10] indicating that normally agreements will not be caught by Article 85(1) if two conditions are met:

(i) market share: the products which are the subject of the agreement and other products of the participating undertakings considered by consumers to be similar by reason of their characteristics, price or use (broadly speaking, competing or substitute products), must not represent, in a substantial part of the common market, more than five per cent of the total market for such products, and

(*ii)* turnover: the aggregate annual turnover of the participating undertakings must not exceed 300 million ECU.

Such so-called 'de minimis' agreements are normally safe, even though they involve certain restrictions. However, the criteria indicated by the Commission are by way of guidance only[11].

Relations between undertakings which bar application of the competition rules

Commercial agents

The European Commission has made it clear[12] that a contract made with a commercial agent who transacts business on behalf of the principal does not fall under Article 85(1). A trader will only be considered to be a 'commercial agent' if he does not bear any responsibility for the financial risks involved in the business transactions (except for the normal *del credere* guarantee, by which the agent undertakes to indemnify the principal against failures to pay by customers) and is in fact no more than a mere intermediary of the principal. The name given to the representative is not decisive in determining whether he is a commercial agent or an independent trader, it is a matter of the factual relation between the parties.

For example, where a distributor

- maintains a considerable stock of the goods in question as his own property, or
- provides at his own expense substantial free customer-service, or
- determines the prices at which he sells or other terms of business,

he will be deemed to be an independent trader, and not a commercial agent, and the rules of competition must be taken into account.

Parent companies/subsidiaries

Article 85(1) can only apply where competition exists between undertakings which is capable of being restricted. Agreements between parent companies and their subsidiaries, or between subsidiaries amongst themselves, in other words undertakings forming one economic unit, will not be caught by Article 85(1), where

- the subsidiary does not have any real freedom to determine its course of action on the market; one criterion here is how large the parent company's shareholding is;
- the agreement relates merely to the allocation of tasks within the concern[13].

Activities which by their nature are not anti-competitive

The European Commission has stated, again by way of notices, that certain forms of co-operation between undertakings and certain types of subcontracting agreements do not pose any problem under the competition rules. The size of the undertakings involved is generally not relevant in this context.

(i) Co-operation agreements

In its Notice concerning agreements, decisions and concerted practices in the field of co-operation between enterprises'[14] the European Commission indicates that eighteen types of the agreements are deemed not to restrict competition where their object is one of the following forms of co-operation:

- an exchange of opinion or experience;

- joint comparative studies of enterprises or industries:
  joint preparation of statistics and calculation models;
  joint market research;
  co-operation in accounting matters;
  joint provision of credit guarantees;
  joint debt-collecting associations;
  joint business or tax consultant agencies;
  joint implementation of research and development contracts;
  joint implementation of research and development projects;
  joint placing of research and development contracts;

- sharing out of research and development projects, among participating enterprises:
  joint use of production, storage and transport equipment;
  joint execution of orders (but only when the participants do not compete with each other as regards the work to be done);
  joint selling arrangements by non-competing firms;
  joint after-sales and repairs services when the participants are non-competing firms, or even if they are competitors, when these services are provided by an undertaking independent of them;
  joint advertising (but no restriction is allowed on the participants *also* to advertise independently);
  joint quality marks (but only where the label is available to all competitors on the same conditions).

(ii) Subcontracting

A subcontracting agreement is a form of work distribution whereby one firm - the subcontractor - supplies goods, work or services for another firm - the contractor - in accordance with the latter's specifications; this distinguishes it from an ordinary sale of goods or supply of services.

While subcontracting is done by undertakings of all sizes, SMEs account for the major part of it. It is indeed a form of business co-operation which is particularly favourable for the development of such firms: whereas the contractor may have the financial and technical resources enabling him to manufacture a complete product, the subcontractor in his turn will be able to improve his facilities, expand his know-how and cut his costs in his particular field of activity.

In the relevant notice[15] the Commission indicates that subcontracting agreements are not of themselves caught by the prohibition of Article 85(1).

However, in order to carry out the order, the subcontractor may have to make use of particular technology or equipment provided by the contractor. In order to protect the economic value of such equipment or technology, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement. In this way, the subcontractor may become dependent on the contractor, and thereby be limited in his freedom of business action.

This applies particularly to the obligation imposed on the subcontractor to supply the items covered by the subcontract solely to the contractor, an obligation of material importance where the subcontract is for the manufacture of spare parts and of adaptable or compatible components which the subcontractor could also sell otherwise than to the contractor.

The Notice indicates that provision of the contractor's technology or equipment to the subcontractor may justify the obligation to supply solely to the contractor the items manufactured or the work done with the help of the technology or equipment. These conditions are fulfilled not only when the technology or equipment is protected by the contractor's industrial property rights over secret know-how but also when it can be used to manufacture a distinctive product or to supply a service which is not available from other undertakings in the same industry. Otherwise, the subcontractor must remain free to meet orders from other customers.

Other clauses covering the use of facilities provided under subcontracting agreements will likewise be judged by the need to protect the contribution actually made by the contractor to the performance of the order and at the same time to safeguard the subcontractor's freedom to engage in other activities. For instance, by reason of the special nature of these agreements the use of know-how supplied by the contractor to the subcontractor may be justifiably confined to the specific order. On the other hand, the subcontracting relationship does not justify reserving solely for the contractor the results of the subcontractor's research and development work, where they can be applied to other purposes.

II. The Commission's legislative programme with respect to agreements and practices of interest for SMEs

1. General Notices

The Commission Notices regarding agreements of minor importance[16], commercial agents[17], and subcontracting[18] are at least partially outdated. Today the borderline between 'innocent' agreements and restrictive agreements should probably be drawn differently, taking into account the case law of the Court of First Instance and the Court of Justice of the European Communities on the interpretation of Article 85(1) of the Treaty since the adoption of said notices.

The notices on *de minimis* and commercial agents will undergo major revision in the near future. The scope of the notice on subcontracting is likely to be widened.

2. Vertical Restraints

Penetrating new markets is risky and takes both time and investment. The process is often facilitated by agreements between producers who want to break into a new market and local distributors. Efficient distribution with appropriate pre- and after-sales support is part of the competitive process that brings benefits to consumers.

However, arrangements between producers and distributors can also be used to continue the partitioning of the market and exclude new entrants who would intensify competition and lead to downward pressure on prices. Agreements between producers and distributors (vertical restraints) can therefore be used pro-competitively to promote market integration and efficient distribution or anti-competitively to block integration and competition. The price differences between Member States that are still found provide the incentive for companies to enter new markets as well as to erect barriers against new competition.

Because of their strong links to market integration that can be either positive or negative, vertical restraints have been of particular importance to the Union's competition policy. Whilst this policy has been successful in over 30 years of application, a review is now necessary, because the single market legislation is now largely in place, the Regulations governing vertical restraints expire shortly and there have been major changes in methods of distribution that may have implications for policy.

The review of policy will take the form of a Green Paper, which will set out the relevant issues as understood by the European Commission. Several policy options will be formulated which will form the basis for a wide reaching public consultation. This consultation will allow the Commission to decide on the direction and form of future policy on vertical restraints in the full light of all the facts.

3. Horizontal Co-operation

The European Commission notice on co-operation between enterprises[19] is also outdated, at least in part, and the same problem of definition of 'innocent' and restrictive agreements arises. The Commission intends to revise, update and enlarge the scope of its notice as part of a much wider exercise regarding horizontal co-operation in general.

Within this context, the Commission needs to act in particular with regard to Regulation 417/85 and Regulation 418/85[20], which expire at the end of 1997. The Commission also intends to give new guidance for co-operative joint ventures, joint buying agreements (or 'cooperatives d'achat', a form of horizontal co-operation which may be of special interest for SMEs) and, if possible, other types of horizontal agreements.

NOTES

1. At present , group exemptions are in force with respect to the following types of agreements: exclusive distribution agreements, Commission Regulation 1983/83, OJ 1983 L 173/1; exclusive purchasing agreements, Commission Regulation 1984/83, OJ 1989 L 173/5; motor vehicle distribution and servicing agreements, Commission Regulation 1475/95, OJ 1995 L 145/25; technology transfer agreements, Commission Regulation 240/96, OJ 1996 L 31/2; specialisation agreements, Commission Regulation 417/85, OJ 1985 L 53/1; research and development agreements, Commission Regulation 418/85, OJ 1985 L 53/5; franchise agreements, Commission Regulation 4087/88, OJ 1988 L 359/46; insurance agreements, Commission Regulation 3932/92, OJ 1992 L 398/7.

2. OJ 1989 L 395/1; corrected version: OJ 1990 L 257/1.

3. OJ 1994 L 377/1.

4. Commission Notice on the notion of a concentration under Council Regulation 4064/89 on the control of concentrations between undertaking, OJ 1994 C 385/5;
Commission Notice on the notion of undertakings concerned under Council Regulation 4064/89 on the control of concentrations between undertakings, OJ 1994 C 385/12;
Commission Notice on the calculation of turnover under Council Regulation 4064/89 on the control of concentrations between undertakings, OJ 1994 C 385/21; and
Commission Notice regarding restrictions ancillary to concentrations, OJ 1990 C 203/5.

5. Commission Notice regarding concentrative and co-operative operations under Council Regulation 4064/89 on the control of concentrations between undertakings, OJ 1990 C 203/10, replaced by the Commission Notice on the distinction between concentrative and co-operative joint ventures under Council Regulation 4064/89 on the control of concentrations between undertakings, OJ 1994 C 385/1.

6. Notice concerning the assessment of co-operative joint ventures pursuant to Article 85 of the EC Treaty, OJ 1994 C 43/2.

7. See Commission Notice, part III.1, point 15.

8. See Commission Notice, part III.2 and 3, points 17 *et seq*. and 32 *et seq*.

9. See Commission Notice, part IV.1 and 2, points 43 *et seq*. and 52 *et seq*.

10. Notice concerning agreements, decisions and concerted practices of minor importance which do not fall under Article 85(1) of the Treaty establishing the EEC, OJ 1986 C 231/2, updated by OJ 1994 C 369.

11. The quantitative thresholds are not absolute yardsticks. On the one hand, agreements between firms exceeding the limits may also have only a negligible effect on trade between Member States or on competition, and therefore may not be caught by Article 85(1). On the other hand, agreements between firms that do not exceed these limits may still be considered by national

courts or by the Court of Justice to infringe Article 85(1). See paras. 3 and 6 of the Commission Notice on agreements of minor importance.

12. Notice on exclusive dealing contracts with commercial agents, OJ 1962 139/2921.

13. See, for all, Case 15/74, Centrafarm v Sterling Drug, [1974] ECR 1183, at para. 41.

14. OJ 1968 C 75/3.

15. Commission Notice concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, OJ 1979 C 1/2.

16. See §§ 21-23.

17. See §§ 24-26.

18. See §§ 29-35.

19. See § 28.

20. See note 2.

AIDE MEMOIRE OF THE DISCUSSION

The Chairman introduced the discussion by stating that a number of countries either have a legal provision exempting agreements between small and medium-sized enterprises (SMEs) or allow such agreements under a *de minimis* clause although such a clause does not necessarily apply only to agreements among SMEs. Referring to the country contributions submitted for the discussion, he felt that there is quite a diversity among countries when one comes to the definition of SMEs or to the threshold notion which makes the *de minimis* or the exemption clause applicable, or to the kind of agreement which can be exempted, or to the sectors in which there are exemptions. From the various contributions, it appears that the rationale for the exemption of cartel agreements among SMEs can be either administrative -- to lighten the burden imposed on anti trust authorities -- or economic -- it is alleged that there are benefits in terms of efficiency or competition -- or even political -- if the exemptions result from the lobbying of special interest groups.

Rationale for specific rules for SMEs

Mr. Jenny went on to refer to the German contribution which provides an overview of the analysis. It suggests that SMEs may have economic disadvantages compared to larger competitors in terms of ability to benefit from economies of scale, in terms of access to capital markets, or to favourable conditions from buyers when it comes to the retail sector. It also points out that SMEs have economic advantages because they are more flexible and able to adapt to the specific needs of customers. From an economic stand point, the German contribution suggests that it may useful to allow agreement between SMEs if their object is the rationalisation of economic activity of their members and if it does not impair substantially competition. Such a determination involves, according to Germany, a case by case approach except for agreements on prices, which must never be exempted.

The German Delegate explained that the written contribution tried to set out the pros and cons on whether there should be any specific favourable treatment for SMEs. The decision of adopting specific rules for SMEs depends on the perception of their economic role, and such a perception may differ from one country to another. It is often acknowledged in Germany that SMEs play an important role and indeed, they are the backbone of the German economy: they contribute to competition, to innovation and to job creation, and in comparison to larger firms, they have a higher degree of creativity and flexibility. Specific treatment to facilitate SMEs' co-operation is, therefore, permitted on the assumption that if larger companies use their economies of scale, competing SMEs have no chance to survive. SMEs' disadvantages vis-à-vis large firms relate to their difficulty to access the capital market; they are often more vulnerable to structural and cyclical fluctuations. Compared to the large firms, it is often argued that their international competitivity is inferior. Against such a background compensation is needed and seen as acceptable from a competition perspective.

The German Delegate went on to say that in German law, there is no definition of small and medium-sized enterprises, and a definition on absolute size criteria would be misleading. The decisive factor is the relation to other firms in the market: with a large turnover in a market, one company may be characterised as a large firm in that market when it would not be the case in another market. The whole situation has to be assessed from market to market given the distinctive features of the relevant market, and the relative position has to be measured based on an overall assessment taking into account specific market criteria, notably the turnover, the market share, the capital resources, etc.

According to the German Delegate, a second problem concerns the limits of the co-operation between SMEs. Where should they be set? If on the one hand, a lot of agreements are outside the ban of

cartels and on the other hand there is a wide range of forbidden agreements, in the middle there are agreements which may be allowed on a case by case basis, weighed against their procompetitive effects. In this respect, the nature, the type and the effects of the co-operation are important elements to make such an assessment. The German Delegate concluded by saying that in the German law there are two exemption provisions for SMEs (small business cartel exemption and exemption for purchasing associations) introduced in 1990, in addition to the *de minimis* rule. This rule applies under guidelines which state that co-operation between SMEs will not be challenged if it is efficiency promoting, if it only involves a small number of SMEs and if the market share does not exceed five per cent.

The Chairman turned then to the Japanese contribution and noted that the recognition of some social and political goals as well as economic goals was at the root of exemptions. In this respect the scope for exemption seems wider in the Japanese law and allows for special treatment of co-operatives or special treatment in some sectors (for example in fisheries where the exemption is not based on antimonopoly law but on a specific law).

Exemption system for SMEs

The Japanese Delegate explained that there are currently two types of exemption system—in the competition law or competition-related laws—but that only the first type of exemption system (under the Antimonopoly Act) is worth discussing; regarding the exemption system in laws other than the Antimonopoly Act, most of the cartels previously approved are either being abolished or have already been abolished, and the system itself may well be abolished quite soon.

According to the Japanese Delegate, the justification of the exemption system for SMEs is that while they cannot compete well with large companies, when they organise themselves to form a co-operative they can act as an effective competitive unit in the market; they can positively contribute to the promotion of competition.

The Japanese Delegate stated that the Antimonopoly Act exempts SMEs' concerted actions only when they are SMEs co-operatives, organised according to specific laws such as the SMEs Act, the Agricultural Co-operative Act or the Fisheries Co-operative Act. Such co-operatives have to meet all the following criteria:

- its purpose should be mutual assistance among small and medium sized enterprises ;
- it should be voluntarily formed and there should be no barriers to entry to new comers ;
- each member should possess equal voting rights ;
- the limit of amount of profits to be distributed among members should be stipulated by law.

Are only exempted co-operatives' activities allowed by the law establishing the co-operative : *i.e.* for SMEs co-operatives the legally activities for such co-operatives include production, processing, sales, purchase, storage, transportation. However, when a co-operative does nothing but price fixing this can be regarded as improper activity and is not exempted from the Antimonopoly Act.

The activities should neither constitute unfair trade practices[1] nor restrict competition substantially in a certain market, leading to an unreasonable price increase.

It is for the JFTC to assess if a company meets the criteria to be eligible for a co-operative exemptions. For co-operatives organised in accordance with the SMEs Co-operative Act, it is provided that one of the following criteria should be satisfied:

- the amount of contribution of the members is less than 100 million Japanese Yen ;
- enterprises employ less than 300 people on a permanent basis (there are some exceptions in the service sector).

The Japanese Delegate concluded his presentation by stating that although exemptions are granted to SMEs, they are granted only when stringent conditions are met. Indeed from time to time some considerations which are not necessarily of an economic nature may lead to the granting of exemptions to co-operatives of SMEs but such considerations are compatible with the objectives of competition.

EU *de minimis* clause

The Chairman introduced the EU contribution. He emphasised that the EU law does not provide for any specific exemption for SMEs; however co-operation agreements may benefit from group exemptions when they do not impede competition. In addition, and according to an EU Commission communication, the *de minimis* clause in the EU law allows agreements between firms which have less than five per cent of a market or if their combined sales are less than 300 million ECU. Against this background, one can assume that Member States can still challenge those agreements but that the Commission will not challenge itself those agreements even if they are price agreements.

The Chairman requested clarification on two points mentioned in the EU contribution: *i)* according to the terms of the *de minimis* clause, there is no mention about agreements which could impair competition but would have a minimal effect on trade among European nations; therefore why would agreements which are anti competitive but have a very small effect on European trade, be exempted; *ii)* What are the Court of Justice's cases law which call for a revision of the Commission's communication concerning the *de minimis* clause?

According to the Representative from the Commission , the main relevant element for horizontal co-operation among SMEs is indeed the *de minimis* rule. Under EU law, exemptions are not granted antitrust immunity; they are pure application of EU competition law (cf. article 85(3)), which applies to any kind of enterprises regardless of their size. The *de minimis* rule relates to the restrictive nature of the agreement and to the effect of the restrictions on trade between Member states. This is a rule which is established through quantitative thresholds and which tends to provide guidance to all kinds of companies as to what the Commission considers as constituting an appreciable restriction on trade between Member states. The *de minimis* notice is a pure guideline for companies which do not therefore have absolute security because the notice only commits the Commission. The Court of Justice has stated that it is not bound by the notice, and in fact the Commission itself has in some cases not followed its own line on the *de minimis* doctrine.

The EU Commission answered the Chairman's first question, stating that agreements which are restrictive of competition but which do not produce appreciable effects on trade between Member states, are not caught by the prohibition. This is not an exemption; it is simply that the prohibition under EU law does not apply. Under the test of article 85(1) there is a debate on the need to introduce a rule of reason to assess whether a restriction or a practice is restrictive of competition in the sense of article 85(1). But at this juncture, regarding the case law of the Court of Justice, one cannot argue that there is a kind of *de*

minimis rule which applies to restrictions of competition. *De minimis* is rather for assessing the effects on trade between Member states, which is a limit to the competence of EU law vis-à-vis national competition law.

The EU Delegate confirmed that the Commission is revising some of the notices for SMEs which, as case law demonstrated, were quite old.

Undueness test

The Chairman referred to the Canadian written contribution which states that agreements which substantially reduce competition are caught by the law and that some agreements which do restrict competition might be exempted, if they have significant efficiency gains. The Chairman noted that in contrast to the *de minimis* notice and in the absence of clear criteria in term of trade in the *de minimis* notice, the Canadian contribution states that while the enforcement of the anti conspiracy provisions is treated as a priority, all the factors may militate against enforcement as far as SMEs are involved. An important factor is the volume of commerce affected by the agreement. While an agreement among SMEs may have an anti-competitive effect in a relevant market, the market may be too small to justify the allocation of the necessary resources to prosecute it, which might be better used on higher priority cases involving larger sectors and markets.

The Canadian Delegate emphasised that SMEs have been job creative and were indeed acting as an engine to the Canadian economy, and he drew a parallel with the German situation as described by his German colleague. This important role is explicitly recognised in the Competition Act (Section 1(1)), which provides that the purpose of the Act is to maintain competition to ensure *inter alia* that SMEs have an equal opportunity to participate in the Canadian economy.

The Canadian Delegate added that there are, however, special rules applied to SMEs. The general prohibition against conspiracy (section 45 of the Act) takes the approach that co-operation among firms is only illegal when co-operation unduly affect competition in a relevant market. “Undueness” was interpreted by the Supreme Court of Canada as follows: to unduly affect competition, the parties must have market power in combination with behaviour that is likely to injure competition. If a group of conspiring SMEs do not together have power in the relevant market, agreements which restrict competition would either benefit the general public by allowing SMEs to be more competitive or dissolve under competitive pressures. Injurious anti competitive behaviour may trigger liability even if market power is not so considerable. Unlike some other jurisdictions efficiency is not a factor to be considered in the analysis of whether conspiracy unduly prevents or lessens competition. General exceptions such as for agreements on R&D co-operation, which can and do promote efficiency, are expressly provided for in the Act.

The Canadian Delegate emphasised that it was not felt useful in Canada to define what is, or is not, an SME on the sole basis of absolute size criteria (such as annual revenue). One would rather focus on the ability of a firm or a group of firms to act independently in a particular market, stressing the relative market power of firms in a particular market. Definition of the relevant product and geographic market is key.

Limited enforcement resources, he added, may however prevent enforcement where SMEs are involved. Case-screening criteria are used in the Competition Bureau to determine if particular cases require particular priority to justify the allocation of the Bureau’s limited resources. An important factor is the volume of commerce affected by the agreement, which is not likely to be particularly high since SMEs

generally do not have a high volume of commerce. Other factors are also considered such as whether the anticompetitive behaviour is directly aimed at the public, i.e. agreement affecting price.

Competitive test

The Chairman introduced the Norwegian contribution and pointed out that it has a *per se* prohibition system with possibilities of exemptions. He asked if under such a system, price fixing agreements could be exempted.

The Norwegian Delegate presented his written contribution, stressing that despite the vital role they play in the economy, SMEs do not enjoy any particular treatment or protection. Under the Norwegian Competition Act, certain practices are prohibited: i.e. price fixing; market allocation; bid-rigging. However, due to the dual aspect of co-operation (anticompetitive and economic efficiency effects), competition authorities may grant exemptions from the general prohibitions, provide certain conditions are met[2]. Thus it is through this exemption policy that SME's situation is affected. The policy is focused on the competitive effects of the prohibited conduct; if the conduct has no competitive significance an exemption may be granted regardless of the nature of the conduct. As a consequence, an exemption may be granted for market behaviour that is not efficient. The explanation is that as long as effective competition is not threatened, the market itself will give the verdict on the wisdom of the specific market conduct. As long as competitive pressure is sustained, it is necessary to address the possible efficiencies of the conduct. On the other hand, one can feel that it is not desirable to have the competition authorities interfere with the strategic decisions of the enterprises as long as efficient competition is not at stake. This does not mean that efficiency is never assessed but the assessment is strictly limited to cases where the competitive effects of co-operation are uncertain or negative. In such cases, a trade-off assessment between competitive effects and efficiencies has to be made.

On the possible administrative costs that such a system may involve, the Norwegian Delegate stated that the introduction of the new Act in 1994 was quite an improvement notably with the introduction of one of the four tests[3] for exemption (if the collaboration has little competitive significance). In addition, guidelines were issued by the competition authority regarding this exemption policy, which give the public and the enterprises extensive information on how they will be treated and how they should set up their application for exemption. In 1994 a *de minimis* rule based on a market share was also considered but that was regarded as impracticable**.**

US 1958 Small and Medium-Size Business Act

The Chairman requested the Delegate from the United States to explain the exemption provisions under the 1958 Small and Medium-Size Business Act. The US Delegate said as a preamble that it is indeed fairly commonly believed that new jobs in the US are created by SMEs and that they are responsible for a lot of innovation. However, he added that the provisions contained in the 1958 Act have almost never been enforced and this has not prevented the American enterprises from developing. This Act provides exemptions from the anti trust laws for agreements among SMEs according to specific procedures. Businesses must make a request to the DOJ and FTC, and must obtain the approval of the Attorney General. The agreement must be filed in the Federal Register. There are two categories of agreement: one related to R&D[4] and the other one related to national defence.

General Discussion

The Austrian Delegate referred to the German contribution and asked a question relating to the different treatment of SMEs and larger firms concerning co-operation agreements with rationalisation purpose. The German Delegate explained that there was no general exemption clause but precise provisions in specific cases and under certain conditions, for instance for rationalisation cartels, that were open to all companies. In light of German history, SMEs benefit from special treatment with two specific exemptions which aim at easing the procedure for obtaining approval for an agreement on co-operation and at lowering the threshold as far as rationalisation was concerned. These two specific exemptions were not seen as a means to compensate SMEs for their structural disadvantages as compared to larger companies, and were not designed to protect the firms from competition.

The Hungarian Delegate explained that OECD Member countries' experience had not provided his country with a clear lesson. Therefore it was decided, in Hungary, that below a threshold of 10 per cent of the market, the Competition Authorities would not intervene no matter what the agreements involved. It was felt that such a *de minimis* clause was the only option to guaranty the enterprises some legal certainty .

The Australian Delegate mentioned the complexity of prosecuting SMEs and the hostility of public opinion and judges when the Commission took SMEs to the Courts. He referred to price fixing behaviour cases where the Commission prosecuted petrol service stations; the Court felt that this was a waste of time when the Commission should have been worried about the big oil companies' practices.

The BIAC Representative noted that the efficiency reasoning has been an underlying concern almost in every country. The way competition rules were applied was, however, key . There were differences depending on the prevailing rule -- strict *per se* approach with possible exemption or a rule of reason approach --, and the administrative related costs. He was glad to hear from the EU Commission that it was considering some broadening of the notice system notably as far as sub-contracting was concerned ; this sub-contracting had allowed networking among small and large enterprises and had contributed to technological improvement.

NOTES

1. Such as abuse of dominant position.

2. See par. 2 of the Norwegian contribution.

3. See par. 2 c) of the Norwegian contribution.

4. In 1958, the Congress found that the expense of carrying on R&D programs was beyond the means of any SMEs. These enterprises enjoyed a competitive disadvantage, and this prevented the orderly development of the national economy.

AIDE MEMOIRE DE LA DISCUSSION

Le Président a ouvert le débat en déclarant qu'un certain nombre de pays sont ou bien dotés d'une disposition légale qui exempte les accords entre petites et moyennes entreprises (PME) ou bien autorisent ces accords au titre d'une clause *de minimis* , quoiqu'une telle clause ne vise pas nécessairement les seuls accords entre PME. Se référant aux contributions que les pays ont communiquées en vue du débat, le Président estime que s'agissant de la définition des PME, de la notion de seuil auquel est subordonnée l'application de la clause d'exemption ou de la règle *de minimis*, ou du type d'accord qui peut faire l'objet d'une exemption, ou encore des secteurs dans lesquels il existe des exemptions, on observe une très grande diversité d'un pays à l'autre. A en juger par les diverses contributions, il apparaît que l'argumentation en faveur de l'exemption des ententes entre PME peut être soit administrative -- il s'agit d'alléger la charge imposée aux autorités antitrust -- soit économique -- il en résulterait, dit-on, des avantages du point de vue de l'efficience ou de la concurrence -- soit même politique -- dès lors que les exemptions résultent des pressions exercées par certains groupes d'intérêt.

Argumentation en faveur des règles spécifiques applicables aux PME

M. Jenny a poursuivi en se référant à la contribution de l'Allemagne qui présente une analyse globale du sujet. Cette note fait ressortir l'idée que, comparées à des concurrents plus importants, les PME peuvent connaître des désavantages économiques dans la mesure où elles ne peuvent bénéficier d'économies d'échelle s'agissant de l'accès aux marchés de capitaux, ou de conditions favorables consenties par les acheteurs lorsqu'il s'agit du secteur de la vente au détail. Elle fait aussi ressortir que les PME présentent des avantages économiques car elles sont plus souples et peuvent mieux s'adapter aux besoins spécifiques de la clientèle. Du point de vue économique, la note de l'Allemagne suggère qu'il peut être utile d'autoriser les accords entre PME si ces accords visent à rationaliser l'activité économique de leurs membres et s'ils n'affaiblissent pas sensiblement la concurrence. Pour en décider, il faut, selon l'Allemagne, adopter une méthode au cas par cas sauf lorsqu'il s'agit d'accords sur les prix, lesquels ne doivent jamais être exemptés.

Le délégué de l'Allemagne a précisé que la note écrite s'attache à exposer les avantages et les inconvénients liés à l'octroi aux PME d'un quelconque régime spécifique favorable. La décision d'adopter des règles spécifiques applicables aux PME dépend de la façon dont est perçu leur rôle économique, et cette perception peut différer d'un pays à l'autre. En Allemagne, on reconnaît souvent que les PME jouent un rôle important et de fait, elles sont la colonne vertébrale de l'économie allemande : elles participent à la concurrence, à l'innovation et à la création d'emplois, et comparées à des entreprises plus importantes, leur créativité et leur souplesse sont plus élevées. Par conséquent, on autorise un régime spécifique pour faciliter la coopération entre PME, partant du postulat que les entreprises plus importantes utilisent leurs économies d'échelle, les PME concurrentes n'ont aucune chance de survivre. Les désavantages des PME par rapport aux grosses entreprises tiennent à la difficulté qu'elles ont d'accéder au marché des capitaux ; elles sont souvent davantage exposées aux fluctuations structurelles et cycliques. On soutient souvent que leur compétitivité internationale est inférieure comparée à celle des grosses entreprises. Dans ces conditions, il faut une compensation et celle-ci est considérée comme acceptable du point de vue de la concurrence.

Le délégué de l'Allemagne a poursuivi en indiquant qu'il n'existe en droit allemand aucune définition des petites et moyennes entreprises, et il serait trompeur de définir des critères absolus de taille. Le facteur décisif est le rapport aux autres entreprises sur le marché : une société ayant un chiffre d'affaires important sur un marché peut être considérée comme importante sur ledit marché et ne pas l'être

nécessairement sur un autre marché. Il faut évaluer la situation globale d'un marché à l'autre en tenant compte des caractéristiques propres du marché considéré ; quant à la situation relative, il faut la mesurer à partir d'une évaluation globale en tenant compte des critères spécifiques du marché, notamment le chiffre d'affaires, la part de marché, les ressources financières, etc.

Selon le délégué de l'Allemagne, les limites de la coopération entre PME posent un deuxième problème. Où ces limites devraient-elles se situer ? Si, d'une part, un grand nombre d'accords échappent à l'interdiction des ententes et si, d'autre part, une large gamme d'accords sont interdits, il existe entre les deux des accords qui peuvent être autorisés au cas par cas, en évaluant leurs effets favorables à la concurrence. A cet égard, la nature, le type et les effets de la coopération sont des éléments importants dans une évaluation de ce genre. Le délégué de l'Allemagne a conclut en déclarant qu'en droit allemand, il existe deux dispositions prévoyant une exemption en faveur des PME (l'exemption visant les ententes entre petites entreprises et l'exemption en faveur des associations d'achat), dispositions qui sont venues s'ajouter en 1990 à la règle *de minimis*. Cette règle s'applique en vertu des lignes directrices stipulant que la coopération entre PME ne sera pas attaquée si elle favorise l'efficience, si elle ne met en cause qu'un petit nombre de PME et si la part de marché ne dépasse pas cinq pour cent.

Le Président s'est ensuite référé à la contribution du Japon et a noté que les exemptions y sont subordonnées à certains objectifs politiques, sociaux et économiques. A cet égard, les possibilités d'exemption paraissent plus large en droit japonais qui prévoit un régime spécial pour les coopératives ou un régime spécial dans certains secteurs (par exemple celui des pêcheries, où l'exemption n'est pas fondée sur la loi antimonopole mais sur une loi spécifique).

Système d'exemption applicable aux PME

Le délégué du Japon a précisé qu'il existe actuellement deux types de systèmes d'exemption -- dans le droit de la concurrence ou dans des lois connexes-- mais que seul le premier type (celui prévu par la loi Antimonopole) mérite d'être examiné ; en ce qui concerne le système d'exemption prévu dans des lois autres que la loi Antimonopole, la plupart des ententes qui avaient été précédemment approuvées ont déjà été supprimées ou sont en voie de l'être, et le système lui-même pourrait fort bien être supprimé très bientôt.

Selon le délégué du Japon, le système d'exemption en faveur des PME se justifie par le fait que si celles-ci ne peuvent soutenir favorablement la concurrence avec les grosses sociétés, elles peuvent constituer une unité concurrentielle efficace sur le marché dès lors qu'elles s'organisent pour constituer une coopérative ; elles peuvent alors favoriser la concurrence de façon positive.

Le délégué du Japon a déclaré que la loi Antimonopole exempte les actions concertées des PME uniquement s'il s'agit de PME groupées en coopératives, organisées selon des lois spécifiques, par exemple la loi sur les PME, la loi sur les coopératives agricoles ou la loi sur les coopératives dans le secteur des pêcheries. Ces coopératives doivent satisfaire à tous les critères ci-après :

- leur objectif doit être la recherche d'une assistance mutuelle entre petites et moyennes entreprises;
- elles doivent être constituées de façon volontaire et aucun obstacle ne doit s'opposer à l'entrée de nouvelles entreprises;
- tous les membres doivent avoir les mêmes droits de vote;

- le volume des bénéfices à distribuer entre les membres devrait être défini par la loi.

Les seules activités exemptées sont celles qui sont autorisées par la loi établissant les coopératives : autrement dit, la production, la transformation, les ventes, les achats, le stockage, les transports. Cependant, une coopérative qui se bornerait à fixer les prix ne serait pas exemptée de l'application de la loi Antimonopole, car la fixation des prix est considérée comme une activité illégale. Les activités ne devraient pas constituer des pratiques commerciales déloyales[1] ni limiter sensiblement la concurrence sur un certain marché, ce qui entraînerait une hausse déraisonnable des prix.

C'est à la JFTC d'apprécier si une entreprise satisfait aux critères à remplir pour pouvoir bénéficier des exemptions applicables aux ententes. Pour que la loi sur la coopération entre PME soit applicable, l'un des critères ci-après doit être satisfait :

- la contribution de chaque membre de l'entente ne dépasse pas 100 millions de yen;

- les effectifs ne dépassent pas 300 personnes employées à titre permanent (certaines exceptions sont prévues dans le secteur des services)

Le délégué du Japon a terminé son exposé en déclarant que si des exemptions sont accordées aux PME, elles ne le sont que si des conditions rigoureuses sont remplies. Certes, de temps à autre, certaines considérations, qui ne sont pas nécessairement de caractère économique, peuvent aboutir à l'octroi d'exemptions à des ententes entre PME, mais ces considérations sont compatibles avec les objectifs de la concurrence.

Clause *de minimis* dans l'Union européenne

Le Président a présenté la contribution de l'UE. Il a souligné que le droit communautaire ne prévoit aucune exemption spécifique en faveur des PME ; toutefois, les accords de coopération peuvent bénéficier d'exemptions de groupe lorsqu'ils ne font pas obstacle à la concurrence. De plus, et selon une communication de la Commission de l'UE, les accords entre des entreprises qui détiennent moins de cinq pour cent d'un marché ou dont les ventes globales sont inférieures à 300 millions d'écus sont autorisés au titre de la clause *de minimis* du droit communautaire. On peut donc supposer que les Etats membres peuvent encore attaquer ces accords, mais que la Commission ne les attaquera pas elle-même, même s'il s'agit d'accords sur les prix.

Le Président a demandé des précisions sur deux points mentionnés dans la contribution de l'UE : *i)* selon les termes de la clause *de minimis*, rien n'est dit au sujet des accords qui pourraient compromettre la concurrence mais qui auraient un effet réduit sur les échanges entre pays européens ; par conséquent, pourquoi des accords, anticoncurrentiels mais ayant très peu d'effets sur les échanges européens, seraient-ils exemptés ? *ii)* quels sont les cas de jurisprudence de la Cour de justice qui nécessiteraient une révision de communication de la Commission concernant la clause *de minimis* ?

Selon le représentant de la Commission, le principal élément à évoquer lorsqu'il s'agit de coopération horizontale entre PME est bien la clause *de minimis*. Aux termes du droit communautaire, les exemptions ne bénéficient pas de l'immunité antitrust ; elles sont une simple application du droit de la concurrence de l'UE (voir article 85(3)), qui s'applique à n'importe quel type d'entreprises quelle que soit leur taille. La règle *de minimis* vise le caractère restrictif de l'accord ainsi que l'effet des restrictions sur les échanges entre les Etats membres. C'est là une règle qui est établie par application de seuils quantitatifs et qui vise à informer tous les types d'entreprises de ce que la Commission estime constituer une restriction sensible des échanges entre Etats membres. L'avis au titre de la règle *de minimis* est une simple indication

pour les sociétés qui n'ont par conséquent aucune certitude absolue car l'avis n'engage que la Commission. La Cour de justice a déclaré qu'elle n'était pas liée par l'avis et de fait dans certaines affaires, la Commission elle-même ne s'est pas conformée à sa propre position concernant la doctrine *de minimis*.

A la première question du Président, le représentant de la Commission de l'UE a répondu que les accords qui limitent la concurrence mais qui n'ont pas d'effets sensibles sur les échanges entre Etats membres ne tombent pas sous le coup de l'interdiction. Il ne s'agit pas d'une exemption ; simplement, l'interdiction au regard du droit communautaire ne s'applique pas. S'agissant du critère visé à l'article 85(1) on s'interroge sur la nécessité d'introduire une règle de raison pour déterminer si une pratique ou une restriction limite la concurrence au sens de l'article 85(1). Mais pour le moment, on ne peut soutenir, s'agissant de la jurisprudence de la Cour de justice, qu'il existe une sorte de règle *de minimis* applicable aux restrictions de la concurrence. La règle *de minimis* permet plutôt d'évaluer les effets sur les échanges entre Etats membres, ce qui limite la compétence du droit communautaire vis-à-vis du droit national de la concurrence.

Le délégué de l'UE a confirmé que la Commission est en train de réviser certains des avis concernant les PME, avis qui, la jurisprudence le prouve, sont très anciens**.**

Critères de l'effet indû

Le Président a évoqué la contribution du Canada dans laquelle il est déclaré que les accords qui réduisent sensiblement la concurrence tombent sous le coup de la loi et que certains accords qui ne limitent pas la concurrence pourraient être exemptés s'ils permettent d'accroître sensiblement l'efficience. Le Président observe qu'à la différence de l'avis *de minimis* et en l'absence de critères précis en matière d'échanges, le Canada indique dans sa contribution que si l'application des dispositions anti-ententes est considérée comme une priorité, tous les facteurs peuvent militer à l'encontre de cette application dès lors qu'il s'agit de PME. Le volume d'échanges touché par l'accord constitue un facteur important. Si un accord entre PME peut avoir des effets anticoncurrentiels sur un marché considéré, celui-ci peut être trop réduit pour justifier l'attribution des ressources nécessaires pour poursuivre l'accord, ressources qu'il serait préférable d'utiliser dans des affaires à caractère plus prioritaire mettant en cause des secteurs et des marchés plus importants.

Le délégué du Canada a souligné que les PME créent des emplois et qu'en fait elles sont l'un des moteurs de l'économie canadienne, et il établit un parallèle avec la situation en Allemagne telle qu'elle est décrite par son collègue allemand. Ce rôle important est expressément reconnu dans la loi sur la concurrence (section 1(1)), laquelle stipule que l'objectif de la loi est de préserver la concurrence pour assurer, entre autres, aux PME une chance honnête de participer à l'économie canadienne.

Le délégué du Canada a ajouté que des règles spéciales s'appliquent pourtant aux PME. L'interdiction générale d'ententes (article 45 de la loi) stipule que le complot entre entreprises n'est illicite que lorsqu'il affecte indûment la concurrence sur le marché considéré. La Cour suprême du Canada a interprété de la façon suivante la notion d'"indûment": pour affecter indûment la concurrence, les parties doivent détenir une puissance sur le marché associée à un comportement qui va probablement léser la concurrence. Si un groupe de PME ayant conclu une entente ne détiennent pas ensemble une puissance sur le marché considéré, les accords qui limitent la concurrence soit bénéficieront au grand public car ils permettront aux PME d'être davantage concurrentielles, soit ils se dissoudront sous l'effet des pressions de la concurrence. Un comportement anticoncurrentiel peut déclencher la responsabilité même si la puissance sur le marché n'est pas tellement considérable. A la différence de certains autres pays, l'efficience n'est pas un facteur à prendre en considération lorsqu'il s'agit de déterminer si une entente empêche ou réduit sensiblement la concurrence. La loi prévoit expressément des exceptions de caractère général notamment

pour les accords instituant une coopération en R&D, qui peuvent favoriser l'efficience et qui effectivement la favorisent.

Le délégué du Canada a souligné que dans son pays, on estime inutile de définir ce qu'est, ou ce que n'est pas, une PME uniquement à partir de critères de taille absolue (tels que les recettes annuelles). On mettrait plutôt l'accent sur la capacité d'une entreprise ou d'un groupe d'entreprises d'avoir un comportement indépendant sur un marché donné, en insistant sur la puissance sur le marché de chaque entreprise sur un marché donné. La définition essentielle est celle du marché géographique et du marché de produits considérés.

Il a ajouté que des ressources limitées peuvent toutefois empêcher d'appliquer les dispositions lorsqu'il s'agit de PME. Le Bureau de la concurrence applique des critères permettant de déterminer si tel ou tel cas doit être examiné en priorité pour justifier l'attribution des ressources limitées dont il dispose. Le volume des échanges touché par l'accord, qui n'est probablement pas particulièrement élevé puisqu'en général les PME n'ont pas un volume d'échanges très important, constitue un facteur significatif. D'autres facteurs sont également pris en considération, notamment la question de savoir si le comportement anticoncurrentiel vise directement le public, ce qui est le cas par exemple d'un accord influant sur les prix.

Test relatif à la concurrence

Le Président a poursuivi avec la contribution de la Norvège et a observé que ce pays est doté d'un système d'interdiction *per se* qui prévoit des possibilités d'exemption. Il demande si, aux termes d'un système de ce genre, les accords de fixation des prix pourraient être exemptés.

Le délégué de la Norvège a présenté sa contribution écrite en soulignant que malgré leur rôle essentiel dans l'économie, les PME ne jouissent d'aucun régime ou protection particuliers. Aux termes de la loi norvégienne sur la concurrence, certaines pratiques sont interdites : par exemple la fixation des prix ; la répartition du marché ; les soumissions concertées... Toutefois, en raison du double aspect de la coopération (effets anticoncurrentiels et effets sur l'efficience économique), les autorités responsables de la concurrence peuvent accorder des exemptions au regard des interdictions générales, à condition que certaines conditions soient réunies[2]. Ainsi, c'est par le biais de cette politique d'exemptions que la situation des PME est modifiée. La politique est axée sur les effets sur la concurrence du comportement interdit; si le comportement n'a pas d'effets importants sur la concurrence, une exemption peut être accordée quelle que soit la nature du comportement. En conséquence, une exemption peut être consentie pour un comportement commercial qui n'est pas efficient. La raison en est la suivante : aussi longtemps que la concurrence effective n'est pas menacée, le marché lui-même jugera de la sagesse du comportement. Tant que les pressions de la concurrence sont maintenues, il est nécessaire d'examiner les efficiences éventuelles du comportement. D'autre part, on peut estimer qu'il n'est pas souhaitable que les autorités chargées de la concurrence interviennent dans les décisions stratégiques des entreprises tant que n'est pas en jeu l'efficience de la concurrence. Cela ne signifie pas que l'efficience ne soit jamais évaluée, mais cette évaluation est limitée rigoureusement aux cas dans lesquels les effets de la coopération sur la concurrence sont incertains ou négatifs. Dans ce cas, il faut procéder à une mise en balance entre les effets sur la concurrence et les efficiences.

S'agissant des coûts administratifs éventuels qu'un système de ce genre peut entraîner, le délégué de la Norvège a déclaré que la nouvelle loi de 1994 représente une nette amélioration, notamment du fait de l'adoption de l'un des quatre critères d'exemption[3] (déterminer si la collaboration a peu d'effets sur la concurrence). De plus, l'instance chargée de la concurrence a publié des lignes directrices concernant cette politique d'exemption, ce qui donne aux entreprises et au public des informations détaillées sur la façon dont ils seront traités et sur la façon dont ils devraient exposer leur demande d'exemption. En 1994, une

règle *de minimis* fondée sur la part de marché a été également envisagée mais on a estimé qu'il serait difficile de la mettre en pratique.

Loi de 1958 sur les petites et moyennes entreprises aux Etats-Unis

Le Président a demandé au délégué des Etats-Unis de préciser les dispositions de la loi de 1958 sur les petites et moyennes entreprises relatives à l'exemption. En préambule, le délégué des Etats-Unis a déclaré qu'en fait il est assez communément admis que les PME créent de nouveaux emplois aux Etats-Unis et qu'on leur doit un très grand nombre d'innovations. Mais, a-t-il ajouté, les dispositions figurant dans la loi de 1958 n'ont presque jamais été appliquées et cela n'a pas empêché les entreprises américaines de se développer. Cette loi exempte de l'application des lois antitrust, selon certaines modalités, les accords conclus entre PME. Les entreprises doivent adresser une demande au ministère de la Justice et à la FTC, et doivent obtenir l'agrément du Procureur général. L'accord doit être inscrit au Registre fédéral. Il existe deux catégories d'accords : les uns ayant trait à la R&D[4], les autres à la défense nationale.

Débat général

Le délégué de l'Autriche a posé, à propos de la contribution de l'Allemagne, une question concernant le régime différent des PME et des grosses entreprises s'agissant des accords de coopération conclus en vue d'une rationalisation. Le délégué de l'Allemagne a précisé qu'il n'existe aucune clause générale d'exemption, mais des dispositions précises, dans certains cas précis, et dans certaines conditions, notamment pour les ententes de rationalisation, ouvertes à toutes les compagnies. Dans le droit allemand, les PME bénéficient d'un régime spécial grâce à deux exemptions spécifiques qui visent à faciliter la procédure d'agrément applicable aux accords de coopération et à abaisser le seuil lorsqu'il s'agit d'accords de rationalisation. Il n'est pas considéré que ces deux exemptions spécifiques soient un moyen de compenser les inconvénients structurels des PME comparées à des entreprises plus importantes, et elles ne sont pas, non plus, destinées à protéger les entreprises contre la concurrence.

Le délégué de la Hongrie a fait valoir que l'expérience des pays Membres de l'OCDE n'a pas été éclairante pour son pays. Il a donc été décidé, en Hongrie, que les instances chargées de la concurrence n'interviendraient pas en deçà d'un seuil de dix pour cent du marché, quels que soient les accords en cause. Il a été jugé qu'une clause *de minimis* de ce genre était la seule solution pour garantir une certaine certitude juridique aux entreprises.

Le délégué de l'Australie a évoqué les difficultés qu'il y a à poursuivre les PME ainsi que l'hostilité de l'opinion publique et des juges lorsque la Commission poursuit les PME devant les tribunaux. Il a évoqué des cas de fixation des prix dans lesquels la Commission a poursuivi des stations-service ; le tribunal a estimé que ces procès étaient une perte de temps et que la Commission aurait plutôt dû se préoccuper des pratiques mises en oeuvre par les grosses compagnies pétrolières.

Le représentant du BIAC a noté que dans presque tous les pays, l'argument d'efficience est à la base des préoccupations. La façon dont s'appliquent les règles de la concurrence sont néanmoins fondamentales. On constate des différences selon la règle qui prévaut -- règle *per se* rigoureuse avec exemption éventuelle ou règle de raison -- et selon les coûts administratifs connexes. Il s'est félicité de ce que la Commission de l'UE envisage d'élargir quelque peu le système d'avis, notamment en ce qui concerne la sous-traitance ; cette sous-traitance a permis de créer des réseaux entre petites et grosses entreprises et elle a contribué à l'amélioration technologique.

NOTES

1. Par exemple, les abus de position dominante.

2. Voir paragraphe 2 de la contribution de la Norvège.

3. Voir paragraphe 2 c) de la contribution de la Norvège.

4. En 1958, le Congrès a estimé que les moyens dont disposaient les petites et moyennes entreprises ne leur permettaient pas de réaliser des programmes de R&D. Ces entreprises étaient désavantagées par rapport à leurs concurrents, ce qui compromettait le développement harmonieux de l'économie nationale.

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment (Roundtable in May 1995, published in 1996)	OCDE/GD(96)22
2.	Failing Firm Defence (Roundtable in May 1995, published in 1996)	OCDE/GD(96)23
3.	Competition Policy and Film Distribution (Roundtable in November 1995, published in 1996)	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements (Roundtable in November 1995, published in 1996)	OCDE/GD(96)65
5.	The Essential Facilities Concept (Roundtable in February 1996, published in 1996)	OCDE/GD(96)113
6.	Competition in Telecommunications (Roundtable in November 1995, published in 1996)	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations (Roundtable in November 1995, published in 1996)	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation (Roundtable in February 1996, published in 1996)	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets (Roundtable in April 1996, published in 1997)	OCDE/GD(97)44