## COMMISSION NOTICE (ALL INDUSTRIES): DE MINIMIS RULES

Subject: De minimis rules
Agreements of minor importance

Industry: All industries

Source: Commission Statement IP/01/709, sated 16 May 2001

*(Note. Under the rules on competition, as interpreted by the courts, practices are prohibited only if they "appreciably" restrict competition. The Commission's successive Notices on the circumstances in which practices do not, in its opinion, appreciably restrict competition, are known as the de minimis rules. The proposal referred to in the report below is designed to bring the 1997 Notice up-to-date in terms of recent developments in economic thinking and competition law, and in particular the latest block exemption regulations.)*

The Commission has adopted a draft Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (the de minimis Notice). The Commission has invited comments by 1st August, 2001, from industry, consumer organisations and other interested third parties. The revision of the de minimis notice is part of the Commission's review of the competition rules. By defining when agreements between companies are not prohibited by the Treaty, the Notice will reduce the compliance burden for companies, especially smaller companies. At the same time the Commission will be better able to avoid examining cases which have no interest from a competition policy point of view and will thus be able to concentrate on more important cases.

Article 81 of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-community trade or on competition is not appreciable. In the present de minimis Notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition. This does not imply that agreements between companies which exceed the thresholds set out in the Notice do appreciably restrict competition. Such agreements may still have only a negligible effect on competition within the common market; but this can be assessed only on a case-by-case basis. This assessment is relevant in particular for agreements which are in addition not covered by any of the block exemption regulations of the Commission.

The current de minimis Notice from 1997 needs to be made consistent with the new rules for vertical and horizontal agreements (that is, respectively, distribution agreements and agreements between companies operating at the same level of the production and distribution chain). The draft Notice reflects an economic approach and has the following key features.

First, the market share thresholds are raised from 5% to 10% for agreements between competitors and from 10% to 15% for agreements between non-competitors. In line with a more economic approach, it is proposed to raise the current thresholds below which agreements are considered to be de minimis. Where less serious restrictions exist (that is, restrictions not classified as "hardcore" – see below), competition concerns are unlikely to arise unless companies have a certain degree of market power. The proposed thresholds take account of this while at the same time staying low enough to be applicable whatever the overall market structure. This more economic approach fits in with the current practice of most Member States and of the Commission. To calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market.

Second, the proposed Notice contains a 5% market share threshold for situations of cumulative effect. The current de minimis Notice (paragraph 18) excludes from its benefit agreements operated on a market where "competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers." This means in practice that firms operating in sectors like the beer and petrol sector can usually not benefit from the de minimis Notice. The proposed Notice seeks to change this by introducing a special but lower market share threshold of 5% for markets where there are parallel networks of similar agreements.

Third, the proposed Notice contains the same list of "hardcore" restrictions, such as price fixing and market sharing, as in the horizontal and vertical Block Exemption Regulations. Agreements containing hardcore restrictions cannot benefit from the de minimis Notice. The current Notice contains a very wide hardcore list in the field of vertical restraints. The exclusion from the benefit of the current Notice of "vertical agreements which have as their object to confer territorial protection to the participating undertakings or third undertakings" (paragraph 11, current Notice) effectively excludes all restrictions on active and passive sales in any type of distribution agreement. For vertical agreements the new Notice takes over the hardcore list of the Block Exemption Regulation on vertical restraints, which allows certain sales restrictions in particular types of distribution agreements. For horizontal agreements the new Notice takes over the hardcore list of Block Exemption Regulation 2658/2000.

Fourth, under the proposed Notice, agreements between small and medium sized enterprises are in general de minimis. The draft Notice states that agreements between small and medium sized enterprises (SMEs) are rarely capable of affecting trade between Member States. Agreements between SMEs therefore generally fall outside the scope of Article 81(1). In cases covered by the new Notice, the Commission will not institute proceedings either upon application or on its own initiative. Where companies assume in good faith that an agreement is covered by the Notice, the Commissioner will not impose fines. Although not binding on them, the Notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81. ■