

## Empowering SMEs

### David vs. Goliath: Collaborative Strategies for SMEs

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The rise of digital business models has reshaped retail landscapes worldwide, fostering significant consolidation within various markets. Online platforms and e-commerce giants such as Amazon, Temu and Alibaba have leveraged their vast resources, extensive reach, and sophisticated data analytics to dominate market segments, often at the expense of smaller players. This consolidation trend poses significant challenges for small and medium-sized enterprises (SMEs) seeking to compete. SMEs, typically lacking the scale and technological infrastructure of their larger competitors, struggle to effectively navigate the competitive pressures imposed by digital giants. In addition, the advertising spend required to be only nearly as visible as the large rivals' offerings among Google search results, is out of reach for many of these smaller players. Limited access to capital, constrained marketing budgets, and difficulties in adapting to rapidly evolving digital trends further exacerbate their challenges. As a result, SMEs face an uphill battle in maintaining market relevance and sustaining profitability.

As the dominance of big online platforms continues to reshape retail markets, there is growing recognition of the need for SMEs to collaborate to level the playing field. The recently updated Horizontal Guidelines of the European Commission are testament to that and promise a looser standard for SME collaboration in theory – but will they indeed create more freedom in practice? This briefing explores what leeway EU and German competition law provides to accommodate collaboration among competing SMEs, enabling them to pool resources and share expertise in collectively commercializing their products and services.

#### Compliant Commercialization Cooperation

Commercialization agreements can entail cooperation between competitors in various business activities, such as selling, distributing, or promoting their products. These agreements can range from comprehensive joint selling arrangements to more limited collaborations focusing only on specific functions like distribution or advertising.

Commercialization agreements between competitors, especially those involving reciprocal arrangements, have the potential to restrict competition by object or effect pursuant to Article 101(1) TFEU. Among the main competition concerns are price-fixing, market partitioning, and information exchange that could lead to collusive outcomes:

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- Price fixing: Joint selling agreements may eliminate price competition and restrict supply (either through explicit price agreements or indirectly through an alignment of costs or increased price transparency)
- Output limitation: Parties may limit supply by agreeing on the volume of products to be put on the market.
- Market partitioning: Agreements may lead to the division of markets or allocation of orders or customers, particularly in reciprocal distribution arrangements.
- Exchange of competitively sensitive information: Agreements often involve the exchange of sensitive commercial information, which may lead to collusive outcomes depending on the type of information exchanged.

Does that mean that any commercialization cooperations is prohibited under Article 101(1) TFEU? Of course not. There is, however, an important caveat: Parties must prove that their commercialization cooperation comes with substantial efficiencies pursuant to Article 101(3) TFEU. Efficiency gains from commercialization agreements must outweigh restrictive effects on competition; furthermore, the agreements have to be indispensable to reach said efficiency gains. They should also benefit consumers and be objective, concrete and verifiable. Agreements that afford the possibility of eliminating competition in a substantial part of the market cannot count on being exempted pursuant to Article 101(3) TFEU.

The German Act against Restraints of Competition lays out an analogous framework for cases without relevance for the European Single Market (e.g. that are not felt beyond Germany's borders and have no significant impact on cross-border trade within the EU) and thus remain subject to German competition law and the German Federal Cartel Office's (FCO) scrutiny.

## What's a "go" and what's a "no"?

The legal standard for antitrust compliant commercialization agreements remains vague and leaves significant room for interpretation. Room that the parties to such agreements need to fill on their own in light of the self-assessment prerogative under 101 TFEU.

Under No. 5.3 of the revised Horizontal Guidelines, the Commission now explicitly acknowledges that joint commercialization may, on balance, be pro-competitive where **SME are joining forces in order to counteract the competitive pressure by larger competitors**: *"Joint distribution can generate significant efficiencies, stemming from economies of scale or scope, especially for smaller producers or groups of independent retailers, for instance where they take advantage of new distribution platforms in order to compete with larger operators. Joint distribution can, in particular, be used to achieve*

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*environmental objectives, which may constitute efficiencies within the meaning of Article 101(3), provided that they are objective, concrete and verifiable”.*

Several examples for a compliant cooperation among smaller producers or groups of independent retailers are used to illustrate the application of legal standards to commercialization agreements as envisaged by the Commission:

- The joint marketing and pooling of resources by four laundry service companies for institutional customers only. In this hypothetical, the Commission considers price fixing as part of creating a new “institutional laundry services” product, promoting a common brand, and achieving efficiency gains. The Commission holds that such a collaboration is likely permissible, provided it does not involve cooperation in relation to *existing services* towards local individual customers but *only in relation to a new service for a new customer group*. The decisive factor in this scenario is, that the creation of this entirely new service would not be feasible without a price-fixing arrangement (notably though, in the example, each laundry service only has an individual 3% market share within a large city!).
- A collaboration between small shops on a web-based infrastructure for promoting, selling and delivering gift fruit baskets as a distinct service from their proprietary online and offline fruit basket sales. These shops share the operating expenses for their common web shop but still compose and deliver the fruit baskets at their own expense and according to their own standards. The web shop allows customers to choose from a variety of pre-set gift baskets at fixed prices. The order is assigned to the shop closest to them. Similar to the previous example, efficiency gains (greater choice, higher quality service, reduction of search costs) can justify the shops’ price fixing. The Commission notes that the fact that the participating shops are *still able to operate individually and to compete with one another*, both through their shops and the internet, may prevent the elimination of competition. The Commission concludes that price fixing is indispensable in this example for the service’s promotion, as customers would not want to choose from a multitude of prices within a single web shop.

Beyond the framework and examples introduced above, there is little guidance by the Commission on how to tailor a commercialization cooperation in an antitrust compliant way. Naturally, there are also not many precedents yet where companies have actually tested the boundaries. So how are SMEs supposed to navigate these complex waters without clear directions?

## The FCO's Perspective on Commercialization

Some guidance on cooperation between groups of independent retailers can also be derived from the FCO's *Genossenschaftsleitlinien* ("Cooperative Guidelines"), that touch on commercialization via joint commercialization platforms:

- According to the Cooperative Guidelines, binding price agreements are permissible only if uniform price setting is indispensable to achieve efficiency gains that outweigh the restriction of competition and benefit consumers, and if competition for a substantial portion of the goods in question is not eliminated. These high requirements make individual exemptions rare, both in theory and practice.
- However, non-binding arrangements where retailers independently set prices on a platform, are generally permissible but require closer scrutiny depending on their degree of cooperation. A "marketplace model," allowing each retailer to set their own prices is unproblematic. Similarly, non-binding price recommendations or maximum prices prescribed by a network group are acceptable, provided they do not effectively function as price fixing.

A promising example for retailers' collaboration efforts through non-binding pricing agreements to counter big tech companies' online retail practices is the *Intersport* model, which has been closely scrutinized and ultimately cleared by the FCO: As a group of approximately 1500 associated sports dealers operated by 900 different members, Intersport established an online sales platform managed by a newly created entity. That entity acts as an intermediary between end customers and the individual Intersport dealers and sets the prices offered to end customers. Individual dealers then have the choice to sell at those prices or not. Individual dealers can access the platform under equitable conditions while remaining free to operate their own websites or sell products through third parties. Intersport sought approval for its online sales model from the FCO, which was granted in 2020. This real-life scenario cleared under the Cooperative Guidelines has striking parallels to the Commission's hypothetical fruit basket case described above and thus provides a helpful example for SME on what antitrust-compliant commercialization cooperation can look like.

Similarly, the FCO has not raised objections to different types of industry-wide online platforms, e.g. for agricultural products, cement, and steel products, respectively, which was, however, subject to certain conditions. While it has acknowledged the efficiency gains that cooperation may entail, it has always emphasized that these platforms must not restrict competition, particularly in terms of the information that is exchanged, and in terms of excessive transparency. Safeguard instruments must be put in place to avoid this, for example, by making sure that prices are only shown to certain users or in an anonymized way.

## Outlook: It's complicated!

By fostering cooperation among SMEs, competition authorities can help mitigate the disadvantages faced by smaller players in the face of powerful tech giants. Although the recent revision of the Horizontal Guidelines indicates a shift towards greater support for cooperative efforts, the path to antitrust-compliant commercialization cooperation remains challenging due to high standards for efficiency gains and preventing anticompetitive effects. Nevertheless, SMEs can seize this opportunity by proactively seeking innovative and legally compliant ways to pool resources, share expertise, and collectively commercialize their products and services: In fact, only by testing specific models and creating proof that efficiencies, which are acknowledged in theory, actually materialize through cooperation, companies can help to reduce the legal uncertainty and pave the way for more guidance. In addition, for those who are not willing to take the residual risk of uncertainty whether their model will actually withstand the scrutiny of competition authorities, both the European Commission and the FCO have repeatedly invited market players for informal consultation. Companies should make use of this and actively seek the authorities' input because this can also help to create positive precedents.

BLOMSTEIN closely monitors future developments in the treatment of collaborative approaches. If you have any questions on the topic, [Anna Huttenlauch](#), [Elisa Theresa Hauch](#) and the entire competition law team will be happy to advise you.

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