ROUNDTABLE ON JOINT VENTURES

-- Note by Germany --

This note is submitted by the German Delegation to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 24-25 October 2000.
1. **Definition of the term joint venture and legal framework applying to joint ventures under German law**

1. German cartel law does not contain any special laws regulating joint ventures and therefore does not provide a legal definition of this term. In practice, the term joint venture refers to enterprises involving two or more firms which are established either by creating a new enterprise or by jointly participating in an existing company.

2. German competition law distinguishes between cartel agreements (Section 1 ff. of the ARC)\(^1\) and concentrations (Section 35 ff. of the ARC)\(^2\) without explicitly excluding joint ventures entirely or partly from either of these fields. According to the practice of the courts, provisions on cartel agreements and concentrations are thus in principle applicable in parallel if the respective conditions are met (see item 3.b) below).

3. At the moment it is not intended to introduce special criteria or administrative regulations relating to joint ventures.

2. **Treatment of joint ventures under competition law**

   a) **Merger control**

4. German merger control can only be applied if the enterprises concerned have merged. The law contains several merger criteria which may be fulfilled when a joint venture is established. Under Section 37 (1) no. 3 of the ARC\(^3\) the acquisition of 25 percent or 50 percent of the shares of an enterprise constitutes a concentration for example. Under this provision, merger control is also triggered if a parent company of an existing joint venture is replaced or if it is restructured, provided the shift in participations reaches the above thresholds.

5. Section 37 (1) no. 2\(^4\) stipulates that the acquisition by one or several enterprises of direct or indirect control over another enterprise shall be deemed to constitute a concentration. This provision also covers potential influences on the management of the joint venture which are not a direct result of equity interests, such as special rights concerning representation in the organs of the company, blocking quorums or de facto possibilities of influencing the enterprise.

6. Ex-ante merger control is only triggered if concentrations reach a certain turnover threshold. The relevant threshold under Section 35 (1) of the ARC\(^5\) is reached if the combined aggregate world-wide turnover of all participating enterprises is more than DM 1 billion and the domestic turnover of at least one participating enterprises is more than DM 50 million.

7. The Bundeskartellamt has to prohibit a concentration in the form of a joint venture if it is expected to create or strengthen a dominant position. In such a case, the general provisions of merger control apply. For the purposes of merger control, joint ventures and parent companies cannot simply be combined to form a single economic unit and their respective resources added together. The respective market shares and resources can only be considered on a cumulative basis if the parent companies transfer their entire operations in the joint venture’s market to the joint venture or if they have joint control.

8. The special provisions on joint ventures are limited to two special clauses. Section 37 (1) no. 3, sentence 3 of the ARC\(^6\) contains a special criterion for joint ventures created by the acquisition of 25 percent or 50 percent of the capital shares or voting rights of another enterprise. For the purpose of
formal merger control, i.e. for calculating thresholds, a fictional horizontal (partial) merger of the parent companies is assumed under this provision, in addition to the existing vertical concentrations of the respective parent company and the joint venture. As a consequence the turnovers of both the two parent companies and the joint venture have to be added up in order to calculate the thresholds. Without this special provision individual calculations would be made whereby the turnover of each parent company would be added to the turnover of the joint venture. The law thus extends the number of proposed concentrations that are subject to control in the field of joint ventures.

9. On the other hand, in accordance with the so-called multiple parent clause under Section 36 (2) sentence 2 in conjunction with sentence 1 of the ARC, the joint venture and the two parent companies are considered to be a single economic unit if the parent companies act together in such a way that they can exercise a controlling influence on the joint venture. This is significant for assessing subsequent concentrations after the creation of the joint venture involving the joint venture itself or one of the parent companies. It means that if the joint venture participates in a concentration, the resources of both parent companies have to be considered in evaluating its market position.

b) Applicability of the ban on cartels under Section 1 of the ARC

10. For a long time the highly controversial question remained unanswered as to whether in addition to merger control, joint ventures can also be subject to Section 1 of the ARC, which prohibits anti-competitive agreements between enterprises. This question was clarified by a fundamental decision of the Federal Supreme Court in 1985 stipulating that joint ventures are to be subject to dual control under both systems. Accordingly, in a second step after evaluation under merger control the Bundeskartellamt assesses whether the joint venture creates anti-competitive horizontal effects between the parent companies within the meaning of Section 1 of the ARC. The examination focuses on the question of whether co-operation within the joint venture causes so-called group effects in the form of concerted action by the parent companies in the joint venture’s markets (direct group effect) or in third markets (indirect group effect).

11. The decision on whether the project can be classified as a full-function joint venture is a first indication of what the outcome of the examination is likely to be. According to the Bundeskartellamt’s decision-making and administrative practices the joint venture can only have purely concentrative effects without leading to co-ordinating effects between the parent companies if it is an autonomous economic unit that plans and acts independently while the parent companies focus exclusively on their financial investments. Administrative and decision-making practices thus focus on whether at least one of the parent companies withdraws from the joint venture’s market. If the joint venture basically remains at the level of simply performing supportive functions for the parent companies or if both parent companies continue to operate in the joint venture’s market, this is considered to be a clear indication that there are likely to be competition-restraining co-ordination effects between the parent companies.

12. If, on the basis of these criteria, it can be assumed that there is a restraint of competition under Section 1 of the ARC, this can initially only be authorised under the exemptions conclusively stated ins Sections 2-7 of the ARC (for example rationalisation or standardisation cartels) which do not contain any special regulations for joint ventures. This part of the Act does not in principle weigh up the pro-competitive against the anti-competitive effects of the co-operation. However, it does give certain criteria which the lawmaker considers to have a generally positive effect that compensates for the restraint of competition. Section 7 (2) of the ARC contains a more vague balancing clause which, however, is of secondary importance vis-à-vis the other criteria and therefore has not gained any practical significance so far.
13. In addition, two unwritten limitations have been developed in practice and by the practice of the courts which are of particular importance in relation to joint ventures. On the one hand, according to the consortium concept, a co-operative joint venture is not subject to the ban under Section 1 of the ARC if co-operation in the form of a joint venture is the only possibility for the parent companies to penetrate a new market or to maintain their position in a current market. If this is the case, competition will not ultimately be restrained since the joint venture is the only way for the parent companies to become potential competitors in the market concerned at all. On balance, competitive structure will be improved as a result.

14. The second limitation relates to competition-restraining clauses in company agreements which otherwise are neutral from the point of view of cartel law and that are indispensable for the viability and functioning of the co-operation project. Since such clauses constitute what are essentially subsidiary agreements, they are not subject to the ban on cartels. It should, however, be emphasised that in practice only clauses are accepted which are absolutely indispensable to the viability of the project, and that it is not sufficient if they are merely “adequately linked” to the project or if they promote positive effects of the joint venture.

c) Procedures

15. The two examination steps outlined above are not embedded in a uniform procedural framework but are subject to different regulations. Thus, the merger control decision is subject to a 4-month deadline while there is no time limit for the decision under Section 1 of the ARC unless the notification of the merger was accompanied by an explicit request for exemption from Section 1 of the ARC, which in practice is only rarely the case.

16. The Bundeskartellamt tries as far as possible to inform the enterprises of its assessment under Section 1 of the ARC at the same time as making the decision on merger control. If, at the time of notification, the facts brought forward give no grounds for an intervention under Section 1 of the ARC, the Bundeskartellamt includes a note to this effect as part of its clearance of the merger. This note does not constitute a formal authorisation but leaves open the option for the Bundeskartellamt to take up the case under Section 1 of the ARC if new developments and external conditions give rise to competitive concerns about the joint venture. Joint ventures set up to operate Internet exchanges are a case in point. The rapid developments in this market hardly allow any forecasts to be made at the moment as to whether such operations will in practice result in concerted practices among the parties involved. If concerns with regard to Section 1 of the ARC require a more thorough investigation of the project, the Bundeskartellamt clears the merger but informs the parties that an examination regarding the ban on cartels is still in progress. This does not impair the legal validity of the clearance but prevents the enterprises de facto from putting the merger into effect because of the fines for illegal concerted practices that may be imposed if the Bundeskartellamt comes to a negative decision under Section 1 of the ARC.

d) Trends

17. Since German competition law does not provide any special regulations for joint ventures, they are not recorded separately in statistics. The above-mentioned merger criterion under Section 37 (1) no. 3 sentence 3 of the ARC is the only exception, with 282 joint ventures being notified in 1999 and 102 until August 2000. What is striking about this is the high number of joint ventures notified in the energy sector in both years. This is basically due to the intensified co-operation efforts local energy suppliers made after the liberalisation of the energy markets began in 1998, which manifested itself either in co-operations with big energy suppliers or among local energy suppliers themselves. In the wholesale and retail trade sectors,
a comparatively large number of projects were notified in both years, mainly relating to co-operations in the fields of e-commerce and logistics. In the field of banking and related activities, many joint ventures were founded in 1999 and 2000 with a view to establishing venture capital companies. The large number of joint ventures in the field of legal/tax/management consultancy in 1999 mainly involved investment companies. In the field of culture, sports and entertainment, the majority of joint ventures created in 1999 concerned the production of films and TV programmes. A relatively new trend which has now reached almost all industries are joint ventures involving electronic marketplaces for B2B transactions. In this field, the Bundeskartellamt has already held many preliminary negotiations and some notifications have already been filed.

3. Cases

a) Moksel/Südfleisch

18. In the Moksel / Südfleisch case, Moksel AG, Buchloe, and Südfleisch Holding AG, Munich, intended to create a joint venture under the name Ost-Fleisch GmbH. Moksel and Südfleisch are the leading companies in the meat industry with annual turnovers of DM 3.5 billion and DM 2.8 billion respectively. Their operations included acquiring cattle and pigs for slaughter and selling beef, pork and other meat products throughout Germany. Both enterprises’ established slaughterhouses were based in the German states of Bavaria and Baden-Württemberg. Further plants were based in the new Länder where there were considerable excess slaughterhouse capacities. Moksel and Südfleisch intended to create a joint venture by Moksel taking over 2/3 and Südfleisch 1/3 of the capital shares. Both parties intended to incorporate a part of their east German slaughterhouses in the joint venture. Ost-Fleisch’s operations were to include slaughtering, trading livestock and meat as well as producing and selling meat products of all kinds throughout Germany.

19. The Bundeskartellamt prohibited the creation of the joint venture both under merger control and cartel law. The prohibition concerned the nation-wide market for selling meat products in which both Ost-Fleisch and the two parent companies would also have been active, the market for acquiring animals for slaughter in the southern new Länder, where both Ost-Fleisch and the two parent companies would also have been active, as well as the market for acquiring animals for slaughter in southern Germany where only the two parent companies would have been active.

20. From the point of view of merger control the project had to be prohibited since in the Bundeskartellamt’s view, the concentration (Section 37 (1) no. 3 sentence 3 of the ARC)6 would have led to a joint dominant position of Moksel and Südfleisch in the market for acquiring animals for slaughter in southern Germany. An indirect group effect of the parent companies was therefore likely. On the one hand, this group effect was to be expected on account of the economic significance of Ost-Fleisch for the parent companies. The sale of meat products accounted for about 50 percent of their respective aggregate group turnovers, with Ost-Fleisch contributing about 1/3 to 1/4 respectively. On the other hand, the parent companies were also expected to participate in concerted practices because this could have helped to secure their investments in Ost-Fleisch’s operations. Additional funds for rapid reinvestment could have been raised by co-ordinating a reduction in purchase prices for animals for slaughter in a co-ordinate manner in southern Germany. The indirect group effect would have resulted in a joint dominant position of Moksel and Südfleisch in the market for acquiring animals for slaughter in southern Germany (duopoly). In addition to Moksel’s and Südfleisch’s high market shares of 20 – 30 percent and 30 – 35 percent respectively, and the wide margin separating them from their next largest competitor, their superior financial power and their advantages in accessing the market through their comprehensive network of slaughterhouses pointed to a joint dominant position.
21. The Bundeskartellamt prohibited the establishment of Ostfleisch under cartel law, too. The Bundeskartellamt expected that if Moksel and Südfleisch remained active in the nation-wide market for selling meat products and in the market for acquiring animals for slaughter in the southern new Länder together with Ost-Fleisch, the three firms would not compete effectively with each other but would act rationally and avoid any competition that would be “detrimental” to all concerned. Therefore it had to be assumed that Moksel, Südfleisch and Ost-Fleisch would co-ordinate their market behaviour both in selling meat products and in acquiring animals for slaughter in the southern new Länder (direct group effect). In addition, rational business behaviour would also result in the parent companies co-ordinating their operations in acquiring animals for slaughter in southern Germany (indirect group effect). The economic significance of Ost-Fleisch and the parent companies’ compulsion to secure their investments in the joint venture supported this assumption (see above).

22. The Berlin Court of Appeal approached by the parties approved of the part of the prohibition based on cartel law as far as the expected co-ordination between Ost-Fleisch, Moksel and Südfleisch in selling meat products throughout Germany was concerned. However, the Court of Appeal reversed the part of the prohibition based on merger control law since an indirect group effect of the parent companies in acquiring animals for slaughter in southern Germany was not to be expected. According to the Court of Appeal, this group effect was unlikely because the economic significance of Ost-Fleisch was not sufficient for the parent companies and there was no actual compulsion to secure their investments made in Ost-Fleisch’s plants. Ost-Fleisch’s shares in the parent companies’ slaughterhouses were below 20 percent. The creation of the joint venture did not require additional funds since investments had already been made. The decision of the Court of Appeal is not yet final. The case is currently pending before the Federal Supreme Court.

b) Rollbeton Berlin

23. In the case of the joint venture Rollbeton Berlin, the Bundeskartellamt cleared the merger control aspects of a change in the partners of the joint venture and tolerated the cartel law aspects of the case for a limited period of time.

24. One third of Rollbeton Berlin’s shares were held by a subsidiary of the Heidelberger Zement group. TBG Nord-Beton, a subsidiary of Alsen AG, intended to acquire the remaining two thirds. The purpose of the joint venture was to produce and sell ready-mixed concrete.

25. The planned acquisition of more than 50 percent of the shares constituted a concentration according to the criteria explained above and was thus subject to merger control. The market concerned was the product market for ready-mixed concrete, which, due to the specific properties of this material, constituted a separate product market. The relevant geographic market concerned was defined by the Bundeskartellamt as covering the greater Berlin area within a 40 km radius of the city centre. The geographic market was limited because deliveries could only be made within a certain distance due to transport costs and the physical and chemical properties of the concrete (hardening). Owing to the high number of ready-mixed concrete plants in the Berlin area with largely overlapping sales territories, the Bundeskartellamt assumed a somewhat greater radius than in comparable cases in rural areas.

26. In assessing whether the concentration would result in a dominant position, the Bundeskartellamt first defined the market volume on the basis of statistical data regarding the per capita consumption of ready-mixed concrete obtained from the responsible Federal association. In assessing the future market position of the joint venture the problem arose that the parent companies concerned participated in many joint ventures with different partners in the relevant market. The ready-mixed concrete market is characterised by a dense network of affiliations since even individual ready-mixed concrete plants are
operated as joint ventures by several parent companies. The Bundeskartellamt analysed all the links existing in the market concerned and attributed the market shares of all the enterprises in which one of the parent companies held more than 50 percent to the parent companies and thus to the joint venture. This market analysis established a cumulative market share of about one quarter.

27. In its assessment the Bundeskartellamt also took account of the fact that about 27 other companies operated in the market concerned including a number of financially powerful major companies operating throughout Germany. It was estimated that the overcapacities existing in the region would promote competition. In addition, the Bundeskartellamt uncovered a quota cartel in the market concerned last year and imposed record fines on the participants, which resulted in strong competition and a dramatic drop in prices. As a result, the Bundeskartellamt concluded that on balance a dominant position would not be created and cleared the project under merger control law.

28. In its decision clearing the project under merger control, the Bundeskartellamt stated at the same time that the project was in principle violating the ban on cartels under Section 1 of the ARC. In the Bundeskartellamt’s view, the joint venture had competition-restraining effects on the relations between the parent companies since they would both remain active in the joint venture’s market either directly or through their subsidiaries. Given this constellation, the parent companies were not expected to engage in substantial competition with their joint subsidiary, Rollbeton, or with each other. Consequently, it was to be feared that competitive pressure would be eliminated or at least reduced (group effect). The Bundeskartellamt therefore threatened to prohibit the joint venture on the grounds that it violated the ban on cartels.

29. However, the participating companies convincingly announced that they would dissolve the Rollbeton joint venture by 31 December 2003 as part of their measures to reduce overcapacities. Investigations on the part of the Bundeskartellamt confirmed that there were substantial overcapacities in Berlin due to the slackening off of building activity after the boom that had taken place directly after reunification. In order not to impede necessary restructuring measures, the Bundeskartellamt agreed to tolerate the joint venture until that date. However, it made clear that an extension of this term was out of the question and that action would be taken against the joint venture immediately after the time limit had expired.

4. International co-operation

30. As far as international co-operation is concerned, there are no special provisions regarding joint ventures, either. However, it should be pointed out in this connection that there is a common form for notifying concentrations in Germany, France and Great Britain. The Covisint case can be taken as an example of how co-operation between the Bundeskartellamt and other competition authorities works in individual cases.

31. Covisint is a company developed and recently set up by the automobile producers Ford, General Motors and DaimlerChrysler with the participation of Renault/Nissan. Its purpose is to operate an electronic exchange for business-to-business (B2B) transactions in the automotive industry. In Germany, the creation of the joint venture was notified to the Bundeskartellamt under merger control law on 2 August 2000. The Bundeskartellamt subsequently sent questionnaires to the 15 major automobile suppliers and to four automobile producers in order to be able to make a competitive evaluation of the project. After receiving some replies voicing concerns about Covisint, the Bundeskartellamt initiated the main examination proceedings on 22 August 2000.
32. The FTC has been examining Covisint since June 2000 and proceedings have now reached the second request stage. Under the Hart-Scott-Rodino Act, Covisint is subject to an obligation to notify its intentions to the FTC in advance and to wait for a specified period before concluding any transactions. The project is being examined inter alia under the Antitrust Guidelines for Collaborations among Competitors. The FTC's obligation to observe confidentiality was waived in its dealings with the Bundeskartellamt. The Decision Division responsible then exchanged information with the FTC, providing it with a summary of the statements made by automobile suppliers and auto companies, without revealing their identities.

33. The FTC cleared the project on 12 September 2000 without imposing any conditions or obligations. However, it announced that it will continue to monitor Covisint in order to prevent it from being anticompetitive in its day-to-day operations.

34. The Bundeskartellamt cleared the project on 25 September 2000. In its decision the authority also reserves the right to further monitor the exchange and to check whether it has any anticompetitive effects.

35. The Covisint case clearly shows the important role international co-operation already plays in dealing with joint ventures that have cross-border effects. This role will become increasingly important as the globalisation of the economy continues.
Annex 1


36. In 1999, 282 joint ventures were notified under Section 37 (1) no. 3 sentence 3 of the ARC. These involved inter alia the following sectors:

38 Energy sector,
22 Data processing,
21 Wholesale trade,
19 Legal, tax and business consulting,
17 Traffic/ancillary business, tourism,
16 Real estate sector,
15 Culture, sports and entertainment,
14 Ready-mixed concrete,
13 Banking and associated activities,
10 Printed products,
10 Retail trade,
10 Telecommunications and
9 Waste disposal.

Until 18 August 2000, 102 joint ventures were notified under Section 37 (1) no. 3 sentence 3 of the ARC. These involved inter alia the following sectors:

14 Energy sector,
11 Banking and associated activities,
8 Chemical products,
8 Ready-mixed concrete,
7 Wholesale trade,
7 Retail trade,
5 Waste disposal and
5 Printed products.
NOTES

1. Section 1
Prohibition of Cartels
Agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.

2. Section 35
Scope of Application
(1) The provisions on the control of concentrations shall apply if, in the last business year preceding the concentration,
   1. the combined aggregate world-wide turnover of all participating undertakings was more than DM 1 000 million, and
   2. the domestic turnover of at least one participating undertaking was more than DM 50 million.
(2) Subsection (1) shall not apply:
   1. insofar as an undertaking which is not controlled within the meaning of Section 36 (2) and had a world-wide turnover of less than DM 20 million in the last business year, merges with another undertaking, or
   2. insofar as a market is concerned in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than DM 30 million in the last calendar year.
Insofar as the concentration restricts competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof, only sentence 1 no. 2 shall apply.
(3) The provisions of this Act shall not apply insofar as the Commission of the European Communities has exclusive jurisdiction pursuant to Council Regulation (EEC) no. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, as amended.

3. Section 37
Concentration
(1) A concentration shall arise in the following cases:
   3. Acquisition of shares in another undertaking if the shares, either separately or together with other shares already held by the undertaking, reach
      a) 50 percent or
      b) 25 percent of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall include also the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this shall be deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;

4. Section 37
Concentration
(1) A concentration shall arise in the following cases:
   2. acquisition of direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means
which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular through

a) ownership or the rights to use all or part of the assets of the undertaking,
b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;

5. Section 35

Scope of Application

(1) The provisions on the control of concentrations shall apply if, in the last business year preceding the concentration,

1. the combined aggregate world-wide turnover of all participating undertakings was more than DM 1 000 million, and
2. the domestic turnover of at least one participating undertaking was more than DM 50 million.

6. Section 37

Concentration

(1) A concentration shall arise in the following cases:

3. acquisition of shares in another undertaking if the shares, either separately or together with other shares already held by the undertaking, reach

a) 50 percent or
b) 25 percent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall include also the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this shall be deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;

7. Section 36

Principles for the Appraisal of Concentrations

(1) A concentration which is expected to create or strengthen a dominant position shall be prohibited by the Federal Cartel Office unless the participating undertakings prove that the concentration will also lead to improvements of the conditions of competition, and that these improvements will outweigh the disadvantages of dominance.

(2) If a participating undertaking is a controlled or controlling undertaking within the meaning of Section 17 of the Joint Stock Corporation Act [Aktiengesetz] or a group company within the meaning of Section 18 of the Joint Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. If several undertakings act together in such a way that they can jointly exercise a controlling influence on another undertaking, each of them shall be regarded as controlling.

8. Section 1

Prohibition of Cartels

Agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.
9. Section 2
Standards-and-Types Cartels,
Condition Cartels
(1) Agreements and decisions whose subject matter is merely the uniform application of standards or types
may be exempted from the prohibition under Section 1.
(2) Agreements and decisions whose subject matter is the uniform application of general terms of business,
delivery and payment, including cash discounts, may be exempted from the prohibition under Section 1
insofar as they do not relate to prices or price elements.
Section 3
Specialisation Cartels
Agreements and decisions whose subject matter is the rationalisation of economic activities through
specialisation may be exempted from the prohibition under Section 1 provided the restraint of competition
does not lead to the creation or strengthening of a dominant position.
Section 4
Cartels of Small or Medium-Sized Enterprises
(1) Agreements and decisions whose subject matter is the rationalisation of economic activities through a
form of co-operation among enterprises other than that described in Section 3 may be exempted from the
prohibition under Section 1 provided
1. competition on the market is not substantially impaired thereby, and
2. the agreement or the decision serves to improve the competitiveness of small or medium-sized
   enterprises.
(2) Section 1 shall not apply to agreements and decisions whose subject matter is the joint purchasing of
goods or the joint procurement of commercial services, but which do not, except in individual cases,
compel the participating undertakings to purchase from that source, provided the conditions in
subsection (1) nos. 1 and 2 are satisfied.
Section 5
Rationalisation Cartels
(1) Agreements and decisions which serve to rationalise economic activities may be exempted from the
prohibition under Section 1 provided they are a suitable means of substantially increasing the efficiency
or productivity of the participating undertakings in technical, commercial or organisational respects and
of thereby improving the satisfaction of demand. The rationalisation effect should be of sufficient
importance when compared with the restraint of competition connected with it. The restraint of
competition shall not result in the creation or strengthening of a dominant position.
(2) If the agreement or decision aims to achieve the rationalisation in conjunction with price agreements or
through the establishment of joint purchasing or selling organisations, an exemption from the
prohibition under Section 1 may be granted, under the conditions of subsection (1), if the rationalisation
effect cannot be achieved otherwise.
Section 6
Structural Crisis Cartels
In the event of a decline in sales due to a lasting change in demand, agreements and decisions of
undertakings engaged in production, manufacturing or processing may be exempted from the prohibition
under Section 1, provided the agreement or decision is necessary to systematically adjust capacity to
demand, and the arrangement takes into account the conditions of competition in the economic sectors
concerned.
Section 7

Other Cartels

(1) Agreements and decisions which contribute to improving the development, production, distribution, procurement, taking back or disposal of goods or services, while allowing consumers a fair share of the resulting benefit, may be exempted from the prohibition under Section 1 provided the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it, and the restraint of competition does not result in the creation or strengthening of a dominant position.

(2) Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation or in some other way, the joint purchasing of goods or the joint procurement of commercial services, or the uniform application of terms and conditions, may be exempted from the prohibition under Section 1 only pursuant to Section 2 (2) and Sections 3 to 5.

10. Section 7

Other Cartels

(2) Agreements and decisions whose subject matter is the rationalisation of economic activities through specialisation or in some other way, the joint purchasing of goods or the joint procurement of commercial services, or the uniform application of terms and conditions, may be exempted from the prohibition under Section 1 only pursuant to Section 2 (2) and Sections 3 to 5.