Question A: SMEs and competition rules – National Report: Germany

Should small and medium enterprises ("SMEs") be subject to other or specific competition rules?

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A. SMEs IN CONTEXT

1. SMEs' economic context and legal definition

There is no legal definition in German law. There is however a particular rule for SME in Sec. 3 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB"):

> ***§ 3 Cartels of Small or Medium-Sized Enterprises***
>
> *(1) Agreements between competing undertakings and decisions by associations of undertakings, whose subject matter is the rationalisation of economic activities through cooperation among enterprises, fulfil the conditions of § 2(1) if:*
> *1. competition on the market is not significantly affected thereby, and*
> *2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises.*
>
> *(2) Unless the conditions of Article 81(1) of the EC Treaty are satisfied, undertakings or associations of undertakings are – upon application – entitled to a decision pursuant to § 32c, provided they demonstrate a significant legal or economical interest in such a decision. This provision becomes ineffective on June 30th 2009.*

Sec. 3 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see above) is a legal fiction.

In Sec. 3 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see above) is a particular rule for SME`s. It is only applicable for horizontal agreements, which means only for agreements of companies being in competition with each other. The rule isn't final, so that even if an agreement isn't exempted under this rule it can still be exempted under the rule applying to every company regardless their size.

There is also in Sec. 20 para. 2 (1) and 4 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") a specific rule for larger companies dealing with SME`s.

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§ 20 Prohibition of Discrimination, Prohibition of Unfair Hindrance

(1) Dominant undertakings, associations of competing undertakings within the meaning of §§ 2, 3, and 28(1) and undertakings which set retail prices pursuant to § 28(2), or § 30(1) sentence 1, shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.

(2) Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

(3) Dominant undertakings and associations of undertakings within the meaning of paragraph 1 shall not use their market position to invite or to cause other undertakings in business activities to grant them advantages without any objective justification. Sentence 1 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.

(4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking
1. offers food within the meaning of § 2(2) of the German Food and Feed Code (Lebensmittel- und Futtermittelgesetzbuch, LFGB) below its cost price, or
2. offers other goods or commercial services not merely occasionally below its cost price, or
3. demands from small or medium-sized undertakings with which it competes on the downstream market in the distribution of goods or commercial services a price for the delivery of such goods and services which is higher than the price it itself offers on such market, unless there is, in each case, an objective justification for this. The offer of food below cost price is objectively justified if such offer is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises by a timely sale, as well as in similarly severe cases. The donation of food to charity organisations for utilisation within the scope of their responsibilities shall not constitute an unfair hindrance.

(5) If on the basis of specific facts and in the light of general experience it appears that an undertaking has used its market power within the meaning of paragraph 4, it shall be incumbent upon this undertaking to disprove the appearance and to clarify such circumstances in its field of business on which legal action may be based, which cannot be clarified by the competitor concerned or by an association referred to in § 33(2), but which can be easily clarified, and may reasonably be expected to be clarified, by the undertaking against which action is taken.
(6) Trade and industry associations or professional organisations as well as quality mark associations shall not refuse to admit an undertaking if such refusal constitutes an objectively unjustified unequal treatment and would place the undertaking at an unfair competitive disadvantage.

Whether a company is small or medium has to be defined by comparing it with other companies on the market. If the company is relativly small compared to the other market participants the specific rules apply.
Within Sec 20 para 2 it is also relevant how big the company, the small or medium one is dependent on, is.
Because of the difficulties to determine the relative size it is possible to refer to the absolute size. Therefore the thresholds for mergers in Sec. 35 of the

german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see below) can be an indication.

§ 35 Scope of Application of the Control of Concentrations

(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration:
1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and
2. the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of another undertaking concerned was more than EUR 5 million.

(2) Paragraph 1 shall not apply:
1. where an undertaking which is not dependent within the meaning of
§ 36(2) and had a worldwide turnover of less than EUR 10 million in the last business year, merges with another undertaking, or
2. as far as a market is concerned on which goods or commercial services have been offered for at least five years and which had a sales volume of less than EUR 15 million in the last calendar year. Where the concentration restricts the competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof, only sentence 1 no. 2 shall be applied.

(3) The provisions of this Act shall not apply where the Commission of the European Communities has exclusive jurisdiction pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, as amended.

In the fifth chapter of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see below) are specific rules for certain sectors of the economy. Especially Sec. 28 and 30 ARC probably concern mostly SME´s. But nonetheless the rules apply to all businesses regardless their size as long as they are acting in the particular sector. Regarding newspapers and magazines there is a further exemption in Sec. 35 para. 2 (2) of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see above).

FIFTH CHAPTER
Special Provisions for Certain Sectors of the Economy

§ 28 Agriculture

(1) § 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations of agricultural producers which concern:
1. the production or sale of agricultural products, or
2. the use of joint facilities for the storage, treatment or processing of agricultural products,
provided that they do not fix prices and do not exclude competition. Plant breeding and animal breeding undertakings as well as undertakings operating at the same level of business shall also be deemed to be agricultural producers.

(2) § 1 shall not apply to vertical resale price maintenance agreements concerning the sorting, labelling or packaging of agricultural products. 14 (3) Agricultural products shall be the products listed in Annex I to the EC Treaty as well as the goods arising from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.

§ 29 Energy Sector

An undertaking, which is a supplier of electricity or pipeline gas (public utility company) on a market in which it, either alone or together with other public utility companies, has a dominant position, is prohibited from abusing such position by
1. demanding fees or other business terms which are less favourable than those of other public utility companies or undertakings in comparable markets, unless the public utility company provides evidence that such deviation is objectively justified, whereby the reversal of the burden of demonstration and proof (Darlegungs- und Beweislast) shall only apply in proceedings before the cartel authorities, or
2. demanding fees which unreasonably exceed the costs.
Costs that would not arise to the same extent if competition existed must not be taken into consideration in determining whether an abuse within the meaning of sentence 1 exists. §§ 19 and 20 remain unaffected.

§ 30 Resale Price Maintenance for Newspapers and Magazines

(1) § 1 shall not apply to resale price maintenance by which an undertaking producing newspapers or magazines requires the purchasers of these products by legal or economic means to demand certain resale prices or to impose the same commitment upon their own customers, down to the resale to the final consumer. Newspapers and magazines shall include products 15 which reproduce or substitute newspapers or magazines and, upon assessment of all circumstances, must be considered as predominantly characteristic of publishing, as well as combined products, the main feature of which is a newspaper or magazine.

(2) Agreements of the kind defined in paragraph 1 shall be made in writing as far as they concern prices and price components. It shall suffice for the parties to sign documents referring to a price list or to price information. § 126(2) of the Civil Code [Bürgerliches Gesetzbuch] shall be inapplicable.

(3) The Bundeskartellamt [Federal Cartel Office] may, acting ex officio or upon the request of a bound purchaser, declare the resale price maintenance to be of no effect and prohibit the implementation of a new and equivalent resale price maintenance if:
1. the resale price maintenance is applied in an abusive manner, or
2. the resale price maintenance or its connection with other restraints of competition is capable of increasing the price of the bound goods, or of preventing their prices from decreasing, or of restricting their production or sales.

Companies have to assess for themselves whether the agreement in question is permitted from an antitrust point of view (system of legal exception).

There is a leaflet (“the Bundeskartellamt`s Information leaflet on cooperation possibilities for small and medium- sized enterprises – Merkblatt des Bundeskartellamts über Kooperationsmöglichkeiten für kleinere und mittlere Unternehmen”) from the Federal Cartel Office (“Bundeskartellamt”) explaining when they consider the restricted competition as minor and therefore will most unlikely pick up an antitrust procedure against the companies involved.

There is also a brochure (“cooperation and competition - Kooperation und Wettbewerb”) from the regional cartel authority of Bavaria (“Landeskartellbehörde Bayern”)

Beside those leaflets dealing especially with SME`s there is also the Notice of the Federal Cartel Office (“Bundeskartellamt”) on the Non-Prosecution of cooperation Agreements of Minor Importance (“de minimis Notice -

Bagatellbekanntmachung") explaining how the Federal Cartel Office is using its judgment in investigating the conduct especially when it doesn`t think the market is more than slightly affected and therefore most likely won`t initiate a procedure. The Notice includes market share thresholds under which the market is in its opinion not affected.

Until 2009 the companies were according to Sec. 3 para. 2, Sec. 32 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") entitled to a decision whether the conducted questioned is legal or not.

Neither the Federal Cartel Office, nor the Cartel offices of the federal states see themselves as some sort of "guardian" for SME´s. Therefore there is no influence within the valuation by the economic dimension.

1. Relevant cases

Court:

Higher Regional Court ("Oberlandesgericht") Düsseldorf, 1. Cartel Penal ("Kartellsenat"), Decision from the 20th of June 2007 (VI 14/06 (V)) – briefly explains why Sec. 3 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") is not relevant in the case.

Regional Court ("Landgericht") Hannover, 1. Chamber for commercial matters („Kammer für Handelssachen"), Decision from the 15th of June 2011 (21 O 25/11) – explains that Sec. 3 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") is most likely to be applicable if the share of the market is below 15 %.

Further decisions or resolutions are not apparent.

Federal Cartel Office:

Year	New proce-dure	No need for legal action	Discontinuation out of other reasons	Abandonment of the questioned conduct	Decision according to sec. 32 ARC (No need for legal action)	Discontinuance of the procedure according to the former law (exemption issued)
2005	4		8			
2006	4	5	3	1	1	4
2007	5	3			2	
2008	3	2		2		
2009	2	1	1	2		
2010	-					

Source: Activity reports of the Federal Cartel Office ("Bundeskartellamt")

Cartel offices of the federal states:

Year	New procedure	No need for legal action	Discontinuation out of other reasons	Abandonment of the questioned conduct	Decision according to sec. 32 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbs-beschränkungen – GWB") (No need for legal action)	Absorption of the economic advantage
2005	-					
2006	-		1			1
2007	1		1			
2008	-					
2009	1		1			
2010	-					

Source: Activity reports of the Federal Cartel Office ("Bundeskartellamt")

B. PUBLIC ANTITRUST ENFORCEMENT AND SMES

1. Substantive and procedural rules applicable to SMEs

Administrative substantive rules are all applied the same way. There are just additional particular rules such as Sec. 3 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) regarding SME`s.

There are no safe harbours. Especially Sec. 3 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) is no specific safe harbour. The companies have to asses for themselves whether the rule is permitted in their case or not.

Sec. 20 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) (see above) is a specific rule for larger companies dealing with SMEs. It contains in para. 2 (1) and 4 a particular impediment ban. While para. 2 (1) prohibits impediment and discrimination by companies with significant vertical market power, para. 4 prohibits impediments by companies with significant market power towards their competitors (horizontal). The ban is supposed to protect particular retailers from specific competition practises by major enterprises, such as low price strategy.

The rule applies for any sector. Sec. 20 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) (see above) protects retailers and competitors (see above).

Sec. 70 para. 4 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) (see below) gives the national authorities the opportunity of keeping the anonymity of the complainant in the complaint procedure against a disposal of the competition authority. This is supposed to protect companies who are afraid to lose their contracting partner if they report the conduct or giving necessary proof. Normally the NCA has to provide evidence regarding the facts of the case. Within Sec. 70 para 4 ARC it is enough if they authenticate the actual indication. Sec 70 para 4 (3) ARC is a further going special legal provision regarding the dependency of companies in the sense of Sec. 20 para 2 (1) ARC (see above). In this particular case it is not necessary to authenticate the actual dependency of the SME´s involved. Those rules do not apply within a complaints procedure regarding the main order of the national authority, which was made after the evaluation of the acquired information. They only apply within the complaint procedure against the disposal regarding information or examination within Sec. 59 para 6 and 7 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) (see below)

§ 70 Principle of Investigation

(1) The appellate court shall, acting on its own initiative, investigate the facts.

(2) The presiding judge shall endeavour to have formal defects eliminated, unclear motions explained, relevant motions made, insufficient factual information completed, and all declarations essential for ascertaining and assessing the facts made.

(3) The appellate court may direct the parties to file statements within a specified time on issues requiring clarification, to specify evidence, and to submit documents as well as other evidence in their possession. In the event of failure to observe the time limit, a decision may be made on the basis of the record regardless of evidence which has not been produced.

(4) If a request pursuant to § 59(6) or an order pursuant to § 59(7) is challenged by way of appeal, the cartel authority shall substantiate the factual aspects. § 294(1) of the Code of Civil Procedure shall be applicable. No substantiation shall be required insofar as § 20 presupposes that small or medium-sized enterprises are dependent on undertakings in such a way that sufficient or reasonable alternatives of resorting to other undertakings do not exist.

§ 59 Requests for Information

(1) To the extent necessary to perform the functions assigned to the cartel authority by this Act, the cartel authority may, until its decisions enter into binding force:
1. request from undertakings and associations of undertakings the disclosure of information regarding their economic situation, as well as the surrender of documents; this shall also include general market surveys which serve the purpose of evaluating or analysing the conditions of competition or market situation and are in the possession of the undertaking or the association of undertakings;
2. request from undertakings and associations of undertakings the disclosure of information on the economic situation of undertakings associated with them pursuant to § 36(2), as well as the surrender of documents of these undertakings, as far this information is at their disposal or as far as existing legal relations enable them to obtain the requested information about the associated undertakings;
3. inspect and examine business documents of undertakings and associations of undertakings on their premises during normal business hours.
Sentence 1 no. 1 and 3 shall apply mutatis mutandis to trade and industry associations and professional organisations with respect to their activities, by-laws, decisions, as well as the number and names of the members affected by the decisions.

(2) The owners of undertakings and their representatives, and in the case of legal persons, partnerships or associations without legal capacity the persons designated as representatives by law or statutes, shall be obliged to surrender the documents requested, make the requested disclosure of information, render the business documents available for inspection and examination, and allow the examination of these business documents as well as access to offices and business premises.

(3) Persons entrusted by the cartel authority to carry out an examination may enter the offices of undertakings and associations of undertakings. The fundamental right under Article 13 of the Basic Law [Grundgesetz] is restricted to this extent.

(4) Searches may be made only by order of the Local Court judge in whose district the search is to be made. Searches are permissible if it is to be assumed that documents are located in the relevant premises which may be inspected and/or examined, and the surrender of which may be requested, by the cartel authority pursuant to paragraph 1. The fundamental right to the inviolability of the home (Article 13(1) of the Basic Law) is restricted to this extent. §§ 306 to 310 and 311a of the Code of Criminal Procedure shall apply mutatis mutandis to appeals from such orders. If there is imminent danger, the persons referred to in

paragraph 3 may conduct the necessary search during business hours without judicial order. A record of the search and its essential results shall be prepared on the spot, showing, if no judicial order was issued, also the facts which led to the assumption that there would be imminent danger.

(5) Persons obliged to provide information may refuse to answer questions if the answers would expose them or their relatives referred to in § 383(1) no. 1 to 3 of the Code of Civil Procedure to the risk of criminal prosecution or of proceedings under the Administrative Offences Act [Gesetz über Ordnungswidrigkeiten].

(6) Requests for information made by the Federal Ministry of Economics and Technology or the supreme Land authority shall be made by written individual order, those of the Bundeskartellamt by decision. The legal basis, the subject matter and the purpose of the request shall be stated therein and an appropriate time limit shall be fixed for providing the information.

(7) Examinations shall be ordered by the Federal Ministry of Economics and Technology or the supreme Land authority by written individual order, and by the Bundeskartellamt by decision made with the consent of its President. The order or decision shall state the time, the legal basis, the subject matter and the purpose of the examination.

Sec. 54 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see below) gives the competition authority the opportunity to initiate a procedure without having to show the name of the complainant in the files. This is supposed to ease the problematic described above about companies not wanting to take the risk of losing their business partner by reporting the conduct.

§ 54 Institution of the Proceedings; Parties

(1) The cartel authority shall, acting on its own initiative or upon request, institute proceedings. If so requested, the cartel authority may, acting on its own initiative, institute proceedings for the protection of a complainant.

(2) Parties to the proceedings before the cartel authority are:
1. those who have applied for the institution of proceedings;
2. cartels, undertakings, trade and industry associations or professional organisations against which the proceedings are directed;
3. persons and associations of persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings; the interests of consumer advice centres and other consumer associations supported by public funds are substantially affected also in cases in which the decision has effects on numerous consumers and in which therefore the interests of consumers in general are substantially affected.
4. in the cases of § 37 (1) no. 1 or 3, also the seller.

(3) The Bundeskartellamt shall also be a party to proceedings before the supreme Land authorities.

Until June 2009 Sec. 3 para. 2 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") entailed a procedural help for the involved companies. They were not only able to apply for a decision of the responsible authority but also had an entitlement to such a decision if they were able to proof a legal or economic interest.

2. Fundamental rights of SMEs (as infringers and victims)

The rules described above are supposed to enable companies to report the conduct or provide evidence without having to fear that they might lose their contracting partner as soon as those partners realise who gave the information to the authorities.
Is it legal nature or size?

The local court ("Amtsgericht") Bonn has decided that in a case of files regarding the leniency programme a third party will not get access to the files. The decision is based on Sec. 406e para. 2 (2) of the german code of criminal procedure ("Strafprozessordnung") (see below), which gives the opportunity to deny access to the files in case of endangering the test purpose. The local court found that it would prevent companies from using the leniency programmes if there was any danger of third parties using the information given in those files for a claim for damages.

Section 406e [Inspection of Files]

(1) An attorney may inspect, for the aggrieved person, the files that are available to the court or the files that would be required to be submitted to it if public charges were preferred, and may inspect officially impounded pieces of evidence, if he can show a legitimate interest in this regard. In the cases referred to in Section 395, there shall be no requirement to show a legitimate interest.

(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation, also in another criminal proceeding, appears to be jeopardized. It may also be refused if the proceedings could be considerably delayed thereby, unless, in the cases designated in Section 395, the public prosecution office has noted the conclusion of the investigations in the files.

(3) Upon application and unless important reasons constitute an obstacle, the attorney may be handed the files, but not the pieces of evidence, to take to his office or private premises. The decision shall not be contestable.

(4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall give this decision. An application may be made for a decision by the court competent pursuant to Section 162, appealing against the decision made by the public prosecution office pursuant to the first sentence. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply mutatis mutandis. The court's decision shall be incontestable as long as the investigations have not yet been concluded. These decisions shall not be given with reasons if their disclosure might endanger the purpose of the investigation.

(5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsections (2) and (4) and Section 478 subsection (1), third and fourth sentences, shall apply mutatis mutandis.

(6) Section 477 subsection (5) shall apply mutatis mutandis.

There is no need to facilitate the access for SME`s only. The rule described above is not a specific one for SME`s.

3. Sanctions, Leniency, settlements and commitment decisions for SMEs

The leniency programme is about elucidating anticompetitive conducts. The fact that the company coming forward with the facts first won't be sanctioned is an appeal to do so, and therefore applies to both, SME and larger companies. There is no need to include specific rules for SME.

C. PRIVATE ANTITRUST ENFORCEMENT AND SMES

Victims of cartels can claim damages according to Sec. 33 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB"):

§ 33 Claims for Injunctions, Liability for Damages

(1) Whoever violates a provision of this Act, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement.

(2) The claims pursuant to paragraph 1 may also be asserted by associations with legal capacity for the promotion of commercial or independent professional interests, provided they have a significant number of member undertakings selling goods or services of a similar or related type on the same market, provided they are able, in particular with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests, and provided the infringement affects the interests of their members.

(3) Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to § 287 of the Code of Civil Procedure [Zivilprozessordnung] may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. §§ 288 and 289 sentence 1 of the Civil Code shall apply mutatis mutandis.

(4) Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1.

Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty.

(5) The limitation period of a claim for damages pursuant to paragraph 3 shall be suspended if proceedings are initiated by the cartel authority for infringement within the meaning of paragraph 1, or by the Commission of the European Community or the competition authority of another Member State of the European Community for infringement of Article 81 or 82 of the EC Treaty. § 204(2) of the Civil Code shall apply mutatis mutandis.

The plaintiff can be the one directly dealing with the members of the cartel or the one on downstream markets, which are affected because the victims of the cartel in the upstream market dealt with the damage by passing it on to their customers through an excessive price. There are however differences in the difficulties of the procedure.
For the victims in the immediate downstream market of the Cartel the damage is not excluded because of the resale of the good or service. The members of the Cartel have to provide evidence of it seriously coming to question that the damages the plaintiff claims were passed on by excessive price when reselling and that the plaintiff had no other disadvantages (such as a fall in demand). An ease of the burden of proof can only be thought of in a restrained way to not compromise the effectiveness of the law of cartel torts.

For the victims in any further downstream market the burden of proof is one of the plaintiff himself. They have to provide evidence about the fact that and in which amount the prices charged were significantly above the prices which would have prevailed in case of effective and undistorted competition. Especially because of the economical complexity of pricing there is no ease to the burden of proof.

For both plaintiffs it is also difficult to be able to proof the exact amount of damage the distorted competition caused. Therefore Sec. 33 para 3 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) (see above) refers to Sec. 287 code of civil procedure (“Zivilprozessordung”) (see below), which allows the judge to value the amount of damage. Besides the creditor of the claim for damages has a right of access to the information about the profits the tortfeasor had to be able to value their own amount of damages.

Section 287 Investigation and determination of damages; amount of the claim

(1) Should the issue of whether or not damages have occurred, and the amount of the damage or of the equivalent in money to be reimbursed, be in dispute among the parties, the court shall rule on this issue at its discretion and conviction, based on its evaluation of all circumstances. The court may decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be involved to prepare a report. The court may examine the party tendering evidence on the damage or the equivalent in money thereof; the stipulations of section 452 (1), first sentence, subsections (2) to (4) shall apply mutatis mutandis.

(2) In the event of pecuniary disputes, the stipulations of subsection (1), sentences 1 and 2, shall apply mutatis mutandis also to other cases, insofar as the amount of a claim is in dispute among the parties and to the extent the full and complete clarification of all

circumstances authoritative in this regard entails difficulties that are disproportionate to the significance of the disputed portion of the claim.

As regards to establish protection mechanisms in order to enhance SMEs' ability to take legal action against anticompetitive practices the problems are for all companies the same. Their size doesn't make a difference here.
Besides the party that has not prevailed in the dispute has to bear the costs of the legal dispute (see sec. 91 code of civil procedure ("Zivilprozessordnung")).

Section 91 Principle of the obligation to bear costs; scope of this obligation

(1) The party that has not prevailed in the dispute is to bear the costs of the legal dispute, in particular any costs incurred by the opponent, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action brought by others. The compensation of costs also comprises compensation of the opponent for any necessary travel or for time the opponent has lost by having been required to make an appearance at hearings; the rules Service provided by the Federal Ministry of Justice in cooperation with governing the compensation of witnesses shall apply mutatis mutandis.

(2) In all proceedings, the statutory fees and expenditures of the attorney of the prevailing party are to be compensated. However, the travel expenses of an attorney who has not established himself in the judicial district of the court hearing the case, and who does not reside at the location of the court hearing the case, shall be compensated only insofar as it was necessary to involve him in order to bring an appropriate action, or to appropriately defend against an action brought by others. The costs of retaining several attorneys shall be compensated only insofar as they do not exceed the costs of a single attorney, or insofar as personal reasons required an attorney to be replaced by another. Where an attorney represents himself, he shall be reimbursed for those fees and expenditures that he could demand as fees and expenditures had he been granted power of attorney to represent another party.

(3) The costs of the legal dispute in the sense as defined by subsections (1) and (2) also include the fees arising as a result of conciliation proceedings before a dispute-resolution entity established or recognised by a Land department of justice (Landesjustizverwaltung); this shall not apply if a period longer than one year has lapsed between the date on which the conciliation proceedings ended and the date on which proceedings were brought in the courts.

(4) The costs of the legal dispute in the sense of subsection (1) also include costs that the prevailing party has paid to the party that has not prevailed in the course of the legal dispute.

Sec. 33 para. 2 of the german act against Restraints of Competition (ARC – "Gesetz gegen Wettbewerbsbeschränkungen – GWB") (see above) allows industrial associations to bring an action before civil courts if their members are affected by the anticompetitive conduct.
At the moment there is an amendment to change the ARC in expanding that right to consumer organizations.

In Germany industrial associations are allowed to bring an action before civil courts (see above), while associations of individuals are not. The reason for including industrial associations in the right was to give someone else the opportunity to bring an action before the court when the immediate affected are not able or willing to do so.

D. CONCLUSIONS AND POLICY RECOMMENDATIONS

In the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) there is in Sec. 3 a specific rule, which allows certain conducts of SME´s. The rule does not include a legal definition of SME`s and is only applicable for horizontal agreements. The companies have to assess for themselves whether the conduct in question is permitted. To ease that decision there are a few leaflets explaining when the national authorities believe the rule to be applicable.

To define if the company involved is in fact a small or medium business it has to be compared to other business on the same market. The thresholds for mergers in Sec. 35 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) can be used as an indication.

Sec. 20 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) entails a specific rule for larger companies dealing with SME`s. Within this section not only the size of the SME has to be determined relatively to the market, but also the size of the larger company.

It seems, that because of the system of legal exception there are not many relevant cases before the national authorities or the courts related to SME`s.
Under the procedural point of view there are specific rules (Sec. 54, 70 para 4 of the german act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”)) trying to ease the problematic of especially smaller companies being afraid to lose their contracting partner if they report a possible anticompetitive conduct or give necessary proof to the authorities. It is therefore possible to keep the company, providing the information, anonymous.

Problems regarding the claiming of damages are for all the companies the same. Therefore the rules regarding providing proof apply to SME and larger companies.

In Germany industrial associations are allowed to bring an action before civil courts, while associations of individuals are not. At the moment there is an amendment to change the ARC in expanding those rights to consumer organisations.