

13th EU-China Competition Week

Horizontal co-operation
agreements/syndicates
– cartels in disguise?

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Syndicates

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- I. Introduction
- II. Legal framework
- III. Case examples

Syndicates

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I. Introduction:

- brief excursion into German history:
 - in the 19th century: competing companies had a common distribution & sales office
 - developed over time into open cartels with a centralized distribution office (joint sales syndicates, procurement cartels)
 - joint decision on output, joint quality standards, joint prices, joint conditions for sale)
 - complex structures (many committees, organs, internal courts of arbitration)

Syndicates

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- around 1900: 400 different cartels with about 1.200 companies
- government legalized cartels by law (freedom to cartelize)
- government subjected syndicates to government control
- syndicates became fairly rich
 - syndicates became part of the state-infra-structure
 - syndicates were an important part in the war-strategy of the government (coal industry, steel industry)

Syndicates

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- after 1945:
Allies prohibited syndicates and cartels
existing syndicates and cartels were dissolved
- after German independence:
ban on cartels part of the first German Competition Law
- various changes since:
 - exemptions were abolished
 - adaption to EU law

Syndicates

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- pro's:
 - joint sales & distribution office can created efficiencies
 - may create stable business units
 - cost of transport can be optimized (no cross selling expenses)
 - more evenly capacity utilization possible

Syndicates

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- con's:
 - higher prices for consumers
 - no incentive for innovation
 - loss of quality
 - no individual marketing & sales activity/risk adverse
 - individual companies lose direct contact to customer
 - strong syndicates create strong syndicates , leads to overall higher market concentration

Syndicates

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- balance of pro's and con's depends i. a. on:
 - availability of substitutes /outside-options
 - barriers to market entry
 - legal framework

Syndicates

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II. Legal framework

- no syndicates in existence to date
- general ban on cartels
- exception under three conditions which have to be met jointly:
 - competition restraint must be indispensable to achieve efficiencies (optimizing production/distribution of goods, promote technical or economic progress)
 - consumer must benefit from efficiencies
 - no opportunity is created to eliminate competition for a significant part of the market

Syndicates

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II. Legal framework

- special exception for cartels formed by small and medium sized enterprises:
 - no substantial impairment of competition
 - competitiveness of small and medium sized enterprises will be enhanced through cartel

Syndicates

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II. Special exemptions by business category

- agricultural sector:
 - exemption from general ban on cartels for producer organizations/organizations of producer organizations for
 - agreements on production (output restraints)
 - sales and distribution agreements
 - joint use of infrastructure
 - if there is no resale price maintenance and competition is not excluded
 - quasi-Syndicate structure

Syndicates

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III. Case law

- agricultural sector/milk:
 - milk prices paid to producers went down considerably in Germany in 2007/08 for various reasons
 - an industry association of producers applied for an exemption from the general ban of cartels to get a guaranteed minimum price for milk
 - could not be exempted from law because the guaranteed minimum price constituted a horizontal price cartel

Syndicates

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III. Case law

- agricultural sector/milk:
 - agricultural sector exemption not applicable (no producer organization)
 - general ban on cartel applicable
 - exemption under general cartel law?
 - no efficiencies, no optimization of production or distribution and no efficiencies passed on to the consumer

Syndicates

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- agricultural sector/milk:
 - subsequent establishment of a producers organization “Milk Board” as economic counterpart to industry association of producers
 - sole purpose: to get a guaranteed minimum price for milk
 - is exempted from competition law as long as producers either are only members of this organization or – if they are members in another organization as well – do not demand a guaranteed minimum price in other organizations
otherwise competition could be completely excluded for the market “selling of raw milk to dairies”
 - European Competition law must be respected

Syndicates

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- agricultural sector/milk:
 - economic consequences:
 - even if producers could (legally) establish a guaranteed minimum price for raw milk sold to dairies:
 - dairies compete for raw milk
 - Germany is in the middle of Europe with open boundaries, milk would come from France, Belgium, Netherlands, Poland, the Czech Republic, Austria
 - dairies will buy cheap milk, because they compete against one another and much milk goes to retail shops with a high degree of market power

Horizontal Co-operation Agreements

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- cooperation between several saving banks to develop and market an app for opening a bank account via mobile phone:
 - 8 regional saving banks (small ones and bigger ones) joint forces to develop and market the app
 - the app will enable customers to select a bank offering such an account from all saving banks participating in the scheme
 - service includes all basic functions of a current account
 - this basic service is free of charge
 - participating banks will set individual conditions for any further service requested by customers

Horizontal Co-operation Agreements

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- system is open for other saving banks
- reaction to recent market developments (N26)
- questions to be answered:
 - (1) do we have an infringement of the general ban to cartels?

are the banks competitors with regard to the service in question?

banks have a regional focus for their offline-business
does it make a difference that bigger banks participate
does it make a difference that N 26 can offer the product without cooperation?

Horizontal Co-operation Agreements

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(1) do we have an infringement of the general ban to cartels?

Is the agreement of a "0"-price a price cartel

in principal: yes

but: N 26 offers the service free of charge

even without an agreement: will an individual saving bank be able to demand a price for the basic product above "0"?

Horizontal Co-operation Agreements

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(2) are there any efficiencies which justify the cooperation?

efficiencies with regard to R&D costs

efficiencies with regard to market introduction

joint risk sharing

(3) is the agreement necessary to reach those efficiencies?

(4) will consumers participate in the efficiency gains?

Syndicates/horizontal co-operation agreements

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thank you very much
for your attention



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