

Annex 1 - SME definition

1. **Page title:** Please insert the full Article reference (e.g. "Art. 1(4) a)") and a short title (e.g. "Deggendorf principle")
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Article	<i>Annex 1 - SME definition</i>
Key words	<i>Natural person - same relevant and adjacent markets</i>
Member State	<i>SK</i>
Question	<p>We received your answer to our question asked on 2019.02.04 regarding assessing of economic activity of natural person (the question with keywords "<i>Reg. 1407/2013, Article 2 par. 2</i> - single undertaking - acitivity/inactivity of the undertaking"). Basically, your answer states that any natural person who owns and actively manages (directly or indirectly by appointing the management) any company should be considered as the undertaking itself. Applying this logic to the SME definition renders the provisions about the same relevant and adjacent markets practically inapplicable and redundant.</p> <p>In situation where natural person constitutes one of the following relations, member state should take into consideration, if undertakings in question are engaged in the same relevant or adjacent markets:</p> <ul style="list-style-type: none"> • an enterprise has a majority of the shareholders' or members' voting rights in another enterprise; • an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise; • an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association; • an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise. <p>In our opinion, all of these relations inevitably constitutes direct or indirect control over an enterprise, thus constitutes economic activity (in spite of aforementioned answer), thus renders involved natural person an undertaking, thus provisions about linkage through natural person should not apply. It is worth noting that in legal framework of Slovak Republic, situations when major shareholder is not involved in management or does not appoint management of a company are very rare (mainly because to appoint a management, votes of majority of shareholders are required).</p> <p>Can you please explain, in which situations should we apply the provisions about the same relevant and adjacent markets? Are those the situations, when such control is conceived by group of natural persons, where no one owns major shares, but together, they have a decisive vote? Or is this situation same as one, where there is only one major shareholder (who also manages the company)?</p>

	<p>How to assess situation, when only one of the owners actually actively manages the company?</p> <p>For example, companies A and B are owned by natural persons 1 and 2. Each natural persons has 50 % share in each company. Natural person 1 manages company A, natural person 2 manages company B. Are those companies single undertaking? Are those companies linked?</p> <p>What about situation, when owner and manager are two separate persons?</p> <p>For example, company A is owned by natural person 1. This company is managed by natural person 2. Natural person 2 also manages company B (with no shares in it) and owns and manages company C. Which of these companies should be considered in creation of single undertaking? Which of them are linked?</p>
Creation Date	2019.05.02
COMP Reply	<p>It should first be clarified that the answer provided on 24.4.2019 referred to in your question concerned the de minimis Regulation, under which a link between different enterprises cannot be established via natural persons (in contrast to the SME definition). This is why this answer explains under what circumstances the jurisprudence by the Union Courts requires that a natural person holding shares in an undertaking has to be considered an undertaking itself.</p> <p>More specifically, the jurisprudence of the Union Courts (see C-222/04 <i>Cassa di Risparmio di Firenze</i>, in particular paras.111-112) clarified under what circumstances an entity (which includes natural persons) owning shares in a company is to be regarded as carrying out an economic activity itself, and thus itself constituting an undertaking. The mere fact that such an entity owns shares, even if it owns a controlling shareholding, is not enough to be considered an economic activity itself. However, if the entity actually exercises control by involving itself directly or indirectly in the management of the company, it must be regarded as taking part in the economic activity carried out by the controlled undertaking. Under such circumstances a natural person needs to be considered an undertaking itself and can, therefore, establish a link between other undertakings regardless of whether these are active on adjacent markets or not.</p>

	<p>As regards the SME definition (and Annex I of the GBER) a link between different enterprises can also be established by natural persons, if the enterprises engage in their activity or in part of their activity in the same relevant market or in adjacent markets. Contrary to the views expressed in your question, this provision is not rendered meaningless by the jurisprudence summarized above. As explained above, if a natural person owns shares (even the majority of shares) in a company, but is not directly or indirectly involved in the management of that company, this natural person is not considered an undertaking. As such, it can only establish a link between different enterprises if one of the relationships enumerated in Article 3(3) (a)-(d) are present and the enterprises engage in their activity or in part of their activity in the same relevant market or in adjacent markets.</p> <p>As to the concrete examples in your question, the information provided does not enable us to provide a definitive answer.</p> <p>In your first example it is not clear whether natural persons 1 and 2 are acting jointly or not. It is also not clear whether companies A and B are active on the same or adjacent markets. It is also not clear whether there are contractual provisions in place clarifying how decisions are to be taken in case of disagreement between person 1 and 2 (since both own 50% of the shares, decisions could only be taken if both agree, unless there is a contractual agreement regulating who has the final say in situations of disagreement). As such it is not clear whether either of the two persons actually controls either of the two companies. However, if persons 1 and 2 are acting jointly and company A and B are active on the same or adjacent markets, these would have to be considered as linked enterprises.</p> <p>In your second example it seems that, if at all, a link between companies A, B and C could only be established through person 2, as person 1 seems not at all to be involved with companies B and C. However, it seems that person 2 is simply managing company A and B, which in itself would not establish any of the relationships listed in Article 3(3)(a)-(d). As such, and if this understanding is correct, companies A, B and C seem not to be linked.</p> <p><i>Disclaimer: This reply does not represent a formal and definite position of the European Commission but is only an informal guidance provided by the services of DG Competition to facilitate the application of the GBER. It is therefore not binding and cannot create legal certainty or legitimate expectations.</i></p>
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