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SME definition not purely formal

The ECJ has held that if two businesses are linked through personal or other non-contractual relationships and act in concert neither will qualify for SME privileges, even if it meets the formal criteria in isolation and the arrangements in question are not intended as an abuse of SME rules.

An SME (small or medium-sized enterprise) placed its entire marketing and many of its technical and managerial functions in the hands of another. The same two individuals were joint managing directors of both companies. The first company was owned by three shareholders, the two managing directors and – as the majority shareholder – the wife of the first. The second company was held in equal shares by that same managing director and his mother. The first company claimed an East German investment grant (no longer available in 2014) at the higher level available to SMEs. The tax office only allowed the lower benefit available to larger companies on the grounds that the two businesses effectively acted as a single unit and should be treated as one, even though they were not formally joined by shareholding or contract. The dispute came before the ECJ because the investment grant rules refer to the EU SME definition.

The ECJ has now held that a business should only be entitled to SME privileges if it remained an SME after taking all other businesses with which it regularly acted in concert into account. Acting in concert was not just a matter of shareholdings or contract; it was a question of fact and could stem from family or other ties. The court pointed out that most SME privileges were exemptions from more onerous requirements on business as a whole and definitions should therefore be followed strictly. However the court also said that although acting in concert was not necessarily dependent upon a contract, a deliberate intent to abuse the SME rules did not of itself suffice for the denial of SME privileges.

The ECJ case reference is C-110/13 *HaTeFo* judgment of February 27, 2014.

Keywords

East Germany, Small and Medium Enterprises (SME), investment grant