THE REVIEW OF THE DE MINIMIS NOTICE

Maria Gaia Pazzi

Keywords: European Commission, The Minimis Notice, Agreement of Minor Importance by Object Restriction, Expedia Case, Block Exemption Regulations

1. INTRODUCTION

On 25 June 2014, the European Commission (the Commission) adopted the new Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice). The main reasons for the revised regime are, on the one hand, the need for a technical update of the De Minimis Notice due to prior revisions of other competition law instruments (in particular, the 2010 revisions of the Vertical and Horizontal Block Exemption Regulations) and, on the other hand, the judgment of the Court of Justice (the Court) in the Expedia case of 13 December 2012. In this preliminary ruling, the Court held that the concept of a non-appreciable impact on competition (de minimis) does not apply when the agreement in question contains a so-called “by object” restriction – which is a severe restriction presumed to be anti-competitive as such. In the new text of the Notice, therefore, the Commission considers the safe-harbour thresholds only applicable to agreements that are anti-competitive “by effect”.

The Notice is particularly significant considering that minor agreements typically fall within the competence of national competition authorities and courts rather than the Commission: although not

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* Italian Competition Authority.

1 C(2014) 4136 final.


3 Judgment of the Court (Second Chamber) of 13 December 2012, in Case C-226/11, Expedia Inc. v Autorité de la concurrence and Others, not yet published.
binding on them, the De Minimis Notice is “intended to give guidance to Member States” in their application of Article 101 of the Treaty.

The following paragraphs summarise the main changes in the revised Notice (par. 2) and briefly describe the accompanying Staff Working Document, which expressly lists the restrictions usually considered by the Commission as being “by object” (par. 3). A few brief conclusions are then added to comment upon the revised text of the Notice (par. 4).

2. **THE NEW DE MINIMIS NOTICE**

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between companies which have as their object or effect to restrict competition within the Single Market. European case law, however, has clarified that Article 101 TFEU is not applicable where the impact of an agreement on competition is not appreciable and, in line with this jurisprudence, the Commission has set out in the De Minimis Notice market-share thresholds which help to define when agreements have no appreciable effect on competition and thus fall outside the scope of Article 101 TFEU. In addition to the thresholds, in order to benefit from safe harbour the agreements shall not contain so-called “hardcore restrictions” of competition (e.g. price fixing and market allocation).

The new Notice confirms a “safe-harbour” threshold for minor agreements between companies of below 10% for agreements between actual or potential competitors and below 15% of market share for agreements between non-competitors (e.g. distribution agreements); if in a relevant market competition is restricted by the cumulative effect of agreements entered into by different suppliers or distributors, the market share threshold is reduced to 5%, both for agreements between competitors and for agreements between non-competitors (points 8-10 of the 2014 Notice).

However, the scope of application of the De Minimis Notice has been amended in line with the jurisprudence of the Court (infra): in particular, to benefit from safe harbour the agreements must not only fall within the mentioned market-share thresholds, but also must not have an anti-competitive “object” (points 2-3).

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4 See Case C-226/11 Expedia, paragraph 31.
5 See the De Minimis Notice, point 5.
6 Commission Staff Working Document, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, accompanying the Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), C(2014) 4136 final.
In the Expedia case, in fact, the French Cour de Cassation considered that it was not established that the Commission would bring proceedings against an anti-competitive agreement containing a “by object restriction” (such as the partnership between SNCF and Expedia), where the market shares concerned do not exceed the thresholds specified in the De Minimis Notice. In its ruling, the Court noted that “such a restriction must be assessed by reference to the actual circumstances of such an agreement […], the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part […], the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question […]”. The Court, moreover, emphasized that “the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”. Finally, it clarified that “an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition”.

The new Notice, therefore, is based on the assumption that anti-competitive agreements “by object” cannot be considered as “minor”, because they have by definition an appreciable impact on competition and, as a consequence, cannot benefit from any safe harbour. Unlike the 2001 De Minimis Notice, which listed specific “hardcore” restrictions that did not benefit from safe harbours, the 2014 Notice more generally states that the Commission will not apply safe harbours to agreements containing any restriction “by object” or any of the restrictions that are listed as “hardcore” restrictions in current or future block exemption regulations (point 13). This achieves a second – and more
technical – objective of the revision, which is to make sure that the new De Minimis Notice will not need to be updated every time another competition law regulation is repealed, amended or introduced.

Furthermore, the new Notice no longer indicates what constitutes an “appreciable effect on trade” between Member States, but merely refers back to the Commission’s Notice on effect on trade adopted in 2004. Indeed, the revised Notice clarifies that agreements which contain a restriction “by object” may still fall outside the scope of Article 101 TFEU on the grounds that they have no effect on trade, as agreements between parties with an aggregate market share equal to or below 5% and an annual turnover equal to or below €40 million are normally excluded from the scope of EU competition law (point 4).

3. **THE GUIDANCE PAPER ON “BY OBJECT RESTRICTIONS”**

As already mentioned, the Commission has also issued a Staff Working document accompanying the De Minimis Notice, which specifies what constitutes a restriction of competition “by object”.

The Guidance paper is intended to be a “living” document, i.e. a non-exhaustive list of “by object restrictions” to be regularly updated by DG Competition, with a view to assisting undertakings (especially SMEs) and practitioners in evaluating whether or not an agreement falls within the scope of the De Minimis Notice.

With regard to the concept of “restriction of competition by object”, the Commission notes that restrictions labelled as “hardcore” in existing or future block exemption regulations “generally” also constitute restrictions “by object”. Indeed, these are restrictions “which in the light of the objectives pursued by the Union competition rules have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) of the Treaty to demonstrate any actual or likely anti-competitive effects on the market” and “[i]this is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU Competition rules” (p. 3).

A list of types of restrictions that have already been considered “by object” restrictions by EU courts or by the Commission in individual cases, or as hardcore/by object restrictions in existing block exemption regulations and Commission guidelines, is thus provided. “By object” restrictions between competitors (horizontal agreements) include agreements to fix prices, limit production and share markets or customers; those between non-competitors (vertical agreements) include practices such as resale price maintenance (RPM) and the restrictions that limit sales to specific territories or categories of customers. In addition to this “negative” definition, for each type of restriction the Commission also explicates which restriction can benefit from the De Minimis Notice (e.g. in the context of joint

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16 See also the De Minimis Notice, par. 13.
purchasing agreements, purchasing price-fixing arrangements which relate to the products subject to the supply contract)\textsuperscript{17}.

In this respect, however, the Commission clarifies that the Guidance Paper is without prejudice to developments in case law and in the Commission’s decision making practices – i.e. it does not prevent the Commission from finding “new” restrictions of competition by object which are not yet identified as such in the paper (p. 5).

On their part, undertakings are not precluded from demonstrating that the conditions set out in Article 101(3) of the Treaty are satisfied, although “practice shows that restrictions by object are unlikely to fulfil the four conditions set out in Article 101(3)” (p. 4). Furthermore, the Commission recognises that, in exceptional cases, such restrictions may fall outside the scope of Article 101(1) of the Treaty, because they are “objectively necessary for the existence of an agreement of a particular type or nature or for the protection of a legitimate goal, such as health and safety” (p. 4).

4. Conclusion

Unlike the 2001 De Minimis Notice, which excluded from its scope only some “hardcore” restrictions, safe harbour in the 2014 Notice excludes more generally all restrictions “by object” and only covers “agreements which may have as their effect the prevention, restriction or distortion of competition within the internal market” (point 3).

However, it is clear from the explanations of the Guidance Paper on what constitutes a restriction of competition “by object” that such restrictions may still fall outside the prohibition of Art. 101(1) TFEU, either because the agreement fulfils the conditions for an individual exemption under Art. 101(3) TFEU or because, in specific – though exceptional – circumstances, the restrictions are objectively necessary to attain a legitimate goal (other than competition) or to implement a particular agreement. Thus, price fixing, output limitation and market sharing “may not constitute restrictions ‘by object’ where they are part of a wider cooperation agreement between two competitors in the context of which the parties combine complementary skills or assets”\textsuperscript{18}.

\textsuperscript{17} See point 206 of the Horizontal Guidelines.

\textsuperscript{18} See Staff Working Document, p. 3.