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# Agreements of minor importance can be investigated and prohibited in france

## Asked to issue a preliminary ruling on the scope of application of the so-called *de minimis* Notice of the European Commission, the Court of Justice of the European Union ("CJEU") has recently held that a national competition authority could apply Article 81(1) of the Treaty establishing the European Community ("TEC") to an agreement that does not reach the market share thresholds specified by the Commission, provided that it constitutes an appreciable restriction of competition.

### 1. The EU legislation on anti-competitive agreements and the *de minimis* Notice of the European Commission

Pursuant to Article 81(1) TEC (now Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU")), all agreements between companies, decisions by associations of companies and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited.

Yet, according to an established case-law, an agreement falls outside the prohibition if it has only an insignificant effect on the market[1].

In 2001, the European Commission published a notice "*on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community*" (the so-called *de minimis* Notice)[2].

In this Notice, the European Commission explains that the Court of Justice has considered that the provisions

of Article 81(1) TEC are not applicable where the impact of the relevant agreement on intra-European Union trade or competition is not appreciable.

The European Commission defines, with the help of market share thresholds, what is not considered as an appreciable restriction of competition under Article 81 TCE.

As such, the safe harbor established by the *de minimis* Notice applies to agreements between actual or potential competitors (i.e. horizontal agreements) insofar as their aggregate market share does not exceed 10%. For agreements between non-competitors (i.e. vertical agreements), the market share held by each of the parties should not exceed 15%. Lastly, for markets where there is a cumulative effect of parallel networks of similar agreements, these market share thresholds are reduced to 5%.

The European Commission has specified that this negative definition of appreciability does not necessarily imply that agreements between companies which exceed the thresholds set out in the *de minimis* Notice appreciably restrict competition.

It has also pointed out that, although not binding on them, the *de minimis* Notice was intended to provide guidance to the courts and authorities of the Member States in their application of Article 81 TEC.

## 2. Reminder of the French legislation governing anti-competitive agreements/practices

Article L. 420-1 of the French Commercial Code prohibits concerted actions, agreements, express or tacit understandings or coalitions which have as their object or effect the prevention, restriction or distortion of competition in a market.

In addition, pursuant to Article L. 464-6-1 of the same Code, the French Competition Authority may also decide not to pursue investigations when the practices referred to in the above Article L. 420-1 do not exceed certain thresholds, corresponding to those set out in the *de minimis* Notice. Yet, this exemption does not apply if such practices constitute one of the hardcore restrictions enumerated in Article L. 464-6-2 of the same Code[3].

## 3. Combined implementation of national and EU competition rules by Member States' competition authorities and national courts

Pursuant to Article 3 of Council Regulation (EC) No 1/2003 of December 16 2002, where the competition authorities of the Member States and/or national courts apply national competition law to anti-competitive agreements which may affect trade between Member States, within the meaning of Article 81(1) TEC, they must also apply this Article to such agreements.

In addition, the competition authorities of the Member States and/or national courts cannot apply national competition law and prohibit agreements/practices if such agreements/practices do not restrict competition in the European market within the meaning of Article 81(1) TCE.

## 4. The dispute in the main proceedings and the question referred to the CJEU for a preliminary ruling

SNCF, the French national state-owned railway company, and Expedia, a US leading online travel company, created a joint subsidiary called *Agence de voyages SNCF.com* ("Agence VSC").

By decision dated February 5, 2009, the French Competition Authority held that the partnership between SNCF and Expedia constituted a cartel that infringed Article 81 TEC and Article L. 420-1 of the French Commercial Code, the object and effect of which was to promote the joint subsidiary on the market for travel agency services provided for leisure travel, to the detriment of competitors. It imposed financial penalties on both Expedia and SNCF.

The French Competition Authority found, inter alia, that Expedia and SNCF were competitors in the market for on-line leisure travel agency services, that their market shares exceeded 10% and that, consequently, the *de minimis* rule, as set out in the European Commission's *de minimis* Notice and in Article L. 464-2-1 of the French Commercial Code, was not applicable.

Examining the appeal lodged by Expedia against the judgment of the Paris Court of Appeals that had upheld the decision of the French Competition Authority, the *Cour de cassation* (French Supreme Court) stressed that while it was undisputed that the agreement at issue had an anti-competitive object, it was not established that the European Commission would bring proceedings in relation to such an agreement where the concerned market shares did not exceed the thresholds specified in the *de minimis* Notice.

The *Cour de Cassation* considered that there existed an uncertainty as to whether the market share thresholds established by the Notice constituted an irrebuttable presumption of there being no appreciable effect on competition.

In these circumstances, the *Cour de Cassation* decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling:

*"Must Article 101(1) TFEU and Article 3(2) of Regulation (EC) No 1/2003 be interpreted as precluding the commencement of proceedings and the imposition of penalties by a national competition authority, on the grounds of both Article 101(1) TFEU and the national competition law, in respect of agreements, decisions of associations of companies or concerted practices that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its [de minimis] Notice*?"

## 5. The ruling of the CJEU

In the decision[4] commented herein, the CJEU underlined that:

- The *de minimis* Notice, as indicated therein, aims at exposing, for informational purposes, the manner in which the European Commission, acting as the competition authority of the European Union, will itself

apply Article 81 TEC (101 TFEU) but is not intended to bind the courts and authorities of the Member States;

- Consequently, in order to determine whether or not a restriction of competition is appreciable, the competition authority of a Member State may take into account the thresholds set out in the *de minimis* Notice but is not required to do so;
- Any assessment of the facts in the main proceedings falls within the responsibility of the national court[5];
- According to a settled case-law, for the purpose of applying Article 81 TEC, there is no need to take into account the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition[6];
- Consequently, it must be held 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.

Based on these findings, the CJEU ruled that Article 81 TEC and Article 3(2) of Council Regulation (EC) No 1/2003 must be interpreted as not precluding a national competition authority from applying Article 81 TEC to an agreement between companies that may affect trade between Member States but that does not reach the thresholds specified by the European Commission in its *de minimis* Notice, provided that the agreement in question constitutes an appreciable restriction of competition within the meaning of that provision.

This decision creates a legal uncertainty for companies as they can no longer consider that they will be immune from investigations by national competition authorities and courts when their market shares are below the thresholds determined by the European Commission and when their agreement does not contain any of the exhaustively enumerated hardcore restrictions.

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[1]Cf. for examples, judgment dated July 9, 1969, Völk, 5/69, Rec. P. 295, #7, and judgment dated May 28, 1998, Deere/Commission, C-7/95 P, Rec. P. I-3111, # 77

[2] Official Journal C 368 of December 12, 2001

[3] Pursuant to Article L. 464-6-2 of the French commercial code, shall be considered as hardcore restrictions:

"a) *Restrictions that directly or indirectly, in isolation or in combination with other factors that the parties can influence, have as their object the fixing of prices, the limitation of production or sales, market sharing or client sharing.*

*b) Restrictions on passive sales made by a distributor to end users outside of its contractual territory.*

*c) Restrictions on sales by members of a selective distribution system who operate as retailers on the market, irrespective of the possibility of prohibiting a member of the system from operating out of an unauthorized place of establishment.*

*d) Restrictions on cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade.*"

[4] Judgment dated December 13, 2012, C-226/11, Expédia v. Autorité de la concurrence and others.

[5] Cf. judgment dated September 8, 2010, Winner Wetten, C-409/06, Rec. p. I-8015, #49 and related case-law.

[6] Cf. judgment dated July 13, 1966, Consten and Grundig v. Commission, 56/64 and 58/64, Rec. p. 429, judgment dated December 8, 2011, KME Germany and others v. Commission, C-272/09 P, not yet published in the Report of Cases, #65, and KME Germany and others v. Commission, C-389/10 P, not yet published in the Report of Cases, #75.