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I. INTRODUCTION

A recent court decision has significantly narrowed the application of the *de minimis* principle under EU competition rules.

In late 2012, the Court of Justice of the European Union ("CJEU") considered whether national competition authorities ("NCAs") of EU Member States are required to follow the European Commission's *de minimis* rule. This principle is contained in guidance adopted by the Commission in 2001, formally called the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1)[2] of the TFEU (the "2001 Notice").

In a preliminary ruling on a reference from the French *Cour de Cassation*, the CJEU examined whether an NCA may condemn companies whose market shares fall below the thresholds set out in the 2001 Notice. The issue arose from a decision of the French *Autorité de la concurrence* to fine both the on-line travel agent, Expedia, and the French State-owned railway company, SNCF, regarding an agreement that undermines competition in the market for the sale of leisure travel services.

II. APPLICATION OF ARTICLE 101

Article 101(1) of the TFEU prohibits arrangements between undertakings and concerted practices which could affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition. Similarly, Article L. 420-1 of the French *Code de Commerce* (or Commercial Code) prohibits anticompetitive arrangements between undertakings that affect trade in France.

The CJEU has, however, consistently recognized that Article 101(1) is not applicable if the agreement only has an insignificant effect on the relevant market. In order to increase legal certainty, the Commission published the latest version of its *de minimis* guidelines over a decade ago. The 2001 Notice quantifies, by reference to market-share thresholds, what is not an appreciable restriction of competition under Article 101. For example, the Commission commits not to investigate agreements between competitors with an aggregate market share of over 10 percent.

Accordingly, the Commission will not, in such circumstances, impose fines provided the relevant arrangement does not contain any hard-core restrictions such as price-fixing or market-sharing. Similarly, Article L. 464-6-1 of the Commercial Code provides the *Autorité de la concurrence* may decide that there are no grounds to investigate where the cumulative market share of the parties does not exceed the thresholds set out in the 2001 Notice. Importantly, the 2001 Notice is purely intended to give guidance to both NCAs and national courts.

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[2] *Available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1222%2803%29:EN:NOT.

III. JOINT VENTURE BETWEEN EXPEDIA AND THE SNCF

Expedia entered into various agreements with the SNCF to develop the sale of train tickets and travel over the internet. A joint venture was created and Expedia was given preferential access, over other travel agencies, to an SNCF website. Following complaints by rival travel agencies, the *Autorité de la concurrence* found that the 2001 Notice did not apply since the relevant market-share threshold was exceeded. It thus found that the agreements between Expedia and SNCF distorted competition within the meaning of Article 101 TFEU and the Commercial Code. Expedia and SNCF were subsequently fined EUR 500,000 and EUR 5 million, respectively.

Expedia sought to overturn the *Autorité de la concurrence's* decision before the Paris *Cour d'Appel* arguing that the regulator had over-estimated the parties' aggregate market share and thus the agreements with SNCF should benefit from the safe-harbor provision contained in the 2001 Notice. The Cour d'Appel did not address this argument directly but, instead, dismissed the appeal finding that the *Autorité de la concurrence* may decide to investigate arrangements between undertakings that do not reach the market-share thresholds contained both in the 2001 Notice and the Commercial Code.

Expedia then appealed to the *Cour de Cassation* who stayed the proceedings pending the outcome of its request for a preliminary ruling from the CJEU. The question referred was whether an NCA may condemn practices that do not reach the market-share thresholds set out in the 2001 Notice. The CJEU first examined whether or not NCAs must abide by the 2001 Notice. Secondly, the CJEU examined the application of the 2001 Notice to object infringements of Article 101.

IV. IS THE 2001 NOTICE BINDING ON NCAS?

The CJEU noted that the 2001 Notice was only ever intended to be used as a guide, and that it is up to an NCA to decide whether to follow it in examining the existence of a potential restriction of competition. The Court found that NCAs may analyze many other different factors such as the actual circumstances of the agreement or the nature of the goods/services, and not merely the market-share thresholds set out in the 2001 Notice.

The CJEU found several sources of support for its reasoning. For example, the Court stated that, unlike other Commission guidelines on competition enforcement, the 2001 Notice does not contain any declarations from NCAs agreeing to comply with it. Moreover, the 2001 Notice appeared in the 'C' series of the EU's Official Journal which publishes information and recommendations, not legally binding measures which are printed in the 'L' series. Finally, the 2001 Notice is intended to be binding on the Commission but is merely a source of guidance for NCAs and national courts. Accordingly, the CJEU ruled that the 2001 Notice is not binding on NCAs

V. OBJECT BREACHES

In line with settled case law, the CJEU found that where an agreement between undertakings has an anticompetitive object, there is no need, for the purposes of applying Article 101, to examine its actual effects. In order to determine whether an arrangement constitutes an object breach of Article 101, it is sufficient that this has the capability of having a negative impact

on competition. The CJEU again emphasized that certain forms of collusion between undertakings can be regarded, by their very nature, as being harmful to competition. The CJEU then held that an agreement with an anticompetitive object that may affect trade between Member States has an appreciable restriction on competition irrespective of its actual effects.

VI. CONCLUSION

The CJEU's decision is unsurprising in that it is entirely predictable that the Court would decide that NCAs are not obliged to follow the 2001 Notice. That said, the CJEU also provides that the 2001 Notice does not apply to any arrangement with an anticompetitive object that may affect trade between Member States.

This means that the application of the 2001 Notice is significantly reduced. It is not binding on NCAs. It also does not apply to object breaches with an effect on inter-Member State trade. Accordingly, an agreement between competitors with an aggregate market share of say, 3 percent will be anticompetitive if it is capable of restricting competition and might affect trade in the EU.

Is it appropriate that Article 101 should apply to an agreement between competitors with minimal market power where there is no actual anticompetitive effect? The *Expedia* case, while in line with the CJEU's recent jurisprudence both widening the scope and hardening its interpretation of Article 101, runs somewhat counter to the modern trend that has witnessed the increasing influence of economics on competition law enforcement policy.