EU Competition & Regulatory

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ARTICLE

The Revised De Minimis Notice: Object Restrictions Safe No More

INTRODUCTION

On 25 June 2014, the European Commission adopted revised rules and guidance in relation to agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU. These rules are set out in a revised De Minimis Notice (the "Notice") and accompanying Commission Staff Working Document. The Notice sets out safe harbours under Article 101(1) TFEU for agreements between companies that are deemed not to appreciably restrict competition in the internal market. This article outlines the key changes introduced by the Notice and examines the new Staff Working Document.

THE 2001 NOTICE

Article 101(1) TFEU prohibits agreements, decisions and concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101 TFEU does not, however, apply to agreements that have no appreciable effect on competition. The Commission’s 2001 De Minimis Notice (the “2001 Notice”) was designed to help companies self-assess whether their agreements would fall under Article 101(1) by defining the circumstances in which agreements between undertakings would not be deemed to appreciably restrict competition.

Appreciability was determined according to the combined market share of the parties in all relevant markets affected by the agreement. Where the undertakings in question were actual or potential competitors and had a combined market share

1 Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice (the “Guidance”).

2 Case C-226/11 Expedia Inc v Autorité de la concurrence and Others (para 16).
of 10% or less, they would fall under the 2001 Notice.\(^3\) Where the undertakings were not actual or potential competitors and they had a combined market share of 15% or less, they would also fall under the 2001 Notice.\(^4\) In cases where competition was restricted by the cumulative effect of agreements (cumulative foreclosure via parallel networks of agreements), the market share thresholds were reduced to 5%, regardless of the competitive relationship of the parties.\(^5\) Where it was unclear whether the agreement was between competitors or non-competitors, the applicable threshold was 10%.\(^6\) The 2001 Notice also set out a list of hardcore restrictions that were always prohibited irrespective of the market shares of the undertakings concerned, e.g. price fixing or allocation of markets in agreements between competitors, resale price maintenance and geographic sales restrictions in agreements between non-competitors.\(^7\)

The 2001 Notice therefore provided a safe harbour for agreements between companies that had low market shares. Where the market share thresholds were met, the Commission would not open proceedings against the relevant companies.\(^8\) Where the Commission had opened proceedings but the parties could show that they had assumed in good faith that the market share thresholds (as set out in the 2001 Notice) were not exceeded, the Commission would not impose fines.\(^9\) While the 2001 Notice bound the Commission, it did not bind national competition authorities or national courts, it merely provided guidance on the application of Article 101 TFEU.\(^10\)

**THE REVISED NOTICE**

The main driver behind the Commission’s review of the 2001 Notice was the Court of Justice’s (the “ECJ”) judgment in *Expedia*.\(^11\) Following a reference from the French Supreme Court the ECJ 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.”\(^12\) The ECJ thus clarified that an agreement that has the object of preventing, restricting or distorting competition cannot benefit from the safe harbour under the 2001 Notice.\(^13\) An object restriction is considered by its very nature to potentially restrict competition and thus proof of actual or likely harmful effects on the market is not required.\(^14\)

The Notice reflects this clarification by explicitly excluding from its scope any agreement that includes an object restriction – regardless of the market shares of the parties.\(^15\) Such agreements are now automatically deemed to appreciably restrict competition. This blanket exclusion represents a change from the approach taken by the 2001 Notice, which was to specifically list all the object and hardcore restrictions that did not benefit from the 2001 Notice’s safe harbour.

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\(^1\) 2001 De Minimis Notice (para 7(a)).  
\(^2\) 2001 De Minimis Notice (para 7(a)).  
\(^3\) 2001 De Minimis Notice (para 7(b)).  
\(^4\) 2001 De Minimis Notice (para 8).  
\(^5\) 2001 De Minimis Notice (para 7(b)).  
\(^6\) 2001 De Minimis Notice (para 9).  
\(^7\) 2001 De Minimis Notice (para 11).  
\(^8\) 2001 De Minimis Notice (para 4).  
\(^9\) 2001 De Minimis Notice (para 4).  
\(^10\) 2001 De Minimis Notice (para 4); *Expedia* (paras 28-29).  
\(^11\) *Case C-226/11 Expedia Inc v Autorité de la concurrence and Others*.  
\(^12\) *Expedia* (para 37).  
\(^13\) *Expedia* (paras 35-37).  
\(^14\) Guidance [pg 3].  
\(^15\) Revised De Minimis Notice [paras 2 and 13].
Another reason for revising the 2001 Notice was to ensure consistency with vertical and horizontal block exemption regulations adopted since 2001. The Notice clarifies that the Commission will not apply the safe harbour to agreements that contain any hardcore restrictions as defined by current or future Commission block exemption regulations.16 The Commission considers that all hardcore restrictions generally constitute object restrictions.17 Moreover, the Notice emphasises the safe harbour’s particular relevancy to agreements that are not covered by any Commission block exemption regulation (e.g. trade mark licence agreements), or those agreements that do fall under a block exemption but that include an excluded restriction (i.e. those restrictions that are not hardcore but which still lose the benefit of the safe harbour under the relevant block exemption).18

Apart from reflecting the Expedia judgment, the Notice does not incorporate any major changes to the existing framework for assessing agreements of minor importance. For instance, the safe harbour market share thresholds described above remain the same.19

GUIDANCE ON OBJECT RESTRICTIONS

The Notice is accompanied by a Commission Staff Working Document that aims to help companies (particularly SMEs) assess whether or not the Notice applies to their agreement. The Staff Working Document acts as a checklist, outlining the types of restrictions that have already been categorised as object or hardcore restrictions by the EU courts or the Commission. For instance, in the context of agreements between competitors, restrictions such as price fixing, market sharing, output restriction, bid rigging and information sharing are listed. In agreements between non-competitors, examples include sales restrictions on buyers and licensees and resale price maintenance.

The Commission will update this document to reflect any developments vis-à-vis object or hardcore restrictions, but is also keen to emphasise that it will not be prevented from finding object restrictions in the future that are not listed in the guidance paper.

COMMENT

The Notice does not represent a significant change from the original framework for assessing agreements of minor importance between companies with low market shares. Instead it represents a codification of the ECJ’s decision in Expedia, clarifying that any agreement containing an object or hardcore restriction will be automatically deemed to appreciably restrict competition and therefore cannot benefit from the safe harbour. It should be noted, however, that such agreements still need to affect trade between Member States in order to trigger the Commission’s jurisdiction to assess them under Article 101 TFEU.

The certainty brought about by the Notice and the checklist of examples in the accompanying Staff Working Document should enable companies, in particular SMEs, to self-assess their agreements more confidently.

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16 Revised De Minimis Notice (para 13).
17 Revised De Minimis Notice (para 13).
18 Revised De Minimis Notice (para 14).
19 Revised De Minimis Notice (paras 8(a)-(b), 9 and 10).
QUICK LINKS:

Article
Merger Control
State Aid

SOURCES

The Revised De Minimis Notice
Commission Staff Working Document
Commission Press Release
Commission Memo
Court of Justice's Expedia Judgment
Merger Control

NOTIFICATIONS

1. *Bridgepoint/EdRCP* (Case M.7309, 27.06.2014).


4. *Simplified procedure cases*
   - *Allergopharma/Stallergenes/Laboratorios Leti/JV* (Case M.7293, 26.06.2014).
   - *Goldman Sachs/Blackstone/IPREO* (Case M.7261, 27.06.2014).
   - *ADP/AELIA/MZLZ Retail* (Case M.7152, 27.06.2014).
   - *Saria/Teeuwissen/Jagero II* (Case M.7329, 01.07.2014).
   - *Uniqa Insurance Group/Uniqa Life* (Case M.7298, 01.07.2014).
   - *PTTGC/Vencorex* (Case M.7303, 02.07.2014).

PHASE I CLEARANCES

5. *Unconditional clearances*
   - *Lenovo/Motorola Mobility* (Case M.7202, MEX/14/0627, 27.06.2014).
   - *Vodafone/ONO* (Case M.7231, IP/14/772, 02.07.2014).

6. *Unconditional clearances: simplified procedure*
   - *Amvest/NPM/Het Gastenhuis* (Case M.7243, MEX/14/0701, 01.07.2014).
   - *Carlyle/Traxys* (Case M.7226, MEX/14/0207, 02.07.2014).

PHASE II CLEARANCE WITH UNDERTAKINGS

7. *Telefónica Deutschland/E-Plus* – The Commission has cleared the acquisition of E-Plus by Telefónica Deutschland following an in-depth investigation. The Commission found that the merger would have removed two key competitors from the German mobile telecommunications market, and that it would have weakened the position of other network operators and service providers to the detriment of consumers. To address this, the Commission has made clearance conditional upon a full set of commitments. These include the merged entity selling up to 30% of its network capacity to other German network operators prior to completion. Further, Telefónica is required to extend existing wholesale agreements to its partners and divest radio wave spectrum and other assets to market entrants (IP/14/771, 02.07.2014).

COURT PROCEEDINGS/PROCEDURE

8. *Electrabel SA/Compagnie Nationale du Rhone* – The Court of Justice has dismissed an appeal brought by Electrabel. The appeal was made against a General Court ruling which had upheld a Commission decision to fine Electrabel €20 million for acquiring control of Compagnie Nationale without prior approval. The Court of Justice considered two grounds of appeal constituted new arguments, and so were inadmissible; the last ground of appeal was found to lack adequate reasoning (Case C-84/13 P, Electrabel v Commission, judgment of 03.07.2014).
State Aid

9. Commission closes investigation into State aid received by Polish steel maker – The Commission has closed an investigation into State aid received by Buczek Automotive, a Polish steel manufacturer. The aid has been deemed without object as Buczek was declared bankrupt in 2012. The investigation was reopened in 2013 following a General Court ruling that Poland should recover the aid from Buczek’s constituent companies (MEX/14/0627, 27.06.2014).

10. Commission orders recovery of Belgian State aid to ARCO – The Commission has decided that State aid granted to shareholders of financial cooperative ARCO confers a selective advantage to its beneficiaries and therefore constitutes State aid. The Commission found the aid scheme to be incompatible with State aid rules, and has ordered its repayment. The aid was given by Belgium to protect shareholders of recognised financial cooperatives from losses. The scheme was initially implemented without Commission approval (MEX/14/0703, 03.07.2014).