EUROPEAN COMMISSION CONSULTATION ON REVISION OF THE DE MINIMIS NOTICE

HERBERT SMITH FREEHILLS LLP RESPONSE

1. INTRODUCTION

1.1 Herbert Smith Freehills LLP is grateful for the opportunity to provide comments to the European Commission ("Commission") in relation to its consultation on revisions to the De Minimis Notice.

1.2 We set out within this response our comments on the revised draft of the De Minimis Notice ("Revised Draft Notice"). These comments are those of Herbert Smith Freehills LLP, and do not represent the views of our individual clients.

2. TREATMENT OF "OBJECT" RESTRICTIONS

Commission's interpretation of the Expedia judgment

2.1 We note the Commission's statement at paragraph 2 of the Draft Revised Notice that:

"The Court of Justice has also clarified that an agreement that may affect trade between Member States and that has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition".

As the basis for this conclusion the Commission refers to paragraphs 35 to 37 of the judgment of the Court of Justice ("CJEU") of 13 December 2012 in Case C-226/11 Expedia v Autorité de la concurrence and others ("Expedia").

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2 Paragraphs 35-36 of the CJEU's judgment state that: "Moreover, it should be noted that, according to settled case-law, for the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299; Case C-272/09 P KME Germany and Others v Commission [2011] ECR I-
2.2 Within the press release announcing publication of the Draft Revised Notice the Commission appears to go further in its assessment of Expedia and states that:

"agreements containing a restriction by object are always seen as an appreciable restriction of competition".

2.3 Similarly, on its webpage in respect of its consultation on the Draft Revised Notice the Commission states:

"The Court has now established 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)".

2.4 At paragraph 12 of the Draft Revised Notice the Commission goes on to state that the "safe harbour" market share thresholds in paragraph 8 of the Draft Revised Notice do not apply to any agreements which have as their object the prevention, restriction or distortion of competition.

Inconsistency of the Commission's interpretation of Expedia with long-established case law

2.5 Whilst the Commission may of course choose not to apply the specific market share thresholds within the Draft Revised Notice to agreements which contain "object" restrictions, as the Commission itself states at paragraph 7 of the Draft Revised Notice, the Notice is without prejudice to the interpretation of Article 101 of the Treaty of the Functioning of the European Union ("TFEU") by the European courts.

0000, paragraph 65; and Case C-389/10 P KME Germany and Others v Commission [2011] ECR I-
0000, paragraph 75). In that regard, the Court has emphasised 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 (Case C-209/07 Beef Industry Development Society and Barry Brothers (BIDS) [2008] ECR I-8637, paragraph 17, and Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-
4529, paragraph 29)". Paragraph 37 mentions appreciability and states, in short order without any further discussion or elaboration, that: "It must therefore 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."

3 IP/13/685 of 11 July 2013.
2.6 We do not believe that the Commission’s interpretation of the, admittedly ambiguous, *Expedia* judgment reflects the applicable legal position. We do not consider that the CJEU can be taken to have intended in this case to have concluded that all object restrictions which may affect trade between Member States must always be regarded as appreciably restricting competition such as to fall automatically within the scope of Article 101(1) TFEU regardless of the facts of the case in hand.

2.7 This would have required a significant departure from well-established and clear previous case law. In our view the CJEU cannot on the basis of its very short form comments in *Expedia* be taken to have intended to make such a departure, in particular given that this question was not in fact the subject of the preliminary reference. We consider that the relevant paragraph of the judgment is better read as simply reiterating the established position that, in the case of an object restriction, it is presumed that a negative impact on competition will result, and the agreement falls within Article 101(1) TFEU, regardless of whether such an anti-competitive outcome materialises in practice.

2.8 That object restrictions do need to fulfil some form of appreciability requirement is clear from the opinion of Advocate General Kokott in *Expedia* (see paragraph 47).

2.9 We also note the comments of the CJEU itself in the earlier paragraphs of its judgment in *Expedia* which recalled:

"if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market" (paragraph 17).

The CJEU in *Expedia* discusses, without criticism or revision, a number of previous CJEU judgments which made it very clear that, even in the case of restrictions which have been found to constitute restrictions by object, such as absolute territorial protection or resale price maintenance, the appreciability test must be satisfied, whether due to the weak position of the undertakings concerned on the market or other reasons: see for example Case 5/69 Völk v Vervaecke (paragraphs 16 and 22 of *Expedia*).\(^5\)

\(^5\) See also the judgments of the CJEU in Case 1/71 Cadillon, Case 22/71 Béguelin Import Co v Import Export SA GL, Case C-306/96 Javico International v Yves Saint Laurent Parfums, Case C-260/07 Pedro IV Servicios and Case C-506/07 Lubricantes y Carburantes Galeicos SL v GALP Energía España SAU. We also refer to the judgment of the General Court in Case T-199/08 Ziegler SA v Commission, a cartel case, in which the General Court, whilst recognising that the Commission is not required to show the
2.10 This established legal position was recognised by the Commission itself in its 2010 Guidelines on Vertical Restraints:

"As regards hardcore restrictions referred to in the de minimis notice, Article 101(1) may apply below the 15% threshold, provided that there is an appreciable effect on trade between Member States and on competition".

2.11 The Commission has itself carried out appreciability analyses in circumstances where it considered the relevant restrictions to constitute object restrictions: see for example Case COMP/39.596 BA/AA/IB.

2.12 We recognise that the appreciability threshold may be easier to satisfy in the case of object restrictions. In practice, this may vary depending on the type and seriousness of the restriction in question – for example appreciability may be more readily established in relation to cartel conduct than in relation to other forms of object restriction.\(^7\)

2.13 However, in our view it is clear that such restrictions must be capable of appreciably restricting competition to fall within the scope of Article 101(1) TFEU. Whilst of course it is the case that an object restriction can infringe Article 101 TFEU regardless of whether it has any concrete effects on the market in practice, it cannot be the case that each and every such restriction falls within Article 101(1) TFEU regardless of whether the presumed negative effects on competition are of sufficient magnitude such to be theoretically capable of appreciably restricting competition in the internal market.

2.14 An approach which assumes that all object restrictions automatically constitute appreciable restrictions on competition in all circumstances – akin to a "per se" approach - ignores economic reality, and is in our view a retrograde step. It is also, in our view, inconsistent with settled case-law. Article 101(1) TFEU is not applicable if the effect of a restrictive practice on intra-Community trade or on competition is not 'appreciable'. An agreement escapes the prohibition laid down in Article 101(1) if it restricts competition or affects trade between Member States only insignificantly\(^6\) (the subsequent appeal to the CJEU in this case focussed on the question of the appreciability of any effect on trade between Member States rather than on competition).

\(^6\) (2010/C 130/01).

\(^7\) We note the comments of the Director-General for Competition within his speech of 26 November 2013 (http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf) indicating that restrictions may exist along a continuum; this is further support for the conclusion that appreciability cannot simply be assumed in all object cases.
with the clear rulings of the CJEU which require the prior step, the assessment of whether a particular restriction in an individual case actually constitutes an object restriction, to be carried out taken into account the objectives of the agreements and the economic and legal context.\(^8\)

**Consequences of the Commission’s interpretation in practice**

2.15 To take the interpretation adopted by the Commission to its logical conclusion, this would mean that the unilateral disclosure on a single occasion of a future pricing intention by A, a supplier of product X, to B, a potential supplier of product X, would constitute an appreciable restriction of competition for the purposes of Article 101 TFEU, even if A and B were the smallest of tens of thousands of suppliers of product X, with a market share of less than 0.1%, and were only active in one area in one Member State.

2.16 Similarly, under this interpretation, the supply of product Y by supplier C to distributor D, on terms that D's volume rebate is limited by reference to sales within its Member State of establishment, would constitute an appreciable restriction of competition for the purposes of Article 101 TFEU, even if again C was the smallest of tens of thousands of suppliers of product Y, and D the smallest of tens of thousands of distributors of product Y, and even if the (indirect) restriction could have no impact in practice, for example if due to transport costs D would never have delivered the product outside its local area.

2.17 Finally, we note that this approach would result in any non-full function joint venture which contains restrictions which could conceivably be regarded as restrictions by object, for example as the joint venture involves agreeing on production, and therefore output, levels, as amounting to an appreciable restriction on competition, regardless of the nature of the joint venture or the parties position on the market, or indeed its likely impact. This is clearly inappropriate.

2.18 It is true that, in relation to the application of Article 101 TFEU, the agreement must also appreciably restrict trade between Member States to fall within its scope. However, this concept has been interpreted very widely, even in relation to agreements which cover only

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\(^8\) For example Case C-501/06 P GlaxoSmithKline Services v Commission and Case C-209/07 Beef Industry Development Society and Barry Brothers. See also the speech of 26 November 2013 of the Director-General for Competition (http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf) noting that within this contextual analysis it must be examined whether the agreement reveals “a sufficient degree of harm to competition” (stating, at page 5, that it is only that if it does not that actual or potential anti-competitive effects need to be established).
one part of a Member State. Moreover, although they are not bound to do so as a matter of EU law, in practice the national competition authorities and national courts of many Member States will follow, or at least take into account, the Commission's guidance when applying both Article 101 TFEU and the equivalent national law provision. Indeed in some Member States such entities may be required as a matter of national law to have regard to such guidance.10

2.19 The issue as to whether any appreciability threshold applies in the case of object restrictions is of considerable practical importance, in particular given that the category of agreements which the Commission considers to constitute restrictions by object is not fixed, and in fact is expanding, and the factors which apply so as to determine whether an agreement constitutes an object restriction are not always clear.11 For example it appears (although the decision has yet to be published)12 that in Case 39226 Lundbeck the Commission has treated so called "pay for delay" agreements as object restrictions.

2.20 Moreover, the national competition authorities of Member States have expanded the category of what is traditionally considered to constitute a restriction by object, as demonstrated by the Expedia case itself, and the decision of the UK OFT in the Tobacco case.13

2.21 The European courts also appear to have broadened the category of agreements which may be regarded as restrictions by object in recent years.14 As the Director-General for

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9 See for example the amicus curiae submissions of the Commission to the French Supreme Court in the Orange Caraïbe case (13 October 2011).
10 See the position in the UK under Section 60(3) Competition Act 1998.
11 And indeed have been described as "notoriously unclear" by some commentators (see Market failures, transaction costs and article 101(1) TFEU case law, Pablo Ibanez Colomo, E.L. Rev. 2012, 37(5), 541-562).
13 Case CE/2596-03 Tobacco, subsequently successfully appealed on other grounds. It is worth noting in this case that the OFT found, consistent with our comments outlined in this response, that in the case of resale price maintenance agreements (considered an object restriction) such agreements would appreciably restrict competition "provided that such agreements do not have only insignificant effects" (paragraph 3.60).
14 See for example the rulings of the CJEU in Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd.
Competition has stated\footnote{Speech of 26 November 2013 (http://ec.europa.eu/competition/speeches/text/sp2013_07_en.pdf).} “the line between restrictions by object and those by effect is not always bright”. In these circumstances it is clearly inappropriate for all agreements which can be placed in the "object box" to be regarded as automatically fulfilling the appreciability criterion, regardless of the facts in question and economic reality.

2.22 Accordingly, we would urge the Commission to reconsider its approach, at least unless and until the CJEU clarifies the meaning of its comments in \textit{Expedia}.

3. DISAPPLICATION OF MARKET SHARE THRESHOLDS

3.1 We note the proposed approach of the Commission at paragraph 12 the Draft Revised Notice of replacing its previous approach of carving out specific "hardcore" restrictions (for example price-fixing) from the applicability of the market share thresholds, with an approach under which all agreements which have as their object the restriction of competition are carved out from the application of the market share thresholds. We further note the Commission's proposed approach of including any "hardcore" restrictions in any current or future block exemptions within the definition of object restrictions for this purpose.

3.2 Whilst we appreciate that from a technical perspective it may be useful to "ensure that the De Minimis Notice does not need to be updated every time another competition law regulation is revised"\footnote{http://ec.europa.eu/competition/consultations/2013_de_minimis_notice/index_en.html.}, it is not necessarily the case that each and every restriction treated as hardcore for the purposes of a block exemption, current or future, should automatically be regarded as an object restriction in all cases\footnote{See for example the Opinion of Advocate General Mazak in Case C-439/09 \textit{Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence} stating that the concept of an agreement with the object of restricting competition is not necessarily the same a hardcore restriction, and that just because a restriction does not meet the criteria for a block exemption, it does not follow that it is necessarily in breach of Article 101 TFEU. See similarly the Opinion of Advocate General Cruz Villalon in Case C-21/11 \textit{Allianz Hungária}.}, nor that from a policy perspective that the market share thresholds should never apply to all such, as yet unknown, restrictions.

3.3 This depends for example on what restrictions are categorised as hardcore in future. In addition, what constitutes an object restriction is, of course, ultimately to be determined by

Case C-8/08 \textit{T-Mobile Netherlands and Others}, Case C-439/09 \textit{Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence}, and Case C-21/11 \textit{Allianz Hungária}.
the European courts. Moreover, the CJEU has made it very clear that whether a particular restriction constitutes an object restriction must be assessed in each individual case taking into account the objectives of the agreement and its economic and legal context.\(^\text{18}\) The Commission's approach appears inconsistent with this.

3.4 If this approach is to be maintained, which we do not agree should be the case, it would be preferable in our view if at the least these points were clarified explicitly in this section of the Draft Revised Notice.

**Herbert Smith Freehills LLP**

**3 October 2013**

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\(^\text{18}\) For example Case C-501/06P *GlaxoSmithKline Services v Commission* and Case C-209/07 *Beef Industry Development Society and Barry Brothers*. 