European Commission’s consultation on the revision of the De Minimis Notice

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An individual response to the European Commission’s consultation on the revision of the De Minimis Notice. It is submitted that the European Commission’s use of the judgment in Expedia as the legal basis for its revision of the Notice in respect of restrictions of competition by object is erroneous.
I welcome the opportunity to comment on the Draft Notice on agreements of minor importance (the ‘Draft Notice’). This response constitutes my personal opinion. I am currently researching for a PhD in Law at the London School of Economics and Political Science. My thesis examines the concept of ‘object’ under Article 101(1) TFEU.

1. Introduction

My comments in respect of the Draft Notice relate, primarily, to the Commission’s intention to remove the remit of the de minimis thresholds from restrictions of competition by object under Article 101(1) TFEU. In summary, I consider that using the judgment in Expedia as the legal basis for excluding restrictions by object is erroneous. Instead, such a decision by the Commission should be referred to as a policy decision. The Commission’s policy objectives in connection with restrictions by object should be more clearly outlined. The blurring of the law on the concept of object and the Commission’s policy choices is confusing for those who rely on its Notices and Guidelines, which has been exacerbated by the tension between the case law and the Article 81(3) Guidelines. I suggest that the Commission should focus less on its understanding of the law, which constrains it and instead should be clearer about its policy initiatives and enforcement priorities.

2. The Draft Notice: section I

Removing object infringements from the benefit of the Draft Notice

The extent of the clarification handed down by the CJEU in Expedia is highly questionable.\(^1\) Not least to suggest that agreements containing a restriction by object are always seen as an appreciable restriction of competition is a limited exposition of the correct position in law. The law in relation to the de minimis doctrine and the object concept is complex and Expedia does not alter that fact. If anything, it adds another layer of confusion. Fundamentally, the judgment in Expedia has not overturned Völk.\(^2\) Rather the Court continues to recognise restrictions by object and by effect need to be ‘perceptible’.\(^3\) The reasoning for its pronouncement in paragraph 37 of the judgment is also not without its discrepancies.\(^4\) Whether it can then subsequently be inferred that the Court intended that the ‘concept of a non-appreciable impact on competition does not apply when the agreement in question contains a...”by object restriction”’ is a moot point.\(^5\) Firstly, the Court ostensibly requires that for an agreement to have an appreciable effect on competition it must satisfy (i) the effect on trade criteria, and (ii) have resulted in a finding that the agreement has an anti-competitive object.\(^6\)

To determine the object of an agreement is not always straightforward. I propose that contrary to being a separate component the requirement of appreciableness should be seen, in the case of determining restrictions of competition by object, as part of the overall assessment of the agreement’s legal and economic context. It is clear from the judgment in Völk, that restrictions by

\(^{1}\) Case C-226/11 Expedia Inc. v Autorité de la concurrence and Others. I assume the Commission is mainly referring to paragraph 37 of the judgment.
\(^{3}\) Expedia, paragraph 17.
\(^{4}\) As shown in its answer to the question referred at paragraph 38 where the Court refers, again, to the requirement of an agreement needing to constitute an appreciable restriction of competition.
\(^{5}\) Extracted from the Commission’s accompanying press release to the Draft Notice.
\(^{6}\) Expedia, Paragraph 37.
object can benefit from a form of appreciable effect as the Court held that, with reference to the actual circumstances of the agreement, an agreement may fall outside Article 101(1) TFEU if the effect on the market is insignificant.\(^7\) The Court did not specify at what level the effect is considered ‘insignificant’, nor did it specify that to determine such effect required knowledge of the parties’ actual market shares. Rather it referred to ‘the weak position which the persons concerned have on the markets of the product in question’.\(^8\) The STM test upholds this notion as it requires that when assessing the precise purpose of the agreement (that is, the object), if an analysis of the clauses of the agreement does not reveal the ‘effect on competition to be sufficiently deleterious’ then the consequences [the actual effects] of the agreement should be considered to determine whether competition has in fact been restricted to an appreciable extent.\(^9\)

Determining whether the effect on competition is sufficiently deleterious would arguably involve an understanding that an agreement had some form of appreciable effect, though it does not necessarily warrant a determination of actual appreciable effect, simply that it is capable or has the potential of having a negative impact on competition.\(^10\) The Court in STM stipulated that to decide whether a restriction is prohibited by its object or effect, it is appropriate to take into account, inter alia, the nature and quantity of the products covered by the agreement and the position and importance of the supplier and distributor on the market for the products concerned.\(^11\) This requirement was repeated in Allianz Hungaria and Expedia, though the citations made in support of this were unhelpful. More importantly the significant authority for this understanding of the law, that of STM, was omitted.\(^12\) Putting to one side those factors, the outcome of the case law is that each agreement should be assessed on its own merits and facts.\(^13\) As such, it would therefore depend on the agreement and the type of restriction it contains at what point it would be considered ‘sufficiently deleterious’\(^14\). It is doubtful whether the market share thresholds for horizontal agreements containing ‘hardcore’ restrictions (which incidentally are not synonymous with restrictions by object) would be the same as for vertical agreements also containing ‘hardcore’ restrictions. This means that specific market share thresholds, from the perspective of the law, are meaningless.\(^15\)

From an economic perspective, however, the argument would be that market shares of between 1% and 5% would have an insignificant effect on competition.\(^16\) Where the economic harm would be if two undertakings with no market power colluded is hard to discern. If the concept of appreciability is understood as being based on the idea that ‘the risk of competitive harm is too small for the law

\(^{7}\) Case C-5/69 Völk v Vervaecke, paragraph 5/7, p 302. Emphasis added.

\(^{8}\) Ibid, paragraph 5/7.

\(^{9}\) Case C-56/65 Société Technique Minière V Maschinenbau Ulm, 249 (‘STM’). Emphasis added. Though it is questionable what the distinction is between ‘sufficiently deleterious’ and ‘appreciable’. See the Commission’s submission in Völk, p 300 IV (e).

\(^{10}\) Case C-32/11 Allianz Hungaria Biztosito Zrt v Gazdasagi Versenyhivatal, paragraph 38.

\(^{11}\) STM, 250.


\(^{13}\) Allianz Hungaria, paragraph 38.


\(^{15}\) The Commission has seemingly applied similar reasoning in respect of its treatment of appreciable restrictions by effect as it differentiates between competitors and non-competitors (section II, paragraph 8).

to be concerned with’, then the de minimis doctrine only applies to cases of real economic insignificance. As such, by removing object cases from the Draft Notice for the reasons set out by the Commission demonstrates a lack of understanding of the doctrine. That said there is mileage in the notion that parties that aim to restrict competition should not benefit from a rule that allows their agreements to come outside Article 101(1) TFEU per se as a result of their low market shares. However agreements are rarely clear cut and therefore the answer as to whether an agreement is de minimis or not will turn on the agreement in hand and what the parties are seeking to achieve. Therefore if the Commission is convinced it wishes to remove object cases from its safe-harbour then it should make this call based on policy and/or enforcement priorities alone, not to ensure that the Draft Notice ‘reflects appropriately the development of the case law’. Furthermore, the Commission must make it clear that simply because an agreement containing apparent restrictions by object comes outside the Draft Notice does not then mean that such agreement is automatically condemned by object under Article 101(1) TFEU. Expedia does not provide a shortcut to the analytical approach advocated in STM.

Consequently, for the Commission to believe that Expedia clarifies the law means the Commission does not understand the case law, particularly the more recent judgment of Allianz Hungaria. At the very least, the judgment in Expedia is not bullet proof and is rightly open to interpretation and challenge, therefore to rely on it as the sole reason why the Commission wishes to remove restrictions by object from the benefit of the de minimis thresholds in the Draft Notice is erroneous. Instead the Commission should be transparent: this is a policy choice. Paragraph 2 (and arguably paragraph 1) of the Draft Notice therefore needs amending.

The role of the Draft Notice

According to the Court in Expedia, it understood the Commission’s role in respect of the Notice agreements of minor importance as making transparent the manner in which the Commission would itself apply Article 101 TFEU. Consequently the Commission binds itself and must not depart from the content of that notice. The Court also understood that the Commission intended to give guidance to the courts and authorities of the Member States in their application of Article 101 TFEU, but that the Notice was not binding on the Member States. The Draft Notice should reflect this. Instead paragraph 3 of the Draft Notice seemingly goes beyond such a remit. It sets out ‘what is not an appreciable restriction of competition under Article 101’. This paragraph should be amended to highlight that any market share thresholds (for object and effect) set out by the Commission are representative only of how the Commission itself applies the law.

3. The Draft Notice: section II

Paragraph 12 of the Draft Notice is problematic in view of the opinion sketched out above, which determines that Expedia does not clarify the law. More importantly, the Commission’s

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17 Bailey, Restrictions of Competition By Object under Article 101 TFEU, CMLR 49: 559-600, 2012, page 590-591, 4.3.
18 See C-19/77 Miller International.
19 Expedia, paragraph 28.
20 Ibid, paragraph 28.
21 Ibid, paragraphs 28-29.
interpretation of the law is not reflective of the case law as a whole. It was arguably never the case that arbitrary market share thresholds ever did apply to agreements that had as their object the restriction of competition. Any quantification of thresholds is a policy choice of the Commission. That is not to say that market share thresholds have no relevance for by-object restrictions. The removal of the thresholds to agreements by object is therefore fundamentally a policy initiative.

Furthermore the Commission makes the link between restrictions by object and hardcore restrictions found in its various guidelines and block exemption regulations. It is now well established that ‘object’ and ‘hardcore’ do not mean one and the same thing. Not all supposed hardcore restrictions of competition have been held to be restrictive by object and restrictions not usually labelled as such have conversely been held to restrict competition by object. According to BIDS, any restriction of competition has the propensity to be restrictive by object as the object of an agreement refers to its ‘aim’ or ‘purpose’ determined within its legal and economic context. The Court of Justice has been willing to conduct in-depth assessments of ‘object’ agreements in that context and refer in their determination to potential and even actual effects of the agreement. The fact new types of agreement are continually added to the so-called ‘object category’ exemplifies further why the Commission should move away from describing object in this manner.

Understanding the object criterion in such a formalistic manner is not in accordance with the case law.

If the Commission is intent on excluding restrictions by object from the scope of the Draft Notice, then it would be preferable if the Commission made clear that those agreements still benefit from the application of an Article 101(1) TFEU analysis. What is apparent from the case law is that it is not always immediately evident or indeed obvious from the outset whether an agreement is restrictive by object or effect. This could mean that particular agreements that should benefit from the Draft Notice do not and vice versa. This is not conducive to legal certainty.

AG Kokott was correct to point out in her Opinion in Expedia that the market share thresholds for object and effect differed. Rather than simply excluding restrictions by object, the Commission could consider establishing different thresholds for by object and by effect infringements.

4. Summary

The position taken in this response is that it would be a mistake for the Commission to cite Expedia as the basis for its policy approach to the de minimis doctrine and thereby exclude restrictions by object from its remit. Expedia is far from clear and it does not overturn Völk.

What is more understandable is that the Commission needs policy initiatives and enforcement priorities as it has limited resources. The Draft Notice seemingly combines what the Commission

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22 See Case C-209/07 Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd (‘BIDS’).
23 This has been particularly pertinent in relation to agreements containing absolute territorial protection clauses and conversely to the MIF in Visa. Also see by way of example Joined cases C-96-102, 104, 105, 108, 110/82 IAZ International Belgium v Commission; Case C-250/92 Gottrup-Klim v Dansk Landbrugs Grovareselskat AmbA.
24 See C-439/09 Pierre Fabre.
25 Opinion, Expedia, paragraph 54.
believes the law is on the de minimis doctrine together with its policy approach. This is not ideal: how it interprets the law and its policy choices must be clearly delineated. Moreover, the Commission needs to be absolutely sure it has interpreted the law correctly. At the very least it must heavily caveat its interpretation. If not, it would be better advised from making any pronouncements in that regard. It is not clear whether the Commission has sufficiently considered the issues involved regarding the de minimis doctrine and its relationship with the concept of object. I therefore hope some of the responses trigger more in-depth reflection.