OSSERVATORIO PERMANENTE
SULL'APPLICAZIONE DELLE
REGOLE DI CONCORRENZA
WWW.OSSERVATORIOANTITRUST.EU

UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

Response to the European Commission public consultation on the European Commission's Draft Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union

(de minimis)

Trento, October, 3rd 2013

Dear Sirs,

This response represents the views of the *Osservatorio Permanente sull'Applicazione delle Regole di Concorrenza* ("**Osservatorio Antitrust**"), an independent research centre established at Faculty of Law, University of Trento (Italy), on the European Commission's *Draft Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (de minimis)* of July 2013 ("**Draft Notice 2013**").

The *Osservatorio Antitrust* is grateful for the opportunity to comment on the European Commission's proposed revision of the so-called "*De Minimis Notice*" of 22 December 2001 ("**Notice 2001**").[1]

We welcome the European Commission's proposal to implement the *Expedia*[2] ruling as well as a number of clarifications in its *De Minimis Notice*. However, we have some concerns which we will discuss in the present contribution.

The views expressed herein are those of the *Osservatorio Antitrust* and should not be construed as those of its individual members or their organisations.

Our comments are structured as follows:

I. Background
II. Comments on the proposal
III. Conclusion

[1] The Permanent Observatory on Antitrust Enforcement (in Italian "Osservatorio Permanente sull'Applicazione delle Regole di Concorrenza" also known as "Osservatorio Antitrust"), founded and headed by **Prof. Gian Antonio Benacchio** and **Michele Carpagnano**, is based at the University of Trento's Faculty of Law and is accredited by the international scientific community as an independent research centre.

The Observatory's objective is to analyse the dynamics of competition in the market, to help solve any related issues and to spread knowledge of antitrust law and economics by promoting the culture of competition in society. For more information please visit Our web page: www.osservatorioantitrust.eu.

This document has discussed and prepared within a small team of researchers and fellows at Osservatorio Antitrust. The team was composed by: **Julia Suderow, Lionel Lesur, Michele Carpagnano, Claudio Lombardi, Edoardo Cazzato and Luca Montani**.

[2] ECJ Case C-226/11 *Expedia Inc. V. Autorité de la Concurrence and Others*, judgement of the Court of Justice of the European Union, 13 December 2012.

I. Background

On 13 December 2012 the Court of Justice made a fundamental change in its view on agreements between undertakings with an anticompetitive object. At paragraph 37 of the *Expedia* ruling, the Court stated that any "*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*".

Therefore, no prior assessment of the appreciable effect on the market of such agreement is required as such effect shall not be taken into account if such agreement has an anticompetitive object, that is to restrict, distort or prevent competition. By way of comparison, it was previously understood that "*an agreement falls outside the prohibition in article* [101 TFEU] *when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question*."[3]

Prior to the *Expedia* ruling, the European Commission adopted several notices to provide guidance on the issue of whether an agreement has an appreciable effect on competition. The last notice, adopted in 2001 (i.e., the Notice 2001), established the so called 'safe harbours' for agreements below certain thresholds (expressed in market shares). These safe harbours do not apply to hard-core restrictions.

Since the *Expedia* ruling, it seems to be a consensus that no agreement with an anticompetitive object can be covered by a safe harbour, *i.e.*, the effect on the market is irrelevant if the object of the agreement is to restrict competition. The Draft Notice 2013 means to, *inter alia*, implement this development and may have important consequences because of its proposed content (see point II below).

Indeed, first, notices of the European Commission are binding for itself and this will naturally be the case for the *De minimis Notice* that will result from the Draft Notice 2013 and substitute the Notice 2001. Second, National Competition Authorities of the European Union usually also heavily rely on them. Therefore, these notices provide compelling guidance for undertakings (and legal practitioners) in the European Union and significantly influence their behaviour and, further, the functioning of the internal market.

[3] ECJ C 5/69 9 July 1969 *Franz Völk v S.P.R.L. Ets J. Vervaecke*.

II. Comments on the proposal

II.1 Part I of the proposal

In this section, we set out our observations or proposals on the Draft Notice 2013.

While we recognise that it is for the Court of Justice of the European Union to interpret EU law, we respectfully submit that the determination made in *Expedia* should not be impulsively transcribed into the *De Miminis Notice*.

A preliminary ruling is by its very nature limited to the question referred to the Court and in the case of the *De Minimis Notice*, issues that were not brought to the Court deserve attention. In the words of the European Commission, these include the reduction of "*the compliance burden for companies, especially smaller companies*" and the ability for the European Commission to "*avoid examining cases which have no interest from a competition policy point of view and […] thus be able to concentrate on more problematic agreements*."[4]

We are also troubled by what appears to be a step back from approximately ten years of economic approach to competition. Competition policy is a mean to attain the internal market, not an end in itself. As such, principled stances against agreements regardless of their (in)significance do not seem appropriate, or even compatible with the general principle of proportionality.[5]

For the same reasons, we are not sure to understand why references to small and medium-sized undertakings and good faith reliance on the Notice 2001 (in paragraph 2 and 4, respectively) were removed. Indeed, not only we believe that the *Expedia* ruling does not require such deletions, but also it is unlikely that the European Commission intends to achieve the internal market by pursuing companies with less than 250 employees and

[4] European Commission, *Competition policy: new Notice on agreements of minor importance (de minimis Notice)* (IP/02/13), 7 January 2001, available at: http://europa.eu/rapid/press-release_IP-02-13_en.htm?locale=en

[5] See, *e.g.*, P. Craig, G de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, 2011, at p. 526.

There will normally be three stages in a proportionality inquiry:

i. Whether the measure was suitable to achieve the desired end;
ii. Whether it was necessary to achieve the desired end; and
iii. Whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved (proportionality *stricto sensu*).

turnovers below EUR 50 million: SMEs have a very reduced individual impact on markets. Similarly, we believe that fining undertakings which had reasonable grounds to believe that they were in scope of the *De Minimis Notice* has still limited appeal.

Furthermore, and more importantly, we believe that the Notice 2001 struck a reasonable balance by excluding hard-core restrictions from its scope at its paragraph 11. In doing so, the most grievous restrictions to competition were addressed and the "tolerability" of other restrictions was gauged in terms of market share.

However, with the Draft Notice 2013, an unreasonable focus is, in our opinion, put on how a restriction on competition is achieved, rather than the restriction on competition itself. Singling out restrictions by object may lead to the incongruous conclusion that there is a preferable form of anticompetitive behaviour for small undertakings (restrictions by effect), instead of establishing a threshold below which enforcement is not desirable.

In relation to the above, the concept of effect on trade appears to have a palliative role to play. By *inter alia* considering that "*agreements are not capable of appreciably affecting trade between Member States when* […] [t]*he aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %*,"[6] the European Commission clearly signals that "small-time" agreements are not of interest. Unfortunately, this palliative effect will be completely lost in instances where National Competition Authorities of the European Union will rely on the *De Miminis Notice* in purely national cases. Indeed, in such instances the concept of effect of trade is not relevant.

III. Conclusion

We would like to renew our sincerest gratitude for the opportunity to comment on the Draft Notice 2013 and hope that the European Commission will find our comments helpful.

To summarise, we take the view that:

i. Consideration for compliance costs for small companies and the reference to the Commission's enforcement priorities should be reintroduced;

[6] European Commission, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07), paragraph 52.

ii. A verbatim application of the *Expedia* ruling, with complete disregard for the significance of an agreement, runs a high risk of being contrary to the general principle of proportionality;

iii. References to SMEs and good faith reliance on the *De Minimis Notice* should be reintroduced;

iv. Focus should be on the threshold(s) under which anticompetitive agreements do not warrant enforcement, rather than making a principled stance against a certain type of anticompetitive agreement; and

v. The concept of effect on trade alleviates the issues raised by the Draft Notice 2013, but not in cases where national authorities rely on the *De Minimis Notice* for purely national cases.

***

We remain at your full disposal should you wish to discuss any aspect of our contribution.

Sincerely,

Osservatorio Permanente sull'Applicazione delle Regole di Concorrenza

OSSERVATORIO PERMANENTE
SULL'APPLICAZIONE DELLE
REGOLE DI CONCORRENZA
WWW.OSSERVATORIOANTITRUST.EU

c/o TRENTO FACULTY OF LAW
VIA G. VERDI, 53
38122 TRENTO
ITALY
info@osservatorioantitrust.eu

WWW.OSSERVATORIOANTITRUST.EU