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Prohibition of Restrictive Competition Agreements in the European Union: Analyzing the "Expedia" Case

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Abstract: Under Article 101 of the Treaty on the Functioning of the European Union (TFEU), shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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.

This article has raised several questions of interpretation as to its meaning and scope. Therefore, the case-law of the Court of Justice of the European Union (CJEU) has been fundamental to its interpretation.

The aim of this work is to carry out a critical analysis of a particular CJEU decision, known as "case Expedia", in order to systematise the answer to some fundamental questions for verify if a particular agreement is restrictive of competition or not.

The central issues of this study are: how do you assess whether, or not, an agreement between undertakings is restrictive of competition and therefore contrary to the Treaty?

What criteria should be used to make this assessment? Is it relevant that one of the undertakings involved is to provide a service of generaleconomic interest?

Can a national authority punish restrictive practices of companies with market shares below the thresholds set by "de minimis" Communication of European Commission?

Methodology used: starting to analyze the case "Expedia" and its comparison with other cases decided by the Court, before and after these decisions; analyze of more relevant doctrinal references; systematic definition of the criteria to recognize an agreement against TFEU.

We can synthesize our conclusions by saying that the restrictive impact of an agreement must be assessed by determining the relevant market, the market share of each of the players or the joint market share of all actors related (cartel), the magnitude of affected consumers. These are the criteria to assess if a particular agreement may "significantlyrestrict competition".

Key words: Cartel; competition restrictive agreement; relevant market share; service of economic general interest

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1. Introduction

European competition law is a cornerstone for the construction of the European market and therefore also crucial for the European Union (EU) project. But linking competition law with various national laws implies constant relations of cooperation between national and European authorities. For this reason, various means have been used to strengthen relations and reduce any jurisdictional conflicts that may arise.

Member States' national legal systems remain independent in their own application of domestic competition law, provided that these national rules are not in opposition to European practices and policies. This is not an easy job and sometimes national authorities have a particular interpretation of the European rules that need to be applied. In some European member States, the domestic competition law has been constructed by the European competition rules, practices and policies. So, we can say that in this field of law there are always new problems to analyzed, practices and models of business that can be a way of violation the European rule of law. After so many years of EU, still remains questions, doughts, controversal opinions about several issues and new problems to solved. The competition law, in specially, demand a balance between European and national competition laws are still an open field for knowledge.

The European Commission (EC) is an important player to guarantee the free competition and the rule of law all over the EU. To do this mission EC is empowered by the Treaty to apply these rules and has a number of investigative powers to that end (e.g., inspection at business and non-business premises, written requests for information, etc.). The Commission may also impose fines on undertakings which violate the EU antitrust rules. As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts to ensure that EU competition rules are applied coherently throughout the EU.

National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted. The national courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. European Commission is also empowered to define the procedures for anticompetitive practices cases, for abuse of dominance cases and the proceedings for the application of Articles 101 and 102 of thr Treaty on Functioning of the European Union (TFEU).

Therefore, it has been promoted a process of harmonization and adaptation of the national legislations with the purpose of correcting problems and incompatibilities, and to provide the national competent authorities with more and better power for an effective promotion of the defense of the competition (Roque, 2014, pp. 111-117). This process increased better performance of the national authorities and better perception of competition law by the national courts. In spite of that, in case of interpretative doughts of the European law, the national courts have the possibilities of request to the European Court of Justice according to the article 267 of TFEU. The request for a preliminary ruling, is intended to give the national courts the opportunity to apply to the Court of Justice, according to article 267 of TFEU. When a question about a European rule or concept need to be clarify, for some dispute resolution inside a member state, the national court may stay the proceedings and refer the question to the European Court of Justice.

The question formulated by the national Court is referred to the Court of Justice, which answers with a judgment, and not with a mere opinion, in order to underline the binding nature of its decision. Nevertheless, the reference for a preliminary ruling is not a litigation procedure designed to resolve an internal dispute. It represents only one element of a global judicial case that begins and ends before a national court.

The aim of this process is, first of all, to ensure a uniform interpretation of European Union law and, with it, the unity of the EU legal order. In addition to this function of preserving the uniformity of EU law, this process also plays an important role in protecting individual rights. The guarantee that national courts are given the possibility to verify the compliance of national law with Union law and, in the event of incompatibility, that the primacy of directly applicable Union law will prevail, requires that the content and scope of the provisions of the EU are clearly defined. As a general rule, only a request for a preliminary ruling can guarantee this clarity, so this process also allows Union citizens to oppose actions in their country contrary to EU law and to achieve the application of this law before national courts.

This dual function of the preliminary ruling compensates to some extent the reduced possibilities for individuals to appeal directly to the Court of Justice and is of crucial importance for the legal protection of individuals. However, for it to ultimately work, national judges and courts must be "willing" to refer the matter to the Court of Justice. In this context we can say that CJEU has a fundamental role in implementing the indeterminate concepts that we find in many European competition law rules.

1.1 The Investigation Objective

The aim of this work is to present the results of an investigation about article 101º of TFEU. The starting point for the development of this study was the analyze one decision of CJEU, called "Expedia Case" and her contribution to the interpretation of article 101 of TFEU. This study, developed in a Seminar about free competition, for the Master in Law Degree, in Faculty of Law and Political Science of Lusófona University of Porto, intends to reflect on the consequences of the jurisprudence of CJEU on the interpretation and application of article 101º of TFEU. This CJEU decision was published in 13/12/2012, in the process number C-226/11. Is known as "Case Expedia", because one of the processual parts is a Travel Agency, called Expedia. The dispute between Expedia company and the NAC: "*La Autorité de la Concurrence*". In this preliminary ruling, the French national court (Cour de Cassation Française) had put two questions to CJEU:

1st: Which is the effect of **"*de minimis*"** communication on national authorities?

2nd: Which is the interpretation of the concept of "***sensitive restriction***" of competition according to the article 3(2) of Regulation (EC) Nº 1/2003 of 16 December 2002 and the article 101º of TFEU?

Thus, this are the investigation questions to analyze, from the point of view of the CJEU considering the consequences on enterprises life and to the market competition.

1.2 Methodology

Considering the rules of investigation on issues of law we have to clarify that this is a case-law study. So the starting point is to analyze the case "Expedia" and its comparison with other cases decided by the Court, before and after these decision. This jurisprudential analyze will be supplemented with some relevant doctrinal references.

With some comparative analyze of other judgments of the CJEU is possible to conclude how the ECJ did the interpretation and developed the sense of the concept. As central issue we want to find systematic definition of the criteria to recognize, in reality, how and when can we conclude that certain agreement between corporations can be restrictive of free competition, and so, illegal and invalid for the European law. After analyze all the answers from CJEU to the different questions to decide we conclude with a critical appreciation of the consequences of this jurisprudence.

2. Legal Framework: The European Legal Order and Competition Law

By establishing the Union, Member States have limited their sovereign legislative powers and created an independent legal order which binds them, as well as their nationals, and which should be used by their courts. This autonomy was clearly recognize in one of the most well-known cases judged by the CJEU, the "Costa v. ENEL case" in 1964, in which Mr. Costa brought an action against the nationalization of electricity generation and distribution and the consequent acquisition of the business of the former electricity companies by ENEL, the new public company. In this judgment the CJEU states the primacy of European law and the autonomy of the legal order of European community. It states, clearly, that all kind of discrimination between corporations from different member states, monopolistic policies or competition restrictions are against European Treaty.

2.1 Autonomy of the Legal Order of the European Union

The autonomy of the EU legal order has a fundamental meaning for itself, as it is the only guarantee that EU law will not be distorted by interaction with national law and that it can be applied uniformly in all Member States. As a result of this autonomy, legal concepts are interpreted primarily in the light of the requirements of EU law and objectives. This determination of concepts, specific to the European Union, is essential, as the rights guaranteed by the EU legal order could be in jeopardy if each Member State could have the final say to decide for itself what it would make of the principles relating to freedoms guaranteed by EU law. Moreover, the standard for assessing EU acts is exclusively EU law and not the national or constitutional law of a Member State (Miranda & Medeiros, 2010, pp. 360, 508).

So, given this notion of autonomy of the EU legal order, how can we describe the relationship between EU law and national law?

The EU legal order and national legal systems are in fact interdependent and cooperating with each other. The competition law is an evidence of that autonomy and interdependency. (Verhoeven,1996, pp. 861-887). The introduction of a system promoting the European economy with an autonomous legal order often leads to conflicts between national legal systems and the rules resulting from EU law (Reyna & Ezrach, 2019, pp. 19-21). It is essential to have a process of adaptability of these two levels of law, the national and the European. In this context, the role of the CJEU is of fundamental importance for understanding and reconciling European competition law and national law (Close, 1978, pp. 81-87; Mendes, 2012, pp. 235-237).

2.2 Competition Law in the EU

The idea of free competition encourages companies to offer consumers goods and services at the most favourable terms. It encourages efficiency and innovation and reduces prices. To be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others (Stigler, 1957, pp. 1-17).

However, although the principle of free competition is the rule stated in the Treaty, we must not forget that it entails exceptions, as is apparent from Article 106(2) TFEU (Anjos, 2016, pp. 33-41, 75-105). Also in according to CJEU the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers. Competition law and competition policy have an undeniable impact on the specific economic interests of final customers who purchase goods or services, and so, they are

crucial for the well-being of European citizens.1European antitrust policy is developed from two central rules set out in the Treaty on the Functioning of the European Union:

1st, Article 101 of the Treaty prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e., agreement between a manufacturer and its distributor). Only limited exceptions are provided for in the general prohibition. The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.

2nd, Article 102 of the Treaty prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

For adaptation to the European reality, which is crucial for the evolution of national competition laws, was particularly important the development introduced by Council Regulation (EEC) No 17/1962 of 21 February 1962 (hereinafter Reg. 17/1962) and Council Regulation (EC) No 1/2003 of 16 December 2002 (hereinafter Reg. 1/2003), with as basic guidelines for the application of European Union Competition Law for all European Territory. Competition Law, is constantly evolving politics and transformation, so "perfect competition" is only a concept of "effective competition" or viable competition and nothing more (Stigler, 1957, p. 16; Reyna & Ezrach, 2019, p. 21).

In this field the CJEU has made an evolution from the concept of perfect and free competition to a concept of workable competition (Collins & Hutchins, 1988, pp. 20-23). Workable competition is the best we can have in free market. In this market condition, we can say that the sellers are free to sale the products at the best price, where each unit of sale will seek the maximum net result, but without limitation of the buyer's freedom of choice because he has several choices and alternatives to buy the product (Mateus, 2004, pp. 1-17). This idea is according to the process of building the EU, based on a logic of integration and liberalization of markets in an environment of free competition. For that in was necessary to introduce a competition law, efficient, with a view to protecting the market from restrictions on competition attributable to both isolated behaviour of economic subjects and related behavior of groups of undertakings (Waelbroeck, 1986, pp. 37-49; Stigler, 1957, pp. 1-17).

Therefore, in EU, a strict free competition defense was guaranteed from the first hour, eliminating all distorting factors from the free movement of goods and services between member States (Vicente, 2013, pp. 223-240). In short, all abusive or restrictive practices of free competition within the EU are forbidden (Peixoto, 2013, pp. 49-51).

The fundamental objective of Community competition rules is to ensure that competition is not distorted. However, effective competition is not an end in itself, but a condition for achieving a dynamic and free internal market, which functions as one of several instruments to promote general economic well-being (Anjos, 2016, pp.

1 This idea is evidenced in several judgements of CJEU, such as: Joined Cases T-213/01 and T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECR II-1601, p. 115. Case C-52/09 TeliaSonera Sverige [2011] ECR I-527, pag. 22. Joined Cases C-468 to 478/06 Sot. Lélos kai Sia and Others [2008] ECR I7139, pag 68. Case C-280/08 P Deutsche Telekom v Commission [2010] ECR I-9555, p. 176. Case Raw Tobacco Italy (Case COMP/C.38.238/B.2) Commission Decision of 20 October 2005. Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband and others v Ichthyol-Gesellschaft Cordes and others [2004] ECR I-2493, pp. 30-31. Case 26/75 General Motors Continental v Commission [1975] ECR 1367. Case 27/76 United Brands v Commission [1978] ECR 207. Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra (AKKA)/ Latvijas Autoru apvienība (LAA) [2017] ECLI; Deutsche Post AG (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40. And many others.

151-206; Laguna de Paz, 2009, pp. 53-69).

The EU's decisively innovative feature in relation to previous attempts is that, in order to unify Europe, it does not use violence or submission, but rather the force of law. Only a union based on free will can have a lasting future, a union based on fundamental values, such as freedom and equality, and preserved and embodied by law. It is in this view that the Treaties that created the European Union are based (Anjos, 2016, pp. 33-62). In other words, it is a Union based on law. However, its application to specific cases will always raise questions and controversial issues (Pais, 2011, p. 20).

Thus, in the construction of the EU, the role of the CJEU is fundamental and its jurisprudence is a guiding light for EU citizens and businesses. Fundamental in the interpretation and development of legal concepts. We can say that the study of concrete cases involves, always the study of the jurisprudence of the CJEU that determines the limits or beacons to the legal concepts (Morais, 2006, p. 25; Reyna & Ezracth, 2019, pp. 20-23). The "Expedia" case is particularly interesting for defining the limits of the restrictive concept of the restrictive agreement of the restrictive market agreement and the relevance of minor restrictive agreements.

3. The Case "Expedia" Facts and Questions to Decide

The "Expedia Case" corresponds to the decision of the CJEU of 13-12-2012, delivered in Case No 226/2011, in which the intervening parties were Expedia Inc. and the french NAC (Autorité de la Concurrence). This is a preliminary ruling procedure promoted by the High Court of the French Republic, "Cour de Cassation" addressed to the CJEU, to clarify two questions about the effect of **"*de minimis*"** communication on national authorities and the interpretation of the concept of ***"sensitive restriction"*** of competition according to the article 3(2) of Regulation (EC) Nº 1/2003 of 16 December 2002 and the article 101º of TFEU.

3.1 Facts of Case Expedia

The French Competition Authority condemned the American company Expedia and the French railway undertaking, SNCF, for considering that the establishment of a common Travel Agency constituted an agreement which had the object and effect of restricting competition and was, in those words, prohibited by national competition law (Article L.420-1 of the French Commercial Code) and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Expedia Inc. is one of the world's largest travel advisors, which controls, in addition to Expedia, the Hotels.com, Trivago, Hotwire, Orbitz, CheapoTickets, Travelocity, Wotif Group, Local Expert, Venere, Egencia, HomeAway, among many others.

Expedia appealed against the administrative decision alleging, inter alia, that the French Authority had overvalued market shares, with the partnership agreement falling under the "*de minimis*" exemption established by the European Commission.

The Court of First Instance, *Cour d'Appel*, held that, in the light of the wording of Article L. 464-6-1 of the French Commercial Code and, in particular, the use of the word "can", the French Authority had the possibility of punishing restrictive practices of undertakings with market shares below the thresholds set by that Code and "*de minimis*" Communication.

Expedia appeals the *Cour de Cassation*, which decided to stay the proceedings and ask the Court of Justice of the European Court ("Court of Justice" or "Court") whether Article 101(1) TFEU and Article 3, Regulation (EC) No 1/2003 of 16 December 2002 ("Regulation No 1/2003") opposed a practice which could affect trade between Member States but carried out by undertakings whose market share do not reach the thresholds set in the De

minimis Communication, to be prosecuted and punished by a national competition authority.

So, the "*Cour de Cassation*" wishes to know from the European Court of Justice:

1st, The assessment by the national authorities of the sensitive nature of a certain restriction of competition must necessarily take place in the light of the criteria which have been published at European Union level, by means of the *Commission's de minimis* communication?

2nd, A national authority can assume the verification of a sensitive restriction of competition in a case where the agreement between undertakings it assessed does not reach the market share limits provided for in the de *minimis communication,* but reveals an anti-competitive objective?

3.2 The CJEU Judgement

The CJEU did appreciate the case Expedia and in the judgement concludes that articles 101 to 109 of the Treaty on the Functioning of the European Union (TFEU) contain competition rules that have be applied in the internal market. Under those articles, agreements between undertakings which may restrict competition are prohibited. An undertaking which holds a dominant position is prohibited from unfairly serving its position and thus affecting trade between Member States. As concentrations and Community dimension are controlled by the European Commission and may even be prohibited in certain cases.

The granting of state aid to certain products or undertakings which distort competition is forbiden, although it may in certain cases be authorised. As competition rules also apply to public undertakings, public services and services of general interest. These rules may be repealed if the achievement of the objectives of these specific services is compromised. In order to be covered by the prohibition of Article 101 TFEU, an agreement between undertakings must restrict competition "***in a sensitive manner*** and ***should be likely to affect trade between Member States***".

The sensitive character of the restriction must be assessed on the basis of the actual framework in which that agreement is inserted, in particular, taking into account the economic and legal context in which it is inserted, the nature of the products or services affected and the actual conditions of the functioning and structure of the market5. The Court recalled the distinction between infringement by object and infringement by effect, and concluded that an agreement which may affect trade between Member States and which has an anti-competitive object constitutes, by its nature and irrespective of any specific effect, a restriction which is sensitive to competition.Furthermore, the Court recalled that the Commission's "*de minimis*" Communication is not binding either on the competition authorities or on the courts of the Member States (as mentioned in paragraph 4). "***It only binds the Commission***" which cannot deviate from its content without breaching general principles of law, such as equal treatment and the protection of legitimate expectations. Thus, in determining the sensitive nature of a restriction on competition, the competition authority of a Member State may take into account the thresholds set out in point 7 of the "*de minimis*" Communication, even if it is not obliged to do so. These thresholds constitute only indications and therefore allow the national authority to determine whether or not a restriction is sensitive in accordance with the actual framework in which the agreement is in force. In the judgment delivered, the CJEU set out Article 81(1). and Article 3(2) of Regulation (EC) No 1/2003 as meaning that the competition authority of a Member State may prosecute and punish one or more undertakings for infringement of competition rules, even if the limits set by the European Commission in its "de minimis communication" are not reached, provided that the authority has taken account of that communication and justifies by any means that the agreement in question has a restrictive effect on competition with a significant impact on the relevant market. It also pointed out that the "*de*

minimis" communication is not binding and must be interpreted as meaning that the market share limits contained therein are irrelevant where it concerns to assess the sensitive nature of restrictions on competition which are the result of agreements between undertakings concluded for anti-competitive object.

CJEU conclude that: "Article 101(1) TFEU and Article 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002, on the enforcement of the competition rules laid down in Articles 81 [EC] and 82 [EC], they must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings which is likely to affect trade between Member States, but that it does not reach the thresholds set by the European Commission in its Communication on minor agreements which do not significantly restrict competition under Article 81 (EC) (de minimis) (de cordance) (de de minimis) in accordance with article 81 (de minimis), provided that such an agreement constitutes a significant restriction of competition within the meaning of that provision."

4. Analysis of Expedia Judgment

Is important to point that the judgment of the Court was proclaimed according by Article 81(1) EC and Regulation No 1/2003, which was adopted for its implementation. Anyway, the article 81º coincides with the current Article 101º of the Treaty of Lisbon (December 2009), TFEU. The legal framework did not change with the TFEU.

In the first answer of CJEU, as regards the absence of binding effects on the part of the *de minimis* communication, it appears that the Court of Justice got its decision right by clarifying that the Commission's communications in the area of European competition law have no binding effect on national authorities and courts. The same is true for the communication *of de minimis* in the present case and its limits of market shares provided for there in. That is due to the very content of the «*de minimis*» communication merely expresses the Commission's legal interpretation, making it clear that it is not binding on the authorities and courts of the Member States. The Communication itself expressly states that its content is without prejudice to the interpretation of Article 81 EC (now Article 101 TFEU). In that communication, the CJEU took the view that the Commission intended only to make its administrative practice transparent in the application of Article 81 EC and to make available the authorities and courts of the Member States with useful interpretative indications to undertakings active in the internal market. It also clarified to the Court that the Commission adopts, in that case, a general opinion or recommendation on competition policy, within the framework of the responsibility conferred on it for the maintenance and development of a competition system. However, such opinions or recommendations are not binding (Article 249 fifth paragraph, EC, current Article 288, fifth paragraph, TFEU).

Only the European Council may adopt binding provisions for the implementation of the competition rules enshrined in the European Treaties and does so in the form of regulations or directives (Article 83 EC, current Article 103 TFEU). Furthermore, the CJEU pointed out that the publication of the *de minimis* communication in the C series of the Official Journal of the European Communities shows that it did not seek to adopt binding legal provisions. Unlike its L series, the Purpose of the C series is not to publish legally binding acts, but only information, recommendations and notices relating to the Union.

Moreover, the legal basis for the competition authorities action against anti-competitive agreements between undertakings is not provided by the "*de minimis*" communication. In fact, the prohibition on cartels, as provided for in EU law, is set out in Article 81 EC (now 101 TFEU), therefore at the level of primary law, in a provision

contained in the Treaty, which, as such, has direct effects both to and from the detriment of undertakings.

The decision examined here has also made it clear, correctly in our point of view, that the communication "*de minimis*" has the nature of "*soft law*". The importance of this understanding in the competition process, both at European and national level, is that it must be taken into account in many similar cases. Thus, as regards to administrative competition proceedings at national level, the «*de minimis*» communication, as it expressly points out, seeks to provide guidance to the courts and national authorities for the application of competition european law. Such guidelines are decisive for the functioning of the decentralised system of application of competition law, as set up by Regulation Nº 1/2003. Those guidelines contribute to the basic objective of the effective and uniform application throughout the EU of the Eurpean competition law, contained in Articles 101 and 102 TFEU.

Even if the communication "*de minimis*", as regards the assessment of agreements between undertakings in the light of competition law, does not result in binding impositions on the competition authorities and the national courts, they must take into account the assessments as to the sensitive nature of the restrictions on competition expressed by the Commission in that communication and, in the event of divergence, justify them by giving the evidence the judicial reasons.

In a word, in "Expedia case" ECJ says that the communication "*de minimis*" is not an impositive decision but an orientation for decision, considering the real impact on relevant market.

Another question abording by CJEU was the concept of "*market share*", because this is one of the methods to draw limits, and is one of several quantitative and qualitative indications in the light of which you can assess whether or not an agreement between undertakings produces a significant restriction of competition. The CJEU stated that the national authorities and courts may act against agreements between undertakings, even if the limits laid down in the "*de minimis*" communication have not be enreached, provided that they have duly taken into account the Commission's indications contained in that communication. It must be analyzed case by case, because there are other indications than market shares, to conclude if the relevant market on competition is or not appropriate. The CJEU then did a thorough analysis of the "*market share*" limits relevance contained in the "*de minimis*" communication as a guideline for national authorities and courts decide, in each case, if agreements between undertakings are being or not anti-competitive.

5. Conclusions

We conclude that, in the CJEU point of view, the "*de minimis comunication*", in substantive terms, means that according to the Article 101 TFEU, only the sensitive restrictions on competition are forbidden. In other words, the requirement of a sensitive impact under the relevant market. Generally, it applies to competition restrictions that the object and effect are intentionally restrictive.

Secondly, proof of the "sensitive restriction of competition" depends on each agreement between undertakings. We need to check in each case whether or not the agreement is capable of cartelising the market or producing an anti-competitive effect.

The CJEU pointed out that according to Art. 81 paragraph 1 TFEU, only if there is insufficient evidence of the anti-competitive nature of the agreement, it will be necessary to verify that the effects of the agreement are restrictive or not. If, on the other hand, it is established that the agreement in question has an anti-competitive object, there is no need for concrete proof of the production of negative effects on competition by that agreement. In this case, it is sufficient to demonstrate that the agreement is specifically capable of preventing, restricting or

distorting competition in the internal market.

According to expedia, a potential restrictive agreement should be assessed by determining the relevant market, the market share of each player or the joint market share of all (if there is a cartel) and the magnitude of the affected consumers.

These are the criteria for assessing whether a given agreement is "significantly restrictive of competition", and therefore illegal and against EU competition law.

In addition, the Court recalled the distinction between "infringement by object" and "infringement by effect" and concluded that an agreement which may affect trade between Member States and which has an anti-competitive object constitutes, by its very nature and independently of any specific effect, a restriction on competition.

Furthermore, the Court says that the «*Commission's de minimis Communication*» is not binding, either for the competition authorities or the national courts. It is only an orientation to follow and to take in consideration. So, some restrictive agreements, with little impact on the relevant market, may be accepted in the light of European competition law.

In our point of view, although this solution is formaly correct, it should be more clear. It maybe do not a good contribution to legal certainty and uniform application of European competition law. Actually, in "Expedia case" the ECJ assumes a very flexible and open position about the concept of "*sensitive restriction of competition*".

In other words, the answer to the first question was quite flexible and open to different interpretations. This is a good theoretical contribution but leaves many open questions. The appreciation case-by-case does not contribute to the security of citizens and companies.

This CJEU decision took a different sense from the previous case-law. It, undoubtedly, contributes to a better understanding of what can be an «agreement of minor relevance», that is not against the European Competition Law, despite its restrictive character, when does not affect in a sensitive way the relevant market. But there remains great uncertainty and conceptual ambiguity in the interpretation of Articles 101 and 102 TFEU.

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