Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

13 December 2012*

(Competition — Article 101(1) TFEU — Agreements, decisions and concerted practices — Appreciable restriction — Regulation (EC) No 1/2003 — Article 3(2) — National competition authority — Practices which may affect trade between Member States — Proceedings and penalty — Market share thresholds of the de minimis notice not attained — Restrictions by object)

In Case C-226/11,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Cour de cassation (France), made by decision of 10 May 2011, received at the Court on 16 May 2011, in the proceedings

Expedia Inc.

v

Autorité de la concurrence and Others,

THE COURT (Second Chamber),

composed of A. Rosas, acting as President of the Second Chamber, U. Lõhmus (Rapporteur), A. Ó Caoimh, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2012,

after considering the observations submitted on behalf of:

— Expedia Inc., by F. Molinié and F. Ninane, avocats,

— the Autorité de la concurrence, by F. Zivy and L. Gauthier-Lescop, acting as Agents, and by E. Baraduc, avocate,

— the French Government, by G. de Bergues and J. Gstalter, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

— the Polish Government, by M. Szpunar, acting as Agent,

* Language of the case: French.

— the European Commission, by N. von Lingen and B. Mongin, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis, M. Schneider and M. Moustakali, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 101(1) TFEU and 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the [EC] Treaty (OH 2003 L 1, p. 1).

2 That reference has been made in the course of proceedings between the company Expedia Inc. ('Expedia') and, inter alia, the Autorité de la concurrence ('the Competition Authority', formerly the Conseil de la concurrence) regarding the proceedings brought and financial penalties imposed by the latter because of the agreements relating to the creation of a joint subsidiary concluded between Expedia and the Société nationale des chemins de fer français (SNCF) ('SNCF').

Legal context

European Union legislation

3 Article 3(1) and (2) of Regulation No 1/2003 provides:

'1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) [EC] which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 [EC] to such agreements, decisions or concerted practices ….

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) [EC], or which fulfil the conditions of Article 81(3) [EC] or which are covered by a Regulation for the application of Article 81(3) [EC]. ...'

4 The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (*de minimis*) (OH 2001 C 368, p. 13, 'the *de minimis* notice') states at paragraphs 1, 2, 4, 6 and 7:

'1. ... The Court of Justice […] has clarified that [Article 81(1) EC] is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable.

2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 [EC]. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1) [EC] …

...

4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81 [EC].

...

6. This notice is without prejudice to any interpretation of Article 81 [EC] which may be given by the Court of Justice or the Court of First Instance ...

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1) [EC]:

(a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors) ...

...'

French legislation

5 Article L. 420-1 of the Commercial Code is worded as follows:

'Concerted actions, agreements, express or tacit understandings or coalitions, particularly when they are intended to:

(1) limit access to the market or the free exercise of competition by other undertakings;

(2) prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices;

(3) limit or control production, markets, investment or technical progress;

(4) share markets or sources of supply,

shall be prohibited, even through the direct or indirect intermediation of a company in a group established outside France, when they have the object, or may have the effect, of preventing, restricting or distorting competition in a market.'

6 Article L. 464-6-1 of that code provides that the Competition Authority may also decide that there are no grounds for continuing the proceedings when the practices referred to in Article L. 420-1 do not relate to contracts entered into pursuant to the Public Procurement Code and the cumulative market share of the companies or bodies which are parties to the challenged agreement or practice does not exceed certain thresholds, corresponding to those set out in paragraph 7 of the *de minimis* notice.

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 In order to expand the sale of train tickets and travel over the internet, SNCF concluded, in September 2001, a number of agreements with Expedia, a company incorporated under US law and specialised in the sale of travel over the internet, and created with it a joint subsidiary called GL Expedia. The

website voyages-SNCF.com, which until then specialised in information on the reservation and sale of train tickets over the internet, hosted the activities of GL Expedia and expanded to offer, in addition to its initial services, the services of an online travel agency. In 2004, the joint subsidiary changed its name to Agence de voyages SNCF.com ('Agence VSC').

8 By decision of 5 February 2009, the French Competition Authority found that the partnership between SNCF and Expedia creating Agence VSC constituted an agreement contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, the object and effect of which is to promote that joint subsidiary in the market for travel agency services provided for leisure travel to the detriment of competitors. It imposed financial penalties on Expedia and on SNCF.

9 The Competition Authority found, inter alia, that Expedia and SNCF were competitors in the market for on-line travel agency services, that their market shares were more than 10% and that, consequently, the '*de minimis*' rule, as set out in paragraph 7 of the '*de minimis*' notice and Article L. 464-2-1 of the Commercial Code, were not applicable.

10 Before the Cour d'appel, Paris, Expedia submitted that the Competition Authority had overestimated the market shares held by Agence VSC. That court did not rule directly on that plea. In its judgment of 23 February 2010, it held, inter alia, in the light of the wording of Article L. 464-6-1 of the Commercial Code and, in particular, the use of the word 'may', that it is possible for the Competition Authority, in any event, to bring proceedings against practices implemented by undertakings whose market share is below the thresholds specified by that article and by the *de minimis* notice.

11 Ruling on the appeal brought by Expedia against that judgment, the Cour de cassation notes that it is not disputed that, as the Competition Authority concluded, the agreement at issue in the main proceedings has an anti-competitive object. It considers that, in view of the relevant case-law of the Court, it is not established that the Commission would bring proceedings against such an agreement where the market shares concerned do not exceed the thresholds specified in the *de minimis* notice.

12 The national court is of the opinion, moreover, that the assertions set out in paragraphs 4 and 6 of the *de minimis* notice, to the effect that that notice is not binding on the courts and authorities of the Member States and is without prejudice to any interpretation of Article 101 TFEU that may be given by the courts of the European Union, give rise to uncertainty as to whether the market share thresholds established by that notice amount to a non-rebuttable presumption of there being no appreciable effect on competition as provided for in that article.

13 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 101(1) TFEU and Article 3(2) of Regulation (EC) No 1/2003 be interpreted as precluding the bringing of proceedings and the imposition of penalties by a national competition authority, on the grounds of both Article 101(1) TFEU and the national law of competition, in respect of a practice under agreements, decisions of associations of undertakings or concerted action that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its [*de minimis*] notice?'

The question referred for a preliminary ruling

14 By its question, the referring court seeks to know, essentially, whether Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its *de minimis* notice.

15 It should be noted that Article 101(1) TFEU prohibits 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.

16 It is settled case-law that an agreement of undertakings falls outside the prohibition in that provision, however, if it has only an insignificant effect on the market (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7; Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 77; Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 34; and Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 50).

17 Accordingly, 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 and be capable of affecting trade between Member States (Case C-70/93 *BMW* v *ALD* [1995] ECR I-3439, paragraph 18; Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 12; and Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, paragraph 68).

18 With regard to the role of Member State authorities in the enforcement of Union competition law, the first sentence of Article 3(1) of Regulation No 1/2003 establishes a close link between the prohibition of the agreements set out in Article 101 TFEU and the corresponding provisions of national competition law. Where the national competition authority applies provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU, the first sentence of Article 3(1) requires Article 101 TFEU also to be applied to it in parallel (Case C-17/10 *Toshiba Corporation* [2012] ECR, paragraph 77).

19 Under Article 3(2) of Regulation No 1/2003, the application of national competition law may not lead to the prohibition of such agreements if they do not restrict competition within the meaning of Article 101(1) TFEU.

20 It follows that the competition authorities of the Member States can apply the provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market.

21 The Court has held that the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement (Case 1/71 *Cadillon* [1971] ECR 351, paragraph 8). Regard must be had, inter alia, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 58). It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, *Asnef-Equifax and Administración del Estado*, paragraph 49).

22 In its examination, the Court found, inter alia, that an exclusive dealing agreement, even with absolute territorial protection, has only an insignificant effect on the market in question, taking into account the weak position which the persons concerned have in that market, (*Völk*, paragraph 7, and *Cadillon*, paragraph 9). In other cases, however, it did not base its decision on the position of the persons concerned in the market in question. Accordingly, in paragraph 35 of *Bagnasco and Others*, it found that an agreement between the members of a banking association which excludes the right, with regard to the opening of current-account credit facilities, to adopt a fixed interest rate cannot have an appreciable restrictive effect on competition, since any variation of the interest rate depends on objective factors, such as changes occurring in the money market.

23 It is apparent from paragraphs 1 and 2 of the *de minimis* notice that the Commission intends to quantify therein, with the help of market share thresholds, what is not an appreciable restriction of competition within the meaning of Article 101 TFEU and the case-law cited in paragraphs 16 and 17 of the present judgment.

24 With regard to the wording of the *de minimis* notice, its non-binding nature, for both the competition authorities and the courts of the Member States, is emphasised in the third sentence of paragraph 4 thereof.

25 Furthermore, in the second and third sentences of paragraph 2 of that notice, the Commission states that market share thresholds used quantify what is not an appreciable restriction of competition within the meaning of Article 101 TFEU, but that the negative definition of the appreciability of such restriction does not imply that agreements of undertakings which exceed those thresholds appreciably restrict competition.

26 Moreover, contrary to the Commission notice on cooperation within the network of competition authorities (OH 2004 C 101, p. 43), the *de minimis* notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them.

27 It also follows from the objectives pursued by the *de minimis* notice, as mentioned in paragraph 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member States.

28 It is apparent from that paragraph, first, that the purpose of that notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the *de minimis* notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 211). Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article.

29 Consequently, and as the Court has already had occasion to point out, a Commission notice, such as the *de minimis* notice, is not binding in relation to the Member States (see, to that effect, Case C-360/09 *Pfleiderer* [2011] ECR I-5161, paragraph 21).

30 Accordingly, that notice was published in 2001 in the 'C' series of the *Official Journal of the European Union*, which, by contrast with the 'L' series of the Official Journal, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union (see, by analogy, Case C-410/09 *Polska Telefonia Cyfrowa* [2011] ECR I-3853, paragraph 35).

31 Consequently, in order to determine whether or not a restriction of competition is appreciable, the competition authority of a Member State may take into account the thresholds established in paragraph 7 of the *de minimis* notice but is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement.

32 Contrary to what Expedia argued during the hearing, the proceedings brought and penalties imposed by the competition authority of a Member State, on undertakings that enter into an agreement that has not reached the thresholds defined in the *de minimis* notice, cannot infringe, as such, the principles of legitimate expectations and legal certainty, having regard to the wording of paragraph 4 of that notice.

33 Furthermore, as the Advocate General pointed out in point 33 of her Opinion, the principle of the lawfulness of penalties does not require the *de minimis* notice to be regarded as a legal measure binding on the national authorities. Cartels are already prohibited by the primary law of the European Union, that is, by Article 101(1) TFEU.

34 In so far as Expedia, the French Government and the Commission have, in their written observations or during the hearing, questioned the finding made by the national court that it is not disputed that the agreement at issue in the main proceedings had an anti-competitive object, it should be remembered that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the main proceedings is a matter for the national court (Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 49 and the case-law cited).

35 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-12789, paragraph 65; and Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 75).

36 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).

37 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.

38 In light of the above, the answer to the question referred is that Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its *de minimis* notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 101(1) TFUE and 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1), [EC] (*de minimis*), provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.

[Signatures]