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*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

**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 Notice)**

(2014/C 291/01)

I.

1. Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements between undertakings 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. The Court of Justice of the European Union has clarified that that provision is not applicable where the impact of the agreement on trade between Member States or on competition is not appreciable⁽¹⁾.
2. The Court of Justice has also clarified that an agreement which may affect trade between Member States and which 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⁽²⁾. This Notice therefore does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market.
3. In this Notice the Commission indicates, with the help of market share thresholds, the circumstances in which it considers that agreements which may have as their effect the prevention, restriction or distortion of competition within the internal market do not constitute an appreciable restriction of competition under Article 101 of the Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this Notice constitute an appreciable restriction of competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 101(1) of the Treaty⁽³⁾.
4. Agreements may also fall outside Article 101(1) of the Treaty because they are not capable of appreciably affecting trade between Member States. This Notice does not indicate what constitutes an appreciable effect on trade between Member States. Guidance to that effect is to be found in the Commission's Notice on effect on trade⁽⁴⁾, in which the Commission quantifies, with the help of the combination of a 5 % market share threshold and a EUR 40 million turnover threshold, which agreements are in principle not capable of appreciably affecting trade between Member States⁽⁵⁾. Such agreements normally fall outside Article 101(1) of the Treaty even if they have as their object the prevention, restriction or distortion of competition.

⁽¹⁾ See Case C-226/11 *Expedia*, not yet reported, paragraphs 16 and 17.

⁽²⁾ See Case C-226/11 *Expedia*, in particular paragraphs 35, 36 and 37.

⁽³⁾ See, for instance, Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraphs 34 and 35.

⁽⁴⁾ Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81), in particular points 44 to 57.

⁽⁵⁾ It should be noted that agreements between small and medium sized undertakings (SMEs), as defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises or any future recommendation replacing it (OJ L 124, 20.5.2003, p. 36), are also not normally capable of affecting trade between Member States. See in particular point 50 of the Notice on effect of trade.

5. In cases covered by this Notice, the Commission will not institute proceedings either upon a complaint or on its own initiative. In addition, where the Commission has instituted proceedings but undertakings can demonstrate that they have assumed in good faith that the market shares mentioned in points 8, 9, 10 and 11 were not exceeded, the Commission will not impose fines. Although not binding on them, this Notice is also intended to give guidance to the courts and competition authorities of the Member States in their application of Article 101 of the Treaty ⁽¹⁾.
6. The principles set out in this Notice also apply to decisions by associations of undertakings and to concerted practices.
7. This Notice is without prejudice to any interpretation of Article 101 of the Treaty which may be given by the Court of Justice of the European Union.

II.

8. The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:
 - (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 those markets (agreements between competitors) ⁽²⁾; or
 - (b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors).
9. In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold is applicable.
10. Where, in a relevant market, competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds set out in point 8 and 9 are reduced to 5 %, both for agreements between competitors and for agreements between non-competitors. Individual suppliers or distributors with a market share not exceeding 5 %, are in general not considered to contribute significantly to a cumulative foreclosure effect ⁽³⁾. A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.
11. The Commission also holds the view that agreements do not appreciably restrict competition if the market shares of the parties to the agreement do not exceed the thresholds of respectively 10 %, 15 % and 5 % set out in points 8, 9 and 10 during two successive calendar years by more than 2 percentage points.

⁽¹⁾ In particular, in order to determine whether or not a restriction of competition is appreciable, the competition authorities and the courts of Member States may take into account the thresholds established in this Notice but are not required to do so. See Case C-226/11 *Expedia*, paragraph 31.

⁽²⁾ On the definition of actual or potential competitors, see the Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1), point 10. Two undertakings are treated as actual competitors if they are active on the same relevant market. An undertaking is treated as a potential competitor of another undertaking if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.

⁽³⁾ See also the Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1, in particular points 76, 134 and 179. While in the Guidelines on Vertical Restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this Notice all market share thresholds refer to total market shares.

12. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the Notice on the definition of the relevant market ⁽¹⁾. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.
13. In view of the clarification of the Court of Justice referred to in point 2, this Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market. The Commission will thus not apply the safe harbour created by the market share thresholds set out in points 8, 9, 10 and 11 to such agreements ⁽²⁾. For instance, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. Likewise, the Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation ⁽³⁾, which are considered by the Commission to generally constitute restrictions by object.
14. The safe harbour created by the market share thresholds set out in points 8, 9, 10 and 11 is particularly relevant for categories of agreements not covered by any Commission block exemption regulation ⁽⁴⁾. The safe harbour is also relevant for agreements covered by a Commission block exemption regulation to the extent that those agreements contain a so-called excluded restriction, that is a restriction not listed as a hardcore restriction but nonetheless not covered by the Commission block exemption regulation ⁽⁵⁾.
15. For the purpose of this Notice, the terms ‘undertaking’, ‘party to the agreement’, ‘distributor’ and ‘supplier’ include their respective connected undertakings.
16. For the purpose of the Notice ‘connected undertakings’ are:
- (a) undertakings in which a party to the agreement, directly or indirectly:
 - i. has the power to exercise more than half the voting rights, or
 - ii. has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - iii. has the right to manage the undertaking’s affairs;
 - (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
 - (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

⁽¹⁾ Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

⁽²⁾ For these agreements, the Commission will exercise its discretion in deciding whether or not to institute proceedings.

⁽³⁾ For supply and distribution agreements between non-competitors see in particular Article 4 of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1) and for licensing agreements between non-competitors see in particular Article 4(2) of Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L 93, 28.3.2014, p. 17). For agreements between competitors see in particular Article 5 of Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 335, 18.12.2010, p. 36), and Article 4 of Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43) as well as Article 4(1) of Regulation (EU) No 316/2014.

⁽⁴⁾ For instance, trade mark licence agreements and most types of agreements between competitors, with the exception of research and development agreements and specialisation agreements, are not covered by any block exemption regulation.

⁽⁵⁾ For excluded restrictions see in particular Article 5 of Regulation (EU) No 330/2010, Article 5 of Regulation (EU) No 316/2014 and Article 6 of Regulation (EU) No 1217/2010.

- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
 - (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
 - i. parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
 - ii. one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.
17. For the purposes of point (e) in point 16, the market share held by these jointly held undertakings is apportioned equally to each undertaking having the rights or the powers listed in point (a) in point 16.
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