

e-Competitions

Competition Laws Bulletin

<i>De minimis</i>

De minimis rule in competition law: An overview of EU and national case law

Anticompetitive practices, Anticompetitive object/effect, Effect on interstate trade, De minimis, Foreword, Judicial review, Thresholds, Market definition, Notification (State aid), All business sectors

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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1. Introduction

Delimitation of national law and EU law and the proper qualification of 'purely national situations' has been a consistent source of questioning, leading up to an important body of case-law in all fields of EU law (again recently illustrated by the *McCarthy* case in relation to movement of EU citizens) [1]. Two recurrent questions are where to draw the line and at what level, EU or national, this divide should best be determined. In EU competition law this topic was early on identified and tackled by the CJEU. In *VÁřřk*, the CJEU held that a restriction of competition must be 'appreciable' for it to be caught by Article 101(1) TFEU [2]. Accordingly, where the market share to the parties is 'insignificant' on the relevant market concerned by the agreement, the alleged restriction will fall outside the scope of the provision. This is so irrespective of whether this agreement would have been deemed to violate Article 101(1) TFEU by its very nature (*i.e.* by object), as in the case of a 'naked' price-fixing agreement or one giving absolute territorial protection to a distributor; or by effect [3]. This judge-made doctrine can be said to mirror a condition explicitly set out in Article 102 TFEU, pursuant to which an abuse of a dominant position must take place in a 'substantial part' of the internal market if it is to be subject to the prohibition.

The *VÁřřk* judgment inspired a series of Notices on agreements of minor importance (*de minimis*) by the Commission, the latest version of which was adopted in 2001 [4]. The purpose of these instruments is to set out in advance the circumstances in which an agreement is, in the view of the EU competition authority, unlikely to have an appreciable effect on competition. Unlike the judgment from which it is inspired, however, the 2001 Notice does not provide guidance regarding the status of agreements that have the potential to restrict competition by object and is therefore limited to agreements that can be presumed to generate efficiency gains [5]. One can see many different, policy-related, reasons why the Commission is reluctant to declare *ex ante* in a soft law instrument that it will not be prosecuting some of the most egregious and harmful restrictions [6].

With the decentralised enforcement of Article 101 TFEU made possible with - and indeed favoured by - the entry into force

of Regulation 1/2003 [7] and the accompanying soft law instruments, one could have predicted that the *de minimis* doctrine would play a significant *jurisdictional* role alongside the 'effect on trade between Member States' condition [8]. To the extent that it defines the scope of Article 101 TFEU, the doctrine can be seen as the expression of a dividing line between the respective boundaries of national and EU competition law. One can indeed presume that the threshold of 'appreciability' will be a lower one in the case of the former, and that national competition authorities (hereinafter, 'NCAs') and, more generally, that national courts will be required to deal more often than the Commission with agreements of relatively 'minor importance' [9]. This is a first reason why an overview of the application of the *de minimis* doctrine in the different Member States in the past years is a valuable exercise for academics and practitioners alike.

The generalised enforcement of Article 101 TFEU at the national level can also contribute significantly to the understanding of the doctrine in its practical implementation which is to a large extent still ignored. As pointed out above, it is undisputed that potential restrictions of competition by object may fall outside the scope of Article 101(1) TFEU altogether pursuant to the *de minimis* doctrine. At the same time, the 2001 Commission Notice does not provide guidance in this regard, and the case law is not particularly illuminating either [10]. To the extent that NCAs and national courts benefit from a greater exposure to agreements in which the doctrine is likely to be at stake, the task of defining the necessary level of 'appreciability' to trigger the application of Article 101 TFEU seems to be more effectively performed at the Member States' level.

In a different vein, an analysis of the application of the *de minimis* doctrine is useful to assess the extent to which EU competition law is consistently applied in the different Member States. The Commission justified the elimination of the notification system of Articles 101 and 102 TFEU on grounds that, 40 years of law enforcement had greatly clarified the substantive scope of these provisions [11]. The risk that the decentralisation in the enforcement of the law could lead to contradictory interpretations across the EU was addressed by means of several mechanisms enshrined in Regulation 1/2003, and which placed the Commission at the top of a network of enforcement authorities ('European Competition Network', or 'ECN') [12].

And finally, it is interesting to examine how EU competition law influences the shaping of equivalent national regimes. The database of 65 case reports draws its examples not only from case law, administrative practice, and legislative initiatives from Member States, but also from that of third countries (*e.g.* Croatia, Macedonia, Turkey) which have taken active steps to bring their systems in line with EU competition law.

A close reading of the different articles reveals that the *de minimis* doctrine has acquired a life of its own at the national level, in the sense that it plays a relevant role in areas that go beyond its original scope of application. Thus similar principles are now relied upon by NCAs to exclude from serious scrutiny mergers and acquisitions that would otherwise fall under the scope of national regimes for reason that they have only insignificant effects on competition on the Member State in question. This appears to be the case, most notably, in the British [13] and the German [14] merger control systems.

There is also a different context in which the *de minimis* doctrine has acquired prominence at the EU level. Even though there was no case law explicitly or implicitly supporting such policy initiatives, the European Commission adopted a Notice, then superseded by a block exemption regulation, identifying the instances in which aid granted by Member States is unlikely to fall within the scope of Article 107(1) TFEU, either because it does not 'distort competition' within the meaning of that provision, or because it does not 'affect trade between Member States'. The latest version of the Regulation was adopted in 2006. [15] Pursuant to Articles 2(1) and 2(2), Member States are dispensed from the notification requirement for aid below the amount of EUR 200,000 for a period of three years. The fact that *de minimis* doctrine has been invoked before national courts in State aid cases – there are two cases in the sample examined below – is evidence of the prominence gained by this discipline in the past decade.

2. Digest of the 65 case reports

This foreword draws on a sample of over 60 online articles, published in the past six years on the e-competitions newsletter, in which the *de minimis* doctrine was a relevant factor in (i) court or administrative proceedings, or (ii) in the context of a legislative process. It is useful to provide a detailed breakdown of the subject-matter of each of the articles, which can be categorised as follows: 29 address the application of the *de minimis* doctrine to Article 101 TFEU and its national equivalent. 13 deal with the application of the doctrine by analogy in the field of merger control. 11 comment on *general* legislative developments at the national level involving, in one way or the other, the appreciability of restrictions of competition. 5 discuss on specific developments addressing the *de minimis* doctrine, whether in the field of merger control or concerning the application of Article 101 TFEU. 5 concern the role of the *de minimis* doctrine in the field of State aid, of which only three concern developments at the national level. Finally, two articles comment on legislative developments at the EU level.

Or to put it in graphics:

A particular emphasis will be placed on the analysis of the 29 cases addressing the application of the *de minimis* doctrine to agreements between undertakings (Section 3). The three cases interpreting Article 107 TFEU and the *de minimis* block exemption regulation in the field of State aid, in turn, are only briefly discussed (Section 4).

3. Restrictive agreements and the *de minimis* doctrine

In the light of the cases examined, and from a general perspective, a first issue is how the *de minimis* doctrine is perceived and applied in national proceedings, on the one hand, and replicated in national legislation, on the other (section 3.1). There are indeed several technical and institutional reasons why it would be wrong to assume that the principles of the *de minimis* Notice would be necessarily endorsed at the national level. But also two distinctly complex technical aspects emerge, related to the application to the doctrine. All restrictions of competition must be appreciable for them to be caught by Article 101(1) TFEU, irrespective of whether they are potentially restrictive by object or by effect. Considering that the *de minimis* Notice issued by the European Commission only provides guidance in the latter case, it appears that confusion in this regard is difficult to exclude at the outset (section 3.2). Similarly, and insofar as the application of the doctrine requires by its very nature that the relevant market is defined, the complications and fallacies that this exercise entails by definition can be expected to arise, in particular when national courts examine the ‘appreciability’ of a restraint (section 3.3).

3.1. Role and prominence of the *de minimis* doctrine at the national level

3.1.1. The *de minimis* doctrine before national courts

A reading of the case reports suggests that national courts and NCAs are familiar with the *de minimis* doctrine. If this should not come as a surprise in the case of the latter, it cannot be automatically presumed that national courts have the ability and the willingness to consider its implications in competition law proceedings. National courts are typically composed of generalist judges who do not always have the expertise or the inclination to address the technicalities of EU competition law. In addition, one has to consider that the *de minimis* doctrine is truly practicable and visible through the application of the principles deriving from the successive Notices issued by the Commission. It is difficult to rule out that some national judges will prove reluctant to endorse the principles issued by an administrative authority, as was illustrated in the past with reference to some national rulings in which such reluctance was made very explicit [16].

Against this background, it is reassuring to note, first of all, that the *de minimis* doctrine appears to be well integrated in

the analysis of national courts. Interestingly, in some of the judgments this doctrine is only considered as a routine step in the assessment of competition restrictions (the 'appreciability' step). By this it is meant that it was apparent from the facts of the case that the market position of the parties to the agreement was far from 'insignificant' [17].

The incorporation of the doctrine in the 'default' analysis of national courts may be the consequence, at least in part, of the fact that it tends to be raised and become relevant in relatively well-defined factual scenarios that arise recurrently, often at the EU level. One is not surprised to find some cases concerning beer supply agreements [18] and petrol stations [19], which have long found their way to the CJEU by means of preliminary references. Some issues become recurrent only in one Member State, which means that expertise is developed at the local level. The two judgments from Austrian courts for instance concern the status under Article 101 TFEU of the so-called 'radius clauses', which are in essence non-compete obligations imposed by the owners of shopping centres on shop tenants, and which according to the correspondents have given rise to a long saga of cases in the country [20]. There is also a significant number of cases involving resale price maintenance in the case reports, namely 4 [21], the restrictive nature of which has always been undisputed [22]. One could speculate whether it is more likely to find such clauses in vertical agreements concluded by relatively small firms either because these market players are less familiar with competition law or because they can reasonably anticipate that competition authorities are less likely to take action against them.

The status of the 2001 Notice was discussed at length in the appeal before the *Cour d'appel de Paris* against the French NCA decision in *SNCF/Expedia* [23]. At first sight, upon reading that the national court stated that the NCA was not bound by the *de minimis* Notice, one could suppose that the court was taking the reluctant attitude hinted at above. A detailed analysis of the judgment reveals, however, a deep understanding of the logic of the Notice and a willingness to incorporate its principles in the assessment. The court held that, unlike the appellant, the NCA had rightly considered that the *de minimis* Notice and its national equivalent in French law are, first and foremost, instruments providing guidance about the criteria that a competition authority may use to define its enforcement priorities [24], and not (as the appellant had suggested) binding opinions interpreting the scope of Article 101(1) TFEU.

3.1.2. The role and prominence of *de minimis* doctrine in national competition law

The *de minimis* doctrine has also been considered in the context of the preparation of new national systems adjusting to the demands of Regulation 1/2003. In 2008, when the Bulgarian Parliament adopted new competition legislation, the *de minimis* market share thresholds were altered to bring them in line with those laid down in the 2001 Commission Notice [25]. A similar amendment was introduced in Romanian law in 2010 [26]. The amendment to the Competition Act circulated by the Czech competition authority sought to change the legal technique through which *de minimis* agreements are left outside the national equivalent to Article 101 TFEU so that it reflects the logic followed by the Commission [27].

Two of the case reports discuss the reform of the Spanish competition law system initiated in 2007. Article 1 of the 2008 Regulation implementing the main lines of the Competition Act addresses the status of agreements of minor importance, and does so by reproducing the essence of the 2001 Notice [28]. The wording chosen by the Spanish legislator is somewhat confusing insofar as it can be interpreted as meaning that the *de minimis* doctrine does not apply to object restrictions, thereby contradicting the *Václav* case. It is submitted that this confusion is the result of codifying into legislation an instrument originally serving a different purpose. As will be discussed below, in any event, subsequent enforcement activity has dissipated any fears about the substantive implications of the ambiguous wording chosen.

A similar constructive attitude can be observed on the part of competition authorities. The German Bundeskartellamt issued in 2007 a new *de minimis* instrument in which it brought the relevant market share thresholds at the level of those chosen by the Commission [29]. The pattern observed in individual cases show how young competition authorities (in particular relative to the German one) build on the experience developed at the EU level. In 2000, the Spanish competition authority took the view that an agreement fell, on *de minimis* grounds, outside the prohibition laid down in national law,

and this at a time when the doctrine had not been formally enshrined in legislation [30]. The following year, thus even before the country joined the EU, the Maltese competition authority relied in part on *de minimis*-based arguments to exempt an agreement under the local equivalent of Article 101 TFEU [31].

3.1.3. The *de minimis* doctrine in third countries

The *de minimis* doctrine has perhaps more surprisingly been incorporated as part of the *acquis communautaire* in third countries in many different ways. When competition legislation was being reformed in 2008 in the Turkish Parliament, an amendment explicitly introduced the *de minimis* doctrine [32]. In December 2005, the Swiss competition authority adopted a Notice in the field clearly inspired from that issued by the European Commission [33].

A handful of decisions taken by third-country authorities are indicative of the degree of influence of EU competition law on these regimes, often in a pre-accession logic. A 2008 decision taken by the Croatian Competition Authority, which involved resale price maintenance, was examined in the light of the relevant EU law precedents, and this included the applicability of the *de minimis* doctrine to the restraints at stake [34]. A 2009 decision of the Macedonian competition authority excluded the applicability of the doctrine to a horizontal agreement on account of the (relatively limited) market share of the parties [35].

3.2. Restrictions by object and the *de minimis* doctrine

As one could have predicted, national competition authorities regularly apply the *de minimis* doctrine to potential restrictions of competition by object. For instance, the Hungarian NCA found that an agreement providing for resale price maintenance clauses did not have an appreciable impact on competition [36]. In 2009, the Spanish competition authority closed a similar case after finding that the market share of the supplier imposing prices on its distributors was below 1% [37]. There are even some examples of horizontal agreements that are found to be *de minimis*. The Turkish competition authority concluded that a price-fixing agreement between 12 bread manufacturers in the mid-sized town of Bergama, which was found to form the relevant geographic market, did not appreciably restrict competition [38]. In December 2007, the Belgian competition authority reached the same conclusion regarding an opening hours' scheme implemented by a group of local pharmacists [39].

The understanding of the relationship between object restrictions and the *de minimis* doctrine seems to have evolved and become more sophisticated over time. The 'economics-based' approach favoured by the Commission in recent years may be one crucial factor explaining this trend. The clarity of the 2001 Notice may be another one. In 1997, for instance, one could still see the Belgian competition authority holding - in contradiction with the *VÅ¶k* judgment - that the *de minimis* doctrine does not apply to agreements featuring the so-called 'hard-core' restraints [40].

It should not come as a surprise that national courts struggle more than competition authorities with this relationship. For instance, a Dutch court of appeals ruled in October 2009 that the mere fact that the vertical restraint at stake in the case qualified as a 'hard-core' one was sufficient to conclude that it restricted competition in an appreciable manner [41]. In any case, there are several examples showing that national courts are able to distinguish between the 'appreciability' test and the qualification of an agreement as restricting competition by object. This seems to be particularly the case in Member States with a longer competition law tradition. For instance, a 2004 ruling of the Higher Regional Court of Düsseldorf held that an agreement giving absolute territorial protection to a distributor did not appreciably restrict competition within the meaning of Article 101(1) TFEU insofar as the market share of the supplier in the case was below 1% [42]. Another interesting judgment was rendered by the Regional Court of Hamburg in December 2007. The case concerned the exclusive agreements for the distribution of a Smartphone device concluded between *Apple* and *T-Mobile* [43]. To the extent that consumers are unable to 'unlock' their device for use in a different network for a 24-month period, one could have claimed that the agreement was aimed at limiting parallel trade across

Member States. However, the Regional Court noted that the vertical relationship between the manufacturer and the mobile operator could not appreciably restrict competition as *Apple* was a new entrant on the relevant market and its market share was assumed to be 0% for the purposes of the application of the *de minimis* doctrine [44].

3.3. Market definition and other technical aspects of the *de minimis* doctrine

The appropriate assessment of the ‘appreciability’ of a competition restriction may be difficult in practice for a variety of reasons. Insofar as the *de minimis* Notice relies on market definition, the familiar problems that are associated with this exercise can be expected to arise. It is well-known by competition authorities, for instance, that market shares may be misleading in the so-called ‘bidding markets’, within which competition takes place ‘for’ the market, as opposed to ‘in’ (or ‘within’) the market [45]. The Hungarian NCA was faced with this situation when it took action against software producers for alleged bid-rigging in tenders for the supply of software to universities. The agency dismissed allegations that the parties were minor players with a joint market share below 10%. According to the decision, the practices under examination had had an appreciable impact on the market insofar as software producers rarely take part in all tenders [46].

Some courts have examined markets in a non-technical sense, or at least in a way that differs from the meaning given in the past decades. When examining the *de minimis* nature of a beer supply agreement, a Portuguese court distinguished, in a 2005 judgment, between an alleged ‘Community-wide market’ and an alleged ‘national market’, and examined whether the *de minimis* doctrine applied in the two cases [47]. By doing so, the court seemingly failed to differentiate between the scope of the relevant market and the effect of the agreement on trade between Member States. The technique used to define the market was equally questionable. In fact, the court considered the turnover made by the supplier relative to the size of the HORECA sector as a whole, and not its actual market share on the market for the supply of beer.

The very logic of the *de minimis* doctrine favours a tendency on the part of authorities to confuse between the relatively limited scope of the relevant market in which the agreement is implemented and the weak market position of the parties therein. While it is clear that the 2001 Notice defines an agreement of minor importance by reference to the latter, authorities and courts may be tempted to conclude that an agreement qualifies as *de minimis* in the light of its reduced scope of application [48]. This confusion is present in the agreement, mentioned above, providing for an opening hours scheme for pharmacists. It was rightly pointed out in the case report that the fact that the agreement was confined to a relatively small region does not mean that it necessarily was of ‘minor importance’ within the meaning of the Notice or equivalent national legislation [49].

An additional complication comes from the impact of networks of agreements on the *de minimis* nature of any single one of them. Pursuant to paragraph 8 of the 2001 Notice, the relevant market share threshold is brought down to 5% where there is a risk that the cumulative effect of parallel networks of agreement leads to market foreclosure (more precisely where parallel networks of similar agreements cover at least 30% of the relevant market). These provisions are particularly relevant in vertical relationships between producers and retailers in markets where single-branding restraints are pervasive. In this sense, it is not by chance that beer and petrol supply agreements have already been singled out as those in which the applicability of the *de minimis* doctrine is often at stake. The challenge for national courts and competition authorities in these situations is to distinguish adequately between the extent of the market covered by the network of agreements concluded by the relevant supplier and the cumulative effect of such network and parallel ones.

The impression one gets from the reports is that the difference between the two is well understood by experienced courts. In September 2007, a commercial court in Madrid applied the *de minimis* doctrine to the agreements concluded between *Galp* and its affiliated petrol stations in Spain, on account of the fact that the agreements concluded by the oil producer only represented 3% of the relevant market [50]. It must be emphasised that petrol supply agreements have been

particularly contentious in the past decade in Spain, as a result of which local courts are comfortable with the particular competition law issues arising in such contexts [51]. An equally meticulous assessment was undertaken by the Brussels Court of Appeals in June 2005 [52]. This judgment is somewhat peculiar, however, if one takes account of the way in which the Court examined the ‘appreciability’ of the beer supply agreement at stake. Contrary to what the logic of the *VÅŕk* doctrine would dictate, it only did so after considering the relevance of the successive vertical block exemption regulations, and not before. Interestingly moreover, the Court first considered whether the general thresholds laid down in the successive *de minimis* Notices (*i.e.* 15% in the case of the 2001 version) applied, and only then did it go on to ascertain whether the cumulative impact of parallel networks of single-branding agreements could lead to market foreclosure (answering in the negative).

4. De minimis State aid

4.1. De minimis State aid before national courts

The two cases commenting on the relevance of the *de minimis* doctrine in the field of State aid at the national level echo some of the controversies that the Commission has sought to clarify with the adoption of a notice on the enforcement of Article 107 TFEU by national courts [53]. The 2001 judgment of the French Council of State addresses the question whether the notification requirement applies to all measures granting and advantage involving the use of State resources or whether, instead, it is in addition necessary to show that the measure in question has an impact on trade between Member States and, at least, threatens to distort competition in the internal market [54]. By taking the view that only measures fulfilling all conditions laid down in Article 107(1) TFEU are subject to the notification requirement, the Council of State anticipated the position that would be expressly endorsed by the CJEU to dissipate any remaining confusion in this sense [55].

A 1999 judgment by a Swedish administrative court [56], the outcome of which is not uncontroversial, raises interesting questions about the exact role of national judges when examining the interaction between the *de minimis* instruments and the procedural requirements stemming from Article 108 TFEU. In this case, the court held that a local authority had granted aid within the meaning of Article 107 TFEU by selling a swimming arena below its market price. However, it considered that, to the extent that the claimant had not shown that aid was above the *de minimis* threshold, it was not established that the measure should have been notified in accordance with Article 108(3) TFEU. This position seems to disregard the fact that the *de minimis* Regulation derogates to the general obligation (stemming from Article 108(3) TFEU) to notify new aid, as a consequence of which the burden of proof lies in principle with the Member State claiming the benefit of the exemption, and not with the firm invoking the breach of the obligation [57].

4.2. De minimis State aid before NCAs

NCAs can play an essential role in ensuring the effectiveness of Articles 107 and 108 TFEU. With the reform of the competition law system in 2007, for instance, the Spanish legislator chose to give monitoring and advisory powers in the field to the new authority [58]. In this same vein, a February 2008 decision of the Romanian NCA shows that a similar system exists in that country [59]. A set of measures falling within the scope of a block exemption regulation issued by the Commission were subject to the control of the NCA prior to their implementation.

5. Conclusions

The *de minimis* doctrine is indispensable in a workable competition system. This need is more apparent at the national level, as courts and competition authorities are more likely to be regularly exposed to agreements of relatively minor

importance. The analysis above reveals that the policy approach favoured by the Commission has become the standard in national competition law systems (including those of European countries), some of which have been amended to bring them in line with the 2001 Notice. When applying these instruments, NCAs remained faithful to EU principles and practice. This in itself may be an indicator that coordination and co-operation mechanisms around the ECN are proving effective in creating (and preserving) a common legal culture. Likewise, the relatively high number of cases brought before national courts hints at the fact that the private enforcement of EU competition law is progressively becoming a 'natural' feature of the system. The technical difficulties observed by courts concerning in particular market definition should come as no surprise but are well identified and not specifically related to the *de minimis* doctrine as such.

[1] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* [2011], nyr.

[2] ECJ, July 9th, 1969, *Völk*, Case [5/69](#), [1969] ECR 295.

[3] The *Völk* case itself concerned an agreement giving absolute territorial protection to a distributor, which after *Consten-Grundig* (Joined cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299) has consistently been considered, as recently reminded in *Glaxo Spain* (ECJ, October 6th, 2009, *GlaxoSmithKline Services e.a. / Commission e.a.*, Joined Cases [C-501/06 P](#) C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P) a restriction of competition by object within the meaning of Article 101(1) TFEU.

[4] Commission [Notice on agreements of minor importance which do not appreciably restrict competition under Article 81\(1\) of the Treaty establishing the European Community \(de minimis\)](#); *OJEU C 368, 22 December 2001, p. 13-15* (hereinafter, the

[5] See para. 11 of the 2001 Notice.

[6] For a discussion of some of these reasons, see A. Jones and B. Sufrin, *EU Competition Law*, 4th edition (Oxford: Oxford University Press, 2011): 176.

[7] Council [Regulation \(EC\) n 1/2003](#), of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*OJEU L 1, 4 January 2003, p. 1-25*) (hereinafter,

[8] On the jurisdictional role of the *de minimis* doctrine, see in particular O. Odudu, *The Boundaries of Competition Law: The Scope of Article 81* (Oxford: Oxford University Press, 2006): 98-101.

[9] To the extent that an agreement has an effect on trade between Member States within the meaning of Article 101(1) TFEU, Article 3(1) of Regulation 1/2003 requires NCAs to apply EU competition law (alone or together with national legislation). In those instances, and pursuant to Article 3(2), the application of national competition law must not contradict the outcome that would have been reached through the application of Article 101 TFEU alone. This would mean that the finding of a restriction of competition under the national law to agreements deemed of Notice would only be possible where the agreements does not have the potential to affect trade between Member States. See in this sense J. Faull and A. Nikpay (eds), *The EC Law of Competition*, 2nd Edition (Oxford: Oxford University Press): 100-101.

[10] The limited number of cases that can shed light in this regard are discussed in J. Faull and A. Nikpay (eds), *The EC Law of Competition*, 2nd Edition (Oxford: Oxford University Press): 227-228; as well as R. Whish and D. Bailey, *Competition Law*, 7th edition (Oxford: Oxford University Press, 2012): 170-177.

[11] See in this sense the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the Treaty, 28

April 1999, in particular paras. 50-51, available at <http://europa.eu/documents/comm/whi...>

[12] See Article 11 of Regulation 1/2003 and the [Commission notice on cooperation within the Network of Competition Authorities](#), *OJ C 101, 27.4.2004, p. 43* .

[13] See, *inter alia*, the following articles: [Michele Giannino, The UK OFT clears a merger in the passenger rail transport sector while applying the SLC test and de minimis exemption to rail franchise \(Govia / South Central Passenger Rail\)](#), 6 August 2009, e-Competitions, n 29960 ; [Kyriakos Fountoukakos, The UK Office of Fair Trading clears merger in the environment noise management systems sector on the basis of the de minimis exemption \(Spectris plc/Lochard Ltd\)](#), 16 February 2009, e-Competitions, n 25130 ; [Kyriakos Fountoukakos, The UK OFT accepts undertakings in newspaper merger, clarifying that its de minimis guidance is not a «get out of jail free» card for small mergers \(Dunfermline press/Berkshire regional newspapers\)](#), 4 February 2008, e-Competitions, n 21562 .

[14] See, *inter alia*, the following articles: [Dr. Frank Rohling, The German National Competition Authority applies new de-minimis exemptions to limit merger notifications of real estate and loan portfolio asset deals](#), 13 March 2007, e-Competitions, n 13340 ; [Daniel von Brevern, A German Court limits the Bundeskartellamt cases on the basis of the de minimis doctrine \(du Pont de Nemours/Pedex\)](#), 22 December 2006, e-Competitions, n 13143 ; [Dr. Philip Kalmus, The German Federal High Court holds that the de minimis condition of merger control does not apply \(i\) if there are related markets which are not de minimis, or \(ii\) if the sum of geographically related markets is not de minimis \(Deutsche Bahn/KVS Saarlouis\)](#), 11 July 2006, e-Competitions, n 12644 .

[15] Commission Regulation (EEC) No [1998/2006](#) of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (*OJ L 379, 28.12.2006, p. 5-10*).

[16] See in particular [Pablo Ibanez Colomo, A Spanish Court refuses to qualify a contract as a resale agreement and holds that the qualification given by «administrative bodies» to similar agreements is not binding upon national Courts \(Melon / Repsol\)](#), 7 July 2004, e-Competitions, n 171 .

[17] See e.g. [Julien Payre, The Paris Court of Appeal rejects appeals in the online travel sales sector for vertical practices and abuse of dominance under both EC and national provisions \(SNCF/ Expedia\)](#), 23 February 2010, e-Competitions, n 31648. Suffice it to mention here that this agreement involved the State-owned railway company in France (SNCF). In this case, the analysis of the French NCA showed already that the joint market shares of the parties to the agreement more than duplicated the *de minimis* thresholds.

[18] Preliminary references concerning the status of beer supply agreements under Article 101 TFEU have been frequent in the past 40 years. Suffice it to think of cases like *Brasserie de Haecht* (ECJ, February 6th, 1973, *Brasserie de Haecht*, Case [48/72](#), [1973] ECR 77); *Delimitis* (ECJ, February 28th, 1991, *Delimitis*, Case [C-234/89](#), [1991] ECR I-935); or *Courage v Crehan* (ECJ, September 20th, 2001, *Courage and Crehan*, Case [C-453/99](#), [2001] ECR I-6297).

[19] Agreements for the supply of petrol, which have been contentious in Spain in the past two decades, have found their way to the CJEU as well, see in particular ECJ, September 11th, 2008, *CEPSA*, Case [C-279/06](#), *not yet published* and Case [C-260/07](#), *Pedro IV Servicios SL v Total Espana SA* [2009] ECR I-2437.

[20] As explained by the authors in the first article mentioned above, these clauses provide that the tenant must not open similar shops in other shopping centre within the relevant [Axel Reidlinger, Heinrich Kuhnert, The Austrian Supreme Court voids a judgment of the Cartel Court on the assessment of a «radius clause» provided for in the lease agreements of a shopping centre \(UNO Shopping/PlusCity\)](#), 25 March 2009, e-Competitions, n 26217 ; and [Rainer Palmstorfer, The Austrian Supreme Court considers a shopping centre](#)

under the cartel-ban provision (McArthurGlen/Europark), 25 March 2009, e-Competitions, n 27433 .

[21] See Alexandr Svetlicinii, *The Croatian Competition Authority holds illegal resale price maintenance obligations imposed by a wholesaler of household electronics on its buyer (M San Grupa/Rivulus)*, 30 December 2008, e-Competitions, n 34777 ; Evi Mattioli, *A Belgian Court holds that a provision requesting feedback on resale prices does not constitute resale price maintenance (IDH Diamonds / Billiton Diamonds)*, 30 June 2005, e-Competitions, n 32299 ; Gabor Fejes, Zoltan Marosi, *The Hungarian Competition Authority finds RPM agreement to be de minimis (Buki Asvanyvíz)* , 14 May 2008, e-Competitions, n 31676 ; and Albert Pereda Miquel, Mar□Gonz□z Navarrete , *The Spanish Competition Authority closes a resale price maintenance case, after applying the de minimis rule (El Corral de las Flamencas)*, 3 December 2009, e-Competitions, n 32027 .

[22] See in particular Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 2015; Case 27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919; and the Guidelines on Vertical Restraints OJ (2010) C 130/1, in particular paras. 223-229.

[23] See Julien Payre, *The Paris Court of Appeal rejects appeals in the online travel sales sector for vertical practices and abuse of dominance under both EC and national provisions (SNCF/ Expedia)*, 23 February 2010, e-Competitions, n 31648.

[24] As rightly pointed out by the French *Cour d* , the Commission is careful to clarify in para. 4 of the 2001 Notice that the instrument is not binding on national courts and authorities and, in para. 6, that it is without prejudice to the interpretation of Article 101(1) by the CJEU.

[25] See Dessislava Fessenko, *The Bulgarian Parliament adopts a new Act on the Protection of Competition*, 28 November 2008, e-Competitions, n 23076 .

[26] See Adrian Ster, *The Romanian Competition Council brings national competition Law in line with European Union competition rules (Emergency Government Ordinance 75/2010)*, 6 July 2010, e-Competitions, n 32137 .

[27] See Robert Pelikan, Jan Poevratil, *The Czech NCA circulates a draft amendment to the Act on the Protection of Competition aimed at a harmonisation with substantive EC competition law, inclusion of specific procedural rules and launch of private enforcement*, May 2008, e-Competitions, n 19852 .

[28] See *Real Decreto 261/2008, de 22 de febrero, por el que se aprueba el Reglamento de Defensa de la Competencia.*

[29] See Max Klasse, *The German Federal Cartel Office issues new notices on agreements of minor importance and on the application of antitrust provisions to SMEs* , 13 March 2007, e-Competitions, n 13386.

[30] See Aitor Montesa Lloreda, Angel Givaja Sanz, *The former Spanish second-tier Competition Authority rules that a non-compete clause of unlimited duration did not infringe either EC nor national competition provisions on the basis of a «de minimis» yet unwritten rule (Hardi International)* , 27 March 2000, e-Competitions, n 15105 .

[31] See Richard Whish, Silvio Melli, *The Maltese Commission for Fair Trading granted an individual exemption despite a right of preference (Fair and exhibitions)*, 22 January 2001, e-Competitions, n 15806 .

[32] See Ercument Erdem, *The Turkish Parliament on the verge of passing reform of competition providing parallel regulation with the EU and other developed countries*

proposals within the scope of OECD, 23 June 2008, e-Competitions, n 26452 .

[33] See Blaise Carron, *The Swiss Competition Commission adopts a de minimis notice*, 19 December 2005, e-Competitions, n 445 .

[34] See Alexandr Svetlicinii, *The Croatian Competition Authority holds illegal resale price maintenance obligations imposed by a wholesaler of household electronics on its buyer (M San Grupa/Rivulus)*, 30 December 2008, e-Competitions, n 34777 .

[35] See Alexandr Svetlicinii, *The Macedonian Competition Authority finds anticompetitive practices on the market for radio advertising (Ros Metropolis Radio)*, 18 December 2009, e-Competitions, n 30928 .

[36] See Gabor Fejes, Zoltan Marosi, *The Hungarian Competition Authority finds RPM agreement to be de minimis (Buki Asvanyviz)*, 14 May 2008, e-Competitions, n 31676 .

[37] See Albert Pereda Miquel, Maraa Gonzalez Navarrete, *The Spanish Competition Authority closes a resale price maintenance case, after applying the de minimis rule (El Corral de las Flamencas)*, 3 December 2009, e-Competitions, n 32027.

[38] See Ahmet Fatih Ozkan, *The Turkish Competition Authority decides that a price-fixing agreement between bread manufacturers does not appreciably restrict competition (Bergama Firincilari)*, 30 December 2008, e-Competitions, n 37670.

[39] See Alexandre Defossez, Gregory Royer, *The Belgian Competition Council clears a local opening hours scheme for pharmacists (F.N.H./Ordre des pharmaciens - GLEP 30)*, 20 December 2007, e-Competitions, n 25689 .

[40] See Louise Depuydt, *The Competition Council rules that a resale price maintenance system in the petfoods sector constitutes a prohibited anti-competitive practice (Laroy-Duvo NV)*, 25 March 1997, e-Competitions, n 32228 .

[41] See Sarah Beeston, *A Dutch Court of appeal rules that termination by supplier of distribution contract under pressure from competing distributors is concerted practice (Batavus - Vriend)*, 6 October 2009, e-Competitions, n 32023 .

[42] See Cora-Marie Pinter, *The Federal Supreme Court of Germany and the Düsseldorf Court of Appeals overrule the Federal Cartel Office industrial sector and fittings for medical and dental treatments (Sulzer, Kelmix and Werfo)*, 25 September 2007, e-Competitions, n 27316 .

[43] See Petra Linsmeier, Moritz Lichtenegger, *A German Court rules on the exclusive iPhone distribution agreements (Apple/T-Mobile)*, 4 December 2007, e-Competitions, n 21242 .

[44] When the decision was taken, *Apple*

[45] On *Journal of Competition Law and Economics* 3 (2007): 1-47. As explained by the author, market shares in such context may overestimate or underestimate the market power enjoyed by the undertakings taking part in auctions and similar procedures.

[46] See Adam Mattyus, Eszter Ritter, *The Hungarian Competition Office imposed a Eur. 5.6 M fine in software public tenders and refuses to apply the de minimis doctrine (SAP)*, 15 June 2005, e-Competitions, n 25324 .

[47] See [Pablo Ibanez Colomo, *A Portuguese court states that a beer distribution agreement does not appreciably restrict competition on the basis of Art. 81 EC and inflicts a fine of Eur. 77,715 \(Centralcer/Nascimento\)*, 14 April 2005, e-Competitions, n 22](#) .

[48] Where the agreement has a limited scope of application, it may be the case that Article 101(1) TFEU does not apply to it, but not because the agreement does not have an impact on trade between Member States. To be sure, this fact would be without prejudice to the application of national competition law.

[49] See [Alexandre Defossez, Gregory Royer, *The Belgian Competition Council clears a local opening hours scheme for pharmacists \(F.N.H./Ordre des pharmaciens - GLEP 30\)*, 20 December 2007, e-Competitions, n 25689](#) . The authors claim that *de minimis* effect - or not - on competition, with the size of the relevant market

[50] See [Aitor Montesa Lloreda, Angel Givaja Sanz, *A Madrid Court applies the de minimis doctrine to a 3% market share \(Galp\)*, 3 September 2007, e-Competitions, n 16070](#) .

[51] The commercial court in this case referred to a precedent in which the coverage of 3.5% of the market was also found to be *de minimis*. On the long saga of judgments addressing the status of this agreements under competition law, see above notes 13 and 16, as well as [Pablo Ibanez Colomo, *The «Repsol Saga» : Background Note on «genuine» agency agreements in Spanish Competition Law*, 11 July 2001, e-Competitions, n 503](#) .

[52] See [Jacques Derenne, Sami Andoura, *The Brussels Court of appeal issues a preliminary ruling on the successive application of EC Reg. N° 1984/83 and N° 2790/1999 on the application of Art. 81.3 EC to vertical agreements and concerted practices and rules on the de minimis doctrine \(Brasserie Haacht\)*, 23 June 2005, e-Competitions, n 239](#) .

[53] See [Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9 April 2009](#).

[54] See [Loic Grard, *The French State contrary to Art. 87 EC have to be notified \(Glenat\)*, 23 November 2001, e-Competitions, n 13636](#) .

[55] Case C-345/02, *Pearle BV and Others v Hoofdbedrijfschap Ambachten* [2004] ECR I-7139.

[56] See [Jakob Lundstrom, Ulf Oberg, Ida Otken Eriksson, *A Swedish Administrative Court annuls a decision of a municipal council to sell a swimming arena but refuses to consider the EC State aid point of view on the basis of possible de minimis exemption \(Ingolf Falk\)*, 1 December 2008, e-Competitions, n 27181](#) .

[57] See in this sense CFI, September 12th, 2007, *Olympiaki Aeroporia Ypiresies v. Commission*, Case T-68/03, not yet published, paras. 34 et seq.

[58] See *Real Decreto 261/2008, de 22 de febrero, por el que se aprueba el Reglamento de Defensa de la Competencia*, mentioned above, Articles 7 and 8.

[59] See [Vlad Olteanu, *The Romanian Competition Council approves a regional State aid scheme to support investments made by small and medium-size companies*, 1 February 2008, e-Competitions, n 15759](#) .

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