Expedia: (R)evolution of the appreciability test for restrictions by object?

“de minimis non curat lex”

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Article 101 TFEU
(ex Article 81 EC / Article 85 EEC)

1. The following 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, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
## Content

Introduction .................................................................................................................. 4

1.1 The principle of supremacy of EU law ..................................................................... 7

1.2 Regulation 1/2003 .................................................................................................. 10

1.3 The principle of direct effect of EU law ................................................................. 14

1.4 Dutch competition law .......................................................................................... 17

1.5 Conclusion ............................................................................................................. 20

2.1 The concept of appreciability for restrictions by object ........................................... 21

2.2 Expedia: facts and ruling ....................................................................................... 25

2.3 Possible interpretations .......................................................................................... 27

2.3.1 Interpretation #1: literal interpretation ............................................................... 27

2.3.2 Interpretation #2: systematic interpretation ....................................................... 30

2.3.3 Interpretation #3: teleological interpretation ...................................................... 34

2.4 Conclusion ............................................................................................................. 35

3.1 Influence EU competition law ................................................................................ 37

3.2 Dutch appreciability test: Secon ............................................................................ 39

3.3 Conclusion ............................................................................................................. 41

4.1 Dutch case law after Expedia ................................................................................ 42

4.2 Possible implications of Expedia for Dutch competition law ................................. 45

4.2.1 Literal interpretation ......................................................................................... 45

4.2.2 Systematic interpretation ................................................................................... 46

4.2.3 Teleological interpretation .................................................................................. 47

4.3 Conclusion ............................................................................................................. 49

Conclusion: (R)evolution? ............................................................................................ 50

Schedule A - Bibliography (list of cited sources) .......................................................... 52

Primary sources .......................................................................................................... 52

Secondary sources ....................................................................................................... 55
Introduction

To fall within reach of the prohibition of Article 101 (1) of the Treaty on the Functioning of the European Union (‘TFEU’) agreements should have either as their object or effect the restriction of competition within the internal market.\(^1\) The distinction between ‘restrictions by object’ and ‘restrictions by effect’ is important since it has consequences for the standard of proof in competition cases. Agreements do not have to fulfil both requirements, they are alternative. First, it must be assessed if the agreement in question constitutes a restriction by object and if this is not the case it should then be seen if it is a restriction by effect. To find out if an agreement is a restriction by object, regard must be had to the content of the provisions of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part.\(^2\) If an agreement is labelled a restriction by object, no inquiry into its actual effects on competition is necessary because these restrictions are presumed to have anti-competitive effects. By their very nature they are perceived as injurious to the proper functioning of normal competition and therefore no further investigation is necessary for these agreements to fall under Article 101 TFEU.\(^3\)

On top of the determination if an agreement amounts to a restriction by object or effect, the CJEU introduced the concept of appreciability in Société Technique Minière\(^4\) and formulated the appreciability test later in Völk\(^5\), namely that a restriction of competition as well as the effect on trade between Member States must be appreciable in order to fall under the prohibition of Article 101 (1) TFEU (then Article 85 of the EEC Treaty).\(^6\) The idea behind this test was that when an agreement is not capable of restricting competition to an appreciable extent, it should be regarded as insignificant and therefore escape the application of Article 101 (1) TFEU.

The appreciability test has a quantitative and qualitative aspect. The quantitative aspect has been given form in the De Minimis notice of the Commission, which stipulates the combined market thresholds parties to an agreement may have under which the Commission will not enforce Article 101 TFEU.\(^7\) If the thresholds set in the Notice have not been met, it does not automatically mean that the agreement lacks an appreciable effect. The Völk test is then still applicable as the qualitative aspect of the test: when the agreement only has an insignificant effect on the market, it should escape Article 101 (1) TFEU. The appreciability test has remained in place ever since its birth in

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\(^1\) Everywhere in this thesis where I use the phrase “agreements” this includes to mean “decisions by associations of undertakings and concerted practices” and where I say a “restriction of competition” this should be read as including the “prevention and distortion of competition”.

\(^2\) The factors which play a part in determining if an agreement constitutes a restriction by object have been formulated repeatedly by the CJEU in its case law. Examples of important cases are GlaxoSmithKline, General Motors and T-Mobile Netherlands.


\(^5\) Throughout this thesis I will cross-refer to Articles 101 TFEU and its predecessors Articles 81 EC and 85 EEC in order to indicate under which Article a judgment by the CJEU was adjudicated.

Société Technique Minière, albeit with some slight additions along the way (which I will discuss later on in this thesis). The appreciability of restrictions by object is determined by looking if its presumed negative effects are capable of affecting competition to a significant extent. The appreciability of restrictions by effect is judged by examining the actual effects on competition and interstate trade, for example by using a counter-factual analysis (comparing competition on the market with and without the contested agreement in place).

On 13 December 2012 the CJEU delivered its judgment in the Expedia case which left many scholars to wonder what remains of the appreciability test for restrictions by object under Article 101 (1) TFEU as it had been formulated by the CJEU in earlier cases. In paragraph 37 of this judgment, by some labelled as an obiter dictum because the preliminary questions regarding the case concerned other topics, reads as follows:

> 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.

One of the questions raised in literature after the Expedia case is the question if the CJEU changed its course when it comes to the appreciability test under EU competition law in relation to restrictions by object, especially the question as to the necessity of this test in the case of restrictions by object. Until the Expedia case was adjudicated the practice was that all restrictions of competition, either by object or effect, should be appreciable in order to fall under the prohibition of Article 101 (1) TFEU. In fact, the agreement at issue in the case of Völk, in which the CJEU formulated the appreciability test, constituted a (vertical) restriction by object. With its judgment in the Expedia case it seems that the CJEU decided that when it comes to a restriction by object that has an effect on trade between Member States, these restrictions are appreciable per se. Does this ruling mean that appreciability no longer has to be tested for these cases? The question remains if the CJEU left its reasoning in Völk or if the judgment in the Expedia case, on a closer look, can be reconciled with the existing doctrine.

In this thesis I will investigate the implications of the Expedia judgment for the appreciability test for restrictions by object under Dutch competition law. The reason I want to look at the consequences of the judgment for Dutch competition law is that the Dutch competition law system is highly influenced by EU competition law. This makes the interpretation of the Expedia judgment relevant for the interpretation and explanation of Dutch appreciability test for restrictions by object. Besides this, Article 6 of the Dutch Competition Act (DCA) is oriented on Article 101 TFEU and therefore the interpretation given to Article 101 TFEU is relevant for the interpretation of Article 6 DCA as well.

Moreover, there is disagreement among Dutch practitioners, scholars and the Dutch competition authority on how to interpret the judgment and what the judgment means for the Dutch appreciability test. Especially the use of the wording ‘an agreement that may affect trade between Member States’ has left many to wonder what this part of the judgment means at Member State level: does this part of the ruling also influence national competition law cases in which the restriction of competition does not affect trade between Member States? In light of legal certainty

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9 Although the concept of obiter dictum is one of common law and thus theoretically does not exist in the civil law system of the EU, the reference can be made to indicate that the CJEU went outside the scope of the case brought before it.

9 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., para 37.
and predictability it is highly relevant to find definitive, or at least reliable and solid, answers as to how the Expedia judgment will influence Dutch competition law and how the judgment should be interpreted. I will only discuss the part of the Expedia judgment that is about the appreciability of restrictions by object as this is the part that instigated a heated discussion. The other part of the judgment, on the binding force of the De Minimis Notice for national authorities, will therefore be left outside the scope of this thesis.\(^{10}\)

I will attempt to find an answer to the question of how the Dutch appreciability test for restrictions by object under Article 6 (1) of the Dutch Competition Act ("Mededingingswet") is affected by the ruling in the CJEU Expedia judgment. In order to formulate an answer to this main research question, I will first describe in Chapter 1 in what way Dutch competition law is influenced by decisions of the CJEU. Then, the line of reasoning adopted by the CJEU in earlier cases on the appreciability of restrictions by object and how the Expedia judgment should be interpreted in light of these cases will be closer looked at in Chapter 2. Thirdly, the relationship between the Expedia judgment and the Dutch appreciability test for restrictions by object as it existed before the judgment is closely scrutinized. I will continue by answering the question of what the expected consequences of the CJEU Expedia judgment will be for the appreciability test under Dutch competition law. By looking at the relationship between EU and Dutch competition law and the body of case law relating to the appreciability test under EU law, I hope to form a comprehensive, clear and accurate view on the expected implications of the Expedia judgment for Dutch competition law. Lastly, by way of conclusion, I will summarize my main findings and formulate an answer to the central research question.

Anticipating this overall conclusion, my view on the Expedia case is that it should be interpreted as meaning that the assessment of appreciability for restrictions by object becomes part of the qualification of an agreement as a restriction by object and that appreciability is assessed in the same manner as the qualification, namely by looking at the content of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part.

\(^{10}\) The part of the judgment relating to the binding force of the De Minimis Notice was generally received as acceptable and logically building on earlier case law of the CJEU, see for example Tjarda van der Vijver & Stefan Vollering, ‘Understanding appreciability: The European Court of Justice reviews its journey in Expedia’ (2013) Common Market Law Review 50: 1133-1144. For a critical view on this part of the judgment see J.F. Appeldoorn, annotatie bij: HvJ 13 december 2012, C-226/11, SEW 2013/11 (Expedia)
Chapter 1: Interface between EU and Dutch competition law

Sub research question: In what way is Dutch competition law influenced by decisions of the CJEU?

1.1 The principle of supremacy of EU law

The principle of supremacy (or primacy) of EU law has been developed in the case law of the CJEU, starting with its judgment in Costa v ENEL.¹¹ It has no basis in the EU Treaties. In short, the principle entails that the EU has its own legal order, separate from the legal order of its Member States, which should be given primacy over national law in case there is a conflict between the two. The justification behind introducing the rule of supremacy was to give full effect to Community law.¹²

In Walt Wilhelm, the CJEU did not only confirm that parallel proceedings in competition law were allowed, but it also stated that ‘conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence’.¹³ Both EU and national competition law can be applied parallel to each other in cases that may have an effect on trade between Member States. Cases that do not have a (potential) effect on trade between Member States are dealt with solely through national competition laws, because EU competition law is not applicable in those cases. In Walt Wilhelm, the CJEU for the first time explicitly applied the principle of supremacy of EU law in relationship to competition law. National judges thus have to give preference to rules of EU competition law over national competition law whenever there is a conflict between the two. However, competition law will not often give rise to a conflict since the substantial provisions in national law resemble or are an exact copy of those on the EU level.¹⁴ The principle, therefore, plays a different role than in other fields of EU law where the rules may vary substantially. Whereas the principle of supremacy of EU law in other fields of law demands from national judges that they set aside national rules in a specific case and apply EU law instead, in the field of competition law it is not so much that national competition law is no longer applicable in that specific case but that the outcome of the application of the rules has been established in the sense that the application of national rules can not be contrary to earlier findings on the EU level (either by the Commission or the CJEU).¹⁵

¹¹ Case 6/64 Costa v E.N.E.L [1964] ECR 1195
¹² Josephine Steiner and Lorna Woods, EU Law (10th edn, OUP 2009) 102
¹³ Case 14/68 Walt Wilhelm and others v Bundeskartellamt [1969] ECR 1
¹⁴ Chapter 1 and 2 of UK Competition Act are an example of exact copies of the EU competition law provisions. In the Netherlands, they are almost an exact copy.
¹⁵ J.F. Appeldoorn, Eenheid in verscheidenheid: de gespreide toepassing van artikel 81 EG, (diss. Groningen) 2004
The principle of supremacy is well defined by the CJEU in its *Simmenthal* judgment:

(...) every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior of subsequent to the Community rule.16

Two other important cases concerning the supremacy in competition law are *Delimitis* and *Masterfoods*. In *Delimitis* the CJEU decided that national judges could not take any decisions when the Commission might subsequently take a decision in the same case. Only if there was little risk that the Commission would take a different decision, the national court was allowed to rule on the agreement at issue. If the national court would find that the agreement might be the subject of an exemption decision or there would be a risk of conflicting decisions, it could stay the proceedings or adopt interim measures.17 In its decision *Masterfoods*, the CJEU added that in case a national court is ruling on the compatibility of an agreement or practice with Articles 85(1) and 86 EC which was already the subject of a Commission decision, it could not take a decision contrary to that of the Commission, even if the Commission decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or to refer a question to the Court for a preliminary ruling.18

In my view, the foundation for both these judgments can be traced back to the ruling in *Walt Wilhelm*. There, the CJEU formulated that when a decision of a national authority regarding an agreement would be incompatible with a decision adopted by the Commission, the national authorities were required to take proper account of the latter decision. When it appeared possible that the decision to be taken by the Commission still in progress concerning the same agreement might conflict with the effects of the decision of the national authorities, the national authorities should take appropriate measures.19 *Delimitis* and *Masterfoods* can thus be seen as a specification of the *Walt Wilhelm* rule of primacy. Court are thus since then bound by decisions of the Commission.

The only way in which national judges are allowed to deviate from a Commission decision is in the case the dispute before them constitutes a different fact pattern.20 Later, in *Kühne and Adeneler* the CJEU effectively held that its interpretations of EU law bind all court and administrative bodies in the Union.21 It held that

The interpretation which, in the exercise of the jurisdiction conferred on it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force.22

The next important question is what are the consequences if the rule of supremacy is being disregarded, in other words a national judge or competition authority does not abide by the aforementioned obligations and takes a decision contrary to that of EU law (for example a decision of

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16 *Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, para 21
17 *Case C-234/89 Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-00935
18 *Case C-344/98 Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369
19 *Case 14/68 Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1, paras 7-8
21 *Case C-453/00 Kühne and Heits v Productschap voor Pluimvee en Eieren* [2004] ECR I-837 and case C-212/04
22 *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057
the CJEU or the Commission)? Where some argue that an infringement of EU law is addressed through the principle of state liability in Article 260 TFEU, others believe that decisions that fail to respect directly applicable rules of EU law are invalid and unenforceable.²³

1.2 Regulation 1/2003

In light of a modernization programme by the Commission for the enforcement of articles 81 and 82 EC, Regulation 17/62 was replaced by Regulation 1/2003 on 1 May 2004. 24 It introduced ‘a fundamental change in the procedural framework for applying the Community competition rules’. 25 One of the most important changes was that the Commission no longer had the sole power to declare Article 101(1) inapplicable pursuant to Article 101(3) TFEU. It thus gave direct effect to Articles 101 and 102 TFEU in their entirety. The notification system under Regulation 17/62 in which agreements should be notified to the Commission in order to get clearance under Article 101(3) TFEU was no longer sustainable for the Commission in terms of time and resources and thus it gave the national authorities the power to apply Article 101(3) TFEU themselves through Article 1(2) of the Regulation. This step has been seen as a decentralization of the enforcement of EU competition law. 26

Before Regulation 1/2003 it was clear that a Commission Decision prohibiting an agreement under 101(1) TFEU was binding on national courts and authorities. 27 What was not exactly clear was if national judges and competition authorities could prohibit agreements that were granted exemption by the Commission under Article 101(3) TFEU, either individually through Article 101(3) TFEU or through a Block Exemption Regulation. The ruling in Walt Wilhelm only dealt with the principle of supremacy for cases in which the Commission found a violation of article 101(1) TFEU. Although I think the view that national decisions running counter to these exemptions violate the supremacy rule as it was formulated in Walt Wilhelm 28 and later specified in Delimitis and Masterfoods, not everyone agreed with this point of view. 29

With the introduction of Article 3 Regulation 1/2003 the Commission has made it clear that national judges and competition authorities may not prohibit agreements that are found by the Commission not to breach Article 101(1) TFEU or that meet the conditions of Article 101(3) TFEU. Article 3(1) imposes an obligation on national competition authorities and courts to apply Articles 101 and 102 TFEU in cases that fall within the jurisdiction of these provisions. The mere possibility of applying EU competition law has been turned into an obligation to do so.

The principle of primacy of EU competition law as formulated in Walt Wilhelm has found its codification in Article 3(2) of Regulation 1/2003. It states that 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

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25 Jonathan Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014)

26 Although Faull & Nikpay think ‘Communitarisation’ of EU competition law is a more fitting term, because the Commission retains full parallel competence in all cases and plays a particular role in ensuring consistent application and defining the orientation of Community competition policy.

27 See Joanna Goyder and Albertina Albors-Llorens, Goyder’s EC Competition Law (5th edn, OUP 2009), stating that “Clearly the principle of the supremacy of Community law dictated that a Commission decision that a particular agreement was prohibited by Article 81 was binding on national courts and authorities.” p. 507


29 See, for example, Alison Jones and Brenda Suffrin, EU Competition Law: text, cases and materials (5th edn, OUP 2014) and Jonathan Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014)
competition within the meaning of Article 101(1) TFEU or which fulfil the conditions of Article 101(3)
of the Treaty or which are covered by a Block Exemption Regulation. The second paragraph of Article
3 is referred to as the ‘convergence rule’.  

According to paragraph 3 of Article 3, the first two paragraphs only apply to national competition
laws and thus does not preclude Member States from implementing national laws which protect
other legitimate interests as long as such legislation is compatible with general principles and other
provisions of EU law. The provisions neither apply to national merger control laws and Member
States are also allowed to adopt and apply stricter national competition laws which prohibit or
impose sanctions on unilateral conduct. Furthermore, the Regulation does not apply to national laws
that impose criminal sanctions on natural persons except to the extent that such sanctions are the
means by which competition rules applying to undertakings are enforced.

Articles 3(1) and 3(2) produce the effect that the exclusive application of national competition law is
reduced. In case of agreements capable of affecting trade between Member States, the application
of EU competition law can be seen as a sine qua non for applying national competition law. With
regard to the allocation of cases, the Commission deals with cases that have sufficient ‘Community
interest’. Normally it will deal with cases that have an effect on competition in more than three
Member States. National competition authorities are automatically relieved of their competence
when the Commission initiates its own proceedings in the same case.

Before Regulation 1/2003, the CJEU in Guérlain made clear that when the Commission filed a
comfort letter stating to close the file on a specific case, national authorities were still allowed to
prohibit the agreement under national law or even under Article 85 EEC. While such a letter was not
binding on national courts, they may nevertheless take it into account in examining whether the
agreement or conduct in question are in accordance with the provisions of Article 85 EEC. In the
same judgment, the CJEU stated that the fact that a practice has been held by the Commission not
to constitute an infringement of 85(1) EC in no way prevents that practice from being considered by
national authorities from the point of view of the restrictive effects which it may produce
nationally. This being the case because the fact that the ‘effect on trade between Member States’
requirement of EU competition law was not fulfilled could still very well mean that there was a
restriction of competition on the national level.

There are, however, two more situations that can be thought off why the Commission could have
found the practice in question in line with Article 101(1) TFEU. The first one being the finding that
competition is indeed restricted but that the parties to the agreement fall below the market
threshold of the De Minimis Notice. In this situation, there is still room for national authorities to

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31 See recital 8 & 9 and Article 3 of Regulation 1/2003.
34 Recital 17 & Article 11(6) of Regulation 1/2003.
35 Cases 253/78 & 1-3/79 Procurer de la République and others v Bruno Giry and Guerlain SA and others [1980] ECR 2327. In this case, the Commission had closed the file on the case and did not gave a formal decision but they issued a comfort letter.
find that the practice constitutes an infringement of national competition rules. By ruling that national competition authorities may apply Article 101(1) TFEU to an agreement that may affect trade between Member States, but that does not reach the thresholds in the De Minimis Notice (provided that the agreement constitutes an appreciable restriction of competition), the CJEU in its Expedia judgment seems to have affirmed this conclusion. The statement of Faull & Nikpay that agreements that are capable of affecting trade between Member States and that are de minimis under EU law cannot be prohibited under national law, has in my view become erroneous in light of the Expedia judgment.

The second alternative is that the Commission finds that the agreement does not qualitatively restrict competition at all. It is argued that in this situation national authorities are bound by the Commission’s findings and therefore are not allowed to adopt decisions finding that the agreement does restrict competition as this would run counter to the very principle of supremacy of EU (competition) law. In my view this also makes sense because the notion of a ‘restriction of competition’ should be sufficiently homogeneous to justify that a finding by the Commission that an agreement does not restrict competition cannot result in a different finding under national competition law.

I think this is different for the finding that the agreement does not restrict competition to an appreciable extent, because lack of appreciability at EU level can still mean that the agreement has an appreciable effect on the national level, the same way in which a European de minimis agreement can be found to constitute an appreciable restriction of competition on the national level as we have seen before. Lack of appreciability can be found also in cases where the parties exceed the thresholds in the De Minimis Notice. Faull & Nikpay do not agree with this statement. They make a legitimate point in holding that the relevant geographical market for agreements which may affect trade between Member States is the EU and thus the finding that a restriction of competition is not appreciable in the sense of Article 101(1) TFEU can also not amount to appreciability at the national level because the same effects are taken into account. This is of course true for the application of Article 101 TFEU by national judges and competition authorities but this is not true for cases where the effect on interstate trade criterion is not met and where, as a consequence, Article 6 DCA is applicable as we will see later on in this thesis.

The aforementioned still seems true after the introduction of Regulation 1/2003. Read together, Article 3(2) and Article 16(1) and (2) solve the question of how many room national authorities and courts are left with to deviate from Commission decisions. Agreements which may affect trade between Member States that do not restrict competition within the meaning of Article 101(1) or which are given negative clearance under Article 101(3) TFEU or which fall under a Block Exemption Regulation cannot be prohibited on the basis of national competition law. Article 16 (1) stipulates

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38 If the Member State has a De Minimis Notice of its own, the thresholds are likely to be lower than the thresholds set by the Commission.
39 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r. Because of the limited amount of space, I will not further focus on the De Minimis aspect of this case.
40 Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014) 106
42 Because of the extent of soft convergence that has taken place in the EU in the field of competition law.
43 Jonathan Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014)
that national courts can neither take decisions running counter to Commission decisions or decisions contemplated by the Commission in proceedings it has initiated. Article 16 (2) states that national competition authorities cannot take decisions which would run counter to decisions adopted by the Commission.

In light of *Walt Wilhelm, Delimitis and Masterfoods*, Article 3(1) and (2) and Article 16 of Regulation 1/2003 seem to be a mere codification of what was already settled case law with regard to the supremacy of EU competition law, rather than create substantial new rights under this principle. The limitations formulated in *Delimitis* no longer apply with regard to the application of Article 101(3), since national judges can directly apply this article now and thus no longer have to put a hold on proceedings because they have to await a Commission decision on the applicability of Article 101(3). The codification of the *Masterfoods* judgment in Article 16(1) of the Regulation suggests the ruling in this judgments remains important. Note that the principle that national judges cannot take decisions running counter to Commission decisions has limited their judicial independence and discretionary power. The only situation in which national judges can deviate from Commission decisions and judgments by the CJEU is when the case before them constitutes a different fact pattern, where they solely apply national law provisions (that do not conflict with EU rules) or when applying a rule of public policy. The relationship between Dutch competition law rules and their EU counterparts is rather special in that Dutch judges have to take into account EU competition law rules and their interpretation by the Commission and CJEU. I will elaborate further on this special relationship in paragraphs 1.4 and 3.1.

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44 Goyder and Albertina Albors-Llorens, *Goyder’s EC Competition Law* (5th edn, OUP 2009), merely stating that the limitations contained in *Delimitis* no longer apply because national courts are now able to apply Article 101(1) and (3) TFEU together and cases therefore no longer have to be suspended merely because one of the parties has notified the agreement in dispute to the Commission. However, in my view, paragraph 52 of *Delimitis* is still applicable under the new Regulation (as it is codified in Article 16(1) of Regulation 1/2003) because there it was stated that “a stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of Articles 85(1) and 86”. Moreover, the *Delimitis* judgment was on agreements that were envisaged by the Commission, while *Masterfoods* was on decisions already taken by the Commission. Article 16 takes both these situations into account.

45 Goyder and Albertina Albors-Llorens, *Goyder’s EC Competition Law* (5th edn, OUP 2009)
1.3 The principle of direct effect of EU law

Where the supremacy principle of EU law has an exclusionary effect in the sense that it trumps national law, the notion of direct effect produces substitutionary effects in the form of the direct and immediate application of EU law, so as to create new rights or obligations derived from the EU Treaties which priory did not exist within the national legal system.\(^{46}\) There is a difference between the direct applicability of EU law and direct effects of EU law. There are basically two theories that influence the direct applicability of international law: monism and dualism. In a monist system, like the Netherlands has, international law is made directly applicable. There is no need to implement international law because it is directly applicable in and of itself. In a dualist system, international law first has to be transformed into national law before it can be directly applicable. Some form of implementation is necessary. In Dutch law, the direct applicability of international law is found in Article 93 of the Dutch Constitution and the principle of supremacy of international law is found in Article 94 of the Dutch Constitution. However, even without having this principle laid down in its constitutional law, judges in the Netherlands would still be bound by EU laws that are directly applicable. In a decision of the Supreme Court of the Netherlands this was confirmed with regard to Regulations, since these are made directly applicable through Article 288 TFEU.\(^{47}\)

On the other hand, the mechanism of attributing direct effect to certain rules of EU law, is used to create individual enforceable rights and obligations that can be relied upon before national courts and which are directly derived from EU law.\(^{48}\) Direct effects were attributed by the CJEU to some treaty provisions, directives and decisions. Even though these rules are not directly applicable, they were still found to produce direct effects. Regardless of whether a Member State has a dualist or monist legal system, EU law is directly applicable and principles that have direct effect directly confer rights and obligations upon individuals. To state it more clearly, ‘[direct applicability] refers to the internal effect of a European norm within national legal orders, [and direct effect] refers to the individual effect of a binding norm in specific cases’\(^{49}\). Thus the status of EU law within a national legal system vis-à-vis the effect of rules in individual cases. Directly effective rules become an immediate source of law for the national courts and authorities, without the need for implementing the rules first.\(^{50}\) Only norms that are directly applicable can produce direct effects. Direct applicability, however, can exist without direct effect. EU rules can have horizontal or vertical direct effect, meaning that directly effective rules can create rights and obligations between individuals (horizontal direct effect) or between an individual against a State (vertical direct effect). The rationale behind giving direct effect to rules of EU law is the same as we have seen for the principle of supremacy: to ensure the effectiveness of EU law.

\(^{46}\) Michael Dougan, ‘When worlds collide! Competing visions of the relationship between direct effect and supremacy’ \[2007\] 44 CMLR 931

\(^{47}\) HR 2 november 2004, ECLI:NL:HR:2004:AR1797

\(^{48}\) The division between the concept of direct applicability and direct effects is rather blurry. In essence, direct effects create the same outcome as direct applicability, namely creating individual rights for citizens that can be relied upon before their national courts. The concept of direct effect is used to ensure that relevant and important rules of EU law also produce direct effect in countries that use the dualist system.

\(^{49}\) Robert Schütze, An Introduction to European Law (CUP 2012)

\(^{50}\) Michal Bobek, ‘The Effect of EU Law in the National Legal Systems’ in Catherine Barnard and Steve Peers (eds), European Union Law (OUP 2014)
Founding father of the doctrine of direct effects of EU law was, again, the case of Van Gend en Loos.\footnote{Case 26/62 Van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1} Subsequently, in Consten & Grundig, the CJEU states that the Community rules on competition have immediate effect and are directly binding on individuals.\footnote{Joined cases 56 and 58/64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community [1966] ECR 299} As this was said in just one sentence and the case was about a different topic, the aforementioned can be seen as merely a sidestep made by the CJEU. In Belgian Radio and Television v. SABAM the Court explicitly and undoubtedly said that as the prohibitions of Articles 85 and 86 tend by their very nature to produce direct effects in relations between individuals, those articles create rights directly in respect of the individuals concerned which the national courts must safeguard.\footnote{Case 127/73 Belgian Radio and Television v. SABAM [1974] ECR 51, 313} Thus, the direct effect for EU competition law was given, with the exception of Article 101(3) TFEU which at the time did not produce direct effects. With the entering into force of Regulation 1/2003, Articles 101 and 102 TFEU in their entirety produced direct effects. To find out which other rules of EU law have direct effect, three criteria simultaneously apply: the norm must be sufficiently clear and precise, unconditional, and leave no room for the exercise of discretion in implementation by Member States or Community institutions.\footnote{Josephine Steiner and Lorna Woods, EU Law (10th edn, OUP 2009)}

In academic literature, two views of the interplay between the doctrines of supremacy and direct effect were given form: the “primacy” model and the “trigger” model.\footnote{Michael Dougan, ‘When worlds collide! Competing visions of the relationship between direct effect and supremacy’ [2007] 44 CMLR 931} In the primacy model, the principle of supremacy works independently from the notion of direct effect. It can produce exclusionary effects by setting aside national rules which are incompatible with EU law. Direct effect can be understood as creating substitutionary effects where EU law creates new rights and obligations derived from the Treaties, which do not exist within the national legal order. Supremacy can coexist with direct effects when national law is incompatible with the newly created rights and obligations conferred through direct effect. Put differently, supremacy requires a confliction national provision to be set aside (non-applicability of the national norm in an individuals case), direct effect leads to the application of newly derived rights and obligations in individuals cases (sometimes at the expense of conflicting national provisions). According to the trigger model, however, direct effects are sort of a precondition for the supremacy principle to apply. Rules that have direct effect can identify a conflict of laws and supremacy resolves it in favour of EU law.\footnote{Michael Dougan, ‘When worlds collide! Competing visions of the relationship between direct effect and supremacy’ [2007] 44 CMLR 931} In the latter model, the two principles work together whereas in the former model they are seen as separate and are applied independently. The relationship between the two in the trigger model is best described as a two-fold step: first, one must determine if a specific rule of EU law has direct effect (this is the case when the rule is clear, precise and unconditional). Then, if the rule is established of having direct effect, the rule can be given primacy over national law in case there is a conflict between a directly effective EU rule and national law. Following the primacy model, rules of EU law that lack direct effect can still be given primacy over national law in case of conflicting rules. Although these rules cannot create new rights for individuals, they can autonomously be applied over national conflicting rules.\footnote{For a comprehensive analysis of the two competing models, see Michael Dougan, ‘When worlds collide! Competing visions of the relationship between direct effect and supremacy’ [2007] 44 CMLR 931} It goes beyond the scope of this thesis to analyse which of these models is more convincing in light of the
case law of the CJEU but it seems that the trigger theory is generally accepted as the prevailing model. For the purpose of this paper, it does not make any difference which model is used to determine the outcome of the application of EU competition law, since it has been made clear by the CJEU that EU competition law has primacy over national competition law and that they produce direct effects.

58 See for example Josehine Steiner and Lorna Woods, EU Law (10th edn, OUP 2009) and Michael Dougan, ‘When worlds collide! Competing visions of the relationship between direct effect and supremacy’ [2007] 44 CMLR 931
1.4 Dutch competition law

The rules on Dutch competition law are laid down in the Dutch Competition Act (“DCA”)\(^\text{59}\). Upon introduction of the Act, the accompanying explanatory memorandum hold that the Dutch rules on competition should stay close to EU competition law. One of the reasons mentioned for this is that already a lot of Dutch companies were subject to EU competition rules so it would make sense to chose comparable national rules for the companies that were outside the jurisdictional scope of EU competition law. It states that the rules on competition agreements and abuse of a dominant position are oriented on those of the EC Treaty, though they are not an exact copy. One of the differences is the lack of a requirement of ‘effect on trade between Member States’ in the DCA and Article 6 DCA does not contain the examples given in Article 101(1) TFEU.

Another important difference between Dutch and EU competition law are the rules on which agreements are *de minimis*. Pursuant to articles 12 and 13 DCA, the DCA has embraced the EU Block Exemption Regulations as if these were part of the national legal system, also with regard to purely national cases. On top of the Block Exemption Regulations of the Commission, Dutch competition law also has some extra block exemptions for national cases. Regarding fines and clemency, the Dutch National Competition Authority (“DNCA”) has other policy rules than the Commission. Most importantly, the basic line is that the DCA shall not be stricter nor more lenient than the EU rules on competition.\(^\text{60}\)

By implementing as much as possible from Articles 101 and 102 TFEU the aim is that the application of the DCA is influenced to a large extent by Commission Decisions and the jurisprudence of the CFI and the CJEU. This is emphasized by the reference made to EU law in some of the definitions in the DCA. Article 6 DCA is the counterpart of Article 101 TFEU and deviates only from that provision because it does not contain the mentioned examples of hardcore restraints in paragraph 1 and the requirement of an effect on interstate trade.\(^\text{61}\) The difference is not so much in the material law, but in procedural law. Procedural rules are found in the administrative law of the Netherlands, specifically in the *Algemene Wet Bestuursrecht* (“Awb”). The investigative procedure followed by the Dutch National Competition Authority (“DCNA”) is comparable to the procedure of the Commission and important procedural safeguards and investigative powers are laid down in the DCA. Because the material law of Article 6 DCA is basically equal to EU Law, all European jurisprudence can be used one-on-one for interpreting Dutch competition law.\(^\text{62}\) When interpreting the DCA, the EU rules on competition have to be taken into account as well, although it has to be borne in mind that EU and Dutch competition law pursue different goals. Whereas EU competition law is concerned with the creation of an internal market and safeguards the actual competition on that market, national law only pursues the aim of protecting actual competition.\(^\text{63}\)

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\(^{60}\) For example, a rule has been implemented to create the possibility of fining individuals.


On the basis of community loyalty, or the duty of sincere cooperation (Article 4(3) TEU), the Supreme Court of the Netherlands (“Hoge Raad”) has to follow previous decisions of the CJEU. Article 267 TFEU states that all national courts may request a preliminary ruling on a question of EU law, but that courts of last instance have an obligation to refer. This obligation to refer can only be excused when there is an EU precedent or when the answer to the question is acte clair (in Dutch called acte éclairé). There is an EU precedent when the question raised, or one similar to it, has already been interpreted by the CJEU in its earlier case law. When the answer to the question is acte clair, the correct application of the rule is without reasonable doubt. The rule that national competition law should not be stricter nor more lenient than EU competition law seems to be taken seriously by Dutch judges. Interpretations of EU competition law in the case law of the CJEU are being used and the convergence of material law is, therefore, almost complete. The little discretionary power of the national judges to give meaning to material questions of law relating to Article 6 DCA and Article 101 TFEU is hardly used by Dutch judges. It was long settled that cases decided by the CJEU in answer to preliminary questions were binding on all national courts in relation to that specific case. Although the CJEU does not create precedents in the way the common law system does, it does often refer to its earlier judgments to state certain rules and interpretations. The case law of the CJEU is also not officially a source of law for national judges to interpret national competition law provisions, but in a lot of cases Dutch judges refer to the case law of the CJEU to apply their reasoning and explanation of EU competition law in the case before them because of the ‘not stricter nor more lenient’ principle. They use the case law of the CJEU to interpret national competition law.

In T-Mobile, the CJEU said that any interpretation that is provided by the Court in applying Article 81 EC is binding on all the national courts and tribunals of the Member States. It goes on with stating that interpretations by the Court of Article 81(1) EC form an integral part of applicable Community law. At the same time the CJEU as court of last instance in the European legal order decides, according to the theory of the civil law system, what the law is in specific cases and essentially explains what the European legislator meant by the law.

As I discussed earlier it was the CJEU who created new rights outside the scope of the Treaties, such as the principles of supremacy and binding effect of EU law. Even so, some of these principles were later codified as the applicable law. The binding nature of Commission Decisions has been laid down in Article 16 of Regulation 1/2003 (as discussed in paragraph 1.2). It follows from the foregoing that Dutch Competition law is not only influenced by the related Treaty provisions on EU competition law, but also by its interpretation by the CJEU and Commission. In applying EU competition law, national judges are bound by CJEU and Commission decisions. Although there is some room to deviate from EU competition law in strictly internal situations where national law is exclusively applied, Dutch judges do not make use of this discretionary power often because the idea that the Dutch competition rules should not be stricter nor more lenient than their European counterparts is strictly

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68 See my reference in paragraph 1.1 to Kühne and Adeneler.
followed. There has been to a large extent what is called ‘soft convergence’ in EU and Dutch competition law.\textsuperscript{69}

Although Dutch competition law is influenced by many more general principles of EU law, it goes beyond the scope of this thesis to delve into the details of every one of them.\textsuperscript{70} For example, under the principle of the useful effect of EU law, national rules may not make the enforcement of EU competition law excessively difficult or practically impossible. And the principle of equivalence demands that national rules for the enforcement of EU competition law may not be less favourable than the rules applicable to the enforcement of national competition law.

In short it might be useful to summarise that individual Commission decisions, Block Exemption Regulations and the case law of the CJEU offer binding guidance to national courts and Commission’s notices, guidelines and annual reports on competition policy are non-binding documents which the national courts may find useful for seeking guidance.\textsuperscript{71} However, this does not mean that non-binding EU rules are never binding. In some cases they generate self-binding rules for the administrative institutions that made the documents and the CJEU is willing to use non-binding guidance documents as an interpretation tool to strengthen its arguments. Nevertheless, the court may disregard the rules just the same if they do not support its desired outcome. Dutch judges even use interpretative administrative EU soft law when applying purely national competition law because of the high level of convergence between the two legal systems. To explain national competition norms, Dutch judges often follow the case law of the CJEU and the decision practice of the Commission.\textsuperscript{72} Based on the judgment in \textit{Grimaldi}, Member States are not obliged to follow EU soft law but merely are bound to take those rules into consideration, in particular where they are capable of casting light on the interpretation of other provisions of national or EU law.\textsuperscript{7374}

\textsuperscript{69} A. Gerbrandy, \textit{Convergentie in het Mededingingsrecht}, (diss. Utrecht) Boom Juridische uitgevers 2009
\textsuperscript{70} To name a few: the duty of loyalty (or sincere cooperation), the principle of equivalence, duty of consistent interpretation, due process, and human rights. See also M.J. Frese, ‘De doorwerking van Europese rechtsbeginselen bij de decentrale handhaving van het EU-mededingingsrecht’ AA 2012, afl. 2, p. 108-116
\textsuperscript{71} Jonathan Faull and Ali Nikpay (eds), \textit{The EU Law of Competition} (3rd edn, OUP 2014)
\textsuperscript{72} J. Luijendijk & L.A.J. Senden, ‘De gelaagde doorwerking van Europese administrative soft law in de nationale rechtsorde’ SEW 2011, afl. 7/8, p. 312-352
\textsuperscript{73} Case 322/88 \textit{Salvatore Grimaldi v Fonds des maladies professionnelles} [1989] ECR 4407
1.5 Conclusion

Although Dutch competition law is influenced by many more general principles of EU law, the two most important are the principles of supremacy of EU law and the direct effect of EU law. Both have been explicitly made applicable in the field of competition law by the CJEU. These principles have also been codified to some extent in the form of Regulation 1/2003. What follows from the principle of supremacy is that in case there is a conflict between national and EU competition law (when they are both applicable), the EU rules on competition take precedence. This is relevant for Dutch competition law since Article 3(1) of Regulation 1/2003 obligates national judges to apply Article 101 TFEU in parallel with national competition rules to agreements that may have an effect on trade between Member States. The fact that EU competition rules have been awarded direct effects means that they create enforceable rights for individuals. The courts and competition authorities in the Netherlands thus have the obligation to enforce and apply EU competition law in individual cases.

Furthermore, we have seen that decisions of the CJEU interpreting Article 101 TFEU are binding upon national courts and authorities and, according to the principle of supremacy, have to be given precedence in case of conflict. The CJEU performs the daunting task of interpreting EU law, in fact deciding what the EU law ought to have been from the moment of its inception. The interpretations given by the CJEU are therefore seen as explaining what the precise content of EU law is and thus are treated as having almost the same legal status as the EU law itself, although officially this is not the case since the EU legal order is a civil law system and not a common law one. Dutch judges are consequently bound (or perceive themselves to be bound) by CJEU decisions when they apply EU competition law. However, when they apply national competition law they are not bound by the CJEU on the basis of EU law (because EU law allows stricter national competition rules for strictly internal situations) but because of the requirement that the DCA shall not be stricter nor more lenient than its EU counterpart. Following this principle, Dutch judges will normally follow the line of reasoning of the CJEU also in purely internal situations. This has led to a situation in which EU and Dutch competition law have almost completely converged.
Chapter 2: The *Expedia* judgment and the appreciability test for restrictions by object

Sub research question: How should the ruling in the Expedia judgment be interpreted in light of the earlier case law by the CJEU on the appreciability for restrictions by object?

2.1 The concept of appreciability for restrictions by object

Article 101(1) TFEU reads as prohibiting agreements ‘which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition’. The use of the word ‘or’ is not coincidental: the CJEU has confirmed that the requirements are alternative.\(^{75}\) To find out what the object of an agreement is, regard must be had to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part.\(^ {76}\) The use of the word ‘object’ does not refer to the subjective intention of parties to the agreement, but refers to the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied.\(^{77}\)

In three early cases, in which the granting of absolute territorial protection was a central issue, it spelled out the basics for restrictions by object and their appreciability: *Société Technique Minière (STM) v Maschinenbau Ulm (MBU)*, *Consten v Grundig*, and *Völk v Vervaecke*. The considerations can be summarized as follows. For an infringement it is enough to assert if the agreement has an anti-competitive object and if it does not, to see if there are any anti-competitive effects resulting from the agreement. The object of an agreement is deduced by looking at its clauses and the purpose of the agreement, in the legal and economic context in which it is to be applied and was concluded by the parties. If no anti-competitive object can be found, the consequences of the agreement should be considered to determine if competition in fact has been prevented, restricted or distorted.\(^{78}\) 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.\(^{79}\) Although the concept of appreciability can already be found in *Société Technique Minière* (‘(..) that the agreement prevents or that it restricts or distorts competition to an appreciable extent’), the central case was *Völk v Vervaecke* because this was the first case where appreciability was an issue. In this case the CJEU ruled, in a strikingly short judgment, that an agreement falls outside the prohibition of Article 101

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\(^{75}\) Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 249

\(^{76}\) Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, para 58

\(^{77}\) Case C-551/03 P *General Motors v Commission* [2006] ECR II-3173, paras 77-78

\(^{78}\) Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 249. In this thesis I will not elaborate further on the concept of restrictions of competition by effect.

\(^{79}\) Joined cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299
TFEU when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question.⁸⁰

By using the words ‘insignificant effect’ in Völk some doubt could exist about the maintenance of the strict separation between object and effect cases. The CJEU made clear, however, that Article 101(1) TFEU does not require proof that agreements with an anti-competitive object have in fact appreciably restricted competition and affected trade between Member States, but merely requires that it be established that such agreements are capable in an individual case of having that effect. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages.⁸¹ It is also sometimes put into words that agreements which have an anti-competitive object are presumed to have anti-competitive effects and, therefore, actual effects do not need to be shown.⁸² Examples of restrictions by object are price-fixing, market-sharing, and the control of outlets.⁸³ The distinction between restrictions by object and restrictions by effect lies in the view that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.⁸⁴

Both the restriction of competition and the effect on trade between Member States should be appreciable in order for an agreement to fall under the prohibition of Article 101(1) TFEU.⁸⁵ The appreciability for the effect on trade between Member States is dealt with in a separate notice.⁸⁶ This notice on the effect on trade concept applies equally to restrictions by object and effect since it does not contain an exemption for hardcore restraints

The question as to what appreciability is exactly cannot be answered easily. The online Cambridge Advances Learner’s Dictionary defines appreciable as follows: ‘if an amount or change is appreciable, it is large or noticeable enough to have an important effect’.⁸⁷ Translated to competition law, the Commission should only be concerned with restrictions of competition that are important enough to be capable of having a noticeable effect on competition. The appreciability requirement thereby also justifies the use of the Commission’s resources to eliminate the agreement (or part of it) and fine the parties concerned. Generally the belief is that appreciability has a qualitative and quantitative aspect. Both the Commission De Minimis Notice and Guidelines on the effect on trade concept are examples of a quantitative approach to appreciability.⁸⁸ They set market share and turnover thresholds below which a restriction of competition or the effect on interstate trade is not considered appreciable. In both notices, however, it is stipulated that in the case the parties exceed the thresholds it does not

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⁸¹ Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-4529, para 31
⁸³ Joined cases 374, 375, 384 & 388/94 European Night Services Ltd (ENS) and others v Commission [1998] ECR II-03141
automatically mean that the restriction or effect in question is appreciable. In the same way, agreements that fall below the thresholds can still amount to an appreciable restriction of competition or affect interstate trade appreciably in exceptional cases. Appreciability in those cases is assessed on a case-by-case basis and can point into a different direction than the market share thresholds indicate because of the qualitative aspect of appreciability. The CJEU has ruled that agreements which do not benefit from the safe harbour of the notice can still be saved from infringing Article 101(1) TFEU is the agreement does not qualitatively restrict competition. Qualitatively, an agreement must be suitable to restrict competition appreciably.

The restriction needs to qualitatively and quantitatively restrict competition appreciably in order to breach Article 101(1) TFEU. If one of the two aspects has not been fulfilled, the agreement falls outside Article 101(1) TFEU. The overall view is that the more serious the restriction of competition is, the lower the market shares of the parties must be in order for the restriction to not be appreciable. In short, the market position of the parties is examined as the quantitative element of appreciability and the seriousness of the restrictions is looked at as the qualitative aspect. An example of the quantitative approach to appreciability is the case of Völk. An example of the qualitative approach to appreciability is the case of Pavlov.

The Commission De Minimis Notice is recently revised and deals with the quantitative element of appreciability for restrictions by effect. Where the former De Minimis Notices did not apply to hardcore restraints, the Commission now explicitly exempts restrictions by object from the safe harbour offered by the notice. The Commission based this change on paragraph 37 of the Expedia judgment. If parties to an agreement with an anti-competitive effect fall below the market thresholds as set out in the notice, they are rest assured that the Commission will not institute proceedings against them. The latest De Minimis Notice is accompanied by a guidance document on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice. Although the practical outcome of changing the exemption for hardcore restraints to an exemption for restrictions by object will not be considerably different (because, generally, hardcore restraints are perceived as being at the same time restrictions by object) it is quite surprising that the Commission took the Expedia judgment as an opportunity to limit the scope of the

89 Richard Whish and David Bailey, Competition Law (7th edn, OUP 2012)
90 See, for example joined cases C-180 and 184/98 Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-06451
92 Alison Jones and Brenda Suffrin, EU Competition Law: text, cases and materials (5th edn, OUP 2014)
94 Joined cases C-180 and 184/98 Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-06451
95 In 1970 the Commission issued its first De Minimis Notice, after which it was replaced in 1977, 1986, 1997, 2001 and 2014 to adjust the thresholds to new economic circumstances and insights.
De Minimis Notice further. The application of the De Minimis exemption is limited in the sense that the list of hard-core restrictions is considered to be an exhaustive list defined by the Commission whereas the list of restrictions by object is open-ended and can in theory be expanded.

Before the Expedia judgment and the latest revision of the De Minimis Notice the general belief was that the issue of appreciability played an equally important role for restrictions by object and restrictions by effect in the sense that appreciability was a requirement for both forms of restriction. Although the Commission exempted hardcore restrictions from the application of the De Minimis Notice, the General Court ruled that object restrictions must also have an appreciable effect. The statement that restrictions by object can never be of minor importance was, therefore, incorrect.

Although the Commission is bound by judgments of the CJEU, we will see later on that the De Minimis Notice is at odds with the case law of the CJEU on the issue of appreciability for restrictions by object. The Commission thinks, at least after Expedia, that appreciability is given for restrictions by object and therefore exempts these types of agreements from the new De Minimis Notice, whereas the CJEU has always considered that appreciability should be tested in every case, regardless of whether the agreement at issue constitutes a restriction by object or effect. We will see in this chapter if the Expedia judgment brought about a change in the view of the CJEU.

99 Although hardcore restraints generally constitute restrictions by object, the list of restrictions by object can be enlarged so as to encompass more agreements than those existing under the predefined hardcore restraints list.

100 Anna Gerbrandy, ‘Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, Judgment of the Court (Third Chamber) of 4 June 2009, not yet reported’ [2010] 47 CMLR 1199. In BIDS the CJEU confirmed that there can be other object restrictions than those listed in Article 101(1) TFEU.

101 David Bailey, ‘Restriction of Competition by Object under Article 101 TFEU’ [2012] 49 CMLR 559, stating that “Although this is not expressly stated in the TFEU, an agreement which has as its object the restriction of competition may fall outside Article 101(1) if it does not appreciably affect competition or affect trade between Member States” and “The exception [of the de minimis doctrine] applies to restrictions by object (and by effect) which are so trifling as to have no, or only an insignificant, impact on the market”. Also Richard Whish and David Bailey, Competition Law (7th edn, OUP 2012): “even a restriction by object could fall outside Article 101(1) if its likely impact on the market is minimal. As a matter of law, therefore, it seems clear that even hard-core restrictions might fall outside 101 because they have no appreciable impact.”

102 Case T-199/08 Ziegler ZA v Commission [2011] ECR II-03507, paras 41-45. Although the GC also held that “undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article [101(1) TFEU] by claiming that their agreement should not have an appreciable effect on competition” – joined cases T-67, 68, 71 & 78/00 JFE Engineering v Commission [2004] ECR II-2501, para 384.

103 This statement was made by Frances Barr, ‘The New Commission Notice on Agreements of Minor Importance: is Appreciability a Useful Measure?’ [1997] 18(4) ECLR 207.
2.2 Expedia: facts and ruling

The Expedia judgment involved a preliminary question referred to the CJEU by the French Cour de cassation. The question related to a dispute between Expedia Inc. (Expedia), an online travel agency, and the Autorité de la concurrence (the French competition authority). Expedia and the French State railway company Société nationale des chemins de fer français (SNCF) were fined for an infringement of Article 81 EC and the corresponding provisions of French competition law. Reason for the fine was that the parties had formed a joint venture for the sale of rail tickets and other travel services and in light of this joint venture, Expedia gained privileged access to the SNCF website ‘voyages-sncf.com’ which resulted in Expedia enjoying preferential treatment where its competitors did not. Expedia got a fine of EUR 500,000 and SNCF was fined EUR 5,000,000.

During the administrative procedure, Expedia argued that its market share fell below the market share thresholds in the Commission De Minimis Notice and its fine should be withdrawn because of that. It referred to Article 3(2) of Regulation 1/2003 to support its argument. The relevant provision in France, Article L 464-6-1 of the Code de commerce implemented the thresholds in the Commission De Minimis Notice with the note that the French Competition Authority had the discretionary power to initiate proceedings against agreements that fell below the thresholds or that it would abstain from doing so. The Competition Authority rejected Expedia’s arguments upon which Expedia appealed to the Cour d’appel in Paris. That court disregarded the market threshold discussion altogether and ruled that the use of the word ‘may’ in Article L 464-6-1 of the Code de commerce indicates that proceedings may be brought and penalties imposed, even if the market share thresholds have not been met. According to the Cour d’appel all the conditions of Article 81 EC were fulfilled and Article 3(2) of Regulation 1/2003 did not preclude the imposition of fines in such cases as these. Expedia appealed to the Cour de cassation, which referred a preliminary question to the CJEU. The question asked reads as follows:

Must Article 101(1) TFEU and Article 3(3) 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 which does not reach the thresholds specified by the European Commission in its [De Minimis Notice]?

Essentially, the abovementioned preliminary question relates to the binding nature of the De Minimis Notice. Also, the Cour de cassation wanted to know whether a national authority may presume an appreciable restriction of competition if an agreement has an anti-competitive object, even though the market share thresholds of the De Minimis Notice have not been met. So the requested ruling revolves around the binding force of the De Minimis Notice. Although the CJEU spent the largest part of its judgment on the first question, I will not further elaborate on its conclusion that the De Minimis Notice is not legally binding on national competition authorities when applying Article 101 TFEU. In light of its earlier case law, this outcome was to be expected and was in no way a surprise for the academic community. The Court did note, however, that the notice is intended to give guidance to

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104 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r.
105 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., Opinion of AG Kokott, para 2
106 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., Opinion of AG Kokott, paras 12-18
107 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., Opinion of AG Kokott, para 24
the courts and authorities of the Member States in their application of Article 101 TFEU and, consequently, the competition authority of a Member State may take into account the thresholds established in the *De Minimis* Notice but is not required to do so. The Court finds these thresholds to be no more than factors in determining if a restriction is appreciable.\(^{108}\)

The part of the judgment that was surprising to the academic community is the part I want to focus on and merely consists of three paragraphs. After stating that the fact that the French national court held the agreement in question to have an anti-competitive object meant that this assessment, which was one of fact, could not be the subject matter of the CJEU’s judgment anymore, the Court devoted paragraphs 35 to 37 to the appreciability in relation to restrictions by object. In two of those paragraphs the Court even cites and repeats its earlier case law so the true novelty in this judgment lies in the one following consideration:

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.

This statement seems to contradict with the findings in paragraph 2.1 above that the appreciability test should be conducted for restrictions by effects, as well as restrictions by object. In fact, the very case in which the CJEU introduced the concept of appreciability constituted a restriction by object.\(^{109}\)

This is a stark contrast with paragraph 37 of the *Expedia* judgment which basically says that every agreement that has an anti-competitive object and that may affect trade between Member States is *by definition* an appreciable restriction of competition. It does not help much either that the CJEU makes one bold statement without having felt the need to clarify in which context it was meant and what the consequences and outcome of it should be.

Looking at the opinion of Advocate General Kokott, we can shed some light on the above. Kokott concludes her opinion on the appreciability aspect of the case by stating that ‘the requirements concerning proof that a restriction of competition ‘by object’ is appreciable should under no circumstances be more stringent than the requirements concerning proof of an appreciable effect on trade between Member States for the purposes of Article [101(1) TFEU]’.\(^{110}\) She then explains that when an agreement with an anti-competitive object is capable of affecting trade between Member States, this means that the agreement is also capable of appreciably restricting competition within the internal market.\(^{111}\) Understood in this explanation, the consideration of the Court could mean as much as that the twofold appreciability test for restrictions by object actually only constitutes one step because the appreciable restriction of competition is given when it is determined the agreement may appreciable affect trade between Member States. Or does it mean something more than that and did the Court mean to say that a restriction by object, regardless of it being capable of affecting trade between Member States, constitutes an appreciable effect of competition because of its very nature? I will explain further on in this chapter what meaning should be given to the abovementioned consideration of the Court, in light of the earlier case law of the CJEU (as discussed in paragraph 2.1).

\(^{108}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., para 28, 31

\(^{109}\) See discussion in paragraph 2.1 on *Völk*.

\(^{110}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., Opinion of AG Kokott, para 56

\(^{111}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., Opinion of AG Kokott, para 57
2.3 Possible interpretations
According to Article 19 TFEU, the CJEU is tasked with the interpretation and application of the Treaties. When engaged in the interpretation of legal provisions, the CJEU has a wide range of interpretation methods at its disposal. For example it can use the literal, systematic, teleological, historical, anticipating or comparative interpretation methods. Of course these methods are used by the CJEU to interpret rules of EU law but it might be useful to use some of these interpretation methods to try to explain and interpret the case law of the CJEU itself, in this case the Expedia judgment. For the content of this thesis is limited, I will use only three interpretation methods: the literal, systematic and teleological interpretation. To be able to apply these methods of interpretation to judgments instead of legal provisions requires some alterations in their application.

2.3.1 Interpretation #1: literal interpretation
Following the literal interpretation method the meaning of a text is extracted by looking at the usual meaning of the words of that text. It sometimes is referred to as the grammatical method of interpretation. Simply applied, the consideration in paragraph 37 of the Expedia judgment means what it says exactly: that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes (...) an appreciable restriction on competition. Put in different words, when it is established that a specific agreement is capable of having an effect on interstate trade (following the guidelines laid down in the Guidelines on trade between Member States) and consequently also that it constitutes a restriction by object, the appreciability for a restriction of competition is given and does not have to be examined separately anymore. This interpretation contains two elements, namely the appreciable effect on interstate trade plus the qualification of agreement as a restriction by object. This interpretation would leave the appreciability test as it was laid down in Völk untouched with regard to purely national competition cases because the requirement of effect on interstate trade is necessarily not met in these cases.

Braeken & Tuinenga adhere to aforementioned view that appreciability for restrictions by object after Expedia only needs to be tested as part of the requirement of an effect on interstate trade. They think that the reading of the ruling that an appreciable effect on trade between Member States includes an appreciable restriction of competition can be seen as a clarification of the Völk judgment, or rather puts it into perspective. This could make sense since the Court in Völk considers the insignificant effect argument in light of both the requirement of effect on interstate trade as well as the restriction of competition. Why the appreciable effect on interstate trade encompasses an appreciable restriction of competition in the case of a restriction by object and not a restriction by effect in this view can be explained by the fact that restrictions by object are considered to be graver than restrictions by object because of their harming nature. A difficult aspect of this interpretation is, in my opinion, that the CJEU explicitly made the appreciability requirement separately applicable to

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112 For the sake of clarity and brevity I will use a simplified model of the interpretation methods used.
the restriction of competition as well as the effect on interstate trade in Beguelin.115 This is also the reason why the Commission issued two separate notices on how the appreciability for both elements should be examined. It would not make sense that the CJEU departed from this view also because it has not elaborated on this issue further in Expedia. Even more, the case in Völk constituted an agreement that had an appreciable effect on interstate trade (as it resulted in a portioning of the internal market) but that lacked an appreciable restriction of competition. If aforementioned view is to be hold true, Völk has been overruled by Expedia. We will later see that it is not likely that the CJEU meant to overrule its judgment in Völk.

Another explanation is that the appreciable effect on trade between Member States encompasses an appreciable restriction of competition, regardless of whether the agreement at issue constitutes a restriction by object or effect. What makes sense in this interpretation is that when judging the appreciable effect on interstate trade, market thresholds also play a role in determining if the effect is appreciable. It does not matter if the market thresholds are looked at when establishing a restriction of competition or an effect on trade between Member States because, either way, a very low market share (below 5%) will amount to the finding that there is no appreciability.116 This argument also goes for the explanation mentioned in the former paragraph. The same argument that in order for this interpretation to work, the CJEU must have meant to overrule its judgment in Völk, applies here as well and therefore this interpretation is less likely. It would also undermine the differential treatment of restrictions by object and effect, which contradicts with the inherent emphasis on restrictions by object in paragraph 37 of Expedia.

A narrower reading of the consideration in Expedia can lead to the view that the appreciability of the restriction of competition is given as soon as the agreement is labelled a restriction by object, without the need to conduct an appreciability test anymore and regardless of whether there is an effect on trade between Member States.117 The appreciability then is presumed for restrictions by object. The view that certain agreements are always prohibited and appreciably because of their inherent damaging nature, is labelled as a formalistic approach to restrictions by object.118 This is also the reading the Commission adheres to in its revised De Minimis Notice.119 This view does set aside the previous judgment in Völk because parties will no longer be able to claim that their agreement does not fall within Article 101(1) TFEU because of their insignificant market shares when their agreement is considered to pursue an anti-competitive object. According to this point of view, the safe harbour for restrictions by object does no longer exist after Expedia.120 Already in 2010, before the Expedia judgment, Loozen believed that the Mannesmannröhren-Werke judgment of the General

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116 See Jonathan Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014) 244 where they state that “[Miller and Völk] suggested that for vertical restrictions, shares below 1 per cent were likely to be ‘insignificant’ while above 5 per cent, the effect was likely to be appreciable and Article 101(1) was likely to apply. Between 1 and 5 per cent could be best described as a grey area”.
117 Angela Ortega González, ‘Restrictions by object and the appreciability test: the Expedia case, a surprising judgment or a simple clarification’ [2013] 34(9) ECLR 457
118 M. Maassen, ‘‘Merkbaarheid post-Secon’: een overzicht van de beschikkingenpraktijk van de NMa’ AM 2009, afl. 5, p. 97-102
120 Jonathan Faull and Ali Nikpay (eds), The EU Law of Competition (3rd edn, OUP 2014)
Court justified the same view and held that the appreciability test for restrictions by object was non-existent. The GC ruled that: In this judgment, the GC ruled that:

(…) which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement should not have an appreciable effect on competition. (...)its existence made sense only if its object were to restrict competition appreciably, i.e. in a manner commercially useful to them; and the Commission has established to the requisite legal standard that the agreement did in fact exist.

The crux of this consideration is in the use of the words 'in principle' since those indicate a rebuttable presumption of an appreciable effect on competition for restrictions by object. I do not believe that based on this consideration one can presume that the Völk theory of appreciability has been abandoned. The same goes for the departing from Völk in Expedia. This is not a such an obvious conclusion since the CJEU refers to the judgment several times. The general consensus is, consequently, that Völk has not been overruled by Expedia. In my view, the validity of aforementioned view depends on the assumption of a rebuttable or non-rebuttable presumption of an appreciable restriction of competition. If there is a rebuttable presumption, the judgment can be reconciled with Völk in that the insignificant effect on the market argument can be used to rebut the presumption. The same way in which this interpretation can be reconciled with the De Minimis Notice and the effect on trade guidelines, which both contain a negative rebuttable presumption that when parties to an agreement meet the thresholds set out in those notices, appreciability is presumed. An automatic and non-rebuttable presumption cannot be reconciled with the Völk judgment and, therefore, is harder to reconcile with the rest of the judgment.

Supplementing the view of a rebuttable presumption is the opinion of the Dutch Advocate-General Mok in its annotation to the Expedia judgment. According to him, the qualification of appreciability as an element of Article 101(1) TFEU is too strong. The application of the appreciability factor is merely optional: parties can make an appeal that there is no appreciable restriction of competition. This view blends in perfectly with the idea of a rebuttable presumption: restrictions by object are assumed to have an appreciable restrictive effect on competition, unless parties can make a credible argument that in a specific case the anti-competitive agreement does not amount to an appreciable restriction of competition.

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121 E.M.H. Loozen, Het begrip mededingingsbeperking zoals neergelegd in artikel 101(1) VWEU: een beslismodel, (diss. Amsterdam UvA) Boom Juridische Uitgevers 2010
122 Case T-44/00 Mannesmannröhrn-Werke AG v Commission of the European Communities [2004] ECR II-02223, paras 130-131. This case was appealed before the Court of Justice but not on this part of the judgment.
123 Alison Jones and Brenda Suffrin, EU Competition Law: text, cases and materials (5th edn, OUP 2014)
126 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., annotation M.R. Mok, NJ 2013/253
Thus, the literal interpretation method gives us four different interpretations of the *Expedia* judgment. I will summarize these interpretations by way of a formula. The first explanation says that an appreciable effect on trade between Member States plus the qualification of a restriction by object equals an appreciable restriction of competition. Secondly, an appreciable effect on trade between Member States equals an appreciable restriction of competition. The third view that the qualification of an agreement as a restriction by object equals an appreciable restriction of competition can be understood equalling a rebuttable or non-rebuttable presumption of an appreciable restriction of competition.

### 2.3.2 Interpretation #2: systematic interpretation

Normally, the systematic interpretation of a legal provision puts this provision in a normative context. By taking into account the general scheme of the treaties and acts of secondary EU law, the provision can be placed in its context. Its interpretation should be consistent with the system, the principles, rules and concepts characteristic of the legal area to which the provision belongs or a distinct area within the same legal order or a different legal order.\(^{127}\) In our case we will use the rest of the judgment and some earlier case law as context and read paragraph 37 in light of the rest of the considerations in the judgment, its dictum and the opinion of the Advocate General. By repeating its settled case law that an agreement of undertakings falls outside the prohibition of Article 101(1) TFEU if it only has an insignificant effect on the market, and by not explicitly departing from it later on its judgment, the CJEU indicates that the appreciability as formulated in *Völk* is still relevant.\(^{128}\) After that, the CJEU even reiterates that to fall within the scope of the prohibition under Article 101(1) TFEU ‘an agreement must have the object or effect of perceptibly restricting competition within the common market and be capable of affecting trade between Member States’ [emphasis added].\(^{129}\) So it thus repeats the appreciability requirement for restrictions by object. It then states that national competition authorities can apply the provisions of national competition law to an agreement 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 [emphasis added].\(^{130}\) Following this, the much repeated phrase in earlier case law is summed up:

> the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement. 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. It is also appropriate to take into consideration the nature of the goods and the services affected, as well as the real conditions of the functioning and the structure of the market or markets in question.\(^{131}\)

The use of the phrase ‘such a restriction’ at the beginning of this paragraph refers back to an ‘agreement that perceptibly restricts competition within the common market’ of the former paragraph. It again refers to its judgment in *Völk* in paragraph 22 where it says 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. In

\(^{127}\) Giulio Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ [2009] 10 German L.J. 537

\(^{128}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., para 16

\(^{129}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., para 17

\(^{130}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., para 20

\(^{131}\) Case C-226/11 *Expedia v Autorité de la concurrence and others* [2012], n.y.r., para 21
other cases, however, it did not base its decision on the position of the persons concerned in the market in question.132

Here we can read the distinction between qualitative and quantitative appreciability. It seems that the CJEU still thinks that both legs of the appreciability should be fulfilled in order to fall within the ambit of Article 101(1) TFEU (or at least that both can be ground for falling outside the scope of Article 101 TFEU).

Before stumbling upon the item of discussion, the Court remembers two concepts of its settled case law, namely that there is no need to take into account any effects when it is determined that an agreement amounts to a restriction by object and second, that the distinction between infringements by object and infringements by effect arises from the fact that certain forms of collusion can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.133 The use of the word ‘therefore’ in paragraph 37 indicates that its conclusion ‘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’ is based on the foregoing considerations. So we know now, by looking at the text and context of the judgment, that the CJEU does not appear to have left its judgment in Völk and that the conclusion in paragraph 37 is based on earlier settled case law (so should be able to be reconciled with this reasoning). What conclusions can be drawn from what initially seems to be an inherent contradiction?

The best reconciliation, I believe, is found in the explanation that the requirement of an appreciable restriction of competition becomes part of the qualification of an agreement as a restriction by object. This is also the most provided possible explanation to paragraph 37 of the Expedia judgment.134 In this view a separate appreciability test is no longer necessary once an agreement has been qualified as a restriction by object. The judgment in Völk could then mean as much as that the Court took into account the parties’ market position as an element of the actual circumstances of that agreement which should be looked at as relevant context in labelling an agreement under Article 101(1) TFEU. So the appreciability test does not disappear but must take place when analysing the agreement’s precise purpose and its context. This means that once an agreement has been found to constitute a restriction by object, the (possible) appreciable effects on competition are given.135

Another slightly different view is that the appreciability test is still separately conducted (at the same time or as part of the qualification test) but its reach is the same as the qualification test in that effects do not need to be taken into consideration. Put in different words, appreciability should be judged according to the nature of the agreement (its facts and circumstances), independently of any conditions.

132 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., para 22
133 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., para 35-36
concrete effect that it may have.  
We have seen already that to find out what the object of an agreement is, regard must be had to the content of the provisions of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part. In aforementioned interpretation, appreciability is assessed in exactly the same way as the object of the agreement is established: by looking at its provisions, objectives and the economic and legal context. Support of this view can be found in the second part of paragraph 28 of the T-Mobile judgment:

Where, however, an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition in fact has been prevented or restricted or distorted to an appreciable extent. [emphasis added]

What can be inferred from the first part of this consideration is that the qualification test contains an investigation to find if an agreement restricts competition by object to a sufficiently deleterious extent, in other words, constitutes by its nature an appreciable restriction. The appreciability test, in this sense, requires an analysis into its context on the basis of which it can be determined that the agreement is able by its nature, and independently of any concrete effect to restrict competition concrete and to a sufficient extent. Also in this view is the appreciability of the restriction of competition is given once it has been established that an agreement constitutes a restriction by object. More support of this view can be found in the Allianz judgment, where the Court considered:

it will still be necessary to determine whether, taking account of the economic and legal context of which they form a part, the vertical agreements at issue in the main proceedings are sufficiently injurious to competition on the car insurance market as to amount to a restriction of competition by object. [emphasis added]

Here the CJEU still thinks that for the finding of a restriction by object there must be an appreciable restriction of competition. The judgment in Allianz was delivered three months after Expedia and constituted a preliminary reference from the Hungarian Supreme Court. The case concerned a preliminary question as to if a certain agreement between car dealers and insurers should be considered a restriction by object. The Court repeats several issues that are considered to be settled case law on the topic of restrictions by object. For example the phrase that ‘in order to determine whether an agreement involves a restriction of competition ‘by object’, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part’. 

Noteworthy is that the Court also repeats paragraph 21 of Expedia, stating that ‘when determining that context, 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 structure of the market or markets in question’. What the judgment in Allianz essentially adds is that in order to determine if the conclusion of the agreements in question eliminated or seriously weakened competition on the market(s) concerned, a court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the

137 Case C-8/08 T-Mobile Netherlands and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529, para 28
139 Case C-32/11 Allianz Hungária Biztosító Zrt. a.o. v Gazdasági Versenyvétal [2013], n.y.r., para 46
140 H.M. Cornelissen, ‘Het Expedia-arrest: een merkbare koerswijziging?’ NiEr 2013, afl. 5, p. 171-177
141 Case C-32/11 Allianz Hungária Biztosító Zrt. and others v Gazdasági Versenyhivatal [2013], n.y.r. para 36
market power of the companies concerned. The eventual dictum of the Court is that the contracts concerned can be considered a restriction of competition by object within the meaning of that provision, where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.

Interesting about the Expedia judgment is furthermore the fact that in its ruling the CJEU does not refer to restrictions by object or effect but to agreements in general and repeats the requirement of an appreciable restriction of competition.

A view taken by Monti in its response to the Consultation on the Draft Notice on agreements of minor importance is that Völk remains good law, even after the Expedia judgment because it provides a safe harbour for what he calls ‘really tiny’ agreements. Regardless of the exclusion of restrictions by object in the revised De Minimis Notice, he believes that agreements with an anti-competitive object between parties with really low (and thus insignificant) market shares are still exempted from the prohibition laid down in Article 101(1) TFEU because they do not restrict competition appreciably. He attaches significance to the fact that in Völk, the parties had a really small market share. However appealing this idea may be, it is difficult to reconcile with paragraph 37 of the Expedia judgment. The only way I see this reasoning sit comfortably with the Expedia judgment is that Völk remains the exception to the ruling in paragraph 37 of the judgment. The rule would then be that restrictions by object that have an effect on trade between Member States in principle amount to an appreciable restriction of competition, unless they have a really small and insignificant effect on the market. The qualification of an agreement as an agreement with an anti-competitive object then amounts to a rebuttable presumption that it restricts competition appreciably.

In paragraph 5/7 of Völk, the Court uses the market position of the parties to refer both to the appreciable effect on competition as well as the appreciable effect on trade between Member States. One of my own thoughts is that it may be that the CJEU wanted to clarify its judgment in Beguelin because it is inferred from that case that both the restriction of competition and effect on trade should be appreciable. However, this case was about a restriction by effect. For restrictions by object, however, the fact that trade between Member States is effected to an appreciable extent can mean that the requirement of an appreciable restriction of competition is consequently fulfilled because of the likeliness of the anti-competitive effects. With respect to restrictions by effect, the effects can be measured and have to be taken into account anyway when labelling the agreement so it makes sense that here the appreciability for both has to be examined. In all the above interpretations, scholars have ignored the fact that the judgment could be easily explained as that Völk remains valid law but only for the appreciable effect on trade requirement and has been left for the appreciable restriction of competition and that therefore the CJEU did not explicitly overturned its judgment in Völk for both requirements of appreciability. The problem with this view is that the

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142 Case C-32/11 Allianz Hungária Biztosító Zrt. and others v Gazdasági Versenyhivatal [2013], n.y.r, para 48
143 Case C-32/11 Allianz Hungária Biztosító Zrt. and others v Gazdasági Versenyhivatal [2013], n.y.r, para 51
CJEU seems to have repeated the appreciability requirement for restrictions by object the later judgment of Allianz.

To sum up, the explanations given by the systematic interpretation method can also be divided into four different interpretations. The first interpretation adheres to the view that the Expedia judgment means that the assessment of appreciability becomes part of the qualification of the agreement as a restriction by object. The second interpretation thinks the assessment of appreciability is still conducted separately but its reach is the same as the qualification of an agreement as a restriction by object. Appreciability then should be assessed by looking at the content of the agreement, its provisions, objectives and the economic and legal context of which it forms part. The third view taken by Monti is that Völk has not been overruled by Expedia because the exception for really tiny agreements remains in place, even for restrictions by object. Monti basically says Expedia did not purport a change in the appreciability test for restrictions by object. Forth and last, one can think of the explanation that the reasoning in Völk has been overturned by Expedia for the appreciable restriction of competition but not for the requirement of an appreciable effect on trade between Member States.

2.3.3 Interpretation #3: teleological interpretation

A teleological interpretation makes use of the objectives pursued by the Treaties and explains a legal text according to the purpose and sense of the legal text. In case of doubt, the legal provision should be interpreted in a way which is coherent with its goals and purposes. A good example of this kind of interpretation is found in the opinion of Advocate General Kokott. She states that applying the safe harbour of the De Minimis Notice to restrictions by object is contrary to the fundamental principles of the internal market since it would practically invite parties with market positions below the thresholds set out in the notice to conclude anti-competitive agreements. However sound this reasoning may be, to the contrary it can be said that the Commission should allocate its resources to prosecute only the most harmful restrictions of competition. This is exactly one of the reasons the De Minimis Notice was drafted and it does not make sense to now exclude object restrictions even if parties have very low market shares since the Commission will not likely go after these agreements in the first place. So the judgment of the CJEU in Expedia should be read in light of the goal and purpose of the safe harbour for restrictions of competition that are not appreciable.

146 Giulio Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ [2009] 10 German L.J. 537
147 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., Opinion of AG Kokott, para 52
2.4 Conclusion

At the very least, the consideration in paragraph 37 of the Expedia judgment is ambiguous, unclear and seems to contradict with settled case law. The CJEU has consistently held, since as early as 1969 when it introduced the concept in Völk, that agreements must constitute an appreciable restriction of competition and appreciable effect trade between Member States in order to fall within reach of the prohibition in Article 101(1) TFEU. It was established that this ‘appreciability test’ applied both to restrictions by object and effect. Although the CJEU on very few occasions has held that an agreement with anti-competitive object did not appreciable restrict competition or affect interstate trade, it was believed that the concept of appreciability applied equally to both forms of restrictive agreements.

Since the Expedia judgment there has been an academic debate on the role of the appreciability test with regard to the restriction of competition for restrictions by object. There seems to be general consensus, with only a few exceptions, that the CJEU did not depart from its earlier ruling in Völk and that appreciability is still of relevance for restrictions by object. Although the Commission disregarded comments pleading this by excluding restrictions by object from the safe harbour in the new De Minimis Notice and holding that restrictions by object constitute an appreciable restriction on competition by their very nature, this is not the overall view. I also strongly believe that this is not the correct reading of the Expedia case as it is too narrow and focuses too much on one consideration.

Moreover, the fact that the Court refers to the appreciability requirement with regard to restrictions by object in the same judgment as well as in its judgment in Allianz, indicates that appreciability still has a role to play when judging a restriction by object under Article 101(1) TFEU. The best interpretation is the literal explanation saying that the appreciable effect on trade requirement includes an appreciable restriction of competition. This makes sense because market share thresholds are also used to assess the effect on interstate trade, more specifically a market share of 5%. To say that agreements between parties with market shares above 5% appreciably affect trade between Member States, restrict competition appreciably as well is fully in line with Völk because there the market shares were even below 1% and 5% is given as the bottom line for appreciability. However simple an appealing this view seems to be, it is hard to reconcile with the CJEU’s repetition of the appreciability requirement for restrictions of competition in its later Allianz judgment.

Therefore, the most compelling argument becomes the one that the appreciability of the restriction becomes part of the qualification of an agreement as a restriction by object, although this interpretation is needlessly complicating. The qualification argument can be easily reconciled with the earlier case-law of the Court in the sense that appreciability for restrictions by object is not eliminated. Because it has to be determined, when qualifying an agreement as one which has an anti-competitive object, if it is capable of generating harmful effects to competition it is not hard to make the extra step of indicating that is capable of appreciably effecting competition. It could be that the Court wanted to make clear that the appreciability test for restrictions by object is not a separate test but is inherent in the qualification of an agreement as a restriction by object. That this only counts for restrictions by object can be reconciled with the CJEU case law that restrictions by object are by their varying nature injurious to the proper functioning of competition.
Appreciability of the restriction of competition remains relevant for restrictions by object but is not separately assessed from the qualification of the agreement. As the conclusion for restrictions by object is that they are considered by their nature to be injurious to the proper functioning of competition is very far-reaching, it is justified to make the qualification process stricter.
Appreciability should consequently be assessed by looking at the content of the agreement, its objectives and its legal and economic context.
Chapter 3: The Dutch appreciability test

Sub research question: How does the EU appreciability test relate to the Dutch appreciability test for restrictions by object as it existed before the CJEU judgment in Expedia?

3.1 Influence EU competition law

In the parliamentary documents accompanying the Dutch Competition Act a paragraph is devoted to the appreciability requirement in light of Article 6 DCA. It is there said that the European de minimis notice will not apply in the Netherlands because they merely contain policy rules and are not binding upon European nor national judges. Moreover it is based on the reach of the European competition law and therefore not deemed fitting for the national competition act. The jurisprudence of the CJEU however, should be used as guidance to interpret the prohibition laid down in Article 6 DCA. It then reiterates the rules as formulated in STM and Völk. From that reference we can conclude that the concept of appreciability as formed by the CJEU in those cases is the applicable law in the Netherlands. The explanatory memorandum to the Dutch Competition Act also introduced the principle that Dutch competition law cannot be more stricter nor more lenient than EU competition law. This principle was introduced by the Dutch legislator and thus it induced on itself the obligation to follow the EU law on competition closely. The EU legal order does not impose this obligation.

The question whether and if so, in how far, the Dutch Competition Authority and administrative and civil judges are bound by the EU competition rules when they apply Dutch competition law can be answered by dividing the Dutch competition law provisions in three separate groups: definitions that refer directly to their EU counterpart, concepts and provisions that are almost identical to EU competition law (are ‘modelled’ after the EU provisions) and provisions that have been inspired on the EU rules on competition. The definitions of ‘agreement’, ‘undertaking’, ‘association of undertakings’ and ‘concerted practices’ are examples of concepts that refer directly to the EU competition law rules for their interpretation following Article 1 sub e, f, g en h DCA and thus have the exact same meaning as the corresponding definitions in EU competition law. For this group of definitions and provisions, the Dutch Competition Authority and judges are strictly bound by Decisions of the Commission and judgments from the CJEU. The substantive scope for these definitions, not the territorial scope, is equal to that of Article 101(1) TFEU.

The second group of provisions is almost identical to EU competition law provisions but deviate to a certain extent nonetheless. The concept of a ‘restriction of competition’ is one such an example. For this type of provisions and concepts, which are modelled after their EU counterparts, it makes sense that the competition authorities and judges take into account Decisions of the Commissions and judgments of the CJEU in this field. They are allowed to copy them exactly and in many cases this will be the obvious route to follow. They should not, however, feel obligated to strictly follow the

decisions and judgments on the EU level in every case. In this sense, the DCA allows them to deviate from the application on the EU level.

The third and last category is the definitions and provisions that are inspired by EU competition law. Not surprisingly, when interpreting these types of provisions, the Dutch Competition authorities and judges are not bound by the EU framework. The DCA in its totality is thus not an exact copy of the EU competition law rules. For a large part, the Dutch Competition Authority and judges are not obliged to follow Union precedent strictly in every case. However, the practice has proven that the Dutch Competition Authority and judges are very willing to follow the jurisprudence of the CJEU. This is mainly ascribed to the principle that the DCA cannot be stricter nor more lenient than EU competition law. Yet, this obligation has been argued not to go as far as applying the law contrary to the aim of the Dutch norm. On the EU level, the goals of competition law are to enhance market integration and protect effective competition. Dutch competition law only has one objective, namely the protection of effective competition. This can justify different outcomes and interpretations.

153 In many competition cases, Dutch judges refer to the case law of the CJEU before adopting a similar line of reasoning.
3.2 Dutch appreciability test: Secon

The year after the entering into force of the DCA, a Dutch court of first instance accepted the appreciability requirement for restrictions of competition. In the years following that judgment, courts had several occasions in which to apply the appreciability test. For example, it was established that the appreciability requirement applied to restrictions by object as well as restrictions by effect. Before this was determined by the Court, the Dutch Competition Authority hold the view that appreciability did not need to be tested for restrictions by object. Ultimately, the ‘real’ Dutch appreciability test was formulated in 2005 in two cases before the highest Dutch competition law court (‘CBb’: the Dutch Trade & Industry Appeal Tribunal): Modint and Secon.

In Modint the court refers to the settled case law of the CJEU that an agreement should be judged taking into account the economic context in which the undertakings operate, the products or services covered by the agreement, the structure of the market concerned and the actual conditions in which it functions. It also states, referring to an earlier judgment in an abuse of dominance case, that the case law of the CJEU should be used as guidance for the application of Dutch competition law. Then the court goes on with saying that in order to qualify an agreement as having an anti-competitive object or effect, an economic and legal analysis of the agreement is necessary. The conclusion that an agreement is anti-competitive by object should take into account the nature of the products and services concerned, the market position and behaviour of the parties, customers and competitors on the relevant market, the freedom of the members to not apply core conditions, the shared costs and the consequences of the agreement for the customers and consumers.

The concept of appreciability was dealt with in a case barely two months later. The test as introduced in Secon has been labelled as the Dutch appreciability test because ever since this case was adjudicated, the CBb and the Court of first instance in competition cases (the Court of Rotterdam) refer to the Secon judgment whenever they have to deal with issues of appreciability. The reasoning in Secon is that Article 6 (1) DCA is not applicable if the effect on competition is not appreciable. Although the CBb believes that when an agreement is anti-competitive by object it will often have a significant influence on the market, it repeats the reasoning of the CJEU in Völk that an agreement falls outside the prohibition in Article 6 DCA when, due to the fact that the parties have a weak position on the relevant market, competition is not restricted to a significant extent. When testing the appreciability requirement regard must be had to the specific situation in which the agreement has effect, especially the economic and legal context in which the parties operate, the nature of the services to which the agreement relates, and the structure of the relevant market and

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155 Rb. Gelderland 18 maart 1999, OR 1999, afl. 82 m.nt. Mok.
159 CBb 28 oktober 2005, ECLI:NL:CBB:2005:AU5316, r.o. 7.2.2.
162 CBb 7 december 2005, ECLI:NL:CBB:2005:AU8309, r.o.6.5.
the real conditions in which that market functions. The appreciability test as formulated by the CBb in Secon can be traced back to the classic appreciability test introduced by the CJEU in Völk and Miller where the court speaks of the size of the undertakings concerned, the market position in the form of market shares and the structure of the relevant market. From subsequent cases adjudicated after Secon it follows that appreciability can depend on several factors. Examples are the (weak) position of the involved parties on the relevant market, the market share of the parties on the relevant market, the number of parties that are connected to the involved undertakings and the turnover associated with a sale.

The Supreme Court of the Netherlands (which handles civil claims concerning competition law in last instance) also adheres to the aforementioned view on appreciability. In a judgment before Secon it ruled that competition should be restricted to an appreciable extent in order to fall under the prohibition of Article 6(1) DCA. According to the Supreme Court, appreciability is approached quantitatively and qualitatively. It also thinks the appreciability requirement constitutes a positive requirement, meaning that it should be fulfilled before a violation of Article 6(1) DCA can be established. Another noteworthy aspect of aforementioned case is that the Dutch de minimis rule as laid down in Article 7 DCA is different from the EU De Minimis Notice since it is not related to the appreciability requirement. The Dutch de minimis rule merely affects restrictions of competition that appreciable restrict competition and therefore fall under the prohibition, but nonetheless are not prosecuted from the point of view that they are obviously of subordinate meaning. This is different from the EU De Minimis Notice since there it is stipulated that agreements between parties which have market shares below the thresholds set out in the notice, will not be considered to have an appreciable effect on competition (apart from the difference that the De Minimis Notice contains policy rules of the Commission and the Dutch de minimis rules is a legal exception).

Furthermore, it is also believed in the Netherlands that appreciability comprises a quantitative and a qualitative element and that both should be fulfilled in order to pass the appreciability test. As we have seen above, the Dutch Supreme Court has ruled that appreciability constitutes a positive requirement for the prohibition laid down in Article 6(1) DCA to apply. This means that although appreciability is not included in the actual legal provision, the appreciability requirement is an element that needs to be proven in order for an agreement to be caught by the prohibition. An agreement thus falls outside the prohibition of Article 6(1) DCA if it lacks either a qualitative or quantitative appreciable effect on competition. Both elements need to be fulfilled. Clearly the CJEU in Völk based the lack of appreciability on a purely quantitative ground and thus a very low market share could be enough to escape the cartel prohibition.

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3.3 Conclusion
As the size of this chapter already indicates, not much can be said about the Dutch appreciability test besides what has already been spelled out about its EU counterpart. Although it has been argued that the Dutch Competition Authority and judges are not strictly bound by EU law in every competition law case and the difference in the goals pursued by both completion laws might justify different outcomes on the national level, in practice the appreciability test is equally applied. Due to the reference to the EU concept of appreciability in the explanatory memorandum accompanying the DCA and the ‘not stricter nor more lenient’ rule, the appreciability test as it has been formulated by the CJEU in Völk has been implemented completely with regard to the application of the cartel prohibition in Article 6 DCA.

Leading case in the Netherlands in this matter is the case of Secon, where the Dutch competition court of appeals adopted a similar reasoning as the CJEU in Völk. It hold that Article 6 (1) DCA is not applicable if the effect on competition is not appreciable and that an agreement falls outside the prohibition in that article when competition is not restricted to a significant extent due to the fact that the parties to the agreement have a weak position on the market. Dutch competition law with regard to appreciability is thus fully in line with EU competition law on this matter.

Both on the EU and the national level the appreciability requirement is a positive one, meaning that when appreciability is not proven by the party alleging a breach of Article 6 DCA or Article 101 TFEU, the agreement falls outside the scope of these provisions and is consequently allowed.
Chapter 4: Consequences of the *Expedia* judgment for the Dutch appreciability test

*Sub research question:* What will be the expected consequences of the CJEU Expedia judgment for the appreciability test for restrictions by object under Dutch competition law?

### 4.1 Dutch case law after *Expedia*

The first Dutch case that refers to the Expedia judgment was a case before a civil Court of Appeal. Another Court of Appeals had repeated the appreciability requirement for restrictions by object one month earlier but there the Court did not refer to the *Expedia* case at all.\(^{167}\) The case we are concerned with was referred back to the Court of Appeals by the Dutch Supreme Court. The earlier judgment of the Court of Appeals was annulled by the Supreme Court on the ground that the Court of Appeals wrongly ruled that a restriction of competition is always appreciable when concerned with a restriction by object, without any further research.\(^{168}\) Coincidentally, the *Expedia* case was adjudicated after the judgment of the Dutch Supreme Court but before the Court of Appeals looked at the case again. The Court of Appeals now had to judge the findings of the Supreme Court against the background of the *Expedia* case, which seemed at first sight to contradict. The Court of Appeals first questions the validity of the Supreme Court’s findings in light of the *Expedia* case.\(^{169}\) Although the case concerned the application of national competition law only, the Court regarded the *Expedia* case relevant for the interpretation of the Dutch appreciability test because of the ‘not stricter nor more lenient’ principle in Dutch competition law. Parties to the case disagreed about the meaning of the *Expedia* case. The Court considered that it has the right and possibility to refer a preliminary question to the CJEU but although the *Expedia* case was unclear and imposed questions of interpretation, the Court would not start a preliminary procedure because it was not necessary for it to find an answer in this specific case. On the basis of the facts and circumstances of the case, the Court established that the appreciability requirement was fulfilled anyway.\(^{170}\) The case was subjected to a full appreciability test regardless of the fact that it constituted a restriction by object and the concerted practice was found to be an appreciable restriction of competition.\(^{171}\) The Court even referred to the *Secon* case.

In another case by the same Court, surprisingly, it refers to the *Expedia* judgment as the last case in which it was confirmed that an agreement falls under the prohibition of Article 6 DCA / Article 101 TFEU when it has as its object or effect an appreciable restriction of competition within the

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\(^{167}\) Gerechtshof ‘s-Hertogenbosch 12 februari 2013, ECLI:NL:GHSHE:2013:BZ1827, r.o. 4.9

\(^{168}\) HR 16 september 2011, ECLI:NL:HR:2011:BQ2213, r.o. 3.9.3.

\(^{169}\) Gerechtshof Arnhem-Leeuwarden 22 maart 2013, ECLI:NL:GHARL-2013:BZ5188, r.o. 3.2.

\(^{170}\) The court has discretion to ascertain whether a decision on a question of EU law is necessary to enable them to give judgment. The court was not obliged to refer to the CJEU a question concerning the interpretation of EU law raised before them if that question is not relevant (if the question can in no way affect the outcome of the case). See case 283/81 *CILFIT and Lanificio di Gavardo Spa v Ministry of Health* [1982] ECR 3415

\(^{171}\) Gerechtshof Arnhem-Leeuwarden 22 maart 2013, ECLI:NL:GHARL-2013:BZ5188, r.o. 3.3-3.12.
Netherlands / the internal market. Following this statement, the Court considers that when assessing whether an agreement is restrictive by object, and also whether there is an appreciable restriction of competition, regard must be had to the wordings and goals of the agreement, as well as the economic and legal context. In this assessment must also be taken into account the nature of the concerned goods and services and the actual conditions for the functioning and the structure of the relevant market(s). It refers to the Expedia and Allianz case to support this finding.

A Court of First Instance in Amsterdam ruled in between aforementioned cases that the fact that an agreement constitutes a hard core restriction or a restriction by object does not justify the conclusion that the appreciability requirement is not applicable.

In an opinion for the Supreme Court, Advocate General Keus articulated that, according to him, the view that a restriction by object constitutes an appreciable restriction of competition by its very nature is wrong. He believes that Völk is still the right test and that a restriction by object can very well have only an insignificant effect on the market. However, he admits that he can imagine that restrictions by object that are capable of affecting trade between Member States appreciably, restrict competition appreciably as well. In his view this does not justify the acceptance that, on a national level, a restriction by object which does not appreciable affect interstate trade by its nature implies an appreciable restriction of competition, irrespective of the extent to which the market is influenced and regardless of the market position of the parties concerned. He adheres to a literal interpretation of paragraph 37 of the Expedia judgment in finding that only agreements that have a restrictive object and affect interstate trade appreciably, restrict competition to an appreciable extent as well.

One civil court in the Netherlands referred to the Expedia case as a case in which the settled case law of the CJEU, that an agreement between undertakings escapes the prohibition of Article 101 TFEU when they only have an insignificant effect on the market, was again confirmed and thus views Expedia as a confirmation of Völk.

The competition law administrative court in Rotterdam made reference to the Expedia case in three separate cases. In the first case one of the parties argued that a restriction by object amounts to an appreciable restriction of competition without any further research, thereby referring to the Expedia judgment paragraphs 35 and 37 for authority. The Court, however, rejects this argument because it then goes on with testing the requirement for appreciability and repeats the weak position on the market example. It concludes eventually that the parties do not have a weak position on the relevant market and the appreciability requirement is therefore fulfilled.
In two subsequent cases, the Court made an interesting point. Translated the Court, after labeling the acts as a restriction by object that is capable of affecting trade between Member States, hold that:

Having regard to the judgment of the Court of Justice of 13 December 2012 in Expedia in which the Court considered that an agreement with an anti-competitive object within the meaning of Article 101 TFEU constitutes by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition, the concerted practice thus constitutes a violation of Article 101(1) TFEU. Having regard to the combined market shares of the parties there is, in the opinion of the court, apart from the way in which the Court of Justice assesses the appreciability requirement in the context of Article 101 TFEU, also a violation of Article 6 Mw. [emphasis added]

Almost exactly the same passage can be found in the third case. In this consideration the Court circumvents the whole issue of interpreting the Expedia case in the context of the Dutch appreciability test. It choose the easy way out by saying that, regardless what the CJEU said about appreciability, the Court finds that the restriction of competition is appreciable based on the combined market shares of the parties. Because the passage is directly preceded by the finding of the Court that the concerted practice constitutes a restriction by object and that it affects trade between Member States appreciably, it is even unclear why the Court concludes that there is a violation of Article 101(1) TFEU: because the agreement affects trade between member states and is a restriction by object, because it is a restriction by object, or merely because the agreement affects trade between member states?

The literal wording of the cited passage suggests the latter (since it says that a restriction by object constitutes an appreciable restriction of competition without reference to the effect on interstate trade), but the preceding findings indicate the former view (as both a restriction by object and effect on trade were established). But by referring to the market shares of the parties, it can at least be deduced that the Court still considers appreciability for restrictions by object to be of importance.

Market shares thus remain part of the Dutch appreciability test so Völk can be reconciled with the reasoning of the Dutch competition court and is still a valid rule in the Netherlands that has not been overturned by Expedia.

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4.2 Possible implications of Expedia for Dutch competition law

To find out what could be the possible implications of the Expedia judgment for the Dutch appreciability test, we need to look at the interpretations given in paragraph 2.4 of this thesis. What consequences will or could follow from these different interpretations? For the sake of clarity I will use the same order as used there.

4.2.1 Literal interpretation

Four literal interpretations of the Expedia judgment have been dealt with in paragraph 2.4.1. The first reading of the case is that the finding of restriction by object that has an appreciable effect on trade between Member States automatically includes the finding of an appreciable restriction of competition. The second reading holds the view that only the finding of an appreciable effect on interstate trade encompasses an appreciable restriction of competition. A third interpretation is that the appreciability of the restriction of competition is given as soon as the agreement is labelled a restriction by object, without the need to conduct an appreciability test anymore and regardless of whether there is an effect on trade between Member States. This third interpretation can be divided in two categories, where the qualification of an agreement as a restriction by object can lead to a rebuttable or non-rebuttable presumption of an appreciable restriction of competition.

The first two interpretations would leave the Dutch appreciability test intact, the third and fourth one would not. Reason for this is that the first interpretation leaves the appreciability test as it was laid down in Völk untouched with regard to purely national competition cases because the requirement of effect on interstate trade is necessarily not met in these cases. If the effect on trade criterion is a necessary prerequisite to conclude that a restriction (by object) is appreciable, the appreciability test for national competition law cases still requires a separate appreciability test for the restriction of competition since effect on interstate trade is not found for such restrictions.

The third, narrower, reading of the case would have implications for the Dutch appreciability as it was formulated in Secon because it would mean that every finding of a restriction by object by definition amounts to an appreciable restriction of competition, without the need to conduct an appreciability test anymore and regardless of whether there is an effect on trade between Member States.\(^{180}\) The appreciability then is presumed for restrictions by object under EU competition law as well as Dutch competition law. A separate appreciability test is no longer vacated, which requires the Dutch courts to leave the appreciability requirement as it was formulated in Secon altogether when dealing with restrictions by object. Appreciability no longer has a role to play for restrictions by object when it is assumed that Expedia amounts to a non-rebuttable presumption of appreciability for restrictions by object. This is only different when the rule in Expedia is interpreted as forcing a rebuttable presumption of appreciability. This is supported by the view of the Dutch Advocate-General Mok that the appreciability principle is no longer an element but an option that can be invoked by the parties. Consequence of this view is that the Dutch case law regarding the appreciability principle in applying Article 101 TFEU and Article 6 DCA should be adjusted. Appreciability should no longer be tested separately as an element of Article 101 TFEU and Article 6

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\(^{180}\) Angela Ortega González, ‘Restrictions by object and the appreciability test: the Expedia case, a surprising judgment or a simple clarification’ [2013] 34(9) ECLR 457
DCA (as a positive requirement) but is a negative option that needs to be tested only when parties (or the competition authority or a court) invoke the principle.  

If the literal interpretation would turn out to be correct in that agreements (with an anti-competitive object) that affect trade between Member States appreciably automatically constitute an appreciable restriction of competition, this leaves room for Dutch courts to apply a different test for purely national cases that do not have an effect on interstate trade. If, however, the right reading of Expedia is that restrictions by object affect competition appreciably regardless of whether the agreement is capable of affecting trade between Member States, the Dutch case law is wrong and needs correcting.  

4.2.2 Systematic interpretation

The systematic interpretation provided earlier in this thesis hold that the ruling in Expedia forces competition authorities and courts to make the appreciability requirement part of the qualification process for restrictions by object. In this view a separate appreciability test is no longer necessary once an agreement has been qualified as a restriction by object. This would mean that a separate appreciability test is no longer required. Dutch courts have applied the appreciability requirement separate from the finding of a restriction by object. The question after Expedia is if this is still justified. A separate test in the systematic interpretation would no longer be necessary since the appreciability is inherent in the qualification of an agreement as a restriction by object. The change brought about by Expedia in this scenario is that Dutch courts can no longer apply the appreciability test separate from their finding of an anti-competitive object. De facto there will be no change however since the appreciability still needs to be assessed on the basis of a motivated context analysis. And this context analysis has been used by Dutch courts in order to assess appreciability.

When the systematic argument is accepted that the Expedia means that the appreciability requirement becomes part of the qualification of the agreement as a restriction by object, Dutch courts should not conduct the appreciability test separately anymore. Since a separate test is generally the way in which appreciability was assessed in Dutch courts ever since the Secon judgment, this interpretation requires a change as well. Object restrictions that were previously found not to restrict competition appreciably, according to this view, may in the future be found not to constitute a restriction by object altogether.

A second, slightly different, systematic interpretation was given in the form of a separate appreciability test which reach would be the same as the qualification test in that effects do not need to be taken into consideration. According to this interpretation, appreciability should be judged according to the nature of the agreement (its facts and circumstances), independently of any concrete effect that it may have. Appreciability then should be assessed by looking at the content of the agreement, its provisions, objectives and the economic and legal context of which it forms part. This would not require any change in Dutch competition law since courts in the Netherlands

181 Case C-226/11 Expedia v Autorité de la concurrence and others [2012], n.y.r., annotation M.R. Mok, NJ 2013/253
183 For example in the Secon case.
have used a context analysis for assessing appreciability in the past. An example of this is a Court of Appeals which hold that when assessing whether an agreement is restrictive by object, and also whether there is an appreciable restriction of competition, regard must be had to the wordings and goals of the agreement, as well as the economic and legal context.\textsuperscript{187} This line of reasoning follows the second systematic interpretation exactly.

It would not require a change if the CJEU in \textit{Expedia} merely indicated that appreciability should be assessed the same way in which the object of an agreement is established: by reference to the economic and legal context without looking at the actual effects of the agreement. This is because Dutch courts generally take into account the wider context of an agreement to test appreciability.

The third systematic view taken by Monti is that \textit{Völk} has not been overruled by \textit{Expedia} because the exception for really tiny agreements remains in place, even for restrictions by object. He basically says \textit{Expedia} did not purport a change in the appreciability test for restrictions by object. The case law of the Dutch courts after \textit{Expedia} is in line with this view because all of them still assess appreciability separately for restrictions by object and keep on using the weak position on the market exemption as introduced in \textit{Völk}.

Forth, the explanation that the reasoning in \textit{Völk} has been overturned by \textit{Expedia} for the appreciable restriction of competition but not for the requirement of an appreciable effect on trade between Member States would not require any change for the Dutch appreciability test for the same reason as the first two literal interpretation do not: because the effect on interstate criterion necessarily is not fulfilled for purely national cases.

\subsection*{4.2.3 Teleological interpretation}

The reasoning applied by AG Kokott in her opinion to the \textit{Expedia} case was that restrictions by object cannot fall under safe harbour of \textit{de minimis} rule because it would be contrary to the fundamental principles of the internal market since it would practically invite parties with market positions below the thresholds set out in the notice to conclude anti-competitive agreements.\textsuperscript{188} The reasoning here is different from the narrow literal interpretation but its outcome the same: restrictions by object are always appreciable. The conclusion is therefore the same as the third literal interpretation in paragraph 4.2.1 in that this would mean that competition authorities and courts can more easily find infringements of Article 101 TFEU and Article 6 DCA by establishing a restriction by object without having the obligation to assess appreciability as well.

Shedding light on all the above a comment by van Hasselt, Urlus & Baars seems to be noteworthy in the Dutch context:

\begin{quote}

it would be an unsatisfactory interpretation if appreciability would no longer play a role for the restriction of competition because if appreciability would no longer be tested for restrictions by object on the national level this would lead to a situation in which national cartels would be scrutinized more strictly than certain cross-
\end{quote}

\begin{footnotes}

\begin{itemize}

\item \textsuperscript{187} Gerechtshof Arnhem-Leeuwarden 15 oktober 2013, ECLI:NL:GHARL:2013:7702, r.o. 4.19

\item \textsuperscript{188} Case C-226/11 \textit{Expedia v Autorité de la concurrence and others} [2012], n.y.r., Opinion of AG Kokott, para 52

\end{itemize}

\end{footnotes}
border cartels that lack an appreciable effect on interstate trade and thereby escape the application of Article 101(1) TFEU\textsuperscript{189} [freely translated]

The function of the effect on trade criterion is to draw the line when EU competition law is applicable. It separates the sphere of application of EU competition law from that of national competition law. That is its only function. If appreciability for restrictions by object would no longer be assessed at the EU level because the literal interpretation of Expedia is valid in that the appreciable effect on interstate trade includes an appreciable restriction of competition (for restrictions by object), the aforementioned authors seem to think that this leads to an unfair advantage for cartels scrutinized only under EU competition law. However, cartels are always scrutinized on both levels and the only difference is that in order for EU competition law to apply, an extra barrier needs to be fulfilled namely the effect on interstate trade. As appreciability is also tested under this requirement and more specifically a market share threshold of 5\% is set out in the guidelines on the effect on trade concept\textsuperscript{190}, I cannot see how this would be unfair to national cartels in relation to European wide cartels. Appreciability is assessed either way, be it under a different umbrella. Moreover, cartels that lack an appreciable effect on interstate trade and thereby escape the application of Article 101(1) TFEU, can still very well be judged according to the national competition laws of the Member States. The only requirement then is that there is an appreciable restriction of competition on the market of a specific Member State.

\textsuperscript{189} E.F. van Hasselt, H.E. Urlus & A. Baars, ‘HvJ EU Expedia en de mededingingsrechtelijke merkbaarheid’ M&M 2013, afl. 4, p. 125

\textsuperscript{190} Commission Notice of 27 April 2004 - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101
4.3 Conclusion

The *Expedia* judgment has not yet been fully crystallized and adopted in Dutch competition law. Although referred to a couple of times, Dutch judges of all instances have been reluctant to give a clear interpretation of the case. What can be objectively and undoubtedly incurred from the Dutch case law after *Expedia* is that appreciability is still a relevant requirement for restrictions by object that needs to be assessed.\(^\text{191}\)

The administrative competition court ruled that it tests appreciability in the context of Article 6 DCA ‘separately from the way in which the Court of Justice assesses the appreciability requirement in the context of Article 101 TFEU’. This use of wording indicates that the Dutch appreciability test now diverges from its EU counterpart. Where the courts are unsure about how to interpret *Expedia* exactly, they at least want to make sure the Dutch appreciability test is still valid and that *Secon* remains the general test.

Although the Dutch courts have not given an exact interpretation regarding *Expedia*, at first sight they seem to adhere to the view that paragraph 37 of *Expedia* means that restrictions by object that have an appreciable effect on interstate trade, automatically are found to restrict competition appreciable as well. They see a gap for applying the Dutch appreciability test different from its EU counterpart because the effect on trade criterion is not applicable for Dutch competition law. The question rises, however, if this line of reasoning can be reconciled with the former case law of the CJEU on the issue of appreciability for restrictions by object and its later *Allianz* judgment.

On the contrary, I think the best interpretation on the national level is also given by the argument that the testing of appreciability becomes part of the qualification of an agreement as a restriction by object. With some effort it can be found that the cases of the administrative competition court do not contradict such a view because there it first found an (appreciable) effect on interstate trade and established an anti-competitive object before saying that, for the application of Article 101 TFEU, this meant that there was an appreciable restriction of competition as well.

The aforementioned interpretation requires a change in the reasoning of Dutch courts since they generally conduct a separate test for appreciability which after *Expedia* would not be warranted anymore. Content wise, however, the Dutch courts pass with flying colours because they already took into account more than just the market positions of the parties to assess appreciability.

Although the Dutch courts do not seem to adhere to this view or even gave it as an option, I believe this is the path they should follow. The exception as formulated by the CJEU in *Völk* and taken over by the Dutch judiciary in *Secon* is still applicable but then as an argument against the qualification of an agreement as a restriction by object. In this view, *Völk* has not been overruled by *Expedia*. Also, the administrative court then does not need to use some sort of artificial reasoning anymore by saying that they assess appreciability in the context of Article 6 DCA separately from the way in which the CJEU assesses appreciability in the context of Article 101 TFEU.

\(^{191}\) See for the same view: E.F. van Hasselt, H.E. Urlus and A. Baars, ‘HvJ EU Expedia en de Mededingingsrechtelijke Merkbaarheid’ [2013] 4 M&M 119
Conclusion: (R)evolution?

Coming back to the research question in the introduction, we can conclude that the appreciability test for restrictions by object under Article 6(1) of the DCA is affected by the *Expedia* judgment in several ways.

Firstly, the finding that the rules of EU competition law have direct effect means that the EU rules on competition can be directly relied upon in individual cases before national courts. In theory they bear the possibility of creating new rights which do not exist under national competition law.

Secondly, following the principle of primacy of EU law, EU competition law is applied at the expense of national competition law whenever there is a conflict between the two legal systems. However, both these principles do not affect the content of Dutch competition rules as such but merely regulate the scope of application of EU competition law and its application in the national legal orders of the Member States.

Thirdly, the way in which Dutch competition law is influenced by EU competition law is through the principle that Dutch competition law cannot be stricter nor more lenient than its EU counterpart. This is a Dutch principle and makes the Dutch competition law model rather special. The principle entails that interpretations given by the CJEU to EU competition law provisions are of relevance for the interpretation of Dutch competition law. The CJEU is tasked with explaining and interpreting what EU law is and what it is ought to have been from the moment of its inception. Therefore, CJEU rulings are binding upon national courts and authorities when applying EU law, but the not stricter nor more lenient principle makes them also binding when applying Dutch competition law.

In addition to the reference to this principle in the explanatory memorandum to the DCA, some definitions in the DCA refer directly to their EU counterparts and thus have the exact same definitional scope. Other provisions are modelled like EU competition law. Article 6(1) DCA, for example, is based on Article 101(1) TFEU and is almost an exact copy of that provision. Besides the aforementioned principle, this is also a reason why the case-law of the CJEU is relevant for the interpretation of Article 6(1) DCA. For these reasons, Dutch courts have been very willing to take over rulings of the CJEU in purely national cases relating to the interpretation of Article 6 DCA. This is indicated by the high level of soft convergence that has taken place between EU and Dutch competition law. Dutch courts are thus bound to judgments of the CJEU to a great extent. The only cases in which they are allowed to deviate is when the case at hand contains a different fact pattern, to the extent the Dutch competition law provisions deviate from EU competition law and when the reasoning by the CJEU is purely based on the goal of realizing an internal market, since this goal is missing for Dutch competition law.

An example of the wide convergence is the appreciability test for restrictions of competition. The Dutch courts have almost exactly copied the CJEU appreciability test as it was formulated in *Völk*: for an agreement to be caught by the prohibition of Article 6 DCA it must constitute an appreciable restriction of competition. However, an agreement falls outside the prohibition of Article 6 DCA when it only has an insignificant effect on the market(s), taking into account the weak position which the parties concerned have on the market of the product in question.
In this thesis, I have given several plausible explanations to (paragraph 37) of the Expedia judgment. All but one share the belief that the CJEU did not intend to overrule its judgment in Völk. I fully participate in this view. The conclusion that restrictions by object that have an appreciable effect on trade between Member States, restrict competition appreciable as well has turned out to be wrong and superfluous. It does not look beyond the consideration of paragraph 37 of Expedia and is inherently contradicting with the CJEU’s earlier case law on appreciability for restrictions by object and its consideration in the later Allianz judgment finding that restrictions by object need to be sufficiently injurious to competition. The last revised De Minimis Notice of the Commission is also wrong in stating that the Expedia judgment means that a restriction by object always constitutes an appreciable restriction of competition for the exact same reasons.

The best interpretation given to Expedia is the explanation that appreciability should be assessed as part of the qualification of an agreement as a restriction by object. In this way, the concept of appreciability remains important for restrictions by object. The ruling in Völk that an agreement escapes the prohibition laid down in Article 101(1) TFEU if it only has an insignificant effect on the market(s) concerned is still valid law but instead of being an argument against the application of the cartel prohibition it becomes an argument against the labelling of an agreement as a restriction by object.

As Völk has been taken over in Secon, the same reasoning applies to the consequences of the Expedia judgment for the application of Article 6(1) DCA. The argument that the Expedia judgment might have a different outcome depending on whether solely national law is applied as opposed to cases where national and EU competition law are applied parallel to each other, is wrong as well. Expedia has the same consequences for Dutch competition law as for EU competition law. The fact that appreciability goes on with being important to restriction by object cases is proven by the case law of the CJEU as well as the case law of several Dutch courts post Expedia. The appreciability requirement has been repeated in multiple different cases which indicates its remaining relevancy. The qualification argument can moreover be reconciled with earlier case law of the Court of Justice because appreciability for restrictions by object is not eliminated. The only difference the judgments warrants for Dutch judges is that they abandon a separate test for appreciability in assessing Article 6(1) DCA.

This all permits the conclusion that the appreciability test for restrictions by object under Article 6(1) DCA, following the CJEU’s ruling in Expedia, becomes part of the qualification of an agreement as a restriction by object. Upon a closer look, Expedia has turned out to be no revolution after all.
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