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CJEU's ruling on the anchor tenant's veto right clause: Rule of Reason and article 101 par. 1 of TFEU revisited?

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I. Introduction

In a valuable judgement issued in the case of Maxima Latvija[1], following a reference for a preliminary ruling from the Augstākā Tiesa (Supreme Court of Latvia), the Court of Justice of the European Union ("CJEU") considered, the right of an anchor tenant of a shopping mall to obstruct a lessor (mall owner) from leasing commercial premises to third parties, from a competition law perspective. This "exclusivity" agreement was examined on the basis of Article 101 par. 1 TFEU.

The CJEU's ruling dealt with the distinction between "by object" and "by effect" impact. The most significant element worth noting in the ruling of the CJEU is the systematic analysis adopted by the Court and its stance in the case, which seems to adopt a more economic approach in the application of Article 101 TFEU. On the contrary, the Latvian Competition Authority has initially adopted a stricter form-based approach, meaning that such agreements-clauses have as their object the prevention, restriction or distortion of competition.

It should be noted also that, in general, competition law does not frequently deal with cases related to commercial lease agreements. Consequently, the decision is a useful guide with regard to the behavior of the parties concluding agreements in this field.

II. The facts of the case

Maxima Latvija, is a Latvian enterprise operating large shops and hypermarkets in the food retail trade. Said company is considered an anchor tenant which has concluded a series of commercial lease agreements with shopping centers (malls) in Latvia for the rental of commercial premises in those centers.

As is usually the case, anchor tenants are large department stores that rent space in a mall or other shopping centers and can attract more customers

[1] Judgment of the Court (Fourth Chamber) of 26 November 2015, SIA «Maxima Latvija» v Konkurences padome, C-345/14.

than the other tenants. From this point of view, the anchor tenant is sometimes referred to as a "traffic generator" or "magnet store".

The disputed agreements contained a "veto right" of Maxima Latvija against the lessor in leasing commercial premises to third parties. More specifically, the (exclusivity) clause in favor of Maxima Latvija was incorporated in the lease agreements and granted the anchor tenant the right to agree to the lessor leasing commercial premises not leased to Maxima Latvija, to third parties. In fact this constituted a non-compete clause in favor of the anchor tenant, within the framework of their vertical agreement. Obviously, this practice could impede a competitor from obtaining access to retail space.

As regards the factual background of the case, the Konkurences padome (Competition Council of Latvia) imposed a fine on Maxima Latvija after considering that these agreements with said clauses constituted vertical agreements that restrict competition by object, according to the Latvian competition legislation.

Then, the Administratīvā apgabaltiesa (Regional Administrative Court) dismissed a first instance action of Maxima Latvija, grounding its decision on Maxima Latvija's market power on the retail market and concluded that the purpose of those agreements was to prevent competition, without it being necessary to demonstrate any effects on competition. Subsequently, the case was brought before the referring court, which, in turn, requested an interpretation of Article 101 TFEU.

III. CJEU's ruling

The reference for a preliminary ruling contained four questions but, as the CJEU noted, the questions at issue were in fact two.

a. The anchor tenant's veto right in the "object box"?

At first, the CJEU was requested to interpret par. 1 of Article 101 TFEU as regards the clause incorporated in Maxima Latvija's agreements.

The CJEU stressed, by citing previous case law[2], that the essential legal criterion for ascertaining whether an agreement involves a "by object" restriction is the determination that such an agreement entails a sufficient degree of harm to competition, for it to be considered that it is not necessary to assess its effects.

The other side of the coin is that the effects of the agreement on competition should be examined when the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition. In such a case, it is necessary to pinpoint the factors which show that competition has in fact been prevented, restricted or distorted according to par. 1 of Article 101 TFEU (restrictive effects/restriction by effect).

Subsequently, the CJEU, by mentioning that Maxima Latvija does not compete against the shopping centers (owners) with which it has concluded the agreements, noted that the agreements at issue do not constitute agreements which, by their very nature, may be considered harmful to competition.

[2] CJEU, C 67/13 P, Cartes Bancaires v Commission, EU:C:2014:2204.

The CJEU stressed that this would also be the case even if the "veto" clause could potentially have the effect of restricting the access of Maxima Latvija's competitors to some shopping centers in which the company operates as anchor tenant. The CJEU came to these conclusions after taking into account –and after an analysis of- the economic context of the disputed agreements.

b. Anticompetitive effects in commercial lease agreements

Subsequently, the CJEU dealt with the second question relating to the negative effects of the agreement on competition. The CJEU reiterated that the effects of an agreement on competition must be assessed within the economic and legal context in which it is implemented eventyally combined with other factors, thus having a cumulative effect on competition.

In the present case, the CJEU provided guidance on the path that the Latvian court should have followed in order to define the conditions under which commercial lease agreements may be considered an integral part of an agreement which has the "effect" of preventing, restricting or distorting competition within the meaning of Article 101 par. 1 TFEU. It did so by referring to three crucial factors for the assessment of the impact of the agreements on competition.

The first factor is the ease of access of Maxima Latvija's competitors to the relevant market. This factor requires the consideration of the catchment areas where the shopping centers are located, in which a competitor could have the ability to establish itself, the availability and accessibility of commercial land in the catchment areas and the existence of economic, administrative or regulatory barriers to the entry of new competitors in those areas.

The second factor is the assessment of the conditions under which competitive forces operate on the relevant market. The crucial elements thereof are the number and the size of operators present on the market, the degree of concentration of that market, as well as customer loyalty to existing brands and consumer habits.

The third factor relates to the thorough analysis of the economic and legal context of the lease agreement.

If, following such analysis, it is found that access to a specific market is hindered by all similar agreements found on said market, then it will then be necessary to consider the extent of its contribution to any closing-off of that market. The CJEU noted that the prohibition of par. 1 will be established only in case where such agreements have a sizeable contribution to that closing-off of the market. For the examination of the contribution of each of the agreements on the cumulative closing-off effect, the following should be taken into account according to the CJEU: the position of the contracting parties on the market in question and the duration of the agreements.

IV. Conclusions

In this case, the CJEU diverged from the "Latvian approach" on the matter and concluded that the clause in question in a vertical (exclusivity) agreement is not anticompetitive "by object". With regard to these clauses, in order to establish a restriction by "effect", a thorough analysis of the economic and legal context of the specific type of lease agreements must

first be conducted, as stated above (i.e. a full analysis of the economic effects of these agreements). Only the agreements that contribute to the closing-off effect and have cumulative effect on competition would be anticompetitive and prohibited by Article 101 par.1 TFEU[3]. The right of the anchor tenant to restrict the leases of its competitors, as in the Maxima Latvija case, does not mean *eo jure* that there exists a breach of par. 1 of Article 101 TFEU.

Moreover, it should be noted that the CJEU held, in essence, that a restriction by object does not exist merely because an agreement can be presumed to have anticompetitive effects.

Furthermore, it could be argued that the CJEU followed the same path adopted in the Delimitis case[4] regarding the analysis of the economic and legal context of the agreement. There is some truth to this view, as the CJEU made also a reference to Delimitis[5].

A strict non-compete clause in a vertical agreement can be in general considered a hardcore restriction of competition categorized as a restriction by object[6]. However, that does not mean that every vertical arrangement having some similar closing-off effect would be *eo jure* considered a hardcore restriction. Thus, according to the CJEU, the right of the anchor tenant granted by the disputed clause does not establish a restriction "by object" and, therefore, the agreement is not automatically prohibited. The validity of such a non-compete clause must be thoroughly and fully assessed in terms of legal and economic factors by taking into account its anticompetitive effects. In our view, the commented judgement breaks away – albeit timidly – from the previous attitude of the Court consisting of denying a priori any "rule of reason" reasoning, within the scope of article 101 para. 1 of the TFEU[7]. We believe that one could validly argue that this is the first time that the CJEU places a more economic analysis in a prima facie hardcore restriction and might open the way for an "effects approach" in applying article 101 TFEU, which has long been claimed by part of the legal doctrine[8], under the influence of the approach adopted within the context of the US Sherman Act.

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[3] See also, with regard to the cumulative effect: Guidelines on Vertical Restraints, 2010C/C 130/01, point 121.
[4] CJEU, C-234/89 - Delimitis v Henninger Bräu.
[5] Point 26 of the Judgement in case C-345/14.
[6] See in that regard article 5 of the Regulation on Vertical Restraints 330/2010 on excluded restrictions and Guidelines on Vertical Restraints, op.cit., points 65-69.
[7] See among other CJEU, C-552/03 P, Van den Bergh Foods v. Commission.
[8] See, indicatively, V. Korah. "The Rise and Fall of Provisional Validity – The Need for a Rule of Reason in EEC Antitrust", Northern Journal of International Law & Business, 1981, 321 and R. Kovar, "Le droit communautaire de la concurrence et la "Rule of Reason", RTDE 1987, 237.