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# The EU Court of Justice rules on limited exclusivity restriction in lease agreements and concludes that it is not a restriction by object (Maxima Latvija)

**European Union, Anticompetitive practices, Vertical restrictions, Exclusivity clause, Anticompetitive object / effect, Distribution/Retail**

**Simon Troch, Cecilia Sbrolli, e-Competitions | N° 78000, www.concurrences.com**

In a preliminary reference judgment in the Maxima Latvija case, the Court of Justice of the EU (CJEU) has ruled that commercial lease agreements including a clause conferring on the anchor tenant the right to approve lease agreements that the property owner may conclude with third parties do not restrict competition 'by object'.

Consequently, a full analysis of the economic effects of the agreement in question is necessary to establish whether it impedes competition. The CJEU sets out the criteria to be applied to examine the competition impact of the agreement.

## I. The Parties

SIA Maxima Latvija (hereinafter 'Maxima') is a major retailer in Latvia, where it operates a chain of large shops and hypermarkets. It mainly carries out its business in the food retail trade sector.

The Konkurences padome ('Competition Council') is the Latvian National Competition Authority.

## II. The Facts

Operating large shops and hypermarkets, Maxima is one of the most prominent food retailers operating in the country. In this capacity, it concludes leases for commercial spaces in large malls and shopping centres. Out of 119 contracts concluded by Maxima, 12 contained a clause giving Maxima, as the 'anchor tenant', the right to oppose the lease of premises to third parties within the same shopping centre. In other words, these agreements included a non-compete clause in favour of Maxima, as such clause allows them to effectively block a direct competitor from taking up retail space.

Essentially, the clauses can be boiled down to the obligation of the shopping centre owner to get the prior consent of Maxima before concluding a lease agreement with a third party. *De facto*, this means that Maxima could block competitors of leasing in these shopping centres (*i.e*. a *de facto* exclusivity obligation on the shopping centre owner).

The Competition Council and, in a later stadium, the Regional Administrative Court ruled the clauses inconsistent with the Latvian equivalent to Article 101(1) TFEU. They found that the purpose of such clauses was anticompetitive by its nature, since they foreclosed competing retailers to enter the market (i.e. qualification as a 'by object' restriction). Consequently, there was no need to demonstrate their actual detrimental effects on competition.

On Appeal, the Latvian Supreme Court requested a preliminary ruling to the CJEU. Two questions are of importance.

- Whether an agreement containing this type of restriction could be viewed as having the object of restricting competition under Article 101(1) TFEU, and

- Under what conditions would commercial lease agreements containing these types of clauses have the effect of restricting competition under Article 101(1)?

**III. The Decision**

Basically, the Latvian Supreme Court asked the CJEU whether the commercial lease agreements including an exclusivity in favour of the anchor tenant can be qualified as a restriction 'by object'; and if this is not the case, whether such agreements constituted a competition restraint 'by effect' and which test should be employed to ascertain whether the agreements had negative effects on competition.

The CJEU found that commercial lease agreements containing the exclusivity clauses, as the ones at issue, cannot be qualified as restriction 'by object'; in second order it found that commercial lease agreements may have a foreclosure effect, which has to be assessed after a thorough analysis of the economic and legal context and the specificity of the relevant market at issue.

*Restriction 'by object'*

In its assessment the CJEU starts by reiterating that 'by object' restrictions should be interpreted restrictively, following its judgment in *Cartes Bancaires* [1]. Considering the grave consequences this qualification entails (no need to prove its actual effects on the market), the CJEU reminds that such concept can be applied only to an agreement which reveals "*in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess the actual effects*".

The CJEU continues by restating that the decisive criterion is 'a sufficient degree of harm', i.e. only arrangements with 'a sufficient degree of competitive harm' can be qualified as a 'by object' restriction.

Subsequent, the CJEU analyses the economic context and the precise object of the clauses. In the present case the CJEU noted that the contested agreement is a vertical agreement (between a non-competing retailer and property owner). Vertical agreements can contain 'by object' restriction

(the CJEU refers to its *Allianz* judgement), but are normally not considered as anti-competitive by their very nature.

The CJEU concludes that the clauses do not have a 'sufficient degree of harm' to restrict competition 'by object', although they could have the potential ability to do so. Since they do not have the 'sufficient degree', the agreements at issue "*are not among [those for] which it is accepted may be considered, by their very nature, to be harmful to the proper functioning of competition*". However, the clauses could potentially restrict competition but this fact does not imply that the agreements containing the clauses restrict or distort competition by nature.

Considering the above, bearing in mind the economic context, the CJEU concluded that the harm inflicted by the clauses is not of such degree to qualify the clauses at hand as restrictive 'by object' for the purpose of Article 101 TFEU.

*Restriction 'by effect'*

In its reply on question two to four, the CJEU considered whether the contested agreements could lead to foreclose the competitors of Maxima by impeding the other retailers from having access to the malls where Maxima was already trading.

The CJEU applies the test it established in the *Delimitis* case. The *Delimitis* test demands a full analysis of the economic and legal context in which the effects of the agreement occur. In order to be able to rule whether there will be an effect preventing, restricting or distorting competition all these elements need to be taken into account. This test can be divided in three parts.

First the market access factors must be assessed. The following factors need to be taken into consideration: whether competitors may establish themselves in the catchment areas of the malls covered by the contested agreements, either by renting a shop in the nearby malls or in premises that are outside shopping centres; whether commercial land in the catchment areas concerned is available; and whether there are economic, administrative or regulatory entry barriers.

Secondly, detailed accounts of how competitive forces on the relevant market operate are assessed. It will be necessary to look at the number and size of the retailers trading in the markets, the degree of market concentration as well as customer fidelity to existing brands and consumer habits.

If this analysis of the economic and legal context in which the lease is granted and the specifics of the local market leads to the conclusion that access to the market is made difficult by similar agreements, it is then necessary to consider as a third part: the closing-off of the market. This analysis is made by looking at all the similar agreements found on the market (i.e. cumulative foreclosing effect). In order, to determine whether they effectively contribute to such effect, the position of the contracting parties and the duration of the agreements to this extent has to be considered.

The CJEU finally states that, after a thorough analysis of the above-mentioned economic and legal contexts, an agreement such as that at issue may be found to be restricting competition 'by effect' after a thorough analysis of the economic and legal context, as well as the particular market.

## IV. Comment

Article 101 TFEU prohibits agreements that have as object to restrict competition or have restrictive effects on competition. The distinction between anti-competitive agreements that are infringements 'by object' and those that are infringements 'by effect' is relevant for the allocation of the burden of proof between the authority and the parties to the agreements. The 'objects' doctrine is useful for a competition authority, as, if it qualifies an agreement as restrictive 'by object', it does not need to undertake any detailed analysis to find evidence of the agreement's effect on the market (i.e. restriction on competition is assumed; however, note that no presumption exists). Proving an anti-competitive effect on a particular market involves time and resources. In order to escape the ensuing competition liability, the parties have to apply for the exemption in Article 101(3) TFEU and bear the burden of proof.

On the contrary, where an agreement is categorized as restrictive 'by effect', the acting competition authority bears the burden to prove the negative effects of the agreement on competition. When the anti-competitive effects are proved, the burden is shifted to the parties, whom can submit the economic efficiency argument in Article 101(3) TFEU.

The *Maxima Latvija* judgment provides clearance on whether commercial lease agreements containing covenants limiting the freedom of property owners to rent to the tenant's competitors could be considered as a competition restraint 'by object' or 'by effect'.

In the present judgement, the reasoning and tenets of the *Cartes Bancaires* judgement are restated: there must be 'a sufficient degree of harm' to competition for there to be a restriction of competition 'by object'. The fact that the agreement at hand is of a vertical nature is not per se determining, since from the Expedia judgement (*see* also *Binon v AMP* (resale price maintenance) or *Costen and Grundig* (absolute territorial protection)) it emerges that even vertical agreements can be qualified as 'by object'. The CJEU states that the clauses at issue potentially have the ability to embody detrimental effects on the retail food market, for example *inter alia* market access foreclosure or the softening of price competition. However, the question is if they have the ability to do so by their very nature and entail 'a sufficient degree of harm'. The CJEU's answer to this question is no: the degree of harm capable to distort, restrict or impair competition is not sufficient to be qualified as restriction 'by object'.

The CJEU did not dismiss entirely the potentiality of their harming effects. The CJEU analysed the anticompetitive effects, using the *Delimitis* test, which entails a full analysis of the economic and legal context of the agreement. The outcome of the test is that the clauses have the potential to restrict competition. The following elements should be remembered:

- The judgement does not make a clear statement on why this is not a restriction of competition 'by object'. That is to say, there is no clear indication as to what 'degree of harm' suffices to allow for an agreement to be categorised as 'by object' rather than 'by effect'.

In addition, once again the CJEU did not explicitly mention the sufficient degree of certainty (i.e. probability criterion) as cumulative condition to qualify a restriction as 'by object'. However, it is possible that this criterion played a role on the background as no definitive study, even in economics literature, exists which states with certainty whether clauses as the ones at hand have a beneficial or detrimental effect on competition (according to us they can have both).

- The CJEU gives guidance to retailers and tenants on how to properly consider all the factors at stake when deciding to carry out such agreements and to determine their impact on the local market.

- The prudence of the CJEU in framing the issue within the 'by effect' box rather than in the 'by object' box is a positive signal of continuance.

[1] See **Daniel Muheme, Greta Juknaite**, The European Court of Justice annuls a judgment of the General Court which in accordance with the European Commission held that certain pricing measures adopted restricted competition 'by object' (Groupement des Cartes Bancaires), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 72930 ; **Matthew O'Regan**, The European Court of Justice provides further clarity on when an agreement has the object of restricting competition (Groupement des cartes bancaires), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 69491 ; **Richard Burton**, The EU General Court issues judgment on tariff arrangement within payment card cartel (Groupement des Cartes Bancaires), 29 November 2012, e-Competitions Bulletin November 2012, Art. N° 58212 ; **Bertold Bar-Bouyssière**, The European Court of Justice rules on restrictions by object in a case regarding payment card rules (Groupement des cartes bancaires), 11 September 2014, e-Competitions Bulletin September 2014, Art. N° 70593

**Simon Troch | Liège University (ULG) | simontroch@hotmail.com**
**Cecilia Sbrolli | Liège University (ULG) | c.sbrolli@student.ulg.ac.be**