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Noticeability Notably Nuanced

On Nov. 26, 2015, the Court of Justice of the European Union (CJEU) ruled in *SIA Maxima Latvija* v. *Konkurences Padome*, that a clause in a commercial lease agreement between a shopping center lessor and an anchor tenant, granting that anchor tenant the right to oppose the letting of the commercial premises to other tenants, will not automatically infringe on EU competition law. Instead the CJEU establishes that Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) does not necessarily mean that such a clause has the object of preventing, restricting or distorting competition within the internal market. The CJEU sheds important light on the by-object and effect dichotomy of Article 101(1) TFEU and confirms that it is necessary to assess whether the clause will have the effect of restricting competition. The question is, does this decision bring change, or does it merely clarify the post-*Expedia* doctrine?[1]

Background

The Latvian competition authority fined Maxima Latvija (Latvija), an operator of large shops and hypermarkets, after it concluded that 12 of its commercial lease agreements with various shopping centers in Latvia contained a clause that granted Latvija the right to oppose other tenants from letting the commercial premises in that particular center. The Latvian competition authority asserted that the commercial lease agreements in question constitute restrictions to competition "by object" and that it is not necessary to further examine the actual impact on the market. Latvija appealed this decision to the Latvian Supreme Court, which decided to refer a series of questions to the CJEU.

Restriction of Competition By Object

In large part, the CJEU provided clarity on the legal criterion for establishing whether an agreement involves a restriction of competition by object. As a result of the earlier *Expedia* ruling, there was some confusion on this legal criterion. In

[1] Case C-226/11 *Expedia* [2012] ECLI:EU:C:2012:795

Expedia, the CJEU emphasized 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*".[2]

However, the case law since *Expedia* has been firm on the proposition that a restriction cannot be deemed to be "by object" without due consideration for the legal and economic context in which it arises. Thus, it is interesting to observe that the CJEU's judgment in the *Latvija* case very heavily relies upon the analytical and legal framework applied in *Allianz Hungary*[3], *Cartes Bancaires*[4] *and Dole Food*[5]*.* The CJEU restates and outlines three important notions:

1. the concept of restriction "by object" is interpreted restrictively;[6]
2. the fact that an agreement simply has the potential to restrict competition is insufficient to qualify it as a restriction "by object"; and
3. a restriction "by object" can only be found when the agreement reveals a sufficient degree of harm to competition.[7]

Essentially, according to the CJEU, an effects analysis is necessary where the content of an agreement does not reveal a sufficient degree of harm to competition. In its ruling, the CJEU also sets out a number of factors that should be taken into account in this effects based analysis. Namely, the economic and legal context to which the agreement arises, and, in the present case, factors which determine access to the relevant market.[8] The CJEU applied a facts based analysis in the application of Article 101(1) TFEU to the facts of the case in Latvija, and determined that in order to address the effects of the agreement it is necessary to consider the availability and accessibility of the commercial land in the catchment areas concerned and the existence of other administrative, economic or regulatory barriers to entry of new competitors in those areas. The CJEU further examined the conditions under which competitive forces operate on the relevant market and particularly, an agreement's ability to effectively close-off a market. Upon analysis of the context of the agreements, the CJEU concluded that commercial lease agreements, such as those in question, have the ability to constitute a restriction "by effect" in accordance with their legal and economic background.

In light of these considerations, the CJEU, nonetheless maintains that certain collusive behavior, that, for example, leads to horizontal price fixing, is by its very nature considered to have negative effects and requires no further examination.[9]

This use of qualitative criteria leaves a white elephant in the room. The CJEU states that an effects based analysis is necessary where the content of the agreement does not reveal a sufficient degree of harm to competition. This indicates a qualitative analysis, but also begs the question: is there room for a quantitative analysis that could result in finding of insufficient harm? The CJEU hints that the effects analysis takes into account the economic and legal context of an agreement, but it is still unclear whether this analysis refers entirely to a qualitative set of criteria or whether this includes a market share component as well. It should be noted that this reasoning is also in line with the court's ruling in the *Völck*/*Vervaeke* case*.* In this case, a market sharing agreement (usually considered a hardcore restriction or restriction by object) between two parties with minimal (<1 percent) market share, was considered to fall out of the scope of article 101 TFEU because of its marginal effect on the market.[10] Would then two market participants with marginal market share that have the intent of harming competition be exonerated due to their position in the market? A judgment that does not

[2] Case C-226/11 *Expedia* [2012] ECLI:EU:C:2012:795, para. 36. This Logic appears to be consistent with a much earlier case, *Industrieverband Solnhoferer Natursteinplatten (OJ L 318/33),* which confirms that in the face of "by object" restrictions, even undertakings with less than five percent market share are capable of restricting competition.

[3] Case C-32/11 *Allianz Hungaria* v. *Gazdasagi Versenyhivatal* [2013] ECLI:EU:C:2013:160.

[4] Case C-67/13 *Groupement des cartes bancaires* v. *European Commission* [2014] ECLI:EU:C:2014:2204.

[5] Case C238/13 *Dole Food Company Inc*. v. *European Commission* [2015] ECLI:EU:C:2015:184.

[6] Case C345/14 *SIA Maxima Latvija* v. *Konkurences Padome* [2015]. Para. 18.

[7] *Ibid*.

[8] *Ibid.* paras. 26-27.

[9] *Ibid.* para. 19.

[10] *ECJ re Franz Völk v S.P.R.L. Ets J. Vervaecke*, *ECR* 1969, p. 00295; 9 July 1969 (C 5-69).

clearly provide the necessary legal and economic criteria that need to be taken into account in the effects analysis, still leaves us with uncertainty regarding the object/effect dichotomy. There are considerable distinctions between the logic of whether sufficient harm to the market was caused, and if certain "by object" restrictions such as market sharing and price fixing exist. On the basis of cases such as *Völck/Vervaeke*, there is merit in arguing that certain agreements that contain such "by object" restrictions, may be exonerated due to the very fact that the market share involved is so marginal that they are incapable of causing sufficient harm to the market.

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