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European Court of Justice Provides Guidance on When Provisions of Property Leases May Be Anti-Competitive

Matthew O'Regan (St Johns Chambers, United Kingdom) · Thursday, December 17th, 2015

It is common for commercial property leases to contain restrictions on how a tenant may use the leased premises. They may, for example, restrict the ability of the tenant to sell certain types of products, by specifying permitted uses (through a 'permitted user' clause) or prohibited uses (through a 'restricted user' clause). Alternatively, restrictions may be imposed on the landlord; for example, the operator of a shopping centre or a parade of shops may covenant with a retailer not to lease units to other retailers selling the same or similar goods or services. Whilst many such restrictions will not damage competition between retailers, in some circumstances they may do so and therefore be unlawful under either national or EU competition law.

In its recent judgment in Case C-345/14 *SIA 'Maxima Latvija' v Konkurences Padome*, the Court of Justice of the European Union ("**CJEU**") provided guidance on when the provisions of a property lease (which gave an 'anchor tenant' the right to veto the grant to third parties of leases of other units in shopping centres) may be anti-competitive.

Importantly, the CJEU emphasised that the agreements in question did not have an anti-competitive object. Therefore, for an infringement of competition law to be established, it must be shown that the agreements had sufficient adverse effects on competition. This would indicate that, in the relevant context, some provisions in commercial leases that restrict the freedom of the landlord or the tenant may be anti-competitive and thus unenforceable, but conversely many will not.

This judgment will be of interest to landlords, tenants and prospective tenants alike. It follows on from the English judgment in December 2013 in *Martin Retail Group Limited v Crawley Borough Council*, in which HH Judge Dight, sitting in the Central London County Court, held that provisions of a lease were unenforceable for infringing the Chapter I prohibition of the Competition Act 1998 ("**1998 Act**").

Relevant legal provisions

Section 2 of the 1998 Act prohibits agreements between undertakings that have the object or effect of preventing, restricting or distorting competition (the 'Chapter 1 prohibition'). Such agreements include those that create, alter, transfer or terminate an interest in land. If an agreement falls within the scope of the Chapter I prohibition, it may benefit from an exemption under s.9 of the 1998 Act where it has countervailing benefits, which mirrors Article 101(3) TFEU. It is for the party seeking

to rely upon an exemption to demonstrate that each criteria is satisfied.

Chapter 1 of the 1998 Act is based upon Article 101 TFEU, which contains a similar prohibition (Article 101(1)) and exemption (Article 101(3)). Article 101(1) is engaged where an agreement may have an effect on inter-State trade. *Maxima Latvija* concerned the application of analogous provisions of Article 11 of the Latvian Competition Law. In its judgment, the CJEU emphasised the importance of EU and national competition law being interpreted uniformly.{at **12**} This is also required by s.60 of the 1998 Act, pursuant to which questions arising under the Act are, so far as possible, to be dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU competition law.

***Maxima Latvija*: facts**

Maxima is a large retailer in Latvia. It operates numerous large food shops and hypermarkets. A number of leases for its premises granted it, as 'anchor tenant', the right to agree to the landlord granting leases to other units in the relevant shopping centre to other retailers. It would thus appear that Maxima was able to veto the grant of leases to competing retailers. The Latvian Competition Council (*Konkurences Padome*) adopted a decision that the leases had an anti-competitive object and fined Maxima approximately € 36,000. It did not demonstrate that the leases had anti-competitive effects. Maxima appealed to the Regional Administrative Court and then to the Latvian Supreme Court. The Supreme Court requested a preliminary ruling, pursuant to Article 267 TFEU, from the CJEU on whether the leases had an anti-competitive object.

Did the leases have an anti-competitive object?

An agreement may infringe Article 101(1) if it has either an anti-competitive object or an anti-competitive effect. An agreement has an anti-competitive object where it has, by its nature, a sufficient degree of harm to competition; if so, it is not necessary to demonstrate that it has in fact prevented, restricted or distorted competition to an appreciable extent.{at **17 – 18**} Only particularly serious infringements, in particular price-fixing cartels, by their nature have serious negative effects on competition as to restrict competition by object.{at **19**}

The CJEU considered that commercial leases for units in shopping centres are not, by their nature, harmful to competition on the retail market.{at **21**} This is so even if they contain clauses that allow one retailer to prevent a competing retailer from leasing space in the same shopping centre.{at **22**} Accordingly, the leases did not have the object of restricting competition.{at **24**} The implication of this is that, in order to find that the leases were anti-competitive, the Competition Council should have analysed the effect of Maxima's veto rights on competition on the relevant retail markets.

The CJEU's guidance on analysing the anti-competitive effects of commercial leases

The CJEU proceeded to provide guidance on assessing whether the leases in question had actual or potential negative effects on competition (by excluding competing retailers from the local market for food retailing in each area), whether individually or cumulatively with other similar agreements.{at **26 – 29**} It emphasised that a thorough analysis of the relevant market and the agreement's effects on competition must be undertaken, taking account of all relevant factors, in particular:

- whether competing retailers could trade from other premises, whether located in other shopping

centres or in other locations
- economic, administrative or regulatory barriers to entry in the retail sector
- whether other landlords are subject to similar restrictions in their own leases
- the nature of competition on the downstream retail market, including: the size of the market, the number of competitors, their market shares and the degree of market concentration and customer fidelity and shopping habits

Only where the terms of the lease (here, Maxima's right of veto over other tenants) and any similar agreements cumulatively foreclose the retail market, so as to appreciably restrict competition, is it necessary to assess the lawfulness of an individual lease. Furthermore, for an individual lease to be unlawful, it must be shown that it makes an appreciable contribution to the market foreclosure. This will depend on the market positions of the parties and the agreement's duration.

Concluding remarks on *Maxima Latvija*

It is plain that it is necessary to undertake a full analysis of whether the provisions of a property lease restrict competition. This cannot be assumed.

First, the relevant markets must be defined, both the product market and the geographic market. These will vary depending on the activities in question, with the geographic area generally being determined using 'iscochrones' (catchment areas) based on walking or driving times or an area that captures 80% of a store's customers. For example, distinct markets have, in past cases, been identified in the retail sector for: ten pin bowling (25 – 40 minute drive time); gyms (40 minute walk time or 20 minute drive time outside London; 20 minute walk time in London); retailing of mobile phones (radius around each store capturing 80% of customers); cinemas (20 minute drive time); grocery retailing from large stores (10 minute drive time in urban areas); convenience retailing (five minute drive time or one mile radius); motor vehicle retailing (radius around each outlet capturing 80% of customers); retail pharmacies (one mile radius); and opticians (radius around each outlet capturing 80% of customers).

It may also be necessary to consider the market on which the landlord is active, in order to assess the significance of the restrictions. This may be a narrow market. In a 2012 merger case, *Capital Shopping Centres/Broadmarsh Retail*, the Office of Fair Trading defined a possible market for the supply of shopping centre retail space in Nottingham city centre: the extent to which out of town sites were an alternative for retailers was limited.

Second, a full analysis of the effects of the agreement on competition on the relevant market must be undertaken. This must consider all relevant factors, in particular those set out by the CJEU in *Maxima Latvija*. An individual agreement will infringe competition law only if (a) the relevant retail market is foreclosed because some or all rival retailers are unable to trade in the catchment area and (b) that agreement makes an appreciable contribution to the foreclosure. It must then be considered whether the agreement satisfies the criteria for an exemption.

***Martin Retail v Crawley Borough Council*: application of the exemption criteria**

In *Martin*, the defendant landlord, a local authority, conceded that the terms of its leases infringed competition law. The authority was the landlord of a parade of shops on a housing estate in Crawley. The Council wished to insert into Martin's new lease for a shop used as a newsagent a restriction on the sale of alcohol and groceries. Martin objected. Amongst the other tenants was a convenience grocery store, located adjacent to Martin's store and operated by a local family firm.

Other convenience stores (including those operated by multiple retailers) were located 1 – 1.5 km away.

It is unclear why the local authority conceded that the proposed new lease terms infringed the Chapter I prohibition, particularly given the approach to market definition set out above and the location of other convenience stores. Its case was that the requirements for an exemption under s.9 of the 1998 Act were satisfied. It was concerned, and applied a 'letting scheme' to ensure, that each parade of shops owned by it had an appropriate 'tenant mix', with each tenant being restricted in the goods or services it could offer. In this way, local residents would have a wide range of neighbourhood shops and parades would not be dominated by larger supermarkets (which it considered could 'out compete' small shops, so reducing choice and the viability of the parades). The Council considered that this ensured that residents had access to a wide range of goods across the parade as a whole, which was to their benefit.

The judge rejected the Council's claim to exemption. It had failed to satisfy its burden of proof. It had not adduced objective evidence (as distinct from its officers' opinions and written assertions made by local residents) to demonstrate that the four criteria were satisfied. In particular, there was no evidence that its 'lettings scheme' improved the distribution of goods or contributed to economic progress as compared to the parade having a supermarket or a number of similar retailers as a result of the operation of market forces.{at **32 – 35**} The Council could point to no documents analysing the economic benefits of its scheme {at **35**}, nor how it benefitted customers or the community generally.{at **36**} Indeed, the Council accepted that there was unlikely to be a price benefit for consumers.{at **36**} There was also no evidence that, absent the restrictive covenants, smaller traders would be discouraged from trading from the parade so as to justify the indispensability of the scheme.{at **37**} In the judge's view, the Council's lettings scheme established local monopoly suppliers for specific goods, eliminating all competition on the parade for convenience goods; however, had the geographic market been wider, this may not have been the case.{at **38 – 39**}

Conclusions

Whilst the provisions of some property agreements, in their proper context, may have anti-competitive effects, many will not. In order to identify which agreements will infringe competition law, the relevant markets must be defined and the effects of the agreement must then be analysed. These effects cannot be presumed.

Even if an agreement does have the effect of appreciably restricting competition, it may still benefit from an exemption and be enforceable. However, as *Martin* makes clear, clear evidence must be adduced to demonstrate that the exemption criteria are satisfied. Ideally, this evidence will be contemporaneous (to the agreement being entered into), documented and both provide a clear rationale for the agreement and set out why the exemption criteria are satisfied. A court or competition authority will not accept either unsubstantiated and/or subjective assertion or opinion or evidence that in reality is an *ex post facto* rationalisation of the reasons for an earlier act or decision.

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