Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 November 2015*

(Reference for a preliminary ruling — Competition — Article 101(1) TFEU — Application of analogous national legislation — Jurisdiction of the Court — Concept of 'agreement having as its object the restriction of competition' — Commercial lease agreements — Shopping centres — Right of the anchor tenant to prevent the lessor letting commercial premises to third parties)

In Case C-345/14,

Request for a preliminary ruling under Article 267 TFEU from the Augstākā Tiesa (Supreme Court, Latvia), made by decision of 11 July 2014, received at the Court on 17 July 2014, in the proceedings

SIA 'Maxima Latvija'

v

Konkurences padome,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal and K. Jürimäe (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 25 June 2015,

after considering the observations submitted on behalf of:

— SIA 'Maxima Latvija', by M. Gailis and L. Mervina, advokāti, and by A. Šteinmanis,

— the Latvian Government, by I. Kalniņš and J. Treijs-Gigulis, acting as Agents,

— the Austrian Government, by G. Eberhard, acting as Agent,

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by N. Khan and F. Ronkes Agerbeek and by I. Rubene, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Latvian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU.

2 The request has been made in proceedings between SIA 'Maxima Latvija' ('Maxima Latvija') and the Konkurences padome (Competition Council) concerning a fine imposed by it on Maxima Latvija for having concluded a series of commercial lease agreements with shopping centres; those agreements containing a clause having an anti-competitive object.

Legal context

3 Under Article 11(1) of the Law on competition (Konkurences likums):

'Agreements between economic operators that have as their object or effect the prevention, restriction or distortion of competition within Latvian territory shall be prohibited and void *ab initio* and agreements relating to:

…

(7) actions (or omissions) as a result of which another economic operator is compelled to leave a particular market or the entry of a potential operator into a particular market is made more difficult,

shall be deemed to constitute such agreements.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

4 Maxima Latvija, a Latvian entity carrying out business predominantly in the food retail trade, operates large shops and hypermarkets. That company concluded a series of commercial lease agreements with shopping centres in Latvia for the rental of commercial premises in those centres.

5 After analysing 119 of those contracts, the Competition Council found that 12 of them contained a clause granting Maxima Latvija, as the 'anchor tenant', the right to agree to the lessor letting to third parties commercial premises not let to Maxima Latvija. The order for reference states that the 'anchor tenant' is the large shop or hypermarket offering everyday consumer goods which, within a shopping centre, usually occupies the largest or main area of that centre.

6 Considering that the commercial lease agreements which contain the clause at issue in the main proceedings constituted vertical agreements the object of which is the prevention, restriction or distortion of competition, the Competition Council adopted a decision in which it concluded that those agreements infringed Article 11(1)(7) of the Law on competition, without it being necessary to demonstrate that, in practice, they rendered entry of a particular operator onto the market difficult. The Competition Council therefore imposed a fine of LVL 25 000 (approximately EUR 35 770) on Maxima Latvija.

7 Maxima Latvija brought an action for annulment against that decision before the Administratīvā apgabaltiesa (Regional Administrative Court), which dismissed it by decision of 28 June 2013. That court held that, in view of the market power held by Maxima Latvija on the retail market, the purpose of the agreements at issue in the main proceedings was to prevent competition and that it was therefore unnecessary to demonstrate any effects on competition.

8 Maxima Latvija appealed against that decision before the referring court. It claims, in essence, that the Administratīvā apgabaltiesa (Regional Administrative Court) erred in law by upholding the analysis of the Competition Council that the agreements at issue in the main proceedings were intended to restrict competition.

9 The referring court notes, first, that it is common ground between the parties to the main proceedings that those agreements are not of a kind that could affect trade between Member States. However, it is of the view that the wording of Article 11(1) of the Law is on competition, in essence, similar to that of Article 101(1) TFEU and that that law should be applied in accordance with the requirements of EU law. That court observes, moreover, that there is a clear interest in having a uniform interpretation of the provisions and concepts of EU law. That court states, second, that the case-law of the Court of Justice on Article 101(1) TFEU does not enable it to be determined with certainty whether agreements such as those at issue in the main proceedings may be categorised as agreements designed to restrict competition within the meaning of that provision.

10 In those circumstances, the Augstākā Tiesa (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Can the agreement under consideration in the present case, concluded by a lessor of commercial premises and a retailer (the anchor tenant), which restricts the lessor’s right to decide individually, without the prior consent of the anchor tenant, to make other lettings of commercial premises to potential competitors of the anchor tenant, be regarded as an agreement between undertakings whose object is the prevention, restriction or distortion of competition, for the purposes of Article 101(1) TFEU?

(2) When the compatibility of the agreement with Article 101(1) TFEU is assessed, must an analysis be made of the structure of the market, and if so, for what purpose?

(3) Is the market power of the parties to the agreement under consideration in the present case, and its possible growth, a factor that must necessarily be taken into account when the compatibility of the agreement with Article 101(1) TFEU is assessed?

(4) If, in order to discover the nature of the agreement and to ascertain that the elements of a prohibited agreement are present, it is necessary to determine whether the agreement could possibly affect the market, can such potential effects on the market at the same time form a sufficient basis for finding that the agreement corresponds to the definition of a prohibited agreement, without any need for it to be determined whether that agreement actually produced any adverse effects?’

Consideration of the questions referred

Preliminary observations

11 It is necessary to determine whether the Court has jurisdiction to answer the questions referred. The Augstākā Tiesa (Supreme Court) states, in its order for reference, that the agreements at issue in the main proceedings concern a purely internal situation and have no impact on trade between Member States. Consequently, Article 101 TFEU is not applicable to the dispute in the main proceedings.

12 In that regard, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning EU law in situations in which the facts in the main proceedings fell outside the direct scope of that law, provided always that those provisions had been rendered applicable by the national law, which adopted, for solutions applied to purely internal situations, the same approach as

that for solutions provided for under EU law. In such cases, according to the settled case-law of the Court, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, inter alia, judgments in *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20, and *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 18).

13 That is, according to the referring court, the case as regards Article 11(1) of the Competition law which faithfully reproduces Article 101(1) TFEU.

14 In those circumstances, it must be held that the Court has jurisdiction to answer the questions referred for a preliminary ruling.

The first question

15 By its first question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that the mere fact that a commercial lease agreement for the letting of a large shop or hypermarket located in a shopping centre contains a clause granting the lessee the right to oppose the letting by the lessor, in that centre, of commercial premises to other tenants, means that the object of that agreement is to restrict competition within the meaning of that provision.

16 It must be recalled that, to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect' the prevention, restriction or distortion of competition within the internal market. According to established case-law since the judgment in *LTM* (56/65, EU:C:1996:38), the alternative nature of that requirement, indicated by the conjunction 'or', leads, first of all, to the need to consider the precise object of the agreement in the economic context in which it is to be applied (see, inter alia, judgments in *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 34 and the case-law cited, and *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 33).

17 Accordingly, where the anti-competitive object of the agreement is established it is not necessary to examine its effects on competition. Where, however, an analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent (judgment in *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 34; see, to that effect, judgments in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52, and *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraph 116).

18 As regards the concept of restriction of competition 'by object', the Court has held that it must be interpreted restrictively and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 58). That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50 and the case-law cited).

19 It is established, in that regard, that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered by their nature as likely to have negative effects, in particular on the price, quantity or quality of the goods and services, so that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market (see, to that effect, in particular, judgment in *Clair*, 123/83, EU:C:1985:33, paragraph 22).

Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51).

20 In the light of the case-law which has just been cited, the essential legal criterion for ascertaining whether an agreement involves a restriction of competition 'by object' is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects (see, to that effect, judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 57).

21 In the present case, it is apparent from the documents submitted to the Court that Maxima Latvija is not in a competitive situation with the shopping centres with which it has concluded the agreements at issue in the main proceedings. Although the Court has already held that a fact of that nature in no way precludes an agreement from containing a restriction of competition 'by object' (see, inter alia, judgment in *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 43 and the case-law cited), it must, however, be stated that the agreements at issue in the main proceedings are not among the agreements which it is accepted may be considered, by their very nature, to be harmful to the proper functioning of competition.

22 Even if the clause at issue in the main proceedings could potentially have the effect of restricting the access of Maxima Latvija's competitors to some shopping centres in which that company operates a large shop or hypermarket, such a fact, if established, does not imply clearly that the agreements containing that clause prevent, restrict or distort, by the very nature of the latter, competition on the relevant market, namely the local market for the retail food trade.

23 Taking account of the economic context in which agreements, such as those at issue in the main proceedings are to be applied, the analysis of the content of those agreements would not, in the light of the information provided by the referring court, show, clearly, a degree of harm with regard to competition sufficient for those agreements to be considered to constitute a restriction of competition 'by object' within the meaning of Article 101(1) TFEU.

24 In the light of all the foregoing considerations, the answer to the first question is that Article 101(1) TFEU must be interpreted as meaning that the mere fact that a commercial lease agreement for the letting of a large shop or hypermarket located in a shopping centre contains a clause granting the lessee the right to oppose the letting by the lessor, in that centre, of commercial premises to other tenants, does not mean that the object of that agreement is to restrict competition within the meaning of that provision.

The second to fourth questions

25 By its second to fourth questions, which should be considered together, the referring court asks, in essence, under what conditions commercial lease agreements, such as those at issue in the main proceedings, may be considered to be an integral part of an agreement having the 'effect' of preventing, restricting or distorting competition within the meaning of Article 101(1) TFEU.

26 In that regard, the Court has held that the effects of an agreement on competition must be assessed in the economic and legal context in which it occurs and where it might combine with others to have a cumulative effect on competition (judgment in *Delimitis*, C-234/89, EU:C:1991:91, paragraph 14 and the case-law cited, and order in *Unilever Bestfoods* v *Commission*, C-552/03 P, EU:C:2006:607, paragraph 84).

27 In the present case, the assessment of the impact of the agreements at issue in the main proceedings on competition must take account, in the first place, of all of the factors which determine access to the relevant market, for the purposes of assessing whether, in the catchment areas where the shopping centres which are covered by those agreements are located, there are real concrete possibilities for a new competitor to establish itself, including through the occupation of commercial premises in other shopping centres located in those areas or by occupying other commercial premises located outside the shopping centres. Accordingly, it is appropriate in particular to take into consideration the availability and accessibility of commercial land in the catchment areas concerned and the existence of economic, administrative or regulatory barriers to entry of new competitors in those areas (see, by analogy, judgment in *Delimitis*, C-234/89, EU:C:1991:91, paragraphs 20 and 21).

28 In the second place, the conditions under which competitive forces operate on the relevant market must be assessed. In that connection it is necessary to know not only the number and the size of operators present on the market, but also the degree of concentration of that market and customer fidelity to existing brands and consumer habits (see, by analogy, judgment in *Delimitis*, C-234/89, EU:C:1991:91, paragraph 22).

29 It is only if, after a thorough analysis of the economic and legal context in which the agreements at issue in the main proceedings occur and the specificities of the relevant market, it is found that access to that market is made difficult by all the similar agreements found on the market, that it will then be necessary to analyse to what extent they contribute to any closing-off of that market, on the basis that only agreements which make an appreciable contribution to that closing-off are prohibited (see, by analogy, judgment in *Delimitis*, C-234/89, EU:C:1991:91, paragraphs 23 and 24). To assess the extent of the contribution of each of the agreements at issue in the main proceedings to the cumulative closing-off effect, the position of the contracting parties on the market in question and the duration of the agreements must be taken into consideration (see, by analogy, judgment in *Delimitis*, C-234/89, EU:C:1991:91, paragraph 25).

30 Moreover, according to the settled case-law of the Court, Article 101(1) TFEU does not restrict such an assessment to actual effects alone, it must also take account of the potential effects of the agreement or practice in question on competition (see, to that effect, judgment in *Asnef-Equifax and Administración del Estado*, C-238/05, EU:C:2006:734, paragraph 50 and the case-law cited).

31 In the light of all the foregoing considerations, the answer to the second to fourth questions is that commercial lease agreements, such as those at issue in the main proceedings, may be considered to be an integral part of an agreement having the 'effect' of preventing, restricting or distorting competition within the meaning of Article 101(1) TFEU, from which it is found, after a thorough analysis of the economic and legal context in which the agreements occur and the specificities of the relevant market, that they make an appreciable contribution to the closing-off of that market. The extent of the contribution of each agreement to that closing-off effect depends, in particular, on the position of the contracting parties on that market and the duration of that agreement.

Costs

32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 101(1) TFEU must be interpreted as meaning that the mere fact that a commercial lease agreement for the letting of a large shop or hypermarket located in a shopping centre contains a clause granting the lessee the right to oppose the letting by the lessor, in that centre, of commercial premises to other tenants, does not mean that the object of that agreement is to restrict competition within the meaning of that provision.**

2. **Commercial lease agreements, such as those at issue in the main proceedings, may be considered to be an integral part of an agreement having the 'effect' of preventing, restricting or distorting competition within the meaning of Article 101(1) TFEU, from which it is found, after a thorough analysis of the economic and legal context in which the agreements occur and the specificities of the relevant market, that they make an appreciable contribution to the closing-off of that market. The extent of the contribution of each agreement to that closing-off effect depends, in particular, on the position of the contracting parties on that market and the duration of that agreement.**

[Signatures]