The EU’s Court of Justice has ruled (in Case C-345/14 Maxima Latvija – albeit under abuse of dominance claims) that a clause in a property lease, that a ‘user clause’ in a lease of a supermarket ‘anchor tenant’, which gives that tenant the ‘right to approve’ the granting of leases to competing stores is not anti-competitive by object. The case involved a clause in a property lease granting an operator of an outlet centre which prevented retailers (outlet stores) from opening another store within a 150 km radius. It concluded that the clause was anti-competitive “by object” because it exceeded a geographic radius of 50 km and lasted longer than five years.

The decision is therefore likely to be welcomed by both shopping centre developers and retailers alike.

Negative

The ruling makes it clear that restrictions on the ability of a small retail group to lease to competitors of the sector leader are not automatically illegal. This is consistent with the UK competition and securities authority’s (CMA) guidance on land agreements.

However, care should be taken. A recent case in Germany may suggest a stricter ‘by object’ approach to radius clauses: CADE will have the opportunity to rule on this issue again soon, in an ongoing investigation into the abuse of dominance.

The judgment sets out an established two-stage test for assessing whether clauses like this (akin to ‘exclusivity’ arrangements) would be restrictive:

- Is the market (‘irrelevant’ to that case) to be considered a relevant market?
- Is there an abuse of dominance?

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The treatment of radius clauses in other countries implies some support for this: the UK guidance indicates that it is unlikely to prioritise enforcement action against such agreements if they do not meet the criteria for an abuse of dominance: CADE will have the opportunity to rule on this issue again soon, in an ongoing investigation into the abuse of dominance.

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