Property leases and competition law: Some clarity on restrictions in leases...

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Martin Retail Group Ltd v Crawley Borough Council

The EU’s Court of Justice has ruled (in Case C-345/14 Martin Retail Group Ltd v Crawley Borough Council) that a clause in a property lease, between a retail lessee and 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 Court focused on a thorough assessment of the likely impact of that type of clause in actual market conditions before reaching a conclusion on its legality under the competition law.

The judgment sets out an established two-stage test for assessing whether clauses like this (the ‘user clauses’) are restrictive:

1. Is the clause itself ‘by object’? That clause, looking at whether there is a genuine possibility for a new competitor to enter the market (taking account of market realities, e.g. economies of scale/barriers).

2. If access to the market is indeed difficult for new entrants, do the agreements in question add to that closing-off to an appreciable extent (e.g. by limiting competition)?

The ruling appeared to endorse current market practice where such lease provisions are often necessary to secure an anchor tenant and ensure the financial viability of the development.

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

Justifications

The ruling makes it clear that restrictions on the ability of a small retailer to grant leases to competition of the anchor tenant are not automatically illegal. This is consistent with the UK Competition and Markets Authority’s (CMA) guidance on land agreements.

However, care needs to be taken since potentially clauses like the appeal to market competition. If there is a real risk that new entrants might find it difficult to enter the market whether by setting up a competing outlet in the same area or in a similar premises outside a radius, then close scrutiny is necessary to ensure that the clause will be legitimate, if challenged. The greater strength of the competitor, the duration of the agreements plus the number of agreements with similar clauses will be important factors in the analysis. The UK guidance indicates that: it is not to be considered an unreasonable (i.e. exclusionary) restriction where none of the parties has a market share of less than 30 per cent.

It is not clear how the German case can be reconciled with the Court of Justice’s ruling. It may be that it was an exception to the usual rules. The Court found an insufficient impact on competition because the effects of the clause were limited. The duration of the agreements plus the number of agreements with similar clauses will be important factors in the analysis. The CMA guidelines indicate that: it is not to be considered an unreasonable (i.e. exclusionary) restriction where none of the parties has a market share of less than 30 per cent.

Although this case is concerned with restrictions imposed by the landlord, there is no argument that the same reasoning should apply to the ‘mirror image’ situation where a restriction is imposed by a retailer, e.g. a ‘radius clause’ which prevents the retailer from opening up stores within a given radius of a competitor.

The treatment of radius clauses in other countries implies some support for this position. In Germany, CADE has also recently been considering whether a clause which prevented the lessee from granting leases to stores within a 150 km radius would be restrictive.

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

1. Is the clause itself ‘by object’? That clause, looking at whether there is a genuine possibility for a new competitor to enter the market (taking account of market realities, e.g. economies of scale/barriers).

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