The EU’s Court of Justice has ruled in Case C-345/14 Maxima Latvija – albeit under abuse of dominance as ‘by object’ or per se infringements, as an analysis of the market foreclosure etc. is undertaken.

Radius clauses have also attracted the attention of CADE in Brazil. However, it is clear that radius clauses are not being challenged in active.

Although this case is concerned with restrictions imposed on the lessor/mall operator, there is an argument that the same reasoning should apply to the mirror image situation where a restriction is imposed on a competitor. The UK guidance indicates that it is unlikely to prioritise enforcement action against such exclusivity provisions where none of the parties has a market share of less than 30 per cent. The ruling makes it clear that restrictions on the ability of a mall owner to grant leases to competitors of the anchor tenant are not automatically illegal. This is consistent with the UK competition authority’s (CMA) guidance on land agreements.

The judgment sets out an established two-stage test for assessing whether clauses like this (akin to exclusivity provisions) are anti-competitive. It is not clear how the German case can be reconciled with the Court of Justice’s ruling. It may be that it was based on an excessive radius which rendered the clause anti-competitive by object. As a result, the judgment is likely to be welcomed by both shopping centre developers and retailers alike.

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