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

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The EU's Court of Justice has ruled (in Case *C-345/14 Maxima Latvija*) that a clause in a property lease, between a mall owner 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'.

This means that any investigating authority/court would have to conduct a thorough assessment of the likely impact of that type of clause in actual market conditions before reaching a conclusion on its legality under EU competition law.

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 closed-off (in this case to food retailers)? That involves looking at whether there are genuine possibilities for a new competitor to enter the market (taking account of market realities, e.g. economic/regulatory barriers).
- If access to the market is made difficult for new entrants, do the agreements in question add to that closing-off to an appreciable extent (given, for example, their duration and the market position of the parties)?

The ruling appears 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.

Implications

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 and Markets Authority's (CMA) guidance on land agreements.

However, care needs to be taken since exclusivity clauses have the potential to restrict competition. If there is a risk that new entrants might find it difficult to enter the market (whether by setting up in a competing mall in the catchment area or in commercial premises outside a mall), then closer examination is necessary to ensure that the clause will be enforceable, if challenged. The market

strength of each of the companies, 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 unlikely to prioritise enforcement action against such exclusivity provisions where none of the parties has a market share of less than 30 per cent.

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 retailer, e.g. a 'radius clause' which prevents the retailer from opening up stores within a given radius of a shopping mall.

The treatment of radius clauses in other countries implies some support for this:

- In 2011, the **Austrian** Supreme Court ruled that clauses in shopping centre leases which prohibited tenants from opening shops in other centres within a certain radius did not infringe the competition rules. The Court found an insufficient impact on competition because the effects of the clause were limited.
- In the **UK** case of *Martin Retail Group Ltd v Crawley Borough Council*,[1] WL 7090797] a court found that a 'user clause' in a lease (preventing the lessee from expanding its offering to sell different goods) was anti-competitive. It is difficult to draw much from this case because the landlord conceded as a preliminary issue that there could be an anti-competitive effect and therefore there was no analysis of this point. However, the strong indication from UK guidance in this area is that an effects analysis would be appropriate (i.e. a 'user clause' should not automatically be regarded as anti-competitive 'by object').[2]

However, care should be taken. A recent case in **Germany** may suggest a stricter 'by object' approach to restrictions imposed on retailers. The German competition agency challenged a radius clause imposed by 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 scope of 50 km and lasted longer than five years.

It is not clear how the German case can be reconciled with the Court of Justice's ruling. It may be that it was the excessive radius which rendered the clause anti-competitive by object. In any event, it is clear that radius clauses stand a better change of being upheld where they are tailored to the operator's need and can be justified. Competition authorities will no doubt be suspicious of radius clauses whose scope is larger than that of the relevant market (e.g. catchment area) in which the company seeking to benefit from the clause is active.

Radius clauses have also attracted the attention of CADE in **Brazil** – albeit under abuse of dominance provisions. CADE will have the opportunity to rule on this issue again soon, in an ongoing investigation concerning shopping malls in northern Brazil. However it is clear that radius clauses are not being challenged as 'by object' or per se infringements, as an analysis of the market foreclosure etc. is undertaken.

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