

RESTRICTION OF COMPETITION BY ANCHOR TENANTS?

THE RIGHT OF AN ANCHOR TENANT TO PREVENT THE LESSOR LETTING COMMERCIAL PREMISES TO THIRD PARTIES HAS BEEN SCRUTINIZED BY THE EUROPEAN COURT OF JUSTICE. SUCH COMMERCIAL LEASE AGREEMENTS MAY HAVE AS THEIR EFFECT THE RESTRICTION OF COMPETITION.

The presence of anchor tenants is crucial for commercial property. Their key importance is often mirrored in lease agreements whereby 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, is restricted. The question whether such clauses are to be considered as restricting competition has up to now not been conclusively clarified.

In a recent decision, the European Court of Justice (SIA "**Maxima Latvija/Konkurences padome**, C-345/14) ruled that such agreements may not be considered, by their very nature, to be harmful to the proper functioning of competition. However, such commercial lease agreements may be considered as having the effect of preventing, restricting or distorting competition..

Since sec 1 Austrian Cartel Act (Kartellgesetz) is essentially similar to Art 101 (1) TFEU, the decision at hand is also relevant under Austrian law.

The case

Maxima Latvija (Maximā) is a food retail chain operating in Latvia and an anchor tenant. Maxima concluded a series of commercial lease agreements with shopping centres which contained a clause granting Maxima as the anchor tenant the right to refuse lease agreements in which the lessor would let commercial premises not already let to Maxima to third parties. The Latvian Competition Council decided that the clause at issue constituted vertical agreements the object of which is the prevention, restriction or distortion of competition. Maxima appealed the decision and the Latvian Supreme Court eventually referred the case to the European Court of Justice..

The decision of the ECJ

Although the ECJ ruled that such clauses have not as their object the restriction of competition, they may nevertheless be considered as having the effect of preventing, restricting or distorting competition. The effects of the agreement must be assessed in the economic and legal context in which they occur and where they might combine with others to have a cumulatively adverse effect on competition. In the case at hand, the assessment of the impact of the agreements must take account of the following:

(a) access to the relevant market: ability for a new competitor to establish itself in the

- catchment area taking into account economic, administrative or regulatory barriers;
- (b) assessment of the conditions under which competitive forces operate on the relevant market; in this context, it is necessary to know the number and size of operators present on the market, the degree of concentration in that market and customer fidelity to existing brands and consumer habits;
 - (c) If, after thorough analysis, one comes to the conclusion that access to the market is made difficult by all similar agreements found on the market in question, the extent to which they contribute to any closing-off of that market can be analysed, as only agreements which make an appreciable contribution to that closing-off are prohibited. The position of the contracting parties on the market in question and the duration of the agreements must be taken into consideration.

The Court emphasised that such assessment is not exclusively restricted to actual effects of the agreements in question, but also to their potential effects on competition.

Hence, following this decision, one must also thoroughly examine whether the clauses contribute to any closing-off in each individual case.

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