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Illegal competitions

Landlord and tenant The application of competition law to restrictions in commercial leases has recently been considered in cases in the EU. Landlords and tenants need to be aware of the developments, says Matthew Hall

In some circumstances a restriction on the tenant or landlord may be unlawful under national and/or EU competition law. If unlawful, the clause is unenforceable, fines may in principle be imposed and a third party could seek to bring a damages claim.

The law

Competition law includes a national law element and an EU-level component, applying where an agreement may have an effect on inter-state trade. The latter is contained in Article 101 of the Treaty on the Functioning of the European Union 2012/C 326/01. National level equivalents are essentially the same, without the need for an effect on trade. In the UK, the relevant law is the "Chapter I prohibition" contained in the UK Competition Act 1998.

Article 101 and the Chapter I prohibition both prohibit, in certain circumstances, agreements that prevent, restrict or distort competition. An exemption (which must be self-assessed by the parties) may be available where on balance the benefits outweigh the anti-competitive aspects.

Latvian case

A recent case relating to Latvia comes from the EU's highest court, the European Court of Justice ("ECJ"). On 26 November 2015, in a preliminary reference (interpretative) ruling requested by a Latvian court, the ECJ considered the case of Maxima Latvija ("ML").

ML is a large Latvian food retailer. It had entered into contracts with its landlord shopping centres that gave it the right, as the "anchor tenant", to veto leases to third parties in those centres. The Latvian competition authority, in the initial decision that gave rise to the appeal case in Latvia and then the ECJ case, had fined ML.

The ECJ, answering questions from the Latvian court, held that this was not an "object" (or automatic) restriction of competition law since it was not clear that a sufficient degree of harm would automatically arise from such provisions. However, such a provision could still have anti-competitive "effects" and be ruled illegal for that reason (subject to the applicability of an exemption) under competition law (Article 101 and/or the Latvian equivalent).

This "effects analysis" would require a full consideration of the economic and legal context and the specificities of the relevant market and a consideration of whether the agreements make an appreciable contribution to the closing-off of that market. This was a question for the Latvian court to consider, and it is currently reviewing that issue.

The judgment confirms that, in certain circumstances, provisions in commercial leases that restrict the landlord or the tenant may infringe competition law. However, many will not and the question in each case will be how to draw the line, bearing in mind relevant factors.

German case

An earlier case from Germany is an illustration of a competition authority applying these principles. On 3 March 2015, the German competition authority announced that it had prohibited non-compete clauses imposed on tenants in a factory outlet centre if these extended beyond a 50km radius and five years.

The outlet centre had restricted its tenants from operating shops in another outlet centre (or individually) within a 150km radius. The authority considered that 150km extended beyond the relevant geographic market in which the outlet centre operated, since most of its customers lived within a 100km radius or used it when passing through.

Further, the clause was not suitable for an exemption since it was not necessary in order to implement the leases at the centre and was not proportionate to their purpose. On the contrary, its chief aim was to restrict competition between the outlet centre and its current and potential competitors by curtailing the freedom of action of its tenants. The clauses were therefore illegal.

UK case

A UK case from 2014 provides another example of a court considering restrictions on a tenant and the issue of an exemption.

The case concerned a proposed permitted-use restriction in a lease renewal. The landlord (which owned the other shops in the "parade") proposed that the permitted uses of the premises should expressly exclude the sale of alcohol, groceries, fresh food and other convenience goods. The tenant, a newsagent and tobacconist that wanted to compete with one of the other shops by selling convenience goods, argued that the proposal was unlawful on the grounds that it was prohibited by UK competition law and therefore would be void and unenforceable.

The landlord conceded at trial that the clause as proposed would be *prima facie* anti-competitive. The judge agreed because the effect of such a clause, in the context of the letting scheme used for the parade, would be to restrict competition in the sale of convenience goods. Under the letting scheme, the tenants were subject to reciprocal obligations protecting each of them from competition by the others in the parade.

This left the issue of an exemption, should the countervailing benefits outweigh the anti-competitive effects. The judge found that, based on the facts, an exemption was not available.

Considering competition early

Restrictions in commercial leases are, like provisions in any other commercial agreement, subject to EU and national competition law. The potential consequences of this can be very significant for the contract and for the parties more generally.

This means that consideration must be given during contract negotiations and subsequent compliance reviews to the application of competition law to any restrictions in leases, as well as in competition compliance programmes generally. This is particularly the case where the provision in question is crucial for the value of the lease from the point of view of landlord or tenant.

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