WIERZBICKI
ADWOKACI I RADCOWIE PRAWNI

NEWSLETTER

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Anti-competitive nature of lease contracts of commercial space

We would like to draw your attention to one of the interesting aspects of our view of competition law, which is the risk of committing an act of unfair competition through the use of certain clauses in the lease contracts of commercial space, in particular retail space.

- recently can be observed increased interest of competition authorities in various countries regarding clauses applied by entrepreneurs in the lease contracts, which should be a kind of warning signal to both landlords and tenants with high market power.

- it seems that the specific concerns may raise clauses entitling the tenant to oppose to leases to other tenants of commercial space located in a shopping center, all kinds of exclusivity clauses, as well as clauses related to charging tenants of common costs or marketing costs mall.

I. Sanctions for breach of competition law

We show that in the event that the competition authority (in Poland - the President of the UOKiK) breach of competition law by the use of certain clauses in lease contracts, there is a risk not only to punish entrepreneurs **severe financial penalty, the value of which can reach up to 10% of the turnover** of the entrepreneur achieved in year preceding the year of imposing fines (separate penalty may be imposed in the event impeding - even if unintentional - of the proceedings by the President of the UOKiK). The entity that committed the infringement should rely primarily with the ruling order prohibiting the use of anti-competitive practices, and therefore - in relation to the lease contracts - both the removal of contractual anti-competitive clauses in the lease, as well as the cessation of the use of such clauses in the future. With regard to already concluded lease contracts, those clauses **are void *ex tunc*** (from the beginning, ie. after the conclusion of the disputed lease contract). **Entrepreneur infringer should be reckoned with potential claims for damages on the part of other market participants, whose rights have been violated as a result of the use of anti-competitive - and hence invalid - clauses.**

II. The decision of the Court of Justice of the European Union of November 26, 2015 in Case C-345/14 Maxima Latvija.

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As an example of a ruling on the anti-competitive clauses in lease contracts we would like to point out the decision of the Court of Justice of the European Union of November 26, 2015 in Case C-345/14 Maxima Latvija (Latvian company operating in the retail sector, mainly food products, operates retail outlets Large). The company Maxima Latvija concluded with Latvia located shopping centers a number of leases of commercial space. A dozen of these contracts contained a provision granting the company Maxima Latvija as a tenant the right to consent to the lease to a third party commercial space vacant to this company. Stores belonging to the Maxima Latvija occupied usually the largest or most important part of the area of the shopping center. Latvian competition authority and the court considered that due to the market power of the tenants on the retail market for food products lease contain this consent clause must be regarded as restricting competition by object, without the need for an impact study.

Considering the present case, the Court held that the test of the lease contracts represent a vertical nature, **which can be considered as restrictive by object**. For a complete evaluation of the particular case **it is necessary to examine the actual and potential effects of the data lease contracts, among others, by verifying whether the tenant has entered into similar contracts in other - in particular neighboring countries - shopping malls, or in relation to retail space outside of these centers.** Next, it should be examined **whether the contract contributes to the creation of barriers to market access**. To do this, it is needed to assess the conditions for the fulfillment of which can be concluded that we are dealing with the free play of supply and demand on the relevant market. What is needed is knowledge not only about the number and size present on the market traders, but also - the degree of concentration of the market, with a commitment to existing customers on its brands and of operating on the consumption patterns. This is the extent to which each of the contracts in question contributes to the cumulative effect of placing at blocking access to the market depends on occupied by the parties to the contracts the market position and the time at which contracts are concluded.

III. Audit of lease contracts

It should be noted that because of the aforementioned risks for entities that are parties to a greater number of lease agreements (both the landlord and the tenant) indicated it may be insightful analysis of the content of the contracts not only in terms of civil law aspect of their records, but also through the prism of competition law. No audit the content of the contracts in this respect may be because very expensive.

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Wierzbicki Adwokaci i Radcowie Prawni sp.k. has been dealing with competition law in the real estate sector. Represented one of our clients, among others, in a precedent-setting proceedings before UOKiK concerning the exclusivity clause in the lease contracts. We also offer our support in auditing lease contracts for potential violations of competition law.