

NEWSLETTER

February 2016

When the lease contract may be considered as anti-competitive

We would like to draw your attention to the recently released, especially important, judgment of the Court of Justice of the European Union on the SIA Maxima Latvija against Konkurences padome, C-345/14, in which the Court made an assessment of leases contracts in shopping centers in terms of their competitive nature.

- I. On the basis of EU law and Polish law it is prohibited to conclude agreements which have as their object or effect the elimination, restriction or any other infringement of competition on the relevant market.
- II. With the prohibition on anti-competitive agreements are not excluded contracts for the use of the property or local, including the lease contracts and lease. These agreements may in fact in some cases provide examples of anti-competitive agreements prohibited by law. Often, to this type of contracts are entered the so-called 'exclusivity clauses', granting *de facto* for tenant exclusive pursuit of the activity in the trade building, or guaranteeing to the landlord that the tenant does not start similar activities in a specific area.
- III. This issue is of great importance, as the use of anti-competitive provisions can be the source of the imposition by the competition authority of the high fines, which in Polish reality can reach up to 10% of the revenue earned in the year preceding the year of imposing the fine.
- IV. The imposition of fine took place under a given set of facts, which became the basis of the Court of Justice of the EU ruling. On the Latvian company Maxima Latvija, operating in the retail sector and leading supermarkets, has been applied by the Latvian competition protection authority fine in a considerable height.
- V. According to the competition protection authority in the leases contracts in shopping centers authority concluded by the company, were included anti-competitive provisions granting Maxima Latvija - the tenant - the right to consent to the rental vacancy rate to a third party company.

[What the Court said?]

- VI. Commented judgment of the Court of Justice of the EU was issued a preliminary ruling in response to the request of the Latvian Supreme Court, who dealt with the case in another instance of the fine imposed by the Latvian competition authority for the Latvian company - Maxima Latvija.
- VII. The Court's analysis examined whether the lease contract between the tenant (the store) and the owner of the shopping center, providing that the tenant agrees to provide the rest, non occupied space to other tenants, resulting in itself that the purpose of this contract is the prevention, restriction or distortion of competition within the meaning of art. 101 paragraph 1 TFEU.
- VIII. Responding to a pre-judicial question, the Court confirmed that the so-called 'exclusivity clauses' in lease contracts are not agreements, for which it is assumed that they can be considered detrimental to the proper functioning of competition due to their very nature. In other words, in the Court's view, the use of so-called 'exclusivity clauses' in the lease does not result in 'automatic' that the purpose of the lease contract is a restriction of competition.
- IX. The Court of Justice of the EU in the commented judgment pointed out a method that allows businesses to analyze the compatibility of the provisions of the lease contracts with competition law. In the Court of Justice's opinion, *the impact of the agreement on competition needs to take into account the economic and legal context, in which it is part which together with other agreements can have a cumulative effect on competition.*
- X. Hence, recognizing the so-called exclusivity clause for anti-competitive competition authorities should assess:
 - a) whether the contractual clauses induce anti-competitive effect of restricting access to the relevant market,
 - b) the contractual clauses contribute to a significant reduction of Access to the relevant market.
- XI. In making the assessment presented above should be considered:
 - a) the number and size of existing entrepreneurs (competitors) in the relevant market,
 - b) the duration of the lease (ie. the exclusivity clause),
 - c) the degree of concentration of the relevant market,
 - d) real and tangible opportunities to enter permanently into the impact of commercial (in this aim it should be taken into account the availability and affordability of suitable land for sale located in the areas of commercial

- influence, and economic barriers, administrative and legal standing in the way of the entrance of new competitors in these areas),
- e) other factors, eg. customer loyalty to existing brands on the market.

XII. After a thorough analysis of the problem of the Court of Justice of the EU in the summary it found that *the lease contracts, such as those at issue in the main proceedings can be considered to have the hallmarks of an agreement whose effect is the prevention, restriction or distortion of competition within the meaning of art. 101 paragraph. 1 TFEU, if after a thorough analysis of the economic and the legal context in which these contracts, as well as the specific features of the relevant market, it turns out that significantly contribute to the possible introduction of barriers in this market. This is the extent to which each of the contracts contributes to this entry barriers depends occupied by the parties to the contracts the market position and the time at which contracts are concluded.*

XIII. Due to the large number of different kinds of shopping malls, including in Poland, commented the outcome of the Court of Justice of the EU is of great practical importance, particularly for those who rent retail space. It appears that the judgment of the Court recognizes the so-called exclusivity clause for normal commercial practice, which only exceptionally, after taking into account many of the abovementioned aspects, will be able, in a particular situation, to be considered as anti-competitive.
