

Territorial clauses in retail lease contracts for the first time decided by Czech civil courts and Antitrust Office

Arthur Braun MA
bpv Braun Partners, Prague

Years after the discussion of territorial clauses in retail commercial lease contracts seems to have been settled on the EU level following the *Maxima Latvia* decision^[1] from 26 November 2015, the Czech Republic saw action in that area both in the civil jurisdiction as well as by the Czech Antitrust Office.

As in a similar case in neighbouring Germany, decided by the Bundesgerichtshof in 2016,^[2] this again dealt with retail commercial leases for factory outlet centres.

For decades, similar radius clauses have been common in hypermarkets as well as in outlet centres. Sometimes retail or office tenants also request similar protection from their landlords. Now, for the first time, courts and the Antitrust Office have to decide issues concerning the potential anti-competitive effect of such radius clauses limiting retail tenants in their activity.

The background for the Czech case

As of 2017, the Czech Republic could boast of only two factory outlet centres, one of them in the financially strongest part of the country, the capital of Prague. A third outlet centre near the Prague airport on the west side of Prague opened in April 2018. Nevertheless, the Prague incumbent in Sterboholy on the east side of the town had clauses in its lease agreements prohibiting its most important tenants (the anchor tenants) from selling goods in an outlet under the same brand within 60 or 90 minutes travel from Sterboholy.

The newcomer took issue with this clause, as it seriously threatened the project. In December 2017, the City Court of Prague issued an injunction prohibiting the incumbent from relying on the clause. This injunction was quashed by the High Court in March 2018 on formal grounds, and so the case will have to be decided by the civil court in regular proceedings, which is not expected before the end of 2018.

Nevertheless, in early April 2018 the playing field moved away from the civil courts to the Czech Antitrust Office (proceedings had started earlier). In its decision published on 12 April 2018,^[3] the Czech Antitrust Office issued a fine against the incumbent and declared the radius clause anti-competitive. According to the Antitrust Office, any limitation of sales in the outlet centre within a 60-minute catchment area can have a potential anti-competitive effect and is, therefore, prohibited.

While the fine of a little above one million Czech koruna was probably modest, the declaration of invalidity of the completion clause and the obligation to inform its tenants about this invalidity would have had greater consequences.

This decision is not in final force at the time of writing.

Legally interesting aspects

First of all, it is worth noting that the legally permissible catchment area was defined to be 60 or 90 minutes travelling distance. The German Bundeskartellamt has also confirmed in subsequent court proceedings that the limit is to be 50 km and recommended a maximum duration of five years. It is, of course, harder to determine whether travelling from one corner of Prague to the other, which is certainly less than 50 km, takes more than 60 minutes in peak traffic.

Unfortunately, at least in the published decisions by the courts and the press release by the Antitrust Office, no permissible number was given – unlike the German Bundeskartellamt, where the 50 km is the cut-off for the validity of such clauses.

Interestingly enough, the Antitrust Office did not deal with the intent by the operator of the Sterboholly Outlet Centre to infringe competition (restriction by object) but – following the *Maxima Latvia* preliminary ruling – looked only at potential effects.

Consequences

As the civil court and infringement proceedings are still ongoing, other retailers using similar clauses are still living in legal uncertainty as to the permitted catchment area and will continue to do so for years to come. A distance-based definition of the permitted restriction would be extremely preferable, as any driver in Prague is aware that a trip which usually takes 45 minutes can easily turn into two hours.

And what to tell a real estate lawyer when drafting retail lease contracts with similar clauses? Basically, they should limit the clause in time and make an analysis of the effect of the clause on the market for tenants and consumers. It is best to be clear and not go to the maximum considered to be admissible, as invalidity of the numbers will invalidate the entire clause, not simply reduce the numbers, whether in minutes of travel time or in kilometres.

Most importantly, lawyers drafting retail lease contracts should be cognisant of the competition law issues that may arise.

Notes

[1] Case C-345/14 judgment of the Court of 26 November 2015.

[2] Decision of 7 June 2016, File No KVZ 53/15.

[3] S0041/2017.