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CASE CARD | 8 December 2023

Via FAOC s.r.o. (ÚOHS-S0041/2017/KD)

Non-compete obligation

1. CASE SUMMARY

A. Summary of facts

Via FAOC is an undertaking operating the Fashion Arena Prague Outlet ('Fashion Arena'), which is the largest outlet in the Czech Republic. Via FAOC imposed so-called 'radius clauses' on tenants renting business premises in the Fashion Arena by means of contractual provisions in the lease contracts.

The radius clauses set conditions for opening a store of the same brand in an outlet competing with the Fashion Arena centre within a particular radius of the leased premises. Specifically, Via FAOC prohibited its tenants from concluding a lease agreement in another outlet centre within a 60-minute travel radius from the Fashion Arena. Under these clauses, stores of individual brands maintain exclusivity in a certain area in the respective relevant market.

A competitor of Via FAOC decided to file a complaint with the Office for the Protection of Competition (the 'Czech NCA'). In its original first instance decision, the Czech NCA ruled that the clauses actually restricted competition. On appeal, the Chairman of the Czech NCA decided that this decision lacked substance, making it unlawful. In the final first instance decision, after having conducted a thorough analysis, the Czech NCA finally decided that the radius clauses did not distort competition.

B. Legal analysis

Original first instance decision

In the original first instance decision, the Czech NCA concluded that the radius clauses imposed by Via FAOC were non-compete obligations in the sense of the VBER.

As to the facts, the contested radius clauses led a number of tenants renting business premises in the Fashion Arena to reject an offer to open a store in the POP Airport Outlet, which was a market entrant at that time, operated by a competitor of Via FAOC.

According to the Czech NCA, the radius clauses could have negative effects on consumers who, in the absence of the contested radius clauses, could have benefited from the possibility to choose between more outlet centres and from the greater variety of goods. For this reason, the NCA concluded that the radius clauses restricted the

ability of Fashion Arena's competitor to effectively enter the market.

The NCA agreed with Fashion Arena's objection that the radius clauses could not be deemed restrictive of competition *by object*. However – despite this statement – the NCA *de facto* treated them as such. It did not conduct a thorough analysis of the actual effects which the non-compete clauses had on the relevant market. The NCA relied on answers of stakeholders to its requests for information as a sufficient basis to assume such negative effects.

In its assessment in the original first instance decision, the NCA emphasized that any undertaking entering a relevant market should be able to implement its entry project under standard competition conditions and, in this particular case, choose goods of brands it would like to directly and/or indirectly offer in its premises (incl. to cooperate with tenants offering goods of specific brands). Such undertaking should not face any restrictions implemented by its competitor that is already present on the market with a purpose to strengthen its market position, or to restrict potential competition by anticompetitive means.

The NCA also considered the importance of the freedom to choose so-called attractive mix of brands for the undertaking entering the relevant market for fashion outlets. Without a possibility to approach resellers of brands that are attractive to end customers, a newly established outlet centre would not be able to attract sufficient customers.

Therefore, according to the original first instance decision, the vertical agreements between Via FAOC and its tenants could actually restrict competition between outlet centres. Whilst the NCA labelled the radius clauses as *by effect* restrictions, it treated them as *by object* restrictions.

Appeal decision

On appeal, the Chairman of the Czech NCA did not agree with the NCA conclusions and overturned the original first instance decision. In his opinion, the NCA failed to adequately demonstrate the likelihood of actual anticompetitive effects of the radius clauses given the potential size of the relevant market.

The Chairman held that the (scarce) evidence used by the NCA could hypothetically indicate a negative impact on competition if the radius clauses restricted 'must have' brands from the perspective of outlet operators.

However, according to the Chairman, the NCA failed to carry out an assessment of the desirability of respective brands, or to independently verify the allegations of the complainant that it was restricted in competition against Via FAOC as a result of the non-compete clauses.

Consequently, the NCA treated the radius clauses as *by object* restrictions, although it itself referred to the necessity of the application of the concept of *by effect* restrictions. This resulted in inconsistencies in the NCA's reasoning, making the contested decision unlawful.

The Chairman of the NCA was sent back to the NCA, who was ordered to carry out an analysis of actual effects of the radius clauses on competition, specifically of whether they foreclosed the relevant market and potential market entrants (the POP Airport Outlet).

The Chairman of the NCA emphasized that the *effect* analysis must be carried out to the relevant standard required by the European Court of Justice of the European Union ('ECJ') in *Maxima Latvija* (C-345/14, §26-31).

Final first instance decision

In the subsequent final first instance proceedings, the Czech NCA confirmed that the radius clauses in question needed to be qualified as non-compete obligations which restrict competition *by effect*. In line with the decision of the Chairman of the Czech NCA, it further examined the existence of actual effects of these obligations on competition.

The NCA requested additional information from stakeholders, mainly tenants operating stores in the Fashion Arena. This revealed that only few tenants with the radius clause in their lease contrasts were influenced in their decision to (not) open a store in the POP Airport Outlet. Most of them stated that they were not interested in operating in the outlet operated by the new market entrant wishing to compete with Via FAOC and its Fashion Arena.

The NCA further examined which brands could be considered as 'must have' in outlet stores. The NCA analysed consumer behaviour and requested other outlet centres in the Czech Republic to provide a list of key brands. Based on this survey, the NCA concluded that approximately 3 to 4 key brands are required to open a new outlet centre. The POP Airport Outlet had already 3 stores of 'must have' brands when it opened, so it was not foreclosed from the market as a result of the radius clauses in question.

Based on the above, the NCA concluded that the radius clauses did not distort competition in a way that would have prevented potential competitors from entering the market. Moreover, the POP Airport Outlet had a relatively high market share despite the radius clauses, so it entered the market successfully and the counterfactual would not be different in the absence of the contested vertical non-compete obligations.

The information gathered by the NCA within the market analysis did not support its hypothesis that the radius clauses actually led, or at least could have led, to the market foreclosure. Consequently, the NCA concluded that it had not established a violation of the prohibition of anticompetitive agreements and closed the investigation of Via FAOC without imposing a fine.

2. QUOTES

"*Furthermore, [the NCA] erred in treating the radius clauses in question as de facto agreements restricting*

competition by object, even though it described them in [the original first instance decision] as agreements restricting by effect. In particular, [the NCA] failed to assess the agreements in their actual economic and legal context by not carrying out any analysis of whether the radius clauses have anticompetitive effects in the sense that they foreclose the relevant market or prevent potential entrants from entering the relevant market. In that respect, [the NCA] uncritically accepted the complainant's allegations as its own without objectifying them." (appeal decision, §229)

"*If an agreement is not found to be anticompetitive by object, it must be examined whether it has restrictive effects on competition. Both actual and potential effects must be taken into account. Such agreement must therefore have a likely anticompetitive effect and that effect cannot be presumed. The negative effects on competition must be appreciable.*" (appeal decision, §104)

"*In assessing whether the agreements [concluded by Via FAOC] fall within the prohibition under Section 3(1) of the Czech Competition Act [note: equivalent of Article 101(1) of the TFEU], the NCA followed the binding opinion of [the Chairman of the NCA] in [the decision on the appeal]. According to that decision, two cumulative conditions must be met. First, it is necessary to establish whether it is possible for a potential new entrant on the relevant market to enter that market or increase its existing market share in the economic and legal context of agreements under the assessment. Second, it is necessary to establish to what extent the agreements contribute to the foreclosure of the relevant market, which depends inter alia on the duration of the agreements*." (final first instance decision, §176)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Section 3(1) of the Czech Competition Act

4. PRACTICAL SIGNIFICANCE

The series of decisions has significant practical consequences. The Czech NCA confirmed that it is necessary to assess actual anticompetitive effects of vertical agreements deemed to restrict competition *by effect*. The NCA cannot rely only on information gathered from the complainant, as required by the ECJ's milestone judgment in *Maxima Latvija*.

On the other hand, one swallow does not make a summer. Despite the conclusions of the decision in *Via FAOC*, we can still see that the Czech NCA in several cases attempts to lower the standard of proof so that it does not have to prove an actual effect of conduct on competition in relevant markets. However, the NCA has learned its

lesson and no longer labels investigated practices as *by effect* when taking such simplified approach. It is contestable whether such an approach is correct.