

e-Competitions

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The Cyprus Commission for the Protection of Competition clears the biggest shopping mall in Cyprus of allegations of concerted practices and abuse of dominant position (*Beautyline / The Mall of Cyprus*)

ANTICOMPETITIVE PRACTICES, CYPRUS, DOMINANCE (ABUSE), DOMINANCE (NOTION), DISTRIBUTION/RETAIL, AGREEMENT (NOTION), CONCERTED PRACTICES, MARKET SHARING, RELEVANT MARKET, HEALTHCARE, LIABILITY (GROUP), HIGH MARKET SHARES

Cyprus Commission for the Protection of Competition, *Beautyline / The Mall of Cyprus*, 5139, 16 November 2018 (Greek)

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Introduction

On the 16th of November 2018, the Cyprus Commission for the Protection of Competition (the “**Commission**”), delivered a decision concerning a complaint filed by Beautyline Stores CA Papaellinas Limited (“**Beautyline**”) against the Mall of Cyprus (MC) PLC (“**The Mall of Cyprus**”), in relation to lease agreements entered into between Ermes Group for their stores known as Debenhams and Glow and the Mall of Cyprus. The Commission unanimously decided that there was no infringement by The Mall of Cyprus of Article 3 and Article 6 of the Protection of Competition Laws of 2008 and 2014 (the “**Law**”).

The undertakings involved

The complainant was Beautyline Stores CA Papaellinas Limited, a limited liability company duly registered under the Laws of Cyprus which is active in the retail of cosmetics including perfumes, make up, face and body creams and other related items. The complainant has retail stores which it operates all over Cyprus.

The complaint was filed against The Mall of Cyprus (MC) PLC, a public liability company duly registered under the laws of Cyprus, who is the proprietor and administrator of The Mall of Cyprus Shopping Center, in Nicosia, and is the biggest shopping Mall in Cyprus.

Facts and practice complained of

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On the 11th of April 2017, Beautyline filed a complaint to the Commission against the Mall of Cyprus. The Commission convened on the 13th of April 2017 and unanimously decided on the basis of Section 35 of the Law, that the submitted information was sufficient to examine the allegations regarding the infringement of Section 3 of the Law. Thereafter, the Commission after examining the contents of the report of the Service of the Cyprus CPC (“Service”) unanimously decided to examine the possible infringements of Section 6 of the Law.

The Service on the 20th of September 2018 concluded its-preliminary investigation and submitted its report to the Commission. In the meantime, on the 6th of September 2018, Beautyline filed a request for the withdrawal of the complaint against the Mall of Cyprus, however, the Commission at its meeting on the 24th of September 2018, unanimously decided to dismiss the request for withdrawal and to continue with the examination of the substance of the case.

The subject matter of the complaint was that Beautyline alleged that the proprietor of the shopping mall, the Mall of Cyprus, consistently refused to provide Beautyline with space to operate as a cosmetic store which in effect led to its exclusion from the biggest market in Cyprus and thus placing it in a significantly disadvantageous position, from a competition perspective, because the cosmetic market within the shopping mall was allegedly monopolized by the Ermes group of stores, namely Debenhams and Glow.

Further, Beautyline claimed that the proprietor’s refusal to grant space so as to enable the Beautyline to operate within the Mall constitutes an abusive exploitation of the dominant position that it holds in the shopping center and that the proprietors of the Mall treated dissimilarly two companies namely Hagalund Trading Limited trading under the tradename “INGLOT” and Beautyline that were interested to operate a cosmetic store within the Mall.

Relevant market

The Commission after taking into account the subject matter of the present complaint, unanimously decided that the first relevant product market is defined widely as the market of cosmetics without further segmentation of the market into sub-markets of luxury cosmetics and price and mass cosmetics since the competitors of Beautyline and Debenhams both offer these types of cosmetics and by extension similar products to the consumers through their shops.

Further, the Commission unanimously decided that the second relevant product/services market, is defined as the market for the provision of the right of leasing shopping areas for the purpose of retail sale of products in major shopping malls.

Commission’s decision

On the 16th of November 2018, after taking into account the factual and legal circumstances as analysed and outlined, the Commission, unanimously decided that the agreements between the Mall of Cyprus, Debenhams and Glow shops did not confer collusion or concerted practices which resulted in the restriction of the sale of cosmetics within the Mall, in breach of Article 3(1)(b) of the Law.

The Commission ascertained that there was no clause in the lease agreements between The Mall of Cyprus and the Ermes shops providing for the exclusion of Ermes competitors from the Mall nor any anti-competitive clause and neither existed any exclusivity arrangement between the Mall of Cyprus and the Ermes Department shops. Furthermore, the Commission considered the results, duration, the legal and financial framework of these lease agreements in order to ascertain whether their characteristics could be deemed as abusive or not.

The Commission noted the Mall of Cyprus' submissions to the effect that the duration of the leases of the shops in question was fair and reasonable after taking into account that the leases in question concerned "*anchor tenants*" whose presence is necessary for the functioning of a shopping mall because it guarantees the financial stability of the shopping mall project.

The Commission further ascertained that the market share of the Ermes shops was such that it could not be held that the long duration of the agreements in question created an exclusion in the market which had as a result the restriction of competition.

The Commission decided also that although the Mall of Cyprus holds a dominant position in the market since it is the largest shopping mall in the capital, Nicosia and as such holds a high market share, nonetheless, this factor is not indicative that the agreements concluded with Ermes Group resulted in the restriction of competition.

The Commission noted that freedom of trade is recognized and every business is free to choose its trading partners. The obligation of a dominant business to transact and/or supply its client is subject to the examination of the factual and financial data of each individual case. Therefore, it concluded that infringement of Article 6(1)(b) may constitute the interruption and/or refusal by a business in a dominant position to supply a customer which results in the restriction of competition in a secondary market to the detriment of the consumers.

Further the Commission unanimously decided that the allegation of the complainant that the proprietors of the Mall of Cyprus treated dissimilarly the two companies which were interested to operate cosmetic shops in the Mall of Cyprus is not founded because of the nature of the products and the size and place of the shops.

Finally, the Commission unanimously concluded, that the decision of the Mall of Cyprus not to operate an additional cosmetic store within the shopping mall for reasons of business strategy because it was not necessary, was considered as objectively acceptable by the Commission and therefore, the Mall of Cyprus' decision was not in breach of Article 6(1) of the Law.

Remarks

The Commission's decision is a landmark case because it ascertained that every landlord has the right to the principle known as commercial freedom, which consequently means that every landlord of a shopping Mall may at his own discretion elect which tenants to enter into lease agreements with in order to achieve the biggest possible visitation rate, the highest demand of shopkeepers who wish to be active in the shopping mall as well as the desired "retail mix". However, such principle may be restricted in cases where there are grounds of public interest, which aim to protect healthy competition.

Further, It transpires from the said decision that a landlord cannot be coerced into concluding lease agreements with tenants who they believe would not ultimately be suitable and achieve the best returns for their investment. However, extreme caution and care should be taken by landlords for the existence of any restrictive clauses in their lease agreements which aim to curtail the freedom of the landlord to lease shops within the shopping mall to new tenants who are in competition with existing tenants.

Further, the Commission's decision has provided clarity with regards to the signing of long term lease agreements with 'anchor tenants'. Should the anchor tenants provide comfort and security for the landlord of a shopping Mall, then such long-term lease agreements entered into with anchor tenants can be seen as being a fair and reasonable practice to ensure the financial stability of such a big project.

Moreover, in its decision, the Commission most importantly noted that there was an entry of a new tenant into the Mall of Cyprus with a similar product market to that of the complainant. The Commission found that the Mall of Cyprus was consistent in its way of electing tenants and that there was insufficient evidence to show that the Mall of Cyprus's actions could be interpreted as denying a specific supply to consumers.

It is therefore not only important for a landlord to be careful of what clauses are inserted into a lease agreement but to also consider from an objective point of view, all surrounding circumstances in the relevant product market when electing which tenants to enter into lease agreements with so as to avoid being in violation of the provisions of the Protection of Competition Laws.