

# Some typical negotiated issues: exclusivity and consideration

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# A «large» definition – part 1

## **Restrictive Clauses**

Are common in commercial lease agreements.

Such clauses can limit a landlord's ability to lease property to other tenants, restrict a tenant's business activities to a certain geographical area or control the subleasing of property. Breaching such a clause can often lead to strict contractual penalties.

## A «large» definition- part 2

Restrictive clauses may create barriers to entry, preventing the opening of new business centres or the entry of retailers (tenants) into existing business centres. At the same time, some clauses can limit competition between competitors – both within and between brands.

## Radius Clause

A clause that forbid tenants to open up shops in another outlet center within a certain radius.

### THE CASE

#### Germany - BKA - 2015

- Value Retail Franconia GmbH vs. Bundeskartellamt
- Radius: **150 KM**-/Wertheim – Montabaur:147 km
- Infringement of the German Competition Law

Final decision: (Bundesgerichtshof – Federal Court of Justice)

**Radius  $\leq$  50KM – Exclusivity Duration  $\leq$  5 years**



## Radius Clause

A clause that forbid tenants to open up shops in another outlet center within a certain radius.

### THE CASE

#### Czech Competition Authority -2018-

- Radius: 60 minutes driving distance + specific commercial lease market outside the radius area.
- Decision: *The Clause violates the Czech Act on the Protection of Competition –*
- Nullity of the clause
- Fine of 40k€uro

# Prior Consent Clause (i.e. Veto Right)

**A clause in a lease granting to a tenant of a shopping centre a veto over other potential tenants**

## **THE CASE**

### **EU Court of Justice -2015**

Maxima Latvija vs. Konkurences Padome (Latvian NCA)

EU Court of Justice Preliminary ruling request by the Latvian Supreme Court

The ‘anchor tenant’ had to give its prior consent to the letting of other premises to third parties. This restraint would work as an exclusivity obligation, in the sense that the tenant is given the right to oppose the letting of premises to competing supermarket chains.

According to ECJ, this is not a **Restriction by Object “ its legality under Article 101 TFUE depends on its market impact.”**

# Restricted Use/User Clause

A particular trade, product or business is restricted to a party.

## THE CASE

### Central London County Court - 2014

Martin Retail Group Limited vs. Crawley Borough Council

Forbidden categories of products

*“Groceries, including fresh foods, beers, wines, spirits and household goods “ (i.e. Convenience Goods).*

***The Clause is anti-competitive***

***“the Proposed User Clause, within the context of the current letting scheme, would contravene section 2 of the Competition Act 1998 and the defendant has not satisfied me that it would be an exempt agreement within section 9(1) of that Act.”***

## Restricted Use/User Clause

A particular trade, product or business is restricted to a party.

### THE CASE

**The Hague Court of Appeal -2015**

**Winkelcentrum Ypenburg vs. Corfu**

The lease agreement stated that the Mall Landlord would not rent out any space/shop to a “***shawarma/doner kebab restaurant***”

Referring to Maxima Latvija decision the Court held that a ***clause in a lease banning a shopping mall from renting space to a competing business is not an illegal restriction under competition law.***



# Restricted Use/User Clause

A particular trade, product or business is restricted to a party.

## THE CASE

**The Limburg District Court - 2016**

Bakery+Commercial Centre vs. Supermarket

Forbidden categories of products

restrictions on selling certain

baked goods.

*“Restriction on selling certain baked goods”*

***The Clause is not anti-competitive***

***“a lease agreement which restricted a supermarket within a centre from selling certain types of bread and baked goods was not anticompetitive”***

# **Consideration Clauses in DS Agreements and the impact of omni-channel retail**

## DS Agreements

The consideration clause may be different depending on the type of agreement between the Company and the Operator in Department Stores:

- ☐ Wholesale / selective distribution
- ☐ Concession
- ☐ Shop in Shop (Affido di Reparto)

## Wholesale - selective distribution

The Company acts as a reseller of the Operator's products

The Company purchases the products from the Operator and sells them directly to the customers of the DS with its own personnel according to its experience on sales and promotion of brands.

In these cases the **consideration** for the Company is mainly represented by **the mark-up on the purchase price for the products**

In selective distribution the Company and the Operator may agree on the presence in the DS of one/two employees of the Operator to act as facilitators for the sale of the Operator's products. **For such activity the Company may recognize a fee to the Operator.**



# Concession

The Company grants the Operator with a free loan for the corner/space in the DS.

The Operator takes care of setting up the corner/space at its own costs

The Operator usually hires the personnel and takes care of all payments connected therewith

The Company sells directly to the customers the products of the Operator.

The **consideration** to be paid by the Operator generally includes:

- **Commission fees:** ....% net selling price of the goods with **minimum commission fees** anyhow due irrespective to the sales' amount;
- **Service Fees** - mainly commercial advice, development and promotion of products (usually calculated as a percentage of the turnover)
- **Accessory Fees** - mainly technical services (air conditioning electricity, cleaning etc...)

## Shop in Shop (Affido di Reparto)

The Company leases a shop (branch of business) within the DS to the Operator.

The Operator is allowed to set up the shop.

The Operator sells directly the products to the customers in the DS benefitting of the integration of the leased shop in the DS and of all services offered by the Company.

The **consideration clauses** may provide for:

- **a fixed rent** amount per m<sup>2</sup> + 100% indexation
- **Accessory fees** for the reimbursement of general expenses and services granted by the Company to the Operator which are also established as an amount per m<sup>2</sup>

## Shop in Shop (Affido di Reparto)

Alternatively to the variable rent, contracts may provide for:

- **A percentage rent** amount on net turnover generated in the shop with a **minimum guaranteed rent** anyhow due + 100% indexation
- **Accessory Fees** for the reimbursement of general expenses and services granted by the Company to the Operator.

# The definition of the shop's net turnover

It is a crucial issue especially for the transformation of the traditional retail landscape and purchase methods due to mobile devices, tablets and social media

Contracts usually contain very detailed clauses concerning:

- a) the definition of the shop's net turnover and
- b) the mechanism ruling the exchange of information and verification of the shop's accounts

The cash register of the Operator is often connected with the Company's administration system for a more efficient and effective control on the sales carried out in the shop.



# **The definition of the shop's net turnover in light of the spread of on line sales**

What is correct to calculate in the turnover?

- online sales made at the shop but delivered to the customer's home
- online sales based on promotional codes distributed at the shop
- online sales with delivery at the shop
- online sales with delivery in the reference postal code of the shop

There is still a large debate between owners and retailers on the inclusion of on line sales in the turnover calculation

## **On line sales: main issues during negotiations**

On line sales are not easy to capture although they are normally included in the definition of the turnover, especially in shopping centers contracts:

- Operators objections: (i) online sale imply development and operational costs both digitally and logistically, (ii) they are already included in the base rent;
- On line sales are sometimes made with different companies of the same group of the Operator.

However, consideration clauses in Italian contracts quite often provide for the insertion in the turnover of :

- On line sales made in the shop, through technological devices;
- On line sales delivered at the shop (click and collect sales)

# **New performance metrics of the physical store**

The new role of the physical store brings the need to evaluate the opportunity to consider and include different performance metrics in the consideration clause:

- Click and collect
- Footfall



## CLICK AND COLLECT

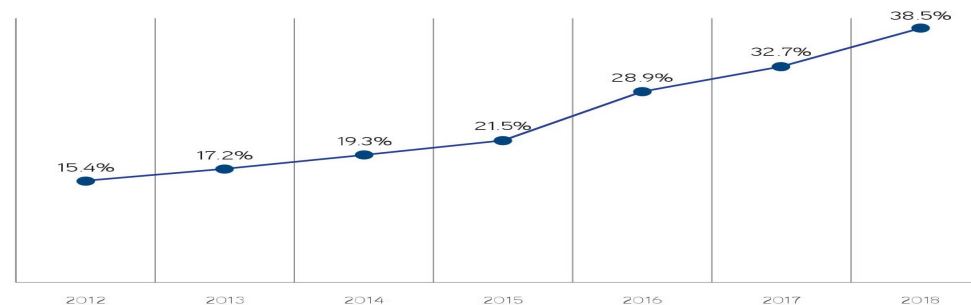
### Stores Are Playing More of a Role in Online Purchases

As online continues to grow, the number of consumers who are picking up online purchases in store is increasing rapidly. The share of consumers who say they regularly use click and collect for online orders has almost doubled over the past five years. Many retailers, like Walmart, have expanded their collect from store services, even offering customers discounts for picking up over having orders delivered.

### Share of Consumers Who Regularly Collect Online Orders from Physical Store

Percentage For Each Year

Source: GlobalData Consumer Panel (n = c5,000 shoppers each year)





What's Driving the [Click and Collect Movement?](#)

### Spending Dynamics of Click and Collect Shoppers In-Store

2017 Full-Year Data

Source: GlobalData Consumer Panel (February 2018, n=6,750)





### Top Five Reasons for Using Click and Collect

Percentage of Click and Collect Users in 2018

Source: GlobalData Consumer Panel (June 2018, n=5,250)

REASON	%
More Convenient Than Home Delivery	57.5%
Enjoy Visiting The Store	39.4%
Cheaper Than Home Delivery	34.7%
Can Get The Item Sooner	30.1%
Can Easily Return The Item, If It Isn't Right	28.8%

## Amazon opens pick-up counters at European retailers



As click&collect has become quite popular with Europeans, **Amazon** is launching its "Counter" service specifically for the European market. Amazon Counter brings Amazon pick-up points to physical retailers. The project will begin in the United Kingdom and Italy, but the rest of Europe is sure to follow.



# Click & Collect: Pros and Cons

## PROS

- (i) customers like it
- (ii) generates increase of footfall in the shop/DS
- (iii) increases income for the shop/DS

## CONS

- (i) The delivery traffic to the DS may significantly increase, the single Operator or the DS should reserve more space to manage the stock related to the click and collect service.
- (ii) Implies a strong technological infrastructure, the Company and Operator's IT systems must be connected and integrated also to detect and trace the goods (and related price) intended for click and collect. This may have a significant impact on costs



# Click and Collect service: impact on the consideration clause

In principle, DS may ask for a consideration for click and collect services:

- a) as part of the turnover of the Operator (preferably in shop in shop, as the Operator sells directly the products)

Example:

*[...] In the calculation of the Turnover must be included all the amounts received or perceived as a result of sales made or services provided in the course of the management of the Business Unit which are referred to or referable to the Operator, **even if the orders are made through electronic means of communication and the products physically collected at the Business Unit.**[...]*

- b) As an additional service rendered to the Operator (e.g. calculated as percentage of the value of the collected products)

# Footfall

Technology is having a great impact on the consumers habits and it is of great importance for retail market players to trace, collect and interpret data from people's access to commercial areas to better understand and, possibly, anticipate their preferences.

Given the new role of the physical store, footfall is an important indicator of how successful a company is bringing people into its stores.

There is a strong debate on how and to which extent such data should be inserted in the consideration clause.



## Footfall conversion rate

One of the key metrics is a store's **conversion rate** i.e. the dividing the number of transactions that are made within a period of time by the **footfall** for the store in that same time period.

Performance	Last Week (\$,£,€)	This Week (\$,£,€)
Sales	5,000	6,300
Footfall	1,000	1,500
Conversion	10%	8.40%

Another example of Footfall rent:

*[....] as consideration, the Tenant will correspond to the Landlord, the higher between the following amounts:*

- a) an amount equal to € [ ....] («the guaranteed minimum»);*
- b) an amount equal to the [ .... ]% of the turnover (the «turnover rent»)*
- c) **starting from the second year of the agreement, an amount resulting from the application on the previous year Annual Rent amount (as below defined), of the percentage increase variation resulting from the average between:***
  - the percentage increase, if positive, of the traffic in front of the shop during the last 12 months compared to the previous twelve months, and*
  - the percentage increase, if positive, of the accesses within the shop during the last 12 months compared to the previous 12 months (the “Footfall Rent”)*

Percentage increase of the passages 12%

Percentage increase of the accesses in the shop 4%

Average  $(12 + 4) : 2 = 8\%$



Are DS trying to implement in their contracts  
new performance metrics

and/or

they better prefer to enhance their customers'  
experience and promote the sales with  
alternative solutions?



International Distribution Institute

**THANK YOU!**

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