

Land Agreements and the Competition Act 1998

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Leases and contracts for the sale of land, as well as other types of land agreement, are currently excluded from the prohibition of anti-competitive agreements contained in the UK Competition Act 1998. This exclusion will cease to have effect on 6 April 2011. After that date, some common restrictions on the use of land could no longer be enforceable and, in certain cases, including them in land agreements could result in potentially substantial fines. On 15 October, the Office of Fair Trading released, for consultation, draft guidance on assessing land agreements for compliance with competition law.

Introduction

Chapter I of the Competition Act 1998 (the "Competition Act") prohibits agreements (whether formal or informal) between two or more businesses which may affect trade in the UK and have the object or effect of preventing, restricting or distorting competition within the UK (the "Chapter I prohibition").

Since the Competition Act came into force, leases, contracts and transfers and certain other agreements relating to land have essentially been excluded from the Chapter I prohibition (the "land exclusion").

In its market investigation into the supply of groceries in 2008, the Competition Commission expressed concern that certain commonly used restrictions on the use of land (such as restrictive covenants and exclusivity arrangements) in the sector were reducing competition in local markets. As well as imposing specific controls on large grocery retailers to address these concerns, the Competition Commission also suggested that there might be merit in revoking the land exclusion altogether.

Earlier this year, the UK Government announced that the land exclusion would be revoked, subject to a one year transition period. The revocation order has now been made and takes effect from 6 April 2011. From this date, companies will have to self-assess land agreements for compatibility with competition law, just as they have to assess other types of agreement.

The Office of Fair Trading ("OFT") was asked to produce guidance to assist in this process. This guidance has been eagerly anticipated, given widespread uncertainty about what impact the repeal of the land exclusion will have on mainstream real estate transactions. The guidance was published in draft form on 15 October. To read it, [CLICK HERE](#).

What sorts of agreements could be affected?

From 6 April 2011, the Chapter I prohibition will apply to all **new and existing** agreements which create, alter, transfer or terminate an interest in land. This includes leases, development agreements, contracts for sale and transfers of land but excludes planning agreements.

The Chapter I prohibition does not apply to agreements where one party is an individual who is not acting as a business. This is intended to exclude residential arrangements but should not be considered a blanket safe harbour for individuals. In particular, some major landowners may be deemed to be carrying out "commercial or economic activities" and therefore to constitute businesses for these purposes.

Which provisions are likely to breach the Chapter I prohibition?

Assessing restrictions in agreements

Land agreements often contain provisions which restrict the way in which land can be used or how a right over land may be

exercised but the OFT expects that only a minority of such restrictions will infringe the competition rules. This will be the case where they have an appreciable effect on competition in the relevant market (which can be the case even in small markets) and do not have sufficient countervailing benefits of the kind which can be taken into account to justify an exemption.

The draft guidance indicates that the OFT is most likely to be concerned about restrictions which keep other businesses out of a market and/or make it more difficult for other businesses to compete. Two key examples of such restrictions are outlined below:

- **Exclusivity arrangements** – where, for example, a landowner agrees with a particular type of tenant not to allow another similar type of retailer to operate from one or more sites owned by a landowner; and
- **Restrictive covenants** – where, for example, the owner of a site (typically a freehold) sells it subject to a covenant preventing any future owner of the land from using it for a purpose which competes with the business of the vendor.

Among the key factors in assessing whether a restriction infringes competition law are the definition of the relevant markets, the parties' position in those markets and the nature of the restriction. For example, if a landlord of a parade of shops enters into an exclusivity arrangement with a tenant planning to operate a bookstore so that other bookstores will not be able to operate from the parade, one important factor in assessing the arrangement under the Competition Act will be whether the relevant market extends beyond the parade of shops so that the tenant may face competition from existing and/or future bookstores operating in the vicinity of the parade.

The draft guidance sets out, in broad outline, how to approach market definition and assess when the countervailing benefits of a land agreement may outweigh its anti-competitive effects, but makes it clear that each situation will be fact specific. Some worked examples are also set out in the draft guidance by way of illustration.

One further point to note is that the impact of a provision cannot be assessed purely by reference to market conditions at the time of entering into the agreement – the assessment may vary throughout the term of the agreement. For instance, taking the bookstore example above, other suitable sites may be available to booksellers seeking to open a store in the vicinity in the first 2 years of the agreement but not in the 3 years following. In such a case, it may be that the provision is not in breach of the Chapter I prohibition initially but becomes so subsequently.

Exclusivity and anchor tenants

One type of restriction on which there has been particular focus in the property world in this context is the grant of exclusivity to an anchor tenant by, for example, the developer of a new shopping centre, guaranteeing that, for a specified period, there will be only one department store in the centre. This is one of the worked examples in the draft guidance and it is recognised that, in this type of situation, the countervailing benefits resulting from the exclusivity could outweigh the anti-competitive effects of the agreement. Whilst consumers might have benefitted from having two department stores, absent the covenant, the tenant might have chosen another site. Without the tenant,

the centre might have attracted fewer retailers and been less viable overall and, without the shopping centre, the area as a whole might have been worse off. In the same way, the draft guidance recognises that a landlord of a shopping centre has sound commercial reasons to control tenant mix and even the location of each type of retailer within the centre, such as by grouping all restaurants within the same zone.

It is important to remember, however, that the restriction in question must be indispensable to achieving the countervailing benefits. This means that a period of exclusivity must not go beyond what is necessary to achieve these benefits.

A fact specific analysis is necessary in each case and the duration should be carefully considered. For example, in relation to subsequent lettings/renewals of leases, it may be difficult to justify a further period of exclusivity unless the tenant makes a further investment in the site.

What are the consequences of breaching the Chapter I prohibition?

A provision which breaches the Chapter I prohibition is unenforceable. In some circumstances, the offending provision may be "severable" from the remainder of the agreement so that other provisions of the agreement can be enforced and, in other circumstances, the whole agreement will be void.

This uncertainty gives parties to the agreement the possibility of resisting enforcement of the entire agreement on the basis that one provision falls foul of the Chapter I prohibition.

“A provision which breaches the Chapter I prohibition is unenforceable”

Parties to an infringing agreement could also face the following sanctions:

- fines of up to 10% of a party's worldwide turnover;
- a direction to terminate the infringement; and/or
- disqualification orders against a relevant company's directors.

It is also possible for parties who have suffered loss as a result of a breach of the Chapter I prohibition to bring private actions for injunctions and/or damages.

Conclusion

The repeal of the land exclusion means that a number of common provisions in land agreements will be at risk of breaching UK competition law. It is therefore important for parties to assess existing contracts for compliance and to take care when negotiating new contracts.

If you would like advice in this area or would like to contribute to our response to the consultation please contact one of the partners named below or your usual contact at Travers Smith.

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