

Review

EU, Competition and Trade team



Chapter I prohibition to apply to “land agreements”

As of 6 April 2011, all restrictions in land agreements (e.g. leases) will be potentially subject to the Chapter I prohibition under the Competition Act 1998, which prohibits (and renders void and unenforceable) agreements whose object or effect is to prevent, restrict or distort competition within the UK. This change will potentially impact many common restrictive provisions in agreements/leases/licences between land owners, tenants, property developers and investors and may have particular impact in certain sectors (e.g. retail, public houses).

Chapter I prohibition and “land agreements”

The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 (the “Exclusion Order”) currently provides a “safe harbour” for land agreements, excluding them from the scope of Chapter I. “Land agreements” include any agreement (or agreement to agree) that creates, alters, transfers or terminates an interest in land, as well as obligations accepted by a party in its capacity as the holder of an interest in land and restrictions accepted by a current landowner restricting the activity that may be carried out from land.

The Exclusion Order was originally adopted to prevent the OFT being overwhelmed with applications for negative clearance of what were assumed to be essentially benign agreements (in terms of their impact on competition in any markets in the UK).

As a result, “land agreements” are currently not exposed to the various risks/penalties applicable to other types of agreements which infringe the Chapter I prohibition – apart from nullity and unenforceability, the possible consequences for parties to agreements which infringe the competition rules include: fines of up to 10% group worldwide turnover, exposure to third party actions for damages, bad publicity, drain on corporate resources, not to mention, for the most serious infringements (e.g. cartels), individual criminal sanction (including prison) and possible disqualification of directors.

Revocation

The Competition Commission (CC) in its April 2008 *Groceries Market Investigation* report found that restrictions in land agreements concerning supermarkets can act as a barrier to grocery retailers wanting to enter or expand in highly concentrated local groceries markets. In its report the CC further observed that the exclusion of land agreements in general from the Chapter I prohibition was an anomaly under the current competition law regime. The Department for Business, Innovation and Skills (“BIS”) responded by launching, in July 2009, a public consultation on the future of the Exclusion Order. This consultation culminated in BIS announcing in January 2010 its decision to revoke the Exclusion Order with effect from 6 April 2011. BIS took the view that there is no longer any practical justification for exempting land agreements from the full effects of competition law, in particular, as it is no longer possible to notify agreements to the OFT for clearance. The OFT supported revoking the Exclusion Order, on the basis that it cannot be assumed all land agreements are not restrictive of competition, so parties should have to self-assess their agreements upfront.

The statutory instrument revoking the Exclusion Order, The Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010, was adopted on 29 June 2010 and comes into effect on 6 April 2011.

“land agreements will be at risk of being unlawful and unenforceable”

Retrospective change

The revocation will apply retrospectively - from 6 April 2011, all land agreements, whether entered into before or after 6 April 2011, will be subject to the Chapter I prohibition. The period between now and 6 April 2011 is intended to provide parties to existing land agreements the opportunity to ensure that any agreements caught by the prohibition are appropriately amended to bring them into compliance.

The sorts of restrictions in land agreements that may be affected by this change include:

- restrictions on the commercial uses of leased property, for example, a landlord preventing a tenant from carrying out certain commercial activity from the leased land, especially if this is to prevent competition for the benefit of other tenants in a development;
- restrictions on landlords preventing them from leasing other premises to certain types of third party tenant, e.g. extracted by an anchor tenant in a mixed-use development guaranteeing that the tenant's competitors will not also be leased premises in the same development; and
- restrictions preventing a landowner from selling adjacent land to a competitor of a buyer.

Impact

Land agreements containing the sorts of restrictions highlighted above will need to be reviewed to ensure they do not infringe the Chapter I prohibition post-6 April 2011.

Whether or not any given land agreement risks infringing the Chapter I prohibition is likely to depend on a series of factors including identifying the relevant economic market affected by an agreement, identifying the structure of such market (which firms are in the set of competitors and what are their respective shares of the relevant market) and taking a view as to whether any restrictions in the land agreement under scrutiny tend to prevent, restrict or distort competition, for instance because they are likely to lead to higher prices, lower quality products, less innovation or higher barriers to future entry/expansion by third parties. Further, if the agreement can be shown by the parties to produce economic and consumer benefits that outweigh any impact on competition, it is possible that the agreement will qualify for exemption from the Chapter I prohibition, provided the restrictions are indispensable to achieving the claimed efficiency, consumers share in the resulting benefit and competition is not thereby eliminated. For example, a property developer of a retail development may, as a commercial reality, require to secure one or more anchor tenants before it can attract other retailers to lease premises. An anchor tenant may only be willing to take up a lease subject to a condition that none of its competitors are to be leased premises within the retail development. Such a restriction, even if caught by the Chapter I prohibition, might qualify for exemption at least for a number of years (although possibly not indefinitely).

The OFT has promised to publish guidelines on how the Chapter I prohibition may apply to land agreements at least 12 weeks before the Exclusion Order revocation takes effect (i.e. by late February 2011).

Next steps

Parties to land agreements potentially impacted by the revocation of the Exclusion Order would be well advised to take advantage of the current transitional period to audit their land agreements (including, inter alia, leases, licences and purchase/development agreements) for compliance issues. It is likely to make sense to await the OFT's promised guidelines (or at least the OFT's consultation draft guidelines) before taking a view on whether a particular land agreement risks infringing the Chapter I prohibition, although already firms could usefully identify which agreements should be included on the list of agreements to be reviewed (either due to commercial importance of the agreement or due to the restrictive nature of the clauses in an agreement) and can already start, in particular, collating the data likely to be necessary to take a robust review on compliance (e.g. market share data).

We would also recommend property firms review their standard terms to ensure that these also comply with competition law for any future land agreements.

“Parties to existing land agreements would be well advised to carry out a review of such agreements”

FURTHER INFORMATION

For further information or advice on any of the issues covered in this Client Alert please contact any of our UK Competition team.

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