

Review



Land agreements now challengeable under competition law

Following a public consultation (on which we reported in our October 2010 Review) the OFT has now published its guidance on the application of the chapter I prohibition under the competition act to “land agreements” (i.e. agreements between businesses which create, alter, transfer or terminate an interest in land) following the revocation of the Land Agreements Exclusion Order (the **Land Agreements Guidance**). From today, 6 April 2011, the exclusion which prevents the application of the Chapter I prohibition of the Competition Act 1998 (**the Chapter I Prohibition**) to land agreements will be removed and restrictions within a land agreement that prevent, restrict or distort competition will be void and unenforceable. Parties to land agreements must now self-assess the competitive impact of existing and future agreements in view of the change in the law, and the Land Agreements Guidance provides detail as to general principles that should be considered when undertaking that assessment. This also means that restrictions in existing land agreements are, as of today, open to challenge of infringing the Chapter I Prohibition.

The OFT has made a number of amendments to the public consultation draft document, and the Land Agreements Guidance provides greater detail on aspects such as market definition, on elements of the Chapter I Prohibition, as well as more detail in the worked examples. We set out below some highlights on other key clarifications included in the Land Agreements Guidance.

- **Minority of restrictions.** The OFT has stated that it recognises there are many legitimate reasons why parties to a land agreement may impose or agree to restrictions regarding the use of land. Further, the OFT expects that only a minority of restrictions will infringe competition law.
- **An agreement is sufficient.** The OFT has not ruled out the possibility of taking enforcement action in a case where the party benefitting from a restriction is not actively enforcing the restriction. The OFT has confirmed that agreeing on a restriction is, in principle, capable of infringing the Chapter I Prohibition of itself even if it is not enforced or challenged (however, see Prioritisation below).
- **Categories of restriction.** The OFT has sought to explain the types of restriction that are more likely to be considered capable of infringing the Chapter I Prohibition and has also described those that do not generally give rise to competition concerns.
 - o **Competitors and restrictive object.** Where parties to a land agreement are competitors and the object of a restriction is for the parties to share markets by territory or type of customer the agreement will “almost invariably” infringe the Chapter I Prohibition.

- o **Market power.** If one or more of the parties to an agreement have some degree of market power¹, and the agreement contributes to creating, maintaining or strengthening that market power, the following restrictions may fall within the Chapter I Prohibition. Generally, these are restrictions that make it more difficult for competitors to enter the market where the land is used, or protect a party from competition:
 - *Exclusivity.* A lease involving a restriction whereby the lessor (e.g. land-owner) agrees not to allow a competitor of the lessee to operate on the land or on other land owned by the lessor, may protect the lessee from competition and foreclose competitors of the lessee. The OFT has indicated that exclusivity provisions have the potential to restrict competition even where the lessee that is offered the exclusivity has been selected by a competitive tender process.
 - *Leasehold user restrictions.* In most cases, a permitted or restricted user clause is unlikely to restrict competition. However, if a land-owner is, for example, active in related markets and seeks to limit the availability of land to downstream competitors (i.e. by restricting use to a particular purpose) this may restrict competition.
 - *Freehold restrictive covenants.* In most cases, a freehold covenant restricting the use of a party's land to the benefit of another party's land will not restrict competition. However, if the clause involves the land-owner stipulating, for example, a type of use in order to limit the availability of land to competitors in a related market, this may restrict competition.
- **Duration of restriction.** The OFT has not set down a specific threshold regarding the appropriate duration of a restriction, highlighting the fact that property investment can involve varying costs and risks such that the commitment of a particular lessee to sign up to a lease may depend on conditions (i.e. exclusivity) being offered by the developer. In short, this remains a case-by-case assessment.
- **UK Block Exemption.** The OFT has the power² to recommend a block exemption order (BEO) to the Department for Business, Innovation and Skills. The effect of a BEO is that certain categories of agreement that fall within the BEO are automatically exempt from the Chapter I Prohibition. The OFT considers there is not sufficient evidence to ascertain whether land agreements warrant a BEO but, importantly, the OFT has stated it will consider the issue going forward.
- **Prioritisation.** The OFT assesses which cases should be taken up for investigation according to published Prioritisation criteria³. On the application of the Prioritisation criteria to land agreements, the OFT has set out in the Land Agreements Guidance a number of principles, which include:
 - o The OFT has not excluded the possibility of prioritising a case involving a land agreement that was entered into prior to 6 April 2011.
 - o It is likely that cases involving a restriction that is being actively enforced are more likely to meet the prioritisation criteria.
 - o It is less likely a case will meet the OFT's Prioritisation criteria where a party has not taken steps to enforce the restriction and has taken steps to amend or modify the land agreement or, if a party is unable to amend the restriction, where a party has recorded in writing that a restriction will not be enforced.
 - o The OFT is unlikely to take further action if none of the parties to the agreement has (or as a result of the agreement obtains) a share of the relevant market which exceeds 30%, although the OFT may nevertheless decide to investigate in such circumstances where there are significant negative effects on competition.

¹ This can often involve a complex legal and economic assessment, in particular, a detailed consideration of the specific characteristics of the market in which the agreement operates.

² Competition Act 1998, s.6 and s.8

³ <http://www.of.gov.uk/news-and-updates/press/2006/146-06>

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- **Penalties.** A breach of the Chapter I Prohibition has a number of possible consequences, including financial penalties, unenforceability of an agreement, private damages actions and director disqualification. The Land Agreements Guidance states that where a party has used best endeavours to amend or remove a clause in breach of the Chapter I Prohibition and has not sought to enforce it the OFT *may* consider this to be a mitigating factor when determining a financial penalty.
 - **Advice.** The OFT has ruled out giving legal advice on the application of UK competition law to land agreements. Businesses must consult legal advisers on any agreements that may raise competition law concerns and consider whether agreements need to be altered or amended. However, the OFT is prepared to provide a Short Form Opinion⁴ regarding a land agreement, providing the necessary criteria are met. These criteria include agreement from the parties to the publication of the Short Form Opinion on the OFT website.

Finally, as would be expected, the OFT has indicated it may be appropriate to review the Land Agreements Guidance in light of developing case-law and OFT decisional practice, but has not committed to when this revision will occur.

For further information or advice on the application of UK competition law to land agreements or any of the issues covered in this Review, please contact any member of our UK antitrust & competition team.

4 <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions/>