

# Land Agreements and competition law – latest guidance

It was announced earlier this year that from 6 April 2011 land agreements will no longer be exempt from the prohibition of anti-competitive agreements in Chapter I of the Competition Act 1998. So companies will have to self-assess land agreements containing restrictive covenants for compatibility with competition law in the same way as they must assess all other types of agreement. This includes covenants in existing documents as well as those made after that date, whether contained in leases, transfers or other property deeds and agreements. Covenants which do not comply will be void and may give rise to other penalties for the parties after next April.

## What might be caught?

The sort of provisions which might infringe the Competition Act include:

- tenant's covenants in a lease restricting their commercial activities - what exactly they may sell at the premises and for what price;
- landlord's covenants in a lease or agreement for lease not to let neighbouring premises to a competitor of the tenant; and
- restrictive covenants in a transfer of freehold land not to sell or let neighbouring land to a competitor of a buyer,

if the effect might be to restrict competition in goods and services in the locality.

## OFT draft guidance

The Office of Fair Trading has now published for consultation draft guidance<sup>1</sup> on the application of competition law to land agreements. The draft guidance provides general advice to companies on the application to land agreements of both the Chapter I (anti-competitive agreements) and Chapter II (abuse of dominance) prohibitions. It focuses on restrictions that affect or limit the way in which the land may be used, or how a right over land

may be exercised. In the vast majority of cases the OFT would not expect land agreements to raise competition problems. The OFT acknowledges that there are many legitimate reasons why a business may impose or agree to restrictions which affect or limit the way in which the land may be used. Accordingly, there is no presumption that a restriction contained in a land agreement constitutes an infringement of competition law.

As most of the advice is of a general and high level nature, the draft guidance may be of limited value to companies seeking to address specific issues in complex land agreements. Nevertheless, there are a number of key points arising out of the draft guidance which may help you to assess whether it is necessary to take professional advice:

- The OFT has expressed concern about restrictions which guarantee one party exclusivity, or protection from competition in a market. For example, an agreement which protects a tenant from facing competing stores within a certain distance or which limits the number of competitors it faces.
- Terms which restrict the process of competition, for example, clauses to stop competitors from using land, can be problematic. In particular, restrictions which are aimed at sharing markets or at making it more difficult for other businesses to compete effectively in a market are likely to give rise to concerns.
- Businesses should be wary of the potential cumulative impact of a series of restrictions in similar land agreements. The OFT would, for example, be concerned about a series of covenants across a shopping centre if they had the cumulative effect of preventing each of the tenants from facing competition within that shopping centre, even though none of the land agreements alone has this effect.
- Restrictions in land agreements in areas where the availability of suitable land or premises is limited (for example because

<sup>1</sup> [http://oft.gov.uk/shared\\_oft/consultations/OFT1280.pdf](http://oft.gov.uk/shared_oft/consultations/OFT1280.pdf)

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of planning restrictions or the need for premises of a certain size/quality), or where the ability to compete in a market requires access to land in a particular location '...such as land in the proximity of a port or transport network', are more likely to be problematic than where there are plenty of suitable alternative premises.

- A restriction on the use of land is more likely to be of concern where the relevant market has a narrow geographic scope. For example, in many retail markets the ability of customers to switch between retailers will be limited to a local level. In contrast, where a market has a wider geographic scope (for example, where the scope is national), it is less likely that a restriction on the use of a particular piece of land will impact on competition in that market.
- The OFT will not be concerned about agreements between parties whose share of the relevant markets do not exceed 10% (if competitors) or 15% (if non-competitors), unless the agreement contains a 'hardcore' restriction such as in agreements to fix prices or allocate customers.

The guidance also includes worked examples of the OFT's likely assessment of a number of basic scenarios involving land agreements and a flowchart summarising the process of self-assessment for companies.

The consultation on this draft guidance will run until January 2011, and the OFT aims to publish final guidance before 6 April 2011 when the exemption for land agreements is revoked.

**Supermarkets:** Some specified land agreements in connection with grocery retailing are subject to the Groceries Market Investigation (Controlled Land) Order 2010. The Order was to address the adverse effects on competition resulting from the control of land by large grocery retailers in areas that were identified by the Competition Commission in its 2008 market investigation report on the supply of groceries in the UK. The Order applies in addition to general competition law.

### Consequences of Breach

An agreement which infringes the Competition Act 1998 is void and unenforceable. It may also attract a fine of up to 10% of the annual turnover and potentially expose an organisation

to claims for damages by customers, suppliers or aggrieved competitors. At the most serious end of the scale, any restriction involving price fixing or market sharing (for example, between landlords) is a "cartel offence" which carries a potential penalty of up to five years imprisonment and disqualification from acting as a company director. All parties to the agreement may be subject to the penalties, not just the party for whose benefit the restriction was imposed.

Prevention is always better than cure so if you think the rules could apply to an existing agreement to which your organisation is a party, it might be wise to consider amending or releasing the restriction before next April.

### More information

If you would like to discuss the draft guidance and its implications for any particular document or agreement, please get in touch with your normal real estate contact at Burges Salmon or with:



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