Competition law to apply to land agreements from April 2011

In April 2011, leases and other agreements relating to land – including those entered into before that date – will be brought within the full rigour of UK competition law. Agreements that affect UK trade and have an appreciable effect on competition within the UK (or part of it) are likely to infringe Chapter I of the Competition Act 1998 and the implications could be severe.

Businesses need to identify any provisions in their leases or agreements that could give rise to such restrictive effects and consider the possible consequences now, in advance of the April 2011 deadline. They should also ensure that relevant staff receive training on the changes.

Background

The Competition Act 1998 came into force in the UK in March 2000. Mirroring similar provisions in the EU, it contains two primary prohibitions (known as the Chapter I and Chapter II prohibitions) outlawing anti-competitive behaviour. The Chapter I prohibition outlaws (among other things) agreements between businesses that could affect UK trade and bring about an appreciable restriction of competition. A breach of the Chapter I prohibition results in any unlawful restrictions, or perhaps even the entire agreement, being void. The Chapter II prohibition outlaws abuse of dominance, and is beyond the scope of this briefing.

In order to protect the Office of Fair Trading ("OFT") against a barrage of unwanted (and mostly unnecessary) applications for clearance or exemption of agreements relating to land, certain agreements that create, alter, transfer or terminate an interest in land, or agreements to enter into such agreements, were excluded from the Chapter I prohibition from the outset. These are referred to for convenience in the remainder of this briefing as "land agreements", and the statutory instrument that gave effect to their exclusion from the Chapter I prohibition is referred to as the "Land Agreements Exclusion Order".

This exclusion is to be withdrawn in April 2011.

From April 2011, the Chapter I prohibition will apply to land agreements in the same way as it applies to any other potentially restrictive agreement within the UK. The prohibition will be capable of applying not only to new agreements but also to agreements that are already in existence as at that date.

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The burden of assessing whether agreements are compliant with competition law now lies with the parties to those agreements (or their advisers), and this is a responsibility that those operating in the property sector will now need to take on.

**Consequences of the withdrawal of the exclusion**

Businesses will need to assess for themselves (with the assistance of their specialist advisers) whether their land agreements could infringe the Chapter I prohibition.

The implications of a land agreement not complying with the Competition Act include:

- the land agreement, or (if they are severable) any unlawful restrictions within it, being rendered void;
- investigation by the OFT (and, if there is a finding of infringement, the imposition of potentially significant fines);
- applications for disqualification of individuals as company directors;
- actions for injunctions and/or damages from those who have suffered loss as a result of the infringement.

**Examples of potentially unlawful restrictions**

Guidance from the OFT on the application of competition law to land agreements is to be provided in early 2011. Arrangements that involve the fixing of prices on which goods or services are supplied, will almost invariably be regarded as infringing agreements and stand virtually no chance of being regarded as exempt from the Chapter I prohibition.

The types of provision within land agreements that could be unlawful (in principle) include:

- a provision restricting particular types of businesses from being able to buy or take a lease of specified premises;
- a provision restricting the use of premises to a particular trade;
- a provision restricting the ability of a tenant to seek permission for a changed use of premises;
- a provision requiring a tenant to source its products from a specified supplier.

However, provisions of these types will not automatically be problematic and in many cases will be entirely legitimate and acceptable.

An agreement that appears to be anti-competitive may not be caught by the Chapter I prohibition in the first place, or it may merit exemption. There are a number of possible reasons why an agreement might fall outside the scope of the Chapter I prohibition:

- The agreement needs to be between two or more "undertakings". This term includes businesses and public sector bodies to the extent that they are engaging in economic activity. A public authority that is fulfilling, in the context of the agreement, exclusively social or statutory functions will not constitute an undertaking. An agreement involving only one undertaking is not subject to the Chapter I prohibition.
• The agreement must affect competition to an appreciable extent. This requires an assessment of the boundaries of the relevant affected market, and whether the agreement affects competition in that market. Just because an agreement contains restrictive terms does not necessarily mean that it will have an appreciable effect on competition. For example if a landlord agrees to a restriction in a lease that prevents the landlord letting adjoining premises to an organisation carrying out the same trade as the tenant (a chemist, say, or a bookshop), the impact of that restriction may be negligible if there is plenty of other property in the vicinity that competitors could use in order to compete with the tenant.

• Provided that the agreement does not contain any so-called “hard core” restrictions (such as provisions fixing prices or sharing markets), an agreement will generally be regarded as not having appreciable effects on competition where the market shares of the parties in relevant markets are below certain thresholds (essentially 10% combined where the parties are competitors, and 15% individually where they are not). Care needs to be taken in ensuring that the relevant markets are properly identified and defined for these purposes. Market definition is a matter of competition economics.

• The agreement could merit exemption as a result of the overall benefits and efficiencies that the agreement produces. An agreement will usually merit exemption if it produces efficiencies that outweigh the restrictions of competition that the agreement entails, provided that there is no less restrictive means available of achieving those efficiencies. However, if an agreement appreciably restricts competition, the burden of proving that the agreement merits exemption lies on the parties to the agreement (or their advisers), and this can require detailed economic analysis and assessment. Specialist advice will be required.

**Action to be taken now**

Businesses need to begin to prepare for the repeal of the Land Agreements Exclusion Order in the following ways:

• Identifying existing land agreements containing potentially unlawful restrictions, and assessing with advisers whether the agreements will be caught by the Chapter I prohibition post April 2011;

• In the case of agreements that may be caught by the prohibition, working out the commercial and practical implications (which could involve seeking amendments to the agreements);

• Extending competition law training to those within their organisations who are responsible for negotiating land agreements;

• Ensuring that competition law issues are taken into account in future transactions, particularly when businesses or properties are being acquired.

**Comment**

In the past many parts of the property sector have had to give little thought to the application of competition law to their agreements. The impending repeal of the Land Agreements Exclusion Order means that this needs to change.

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We are not expecting the repeal to render vast numbers of existing land agreements unlawful and unenforceable, but it is important that businesses understand the circumstances where this could happen, and vital that they have the means to assess going forward where agreements could trigger potentially significant liabilities. We would be pleased to help you to understand the implications of the application of the competition law regime to the property sector.