

# BRIEF UPDATE

FROM THE COMMERCIAL PROPERTY DIVISION  
Commentary by Samantha J Chinn

If you are involved in renewable energy, are a house builder or landlord this may affect you?

## Competition Act 1998 - The Effect on Land Agreements

**With effect from 6 April 2011, the Competition Act (Land Agreements Exclusion and Revocation) Order 2004 will be revoked. This revocation will bring Chapter I of the Competition Act 1998 into effect for all new and existing land agreements. From 6 April 2011, companies will have to self-assess land agreements to ensure that they are complying with the requirements of the Act. This Brief Update focuses on the land agreements that may be affected by the Act together with the consequences of non-compliance.**

### Land Agreements

The Office of Fair Trading (OFT) published draft guidance in October 2010 dealing with the application of competition law on land agreements. The guidance defines land agreements as agreements which create, alter, transfer or terminate an interest in land. Accordingly, land agreements will include dispositions, leases, licences, heritable securities and other property agreements.

Land agreements will only be affected by the Act if they are entered into between businesses, known as 'undertakings'. Land agreements



entered into with individuals who are not acting as a business will not fall foul of the Act. An example of such an agreement would be a business renting a property to an individual.

The Act will apply retrospectively which means that all new and existing land agreements will be affected by the Act. Accordingly, existing agreements should be reviewed to ensure that no provision is breaching the Act. This review should occur on a regular basis to ensure that a provision which was in order when the agreement was created has not subsequently become anti-competitive due to a change in the conditions of the relevant market.

Whether land agreements infringe the Act will depend on the restrictions that they contain and the context in which they are implemented. Restrictions which are aimed at sharing markets or at making it more difficult for other businesses to compete effectively in a market are the most likely to constitute an infringement of the Act. It should be noted that only land agreements which aim to have a negative impact on competition will breach the Act. A land agreement which aims to create competition that would not otherwise have existed does not prevent or restrict competition and accordingly does not infringe the Act.

The OFT has advised that land agreements will not fall within the scope of competition law unless the impact on competition is appreciable. The OFT does not consider that land agreements

between firms can restrict competition unless the aggregate market share of the parties to the agreement exceeds 10% (for competing undertakings) or 15% (for non-competing undertakings) of the relevant market. The two factors to consider when defining the relevant market are 1) the land or business premises together with 2) geographic location .

### Consequences of Infringement

Agreements which infringe competition law may face enforcement action by the OFT who may impose fines of up to 10% of a firm's worldwide turnover and provide directions to take steps to bring the infringement to an end.

A land agreement which contains a prohibited restriction is void and unenforceable. The court may consider that it is appropriate to only make void the specific provisions of the land agreement that breach competition law and to allow the remaining terms of the agreement to remain in force, however, this will not be applicable in all circumstances.

Third parties who suffer loss or damage as a result of anti-competitive behaviour can recover damages. Additionally, the OFT has the power to apply for disqualification of directors in certain circumstances following an infringement.

### Land Agreements Affected

All land agreements may be affected by the Act, however, the following agreements in particular may require amendment prior to 6 April 2011 depending on the circumstances of the relevant market that they operate in:-

- (a) land agreements for renewable energy developments may require amendment in relation to exclusivity clauses;
- (b) land agreements for housebuilders may require amendment where they have imposed restrictions in relation to selling land to a rival housebuilder or in relation to options to acquire further land where the option period is unreasonable; and
- (c) retail leases may require amendment in relation to user restriction clauses where they are prohibiting certain tenants from entering the retail market in order to monopolise the competition. Such a clause may be justified in shopping centre leases in order to provide a wide and varied offer of tenant mix to the consumer.

### Practical Advice

Careful regard will be required to assess whether the particular circumstances of the land agreement may justify a potential restriction on competition. Important factors to consider are (i) whether adequate competition is available in the locality of the relevant market, (ii) whether the market share of the parties is significant enough to have an appreciable effect on competition in the relevant market, and (iii) whether the restriction can be justified by any economic or consumer benefits which may emerge from the potential infringement.

Scrutiny will be required to all new and existing land agreements to ensure that they are compliant with competition law, having regard to the particular circumstances in relation to the relevant market. Further regard should be had to land agreements where an assignment or change in landlord is being considered as this could materially affect the relevant market conditions. We would recommend that parties to land agreements seek further advice on compliance.

### Further Advice

For more information in relation to the above, please contact one of the partners in the Property Services Group.



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