

# A significant and overdue repeal

**Land agreements** will no longer be excluded from UK competition legislation from April 2011, warn *Gillian Sproul* and *Nick Marshall*

The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 will be repealed with effect from 6 April 2011. The order excludes certain types of land agreement from the Competition Act 1998 prohibition on anti-competitive agreements.

The repeal is generally viewed as being overdue. It offers clear confirmation that land agreements will not benefit from special treatment under UK competition law, but are to be assessed for compliance in the same way as any other agreement.

Of key significance is the increased risk associated with agreements that satisfy the conditions of the order but in practice have anti-competitive effects. Until 6 April 2011, the benefit of the order can be withdrawn from such agreements and the parties can be ordered to amend them. On that date, the risk changes radically – the parties immediately become liable for the full range of sanctions for breach of competition law.

## Exclusions to the prohibition

The 1998 Act prohibits agreements that have an anti-competitive effect in the UK. These include not only cartels – which generally involve price-fixing, market-sharing or bid-rigging among competitors – but also exclusivity arrangements, non-competes and other forms of trading restriction.

The order excludes “land agreements” from this prohibition. These create, alter or transfer an interest in land – for example, a freehold transfer, a lease or an agreement with a local authority regarding the use of its land – and contain obligations that protect the land interests of the parties.

This exclusion can be formally withdrawn from an individual agreement that, despite complying with the terms of the order, has anti-competitive effects. The parties can be required to amend the offending provisions. Until this point, however, they are immune from the remedies imposed under the Act:

- the unenforceability of the restrictions in the agreement (possibly the agreement itself, depending on the importance of those restrictions);

- fines of up to 10% of global group turnover; and

- actions for an injunction and/or damages brought by any person suffering loss as a result of the infringement.

Many land agreements contain restrictions that raise doubts concerning

the applicability of the 1998 Act. The exclusion was adopted to allay these doubts and so prevent a flood of land agreements from being notified to the Office of Fair Trading (OFT) under the notification system established by the Act in March 2000. This system enabled the parties to any agreement potentially caught

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by the prohibition to notify the OFT; notification generally protected the parties from sanctions until the OFT reached a decision, so it made sense to notify in cases of doubt.

Four years after the Act came into force, the notification system was abolished, eliminating the rationale for the exclusion. Nevertheless, the exclusion was preserved in order to provide continued certainty for parties to land agreements.

Since 2004, parties to any other type of agreement have had to assess for themselves whether: (i) their agreement is excluded from the Act prohibition because it contains no restrictions on competition; and (ii) if it is not excluded, it qualifies for exemption from the prohibition because the consumer and efficiency benefits it confers outweigh its anti-competitive effects.

## Land agreements caught by the Act

The 1998 Act applies only where an agreement affects competition and trade in the UK. This is reflected in the order. In the main, restrictions in land agreements affect the parties' land interests, not their trading interests, and the Act would therefore not apply. For example, a covenant in a lease that prohibits the lessee from using a residential property as a shop will protect the lessor's land interest by preserving the residential character of the property.

However, some land agreements may protect trading interests and so potentially fall foul of the prohibition. For example, a covenant in a shopping centre lease preventing the lessor from leasing other units to competitors of the lessee protects the latter's trading interests; and a covenant

in an agreement to buy pub premises from a pub chain that prevents the new owner from using those premises as a pub, protects the vendor's trading interests.

In the final report on its inquiry into the market for the supply of groceries in the UK dated 30 April 2008, the Competition Commission (CC) found that some agreements satisfy the definition of “land agreements” protected by the order yet adversely affect competition in local markets in which a limited number of parties compete. In the grocery context, these arrangements involve an agreement, between a landowner or a local authority and a supermarket chain, that no other grocery chains will operate from other land owned or occupied by the landowner or the local authority. Although these may protect interests in land and so meet the criteria in the order, they create a barrier to a new entry to the market and to the expansion of existing players, thereby protecting the trading position of the supermarket chain.

Recognising this anomaly – which can also exist in non-grocery markets – and that the order may have led parties to land agreements to assume that all their agreements were excluded, the CC recommended that the order should be restricted in scope or repealed in its entirety. It was this recommendation that prompted its repeal.

## A significant step

The repeal is significant for parties to agreements that appear to be covered by the order but in fact may have anti-competitive effects.

The 16-month lead-in should allow those parties ample time in which to assess their compliance with the Act. The order will provide a useful benchmark for this assessment, although the practical effect of the agreements on competition will have to be analysed, to ensure that any risks are identified and that the necessary safeguards and corrective measures are put in place before 6 April 2011.

The repeal is also significant in respect of new land agreements. As in the case of other types of agreement, these should be assessed for compliance before signing, to ensure that they do not give rise to competition risks.

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