

Is Your House In Order?

Gary Rocks, Commercial Property Solicitor with Mills Selig discusses the implications for the property industry on the application of the Competition Act to land agreements.

From the 6th April 2011 the provisions of the Competition Act 1998 ("the Act") will apply to all land agreements, which had previously been exempt from its provisions. Some common restrictions on the use of land may no longer be enforceable and to include them in land agreements could result in potentially substantial fines. The Act will apply retrospectively so companies must now assess all existing land agreements to ensure compliance with the Act.

What is a land agreement?

The Act will apply to all land agreements which create, alter, transfer or terminate an interest in land, such as leases, development agreements, contracts for sale, creation of easements and licences. Residential arrangements and those relating to individuals not acting in a business capacity will not be affected.

Who will be affected?

Anyone with an interest in property - landlords, tenants, vendors, purchasers, developers, investors and lenders.

What agreements will be affected?

The types of provisions that are most likely to be affected by the Act include:

- Restrictive Covenants in a Lease which limit the scope and type of commercial activity (to include assignments) a tenant may undertake, if the restriction protects competing interests of the landlord or other tenants;

- Restrictions in a Lease restricting the landlord from letting other premises to a competitor of a tenant;
- Restrictions in a Lease requiring the tenant to obtain certain goods or services from a landlord's preferred supplier;
- Restrictions on a buyer of a property not to use the property for a particular purpose;
- Restrictions on a seller of a property not to sell/lease neighbouring property to a competitor of the buyer.

When are Agreements in breach?

An agreement will only infringe the Act if it prevents, distorts or restricts trade within the relevant market and is capable of having an appreciable effect on competition.

If restrictions are aimed at making it more difficult for other businesses to compete effectively in the relevant market then they are the most likely to constitute infringement of the Act. However in order to properly determine if that is the case, a company will need to consider a number of factors such as, the relevant market the agreement affects, its market share and that of its competitor, barriers to competitors in the market, the nature and context of the restriction and the availability of suitable land.

Even if an agreement is initially compliant with the Act, as market conditions may vary throughout the term of the agreement, an agreement may in time be in breach of the Act.



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Exemptions

An agreement may be exempt from the provisions of the Act if it satisfies all of the following conditions:-

- It contributes to improving production, distribution or promotes technical or economic progress;
- Consumers are allowed a fair share of the resultant benefit;
- The restrictions are indispensable to achievement of the parties' objectives;
- Competition in respect of a substantial part of the products that each of them sell is not eliminated; or
- The combined market share of the parties to the agreement is "de minimis", i.e., below a 10% - 15% threshold

In addition if there are demonstrable pro-competitive benefits arising out of the anti-competitiveness of the agreement it may be argued that the Act should not apply. An example of this would be the grant of exclusivity to an anchor tenant in a shopping centre development. This restriction prevents competitors gaining access to other units in the development and is therefore anti-competitive however the anchor tenant may be vital to secure finance for the development and without exclusivity the anchor tenant would not commit. Without an anchor tenant the landlord will attract fewer retailers rendering the development less viable and possibly impacting on the local economic landscape.

Consequences of breach

If the Act is breached the consequences for a company are:

- The agreement could be declared void and unenforceable;
- A fine of up to 10% of the company's annual worldwide turnover;
- An action for an injunction and/or damages by a third party affected by the breach;
- An application for disqualification of individuals acting as company directors;
- An investigation by the OFT and responsibility for the resultant costs.

What should you do now?

Businesses must assess each case to determine whether their existing land agreements comply with the Act and in order to reduce any risk of breaching the Act they should consider the following measures:

- (i) review existing land agreements that contain restrictive covenants;
- (ii) consider whether to negotiate the removal of covenants benefiting a third party which could be anti-competitive;
- (iii) carry out a competition risk analysis of future land agreements; and
- (iv) provide Competition Law training for employees who negotiate land agreements.

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