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Practice Group:

*Antitrust,
Competition & Trade
Regulation*

Supermarkets' Land Agreements come under closer UK Competition Scrutiny

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On 1 July 2012, the Office of Fair Trading ("OFT") will implement its powers under the Groceries Market Investigation (Controlled Land) Order 2010 (the "Groceries Order") to assess the competitive impact of land agreements entered into by certain larger supermarkets. This means that the OFT is now in a position, in terms of having the relevant software, personnel and procedures, to review such agreements when notified to it and to require the relevant supermarket to release/not to enforce infringing agreements.

Background

One of the concerns identified by the Competition Commission in the course of its market investigation of the groceries sector was that land agreements were being used by the major supermarkets to make it difficult for competitors to enter local groceries markets. This led to a number of changes in the competition assessment of land agreements in all sectors. In relation to land agreements in the groceries sector, it has led to the additional requirements set out in the Groceries Order.

The Groceries Order relates to the following agreements entered into by the designated large grocery retailers:

- restrictive covenants, i.e. agreements which restrict the use of land for the benefit of another plot of land, e.g. a restriction on the burdened land being developed as a grocery store; and
- exclusivity agreements, i.e. arrangements by which a person agrees with a large grocery retailer not to allow another grocery store to operate from the same site or otherwise agrees to restrict or limit the sale of groceries by competitors on the site.

The Process

The OFT's process involves an assessment as to:

- whether the agreement falls within the relevant terms of the Groceries Order (e.g. in terms of the type of agreement, whether a designated large grocery retailer has the benefit of the agreement, whether it has already been examined by the Competition Commission, whether it was entered into in the relevant time period and was not a residential restrictive covenant or related to town and country planning);
- whether the OFT has received all of the information it requires for its assessment; and
- whether the test set out in the "Groceries Order Test" box below is passed.

The process is expected to be relatively streamlined compared to the OFT's review processes under general competition law (in particular Chapter I of the Competition Act 1998). It is also hoped that it will be a more predictable process requiring less time and expense on the part of complainants.

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Powers

If the OFT believes that the test is failed, it will notify the relevant large grocery retailer and the applicant of its provisional decision and allow 20 working days for the parties to respond and may seek further information before coming to its final decision.

If the OFT concludes that the test is failed, the OFT will require (a) a restrictive covenant to be released within three to six months from the date that the retailer is notified of the OFT's decision; (b) that an exclusivity agreement is not enforced from the date which is the later of 30 April 2013 and five years from the date on which the grocery store which benefits from the exclusivity arrangement began trading.

Comment

The OFT has had jurisdiction to bring an enforcement action in relation to land agreements under general competition law since April 2011 (private court actions are also possible), although no cases have been brought as yet. Now that it has concurrent powers in relation to some land agreements under the Groceries Order, there are a range of tools open to parties wishing to challenge potentially anti-competitive land agreements.

If you have any questions as a result of the information contained in this article, please contact Neil Baylis or Jennifer Marsh of K&L Gates LLP.

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Groceries Order Test

- Construct a 10-minute drive-time isochrone around the burdened site (this means identifying the area from which it is possible to get to the site within 10 minutes);
- identify any grocery stores with a sales area of 280 sq metres or more owned by the relevant retailer within 10 minutes' drive-time;
- if no stores are identified, the test is passed;
- if stores are identified, construct a 10-minute drive-time isochrone around each identified store;
- if the identified store has a sales area of more than 1,000 sq metres:
 - in each isochrone, count the number of competing supermarkets of different groups with a sales area of more than 1,000 sq metres;
 - if the number is three or more, the test is passed;
 - if the number is less than three, calculate the share of the identified store's owner of the total sales area of all stores within the isochrone with a sales area of more than 1,000 sq metres;
 - if the share is less than 60%, the test is passed;
 - if the share is 60% or more, the test is failed.
- if the identified store has a sales area of between 280 and 1,000 sq metres inclusive:
 - in each isochrone, count the number of competing supermarkets of different corporate groups with a sales area of 280 sq metres or more;
 - if the number is three or more, the test is passed;
 - if the number is less than three, calculate the share of the identified store's owner of the total sales area of all stores within the isochrone with a sales area of more than 280 sq metres;
 - if the share is less than 60%, the test is passed;
 - if the share is 60% or more, the test is failed.

If any identified store fails the test, the test is failed regardless of whether several other stores have passed the test.