



Chris Robinson

*Legal Consultant
Clarity & experience
in corporate law*

Abuse upon a use

Competition law and user restrictions in leases

This note focuses on the effect of competition law on the negotiation of lease terms.

From April 2011, land agreements (which include leases) lost their blanket exemption¹ under the [Competition Act 1998](#). The [Chapter I prohibition](#) in that Act applies to agreements that prevent, restrict or distort competition to an appreciable extent. An agreement that breaches the prohibition is void, and can attract large fines for the parties.

A common form of restriction in a lease that might infringe the ban is the user clause in a retail lease. Leases normally restrict the use of the premises to a particular purpose, which might be broad or narrow.

The effect on competition must be “appreciable”. If both parties have less than a 10% share of the relevant market, the prohibition is not likely to apply (unless there are “hardcore” restrictions such as price fixing). But defining the market can be tricky, and in the case of retail leases the relevant market may be very local. You cannot tell whether a restriction is permitted just by looking at the clause. Also, you can’t judge it only at the date of the lease: a restriction that was valid could become prohibited due to a change in market conditions.

Where both parties are trading in the same market, restrictions are particularly sensitive and should be looked at individually. For instance, where the landlord is a large retailer, letting smaller units on its own retail estate, any restriction on what those units can sell (with a view to restricting competition with the landlord) should be looked at very carefully. Where the parties are potential competitors and the object of a restriction is to share

¹ Under the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 which replaced the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, revoked by the Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010.

markets by territory, type or size of customer, the agreement will almost invariably infringe the Chapter I prohibition.

If the landlord is not a potential competitor of the tenant, most forms of restricted user clause will not normally infringe the prohibition. The main thing to look for is anything that imposes a restriction on the landlord – usually preventing it from granting leases to competitors of a tenant.

The OFT accepts that restricting use of premises in shopping centres and retail parks is just good estate management, providing a good retail mix. The landlord normally has no interest in restricting competition amongst its tenants, but it wants a thriving estate with a large footfall. Sometimes, though, the landlord will agree not to grant other leases for the same use, or not to permit changes of use, to protect the businesses of tenants from competition. Those restrictions could well be prohibited agreements, if they have an appreciable effect on competition.

However, an agreement is exempt from the prohibition if four cumulative criteria are satisfied:

- The agreement must contribute to improving production or distribution, or to promoting technical or economic progress.
- It must allow consumers a fair share of the resulting benefits.
- It must not impose restrictions beyond those indispensable to achieving those objectives.
- It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The OFT considers that the exemption is capable of applying, for example, where a restriction is essential to attract an anchor tenant to a retail development. The tenant may need to justify substantial investment. Excluding the landlord from bringing in a direct competitor elsewhere in the development could be necessary to achieve that, making the whole development viable and bringing benefits for consumers. But the OFT points out that the restriction should be time-limited, since it must otherwise go beyond what is “indispensable”.

Finally, networks of agreements have to be looked at together. That could include all the leases for one estate, or leases between the same landlord and tenant in different shopping centres across the country.

The OFT publishes a [detailed guide to competition law and land agreements](#) on its website.

Chris Robinson

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