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Client Note:
A Short Guide to Competition Law and Commercial Property

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INTRODUCTION

On 6 April 2011, property agreements, existing and future, became subject to UK competition law prohibiting anti-competitive agreements.

BACKGROUND

Broadly, Chapter I of the Competition Act 1998 prohibits those agreements which have the object or effect of restricting competition. Agreements "relating to land" such as freehold transfers, leases, licences, agreements for lease, transfers of land and development agreements are now covered by Chapter I. Section 106 agreements are not.

UK competition law operates on a "self-assessment" basis, meaning that parties to an agreement must determine for themselves whether its terms will be lawful or could breach the Chapter I prohibition. The process of self-assessment is set out in the attached flowchart from the Guidance issued on 25 March 2001 by the Office of Fair Trading ("OFT").

CONSEQUENCES OF BREACH

Anti-competitive restrictions are void and unenforceable - usually, only the infringing provision rather than the entire agreement. In addition, there is the possibility of a fine, an award of damages and, for the most serious infringements, directors' disqualification.

ANALYSING AN AGREEMENT

The first stage is to define which economic market(s) may be affected by any restriction, which may require specialist advice. After that, the relevant test is whether the agreement "appreciably" prevents, restricts or distorts competition in the market(s).

If it does, it can still be exempt if, broadly speaking, it contributes to technical or economic progress, consumers have a fair share of the benefits, the restrictions are indispensable **and** competition is not substantially eliminated.

Two general types of agreement which are expected to have an "appreciable" impact are:

- agreements between competitors to share/allocate markets; and
- other agreements which substantially "foreclose" a competitor from a market.

AGREEMENTS LIKELY TO RESTRICT COMPETITION

An agreement is more likely to be void where one or more parties has "market power", eg high market share or an entrenched position due to existing barriers to entry. The OFT considers that both exclusivity granted to a tenant and restrictive covenants imposed on the freehold disposal of land **may** restrict competition.

AGREEMENTS UNLIKELY TO RESTRICT COMPETITION

The OFT's examples of agreements which are **not** likely to restrict competition include:

- provisions relating to financial criteria or restricting tenants' alterations, repairs, planning applications, advertisements or hours of use;
- user clauses in leases, unless the landlord is using such clauses to protect itself from competition from its tenants;
- tenant mix policies generally, unless in return for an exclusivity commitment by the landlord; and
- restrictions on neighbouring properties necessary to guarantee the beneficiary's enjoyment of its own property.

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EXAMPLES OF PERMITTED AGREEMENTS

The OFT Guidance (which is only a non-binding guide, reflecting the OFT's currently limited experience of real estate matters) gives seven worked examples which it considers likely to be lawful/valid including:

- the developer of an office complex prohibiting a tenant from opening a shop on the site because this enables the developer to use the land for its intended purpose and to guarantee that other tenants can use the land for its intended purpose;
- a developer agrees a 25 year lease with a department store anchor tenant for a shopping centre, granting exclusivity - either because there is no appreciable restriction of competition (if the shopping centre would not have been developed at all without the anchor tenant) or because it facilitates the building of the shopping centre, increasing choice and competition in the wider area as well as greater footfall and profitability within the shopping centre;
- in the same shopping centre, the developer has a tenant mix policy for small and medium units restricting each unit to a specific use and locating the units only within particular zones because the developer is generally free to determine for itself which retailers can take on leases within its shopping centre; and
- the owner of one of five bookmaker's shops in a town sells off vacant land subject to covenant not to use it as a bookmaker's shop because there is already relatively strong competition from other betting shops in the area.

EXAMPLE OF A PROHIBITED AGREEMENT

The OFT gives the following as an example of what it considers likely to be illegal: a developer of a shopping centre grants exclusivity to a coffee shop, even though the centre could support further coffee shops because this is likely appreciably to restrict competition as it "might be difficult" to argue that the restriction is necessary to attract a single coffee shop operator to trade.

WHEN THE OFT IS LIKELY TO TAKE ACTION

As a matter of enforcement policy, the OFT is unlikely to take action if none of the parties to the agreement has a share of the relevant market (ie the market in which the land in question is used to carry out a retail or other activity) above 30% (unless the agreement itself shares markets between competitors).

FOOTNOTE: MERGER CONTROL

Real estate transactions are also subject to the merger control regime. The OFT is, for example, currently investigating whether Capital Shopping Centres' acquisition in January 2011 of the Trafford Centre in Manchester reduces competition in the market and should be referred to the Competition Commission.

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