

# Land Agreements Exclusion Order

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■ Graeme Parker, 18<sup>th</sup> January 2011

Land agreements are currently excluded from the prohibition of anti-competitive agreements imposed by Chapter 1 of the Competition Act 1998. However from 6 April 2011, this exclusion will no longer apply.

A land agreement is an agreement which creates, alters, transfers or terminates an interest in land. This includes therefore the transfer of a freehold interest in land, and the grant or assignment of a lease.

Certain land agreements in connection with grocery retailing activities are subject to additional controls.

The Office of Fair Trading has issued guidance on the application of competition law following the revocation of the Land Agreements Exclusion Order. This can be viewed at [www.of.gov.uk](http://www.of.gov.uk).

Whether land agreements infringe the Chapter 1 prohibition will depend on the restrictions that they contain and the context in which they are implemented. The Office of Fair Trading expects that only a minority of restrictions will infringe the prohibition.

Land agreements often contain provisions which affect or limit the way in which land may be used, or how a right over land may be exercised. There are many legitimate reasons why a person or business may impose or agree to such restrictions.

For example, the tenant of a shop may agree with the landlord not to alter the character of the building or not to undertake certain activities which could upset the lives of residents in the same area.

There is no presumption that a restriction contained in a land agreement constitutes an infringement of competition law.

In some cases, restrictions in land agreements can have an impact on the way in which goods and services are produced, distributed or traded in certain markets. For example, a restriction preventing a high street retail unit from being used for the sale of the same products that are being sold in the premises next door to it may distort competition in that product market.

An agreement which contains a prohibited restriction is void and unenforceable. In some cases, a Court may consider it possible to sever certain provisions which infringe the Chapter 1 prohibition in a land agreement,

and let other terms of the agreement remain valid and enforceable.

The compatibility of a land agreement with the Chapter 1 prohibition needs to be assessed taking into account present and also future circumstances. An agreement which does not infringe the Chapter 1 prohibition at the time when it is entered into may, subsequently, and as a result of change in its economic context, infringe the prohibition and become void and unenforceable. Considering the possibility of an agreement infringing competition law in the future is important when an agreement can make it more difficult for other businesses to compete effectively in a market.

An agreement will not fall within the scope of the Chapter 1 prohibition unless its actual or potential impact on competition is appreciable.

Assessing the impact of a land agreement will often involve consideration of the related market. This is the market in which the land affected by the agreement is used to carry out an economic activity. For example, when considering a covenant in a lease that prevents the tenant from opening a coffee shop, it will be necessary to consider the impact of that covenant on the market in which a coffee shop would compete. The related market will often be a retail market although in certain circumstances land agreements may also have an impact on competition in other types of market.

In many cases it is also necessary to consider the competitive conditions in the market for land itself. This can be important to determine the availability of suitable land for the use in question when assessing the impact of a restriction over a particular piece of land.

Determining what land is suitable (and over what geographic area) will depend on the scope of the related market. For example, a particular plot of land in a town may be the only site suitable for a distribution centre, but at the same time it may be one of several sites in the town suitable for an office building.

When assessing what impact an agreement has on competition, it is always necessary to consider the specific facts of the case. There is no presumption that a restriction on the use of land is anti-competitive, and the Office of Fair Trading expects that only a minority of restrictions will be anti-competitive.

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