LANDLORDS BEWARE: UK'S COMPETITION WATCHDOG BARES ITS TEETH TO REAL ESTATE SECTOR

It's been a long time coming, but the Competition and Markets Authority (CMA) has recently taken enforcement action in relation to a land agreement for the first time since such agreements ceased to be exempt from the provisions of the Competition Act 1998 (the Act) in 2011. With heavy penalties for non-compliance, as well as the inevitable reputational damage, this regulatory intervention serves as a useful reminder to all landlords and landowners to be mindful of competition law constraints when entering into agreements such as leases, sale agreements, agreements for lease, development agreements and other agreements relating to land.

The Act prohibits agreements that affect trade within the UK and that have the object or effect of preventing, restricting or distorting competition. Offending contractual provisions are void and unenforceable and any organisation found to be in breach can be liable to a fine of up to 10% of global turnover, directors can be subject to disqualification and criminal prosecution, and damages may be payable to any competitors or members of the public who have suffered loss.

Falling foul of the Act can therefore be costly, as Heathrow Airport can testify having just paid a reported settlement fine of £1.6m to the CMA in relation to the inclusion of an anti-competitive clause in a lease of the Sofitel hotel site at Terminal 5. The lease contained provisions which prevented the hotel tenant, the Arora Group, from charging non-hotel users less for car parking than the amount being charged at other airport car parks. Following an investigation the CMA provisionally ruled that this pricing restriction infringed competition law, as a result of which the parties agreed to remove the unlawful provision and Heathrow Airport voluntarily agreed to pay a fine of £1.6m (reduced from £2m on account of the settlement). It remains to be seen whether either party will face private legal action from disgruntled drivers who can demonstrate that they paid more for their car parking as a result of the unlawful arrangement.

Aside from being the first time that the CMA has taken enforcement action in relation to a land agreement, this investigation is also noteworthy for a number of other reasons:

Key issues

- Landlord and tenant found to be in breach of competition law by including provisions in a lease which restricted the price chargeable by the tenant in respect of car parking spaces at the demised premises.
- Competition regulator took action even though the relevant clauses had never been enforced by the landlord and the lease had been entered into before land agreements became subject to the provisions of the Competition Act 1998.
- Landlords should examine existing agreements to assess compliance with competition law and take steps to ensure that staff are aware of what is legally permitted to be included in future agreements.

- it demonstrates that the provisions of the Act apply to arrangements that pre-date the removal of the exemption for land agreements in 2011, as the Sofitel hotel lease was entered into several years before this in 2005;
- the breach was actionable even though, according to Heathrow Airport, the pricing restriction was never monitored or enforced and therefore there was no evidence of any customers of Heathrow or the Sofitel suffering any adverse effects; and
- despite being a party to an anti-competitive agreement, the Arora Group was not fined as the investigation arose as a result of the Arora Group reporting the arrangement to the CMA, for which it was granted immunity under the CMA's leniency programme (which is designed to incentivise organisations to co-operate if they think that they might have been involved in anti-competitive behaviour).

So what should landlords and landowners do to manage the risks associated with the potential application of competition law to land agreements?

In terms of historic non-compliance, landlords and landowners should assess whether they are party to any agreements which contain unlawful provisions – even if these agreements pre-date 2011 and even if the relevant rights and obligations are not enforced in practice. If in doubt they should consult their legal advisers and, in cases where a breach is suspected, consideration may be given to self-reporting to the CMA in the hope of receiving immunity or reducing the potential penalties.

To help mitigate the risks of future non-compliance, landlords and landowners should ensure that all of their employees and advisers are aware of the existence of the Act and have at least a basic understanding of how competition law can affect freely negotiated contractual provisions in land agreements. A price-fixing clause is an obvious example of a provision that might be susceptible to regulatory challenge, as is a sale agreement between competitors aimed at sharing or carving-up markets. But in most instances it is less obvious whether the relevant provisions are on the right side of the line or not. Provisions that restrict the way in which land may be used or how a right over land may be exercised are often an integral part of estate management (e.g. restricting the permitted user under a lease) but they may, depending on the context and the market position of the parties involved, be unlawful (e.g. where a landlord agrees not to allow a competitor of the tenant to operate on other land that is owned by the landlord or where a seller of land imposes a restrictive covenant on the land to prevent it from being put to a competing use after the disposal).

The potential effect of mandatory legal provisions such as the Act also reinforces the need to include a severance clause in all contractual agreements: since any prohibited provisions will be void, the inclusion of a properly-worded severance clause should enable a Court to uphold and enforce the remainder of any affected agreement.

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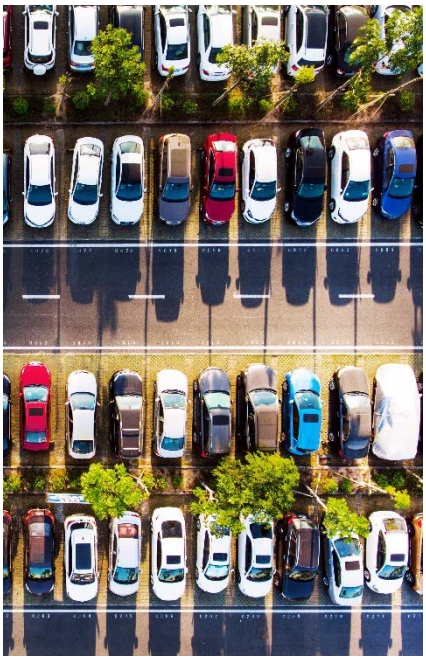

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