

**Response to the Department  
for Business, Innovation &  
Skills Consultation on the Land  
Agreements Exclusion and  
Revocation Order 2004: a  
consultation on the Order's  
future**

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# 1 INTRODUCTION

- 1.1 This paper sets out the response of the Office of Fair Trading (OFT) to the Department for Business, Innovation & Skills (BIS) consultation on the Land Agreements Exclusion and Revocation Order 2004: A consultation on the Order's future.
- 1.2 The Land Agreement Exclusion and Revocation Order 2004 (the 'LAEO') has the effect that certain agreements concerning an interest in land are excluded from the Chapter I prohibition of anticompetitive agreements of the Competition Act 1998 (the 'CA98'). However, land agreements are already subject to Articles 81 and 82 of the EC Treaty provided that they may affect trade between Member States.
- 1.3 In its report on 'The supply of groceries in the UK market investigation', the Competition Commission (the 'CC') found that the control of land by incumbent retailers in highly-concentrated local markets acts as a barrier to entry, by limiting entrants' access to potential sites for new larger grocery stores. As a consequence, the CC recommended, *inter alia*, that the LAEO be amended so that certain exclusivity arrangements which restrict grocery retailing should no longer benefit from the exclusion. The CC, however, went on to comment that there may be merit in revoking the LAEO in its entirety as it was 'something of an anomaly in the current competition regime'.
- 1.4 BIS is now consulting on three options:
- Option 1: Make no change to the LAEO.
  - Option 2: Amend the LAEO to remove its application to exclusivity arrangements in the grocery sector.
  - Option 3: Repeal the LAEO altogether.

1.5 BIS' preferred option is option 3. This is essentially because:

- The Government is committed to competition as an essential characteristic of fair and open markets, driving productivity which brings benefits for both businesses and consumers. Competition law should therefore apply widely across the economy and any exceptions should require clear justification.
- It is not obvious that the LAEO is justified. The CC identified agreements in the grocery sector that may be detrimental to competition. There may be agreements similarly detrimental to competition in other sectors.
- Whether or not an agreement does adversely affect competition depends upon an assessment against the specific circumstances and characteristics of the relevant market.

1.6 The OFT welcomes the consultation and broadly supports the proposals and analysis contained therein.

## **2 THE LAEO**

- 2.1 The background to the LAEO is discussed at paragraphs 3.1 to 3.8 of the consultation document. The LAEO is available at:  
[www.opsi.gov.uk/si/si2004/20041260.htm](http://www.opsi.gov.uk/si/si2004/20041260.htm)

### **3 LAND AGREEMENTS ARE CAPABLE OF BEING ANTICOMPETITIVE**

- 3.1 Because land agreements are currently excluded from the Chapter I prohibition, the OFT does not have any significant experience in this area. However, the CC demonstrated in its report that certain land agreements acted as a barrier to entry and had an adverse effect on competition in concentrated local grocery markets.
- 3.2 Furthermore, in the CAMRA super-complaint response,<sup>1</sup> the OFT noted that restrictive covenants imposed by pub companies on the sale of pubs in order to prevent or limit their future use had the potential to harm consumers. In that case the OFT ultimately concluded that the use of restrictive covenants by pub companies would be unlikely to give rise to a significant adverse effect on competition.<sup>2</sup> However, the OFT stated that its response to the super-complaint did not preclude further action being taken by the OFT in future in relation to the use of restrictive covenants, in particular if such practices became more persistent and widespread.
- 3.3 In principle, there is no reason for believing that land agreements are more or less capable of having anticompetitive effects than any other agreement. The vast majority of land agreements are entered into for legitimate reasons and have no anticompetitive object or effect. However, the same is also true for the vast majority of agreements between

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<sup>1</sup> See [www.offt.gov.uk/news/press/2009/127-09](http://www.offt.gov.uk/news/press/2009/127-09)

<sup>2</sup> This was on the basis that: a) restrictive covenants were not being used in a significant proportion of pub disposals by pub companies which tie over 500 pubs in the UK; b) certain of those pub companies had recently stated that restrictive covenants would not be used in future; c) there generally appeared to be a high level of competition between pubs at a national, regional and local level and some parties had referred to the relative ease of opening new pubs in certain areas.

undertakings.<sup>3</sup> It is for the undertakings concerned to assess for themselves whether their agreements comply with the Chapter I prohibition and, if they do not, to amend or abandon them as the case may be.

3.4 For these reasons, the OFT supports option 3, i.e. to revoke the LAEO altogether. Option 2, i.e. to amend the LAEO so that it would not apply any longer to exclusivity arrangements in the grocery sector, would give rise to unnecessary complications in defining the agreements that are not covered by the LAEO. Furthermore, under option 2, land agreements other than those not covered by the LAEO would still be excluded from the Chapter I prohibition although they may have the object or effect of restricting competition and may not fulfil the conditions set out in section 9 of the CA98.<sup>4</sup>

3.5 The OFT notes that the revocation of the Order may have the effect of increasing the number of complaints made to the OFT. However, the OFT agrees with BIS in that the current regime does not rule out the possibility of complaining to the OFT. In fact, the OFT has the power to withdraw the benefit of the exclusion if it considers that any agreement would infringe the Chapter I prohibition if it were not covered by the LAEO. If the LAEO is revoked, the OFT will assess any complaints relating to land agreements under its prioritisation framework as it currently does with all other complaints.

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<sup>3</sup> The term undertaking is not defined in the EC Treaty or in the CA98 but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed.

<sup>4</sup> Section 9 of the CA98 provides that an agreement is exempt from the Chapter I prohibition of the CA98 if four conditions are fulfilled: 1) the agreement contributes to improving production or distribution or promoting technical or economic progress; 2) it allows consumers a fair share of the resulting benefit; 3) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; 4) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

## **4 FURTHER OFT WORK IN THIS AREA**

- 4.1 In the consultation paper, BIS states that, if the LAEO is revoked, it expects the OFT to issue guidelines on how the Chapter I prohibition applies to land agreements. The consultation paper further suggests that such guidelines should be in place around twelve weeks before the revocation Order comes into force.
  
- 4.2 The OFT fully understands the importance of legal certainty for business. To this end, the OFT has published a set of guidelines covering all the main aspects of the competition regime. If the decision is made to revoke the LAEO, the OFT will carefully consider the benefits of issuing further guidance and what form such guidance should take.