

**GOVERNMENT RESPONSE TO THE  
CONSULTATION ON THE  
COMPETITION ACT 1998 LAND  
AGREEMENTS EXCLUSION AND  
REVOCATION ORDER 2004**

JANUARY 2010

## **DECISION TO REVOKE THE COMPETITION ACT 1998 (LAND AGREEMENTS EXCLUSION AND REVOCATION) ORDER 2004**

### **Introduction**

1. This document sets out the Government's conclusions on whether to amend or revoke the Order made under the Competition Act 1998 which currently excludes land agreements from the effect of the general prohibition on anti-competitive agreements contained in Chapter I of the Competition Act 1998. The effect of that exclusion is that land agreements, as defined in the order, are deemed compatible with from the prohibition unless and until the Office of Fair Trading (OFT) specifically withdraws the benefit of the exclusion from a particular agreement.
2. Full background information on the original purpose of the Land Agreements Exclusion Order<sup>1</sup> and on the reasons for now examining whether it should now be amended or repealed was provided in the consultation document on the Order's future published by BIS on 29 July 2009. The document may be found on the BIS website at <http://www.berr.gov.uk/consultations/page52385.html>. In short, the decision to introduce the exclusion was made on largely practical grounds. There was a concern that at the inception of the new competition regime brought in under the Competition Act 1998, a large number of land agreements could be notified to the OFT for approval. It was considered that the vast majority of these agreements were not likely appreciably to restrict, distort or prevent competition in the UK or a significant part of the UK and therefore would not breach the Chapter I prohibition. Providing certainty about the position of land agreements through an exclusion order would avoid a situation where the OFT was having to deal with a large number of precautionary notifications of benign agreements rather than focusing on matters of genuine competition concern, such as cartels.

### **Consultation**

3. The consultation posed a number of questions seeking to elicit views on the pros and cons of three options for the future of the Land Agreements Exclusion Order. It indicated that the Government's initial view was that the exclusion is no longer necessary and that its continued existence is inappropriate.

### **Responses to the consultation**

4. We received 15 written responses including from large retail businesses, legal advisers, representatives of the retail property sector, Government organisations and a number of parties representing small business and the beer and pub sector. Most expressed agreement with the Government's view that the exclusion is no longer necessary or appropriate and should be revoked. However, two respondents argued in favour of retaining the order on the basis that it continues to have a beneficial effect of providing certainty to businesses and avoiding unnecessary burdens arising from

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<sup>1</sup> A Link to the Exclusion Order (as amended in 2004) is available at:  
<http://www.opsi.gov.uk/si/si2004/20041260.htm>

having to self assess agreements for compatibility with competition law and that its existence was not likely to result in a negative impact on effective competition in markets.

#### **Arguments put forward in favour of retaining the exclusion order**

5. The main arguments put forward for retaining the exclusion were that it remained beneficial in providing certainty to business and that its revocation would impose substantial cost and administrative burdens on parties who would be required to undertake relatively challenging and novel competition analysis in relation to a potentially large number of agreements, whereas at present, parties need only consider whether an agreement is within the scope of the exclusion order. This would be a disproportionate burden given that there are no significant disadvantages arising from the Order's continued existence and that Land Agreements represent negligible risk of anti-competitive outcomes. It was also suggested that repeal of the exclusion would lead to the OFT being asked to advise on or investigate a substantial number of land agreements as people sought clarity about or challenged the validity of particular agreements.

#### **Purpose of the exclusion order**

6. As explained in full in the consultation document, the exclusion order was never intended to provide a safe harbour for agreements that are anti-competitive. It has always been the case that agreements concerning land must be compatible with Chapter I of the Competition Act 1998 and that the OFT could withdraw the benefit of the exclusion from any agreement brought to its attention and found to have the effect of restricting competition in markets. The exclusion order only meant that land agreements did not need to be notified to the OFT for approval. They would be assumed to be compatible with the Chapter I prohibition unless and until found not to be - at which point the benefit of the exclusion would be withdrawn from the relevant agreement.
7. The decision to exclude land agreements from the application of the Chapter I prohibition in the Competition Act 1998 reflected a practical objective. Prior to introduction of the Competition Act, agreements concerning land had been deemed not to be captured by competition law whereas they would be under the new regime. In this context, a specific general exclusion for such agreements was deemed appropriate to reassure parties that any agreement falling within the scope of the order would be compatible with the new legislation unless and until the OFT concluded that it was not. In particular, reassurance on this matter would prevent parties from deluging the OFT with precautionary applications to approve large numbers of agreements.
8. The presence of the exclusion order may well have had the unintended effect of encouraging some parties to believe that there was no need to bother assessing the competition effects of agreements relating to land and others to believe there was no point in challenging the validity of such an agreement.

### **The Government's view**

9. The key matter for the Government to address is whether there is a principled policy reason why it remains appropriate to exclude land agreements from the application of the Chapter I prohibition or whether there remain strong practical reasons for doing so.
10. Our view remains that there is no in principle reason why land agreements should be excluded from the application of the Chapter I prohibition.
11. The Government's aim is to promote effective competition in all markets. Any exceptions to this principle would need clear justification. In the context of its investigation onto the supply of groceries, the Competition Commission has found that land agreements are capable of having anti-competitive outcomes by acting as a barrier to entry into a market. We agree that it seems feasible that such agreements in other sectors of the economy are equally likely to be capable of having such detrimental effects.
12. While it may presently be feasible for the OFT to withdraw the benefit of the exclusion order from any specific agreement that may be brought to its attention, this approach appears liable to discourage rigorous self assessment of land agreements since it means there is no sanction for concluding agreements that are incompatible with the law. The most that can happen if and when the offending agreement is brought to the OFT's attention is that the benefit of the order would be withdrawn and the parties would be required to amend the agreement as necessary to remove those features that restrict competition in markets. This contrasts with the position in all other sectors where the possibility of sanctions acts as a strong incentive to ensure agreements are compatible with the Chapter I prohibition. In addition, while the exclusion order includes a clear definition of what constitutes a "land agreement" for the purposes of the order, there appears reason to believe that its existence promotes the inaccurate assumption that no agreement can ever fall foul of competition law provided it concerns land.
13. We similarly believe there are no strong practical reasons why it makes sense nevertheless to retain the order. Circumstances have changed since the need for an exclusion order was originally identified at the introduction of the Competition Act 1998. Modernisation of competition law in 2004 means parties may no longer seek OFT clearance of agreements. An agreement either complies with the law or it does not. Parties must self assess their agreements to ensure they do not result in a breach of the Chapter I prohibition and if they do, they must amend the agreement accordingly. It may be considered that there was an argument for revoking the exclusion for land agreements at the same time we revoked the exclusion for vertical agreements in 2004. Again, the decision not to do so reflected practical considerations. Whereas revocation of the exclusion for vertical agreements was necessary to ensure UK competition law was compatible with modernised EU competition law, it was not

similarly essential to such compatibility to revoke the exclusion for land agreements. Accordingly, for the sake of simplicity, we decided against addressing at that time the continued appropriateness of the exclusion for land agreements and instead simply left it in place.

14. The OFT acknowledges that revoking the exclusion order may result in an increased number of complaints about agreements that may previously have been considered protected by the order. However, as previously noted, in principle at least it was never the case that the validity of a land agreement could not be challenged on the basis of incompatibility with the Chapter I prohibition. Anyone that considers a land agreement results in a restriction of competition could currently make a complaint to the OFT who would have the power to withdraw the benefit of the order from that agreement if appropriate. It may also be noted that the exclusion order does not any impact on the application of Article 101 of the Treaty on the Functioning of the European Union. While this only applies to agreements that affect trade between EU Member States, the threshold for establishing that an agreement has such an effect is low. Parties to land agreements may be expected to have taken this into account when entering into land agreements.
15. It may also be that there would be a demand for the OFT to provide advice to parties to land agreements about the compatibility of particular agreements with the Chapter I prohibition. 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. It may, however, be that additional guidance will be appropriate to address any novel matters that may be raised by agreements relating to land. The OFT is currently minded to provide updated high level, principles-based guidance on land agreements in order to assist business in assessing land agreements.
16. It may be noted that the OFT's view is that land agreements are no more or less capable of having anti-competitive effects than any other type of agreement and that the exclusion order should be revoked.

#### **The cost burdens arising from reviewing land agreements**

17. Two respondents sought to highlight the costs and burdens that businesses would incur if required to carry out analysis of the impact land agreements may have on competition in markets. They suggest the Government has under-estimated these costs.

#### **The position of existing agreements - no retrospective effect**

18. The other point made strongly by some respondents was that, if the order was repealed, it should not have retrospective effect. We agree that it would only be appropriate to sanction parties to land agreements found to restrict competition from the time the revocation of the exclusion order comes into effect.

19. The other concern raised is that existing arrangements and investments based on exclusivity arrangements and made in the context of the exclusion order could cease to be legal if the order was repealed and that the value of investments would be reduced if those exclusivity arrangements could no longer be enforced.
20. Revoking the exclusion order altogether means the benefit of the exclusion would be removed from existing as well as new agreements. Whilst this could go to the heart of the commercial bargain represented by existing agreements, as noted above, such investments are not currently absolutely protected. When parties enter into agreements that are potentially problematic they know that the exclusion may be withdrawn. Prudent parties may be expected to factor into the value of any investments the risk that the exclusion may be withdrawn in respect of the particular case. While the revocation of the order will affect all potentially problematic agreements in bulk rather than on an individual basis, from the point of the view of the parties this should not make a difference. If an exclusivity arrangement does have anti-competitive effects, it is right that the parties should cease to benefit from it.

### **Restrictive Covenants and Pubs**

21. A number of respondents raised matters relating to the use of restrictive covenants to impose restrictions on the future use of properties that were previously pubs and prevent their future use as a pub. However, it would not appear that such restrictive covenants currently benefit from the Land Agreements Exclusion Order. In paragraph 11.219 of their report on the groceries sector<sup>2</sup>, the Competition Commission said:

*“We understand that whereas the Land Agreements Exclusion Order applies to exclusivity arrangements, it may not apply to restrictive covenants. If the exclusion is to apply, the party benefiting from the restriction in question must hold an interest in the land which is the subject of the agreement. In the case of a restrictive covenant, the party benefiting from the restriction has often sold the land which is the subject of the agreement and therefore the Land Agreements Exclusion Order would not apply.”*

22. It may also be noted that, in the context of its recent response to the super-complaint brought by the Campaign for Real Ale (CAMRA), the OFT considered the competition issues arising from this matter. The OFT concluded that the use of restrictive covenants by pub companies would be unlikely to give rise to a significant adverse effect on competition in markets while indicating that further action in relation to this matter remained possible if such practices became more persistent and widespread.

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<sup>2</sup> A full copy of the CC's final report on the UK groceries sector is available on their website at: [http://www.competition-commission.org.uk/rep\\_pub/reports/2008/fulltext/538.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf)

23. In view of the above, in reaching a decision on whether or not to repeal the land agreements exclusion order, it would appear unnecessary for the Government to undertake further substantive examination of issues around the use of restrictive covenants.

**Amending the order to remove its application to the groceries sector**

24. Most respondents expressed support for the Government's initial view that amending the Order so that it did not apply to agreements concerning grocery retailing raised substantive complications and practical difficulties and risked unintended consequences and incoherence. We remain satisfied that this option is unduly complicated and problematic and that, in any event, the right course of action is to revoke the order entirely.

**Transitional period**

25. Most respondents expressed support for the Government's proposal of a one year transition period before revocation of the order comes into effect. Assuming, the order is revoked on 6 April 2010, this would mean it would cease to have effect from 6 April 2011. This should afford relevant parties sufficient time to undertake necessary assessment of agreements and ensure their compatibility with the Chapter I prohibition.

**Conclusions**

26. We see no justification for retaining this exclusion order. We agree with the Competition Commission's view that requiring enterprises to self assess land agreements for compatibility with competition law, in the same way they must assess other types of agreement, would be wholly beneficial.
27. This is not simply an academic issue or a matter of removing an anomaly from the legal framework for the sake of tidying up the statute book. Ensuring that the prohibitions in competition law apply uniformly to all aspects of the economy is an important objective in its own right. The knowledge that an agreement that restricts competition will not be enforceable and that being party to such an agreement risks the imposition of severe penalties encourages enterprises to take seriously the need to avoid concluding such agreements. Revoking the exclusion order will ensure that parties to land agreements are aware of this regulatory risk and will act accordingly.
28. If a land agreement is reviewed and found in fact to breach the Chapter I prohibition and is subsequently amended, this will benefit consumers. Providing that competition law applies to land agreements in the same way it does to all other agreements should ensure that the benefits of effective competition between businesses are not lost as a result of land agreements that restrict such competition. This should promote fairer and more open markets and a better deal for consumers through improved price, wider choice, greater investment and higher standards of customer service.

29. Revoking the exclusion order will not mean that agreements that were previously legal will become illegal. Only agreements that have the object or effect of preventing, restricting or distorting competition are prohibited under Chapter I of the Competition Act 1998. There is good reason to consider that the vast majority of land agreements, like the great majority of all other types of agreement, will not have any such object or effect and will not, therefore, be prohibited. However, in circumstances where it is clear that land agreements are at least capable of having anti-competitive effects, it is not appropriate that they should be excluded from the application of the Chapter I prohibition. Removing that exclusion will incentivise parties to properly assess the compatibility with competition law of agreements they might otherwise have been perversely incentivised to allow to be put in place. It is important to note that all agreements, whether they are restrictive by object or effect, may in principle benefit from the legal exclusion provided under section 9 of the Competition Act 1998, where the relevant criteria are fulfilled.
30. We recognise that revoking the order will mean that parties to land agreements will need to expend a certain amount of effort and cost in reviewing these for compatibility with the Chapter I prohibition. There are clearly a large number of land agreements in the economy. There is no precise way to measure the number that might need to be reviewed or the unit cost of undertaking such a review. What we can say is that there is no reason to consider the costs and burdens associated with doing this for land agreements are significantly greater than they are for other types of agreement, though there may be some novel matters to be addressed. The principles of competition analysis are well understood. In addition, the OFT would expect to publish revised guidance on the application of competition law to land agreements and this should assist parties in carrying out the necessary work.
31. We consider the burdens associated with undertaking such reviews do not represent a credible, strong reason to retain the exclusion when set against the benefits that arise from achieving consistent application of the Chapter I prohibition on anti-competitive agreements across the whole economy and ensuring that the benefits to consumers from effective competition are not lost.
32. A [final impact assessment](#)<sup>3</sup> considering in more detail the costs and benefits associated with revoking the exclusion order for land agreements is available.

### **Decision and next steps**

33. The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 will be revoked with the effect of the revocation coming into force on 6 April 2011.

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<sup>3</sup> <http://www.berr.gov.uk/files/file54192.pdf>

## **Annex A – List of Stakeholders that responded**

Association of Licensed Multiple Retailers  
Addleshaw Goddard LLP  
British Beer and Pub Association  
British Council of Shopping Centres  
Campaign for Real Ale  
Fairpint  
Federation of Small Businesses  
Herefordshire Campaign for Real Ale  
Horticultural Trade Association  
Independent Pub Confederation  
John Lewis Partnership  
Land Registry  
Office of Fair Trading  
Sainsbury's  
Tesco