

## Summary: Intervention & Options

<b>Department /Agency:</b> Department for Business, Innovation and Skills	<b>Title:</b> Impact Assessment of the Government's response on the future of the Land Agreements Exclusion and Revocation Order 2004	
<b>Stage:</b> Final	<b>Version:</b>	<b>Date:</b> January 2010
<b>Related Publications:</b> The Supply of Groceries in the UK Competition Commission Market Investigation Report (published on 30 April 2008)		

### Available to view or download at:

[http://www.competition-commission.gov.uk/rep\\_pubs/reports/2008/538grocery](http://www.competition-commission.gov.uk/rep_pubs/reports/2008/538grocery)

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### What is the problem under consideration? Why is government intervention necessary?

It is no longer necessary to make special provision to exclude agreements relating to land from the general prohibition on anti-competitive agreements between undertakings that is contained in Chapter I of the Competition Act 1998. Recent changes to European and UK competition law mean the original reasons for providing that exceptional exclusion no longer apply. In particular, since modernisation of competition law in 2005, it is no longer the case that agreements are subject to approval by the OFT so the concern about the OFT being deluged with precautionary notifications of what were, in the great majority of cases, likely to be benign agreements is no longer relevant. The Competition authorities consider that agreements concerning land are no more or less capable of resulting in a restriction of competition in markets than any other type of agreement. In view of this, the Government is satisfied there is no policy reason to retain this unique exclusion from the application of the Chapter I prohibition and that the order should now be revoked.

### What are the policy objectives and the intended effects?

Revoking this exclusion will remove an anomaly and provide for the uniform application of competition law to all agreements. It will also remove the scope for parties to mistakenly believe that agreements relating to land need not be assessed to ensure they do not result in a restriction of competition in markets. It has always been the case that agreements concerning land must be compatible with Chapter I of the Competition Act 1998. The exclusion only meant that such 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. Removing the exclusion will make it clear that land agreements must be assessed for compatibility with the Chapter I prohibition in the same way as must all other types of agreement. The great majority of agreements are compatible with the prohibition. It is only agreements which have the effect of restricting competition in markets that are prohibited.

### What policy options have been considered? Please justify any preferred option.

Option 1- Do nothing i.e retain the exclusion order

Option 2- Amend the Exclusion Order so that it no longer applies to exclusivity arrangements which restrict grocery retailing and which are entered into by grocery retailers.

Option 3- Revoke the order altogether. This is the preferred option that is being taken forward. We are satisfied there is no longer a valid reason to exclude land agreements from the effects of the general prohibition on anti-competitive agreements provided for in Chapter I of the Competition act 1998..

### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy involves revoking an order that we judge is no longer necessary. There would be no formal review of the policy. It remains open to make a new order to exclude particular agreements from the Competition Act Chapter 1 prohibitions as deemed appropriate in future.

**Ministerial Sign-off** For SELECT STAGE Impact Assessments:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister:

..... Date:

## Summary: Analysis & Evidence

**Policy Option: 3**  
**Revocation of the**  
**Order**

**Description: Option to revoke the Land Agreements Exclusion and**  
**Revocation Order 2004**

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups'. It is not possible, to estimate the key monetary costs and annual costs on revoking the Order in its entirety.  There may be one -off costs involved for business to review their terms of agreements for compliance but we have been unable to quantify figures from interested parties following the consultation.
	<b>One-off</b> (Transition)	Yrs	
	£ non quantifiable		
	<b>Average Annual Cost</b> (excluding one-off)		
	£ non quantifiable		
<b>Total Cost (PV)</b>			£
Other <b>key non-monetised costs</b> by 'main affected groups'			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'  Revocation of the Order should lead to improved competition, and better choice for consumers through fairer and more open markets (see below) but it is not possible to quantify this in monetary terms.
	<b>One-off</b>	Yrs	
	£ non quantifiable		
	<b>Average Annual Benefit</b> (excluding one-off)		
	£ non quantifiable		
<b>Total Benefit (PV)</b>			£
Other <b>key non-monetised benefits</b> by 'main affected groups' If agreements are revoked, then this will ensure that the benefits to consumers of ensuring effective competition between businesses are not lost as a result of a land agreement that does in fact restrict competition. This should establish fairer and more open markets which should provide a fairer deal for consumers through improved price, increased choice, greater investment and higher standards of customer service. The requirement to self assess each year will ensure companies have greater awareness of the regulatory risks of anticompetitive practices & ensure a consistent approach across the UK.			

**Key Assumptions/Sensitivities/Risks** Revoking the Order may require a large number of parties to undertake a certain amount of work to assess whether or not their agreements have any substantive effects on the market. However, self assessment of agreements should already be taking place.

Price Base Year	Time Period Years	<b>Net Benefit Range</b> (NPV) £	<b>NET BENEFIT</b> (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		UK	
On what date will the policy be implemented?		April 2011	
Which organisation(s) will enforce the policy?		OFT	
What is the total annual cost of enforcement for these organisations?		£ N/A	
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		No	
What is the value of the proposed offsetting measure per year?		£ N/A	
What is the value of changes in greenhouse gas emissions?		£ N/A	
Will the proposal have a significant impact on competition?		Yes	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium      Large
Are any of these organisations exempt?	No	No	No      No

**Impact on Admin Burdens Baseline** (2005 Prices) (Increase - Decrease)  
 Increase of £ 0      Decrease of £ 0      **Net Impact** £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

### Final Impact Assessment Evidence Base Sheet for Consultation on the Competition Act 1998 (Land Agreements Exclusion & Revocation) Order 2004

#### **A. Strategic Overview and Background to the Consultation**

The Government's policy is to ensure the right conditions are in place to promote rigorous competition between enterprises. This benefits both business and consumers, encouraging efficiency in companies and forcing them to offer consumers the best products and services at the most attractive prices. An effective competition law regime, prohibiting anti-competitive conduct, helps ensure these benefits are achieved.

The Competition Commission (CC) is one of the UK's two independent competition authorities responsible for ensuring healthy competition in markets.

One of the CC's roles is to carry out market investigations, examining markets where there is a concern that they may not be working well for consumers and imposing remedies where appropriate to address situations that significantly damage or restrict competition in markets. If the CC decides such remedies are required, it will consult with relevant parties on the choice and form of these measures and then explain its decisions in its final report.

The CC has the powers to implement remedies itself through exercising its order making powers or accepting undertakings from the parties. Alternatively, the CC may recommend, as in this particular case, that remedial action should be taken by others, such as Government, regulators and public authorities, to remedy the adverse effects on competition (AEC) or any detrimental effect on customers resulting from AEC.

#### **B. The Issue**

In its final report on the supply of groceries in the UK which was published on 30 April 2008 following a two year investigation, the CC recommended that the Government should amend the Competition Act 1998 Land Agreements Exclusion Order so that it no longer applied to exclusivity arrangements which restrict grocery retailing. The Order currently provides exclusion to businesses' land agreements from the general prohibitions of the 1998 Competition Act. However, the CC's findings suggested that in highly concentrated markets, supermarket margins were higher than in non-concentrated ones. In this context the CC found that land exclusivity agreements were capable of having an adverse effect on competition in the groceries sector by preventing the entry of competitors that would put downward pressure on margins. The CC also judged the Order an anomaly in the current competition regime and consider there may be other sectors affected by land agreements capable of having anticompetitive effects.

The Order applies across the UK. However, the scale, geographical extent and a precise definition of which groups (apart from retailers) would be affected are unquantifiable following the consultation exercise. As stated above, the CC has indicated that land agreements may, in certain circumstances, give rise to competition problems in the market they examined (the market for the supply of groceries in the UK) and suggested it is feasible that they might also give rise to similar anticompetitive effects in other markets.

Revoking the Order as recommended by the CC may impose some costs. It has not been possible to identify any precise measure of the extent of costs involved relating to the numbers or types or proportion of land agreements that may need to be reviewed to ensure that these are compliant with competition law. Some responses to the consultation suggested the burden involved was not significant while others suggested we may have under-estimated the level of effort and cost involved.

### **C. Objectives**

The CC believed the Exclusion Order created an inaccurate impression amongst some grocery retailers that land agreements covered by the Order raised no competition concerns. The Order's original purpose in creating an exclusion from prohibition for land agreements stemmed from the concern that there would be significant uncertainty amongst businesses that are parties to land agreements about how the newly amended competition regime established through the Competition Act 1998 would apply to land agreements. Since the belief was that the vast majority of land agreements would not result in any breach of the Chapter I prohibition, it was decided to provide a general exclusion for such agreements to provide legal certainty & to avoid the OFT being overwhelmed with a large number of precautionary notifications of agreements which were not, in fact, likely to raise competition concerns. Agreements would be deemed compatible with the Chapter I prohibition unless and until found not to be so. However, since modernisation of competition law in 2004, it is no longer the case that agreements may be notified to the OFT for approval. Parties to agreements must now self assess their agreements with the possibility of severe sanctions if found to be acting in breach of the law. Accordingly, the original concern about creating unnecessary pressure on the OFT's resources no longer applies.

Removing the Order's application might force some firms to look again at their land agreements and assess whether or not they are indeed compliant with Chapter I of the Competition Act 1998. The CC considered that this process would be wholly beneficial. It will ensure consistent application of competition regime, placing on parties to land agreements the same pressure to act in compliance with the law as is already exerted on parties to all other types of agreement.

Revoking the Order altogether, rather than the alternative of amending it only so that it did not apply to agreements relating to the groceries sector, would also have the benefit of removing the need to define when a land agreement should be deemed to relate to the groceries sector and would remove the problematic scope for debate as to whether or not a particular agreement fell within that definition.

We would expect the OFT to publish new guidance on how land agreements should be assessed against competition law and this should help businesses conduct their self assessments. We also propose a one year transitional period following revocation of the Order to enable businesses to review their agreements before the exclusion from the Chapter I prohibition came to an end.

### **D. Options Identification**

The following three options were considered in the consultation exercise

- Option 1: To retain the Exclusion Order;
- Option 2: To amend the Exclusion Order in the way recommended by the CC so that it does not apply to agreements relating to the groceries sector;

- Option 3: To revoke the Exclusion Order altogether. This was the Government's preferred option.

After consideration of the responses from the consultation exercise, BIS has decided that Option 3 is the most appropriate action to take. The Department's view is that the Order no longer appears to be necessary and should be revoked. Following modernisation of competition law in 2004, businesses are no longer able to notify their agreements to the OFT and are required instead, to self assess their agreements to ensure they are compatible with competition law. In the modernised European and UK competition law regime, based on self assessment, businesses should be self assessing all the agreements they conclude and reaching appropriate conclusions about whether or not they are likely to have anti-competitive effects and be compatible with the prohibition in Chapter I of the Competition Act 1998. In the absence of strong arguments as to why this would be impracticable or have unhelpful consequences, there appears no reason why the principles of competition law should not apply to land agreements in the same way as they do to all other agreements.

## **E. Analysis of options and risks**

### **Option 1. Do nothing i.e. retain the Order**

There are difficulties in presenting the associated costs and benefits of retaining or changing the Order in actual monetary terms. It is not possible to determine the number of agreements in existence that might be considered capable of having anti-competitive effects or how important they are in economic terms or how much of an additional burden on business would be avoided. However, the estimate of the costs to consumers of the adverse effect on competition found in the CC's grocery investigation can serve as an illustration of the impact on consumers that might arise from parties concluding land agreements that do result in anti-competitive effects.

In its investigation into grocery retailing, the CC estimated that the effect of weak local competition on store level profit margins allows large grocery retailers to earn an additional £105-£125 million in profits per year at their larger grocery stores. In its final decision following remittal of the proposed competition test by the Competition Appeal Tribunal the CC estimated that development by an incumbent in a highly concentrated area would cost consumers between £0.2m and £3.1m compared to the incumbent's development being blocked and a rival store expanding its activity. The amount of benefit of the test to consumer depended on whether the incumbent and the entrant developed new stores or extension to existing ones.

The CC believed that the existence of the Exclusion Order created an inaccurate impression among some grocery retailers that any agreements relating to land fell within the scope of the order and raised no such competition concerns. Retaining the order in its current form would only serve to maintain this misconception amongst businesses who may be unaware as to whether their agreements are, or are not in fact, compliant with competition law.

However, the Order was never intended to, and does not, provide a safe harbour for agreements that restrict competition in markets. The benefit of the exclusion could be removed from any agreement at any time if the agreement is found, in fact, to have anti-competitive effects. Parties to land agreements should already be considering their agreements to ensure these do not infringe the chapter 1 prohibitions of the Competition Act.

The CC's report found that, in highly concentrated local markets, agreements which fell under the scope of the Order which restrict grocery retailing are in fact, capable of having an AEC by serving as a barrier to new parties entering the market and to existing parties expanding their businesses. The CC also highlighted in their report, there may be other sectors in respect of which land agreements which currently fall within the scope of the Order may be capable of

having similar AEC and serve as barriers to entry. Retaining the Order in its current form could, lead to restrictions in competition and increased prices, thus impacting on consumer detriment.

### Option 2 Amending the Order

Likewise as stated under option 1, there are difficulties in presenting the associated costs and benefits of changing the Order in actual monetary terms

The CC's report found that, in highly concentrated local markets, agreements (exclusivity arrangements) which fell under the scope of the Order which restrict grocery retailing are in fact, capable of having an AEC by serving as a barrier to new parties entering the market and to existing parties expanding their businesses. To address these concerns, the CC have recommended to Government to consider amending the Order so that exclusivity arrangements which restrict grocery retailing and which are entered into by grocery retailers which were previously within its scope, should no longer benefit from exclusion under the Competition Act.

The benefits of amending the Order in this way stem from the fact that the prohibition on anti-competitive agreements provided for in Chapter I of the Competition Act 1998 will apply to land agreements relating to grocery retailing in the same way that it applies to all other agreements. This will ensure that the benefits to consumers of ensuring effective competition between businesses in the groceries sector are not lost as a result of a land agreement that does in fact restrict competition.

The costs that might arise are those that some businesses could incur in reviewing the land agreements to which they are a party and which they consider may raise competition concerns. The Exclusion Order however, was never intended to, and does not in fact, provide a safe harbour for agreements that restrict competition in markets. As the CC commented in their report on the groceries sector, there appears no longer to be any sound policy reason to exclude this category of agreements from the effects of the prohibition. Forcing enterprises to examine their land agreements to ensure they are indeed compatible with the Chapter I prohibition would be wholly beneficial.

Parties to land agreements should already be considering their agreements carefully to ensure they do not in fact result in anti-competitive outcomes and breach the Chapter I prohibitions of the Competition Act.

### Option 3 – Revoking the Order

As with the previous two options, there are difficulties in presenting the associated costs and benefits of revoking the Order in actual monetary terms.

The benefits of revoking the Order stem from the fact that the prohibition on anti-competitive agreements provided for in Chapter I of the Competition Act 1998 will apply to apply to land agreements in the same way that it applies to all other agreements. This will ensure that the benefits to consumers of ensuring effective competition between businesses are not lost as a result of a land agreement that does in fact restrict competition. This will help to establish fairer and more open markets which should provide a fairer deal for consumers. The requirement on companies to self assess their agreements will ensure that companies have a greater awareness of the regulatory risks of anti- competitive practices and should ensure a consistent approach across the UK.

Other benefits of revoking the Order in its entirety, (rather than the alternative of amending it only so that it did not apply to agreements relating to the groceries sector), would also have the benefit of removing the potentially problematic scope for debate as to whether or not, a particular agreement fell within that definition.

The costs that might arise are those that some businesses could incur in reviewing the land agreements to which they are a party, and which they consider may raise competition concerns. If agreements are assessed and it is found that they would infringe competition law, the parties to the agreement may incur costs in making them compliant. There is no practical way of determining the level of effort and cost associated with undertaking this work. However, any such costs must be weighed against the benefits to consumers and the economy arising from the relevant enterprises re-examining those agreements and ensuring they are compatible with the Chapter I prohibition.

The Exclusion Order was never intended to, and does not in fact, provide a safe harbour for agreements that restrict competition in markets. Parties to land agreements should already be considering their agreements carefully to ensure they do not in fact result in anti-competitive outcomes and breach the Chapter I prohibition. The very fact that we have now re-examined the scope for land agreements to breach the Chapter I prohibition means that all interested parties should be considerably more aware of the need to critically examine whether or not a particular land agreement does or does not result in anti-competitive effects in the knowledge that if it does, it is open to the OFT to remove the benefit of the exclusion order from that agreement. In this way, the additional cost that arises from removing the exclusion order which is the Government's preferred option, could be deemed to be nil.

### **Enforcement**

It would fall to the OFT to take the necessary enforcement action as appropriate against any relevant parties found to have an agreement in place that breaches the Chapter 1 prohibition. Revoking the Exclusion Order simply means that this would apply in respect of land agreements in the same way as it does in relation to any other type of agreement.

### **Implementation**

Following its decision to revoke the Order, BIS will apply for the affirmative procedure through Parliament as required by the Competition Act (under section 71). Usual timescales of at least 6-8 weeks will need to be factored in for this parliamentary procedure.

Further time will also be needed to comply with Departmental procedures. Implementation of guidance will need to be published around twelve weeks before the Order comes into force. We intend to follow the Departmental common commencement dates protocol to enact changes to the Order around April or October. It should be noted that a one year transition period will have the effect of delaying implementation to enable businesses to review their agreements.

### **Monitoring and evaluation**

The Order is being reviewed as a result of the CC's inquiry into the supply of groceries in the UK. The CC identified that the Order might contribute to an AEC and recommended that it be amended or revoked.

Given that the review's aim is to deal with the AEC it will be the role of the competition authorities to monitor the eventual outcome to ensure that the action taken has the desired impact on freeing up markets and opening up competition. However, this is a small measure that is part of a wider package of remedies that the CC is taking forward on restrictive covenants and exclusivity arrangements. The monitoring of these measures will be part of the ongoing role of the competition authorities based on priorities. It is unlikely that the measure would be reviewed again by central Government unless a further recommendation is made by the competition authorities.

The competition authorities undertake their own evaluation exercises to measure the financial impact that their actions have on the UK economy. In light of government's decision to pursue total revocation of the Order as the way forward, the OFT may choose to monitor and review the market conditions at an appropriate point as it deems necessary.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

<b>Type of testing undertaken</b>	<b><i>Results in Evidence Base?</i></b>	<b><i>Results annexed?</i></b>
Competition Assessment	Yes	Yes
Small Firms Impact Test	Yes	Yes
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

## **1. Competition Assessment**

The CC's report found that, in highly concentrated local markets, land agreements which fell under the scope of the Exclusion Order which restrict grocery retailing had an adverse effect on competition by serving as a barrier to new parties entering the market and to existing parties expanding their businesses. The CC recommended to Government that the Order should be reviewed with a view to being amended or revoked entirely.

The CC also believed the Exclusion Order created an inaccurate impression amongst some grocery retailers that land agreements covered by the Order raised no competition concerns. The Order's original purpose was to provide legal certainty to businesses & to avoid overwhelming the OFT with a large number of notifications which did not raise competition concerns.

The government's preferred option is to revoke the Order altogether to the effect that prohibitions on anti-competitive agreements provided for in Chapter I of the Competition Act 1998 will apply to land agreements in the same way that it applies to all other agreements. This will ensure that the benefits to consumers of ensuring effective competition between businesses are not lost as a result of a land agreement that does in fact restrict competition. This should establish fairer and more open markets which should provide a fairer deal for consumers through improved price, increased choice, greater investment and higher standards of customer service.

Other benefits of revoking the Order in its entirety, (rather than the alternative of amending it only so that it did not apply to agreements relating to the groceries sector), would also have the benefit of removing the potentially problematic scope for debate as to whether or not, a particular agreement fell within that definition. In addition, the requirement to self assess each year will ensure companies have greater awareness of the regulatory risks of anticompetitive practices & should ensure a consistent approach across the UK.

Given that the aim of reviewing the Order is to deal with the adverse effects on competition, it will be the role of the competition authorities to monitor the eventual outcome to ensure that the action taken has the desired impact on freeing up markets and opening up competition. However, this is a small measure that is part of a wider package of land remedies that the CC is taking forward.

Removing the Order's application might force some firms to look again at their land agreements and assess whether or not they are compliant with the Competition Act 1998. The CC considered that this process would be wholly beneficial.

## **2. Small Firms Impact Test**

The Exclusion Order for land agreements applies across the UK. However, it has not been possible based on information provided from the consultation exercise to obtain any precise definitions of which groups (apart from retailers) or size of businesses could or would be affected. The CC has indicated that as land agreements, may in certain circumstances, give rise to competition problems in the market for the supply of groceries in the UK then it is possible that they might also give rise to similar anticompetitive effects for land agreements in other sectors.

Other specific impact tests have been considered, including Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Race Equality, Disability Equality, Gender Equality, Human Rights and Rural Proofing. After careful analysis it has been concluded that there is no significant impact anticipated in any of these areas.

### **3. Equalities-related impact tests**

After initial screening as to the potential impact of this policy/regulation on race, disability and gender equality it has been decided that there will not be a major impact upon minority groups in terms of numbers affected or the seriousness of the likely impact, or both.

### **4. Other impact tests**

Other specific impact tests have been considered, i.e Legal Aid, Sustainable Development, Carbon Assessment, Other Environment, Health Impact Assessment, Human Rights and Rural Proofing. After careful analysis it has been concluded that there is no significant impact anticipated in any of these areas.