



Paul Gilbert
Office of Fair Trading
Fleetbank House
1-6 Salisbury Square
London
EC4Y 8JX

20 December 2010

Dear Mr Gilbert

The Office of Fair Trading - Competition Act 1998 (Land Agreements
Exclusion Revocation) Order 2010

Consultation on Draft Guidance

I write on behalf of Accessible Retail (AR), the organisation which represents the property interests of the retail warehouse and retail park sector of the retail industry. AR has over 900 members comprising owners/investors, developers, retailers and advisers, a membership which includes most of the major companies active in the sector. The majority of our member's interests are located in out-of-centre locations, but also, they have significant town centre interests.

The retail industry constitutes a major part of the UK economy accounting for some 8% of GDP and employing nearly 3 million people. Of this, retail warehouses and retail parks comprise some 30% of total retail spend from 3% of all retail outlets and it constitutes the largest part of investment grade retail commercial property with a value in 2010 of some £30.9 billion (compared with £37.9 billion for shopping malls and £30.9 billion for high street shops). Over half of the sector's assets are owned by pension funds. The sector, therefore, constitutes an important part of the economy.

AR believes the Order will have a similar impact across all the main sectors of the property industry and consequently we have discussed the Draft Guidance with colleague organisations including, in particular, the British Property Federation. We are in broad agreement with the views contained in the latter's response and wish to add our full support to it.

In particular, we share the following principal concerns:-

1. The guidance needs to be simple, concise and accessible given that competition scrutiny now applies to land agreements for the first time and the property industry has little experience of them.

2. It needs to be clearer that Chapter 1 of the Act applies to historic land agreements as well as future ones and more information given on how the OFT proposes to police such agreements.
3. A firmer indication is needed on how long exclusion agreements can exist before they infringe Chapter 1 of the Act; it should be made clear that five year exclusion agreements do not infringe Chapter 1 of the Act.
4. Generally, given our sector's unfamiliarity with the Act, more examples showing the impact of the removal of the exclusion would be helpful; in particular, examples should be included exemplifying how the exclusion applies to zones in retail parks.

Regarding the three specific questions you ask, alongside endorsing fully the comments of the BPF, we would emphasise the following aspects.

Question 1: Is this guidance sufficiently clear to assist you in understanding how the law on anticompetitive agreements applies to land agreements in the UK? Is the format easy to follow? If not, what improvements do you suggest we make?

The property industry has little experience or knowledge of competition law. However, it is property owners who largely determine the terms of land agreements offered to occupiers and it is essential that they understand the requirements of the Act. The guidance should be written, therefore, in a manner to make it accessible to property owners rather than (as in the Draft) their legal advisers.

In particular, in view of the potentially significant penalties which might result from infringing the Act, AR members will particularly be concerned to understand how the OFT will operate its prioritisation principles in deciding whether to take action or not, especially the circumstances where it would press for fines of up to 10% of global turnover. More information and examples should be included on this aspect.

A further point of concern is that lease agreements (whether existing or new) which contain a prohibited restriction are 'void and unenforceable'. This will be of serious concern to the property industry where leases are often for a long term and especially so in the retail park and retail warehouse sector where the average rent weighted lease length in 2010 was 14 years (compared with 8-10 years for other leases). With the current difficult lettings market, the maintenance of income is critical and AR urges the OFT to concentrate any enforcement activity on lease agreements signed after 6th April 2011.

Question 2: Are the worked examples in chapter 8 useful in helping you understand the application of the law on anticompetitive agreements? How might they be improved?

Yes. However, it would be beneficial to include more retail examples (see below).

Question 3: Are there any specific areas in the scope of this document where you consider further examples or guidance would be useful?

The draft guidance contains examples that are specific to the retail sector including what the implications are for lease agreements that contain restrictive clauses on where a retail unit is placed. However, they are restricted to shopping centres, although retail warehouses, factory units and retail parks also will be affected by the removed exclusion. AR members would benefit from further examples drawn from these circumstances being included as case studies in the guidance.

If AR can be of further assistance in the compilation of the guidance, please contact me on at the details shown below.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'William McKee', written in a cursive style.

William McKee
Chief Executive

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