Proskauer

UK's Regulators' Unprecedented Enforcement Action Relating to Land

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Summary

Prior to 6 April 2011, land agreements were largely excluded from the application of the UK's competition rules. However, in November 2018, the United Kingdom's Competition and Markets Authority (CMA) published a non-confidential version of its infringement decision to use its competition enforcement powers for the first time in relation to a land agreement restriction.

In particular, the CMA found that an airport operator's commercial agreement in relation to the lease of a hotel included a clause restricting how parking prices should be set by the hotel operator for non-hotel guests. The CMA considered that the pricing restriction prevented the hotel operator from charging non-hotel guests cheaper prices than those offered at other car parks at the airport and that as a result, the relevant commercial provision infringed the Chapter I prohibition in the UK's Competition Act 1998 (Act).[1] The CMA's full decision can be found here. This decision is important for all those engaging in land agreements in the UK and across the EU. Failure to comply with the applicable competition rules can result in large fines imposed on companies and in the UK, potential criminal prosecutions and director disqualifications for individuals.

CMA's Review of Restriction Contained in Land Agreement

Overview of the Restriction Subject to the CMA's Review

An inter-company head lease was created on 1 July 2005 which contained the following pricing restriction (the 'Head Lease Pricing Restriction'):

"[the Tenant Covenants] *whilst the Property is being used as an hotel to charge users of the car park during the period of their use of the Hotel at rates no lower than the equivalent rates from time to time charged elsewhere on the Airport by the Landlord save that resident guests of the hotel may during their stay in the hotel or Property park at rates to be set by the Tenant in its discretion and for the avoidance of doubt the Tenant will not offer or provide holiday parking schemes of any nature*".

In its decision,[2] the CMA found that the Head Lease Pricing Restriction precluded the hotel operator from freely setting car parking rates at the hotel for non-resident guest users of the car park.[3]

Application of UK Competition Law to Head Lease Pricing Restriction

Section 2 of the Act prohibits agreements between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an applicable exclusion applies or the agreements in question are exempt in accordance with the provisions of Part 1 of the Act. According to the CMA, the parties entered into 999 year leases containing the Head Lease Pricing Restriction which, from at least 31 July 2008 until April 2018, precluded the hotel operator from charging non-guests using the hotel car park prices lower than those charged at the airport's car parks. The CMA held that the Head Lease Pricing Restriction constituted an agreement within the meaning of the Chapter I prohibition.[4]

Object of Preventing, Restricting, or Distorting Competition

The Chapter I prohibition prohibits agreements between undertakings[5] which have as their object or effect the prevention, restriction or distortion of competition. The term 'object' in both prohibitions refers to the 'aim', 'purpose', or 'objective', of the coordination between undertakings in question. Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement. Object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[6] According to the CMA, the Head Lease Pricing Restriction had the **clear objective** aim of protecting the airport's own car parking operations from price competition from the hotel.[7]

Appreciable Restriction on Competition

An agreement that is restrictive of competition by 'object' will fall within the Chapter I prohibition only if it has the object of perceptibly restricting, preventing or distorting competition. The CMA found that because the Head Lease Pricing Restriction had the object of preventing, restricting or distorting competition and that it may have affected trade within the UK, it ordinarily follows that by its very nature, it amounted to an appreciable restriction of competition for the purposes of the Chapter 1 prohibition. In any event, and in the alternative, the CMA held that the Head Lease Pricing Restriction had an appreciable impact in the supply of car-parking services in the terminal where the hotel was located.

Impact of Decision on Parties Involved in Land Agreements

The CMA has published guidance to help organizations understand more about land agreements and compliance with competition law.[8] Whilst this guidance makes clear that lots of restrictions within land agreements are unlikely to give rise to competition law infringements, the CMA's November 2018 decision confirms that certain restrictions can fall foul of the UK (and potentially EU) competition rules.[9] Moreover, whilst the CMA's investigation and subsequent decision concerned a restriction within a commercial lease arrangement, it is clear that other restrictions in other forms of land agreements may infringe UK and /or EU competition rules. Parties should be mindful of the competition law implications, for example, of leasehold use restrictions and exclusivity arrangements.

The UK's CMA is not the only authority to review land agreements in the context of national and supra-national competition laws, such as the EU competition laws. For example, the Czech Competition Authority has this year fined the landlord of an outlet centre for restricting tenants from opening in competing outlet centres within a particular radius from the landlord's centre. In Europe, the review of land agreements under the competition rules is not new. In 2015, the European Court of Justice, Europe's highest court of appeal, clarified whether an existing tenant is able to rely on a non-compete clause in a commercial lease in order to refuse its permission to allow competitors from opening shops within a shopping centre.[10] In determining whether the arrangement was anticompetitive, the Court analysed the availability or accessibility of commercial land to new competitors, the existence of other administrative, economic or regulatory barriers of entry and the ability to close off a particular market by such measures.

In this context and given parties can face significant fines (up to 10% of group annual turnover) and other serious consequences (including director disqualification and criminal prosecutions) for breaches of competition laws, it is recommended that parties take all appropriate actions to safeguard their commercial and personal interests, including:

- ensuring that all relevant individuals within their organisations are able to identify potential competition law compliance issues early when negotiating land agreements, as well as all commercial terms relating to interests in land;
- assessing, whether by way of periodic review or otherwise, the extent to which any current, intended or expired land agreement may infringe domestic and potentially international competition laws and to understand the most effective means by which to address those concerns; and
- ensuring that the organisation has a top-down culture of competition law compliance that is reflected at all levels within the organisation. Following the CMA's investigation and the settlement discussions, Heathrow engaged constructively with the CMA to introduce a number of enhancements to its own competition law compliance programme.[11]

This case also highlights the functions and the incentives of the CMA's (and other competition authorities, such as the European Commission) leniency programs to report suspected anti-competitive conduct as soon as possible in order to secure full immunity or reductions from financial penalties. In the UK and other jurisdictions where certain anti-competitive conduct has criminal consequences, early reporting of competition law infringements may also secure full immunity from criminal proceedings.

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[1] Heathrow Airport agreed to pay a fine of £1.6 million. Heathrow T5 Hotel Limited (and its parent Arora Holdings Limited) was not fined because Arora applied for and was granted immunity under the CMA's leniency programme. The fine on Heathrow Airport included a 20% settlement reduction. The CMA's full decision can be found here.

[2] See Section 3.41.

[3] During the CMA's investigation, the parties agreed to remove the Head Lease Pricing Restriction from the Head Lease. The relevant variation was signed on 27 April 2018. Arora also removed the equivalent obligations in the relevant under leases.

[4] This is because it was an agreement in written form, entered into and signed on behalf of both parties, and its existence is beyond doubt and reflects the faithful expression of the parties' joint intention to conduct themselves in a specific way, which according to the CMA, was through the fixing of prices at the hotel car park. Proof of implementation is not necessary for a finding of infringement of the Chapter I prohibition.

[5] An undertaking may consist of several persons, legal or natural. Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify the relevant legal persons that form part of the undertaking in question.

[6] Agreements between actual or potential competitors that restrict price competition have consistently been found to constitute agreements that have the object of restricting competition. It follows from the CMA's findings on market definition and the legal and economic context, in particular the fact that the parties were actual or potential competitors for the provision of car parking services, that the Head Lease Pricing Restriction restricted Arora from freely competing on price.

[7] According to the CMA, such an agreement by seeking to remove or limit the potential benefit to consumers of price competition between Arora and Heathrow was by its very nature harmful to the proper functioning of normal competition. The CMA stated that it reveals in itself a sufficient degree of harm to competition and therefore constitutes a restriction of competition 'by object' such that there is no need to examine its effect. As a result, the CMA found that it had as its object the prevention, restriction or distortion of competition.

[8] https://www.gov.uk/government/publications/land-agreements-and-competition-law-dos-and-donts

[9] In particular, if a land agreement or a provision contained therein is held to be in breach of the applicable competition rules, all parties to the relevant arrangement will be liable including the party to whom the infringing restriction applies.

[10] *SIA Maxima Latvija ("Maxima") v Konkurences Padome ("Competition Council")* Case C-345/14

[11] Heathrow will also submit a report to the CMA on its compliance activities 15 months after the date of this Decision.