Kluwer Competition Law Blog

UK real estate and competition law: Heathrow fined £1.6 million for a restriction in a commercial lease

Samuel Beighton (Gowling WLG) · Tuesday, October 2nd, 2018

On 18 September 2018, the UK's Competition and Markets Authority (the "**CMA**") announced that Heathrow airport ("**Heathrow**") will pay a fine of £1.6 million in relation to an infringement of UK competition law arising from a restriction included within a commercial lease.[1]

Importantly, this case marks the first occasion that the CMA has used its competition law enforcement powers in relation to a so-called "land agreement" – i.e. an agreement between businesses that creates, alters, transfers, or terminates an interest in land.[2]

Pending the publication of the full text of the CMA's decision, this update provides an overview of:

- the background to the CMA's case; and
- the implications of the case for parties that enter into, or that have entered into, land agreements in the UK.

Leasehold restriction in relation to prices for parking

By way of background, Heathrow, the freeholder, entered into a lease with the Arora Group ("**Arora**") for the lease of Arora's Sofitel hotel at Terminal 5 of Heathrow airport.

Importantly, the lease included a clause addressing how Arora should set parking prices for non-hotel guests. In particular, the CMA considered whether the clause operated to prevent Arora from charging non-hotel guests prices for parking that were lower than those charged at Heathrow's car parks. The CMA provisionally found that the clause restricted price competition for parking at Heathrow airport.

In this context, it is implicit from the CMA's announcement that, at least for the purposes of the restriction, Heathrow and Arora were viewed by the CMA as competitors (e.g. with each offering parking services at Heathrow airport).

However, the CMA's announcement does not set out the actual wording of the restriction that was included within the lease, and it remains to be seen if (and how) the clause in question will be

described in the full text of the CMA's decision once published.

The parties' acknowledged infringement of UK competition law

The CMA considered that the restriction within the lease infringed UK competition law, specifically section 2 of the Competition Act 1998 (the "**Chapter I Prohibition**").

During the course of the CMA's investigation, both parties accepted the CMA's provisional finding that the restriction infringed the Chapter I Prohibition, and each party entered into a settlement agreement with the CMA, accepting their individual liability for the infringement. In addition, the restriction was removed from the lease.

In terms of the fine imposed upon Heathrow, this includes a 20% reduction in recognition of Heathrow's settlement agreement with the CMA.

Significantly, the CMA has not imposed a fine upon Arora. This is on the basis that Arora approached the CMA, and informed it of the restriction. As such, Arora received immunity from financial penalties, in recognition of its cooperation under the CMA's leniency programme.[3]

Risks associated with infringing UK and/or EU competition law

As considered further within the CMA's published guidance[4], UK and/or EU competition law applies to land agreements in the UK, exposing parties to significant risks in the event of infringement, including:

- significant financial penalties of up to 10% of each party's group worldwide turnover;
- an infringing agreement being void and unenforceable;
- actions for damages being brought by parties alleging to have suffered loss as a result of the infringement; and
- the disqualification of directors for periods of up to 15 years (as considered here).

In addition, the CMA is also able to prosecute individuals under the criminal Cartel Offence in respect of arrangements relating to competing undertakings regarding (i) reciprocal price fixing; (ii) reciprocal limitations of supply or production; (iii) market sharing; and/or (iv) bid-rigging.[5]

As considered previously, the Cartel Offence has been reformed to lessen the evidential burden upon the CMA when seeking to prosecute individuals, with the aim of enabling a greater number of successful prosecutions to be brought in the UK.

What does this mean for parties involved with land agreements?

Importantly, the CMA's own guidance makes clear that, in many instances, restrictions included within land agreements are unlikely to give rise to competition law concerns.[6]

However, while the awaited decision may be expected to provide greater clarity, the CMA's

investigation into the lease between Heathrow and Arora confirms that certain restrictions within land agreements will infringe UK competition law (if not EU competition law), exposing the parties to the agreements (as well as certain connected individuals) to the risks associated with infringement.

In addition, while the CMA's investigation focussed upon a restriction included within a lease, restrictions included in any land agreements may be caught by UK and/or EU competition law, including for example: (i) exclusivity arrangements; (ii) leasehold use restrictions; and (iii) freehold restrictive covenants.

Moreover, the CMA's investigation highlights the function of the CMA's leniency programme, and the clear incentives this provides for parties to approach the CMA proactively, so as to report suspected anti-competitive conduct with a view to securing immunity from financial penalties (as well as director disqualification proceedings, and/or criminal prosecutions).

Taking appropriate action in advance

Against this background, in view of the considerable risks associated with infringement, it would be prudent for parties to take appropriate action to seek to safeguard their interests, including:

- ensuring that relevant individuals within their businesses are able to identify potential competition law compliance issues when negotiating land agreements, as well as commercial terms relating to interests in land;
- assessing the extent to which any former, current, or planned land agreements may present potential competition law compliance issues, and determining the most effective means by which to address compliance concerns; and
- more generally, maintaining an effective culture of competition law compliance at all levels of their businesses.

References[+]

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