ARNOLD & PORTER (UK) LLP

ADVISORY MAY 2010

SHORTER PROCESS AND FAIR PROCESS—ONE STEP FORWARD, TWO STEPS BACK FOR THE OFFICE OF FAIR TRADING

Three recent developments in the United Kingdom, the most recent being in May 2010, highlight how the UK's Office of Fair Trading (OFT), is striving—not always with success—to modernise its process in competition cases. First, the OFT has introduced a short-form opinion procedure providing guidance to businesses on the application of competition law to prospective collaboration agreements between competitors. Secondly, whilst continuing to champion the use of 'early resolution agreements' in cartel cases (a form of settlement process that enables the OFT to close its investigation at an earlier stage) in a recent case the OFT has been forced to amend and withdraw some of its provisional findings in agreements that it had concluded with certain retailers and suppliers in the dairy sector. Thirdly, the first criminal case brought by the OFT for price-fixing collapsed in spectacular circumstances.

The introduction of a short-form opinion procedure is likely to prove a popular mechanism for collaborations that do not require the cover of confidentiality. In contrast, the effective 'back tracking' by the OFT in relation to its investigation in the dairy sector serves as a warning that the efficient prosecution of competition cases should not come at the expense of establishing a proper case to answer. Finally, the collapse of the OFT's case against four former or current executives of British Airways shows the importance of due process, particularly where the evidence was obtained as part of an immunity procedure.

This Advisory discusses the OFT's new short-form opinions process, and explains the circumstances in which parties may be able to obtain such advice from the OFT. It also briefly explains the OFT's use of early resolution agreements and comments upon the recent developments of the OFT's investigation in the dairy sector. Finally, it explains what went wrong in the OFT's case against the "British Airways Four" (BA Four).

SHORT FORM OPINIONS

Background

Shortly after the introduction of its short-form opinion process, the OFT announced[1] that it had issued its first short-form opinion providing guidance on the application of competition law to a prospective collaboration agreement

1 *See* OFT press release 44/10 dated 27 April 2010, *available at:* http://www.oft.gov.uk/news/press/2010/44-10.

London
+44 (0)20 7786 6100

Brussels
+32 (0)2 290 7800

Denver
+1 303.863.1000

Los Angeles
+1 213.243.4000

New York
+1 212.715.1000

Northern Virginia
+1 703.720.7000

San Francisco
+1 415.356.3000

Washington, DC
+1 202.942.5000

arnoldporter.com

between *Makro-Self Service and Palmer & Harvey*, who sought clarification on the competition law implications of a proposed joint purchasing agreement.

Since the modernisation of competition law in 2004, businesses have been required to self-assess whether agreements affecting competition in the UK are likely to infringe Chapter I of the UK Competition Act 1998 (CA) and/or Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 81(1) EC). In its Annual Plan for 2010/2011,[2] the OFT announced that it was to trial a short-form opinion procedure which would provide guidance on a novel or unresolved issue of wider interest arising in the context of a 'specific prospective collaborative initiative'. In addition, more recently, the Chairman of the OFT indicated that concerns have been expressed by the business community that uncertainty around how competition law might apply in a particular case has led to some forms of potentially beneficial collaborative work between businesses being abandoned.[3]

How To Get a Short-Form Opinion

The OFT has published guidance explaining the features of its new policy on short-form opinions (the Guidance).[4] The Guidance clearly explains that the new short-form opinion process will only be available for a limited number of cases per year and sets out four cumulative criteria that must be fulfilled before parties can make a request for a short-form opinion:

1. the request must concern *novel or unresolved questions* about the application of Article 101 of the TFEU and/or Chapter I prohibition of the CA *where clarification would benefit a wider audience*
2. the request must relate to a *prospective horizontal agreement* (i.e., between competitors)
3. the proposed agreement must have a *material link to the United Kingdom*
4. the parties must be prepared to provide a *joint statement of facts* on which the short-form opinion is based and to allow the statement of facts and the short-form opinion to be published

Even in these cases, the OFT will not issue an opinion unless:

- sufficient guidance is not already available from precedent in EU or UK case law, or decisions, practice, or previously published opinions given by the competition services of the European Commission's (Commission) competition services or the OFT;
- there is a need for a published opinion;
- the question(s) raised are not identical or similar to issues raised in a case pending before the European Court or the Commission;
- the agreement or conduct in question is not subject to proceedings pending before a Member State court or national competition authority (NCA) in the EU;
- the Commission or another NCA is not already considering a request for a short-form opinion on the same matter; and
- the request does not relate to hypothetical questions.

The process is intended to be simple, short, and flexible. The OFT aims to publish a short-form opinion based on the parties' statement of facts[5] within two to three months. The short-form opinion will provide answers to specific questions asked by the requesting parties in order to facilitate their self-assessment of the proposed agreement under Chapter I and Article 101(1). Importantly, the short-form opinion does not bind other NCAs or courts, and will not bind the subsequent assessment of the same or similar issues by the OFT in the future.

2 *Available at*: http://www.oft.gov.uk/shared_oft/about_oft/706647/oft1215.pdf.

3 *See* speech by Philip Collins "*Compliance: a key role for Trade Associations in helping business understand and meet their legal obligations*" 4 March 2010, *available at*: http://www.oft.gov.uk/shared_oft/speeches/689752/spe0210.pdf.

4 *See* document entitled '*Short Form Opinions–The OFT's Approach*', *available at*: http://www.oft.gov.uk/shared_oft/press_release_attachments/SFO.pdf.

5 Note: Importantly, the OFT will *not* verify the accuracy or completeness of the parties' statement of facts.

The First Short-Form Opinion

The OFT's first short-form opinion concerned a proposed joint purchasing agreement between *Makro-Self Service* (Makro) and *Palmer & Harvey* (P&H). The press release announcing the opinion[6] explains that the OFT expressed the opinion that despite increased contact between the two competitors, the proposal was unlikely to reduce competition as they would not have the power to raise price or reduce output in the sale or delivery of products downstream. The OFT also considered that the proposal may allow the companies to increase price competition, thereby creating the benefit of lower prices for suppliers and consumers.

The press release also explains that, during its analysis, the OFT identified a concern that certain exchanges of information between the firms could potentially lead to a reduction in competition. However, following advice from the OFT, the parties agreed to ensure that the data they supply to each other will be general and aggregated, preventing either company from extrapolating specific or sensitive information.

Will They Work?

As the OFT has made clear in the Guidance, the short-form opinion process does not constitute a return to the situation prior to May 2004 where parties could pre-notify agreements to the OFT for prior approval. Rather, the short-form opinion is intend to assist parties carry out a self-assessment of their agreements.[7]

The European Commission has similar powers to issue 'guidance letters' where cases give rise to novel or unresolved questions regarding the application of Article 101 and 102 TFEU.[8] The accompanying Notice[9] (the Notice) explains that the Commission will consider whether the question is novel and also consider the 'economic importance' of the case from the point of view of consumers of the goods or services.

Whether the OFT will take the same line as the Notice and decide whether a question will have benefit to a 'wider audience' by considering the 'economic importance' of the goods/services in question remains to be seen. Also, at present, the OFT's short-form opinions are only available in relation to agreements subject to Chapter I and/or Article 101(1). Unlike the Commission, the OFT will not opine on unilateral conduct by a dominant undertaking under Chapter II of the CA or Article 102 TFEU.

To date, the Commission has not issued any guidance letters, which may be indicative of the high thresholds that parties must reach in order for the Commission to consider that a request merits a guidance letter. Whilst it is clear from the OFT's Guidance that only exceptional cases will merit the use of the short-form opinion process, it is clear from the fact that the OFT has now already issued an opinion, that thresholds for seeking a short-form opinion are attainable. The OFT has stated that the procedure will be run on a trial-basis only, but given its expected popularity it is likely to become a permanent feature of the OFT's work.

EARLY RESOLUTIONS AGREEMENTS

Background

Over the past few years, the OFT has reached a number of 'early resolution agreements' in cartel cases, pursuant to which the parties concerned accept liability in principle for a breach of competition law in return for a shortened investigative procedure and a reduction in the fine.[10] As the OFT has explained, early resolution agreements allow cases to be "*...resolved effectively and swiftly...significantly reduc[ing] the costs of pursuing the investigation to the OFT and to the businesses concerned.*"[11]

6 *See* fn 1. The full short-form opinion will be published on the OFT's website shortly.

7 The OFT has actually issued one opinion since May 2004 in relation to newspaper and magazine distribution (Opinion *available at*: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1025.pdf). However, that opinion was very detailed in its guidance and the new short-form opinions are likely to be considerably shorter.

8 Powers pursuant to Regulation 1/2003.

9 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) 2004/C 101/06, OJ C 101/78.

10 For example, the OFT's early resolution agreements in the Independent Schools case, see OFT press release 88/06 19 May 2006, ***available at***: http://www.oft.gov.uk/news/press/2006/88-06 and also the British Airways case, OFT press release 113/07 1 August 2007, *available at*: http://www.oft.gov.uk/news/press/2007/113-07.

11 *See* OFT press release 170/07, 7 December 2007, *available at:* http://www.oft.gov.uk/news/press/2007/170-07.

Resolve in Haste, Repent at Leisure—The OFT's Dairy Investigation

In September 2007, the OFT issued a Statement of Objections to UK retailers Asda, Morrisons, Safeway, Sainsbury's and Tesco, and dairy processors Arla, Dairy Crest, Lactalis McLelland, The Cheese Company, and Wiseman. The OFT had provisionally found evidence of collusion in the markets for certain dairy products such as liquid milk, value butter, and cheese. In December 2007, the OFT announced[12] that it had reached early resolution agreements with a number of the parties who had admitted involvement in anti-competitive practices and had agreed to pay individual penalties which, combined, totalled over £116 million. The OFT continued its case against two retailers, Morrisons and Tesco, who opted not to enter into early resolution agreements.

On 30 April 2010, the OFT announced[13] that—in the light of new evidence—it had concluded it did not have a case to support an infringement finding in relation to a large part of its complaints. As a result, it intended to reduce the individual penalties accepted by a number of early resolution parties.

This rather embarrassing climb down for the OFT reduced the total penalties that the early resolution parties to the dairy investigation have agreed to pay, from a total of over £116m, to approximately £70 million. OFT has also dropped certain allegations against Tesco.[14]

Will They Work?

The introduction of settlement agreements has generally been welcomed as a means of prosecuting cases more efficiently. The European Commission has similar procedures,[15] although to date no settlement agreements have been reached. The current climb down by the OFT highlights the concern that settlement agreements may sometimes be concluded at the expense of a full investigation which may disprove the basis on which the settlement agreements have been agreed. Indeed, were it not for Tesco and Morrisons contesting the OFT's allegations, all of the parties to the OFT's dairy investigation may have potentially admitted participation in circumstances where an infringement could not be said to have taken place.

The case may also cause the OFT to reconsider the circumstances in which it agrees to enter into early resolution agreements. It is clear that in cases where not all the parties wish to settle with the OFT there is a risk that the 'agreed' facts in any early resolution agreements could later be disproven by the parties who contest the allegations. Moreover, having to re-draft early resolution agreements obviously goes against the argument that the settlement process is an efficient way of prosecuting cases.

Whether this case will make parties more or less likely to enter into settlement agreements remains to be seen. Going forward, the OFT is likely to give greater consideration as to which cases are suitable for the settlement procedure. Indeed, the fact that the European Commission has waited nearly two years to enter into its first cartel settlement (and is still waiting) demonstrates the difficulty of selecting the 'right' cases. This case is also likely to prompt parties to carefully scrutinise the OFT's allegations in order to assess whether there is sufficient evidence for an infringement decision to be made. This became even more relevant most recently as a by-product of the collapse of the OFT's case against the "BA Four".

THE COLLAPSE OF THE FIRST CRIMINAL TRIAL

On 10 May 2010, three weeks into the first criminal trial for price-fixing to be brought by the OFT, the agency announced[16] that it would not proceed with the prosecution of four past and current British Airways (BA)

12 *Ibid.* In addition, the OFT entered into a settlement agreement with Lactalis McLelland in February 2008, *see* OFT press release 22/08 15 February 2008, *available at*: http://www.oft.gov.uk/news/press/2008/22-08.

13 *See* OFT press release 45/10 30 April 2010, *available at*: http://www.oft.gov.uk/news/press/2010/45-10.

14 *See* OFT Press release 46/10, 30 April 2010, *available at*: http://www.oft.gov.uk/news/press/2010/46-10.

15 *See* Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF.

16 *See* OFT Press Release 47/10, 10 May 2010, *available at*: http://www.oft.gov.uk/news-and-updates/press/2010/47-10.

executives for their alleged part in a fuel surcharge cartel with Virgin Atlantic (Virgin). The case had its origins in an immunity application made by Virgin and its executives, and following an early resolution agreement the OFT had concluded with BA in August 2007, pursuant to which BA admitted collusion on the price of long-haul passenger fuel surcharges with Virgin.[17] The collapse of the case against the executives resulted from the discovery of a reported 70,000 emails that had not been disclosed to the defendants. The OFT accepted that "to continue with the trial in light of this unforeseen development would be potentially unfair to the defendants."

The OFT has defended its decision to bring criminal charges against the executives, but acknowledged its responsibility for its part in the "oversight", which it explained "occurred at a time when the UK criminal cartel regime was still relatively new and the OFT's approach to the handling of leniency applications in the context of parallel criminal and civil investigations was still evolving." In addition, the OFT has also accepted that it will have to review the role played by Virgin "in light of their obligations [under the leniency procedure] to provide the OFT with continued and complete cooperation."[18] Should the OFT decide that Virgin failed in its duty to provide all information relevant to the case, it could withdraw the leniency originally granted and seek to impose a fine. In a further twist, should the new evidence provide additional information that alters the known 'facts' regarding the parties' apparent collusion, there is a risk that the settlement agreement entered into between the OFT and BA will have to be revisited—much like the OFT was forced to do in its investigation in the dairy sector, as explained in this Advisory.

Dropping its criminal cases against the four past and present BA executives represents a further setback for the OFT—particularly following on so soon after the authority was forced to drop certain allegations against a number of companies involved in its investigation in the dairy sector. The OFT has defended its prosecutorial processes, arguing that since 2006 (when the OFT's investigation into alleged collusion on long-haul fuel surcharges began) it has appointed new staff to strengthen its criminal investigation and prosecution functions. It also points to the fact that new guidance on leniency has been published since 2006.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

Tim Frazer
+ 44 (0)20 7786 6124
Tim.Frazer@aporter.com

Susan Hinchliffe
+44 (0)20 7786 6122
Susan.Hinchliffe@aporter.com

Mark Gardner
+44 (0)20 7786 6159
Mark.Gardner@aporter.com

17 *See* OFT Press Release 113/07, 1 August 2007, *available at*: http://www.oft.gov.uk/news-and-updates/press/2007/113-07.

18 As a condition of a successful leniency application, the company in question must provide the OFT with continuous cooperation, which includes providing the OFT with all information relevant to the case. Failure to meet this standard can result in leniency being withdrawn.