COMPETITION LAW ASSOCIATION

OBSERVATIONS

ON OFT PRACTICE SINCE THE INTRODUCTION OF THE COMPETITION ACT 1998

INTRODUCTION

1 This paper has been prepared by the Competition Law Association[1] ("CLA") in order to identify areas in which its members consider issues have arisen in the enforcement of the Competition Act 1998 ("the Act") to date It also makes some suggestions as to the way in which those issues might be addressed.[2]

2 As background to these submissions the CLA notes that since 1 May 2004 the OFT not only carries out functions under domestic law and is subject to domestic law standards of administrative fairness, but also carries out functions under EC law and in that respect is subject to the principles of administrative fairness laid down in EC law, now codified in the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union [3]

3 In developing a world class system for competition law enforcement, the CLA assumes that it is common ground that enforcement agencies should

- aspire to best practice, with respect to the rights of the defence,
- establish an institutional culture which reflects these priorities,
- ensure that performance by case handlers and others is assessed having regard to appropriate performance criteria reflecting such values

[1] The Competition Law Association is the British Group of the Ligue Internationale du Droit de la Concurrence (International League for Competition Law) Its membership is predominantly composed of lawyers and intellectual property professionals in private practice and industry Its secretary is Jenny Block of Simmons & Simmons, CityPoint, One Ropemaker Street, London EC2Y 9SS The Association's website is located at www competitionlawassociation org uk These observations are made solely by the CLA

[2] In general references are made to the practice of the OFT as the public authority with the lead responsibility for enforcing the Act However, such references should be taken to include the other sectoral regulators with concurrent responsibility for the Act where appropriate

[3] (2000/C 364/01)

The CLA fully recognises the very substantial tasks entrusted to the OFT The CLA hopes that these observations will make a contribution to the ongoing development of standards of best practice in the enforcement of the Act.

REQUESTS FOR INFORMATION

4 Under section 26 of the Act the OFT can issue a notice requiring a person to provide it with specified information or documents. In its Guideline on its powers of investigation the OFT states that it will not seek more documents or information than it believes are necessary for the investigation as at the date of the notice It also states that in setting an appropriate time limit for the productions of documents or information it will consider the amount and the complexity of the information required, the resources available to the individual or undertaking and the urgency of the case [4]

5 These statements are welcome. However, concerns have been raised that these statements – laudable in principle - are not always being applied in practice In particular, it has been suggested that in a number of cases such notices have been poorly drafted and couched in unnecessarily wide terms thereby disproportionately increasing the burden on the person to whom it is addressed The costs and disruption involved can be compounded in cases where an unduly short time period is set for a response CLA members have reported a number of occasions where they considered that the time limits set were unduly short

6. Greater dialogue between the OFT and the person to whom a section 26 request is to be addressed before the notice is issued regarding the nature and form in which information is held by that person and the scope of the notice would be useful Issuing such notices in draft should be contemplated We think this would assist the OFT in implementing its stated policy of issuing focussed section 26 notices which avoid imposing a disproportionate burden on those to whom they are addressed [5] In addition we think that this approach will help to reduce the likelihood of OFT resources being diverted to sifting through quantities of irrelevant material

7 In some cases it may well be the that resort to a formal section 26 notice is not required and that the information can be obtained more easily and flexibly by means of an informal request Although there may be cases where it would not be appropriate to alert the person concerned as to the content of the notice, in general we think that greater dialogue and cooperation before a section 26 notice is issued would help promote greater efficiency and fairness in this area [6]

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[4] OFT 404 Powers of Investigation, at paragraphs 3 10 and 3 11

[5] See paragraphs 3 10 and 3 11 of its Powers of Investigation Guideline (December 2004 – OFT 404)

[6] Where there is a concern as to the effect of giving advance notice of a request for information we would have thought that in most cases the OFT would be contemplating the use of its powers under section 28 of the Act rather than those under section 26

8 We have received comments that sometimes the manner in which section 26 notices have been issued to customers of companies under investigation has been "clumsy" and "commercially damaging". In particular, the effects of a number of section 26 notices being sent to a number of an undertakings customers over, say, a 2 year period before a statement of objections is even issued can be extremely damaging Although not always possible everything should be done to try to avoid such situations arising It is to be hoped that improving practice in relation to section 26 notices will keep the number of notices issued to the minimum

9 It has been suggested to us that greater input from more senior officials at an earlier stage of an investigation might help to address some of these issues One comment we received suggested that in addition to recruiting graduate case officers there was something to be said for the OFT recruiting persons from other backgrounds such as former police detectives'

STATEMENT OF OBJECTIONS AND ACCESS TO THE OFT FILE

10 Where, following investigation, the OFT proposes to make a finding of infringement it must issue a statement of objections setting out the findings it proposes to make The statement must also identify the evidence on which it relies in order to permit the company concerned to respond The addressee of the statement must be allowed to inspect the documents on the OFT's file

Disclosing complaints timing

11 The OFT is required by the Act to make known its objections about a particular agreement or course of conduct at the stage of issuing a statement of objections However, in cases originating from a complaint there may well be circumstances in which fairness suggests that the substance of the case being made against a person is made available to that person at an earlier stage than the issue of the statement of objections For example, where a complainant has publicly - and perhaps repeatedly - announced that it has lodged a complaint to the OFT we think that fairness requires that the substance of the complaint is disclosed to the subject of that complaint at the earliest opportunity The time from the start of an investigation to the issue of the statement of objections may be considerable - a matter of years rather than months in many cases The person subject to investigation should be in a position to provide a detailed rebuttal of the complaint to its customers, to the market and to the OFT as soon as practicable

12 Countervailing considerations are the need to protect confidential information (which may in some cases include the identity of a whistleblower) and the need to avoid giving away information at an early stage of an investigation which might prejudice its subsequent conduct

13 As regards confidentiality, it should be possible in most cases for the complainant to make appropriate redactions to the version of the complaint provided to the subject of the complaint

Similarly, as regards disclosure, in many cases this is unlikely to prejudice the future conduct of the investigation Even where there is such a risk, however, this would not preclude giving details of the substance of a complaint once dawn raids had been carried out or responses received to section 26 requests As already mentioned there is usually still a significant period of time between the information gathering stage of an investigation and the issue of a statement of objections We consider that such an approach would promote greater fairness from the point of view of the defence's ability to start to address the concerns raised and may lead to greater efficiency In some cases issues raised could be resolved at earlier stage in an investigation than might otherwise have been the case

Access to the file and response to the statement of objections

14 In addition to the points raised above regarding section 26 notices, issues have also been raised regarding the deadlines set for access by the defence to the OFT's file and response to the statement of objections In one case the recipient of a notice had to go so far as seeking judicial review, and the time for responding was only extended after permission had been granted This is clearly an unsatisfactory way of dealing with such issues

15 If the OFT intends to issue a press release at the time of issue of the statement of objections, it is important that the press release should be checked in advance with the relevant undertakings for issues of confidentiality The potential to disclose confidential information applies not only to the final decision but to all statements dealing with the facts of the case Also, fairness dictates that the recipient of the statement of objections should generally be given advance sight of the draft press release, so that it can both make representations to the OFT and prepare its own press release

Rights of complainants and third parties

16 Issues relating to access to the file arise in relation to complainants and third parties as well as those who are the subjects of an investigation

17 In our view, third parties with a sufficient interest should generally be given an opportunity to make observations on, as the case may be, an appropriately redacted version of the statement of objections or draft decision rejecting the complaint Such parties have a right of appeal and it is likely to be counter-productive to exclude them from effective participation in the administrative proceedings To do so is likely to increase the number of appeals, quite apart from the unfairness of requiring such a party to wait until the appeal stage before

it can see the detailed arguments. As we understand it, there have been some cases in which the OFT has taken this approach (e g in its BSkyB decision where the statement of objections was disclosed to the complainant) but others in which it has not.[7]

18 We note that in *Pernod Ricard* the CAT said that it would be appropriate to disclose a statement of objections or the draft decision to reject a complaint to the complainant [8] We understand that the OFT has accepted this ruling in the particular circumstances in which it was made [9] It would be very helpful to understand in greater detail the OFT's general practice in this area which we understand is undergoing or has undergone a review There seem to be very few public OFT statements about the rights of complainants. We think that in general[10], and subject to appropriate safeguards as to confidentiality, disclosure of the statement of objections and/or a draft of the proposed decision rejecting the complaint should be made for at least two reasons·

a it would help to ensure that nothing material is overlooked in any eventual decision[11], and

b it would be fairer to the company whose interests may be directly affected by the subject matter of the investigation

CONFIDENTIALITY AND DISCLOSURE DURING THE ADMINISTRATIVE PROCEEDINGS

19 We consider that the regime to protect confidential information established under Part 9 of the Enterprise Act appears to be quite difficult to apply in practice in a way that satisfactorily accommodates the interests of all those whose interests are affected, most particularly the rights of the defence in penalty cases

Redactions of confidential material

20 When material on the OFT's file is withheld or parts of it are redacted on grounds of confidentiality, it is in our view desirable that, as far as is practicable, an explanation should be given as to the nature of the contents of the material This

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[7] In some cases the OFT has been reluctant to permit a person who is not a party to an agreement or the addressee of a statement of objections to make representations following the issue of the statement of objections In one case the failure to do so until judicial review proceedings were threatened and subsequently issued led to the OFT having to pay the applicant's costs of issuing the proceedings see *British Horseracing Board and Jockey Club v OFT* [2003] EWHC 2311 (Admin), Jackson J

[8] [2004] CAT 10 In that case the CAT also said that it considered in general it was appropriate to provide a complainant in the equivalent position of Pernod with an appropriately redacted version of the statement of objections and, in the context of that case, to disclose the draft commitments which the OFT proposed to accept from Bacardi (paragraphs 236 to 239)

[9] OFT press release of 1 July 2004

[10] We note that in *Pernod* the CAT said that its observations did not apply to cases where the complaint was a weak one

[11] Cf below the potential benefits of "devil's advocates" in strengthening the decision-making process

would enable a person who might wish to seek disclosure to assess the material's potential relevance to its case

Recent infringement appeals

21 In *Umbro*, material potentially relevant to the submissions of various defendants as to the amount of the penalty only came to light for the first time at the appeal stage of the proceedings [12] Successful applications for disclosure of that material were then made A similar situation arose in *Argos* [13] The problems here arose in the context of penalty appeals in relation to material which the OFT itself did not rely on or "use" in the decision and was claimed to be confidential by the person from whom it was obtained We think that there is a need to consider whether this is an area in which the OFT itself can develop an approach for deciding whether to disclose material to another party in the face of an objection from the person from whom it was obtained at an earlier stage than an appeal to the CAT We consider that in general the possibility for greater disclosure to take place in the administrative proceedings would make those proceedings fairer and more efficient This would also reduce the extent to which such issues have to be raised on appeal The CAT's resources are limited. Contested applications for disclosure are time consuming and liable to have an adverse effect on the speed and efficiency with which appeals can be dealt with.

Disclosure to complainants

22 Difficulties have also arisen with disclosure to complainants during the administrative process Here, disclosure has to be managed as between the complainant and the subject of the complaint as both of their interests may be closely affected. The difficulties that arise with managing issues of confidentiality during the administrative stage of the proceedings has meant in some cases that it was only at an advanced stage of the appeal that either the complainant or the subject of the complaint were in possession of sufficient information to protect their interests in the proceedings

23. As we mention elsewhere in this paper (e g at paragraph 26), we hope that greater disclosure can be made during the administrative proceeding to avoid this sort of situation occurring However, where the OFT consider that disclosure is precluded without an order but that disclosure ought to be made, it should itself make an application to the CAT for permission to make such disclosure once appeal proceedings have been launched, preferably no later than at the first case management conference and at any rate as soon as it becomes aware that

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[12] *Umbro Holdings Ltd v OFT (Application for Leniency Confidentiality)* [2003] CAT 26

[13] *Argos v OFT* [2004] CAT 24 In *Argos* an order for disclosure from the Tribunal was not actually required as Hasbro at a late stage was prepared to allow the material to be disclosed It should be noted in *Argos* that the fact that Hasbro had made a successful application for leniency was public knowledge, whereas in *Umbro*, Umbro's failed application was only known to Umbro and the OFT until this fact emerged during the appeal

disclosure ought to be made [14] In that regard, it is not appropriate for the OFT to adopt an adversarial approach of the kind found in private litigation In general, we think that the OFT should play a pro-active role in this area and keep the issue of disclosure under review throughout both the administrative and appeal proceedings This is consistent with the widely accepted role of a prosecuting authority to act as a 'minister of justice'. Of course, it is open to the parties to make such applications but (i) some parties are less equipped than others to protect their interests in this respect, and (ii) there will be cases where a party and its advisers may not be aware of the existence of potentially relevant material (eg *Umbro*)

Internal documents

24 One specific area in which concerns have been raised is the operation of the distinction between so-called "internal" OFT documents which are not disclosable as part of the access to the file procedure and "evidence" which must be A potential difficulty, however, is that material which is "internal" to The OFT may be included within a document which also includes "evidence"

25. The OFT's system of note taking should be such as to ensure that

- no notes or other materials are classified as "internal", when they cover any dealings between any OFT official and any third party, i e any non OFT official,
- any such dealings between one or more OFT officials and one or more non OFT officials are appropriately minuted, however insignificant these may appear to be in the view of the OFT official responsible for the note taking

26 Further, the OFT's system of note taking should be adequate to ensure that notes are clear, that they are made relatively contemporaneously to the event of which they purport to be a record, that they indicate both the date on which they were made and the date of the event of which they seek to be a record, that all persons involved are listed, and that all salient points are captured.

Divergence between disclosure at the administrative and appeal stages

27 At the moment it is easier to obtain disclosure from the CAT on appeal than it is from the OFT at the administrative stage of the proceedings We hope that steps can be taken to reduce this divergence within the existing legislative framework If this is not possible we think that some consideration should be given to whether any amendment of the provisions governing disclosure at the administrative stage is necessary

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[14] See e g *JJ Burgess & Sons v OFT* (Case 1044/2/1/04 – judgment pending)

STRENGTHENING THE ADMINISTRATIVE PROCEDURE

28. We consider that administrative measures could be introduced to strengthen the administrative procedure and to provide for a greater separation between the OFT's role as both investigator and prosecutor This could have a positive effect in terms of a number of the issues touched on above Such measures could include designating an official who is not a member of the case team to review disclosure decisions in a manner akin to the function of the hearing officer appointed by the EC Commission We note that the CC has given its Chief Executive a role in helping to resolve disputes about confidentiality where these arise between the inquiry group and a relevant party [15] Such an official could also deal with reasoned objections to a deadline set by the OFT for a response to a section 26 notice or statement of objections The official could perhaps play a role in ensuring a greater consistency of approach across different case teams While judicial review does exist as a means of ensuring adherence to standards of administrative fairness during the proceedings before the OFT, it is very much a remedy of last resort The practical reality is that in relation to these types of decision it is a cumbersome and, in most cases, disproportionately expensive process.

29. In the merger sphere, we understand that a system of "devil's advocates" has been introduced by the OFT in order to strengthen the decision making process This is a useful initiative which mirrors developments taking place at the EC Commission We consider that this would be a useful measure which could be introduced to strengthen the decision making process in Competition Act cases as well The use of "devil's advocates" might well help to prevent matters being overlooked in the way in which, for example, they appear to have been in the recent *ABI* appeal [16]

ORAL HEARINGS

30 Many have questioned the value of oral hearings as presently conducted We hope that the OFT in the light of its increasing experience in enforcing the Act, will feel increasingly able to engage in debate at oral hearings, a development which should result in those hearings becoming more useful

31 In our view, the oral hearing would be of greater use both to the OFT and the parties appearing before it if the OFT case team, having taken sufficient time to absorb the written submissions made, were able to identify before the hearing

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[15] See CC4 – General Advice and Information (June 2003) at para 6 30

[16] In that case the OFT's decision was appealed to the CAT but at the first case management conference, i e before the defence was filed, the OFT announced that it did not intend to contest the appeal

their key outstanding areas of concern This would help to narrow the issues that needed to be dealt with at such hearings and would avoid the needless reiteration of submissions previously made We suggest that this would lead to more effective oral hearings from the OFT perspective as well

COMMITMENTS

32 Concern has been expressed that the OFT has unnecessarily restricted the circumstances in which it will accept binding commitments instead of proceeding to a decision.[17] In particular, by appearing to rule out accepting commitments in price fixing cases save in exceptional circumstances, the OFT would appear to be excluding certain cases (particularly vertical agreements) which, while not likely to be "exceptional" might nevertheless be appropriate candidates in which to accept undertakings when the OFT's competing priorities are weighed in the balance

INVESTIGATION TIMETABLES

33 It would be helpful to have a clearer idea of the timetable by which the OFT aims to complete the various stages of an investigation In some cases, both the subjects of an investigation and complainants have been told that a particular stage of an investigation will be reached by a particular date, only to have that date revised and in some cases re-revised Inevitably it may be difficult to give much of an indication of a timetable at the very early stages of an investigation and matters which may have an impact on such a timetable cannot always be foreseen However, it would be of great assistance for those involved with investigations to be able to gain as soon as practicable from the OFT a reasonably firm indication as to when key stages of the investigation will take place, subject of course to unforeseen events arising Working to a timetable from which derogation is not readily countenanced would assist companies to plan and execute the work that an investigation requires and could also assist the OFT in managing its demanding caseload Although it is not suggested that the timetables which apply to a CC merger investigation would be appropriate to an OFT Competition Act investigation, the experience of working to deadlines which can only be extended in defined circumstances has generally been a positive one In that regard the CLA notes that OFCOM has publicly committed itself to making a decision within 6 months in a case where it considers that there are no grounds for action and 12 months in cases where it proposes to issue an infringement decision [18]

Competition Law Association
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[17] See the OFT's Guideline on Enforcement (December 2004 – OFT407) at page 32
[18] See Guidelines for the handling of competition complaints and complaints and disputes about breaches of conditions imposed under EU Directives