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Dear Katherine,

Joint Working Party and Competition Law Association discussion papers on issues arising in Competition Act investigations

Once again, many thanks for inviting Ali, Brian and myself to the JWP/CLA meeting on 5 April. We are grateful for the comments and suggestions on the wide range of issues relating to the OFT's procedures, and we will give them full and careful consideration. This response addresses some of the key points which were raised either in the papers circulated by the Competition Law Association (CLA) and the Joint Working Party of the Bars and Law Societies of the United Kingdom (JWP) or at the meeting itself.

Background

One of the OFT's stated objectives[1] is to use our powers actively to deal with anti-competitive practices in the UK. The effectiveness of a proactive enforcement regime depends to a great extent on having in place procedures which lead to robust decisions being made in a timely manner. In devising procedures to achieve this, we keep in mind the burden which investigations place on parties to suspected infringements, as well as the need to deploy our finite resources in the most effective manner. At the same time we must ensure that we abide by principles of administrative fairness, not only to parties under investigation, but also to interested third parties.

These various considerations are not always easily reconcilable, and we recognise that we do not always get the balance right. We welcome this opportunity to engage in a constructive dialogue with the CLA, the JWP and their members on the areas where we could, and should, improve our procedures. We are operating in what is still a relatively young enforcement regime. Regular evaluation is important; indeed, we are currently carrying out review of our procedures. We have already implemented a number of key changes which address some of the areas highlighted by the discussion papers (for example, increased rigour in our prioritisation of cases, and the introduction of case review panels). We are also actively considering others (for example, the more formal

[1] See the OFT's Annual Plan 2005-6.

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and structured involvement of complainants and other third parties in our investigations).

Before moving on to some of the specific issues which are raised by the discussion papers, it may be worth noting the following general observations, which have helped inform our thinking.

First, it should be recognised that certain of the changes to our administrative practice which are put forward by the discussion papers will not necessarily be appropriate or practicable in all cases. A number of the suggestions which have been made (for example, the greater use of informal information requests in place of our formal powers) seem to us to depend on there being at least a degree of co-operation and trust between the OFT and the parties. Whilst this will not prove a stumbling block in many instances, parties who are under investigation in some cases (notably those which concern hardcore infringements, and/or where large penalties are anticipated) are, perhaps understandably, often not co-operative during the administrative process. Some of the suggestions put forward would be unlikely to be workable in that environment.

Secondly, there is not an automatic 'read across' from the procedures and timetables adopted by other competition authorities and/or other types of cases (for example, the Competition Commission and/or mergers cases), such that it can be assumed that it would be appropriate for the OFT to adopt the same (or similar) practices in Competition Act cases. There are, for instance, distinctions between the Enterprise Act mergers regime and Competition Act cases not only in terms of the type of enforcement (*ex ante* as opposed to *ex post*), but also in terms of the parties' incentives to co-operate (particularly within short timescales), and in terms of the OFT's role (first phase as opposed to full investigation). That is not to say, however, that practices elsewhere may not on occasion usefully inform Competition Act procedures. Peer review panels, for example, which were first introduced in mergers cases, and are chaired either by me or by my Deputy, Ali Nikpay, have now been extended to Competition Act cases, where we believe that they are successfully contributing to the process of robust decision-making.

The following sections set out our comments on some of the specific points raised by the discussion papers. They are intended to give an indication of our current practice and/or thinking, rather than to state any definitive positions.

Information about the OFT's concerns in the stages before Statement of Objections

It is suggested that the OFT tends not to disclose its concerns, or give an indication of the progress of an investigation, before a Statement of Objections is issued.

As the JWP recognises, there will be cases where an investigation could be prejudiced if we were to provide any indication to the parties as to its nature or status, or where there is other good reason for keeping the amount of information disclosed to a minimum (for example, to protect the identity of a complainant in the initial stages).

We agree, however, that there is likely to be merit in, wherever possible, seeking to be open and informative – both in terms of indicating our concerns and in terms of keeping the parties updated on progress – to a greater extent than is often the case at present.

We will give consideration to how such an approach might be fruitfully developed as a matter of best practice. Clearly, there are many issues to think through, but it may be,

for example, that some form of policy guidance, or possibly a code of practice, would be appropriate.

Information requests

The discussion papers make a number of observations about the OFT's use of section 26 notices, and about the scope and content of such notices. In particular, it is suggested that:

- section 26 notices are sometimes used when it might be as productive (if not more so) to obtain the requested information on an informal basis, and
- section 26 notices are frequently drafted too widely and/or ambiguously, with unrealistically short deadlines for response.

Since the Competition Act came into force, our practice has been (and it continues to be) to use the formal powers available to us as the primary means of information gathering. They are a vital tool in achieving an effective and timely administrative procedure. Our case work experience also suggests that, as the JWP notes, undertakings may often prefer to receive formal requests, and the certainty that they provide, to a more informal procedure.

That said, the existence of formal powers does not preclude our ability to obtain information informally[2], and we have found this to be useful on a number of occasions. Although we agree that a process based to a greater extent on informal co-operation may in some instances be beneficial both to the OFT and to parties under investigation, we need to tread very carefully in considering whether an informal approach should be adopted on a more widespread basis. Clearly, it would not be appropriate to use informal powers in any case where there is a risk of non-compliance or destruction of documents[3], or where efficient and timely process would be likely to be jeopardised, or our formal powers in any way undermined.

You may recall that at our meeting on 5 April, I floated the idea of whether it might be feasible to implement some form of 'concordat', whereby the OFT would agree to refrain from using its formal powers, in return for the parties agreeing to co-operate with the OFT and disclose requested information in a timely manner. This form of 'enhanced' co-operative process could be suited to those categories of non-hardcore cases where the OFT might consider it appropriate to accept commitments (the commitments procedure itself being based on voluntary co-operation between the OFT and the parties). It must be stressed that this is no more than a possibility, however, which will need careful consideration in terms of substance, workability and added value to the administrative process[4].

We recognise that the drafting and content of section 26 notices is an area where there is room for improvement. Deciding the precise scope of a section 26 notice is not always a straightforward matter. Too wide a scope may result in a disproportionate burden on the recipient and on the OFT; too narrow a request can result in potentially relevant documents being overlooked. We are working to improve the consistency and

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[2] See paragraph 2.4 of OFT 404 *Powers of Investigation.*

[3] These issues are not relevant to the use of section 28 alone, as evidenced by the fact that the criminal offences for non-compliance cover sections 26, 27 and 28.

[4] On a related topic, the CBI have recently raised the issue of the Cabinet Office Enforcement Concordat, and we will be meeting with them shortly to discuss this.

quality of our practice in this regard. At the same time, whilst we are always receptive to re-evaluating requests if recipients reasonably feel that the information requested is (for example) too wide in scope, and/or the timescale for response too short, it must to an extent to accepted that it is in the nature of an enforcement regime that the OFT and the recipient may not always see eye to eye on this issue.

In some cases we have found it helpful, as the discussion papers suggest, to circulate proposed information requests to addressees in order to discuss their scope and content, and the timescale for responding, shortly before sending finalised versions. This more flexible and co-operative approach would be unlikely to be suited to hardcore cases, particularly given that there is no legal obligation to comply until we have issued a formal notice. However, our experience does suggest that advance circulation of information requests may have a role to play – possibly in the context of a 'concordat' as mentioned above – in complex, document intensive cases, provided that there is no risk that an investigation will be prejudiced by issuing draft notices, and where we consider that doing so is likely to contribute to a more efficient administrative process. We will give thought to whether this approach should be adopted as a matter of best practice in appropriate cases[5].

Access to file

The discussion papers raise a number of issues in relation to organisation of the OFT's file, OFT practice regarding minutes of meetings and phone calls, and redaction of confidential material.

Again, access to file is an area where we accept that our practice has not always been consistent, and we are working to improve this as a matter of priority. It is of course essential that accurate notes of meetings and telephone calls are taken as a matter of good administration. Where such notes record meetings or conversations with external parties, we would expect to disclose them (subject to confidentiality issues) as a matter of course during access to file.

It is perhaps inevitable that the issue of confidentiality is a particularly contentious topic, both in terms of what constitutes confidential material, and the extent to which confidential material is disclosed during the administrative process. It is also an issue which to an extent 'cuts both ways' from the external perspective, in that companies providing information to the OFT are inclined to argue that their own information should be protected from disclosure, whilst as the same time arguing for extensive disclosure of information provided by other parties. It is against this context that we carry out our obligations under the disclosure provisions of Part 9 of the Enterprise Act.

The discussion papers may suggest that the OFT has not always taken a sufficiently rigorous approach to assessing confidentiality. However, we believe that our practice in this regard is improving as we gain greater experience in operating under the restrictions of Part 9. We recognise that our approach must be to assess confidentiality objectively and thoroughly, and to challenge claims where appropriate (particularly where they are

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[5] We would suggest, however, that it is not necessarily apposite to draw a parallel with the practices of regulators exercising concurrent powers, since they tend to have regular contact, and are thus more familiar, with the recipients of information requests, and are arguably better able to assess whether advance provision of a proposed request is likely to be useful and non-prejudicial to an investigation.

made on a 'blanket' basis). We are actively working to implement a rigorous and consistent approach to the assessment of confidentiality in the context of our procedures review.

Equally, however, it must be recognised that we are restricted by Part 9 to a considerable extent in terms of the information that we are able to disclose. This contrasts with the CAT, to which Part 9 does not apply.

The determination of whether confidential material should be disclosed during the administrative stages requires a careful balancing of, on the one hand, the need to protect the rights of defence of the parties under investigation, and on the other the serious prejudice which disclosure is likely to cause to the party providing information. We also need to bear in mind the criminal sanctions which exist for disclosure in breach of Part 9. We do not believe, in the light of these considerations, that it would be appropriate for us to adopt an overly liberal approach to the disclosure of confidential material. At the same time, we have taken note of the CAT's comments on, and approach to, the disclosure of confidential material. We are continuing to assess our practice, in the light of the CAT's judgments, and in the context of our procedures review. The issues raised by the discussion papers will also feed into that process.

Oral representations

We note the suggestion made in the discussion papers that the value of oral hearings would be increased (both to the parties and to the OFT) if, having taken sufficient time to consider the written submissions made, we were able to identify our key outstanding areas of concern to the parties in advance of the hearing. We recognise the attraction of giving advance indication of this sort, which would be likely to increase the effectiveness of oral hearings by cutting down on repetition and leading to more focused submissions. We will give further consideration to this issue.

The discussion papers also comment on the desirability of OFT senior management engaging with case work as much as possible. The papers acknowledge, and we agree, that the review and hearing process may be the best means of achieving greater involvement of senior management. To that end, oral representation hearings are - as with peer review panels - chaired either by me or by my Deputy, and in order to ensure consistency and familiarity with the case, we also ensure that, where possible, the same person acts as chair at both stages.

Involvement of complainants and other third parties in the administrative procedure

The discussion papers suggest that third parties with a sufficient interest should be given an opportunity to make observations on the decision to reject a complaint and/or Statement of Objections.

We agree that the structured involvement of certain complainants and other third parties in our administrative procedures will be likely to assist our investigations, whilst at the same time providing greater guidance to third parties as to the extent of their likely involvement in the administrative process. To that end, we have been considering various options for involving third parties in our investigations in a more formal and structured manner.

Given the importance of this issue to those who stand to be affected by the outcome of OFT investigations, we take the view that full consultation is essential to take account

of all interested parties' rights. We will shortly be issuing a paper setting out a number of proposals and options for the involvement of third parties in our investigations, and inviting comments on them.

Yours sincerely

Vincent Smith