

# EU & Competition

## Briefing

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### Executive Summary

- The OFT is introducing a possibility for competitors to ask the OFT for a short opinion on a proposed collaborative project that may at first sight be problematic from a competition perspective
- The OFT intends to publish a small number of such opinions per year in cases where there is a wider interest in the outcome
- The OFT intends to publish such opinions in a short time (2-3 months) and based on a joint statement of facts provided by the parties
- The OFT has issued the first such opinion on a 'commercial' case (joint purchasing) - in future it may also look at industry collaborations on 'public good' issues such as those aiming to increase environmental protection



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## Competitor collaboration made easier? - The OFT's new Short Form Opinions

### Background

Traditionally, EU and UK competition law enabled companies to notify any agreements of potential competition concern with competitors, distributors etc to the European Commission ("Commission") or the Office of Fair Trading ("OFT") respectively. The principal benefit of notifying such agreements to the competition authorities was that, even if the relevant agreement was not cleared or exempted, no fine could be imposed for the conduct from the point of notification up until the point at which the relevant competition authority decided whether or not to clear the agreement or grant an exemption. However, a major downside of the system was that many risk-averse companies notified agreements to the competition authorities as a matter of course, leading to the authorities being overwhelmed by a flood of notifications concerning mostly benign agreements.

Against that background, both EU and UK competition law underwent a significant change on 1 May 2004. At EU level, Regulation 1/2003 (the "Modernisation Regulation") came into force, and at UK level the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 amended the Competition Act 1998 in line with the Modernisation Regulation. Among a host of other changes, the main change in both the EU and the UK regime

was that the possibility of notifying agreements was abolished.

This significant change meant that the competition regimes at EU and UK level became systems in which companies had to "self-assess" the compliance of their activities (including any agreements they entered into) with competition law. In other words, companies were no longer able to use (some may say misuse) the notification system to minimise the risks of being fined for entering into agreements that were not justifiable under the criteria set out in Article 101(3) at EU level and in section 9 of the Competition Act 1998 at UK level.

At both EU and UK level, even in the modernised regimes, there is still the possibility for companies to approach the Commission or the OFT to seek guidance (in the form of a formal "Opinion") on novel issues of competition law. Both the Commission and the OFT have published notices that describe the applicable procedures and the relevant analysis framework. However, the process of obtaining such a formal Opinion is laborious and time consuming, and indeed the Commission has so far not published a single Opinion. The OFT has published one Opinion on distribution arrangements for newspapers and magazines in the UK, although this followed a lengthy

complicated process with full consultation of all relevant industry stakeholders, a detailed review of the competitive dynamics in the industry and a full legal analysis<sup>1</sup>.

Therefore, for some time now, the business community has lobbied the OFT to provide a half-way house between self-assessment and the existing Opinion process, and on 27 April the OFT announced that it had issued, as part of a trial, its first Short Form Opinion (“SFO”).

#### OFT’s proposed approach on SFOs

Alongside the OFT’s press release announcing the issue of its first SFO, the OFT has published a helpful brief summary of the approach it intends to take in relation to SFOs. The key points are summarised in a Q&A style below.

#### What is an SFO designed to achieve?

The OFT is reacting to a request from the business community to ensure that potentially beneficial collaboration between competitors does not fail to progress due to an unduly cautious approach to possible competition law concerns. In other words, the OFT has recognised that, in certain circumstances, its significant work on the competition advocacy front may be holding back genuinely beneficial competitor collaboration because, in a self-assessment regime, the competitors can’t get the comfort they need to proceed.

As a result, the OFT appreciates that a simple, short and flexible system is needed through which competitors can approach the OFT with a proposed collaborative project for the OFT to give a view on. The OFT plans to provide any SFOs that it agrees to consider within a period of two to three months.

#### How many SFOs will the OFT be willing to give?

The OFT has stated that it intends to apply its prioritisation criteria to SFO requests in the usual way. In addition, the OFT has indicated that it will only issue a limited number of SFOs per year.

#### What conditions must be fulfilled before the OFT will consider providing an SFO?

The OFT has set out the following cumulative conditions that need to be met before an SFO can be provided:

- The SFO should be capable of clarifying a novel or unresolved question of law that would benefit a wider audience;
- The competitor collaboration should be prospective, i.e. not either hypothetical or already in place;
- The SFO should relate to a horizontal agreement between competitors and the agreement should have a material link to the UK;
- The requesting parties must be willing to prepare a joint statement of facts on which the OFT will base its analysis, and see a non-confidential version of the joint statement of facts published alongside the SFO;
- The matter which is the subject of the SFO request must not be:
  - similar to a case already being investigated by the Commission or a national competition authority;
  - the subject of litigation; or
  - already being considered in the context of an Opinion by the Commission or a national competition authority.

#### What does the OFT base its competition analysis on?

As referred to above, the parties requesting an SFO must provide the OFT with a joint statement of facts. This is the only document on which the OFT bases its analysis contained in the SFO, so there is a clear imperative for the parties to provide sufficient information for the OFT to be able to conduct a proper analysis and (equally if not more important) to provide helpful guidance on the matter in question.

#### Are SFOs binding?

No. Although the OFT has stated that it will take SFOs into account should it need to look into the same or similar questions again at a later stage, SFOs will not bind the OFT, other national competition authorities, the Commission or the courts. However, clearly they are persuasive and it will be correspondingly more difficult for authorities or courts to take a line that diverges from an SFO unless the factual circumstances change.

#### What is the current SFO about?

The parties to the proposed agreement, which is a joint purchasing agreement, are the grocery wholesalers Makro Self Service and Palmer & Harvey. They propose to enter into an arrangement by which they jointly purchase from common suppliers to secure lower prices. It is understood that the parties were concerned that the information that needed to be shared between them for the arrangement to work may give rise to competition law concerns around information exchange. The OFT’s press release indicates that it has indicated to the parties how the exchange of information can be structured to be sufficiently general and aggregated not to give rise to concerns.

<sup>1</sup> SJ Berwin advised a wide variety of industry players throughout the OFT’s inquiry, including in particular the Periodical Publishers Association. See SJ Berwin’s press release (“SJ Berwin advises on OFT’s first ever written opinion”), 24 October 2008, available at: <http://www.sjberwin.com/newsdetails.aspx?hd=News&pid=2658&ctid=0&mid=1&rid=1>.

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### What types of cases is the OFT likely to take on next?

When Philip Collins, the OFT's Chairman, announced the SFO initiative in early March, the expectation was that SFOs would primarily be used for industry collaborations on themes that had a "public good" connection, e.g. common efforts to reduce the salt level in foods or common efforts seeking to protect the environment.

However, we understand that the OFT is happy to use SFOs not only for such "public good" cases but also for ordinary commercial cases, of which the first SFO subject matter is an example.

### How different is this from previous practice?

For a number of years after modernisation, both the Commission and the OFT were very reluctant to go back to anything which even vaguely resembled a notification system. Self-assessment was what companies were supposed to do in order to free up competition authorities' resources for cartel enforcement and other high profile projects.

Previous practice on 'Opinions' is, as noted above, thin. The only UK Opinion to date went through three drafts, nearly five years of investigation and the OFT still intends to re-examine the market in the next few years.

Therefore, the idea of a fast, flexible system for providing guidance on a

difficult area of the law that may otherwise hold back beneficial collaborative projects is an important shift of emphasis.

### Will the Commission be adopting a similar approach?

It is understood that the Commission is following the OFT's trial of SFOs with interest and, as is common with successful novel procedures that are adopted by particular competition authorities, it may well be that other authorities such as the Commission follow suit in due course.

### Conclusion

The proposed SFOs are a significant and welcome departure from the OFT's previous practice. On the assumption that the OFT chooses suitable topics which will indeed be of wider interest to companies and their advisers, there is every chance that SFOs will make a lasting beneficial contribution to the UK competition landscape for years to come.

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