

The City of London Law Society Competition Law Committee (CLLS)
and
Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law
(JWP)

Response to the Office of Fair Trading's (OFT) consultation on the OFT Transparency Project

Introductory and general comments

1. The JWP and the CLLS were pleased to have the opportunity to discuss the OFT Transparency Project with OFT representatives on 28 October 2008. The move towards greater transparency in OFT non merger projects is welcomed. The Mergers Branch procedures are commendably transparent and generally enable parties and their advisers properly to plan for the various stages of a merger investigation. The quality of decision making in the Mergers Branch is also considered to be high notwithstanding the timetable constraints within which it operates. Whilst it is accepted that non merger projects do not have the same timetable constraints, the requirement of good administration requires them to be dealt with efficiently, transparently, fairly and timeously.
2. As far as the OFT more generally is concerned, it would be very helpful if the website could clearly set out who works at the OFT and what they do. It would be particularly helpful to have details of who to contact on particular projects. The websites of the European Commission, Competition Commission and US Department of Justice would be good examples to follow.
3. It is suggested that interested parties should be provided with contact details for the OFT's team that is working on any particular project, and that such details should be updated if the composition of the team changes over time.
4. It is also suggested that caution should be exercised in assuming that transparency is achieved simply by publishing regular press releases setting out the OFT's "latest achievements" in a case e.g. publication of a statement of objections, conclusion of settlement agreements etc.
5. The OFT website contains some very useful information. However, much of this is difficult to find as the layout is insufficiently clear. The websites of DGCompetition and the US FTC are easier to navigate. Can OFT adopt some of their approaches?

Market studies/investigations compared with cartel and other enforcement projects

- Distinction to be drawn between transparency in market studies/investigations, on the one hand, and in cartel and other enforcement projects, on the other.
- Distinction also to be drawn between (i), level of transparency vis-à-vis the parties (including complainants) and (ii) more generally.

Market studies/investigations

Suggestions:

- Publication of an indicative timetable on OFT's website setting out key milestones and workstreams/information requests (this timetable to be able to be "flexed" as circumstances require).
- Giving names and contact details of who is running the investigation down to a reasonable level. We welcome the practice adopted in Scottish Property Managers case with names of the senior team on the OFT website.
- Looking at the Competition Commission's ("CC") procedures and see what else might be adopted, recognising that market studies should not seek to replicate CC market investigations.
- Avoiding unduly broad brush requests for information.

Enforcement projects

OFT engagement with parties

- Proper notice should be given to parties regarding the composition of the OFT team at the outset (i.e. when deciding whether or not to investigate) and parties should also be given details of any changes to the team. The OFT should ensure a proper handover in the event of change in personnel.
- An indicative timetable should be drawn up to enable parties to plan:
 - OFT must have indicative timetable internally.
 - An approximate timetable is all that is sought, with updates when things change.
 - It is recognised that there will inevitably be slippages, but some milestones are needed.
 - The timetable should provide for completion within a reasonable period. Lengthy cases can cause real problems for both the OFT and the parties because staff with knowledge may leave the business.
- Quarterly updates should be given.
- Section 26 Notices:
 - The OFT should agree key word searches with parties, as it often does in leniency process.

- Requests should be produced in draft to the parties.
 - Requests should not be too broad brush.
 - Reasonable notice should be given and requests must be properly modulated to avoid wasted time and resources on both sides.
- In complex cases (particularly Chapter I effects cases and Chapter II cases):
 - The OFT should explore the possibility of meeting the parties at an early stage so that market context/practice etc can be explained by the parties - this was offered but not taken up in *Dairy* and other cases.
 - The OFT should discuss its "emerging thinking" and theories of harm with parties, including parties' economists where helpful.
 - This would save time, money and resources.
- Statement of objections:
 - Proper notice should be given to the parties – fear of leaks should not prevent this.
 - Leaks could be dealt with via strict embargoes on the parties.
- Access to staff
 - It would be helpful to have details of the whole team.
 - Junior OFT staff are often just used as messengers and not authorised to take decisions on even simple points.
 - Senior OFT staff are usually very good but are often so busy that they are not very available.
 - As all cases on the practitioners' side are led by partners, senior people should be assigned to matters from the OFT side.
 - It would be sensible for the OFT to engage early on with the parties, in non cartel cases in particular.
- Dissemination of best practice:
 - Best practice should be disseminated within the OFT, so that what works on one case can be applied more generally.
- Other matters:
 - The OFT should consider in advance who else might need to see the SO (e.g. ex employees) so that consent can be given quickly. Delay in this regard seriously prejudices parties' rights of defence.

Position of complainants

- Same transparency and access subject to confidentiality and other restrictions.

Transparency more generally

- The OFT should not make public statements as a matter of course when a case is opened:
 - Section 25 has a low threshold which may be misinterpreted
 - The OFT can satisfy reporting requirements by referring to cases in its annual report.
 - The fact of an investigation may be market sensitive information which could have an adverse effect on companies.
 - Regulators, such as Ofcom, are in a different position, as their inquiries are considered to be more routine than OFT investigations.
- Press release on issuing of SO
 - Public companies would generally need to issue statements at this stage.
- Tone of OFT press releases:
 - Press releases should be factual (not triumphalist/pre-judging issues) and explain that no decision is yet taken.
 - It should be borne in mind that OFT statements can be misinterpreted by the press, particularly given OFT's very slow decision-making process. An SO is effectively treated by the press as the decision, and the OFT often seems to welcome this interpretation.
- Other government departments:
 - Should disclose their involvement to the parties. FOI requests can therefore be avoided.
- Consistency of OFT practice is key.

Settlement procedure

- The OFT's settlement procedures are more flexible than those of the European Commission.
- Clients/advisers welcome the OFT's pragmatism, but basic levels of fairness need to be respected.
- There have been notable inconsistencies in the OFT's approach to transparency in different cases (eg in *Tobacco* and *Construction*) – with the result that in some cases the settlement process has been arguably unfair/discriminatory.
- Greater consistency is needed.

- Now is the time for policy statement/guidelines.