

Kluwer Competition Law Blog

Two Years of OFT Short-Form Opinions: Not Quite the Return of the Notification System

Patrick Harrison (Sidley Austin LLP) · Thursday, March 15th, 2012

Competition authorities are forever looking to be more efficient. With limited resources and an almost unlimited supply of complaints and applications for immunity, the premium attached to efficiency in antitrust enforcement has never been greater. From the publication of decisions to the issuance of guidelines, and from the promotion of private enforcement to the giving of speeches at industry conferences, competition authorities are constantly seeking more bang for their enforcement buck.

Recent efficiency-driven initiatives at EU-level have included the conduct of multiple sector inquiries, the preparation of guidance on the Commission's Article 102 TFEU enforcement priorities and the instigation of an early settlement procedure in cartel cases. Back in early 2010, the UK's Office of Fair Trading ("OFT") appeared to take things a step further, saying that it was prepared to issue Short-Form Opinions on proposed agreements where it thought that the Short-Form Opinion might provide useful guidance to other companies contemplating similar arrangements. Was this a return to the best bits of the EU's notification and comfort letter system? Would these Short-Form Opinions provide the kind of detailed practical guidance so often absent from the Commission's Block Exemptions and Guidelines? Was this the way forward for the Commission and for the other National Competition Authorities ("NCAs")?

Certainly, the OFT made great play of its introduction of Short-Form Opinions. In its Annual Report for 2010/2011, the OFT stated that: *"Under this [Short-Form Opinion] process, the OFT aims to provide clarity to businesses within a prompt timetable on how the law applies to prospective collaboration agreements between competitors which raise novel or unresolved competition issues."* Laudable intentions.

The OFT's first Short-Form Opinion was issued in April 2010. It related to a proposed joint-purchasing agreement between two grocery wholesalers, was 17 pages long and gave the proposed arrangements a (carefully-caveated) clean bill of health. The OFT hoped that its opinion might: *"provide wider guidance to other parties contemplating joint purchasing arrangements in the same or other industries."* A promising start: it seemed the OFT had found a way of keeping the best parts of the notification system and providing detailed guidance to industry. Some wondered whether the Commission might decide to follow suit and be more prepared to issue informal "Guidance Letters" in relation to novel cases.

But, almost two years on, the April 2010 opinion remains the only Short-Form Opinion in

existence. That hasn't prevented the OFT from continuing to make great play of the concept of Short-Form Opinions in its public statements, however. Its draft Annual Plan for 2012/2013 states that: "*Competition enforcement is now more streamlined, and innovative approaches – such as early resolution and short-form opinions – are allowing us to achieve quicker outcomes.*" One opinion in two years would suggest that Short-Form Opinions are far from contributing materially to a more streamlined enforcement of competition rules...

So what has gone wrong?

The OFT's criteria for accepting requests to give Short-Form Opinions appear extremely restrictive. Requests must meet (*inter alia*) all of the following conditions: (i) they must raise novel or unresolved questions; (ii) clarification of the questions raised must benefit a wider audience; (iii) the request must relate to a prospective, horizontal agreement; (iv) the parties must be prepared to provide a joint statement of facts; and (v) the parties must accept that the statement of facts and the Short-Form Opinion will be published on the OFT's website.

Perhaps the criteria are too restrictive. The fact that requests can only be made in relation to agreements that have not yet been entered into means that parties must be clear as to their commercial intentions a long way in advance, must be in no hurry to enter into the arrangements and, frankly, must be prepared to run the risk of being told beforehand to desist from entering into arrangements when they might have stood a better chance of defending them retrospectively. The fact that detailed summaries of future agreements need to be published on the OFT's website might also be a significant deterrent where parties fear suppliers or competitors getting a heads-up (or just more detailed information) on their commercial strategies. Equally, it seems odd that guidance will only be given in relation to horizontal agreements. Distribution agreements are much more commonplace than horizontal agreements and there are plenty of unknowns arising out of the Commission's recast Vertical Guidelines (including in relation to internet sales restrictions) that industry might want to see clarified.

It would be interesting to hear the OFT's views as to why it has issued so few Short-Form Opinions. OFT Chief Executive John Fingleton stated in May 2011 that: "*[a]lthough there have been some approaches for an opinion since [April 2010], the team is awaiting a suitable second application*". Though the use of the word "*some*" to describe the number of approaches is rather vague, the quotation does suggest that parties weren't entirely put off the procedure by the OFT's criteria (or by the April 2010 opinion). However, the comments do rather beg the question as to why the OFT is so reluctant to issue opinions when the very *raison d'être* of the Short-Form Opinion procedure was to provide guidance to industry. Perhaps the answer is that the OFT team in question is just too busy on other, more pressing issues.

One thing is clear, however. As an exercise in improving efficiency in enforcement, the introduction of Short-Form Opinions has yet to deliver. The procedure and the criteria will have taken a good deal of time to devise and the first Short-Form Opinion will have taken a disproportionate amount of time to draft and approve (as with everything that a competition authority does for the first time). But the lack of a second, never mind third or fourth, Short-Form Opinion means that the OFT is not getting much bang for the enforcement bucks it spent in devising the procedure in the first place. It seems unlikely that the Commission (which is still yet to issue a Guidance Letter under its 2004 Notice) and the NCAs in other EU Member States will be forming an orderly queue at the OFT's door to find out more about its experience with informal guidance.

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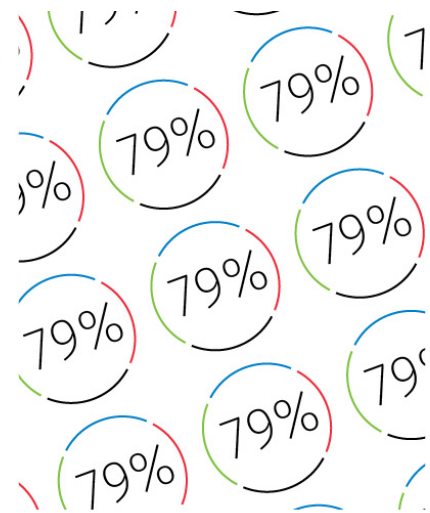
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