On 16 October 2012, the Office of Fair Trading ("OFT") issued revised guidance on investigation procedures in competition cases. This follows the updated guidance issued in March 2011 and a further consultation process launched in March 2012.

The changes largely relate to the decision making process within the OFT in Competition Act 1998 ("CA98") cases (including Articles 101 and 102 TFEU), including providing for a clear delineation between individuals responsible for issuing a Statement of Objections and those responsible for ultimate decision-making. Other procedural changes provided for include the publication of case opening notices, more interactive oral hearings, and an additional step in investigations allowing parties to make representations on penalties. The OFT believe these changes will enhance the robustness and efficiency of their cases, while also allowing better interaction with parties to investigations and improving the transparency of the OFT's work.

2011 GUIDANCE

The OFT introduced various new measures in the March 2011 Procedural Guidance after a consultation commencing in August 2010. The 2011 Guidance set out in more detail than had been the case the OFT's approach to decision-making, including responsibilities within the OFT. Other procedural changes included offering informal pre-complaint discussions to assist potential complainants, a commitment to reach a decision whether to pursue a case within 4 months of receiving a complaint, and sending case initiation letters upon formally opening an investigation.

However, the most significant new measure was the one year trial of the Procedural Adjudicator role. The Procedural Adjudicator, initially Jackie Holland - Director of Competition Policy at the OFT, is able to review certain decisions on procedural issues taken during an investigation, such as deadlines imposed on companies or decisions on confidentiality redactions. This followed feedback by parties under investigation and their advisers that there was no effective mechanism for resolving procedural disputes between parties and the OFT. The Procedural Adjudicator, while still an OFT official, is independent from the case team and reports directly to the CEO.

THE NEW GUIDANCE

The OFT's 2011 Guidance did not reflect all of the feedback received during the 2010 consultation and following an additional year of observation, the OFT has now further amended its guidance.

The New Guidance is concerned exclusively with the OFT's investigations under the CA98. The New Guidance will apply to all on-going and future cases, except those in which a Statement of Objections
("SO") was issued prior to 18 July 2012. The main changes and their implications are explored below.

**Case Opening Notices**

Going forward, the OFT will publish Case Opening Notices following the opening of a formal investigation. The Notice will only set out the basic details of the investigation. In certain circumstances, the Notice may simply refer to an investigation having been launched in a broad industry sector. Parties will not generally be named except in special circumstances. Interestingly, the European Commission's policy on naming parties at an early stage has been markedly inconsistent in recent years.

**Separation between investigative and decision making teams**

It has now been made clear that the Senior Responsible Officer ("SRO") is responsible for the decision to issue an SO but will not be responsible for the decision to proceed to a final infringement decision. The SRO will consult with the General Counsel and the Chief Economist, and possibly with other senior OFT officials in deciding whether to issue an SO. Once an SO has been issued, a Case Decision Group ("CDG") will be appointed, consisting of three senior OFT officials, who will be responsible for the decision to proceed to a final decision on infringement and penalty. The SRO will not be a member of the CDG and at least one member of the CDG will be legally qualified.

**Representations on Penalty**

After any written and oral representations on the SO have been considered by the CDG, the OFT will provide parties with a draft penalty statement setting out the key aspects relevant to the calculations of the penalty that the OFT proposes to impose on that party. A brief explanation of the CDG’s reasoning will be included. Parties will be offered the opportunity to provide both written and oral representations on penalties. Parties will also be able to review non-confidential versions of any submissions made by other parties to the investigation.

**Interactive Oral Hearings and 'State of Play' Meetings**

A number of changes have been made to the way in which oral hearings will be conducted. In particular, where previously the "decision-maker" would generally be expected to attend an oral hearing unless it was impractical to do so, the CDG will now attend all oral hearings. The hearing will also be attended by members of the case team, the Chief Economist and the General Counsel. The addressee and the case team will agree an agenda in advance of the hearing, taking into account any matters which the CDG wishes to address. The Procedural Adjudicator will chair the oral hearing and, following the hearing, will report to the CDG on any procedural issues that have been brought to his/her attention during the oral hearing, confirming whether the parties’ right to be heard has been respected (somewhat akin to the role of the Hearing Officer in EU proceedings).

The OFT has also introduced "state of play" meetings at which parties will be updated on the OFT’s progress in an investigation and provisional thinking. These will typically be held once a case has been formally opened, before a decision is taken on whether to issue an SO, and after written and oral representations on any SO have been reviewed.

**Procedural Adjudicator**

The OFT has decided to extend the Procedural Adjudicator trial for a further year. As noted above, the role will be expanded to include responsibility for chairing oral hearings and reporting to the CDG following the oral hearing.
IMPLICATIONS

The OFT hopes that publishing Case Opening Notices will enhance the transparency of the OFT’s portfolio of open investigations, including facilitating the potential to elicit information from businesses or individuals who were previously unaware that an investigation was ongoing. However, given the level of generality observed so far, this may not be realistic.

In the past, the OFT has faced criticism for the opacity of its investigation process. While a separation between the investigative and decision-making roles is a step forward, observers of the on-going debate regarding the European Commission’s similar procedures will be aware that many commentators are unconvincing that this is a sufficient level of separation. Concerns have also been raised as to whether the members of the CDG will be sufficiently experienced and able to devote enough time to reviewing case documentation. There is also a risk that the additional procedural safeguards may lengthen the investigation period, rather than add efficiencies. However, a corollary of this may be a freeing up of much needed investigative resource enabling the OFT to investigate a greater number of potential infringements.

The OFT’s changes to the process for fixing penalties are a clear result of the Competition Appeal Tribunal’s Construction and Construction Recruitment Forum judgments in 2011 in which a number of criticisms of the OFT’s fining methodology were upheld. The OFT’s aim is to ensure its penalty decisions are more robust on appeal and reduce the number of appeals made against decisions. However, it is important to note that there is no obligation on the CDG to take account of any representations made by parties in their final decision. The success of this change will ultimately depend upon the responsiveness of the CDG to the parties’ representations. A notable concern arises out of the potential for a reduction in a party’s ability to appeal, even where it is not evidence that their views are reflected in the Decision.

The New Guidance is very clearly limited to investigations under the CA98 and specifically does not concern investigations under the Enterprise Act 2002 (“EA02”). It seems likely that the number of prosecutions under s.188 EA02 (“the cartel offence”) will increase if the changes proposed in the latest iteration of the Enterprise and Regulatory Reform Bill are passed. These changes would see the removal of the “dishonesty” element of the cartel offence and the introduction of new defences for parties who can show that they did not intend to conceal the nature of the cartel arrangements from customers or prosecutors, or that before making the agreement they took reasonable steps to ensure the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or their implementation.

These reforms suggest that all cartel cases will be the subject of criminal investigations and it will be for the parties to lead positive defences. Does this mean that the OFT will need to apply its criminal investigation powers to all cartel cases in the future? If that is the case, the New Guidance may have limited relevance during the investigation phase of CA98 proceedings given the higher standard of proof required in criminal cases. Furthermore, what do the changes mean for legal privilege which the OFT still maintains in the New Guidance protects disclosure of correspondence between a professional legal adviser and their client for the purposes of giving or receiving legal advice, or those which are made in connection with, or in contemplation of, legal proceedings?

SMALLER MARKETS - WHAT IS THE RELEVANCE?

The importance of these changes across the UK business sector is brought into perspective by the recent opinion issued by AG Kokott in Case C-226/11 Expedia Inc. In that case, Expedia on appeal from a decision of the French regulator, argued that the French regulator could not have found there to be an infringement of Article 101 (1) TFEU and its French equivalent because there could not be an appreciable restriction of competition where the parties’ market shares fell below the thresholds set out in the European Commission’s De Minimis Notice (10% combined market share in the case of horizontal agreements; or 15% market share at either level of supply in the case of vertical agreements).

Kokott dismissed the arguments made by Expedia. First, Kokott submits that domestic courts and authorities are not bound to follow Commission guidance but must rather take “due account” of any guidance. Kokott observes that there “may be special national or regional competition problems in the various markets in the Member States to which the respective authority and the respective court must be able to react effectively” and “there may be objective differences in the enforcement practice of competition authorities.” Indeed, the OFT has shown a clear interest in smaller markets in recent years, as demonstrated by its Construction Decision and the recent decision to issue an SO against Mercedes-Benz and five dealers of Mercedes-Benz commercial vehicles. In June, the OFT noted of this decision:

"This case … shows the OFT’s commitment to pursuing allegations of serious competition law infringements irrespective of the size of the companies involved or the geographic scope of the case."

If Kokott’s opinion is followed by the ECJ, this may lead to a revision of how national authorities view priorities in smaller markets.
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