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## Interim arrangements for informal advice and pre-notification contacts

Updated April 2006

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### Introduction and summary

1. This Notice replaces the OFT's November 2005 Notice on the provision of confidential guidance and informal advice.<sup>1</sup> It sets out OFT interim practice from April 2006 until the OFT clarifies the long-term position on these non-statutory services prior to April 2007.
2. The OFT will consult publicly on the long-term provision of informal advice and confidential guidance as part of a wider revision of its merger enforcement procedures after three years' experience under the Enterprise Act 2002 (EA02) regime. The OFT will publish the new guidance by March 2007 and aims to do so before the end of 2006.
3. During this interim period, the OFT will deal with informal advice applications for good faith confidential transactions when presented with a case where the OFT's duty to refer is a genuine issue. The OFT believes that, where these conditions are met, its advice may assist business in a way that the parties' legal and economic advisers cannot. The OFT does not consider that public resources can be devoted to advice on transactions without apparent issues and which may never become live public cases.

These and related procedural issues are explained in more detail below.

### The changed EA02 context

4. Informal advice (IA) and confidential guidance (CG) have their origins in the Fair Trading Act (FTA) era at a time when the OFT provided unpublished advice to ministers on the application of a public interest test to mergers. Both services

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<sup>1</sup> For more details on informal advice and confidential guidance, see OFT, *Mergers – Procedural Guidance* at 3.4 *et seq.*

were retained under the EA02, in part based on expectations that the new regime would embody practice under the latter days of the FTA.

5. As experience and judicial guidance under the EA02 has made clear, however, OFT merger review is now very different. As the decision-maker assessing the applicability of a duty to refer, the OFT must justify its reasoning based on objective facts, which has driven evidence-gathering and assessment to the core of its investigative and decision-making processes. And at a time of increasing caseload and litigation, the OFT must strive to reach the 'right answer' while balancing due process obligations to the parties and complainants within a relatively tight first-phase time-frame.
6. In this new environment, routine provision of these non-statutory services was detracting from the OFT's ability to conduct high quality review of public-domain merger cases, including timely senior oversight and input.
7. At the same time, the new EA02 regime suggests that IA often provides minimal 'added value' beyond the parties' advisers own assessment. Experience suggested that it was dangerous to suppose that a limited review by OFT officials – without proper review of the parties' or third party evidence – made the OFT officials better placed than the parties' advisers to assess transaction risk up-front. In particular:
  - *Analytical framework* – the OFT's published substantive guidance on the EA02's competition test is supplemented with its decisional practice in all cases – making the UK system at least as transparent and predictable in this regard as the EC merger regime, which has no IA and CG equivalent;
  - *Evidence in individual cases* – advisers are typically in a better position to conduct an evidence-based risk assessment at the confidential stage: they have access to the parties' own evidence (e.g. business plans, customer research) and, by interviewing business personnel familiar with the market under protection of legal privilege, are generally better able to predict the likely evidence forthcoming from customers and other market participants than will OFT officials within the limits of the former CG/IA procedures.
8. The later emergence of facts and evidence unknown to OFT at the time tends to explain why it gave unhelpful 'favourable' IA for more than one in five transactions referred to the Competition Commission (CC) under the EA02. (Public examples that highlight this concern include *Emap/ABI*, a case with 'favourable' IA that was

ultimately prohibited and *Phoenix/EAP*, a case with 'unfavourable' CG that was unconditionally cleared twice.<sup>2)</sup>

9. The resource implications of IA and CG at that time, and its often limited value, led the OFT to announce the November interim measure. The OFT has since been reviewing the issue with constructive engagement from representatives of the business and legal adviser community; the CBI, the Joint Working Party of the Law Societies and Bars of England and Wales, and the City Solicitors' Company.
10. In response, and in the interests of striking a balance between genuinely assisting business as against the need to allocate its own resources responsibly, the OFT is now prepared to deal with IA applications, on an interim basis, according to the principles outlined in this note. Under the current EA02 regime, however, it continues to suspend CG as an unjustifiable call on its resources given the small additional benefits it may provide in some cases compared with IA. While CG shares with IA the inherent weakness of a lack of third party evidence, it is substantially more resource-intensive for the OFT.

### Informal advice – principles

11. The following are screening principles for IA applications, which are consistent with the OFT's overall competition enforcement vision, in step with the National Audit Office, to be discriminating in the work it takes on and to deploy senior experienced staff to maximum effect. In the merger control context, such resources should not lightly be diverted from managing how the OFT evaluates around 230 live public transactions annually to which statutory duties and high expectations apply.
  - ***Advice is appropriate for good faith confidential transactions only.*** As reflected in the OFT's procedural guidance, IA is available only for transactions that are neither hypothetical ('too soon for IA') nor in the public domain ('too late for IA').<sup>3</sup> In assessing whether a confidential transaction is ripe for the IA process, the OFT will generally expect to be satisfied that there is a **good faith intention** to proceed as evidenced by a likely ability to do so, having regard to (i) adequate financing; and (ii) heads of agreement or similar for agreed transactions; or (iii) evidence of board-level consideration by the acquirer where circumstances required IA prior to notifying the target. The factors listed above

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<sup>2</sup> See [www.competition-commission.org.uk/rep\\_pub/reports/2005/fulltext/497.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2005/fulltext/497.pdf) for EMAP/ABI CC report and [www.offt.gov.uk/NR/rdonlyres/FF822111-CB75-45FD-BFDF-4379DEF115BD/O/Phoenix.pdf](http://www.offt.gov.uk/NR/rdonlyres/FF822111-CB75-45FD-BFDF-4379DEF115BD/O/Phoenix.pdf) for OFT decision of June 2005. Phoenix/EAP was cleared originally in December 2004 and again in June 2005 once the case was remitted following appeal.

<sup>3</sup> See further, OFT, *Mergers – Procedural Guidance* at 3.4 *et seq.*

are non-exhaustive and the OFT will be open to persuasion that a specific good faith proposal is appropriate for IA consideration.

- ***Advice is useful and appropriate only when there is a genuine issue.*** The OFT believes it can materially assist business, and justify use of its own resources for IA, only when its duty to refer is a genuine issue. It sees no value to business or the taxpayer in accepting invitations to endorse the propositions of advisers that a transaction raises no such issue. Parties are well-placed to rely on proper external advice in such cases; as the UK regime is voluntary, they are of course under no obligation to submit to OFT merger review.

In practical terms, the OFT will provide open up-front assistance where it can engage with a candid presentation of an issue – on familiar 'without prejudice' terms. In order to do that advisers will therefore be expected to articulate the theory of harm that the OFT might reasonably rely upon as a **credible candidate case for reference**. This standard is that employed within the OFT to decide whether a case should be subject to the OFT's in depth Case Review Meeting (CRM) procedure, including the Issues Meeting process. This standard will not be met simply through a claim that the client is 'very risk averse', or that 'third parties might complain'. Nor should self-incrimination be an issue. The OFT has a record of dealing with parties' arguments in CRM cases, including remedies proposals, on a without prejudice basis: CRM cases are often cleared (and proposed undertakings in lieu left aside) because the OFT decided it had no duty to refer.

- ***Delivery and content of advice will be tailored to assist business most.*** In lieu of a 'one size fits all' approach to the IA process, the OFT will now provide a bespoke response to an IA application according to what, in its view, would most assist business in the circumstances. This should increase efficiency, enabling the OFT to offer a quick over-the-phone service where a protracted meetings-based process would simply entail delay and cost to the parties. At all times when IA is given, the OFT will genuinely provide as comprehensive and useful advice as it can. However, where OFT officials possess no particular insights that the parties and their advisers lack, the advice will be to this effect. Where an issue is complex and finely-balanced, the OFT may confine itself to advice in those terms, rather than forcing itself to choose between 'likely' and 'unlikely' to refer, as was historically the case.
- **Fast-track examples** – Two examples are set out below, but note that the traditional 'fireside chat' meeting will only be held where, in the OFT's view, the issue presented warrants it and meeting with business personnel will improve the advice that OFT officials can give.

- *Example – OFT advises that it cannot offer meaningful guidance beyond that available in published practice.* An IA application relates to a market for which suitable guidance in the form of previous OFT, CC or other decisional practice exists. The OFT advises by phone to this effect, adding any additional insights it feels it can offer prior to evaluation of any third party evidence. It offers a pre-notification conference call with the case team in due course to discuss a draft notification and suggests evidence which may be appropriate to shed light on the key competition issues of the case.
- *Example – OFT advises that third party evidence is likely to be decisive as to its duty to refer.* An IA application presents a merger as a '4:3' in a declining market with high entry barriers and a sophisticated, concentrated customer base. It argues that buyer power alone is sufficient to avoid a reference outcome, but seeks the OFT's view. The OFT's advice is as follows: (i) Primary weight would be given by the OFT to customers' own views on this point, substantiated with evidence; (ii) the parties' best course of action in the interim would be to gather credible evidence that buyers have leveraged such 'power' – by threatening to self-supply, sponsor entry or retaliate in other markets as the case may be – in past pricing negotiations; (iii) at the end of its inquiry, the OFT would weigh the probative value of such 'rebuttal' evidence against evidence supporting concerns in assessing whether it had the duty to refer. A pre-notification meeting with the case team is offered for when the parties have gathered the relevant evidence.

12. The above approach will sometimes result in more modest or qualified – but ultimately more accurate – advice. The OFT believes that business' needs will best be served when OFT guidance is simply an input into the assessment that expert advisers can offer the parties. Despite the caveats applicable to IA (see 17, below) the OFT believes that undue significance has been given in the past to its IA by the parties or their advisers in some cases.
13. Where an application for IA is accepted based on these principles, advice on jurisdictional issues – such as share of supply test or material influence questions – may be given along with advice on the substantive issues raising the genuine issue of a duty to refer.
14. Under these interim arrangements, however, the IA process is deemed unsuitable and inappropriate for the OFT to advise on the decisive legal question of whether the structure of a transaction, designed to fall outside the Water Act regime, is nonetheless caught by the relevant automatic reference provisions. Pre-notification is recommended in such a case.

## Informal advice – procedure and caveats

15. **Applications** – Parties should address all IA applications to the Director of Mergers. The request should be presented in clear, concise executive summary format of no more than **five pages** in length, covering:
- the suitability of the proposed transaction for IA treatment by reference to the principles set out in paragraph 11
  - the theory of harm underlying a credible candidate case for reference, leading the OFT to believe the duty to refer is a genuine issue
  - the key substantive issue(s) – and where applicable, jurisdictional issues – on which the parties seek guidance.
16. **Timing** – while there is no administrative timetable for IA, the OFT will endeavour to indicate whether it will accept or reject an IA application within 5 working days. Where IA is not given immediately but only at the conclusion of a meeting, the OFT will endeavour to schedule that meeting within 10-15 working days of receipt of the original application. Urgent cases will be handled more swiftly if (i) adequately justified by the parties and (ii) the diaries of relevant OFT staff permit.
17. **Caveats** – the existing conditions and caveats to IA still apply:<sup>4</sup>
- first, IA is solely the view of the OFT staff in the mergers branch, does not bind the OFT, and creates no expectations as to the outcome at the public stage of any transaction
  - second, both the content of IA and the fact that a party has applied is strictly confidential to the party or parties seeking that advice and their legal advisers, even after the deal becomes public
  - third, the OFT is unable to test the parties' submissions to verify information provided in an informal advice application: any advice given is based on the assumed accuracy of that information, and
  - fourth, the IA process is 'one-shot' and not iterative, though subsequent pre-notification contacts may be encouraged.

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<sup>4</sup> See further: OFT, *Mergers – Procedural Guidance*, at 3.4 *et seq.*

## Pre-notification discussions

18. The OFT also encourages better use of pre-notification contacts generally. This will be appropriate where parties are in the process of preparing their submissions on a merger (be it a confidential or a public domain transaction) but where early contact with the case team may be beneficial for some of the reasons outlined below.
19. **Potential benefits** – Pre-notification contacts benefit the parties, and often the OFT, by serving, for example, to:
- educate the case team where markets are complex and/or unfamiliar
  - frame the transaction, including its rationale and efficiencies, in a realistic context early on
  - clarify what information and evidence the OFT will require to deem a submission satisfactory or a Merger Notice complete, or will request early in the review procedure
  - identify useful items of evidence that may assist the parties' case
  - potentially avoid or minimise burdensome information requests
  - be an additional forum for informal dialogue on the OFT's likely approach to a novel issue or on competition concerns, if the parties wish
  - promote agreement on pragmatic methodological solutions to tackling issues, eg, isochrone analysis in grocery and cinemas cases, road/rail overlap and profitability data in transport cases, and so on.
20. **Contact** – In the first instance, parties seeking to hold pre-notification discussions should contact the case team leader responsible for the relevant industry sector. These details can be found on the OFT website at [www.offt.gov.uk/About/Who + to + contact/In + Competition + Enforcement + division.htm](http://www.offt.gov.uk/About/Who+to+contact/In+Competition+Enforcement+division.htm)
21. **Handling** – The case team will endeavour to review submissions and revert to the parties within a reasonable time frame; as a guide, this is generally expected to be some 5-10 working days from receipt, although the team will endeavour to accommodate City Code or other pressing timetable concerns whenever possible. Where a pre-notification meeting or conference call is desirable, the case team will schedule one, generally chaired by the case team leader or senior manager where appropriate; otherwise pre-notification contacts will proceed on the basis of phone, email and formal written contacts as required.