

ANNEXE 1

Short-form Opinions – The OFT’s Approach

- 1.1 The OFT has reviewed its approach to Opinions under the Modernisation guideline (OFT442) in response to concerns raised by business and other stakeholders that some forms of beneficial collaboration are currently not going ahead for fear of infringing competition law.
- 1.2 The OFT has decided to trial a new Short-form Opinion process with a view to providing guidance to businesses and their advisers on the application of competition law where there is an interest in issuing clarification for the **benefit of a wider audience**. Since 2004 businesses have been required to self-assess whether their agreements comply with competition law.
- 1.3 The new Short-form Opinion process will only be available for a limited number of cases per year in order to avoid a return to a notification regime.

When the Short-form Opinion process is available

- 1.4 The Short-form Opinion process may be used for requests that meet all the following conditions:
 - guidance is requested on **novel or unresolved questions** about the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and / or the prohibition in section 2 of the Competition Act 1998 (CA98), clarification of which would **benefit a wider audience**
 - **the request relates to a prospective agreement** – since the initiative is aimed at facilitating agreements to go ahead where possible under competition law rather than giving a second opinion on agreements that would have gone ahead in any event
 - **the request relates to a horizontal agreement** between competitors – since the OFT recognises that these types of agreements typically raise more significant competition law concerns that may discourage the parties from taking part in the agreement

- the proposed agreement has a material link to the **United Kingdom**, and
- the parties to the proposed agreement are prepared to **provide a joint statement of facts** on which the Short-form Opinion is based and to allow the statement of facts and Short-form Opinion to be **published** for the benefit of a wider audience.

The conditions above are **cumulative**.

1.5 The Short-form Opinion process falls within the OFT's general Opinions process. The Modernisation guideline sets out the circumstances in which the OFT will consider giving an Opinion and these general provisions also apply to Short-form Opinions.¹ In considering a request for a Short-form Opinion, the OFT will, in addition to confirming that all the conditions at 1.4 above are met, check that:

- there is not sufficient precedent in EU or UK case law, or decisions, practice or previously published opinions given by the European Commission's competition services or the OFT to answer the question posed
- there is a need for a published Opinion, and
- the Opinion can be prepared on the basis of the information provided.

1.6 The OFT will not consider a request for a Short-form Opinion where:

- the question(s) raised are identical or similar to issues raised in a case pending before the European Court or the European Commission
- the agreement or conduct to which the request refers is subject to proceedings pending before a Member State court or NCA
- the European Commission or another NCA is already considering a request for an Opinion in respect of the agreement or conduct which is the subject of the request before the OFT, or
- the request relates to hypothetical questions – a prospective agreement needs to be in contemplation.

¹ OFT guideline 442, Modernisation (December 2004), paragraphs 7.4 et seq.

What the Short-form Opinion process is designed to achieve

- 1.7 The process is designed to be simple, short and flexible, resulting in a published Short-form Opinion within an envisaged timeframe of two to three months. The Short-form Opinion will be given on the basis of a **statement of facts** that has been agreed between the parties. The OFT will assume that the statement of facts is accurate and that all material facts have been provided by the parties; and the Short-form Opinion will be given on this basis. The OFT **will not verify the accuracy or completeness** of the statement of facts.
- 1.8 Under the Short-form Opinion process, the OFT will provide guidance in response to specific questions asked by the requesting parties in order to facilitate their self-assessment of the compatibility of the proposed agreement with the relevant provisions of the Chapter I prohibition in the CA98 and/or Article 101 TFEU. It is in the parties' interests to provide a statement of facts that is accurate, complete and not misleading in order to maximise the relevance of the guidance given in the Short-form Opinion to carrying out their self-assessment exercise. The Short-form Opinion will not reach any definitive conclusions on the application of the Chapter I prohibition in the CA98 and/or Article 101 TFEU.
- 1.9 The Short-form Opinion cannot prejudge the assessment of the same question by the European Commission, the European Court, or the Competition Appeal Tribunal. Nor does it bind other national competition authorities or courts having the power to apply the Chapter I prohibition in the CA98 and/or Article 101 TFEU. The Short-form Opinion also cannot bind the subsequent assessment of the same or similar issues or conduct by the OFT, although the OFT will have regard to its Short-form Opinion when carrying out any such assessment.

Requesting the Short-form Opinion process

- 1.10 Undertakings considering making a request for a Short-form Opinion should approach the OFT informally to establish the best way to proceed. For further information, contact:

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- 1.11 Requests for Short-form Opinions will be considered as usual under the OFT's prioritisation principles.²
- 1.12 The OFT proposes to keep its approach to Short-form Opinions under review to evaluate whether it achieves its objectives and is an efficient use of OFT's limited resources.

² OFT953 (October 2008).