JOINT COMMENTS OF
THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW REGARDING THE OFFICE OF FAIR TRADING'S GUIDE TO INVESTIGATION PROCEDURES

November [12], 2010

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the Sections) of the American Bar Association (ABA) are pleased to submit these joint comments to the United Kingdom Office of Fair Trading (OFT) regarding its consultation paper entitled *A guide to the OFT's Competition Act of 1998 investigation procedures* (the "*Guide to Investigation Procedures*").[1] The Sections have substantial experience in investigations relating to competition laws in the United States and other jurisdictions, and in the practical implications of those investigations. These comments draw upon that experience.

The Sections applaud the OFT's efforts in preparing the draft *Guide to Investigation Procedures* and inviting comments as they contribute to the increased efficiency, consistency, and transparency of the investigation procedures.

EXECUTIVE SUMMARY

The Sections commend the OFT and offer specific comments below on each of the questions posed for consultation in the draft *Guide to Investigation Procedures* as follows:

1. The Sections agree that it would be beneficial to both the OFT and potential complainants to have the opportunity to meet informally prior to the submission of a formal complaint.

2. The Sections applaud the OFT's goal of informing complainants within four months of whether or not a formal investigation will be opened, as long as it is a guideline and not a mandatory deadline.

3. The Sections suggest that the OFT provide further detail on how it conducts its prioritization assessments and recommend some concrete examples below.

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1. OFFICE OF FAIR TRADING, A GUIDE TO THE OFT'S COMPETITION ACT OF 1998 INVESTIGATION PROCEDURES: A CONSULTATION PAPER (2010), *available at* http://www.oft.gov.uk/shared_oft/consultations/oft1263con.pdf

4. The Sections believe it would be helpful if the OFT provided additional clarity on how it scrutinizes its cases. For example, the OFT may want to provide additional detail on what should be included in a well structured and supported complaint.

5. The Sections suggest that further clarification could be provided on the role of the "independent" OFT official during the oral representations meeting. Moreover, additional opportunities for informal oral representations could be provided.

6. The Sections applaud the overall efforts to describe the OFT's processes during its investigations. The Sections recommend that more detail could be provided with regard to the protection of confidential data and the identity of the final decision-maker.

7.&8. The Sections provide a number of general comments on the draft *Guide to Investigation Procedures*. Nevertheless, the Sections believe that the consultation document is an ambitious undertaking that will greatly increase the transparency and clarity into the OFT's investigation procedures. The Sections further note that the Guide strikes a good balance between identifying specific rules, yet also permitting flexibility where necessary.

The Sections hope that these joint comments will be useful to the OFT. The Sections would be pleased to explain or expand upon their comments in greater detail, or to assist the OFT in any other appropriate way.

RESPONSES TO QUESTIONS FOR CONSULTATION

Question 1

We are proposing to offer potential complainants with the opportunity to have informal discussions with us in some cases before they decide whether to submit a formal, written complaint.

A.1 What are your views on this initiative? Will it help to encourage the submission of well-reasoned complaints?

Sections' Response to Question 1

Although pre-complaint discussions should not become mandatory, the Sections respectfully submit that such discussions can form an important part of the OFT's investigatory procedures and ensure that complaints are well-reasoned at the time of actual submission. The discussions may benefit the complainants and the OFT, by serving, for example:

- to educate the OFT where the markets are complex or unfamiliar;

- to frame the alleged infringement, including its legal basis and anticompetitive harm, in its market context;

- to clarify what information and evidence the OFT will require to deem a complaint complete or likely to progress to a formal investigation;

- to identify useful items of evidence that may assist the complainant's case; and,

- to serve as an informal dialogue on the approach to a novel issue or the assessment of a particular competition concern.

Pre-complaint discussions also can constitute an efficient method of gathering information that otherwise would be unavailable or difficult to obtain by a public body. In this context, it would be helpful if the OFT could indicate what "basic level of information" is required from complainants with respect to the "key aspects of their concerns."[2] For example, the Sections suggest that the OFT recommend, but not require, potential complainants to submit a memorandum providing a brief background of the complaint, a brief description of the relevant markets involved, and a review of the alleged anticompetitive conduct and its impact, together with relevant documentary evidence in its possession (e.g., internal board presentations, analyses, reports, and economic studies of the alleged harm). Moreover, it would be helpful to clarify that this basic level of information will be only a starting point for the OFT's consideration of whether it will engage in any pre-complaint discussions.

The Sections have some concerns regarding the OFT's substantive assessment of a complainant's competition concerns during pre-complaint discussions. In particular, unless there are appropriately defined conditions and safeguards, the Sections believe there is a risk that potential complainants could use their pre-complaint discussions with a Government enforcement agency as a tactical litigation tool to disrupt a potential defendant's legitimate business activity. This is a matter of particular concern as the OFT and the European Commission seek to encourage private rights of action in competition law cases as a complement to public enforcement. "Private competition law actions should exist alongside, and in harmony with, public enforcement."[3] It is in the public's interest for the OFT to be and be perceived to be an impartial investigating agency, not an arm of any potential complainant coaching or taking sides with respect to a particular competition complaint. Accordingly, it may be worthwhile for the OFT to consider implementing procedures, criteria, and filters to ensure that pre-complaint discussions are not used as a vehicle for complainants to pursue their individual commercial and legal interests. For example, the pre-complaint discussions should not be used as part of a process to refine the merits of a potential complainant's cause of action prior to filing a claim in the UK courts. In such a scenario, it is possible that a complainant could assert that it had filed its civil action following consultation with the OFT. How would the OFT

2. GUIDE TO INVESTIGATION PROCEDURES, *supra* note 1, ¶3.3.
3. OFT 916resp, Private Actions in Competition Law: Effective Redress for Consumers and Business, Recommendations from the OFT (Nov. 2007), Section 4.1.

react to such claims? What effect would the filing of a civil action in the UK courts have on the determination of whether the OFT opened its own investigation? Thus, while the OFT seeks to encourage private rights of action in competition cases, it is important that any pre-complaint process be structured and implemented to adhere to its public enforcement focus on "those cases that are considered to be the most important because they pose the greatest threat to consumer welfare or vulnerable groups."[4]

Question 2

We are proposing to commit to informing complainants within four months from the date we receive their substantiated complaint whether or not we intend to open a formal investigation.

A.2 What are your views on this initiative? Will it assist complainants in submitting well-reasoned complaints?

Sections' Response to Question 2

The Sections applaud the OFT for offering to respond to a complainant within a date certain in its draft *Guide to Investigation Procedures*. Our experience suggests that internal time frames for investigative matters allow the investigators, complainants, and parties to focus on and crystallize the key issues.

Caution must be exercised in setting rigid time frames, however. Competition law matters vary in their complexity. Abuse of dominance matters, for example, can involve complicated questions both of law and of fact. For example, in matters involving refusals to deal with competitors, several factors may be open to debate. The legal obligation to deal with a competitor, the amount of evidence required, and the meaning of the information contained in that evidence may not be readily apparent. In contrast, a resale price maintenance investigation may be relatively straightforward. As such, a process that imposes rigid deadlines to make a decision on whether or not the OFT will open a formal investigation carries some risk. If the four-month period were mandatory, the Sections would be concerned that the OFT may close an investigation at the end of four months because it lacked sufficient evidence to move forward, when a few more weeks or months of inquiry could reasonably be expected to yield sufficient evidence. Similarly, the Sections would be concerned, for example, if at the end of four months, the OFT chose to open a formal investigation on the basis of a looming deadline when information necessary to determine dispositive issues could be obtained easily and in short order.

The Sections therefore believe that instead of adopting a rigid time frame, the OFT should adopt a time frame that is flexible but provides a strong and meaningful goal by which the OFT will make its decision. For example, there could be a presumption that

4. *See id.* § 5.8 ("A robust and effective regime requires public enforcement to be focused on those cases that are considered to be the most important because they pose the greatest threat to consumer welfare or vulnerable groups").

a decision would be made within four months or the four months could be treated as a relatively formal status check to determine the merits of a particular investigation. Depending on the complexity of the issues, the OFT may require significantly less time than four months to evaluate the merits of a complaint and to determine whether it is necessary to open a formal investigation. In such cases, of course, the OFT should inform a complainant about its evaluation of the issues raised in the complaint much sooner than four months.

Question 3

We have described how we decide which cases to prioritize.

A.3 Does this guidance give sufficient information on how we conduct our prioritization assessments?

Sections' Response to Question 3

The Sections believe that it would be helpful if the OFT were to include more guidance on prioritization in the draft *Guide to Investigation Procedures* and also encourage the OFT in individual matters to provide transparency about its strategy and how it applied its priorities. Although there is separate OFT guidance devoted to the OFT's prioritization principles, the Sections believe that the OFT could clarify whether the OFT was aiming to achieve a particular goal by mentioning such guidance in the draft *Guide to Investigation Procedures*.

The existing OFT guidance on prioritization gives the OFT very wide latitude to take on or reject a case. That guidance also indicates that it should be read alongside the OFT strategy plan applicable at the relevant time. While the Sections understand that it is not desirable (and perhaps even impossible) to state with precision which types of cases will be pursued, the OFT could provide additional detail for companies and their advisers. For example, the consultation document could explain how the OFT would weigh the various criteria against one another. The OFT also could indicate, when it sends a Statement of Objections ("SO") (and in any subsequent decision), why the case qualifies for investigation on the basis of its priorities and prevailing strategy.

The *Guide to Investigation Procedures* also could shed light on when the OFT decides to "thin" cases out at a relatively advanced stage—i.e., why the OFT decides to drop a case against some companies but not others. It would be useful for the OFT to confirm whether this is a judgment that is made on the basis of the strength of the evidence against that company – or whether other reasons may be equally valid, such as a company's relative size or market share.

Question 4

We have described the ways in which we scrutinize our investigation process.

A.4 Does this guidance give sufficient information on how we scrutinize our cases?

Sections' Response to Question 4

The Sections acknowledge the detailed information and explicit guidance provided to potential complainants and applicants regarding matters under the Competition Act (the Act). The Sections also appreciate that the OFT differs from many other national competition regulators in that its decisions to undertake or close an investigation may be subject to judicial review.[5] Thus, the OFT must be in a position to carefully and transparently document and justify its rationale for decision-making in this regard. At the same time, the OFT should be able to come rapidly to a view on the legitimacy of a particular complaint or leniency application, particularly in light of the power under Section 35 of the Act to bring interim measures which could have serious consequences to targets of investigations. The OFT's careful scrutiny over its investigative processes will instill public confidence in the results of its inquiries.

The draft *Guide to Investigation Procedures* is complementary to several other OFT publications, including its 2008 Leniency and No-action guidance note on the handling of applications (the *Leniency Guide*).[6] In large measure, the OFT's inquiries rest upon the veracity and completeness of the information provided by complainants and applicants under the *Leniency Guide*, by requiring applicants to provide all pre-existing written evidence of the cartel[7] and imposing upon applicants the requirement that the overall approach to the leniency process must be constructive and designed to genuinely assist the OFT.[8]

It is in this context, then, that the OFT ". . . routinely review[s] and analyse[s] the information in our possession to test the factual, legal and economic arguments and to establish whether it supports or contradicts the theory/ies of competition harm."[9] The Sections also note the comments expressed at paragraph 9.8 that the OFT will ". . . regularly scrutinize our investigation processes and routinely assess the applicants before us to ensure that our actions and decisions are well-founded, fair and robust."

An agency's ability to obtain and assemble a comprehensive factual analysis is a key component to arriving at a well-founded view of a complaint or application. In short, a decision is only as good as the information upon which it is based. The Sections believe that there are two important elements to this:

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5. The Queen (on the application of Cityhook Limited); Cityhook, Cornwall (Limited) v. The Office of Fair Trading [2009] E.W.H.C. 57 (ad min).
6. OFFICE OF FAIR TRADING, LENIENCY AND NO-ACTION: OFT'S GUIDANCE NOTE ON THE HANDLING OF APPLICATIONS (2008), *available at* http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf
7. LENIENCY GUIDE, *supra* note 6, ¶¶ 3.18, 3.11.
8. *Id.*, ¶ 8.1.
9. GUIDE TO INVESTIGATION PROCEDURES, *supra* note 1, ¶ 9.1.

(a) ensuring that complainants and applicants have provided information sufficient to provide a balanced view of the issues presented; and

(b) ensuring, in appropriate cases, that the version of events put forward by the complainant or applicant is adequately corroborated.

With respect to the first point, the Sections believe it is essential that complainants and applicants be required to provide non-privileged information in their possession or control that is reasonably related to the matter, including both supporting and non-supporting facts and materials. The Sections would recommend that the *Guide to Investigation Procedures* make clear that the OFT will require submissions to be as comprehensive as possible and accurate in all respects and not simply rely on "cherry picked" evidence. It is for the OFT to determine the relevance and weight of both the supporting and non-supporting information. Ensuring that complainants and applicants have provided complete information would contribute to a high level of public confidence in the OFT's investigative scrutiny procedures.

As to the second point, experience has shown that courts have been cautious and sometimes strongly critical of the evidence supplied by complainants and informants in antitrust matters. The Sections therefore recommend that, given the potential consequences to targets of OFT investigations, the OFT consider including a requirement in the draft Guide to Investigation Procedures that facts supplied by complainants or informants be sufficiently corroborated to reduce the risk of the development of so-called "tunnel vision" on the part of the investigative team, and the OFT possibly bringing cases or proceedings with limited merit.

The OFT notes that "[w]ell structured written complaints supported by evidence are likely to proceed more rapidly to a prioritized assessment and, if they are prioritized, to an investigation."[10] The Sections believe, however, that the OFT would benefit by providing additional detail on the elements and quality of the evidence that is contained in a well structured and supported complaint.

The Sections suggest that the OFT refer complainants to general competition law pronouncements of the OFT and request that complaints address all the elements of violation, including identifying with specificity the conduct, the time of the conduct, who was involved, market definition and shares, effects, entry barriers, and other elements the OFT believes are relevant. This will assist complainants in understanding the types of cases that likely would be prioritized. It would also save the OFT time and resources. The OFT also may consider requesting that complaints identify other market participants that were injured by the alleged violation. Further, the OFT may want to make clear that it will examine the motivations of complainants in submitting their complaints. The Sections believe further clarity and detail will enhance the ability of the OFT to receive well structured and supported complaints that the staff can assess quickly and efficiently.

10. GUIDE TO INVESTIGATION PROCEDURES, *supra* note 1, ¶ 4.3.

The Sections also believe that the OFT should exercise caution regarding the ability to grant Formal Complainant status in relation to an investigation to persons submitting a written, reasoned complaint, and particularly the ability to provide Formal Complainants with access to the same information available to companies under investigation.[11] The Sections caution that the preferential role awarded a Formal Complainant could lead to a negative public perception that both the assembly of information and the scrutiny of that material could be biased or in some way influenced in favor of that party. The Sections recommend that the commentary in this section of the Guide include a statement that a Formal Complainant shall have no role in the internal scrutiny of the OFT's investigation processes, which are conducted independently of any submissions made or position expressed by a Formal Complainant.

Lastly, the Sections agree that the internal scrutiny procedures described in paragraphs 9.8 – 9.10 are helpful to ensure that a case is tested against a "fresh pair of eyes." It is evident that the OFT is committed to verifying internally its assessment of the facts and to inviting other parts of the OFT to give views on a developing—and perhaps novel—theory of harm.

The Sections also believe it would be helpful for the OFT to meet with the relevant parties early in the process to discuss the OFT's presentation of the facts or theories of harm. Regular "state of play" meetings—such as those now offered by the European Commission and by the U.S. enforcement agencies—are a key requirement to operating transparently and determining the facts. In the Sections' view, the OFT should be guided by the EU process (which is similar to the informal U.S. process) and offer state of play meetings (in addition to ad hoc meetings) at key stages including prior to the opening of proceedings, prior to adopting an SO, and after the reply to an SO or an oral hearing. It may also be helpful for the OFT to offer "triangular" meetings, similar to those held by the European Commission. Such meetings would enable the OFT to reach a more informed conclusion when two or more opposing views have been put forward as to key data or evidence.

A commitment by the OFT to such ongoing transparency and engagement not only will allow investigated companies a full and fair right to respond, but also will help to narrow the scope of disputed issues, correct misconceptions, reduce the likelihood of being surprised by arguments made in response to its formal charges, and enable the OFT to test its theories during the course of the investigation. Such measures would also enhance the quality of the OFT's fact-finding as well as its ability to allocate its resources efficiently.

Question 5

We have set out our oral representations process, which is a key part of parties' right of defense.

[11] *See id.*, ¶ 5.7.

A.5 What further information, if any, would be useful about how this process works?

Sections' Response to Question 5

The Sections welcome the OFT's effort to provide greater transparency concerning the oral representations process and to provide guidance to SO recipients so that they know how to prepare for and what to expect at the meeting. The Sections note that, as currently drafted, the draft *Guide to Investigation Procedures* suggests that it is incumbent upon the SO recipient to request an oral representations meeting and to provide advance notice to the OFT of the matters to be discussed at the meeting. The draft does not appear to include any provision whereby the OFT or the case team may initiate an oral representations meeting on its own. Nor does it appear to contemplate an opportunity for the OFT or the case team to provide advance notice to the SO recipient of questions it has concerning the SO recipient's written submissions or to provide guidance before the meeting to the SO recipient about the issues it would like to have addressed. The Sections suggest that the proposed guidance provide that, under appropriate circumstances, the OFT or case team may initiate the oral representations process on its own. The Sections further suggest that the proposed *Guide to Investigation Procedures* provide that the OFT or case team may notify the SO recipient in advance of the meeting of any questions it has concerning the parties' written submissions. This would advance the OFT's goals of maintaining flexibility in its investigations and promoting focused and productive oral representations meetings.

The Sections also suggest that interested parties would benefit from further clarification concerning the role of the participants at the oral representations meeting. The proposed guidance states that complainants and third parties generally will not be invited to attend the party's oral representations meeting, but does not describe the circumstances under which deviation from this general rule might be appropriate. The proposed guidance further provides that the oral representations meeting will be chaired by a senior OFT official who is independent of the case team, but the proposed guidance does not explain the meaning of the term "independent" and does not explain why having an independent official chair the meeting is important. For example, it is unclear whether a senior OFT official who has been consulted by a Senior Responsible Officer (SRO) in the course of an investigation could be considered independent for purposes of the oral representations process. Similarly, it is unclear whether or to what extent the independent OFT official who chairs the meeting participates in any subsequent appraisal of the information submitted during the representations process or has any responsibility with respect to the final infringement decision. Accordingly, the Sections suggest that the OFT consider providing additional information about the role of the independent person. The Sections further suggest that the OFT consider providing a clear statement of who has ultimate responsibility for appraising a case as set out in the SO, for evaluating the information that is presented during the oral representations process, and for issuance of a final infringement decision.

In addition, the Sections believe that interested parties would benefit from an oral representations process that is adaptable to the particular circumstances of each case and

that encourages open and honest dialogue among the SO recipient, the case team, and the OFT. As currently drafted, the proposed guidance does not provide a mechanism whereby the SO recipient may meet with the case team outside of the presence of senior OFT officials to respond directly to any questions that the case team might have concerning the parties' written submission. Nor does the proposed guidance provide any opportunity for informal oral representations, including meetings or telephone calls during which the proceedings would not be transcribed or after which non-confidential aspects of the meeting would not be made public. The Sections note that in the U.S. experience these types of informal interactions between the case team and the target of an investigation often have proven to be extremely valuable to both sides. Thus, the Sections suggest that the proposed *Guide to Investigation Procedures* include additional means by which oral representations may be made to SO recipients in an informal manner. The Sections believe that providing additional opportunities for informal information exchange would provide the OFT with additional flexibility in the conduct of its investigations and would encourage a more honest, candid, and open dialogue among all parties.

Finally, the Sections believe that the OFT should be flexible regarding the scheduling of an oral hearing. Although paragraph 12.11 states that the oral hearing will be held around 10-20 working days after the deadline for the submission of replies to the SO, it may be preferable to schedule the oral hearing after consulting with the investigated parties. Depending on the level of complexity of the facts and/or economics, the parties may require more than 10-20 working days to prepare sufficiently for the oral hearing.

Question 6

A.6 Does this guidance cover in sufficient detail all aspects of the processes in our investigations under the Act? If not, what additional guidance would be useful?

Sections' Response to Question 6

The Sections believe that it is important for the OFT to establish its approach to "early resolution" as a matter of urgency and then communicate this to the SO recipient and its advisers. A key aspect is flexibility, i.e., early resolution should be available both before and after the issuance of the SO.

It would be helpful if paragraphs 11.19–11.22 provided greater detail regarding the right of access to the file. Further, the draft *Guide to Investigation Procedures* appears to indicate that confidential data will never be disclosed to an investigated party. Throughout enforcement proceedings, the OFT will be faced with tension between the need to provide firms subject to investigation with full details of the complaints and evidence to enable them to respond fully to the allegations on the one hand, and the confidentiality required to protect legitimate business secrets of complainants and others participating in the investigation on the other hand.

The Sections believe that the OFT should enact procedures to manage this tension that are similar to the procedures enacted by the EU and that are similar to those used routinely in U.S. court proceedings to protect confidentiality of information needed for a defense. For example, confidential documents should be disclosable to firms on condition that they are not disclosed to others or used other than for the purposes of the proceeding at issue. In exceptional circumstances, where compelling commercial sensitivity surrounds the sharing of certain confidential information, such that it would be demonstrably harmful to allow a firm to have access to the information subject to the conditions described above, the OFT should have procedures in place to deal with the exceptionally sensitive elements. This could include (i) arrangements for the disclosure on the basis of terms agreed between the parties concerned; or (ii) a procedure pursuant to which the defendant would be given access to the confidential information on terms defined in an access agreement between the parties and the OFT (the terms of which would expressly state who could have unrestricted access and penalties for breach of the non-disclosure restriction).

The Sections note that there is still limited transparency with regard to the identity of the final decisionmaker. Indeed, the OFT uses the term "we" somewhat cryptically in chapter 13. It is key for parties to understand who will be making the final decision. This official should also be the OFT official who is present at the oral hearing.

Questions 7 & 8

A.7 Do you have any comments on how easy the guidance is to understand and whether its format is easy to follow?

A.8 Do you have any other general comments on the OFT's procedures in our investigations under the Act?

Sections' Responses to Questions 7 & 8

The OFT's draft *Guide to Investigation Procedures* is a very ambitious and well-written summary description of its procedures that avoids being overly technical. It is successful in the sense that it is a comprehensive description, and it is accessible to the business community. Notably, the document does not attempt to cover every known contingency, and it often reiterates that procedures may be adapted to achieve the objectives of the Act in the circumstances presented.

The *Guide to Investigation Procedures* manages to communicate the roles of governmental and private participants and their rights and duties in a relatively concise form by referencing a large set of existing OFT publications that deal with particular issues in more detail.[12] Although these references permit the document to maintain its focus on the narrative of how the OFT processes matters under the Act, the Sections note that the document would benefit from clarification of its relationship with other

12. *See, e.g.*, GUIDE TO INVESTIGATION PROCEDURES, *supra* note 1, ¶ 1.1 & Fig. 1.1.

publications and the procedures in related matters. For example, while the *Guide to Investigation Procedures* indicates that it is "concerned exclusively with our investigations under the Act" and that it does not cover OFT investigations into individuals suspected of having committed the criminal cartel offense, it is not immediately apparent whether the procedures outlined in the *Guide to Investigation Procedures* will apply to the assessment of leniency under the leniency program, or more generally to complaints concerning cartel behavior.[13] Paragraph 3.10 refers to the leniency application procedure, and paragraph 3.15 states that "complaints made to ERC which appear to relate to a suspected cartel will be redirected to the Cartel Hotline." If the *Guide to Investigation Procedures* is not applicable to the assessment and/or undertaking of consequential investigations relating to cartel matters (either after a leniency application or by complaint), then this should be made clear within the document.

The Sections also believe that it would be helpful if the OFT clarified its position in paragraph 7.5 regarding legal privilege. This paragraph states that issues of legal privilege are complex and therefore parties should seek advice of their own counsel and will not get advice from the OFT on such matters. Although there are no doubt matters concerning legal privilege that require close analysis, the OFT ought to make clear its position that UK rules on privilege extend to in-house legal advice (especially in light of the recent Court of Justice decision in *Akzo Nobel*).[14] A restatement of the position set out in OFT404 at [6.2]ff would be appropriate. Apart from this topic, the document seems to have struck a good balance between establishing specific rules and establishing reasons and procedures for modifying the normal procedures.

The draft *Guide to Investigation Procedures* also has addressed many issues about which the ABA previously has expressed concerns. For example, it appears to be responsive in most respects to the joint comments dated March 3, 2010 that the Sections submitted to the EC on its proposed rules on transparency and predictability in competition proceedings.[15]

Two principles are of central importance to understanding the OFT's draft *Guide to Investigation Procedures*. The first principle is the transparency commitment that the OFT made in July 2010, and specifically, transparency in explaining the work the OFT does, the expected duration of that work, and how the OFT will engage with those directly involved in the work. Transparency is evidenced, for example, by the explanation of the rights to submit information to the OFT by complainants, clarification on how their information will be treated, details on the rights and duties of parties to obtain prior notice of investigations, and explanations about the nature of the investigative proceedings. The parties are also entitled to examine the non-confidential materials in the OFT files so that SO recipients or affected third parties can add, explain,

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13. *See id.*, ¶ 1.3.
14. C-550/07 AkzoNobel Chemicals and Akcros Chemicals v Commission and Others.
15. The March 3, 2010 comments may be found at http://www.abanet.org/antitrust/at-comments/2010/03-10/2010_sal_sil_transparency.shtml.

or respond to conclusions based on information in the files. The procedures also allow parties to claim confidentiality or privilege for certain kinds of information where the parties justify such treatment. The results of OFT investigations are made available and explained to the public at specified stages.

The second principle is to establish timetables for procedures before the OFT and specify the responsible OFT officials. The OFT guidance either establishes the timetable (for example, how much time a party has to submit its justification for confidential treatment of its information), or commits the OFT to include the timetable in the proceedings, such as a request for documents. The procedures also require that the parties be informed at the outset of the names of the Team Leader who has day-to-day control of the investigation, the Project Director who is responsible for the quality of the investigation, and the person with the authority to decide whether an SO should be issued. The explicit designation of these individuals is important both to define the responsibilities of the individuals, and, in some circumstances, to identify the individuals to whom adverse decisions may be appealed. It also explains how the OFT officials in charge of a matter may seek advice from other OFT officials.

This kind of guidance could be developed only by an agency with a true commitment to transparency. The *Guide to Investigation Procedures* is filled with examples and exceptions to general rules that will be dealt with and explained on an individual basis. In addition, the OFT has made a commitment to review each matter when it is resolved for possible new lessons for future matters. The procedures are an ambitious undertaking and it will be of interest to all competition agencies to observe how they are put into practice.