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 ("the Sections") of the American Bar Association ("ABA") appreciate the opportunity to present their views concerning the United Kingdom Office of Fair Trading’s draft Detailed Guidance on the Principles and Process for Applications for Leniency and No-Action in Cartel Cases, (OFT803con, Annexe C, herein “Draft Guidance”).

EXECUTIVE SUMMARY

The Sections applaud the OFT’s efforts to provide greater clarity to potential leniency applicants. The Sections believe that the Draft Guidance is a commendable effort to provide procedural transparency, and it largely achieves this goal in one comprehensive, intelligible document. The Draft Guidance is a helpful reference source that undertakings and their counsel can use to explain and analyze the leniency application process. Overall, the Sections believe that the Draft Guidance represents a substantial improvement over prior guidance materials, and a potential template for similar documents in other jurisdictions.

The Sections, however, have three major substantive concerns with OFT policies as reflected in the Draft Guidance.

First, the Sections have serious concerns with the OFT’s policy on the potential waiver of legal privilege in criminal investigations. The Sections are sensitive to any intrusion into legal privilege generally and object to the requirement of waiver of legal privilege under any circumstances. The Sections believe that the OFT can fully execute its obligations to investigate
and prosecute cartel conduct and still preserve the legal privilege, as is done in other major jurisdictions around the world including the U.S., Canada and the European Commission (“EC”). Moreover, requiring waiver in even a small number of cases will add substantial uncertainty to the OFT’s leniency program and deter applicants from coming forward to report their involvement in cartel conduct. Based on recent experience in the United States, requiring waiver of legal privilege will inhibit effective internal investigations and self reporting by undertakings and have the unintended consequence of making it more difficult for the OFT to investigate and prosecute cartel conduct. Moreover, although the Draft Guidance states that the OFT will seek “the guidance of the court where necessary,” waiver of legal privilege should never be required, and the privilege should always be honored by the OFT, unless a court of competent jurisdiction determines that the privilege does not exist in a particular matter under the applicable prevailing law or has previously been waived the undertaking in that matter.

Second, the Sections believe that the standards for discretionary leniency for Type B applicants lack the transparency and clarity that the OFT has achieved elsewhere in the Draft Guidance. The Sections believe that an applicant that complies with all the requirements for Type B leniency should obtain the same level of immunity that a Type A applicant receives. Moreover, in those cases where the Type B leniency applicant receives a form of leniency rather than full immunity, the Draft Guidance explicitly declines to articulate the factors that determine the degree of leniency granted, noting only that in such cases, leniency will likely not be near one hundred percent.

The net result from this portion of the Draft Guidance is that potential Type B applicants have very little transparency into the process. The reader is left with the understanding that Type B immunity is discretionary; that the Type B applicant will find out if it receives immunity only after completion of the cooperation process; and that if the applicant fails to obtain immunity, the resulting level of leniency is “unlikely to be close” to one hundred percent. The Sections believe that this portion of the Draft Guidance will potentially deter leniency applications, creating an adverse effect on law enforcement, and may require additional discussion and possible revision.

Third, the Sections have several additional concerns with the scope and breadth of the Draft Guidance’s Annexe C, “Conducting Internal Investigations Before A Leniency

\[1\] Draft Guidance, Ch. 3.19
Application.” The Sections appreciate the OFT’s guidance on internal investigations, but are concerned about the request for “limited” internal investigations before reporting to the OFT. It is unrealistic for companies to make the weighty decision to apply for leniency, even at the marker stage, without a solid understanding of the facts. In addition, the OFT’s request for limited internal investigations appears to conflict with other jurisdictions’ demands for more detailed information, even at the marker stage. Moreover, by limiting internal investigations to accommodate the OFT, undertakings may be placing themselves at risk of not qualifying for leniency in other jurisdictions, such as the US and the EC, that require more detailed information and a more robust internal investigation to qualify for immunity and leniency. The Sections are concerned that by proposing a different standard on internal investigations from that of other jurisdictions, the OFT may be creating disincentives for undertakings to report cartel conduct to the OFT. Undertakings do not want to prejudice their ability to qualify for leniency in other jurisdictions by limiting their internal investigation, therefore, they may decline to report the cartel conduct to the OFT.

COMMENTS

I. The Objectives and Effectiveness of the Draft Guidance

The Sections commend the OFT for its continued recognition that transparency and legal certainty are critical to attracting applicants to participate in a leniency program. And the Draft Guidance is a productive step in the direction of providing potential leniency applicants with transparency and predictability. Notwithstanding the Sections’ Comments in Part II below, the Draft Guidance in large part achieves a commendable degree of clarity, specificity, and transparency. The Sections believe that the OFT largely realized its “hope [of] giving additional or clearer guidance” with respect to its policies and procedures.2

For example, the Draft Guidance will assist applicants and advisors in their understandings of what the OFT will expect over the course of its investigation in terms of cooperation. The chapter provides practical guidance for complying with the requirement to maintain continuous cooperation and discusses the information to be provided by leniency

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2 Id.
applicants. The chapter also attempts to outline in some detail the investigative steps the OFT will typically take in the course of an investigation. By outlining a potential investigation in this clear and systematic fashion, the Draft Guidance provides substantial transparency to the process, and will provide potential applicants with concrete, specific information that they can use to evaluate the decision to apply for leniency.

Adding to the predictability that this chapter seeks to bring to the investigatory process, the Draft Guidance maintains the policy—also set forth in the October 2008 Guidance—that the OFT will not seek information unrelated to the leniency application. Specifically, the Draft Guidance restates that it “will not be asking US-style ‘omnibus questions.’” In the Sections’ view, while the OFT may be foregoing the discovery of unrelated—but potentially criminal—information, the decision to refrain from asking the “omnibus questions” removes a disincentive for some potential applicants to pursue a leniency application. Therefore, this policy likely will increase the number of leniency applicants.

Likewise, in the Sections’ view, the OFT’s “Leniency Plus” program remains useful for increasing the number of leniency applications and generating cases. By all accounts, the leniency plus program has resulted in many successful investigations in the United States, and remains an important part of the Department of Justice’s leniency program.

The Draft Guidance also retains the notion that a “coercer” is not eligible for the leniency program. But the Draft Guidance provides helpful examples of what may amount to coercion, and what will not. Providing such detailed information is a helpful attempt to provide clear and meaningful guidance on a highly fact-intensive issue, and it only helps increase the transparency of the leniency application process.

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3 See id., Ch. 5.4-7, 5.11-20.
4 See id., Ch. 5.23-32
6 Draft Guidance, Ch. 5.21.
7 See id., Ch. 9.1-9.4
8 See id., Ch. 2.50-2.59.
The Sections also commend the OFT for sequencing the chapters and annexes to follow the natural progression of a leniency application and investigation, walking the reader through the entire process. The Table and Overview Charts are also helpful in illuminating the leniency process and its practicalities.

II. The Sections’ Concerns with the Draft Guidance

A. Waiver of Legal Privilege

The Sections commend the OFT for its recognition of the unique role of the attorney-client relationship and the preservation of legal privilege even in the face of a cartel investigation. The Draft Guidance appropriately notes that the “OFT recognizes the importance of companies and individuals being able to obtain legal advice on possible cartel activity and leniency applications confidentially with full disclosure to the legal advisor.” Moreover, the Draft Guidance reaffirms the important legal principle that “absent a waiver of privilege, whether as part of the cooperation from a leniency applicant or otherwise, it cannot compulsorily require the production of legally privileged documents.” The Sections believe that the preservation of the confidentiality of legal privilege is of paramount importance, and a crucial component of an effective anti-cartel enforcement program.

The Sections also commend the OFT for its efforts to balance the preservation of the legal privilege with the OFT’s needs to investigate and prosecute cartel conduct effectively. In that light, the Sections praise the OFT for unequivocally stating that the “OFT will not require waivers of legal professional privilege over any class of documents in civil investigations.”

However, in a departure from earlier guidance, the OFT states “that in some circumstances, the OFT will need applicants to waive privilege in certain documents, for review by the OFT and potentially for disclosure to criminal defendants.” The Sections are concerned about any intrusion into legal privilege and object to the requirement of waiver under any

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9 Id., Ch. 3.14.
10 Id.
11 Draft Guidance, Ch. 3.17.
12 Id., Ch. 3.18.
circumstances. The Sections believe that requiring waiver is both unnecessary to a thorough investigation and hurtful to the leniency program because it could deter applicants from coming forward to report their involvement in cartel conduct. The ABA has long championed the central importance of the attorney-client relationship in the US legal system and has sought to preserve legal privilege in the context of corporate investigations. The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client’s rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance on how to conform their conduct to the law. In addition, the privilege facilitates self investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community, and society at large.

The Sections believe, based on recent experience in the United States, that requiring waiver of legal privilege will inhibit effective internal investigations and self reporting by corporations and have the unintended consequence of making it more difficult for the OFT to investigate and prosecute cartel conduct. They also believe that the OFT’s attempts to limit the scope of the waiver are impractical. Each point is addressed in turn.

1. **Recent U.S. experience demonstrates the negative consequences of requiring waiver even in limited circumstances.**

Over the last decade, a number of US federal governmental agencies—including the Department of Justice and the U.S. Sentencing Commission—adopted polices that weakened the attorney-client privilege and work product doctrine in the corporate context by encouraging federal prosecutors to routinely pressure companies and other organizations to waive these legal protections as a condition for receiving credit for cooperation during investigations. The

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Department of Justice’s privilege waiver policy was set forth in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled “Principles of Federal Prosecution of Business Organizations.”\(^\text{14}^\) The Thompson Memorandum instructed federal prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in the Thompson Memorandum is the organization’s willingness to waive attorney-client and work product protections and provide this confidential information to government investigators. The Thompson Memorandum expanded upon a similar directive that then-Deputy Attorney General, Eric Holder, currently the Attorney General of the United States, sent to federal prosecutors in 1999.\(^\text{15}^\) The United States Sentencing Commission provided further support to this waiver policy when it added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Department’s policy, authorized and encouraged prosecutors to seek privilege waiver as a condition for cooperation.\(^\text{16}^\)

Although the Thompson Memorandum, like the earlier Holder memorandum, stated that waiver is not an absolute requirement, it nevertheless made it clear that waiver was a key factor for prosecutors to consider in evaluating an entity’s cooperation. It relied on the prosecutors’ discretion to determine whether waiver was necessary in a particular case. The Department of Justice’s privilege waiver policy—like the 2004 privilege waiver amendment to the Sentencing Guidelines—brought about a number of profoundly negative consequences, which ultimately resulted in a reversal of the policy.


\(^{15}\) See Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, “Bringing Criminal Charges Against Corporations” (June 16, 1999), available at http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF.

\(^{16}\) The 2004 amendment to the Sentencing Guidelines added the following language to the Commentary:

Waiver of attorney-client privilege and work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government] . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

The new language placed the waiver decision within the sole discretion of the federal prosecutor, which added a substantial element of uncertainty to the process and inevitably led to a large number of waiver requests in investigations.
First, although the Thompson memorandum stated that waiver is not mandatory and should not be required in every situation, the policy it reflected led prosecutors in the U.S. to pressure companies and other entities to waive their privilege on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, companies have no choice but to waive when requested to do so, as the government’s threat to label them as “uncooperative” will have a profound effect not just on charging and sentencing decisions, but on the company’s public image, stock price, and creditworthiness as well.17

Second, the waiver policy seriously weakened the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity’s best interest. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board, and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of an entity’s attorney-client and work product protections, or even the threat of waiver, these governmental policies discouraged entities from consulting with their lawyers, thereby impeding the lawyer’s ability to effectively counsel compliance with the law.18 This harmed not only companies, but also the governmental agencies entrusted with investigating and prosecuting cartel violations.

Third, while these waiver policies were intended to aid governmental prosecution of corporate criminals, they made the detection of corporate misconduct more difficult by undermining companies’ internal compliance programs and procedures. These compliance programs, which often include internal investigations conducted by the company’s in-house or outside lawyers, are one of the most effective tools for detecting and reporting cartel conduct. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, the Sections believe that any attempt to require routine waivers of attorney-client and work product

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18 Id. at 7.
protections will seriously undermine the internal investigative procedures that are crucial to effective compliance programs.

As a result of these well documented drawbacks, and substantial concerns aired by a wide variety of interested parties, the U.S. Department of Justice recognized the harm caused by requiring waivers of legal privilege and reversed its policy. On August 28, 2008, the Deputy Attorney General, Mark Filip, announced the change of policy in what is widely referred to as the Filip Memorandum.19 Signaling the importance of the revised policy, it was included in the United States Attorneys’ Manual, and became binding on all federal prosecutors within the Department of Justice. The new policy reiterated the importance of the attorney-client privilege and the attorney work product privilege in the American legal system. According to the Filip Memorandum, the waiver of attorney-client and work product privilege is not “a prerequisite under the Department’s prosecution guidelines for a corporation to be viewed as cooperative.”20 Moreover, “while a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.” (Emphasis added).21

Significantly, during the reign of the Thompson Memorandum, the Justice Department’s Antitrust Division made it a policy never to require the waiver of attorney-client privilege as a condition for acceptance into the leniency program or cooperation discounts, remaining steadfast in its refusal to require the waiver of attorney-client privilege.22 Despite, or perhaps because of that, that period was an extraordinarily successful one in U.S. cartel enforcement.23

2. The OFT’s attempt to limit the waiver is impractical


20 Id. at p. 8.

21 Id. at p. 9.


In addition, the Sections do not believe that the OFT’s efforts to minimize the scope of the disclosure of legal privilege will be effective. The OFT’s Draft Guidance is sensitive to the concerns raised by this new waiver requirement, and has attempted to minimize the scope of such disclosures. The OFT Draft Guidance states that in those circumstances where waiver is required it will “most likely arise in relation to ‘first witness account material.’”\(^{24}\) Furthermore, the Draft Guidance states that “waiver of privilege in such materials and their disclosure to the OFT does not necessarily imply that materials will be further disclosed to others.” Although the OFT’s efforts to limit the scope of waiver of legal privilege are welcomed, unfortunately, the Sections are concerned that it will not be effective. In many jurisdictions, including the United States, even limited disclosures of legal privilege anywhere in the world can lead to broader “subject matter” waivers on all privileged material relating to the subject matter of the material disclosed, no matter how limited the initial disclosure.\(^{25}\) Moreover, in the United States the disclosure of privileged material to a government agency, including a foreign government agency such as the OFT, constitutes waiver of that privilege as to all parties.\(^{26}\) Once a party makes even limited disclosures of legally privileged material, it is almost impossible to limit further disclosures. This is of particular concern in the United States where civil plaintiffs have become much more aggressive in their discovery requests for materials provided to enforcement agencies around the world.\(^{27}\)

The OFT Draft Guidance also states that the “OFT will not require disclosure of privileged materials as a matter of course. It is only likely to seek counsel’s advice on the necessity of disclosure of privileged material at a point in the investigation where it has determined that there is otherwise sufficient evidence to charge one or more individuals with the

\(^{24}\) Id., 3.18


\(^{26}\) See *In re Steinhardt Partners*, L.P., 9 F.3d 230, 235-36 (2d Cir. 1993); *In re Sealed Case*, 676 F.2d 793, 820-825 (D.C. Cir. 1982).

\(^{27}\) See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 07-MD-1827 Doc. No. 2686 (N.D. Cal. April 26, 2011 (motion to compel all communications and documents exchanged with the European Commission and the Japan Fair Trade Commission denied after in camera review by the court).
cartel offense.” Once again, the Sections applaud the OFT for its efforts to minimize the frequency of waivers. But for companies contemplating a leniency application, even if waivers are required in only a small number of cases, counsel for the company will have to assume that the possibility of waiver exits in all cases before the OFT and act accordingly. The Sections are concerned that the specter of having to waive attorney-client privilege in all OFT matters will introduce great uncertainty into the leniency application process and create a substantial chilling effect. The adverse consequences of the OFT’s waiver policy in other jurisdictions and in private civil damage claims could significantly limit the number of leniency applications in the UK. Thus, the OFT runs the risk of isolating itself from the rest of the major cartel enforcement jurisdictions, as companies may chose to bypass the UK as they report cartel conduct to other jurisdictions around the globe.

If the OFT retains the legal privilege waiver policy, the guidance is not clear on the consequences to undertakings for refusing to waive the privilege. In one portion of the Draft Guidance the OFT states that “absent a waiver of privilege, whether as part of the cooperation from a leniency applicant or otherwise, it cannot compulsorily require the production of legally privileged documents.” However, another section of the Draft Guidance states “that in some circumstances, the OFT will need applicants to waive privilege in certain documents, for review by the OFT and potentially for disclosure to criminal defendants.” The guidance should clarify this ambiguity and clearly articulate the consequences to undertakings for failing to waive the legal privilege.

Finally, in order to adequately protect the due process rights of companies and individuals, the Draft Guidance should explicitly state that waiver of legal privilege will never be required, and the privilege will be honored by the OFT, unless a court of competent jurisdiction determines that the privilege does not exist in a particular matter under the applicable prevailing law or has previously been waived by the undertaking in that matter.

28 Draft Guidance, Ch. 3.22.
29 Draft Guidance, Ch. 3.14.
30 Id., Ch. 3.18.
**B. Discretionary Immunity and Leniency for Type B Applicants.**

The guidance document states that the OFT retains discretion whether to grant immunity to Type B applicants and level of leniency that may be provided to a Type B leniency applicant if that applicant does not receive full immunity.\(^{31}\) The Sections believe that a discretionary standard is incongruous with recognized principles for successful leniency programs, as well as the stated objectives of the OFT.

1. **Discretionary Immunity**

The OFT states that its decision whether to grant Type B applicants immunity will ultimately be judged, at least in part, not based on the leniency applicant’s compliance with the requirements of the application process, but on the OFT’s “assessment of where the public interest lies in the particular case.”\(^{32}\) The OFT will conduct this assessment by “perform[ing] a balancing exercise, assessing the benefits of gaining additional evidence by reason of a grant of leniency against the disbenefit of granting immunity or a reduction in penalties after an investigation has already commenced, resources have been expended and after the OFT may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.”\(^{33}\) The Sections believe that this standard is unsatisfying.

It is widely recognized that a successful leniency programs should involve as little prosecutorial discretion as possible in the determination of whether an applicant is entitled to immunity or a reduction in fines.\(^{34}\) Without being able to point to concrete thresholds to

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31 “In Type B cases, it is possible that the value added by the application will be high, as it will be the OFT’s first application on the case and, as such, even where the application does not result in a grant of corporate immunity, awards of up to 100 per cent are possible. However, the OFT has insufficient experience of Type B reductions in penalty to give any more guidance about the percentage reductions that a re likely to be on offer in the majority of cases.” Draft Guidance, Ch. 6.9.

32 Id., Ch. 2.18.

33 Id.

34 Competition officials in the United States and elsewhere comment frequently about the importance of removing prosecutorial discretion from the leniency process. See, e.g., Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004) (“Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.”).
evaluate whether it will be able to obtain immunity, a potential Type B leniency applicant—who will typically be unfamiliar with the OFT’s practices—will be less inclined to risk a discretionary grant or denial of immunity. The Sections therefore urge the OFT to reconsider whether immunity for Type B leniency applicants should be automatic if the applicant meets the criteria for a successful application, consistent with the level of immunity granted to Type A applicants.

However, assuming that the OFT does not change the discretionary nature of Type B immunity, the Sections suggest that the OFT provide additional facts regarding Type B leniency applications beyond the “balancing test” discussed above. For example, the OFT could include historical statistics of the percentage of Type B leniency applicants that obtain immunity. Moreover, the guidance would benefit from the provision of illustrative examples of instances where immunity would not be awarded to a Type B leniency applicant other than those instances identified in paragraph 2.23 of the Draft Guidance.

2. Discretionary Levels of Leniency

The Draft Guidance does not describe the factors that determine the degree of leniency granted to Type B applicants not granted full immunity. Instead, the OFT states that it “has insufficient experience of Type B reductions in penalty to give any more guidance about the percentage reductions that are likely to be on offer in the majority of cases.” The Draft Guidance goes on to state that leniency will likely not be near one hundred percent, because if an applicant was close to one hundred percent, “the OFT would otherwise probably have granted corporate immunity to the Type B applicant.”

The only additional information that sheds any further light on the level of leniency that would be afforded to a Type B applicant is the observation—in the same paragraph, Ch. 6.9—that Type C applicants typically will receive no more than fifty percent leniency. It is unclear whether the OFT intended this statement to suggest that Type B leniency could approach, but would not be below, 50 percent. But as presently drafted, that is a potential inference the reader

35 Id., Ch. 6.9.
36 Id.
37 Id.
can glean from this paragraph. If the OFT does not intend to readers to make this inference, it should further clarify that the 50 percent upward threshold for Type C leniency is not a factor in the amount of leniency afforded to Type B applicants.

The Sections believe that this portion of the Draft Guidance does not provide sufficient transparency regarding the benefits of Type B leniency. Essentially, the only guidance provided is that if a Type B applicant does not obtain immunity, it will probably receive leniency of at least fifty percent, but substantially less than one hundred percent. The resulting uncertainty will, the Sections predict, discourage Type B leniency applications.

Additional clarity can be gained in various ways. For example, the guidance paper can include a presumptive floor for type B leniency discounts. At a minimum, the OFT should consider including descriptions of the reductions in penalties received by Type B leniency applicants in an Annexe to the Draft Guidance.

C. Annexe C: Conducting Internal Investigations Before A Leniency Application.

The OFT seems to suggest that internal investigations be narrow and limited. At one place, for example, the document states that an internal investigation should “limited to that which is necessary.”38 At another it states that “there should be no reason to undertake significant internal enquiries before applying for a marker.”39 The document also states that “it is of prime importance that would-be applicants conduct an enquiry that is as limited as it can be at the pre-leniency stage.”40

The Sections have two primary concerns regarding the OFT’s Draft Guidance on limited internal investigations. First, it is unfair to expect companies to make the monumental decision to apply for leniency, even at the marker stage, without a solid understanding of the facts. Reporting cartel conduct to an enforcement agency is one of the most complicated and difficult decisions a company can make, and few companies will make that decision without a thorough

38 Draft Guidance, Ch. 3.8
39 Id. Ch. 3.11
40 Annexe C, Ch. C.4
understanding of the underlying facts. It is not unheard of for a company to receive credible information of cartel conduct, only to discover upon further investigation that the information is false or based on a misunderstanding of the law. Companies want to make sure they fully understand the nature of the conduct, and that it is in fact illegal, before reporting it to the authorities. Penalizing companies for being diligent and taking their time may be counterproductive and could lead to erroneous leniency applications. Second, the OFT’s request for limited internal investigations appears to conflict with other jurisdictions’ demands for more detailed information, even at the marker stage. The OFT recognizes this discrepancy in standards when it states that “the OFT does accept that some of the other agencies set a higher threshold and that a more significant investigation may be necessary in order to make leniency applications in multiple jurisdictions.” This is correct. In the U.S., for example, leniency applicants must agree to “provide full, continuing, and complete cooperation” including “a full exposition of all facts known” and “providing promptly, and without requirement of subpoena, all documents, information, or other materials in its possession, custody, or control, wherever located . . . .” No limitations are placed on the scope or timing of the internal investigation. Similarly, to qualify for immunity in the EU, applicants are required to provide a detailed description of the cartel conduct including “specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.” These U.S. and EU obligations are inconsistent with the OFT’s request for a more limited internal investigation.

Where immunity applicants are considering the risks and advantages of filing multiple immunity applications with antitrust agencies operating their separate leniency programs around the world, it is vital for first applicants to be able to coordinate their immunity applications in all major jurisdictions affected by the infringing conduct. When the rules are inconsistent, steps taken in one jurisdiction to improve or even preserve the applicant’s position with one antitrust agency can prove detrimental to the same applicant’s interests in other jurisdictions. To the

41 Draft Guidance, Ch. 3.11

42 United States Department of Justice, Antitrust Division, Model Corporate Conditional Leniency Letter, Paragraph 2.

extent the OFT imposes cooperation requirements that are inconsistent with the other major enforcement agencies, it may deter leniency applicants from reporting to the OFT.

Finally, it is not clear if the OFT’s guidance on internal investigations is mandatory, or merely advisory. Moreover, the consequences for failure to abide by this guidance are unclear. With regard to internal investigations, the guidance states that “the OFT only requires that undertakings act reasonably”\textsuperscript{44} and that “this sets out the steps and precautions the OFT expects applicants to take,”\textsuperscript{45} which suggests the voluntary nature of these recommendations. If the guidance on internal investigations is not mandatory, but merely advisory, this should be clearly stated in the document.

**CONCLUSION**

The Sections appreciate the opportunity to submit these comments and hope they are helpful to the OFT. We regard leniency programs as critically important elements of cartel enforcement worldwide, and therefore consider the issues raised in these Comments to be of particular importance.

\textsuperscript{44} Draft Guidance Ch. 3.8

\textsuperscript{45} Id., Ch. 3.10