JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
ON THE
OFFICE OF FAIR TRADING’S DRAFT REVISED GUIDANCE AS TO THE
APPROPRIATE AMOUNT OF A PENALTY (OFT423con)

January 25, 2012

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.

INTRODUCTION & EXECUTIVE SUMMARY

The Section of Antitrust Law (“Antitrust Section”) and the Section of International Law (“International Section”) (together, “Sections”) of the American Bar Association (“ABA”) welcome the Office of Fair Trading’s (“OFT”) consultation on its draft revised guidance as to the appropriate amount of a penalty (“draft Guidance”) and commend the OFT for giving business and consumer organizations an opportunity to provide comments on the draft Guidance.

The Sections believe that the draft Guidance contains a wealth of useful material which will greatly aid businesses and others in understanding the OFT’s policies and practices in regard to penalties. The draft Guidance therefore succeeds in achieving the transparency that is one of the key objectives of guidance documents of this kind. Moreover, the Sections agree with the substance of the draft Guidance in most respects. The Sections believe that the document can be improved and strengthened in the following ways:

Role of compliance activities as a mitigating factor: The Sections welcome the OFT’s proposal to treat compliance activities as a mitigating factor where the offending business has taken all necessary steps throughout its organization to achieve a clear and unambiguous commitment to competition law through appropriate competition law risk identification, risk assessment, risk mitigation, and review. In response to Question No. 8, the Sections suggest, however that fines should ordinarily be reduced for businesses satisfying this test and that the OFT should specifically set out in the final version of the draft Guidance the level of fine reduction that may be granted by the OFT where the compliance program meets the requisite standard. The Sections believe that a reduction of at least 10% would be appropriate, as suggested by the consultation paper that accompanies the draft Guidance.

Role of compensation as a mitigating factor: In response to Question No. 9, the Sections believe that the OFT should include offers to pay compensation or restitution as part of its assessment of penalties.

1 The Sections have previously commented on the fining provisions of the Canadian Competition Bureau, the U.S. Department of Justice, Antitrust Division, and the French Competition Authority, and these comments reiterate many of the principles discussed in those comments. See Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases Issued by the Competition Bureau of Canada (June 14, 2008), Comments of the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission’s Request for Public Comment on Criminal Remedies (Nov. 14, 2005) and Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the French Competition Authority’s Draft Notice on Fines (Feb. 16, 2011).
mitigating factors. Such an approach would not appear different from other areas of English law where restitution has been taken into account in setting fines, and would be consistent with the OFT’s core goal of delivering direct financial benefits to consumers. While the Sections agree with the OFT that a “pound for pound” reduction in fine based on compensation is not always necessary, we also would not limit the possible reduction in fines to a modest 5 to 10%. Finally, even if the OFT is not inclined to consider offers of restitution as a mitigating factor in every case, the final version of the draft Guidance should clarify that payment of compensation or restitution can be viewed as a mitigating factor in the right circumstances.

Starting Point for the Fine Assessment: In response to Question 2, the Sections respectfully submit that increasing the starting point to a maximum of 30% of the value of sales, with a 25% minimum for the most serious infringements, is disproportionate. Recent cartel fines imposed by the European Commission suggest that a range of 15-20% is more appropriate for the most serious infringements. Alternatively, the Sections suggest that instead of a minimum starting point of 25% for the most serious infringements, the final Guidance should make clear that fines above 20% are reserved for hard-core cartels.

Duration of Infringements: In response to Question 4, the Sections respectfully suggest that the duration of an infringement should not be considered as an independent factor in the calculation of fines. If, however, the OFT does retain duration as an independent factor, then it is respectfully suggested that a minimum period of six months should be allowed, an approach consistent with the European Commission’s guidelines on fines.

Specific Deterrence Adjustments: In response to Question 6, while the Sections agree that, in certain circumstances, adjustments to a fine level may be needed to promote specific deterrence with respect to the undertaking in question, we suggest that an undertaking’s margin is not an appropriate basis to measure whether a proposed fine should be increased to promote specific deterrence.

Aggravating Factor of Recidivism: In response to Question 8, while the Sections believe that recidivism is an appropriate aggravating factor in a fining calculation, we suggest that a 15 year review period may be excessive and lead to inequity. The Sections observe that, under the U.S. Sentencing Guidelines, the maximum period relevant to an increase for recidivism is 10 years.

1. ANTITRUST COMPLIANCE PROGRAMS AS A MITIGATING FACTOR

Question No. 8 asks for views on the OFT’s proposed revisions to the illustrative list of aggravating and mitigating factors, which includes further guidance on the relevance of compliance activities.

The Sections welcome the OFT’s proposal to treat competition law compliance activities as a mitigating factor where the offending business has demonstrated its commitment to compliance. However, while the Sections commend the OFT on its general approach, they are nevertheless concerned by the specific proposal that, when the OFT considers compliance programs and activities, its “starting position . . . will be neutral” and it will only consider mitigation on “an individual case” basis (footnote 22 of the draft Guidance).

The Sections consider that, provided the company in question satisfies the test for having a clear and unambiguous commitment to competition law throughout its organization, the company should ordinarily obtain a reduction in its fine. Moreover, the Sections consider that the OFT should specifically set out in the final version of the draft Guidance the level of fine
reduction that may be granted where there is evidence the compliance program meets the requisite standard. The Sections believe that a reduction of at least 10% would be appropriate, as suggested by the consultation paper that accompanies the draft Guidance.

The Sections believe that an even stronger commitment from the OFT to take compliance programs into account would foster greater adoption of competition compliance programs. Compliance programs are the first line of defense to prevent antitrust offenses and the corresponding harm to consumers. The Sections believe that efforts made by a company to prevent antitrust offenses should be encouraged, not disregarded, and therefore a company should receive credit for attempting in good faith to prevent and, failing that, root out anticompetitive behavior. The case for mitigation is particularly compelling, we believe, where the misconduct involved rogue employees who have infringed internal compliance rules.

This general approach to compliance programs is recommended in a paper prepared for the OECD Competition Committee Roundtable on Promoting Compliance with Competition Law held in June 2011, where it is stated that in order to promote effective competition compliance, governments should, among other things, offer a reduction in penalties to companies with effective compliance programs in place.

The Sections note that a well-designed compliance program operates as a mitigating factor under the U.S. Sentencing Guidelines by lowering the “culpability score”, which contributes to the calculation of the criminal fine that may be imposed on a corporation. If the organization has a qualifying compliance program, its culpability score is lowered, thereby triggering a lower fine range. The basic requirement for a qualifying compliance program in the U.S. is that an organization shall “exercise due diligence to prevent and detect criminal conduct [and] otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” Furthermore, “[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.” Under recent amendments, a compliance program may still be deemed effective, even though high-level personnel participated in the violation, as long as those responsible for compliance reported the matter directly to the company’s governing authority (such as the board of directors), and any offense was detected and properly reported to the government.

Finally, the Sections consider that the availability of personal penalties in the UK is a relevant issue. These individual penalties (criminal sanctions for cartel activity and director disqualification orders for competition law violations more generally) allow enforcement action to be aimed directly against those primarily responsible for competition law breaches. This means that there will not likely be a negative impact on deterrence resulting from a corporate fine reduction for an effective compliance program, as separate, and arguably more effective, incentives for individuals to comply with the law exist in parallel.

2. OFFERS OF COMPENSATION AS A MITIGATING FACTOR

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2 Joseph Murphy, Promoting Compliance with Competition Law: Do Compliance and Ethics Programs have a role to play?, Paper Prepared for the OECD Competition Committee Roundtable on Promoting Compliance with Competition Law, DAF/COMP(2011)5, (May 31, 2011).

3 Id. at 36.


5 Id.

6 See id. § 8C2.5(f)(3)(C).
Question No. 9 asks for comments on the OFT’s preliminary view that compensation payments to victims should ordinarily not be treated as a mitigating factor. Instead, the OFT would remain prepared to consider arguments that the payment of compensation could be viewed as a mitigating factor in specific cases.

The Sections believe that the OFT should take into account compensation payments as part of its assessment of mitigating factors, and state this explicitly in the final version of the draft Guidance. If an undertaking found to have infringed UK or EU competition law has made adequate steps to offer compensation to those that have been harmed by its illegal activity, the Sections respectfully suggest that the OFT’s fining policy should encourage such remedial conduct by taking this into account as a mitigating circumstance and thereby reducing the fine.

2.1 Restitution Should Be Encouraged From a Policy Perspective

Currently in Europe, antitrust enforcement is generally focused on public rather than private enforcement. While efforts are being made to promote private damages actions (particularly in relation to cartel damages), even in the UK (where the regime is arguably more “claimant-friendly” than other European jurisdictions) private enforcement is relatively limited and is likely to remain a difficult process for the foreseeable future. Voluntary compensation is therefore important and should be encouraged. One way to do so is by taking it into account in public fining decisions.

Integrating elements of private enforcement into public enforcement would better achieve the OFT’s commitment of delivering direct financial benefits to consumers.7 As recognised in the consultation paper that accompanies the draft Guidance, this principle has already been tested by the OFT in the decision in the Independent Schools case, where, in addition to a nominal fine, ex gratia payments were made by the schools in question to fund a £3 million educational trust fund “thus indirectly benefiting those whose interest the Act is designed to protect.”8 Compensation payments can in fact be much more effective than private actions (particularly in consumer products cases where there may be a limited number of actual claimants although the number harmed may be large) and should as such be encouraged. In the replica football kits case, for example, JJB’s offer of football shirts was taken up by a reported 16,000 consumers,9 compared with the 500 who signed up to the follow-on damages action. The number of consumers compensated under the settlement was therefore many times greater than the number originally part of the damages action itself.

In this context, the Sections also note that the OFT’s estimates of direct consumer savings from its activities (which it is committed to continue to publish under CSR 10) could include compensation payments made as a result of its competition law investigations. Indeed, such payments would seem clearly to be a directly and objectively measurable benefit to consumers and would likely assist the OFT in meeting its goal of achieving direct consumer savings totalling at least five times the amount of OFT’s enforcement costs covered by taxpayers.

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7 The OFT’s goal is to “‘make markets work well for consumers’ and our impact target focuses on the direct financial benefits to consumers”, Office of Fair Trading, Positive Impact 10/11 Consumer benefits from the OFT’s work at 6, OFT1354 (July 2011), available at http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/OFT1354.pdf.
9 Christopher Hodges, The Reform of Class and Representative Actions in European Legal Systems (Hart Publishing 2008), ch. 8, n.112.
Recognition of compensation in the assessment of the fine would focus the penalty more directly on corrective justice rather than on punishment alone. It also would provide incentives to infringers to compensate victims of the infringement, incentives that, given the remaining obstacles to private enforcement in the UK, may not be as strong absent recognition from the OFT. The Sections therefore respectfully suggest that, as a matter of policy, the OFT should add compensation payments to the illustrative lists of mitigating factors to promote a synergy between private redress and public actions.

### 2.2 Approaches in Other Jurisdictions

Other jurisdictions in Europe certainly recognise the restitutionary objectives of competition policy. In the Netherlands, for example, the Fining Code 2007 of the Netherlands Competition Authority incorporates as a mitigating circumstance “that the offender of his own account provided compensation to the injured party/injured parties.”10 The collective opinion of National Competition Authorities also favors such an approach. Specifically, the European Competition Authorities have formed non-binding principles allowing a fine to be reduced if the offender takes active steps to mitigate the adverse consequences of the infringement “in particular by providing, voluntary, timely and adequate compensation to those who have suffered damage as a result of it.”11

### 2.3 Restitutionary Approach under Other Aspects of English Law

The Sections understand that accounting for compensation payments in setting a fine is well established in other aspects of English law. The Regulatory Enforcement and Sanctions Act of 2008 seeks to advance Hampton’s vision of a regulatory system that is “risk-based, consistent, proportionate and effective.”12 It recognises as a mitigating factor “[a]ctions taken to repair the harm done by regulatory non-compliance.”13 The Sections further understand that it is a general sentencing principle in the English courts, in the realms of both corporate and personal offences, to consider voluntary restitution to injured third parties as a mitigating factor.

A recent example of a compensation payment being taken into account can be seen in the BAE Systems bribery case concerning Tanzania. As part of a settlement with the UK Serious Fraud Office (“SFO”), BAE agreed to pay around £30 million in restitution to the people of Tanzania, and consequently its fine was reduced to only £0.5 million.14 The Sections suggest that this case shows two key factors: first, the importance of restitution in sentencing policy and, second, that compensation can be taken into account as part of an overall regulatory “solution” (the settlement was a global agreement reached between BAE, the SFO and the United States Department of Justice).

Another example where compensation payments were taken into account in reducing a regulatory fine relates to a breach of the Broadcasting Code and the ITC Programme Code in relation to viewer competitions. In this case, Ofcom imposed a fine of £2 million. In its

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12 Id. at 38.
13 Id. at 38.
September 2007 decision, Ofcom stated that the fine would have been higher if GMTV had not come up with an extensive programme of reparations and remedies. The remedies offered by GMTV included offering refunds on a potential 25 million entries.

The Sections respectfully suggest that the above examples show that other regulatory authorities in the UK are able to and do take restitutionary payments into account when imposing fines, in circumstances that do not appear to be fundamentally different from those faced by the OFT in its competition law investigations.

2.4 The Issues Identified in the Consultation as Preventing the Inclusion of Compensation Payments as a Mitigating Factor Appear Overstated

The consultation states that there are a number of potential issues that lead the OFT to its preliminary view that it would be inappropriate to have a general approach of treating compensation as a mitigating factor. While the Sections appreciate that the inclusion of compensation as a mitigating factor undoubtedly would raise additional issues that both the OFT and parties subject to an investigation would need to consider, we respectfully submit that these issues do not appear insurmountable:

- **Negative Effect on Deterrence:** The consultation suggests that giving discounts in return for redress may have a negative overall impact on deterrence. The Sections note that, as a report recently commissioned by the OFT found, financial penalties imposed on infringers are only one driver of compliance and not even the most important one, which is negative impact on reputation. It is therefore difficult to see how a reduction in fine where restitution was made would have a negative impact on deterrence.

- **Timing:** The consultation raises questions concerning the timing of compensation payments. The Sections understand the OFT’s concerns; however, this issue could be largely resolved by infringers being encouraged to make actual early compensation payments to victims on the basis that only this level of commitment and certainty would lead to a reduction in the fine. Alternatively, any timing difficulties could be neutralised by keeping a proportion of the fine in a blocked interest-earning account for a short period of time (e.g., two years); if restitution were made during that time, then the undertaking could apply to the OFT to have this amount returned to it. If not, the amount would be transferred to the Treasury, as with normal fines.

- **Level of Discount:** The OFT questions the precise level of discount given, and states that a “pound for pound” reduction in the fine would not be appropriate in response to compensation payments. The Sections agree that a “pound for pound” reduction in the penalty in response to compensation payments is not always necessary. It would appear possible for the OFT to determine the appropriate reduction, if any, on a case-by-case basis utilizing a methodology as suggested below.

More generally, the Sections respectfully suggest that the OFT should not limit itself to a “modest (five to 10 per cent) decrease” in the event of compensation

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being offered. Clearly, the greater the reduction which is offered, the greater the likelihood that real compensation will be paid. In this context, the OFT should perhaps keep in mind the need to encourage voluntary compensation to be paid, particularly in a climate in which real private enforcement is difficult and its outcome uncertain (and therefore the probability of an infringer paying damages remains low).

- **The Goals of Public Enforcement and Ease of Assessment:** The Sections respectfully suggest that, while not detracting from the OFT’s prime role of detecting, examining and sanctioning anti-competitive activity, as a matter of policy, public and private enforcement should be considered together as mutually reinforcing remedies. If this is not the case, there is a risk of disproportionate liability for infringers and inconsistent enforcement. It would be unfair for an infringer to be in a situation where it pays both full compensatory damages and a high fine simply because fines at that level have been set historically based at least in part on the assumption that no damages would be paid. It would also be incongruous if only some infringers pay full damages or high fines while others pay neither full damages nor high fines. It has been argued that this could amount to a breach of Article 6 of the European Convention on Human Rights which requires “fair treatment in both individual and comparative cases.”

In addition, the Sections observe that not all antitrust cases are similarly situated with respect to the potential complications arising from restitution. While potential complicating factors may arise in some cases, in others (for example, matters involving bid rigging in a public procurement context) factors such as the identity of the injured parties and the amount to be paid in compensation may be much clearer. In any event, it would be within the OFT’s discretion to determine whether or not a reduction based on the payment (or offer to pay) compensation is appropriate on a case-by-case basis.

### 2.5 Suggested Methodology

As to the methodology the OFT would apply in order to assess the level of discount provided, it could adopt a sliding scale approach where various factors are taken into account in determining whether the discount should be granted and at what level. Examples could be the amount of restitution in proportion to the (full) fine that would otherwise be paid, the types and overall numbers of victims receiving compensation, and whether there are injured parties that can legitimately complain that the compensation was insufficient. Ultimately, the burden would rest on the offending company to convince the OFT that its restitutitory efforts were worthy of a fine reduction. While this may result in some delay and diversion of OFT resources, the Sections respectfully suggest that promoting good public administration and reaching the right and just outcome should be of greater significance to the OFT than a minimal delay to its timetable.

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17 *Id.*

18 *Id.*

19 This was the case, for example, in the United States, where combined action by the Department of Justice and State Attorneys General resulted in multiple criminal convictions arising from bid rigging for contracts for the supply of milk to public schools. These convictions led to fines and restitution payments made to the affected state institutions. See, e.g., Press Release, Dept. of Justice, Minnesota, Iowa Diaries Agreed to Plead Guilty and will each pay $1 Million for Participating in Milk Price Fixing Conspiracy (Apr. 25, 1997), available at http://www.justice.gov/atr/public/press_releases/1997/229042.pdf (defendant paid criminal fine of $540,000 and restitution of $460,000 to the State of Minnesota on behalf of public school districts and state institutions).
2.6 Conclusion

The Sections therefore respectfully suggest that compensation payments should be included as a mitigating factor given that the concerns which have been raised are modest, manageable and outweighed by the overall public policy benefits. OFT has essentially conceded this point by acknowledging that it “does not rule out that, in certain situations, payment of compensation could be viewed as a mitigating factor.”

3. OFT Calculation of Starting Point for the Fine Assessment (Question 2)

The OFT proposes that the maximum percentage of value of sales to be taken into account in setting the fine for an infringement of competition law should be increased to 30% of value of sales (paragraph 5.12 of the consultation paper attached to the draft Guidance), with 25% as an appropriate minimum level for the most serious infringements (paragraph 5.13), including hard core cartel activity and serious abuses of dominance. The 30% maximum (but not the 25% figure) is in line with the European Commission’s Guidelines on Fines, which were adopted in 2006 (i.e. before the economic crisis starting in 2008). The OFT indicates (paragraph 5.11 of the consultation attached to the draft guidance) that the maximum 30% figure is appropriate as the general deterrence represented by the percentage to be applied to turnover “is related [at least to some extent] to the harm/gain that is expected to result, or actually results, from particular types of infringement . . .”

The Sections respectfully suggest, however, that such an approach is not consistent with the OFT’s stated objective that fines should be proportionate and not excessive.

First, as described further below, any proxy or set presumption is likely to be a poor estimate of the actual economic harm in any given case, and the Sections would therefore advise for caution in the use of any proxy or presumption (especially an irrebuttable proxy or presumption). Second, the definition of “the most serious infringements” is not clear, which could result in the highest level of fines being imposed on conduct that is not considered among the most serious infringements in other jurisdictions.

The Sections suggest that the “the most serious infringements of competition law” should include only hardcore cartel activity (i.e., conspiracies among horizontal competitors to fix prices, rig bids, or allocate customers or markets) and should not also extend to so-called abuses of dominance, whether or not labeled “serious.” Unlike horizontal cartels among competitors, which have long been considered to be the most egregious antitrust and competition law infringements on both sides of the Atlantic, the Sections are unaware of any clear and widely recognized distinction between a “serious” and “normal” abuse of dominance.

3.1 The European Commission’s Experience

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20 OFT423con at paragraph 5.49.
21 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the “Commission’s Guidelines on Fines”).
Although the Commission’s Guideline on Fines uses a maximum of 30%, it is notable that the Commission usually limits its fines for cartels to between 15 and 20% of the value of sales (so far as is known from its decisions in the public domain).

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<tr>
<th>Commission Decisions</th>
<th>% Value of Sales</th>
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<td>Heat Stabilisers - in the tin stabilisers market(^{22})</td>
<td>20%</td>
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<td>Heat Stabilisers - in the EBS/esters market(^{23})</td>
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<td>Sodium Chlorate(^{24})</td>
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<td>Flat Glass(^{25})</td>
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\(^{23}\) Id.


\(^{31}\) Case 38628, Nitrile Butadiene Rubber, Prohibition decision of 23 October 2008, paragraph 175 (“Nitrile Butadiene Rubber”).

\(^{32}\) Case 38511, DRAMs, Prohibition decision of 19 May 2010, paragraph 101 (“DRAMs”).

\(^{33}\) Case 39579, Consumer Detergents, Prohibition decision of 13 April 2011, paragraph 8.3.2 (“Consumer Detergents”).
In *Marine Hoses*, the European Commission applied an exceptionally high coefficient of 25% of value of sales in view of the particular seriousness of the infringement.  

Notwithstanding that most fines imposed by the European Commission are between 15 – 20%, companies that are the subject of a cartel or abuse of dominance investigation must plan for a possible fine of 30% of the value of sales. This may place severe financial pressure upon companies in terms of liquidity, access to funding for investment, and corporate restructuring (in particular merger discussions).

### 3.2 The US Experience

The fining process in the United States is administered using the U.S. Sentencing Guidelines, which provide a consistent structure for calculating fines. The U.S. courts consider the Guidelines to be advisory, not mandatory, and allow for judicial discretion.

Under the U.S. Sentencing Guidelines, a formula is used to calculate corporate fines. The first figure which is established is the “base fine”, which is set by applying a multiplier to the volume of commerce affected by the violation. The U.S. volume of commerce is measured as the amount of goods or services sold by the corporation that was affected by the violation over the entire length of the violation.

From their inception in 1991, the U.S. Sentencing Guidelines have used 20% as the multiplier. This is intended to be an appropriate proxy for actual overcharge because the determination of an overcharge or harm is very difficult to establish through evidence. The use of this irrebuttable proxy has however been subject to serious criticism in the United States. Empirical studies have found significant variation in the minimum, maximum, median, mean, and range of cartel overcharges. Accordingly, any proxy or set presumption is likely to be a poor

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34 Case 39401, *Gas*, Prohibition decision of 8 July 2009, paragraph 365 ("Gas").
35 Case 39188, *Bananas*, Prohibition decision of 15 October 2008, paragraph 460 ("Bananas").
37 In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court held that the U.S. Sentencing Guidelines are no longer mandatory, but stated that “[the Federal Sentencing Act] requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well, see [18 U.S.C.] 3553(a).” The Court also stated, “Those factors [3553(a)] in turn will guide appellate courts, as they have in the past, in determining if a sentence is unreasonable.” The advisory status of the Guidelines under Booker amplifies the need for the Sentencing Commission to offer empirical support for its recommendations and methodology so that courts will have a sufficient understanding of the premises of the Guidelines to exercise their sound sentencing discretion and impose reasonable sentences.
estimate of the actual economic harm in any given case, and the Sections would therefore advise caution in the use of any proxy or presumption (especially an irrebuttable proxy or presumption) in fining guidelines or practices in general.

Once the base fine is established, the culpability score of the corporation is calculated based on several aggravating factors: the size of the organization; whether high level employees participated in the violation; whether the company is a recidivist; and whether it obstructed the investigation; and mitigating factors: an effective compliance program; reporting the violation; and cooperating with the investigation. With the calculation of the culpability score, the Guidelines assign multipliers by which the base fine is multiplied, creating a range within which the Court may assess a fine.

The United States system is very specific in assigning points for aggravating and mitigating factors, and, as such, it creates some parameters that allow a certain degree of transparency and proportionality, as well as less subjectivity. These elements also tend to differentiate fine levels in the United States, especially for those companies that are smaller, less culpable and more cooperative.

A final observation with respect to the United States is that the fining procedures set out in the U.S. Sentencing Guidelines are only applied to hard-core infringements of Section 1 of the Sherman Act. While theoretically criminal sanctions can apply to various infringements of the Sherman or Clayton Acts, as a practical matter the Antitrust Division of the U.S. Department of Justice seeks fines under the U.S. Sentencing Guidelines only for conspiracies among horizontal competitors to fix prices, rig bids, or allocate customers or markets. Such infringements have long been considered to be the most serious violations of U.S. antitrust law.

3.3 Recommendation

In conclusion, it is suggested that the OFT limits the application of fines to 15–20% for the most serious infringements, as this provides sufficient basis for a proportionate fine that has deterrent effect. Again, the Sections note that the minimum fining level for serious infringements recently adopted in France is 15%.

In the alternative, it is respectfully suggested that the reference to the minimum starting point as 25% of turnover be removed and that the draft Guidance instead clarify that fines above 20% of the value of sales are exceptional and shall be applied only to the most egregious hard-core cartels. As stated above, in the United States, fines under the U.S. Sentencing Guidelines are only imposed for hard-core cartel infringements, and the Sections recommend that the OFT adopt an analogous approach and make this clear in the draft Guidance.

4. DURATION OF INFRINGEMENTS (QUESTION 4)

The OFT proposes that the final version of the draft Guidance will indicate that the relevant sales figure will be multiplied to take fully into account the duration of the participation
of each undertaking in the infringement, with a minimum of one year. For periods of infringement longer than one year, the duration will be rounded up to the nearest quarter year.

The Sections note that it may be arbitrary to increasing the magnitude of the fine based simply on annual increments (or quarter year increments). In the United States, as discussed above, the calculation of the fine under the U.S. Sentencing Guidelines begins with the determination of a “base” fine, 20% of affected volume of commerce. That volume of commerce is measured as the amount of goods or services sold by the corporation that are affected by the violation, i.e., the total volume of goods and services sold during the entire course of the cartel. In this way, duration of the cartel alone (which may or may not have any bearing on its perniciousness) is not, in and of itself, a factor in sentencing. The Sections therefore respectfully suggest that duration should not be considered as an independent factor in the calculation of fines.

In any event, the Sections note that the European Commission’s guidelines on fines\(^{40}\) state that “periods of less than six months will be counted as half a year,” so that it does not set its fines by reference to a minimum of one year duration.\(^{41}\) It is respectfully suggested that if duration is retained as an independent factor then a minimum period of six months should be allowed for.\(^{42}\)

5. THE PROPOSED APPROACH TO SPECIFIC DETERRENCE ADJUSTMENTS (QUESTION 6)

The draft Guidance provides that the penalty imposed should be of sufficient magnitude to promote both general deterrence and specific deterrence with respect to the specific undertaking subject to the penalty. The Sections agree.

However, while the importance of total sales and financial resources of the undertaking may be relevant to determining whether a given fine would have the adequate deterrent effect, the draft Guidance states (at paragraph 2.16) that the undertaking’s margins may be used as an appropriate indicator for the industry in question. The Sections respectfully suggest that it is not possible for a competition authority to determine what an “appropriate” margin should be for a specific industry or for a specific company. Margin level will depend on a variety of factors that have nothing to do with a competition law infringement. For example, a particularly innovative or efficient undertaking may have relatively high margins compared to its rivals. Consequently, it is suggested that margins not be included in the factors assessed in determining whether a proposed fine should be increased to promote specific deterrence.

6. RECIDIVISM AS AN AGGRAVATING FACTOR (QUESTION 8)

The OFT proposes to indicate that it would not expect to apply an uplift for recidivism in respect of prior infringement findings made more than 15 years before the start of the infringement for which the instant penalty is being set.

The Sections believe that it is appropriate to include recidivism as an aggravating factor. However, the review period of 15 years may be excessive and result in inequity. The Sections

\(^{40}\) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C210, 1 September 2006.

\(^{41}\) As an example see Case 39180, Aluminium Fluoride, Prohibition decision of 25 June 2008. The infringement lasted less than six months and the multiplying factor applied to the amount determined on the basis of the value of sales was therefore 0.5.

\(^{42}\) It can also be noted that European Commission practice is now to use actual years and months of an infringement to set the duration as opposed to rounding part years down or up (or using quarter years).
understand that the standard period of limitation in the UK is five years. By having a period of 15 years, effectively one generation in a company is being penalized for an infringement committed by a previous generation often with an entirely different management and work force. As a point of comparison, the maximum period relevant to an increase for recidivism identified in the U.S. Sentencing Guidelines is 10 years.\(^{43}\) It is respectfully suggested that a shorter limitation period that could be rebuttable depending upon corporate circumstances would satisfy the public policy objective of preventing repeat offenses without being disproportionate.

In addition, the Sections note that the OFT proposes to treat recidivism as an aggravating factor where a prior same or similar infringement has been established by the European Commission or another European National Competition Authority. The Sections note that the OFT proposes to determine increases for recidivism on a case-by-case basis. However, they respectfully suggest that the OFT make clear that a prior decision relating to the same case under review is not relevant to the recidivism question.

CONCLUSION

The Sections commend the OFT for carrying out this consultation and the Sections hope that these observations will assist the OFT in finalizing the draft Guidance.