Joint Comments of The American Bar Association
Section of Antitrust Law and Section of International Law on “A Competition Regime for Growth: A Consultation on Options for Reform” of the United Kingdom's Department of Business Innovation & Skills

May 2011

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. 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”) respectfully submit these comments to the Department of Business Innovation & Skills as part of its consultation, “A Competition Regime for Growth: A Consultation on Options for Reform” (the “Consultation”).

The Sections appreciate the opportunity to present our experience and views on two of the central issues in the consultation: reform of the “dishonesty” requirement in the Enterprise Act and adoption of a pre-merger notification process.

The Sections have substantial experience with the antitrust/competition laws of the United States and other jurisdictions, particularly in the areas of cartel enforcement and merger control. The Sections’ comments reflect their expertise and experience with U.S. law and their familiarity with competition law and policy internationally, as well as expertise in the economics underlying the analysis of antitrust issues.

1. EXECUTIVE SUMMARY

1.1 The Criminal Cartel Offense

The Sections welcome the UK Government’s consideration of reform of the criminal cartel offense contained in Sections 188-189 of the Enterprise Act 2002. While the introduction of the cartel offense marked a significant development in competition law enforcement in the UK, prosecution and conviction of ‘hard-core’ cartel activity has not been as successful as might have been expected.

The Sections have developed considerable experience with criminal enforcement of hard-core cartel conduct in several jurisdictions, particularly the United States. The Sections have relied on that experience in formulating these
comments and hope that they may be of some assistance in the evaluation of proposals to reform the UK criminal cartel offense.

The Sections respectfully submit comments on the proposal to remove the necessity to show dishonesty as an element of the criminal cartel offense. The Sections’ comments address the general proposition as well as each of the four options for reform set out in Chapter 6 of the consultation document.¹

There is a need to use an appropriate mental element (the mens rea) to differentiate between ‘hard-core’ criminal activities and antitrust violations that are properly enforced through civil means, and to capture the ‘criminality’ of the prohibited conduct. However, from the Sections’ perspective, dishonesty is not the most appropriate determinative characteristic. The notion of dishonesty as adopted for the cartel offense requires both objective and subjective elements and obliges the jury to make very complex social judgments. The Sections are aware that the element is used in other areas of UK criminal law, for example, in theft and fraud. However, the dishonesty element does not translate seamlessly into the cartel offense. Further, the Ghosh² test, on which the dishonesty element in the cartel offense is founded, has long been controversial in UK criminal law. Such an esoteric test inevitably complicates prosecutions and reduces convictions—a point that the UK Government has acknowledged in the consultation document.

The Sections strongly agree that the dishonesty element should be removed. We urge the Government to consider Option 3 in the Consultation for the reasons articulated in these comments. However, the Sections believe that an even better alternative is to remove the dishonesty element and replace it with a mens rea that the defendant agreed to cause the relevant corporate entities to engage in the conduct specified in Section 188 of the Enterprise Act 2002 and knew, or ought to have known, of the terms of the conduct engaged in.

1.2 A Mandatory Merger Regime

The Sections welcome the UK Government’s decision to consider whether the introduction of a mandatory merger regime might help to further strengthen the performance of UK merger review.

The Sections recognize that benefits and drawbacks inherently exist in both voluntary and mandatory notification regimes, but in the Sections’ view, adoption of a well-designed and efficiently operated mandatory notification system applicable to mergers above a reasonable size threshold would enhance the efficacy of the UK’s merger regime.

¹ The Sections are not commenting on the UK Government’s aim to reduce the risk that the cartel offense would be considered as “national competition law” because this issue is specific to the EU competition law modernization regime under Council Regulation (EC) No 1/2003.

Mandatory systems are the prevalent type of pre-merger notification regimes in the world. Moreover, the international business community has become accustomed to mandatory pre-merger notification and has adapted to the obligations of such systems.

If, as discussed in the Consultation, the UK Government should choose to retain and improve a voluntary regime, the Sections would recommend the inclusion of an automatic statutory restriction rather than a clarification of CMA powers to prevent pre-emptive action. The former would provide the parties with relative certainty, enabling more effective business planning, and avoid burdensome and time-consuming negotiations over a hold-separate arrangement for each transaction subject to an inquiry. The latter option would, in contrast, foster uncertainty regarding how CMA would proceed in individual cases.

The Consultation proposes two options in relation to jurisdictional thresholds. The Sections respectfully submit that neither proposal should be adopted in the form outlined in the Consultation and instead the UK Government should consider a higher threshold for UK turnover in conjunction with a mandatory suspensory regime. This would better reflect prevailing trends in other jurisdictions with mandatory thresholds.
2. **COMMENTS ON THE PROPOSED REFORM OF THE CRIMINAL CARTEL OFFENSE**

All four of the UK Government’s options for reform of Section 188 of the *Enterprise Act 2002* propose the removal of the element of dishonesty from the criminal cartel offense. The Sections believe that this is the correct approach for the reasons discussed below.

At present, an individual is guilty of a criminal offense if he dishonestly agrees with one or more other persons to make or implement, or cause to be made or implemented, arrangements in which at least two competing companies engage in specified cartel activities in the UK. The specified activities include direct or indirect price-fixing, limitation of production or supply, sharing customers or markets, and bid-rigging. Dishonesty can be established only if it is proven to the satisfaction of the jury, and beyond reasonable doubt, that the actions of the individual were dishonest by the ordinary standards of reasonable and honest people and, if so, that the defendant realized that his actions were dishonest according to those standards.

In adopting the ‘dishonesty’ approach, the UK Government recognized “the need to define carefully the criminal offence so as to make it clear that only individuals actively involved in agreements which could never be exempt would be caught. The government has no desire to criminalise involvement in benign agreements which would not be unlawful under existing competition law.”

Like other jurisdictions that prosecute cartel conduct criminally, the UK criminal offense applies to ‘hard-core’ or ‘serious’ cartel offenses and not more generally to horizontal arrangements that might be appropriate under Article 101(3) TFEU or Section 4 of the *Competition Act 1998*. Other jurisdictions have sought to draw the distinction between criminal and civil liability in various ways but all have recognized the critical importance of the distinction.

The Sections applaud the UK Government’s desire to maintain this distinction between civil and criminal enforcement. Thus, it is imperative that a line between criminal and civil liability is drawn as clearly as possible. Certainty and consistency in the application of the criminal law are important to facilitate compliance, protect the interests of defendants, and enable the law to be an effective deterrent. However, the Sections recognize the difficulty of defining with precision conduct that constitutes the offense (the *actus reus*). The formulation must capture only ‘hard-core’ cartel behavior involving criminality, leaving restrictive agreements that do not involve turpitude to the realm of civil enforcement.

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3 *A World Class Competition Policy*, Department of Trade and Industry, July 2001, Cm. 5233, para. 7.27.
2.1 The ‘Dishonesty’ Element in Other Jurisdictions

The United States

The Sherman Act (1890) is both a civil and a criminal statute. It does not rely on concepts such as ‘dishonesty’ to distinguish criminal from civil offenses. Instead, the Act requires evidence only that the parties actually agreed to engage in anticompetitive conduct. Although this is the actus reus, the evidence will also satisfy the mens rea element, which is required before criminal liability can be imposed under U.S. constitutional law.\footnote{United States v. U.S. Gypsum Co., 438 U.S. 422, 443 (1978).} The United States has the benefit of being able to rely on a long history of prosecutorial discretion in cartel matters. The U.S. Department of Justice (“DOJ”) has long prosecuted as criminal violations conduct (and, more specifically, agreements) that the U.S. courts deemed to have no possible legitimate business or economic justification—price fixing, bid rigging, and customer, territorial, and market share allocations. The enforcement community in the United States understands that criminal conduct has to be carefully defined so that all business persons and counsel advising them know what the boundaries are and have repeatedly defined the conduct subject to criminal prosecution clearly and simply, as follows:

\[\text{T}h\text{e cartels that . . . have [been] prosecuted criminally invariably involved hard-core cartel activity — price-fixing, bid-rigging and market and customer-allocation agreements. The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover up their actions . . . . Moreover, the cartels typically involve senior executives at firms — executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs.}\footnote{See Scott Hammond, Deputy Asst. Attorney General, U.S. Dept. of Justice, Caught in the Act: Inside an International Cartel, OECD Competition Committee Working Party No. 3: Public Prosecutors Program, at 2-3 (Oct. 18, 2005), www.justice.gov/atr/public/speeches/212266.htm; see also R. Hewitt Pate, Asst. Attorney General, U.S. Dept. of Justice, Vigorous & Principled Antitrust Enforcement: Priorities & Goals, ABA Antitrust Section Annual Meeting, at 6 (Aug. 12, 2003) ("The cases we criminally prosecute at the Division are not ambiguous.") www.justice.gov/atepublic/speeches/201241.htm.}

Over time, those decisions and pronouncements by the DOJ have developed into principles on which firms, individuals, and their counsel now rely to predict with reasonable confidence when certain conduct may create the risk of criminal exposure. Those principles have proven to be extraordinarily important
to (and useful in) the efficient administration of justice in the United States. Thus, the inclusion of an additional dishonesty component, as is the case in the UK cartel offense, has not been considered to be necessary.\textsuperscript{6} 

By carefully limiting criminal enforcement to ‘hard-core’ violations, the DOJ has established clear, predictable boundaries for business. In addition, DOJ enforcement officials have observed that this narrow focus reduces the complexity of proof in cartel cases.\textsuperscript{7} By focusing criminal cases “on conduct that has no plausible business justification and that usually occurs in secret, accompanied by preemptive cover-ups and misrepresentation, defendants cannot reasonably argue that they failed to grasp the illegality of their actions.”\textsuperscript{8} Thus, the Sherman Act, which is based on the notion of conspiracy, requires only a deliberate intention to engage in the conduct prohibited by law. The jury must be satisfied that the defendant ‘knowingly and intentionally’ became a member of a conspiracy to fix prices, rig bids, allocate territories, etc. This \textit{mens rea} element requires that the defendant was aware of the nature of his actions, and intended to achieve the goal of the conspiracy.

\textbf{Canada}

There is also no explicit statutory concept of dishonesty in Canadian law, which imposes criminal sanctions for participating in ‘hard-core’ cartel activities. Rather, Section 45 of the \textit{Competition Act} (R.S.C., 1985, c. C-34) states that any person who, with a competitor in respect of a particular product, conspires, agrees or arranges any of the following is guilty of an indictable offense:

\begin{itemize}
  \item fixing, maintaining, increasing or controlling the price for the supply of the product;
  \item allocating sales, territories, customers or markets for the production or supply of the product; or
  \item fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.
\end{itemize}

Previously, the Canadian \textit{Competition Act} prohibited only conspiracies that had serious or ‘undue’ competitive effects, as determined under a ‘partial rule of reason’ analysis. Price-fixing, market-allocation and output restriction conspiracies are now illegal \textit{per se} in Canada. Today, conviction under the revised Act requires the prosecution to prove beyond reasonable doubt both the \textit{actus reus} and the \textit{mens rea} of the

\begin{itemize}
  \item Although the concept of dishonesty plays no explicit statutory role in criminal antitrust enforcement in the United States, the elements of dishonesty, secrecy, and/or subterfuge appear to play a role in the exercise of prosecutorial discretion.
  \item \textit{Id.}
\end{itemize}
offense. The actus reus is established by demonstrating that the accused was a party to a conspiracy, agreement, or arrangement with a competitor to fix prices, allocate markets or customers, or lessen production or supply of a product in the manner described above. The mens rea is established by demonstrating that the accused subjectively intended to enter into the agreement and had knowledge of its terms.9

Under the revised Competition Act, the standard for a criminal conviction is far less complicated and closer to the U.S. standards of proof.10

**Australia**

The concept of ‘dishonesty’ was considered by the Australian Government during the draft stages of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*. The test for ‘dishonesty’ used in other Australian statutes (e.g. the *Criminal Code Act 1995* and *Corporations Act 2001*) is based on the *Ghosh* standard currently adopted for the purposes of the *Enterprise Act 2002*. The need to demonstrate dishonesty in the criminal cartel offense was, however, rejected in favor of strict liability, with no requirement to prove dishonesty or to show that the conduct was known by the parties to be illegal. To establish the Australian criminal offense, it is sufficient to prove beyond reasonable doubt that the parties had ‘knowledge or belief’ that the conduct in question had the elements (including purpose) that make up the definition of the cartel offense, even if they did not appreciate that it was cartel conduct.11

**Other Jurisdictions**

The dishonesty concept has no parallel in the criminal cartel laws of France, Germany, Ireland, Japan, or Korea.

The Greek competition regime was amended significantly in April 2011 to bolster the competition commission’s ability to prosecute individuals for cartel offenses and increase the levels of fines. The Greek offense is based on strict liability; there is no requirement to prove a mens rea. Any individual or representative of an entity who “enters into an agreement” to carry out prohibited activities, such as market sharing, is guilty of a criminal offense (*Law No. 703/1977* Art. 29). As far as the Sections are aware, there was no discussion about the implementation of a statutory mens rea in the discussions leading to the reform of the law.

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9 Facially pro-competitive activities such as joint ventures and strategic alliances are assessed under the new Section 90.1 provision, which is civil.
10 Competition Act (Canada), R.S.C., 1985, c.19, (2nd Supp), s.19.
11 The Sections provided comments to the Australian Competition Consumer Commission counseling against the use of a dishonesty standard. See Comments of the American Bar Association Section of Antitrust Law and Section of International Law In Response to the Commonwealth Government of Australia’s Request for Public Comment on the Draft Legislation Providing Criminal Penalties for Serious Cartel Conduct, February 2008.
The current UK regime is therefore at odds with the direction taken by other EU and non-EU enforcement regimes. Although the Sections do not believe that alignment of approach and theory between countries should necessarily be the principal driver of change, it is worth noting that other countries have rejected the dishonesty element as a requirement for the criminal offense, chiefly because it added complexity, made convictions more difficult and, thus, placed the deterrent value of the statute in jeopardy.

2.2 The Disadvantages Of the ‘Dishonesty’ Element

The UK Government is correct that there are challenges presented by maintaining the element of dishonesty in the current UK criminal cartel offense, as defined by the *Ghosh* test.

One of the most significant criticisms of the *Ghosh* standard is that it invites a complex social judgment on which different juries might give different answers, and thus may make ‘hard-core’ criminal activity unnecessarily difficult to prosecute.\(^\text{12}\) The use of dishonesty as a distinction between criminal and non-criminal conduct, therefore, creates a risk of inconsistent prosecutorial outcomes.\(^\text{13}\) Many have argued that the standard is ambiguous. While the *Ghosh* test (for all its deficiencies) assists juries in reaching a common-sense result in relatively straightforward fraud or theft charges, it may well make it more difficult for a jury to capture the nuance and effect of hard-core cartel conduct. For example, as commentators have pointed out, it could be difficult for a jury to draw the line between aggressive business practices and criminality, and some jurors might be swayed by defendants’ arguments that they agreed to fix prices to avoid having to close their factories and make their workers redundant.\(^\text{14}\)

The Sections also believe that the *Ghosh* standard of dishonesty may focus the concept of dishonesty on the idea of making an illicit profit, causing an illicit loss, or otherwise jeopardizing the economic interests of others.\(^\text{15}\) These are not factors considered in determining criminal liability in U.S. cases and will frequently prove a difficult element to establish in relation to many cartels.

The Sections also note that removing the dishonesty element would not necessarily result in the offense lacking a sufficient and clear *mens rea*, as is evident from the approaches taken in the United States, Australia, and Canada, among others.


\(^{14}\) See, for example, Joshua (2003), at 626.

The Sections therefore respectfully agree that the dishonesty element should be removed from the offense. Although we are aware that it is the standard used in other UK criminal offenses, for example fraud and theft, we do not consider that it is appropriate for this particular offense.

Dishonesty is not an additional element required for the conviction of offenses under the Bribery Act 2010. The Joint Prosecution Guidance issued by the Serious Fraud Office and the Director of Public Prosecutions (the “Prosecution Guidelines”) states that the concept of ‘improper performance’ in Section 4 of the Bribery Act 2010 is based on a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned. In turn, the element of wrongfulness required for conviction of the offense of bribing another person is described in the Prosecution Guidelines as an intention to induce improper performance, or knowledge or belief that the acceptance of the bribe involves improper performance. This mens rea falls well short of dishonesty standard in Ghosh.

However, if the UK Government decides to preserve the dishonesty element, it should focus on the objective limb of the Ghosh standard rather than the subjective limb. At the very least, the two limbs of the standard should be made alternatives, so that proof of either objective or subjective dishonesty should suffice to establish a criminal offense. The factors laid out in Deputy Assistant Attorney General Hammond’s remarks 16 - especially the existence of acts taken to avoid detection - could usefully be incorporated as a demonstration of the conditions that could satisfy the dishonesty standard.

2.3 Option 1: Removing The ‘Dishonesty’ Element From The Offense And Introducing Prosecutorial Guidance

The Sections recommend removal of the dishonesty element and agree that prosecutorial guidance would be a beneficial tool. However, we do not believe that prosecutorial guidance would, by itself, provide the desired level of clarity and certainty.

The Sections are concerned that there have only been two criminal cartel cases brought under Section 188 and only one successful conviction. The combination of the removal of the express statutory wording and the lack of case law may make it difficult for individuals and businesses to understand fully the scope of the law and whether or not they have committed or are about to commit an offense. The Sections are also concerned that the changeable nature of prosecutorial guidance may not give the level of clarity that is needed in the offense and that we understand to be required by Article 7 of the ECHR.

16 See note 5, above.
In addition, although prosecutorial guidance is a useful tool, it is something that must develop carefully over a long period of time, and generally is not consistent with a rule of law approach to enforcement. In the U.S., it has been developing over 120 years and, in more recent decades, the strong enforcement principles discussed herein have become entrenched in the system. But this approach should not be viewed as a substitute for a well-defined criminal offense, which likely is the minimum requirement to secure the interests of the UK Government and the proper functioning of the criminal process.

2.4 Option 2: Removing The ‘Dishonesty’ Element From The Offense And Defining The Offense So That It Does Not Include A Set Of ‘White Listed’ Agreements

Option 2 creates a list of permitted agreements. Such a list would have to be comprehensive and carefully and exhaustively defined. Such a list would have a limiting effect on and would unnecessarily complicate business decisions, as well as counseling businesses on the risk involved in their decision-making. Unlike the U.S. prosecutorial discretion model, which will consider all aspects of the company's conduct based on over 100 years of prosecutorial decisions and judicial action, this option is limiting on both the prosecutors and the business community. The U.S. prosecutorial discretion system, as described on pages 3 to 5 of these Comments, works effectively because it is based on a set of common principles subject to judicial review that has stood the test of time.

Furthermore, even if this were overcome, a list defined by ‘type’ of agreement would need to give at least some consideration to economic features. As the consultation notes, this would be closer to a civil antitrust style approach. As mentioned above, the Sections would prefer to see a clear distinction between the criminal and civil systems.

It is unclear whether this option would give rise to a strict liability offense. If not, the option does not appear to address the mental element of the offense satisfactorily. There would still be a need for an effective and appropriate mens rea to replace the current dishonesty element.

2.5 Option 3: Replacing The ‘Dishonesty’ Element Of The Offense With A ‘Secrecy’ Element

Option 3 is a feasible alternative to the present system. As mentioned above, ‘secrecy’ plays an effective role in the exercise of prosecutorial discretion in the United States. It is a clearer and less subjective concept than dishonesty and less apt to vary among different communities. On that basis, it is more likely that juries would understand the language and the concept better than the concept of dishonesty. It would also continue to distinguish between the criminal cartel and the civil antitrust offenses.

However, the Sections are not certain that an offense based on the concept of secrecy would be any easier to prosecute than the present offense. The prosecutor
would still need to prove that the defendant ‘secretly agreed,’ or conspired to enter into an agreement to commit one of the prohibited actions, and the jury would need to consider whether or not the defendant committed the offense on the basis of what a reasonable person would consider to be covert behavior. The Sections question whether, from the prosecutor’s point of view, the use of ‘secrecy’ would have any real difference in effect.

Importantly, however, the removal of the need to satisfy the subjective element of the Ghosh test is a practical benefit that should not be dismissed readily.

If this option is selected, it would benefit significantly from greater clarification of the element of secrecy. Confidential sharing of business secrets, even among competitors, may further legitimate business interests such as in the context of merger discussions or beneficial collaborative joint ventures. The more relevant and problematic secrecy involves stealthy or clandestine conduct designed to avoid detection - especially by government enforcement authorities - as opposed to conventional business steps for the legitimate preservation of confidential business information. Thus, there is a readily apparent distinction between, on the one hand, use of a code name for a potential merger transaction or placement of strict controls on the dissemination of corporate planning and strategy materials in order to preserve appropriate business confidentiality, and, on the other hand, use of false names or suppression of attendance lists or travel records to conceal participation at a cartel meeting. Moreover, the distinction between active and passive secrecy, while potentially useful, could raise concerns unless further clarification is provided. In particular, passive secrecy, if considered a sufficient threshold to attract criminal liability, will need greater clarity to enable individuals to understand the type of conduct that would, and would not, fall within the scope of the offense.

2.6  Option 4: Removing The ‘Dishonesty’ Element From The Offense And Defining The Offense So That It Does Not Include Agreements Made Openly

Option 4 is the preferred option of the UK Government. However, the Sections respectfully express their concerns over how this option would work in practice.

First, we are unsure whether a notification of, say, price-fixing would be sufficient to enable customers to choose to contract elsewhere, as envisaged in paragraph 6.52 of the Consultation. For example, where there is no real or readily available substitute for the whole volume of the affected products from companies that are not members of the cartel, customers (whether intermediaries or final consumers) may be unable to put the information to good use.

Second, it is possible that an intermediary may not object to the presence of an upstream cartel. This might be the case where the intermediary charges for the finished product or service on a ‘cost plus’ basis. In such circumstances, the customer may benefit if the additional element is expressed as a percentage of the cost –
assuming the customer either does not face effective competition in the downstream market or the cartel affects a high proportion of the intermediary’s competitors. Even where the customer does not benefit, it may be indifferent to the additional costs incurred through the cartel where it is able to pass it on to its own downstream customers.

Third, there may be other factors to consider, such as the practicability of announcing arrangements “to all consumers” in particularly large or complex markets, or the timing of making such announcements. For example, companies may choose not to announce competitively sensitive information involving market conduct until immediately before the agreement takes effect. Alternatively, parties to a cartel may choose to release the information at a time prior to its taking effect but in circumstances where customers would incur high switching costs.

Fourth, the willingness of individuals to disclose conduct to third parties may be constrained by their actual or perceived fiduciary or employment obligations to their employer.

Finally, any failure to disclose may not in itself be a reliable sign of criminal conduct.

For the reasons discussed above, the Sections are concerned that the presence or absence of a disclosure to customers may not be a sound basis for distinguishing criminal and non-criminal conduct.

2.7 An Alternative To Consider

Of the four options articulated, the Sections believe that Option 3 is closer to the three objectives the UK Government seeks: ensuring that the offense does not apply to agreements that are lawful, reducing the likelihood that conviction would depend on judgments taken on detailed economic evidence and providing juries with a test that they can understand and apply. However, Option 3’s proposal of a secrecy requirement, while somewhat more objective, still creates difficulty in presenting the prosecution, as jurors may have very different views of what is covert or secret. The secrecy issue should not be the determinative issue for the jury to decide, yet it can be an important component of their thinking.

The Sections, therefore, urge the UK Government to consider eliminating the "dishonesty" element and rely only on the mens rea element that the defendant agreed to cause the companies to engage in the conduct specified in Section 188 and knew, or should have known, of the terms of the conduct and what it would cause to happen. In U.S. cases, the common formulation of the charge is that the defendants knowingly participated in the illegal conduct and "did those things that they combined and conspired to do." This would focus the prosecution not on a list of specific actions that a defendant did or did not do, but on the common sense finding that there was no
rationale for doing what the defendant did other than to violate the antitrust law. That provides jurors with a test they can understand and apply.

3. **COMMENTS TO CHAPTER 4: “A STRONGER MERGER REGIME”**

The Consultation correctly observes that the UK merger regime is highly regarded internationally and that its strengths include technical competence, independence from the political process, transparency, accountability, and robustness of decisions. Particularly because such attributes already exist in the current system, the Sections commend the UK Government for conducting this rigorous evaluation into whether certain changes would enhance the process and further strengthen the performance of UK merger review. To this end, the UK Government appropriately focuses on three key areas: the voluntary notification rule, methods to streamline the process, and a potential small business exemption. The Sections are pleased to submit the following comments on these issues.

3.1 **Adoption of a Mandatory Notification Regime**

In the Sections’ view, adoption of a well-designed and efficiently operated mandatory notification system applicable to mergers above a reasonable size (discussed *infra*) would enhance the efficacy of the UK’s merger regime. The Sections recognize that benefits and drawbacks inherently exist in both voluntary and mandatory notification regimes. Sections 4.3 through 4.5 of the Consultation explain two primary drawbacks to voluntary notification. First, the UK Government may not learn about mergers that raise competitive concerns. Second, crafting effective remedies can be difficult when, as is often the case, the UK Government does not learn about such mergers until after the parties have extensively combined their operations. These problems can largely be eliminated in a system that both requires pre-merger notification and (as the Consultation suggests in §§ 4.18-4.22) temporarily suspends the right to integrate pending well-defined and reasonably tailored UK Government review periods. To be sure, mandatory pre-merger notification is not without drawbacks, because it imposes significant burdens on the participants. For the UK Government, an apparatus of skilled professionals is necessary to operate and enforce such a program efficiently. For merging parties, as the Consultation notes (§ 4.18), compliance costs (just for the initial notification) include the gathering and submission of information, as well as the delay to integration caused by a suspension period. In addition, the overwhelming majority of mergers pose no anticompetitive concerns. 17 A mandatory regime, therefore, would capture mostly competitively

17 In the United States, mandatory pre-merger notification is pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (“HSR”). In 2006, the U.S. Department of Justice and Federal Trade Commission said that “[f]or more than 95% of the transactions reported under HSR, the Agencies promptly determine – i.e., within the initial fifteen- or thirty-day waiting period that immediately follows HSR filings – that a substantial lessening of competition is unlikely.”
benign or beneficial mergers, and, as to this very high percentage of mergers, the system’s costs would not be offset by direct benefits to the public.

Notwithstanding these drawbacks, the Sections believe the benefits of a mandatory notification system can outweigh its costs. The public benefits when mergers that risk a substantial lessening of competition can – before their integration – be identified, investigated, and, if warranted by the facts and by rigorous economic analysis, resolved as to their anticompetitive aspects by a tailored remedy. As the Consultation points out (§ 4.17), mandatory systems are the prevalent type of pre-merger notification regime in the world. Governments, for the most part, have implemented procedures for handling the intake and processing of mandatory pre-merger filings without unduly constraining the dynamic role that mergers play in the global economy. The international business community, moreover, has become accustomed to mandatory pre-merger notification and has adapted to the obligations of such systems.

The reasonableness of any notification regime depends on its details – including, among other things, the content of information that must be reported in the notification, the extent to which files must be searched for responsive information, the notification thresholds and how they must be calculated, the length of any suspension period(s), whether a waiting period can be accelerated in particular cases, standards for compliance, and numerous other issues. Understandably, at this stage of the UK Government’s evaluation of the merger regime, the Consultation discusses only certain proposed details (on which the Sections provide comments below). Should the UK Government decide to adopt a mandatory notification regime, the Sections would welcome the opportunity to comment on the proposed particulars of the new framework.

3.2 Other Issues

- Improving the voluntary notification regime. Whether the UK Government should (i) create an automatic statutory restriction on further integration as soon as CMA commences an inquiry or (ii) clarify actions CMA may take in phase 1 or phase 2 to prevent pre-emptive action, including reversal of integration that already took place. (§§ 4.12-4.15)

Both alternatives have significant shortcomings in a voluntary regime and, if either were adopted, a mandatory filing regime would be preferable. The Sections understand that the Consultation frames this issue in terms of which option better facilitates more effective remedies in a voluntary regime. In that context, the Sections

Commentary on the Horizontal Merger Guidelines at 2. The UK experience would presumably be substantially similar.

view an automatic statutory restriction to be the better option. It would provide the parties with relative certainty, enabling more effective business planning, and avoid burdensome and time-consuming negotiations over a hold-separate arrangement for each transaction subject to an inquiry. The second option (clarification of CMA powers to prevent pre-emptive action) would, in contrast, foster uncertainty regarding how CMA would proceed in individual cases. The power to reverse prior integration could result in the imposition of punitive costs on the merging parties, at a time prior to the CMA’s determining that a substantial lessening of competition has occurred, and ultimately be ineffective as a remedy.

Although, as the Consultation observes, an automatic restriction may deter parties from notifying the CMA until after integration is complete, the drawbacks of the second option raise a similar concern.

- **Penalties for violation of hold-separate obligations.** Whether a violation of hold-separate obligations should trigger financial penalties up to 10% of the parties’ aggregate turnover. (§ 4.16)

  The Sections believe that this proposal is not necessary to protect the public interest in deterring premature integration and that the amount of the fines could be excessive and inappropriately punitive. In addition, the potential for such high fines would likely exacerbate incentives parties may have in a voluntary regime not to report a transaction until integration is complete.

  By comparison, the U.S. experience has been that far smaller penalties (i.e., currently $16,000 per day for an ongoing violation) typically are sufficient to ensure compliance with a strict full-stop no integration rule. Enforcement of the penalty provisions in the U.S. has been rare, as most parties adhere to the statutory requirements. In the few cases in which enforcement has been necessary, it was typically due to the parties’ failure to file the mandatory merger notification, and comparatively modest fines followed. (In cases in which the parties were found to have begun integrating their operations prior to the expiration or termination of the mandatory waiting period, more significant fines and other penalties have been imposed.) Reputational concerns coupled with these comparatively modest penalties have proven generally effective in deterring merger parties from integrating their operations during an active government investigation.

- **Suspension on Completion of Merger Pending Clearance.** Whether mandatory notification should trigger suspension on completion of the deal until clearance obtained from CMA (§§ 4.18-4.22)
As discussed above, the Sections agree that in a mandatory system, limited suspensory periods of appropriate duration, during which parties may not complete their notified merger until clearance is obtained from the UK Government, is sensible. Experience from other jurisdictions demonstrates that an initial waiting period of approximately thirty calendar days from the date of notification creates little material burden on parties in most cases. (A shorter initial waiting period, e.g., 10-15 calendar days, should apply to hostile takeovers, given the exigencies of such transactions.) Extended suspension of reasonable duration for mergers subject to Phase 2 inquiry is also appropriate, so long as a process is in place to ensure a reasonable, certain termination date for the extended suspension period.

- **Options for a jurisdictional threshold.** Whether either jurisdictional notification thresholds should apply: (i) full mandatory – target UK turnover exceeds £5 million and acquirer worldwide turnover exceeds £10 million; or (ii) hybrid mandatory – target UK turnover exceeds £70 million and CMA retains authority over mergers that are below the turnover threshold but meet share of supply test (i.e., merger results in creation or enhancement of 25% share of supply of goods or services in UK. (§§ 4.27-4.30)

The Sections respectfully submit that neither proposal should be adopted in the form outlined in the Consultation. In the Sections’ view, the UK Government should consider a higher threshold for UK turnover in conjunction with a mandatory suspensory regime. In the Sections’ experience, a mandatory merger control system with reasonable and objective jurisdictional turnover thresholds is best suited to identifying and preventing transactions that threaten harm to competition in the UK without imposing unnecessary burdens on numerous transactions that do not present such concerns. Should the UK Government adopt a mandatory regime, it should include clear, objective notification thresholds, together with appropriate regulations and guidance for the calculation of turnover.

### 3.3 Option 1 - Full Mandatory Notification

Although the Sections appreciate that there is no globally accepted turnover threshold, and that each jurisdiction must decide for itself what level of contacts should warrant an assertion of jurisdiction to review a merger, various international organizations and working groups (such as ICPAC, OECD, and the ICN) have advocated objective tests that capture only those transactions with a sufficient jurisdictional nexus to warrant review by the local jurisdiction. \(^{19}\) Accordingly, the

Sections believe that the full mandatory proposal above is overbroad because (i) the revenue threshold for the acquiring party is based solely on worldwide revenue, and (ii) in any event, the revenue thresholds do not appear to be high enough to minimize unnecessary filings.

Because the threshold for the acquiring party is based solely on worldwide revenue, the proposed threshold threatens to capture a wide range of mergers in which there is no competitive overlap in the UK between the activities of the target and the acquirer and where the acquirer may not even carry on business in the UK. As such, the Sections believe that this threshold would impose significant transactions costs upon parties (and additional burdens upon the CMA) with very little corresponding enforcement benefit. In this respect, the Sections refer the UK Government to the ICN Recommended Practices, which state that:

Many jurisdictions require significant local activities by each of at least two parties to the transaction as a predicate for notification. This approach represents an appropriate "local nexus" screen since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted. To the extent that the "local nexus" requirement can be satisfied by the activities of the acquired business alone, the requisite threshold should be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy. 20

Although the Sections believe that any mandatory threshold should require some minimum level of UK turnover for at least two parties to a transaction, if the UK Government should adopt only a worldwide threshold for the acquiring party, the Sections endorse the ICN Recommended Practices on this point, which state that “If a jurisdiction adopts such notification criteria, the applicable notification thresholds should be set at a very high level. If such thresholds are insufficient to minimize unnecessary filings, other objectively-based limiting filters should be adopted.”21

In contrast to the proposed mandatory threshold, many other jurisdictions have adopted thresholds that are substantially higher and that require minimum contacts from at least two of the parties to the transaction. For example:


20 ICN Recommended Practices I.C, Comment 2.
• **France** (combined worldwide turnover of the parties is over €150 million and at least two of the parties involved each has turnover in France of over €50 million);

• **Germany** (combined aggregate worldwide turnover of all participating undertakings was more than €500 million and the domestic turnover of at least one participating undertaking was more than €25 million and the domestic turnover at least one other participating undertaking was more than €5 million);

• **Ireland** (worldwide turnover of at least two of the parties is €40 million or greater; at least two of the parties must carry on business in Ireland; Irish turnover of one of the parties must be €40 million or greater).

There are numerous other examples of jurisdictions that have revised statutory notification thresholds to increase the local nexus required to trigger notification and review.22

The Sections respectfully suggest, therefore, that the UK Government establish a reasonable mandatory threshold that requires at least two parties to the transaction to derive some minimum level of revenue in the UK. The appropriate threshold should be one that minimizes unnecessary transactions costs (and the workload of the CMA), thus allowing the CMA to focus on transactions most likely to have significant anticompetitive effects in the UK.

### 3.4 Option 2 – Hybrid Mandatory Notification

The Sections believe that Option 2 also has several deficiencies and should not be introduced.

(a) **£70 Million Target Revenue Threshold**

As the Consultation notes, based on an examination of the UK agencies’ past caseload, the £70 million threshold for target UK revenues appears to be too high. As a consequence, many potentially anticompetitive mergers would not be subject to mandatory notification – resulting in many of the practical inefficiencies and potential costs to consumers that occur in the voluntary system. The Sections endorse the Consultation’s approach of examining past cases in order to provide a benchmark against which to determine new thresholds.

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22 Belgium, for example, has raised the local nexus in its jurisdictional thresholds at least five times. In the last decade, the Czech Republic discontinued a combined worldwide threshold. Finland and other European countries have also followed suit.
(b) The Share of Supply Threshold

The Sections suggest that the “share of supply test” from the Fair Trading Act 1973 should be abandoned as a jurisdictional test for CMA’s ability to review anticipated or completed transactions. The Sections believe that a well-designed merger control process should promote legal certainty. Consistent with this belief, the Sections have long promoted the elimination of “market-share” or “size of market” jurisdictional thresholds in favor of objective, ascertainable criteria such as transaction value, turnover or assets. Other international best practice documents on merger review also reject the use of market shares in notification thresholds.

In the Sections’ view, market share or share of supply thresholds have several significant drawbacks. First, such thresholds are inherently uncertain in their application, because the definition and measurement of the relevant market is almost always subject to considerable judgment. This is particularly true of the “share of supply” test, which does not require the delineation of a relevant antitrust market, and for which the agency has historically exercised great discretion in order to determine its jurisdiction. Second, market share or share of supply tests can require the merging parties to undertake extensive fact-gathering and substantive analysis - even for transactions that do not present significant competitive problems – merely to determine jurisdiction. In the Sections’ view, this can impose substantial compliance costs on the merging parties with little to no enforcement benefit, and without providing any certainty.

The Sections express no opinion with respect to the CMA’s ability to review all non-notifiable mergers, except those qualifying under the proposed “small merger” exception. As the Consultation rightly notes, such an approach is similar to the situation that exists in the United States under the HSR Act. The U.S. antitrust enforcement agencies (both state and federal) have the ability to review virtually any transaction that substantially lessens competition in the United States (or a part thereof), regardless of whether the transaction is notifiable or not. Indeed, the U.S. agencies can initiate non-HSR investigations of transactions even if they were notified and obtained “HSR clearance.” As the Sections understand Option 2, however, the

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23 American Bar Association Section Of Antitrust Law, Report On Multijurisdictional Merger Review Issues Presented To The International Competition Policy Advisory Committee (May 17, 1999) at 6 (noting that “notification thresholds based on market-share based tests should be eliminated, or, at a minimum, coupled with an appropriate objectively based de minimis local sales threshold”).

24 ICN Recommended Practices II.B.I.; OECD Recommendation at I.A.1.2.2; OECD BIAC Recommended Framework at 6 (“Market share-based tests should be eliminated in favor of objectively quantifiable and readily accessible information….”).

25 See ICPAC Report at 91 (“Many jurisdictions’ filing requirements are vague, subjective, or difficult to interpret. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests….”).
CMA would not have a similar ability to review notifiable mergers that have been notified and cleared.

Should the CMA retain jurisdiction to review non-notifiable mergers, then the Sections suggest that the circumstances in which such reviews take place be limited – for example, by a statutorily prescribed time period – to promote certainty for business interests.

- **Material influence and mandatory notification.** Whether mandatory notification should be required of mergers resulting in the acquisition of (i) control of policy (broadly equivalent to “decisive influence” threshold in EU) and (ii) a controlling interest; also, should CMA retain jurisdiction over transactions resulting in the acquisition of “material influence.” (§ 4.36)

  The Sections endorse the proposal that notification be required only in the case of an acquisition of control. Consistent with international calls to rely on clear and objective criteria to determine whether a merger must be notified, the Sections believe that any control test should be clearly and objectively defined, so that merging parties can know with certainty whether they must notify. Although the Consultation (§ 4.36) refers to the “acquisition of control of policy of the target” as being “broadly equivalent to the EU Merger Regulation decisive influence threshold,” the Sections suggest that it would further promote certainty if the UK Government implements a control test that is more clearly and objectively defined. While the existing practice and precedents of the European Commission provide some certainty, the standards for control in the United States are more objective and clear.

  Harmonization is an important objective. The Sections note that there are several examples of successful harmonization with the rules adopted under the European Merger Regulation. For example, many national competition regimes have aligned their analysis of joint ventures to those followed by the EC. Similarly, many national agencies have adopted the same methods for calculating turnover as those adopted in the relevant jurisdictional notices from the EC.

  With respect to transactions that exceed turnover thresholds and in which the acquirer will not obtain a control of policy or controlling interest in the target, but will acquire a position of “material influence,” the Sections endorse the Consultation’s proposal that the CMA would have jurisdiction to investigate such transactions if they threaten to substantially lessen competition in the UK.

- **Jurisdictional threshold in a voluntary regime.** Whether, in a voluntary regime, the jurisdictional thresholds should be changed, perhaps by

26 OECD Recommendation at I.A.1.2.2 and OECD BIAC Recommended Framework at 2.1.1.1.
eliminating both the turnover and share-of-supply tests and granting CMA jurisdiction over all mergers except those between small businesses. (§§ 4.38-4.39)

The Sections agree, for the reasons stated above, that the share-of-supply test should be eliminated, and has no objection to the Consultation's specific proposal.

- **Small Merger exemption.** Whether mergers between small businesses should be exempt in a mandatory-hybrid and voluntary regime if the target’s UK turnover does not exceed £5 million and the acquirer’s worldwide turnover does not exceed £10 million. (§§ 4.40-4.42)

  The Sections endorse appropriately tailored *de minimis* exceptions for small businesses. Further, the Sections have no objection to the Consultation’s specific proposal, which is clearly defined and ascertainable with reference to objective criteria.

- **Statutory timescales – Phase 1.** Whether the Phase 1 time period should be shorter in a mandatory regime (e.g., 30 working days) than in a voluntary regime (e.g., 40 working days). (§ 4.45)

  The Sections generally support Phase 1 waiting periods of approximately one month's duration, and suggest that calendar days may result in a more harmonized approach than working days.

- **Statutory timescales – Phase 2 (Remedies).** Whether the UK Government, without changing the 24-week time limit (and up to 8 weeks’ extension) of Phase 2, should establish an additional statutory 12-week period (able to be extended 6 weeks) to implement remedies. (§ 4.46)

  The Sections generally favor enhanced flexibility within Phase 2 to accommodate the exigencies of particular transactions. The proposed new time period for implementation of remedies appears in general to be reasonable in many cases, as long as its availability does not have the effect of unnecessarily delaying CMA’s consideration of remedies that would otherwise occur significantly sooner, i.e., within the 24-week period, and provided any extension for a remedies phase is otherwise consistent with an efficient and well-managed Phase 2 process. The Sections recommend that any Phase 2 period should provide an appropriate mechanism for “early termination” of any Phase 2 review, should the CMA conclude that there are no competitive concerns or should the parties and the CMA conclude appropriate undertakings.

- **Extension of Timescales.** Whether the following are necessary to ensure the rigor and robustness of the regime:
(i) the ability to extend time frames for complex cases (§ 4.47);

The Sections’ general view is that a thirty-day time period in Phase 1, followed by a 24-week period (and potential 8-week extension) in Phase 2, followed by a potential additional 12-week period (and an optional 6-week extension) for remedies/undertaking all combine to provide more than an adequate time for complex cases, such that an additional ability to further extend time frames is unnecessary. The Sections would be pleased to address this issue in the context of a more detailed description of a new notification regime.

(ii) extend to Phase 1 the powers currently applicable in Phase 2 to obtain information from main and third parties (§§ 4.47-4.49);

In the Sections’ experience, parties whose transactions are subject to mandatory suspension (e.g., a 30-day waiting period) have a naturally strong incentive to respond fully to a UK Government information request in Phase 1, since the likely consequence of failing to respond is often a costly extension of the investigation (i.e., a Phase 2 investigation or, in the U.S., a “Second Request”). Accordingly, in such situations, the Sections believe that additional compulsory process powers in Phase 1 are likely to be unnecessary. The Sections would be pleased to address this issue in the context of a subsequent, more detailed description of a new notification regime, which would presumably include a description of the notification form and the factual information it would require.

Parties to transactions subject to a voluntary regime typically face similar incentives to avoid a protracted investigation, such that, in the Sections’ view, additional Phase 1 information-gathering powers are unnecessary in those situations as well. The Sections recognize that third parties typically do not share the same incentives as the merging parties to comply promptly with UK Government information requests, such that processes to compel responses by third parties to reasonably limited information requests are justifiable in Phase 1 and Phase 2.

(iii) extending information-gathering powers for main and third parties and stop-the-clock mechanisms during Phase 1 and Phase 2 during the undertakings in lieu of remedies implementation. (§ 4.47)

The Sections incorporate by reference the responses to subparts (i) and (ii) above.

- Stop the clock on mergers likely to be cancelled or significantly altered. Whether, for anticipated mergers, a discretionary “stop the clock” power should enable a three-week suspension/extension of the review timetable if it believes the transaction will be cancelled or significantly altered. (§ 4.50)

The Sections observe that a reasonably tailored suspension of the review timetable under such circumstances can in the ordinary case be achieved by agreement
among the UK Government and the parties. Accordingly, it is not apparent to the Sections that a stop-the-clock power is necessary for this purpose. Any such power should be exercised solely to accommodate a good faith request from the parties, or otherwise be reasonably grounded in the facts of the situation suggesting that cancellation or significant alteration of the merger is reasonably likely.

- Earlier consideration of remedies in Phase 2. Whether CMA may consider remedies earlier in Phase 2 without having to decide whether the merger will result in a substantial lessening of competition. (§§ 4.51-4.52)

The Sections agree with this proposal. In addition, the Sections respectfully suggest that the UK Government authorize CMA, in appropriate factual situations, to allow the ex-UK aspects of a particular transaction to go forward while remedies applicable to the UK are being addressed. Such a procedure can be practical and effective when the transaction involves a discrete set of UK assets, such as in many retail markets.

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In addition to the foregoing discussion of issues raised in Chapter 4, the Sections also submit the following comment regarding a topic addressed contained in Chapter 11.

- Filing Fees. What is the appropriate level and structure for merger filing fees under either a voluntary or mandatory regime? (§§ 11.7 -11.15)

The Sections agree that all of the several proposals discussed in this section of the Consultation reflect good practices and are consistent with global standards. Although the Sections have in the past expressed the view that antitrust merger enforcement is a law enforcement function, which ideally should be funded from general government revenues, the Sections recognize that most jurisdictions have elected to fund the cost of antitrust merger enforcement in whole or in part from fees assessed on the parties to merger transactions. In this context, the Sections believe that such fees should be set no higher than is required to fund the merger review function and should not be designed to fund other law enforcement activities, including non-merger antitrust enforcement. Further, the Sections believe that the current system of scaling fees to reflect the size of merger transactions based only on domestic (as opposed to global) revenues of the target should be preserved, because domestic target revenues typically have a closer relationship to the burden and cost of merger review within the jurisdiction. As described in the Consultation, each of the alternative filing fee arrangements under consideration complies with these general principles.
Conclusion

The Sections hope that the Department finds these comments useful. We would be pleased to respond to any questions that the Department may have and to provide any further assistance that may be appropriate.

Respectfully submitted,

Section of Antitrust Law
Section of International Law
American Bar Association