The views stated in this submission are presented only on behalf of the Antitrust Law and International Law Sections of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the Association.

The Sections of Antitrust Law and International Law of the American Bar Association (“ABA”) (together, the “Sections”) welcome the opportunity to comment on the Draft Guidelines for the Determination of Administrative Penalties for Prohibited Practices (“Draft Guidelines”) issued by the Competition Commission of South Africa (the “Commission”). The Sections commend the Commission for its commitment to provide comprehensive, transparent, and useful guidance for businesses, their legal advisors, and others.

The Sections recognize that there is no “one-size-fits-all” approach for determining and imposing penalties. The Sections’ comments are therefore limited to a few areas, as follows:

1. how penalties will be assessed, especially for unilateral conduct, which the Sections recommend should be treated differently from cartel conduct;

2. when parental or holding companies should be assessed penalties for the actions of their subsidiaries when they were not directly involved in or sufficiently linked with those actions;

3. the assessment of penalties for lack of cooperation with the Commission, to avoid misunderstandings as to the assertion of privilege, confidentiality, or defenses; and

4. certain terminology used in assessing penalties for bid-rigging.

A. The Factors for Determining the Amount of the Penalty under the Draft Guidelines

Paragraph 5.11 of the Draft Guidelines sets forth five factors relevant to determining the relative percentage of turnover (from 0% to 30%) to be used as the base amount of an administrative penalty: the nature of the affected products, the structure of the market, the defendants’ market shares, the existence of barriers to entry and the impact of the violation on low income consumers and small and medium-sized businesses. The first four factors appear to
draw from factors used by the United Kingdom.\(^1\) Paragraph 5.13 indicates that the “higher end of the scale will be reserved for the most serious contraventions,” which are identified as both “hard-core cartel conduct” and “some forms of abuse of dominance or unilateral conduct -- including excessive pricing, predation, refusal to provide access to essential facilities, inducement-related practices, and buying-up a scarce supply of intermediate goods or resources. These enumerated categories of behavior appear to constitute a majority of the identified areas for which the Competition Act authorizes an administrative penalty.

The Sections respectfully suggest, first, that the higher end of the penalty scale should be reserved for unambiguously harmful hard-core cartel activity, as such activities pose the greatest threat to consumer welfare as well as to economic development and growth. Second, in assessing penalties for unilateral conduct at the lower end of the scale, the Commission should consider as two additional factors, (i) potential pro-competitive justifications for or efficiencies arising from the conduct, and (ii) the availability and effectiveness of non-monetary relief.

Such revisions would align with proven practices in other jurisdictions. For example, even in cartel actions, the European Commission (which has similarly adopted a 30% maximum base amount) has employed typical base percentages ranging from 15% to 20%.\(^2\) Exceeding 20% has been a rare exception even for hard-core cartels.\(^3\) Similarly, the base percentage for a hard-core cartel violation under United States Sentencing Guidelines applicable to the assessment of criminal fines in the United States is 20%.\(^4\) In contrast, while the European Commission can impose a fine for single firm conduct, the European Commission’s Guideline on Fines indicates that penalties at the higher end of the scale will be assessed only for cartel conduct, because it causes the greatest harm.\(^5\)

The United States has not imposed, nor sought to impose, criminal fines for non-hard-core conduct. While civil fines may still be available for such conduct (e.g., under state law), such fines are generally not imposed. Rather, the United States remedies anticompetitive conduct by monopolists or dominant firms through behavioral or, very rarely, structural remedies.\(^6\) As the United States Supreme Court has observed, “[c]oncerted activity inherently is

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\(^1\) United Kingdom Office of Fair Trading, OFT’s guidance as to the appropriate amount of a penalty, OFT423, para. 2.6 (September 2012, since adopted by the Competition and Markets Authority).

\(^2\) See, e.g., Case 38.589, Heat Stabilisers, Prohibition decision, Nov. 11, 2009, 2010 O.J. (C 307) 9, paras. 708-09 (utilizing 20% base percentage); Case 39.165, Flat Glass, Prohibition decision, Nov. 28, 2007, para. 482 (18% base percentage); Case 39401, Gas, Prohibition decision of 8 July 2009, para. 365 (15% base percentage).

\(^3\) The Marine Hoses cartel penalty used a 25% base percentage, in part due to the length of the cartel, which continued for more than two decades as what was described as a “single, complex and continuous infringement.” Case 39406, Marine Hoses, Prohibition decision of January 28, 2009, paras. 439, 445.

\(^4\) U.S.S.G. § 2R1.1(d)(1).

\(^5\) European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 O.J. (C210)2, para. 23.

\(^6\) In the United States, disgorgement of profits from anticompetitive conduct is also sometimes used as a remedy in unilateral conduct cases, although it is viewed as equitable relief rather than punishment. See United States v. Keyspan, 763 F.Supp.2d 633, 638-42 (S.D.N.Y. 2011). Disgorgement tends to be used particularly when other remedies, such as non-monetary relief, are not available. Id. at 640. Disgorgement has been sought and granted in some U.S. antitrust cases but is not common in unilateral conduct cases. See, e.g., In re TFT LCD Panel Litigation, MDL No. 1827, 2011 WL 2790179, *3-4 (N.D. Cal. July 12, 2011) (disgorgement could be available as a remedy in a price-fixing case under state law). See also U.S. Federal Trade Commission, Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47070 & n.5 (Aug. 7, 2012).
fraught with anticompetitive risk,” and is therefore “judged more sternly than unilateral activity.” On the other hand, treating unilateral behavior as strictly, or more so, than concerted behavior risks deterring legitimate and pro-competitive conduct due to fear of “litigation costs and judicial error”.

The same conduct that can be potentially anticompetitive can also have pro-competitive benefits. Treating unilateral behavior as harshly as (or more harshly than) hard-core cartel behavior risks deterring legitimate and even pro-competitive conduct that enhances consumer welfare, especially if the law does not even allow for consideration of pro-competitive justifications in the setting of penalties.

South Africa’s Competition Act in fact recognizes that single-firm conduct is not always anticompetitive. For example, Section 8(d) of the Competition Act—for which certain violations are subject to administrative penalties—describes exclusionary conduct that is prohibited only when the conduct’s anticompetitive effect is not outweighed by technological, efficiency, or other pro-competitive gains. Under Section 8(b) of the Competition Act, refusal to give a competitor access to an essential facility when it is economically feasible to do so can constitute an abuse of dominant position. However, whether a facility is “essential” may change over time, such that a firm’s possible lack of awareness that its asset would be so categorized may warrant a downward assessment of penalties. Similarly, the Commission may find that agreement by the firm to comprehensive non-monetary relief may warrant a downward assessment.

B. Clarification of Parental or Holding Company Liability for Actions of Subsidiary or Joint Venture

Paragraph 8 – Holding Company Liability – Confirming Applicability of Listed Factors: Paragraph 8.1 states that the “Commission may impute liability for payment of the final administrative penalty on a holding company (parent company) where its subsidiary has been found to have contravened the Act.” Similarly, Paragraph 8.4 states that “the Commission may impute liability, jointly or severally, for payment of the final administrative penalty on the parent companies of the joint venture.” As written, this could be construed as affording the Commission the unconstrained discretion to assign liability to a parent company, as opposed to administering a liability test that applies the factors set forth in Paragraphs 8.1.1 to 8.1.4. The

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8 Id. at 190 n.2, quoting 7 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 1464c, at 206 (2nd ed. 2003).
9 American Needle, 560 U.S. at 190 & n.2.
10 The European Commission’s Guidance in Its Enforcement Priorities in Applying Art. 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (“Article 102 Guidance”) states that an input is essential in a refusal to deal context when “there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long-term – the negative consequences of the refusal.” Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, para. 83.
11 See, e.g., S. Salop & R. Craig Romaine, Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft, 7 GEO. MASON L. REV. 617, 665-670 (1999) (discussing the kinds of relief that differing standards may suggest for monopolization). In this respect, the Sections appreciate that, in Paragraph 6.1, the Commission has recognized a general willingness to settle as warranting a downward departure in the assessment of fines.
Sections believe it would be preferable to condition parental liability directly on the factors stated in Paragraphs 8.1.1. to 8.1.4.

**Paragraphs 8.1.1 to 8.1.4 – Clarifying the Proposed Factors for Holding Company Liability:** The Draft Guidelines in Paragraph 8 explain that the Commission may “impute” liability for the payment of an administrative penalty on a holding company “where its subsidiary has been found to have contravened the Act.”\(^\text{12}\) In addition, Paragraph 8.1.4 sets out as a factor for parental liability that “the parent derived substantial benefit from the activities of the subsidiary.” Taken together, these paragraphs could be read to suggest that a parent company could be divorced from the alleged wrongdoing as well as the exercise of close influence over the subsidiary, and yet be liable for the administrative penalty.

If so, this factor would appear to be inconsistent with international practice including that of the United States and the European Union, where a parent company is penalized for the infringing conduct of its subsidiary only when it is involved with or otherwise exercises a specified level of influence over the infringing conduct.\(^\text{13}\)

The Sections respectfully suggest that the Commission clarify the limits on parental or holding company liability for the actions of their subsidiaries. It may aid the Commission to tie those limits not only more expressly to Paragraphs 8.1.1 to 8.1.4 of the Draft Guidelines but also to consider clarifying those factors in accordance with jurisprudence in the European Union and the United States. A balance should be struck such that parental or holding companies that are directly involved in, or closely enough linked to, the actions of their subsidiaries can be held liable under the Competition Act without discouraging investment and development. Clarifying parental liability is important for the predictability necessary to achieve the Competition Act’s goals of promoting foreign investment and economic development.\(^\text{14}\)

**Applicable Standards for Determining Holding or Parental Company Liability under United States and European Union Competition Law:** The fundamental principle in both the United States and the European Union is that strict liability is not imposed on parents or holding companies when a subsidiary commits an infringement.\(^\text{15}\) The main basis

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\(^{12}\) Para. 8.1.

\(^{13}\) See infra notes 13-21.

\(^{14}\) The establishment of in-state subsidiaries in South Africa by foreign parents can help those parents to diversify risk and so encourage investment. See *Bellomo v. Penn Life Co.*, 488 F. Supp. 744, 746 (S.D.N.Y. 1980); see also *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (“Limited liability is the rule, not the exception; upon that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.”). The same is true in reverse for South African companies seeking to do business abroad, an important point given the goals of the Competition Act.

\(^{15}\) *Blair v. Infineon Technologies AG*, 720 F. Supp. 2d 462, 469 n.10 (D. Del. 2010) (“Piercing the corporate veil is not itself an independent . . . cause of action, but rather is a means of imposing liability on an underlying cause of action.”), quoting *Peacock v. Thomas*, 516 U.S. 349, 354 (1996)). Case C-97/08 P *Akzo Nobel NV and Others v Commission* [2009] ECR I-8237 para. 77 (“Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which . . . may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.”).
for determining that a parent is liable for the actions of its subsidiary is the parent’s involvement in the infringing behavior of its subsidiary or (in the European Union) its exercising decisive influence over subsidiaries that participated in the behavior. Mere involvement in or high-level oversight by the holding company regarding the ordinary activities of its subsidiary typically is not sufficient. For example, the United States Supreme Court has held that “[Parental] activities that involve the [operation of a subsidiary’s] facility but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.”

Instead, it must be shown that the subsidiary did not operate independently but carried out, in all material respects, the instructions of its parent. This is often referred to in the United States as “piercing the corporate veil.” An example of the application of the successful application of the “piercing the corporate veil” doctrine in the context of United States antitrust law is the Vitamin C case involving an export cartel aimed at United States import commerce. The liability of a parent company in the European Union is based on the rationale that the subsidiary and the parent form a “single economic unit” or “undertaking.” To conclude that parent and subsidiary form a single unit, it must be established that the subsidiary does not determine its conduct independently, but carries out, in all material respects, the instructions

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17 Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979) (stating that one corporation is considered to be a mere alter ego when it “has been so dominated by . . . another corporation . . . and its separate identity so disregarded, that it primarily transacted the dominator’s business rather than its own.”).
18 See Bestfoods, 524 U.S. at 52 (“the corporate veil may be pierced . . . when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes.”). Although parental liability may be imposed as well under agency theory (i.e., the subsidiary is deemed to have acted as an agent of the parent as a principal), agency applies as a basis for jurisdiction or liability only when the relationship between the parent and the subsidiary is sufficiently close and direct that the subsidiary is in effect acting as the agent of the parent. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); see also, e.g., Gen. Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 392 (1982); Chicago, M & St. P. Co. v. Minneapolis Civic & Commerce Ass’n, 247 U.S. 490, 496-98, 500-02 (1918). A parent’s voting shares, or making appointments to the board, of its subsidiary does not suffice to demonstrate agency. See Transamerican Leasing Inc. v. La Republica de Venezuela, 200 F.3d 843, 849 (D.C. 2000). Similarly, a parent’s supervision of financial and capital budget decisions to protect its investment falls below the level of control that should trigger an agency relationship for purposes of general jurisdiction. See Sun Microsystems v. Hynix, 622 F. Supp. 2d 890, 899-900 (N.D. Cal. 2009) (collecting case law). However, agency may differ from “piercing the corporate veil” depending on whether day-to-day control is required for agency as it is for “piercing the corporate veil.” See First Nat’l City Bank v. Banco Para el Comercio de Cuba, 462 U.S. 611, 629-30 (1983).
19 In Vitamin C, defendant China Pharmaceutical Group (“CPG”), a Hong Kong holding company, filed a motion to dismiss price-fixing claims on the ground of lack of personal jurisdiction even though it owned 100% of another company, Weisheng Pharmaceutical Co. Ltd. (“Weisheng”). Although CPG claimed that it did not do business in the United States market for Vitamin C and that its sole business was to invest in other companies, CPG’s primary business was to sell Vitamin C through subsidiaries such as Weisheng. CPG selected all of Weisheng’s directors from among the ranks of its own directors, Weisheng itself had very few board meetings. CPG financed the expansion of Weisheng’s Vitamin C production capabilities, and CPG closely reviewed and supervised employee compensation decisions. In re Vitamin C Antitrust Litig., No. 06-MD-1738, 2012 WL 2930109, at *1-4, 10 (E.D.N.Y. July 18, 2012).
given to it by the parent company.\textsuperscript{21} Under these circumstances, the subsidiary is deprived of the autonomy to determine its own market behavior and the parent company exercises “decisive influence” over the subsidiary’s conduct.\textsuperscript{22} It is the parent’s “decisive influence” (and the actual exercise of that decisive influence) over its subsidiary’s infringing activities that results in the parent company’s liability.

**Extension of National Competition Laws to Foreign Entities:** One additional consideration that has been applied in determining the appropriate application of domestic competition laws to foreign corporate entities is the doctrine of comity as it applies to corporate legal structures. The United States Supreme Court has “warned that rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.’”\textsuperscript{23} In accordance with that concern, a recent decision of the U.S. Court of Appeals for the Seventh Circuit declined to apply United States competition law to losses suffered by foreign legal entities in foreign countries even though those entities were wholly owned, and directed, by an American parent. The court believed that such foreign entities should look to the law of their own jurisdictions in explaining that allowing suit under “U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own economies.”\textsuperscript{24} The Commission correspondingly may wish to consider international comity—as well as effects on investment in South Africa’s economy per Sections 2 and 3(1) of the Competition Act—when finalizing these guidelines insofar as foreign holding companies or parents of South African subsidiaries may be concerned.\textsuperscript{25}

**Penalties Assessed on Trade Associations:** On a related point, the Commission may wish to take into account that when the members of an association are being sanctioned and the association is also the subject of an administrative penalty, the firms in question will effectively be penalized twice—first, directly in their own capacity, and second, indirectly through the administrative penalty imposed on the association. The Sections believe this should explicitly be taken into account in determining the extent of any penalty imposed on the associations, as the Sections understand that associations in South Africa are often voluntary organizations of individual members without any independent legal existence.\textsuperscript{26}

\textsuperscript{21} Case C-440/11 P Stichting Administratiekantoor Portielje and Gosselin Group NV v. Commission [2013] (not yet published), para. 60; while the primary basis for determining liability is the personal responsibility of the economic entity that committed the infringement, there is a rebuttable presumption that a parent company exercised decisive influence over a subsidiary’s conduct where that parent company holds all or almost all of the capital of the subsidiary. See generally Case C-289/11 P Legris Industries SA v. Commission [2012] (not yet published), para. 46.
\textsuperscript{22} Case C-97/08, P Akzo Nobel, para. 58.
\textsuperscript{23} See Motorola Mobility LLC v. AU Optronics, No. 14-8003, 2015 WL 137907 at *9 (7th Cir. 2015), citing F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004). It has been reported as being likely that Motorola, the plaintiff, will seek review of this decision by the U.S. Supreme Court.
\textsuperscript{24} Id.
\textsuperscript{25} Ultimately, the Sections believe that looking to South African common law, for example on piercing the corporate veil or agency, as well as the experience of other jurisdictions to aid it in clarifying those aspects of these guidelines concerning parental or holding company liability, would not be inimical to other goals of the Competition Act involving economic development and remedying historical disadvantages. See OECD Peer Review, Competition Law and Policy in South Africa, at 19 (May 2003).
\textsuperscript{26} See Council on Foundations, South Africa (October 2014), [http://www.cof.org/content/south-africa#Types](http://www.cof.org/content/south-africa#Types) (accessed on Jan. 15, 2015).
C. Clarification of Credit for Cooperation to Avoid Misunderstandings as to Assertions of Privilege, Defenses, and Confidentiality Issues

In Paragraph 5.19.3 of the Draft Guidelines, the Commission sets out its proposed approach for dealing with the factors set out in Section 59(3)(f) of the Competition Act, regarding “the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal.” In Paragraph 5.19.3.2, the Commission helpfully reiterates that a firm’s tangible actions to facilitate the speedy resolution of a matter should be taken into account in mitigation of the potential administrative penalty. However, Paragraph 5.19.3.1 of the draft could be read to suggest that any delays in the investigation or litigation process that could be attributed to the respondent firm’s conduct may be regarded as being aggravating factors in determining a potential administrative penalty.

The Sections recommend, first, that Paragraph 5.19.3.1 be clarified to ensure that it not be read to suggest that a party’s exercise of its right to contest a complaint referral, for example by offering evidence of countervailing efficiencies, may be regarded as an aggravating factor. The Sections also respectfully recommend that this paragraph be clarified so that the assertion of privilege or confidentiality claims not be regarded as constituting dilatory conduct for the purposes of assessing penalties. Given that Paragraph 5.19 of the Draft Guidelines already provides that the Commission may take into account “unspecified” mitigation factors, such a clarification would merely add specificity to factors the Draft Guidelines already recognize.

Clarifying Paragraph 5.19.3.1 in this manner would be consistent with international principles of due process and fairness. These principles include providing an opportunity for companies to be heard as to any efficiencies or defenses that they may wish to offer and to assert any applicable privileges or confidentiality issues.27

Relating to the need for clarification of Paragraph 5.19, the Sections respectfully suggest that the Commission also clarify the Draft Guidelines to avoid situations in which it may be double-counting cooperation from leniency applicants who are already being rewarded for the information they are providing. A similar clarification was offered by the United Kingdom in footnote 28 of its Penalty Guidelines.28

D. Clarification of Certain Aspects of the Calculation of Fines Involving Bid-Rigging

The Section commends the Commission for addressing different types of scenarios that may arise in the context of bid-rigging cases, in the interests of transparency and in developing a consistent approach. However, the Sections respectfully suggest that it make certain amendments to the current draft of Paragraph 5.8 to avoid ambiguity.

28 United Kingdom Office of Fair Trading, OFT’s guidance as to the appropriate amount of a penalty, OFT423, at 13 n. 28.
In particular, the Sections respectfully suggest that the reference to the “value of the tender/contract” is unclear and may be interpreted differently by different parties. Typically, a tender would not contain a value but each of the parties tendering would put forward a price, and the successful party may or may not be the one offering the lowest price. It seems appropriate, however, when determining the “affected turnover,” to use the value of the successful tender, i.e. the contract concluded or to be concluded by the successful bidder. While it appears that this is the objective of Paragraph 5.8.1, the wording is not entirely clear. The Sections therefore suggest the following amendments to Paragraph 5.8.1:

“For the firm that has won is awarded the tender, and that was party to the collusive agreement, the Commission will consider the affected turnover to be the greater of (i) the value of the tender/contract bid submitted by the successful bidder; or (ii) the contract concluded or to be concluded pursuant to the tender process; or (iii) the amount ultimately paid to the successful bidder pursuant to the tender;”

In addition, this proposed wording seeks to provide for circumstances in which a bidder is successful but ultimately does not conclude a contract with the party seeking the competing bids for whatever reason (for example, the project does not proceed or the successful bidder is declared insolvent). The proposed amended wording seeks to cover situations in which a project goes out to tender, the tender is awarded to the successful bidder, and the scope of work is extended after the tender is awarded due to circumstances not foreseen at the time (for example, additional repair work that was not included in the original tender document but is ultimately required and undertaken by the successful bidder pursuant to the tainted bid).

Paragraph 5.8.2 of the Guidelines also appears unclear to the Sections in a number of respects:

- Paragraph 5.8.2 refers to “complementary bids.” The Sections submit that the term “complementary” is unclear in this context and is not defined in the Guidelines or in the Competition Act. As such, it is unclear whether “complementary bids” is intended to refer to “purportedly competing bids” or is a synonym for a “cover price” or whether the term is intended to have another meaning. The uncertainty is compounded by the use of “cover bid” in the last line of paragraph 5.8.2. It is therefore suggested that “complementary bid” be defined or otherwise clarified.
- The Sections suggest that the wording of Paragraph 5.8.2 be amended to provide clearly for more than one unsuccessful bidder, as there may be a number of parties to a collusive tendering agreement. Similarly, minor amendments are suggested to cover a collusive agreement between one or more parties but not put into effect (for example, where bid-riggers reach an agreement on a tender but “whistleblowing” takes place before its submission).
- Line five of Paragraph 5.8.2 refers to “affected” in the context of turnover generated by the party to a collusive agreement in respect of goods and services. Since “affected turnover” is defined in the Guidelines, by inference, “affected” in the context of Paragraph 5.8.2 does not refer to “affected turnover” as defined.
Consequently, the Guidelines do not address the method for determining “affected” or its meaning. To provide certainty and transparency in accordance with the objectives of the Guidelines, the Sections respectfully suggest that the term “affected” either be defined or replaced.

- Line six of Paragraph 5.8.2 refers to “affected turnover” as being the greater of “(2) the turnover reflected in the contract or bid on which the firm submitted a rigged bid or a cover bid in connection with the contravention, or (3) the value of the tender/contract.” As already identified in Paragraph 5.8.1, the reference to “value of the tender/contract” is ambiguous; the Sections therefore recommend that, to ensure consistency and clarity, the Guidelines be amended to refer to the value of the contract concluded pursuant to a successful tender. Without this amendment, the reference to item (2) could be interpreted as referring either to the unsuccessful bid or to a successful bid (which has already been addressed in Paragraph 5.8.1 of the Guidelines).

Accordingly, the Sections respectfully suggest that Paragraph 5.8.2 be amended as follows:

“For the a firm that did not win was not awarded the tender, where it but was party to the a collusive agreement in respect of the tender in question and submitted or agreed to submit one or more complementary a purportedly competitive bids, or where it agreed to not submit a bid, or to submits a high bid at a particular level to ensure a bid that the tender is won by another firm, the Commission will consider the affected turnover to be the greater of (1) the turnover generated by the firm in the goods or services that were affected by the contravention that was awarded the tender, in respect of the tender in question, or (2) the turnover reflected in the contract or value of the bid on which the firm submitted by the unsuccessful firm in question a rigged bid or a cover bid in connection with the contravention, or (3) the value of the tender/contract.”

This proposed clarification also slightly amends the wording to provide for situations in which (i) there may be more than two parties to a collusive tender; and/or (ii) the unsuccessful bidder to be prosecuted may have been party to an agreement with another unsuccessful bidder but not the successful bidder. To avoid doubt, the Sections suggest omitting the word “high” as this is a relative term that may become the subject of debate.

Conclusion

The Sections appreciate the opportunity to provide these comments and are available to provide any additional comments or clarification that the Commission may find helpful.