JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
REGARDING THE OFFICE OF FAIR TRADING’S REVIEW OF
THE OFT’S INVESTIGATION PROCEDURES IN COMPETITION CASES

June 18, 2012

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

The Section of Antitrust Law and the Section of International Law (together, the Sections) of the American Bar Association (ABA) are pleased to submit these joint comments to the United Kingdom Office of Fair Trading (OFT) regarding its consultation paper entitled Review of the OFT’s investigation procedures in competition cases. The Sections previously submitted to the OFT in November 2010 joint comments on the OFT’s consultation on its proposed guide to investigation procedures under the Competition Act of 1998, which the OFT published in final form in March 2011 (the Guide to Investigative Procedures). The Sections have substantial experience in investigations relating to competition laws in the United States and other jurisdictions and in the practical implications of those investigations. These comments draw upon that experience.

The Sections believe that overall the proposed changes would improve the OFT’s procedures. These comments offer some suggestions for additional improvements.

EXECUTIVE SUMMARY

1. The Sections support the idea of placing final authority with an independent OFT group rather than with the case’s Senior Responsible Officer. However, the Sections suggest that the OFT consider adopting procedures to prevent the creation of the new independent group from causing undesirable delays.

2. The Sections recommend the adoption of measures to minimize the harm to targets from the publication of a Case Opening Notice.

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The Sections support the OFT’s proposals for increasing the number of state-of-play meetings and for enabling targets to provide comments on proposed penalty calculations.

The Sections hope that these joint comments will be useful to the OFT. The Sections would be pleased to explain or expand upon the comments below in greater detail or assist the OFT in another manner.

**RESPONSES TO QUESTIONS FOR CONSULTATION**

**Question 1**

*Do you agree with the proposal for a revised decision-making model set out in this document? In particular, do you consider the changes will enhance the robustness of decision-making?*

**Sections’ Response to Question 1**

The Sections agree that the Senior Responsible Officers (SROs) should no longer have the final say on the outcome of an investigation. Removing such authority from the SRO would, among other benefits, eliminate the appearance of a confirmation bias and lend greater objectivity and credibility to the investigation process.

The Sections also believe that placing such authority in a three-person group could lead to higher-quality decisions. As the OFT recognizes in the draft guidance, however, this change has the potential to cause decisions to take longer. The Sections suggest, therefore, that the OFT consider adopting specific timetables to ensure that the Case Decision Group’s consideration causes no delays in the process. As one potential model, the U.S. Federal Trade Commission, recognizing that its cases moved too slowly, recently adopted tighter time limits for its own adjudicatory process, including limits on how much time the Commission itself has to issue rulings. The Sections also suggest that the OFT consider whether to clarify how the Case Decision Group will resolve splits.

**Question 2**

*Do you agree with the proposed transitional arrangements if the new decision-making model is introduced?*

**Sections’ Response to Question 2**

The Sections believe that applying the new decision model only to investigations in which oral hearings have not yet occurred is reasonable.

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3 See [http://www.ftc.gov/os/2008/12/P072104part3frn.pdf](http://www.ftc.gov/os/2008/12/P072104part3frn.pdf). See also the Antitrust Section’s comments on the FTC’s proposals. [http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_3and4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_3and4.authcheckdam.pdf)
**Question 3**

Does the revised draft guidance set out at Annexe C cover in sufficient detail all aspects of the revised processes in our investigations under CA98? If not, what additional guidance would be useful?

**Sections’ Response to Question 3**

The Sections suggest that OFT consider the following additions to its investigation procedures.

1. **Case Opening Notices and Timetables**

   Under the proposed changes, the OFT would publish a “Case Opening Notice” on its website in every case in which the OFT opens a “formal investigation.” While this change would provide additional transparency, and perhaps bring OFT practice into greater alignment with European Commission (EC) practice, the Case Opening Notice could create serious problems for targets, especially if they are identified, expressly or implicitly, in the Notice. The Sections believe that the OFT should give greater consideration to these consequences.

   When a company is identified as a target of an antitrust investigation, it suffers immediate reputational harm and could become embroiled in costly private litigation long before the OFT finds any wrongdoing—a problem not cured by disclaiming language in the Notice. Experience in other jurisdictions demonstrates that such disclaimers are generally ignored by private parties inclined to file suit.

   Going public with the identity of targets also could jeopardize the confidentiality of investigations in other jurisdictions, such as the United States where investigations generally are non-public and do not become public unless and until disclosed by a target or other recipient of formal process or a complaint is issued. The seriousness of this confidentiality concern is illustrated by the fact that the U.S. Department of Justice successfully seeks stays of private litigation pending the outcome of its own investigations.

   Another problem with identifying the targets is that it could exacerbate the already-serious problem that, once a Case Opening Notice is issued, the staff may be less inclined to close the investigation without any remedy due to public expectations.

   The EC’s press announcements regarding cartel investigations generally do not name the targets. The Sections suggest that OFT do the same, and should take care not to disclose information that would enable the public to identify the targets even when they are not named.

2. **More State of Play Meetings**

   The Sections wholeheartedly endorse the proposal to give targets an opportunity for a second state of play meeting before a final decision is made, for all the reasons identified in the consultation paper.
3. Parties’ Comments on Draft Penalty Calculations

The Sections support the proposal to provide parties with an opportunity to comment on draft penalty calculations before the OFT makes any final penalty determination. This proposal would align the OFT’s practices with those of the EC and allow parties to offer input and relevant information on penalties during the administrative stage of the investigation. The ability to comment on draft penalties should be particularly robust given the existence of a new Case Decision Group with final decision-making authority on any penalties.

4. Enhanced Oral Hearings and Internal Checks and Balances

The Sections applaud the OFT for its proposals designed to enhance oral hearings and the interaction between investigation staff, decision makers, and the targets of the investigation. The proposed changes allow targets greater opportunity to express their views at the oral hearing on the Statement of Objections and to supplement their written responses.

While the Sections generally favor the proposal for greater participation by the General Counsel and Chief Economist (or their designees) in the investigation process generally and the oral hearing in particular, we encourage the OFT to make sure these changes do not unduly delay proceedings.

**Question 4**

Do you have any comments on how easy the revised draft guidance is to understand and whether its format is easy to follow?

**Sections’ Response to Question 4**

The Sections generally found the proposed changes to be comprehensive, well-articulated, and easy to follow.

**Question 5**

Do you agree that greater guidance on the OFT’s settlement policy and procedures would be worthwhile at this time or do you think it should be left to a later date, for instance after the establishment of the CMA?

**Sections’ Response to Question 5**

The Sections believe that the OFT should offer further guidance on settlement policy and procedures now rather than waiting.