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City of London Law Society Competition Law Committee Response to OFT Consultations on Guidance as to the Appropriate Amount of a Penalty and on Applications for Leniency and No-Action in Cartel Cases

This paper is submitted by the Competition Law Committee of the City of London Law Society in response to the OFT consultations in respect of Penalties and Leniency and no-action in cartel proceedings, published in October 2011.

The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

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1. QUESTION 1

Do you agree that the OFT should retain a step-based approach to calculating penalties rather than moving to an 'in the round' approach? Please give reasons for your views.

1.1 We agree that the OFT should retain a step-based approach. This enables the OFT to work towards a principled position in relation to penalties. The transparency it brings allows the investigated parties to exercise their rights of defence.

1.2 We appreciate the need for a degree of flexibility to ensure that penalties are set at a proportionate level. However, we consider that this is best achieved through the 'fine-tuning' of each step of the penalty-setting process, rather than by developing an 'in the round' approach which would replace structure and transparency with a wide OFT discretion.

2. QUESTION 2

What are your views on the OFT's proposed changes in relation to calculating the starting point?

(i) whether it is appropriate to increase the maximum starting point to 30 per cent of relevant turnover

2.1 We do not believe that the range should be increased to 30 per cent. This seems to be a somewhat blunt means of achieving the OFT's stated aim of being able to differentiate between different infringements. The proposal also seems to run counter to OFT statements that it does not seek high fines per se.[1]

2.2 We note that the OFT cites, in support of the proposal, the higher percentage ranges used as a starting point by certain other competition authorities in the EU. However, it is necessary to take into consideration the full range of enforcement tools at an authority's disposal when assessing overall deterrent effect. A major difference between the regimes cited and that of the UK is that the OFT has developed other antitrust enforcement tools, including criminal/personal sanctions, to complement its fining powers. The OFT's 2011 report on the impact of competition interventions on compliance and deterrence cites reputational damage as a more significant deterrent than criminal sanctions and fines.[2] This vindicates OFT efforts to look beyond simple corporate fines when trying to motivate compliance.

2.3 We are also concerned that having such a high starting point could result - despite later steps - in excessively high fines, particularly for 'single product firms' or UK/regional firms which might consistently be fined at close to the cap of 10 per cent of worldwide turnover. We appreciate that the OFT sees value in having a 'step 1' which is as objective as possible. However, we are concerned that a mechanistic approach at this first step will result in over-reliance on subsequent proportionality adjustments which should, in our view, be limited to a relatively simple 'reality check' and not take on the character of a more complex assessment forcing the OFT to revisit previous steps in the process each time it sets a penalty.

2.4 The setting of a potentially high starting point is likely to result, in almost all cases, with considerable pressure being exerted upon the OFT at a subsequent stage to reduce fines to ensure proportionality. Increasing the range to a maximum of 30 per cent may ultimately require the OFT to reinstate a cap of 10 per cent of UK turnover to ensure proportionality. This would seem to be a backward step.

(ii) whether it would be appropriate for the OFT to use 25 per cent of turnover as a minimum starting point for the most serious infringements of competition law

2.5 We appreciate that the OFT seeks to impose higher fines in respect of more serious infringements and that it seeks to do this in a transparent manner. However, we are concerned about both the suggested starting point and the difficulty of defining in advance what amounts to a serious infringement of competition law, especially in relation to the Chapter II prohibition. These two concerns are explained below.

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[1] Most recently, John Fingleton stressed at CRA's 7 December 2011 conference on "Economic Developments in European Competition Law" that agencies should put more resources into probes, particularly own-initiative cartel investigations "as a substitute to higher fines".

[2] *The impact of competition interventions on compliance and deterrence*, Final Report, December 2011, OFT 1391. See in particular figure 6.1; http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf.

Starting point of 25 per cent

2.6 We believe that a minimum starting point of 25 per cent of turnover is inappropriate for the following reasons:

- It would lead to excessively high penalties. 25 per cent is considerably higher than the starting point used by the EU. Other regimes with a high starting point lack the more nuanced enforcement tools which the OFT has at its disposal. Further, competition fines, on any view, already significantly exceed fines for what the public may regard as more serious corporate behaviour – such as corporate manslaughter or deliberately bad business practices resulting in loss of life or serious injury, but prosecuted only under health and safety legislation. It is therefore important that the end result does not get too far out of touch – proportionality adjustments should not be treated as the only tool to do this.

- As indicated below, we do not think that the OFT should take into consideration issues of general deterrence in this initial step (which the OFT cites as a reason for increasing the starting point in step 1).

- Setting a default of 25 per cent will inevitably force penalties to 'coalesce' around the 25 per cent mark. Since this is so close to the upper threshold of the band, the setting of the starting point will undermine one of the OFT's key objectives - to provide sufficient headroom to differentiate between infringements (which of course is necessary even in relation to hardcore cartel conduct).

- If the OFT is committed to a default starting point, we think the guidance should simply indicate that the starting point for infringements that have resulted in serious consumer harm will be set towards the upper end of the range.

"…for serious infringements of competition law."

2.7 We are concerned that an unduly broad definition of "serious" might be adopted - for example by treating as serious all those Chapter I infringements which are characterised as having an anti-competitive object. In reality, there may be genuine differences between the various infringements even in relation to 'object' infringements. This was of course acknowledged by the CAT in the Construction appeals in relation to bid rigging. A formalistic approach would of course overlook this important fact.

2.8 In addition, novel infringements which are characterised as object infringements by the OFT should not attract the same starting percentage as horizontal price-fixing cartels. This is a particular concern of business in the light of OFT commitments to continue to pursue complex infringements at the outer edges of existing case law.

2.9 We consider that, rather than list particular types of infringement, the OFT should only treat as serious those infringements that have resulted in serious consumer harm. Further, if the OFT is minded to proceed with the suggested approach, we consider it appropriate for the OFT to commit, in certain circumstances, to using a lower starting point, e.g. where the practice is well known (such as cover pricing, which was long established and written up in text books) or some other well-known information exchange. This would enable the OFT to differentiate between cases where there was less consumer harm (and thus where it would be appropriate to treat the starting point as lower for all participants) and a long-standing secret cartel involving direct competitor agreement on upward price moves.

2.10 We do not consider it appropriate to apply the same approach in a dominance context. In contrast with cartel-type conduct, it is rarely possible to identify, at the outset, conduct which deserves to be classed as a serious abuse of dominance. Consequently, such conduct should

not be treated in the same way as hardcore cartel conduct. Given the fine line between a serious abuse of a dominant position and quintessentially competitive conduct (where, for example, the same conduct is adopted by a company lacking substantial market power), there is a real risk that the OFT's proposal would have a chilling effect on companies who would not want to run the risk of being severely punished if pricing schemes etc are subsequently regarded as abusive.

2.11 An authority might look to internal company documents for clues as to whether a company intended to engage in serious anti-competitive conduct but it will rarely be possible to reach a satisfactory conclusion on the existence of a corporate intention to commit a serious abuse of dominance. In any event, all such documents would need to be placed in context before they could be properly understood by the OFT.

2.12 More generally, the form-based approach of treating certain Chapter II conduct as serious seems to be at odds with the more effects-based approach being adopted by the OFT towards Chapter II cases.

(iii) whether the proposed maximum of 30 per cent of relevant turnover at the starting point should apply to relevant market turnover or to turnover directly or indirectly affected by the infringement

2.13 In our view, the penalty should be calculated by reference to turnover directly or indirectly affected by the infringement. This is logical since the penalty should be tailored to the harm caused. It is also more appropriate to identify affected turnover rather than undertake an incomplete market definition exercise on which to base the penalty calculation.

(iv) whether including a separate 'entry fee' in the starting point, in addition to a percentage of relevant turnover, would enhance deterrence and should therefore be included in the Draft Revised Guidance. Please give reasons for your views.

2.14 We agree that it is not necessary to introduce an 'entry fee'. We believe that the existing steps, once clarified by the revised guidance, will be adequate to ensure both general and specific deterrence.

3. QUESTION 3

Do you agree that the OFT should assess general and specific deterrence separately, covering general deterrence at Step 1 and specific deterrence at Step 4? In particular, what are your views on the proposal to make later deterrence adjustments only where the OFT considers that a higher penalty is necessary to achieve specific deterrence of the undertaking in question?

3.1 We believe that the OFT should continue with the current approach of adjusting for general and specific deterrence. We appreciate that a higher range for the starting point of the fine in step 1 could also address general deterrence but our view is that the OFT should distinguish the adjustments for deterrence with the decision on the appropriate starting point. It seems to us that the current approach would work well provided the OFT determines with care any uplift for general deterrence.

3.2 We agree that the OFT should take a 'step back' (as suggested in paragraph 5.32) in order to ensure that the penalty at the proposed level is necessary and proportionate to achieve the OFT's policy objectives.

4. QUESTION 4

What are your views on the OFT's proposed approach to determining the duration of infringements?

4.1 We do not agree with the proposal to treat the duration as a year when the infringement may have lasted (substantially) less than this. We are concerned that the OFT's approach will result in the application of a large multiplier which will often mean that the penalty is not commensurate with the consumer harm.

4.2 It also leads to a perverse outcome where parties that have entered into an anti-competitive arrangement, e.g. as a result of a one-off meeting, would, effectively, not be incentivised to terminate that arrangement before a year has expired.

4.3 In our view, the OFT should take this opportunity to adopt the approach taken by the General Court in its judgment in *Choline Chloride* where, having the precise information about the duration, it proceeded to calculate the fine on a pro rata basis in order to ensure that the fine was "proportionate".[3]

4.4 If the OFT is nonetheless committed to rounding up the duration of an agreement lasting less than a year, we think that the OFT should adopt the same policy that it adopts more generally - i.e. adopt a consistent policy of rounding up durations to the nearest quarter year.

5. QUESTION 5

What are your views on the OFT's proposal to reverse the order of Steps 3 and 4 of the Current Guidance and apply aggravating and mitigating factors before assessing whether adjustments for deterrence or proportionality are required? Please give reasons for your views.

5.1 We agree that there is a logic to this. In particular, it makes more sense to check for proportionality once any upward adjustment for deterrence has been made.

6. QUESTION 6

Do you consider that the OFT's proposed approach to specific deterrence adjustments is appropriate?

6.1 As indicated above, it is our view that the OFT should not adopt a higher starting range and should continue with its current methods for assessing general and specific deterrence in its penalty-setting.

6.2 In any event, we agree that, given the numerous other steps involved in the process, the circumstances in which a penalty is increased for specific deterrence (namely those at paragraph 5.3.1) should be defined/interpreted narrowly. For example, parent/wider group turnover should only be taken into consideration in situations where that parent company was involved in the infringement. If the OFT is imputing liability to the parent company because of its actual influence over the infringing entity, the OFT should only have regard to the wider group turnover where that parent company failed to promote compliance adequately within the group.

[3] Joined Cases T-101/05 and T-111/05, *BASF AG and JCB SA v Commission*, judgment of 12 December 2007, paragraphs 219-220.

6.3 If the OFT is committed to its proposal to round up the duration of infringements to one year in situations where the infringement lasted for a shorter period, it is our view that the guidance should indicate that, as part of specific deterrence, a reduction would be made where the infringement is less than a year.

6.4 We also believe that the OFT should, as part of specific deterrence, ensure that penalties are reduced as appropriate in the event that a company is a single product company. These firms stand a particularly high chance of receiving a disproportionately high fine. The guidelines should state explicitly that an adjustment will be made at this step in such circumstances.

7. QUESTION 7

Do you agree that the OFT should carry out an explicit proportionality assessment as described? Also, do you agree that the assessment should be carried out at the same Step as adjustments for specific deterrence rather than as a separate Step at the end of the calculation procedure?

7.1 We agree that it is appropriate to carry out an explicit proportionality assessment as described. However, the guidance should also refer to the principle of equal treatment and explain how that principle will be applied by the OFT. We appreciate that the OFT has elected to deal with this principle implicitly. However, in our view, the OFT should address this key principle explicitly. The guidance should explain which factors the OFT will commonly take into consideration when checking that the investigated parties have been treated equally.

7.2 We agree that the proportionality check should be carried out at the time proposed by the OFT. It is appropriate to ensure that the penalty is proportionate before any final adjustments are made in connection with the 10 per cent cap, leniency, settlement and financial hardship.

8. QUESTION 8

What are your views on the OFT's proposed revisions to the illustrative list of aggravating and mitigating factors? Please give reasons for your views.

<u>"Persistent and repeated unreasonable behaviour…"</u>

8.1 We understand that the OFT wishes to send a strong signal to companies that they should not cause unreasonable delay to investigations. However, in our view, the OFT should make use of its existing powers to impose fines for procedural infringements, rather than develop new provisions. Making use of existing powers would also avoid the conflation of procedural and substantive issues. Should the OFT consider that existing powers are insufficient, we suggest that steps are taken to make them easier to use.

8.2 In any event, we are concerned about the potentially wide scope of the new aggravating factor - i.e. "persistent and repeated unreasonable behaviour that delays the OFT's enforcement action". This wording is wider in scope than that of a similar provision in the EU fining guidelines which treats as an aggravating factor a refusal to cooperate with the Commission or obstruction of the Commission in carrying out its investigations. The OFT guidance would be much clearer if the OFT adopted a more objective concept.

8.3 We are concerned that the broad definition may capture circumstances where the parties are simply exercising their rights of defence. We understand, of course, that this is not the OFT's intention. Consequently, we recommend that the wording is amended to make it clear that this proposal will not apply where the parties can demonstrate a bona fide intention to meet OFT deadlines (and have simply run into unforeseen problems when procuring information or can no longer attend meetings for legitimate reasons). The guidance should also explain that issues which result in the parties making an application to the Procedural Adjudicator will not

be treated as giving rise to an aggravating factor. It should also be made clear that parties can apply to the Procedural Adjudicator for a ruling where the OFT proposes to rely on this aggravating factor when setting a penalty.

Recidivism

8.4 As a matter of principle, we do not believe that the OFT, as a UK regulator, should be concerned with infringements in other countries within the EU. This is a matter for an EU regulator. There is also the added problem of taking into consideration conduct in other countries which the OFT might not have regarded as an infringement. In our view, the OFT should only consider previous OFT decisions when considering recidivism.

8.5 On a related point, we query whether it is appropriate for the OFT to take into consideration any relevant infringements in the last 15 years. We think this period should be no longer than the period for which the UK has had effective competition law - i.e. 10 years. We understand that the OFT might want to alter this in future, e.g. once the Competition Act has been in force for 15 years.

8.6 As regards the percentage multiplier, we suggest that, to avoid excessive penalties, the OFT adopts a similar practice to that which is emerging in the EU - i.e. increasing in practice fines by 50 per cent in case of one prior infringement, 60 per cent in case of two prior infringements, 90 per cent in case of three prior infringements and 100 per cent in case of four prior infringements.[4]

Compliance

8.7 We appreciate the OFT's efforts in this area and would encourage the OFT to be more robust in its guidance. In particular, we think that footnote 22 of the guidance should be amended to indicate that where there is evidence of a "clear and ambiguous commitment to competition law" (as further described in that footnote) this "will" (as opposed to "may") be treated as a mitigating factor.

9. QUESTION 9

Do you agree that the OFT should not include compensation payments in the illustrative list of mitigating factors, whilst being prepared to consider arguments in relation to specific cases? Please give reasons for your views.

9.1 We believe that public and private enforcement can be good complements. As such, we think that the OFT could encourage private enforcement of some form by recognising compensation payments as a mitigating factor. In paragraph 5.48 the OFT sets out a number of practical difficulties. These are set out below, together with our explanation of how they might be overcome.

- *Continuing need for deterrence*: we appreciate that the OFT would not want to undermine the deterrent effect of fines. However, this is unlikely to be a major issue since, as the OFT explains in paragraph 5.48 (fourth bullet), any discount given would not be given on a 'pound for pound' basis. That said, we do think that a reduction of more than 10 per cent would be required in order to encourage compensation. In any event, the continuing need for deterrence can be taken into consideration when calculating the discount. This of course may require the OFT to consider in broad terms the amount of

[4] See for example Wouter Wils's paper on Recidivism in EU Antitrust Enforcement http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957088, p 4.

harm caused to consumers but this would seem to be appropriate - not least because it would help inform other steps of the process - e.g. proportionality.

- *Timing difficulties*: a conditional discount could be granted by the OFT.

- *Diversion of resources*: we agree that the OFT should be concerned primarily with detecting, examining and sanctioning anti-competitive activity. However, an assessment of consumer harm is a relevant factor in imposing an appropriate sanction. Indeed, it is also an important factor in terms of OFT prioritisation.

- *Inevitable debate over the precise level of discount*: we understand the OFT's concern that there might be debate over the precise level of discount. However, provided some material incentive is provided - e.g. to encourage the use of ADR - the debate may be kept to a minimum.

- *Assessment of the level of compensation*: again, we appreciate the OFT's concerns but suggest that a commitment to binding ADR or offer of a discount conditional on settlement with victims of the infringement should be considered.

10. QUESTION 10

Do you agree that it would be helpful to make the application of leniency and settlement discounts a formal Step in the Draft Revised Guidance? Do you agree that these reductions should be carried out after the Step 5 adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy? Please give reasons for your views.

Yes. It is logical to apply these steps at the end of the process.

11. QUESTION 11

Do you agree that the financial hardship assessment should be carried out at the end of the calculation process?

Yes. However, we think that the OFT should expand on the situations that it would treat as financial hardship.

12. QUESTION 12

Is the Draft Revised Guidance sufficiently clear to assist you in understanding how the OFT will set financial penalties for relevant competition infringements? Are there any specific areas in the scope of this document where you consider further guidance would be useful? Please explain which areas and why. Please give reasons for your views.

12.1 In the interests of due process, we also believe that the OFT should provide more details in its statement of objections on the calculation of penalties. It would be of great benefit to both the investigated parties and the OFT if the statement of objections set out the essential facts and matters of law which the OFT proposed to use under each step of the penalties guidance. This information should include the relevant sales figures to be taken into account and the year(s) that will be considered for the value of such sales. Should the OFT intend to depart in its final decision from the elements of fact or of law set out in the statement of objections to the disadvantage of the parties, those parties should be given another opportunity to respond to the OFT.

13. QUESTION 13

Do you agree with the OFT's proposed transitional arrangements?

Yes.

RESPONSE TO OFT CONSULTATION ON APPLICATIONS FOR LENIENCY AND NO-ACTION IN CARTEL CASES

1. INTRODUCTION

1.1 We believe that the draft guidance on leniency applications has a number of useful new aspects such as the overview charts and checklists. The process for making a leniency application is explained in more simple terms and we welcome the extra detail on the circumstances in which the OFT will provide confidential guidance. We also agree that it is appropriate to consolidate the existing guidance on 'no action' letters into this Guideline. Indeed, we think it important that the OFT seeks, as far as possible, to produce a single, detailed point of reference in relation to the areas on which it provides guidance.

1.2 Consequently, we limit our responses to two areas: (i) the conduct of internal investigations where the OFT seeks, unusually, to limit the amount of legal advice that a company can obtain; and (ii) the waiver of legal privilege where we recognise that the OFT has a legitimate aim but wonder whether it might be achieved in a less radical manner.

1.3 First, we make an observation about the OFT's evolving philosophy in relation to the fundamental aims of a leniency regime.

2. THE CONTINUING NEED TO INCENTIVISE LENIENCY APPLICATIONS

2.1 In paragraph 2.4 of the draft guidance, the OFT refers to two principal purposes behind a leniency policy: the detection of cartels and the bringing of effective enforcement action by harnessing cooperation of applicants in relation to the provision of evidence. In paragraph 2.6, the OFT indicates that it is conscious of the tension between these objectives - since the greater the cooperation requirement (and therefore cost) faced by an applicant, the lower the incentive to come forward in the first place - but is mindful of this balance.

2.2 However, it seems to us from the tenor and detail of the draft guidance that the OFT has begun to regard the second of these two objectives (i.e. the cooperation of applicants in order to carry out and complete OFT investigations) as a more important policy aim and therefore a greater priority. In particular, we are not aware of any other competition law jurisdiction placing so much responsibility on the applicant to assist the OFT in bringing enforcement action, e.g. through a power to seek the waiver of legal privilege; strict controls on a company's internal investigations well before the OFT is involved; the need to admit an infringement of the law at a very early stage; and very long-term cooperation requirements.

2.3 We are concerned that this shift in attitude overlooks the fact that even the best leniency application will fall considerably short of all the evidence that the OFT will ultimately need in order to bring its case. Rather, the OFT should continue to see leniency as a key means of detecting cartels and continue to concentrate on refining its own abilities to bring successful enforcement actions.

2.4 In our view, there is a real risk that using leniency to drive enforcement proceedings forward, rather than to detect illegal cartels in the first place, will result in fewer leniency applications which may also be of a lower quality. We understand that this shift in attitude, seeking to enlist greater input for the leniency applicant, is driven by the OFT's findings following its review of the BA/Virgin trial but believe that the OFT should guard against over-correcting in respect of circumstances which were perhaps quite unusual (in terms of number of leniency applicants, IT forensics issues).

3. CONDUCTING INTERNAL INVESTIGATIONS

3.1 The OFT's approach towards the carrying out of internal investigations is a clear example of how the pendulum has swung too far towards treating leniency applications as a means of driving cases through the administrative/criminal system, rather than a means of detection. Significantly, the OFT's explanation of how internal inquiries should be carried out seems to underestimate how much evidence gathering a company would always want to carry out before it proceeds to take the significant step of alerting the OFT to a cartel via a leniency application.

3.2 A recommendation that parties and their lawyers carry out a 'light touch' audit also appears to overlook the fact that the quality of a leniency application is directly related to the quality of the investigation carried out. We believe that aspects of the proposed guidance will discourage companies from making leniency applications since they may prefer to adopt a 'reactive' strategy (defending against cartel allegations) rather than conducting a low key audit only to obtain immunity in respect of a subset of the cartelised products and in a subset of the countries affected.

3.3 Conversely, paragraph 3.8 contains a statement which we believe should inform the OFT's attitude to investigations throughout the draft guidance. In that paragraph, the OFT states that it "only requires that undertakings act reasonably, reducing the risks as best they can having regard to all relevant considerations". This seems entirely reasonable and proportionate - and the bullet points listed in paragraph 3.10 set out issues which are of undisputed importance in the context of conducting an internal investigation.

3.4 However, the OFT appears to depart from this standpoint, suggesting somewhat unhelpfully in paragraph 3.8 that companies "may wish to take advice from a criminal lawyer". We suspect that companies - at the outset of an internal investigation which may not even result in any civil liability - are unlikely to regard this suggestion as helpful guidance and are more likely to be confused by the signal being given by the OFT.

3.5 Annexe C also contains a number of statements which we think should be amended in recognition that companies will need to undertake a detailed investigation even at an early stage.

3.6 As a preliminary point, we believe that Annexe C should differentiate between inquiries which are triggered by a dawn raid/internal whistle-blowing report (where suspicious conduct has been alerted to company management) and some other more 'routine' audit. We think the guidance should acknowledge that the Annexe C is intended to apply to the former category of investigations rather than to more routine health checks (e.g. as part of corporate compliance) where the concern of tipping-off does not arise.

3.7 As regards other types of investigation, we think that Annexe C is broadly helpful and that many of the bullet points contained in that Annexe represent best practice. However, while we appreciate the need for internal investigations to be conducted with care and precision even before the OFT is involved, it is our view that the OFT needs to see the company's efforts and the conduct under investigation in their wider context. Although the threshold for obtaining an OFT marker is relatively low, a company will not be incentivised to apply for a marker without understanding as far as possible the scope of its exposure. Clearly, there are two aspects to this exposure:

- First, although an internal tip-off etc may have identified a single product, the conduct may stretch into neighbouring products or, through common participants, into other business divisions. Indeed this appears to be a trend in cartel enforcement, e.g. the series of investigations taking place across all major competition law jurisdictions into a variety of automotive components.

- Secondly, the geographic scope of the conduct will often be unclear. There are numerous examples of companies obtaining immunity in one country but not in another (e.g. *Lifts and Elevators, Detergents*) - presumably because they were not first-in in all affected countries. There is always a risk of this happening but the OFT's approach will add to the risk quite unnecessarily.

3.8 This of course explains why companies will want to conduct as thorough an investigation as possible to assess exposure (while also recognising that it is locked in a race against other potential immunity applicants). Where 'smoking gun' evidence is lacking (e.g. pure information exchange cases) there will be a particular need to undertake fact-finding to determine whether there is in fact an infringement. From a more practical perspective, a company's Board may need to be consulted in advance of making an application which will mean that sufficient evidence is needed to brief and convince directors that the major step of applying for leniency is appropriate.

3.9 The OFT seems to acknowledge the wider context (at least in terms of geographic scope to cartel conduct) in paragraph 3.11 where it acknowledges that "a more significant investigation may be necessary in order to make leniency applications in multiple countries". We think this section of the guidance should be amended so that it also recognises that the nature of the products/activities under investigation may often justify a more thorough investigation. This should also be reflected in paragraph C.4 which currently only states that the inquiry should be "as limited as it can be" without recognising the factors that would justify a thorough investigation (which will often be present).

3.10 This would enable companies to carry out proportionate investigations which will of course translate into higher quality leniency applications (at a time when there is a legitimate concern about the veracity of immunity evidence).

3.11 On a related point, we think it is very positive that the OFT will provide confidential guidance on how internal investigations should be conducted. However, we do not regard the confidential guidance process as an effective tool for managing the mismatch between the evidentiary thresholds for obtaining leniency markers across jurisdictions. Even assuming that cartel conduct were confined to the EU, reliance on the OFT to liaise with other NCAs with a view to persuading them to align their marker threshold with that of the OFT would not be satisfactory from a risk management/timing perspective. It would also be an unnecessary drain on OFT resources.

4. WAIVER OF LPP

4.1 We fully appreciate the need for the OFT to discharge its duties as a prosecuting authority in the criminal context and applaud the OFT for its commitment to ensuring that all the facts are brought to light as early as possible.

4.2 However, we wonder whether a number of other innovations contemplated by the OFT will allow the OFT to fulfil its aims (and duties) in an alternative manner which would avoid the need to require companies to waive LPP.

4.3 For example, we note that the OFT is proposing a number of changes to the way in which it approaches investigations with a view to ensuring that it has the evidence it requires. In particular, paragraph 5.27 lists the typical investigative steps that the OFT may carry out directly. The need for applicants to differentiate between known facts supported by evidence and statements based on the belief or best recollections of witnesses and suspicions and assumptions (paragraph 4.28) plus the requirement for applicants to provide exculpatory evidence will also assist greatly. Overall, given the heightened requirements in order to meet ongoing cooperation requirements and the fact that the OFT is committed to being more

involved in the investigation earlier, it is unclear why - at a late stage in the inquiry - the OFT may then have to invite waivers of LPP.

4.4 We appreciate that the goal is to investigate any changes of testimony over time - which is a factor that may well be significant for witness credibility etc. and of course the rights of the defendant. However, it will often be challenging in practice to differentiate naturally and innocently evolving testimony from situations where a witness is altering their recollection for suspect reasons.

4.5 Further, even if the OFT is satisfied that the first witness account material appears to be consistent with the case they are proposing to bring, that first account material will then no doubt be subjected to scrutiny (including cross examination of the junior lawyers that drafted the interview notes or cross examination to compare the recollection of the interviewer with that of the note-taker) in court. The waiver of LPP material may therefore open up another front for conflict, and fail to achieve anything more than could be achieved by the OFT interviewing key witnesses as early as possible in their investigation.

4.6 Indeed, this area can be expected to be a fertile ground for defence lawyers who may pressure the OFT to require disclosure of the legal representative's investigative logs etc in an effort to challenge the propriety of each stage of the investigation. Criminal investigations could last much longer as a result.

4.7 As drafted there is a real risk that the OFT's guidance will result in changes in practice which will lead to less documentary evidence being available with a resultant impact on enforcement. For example, companies will be concerned that statements made by a witness about conduct in other countries will be disclosable in overseas litigation, leading to significantly increased exposure. This approach may well have a chilling effect on leniency applications at a time when leniency materials are under siege in the light of the *Pfleiderer* judgment.

4.8 On a related point, we note that paragraph 4.2 (c) introduces the need for an acceptance by the undertaking that, "as a matter of fact and law, the available information suggests that it has been engaged in cartel conduct". We understand that the OFT needs to guard against conditional applications for immunity. However, we query whether the protection this provides to the OFT is outweighed by the risk that it will encourage applicants to characterise conduct as cartel conduct when a number of key facts still need to be investigated by the OFT. There is a risk in other words that the imposition of this requirement at such an early stage will lead applicants into exaggerating the facts or framing the facts in a certain way in order to meet the condition.

4.9 In any event, should the OFT be committed to requiring waivers of LPP, we make the following observations in relation to the proposed guidance:

- Paragraph 3.15 notes that the topic of LPP is complex and beyond the remit of the guidance. We agree and therefore suggest that the guidance does not attempt to refer to the precise scope of LPP. This will ensure that the guidance note remains focused on matters of policy and avoids adding uncertainty to an already complex area.

- Paragraph 3.19 indicates that the OFT will only seek a waiver when advised by counsel. However, it is unclear why counsel would be well-placed to advise. The guidance should explain how counsel would resolve the issue - i.e. which factors counsel will take into account to assist the OFT. The OFT also contemplates seeking an order from the court. In our view, the extra protection that this brings means that the OFT should obtain a court order in all cases.

- Paragraph 3.20 explains that, where a waiver is required, the relevant document is likely to be required to be disclosed in full. In our view, the OFT should as far as possible strive to ensure that irrelevant content is redacted - e.g. statements relating to conduct in other countries. Partial disclosure, in other words, may help to address legitimate corporate concerns about waiving LPP in a manner that will have an impact far beyond the UK.

- Paragraph 3.20 suggests that applicants and their advisers should keep separate any correspondence and documents which may have a bearing on (subsequent) criminal proceedings. We query whether this is practicable. The material in which the OFT has indicated an interest may be simple matters of fact which have, at the time, no obvious relevance to a criminal prosecution. It is therefore not simply a case of keeping separate any interview transcripts that deal with the dishonesty element of the s. 188 offence. As a result, disputes are likely to be commonplace when the OFT seeks a waiver.

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