4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

19 June 2012

The City of London Law Society

Competition Law Committee

RESPONSE TO CONSULTATION ON OFT's INVESTIGATION PROCEDURES IN COMPETITION CASES

City of London Law Society Competition Law Committee

RESPONSE TO CONSULTATION ON OFT's INVESTIGATION PROCEDURES IN COMPETITION CASES

1 Introduction and executive summary

Background to the submission

1.1 This paper is submitted by the Competition Law Committee of the City of London Law Society in response to the Office of Fair Trading's consultation paper *Review of the OFT's investigation procedures in competition cases*, published on 28 March 2012 ("the Consultation Paper").

1.2 The City of London Law Society (CLLS) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.

1.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

1.4 The CLLS Competition Law Committee has prepared this submission. 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.

1.5 The authors of this response are:

Robert Bell, *Speechly Bircham LLP* (Chairman, Competition Law Committee)

Howard Cartlidge, *Olswang LLP*

Michael Grenfell, *Norton Rose LLP*

Nicole Kar, *Linklaters LLP*

Margaret Moore, *Travers Smith LLP*

Becket McGrath, *Edwards Wildman Palmer UK LLP*

Nigel Parr, *Ashurst LLP*

Alex Potter, *Freshfields Bruckhaus Deringer LLP* (Chair, OFT's investigation procedures working party)

Isabel Taylor, *Slaughter and May*

1.6 We are grateful for the contributions of colleagues on the Committee.

Executive Summary

1.7 As an introductory comment, the Committee welcomes the OFT's review of its investigation procedures and its focus on key areas such as the robustness of its decision-making procedures as well as its desire to increase the transparency of the investigation process for parties.

1.8 Specifically, on the substance of the Consultation Paper, the Committee supports:

(a) the separation of investigators from decision-makers, and the introduction of a Case Decision Group ("CDG") to assist with this process - marking a significant step in addressing the risk of confirmation bias inherent in having a single body as investigator, prosecutor, judge and jury;

(b) the involvement of the Chief Executive, General Counsel and Chief Economist in the Decisions Committee;

(c) improved access to the key decision-makers throughout an investigation;

(d) the systematic use of an administrative timetable to mitigate the impact of investigations on businesses, provided that the OFT will engage in full and constructive discussion with parties to manage the timetable in everyone's best interests;

(e) the increased number of state of play meetings, since businesses place considerable value on direct access to the case team and decision-makers as a very productive method of both sides understanding the issues at stake;

(f) increased transparency concerning the calculation of penalties at an earlier stage of an investigation;

(g) the extension and expansion of the Procedural Adjudicator role to enhance the robustness of the process; and

(h) the enhanced oral hearings process to involve both the CDG and the Procedural Adjudicator, since it important that the investigators and the decision-makers are present to hear the parties at such a key stage of an investigation.

1.9 The Committee has certain concerns about some of the proposals, and believes that the level of clarity in some areas should be improved. Key points are:

(a) adequate procedures should be put in place to ensure that parties have necessary access to the CDG (after its appointment) for all key stages of the investigation given its importance as decision-makers;

(b) the proposed decision-making structure appears relatively complex and therefore the OFT's Guidance should provide further clarity on how it will operate, as well as a greater understanding of the interaction between the CDG, the case team and the Decisions Committee, how evidence will be shared amongst them and how they will interact with the parties;

(c) the CDG should not be involved in the decision-making process concerning possible settlement discussions to avoid later concerns of confirmatory bias in, for example, mixed settlement discussions;

(d) notwithstanding the recent legislative proposals contained in the Enterprise and Regulatory Reform Bill, additional procedural clarity is needed concerning the use of Case Opening Notices and how and when they may be deferred. Indeed the publication

of Case Opening Notices can give rise to significant pressure on the parties under investigation;

(e) parties to investigations should be properly engaged in the timetabling process and, thereafter, continue to have clarity concerning the timing for publication of key case documents such as the Statement of Objections and the decision;

(f) a lack of clarity as to how the Enquiries and Reporting Centre and Preliminary Investigations Team and the OFT will handle complaints; and

(g) further clarity is needed concerning a range of aspects of the OFT's draft Guidance (in Annex C) including:

(i) guidance on the use of section 27 notices;

(ii) the interaction between CDG and the Decisions Committee; and

(iii) the identity of the members of a typical CDG.

1.10 Additionally, the Committee would like to take this opportunity to emphasise the critical importance of an adequate pool of senior, experienced officials at the OFT to ensure that the positions of the Senior Responsible Officer (SRO) and members of the CDG are properly staffed and that these senior individuals have sufficient time to read in so that they are fully on top of the facts, key issues and arguments. The Committee views the SRO role as critical to the OFT's objective of undertaking well-directed investigations that lead to robust decisions; if the involvement of experienced officials to direct cases does not occur from the outset, the task of the CDG at a later stage of the process will be significantly more difficult or, conceivably, significantly less effective in delivering robust outcomes.

1.11 The Committee has grouped its response to the Consultation Paper into five main themes: decision-making processes, transparency of the investigatory process, procedural rights of defence, the OFT's draft guidance (the "Guidance"), and comments on the transitional arrangements.

1.12 The Committee has also addressed each of the OFT questions posed in Annex A of the Consultation Paper in this response. To assist the OFT further with its review of this response, these questions are addressed in the following sections of this paper:

Question number: Annex A	**Addressed at**
1	Sections 2 and 4
2	Section 5
3	Paragraphs 6.1 to 6.10
4	Paragraph 6.11
5	Section 7 and paragraph 2.7

2 Decision-making processes and structure

2.1 We very much welcome the initiative from the OFT to separate the decision-makers from the investigation team. It is an important step in addressing concerns about confirmation bias. We also welcome increased clarity on the role of the decision-makers and their presence at oral hearings.

2.2 We have outlined below our further suggestions to help ensure that the decision-making process is robust, transparent and fair for parties.

Decisions Committee

2.3 We welcome the involvement of the Chief Executive, General Counsel and Chief Economist in the Decisions Committee to bring their experience and oversight to investigations. However, we would seek further clarity on how the consultation process between the Decisions Committee and the CDG will operate, given that all key decisions within an investigation, after the issue of an SO, will remain with the CDG.

2.4 The key to robust decision-making is the involvement of decision-makers with sufficient seniority and experience. Therefore, we attach significant importance to the consultation process between the Decisions Committee and the CDG to ensure fair and robust decisions are taken.

Case Decision Group

CDG members' identity

2.5 We welcome the inclusion of at least one lawyer and one member of the Decisions Committee in the CDG. Nevertheless, it would be helpful to have greater clarity on the identities of the proposed CDG members. In particular, members of the CDG should be sufficiently senior and experienced from other investigations to underscore a robust and fair decision-making process. Therefore, we would like to emphasise the importance of adequate senior resources at the OFT to ensure the CDG is properly staffed and that these senior individuals have sufficient time to prepare properly.

CDG involvement in the investigation

2.6 We believe that the CDG should become involved in an investigation after the Statement of Objections ("SO") has been issued: its involvement at this stage will ensure that the CDG represents a "fresh pair of eyes" for the key decision-making stages during an investigation, thereby enhancing its robustness.

2.7 We do not think that the CDG should be involved in the decision-making process concerning possible settlement discussions. In particular, should the CDG be involved in the detail of mixed settlement discussions, where the investigation will be ongoing, involvement at this stage may risk bias and a loss of independence (the "fresh pair of eyes") for key case decisions to be taken after the SO. We believe that a decision will need to be taken at senior level to ensure that an investigation is suitable for settlement and likewise a further such decision after settlement negotiations will be required to ratify that settlement agreement. Therefore, we would propose that the SRO, in consultation with the Decisions Committee is better placed to handle settlement discussions. In addition, we request that the settlement guidance (see further Section 7) adequately outlines these decision-making procedures.

Access to the CDG

2.8 Access to the CDG will be an important dynamic of the investigation for parties. The parties should have full access to the CDG throughout its involvement in a case: this will ensure that the CDG can hear all evidence and the parties' views firsthand and thereby be best placed for its decision-making role. In order to facilitate this, we consider that the CDG should be present at the state of play meetings scheduled after the SO has been issued.

2.9 It is important for the parties to experience continuity of both the CDG and the case team throughout an investigation: parties have previously found that frequent changes of personnel potentially undermine the robustness of the investigation process and, ultimately, the OFT's decision. Some changes in team composition, due to personnel departures, are inevitable in cases that run for several years; changes for other reasons should, however, be kept to an absolute minimum.

Senior Responsible Officer

2.10 Whilst we welcome the OFT's focus on enhanced senior oversight in the decision-making model,[1] we do not consider that this is a substitute for senior involvement throughout to drive investigations from the outset in the most effective manner. The seniority and experience of the SRO, given their continuing important role in managing an investigation, is key to the effectiveness of an investigation: the SRO and their staff should be taking responsibility for their cases. Therefore, we would like to emphasise the importance of there being a sufficient pool of experienced officials from which to draw both SROs and CDG members.

3 Transparency of process

Case Opening Notices

3.1 The publication of Case Opening Notices risks creating unfairness where such notices name the parties to an investigation. The inevitable interest levels from the press and stakeholders such as shareholders and customers, and the possibility of such notices serving as a trigger for damages claims, are likely to place intense pressure on parties under investigation, all at a time when the OFT is a long way from reaching a preliminary conclusion that there has indeed been an infringement of the law.

3.2 Publication of a more limited notice, without the identification of the parties under investigation, will also give rise to pressures and possibly to perverse outcomes. Where the fact of an investigation in a sector is mentioned, without naming those involved, those market participants who are not (at that time) under investigation may find themselves with a strong interest in clarifying this publicly. This could in turn lead to inferences being drawn about those who have not announced anything and similar pressure on them to make a public statement on the issue. See further below.

3.3 We recognise that the publication of Case Opening Notices could assist the investigation process by encouraging third parties to volunteer evidence of relevance to the investigation. We would query, however, whether such a goal requires incurring the difficulties mentioned above, in light of the OFT's already extensive information-gathering powers.

[1] Consultation Paper, paragraph 2.17.

3.4 If, following the Consultation, the OFT chooses to adopt a policy of issuing Case Opening Notices on a systematic basis, we consider that the OFT should be mindful of the pressures such notices will put on those parties subject to investigation and seek to mitigate these pressures as much as possible. In particular, it would be strongly preferable that parties who are to be named in a Case Opening Notice should be given advance, embargoed, copies of the notice (no later than 24 hours prior to its publication) to ensure that they are in a position to respond to enquiries once the notice has been published. We recognise there may be difficulties in adopting the same approach in relation to a limited notice, where parties are not named, but would encourage the OFT to explore ways of addressing this issue in this eventuality as well.

3.5 If a Case Opening Notice is to be issued, we agree that the earliest point at which the OFT should consider publication is the opening of a formal investigation under section 25 of the Competition Act 1998. We also agree, however, that there will be some cases where it will not be appropriate to publish a full Case Opening Notice at this stage – for example, where a dawn raid might be planned, or perhaps where there remains a material level of uncertainty as to the parties or the scope of the investigation.

3.6 In this context, our view is that in most cases publication of a "limited notice", as envisaged in paragraph 2.32 of the Consultation Paper and section 34(2) of the Enterprise and Regulatory Reform Bill ("ERRB"), is likely to be difficult. Our experience is that once a sector has been identified as subject to an investigation, the consequent press speculation puts significant pressure on both the OFT and the parties involved to clarify the position. Without necessarily ruling out the possibility that a limited notice could be appropriate in some cases, we would therefore suggest that the starting point should be that in cases where publication of a full notice (in line with the provisions of clause 34 ERRB) is not appropriate, the OFT will simply delay publication of the case opening notice until such time as the concerns around publication have reduced. This appears to be in line with the approach to the issuing of a case initiation letter to the parties as described in paragraph 5.5 of the OFT Guidance. It will be important that the OFT approaches this new process with both flexibility and consistency for the different infringements investigated to ensure that parties can be subjected to fair and predictable treatment.

3.7 At whatever stage it is published it will, as the OFT Consultation Paper recognises, be important that the notice is carefully phrased so as to make clear that it refers only to the opening of an investigation and that there has been no infringement finding. This issue already exists in relation to statements issued at the time of an SO, but will be even more important at case opening when the OFT has not even reached a provisional finding on the issues. We note that this is a concern that Government has recognised in the ERRB to provide explicitly for absolute privilege from defamation for such notices.[2] We would expect, as a minimum, that there would be standard language for journalists contained within the Case Opening Notice confirming that there was no finding of any infringement but that this was merely the start of the OFT's investigation.

Administrative Timetables

3.8 We see the systematic use of an administrative timetable in investigations as an important practical reform that will allow parties and third parties to an investigation better to plan and manage their resources. Lack of clarity over timeframes is a key source of frustration for parties

[2] ERRB, section 34(2).

to investigations: this impacts even at the very simple operational level of understanding whether or not relevant staff can be released to travel abroad or to take holiday. Given the timeframe over which Competition Act cases take place, and the significant fluctuations in the demands placed on businesses participating in investigations at different stages of the investigation, the potential benefits that a clear timetable can offer in terms of allowing businesses to manage their resources effectively should not be underestimated. Therefore, it is important that the OFT commits to updating timetables to ensure their accuracy at all key stages of the investigation.

3.9 More specifically, it is important that parties that are subject to an investigation have clarity over the timing for issue of key case documents such as the SO and the decision, so that they are able to manage their internal and stakeholder demands by, for example, allocating internal resources to respond to information requests and the SO, as well as being ready to deal with press interest and any announcements that may need to be made by the company. We would also encourage the OFT, as part of the dialogue on timetable, to provide more information to the parties to clarify process and timing for the OFT's internal decision-making procedures, so that the key "check points" are understood and expectations can be managed accordingly.

3.10 All of these benefits discussed above could be achieved by issuing an administrative timetable privately to the parties under investigation and third party complainants; they do not depend on publication to the world at large.

3.11 If the OFT were to consider that there should be publication of timetables, the success of published timetables will depend on the process by which the timetables are drawn up and the amount of information that they contain. Our experience of current OFT practice as regards the provision of case-specific investigation timetables to the parties is mixed. It will be important that the timetables set are realistic at the outset – recognising that it can be difficult to predict with a high level of certainty how a case will unfold. We would therefore welcome confirmation that the OFT expects to consult the main parties to an investigation in setting the timetable ahead of its publication. This is particularly the case given the OFT proposals to publish the reasons that a timetable is changed and, potentially, to identify individual parties that the OFT considers to have been the cause of delay.

3.12 On this point, we recognise the OFT's desire to increase transparency as to the cause of delays. However, it will be important that these arrangements are operated sensitively and pragmatically: whilst we do not understand this to be the OFT's intention, we would be concerned if a focus on timetables meant that in practice the OFT was unwilling to take additional time to reconsider aspects of a case where this was appropriate. Equally, we would be concerned if the possibility of "naming and shaming" parties to investigations was used to discourage parties from taking the time necessary to carry out a particular step in the process thoroughly.

"State of Play" Meetings

3.13 We strongly support the proposal for additional state of play meetings. Our experience is that businesses that are subject to OFT investigations place considerable value on direct access to the case team and decision-makers, particularly over the course of a long investigation. We believe that such discussions can be productive for the OFT as a way of clarifying issues and avoiding misunderstandings and can assist businesses to understand the OFT point of view. More generally, open access to the OFT gives a business that is a party to an investigation greater confidence that its view has been heard and taken into account.

3.14 To achieve these objectives it will be important that the OFT team that attends the state of play meeting is empowered to engage actively in the process and the debate on the issues rather than simply being in "listening mode" or delivering a pre-prepared position. It is for this reason that we consider the involvement of the CDG, once appointed, at these meetings would be beneficial for the parties (please see further at paragraph 2.8 above).

Draft Penalty Calculations

3.15 In the interests of due process, we believe that the OFT should provide a detailed calculation of penalties in its SO. Therefore, the draft penalty calculation should:

(a) be fully reasoned by reference to the OFT's Penalty Guidelines;

(b) set out the essential facts and matters of law which the OFT proposed to use under each step of the Penalty Guidelines; and

(c) include the relevant turnover figures to be taken into account and the year(s) that will be considered for the value of such sales.

3.16 The current system is anomalous. International best practice encourages early disclosure of penalty calculations. For instance the EU Commission's Notice on Best Practice for the Conduct of Proceedings under Articles 101 and 102 recommends that the Commission should clearly indicate whether it intends to impose fines and set out in the SO the essential facts and matters of law relied upon to justify the imposition of a fine (such as duration and gravity). Any aggravating and attenuating circumstances in the case should also be set out in a "*sufficiently precise manner*". In doing so the SO should also cross refer to the relevant principles laid down in the EU Guidelines on setting fines.[3]

3.17 Furthermore in light of the proposed higher starting point for fines and the OFT's proposed new aggravating factors of persistent and repeated delays and recidivism in setting the level of the penalty, we take the view that the inclusion of the penalty calculation in the SO is a necessary procedural requirement to respect the rights of the defence.[4]

3.18 We therefore strongly welcome the proposals to engage the parties at an earlier date on the key elements of the penalty calculation. We believe this will increase transparency and ensure the parties are better engaged in the settlement process. This will aid settlement at an earlier stage and lessen the possibility of appeals in the event of an infringement decision.

3.19 The information included in the SO on the calculation of penalties 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 together with a detailed reference to all aggravating and attenuating circumstances. All elements of fact and law relied upon should cross refer to the relevant principles in the Penalty Guidelines. The parties should have the right to comment on the penalty calculation both in writing and also at the oral hearing. We think the right to make oral representations on the penalty calculation is important as it allows the parties to make representations on both liability and quantum and to be questioned on their representations before the Decision Makers. Where they are held, oral hearings should therefore allow appropriate additional time for the expanded scope of material on which the parties have the right to comment.

[3] October 2011; OJC308/6 20.10.2011, paragraph 84.
[4] OFT Consultation on Guidance as to the Appropriate Amount of a Penalty, October 2011, paragraphs 5.35 and 5.39.

3.20 If for any reason it proves not to be possible to issue the penalty calculation in the SO (although we would encourage inclusion in the SO in all cases, absent exceptional circumstances), the calculation should be published as a separate document as soon as possible thereafter, and the parties should have the separate right to make representations on the calculation both in writing and at a separate Oral Hearing.

3.21 If the OFT departs from any element of the penalty calculation to the detriment of the parties then the parties should be given another opportunity to respond to the OFT.

3.22 We note that the OFT Guidance refers (at paragraph 11.5) to the provision of a draft penalty calculation to "the party". We agree that the right to comment on the penalty calculation should be limited to the party that would be the subject of the penalty. Whilst third parties may have a legitimate interest in being consulted on certain elements of the case that may have a bearing on penalties (e.g. duration of the infringement), these issues will in any event be covered as part of the third party comments on the substantive issues in the investigation. Consequently, if the draft penalty calculation were to be included in an SO then we would expect that it would be redacted from any non-confidential version that is supplied to a third party.

Other transparency issues

Information requests

3.23 We welcome recent steps taken by the OFT to engage with the parties on the scope and timing of information requests, as it is important that such requests are as focused as possible. We agree that requests that are too broad result in large amounts of irrelevant material being collected and, as a consequence, in wasted time and costs for the parties and the OFT. By ensuring such requests are tailored appropriately, the OFT will also ensure that its tighter deadlines can be met, resulting in a more efficient process for all parties concerned.

Use of confidentiality rings

3.24 We note that the OFT has expanded its guidance on the use of confidentiality rings for access to documents.[5]

3.25 We agree that the use of confidentiality rings should be given active consideration. In our experience, the need to produce large volumes of redacted documents is both cumbersome and unpopular with clients and the resulting need for the OFT to co-ordinate redactions proposed by multiple parties can be a material source of delay in the process. However, we also agree that confidentiality rings should be considered on a case by case basis and will not be appropriate in all cases. In particular, our experience is that where the documents in issue include information supplied by third parties to the investigation (or parties that have been dropped from the investigation), and who therefore will not be part of the confidentiality ring, those third parties may then be unwilling to consent to arrangements over which they have no oversight.

[5] Chapter 11, Revised Draft CA98 Procedural Guidance.

4 Procedural rights of defence - enhancing fairness in interaction with the parties

Procedural Adjudicator

4.1 We welcome the proposals in the Consultation Paper:

(a) to extend the Procedural Adjudicator "trial" for another year[6] although we would prefer it if the role were made permanent; and

(b) to expand the Procedural Adjudicator's role so as to encompass (i) chairing oral hearings[7] and (ii) reporting to the SRO/CDG on procedural issues arising from the oral hearing[8].

Extension to a second year

4.2 We consider it valuable that, in disputes over procedural matters, there should be a quasi-independent adjudicator. As you will be aware, a similar approach, for comparable reasons, has been taken by the European Commission in appointing the hearing officer in antitrust investigations. It is valuable for the parties, in helping ensure that their procedural concerns are addressed, and in enhancing their confidence in the process. It may also make parties less likely to feel the need to appeal to the CAT (and thus represents a costs saving for business).

4.3 It is also valuable for the OFT, enhancing the robustness of decisions, increasing protection against the risk of a challenge in the CAT, and improving the level of trust underpinning its relations with the parties.

4.4 Most of all, objectively, it is right because it improves fairness.

4.5 Given all these considerations, we do not understand why the role is being extended only by a year to March 2013. We would propose that it be put on a permanent footing, and we see no reason not to do this. We note the point made in the Consultation Paper (at paragraph 2.22) that there is "insufficient evidence" to justify installing the role on a permanent basis, "given the low number of applications received during the trial period". However, we suggest that this is the wrong measure: the success of the Procedural Adjudicator is not measured by the number of disputes brought before it, but by the way that the knowledge that disputes can be referred to the Procedural Adjudicator acts as a discipline on the case team to respect procedural rights (and, correspondingly, as a confidence-enhancing measure for the parties). It is the success of the role in avoiding procedural disputes which is the true justification for its continued use.

Expanded role

4.6 We welcome the expansion of the Procedural Adjudicator's role to include (a) chairing oral hearings and (b) reporting on procedural issues arising out of oral hearings[9]. These seem sensible approaches, and bring the Procedural Adjudicator's role more in line with that of the hearing officer at the European Commission, which represents a welcome enhancement of procedural safeguards.

---

[6] Consultation Paper, paragraph 2.22.
[7] Consultation Paper, paragraph 2.23.
[8] Consultation Paper, paragraph 2.24 and 2.47 respectively.
[9] Consultation Paper, paragraph 2.47.

4.7 We note that, in addition to the hearing officer's specific responsibilities, the hearing officer also has general duties (as set out in the "mission" statement on the European Commission's website - http://ec.europa.eu/competition/hearing_officers/index_en.html):

(a) "*to ensure the effective exercise of procedural rights throughout proceedings*…"; and

(b) "*to ensure the respect of the right to be heard*".

4.8 It seems to us appropriate that the Procedural Adjudicator's responsibilities (as listed in Annex D to the Consultation Paper, to which are added the two new specific responsibilities) should be expanded to include general responsibilities in line with those of the hearing officer at the European Commission.

Enhanced oral hearings

4.9 Oral hearings are an essential part of respecting the rights of defence of parties under investigation and should be approached by the OFT with this guiding principle in mind. Therefore, we fully support the proposals to enhance the oral hearings by:

(a) ensuring attendance by the CDG, members of the case team, and representatives from the offices of the Chief Economist and the General Counsel; and

(b) having the hearings chaired by the Procedural Adjudicator (as to which see above).

4.10 It seems to us very important that both the investigators and the decision-makers interact face-to-face with the parties at an oral hearing. Both the case team and the CDG should be able to see the parties making their case, and defending their positions, which can enhance the OFT's ability to assess the position (over and above what can be gleaned from written submissions).

4.11 As we have explained above in Section 3, it is important for the parties that they feel that they have real access to the decision-makers, and a chance to make their case in front of them; this enhances their sense that they are being given a fair hearing, and thereby may help reduce the feeling that they need to appeal to the CAT if the decision goes against them (on the grounds that their case has not been properly heard). The CLLS has consistently emphasised the importance of parties having access to decision-makers, and thus the feeling of being properly heard, in our submissions to BIS in the context of the current proposals to reform the UK competition law system.

4.12 Bearing in mind the primary purpose of the oral hearing – namely, to allow the parties to an investigation to exercise their rights of defence – it will be important that the interactive nature of the oral hearing is two-way. In other words, while it will be appropriate for the parties under investigation to have questions put to them by both the CDG and the OFT case team, it is equally appropriate that the parties should be able to put questions to the OFT case team. If this ability to interact is not granted, the potential benefit of being able to put a case directly to the decision makers will be materially reduced.

5 Transitional arrangements

5.1 In principle, we are in agreement with the transitional arrangements: namely, that a CDG should be appointed for all investigations still at the pre-hearing stage. Given the importance of the CDG being fully abreast of a case and its evidence, there should be sufficient time allowed prior to an oral hearing for the CDG to become fully appraised of the case.

5.2 In those circumstances where the parties have elected not to have an oral hearing, the CDG should be introduced for those cases in which the parties are yet to submit their written representations to the OFT.

6 Revised processes: clarity of the OFT's Guidance (Annex C)

6.1 We consider that the revised draft Guidance does, on the whole, cover the revised processes in sufficient detail. To the extent that further improvements could be made, these are noted below. We would also suggest that the OFT should take this opportunity to update its Guidance on those aspects of its investigation procedures that are not directly affected by the proposed changes to its decision-making processes, to ensure that the Guidance reflects its current practice more generally. Instances where we consider that such revisions would be useful are also listed below.

6.2 The description of the complaints handling process in Chapter 4 gives the impression that each of the Enquiries and Reporting Centre and Preliminary Investigations Team makes decisions on how to handle complaints independently of the rest of the OFT. These are important decisions and it is important, in the interests of transparency, that parties understand how they are made and by whom. If, in practice, these units consult with other parts of the OFT before making such decisions, it would be helpful to explain this in the Guidance.

6.3 It appears that the OFT's current practice with respect to publishing Case Opening Notices is not wholly consistent across investigations. In this regard, paragraph 5.7 of the draft Guidance indicates that a Case Opening Notice will "generally" be published once a formal investigation is opened. Clause 34(2) ERRB merely proposes that the [CMA] *may* publish a case opening notice for an investigation. Therefore, given these uncertainties and in line with our comments in Section 3 above, we consider that the OFT should include further guidance on:

(a) its approach to publishing Case Opening Notices;

(b) the proposed contents of Case Opening Notices; and

(c) the timing of publication of Case Opening Notices.

6.4 Chapter 6 of the draft Guidance contains some potentially helpful guidance on information gathering procedures. Based on our experience, however, the OFT's practice does not always comply with this guidance. In particular, there appears to be varied use of draft requests or advance discussion of deadlines with parties which could be improved for the benefit of parties. We would urge the OFT to follow its Guidance more closely in these respects.

6.5 We also note that the Guidance makes no mention of the OFT's increasing use of section 27 notices, with the cooperation of parties to a case, as a means of managing document reviews and reducing the volume of irrelevant documents on the case file. While section 27 notices are covered in outline, at paragraphs 6.21 – 6.24, the treatment does not cover the different circumstances in which such notices are used. We consider that this would be a welcome procedural development that could usefully be outlined here.

6.6 In Chapter 10, it would be helpful to clarify who takes the decision to close a formal investigation on administrative priority grounds. Although this type of decision is mentioned at paragraph 10.2, the decision maker is not stated. While we assume that this decision is made by the SRO on the case, it would be helpful if this could clarified.

6.7 To improve clarity, we suggest that paragraph 11.27 be amended to read "*The SRO allocated to a particular case will not be a member of the Case Decision Group on that case to ensure that the final decision…*".

6.8 In Chapter 12, oral hearings are described in paragraph 12.11 to 12.20. However, they are not described as oral hearings but, rather, as "oral representations", both in the text and in the sub-heading - except, confusingly, for just one use of the expression "oral hearing" in paragraph 12.18. The Guidance should explain and clarify this point: the non-use of the term "oral hearing" is likely to confuse parties (particularly when the expression "oral hearing" will be familiar to many readers from their experience of European Commission cases). Therefore, we would recommend that "oral representations" be replaced by "oral hearing" throughout the Guidance unless there is a distinction that the OFT wishes to clarify.

6.9 As explained in Section 2 above, we have concerns about the lack of clarity over the interaction between the CDG and the Decisions Committee, with the result that, in practice it is questionable who is the actual decision maker (particularly given the presence of the OFT's CEO on the Decisions Committee). Therefore, it would be helpful for parties to have further clarity explaining the interaction between these two bodies in Chapter 11 of the Guidance.

6.10 Paragraph 14.2 mentions the Procedural Adjudicator, but gives an inadequate description of the role, and simply refers the reader to the OFT's website. We think it important that the role of the Procedural Adjudicator should be adequately, albeit briefly, described in the Guidance. This could be achieved relatively easily by incorporating aspects of the Updated Briefing Note provided at Annex D of the Consultation Paper.

6.11 In summary, we consider that the Guidance is generally easy to understand and follow but have made various suggestions in our response to help its clarity further. We have made a couple of further minor points of clarity concerning its drafting below:

(a) we would suggest that some explanation of the function of the Pipeline and Performance Group could usefully be given at paragraph 4.3, since this is not explained elsewhere in the Guidance; and

(b) we query whether Figure 1.1 is necessary, given that relevant guidelines are detailed elsewhere in the Guidelines. If it is retained, we suggest that it could be integrated better within the text, since it currently appears before, and separately from, the footnote that refers to it.

7 Guidance on settlement procedure

7.1 We would welcome greater transparency and guidance concerning both the settlement process and the OFT's settlement policy. Therefore, if new guidance is to be issued by the OFT, it should be focused on both the OFT's settlement policy and its procedures for parties, and should be published as soon as practicable in order to assist parties.