THE CRIMINAL BAR ASSOCIATION

Question 1

Is the OFT's proposal for different guidance documents aimed at legal practitioners, businesses and individuals appropriate and will it facilitate understanding of the issues by those involved in decisions as to whether to apply for leniency?

1. The proposal for the detailed guidance aimed at lawyers to be supplemented by two short summary documents targeted at businesses and individuals is welcomed. It is perfectly appropriate and can only promote more widespread understanding of the process.

Question 2

Does the revised draft guidance meet the objectives of this review. In particular:

(a) Do you find the approach of structuring the guidance according to the application process helpful, and in particular consider that this will be of assistance when considering or making leniency applications?

2. The structure of the revised draft guidance is a substantial improvement to the existing guidance. The sequential structure makes it simpler to follow and it is easier to find the guidance on specific topics in the text.

(b) Is the proposed application process an improvement, in terms of clarity for applicants before applying and during the process?

3. The proposed application process is an improvement. The simplified rules on the availability of different types of leniency are welcomed.

(c) Is the draft guidance effective at communicating the OFT's expectations on the levels/nature of cooperation required from immunity and leniency parties throughout the enforcement process?

4. The draft guidance is a significant improvement on existing guidance concerning the obligations of immunity and leniency applicants. However, the CBA has identified three particular areas where the guidance could be improved: (i) the early obligations of prospective leniency applicants in properly conducting internal investigations; and (ii) the obligation of continuing cooperation throughout the investigation and trial process; and (iii) waiver of legal professional privilege. This last area is addressed in the response to Question 3, below.

5. From a fair trial perspective, particular risks are presented by careless internal investigation, poor or incomplete recording of investigative steps, and doubts about the extent to which leniency applicants are required to cooperate with OFT. The obvious specific dangers are the contamination of evidence, particularly witness testimony, by poorly conducted internal investigations and the impact of failures by leniency applicants to cooperate with OFT in fulfilling its disclosure obligations under CPIA 1996.

The conduct of internal investigations

6. The CBA would like to see more detailed guidance being provided on best practice in interviewing potential witnesses and recording the raw information they provide. The guidance provided in chapter 3 (which essentially mirrors the existing guidance at OFT803 8.19-8.28) and Annexe C (which is new) is a step in the right direction in identifying common sense principles, but more detailed guidance is called for.

7. Paragraph 3.12 states that, because the conduct of an internal investigation can have an impact on subsequent investigation and prosecution by the OFT, '*the way in which internal investigations are conducted by an applicant cannot be considered exclusively a matter for the applicant concerned*'. Paragraph 3.8 states that *'the OFT only requires that undertakings act reasonably, reducing the risks as best they can having regard to all relevant consideration'*. The CBA submits that a firmer line needs to be expressed. The guidance should state that a high level of care and competence is expected. Any internal investigation of cartel activity investigation must be

objective and decisive. Steps to identify and preserve evidence should be taken in the same way that the undertaking might expect the OFT to do if conducting a dawn raid.

8. At paragraph 3.1 the guidance states that *'The OFT sets a relatively low evidential threshold for the gaining of a marker, and it follows that where an approach is intended only to the OFT, there should be no reason to undertake significant internal enquiries before applying for a marker. All that is necessary is to establish sufficient for a concrete basis for a suspicion of cartel activity and a demonstration of a genuine intention to confess'*. The CBA submits that this may be unrealistic. Many undertakings will not approach the OFT unless and until they have established to their own satisfaction that cartel activity has taken place, and they have been able to assess its extent and significance; how else will the undertaking form a genuine intention to confess? Few undertakings are likely to approach the OFT having only a suspicion that cartel activity has taken place. The reality is that an undertaking contemplating approaching the OFT is likely to seek extensive advice concerning not just the cartel activity itself but also the benefits and obligations of applying for leniency. The exhortation in Annexe C.4 that '*it is of prime importance that would-be applicants conduct an enquiry that is as limited as it can be at the pre-leniency stage*' is correct in principle but it will usually be the case that undertakings will not approach the OFT unless they are driven by their internal investigation to conclude that they must seek leniency. The guidance should reflect that in most cases there will have been some substantial investigation at the pre-leniency stage.

9. Furthermore the concept of a 'concrete basis for a suspicion' is unhelpful and incompatible with 'a genuine intention to confess'.[1] It is doubtful that a basis for suspicion can ever be concrete. It is not possible to have a concrete suspicion; a concrete *basis* for suspicion can mean no more than that there is some credible and substantial basis for suspicion which is not otherwise contradicted. In the interests of clarity it would be better to replace 'concrete basis for suspicion' with 'a firm and reasonable belief', 'reasonable grounds to believe' or some similar formula.

10. Paragraph 3.9 states that *'…even where it appears that a criminal investigation is unlikely…potential applicants are asked to have regard to the importance of internal*

[1] See the explanation provided at *OFT803con* paragraph 4.23; also 4.26.

investigations being carried out with appropriate care'. This does not go far enough. Where they have identified possible cartel activity, applicants and their advisers should always conduct their internal investigations in the expectation that a criminal investigation will be conducted by OFT. Anything less may be read as inviting the applicant to take care commensurate with their perception of the gravity of the conduct. The early stages of an internal investigation are vital in securing evidence and perceptions of the gravity of the conduct in the early stages may be inaccurate.

11. In the following paragraphs the CBA has sought to identify a few areas where further guidance could be provided, either incorporated into the text or published as a supplement to OFT803 specifically addressing best practice in the conduct of internal investigations:

- The guidance at paragraph 3.27 and C.7-10 is weak. The table at C.10 states that '*If certain individuals have used laptop computers [etc]…which might contain relevant evidence, consideration should be given to removing those items from further use at the earliest possible opportunity, so as to prevent evidence loss or to allow a forensically sound image to be created*'. This needs to be strengthened. Potentially relevant evidence should immediately be retrieved from any person who may have participated in the cartel or be a witness to its activities. This includes all potentially relevant hard copy documents or electronic data (for example stored in computers and company mobile telephones). There should be no sense in which a potential witness to the cartel activity should be able to direct or influence these steps, either by positive action or delay. Potential witnesses should not be relied upon to produce relevant material following their own searches. The retrieval of the material should be undertaken by someone unconnected to the alleged activity and these actions should be contemporaneously recorded.

- The table at C.10 further states that '*when examining any electronic media, take care to ensure that it is examined in such a way that the evidential integrity of the material in question is not adversely affected*'. Further guidance is offered in the table at C.18 which sets out the records that should be kept of computer searches. It states that a record should be kept of '*means of searching, in particular whether searches were conducted on a*

forensically secure image or on the original data'. Imaging of computers and digital media should, wherever possible, take place before any searches are conducted or before any assessment of their contents is made. This is the only way to prevent later disputes about whether data has been lost either deliberately or inadvertently. This may be what is meant by the next entry in the table at C.10 ('*Wherever practicable, forensic experts should be used, who are familiar with universally accepted standards for the recovery of electronic data*') but the guidance here is insufficiently clear. In most cases the existence of the cartel will have come to light by a participant disclosing their role in it, and so the applicant should be able to obtain a clear idea whether particular computers are likely to contain relevant evidence. If there are reasonable grounds to believe that a particular computer may contain relevant material, it should be imaged before examination.

- The table at C.13 advises that '*Careful consideration should be given to the conduct of the investigation where senior managers who are witnesses would normally expect to see the results of the investigation and be involved in decisions whether or not to apply for leniency*'. This is correct as far as it goes but does not provide any guidance as to what practical steps should be taken. Where possible, those who are believed to have participated in the cartel activity should be 'quarantined' to the extent that they take no role in the decision-making process behind the leniency application, and they should not be apprised of the progress of any internal investigation. They should not fulfil any function in the conduct of the investigation except by providing their account as a potential witness. This is in addition to the usual safeguards concerning contamination of witness evidence. The guidance should acknowledge that such quarantining should be perfectly possible if the undertaking is large but may be more difficult or impossible if the undertaking is small.

- C.11-13 sets out guidance on the conduct of interviews with potential witnesses. It is a useful starting point but should be expanded. For example, great care should be exercised in selecting appropriate individuals to conduct witness interviews. The primary aim of witness interviews (extracting a true

and coherent account) is capable of being undermined where the interviewer fulfils a wider role, such as advising the undertaking. The interview process must be conducted with objectivity and formality. The need for objectivity is all the greater given that, even if the interviews are conducted by external lawyers, there is a pre-existing relationship between the external lawyers and the undertaking, their client. Experience shows that even experienced professionals can find it difficult to maintain a firewall between the objective exercise of extracting accurate evidence from a potential witness and advancing the interests of their client. Where there is material suggesting that a witness has been influenced or put under pressure by those conducting the investigation to adjust their evidence in a way which is favourable to the undertaking, it gives rise to a reasonable concern on the part of defendants that the evidence may not be truthful, and it creates disclosure difficulties for the prosecution. The criminal trial process is capable of addressing these problems but it is time-consuming and can be avoided by practical steps to promote the transparency of the internal investigation process.

- Where possible audio and/or video recordings should be made of interviews. Handwritten/typed notes are, even if apparently verbatim, open to interpretation and dispute. Audio/video recording is usually easier in any event. The guidance at paragraph 3.13 states merely that *'applicants and their advisers should keep notes of the steps in their investigation and, in particular, of any interviews with individuals who either took part in, or may be witnesses to, cartel activity'*.[2] The table at C.18 lists specific aspects of witness interviews and physical searches which should be noted. This guidance is good as far as it goes, but understates the level of accuracy required when it states '*If no tape recording or detailed transcript was made, a note of questions asked and answers given* [should be made]'.

- The guidance observes that witnesses should not be '*contaminated by exposure to documents or records that the witness did not create or have access to at the time*'. This is only partially correct. There are some records

[2] See also *OFT803con* paragraph 3.22.

which a potential witness did not create or have access to at the time which may be instrumental in extracting an accurate account. For example, if a witness (person A) is to be asked about telephone contact with person B, questions asked in the abstract may elicit some useful evidence but it is likely to be vague and incomplete. If telephone records are available which show the precise dates/times/durations of telephone contact between A and B it would be far better for this data to be provided to A to comment upon and use as an aide memoire. This does not amount to contamination but promotes the extraction of a more accurate, considered account.

Continuing cooperation

12. The guidance at paragraph 5.2 properly states that although there may be dialogue between the applicant and the OFT as to the necessary investigative steps that must be undertaken, '*ultimately it will be for the OFT to determine what steps are necessary and appropriate*'. The same point is revisited at 5.24 where it is stated that '*Leniency applicants will be expected to comply with requests to cooperate in such steps, including anything that could be required from a non-applicant by the use of the OFT's formal powers, without the OFT having to resort to formal powers in relation to the applicant*'. However, it may be worth further emphasising the point by expressly stating that:

- where there is disagreement between the OFT and the applicant as to the steps necessary to be taken during the investigation, the applicant must comply with directions issued by the OFT. The OFT retains total control over all investigative decisions; the scope of the investigation will not be the subject of negotiation; the applicant is a subordinate, not a partner. This is necessary to avoid any suggestion that the OFT has 'subcontracted' the investigation to the leniency applicant or that the investigation has been steered or moulded to suit the concerns and aims of the applicant.
- The day to day conduct of the investigation will almost certainly require employees of the undertaking or the undertaking's legal advisers to work to the instruction of OFT investigators, almost as though they were an extension of the OFT investigation team.

- Responses to instructions/requests must be prompt. Steps should be taken by the applicant to expedite instructions to avoid each and every investigative instruction/request issued by the OFT being delayed by internal discussion and the taking of instructions. The undertaking should appoint a person unconnected to the cartel activity to act as a point of contact facilitating OFT directions and requests.

13. The general guidance at paragraphs 5.4 to 5.7 concerning the spirit of cooperation is clear but the sanctions for refusal or failure should be clearly delineated.

14. The issue of continuing cooperation is addressed further in the context of waiver of legal professional privilege (see response to Question 3, below).

(d) Do you consider that the guidance on our existing practices and policy is sufficiently clear to promote certainty for would-be applicants and in turn encourage more applications?

15. However carefully described, leniency remains a complex and fluid process. The draft revised guidance offers a generally clear explanation of the different stages and the possible outcomes.

16. The CBA is not in a position to comment whether the draft revised guidance will encourage more applications.

Question 3

Is the current leniency policy as described in the revised guidance the optimal means for the OFT to secure the cooperation of cartel participants to detect and enforce cartel activity? If not, do you have other suggestions for changes to the policy that would result in enhanced detection and enforcement? Specifically do you agree that the OFT should not exclude the possibility of requiring waivers of legal professional privilege in criminal cartel cases?

17. The CBA considers that the current leniency policy as described in the revised guidance should be an effective means of promoting disclosure of cartels and

securing continuing cooperation from cartel participants. However, the CBA is less concerned with the efficacy of the policy than with ensuring that it is compatible with fairness in the criminal trial process.

Waiver of privilege

18. Legal professional privilege is a fundamental principle of English law. Strict adherence to it is a vital component of ensuring the fairness and efficacy of criminal proceedings. Nothing in this response should be read as in any way seeking to diminish its importance.

19. It is outside the scope of this document to debate whether any prosecuting agency should, as a matter of principle, require co-operators to waive privilege in the early accounts they provided in order to seek legal advice. The CBA does not here address in the abstract whether the OFT should demand waiver of privilege from leniency applicants.

20. A recent case (*R. v George and others*, Southwark Crown Court, 2010) has shown that the courts may expect the OFT to seek waiver of privilege to progress its disclosure obligation to secure relevant unused material, and to withdraw leniency if privilege is not waived. Note at the time this case was heard the OFT's guidance did not contain any suggestion that a waiver of privilege might be required from leniency applicants.

21. However, if leniency applicants are, before they engage in the leniency process, fully aware that a waiver of privilege may be required as part of the price of leniency, objections in principle to waiver of privilege are much more difficult to sustain. Whether a waiver is deemed to be necessary by the OFT and their counsel will depend upon the circumstances of individual cases. Given the importance of the principle the need to request a waiver in any particular case must obviously be considered with care. However, where waiver is deemed necessary by the prosecution to satisfy its disclosure obligations, the OFT will not be exercising a power to demand a waiver of privilege; a waiver would simply be part of the price paid by an undertaking when it voluntarily participates in the leniency process. If an undertaking or individual does not wish to waive privilege it cannot be compelled to do so, but the cost of refusal may be a loss of the advantages gained as a leniency applicant. The guidance should be more explicit about this.

22. Against that background the CBA is less concerned with the exercise of that choice by an undertaking or individual than with its impact on the trial process.

23. The principle category of material which is likely to be sought via any waiver of privilege is witness account material.[3] For example, a company director who has been a party to cartel activity may be asked to set out his account on one or more occasions as part of the internal investigation by an undertaking before the OFT is contacted and a leniency marker sought. The director may provide his first account to an in-house lawyer. This might be a full, detailed account or merely a preliminary account to enable those conducting the internal investigation to establish what steps they should take to secure evidence, identify other potential witnesses and provide early advice to the undertaking. The director may be asked to provide his account on a number of occasions as the internal investigation progresses. Some of these may be full accounts; others might be short interviews to clarify particular areas of his account as other evidence comes to light. Once external lawyers are instructed the director may be required to provide his account again.

24. The purpose of obtaining these accounts in the early stages of the internal investigation is predominantly to enable the internal/external lawyers to advise the undertaking on whether what has taken place amounts to cartel activity, whether leniency should be sought and the likely ramifications. Advice may also be offered to individuals who participated in the cartel activity.

25. If the director is later called as a prosecution witness, these early full or partial accounts may become relevant and the prosecution may seek to obtain them with a view to making disclosure of them. The relevance of the material might be established by a number of different routes. Firstly, if the defence do not accept the account provided by the director, and wish to cross-examine him about changes in his account. Secondly, the defence may argue that the detail of the director's account was influenced by legal advice he had received. For example, it may be asserted that the director has exaggerated the extent of the cartel activity to assist the undertaking to obtain leniency and for the director to obtain a no-action letter.

[3] *OFT803con* paragraph 3.18.

26. In either situation the prosecution is most likely to seek the 'witness account material' and may also consider that they must seek the 'witness advice material' which may have influenced the development of the witness's evidence.[4]

27. The CBA agrees with the guidance at paragraph 3.20 to the effect that applicants and their advisers should try to keep separate material where there is a clear claim to privilege and relevance to criminal proceedings is likely to be low, from material where the claim to privilege is less clear and a waiver for disclosure purposes is more likely to be required. It would be in the interests of everyone connected to the trial process if witness account material and witness advice material was clearly demarcated to avoid protracted arguments about the scope of privilege.

28. The guidance at paragraph 3.15 is less helpful. The criteria set out may be relevant to an assessment of whether material is properly described as privileged, but that is a side-issue. The thrust of the guidance generally should be that, whether material is privileged or not, if the OFT concludes that it must be obtained in order to satisfy its disclosure obligations in criminal proceedings, the applicant must provide it if required to do so. Its precise status is rendered a marginal consideration.

29. The CBA considers that the guidance should make it clear to those seeking leniency that:

- The privileged status of material is irrelevant if the OFT deems that it requires the material;
- Applicants and their advisers should proceed in the expectation that they may be required to disclose to OFT some or all privileged material, especially where it concerns 'witness account material' and 'witness advice material'. The guidance at paragraph 3.22 goes a little way in this direction but should be more explicit. The scope of required material may extend to all records of contact between those conducting the internal investigation and the witnesses.
- Efforts to isolate witness account material and witness advice material should be taken, not just to make waiver and onward disclosure a simpler exercise, but also because such separation is best practice in extracting accurate and reliable witness testimony.

[4] *OFT803con* paragraph 3.18.

- Where possible witness interviews should not be conducted by the same legal advisers responsible for advising the undertaking in connection with the cartel activity and possible leniency application;
- In determining whether privileged material is relevant to the OFT's criminal investigation, and in deciding whether disclosure should be made to the defence, the decision rests with the OFT. The applicant's views may be sought but will not be decisive; the OFT will not enter into negotiation or debate with the applicant.

30. At 3.21 the guidance states that *'Waiver of privilege in such materials and their disclosure to the OFT does not necessarily imply that the materials will be further disclosed to others…the material will be treated in accordance with the Criminal Procedure and Investigations Act 1996…*'. In principle this must be correct, but in reality if the OFT has required a waiver of privilege in respect of witness account material or witness advice material it is highly unlikely that such material will not subsequently be deemed to satisfy the disclosure test in CPIA 1996 and so be disclosed to the defence.

Question 4

Do you have any other comments on the draft guidance?

31. The observations which the CBA wishes to make have been made above.