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PROFFER AND ACCEPTANCE

NAVIGATING THE IMMUNITY AND LENIENCY PROCESS WITH THE OFT IN CARTEL INVESTIGATIONS

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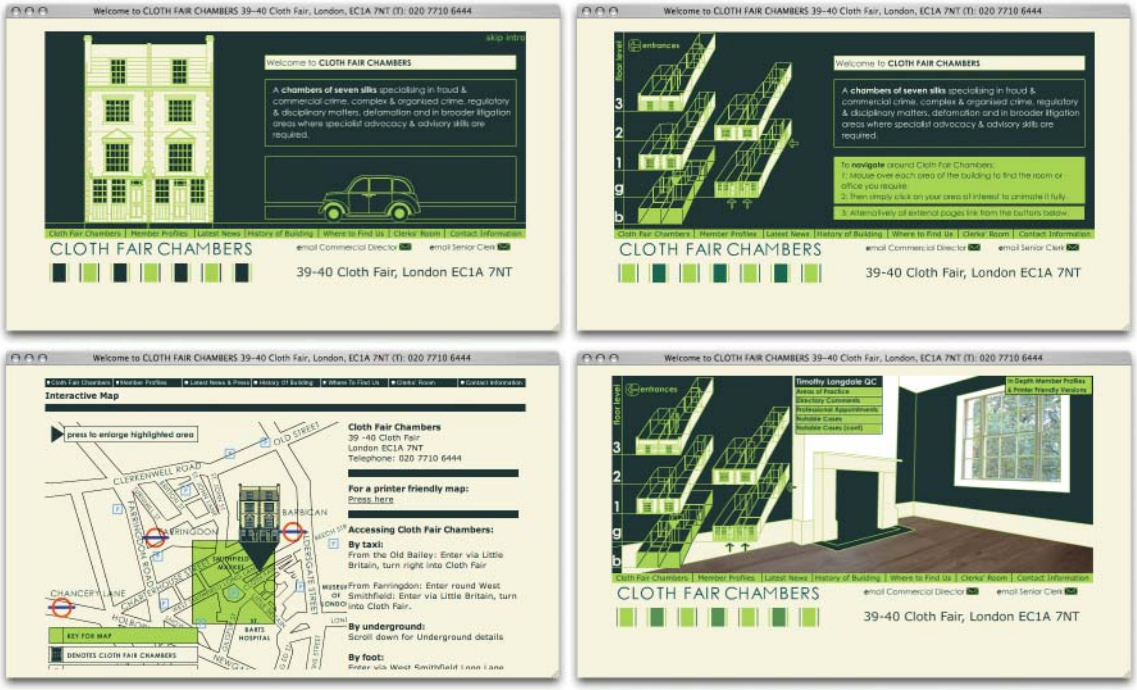

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PART TWO

NICHOLAS PURNELL QC

1. The Enterprise Act 2002, Section 190, sub-section 4, which came into force with the rest of the Act on 20 June 2003, conferred a power on the OFT to grant criminal immunity to individuals, civil immunity to undertakings or to extend leniency to companies and individuals "for the purposes of the investigation or prosecution of offences."

2. This was the first statutory leniency programme to be introduced into the law of England and Wales. This pioneering section, modelled closely on the American anti-cartel provisions, preceded the subsequent introduction of the wider set of formalised leniency procedures contained in Chapter 2 of Part 2 of the Serious Organised Crime and Police Act 2006, which came into force on 1 April 2006.

3. The cartel leniency programme is regarded as a key feature in the armoury of the OFT in the fight to counter anti-competitive practices. It draws its inspiration from the success of the US Department of Justice in "carving in," within an immunity from prosecution, those who provide information and add value to the criminal investigation and "carving out" of the immunity and rendering liable to prosecution those who are implicated in the execution of the cartel.

4. The process of introducing this "inform and negotiate yourself out of the indictment" policy is not without its sensitivities for the prosecuting authorities. Accordingly the OFT has issued a series of "notes" and "guidance" on the proposed handling of applications for leniency and this process is still a work in progress.

5. This is hardly surprising nor is it a matter for criticism. The American experience has shown that their policy has been the single most important factor in accelerating the investigation and prosecution of anti-competitive agreements. It has however, over the course of time, undergone a series of revisions of emphasis and adjustments.

6. The first guidance was issued by the OFT as **Note for Guidance OFT 513** of July 2002,

after the statute was enacted but twelve months before the Act came into force. Three years later, in July 2005, the OFT issued **Leniency and No-action, the OFT's interim note for guidance on the handling of applications: OFT 803**. This document described itself as an elaboration upon OFT 513 and indicated that the Office of Fair Trading proposed to "road test" the proposals for about a year before issuing final guidance.

7. This road testing exercise has produced what is now described as a "draft final version" which is dated 30 November 2006 and is issued for consultation as **Leniency and No-action: The OFT Note on the handling of applications: OFT 803** with an invitation for any further comments by no later than 31 January 2007.

8. The 24 page document of July 2005, marked by its distinctly "come hither" style of language, has developed into a 37 page document which now, at the start of 2007, has an added section dealing with the potential dilemmas which confront any party which may seek to make parallel leniency approaches to the European Commission and to the OFT.

9. The OFT acknowledges that what is now issued is "a quite complex set of rules and principles."

10. In essence the document delineates a categorisation of approaches:

    TYPE A Immunity – you are the first applicant – there is no **pre-existing civil or criminal investigation** into the activity. As the first applicant for leniency, you will be granted **automatic immunity**, civil immunity for the undertaking itself and criminal immunity for all its current and former employees and directors.

    TYPE B Immunity – you are the first applicant – **but there is an existing civil/criminal investigation**. In respect of the first applicant for leniency, the **OFT has a discretion to grant the undertaking civil immunity and a discretion to grant to the current and former employees and directors an immunity from prosecution.**

    TYPE B Leniency – using the discretion described above, the OFT may determine to grant a level of leniency to the first applicant **by reducing, but not granting immunity from, civil financial penalties** where there is already an existing civil or criminal investigation.

    TYPE C Leniency – you are not the first applicant and, obviously, there must exist a current civil or criminal investigation. The OFT may grant a reduction of up to 50% in the financial penalty imposed.

    Immunity **may** be granted on a corporate or on an individual basis but there may be no necessary congruence between the two.

11. The overarching principles underlying the policy are, that the policy will be applied:

    - fairly,
    - accessibly and approachably,
    - erring in favour of applicants where the decision to grant or not to grant is a "close call",
    - providing informal no-names guidance – subject to conditions,
    - informing legal advisers if TYPE A Immunity remains available,
    - guaranteeing criminal immunity for all co-operating TYPE A applicants,
    - providing that TYPE B Immunity will be the "norm" in the exercise of discretion for first applicants in case which are already under investigation,
    - setting a high bar for defining "coercers", a category which renders the applicant ineligible for leniency.

12. The "principle" that the OFT would not "require admissions of dishonesty except in extreme cases", which appeared in the July 2005 text, has been omitted from the November 2006 text for reasons which will be discussed in later paragraphs.

CIVIL LENIENCY: MAKING AN INFORMAL APPROACH

13. Legal advisers may approach the OFT on a no-names hypothetical basis to obtain guidance about whether or not to apply for leniency. To do so the legal adviser must be prepared to provide a factual matrix to indicate to the OFT the area of commercial activity.

14. This process – applying for a TYPE A "Marker"– has attached to it certain presumptions, namely that the legal adviser has a concrete basis for suspicion of cartel activity and the undertaking has a "genuine intent to confess".

15. Given these presumptions, it is expected that the legal adviser will make a telephone approach to ask whether TYPE A Immunity is available.

16. At the same time the legal adviser is expected to be able to confirm that oral instructions are in place to apply for a TYPE A Immunity, should the OFT confirm that it is available.

17. This exchange must be sufficiently explicit to provide the OFT with enough information for it to determine whether there is a pre-existing civil or criminal investigation and to confirm whether TYPE A Immunity is available in principle.

18. In the event that positive indications are given, the legal adviser would be expected to disclose there and then and apply for immunity, thus "securing a TYPE A Marker." In so doing, it is expected that the legal adviser will provide details of the concrete basis for suspected participation in cartel activity, the suspected infringement and the substance of the evidence so far uncovered.

19. The OFT will then provide a timetable for the process of "perfecting the marker."

20. If the OFT indicates that TYPE A Immunity is **not available**, the legal adviser is free to walk away and consider all the available options.

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PERFECTING THE MARKER

21. This requires the undertaking to provide the OFT with a sufficient basis to take forward a credible investigation – that is to trigger formal investigation powers such as an on-site inspection and to have witnesses made available for interview.

22. The undertaking can apply for automatic criminal immunity for all current and former employees and directors if criminal exposure to the cartel offence is anticipated.

SIMULTANEOUS APPLICATION TO THE EUROPEAN COMMISSION FOR IMMUNITY UNDER A "SECTION A" COMMISSION NOTICE

23. Where an identified legal adviser informs the OFT that he is making an application to the Commission for immunity and provides TYPE A information, the OFT will provide a no-names marker for such a period as will enable the legal adviser to revert to the OFT to confirm that an application to the Commission **has been** made, together with the identity of the undertaking and an outline of the infringement and the evidence as before.

24. Where the Commission informs the legal adviser that TYPE A Immunity is **not available**, the legal adviser may either withdraw the no-names marker to consider the options for going forward or seek to perfect the OFT marker for the domestic jurisdiction.

25. Except in the case of Commission applications, no-names markers are to be regarded as rarely given because of the presumption that applicants already have oral instructions to apply.

PROTECTION AGAINST SELF-INCRIMINATION BY REASON OF THE APPLICATION PROCESS.

26. Any self-incriminatory material which has been provided in good faith but has not resulted in civil immunity (for example because no credible investigation could be taken forward) will not be adduced against a company or its employees/directors for any purpose. Neither will it be subject to a process of reverse engineering to assist the OFT to identify a previously unnamed undertaking. Material provided in bad faith (for example when no co-operation has been forthcoming) is not protected by this self-denying ordinance.

27. The OFT reserves the obvious right to make use of any publicly available information which may have been included in the legal adviser's approach.

28. The TYPE A Marker will remain in place until circumstances change by:

- the intervention of a civil investigation – it thereby becoming a pre-existing investigation,
- the OFT acquiring sufficient information to establish the existence of cartel activity,
- another undertaking **or individual applying for and being given TYPE A Immunity,**
- the OFT independently initiating a criminal investigation into the cartel.

29. If only the last obstacle exists, an undertaking may still be eligible for civil immunity by reason of the TYPE A Marker but no criminal immunity will be available to employees and directors. Whether or not a discretionary TYPE B Immunity might still be available is more problematic.

SECURING A TYPE B MARKER

30. The grant of TYPE B Immunity is discretionary but should be regarded as "the norm " where it is applicable. Most TYPE B approaches will result from inspections. The OFT will indicate if TYPE B Immunity remains available in principle even though no identification and no immediate application is made.

31. An approach after an inspection is likely to result in the OFT requiring time to consider whether to confirm if TYPE B Immunity is available. However it may provide a provisional marker (you are number 2, 3 or 4 on the grid) if the identity of the undertaking is given. The inspection will continue in its remorseless way whether or not any approach is made.

32. The procedure for the application is the same as for TYPE A Immunity. To perfect a TYPE B Immunity marker the approach must include all available information and be such as to offer the OFT "significant **added value**".

33. The approacher can "**proffer**", that is indicate to the OFT the bounty on offer before securing a marker and thus ascertain whether the OFT regards the prize does provide appropriately added value. Whilst this can be done on a no-names basis, no marker will be effective until an identity is established.

34. A degree of tolerance will be permitted between the information proffered and the substance of the evidence provided in due course when a marker is perfected. However a marked discrepancy between the two would be regarded as misleading and as an act of bad faith.

35. Because of the discretionary nature of TYPE B Immunity, the gambling element is given emphasis by the OFT. Should it be available, the earlier an approach is made the more likely the grant. Even if Immunity is not available, Leniency may still be on offer. The Guidance Note adds that only TYPE A Immunity, however, guarantees immunity and you may be beaten in the race if you dawdle.

36. Because TYPE B Immunity is discretionary in all circumstances, a TYPE B Marker ceases to be available as soon as the OFT has sufficient information to establish the existence of a cartel infringement; or when TYPE B Immunity has been successfully applied for by another applicant; or when a criminal investigation is in progress and sufficient evidence has already been obtained.

37. The different layers and potential options which the discretionary nature of TYPE B Immunity and Leniency affords, makes the process less predictable and more of a lottery. Because the "proffer" may be made without revealing the identity of the undertaking, it presents an inquirer with a no loss opportunity to find out if it remains available.

TYPE C LENIENCY

38. TYPE C Leniency is always discretionary and is only available when and where the OFT feels inclined still to entertain a further leniency application. If so, the evidential threshold is the same as before – namely a timely approach, with material that adds significant value.

COERCERS

39. Public policy reasons dictate that the OFT, in common with its American counterpart, is seen to aver an exclusion from leniency programmes for those who have exercised actual physical violence or their real threat or have used blackmail or irresistible economic pressure to persuade a reluctant participant to engage in cartel conduct.

40. At the same time (and coincidentally citing the practice of the Department of Justice) the OFT strongly suggests that such an exclusion would be a rare occurrence. The "bar will be set high" both as regards the conduct condemned and the evidence required to establish such conduct. Moreover the OFT gives examples of conduct falling below the test – market pressure which reduces profit margins but falls short of bringing about market exit; agreed enforcement or punishment mechanisms to secure the operation of the cartel or standard term contracts imposed by reason of inequality of bargaining power.

41. To date no "coercer refusal" has been issued in the UK, the EU or in the US and the authorities even extend the invitation to troubled advisers to make contact on a no-names basis to identify whether there is any coercer issue in any prospective application. This seems to be an expansive offer if there is to be no identification of the proposed applicant but only an identification of a market by area.

42. Moreover eligibility for the financial penalty reduction and the potential for criminal immunity for existing and former employees and directors (other than the rogue coercers) remain.

NO-ACTION LETTERS: THE BADGE OF CRIMINAL IMMUNITY

43. The creation of a criminal offence for individuals in the Enterprise Act means that the major prize for an employee or director

of a company which is the subject of an OFT cartel investigation is a no-action letter conferring immunity from criminal prosecution. The first step is an informal approach to see whether, in a given hypothetical situation, a criminal prosecution is a possibility.

44. If it is not possible to rule out a criminal prosecution then certain preconditions apply to the issue of a no-action letter. The first – and most difficult to swallow- is an admission to **the** criminal conduct together with an admission of dishonesty. If the individual is a principal offender, such an admission would be fundamental to the successful prosecution of any other principal.

45. The November 2006 guidance somewhat withdraws from an earlier suggestion that even without an admission of dishonesty, immunity might be available for peripheral offenders. In such cases a "comfort letter" (less than a no-action letter) indicating the individual is not at risk of prosecution seems to be the appropriate official response. However the OFT tantalisingly suggests that in an exceptional case a full and truthful account without an admission of dishonesty might still do the trick. The OFT "thinking" will, the document states, "continue to develop in the light of experience."

46. Whether or not an individual would be excluded from criminal immunity by reason of his "coercing role" would be subject to the same tests as the civil immunity application. Specifically the issue is whether or not another *undertaking* has been coerced not whether one individual has coerced another. Thus if an undertaking is not deemed to be a coercer, no individual employee or director could be a coercer. The only contemplated exception is if an individual has some unique personal power, independent of his employer, which imbues him with coercing status.

47. Even where an undertaking is deemed to be a coercer, individuals who did not play a coercing role will not be excluded from immunity thereby.

48. It is guaranteed that in the case of any undertaking granted a TYPE A Immunity, all existing and former directors and employees who require it will be granted criminal immunity. One difference between the OFT regime and the US experience is that unlike

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the Department of Justice practice, in which the corporate immunity letter suffices, the OFT will issue individual no-action letters to all those who face the prospect of prosecution.

49. Where an undertaking has been able to perfect a TYPE B Marker and obtain civil immunity, the same guarantee of criminal immunity for existing and former employees/directors applies. However where there is a pre-existing criminal investigation the chances of TYPE B Immunity are severely limited and where a criminal investigation is well advanced, no TYPE B Immunity will be available.

50. No blanket immunity for ALL employees/ directors is available in TYPE C Leniency cases. By its very nature, if a TYPE C approach is able to be made, it is not a case in which the OFT intends to make a criminal investigation. On an individual by individual basis, the OFT will assess whether the overall value which a TYPE C applicant might add might, in the public interest, justify the grant of criminal immunity.

INDIVIDUAL GRANT OF IMMUNITY

51. An individual grant of immunity is most likely to occur where an approach is made by an individual quite independently from any application made by an undertaking for TYPE A or TYPE B Immunity.

52. An approach which is made prior to any other and before any criminal or civil investigation is under way will receive an individual guarantee of immunity from criminal prosecution.

53. An individual who approaches the OFT when an existing investigation is already under way may still be granted an immunity from criminal prosecution at the discretion of the OFT if sufficient added value can be shown and the individual is not excluded as a coercer.

54. An approach may always be made on a no-names basis to ascertain the likely OFT response.

55. Where an individual applies for immunity *before any application is made by the undertaking for whom he works or worked* the guarantee of TYPE A Immunity is lost and the question whether or not the undertaking and/or its employees/directors may obtain immunity becomes one of discretion and an evaluation of the extent to which the evidence available from the undertaking may advance the case.

56. This is the sword of Damocles that the OFT wishes to emphasise will hang over any undertaking which discovers cartel activity among its affairs in order to prompt disclosure to the OFT and application for TYPE A Immunity – hesitate and agonise for too long and you may find that you have been trumped by a prudent current or former employee who has made an individual application and thereby removed your guaranteed immunity.

THE INTERVIEW PROCESS

57. Where TYPE A or B applications have been granted, the individual will know that he has guaranteed immunity from prosecution and accordingly the interview process is part of the co-operation side of the bargain to which he is expected to sign up. The interview will be intended to advance the OFT investigation.

58. Where the grant of immunity is discretionary however, in TYPE C cases and individual grants of immunity, the interviewing of individuals is part of the process by which the OFT evaluates whether the available information is of a value and whether the public interest supports the grant of immunity.

59. The interview will, in such cases, be carried out in accordance with the Human Rights Act protections, namely that the interview will not be used directly against a future defendant as admissible evidence provided it is not materially false or misleading or a subsequent failure to co-operate leads to a revocation of the no-action letter.

60. Where, in a TYPE A or TYPE B Immunity case, an individual current or former employee/ director fails to co-operate with the OFT, the failure will remove the criminal immunity of

that employee only and the civil immunity of the undertaking will be protected provided it can show that it used its best endeavours to secure the co-operation of its current and former employees/directors and that the evidence provided by the undertaking is sufficient for OFT purposes.

61. The undertaking retains a duty to inform the OFT of any concerns about the level of co-operation forthcoming from individuals and any concerns about the accuracy and completeness of statements which have been made.

THE TRANSFER OF INFORMATION BETWEEN AGENCIES.

62. The OFT retains the right to provide information obtained from undertakings for civil immunity and from individuals for criminal immunity to the EU Commission for the purposes of enabling the Commission to pursue Article 81 EC Treaty proceedings against undertakings.

63. Such releases of information are guaranteed from further disclosure to any other agency.

64. If the OFT wishes to pass any information obtained from an undertaking or an individual to another UK agency, for example the SFO or the SOCA, the OFT will discuss the intended supply with the applicant and/or his legal adviser. What is not clear is what may occur if the provider objects to onward supply to the SFO. No further disclosure to any foreign agency other than the EU Commission is permissible without the consent of the provider.

OTHER OFFENCES

65. The immunity granted by a no-action letter does not extend to other *severable offences*, for example the corruption of a public official. It does, however, cover offences under the autrefois acquit principle such as any attempt by the SFO to charge conspiracy to defraud on the same facts where the OFT has granted criminal immunity. The Director of the SFO has confirmed that no such attempt would be made to circumvent the effect of a no-action letter.

INTERACTION BETWEEN THE CARTEL OFFENCE IN THE UK AND THE COMMISSION LENIENCY NOTICE

66. The most recent issue of the Guidance Note contains 12 new paragraphs which consider the position of undertakings which seek to make parallel applications for Commission Leniency Notices at the same time as considering application to the OFT. The space available within this single newsletter article prevents a detailed analysis of these provisions. In essence the OFT has added to these sections to the Guidance in order to allay fears that undertakings, by approaching the EU Commission, might render themselves vulnerable to prosecution for criminal offences by the OFT. The OFT recommends prior informal approaches to it for a TYPE A Marker to secure the position of an undertaking during the process of making an approach to the EU Commission for a Leniency Notice. The OFT takes the view that any applicant who is successful in an approach to the Commission is likely to be similarly successful in its application for immunity from the OFT.

POST APPLICATION CONDUCT

67. Once an application for immunity has been made an undertaking and its relevant individuals will, not surprisingly, be expected to cease any further participation in the cartel activity. In rare cases the need for confidentiality to protect the on-going investigation may necessitate a direction from the OFT for the participation in the cartel to continue subject to any concerns for personal safety which, the OFT insists, will never be compromised. Similarly an individual seeking personal criminal immunity before any application has been made by any undertaking, may be directed to remain a secret source, and continue to take part in his everyday activities.

68. Where a case has already been referred to the SFO, the OFT will consult the SFO before any grant of criminal immunity is to be made. The fact of such a referral may itself act to negate any grant of criminal immunity as the public interest test will be harder to satisfy.

69. What is clear is that if you don't ask, you don't get. The OFT is still feeling its way forward both as a criminal prosecution authority and as the guardian of a leniency and immunity procedure. The capacity and

appetite for discussion is genuine and, in my experience, flexible. The authority sees its purpose as both educating industry to reform and punishing those who transgress. The balance to be struck is not clear cut and any specific undertaking and any particular individual must expect the particular facts of the case, the alacrity of the application, the nature of the information and the probative value of the evidence proffered to be the determining factors as to whether the discretionary elements of the package will operate in favour of the client.

70. The extent of the initial disclosure is something the OFT declares itself to be realistic about. The subsequent discovery of innocently omitted material may not prejudice the undertaking if the omission was truly innocent, not the consequence of a negligent audit for relevant information and promptly remedied by further disclosure.

71. Where an undertaking has made an application to the OFT for TYPE B or TYPE C Leniency and there emerge unknown facts which aggravate the duration or gravity of the cartel activity, the OFT will adopt the policy of the EU Commission and not take such matters into account in assessing financial penalties.

SEPARATE INFRINGEMENTS

72. Where an applicant discovers unrelated infringements separate from the subject matter of an application which has been made, there is no obligation on it to submit such material. If it wishes it can, and the OFT obviously encourages it to, make a separate and fresh application for "leniency plus." The OFT avows that it will not adopt the Department of Justice policy of posing omnibus questions to fish for further infringements.

73. Leniency Plus is available where the new disclosure relates to a completely separate cartel activity. The US Department of Justice policy refers to amnesties extended to information relating to "a completely separate industry." The OFT declares itself more common sense in its approach and prepared always to deal with applicants in good faith. The test is that the new disclosure must be novel, separate and truly independent of the earlier application.

74. The agreements themselves are in standard form and are annexed to the Guidance. The co-operation is intended and is stated to continue to the conclusion of any criminal proceedings and accordingly, where it may be necessary, would include an agreement to give evidence on behalf of the prosecuting authority.

POSTSCRIPT

75. There is no sign of any slow-down in the investigative appetite of the Department of Justice or its interest in further extending its campaign into the boardrooms of Europe. How effective and active as a criminal authority the OFT, with the SFO as its prosecuting agent, will become remains to be seen. Certainly the leniency programme in the US is a developed and utilised process. The initial hard-man approach of its investigators is capable of being tempered by sensible and reasoned discussion. In introducing its version of a leniency and immunity policy, the theme of the OFT Guidance is orchestrated as a pronounced invitation to seek advice and ask for indications, to engage in discussion and enter into negotiation.

76. What is certain is that the legal adviser must develop new skills and adopt a new approach in order properly to advise individual and corporate clients. The risk benefit analysis of initiating an approach to the OFT has to be carefully balanced and timing is of the essence. If companies discover cartel activity, whether through internal auditing procedures or as a result of whistle-blowing, access to the right advice and at the right time will be of crucial importance.

If you have not received Issue One of the Cloth Fair Newsletter and would like to read Nicholas Purnell's article "The Development of Criminal Offences for Anti-Competitive Activity in England and Wales: A Curiously English Approach" which forms Part One of this series you can download it from the website www.clothfairchambers.com or contact Charlotte Bircher, email charlottebircher@clothfairchambers.com

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