

Quick Guide to Cartels and Leniency for Businesses

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1 INTRODUCTION

- 1.1 This Quick Guide is designed to provide an overview of the application of the Office of Fair Trading's ('OFT') leniency policy to undertakings (referred to as 'businesses' throughout this guide). It may be read in conjunction with the revised Quick Guide aimed at individuals, OFT513 *Quick Guide to Cartels and Leniency for Individuals*, which provides an overview of how an individual involved in cartel activity might be able to obtain a no-action letter. Under the leniency policy, businesses that have engaged in prohibited cartel activity and their directors and employees can benefit from reporting and providing evidence of a cartel.
- 1.2 Cartel activities are amongst the most serious infringements of competition law. Under the Competition Act 1998 ('CA98') the OFT is empowered to impose substantial fines on businesses found to have engaged in cartel activity. Individuals who dishonestly engage in cartel arrangements may also commit a criminal offence under the Enterprise Act 2002 ('EA02'). The OFT can also seek Competition Disqualification Orders against directors of companies that are found to have engaged in cartel conduct, preventing them from acting as directors.
- 1.3 Cartel activities broadly encompass price fixing, market sharing, bid rigging and the fixing of output quotas and/or restrictions. They are a particularly damaging form of anti-competitive activity. The OFT's leniency policy enables the detection of cartels which could otherwise remain hidden and facilitates the bringing of enforcement action against those cartels by harnessing the co-operation of business and individuals in relation to provision of evidence or more generally.
- 1.4 A business that informs the OFT of cartel activity that the OFT was not previously investigating can receive guaranteed immunity from any financial penalty, guaranteed protection for all of its cooperating employees (both current and former) from criminal prosecution for the criminal cartel offence and full protection from

possible sanctions under the director disqualification regime.¹ The leniency policy therefore offers a very real incentive for businesses to come forward with information.

- 1.5 The chapters that follow provide a brief outline of the definition of a cartel including a reference to the cartel offence and an overview of leniency for businesses including the availability of criminal immunity for employees (both current and former) and protection for company directors from Competition Disqualification Orders. More detailed and comprehensive guidance is set out in the revised guidance *OFT803 Applications for leniency and no-action letters in cartel cases*. It should be noted that this Quick Guide provides a synopsis of competition law only and should not be relied on as a substitute for the law itself. If you have any doubts about your position under the law, you should seek legal advice.

¹ The leniency policy does not offer protection against private actions brought by persons claiming compensation for the financial loss they have suffered as a result of the cartel activity engaged in by the business.

2 WHAT IS A CARTEL?

Cartels under the CA98

- 2.1 The Chapter I prohibition of the CA98 prohibits agreements or concerted practices between businesses which prevent, restrict or distort competition within the UK and which may affect trade in the UK. Article 101(1) of the Treaty of the Functioning of the European Union ('TFEU') prohibition is similar to the Chapter I prohibition, but applies to agreements that affect trade between EU Member States.
- 2.2 A cartel is an agreement or concerted practice between businesses which infringes Chapter I of CA98 and/or Article 101 of the TFEU, and involves:
- price fixing (including resale price maintenance)
 - bid rigging (collusive tendering)
 - the establishment of output restrictions or quotas, and/or
 - market sharing or market dividing.
- 2.3 The OFT has the power to impose penalties of up to 10 per cent of a business' worldwide turnover if the OFT has found that a business has engaged in cartel activity. As set out in more detail in the OFT's published penalty guidance OFT423 *Guidance as to the appropriate amount of penalty*,² the serious harm caused by cartel activities is reflected in the severity of the financial penalties businesses that participate in cartel activity can expect.

Cartels under the EA02

- 2.4 An individual is guilty of a criminal offence if he or she dishonestly agrees with one or more other persons to make or implement or cause to be made or implemented one or more of the prohibited

² September 2012.

cartel activities set out in paragraph 2.2³ above (pursuant to section 188 of the EA02) relating to at least two businesses.⁴ The offence only applies in respect of agreements between businesses at the same level in the supply chain.

- 2.5 The offence is committed irrespective of whether or not the agreement is actually implemented or whether the individuals had the authority to act on behalf of the businesses at the time of the agreement. If the agreement is made outside of the United Kingdom, proceedings may only be brought where the agreement has been implemented in whole or in part in the United Kingdom.
- 2.6 In England, Wales and in Northern Ireland, prosecutions are generally undertaken by the OFT, although the Serious Fraud Office (SFO) also has the power to prosecute. In Scotland, prosecutions are brought by the Lord Advocate.
- 2.7 In England and Wales, the cartel offence is triable either in the Magistrates' court (summary trial) or before a jury in the Crown Court (trial on indictment). Before the magistrates, a convicted offender may receive a maximum sentence of six months' imprisonment and/or a fine up to the statutory maximum. On conviction on indictment, an offender may receive a maximum of five years' imprisonment and/or an unlimited fine.
- 2.8 Further information concerning leniency in relation to the criminal cartel offence and leniency for individuals can be found in the

³ Save for resale price maintenance, which is a vertical agreement, in that it is an agreement between businesses which do not operate at the same level in the supply chain.

⁴ Section 47 of the Enterprise and Regulatory Reform Act 2013 (ERRA) amends section 188(1) of the Enterprise Act 2002 by omitting 'dishonestly' from the cartel offence. This amended offence will come into force on 1 April 2014. Until 1 April 2014, the OFT will continue to consider whether to investigate a cartel under its criminal powers with regard to whether it is likely that there will be evidence of dishonesty.

Quick Guide OFT513 *Quick Guide to Cartels and Leniency for Individuals.*

3 LENIENCY

- 3.1 The OFT is prepared to grant lenient treatment in certain circumstances to businesses and individuals who have participated in cartel activity and come forward with information about the cartel. Leniency applicants are encouraged to approach the OFT as early as possible.

Availability of different types of leniency⁵

- 3.2 A business applying for leniency must in all cases be able to establish a concrete basis for a suspicion of cartel activity⁶ and demonstrate a genuine intention to confess.⁷ The grant of all forms of leniency is also subject to other conditions which are discussed in more detail below.

Type A immunity

- 3.3 Type A immunity is only available to the **first member of a cartel to come forward** and will be available provided the OFT has not already begun a CA98 investigation and does not already have sufficient information to establish the existence of the alleged cartel activity. **The main characteristic of Type A immunity is that it offers automatic and guaranteed protection to the applicant and all of its cooperating current and former employees and directors.**
- 3.4 A business in receipt of Type A immunity will obtain:

⁵ Joint leniency applications from businesses will not be accepted.

⁶ A 'concrete basis' for suspecting cartel activity may take many forms but might include, for example, documentary evidence which plainly indicates the existence of a cartel, or information from a potential witness alleging cartel activity, or a combination of evidence from documentary and/or witness sources which together point to cartel activity.

⁷ A 'genuine intention to confess' means that there must be an acceptance by the undertaking that, as a matter of fact and law, the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I prohibition and/or Article 101 of the TFEU.

- guaranteed corporate immunity⁸ from financial penalties for an infringement of Chapter I of CA98 and/or Article 101 of TFEU
- guaranteed 'blanket' criminal immunity from prosecution for co-operating current and former employees and directors of the business, and
- guaranteed protection from Competition Disqualification Orders for all cooperating current and former⁹ directors of the business.

Type B immunity/leniency

3.5 A business that is the first to report and provide evidence of a cartel but does so only **after** a CA98 investigation has started will be in a Type B situation only if there is no Type A applicant.

3.6 A Type B applicant **may** be eligible for:

- corporate immunity from penalties or a reduction in the level of the financial penalty of anything up to 100 per cent
- criminal immunity from prosecution for co-operating current and former employees and directors of the business which may be granted on a 'blanket basis' **or** granted for specific individuals, and
- protection for its current and former cooperating directors from Competition Disqualification Orders.¹⁰

⁸ Subject to the business complying with all the conditions for the grant of leniency as set out in paragraph 3.8.

⁹ The OFT may however consider applying for a CDO against a former director who has been removed as a director by the business because of his role in the breach of competition law or for opposing the relevant application for leniency.

Unlike Type A immunity, the grant of Type B immunity/leniency is always discretionary. Type B applications made at an early stage of the case are more likely to result in the grant of immunity from both fines and/or prosecution.

Type C leniency

- 3.7 A leniency applicant that reports and provides evidence of cartel conduct in circumstances where another business has already reported the cartel activity **may** be eligible for:
1. a reduction in corporate penalty of up to 50 per cent
 2. discretionary criminal immunity for specific individuals, and
 3. protection for its current and former directors from Competition Disqualification Orders.¹¹

The level of reduction of fines is always discretionary in Type C situations, and Type C leniency will never result in the grant of 'blanket' immunity from prosecution for individuals.

Conditions for the grant of leniency

- 3.8 In order to benefit from immunity or reductions in penalty a business must meet the following conditions, each of which will apply throughout the leniency application process and until the final determination of any prosecution and/or infringement decision, including any resulting appeals.

a) Admission

Leniency is given in exchange for admissions of participation in cartel conduct, including an acceptance that such conduct

¹⁰ The OFT may however consider applying for a CDO against a former director who has been removed as a director by the business because of his role in the breach of competition law or for opposing the relevant application for leniency.

¹¹ See footnote 10 above.

amounted to an infringement of the civil competition laws and, if relevant, the cartel offence.

b) Information

The applicant must provide the OFT with all non-legally privileged information, documents and evidence available to it regarding the cartel activity.¹² This includes information that supports a finding of infringement, any exculpatory material in the leniency applicant's possession of which it is aware and information on possible leads or sources of information that the OFT may wish to pursue.

The OFT will advise the applicant on steps which it will take directly to gather information and steps which it expects the applicant to undertake.

c) Cooperation

The requirement to maintain continuous and complete cooperation throughout the investigation and any subsequent proceedings is at the heart of the leniency process. The overall approach to the leniency process by the applicant must be a constructive one, designed genuinely to assist the OFT in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct.¹³

d) Termination

The applicant must refrain from further participation in the cartel activity from the time of disclosure to the OFT of the

¹² In order to benefit from Type A immunity a business must, as a minimum, provide sufficient information to give the OFT a basis for taking forward a credible investigation. In Type B and C cases, the information provided by the applicant must, as a minimum, add significant value to the OFT's investigation, that is, it must be information which genuinely advances the investigation.

¹³ Further details regarding the concrete expression of this duty can be found at Chapter 5 of OFT803 *Applications for leniency and no-action letters in cartel cases*.

cartel activity (unless the OFT directs otherwise, which it will do only rarely).

e) Coercer test

If the applicant has taken steps to coerce another business to take part in the cartel activity it will be eligible only for a reduction in fine of up to 50 per cent (Type C leniency), even if it is the first to report (although non-coercing employees will still be eligible for criminal immunity).¹⁴

When leniency is no longer available

3.9 The OFT will not accept leniency applications from businesses once the OFT has issued a Statement of Objections¹⁵ in respect of the cartel activity nor will it accept an immunity application from an individual once that individual has been charged with the cartel offence.

3.10 Where there is a pre-existing investigation the OFT may exercise its discretion in relation to the grant of leniency or immunity. In some cases the OFT may conclude that it will no longer accept any further leniency applications. This may be because it already has sufficient information to establish the infringement or offence or that additional information is unlikely to add significant value such as to justify the resources to handle the application.

¹⁴ As at June 2013, the OFT has never had cause to refuse immunity on the basis of the coercer test.

¹⁵ If the OFT proposes to make an infringement decision, the OFT will issue a Statement of Objections. A Statement of Objections is a notice which states that the OFT proposes to make an infringement decision that one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101 of TFEU and Article 102 of TFEU has been infringed (see Rule 4 of the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751)).

When a cartel case involves a criminal offence

- 3.11 We recognise that the possibility of a criminal investigation is a relevant factor for applicants in deciding whether to proceed with an application for leniency. Not all cartel cases will involve a commission of the cartel offence. Even where an offence has been committed, the OFT may decide not to commence a criminal investigation. The prime consideration will be the extent to which there is likely to be evidence that an individual, whether an employee of the applicant or another cartel member, behaved dishonestly.¹⁶
- 3.12 A potential applicant who is concerned about the likelihood of a criminal investigation can provide details of the conduct on a 'no-names' basis. The OFT may be able to give an assurance that criminal enforcement would not be contemplated in the scenario given.

¹⁶ Section 47 of the Enterprise and Regulatory Reform Act 2013 (ERRA) amends section 188(1) of the Enterprise Act 2002 by omitting 'dishonestly' from the cartel offence. This amended offence will come into force on 1 April 2014. Until 1 April 2014, the OFT will continue to consider whether to investigate a cartel under its criminal powers with regard to whether it is likely that there will be evidence of dishonesty.

4 LENIENCY APPLICATION PROCESS

Before applying for leniency

Confidential guidance

- 4.1 The OFT recognises that businesses will want and need to consider carefully the decision whether to apply for leniency. Therefore businesses may approach the OFT for confidential guidance on any aspect of the leniency or no-action letter procedures. An approach can usually be made on a no-names basis so that the business or individual concerned may obtain comfort on an issue before deciding whether to apply for leniency.
- 4.2 The OFT will give its view and will consider itself bound by it, provided that the discussion is followed up by a leniency application within a reasonable time, the information provided was neither false nor misleading and there has been no material change in circumstances.
- 4.3 It is essential that businesses maintain complete confidentiality regarding their leniency application (or even if contemplating a leniency application) to ensure that there is no 'tipping off' of other parties to the cartel.

Internal investigations

- 4.4 The establishment in the UK of a criminal cartel regime has made it particularly important for internal investigations prior to an approach for leniency to be conducted with care and precision and to be limited to that which is necessary.
- 4.5 The OFT's detailed leniency guidance¹⁷ sets out the steps and precautions the OFT expects applicants to take, concerning:
 - minimising the risk of 'tipping off' other parties to cartel activities

¹⁷ OFT803 *Applications for leniency and no-action letters in cartel cases*.

- preserving and securing electronic and physical evidence
- interviewing witnesses, and
- keeping a note of the investigative steps taken.

Applying for leniency

- 4.6 A business may make initial contact with the OFT to determine which, if any, type of leniency is available. If leniency, of whatever type, is available in principle, then the business must disclose its identity and provide the information requested by the OFT to obtain a preliminary marker.¹⁸ This information will need to be followed by more detailed information ('the application package'), and the OFT will discuss the timing and process for the provision of the application package during or immediately following the call to obtain the preliminary marker.
- 4.7 Once the OFT has considered the information it will revert to the business and either:
- confirm the marker but not launch an investigation
 - confirm the marker and discuss next steps
 - reject the preliminary marker, or
 - ask for more information before confirming or rejecting the marker.
- 4.8 In cases where the OFT proceeds to an investigation, a senior representative of the undertaking will be asked to sign a letter indicating that the applicant understands the conditions for the grant of leniency and in particular that it is committed to complete

¹⁸ A 'marker' is a formal acknowledgement of a leniency application which records the timing of the application and priority relative to other applicants.

and continuous cooperation throughout the OFT's investigation and subsequent enforcement action.

- 4.9 Leniency agreements¹⁹ will be signed in the later stages of the OFT's investigation, shortly prior to the issue of the Statement of Objections in a CA98 investigation or shortly before any individuals are charged with the cartel offence.
- 4.10 If the leniency application fails the OFT will not rely on any self-incriminatory information²⁰ against the business or its employees (both current and former) provided prior to the marker being rejected, but reserves the right to use the information against third parties. It is the OFT's experience that disputes about the use of information from failed applications rarely arise, because a failed applicant will rarely have provided information of significant value in any event. Different considerations apply in relation to applications that are either withdrawn or revoked by the OFT for failure to cooperate or because the applicant acts in bad faith and the OFT reserves the right in these circumstances to use the information provided against the applicant.²¹

Leniency Plus

- 4.11 If a business is co-operating with the OFT in relation to cartel activity in one market (the first market) for example under Type C leniency, it may also be involved in a completely separate cartel in another market (the second market). If as a result of providing information about a cartel in the second market the business obtains total immunity or a reduction of 100 per cent in the amount of financial penalty (because it is a Type A or B leniency applicant in relation to its activities in the second market) it will also receive a reduction in penalty in addition to the reduction it would have received for its co-operation in the first market.

¹⁹ A pro-forma leniency agreement is contained in Annexe A of OFT803 *Applications for leniency and no-action in cartel cases*.

²⁰ Unless the self-incriminatory material can be obtained from public sources.

²¹ The OFT's policy in these situations is set out in detail in Chapter 7 of OFT803 *Applications for leniency and no-action letters in cartel cases*.

5 CONTACT THE OFT

- 5.1 Businesses should contact the OFT on the Leniency Enquiry Line on 0207 211 8833, for all initial contacts with the OFT with a view to making leniency applications, ascertaining the availability of leniency or seeking confidential guidance. Once the purpose of your call has been assessed, you will be transferred to an appropriate senior officer experienced in leniency cases.

- 5.2 Businesses should note that a leniency application to the OFT will not be considered as a leniency application to other national competition authorities or the European Commission. Businesses concerned about obtaining leniency in other jurisdictions or from the European Commission should consider the relevant leniency policies in those jurisdictions.