

The cartel offence

Guidance on the issue of no-action letters for individuals



The Enterprise Act 2002 received Royal Assent in November 2002. It will come into force in June 2003.

The Act makes a number of significant reforms to competition law and consumer law enforcement in the UK. The new provisions will work alongside the Competition Act 1998 and various pieces of consumer legislation, largely replacing the Fair Trading Act 1973.

The Act establishes the Office of Fair Trading (the 'OFT'), replacing the former statutory office of the Director General of Fair Trading. The OFT will apply and enforce the new competition and consumer measures alongside the Competition Commission, the sectoral regulators, the Competition Appeal Tribunal, Trading Standards Departments and others.

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1 Introduction

¹ 'Undertaking' includes any natural or legal person capable of carrying on commercial or economic activities relating to goods or services, irrespective of its legal status. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit making organisations. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

² In this guidance, 'information' means facts, statements, documents, evidence or any other items unless the context indicates otherwise.

1.1 The Enterprise Act 2002 introduces the cartel offence - a criminal offence for **individuals** who dishonestly engage in cartel agreements. The cartel offence will operate alongside the existing Competition Act 1998 regime, which provides for the imposition of civil sanctions on undertakings¹ that breach the Chapter I prohibition on anti-competitive agreements. (Further information on the Chapter I prohibition can be found in the Office of Fair Trading Competition Act guideline *The Chapter I Prohibition (OFT 401)*). The cartel offence will deter individuals against engaging in cartel activity and supplement the deterrent provided by the threat of financial penalties under the Competition Act for the undertakings involved.

1.2 The Office of Fair Trading (the 'OFT') wishes to encourage individuals to come forward with information² relating to any cartel activities in which they are involved. The OFT therefore sets out (in part 3) guidance on when immunity from prosecution - in the form of 'no-action letters' - will be available to such individuals

2 The cartel offence

The offence

- 2.1** Section 188 of the Enterprise Act provides that an individual is guilty of an offence if he or she **dishonestly**³ agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities. These are:
- price-fixing
 - limitation of supply or production
 - market-sharing, and
 - bid-rigging.
- 2.2** The offence only applies in respect of agreements between undertakings at the same level in the supply chain, known as horizontal agreements. Vertical agreements⁴ will not fall within the scope of the offence.
- 2.3** The offence will be committed irrespective of whether or not the agreement reached between the individuals is actually implemented by the undertakings and irrespective of whether or not the individuals have the authority to act on behalf of the undertakings at the time of the agreement.
- 2.4** If the agreement between the individuals is made outside the United Kingdom, proceedings may only be brought where the agreement has been implemented in whole or in part in the United Kingdom.

³ The offence is committed only if the individual acts dishonestly, a concept which is well understood in criminal law. For England and Wales and Northern Ireland, the test for dishonesty is that set out in **R v Ghosh [1982] QB 1053, 75 Cr. AppR. 154 CA, 2 All ER 689, CA.**

⁴ A vertical agreement is an agreement between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain.

Penalty and prosecution

- 2.5** The cartel offence will be triable either in a 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 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.

- 2.6** In England and Wales, and in Northern Ireland, prosecutions will generally be undertaken by the Serious Fraud Office (SFO), although the OFT will also have the power to prosecute. Private prosecutions may be brought only with the consent of the OFT. In Scotland, prosecutions will be brought by the Lord Advocate.
- 2.7** Where cross-jurisdictional issues arise, the jurisdiction in which a case will be brought will depend on the outcome of discussions between the OFT, the SFO and the Lord Advocate's office, and will follow the well- established principles that govern other criminal prosecutions.

3 Immunity from prosecution for individuals coming forward with information

No-action letters

- 3.1** The OFT considers that it is in the interest of the economic well-being of the United Kingdom to grant immunity from prosecution to individuals who inform competition authorities of cartels and who then cooperate fully in the circumstances set out below. The secret nature of cartels and their damaging effects justifies such a policy. The interests of customers and end-consumers in ensuring that such practices are detected and brought to an end outweigh the policy objectives of imposing penalties on those individuals who have committed an offence but who cooperate fully with the OFT and, where appropriate, any other competition authorities.
- 3.2** In the context of the cartel offence, immunity from prosecution will be granted in the form of a 'no-action letter', issued by the OFT under section 190(4) of the Enterprise Act. A no-action letter will prevent a prosecution being brought against an individual in England and Wales or Northern Ireland for the cartel offence except in circumstances specified in the letter. Whilst guarantees of immunity from prosecution cannot be given in relation to Scotland, cooperation by an individual will be reported to the Lord Advocate who will take such cooperation into account. In suitable cases this may include an early decision as to whether or not a particular individual remains liable to be prosecuted. A draft no-action letter is annexed to this guidance for information. This letter may be amended to take into account any special circumstances of an application.

Conditions for the issue of a no-action letter

- 3.3** In order to benefit from a no-action letter, and subject to paragraph 3.4 and 3.9 below, an individual must:
- admit participation in the criminal offence
 - provide the OFT with all information available to them regarding the existence and activities of the cartel
 - maintain continuous and complete cooperation throughout the investigation and until the conclusion of any criminal proceedings arising as a result of the investigation

- not have taken steps to coerce another undertaking to take part in the cartel, and
- refrain from further participation in the cartel from the time of its disclosure to the OFT (except as may be directed by the investigating authority).

3.4 However, the fact that these conditions are satisfied in any particular case is not in itself sufficient for the issue of a no-action letter. Where the OFT believes that it already has, or is in the course of gathering, sufficient information to bring a successful prosecution of an individual, it will not issue a no-action letter to that individual.

Procedure

3.5 When an individual believes that they may require a no-action letter, or an early determination as to whether they are liable to be prosecuted in Scotland, an approach should be made to the Director of Cartel Investigations at the OFT. The approach may be made:

- directly by the individual
- by a lawyer representing the individual, or
- on behalf of named employees, directors, ex-employees or ex-directors, by an undertaking (or by a lawyer representing such undertaking) seeking leniency from the OFT in accordance with the OFT's *'Guidance as to the Appropriate Amount of a Penalty'* (the OFT's Guidance)⁵ or in conjunction with an application for leniency from the European Commission in accordance with the Commission Notice on immunity from fines or reduction of fines in cartel cases (the Commission Notice on Immunity)⁶.

Initially, approaches by lawyers may be made on an anonymous basis.

3.6 When an approach is made, the Director of Cartel Investigations will give an initial indication as to whether the OFT may be prepared to issue a no-action letter. In cases where an undertaking has been granted 100 per cent leniency in accordance with the OFT's Guidance or the Commission Notice on Immunity, the OFT will normally be prepared to issue no-action letters to those named employees,

⁵ The Office of Fair Trading's *'Guidance as to the Appropriate Amount of a Penalty'* (OFT 423).

⁶ Commission Notice on immunity from fines and reduction of fines in cartel cases (at the time of drafting: OJ C45, 19.02.02, p 3).

directors, ex-employees or ex-directors on whose behalf an approach is made, subject to the conditions set out at paragraph 3.3 above being met and subject to paragraph 3.9.

- 3.7** If the OFT is prepared to issue a no-action letter the individual applying for immunity from prosecution will be interviewed. Any information they provide in such interviews will not be used against them in criminal proceedings except in the following circumstances:
- where a no-action letter is not issued, if the individual applying for immunity from prosecution has knowingly or recklessly provided information that is false or misleading in a material particular, or
 - where a no-action letter is issued, if it is subsequently revoked (see further paragraphs 3.11 to 3.13 below).
- 3.8** On completion of the interview (which may extend over several sessions), the OFT will advise the applicant in writing whether it is prepared to issue a no-action letter.
- 3.9** In cases where the OFT concludes that, on the basis of the information that has been given, the applicant is not at risk of criminal prosecution for the cartel offence, it will not issue a no-action letter for this reason and will confirm this in writing.
- 3.10** If, following discussions:
- the OFT considers that, without a no-action letter, there is a likelihood of prosecution, and
 - the applicant confirms that they will meet the conditions for the issue of a no-action letter

a no-action letter will be issued. Alternatively, in a case where prosecution would be brought in Scotland, the cooperation given by the applicant will be reported to the Lord Advocate with a request for an early decision as to whether the individual remains liable to prosecution.

Revocation

- 3.11** A no-action letter may be revoked if:
- the recipient of a letter ceases to satisfy in whole or in part any of the relevant conditions (set out at paragraph 3.3 above), or
 - the recipient of a letter has knowingly or recklessly provided information that is false or misleading in a material particular.
- 3.12** On revocation any immunity granted by the no-action letter will cease to exist as if it had never been granted and the OFT may rely on any information given by the applicant in a prosecution against them for the cartel offence.
- 3.13** If a no-action letter is to be revoked the recipient of the letter will be notified in writing and given a reasonable opportunity to make representations.

Competition Disqualification Orders

- 3.14** Section 204 of the Enterprise Act empowers the OFT to ask the relevant court to make a Competition Disqualification Order (CDO). This is an order disqualifying a director of a company which commits a breach of competition law⁷. For these purposes, a breach of competition law includes an infringement of the Chapter I prohibition or Article 81 EC Treaty.
- 3.15** The OFT has issued guidance on CDOs⁸, in which it states that it will not seek CDOs against individuals who benefit from no-action letters or who are directors⁹ of companies that benefit from leniency from either the OFT in accordance with the OFT's guidance or the European Commission in accordance with the Commission Notice on Immunity. Individuals who apply for no-action letters and undertakings benefiting from leniency will receive individual confirmation of this policy.

⁷ Before granting a CDO, a court must also be satisfied that the conduct of that individual as a director makes him unfit to be concerned in the management of a company.

⁸ See Office guideline *Competition Disqualification Orders (OFT 500)*.

⁹ For the purposes of CDOs, 'director' includes a de facto director as well as a shadow director.

Annexe

Draft letter

ENTERPRISE ACT 2002 ('the Act')

NOTICE UNDER SECTION 190(4)

- 1 This letter gives written notice to _____ (the 'Applicant') that he/she will not be prosecuted in England and Wales or Northern Ireland for an offence under section 188 of the Act that falls within the description specified in paragraph 2 of this letter (except in the circumstances specified in paragraph 6).
- 2 The offence for which immunity from prosecution is granted (the 'Reported Offence') is that **describe** e.g. 'the Applicant dishonestly agreed with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to [Undertaking A] and [Undertaking B] to fix a price for the supply by [Undertaking A] in the United Kingdom (otherwise than to Undertaking B) of [a product or service] ('the Cartel Agreement').
- 3 This grant of immunity from prosecution is made and remains conditional on the Applicant satisfying and continuing to satisfy each of the conditions set out below.

Conditions

- a) The Applicant must admit participation in the Reported Offence described in paragraph 2 of this letter.
- b) The Applicant must provide the Office of Fair Trading (the 'OFT') with all facts, statements, documents, evidence or any other items ('Information') available to him/her relating to the Reported Offence and the existence and activities of the Cartel Agreement.
- c) The Applicant shall maintain continuous and complete cooperation throughout the investigation of the Reported Offence and until the conclusion of any criminal proceedings arising as a result of the

investigation. Such cooperation includes but is not limited to the Applicant:

- i) voluntarily and without prompting, providing the OFT with all Information that becomes known to him/her or available to him/her relating to the Reported Offence and the Cartel Agreement, in addition to any such Information already provided
 - ii) providing promptly, and without the OFT using its powers under any section of the Act, all Information available to him/her wherever located, requested by the OFT in relation to the Reported Offence and the Cartel Agreement, to the extent that it has not already been provided.
- d) The Applicant must not have taken steps to coerce another undertaking to take part in the Cartel Agreement.
 - e) The Applicant must have refrained from participation in the Cartel Agreement (except as may have been directed by the investigating authority) from and including [date of disclosure to the OFT].
 - f) The Applicant must refrain from any further participation in the Cartel Agreement (except as may be directed by the investigating authority).

4 The Applicant confirms that he/she has complied with conditions (a), (b), (d) and (e) above, and undertakes to comply with conditions (c) and (f) above.

5 If, in the view of the OFT, at any time before the conclusion of any criminal proceedings arising as a result of the investigation into the Reported Offence, the conditions which are set out in this letter have not been complied with in full by the Applicant or the Applicant has knowingly or recklessly provided Information that is false or misleading in a material particular, the OFT shall give immediate written notice to the Applicant of the nature of the alleged non-compliance and that the OFT is considering revoking the grant of immunity. The Applicant will be given a reasonable opportunity to explain the alleged non-compliance and, if the OFT considers it appropriate, to remedy the breach within a reasonable period of time from the giving of such explanation.

- 6 If the OFT then determines that the conditions set out in this letter have not been fully complied with, or that the Applicant knowingly or recklessly provided Information that is false or misleading in a material particular to the OFT, the OFT may revoke the grant of immunity from prosecution. On revocation, the grant of immunity will cease to exist as if it had never been granted and any Information provided by the Applicant may be used against him/her in criminal proceedings.
- 7 Irrespective of whether, the OFT has revoked the grant of immunity, all Information provided to the OFT by the Applicant shall remain in the possession of the OFT.
- 8 This letter sets out all of the terms and conditions on which the OFT grants immunity from prosecution to the Applicant for the Reported Offence. It supersedes all prior understandings, if any, whether oral or written, relating to the Reported Offence.
- 9 The signatories below acknowledge acceptance of the terms and conditions set out above which shall only take effect when both parties have signed this letter in duplicate, one original to be retained by each party.

Signed:

Date:

Name:

Position: Director of Cartel Investigations.

For and on behalf of the Office of Fair Trading

Signed:

Date:

Name:

Enterprise Act publications

Throughout 2003 the OFT is issuing a series of guidance booklets on various aspects of the Act. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets:

check www.ofg.gov.uk/enterpriseact.htm
email enterpriseact.enquiries@ofg.gsi.gov.uk
or telephone Enterprise Act enquiries on 0207 211 8181

All guidance booklets can be ordered or downloaded from the OFT's website <http://www.ofg.gov.uk/enterpriseact.htm>. Or you can request them by:

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