

Leniency in cartel cases

A guide to the leniency programme for cartels



Competition
law 2005

Understanding competition law

Leniency in cartel cases is one of several quick guides designed to inform businesses about how the Office of Fair Trading (OFT) applies competition law in the UK. You may wish to read this together with *Competing fairly* which provides an overview of all the quick guides in the series. More comprehensive information is available in a number of detailed competition law guidelines published by the OFT in conjunction with the sector regulators. Turn to the back of this guide to find out how to obtain copies of other OFT publications.

Competition law is enforced in the UK principally by the OFT. However, in certain industries, such as gas and electricity, the sector regulators have been given 'concurrent powers' to apply and enforce competition law. Although this guide is based on OFT experience and practice, it should also be of assistance if you are dealing with one of the sector regulators. You will find a list of these sector regulators and their contact details at the back of this guide.

This quick guide provides an introduction to 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.

Introduction

In the UK, anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position by a business. Businesses that infringe competition law may face substantial financial penalties of up to ten per cent of their worldwide turnover.

Cartels are a particularly damaging form of anti-competitive activity. Their purpose is to increase prices by removing or reducing competition and as a result they directly affect the purchasers of the goods or services, whether they are public or private businesses or individuals. Cartels also have a damaging effect on the wider economy as they remove the incentive for businesses to operate efficiently and to innovate. Detecting and taking enforcement action against the businesses involved in cartels is therefore one of our main enforcement priorities and any business found to have engaged in cartel activity is likely to face a particularly high financial penalty.

The OFT is, however, prepared to offer lenient treatment – in terms of the penalty to be imposed – to businesses that come forward with information about a cartel in which they are involved. This guide explains how the OFT’s cartels leniency programme for businesses works. You may wish to read it together with the other quick guides *Competing fairly*, which provides an overview of the law, and *Cartels and the Competition Act 1998*, which can help you to identify cartel activity.

Further information

For further information, see the *OFT’s guidance as to the appropriate amount of a penalty*.

In addition, it is a criminal offence under the Enterprise Act 2002 for an individual to dishonestly engage in cartel arrangements in the UK. Immunity from prosecution may be available to individuals who come forward with information in the form of a ‘no action letter’ and individuals may also avoid being disqualified from being a director.

Further information

For further information, see the OFT Enterprise Act guidance *The cartel offence – guidance on the issue of no-action letters for individuals* and *Competition disqualification orders*.

Definition of ‘business’

Throughout this guide, we refer to a ‘business’. This term (also referred to as an ‘undertaking’ in our more detailed competition law guidelines) means any entity engaged in economic activity irrespective of their legal status, including companies, partnerships, Scottish partnerships and individuals operating as sole traders.

Leniency

Why offer leniency?

Cartels are widely accepted as having the most damaging effect on consumers and the wider economy. We therefore have a special interest in ensuring that they are uncovered and broken up. We have at our disposal considerable investigative powers under the Competition Act 1998 to pursue complaints that a cartel is operating. Our leniency programme helps us obtain the information needed to carry out our work in this area as effectively as possible.

What's in it for cartel members?

We intend to impose severe penalties where an infringement of the law involves cartel activities. We can impose penalties of up to ten per cent of a business' worldwide turnover. Under the leniency programme, a member of a cartel may have their financial penalty reduced substantially or avoid a penalty altogether.

Where a leniency applicant qualifies for automatic total immunity, the applicant will also receive full protection for all of their employees (and ex-employees) from criminal prosecution for the criminal cartel offence, and full protection from possible sanctions under the director disqualification order regime.

The leniency programme therefore offers a very real incentive to come forward with information.

Further information

For further information, see the OFT Enterprise Act guidance *The cartel offence – guidance on the issue of no-action letters for individuals and Competition disqualification orders*.

What sort of activity is covered?

Under the leniency programme, the term 'cartel' or 'cartel activities' applies to agreements, decisions or concerted practices that infringe the Chapter I prohibition in the Competition Act 1998 and/or Article 81 of the EC Treaty and involve:

- price fixing (including resale price maintenance)
- bid-rigging (collusive tendering)
- the establishment of output restrictions or quotas, and
- market sharing or market dividing.

What form does leniency take?

Leniency may take the form of **total immunity** from or a **significant reduction** of the financial penalties that we can impose. It does not extend to the other consequences of infringing the law, which include the fact that the unlawful agreement is void and therefore cannot be enforced and the possibility that third parties who consider they have been harmed by the cartel may have a claim for damages in the courts. Leniency does not provide immunity from any penalty that may be imposed on the business by other competition authorities outside the UK, such as the European Commission.

Total immunity from financial penalty

We will offer automatic total immunity from financial penalties for an infringement of the Chapter I prohibition and/or Article 81 to the **first** member of the cartel to come forward with relevant information relating to the infringement **before** we have started an investigation of the cartel activity, **provided that** we do not already have sufficient information to establish the existence of the alleged cartel activity.

The business must also:

- provide us with all the information, documents and evidence available to them regarding the cartel
- maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action

by the OFT arising as a result of the investigation

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

Significant reductions in penalty

We **may** offer a **reduction in the level of the financial penalty of up to 100 per cent** for the first cartel member to come forward **after** an investigation has started but before a Statement of Objections has been issued. The grant of a reduction of up to 100 per cent in these circumstances is discretionary and when deciding on the reduction in penalty, we will take into account the stage at which the cartel member has come forward, the evidence already in our possession and the evidence provided by the cartel member. The leniency applicant must also fulfil all four conditions outlined previously.

Definition of 'Statement of Objections'

If we take the view that a business has infringed competition law, we will send them a **Statement of Objections** which is, in effect, a proposed infringement decision and we will invite views from the business.

Reductions in penalty of up to 50 per cent **may** be available if a business:

- is not the **first** to come forward with information but does so **before** the OFT has issued a Statement of Objections, or
- does not satisfy all the conditions for total immunity.

In both cases, to qualify for a reduction, the business must fulfil the first three of the conditions outlined previously (ie, it does not have to fulfil the condition of not having taken steps to coerce another business to take part in the cartel activity).

Any reduction will be calculated taking into account the stage at which the business has come forward, the evidence in our possession and the evidence provided by the business. The grant of a reduction in these circumstances is discretionary.

Involvement in additional cartels

The leniency programme also provides an incentive for cartel members to come forward with information about any other cartels that they may be involved in.

Further information

For further information, see the *OFT's guidance as to the appropriate amount of a penalty*.

How do I apply for leniency?

Applications for lenient treatment under the programme should be made to the Director or Deputy Director of Cartel Investigations at the OFT (phone **020 7211 8117**) or their equivalent at the appropriate sector regulator. This step has to be taken by a person who has the authority to represent the business for that purpose. Prospective applications may be discussed with the Director or Deputy Director of Cartel Investigations on a no-names basis, perhaps with the prospective leniency applicant's legal adviser. In the past, such no-names based approaches have often been very productive.

Leniency applications and the European Competition Network (the ECN)

The European Commission and a number of national competition authorities (NCAs) of other European Member States also have leniency programmes that facilitate the detection and prohibition of cartels. An application for leniency to us will not be considered as an application for leniency to the European Commission or any other NCA within the ECN.

It is therefore in the interest of businesses to apply for leniency to all the NCAs (and the European Commission) in any countries in which the cartel operates. In view of the importance of timing in most existing leniency programmes, businesses will also need to consider whether it would be appropriate to make leniency applications to the relevant NCAs simultaneously.

Further information

For further information on the relationship between EC and national competition laws and cooperation within the ECN see the guideline *Modernisation*.

Will my identity be disclosed to other cartel members?

Any business wishing to take advantage of the leniency programme may be concerned that their fellow cartel members may become aware that they have volunteered information to the OFT. As a result, we will endeavour, to the extent possible, and allowing for the exchange of information as required within the ECN, to keep the identity of any such businesses confidential. Where we proceed to issue a Statement of Objections, it will be necessary to disclose the identity of a leniency applicant.

Further information

Further information as to the safeguards in place to protect the position of a leniency applicant with regard to information exchange within the ECN can be found in the European Commission's *Notice on Cooperation within the Network of Competition Authorities* at www.europa.eu.int/comm/competition/antitrust/legislation/

No-action letters

In addition to the financial penalties that can be imposed on businesses under the Competition Act 1998 and Article 81 of the EC Treaty, it is a criminal offence under section 188 of the Enterprise Act 2002 for an individual to dishonestly engage in cartel arrangements in the UK. It may be possible for an individual who comes forward with information about the cartel to receive immunity from prosecution in the form of a 'no-action letter' from the OFT.

A business, in their own application for leniency, may also request that no-action letters in respect of the cartel offence be issued to named current or former employees or directors of the business. Where such a business has been granted total immunity from financial penalties, subject to certain conditions, we will normally be prepared to issue no-action letters to those named individuals.

Further information

For further information, see the OFT Enterprise Act guidance *The cartel offence – guidance on the issue of no-action letters for individuals*.

Where can you get further information?

You can order free copies of our publications by phoning **0800 389 3158** or emailing **oft@ecgroup.uk.com**
You can also download our publications from **www.oft.gov.uk**

Quick guides

This booklet is one of a series of quick guides designed to inform you about how we apply competition law in the UK. *Competing fairly* gives an overview of the law while the other guides cover specific areas.

Competing fairly (OFT447)

How your business can achieve compliance (OFT424)

Under investigation? (OFT426)

Cartels and the Competition Act 1998 (OFT435)

Leniency in cartel cases (OFT436)

This information is available in other formats and languages on request.

CD-Rom on compliance

We also provide a CD-Rom called *Compliance matters!* (OFT723) explaining the importance of compliance.

Competition law guidelines

Detailed information on the Competition Act 1998 and Articles 81 and 82 of the EC Treaty is given in a series of guidelines we have published in conjunction with the sector regulators. The titles shown below are currently available:

Agreements and concerted practices (OFT401)

Abuse of a dominant position (OFT402)

Market definition (OFT403)

Powers of investigation (OFT404)

Concurrent application to regulated industries (OFT405)

Enforcement (OFT407)

Trade associations, professions and self-regulating bodies (OFT408)

Assessment of conduct (draft) (OFT414a)

Assessment of market power (OFT415)

Vertical agreements (OFT419)

Land agreements (OFT420)

Services of general economic interest exclusion (OFT421)

OFT's guidance as to the appropriate amount of the penalty (OFT423)

Modernisation (OFT442)

Enterprise Act guidance

We produce a series of booklets on various parts of the Enterprise Act 2002. The two mentioned in this quick guide are:

Competition disqualification orders
(OFT510)

The cartel offence: guidance on the issue of no-action letters for individuals
(OFT513)

You can find a full up-to-date list of our Enterprise Act guidance at **www.oft.gov.uk/Business/Legal+Powers/Enterprise+Act/publications.htm**

Dealing with the OFT

Individuals, businesses and their advisers are entitled to be treated with courtesy, respect and in a non-discriminatory manner. If you have a concern or complaint about our procedures, you may contact us by phone (phone **OFT Enquiries** on **08457 22 44 99**) or write to us setting out your concerns. Complaints in writing should be sent to us at:

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Sector regulators

Office of Communications (OFCOM)
Riverside House
2a Southwark Bridge Road
London SE1 7DB
Tel: 020 7981 3000
www.ofcom.org.uk

Gas and Electricity Markets Authority
(OFGEM)
9 Millbank
London SW1P 3GE
Tel: 020 7901 7000
www.ofgem.gov.uk

Northern Ireland Authority for Energy
Regulation (OFREG NI)
Brookmount Buildings
42 Fountain Street
Belfast BT1 5EE
Tel: 028 9031 1575
ofreg.nics.gov.uk

Office of Water Services (OFWAT)
Centre City Tower
7 Hill Street
Birmingham B5 4UA
Tel: 0121 625 1300
www.ofwat.gov.uk

Office of Rail Regulation (ORR)
1 Waterhouse Square
138-142 Holborn
London EC1N 2TQ
Tel: 020 7282 2000
www.rail-reg.gov.uk

Civil Aviation Authority (CAA)
CAA House
45-59 Kingsway
London WC2B 6TE
Tel: 020 7379 7311
www.caa.co.uk

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