

Leniency and no-action

**OFT's interim note on the
handling of applications**

July 2005

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FOREWORD

This document is a word version (with some minor amendments) of various PowerPoint slides presented at the Office of Fair Trading (OFT) conference on its leniency and no-action policy held on 1 June 2005. It sets out the OFT's interim policy by way of supplement to and elaboration of the OFT's existing Penalty (OFT 423) and No-action guidance (OFT 513) which are also available on this website.

The OFT proposes to 'road-test' these proposals - probably for about a year - before publishing final guidance. In the meantime, any comments on the interim policy are most welcome and should be sent to:

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1 INTRODUCTION

- 1.1 This note sets out the detail of how the OFT will handle applications under the OFT's existing published leniency and no-action policies.¹ The note supplements and elaborates on the procedures set out in those policies.² It does not replace them.
- 1.2 A finalised guidance note will be published in due course, after further consultation, and when published will replace the interim policy set out here.

Some terms

- 1.3 In this note the following terms have the following meanings:
- CA98 – Competition Act 1998
 - corporate immunity – 100 per cent immunity from financial penalties under CA98
 - corporate leniency – a reduction pursuant to the OFT's leniency policy of a financial penalty that would otherwise have been imposed under CA98 but falling short of corporate immunity
 - EA02 – Enterprise Act 2002

¹ *OFT's Guidance as to the appropriate amount of a Penalty* (OFT 423, December 2004) and *Guidance on the issue of No-action letters for individuals* (OFT 513, March 2003).

² As such, where there are references throughout this document to situations where an applicant will be granted corporate or individual immunity, this will always be subject to the well established restrictions (such as coercion) and obligations (such as the requirement to cooperate) that are set out in the OFT's penalty and no-action guidance as well as any further considerations set out throughout this document.

- individual or criminal immunity – immunity from prosecution of individuals under Part 6, EA02
- no-action letter – letter issued by the OFT pursuant to section 190(4) EA02 guaranteeing individual immunity
- OFT’s no-action guidance – *OFT’s Guidance on the issue of No-action letters for individuals* (OFT 513, March 2003)
- OFT’s Penalty guidance – *OFT’s Guidance as to the appropriate amount of a Penalty* (OFT 423, December 2004)
- Type A case – where an applicant is the first to come forward and there is no pre-existing civil or criminal investigation
- Type B case – where an applicant is the first to come forward and there is a pre-existing civil and/or criminal investigation
- Type C case – where an applicant is not the first to come forward and there is a pre-existing civil and/or criminal investigation
- Type A/B immunity – corporate and/or individual immunity granted in a Type A/B case, and
- Type C immunity – individual immunity granted in a Type C case.

Aim

- 1.4 It is hoped that the OFT's overall approach set out here will make it more attractive – especially in 'hard core' cases - to apply for corporate immunity or leniency and/or individual immunity.³

How?

- 1.5 The OFT hopes to achieve this by:
- gaining a reputation for applying guidance fairly
 - being accessible and approachable
 - erring in favour of the applicant where it is genuinely a close call
 - giving informal guidance on a no-names basis about 'hypothetical' cases when asked
 - informing legal advisers if their client is a Type A case
 - guaranteeing individual immunity for cooperating employees in Type A cases and providing a system of overall approach that gives swiftness and certainty
 - making applications in Type B cases much more attractive – corporate and individual immunity will be the norm not the exception

³ The changes introduced by this note are mostly procedural and do not involve substantive changes to the OFT's penalty guidance in CA98 cases, which would require the approval of the Secretary of State. The note does make certain substantive changes to the OFT's policy on the issue of no-action letters as set out in the OFT's no-action guidance on the issue of no-action letters; where these changes are discussed, reference is made to the section(s) of the OFT's no-action guidance affected by such changes.

- setting a high 'bar' on when an undertaking or individual will be found to be a coercer and therefore ineligible for corporate or individual immunity, both as to circumstances and standard of proof, and
- save in clear cases, not requiring admissions of dishonesty as a condition for individual immunity.

2 THE INITIAL APPROACH UNDER THE CORPORATE LENIENCY PROGRAMME

Approach for confidential guidance

- 2.1 Undertakings thinking about applying for leniency may, before doing so, approach the OFT for confidential guidance. This would usually involve a 'hypothetical' discussion on a no-names basis about a given factual matrix with a view to the undertaking obtaining comfort on an issue before deciding whether to make an application.
- 2.2 The OFT will give its views, by which it will consider itself bound, if the discussion is followed-up by an application within a reasonable time and provided no false or misleading information was given when the advice was sought and there has been no material change of circumstance.

Getting a marker in Type A cases

How would it work in practice?

- 2.3 Before contacting the OFT:
- the legal adviser should ensure there is a 'concrete basis' for a suspicion that his/her client has participated in cartel activity
 - the undertaking must have a 'genuine intention to confess', and
 - if so, the legal adviser should contact the OFT - usually by telephone.

Ascertaining the availability of Type A immunity

- 2.4 The legal adviser would request disclosure as to whether Type A immunity is available.
- 2.5 The legal adviser would provide an oral confirmation that he/she has obtained conditional instructions to apply for immunity, if Type A is available.

- 2.6 The legal adviser would specify the relevant sector (eg: by SIC code or similar) or otherwise provide sufficient information to allow the OFT to determine whether there is a pre-existing civil and/or criminal investigation.
- 2.7 The OFT will then confirm whether or not Type A immunity is available.
- 2.8 If it is, the legal adviser will disclose his/her client's identity and apply for immunity then and there.
- 2.9 If not, the legal adviser and his/her client are free to consider all the available options.

Information to be provided to secure marker

- 2.10 The applicant should be able to identify the 'concrete basis' for suspicion that it participated in cartel activity.
- 2.11 Normally, the applicant would be expected to specify:
- the nature and emerging details of the suspected infringement, and
 - the nature of the evidence uncovered so far (ie: its form and substance).
- 2.12 A discussion of the timing/process of perfecting the marker will then follow, ie: the prompt provision by the applicant of relevant information/material.

Information to be provided to perfect the marker

- 2.13 The test for a successful application for Type A immunity is whether the applicant's information provides the OFT with a sufficient basis for taking forward a credible investigation.
- 2.14 In practice, this means that the information is sufficient to allow the OFT to exercise its formal powers of investigation (eg: on-site inspections).

Other material procedural points

- 2.15 The OFT will not require a professional undertaking from the legal adviser as to his/her conditional instructions to make an application.
- 2.16 The marker will be operational from the moment the applicant's identity has been disclosed to the OFT.
- 2.17 The entire application process can be oral if requested. However:
- all pre-existing written evidence of the cartel will need to be provided to the OFT, and
 - witnesses will also need to be made available for interview and to sign witness statements, setting out their evidence.
- 2.18 The undertaking can also apply for automatic individual immunity for all of its current and former employees and directors.
- 2.19 In exceptional circumstances the OFT may provide a short term marker on a no-names basis with a view to this becoming a named marker quickly. Strong justification will be needed as ordinarily the OFT will expect the legal adviser to have obtained conditional instructions to apply for immunity if confirmation of the availability of Type A immunity is given.

Use of information submitted during marker approach

- 2.20 The OFT's past and current view is that such information will not subsequently be relied on against an undertaking (or for that matter any of its employees or directors) which, despite having acted in good faith throughout, has failed to qualify for corporate immunity (eg: because the information supplied was insufficient, in the absence of other information, to give reasonable grounds to suspect the infringement).
- 2.21 The OFT will not use information provided by an undertaking or its legal adviser in connection with trying to establish whether Type A or Type B

immunity is available. Where, for example, it is only possible to determine the availability of such immunity by the undertaking disclosing the precise sector concerned only for it to be informed by the OFT that immunity is no longer available, the OFT will not attempt to 'reverse engineer' to establish the undertaking's identity. In most cases this would in any event be impossible.

- 2.22 Where the applicant acted in bad faith, eg: a manifest failure to cooperate, the OFT reserves the right to use information derived from an approach or application in its investigation against that failed applicant.

Getting a marker in Type B cases

How would the position be different in a Type B case?

- 2.23 A marker for Type A immunity will be available until the OFT exercises powers under sections 26 to 28A of the CA98 or the OFT has 'sufficient information to establish the existence' of the CA98 infringement.⁴
- 2.24 The grant of corporate and individual immunity in Type B cases remains discretionary, however its grant is expected to be the norm rather than the exception. In practice, approaches in Type B cases are most likely to be triggered by inspections.
- 2.25 The OFT will, if requested, inform the undertaking or its legal adviser whether Type B immunity is available in principle without a requirement to identify the undertaking or that the undertaking make an immediate application.
- 2.26 If an approach is made to the OFT during or immediately after the inspections, the OFT may, for a short time, have to defer a definite

⁴ Paragraph 3.9, OFT's Penalty guidance.

answer on whether Type B immunity is available. If requested, the OFT could provisionally mark the undertaking's position in the queue (once its identity had been given) until the OFT had a better understanding of the evidence it had obtained during the inspection.

- 2.27 Where an approach is made during an inspection, the inspection will continue in the normal way. To the extent that an undertaking merely complies with its obligations pursuant to the OFT's mandatory powers of investigation it is not treated as having provided information under the OFT's leniency or no-action policies.
- 2.28 To obtain a marker in a Type B case, the undertaking initially needs to provide the same information as in a Type A case (and the same considerations, as set out in paragraphs 2.20 to 2.22 above, would apply).
- 2.29 To perfect the marker in a Type B case the undertaking must provide 'added value' to the OFT's investigation ie information which genuinely advances the OFT's investigation.
- 2.30 An undertaking can explore whether what it can give would genuinely advance the OFT's investigation by making a 'proffer' specifying the form and substance of the information it is likely to provide the OFT with; the OFT will then confirm whether, if such evidence were to be provided, Type B immunity would be given. In principle, there is no reason why this cannot be done on a no-names basis. However, there would be no marker protection until disclosure of the applicant's identity.
- 2.31 The OFT will be sensible about comparing the proffer with the information actually given subsequently. Some variation is accepted provided, overall, the proffer does not turn out to have been substantially misleading and the OFT's investigation has not, in fact, been genuinely advanced.
- 2.32 Having obtained a marker, the undertaking would then be given a limited period of time to perfect the marker (similar again to the Type A case, as set out above).

- 2.33 Where the OFT has indicated that Type B immunity is available; sufficient has been given to obtain a marker and information/material has then been given that genuinely advances the OFT's investigation, the OFT will:
- grant corporate immunity, and
 - grant individual immunity to all of the undertaking's current and former employees and directors.
- 2.34 In practice, being a Type B case will now be significantly more attractive than in a Type C case (especially given the availability of individual immunity for all of the applicant's current and former employees and directors).
- 2.35 The sooner an undertaking approaches the OFT for Type B immunity the higher the likelihood of it being available.
- 2.36 Type A immunity, however, clearly remains the most attractive option as it is guaranteed and not discretionary (subject to the established obligations and restrictions) and the risk of being beaten in the race to the OFT is in practice minimal. Another relevant consideration in this respect is that referred to in paragraph 4.31 below.
- 2.37 For more on individual immunity in Type B cases, see in particular, paragraphs 4.16 to 4.18 below.

3 THE COERCER TEST

3.1 It is always possible to contact the OFT for no-names confidential guidance about whether the coercer bar may be an issue in a prospective application.

3.2 The OFT has already given such guidance in past cases, allayed fears and then received leniency applications.

3.3 As with the US Department of Justice currently, the OFT believes that looking back in five years time, the coercer bar will not have led to any or any significant number of refusals to grant immunity.

3.4 The OFT believes that there is no mileage in trying to develop a detailed definition of 'coercer', but:

- there must be evidence to prove the two elements of coercion (on an objective basis):
 - an unwilling participant in the cartel, and
 - clear and positive steps from a coercer to pressurise that unwilling participant to take part.

3.5 The OFT believes that there may be a coercer issue in the following situations:

- actual physical violence or proven threats of violence which have a realistic prospect of being carried out or blackmail (these would apply equally to cases of horizontal as well as vertical collusion), and
- such strong economic pressure as to make market exit a real risk, where, for example, a large player organises a collective boycott of a small player or refuses to supply key inputs to such a small player (these scenarios are more likely to apply in cases where there is at least a significant vertical element and are less likely to be relevant where an arrangement is purely horizontal and there are no significant cross-supplies between competitors).

- 3.6 The OFT takes the view that there will not be a coercer issue in the following situations:
- harmful market pressure which falls short of risking market exit but may reduce profit margins
 - mere agreed enforcement or punishment mechanisms to enforce the operation of a cartel, and
 - standard contracts in a resale price maintenance case even where there is inequality of bargaining power.
- 3.7 The bar is high in relation to both the 'coercive' behaviour and the evidence necessary to prove that behaviour.
- 3.8 The OFT has, to date, never refused corporate immunity on coercer grounds. Nor has any undertaking been refused corporate immunity on those grounds in the EU or US programmes.
- 3.9 Even if an undertaking were to lose automatic corporate immunity as a result of subsequently finding out that it had been a coercer:
- it would still be eligible for up to a 50 per cent reduction in penalty, and
 - the undertaking's current and former employees or directors (except for the 'rogue' coercing employee(s)) would retain their individual immunity.
- 3.10 More is said at paragraphs 4.6 to 4.9 below on coercion in the context of individual immunity.

4 NO-ACTION LETTERS

4.1 The OFT would stress again that the legal adviser to an undertaking or individual may call the OFT and ask if a given 'hypothetical' scenario would, or be likely to, lead to prosecution. Often the OFT will be able to give an assurance that prosecution for the criminal cartel offence will not be an issue.

Dishonesty⁵

4.2 The OFT contemplates two types of no-action letter. They will only differ as regards the type of admission required.

4.3 In the majority of cases (whether Type A, B, or C) individuals will need only to give a full and truthful account of all the relevant facts as they are known to them and to provide the OFT with any evidence that is in their possession or under their control.

4.4 In those cases where a person is clearly a principal offender in a dishonest cartel arrangement and whose evidence is likely to be needed to support a prosecution case against other principals, a full admission of their participation in the offence will be required, including as to dishonesty. This is because, without it, it may be difficult to prosecute other principals in the cartel (this being a major reason for having the policy in the first place).

4.5 This is still more favourable than the US system where *all* participants are required to admit to the actual commission of the offence.

⁵ Note that the provisions in paragraphs 4.2 to 4.5 represent a substantive change to paragraph 3.3, first bullet of the OFT's no-action guidance (as referred to in footnote 3 above).

Coercer

- 4.6 There is full alignment of the position of an individual under the no-action letter policy with the position of the undertaking under the corporate immunity policy.
- 4.7 In other words the question is whether another *undertaking* has been coerced, not specifically whether one individual has coerced another or others within the undertaking. Therefore, if the undertaking is not deemed a coercer, no employee or director within it will be refused individual immunity on the coercer ground, save in any exceptional circumstances where somehow an employee enjoyed a position of power independent of their position within the undertaking and used it to coerce another undertaking.
- 4.8 If an undertaking *is* found to be a coercer, individuals within the undertaking who did not themselves play a coercing role will not be denied individual immunity on coercer grounds.
- 4.9 The OFT has, to date, never refused individual immunity on coercer grounds. Nor has any individual been refused individual immunity on those grounds in the US programme.

The link with Type A Corporate immunity

- 4.10 Individual immunity will be automatic for those current and former employees and directors of an undertaking which made a Type A corporate immunity application.
- 4.11 There is no need for the legal adviser of an undertaking to produce a list of names in order to mark the undertaking's and its employees' and

directors' position as the first to apply: he/she can take it as a definite that any current or former employee and director, wherever they are in the world and whatever their role in the cartel activity, will receive a no-action letter where they need it.⁶

- 4.12 As both the OFT's and the undertaking's own investigations progress, it will steadily become apparent which individuals within the undertaking had some part in the cartel. Provided, in particular, that they cooperate, those that would otherwise be at risk of prosecution and therefore in need of a no-action letter will be guaranteed one.
- 4.13 Others in the undertaking who simply do not feature as being relevant to the investigation will not need a no-action letter, as there is no prospect they will be prosecuted.
- 4.14 However, if someone who was initially discounted as irrelevant to the investigation, later assumes more significance, they will be given a no-action letter provided, in particular, they have co-operated throughout.
- 4.15 Fundamentally, there is no difference here with the US system save that no-action letters will be given on an individual basis to those that need them, whereas in the US the corporate immunity letter suffices for all.

Gaining Individual immunity in Type B cases

- 4.16 Where the OFT has indicated that Type B immunity is available; sufficient has been given to obtain a marker and information/material has then been given that genuinely advances the OFT investigation, all current and former employees and directors, *however serious their role in the cartel*, will be guaranteed immunity.

⁶ Note that this represents a substantive change to paragraph 3.5 of the OFT's No-action guidance (as referred to in footnote 3 above).

- 4.17 However, one potentially significant restriction in this context is that individual immunity will generally not be available in a Type B case (and of course a Type C case) if pursuant to paragraph 3.4 of the OFT's No-action guidance 'the OFT believes that it already has, or is in the course of gathering, sufficient information to bring a successful prosecution'.
- 4.18 It should be noted that in practice, where the 'in the course of gathering' part of the paragraph 3.4 test is met as regards one individual within a cartel, it is likely also to be met in relation to all other individuals with any significant involvement in the cartel since an investigation will invariably be of a 'holistic' nature examining the cartel as a whole.

The position in Type C cases

- 4.19 Individual immunity in Type C cases will be granted much more sparingly than in Type B cases.
- 4.20 In Type C cases, the OFT will want to see *substantial added value* to its investigation and if the role of the person is peripheral within the cartel, they are more likely, on a sliding scale, to be granted individual immunity.
- 4.21 Type C immunity is still very much worth exploring: a no-names approach should allow the OFT to be able to make a determination as to whether it would be 'minded' to grant individual immunity.
- 4.22 If the OFT states that it is so minded, the legal adviser will be required to identify his/her client in order to mark the client's position and no final decision will be taken on whether to grant a no-action letter in an individual case until the person has been interviewed.

How will interviews be conducted?

- 4.23 Whether the case is a Type A, B or C case the OFT will always interview individuals under the protections laid out in paragraph 3.7 of the OFT's No-action guidance. The information will not be used in evidence against the individual provided information is not false or demonstrably

misleading or where, exceptionally, a no-action letter is revoked for non-cooperation.

- 4.24 These same principles will also apply in the case of information given in documentary form, whether directly or through the applicant's legal adviser.
- 4.25 In Type A cases, interviewees can give their accounts under the guarantee that they will get individual immunity provided they cooperate. This is so even if any other employees fail to cooperate. In Type B cases where immunity is available in principle, the individual is in the same position as in Type A cases, so if due to lack of co-operation on that individual's part, the undertaking fails to deliver on its proffer, no other individuals will be penalised provided they give full co-operation. In Type C cases, as discussed, interviewees will be protected by the provisions of paragraph 3.7 of the OFT's No-action guidance.
- 4.26 In all cases, (ie: Type A, B or C), while paragraph 3.7 of the OFT's No-action guidance will prevent material from being used against the individual, it could be used against the undertaking if the latter failed as a whole to satisfy the cooperation criteria. In that respect, however, the OFT recognises an undertaking's ability to secure the co-operation of former employees or directors or, indeed, staff who have a settled intention to leave the undertaking imminently may be somewhat limited. Undertakings will nevertheless be expected to use their best endeavours to secure cooperation.

Approach by an individual on his/her own account

- 4.27 As with the US system, an individual is at liberty to apply for individual immunity on their own account.
- 4.28 That individual will be guaranteed a no-action letter, if they need it, provided they tell the OFT about the cartel activity before any other individual or undertaking.

- 4.29 If there is already a criminal investigation, but the individual tells the OFT about the cartel activity before any other individual or undertaking, the individual will still be granted individual immunity, provided they add value to the OFT's investigation. Note however, one of the important restrictions to this; namely paragraph 3.4 of the OFT's No-action guidance.
- 4.30 If an individual within an undertaking self-reports the cartel on his or her own account before the undertaking does, the undertaking will lose *guaranteed* corporate and individual immunity, in circumstances where that undertaking would otherwise have qualified for it. However, the OFT may, in its discretion, still grant corporate and individual immunity, in circumstances where it would otherwise have qualified for it, depending on the value that the OFT is likely to gain from the additional evidence and the stage of the OFT's investigation.
- 4.31 The ability of an individual to self-report before the company is another reason why companies who discover potential wrongdoing should promptly make a Type A approach and not leave it in the hope of being able to make a successful Type B immunity application once an investigation has started.

5 OTHER ISSUES

- 5.1 Ordinarily the applicant (whether corporate or individual) will be required to refrain from further participation in the cartel activity. However the OFT may direct otherwise.
- 5.2 Such a direction will be rare. The OFT will never expect individuals within a company or an individual immunity applicant to take inappropriate risks. They will, in nearly every case, only be asked to carry on their basic activities in the same way as if they had never approached the OFT. They will be professionally 'handled' by the OFT.
- 5.3 In cases where a person applies on his/her own account and who arguably participated in a cartel but has valuable information to give to us, they may be granted individual immunity but remain a secret source. In such a case, the OFT will not disclose the identity of the individual. However, an individual immunity applicant would only be treated as a secret source where the safety of the individual would be in serious jeopardy or other very serious adverse consequences would follow if the person's approach to the OFT were to become known.
- 5.4 If we want to pass information deriving from an immunity applicant to another UK agency such as the SFO, we will always discuss this with the applicant or his/her legal adviser first.
- 5.5 Information supplied as part of an application for individual immunity will never be passed to an overseas agency without the consent of the provider save for one exception. The OFT may wish to provide the information to the European Commission to pursue administrative proceedings against two or more undertakings under Article 81 EC Treaty. The European Commission would be required to guarantee to the OFT that the information would not be provided to any other agency. Also, where such a disclosure to the European Commission was considered by the OFT, the OFT would always consult the provider. The OFT recognises that to do otherwise would be seriously detrimental to its leniency policy.

5.6 Information supplied as part of an application for corporate immunity or leniency will also never be passed to an overseas agency without the consent of the provider save, again, for one exception. Such information may be disclosed to the European Commission and/or an EU national competition authority but only in accordance with the provisions and safeguards set out in paragraphs 40 and 41 of the Network notice.⁷ Again, where the OFT was considering such a disclosure to the European Commission or to an EU national competition authority, the OFT would always consult the provider.

Other Offences

5.7 The grant of a no-action letter cannot in the OFT's view cover an offence which, though related to the cartel behaviour, is clearly severable such as the separate corruption of a public official. However, we believe that attempts by a prosecutor to prosecute an offence such as conspiracy to defraud on the same factual matrix as that for which a no-action letter is given would be viewed by the courts as unfair and an abuse of process and that, as such, the risk of this happening is very low. Note the SFO's undertaking at paragraph 5.12 below. In the US, amnesty does not strictly apply to equivalent common law or ancillary offences and this has never proved to be a problem.

Cases referred to Serious Fraud Office (SFO)

5.8 The SFO will be consulted about the possible grant of individual immunity in all those cases which the OFT has already referred to them. This is appropriate given that they will be spending resources on the case.

⁷ Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.04.2004, p 43).

- 5.9 However, the stated policy on individual immunity does not change merely because the case has been referred to the SFO.
- 5.10 However, in cases which have been referred, paragraph 3.4 of the OFT's No-action guidance is rather more likely to apply so that immunity may no longer be available.
- 5.11 The key point is that OFT policy still applies. The ability of an applicant to obtain certainty is not reduced. The legal adviser will ask the OFT if individual immunity is still available and there is simply a greater prospect the answer will be no. There is no detriment in asking.
- 5.12 Robert Wardle, the Director of the SFO, has confirmed that if a person has been given a no-action letter in relation to particular cartel activity – and provided that letter is not subsequently revoked for any of the reasons set out in the OFT's No-action guidance – the SFO would obviously not attempt to prosecute that individual for the cartel behaviour with a charge of conspiracy to defraud as a device for circumventing the effect of the no-action letter.

Scotland

- 5.13 In Scotland, the Lord Advocate has the final say as to whether or not to bring a prosecution for the cartel offence in that jurisdiction.
- 5.14 The Scottish prosecutor will accord the OFT's representations on non-prosecution very serious consideration, however.
- 5.15 The OFT can discuss with the Scottish prosecutor, on a hypothetical basis, on behalf of the legal adviser's client, what the prosecutor's position would be in a given case.

6 EXPANDING SCOPE OF APPLICATIONS FOR LENIENCY AND/OR NO-ACTION

- 6.1 The OFT will discuss the scope of the application during the applicant's initial approach.
- 6.2 The scope of the application should cover the suspected cartel activity. The OFT will be realistic about what can sensibly be identified at the early marker stage and the scope can be further specified/refined when the marker is perfected.

Scope of applications

- 6.3 Where an undertaking discovers any innocent omissions after the perfection of the marker it should inform the OFT immediately and satisfy the OFT that:
- the omission was indeed innocent, ie: the audit for relevant information had been thorough, and
 - the information subsequently discovered has been provided to the OFT without undue delay.
- 6.4 If the OFT is satisfied that the above is the case, and such information affects the scope of the leniency agreement, it will normally be prepared to expand it accordingly.
- 6.5 On a separate but related point, the OFT will adopt the European Commission's practice regarding the use of evidence of previously unknown facts relevant to the gravity or duration of the infringement submitted by an applicant for corporate leniency:⁸ the OFT would not

⁸ Point 23, last sentence of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p 3).

take account of such information to the detriment of an applicant when assessing the appropriate amount of penalties.

Discovery of genuinely unrelated material

- 6.6 There is no obligation to submit material which is outside the scope of the leniency application to the OFT; the OFT will not be asking US-style 'omnibus questions'.
- 6.7 To the extent the information relates to an entirely separate infringement, it is treated in the normal way. Undertakings are, therefore, encouraged to apply for leniency for it. To the extent that the undertaking is not benefiting from full immunity in relation to the original leniency application, the OFT's leniency plus policy should be taken advantage of.

Leniency plus

- 6.8 Guidance is provided under paragraphs 3.16 and 3.17 of the OFT's Penalty guidance. The key question here is whether the novel evidence relates to a 'completely separate cartel activity'. The fact that the activity is in a separate market is a good indicator, but not always decisive.
- 6.9 The UK practice is intended closely to mirror the US practice. The US Department of Justice's Status Report, Corporate Leniency Programme, February 2004 refers to amnesty plus cases as being based on information relating to a 'second, unrelated conspiracy' and information which leads to investigations in 'a completely separate industry'.
- 6.10 The perceived emphasis in the OFT's Penalty guidance on markets may potentially be distracting. The precondition to the availability of leniency plus is the fact that the novel evidence relates to 'a completely separate cartel activity' (or 'conspiracy').
- 6.11 The OFT will take a common sense approach and, as always, deal with applicants and their legal advisers in good faith.

Vertical market sharing

- 6.12 The OFT's Penalty guidance limits the vertical scope of the policy to price fixing (eg: resale price maintenance cases).
- 6.13 The OFT's policy is not intended to cover other stand-alone vertical restrictions of competition as these tend to be (at least to an extent) visible on the market and self-detecting.
- 6.14 There is one exception to this rule. Where vertical behaviour might be said to be facilitating horizontal collusion, leniency should in principle be available, as a facilitator can be a party to the collusive arrangements and as a result be exposed to significant sanctions.
- 6.15 A party seeking lenient treatment on this basis should be able to provide the OFT with a 'concrete basis' for its vertical facilitation concern, however.