

# **Quick Guide to Cartels and Leniency for Individuals**

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# 1 WHAT THIS QUICK GUIDE IS ABOUT

- 1.1 Cartels are amongst the most serious infringements of competition law. **Individuals who are dishonestly involved in cartel activity may commit a serious criminal offence punishable by up to five years in prison and/or an unlimited fine.**
- 1.2 Under the OFT's leniency policy, individuals who self-report their involvement in cartel activity to the Office of Fair Trading (OFT), or who are employed by businesses who self-report such activity, may benefit **from individual immunity from prosecution from the criminal cartel offence in the form of a 'no-action letter'**.<sup>1</sup>
- 1.3 This Quick Guide provides an overview of how an individual involved in cartel activity might be able to obtain a no-action letter.
- 1.4 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.
- 1.5 The chapters that follow provide a brief outline of the definition of a cartel, a simple explanation of the cartel offence, an overview of leniency for individuals and a summary of the processes in relation to the grant of no-action letters for individuals. More detailed and comprehensive guidance is set out in the guidance OFT803 *Applications for leniency and no-action letters in cartel cases*. It contains a full description of the conditions and process for the issue of no-action letters. This Quick Guide may also be read in conjunction with the revised Quick Guide aimed at businesses, OFT436 *Quick guide to Cartels and Leniency for Businesses*.

<sup>1</sup> Note however that grants of immunity from prosecution cannot be given by the OFT in relation to the criminal cartel offence which falls to be prosecuted in Scotland, as the Lord Advocate has the final say on such matters. See chapter 8 below for further discussion of the criminal cartel offence in Scotland.

1.6 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.

## **2 WHAT IS A CARTEL?**

2.1 A cartel is an agreement or concerted practice between businesses that infringes the Chapter I prohibition of the Competition Act 1998 (CA98) or Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and which 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.

2.2 Cartel activities are a particularly damaging form of anti-competitive activity. Their purpose is to increase or maintain prices by removing or reducing competition which directly affects the purchasers of goods and services, whether they are businesses or individuals. Cartels also have a damaging effect on the wider economy as they remove the incentives for businesses to operate efficiently and to innovate. It is in the interests of customers and end-consumers to detect and take enforcement action against businesses and individuals involved in cartels.

### **Cartels under the CA98 and TFEU**

2.3 Businesses involved in cartel activity may infringe the Chapter I prohibition of CA98 and Article 101(1) of the TFEU.

2.4 The Chapter I prohibition of the CA98 prohibits agreements or concerted practices between undertakings which prevent, restrict or distort competition within the UK and which may affect trade in the UK. Article 101(1) TFEU prohibition is similar to the Chapter I prohibition, but applies to agreements that affect trade between EU Member States. Undertakings are referred to as businesses for the purpose of this Quick Guide.

2.5 Under the CA98, if the OFT has found that a business has engaged in cartel activity it will make a reasoned decision that the business has infringed the Chapter I prohibition, ('an infringement decision') and can impose penalties of up to 10 per cent of a

business' worldwide turnover. The infringement decision may facilitate follow-on damages actions by persons claiming compensation for the loss they have suffered as a consequence of the cartel activity.

- 2.6 The OFT can also seek Competition Disqualification Orders ('CDOs') against directors of companies that are found to have engaged in cartel conduct, preventing them from acting as directors.

### **The criminal cartel offence under the Enterprise Act 2002 (EA02).**

- 2.7 An individual is guilty of a criminal offence under the Enterprise Act 2002 (EA02) 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 cartel activities relating to at least two businesses set out below (pursuant to section 188 of the EA02):<sup>2</sup>

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

- 2.8 The offence only applies in respect of agreements between businesses at the same level in the supply chain.<sup>3</sup>

- 2.9 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

<sup>2</sup> 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.

<sup>3</sup> Therefore it does not apply to resale price maintenance.

Kingdom, proceedings may only be brought where the agreement has been implemented in whole or in part in the United Kingdom.

- 2.10 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.
- 2.11 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.



### **3 NO-ACTION LETTERS FOR INDIVIDUALS**

- 3.1 The OFT can issue no-action letters to individuals. A no-action letter provides that individual with immunity from prosecution for the criminal cartel offence in respect of the cartel activity described in the letter. An individual must continue to meet the conditions set out in the no-action letter in order to continue to benefit from immunity from prosecution for the criminal cartel offence.
- 3.2 An individual may be able to obtain a no-action letter from the OFT in one of two ways:
- 1) the business employing the individual has been granted immunity from financial penalties, or lenient treatment, under CA98 and/or Article 101(1) TFEU, or
  - 2) the individual has directly approached the OFT for a no-action letter.
- 3.3 In either case, whether an individual will be granted a no-action letter will depend upon the circumstances surrounding the approach to the OFT. The individual must also meet, and continue to meet, certain conditions.<sup>4</sup>

<sup>4</sup> See Chapter 6 of this Quick Guide.

## **4 NO ACTION LETTERS – WHEN A BUSINESS APPROACHES THE OFT**

**Business is the first to come forward before a CA98 investigation has commenced – Type A immunity**

- 4.1 If a business is the first member of a cartel to come forward and provide the OFT with relevant information relating to a cartel **before** the OFT has begun a CA98 investigation of the cartel activity<sup>5</sup> the OFT **will** grant that business total immunity from financial penalties for an infringement of Chapter I of CA98 and/or Article 101 of TFEU (Type A immunity). The grant of immunity is of course subject to the business continuing to meet the conditions of immunity. There are a number of conditions associated with the grant of Type A immunity.
- 4.2 **The OFT will also grant ‘blanket’ criminal immunity from prosecution to every co-operating current and former employee and director of the business that has been granted Type A immunity, for the activity to which that immunity has been granted only. A more detailed explanation of blanket immunity granted under leniency is set out in OFT803 *Applications for leniency and no-action letters in cartel cases*.**
- 4.3 The OFT will also provide guaranteed protection from CDOs for all cooperating current and former<sup>6</sup> directors of a business benefitting from Type A immunity.

**Business is the first to come forward after a CA98 investigation has commenced – Type B immunity/leniency**

- 4.4 If a business is the first member of a cartel to come forward but does so **after** a CA98 investigation has commenced but before a

<sup>5</sup> Provided that the OFT does not already have sufficient information to establish the existence of the alleged cartel activity.

<sup>6</sup> 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.

Statement of Objections<sup>7</sup> has been issued the OFT may offer total immunity from financial penalties or a reduction in the level of the financial penalty of up to 100 per cent (Type B immunity/leniency). Unlike Type A immunity, the grant of total immunity from financial penalties or leniency is discretionary in Type B situations.

- 4.5 **If a business has been granted Type B immunity/leniency, the OFT may offer blanket immunity from prosecution to co-operating current and former employees and directors of the business or individual immunity from prosecution may be granted to specific individuals employed by the business. In relation to individual immunity, this means that the OFT will consider whether, and to whom, it might grant no-action letters on an individual basis.**
- 4.6 The grant of criminal immunity from prosecution for co-operating current and former employees of a business benefitting from Type B immunity is discretionary unlike the grant of criminal immunity in relation to Type A immunity, which is automatic.
- 4.7 The OFT will provide guaranteed protection from CDOs for all cooperating current and former<sup>8</sup> directors of a business benefitting from Type B immunity or leniency.

**Business is not the first to come forward or may have coerced another business to participate on the cartel activity – Type C leniency**

- 4.8 In circumstances where another business has already reported the cartel activity to the OFT (or where a business has coerced another business to participate in the cartel activity)<sup>9</sup> the OFT may

<sup>7</sup> 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)).

<sup>8</sup> 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.

<sup>9</sup> See OFT803 for a discussion of the coercer test.

grant the business a reduction in financial penalty of up to 50 per cent (Type C immunity).

- 4.9 The OFT will not grant blanket immunity from prosecution for the criminal cartel offence to all current and former employees of a business benefitting from Type C leniency.
- 4.10 **For businesses benefitting from Type C leniency the OFT may grant individual immunity to specific individuals.**
- 4.11 The OFT will provide guaranteed protection from CDOs for all cooperating current and former<sup>10</sup> directors of a business benefitting from Type C leniency.

<sup>10</sup> 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.

## 5 NO-ACTION LETTERS – WHEN AN INDIVIDUAL APPROACHES THE OFT

- 5.1 Individuals who have been involved in cartel activity do not need to wait for their employer to make an approach to the OFT. **A no-action letter may be granted when an individual makes an approach for criminal immunity on their own account.**
- 5.2 Individual immunity in this guidance refers to a situation where one or more individuals are granted criminal immunity but not as part of a 'blanket' grant of criminal immunity to all current and former employees and directors of a business which qualifies for Type A or Type B leniency. Individual immunity is most likely to be granted when an individual makes an approach for criminal immunity on their own account, but it may also be granted to one or more individuals where their employer or former employer business qualifies for Type B or C leniency.
- 5.3 Individuals in Type A circumstances,<sup>11</sup> will be guaranteed a no-action letter if required, or comfort letter,<sup>12</sup> subject to meeting the conditions for leniency.
- 5.4 Whether an individual will be granted a no-action letter in any other circumstances will depend upon a range of factors. These will include when the individual has approached the OFT and how much information the individual can provide the OFT about the cartel activity in question.
- 5.5 The OFT is always prepared to engage in confidential discussions, on a 'no-names basis' if necessary, in order to assist an individual or business in determining whether leniency is available.

<sup>11</sup> Which is to say, they are the first participant of a cartel to come forward, whether a business or an individual, and they provide the OFT with relevant information relating to a cartel **before** the OFT has begun a CA98 or EA02 investigation of the cartel activity (provided that the OFT does not already have sufficient information to establish the existence of the alleged cartel activity).

<sup>12</sup> A comfort letter will state that the OFT has decided not to commence a criminal investigation. See paragraph 7.5 of this Quick Guide.

## 6 NO-ACTION LETTERS – CONDITIONS

### Conditions required for a no-action letter to be issued<sup>13</sup>

6.1 The issue of a no-action letter in any situation will be subject to the following conditions being met by the individual:

- Admission - an individual must admit participation in the cartel offence including dishonesty.<sup>14</sup>
- Information - an individual must provide the OFT with all the non-legally privileged information, documents and evidence available to them regarding the cartel activity.
- Co-operation - an individual must co-operate with the OFT throughout the investigation and until the conclusion of any criminal proceedings, arising as a result of the investigation.<sup>15</sup>
- Termination - an individual must cease involvement in the cartel activity from the point when it is disclosed to the OFT.
- Coercer Test- to gain immunity from prosecution, an individual must not have coerced another business to take part in the cartel.

### Revocation of a no-action letter

6.2 A no-action letter may be revoked if the individual has been found not to have complied with the conditions above, or has knowingly

<sup>13</sup> Where the OFT considers 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.

<sup>14</sup> 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.

<sup>15</sup> An individual may also be required to co-operate with a corresponding CA98 investigation.

or recklessly provided information to the OFT which is false or misleading.

- 6.3 If the OFT is considering revoking a no-action letter, the recipient will be notified in writing and given a reasonable opportunity to explain his or her non-compliance, and if appropriate remedy the breach.

## **7 GETTING A NO-ACTION LETTER - PRACTICALITIES**

- 7.1 **An individual who believes that they may require a no-action letter, or a business acting on behalf of its employees (current or former) or their legal representatives should call the Leniency Enquiry Line on 0207 211 8833.**
- 7.2 The OFT is always willing to discuss the availability of leniency for businesses and/or no-action letters for individuals, on a confidential, 'no-names' or even 'hypothetical' basis.
- 7.3 The OFT will give an initial indication as to whether the OFT may be prepared to issue a no-action letter.
- 7.4 If the OFT may be prepared to issue a no-action letter, the individual will be interviewed. On completion of the interview, the OFT will advise the individual whether it is prepared to issue a no-action letter.
- 7.5 If the OFT considers that after analysis of the evidence there is insufficient evidence to implicate the individual in the cartel offence and therefore the OFT does not consider that there is any risk of prosecution by the OFT or any other agency, it will issue a 'comfort letter'. A comfort letter will state that the OFT has decided not to commence a criminal investigation, having regard to the nature of the cartel behaviour reported, the role of the individuals and the overall public interest.
- 7.6 The OFT will generally determine whether to issue a no-action or comfort letter near to the conclusion of the criminal investigation.

### **What if a no-action application fails?**

- 7.7 If a no-action application fails, the OFT will **not** use any admission made by the individual as evidence against that individual unless:
- where a no-action letter has been issued, the individual applying for immunity from prosecution knowingly or recklessly provides information that is false or misleading, or



- where a no-action letter has been issued, it is revoked.

**When will a no-action letter cease to be available?**

7.8 A no-action letter will not be available to an individual once that person has been charged with the criminal cartel offence under EA02.

## **8 INDIVIDUAL IMMUNITY IN SCOTLAND**

- 8.1 Guarantees of immunity from prosecution cannot be given by the OFT in relation to alleged criminality wholly or partly in Scotland/that falls to be prosecuted in Scotland, as the Lord Advocate has the final say on such matters. However, the OFT would bring to the Lord Advocate's attention the cooperation being offered by individuals, or which has been provided. Where a would-be applicant is concerned to know the likely approach of the Scottish prosecution authorities, the OFT will, if desired, contact those authorities in order to seek a view from them about whether individuals might be exposed to prosecution.
- 8.2 The OFT is, as at the date of publication, in discussions with the Serious and Organised Crime Division of the Crown Office, Scotland regarding the renewal of their Memorandum of Understanding in relation to cooperation in the investigation and prosecution of cartel offences that have been committed within the jurisdiction of the Scottish Courts (including the handling of leniency applications).<sup>16</sup>
- 8.3 The OFT recommends that applicants who consider their application may potentially require consideration under the Memorandum of Understanding should inform the OFT of this at the earliest opportunity.

<sup>16</sup> OFT546, June 2009. The Memorandum of Understanding has been renewed annually since 2009.