

Applications for leniency and no-action in cartel cases

**OFT's detailed guidance on the
principles and process**

July 2013

OFT1495

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FOREWORD

The OFT's leniency policy enhances and facilitates its enforcement actions against cartel conduct. Not only does the policy help to uncover cartels that would otherwise go undetected, it also encourages firms that have been involved in wrong-doing to provide first-hand, direct 'insider' evidence and to cooperate proactively in the bringing of successful enforcement action. In return, firms who fully and actively assist us in pursuing those purposes may benefit from immunity from, or a reduction in, financial penalties. Similarly, cooperating individuals receive protection from personal sanctions in the form of immunity from criminal prosecution and/or protection from director disqualification proceedings.

The benefits of offering leniency as a key part of anti-cartel enforcement action may be summarised as:

- Detection – promoting the discovery of cartels, which are difficult to detect by customers, competitors, enforcement agencies or other outsiders.
- Desistence – causing cartels to cease operation, as termination of the cartel activity is a condition for obtaining lenient treatment.
- Deterrence – making sanctioning of cartels more likely, and thereby making cartel membership less attractive and destabilising cartel arrangements.
- Redress – facilitating compensation for victims, through publicity of otherwise undetected cartels and a greater likelihood of infringement decisions that can be used as the basis for compensation claims.

Taking all of these together, the OFT's leniency policy serves to improve the level of compliance with competition law. Although an offer of immunity or other lenient treatment to those who have infringed the law is not undertaken lightly, it is justified by the greater benefits to the community and the economy. More effective compliance with competition law will increase competition, leading to lower prices, better service, higher quality, greater innovation and greater efficiency.

1 INTRODUCTION

- 1.1 This guidance sets out the detail of how the OFT will handle applications for civil leniency for undertakings (leniency agreements) and criminal immunity from prosecution for individuals (no-action letters). This document is primarily intended for legal practitioners, as it aims to provide the reader with a thorough understanding of the OFT's approach to leniency – the overarching principles, as well as the detail.¹
- 1.2 The guidance is structured to follow the natural progress of a leniency application and subsequent investigation and enforcement action. The application process is summarised in two overview charts which appear at the end of this chapter: one for applications made before the OFT is investigating and the other for situations where the applicant is already aware of an OFT investigation into the relevant cartel activity.²
- 1.3 The guidance covers requirements and procedures applicable to both civil investigations into Competition Act 1998 (CA98) infringements by undertakings and criminal investigations into cartel offences by individuals under the Enterprise Act 2002 (EA02). Applicants should note from the outset that either or both types of investigation may arise, regardless of whether the application is made by an undertaking or an individual. Leniency applicants will be required to cooperate with all relevant enforcement action. Undertakings and their advisers will therefore need to be familiar with, and follow, guidance and requirements relating to criminal investigations and prosecutions in any case where the cartel activity is potentially criminal in nature.³ Similarly, individual no-action letter applicants may be required to cooperate with civil investigations under the CA98.

¹The OFT's general policy as to leniency (immunity from, or reductions in, penalties in civil cases) is set out in the OFT Penalty Guidance *OFT's guidance as to the appropriate amount of a penalty* (OFT 423, September 2012). The availability of criminal immunity is established in section 190(4) of the EA02.

² Cases where the OFT has commenced an investigation but then receives a related leniency application from an applicant who was not aware of that investigation are expected to be rare. In such cases, the OFT will be able to advise the applicant of the appropriate procedure.

³ It is important to realise that the criminal activity could have been undertaken by an individual in another cartel member.

- 1.4 The interaction between civil and criminal procedures, and the variety of different circumstances that can give rise to leniency applications, mean that this is a complex topic. We aim to strike an appropriate balance in this guidance between detailed guidance offering certainty and maintaining sufficient flexibility to adapt the policy as appropriate in individual cases, for example where novel points or circumstances arise. It should always be remembered that would-be applicants and their advisers who are unsure about particular aspects of the policies can seek further guidance – if necessary on a no-names basis. See further paragraph 3.3.
- 1.5 This guidance is not published pursuant to any statutory obligation and should not be read as if it were akin to a statutory enactment. The OFT's policy in relation to the handling of leniency applications is evolving and the OFT reserves the right to depart from this guidance, where it considers it appropriate to do so in all the circumstances of the particular case. Furthermore, this guidance note does not attempt to address in advance every conceivable situation which might arise. Where there are particular issues of the policy which are of crucial significance to an applicant or would-be applicant for leniency and these are not considered to have been directly and specifically addressed in this guidance, or it is important for the applicant to be certain that a particular aspect of the note accurately reflects the OFT's current thinking, it is incumbent on the applicant to raise the matter as early as possible with the OFT so that specific guidance can be given.
- 1.6 The reader should take particular note of the definitions used. A glossary of terms is included at the end of this guidance.
- 1.7 This guidance note and the other OFT leniency documents are all available on the OFT's website (www.of.gov.uk).

Key features of the UK leniency system

- 1.8 The key features of the UK leniency system are:
- the availability of confidential guidance on a no-names basis about 'hypothetical' cases on request
 - the ability of legal advisers to determine whether immunity is available for their client prior to the client's identity being revealed

- the availability of 'markers' for leniency pending formal agreement on the scope of leniency protection
- guarantees of criminal immunity for all cooperating current and former employees and directors in cases where the applicant informs the OFT of cartel activity that it was not previously investigating
- the availability of immunity or a reduced penalty for undertakings and/or employees/directors where an applicant is the first to approach the OFT but there is already a pre-existing investigation
- the availability of a reduction of any penalty which might be imposed on applicants who are not the first to apply and the possibility that some cooperating current or former employees and directors in such circumstances will be granted individual immunity
- a commitment that the OFT will not apply for a Competition Disqualification Order against any current or former⁴ director of a company which benefits from leniency in respect of the activities to which the grant of leniency relates⁵
- the possibility of oral applications, where appropriate
- the possibility of applications by undertakings or by individuals
- a high threshold, both as to the circumstances and standard of proof, for finding an undertaking or individual to be a coercer and therefore ineligible for corporate and/or criminal immunity.

1.9 In addition to the above, the OFT hopes that the following will also be considered to be key features of the UK leniency regime:

- a reputation for fair application of the guidance
- the availability of detailed guidance, with a view to enhancing clarity, transparency and certainty for applicants

⁴ The OFT may consider applying for a CDO against a former director who has been removed or otherwise ceases to act as a director because of a breach of competition law and/or opposing the relevant leniency application. For further guidance *Director disqualification orders in competition cases* (OFT510, June 2010) paragraph 4.14.

⁵ Provided that the director cooperates with the leniency process. For further guidance see *Director disqualification orders in competition cases* (OFT510, June 2010) paragraph 4.14.

- accessibility and approachability, and
- erring in favour of the applicant where it is genuinely a 'close call'.

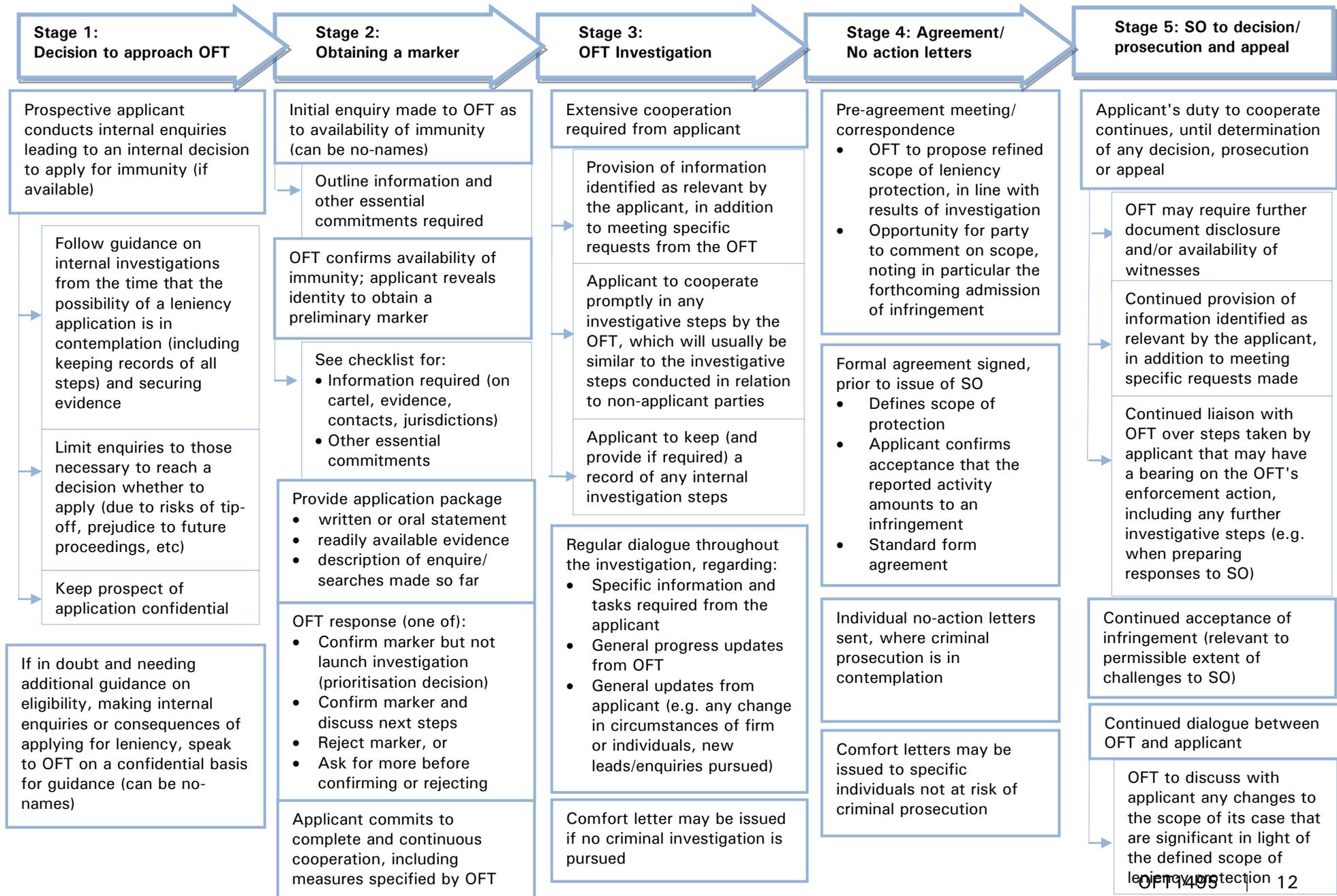
Overview of types of leniency and the application process

- 1.10 Table A below summarises the different types of leniency that are available, by reference to the stage at which the application is made, the level of information provided, the conditions of leniency and the level of protection available. This is a quick reference guide and not intended as a substitute for the fuller guidance in Chapter 2 of this guidance. Note that the table relates primarily to applications by undertakings, but individuals can also apply other than as part of a corporate application.
- 1.11 Overview Charts A and B below illustrate the processes to be followed when applying for leniency. They refer principally to applications by undertakings, although they would also be a good starting point for any individuals contemplating making an application separately from a corporate application.
- 1.12 Overview Chart A shows the processes for making applications where the applicant is not aware of the OFT having already commenced an investigation into the cartel activity or closely related activity. Overview Chart B relates to the situation where the applicant is already aware of an OFT investigation.

Table A - Types of leniency (summary)

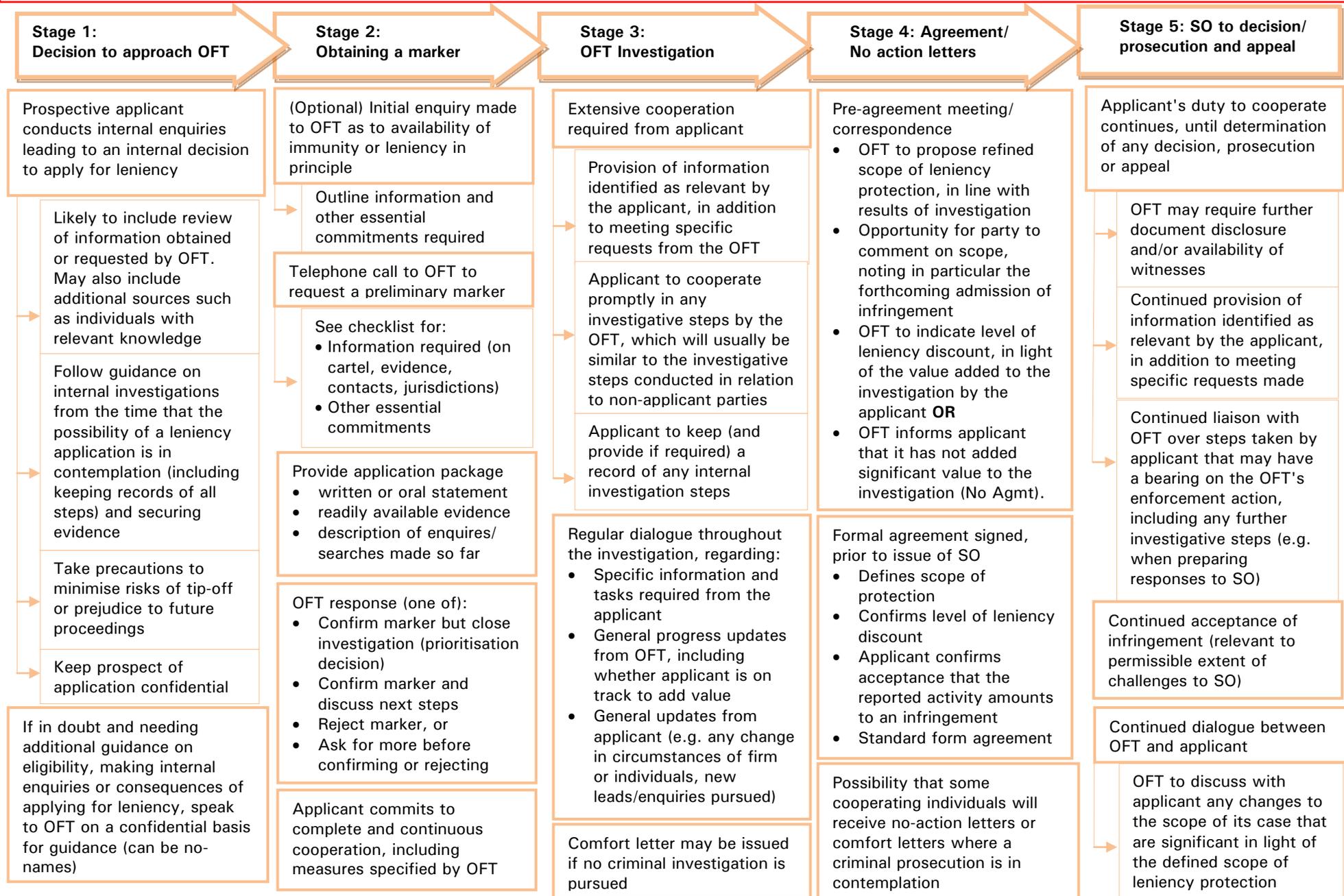
Stage of application	Minimum information	Conditions (for undertaking and any individuals seeking to benefit)	Level of protection
<p>'Type A'</p> <ul style="list-style-type: none"> • First applicant • No pre-existing investigation 	<p>Information must give the OFT a sufficient basis for taking forward a credible investigation.</p>	<p>(a) Accept participation in a cartel activity (which by definition is a breach of the law).</p> <p>(b) Provide the OFT with all relevant information, documents and evidence.</p> <p>(c) Maintain continuous and complete cooperation throughout the investigation.</p>	<ul style="list-style-type: none"> • Guaranteed corporate immunity from financial penalties. • Guaranteed 'blanket' immunity from criminal prosecution for individual employees or officers. • Guaranteed director disqualification protection.
<p>'Type B'</p> <ul style="list-style-type: none"> • First applicant • Pre-existing investigation, but prior to statement of objections 	<p>Information must add significant value to the OFT's investigation.</p>	<p>(d) Refrain from further participation in the cartel activity.</p> <p>(e) Must not have coerced another to take part in the cartel.</p>	<ul style="list-style-type: none"> • Discretionary corporate immunity from financial penalties, or reductions of up to 100%. • Discretionary immunity from criminal prosecution for individual employees or officers, which may be 'blanket' or for some but not all individuals. • Director disqualification protection, if corporate immunity or a leniency reduction is granted.
<p>'Type C'</p> <ul style="list-style-type: none"> • Second or later applicant (or coercer) • Prior to statement of objections 	<p>Information must add significant value to the OFT's investigation.</p>	<p>Conditions (a), (b), (c) and (d) as above.</p>	<ul style="list-style-type: none"> • Discretionary corporate leniency reductions in financial penalties of up to 50%. • Discretionary immunity from criminal prosecution for specific individuals. • Director disqualification protection if a corporate leniency reduction is granted.

Overview Chart A: Immunity applications under OFT's leniency policy (no pre-existing investigation)



Overview Chart B: Immunity/Leniency applications under OFT's leniency policy (after commencement of an investigation)

Any grant of corporate immunity/leniency reduction or of individual immunity (whether for specific individuals or all employees/officers of an applicant), is at the OFT's discretion.



2 ELIGIBILITY FOR DIFFERENT TYPES OF LENIENCY

Cartel activity

- 2.1 Leniency is available to undertakings and individuals who have participated in cartel activity.
- 2.2 Cartel activity is defined for the purposes of the OFT's leniency policy for undertakings as agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing.⁶ The OFT notes that, by definition, cartel activities have as their **object** the prevention, restriction or distortion of competition and therefore neither the applicant nor the OFT will be required to assess the actual **effects** of the cartel activity before proceeding with an application.
- 2.3 Leniency in relation to vertical arrangements⁷ is limited to price fixing (for example, resale price maintenance cases). The OFT's leniency policy does not cover other stand-alone vertical restrictions of competition as these tend to be (at least to an extent) visible on the market and therefore over time self-detecting. However, where vertical behaviour might be said to be facilitating horizontal cartel activity, leniency is available in principle to the parties involved in such behaviour (including the facilitator), as participation in such cartel activity can lead to exposure to significant sanctions.
- 2.4 For individuals, no-action letters can cover any type of activity that would amount to the criminal cartel offence under section 188 EA02.
- 2.5 The list below contains non-exhaustive examples of cartel activities for which leniency has in the past been granted:

⁶ See paragraph 3.1 of the OFT's the revised Penalty Guidance *OFT's guidance as to the appropriate amount of a penalty* (OFT 423), September 2012.

⁷ Vertical agreements are agreements between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain (for example, between a supplier and a distributor). They are capable of infringing Article 101 of the TFEU and/or the Chapter I prohibition but do not fall within the scope of the criminal cartel offence.

- a) Agreements between competitors to coordinate the prices for the supply of goods or services, including coordination of the extent of price rises or elements of a price as well as agreeing absolute or total prices.
- b) Direct or indirect communication of specific, not publicly available, information regarding future pricing intentions between two or more competitors in a market. Indirect communication can include exchanges of information between direct competitors via one or more companies in a different level of the supply chain (for example a common supplier of goods or services).
- c) Various forms of bid-rigging (also known as collusive tendering), including (but not limited to) bid rotation, cover pricing (which occurs when a potential bidder submits a price obtained from a competitor in a tender process which is not designed to win the contract but to give the appearance of competition) and agreements to pay compensation to unsuccessful competing bidders in a tender process.
- d) Arrangements between suppliers and retailers of a good or services, which restrict the ability of the retailers to determine their retail prices by reference to the prices charged by different suppliers.
- e) Arrangements to restrict marketing or sales activities of competing undertakings to particular territories or groups of customers.

2.6 The OFT will have regard to the case law of the UK and EU courts on the interpretation of price-fixing, bid-rigging (collusive tendering), output restrictions or quotas and market sharing or market-dividing.

Conditions for the grant of leniency

2.7 In order to benefit from leniency from financial penalties or immunity from criminal prosecution, and subject to the limitations on availability described below, an applicant must meet the following conditions, each of which will apply throughout the application process and until final determination of any prosecution, infringement decision and resulting appeal proceedings.

Condition (a) - Admission

Applicants that are undertakings must accept that the undertaking participated in a cartel activity (which by definition includes an

acceptance of an infringement of the law, see paragraph 2.2). Individual applicants must admit participation in the cartel offence under section 188 of the EA02.

Condition (b) – Information

The applicant must provide the OFT with all the non-legally privileged information, documents and evidence available to it regarding the cartel activity (see paragraphs 5.12 onwards).

Condition (c) – Cooperation

The applicant must maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action (including criminal proceedings and defending civil or criminal appeals) by the OFT arising as a result of the investigation (see Chapter 5 of this guidance).

Condition (d) – Termination

The applicant must refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the OFT (except as may be directed by the OFT) (see paragraphs 4.44 onwards).

Condition (e) – Coercer test

In relation to a grant of immunity,⁸ the applicant must not have taken steps to coerce another undertaking to take part in the cartel activity (see paragraphs 2.50 to 2.59).

Availability of different types of leniency

2.8 In the OFT's experience, applications from undertakings (on behalf of the undertaking and also its employees and directors) are much more common than applications from individuals. Accordingly, this chapter approaches the availability of leniency/immunity by dealing primarily with applications from undertakings, but noting any points relating to applications from individuals where relevant.

⁸ This condition does not apply to Type C leniency for undertakings.

Type A immunity

2.9 The first applicant to report and provide evidence of a cartel, when the OFT does not have a pre-existing investigation into the reported cartel activity and does not otherwise have sufficient information to establish the existence of the reported cartel activity, will be granted Type A immunity.

2.10 Type A immunity provides:

- guaranteed corporate immunity (that is, total immunity from financial penalties under CA98), together with
- guaranteed 'blanket' immunity from criminal prosecution for all cooperating current and former employees and directors of the undertaking (see paragraphs 2.38 to 2.40),⁹ and
- protection from director disqualification proceedings for all directors of the undertaking.¹⁰

in relation to the reported cartel activity.

2.11 The grant of Type A immunity is subject to the applicant meeting the conditions of leniency (see paragraph 2.7), including not having coerced another undertaking to take part in cartel activity. Where an undertaking has been a coercer only Type C leniency will be available (Condition (e) of paragraph 2.7, see also paragraphs 2.50 to 2.59 below). The information provided in relation to condition (b) must, as a minimum, give the OFT a sufficient basis for taking forward a credible investigation.

2.12 If the Type A applicant is an individual, he/she alone will be guaranteed immunity from criminal prosecution, but his/her employer undertaking

⁹ Though please see paragraphs 8.21 to 8.22 below with respect to criminal prosecutions in Scotland.

¹⁰ The OFT will not apply for a Competition Disqualification Order against any current or former director of a company which benefits from leniency in respect of the activities to which the grant of leniency relates. This applies provided that the director in question maintains complete and continuous cooperation with the OFT investigation and, in the case of a former director, the director has not been removed from office or otherwise ceased to act as a director as a result of his/her involvement in the breach of competition law. Note that this does not preclude a criminal court from making a Director Disqualification Order following a conviction for a cartel offence. Orders can be made in such cases without an application by the OFT.

and colleagues may be eligible for immunity or leniency protection as a Type B applicant (see footnote 11).

2.13 A pre-existing investigation will exist from the point where the OFT considers it has reasonable grounds to suspect cartel activity, such that it may conduct an investigation under one or both of section 192 of the EA02 and section 25 of the CA98, and has taken active steps in relation to that investigation. Active steps may be overt or covert and may or may not involve the use of statutory information gathering powers. Examples would include (but are not limited to) voluntary interviews of witnesses, inspections of premises (under Section 28 of the CA98 or Section 194 of the EA02) or preparing applications for warrants.

2.14 Type A immunity therefore ceases to be available if:

- the OFT has a pre-existing investigation into the reported cartel activity
- the OFT has previously received a leniency application regarding the reported cartel activity, whether from an undertaking or an individual, or
- the OFT has sufficient information to establish the existence of the reported cartel activity.

Type B immunity/leniency

2.15 The first applicant¹¹ to report and provide evidence of a cartel, when the OFT is conducting a pre-existing investigation into the reported cartel activity will be a Type B applicant.

2.16 Type B applicants will be eligible for:

- discretionary corporate immunity from penalties or reductions in penalty of anything up to 100 per cent, and/or
- discretionary criminal immunity for cooperating current and former employees and directors of the undertaking, which may be granted on a 'blanket' basis (see paragraphs 2.38 to 2.40), or for specific individuals, or for all employees other than named individuals, and

¹¹ Where the first applicant (Type A or B) is an individual, that individual's employer undertaking will be eligible to apply for Type B provided it remains the first **undertaking** to apply.

- protection from director disqualification proceedings¹² for all directors of the undertaking (which will be automatic if corporate leniency or immunity is granted),

in relation to the reported cartel activity.

- 2.17 The grant of any form of immunity or reduction in penalty to a Type B applicant is subject to the applicant meeting the conditions of leniency (see paragraph 2.7), including not having coerced another undertaking to take part in cartel activity. Where an undertaking has been a coercer only Type C leniency will be available (Condition (e) of paragraph 2.7, see also paragraphs 2.50 to 2.59 below). The information provided in relation to condition (b) must, as a minimum, add significant value to the OFT's investigation, that is, it must be information which genuinely advances the investigation.
- 2.18 The OFT's exercise of its discretion to grant immunity or a reduction in penalties will depend on its assessment of where the public interest lies in the particular case. In particular, the OFT will perform a balancing exercise, assessing the benefits of gaining additional evidence by reason of a grant of leniency against the disbenefit of granting immunity or a reduction in penalties after an investigation has already commenced, resources have been expended and after the OFT may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.
- 2.19 The grant of corporate immunity/reduction in penalties will be assessed independently from the grant of any individual criminal immunity, noting in particular that there may be differences in the extent of information already available to us in relation to the civil infringement and the related criminal offence. The public interest in granting immunity from fines may not extend to immunity from criminal prosecution for some or all individuals.
- 2.20 Although Type B does not offer guaranteed immunity, Type B applications made at an early stage of the OFT's investigation are inherently more likely to result in the grant of corporate immunity and/or criminal immunity than late-stage Type B applications or Type C applications.

¹² See above footnote 10.

- 2.21 Moreover, where the OFT has a pre-existing investigation which relates to a suspected infringement of the CA98 but not a criminal cartel offence, the OFT would normally expect to grant 'blanket' criminal immunity (or issue a comfort letter confirming that the case is not being investigated criminally). Similarly, where the OFT has only a pre-existing criminal investigation, it would normally expect to grant corporate immunity.
- 2.22 In practice, approaches for Type B immunity are most likely to be triggered by inspections.¹³ The OFT will, where possible, give prospective applicants an indication of whether corporate immunity and/or blanket criminal immunity are in principle available before the undertaking's identity is revealed. Would-be applicants therefore have nothing to lose by enquiring about the availability of Type B immunity after the commencement of an investigation. Applicants should however note that there may be some delay between the initial inspections and the OFT being in a position to assess properly whether there is a public interest in granting immunity. It is therefore for applicants to decide whether to wait for a firm indication from the OFT as to whether immunity is available, or to avoid the risk of others applying first by making an early application for Type B immunity or leniency.
- 2.23 The grant of any form of immunity or reductions in penalties to Type B applicants is discretionary in all circumstances. However, Type B protections will definitely cease to be available where:
- the OFT has previously received a leniency application regarding the reported cartel activity from an undertaking, or
 - the OFT has sufficient information to establish the existence of the reported cartel activity.

Type C leniency

- 2.24 In circumstances where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency is available. The grant of Type C leniency is always discretionary.

¹³ On-site inspections under sections 27 or 28 of the CA98 or sections 193 or 194 of the EA02.

- 2.25 In the Type C position, the applicant will be eligible for:
- discretionary reductions in corporate penalties of up to 50 per cent, and/or
 - discretionary criminal immunity to specific individuals, and
 - protection from director disqualification proceedings¹⁴ for all directors of the undertaking (if a reduction in corporate penalty is granted).
- 2.26 The grant of Type C leniency is subject to the applicant meeting the conditions of leniency (see paragraph 2.7), save for Condition (e) (coercer test). The information provided in relation to condition (b) must, as a minimum, add significant value to the OFT's investigation, that is, it must be information which genuinely advances the investigation.
- 2.27 The OFT's exercise of its discretion to grant leniency will depend on its assessment of where the public interest lies in the particular case. In particular, the OFT must perform a balancing exercise, assessing the benefits of gaining additional evidence by reason of a further grant of leniency against the disbenefit of granting leniency to multiple parties in a single investigation, when the OFT may already have some probative evidence and further fruitful lines of enquiry to pursue and already has the cooperation of at least one applicant.
- 2.28 The grant of a reduction in corporate penalty will be assessed independently from the grant of any individual criminal immunity, noting that there may be differences in the extent of information already available to the OFT in relation to the civil infringement and the related criminal offence. The public interest in granting a reduction in fines may not extend to immunity from criminal prosecution for any individuals.
- 2.29 'Blanket' criminal immunity, that is, immunity for all cooperating current and former employees and directors at risk of prosecution for the cartel offence, will not be granted in Type C leniency cases, but comfort letters may be available in cases not investigated criminally.
- 2.30 However, the OFT will consider, on an individual-by-individual basis, whether one or more current or former employees or directors of an undertaking qualifying for Type C leniency should be granted individual

¹⁴ See footnote 10.

immunity. Whether the OFT will grant individual immunity will depend on an assessment of the overall public interest.

- 2.31 In circumstances where the OFT has sufficient information to establish the existence of the reported cartel activity in relation to an applicant, such that it could prove the involvement of that applicant in cartel activity, the OFT is highly unlikely to exercise its discretion to grant leniency, but may do so where it considers that the public interest is best served by using information and cooperation from the applicant to prove the participation by others in the cartel.
- 2.32 The OFT will, where possible, give prospective applicants an indication of whether Type C leniency reductions and/or individual immunity are in principle available at the time of the application. However, depending on the stage at which the application is made and the extent of information already in the OFT's possession, it is possible that the OFT will only be able to assess whether the applicant could potentially add significant value to the investigation once it has fully assessed both the information already gathered from other sources and that put forward by the applicant, and hence it may not be able to confirm in principle whether or not leniency is available until a late stage.¹⁵

When can individual immunity be granted?

- 2.33 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 an undertaking in a Type A or Type B case.¹⁶
- 2.34 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 undertaking qualifies for Type B or C leniency.
- 2.35 Individuals in Type A circumstances will be guaranteed a no-action letter if they need it, or comfort letter, subject to meeting the conditions for leniency (see paragraph 2.7).

¹⁵ Paragraphs 7.14 to 7.18 provide guidance on the use of information provided by an applicant who, despite having acted in good faith, has failed to qualify for leniency.

¹⁶ Blanket immunity may be granted in some Type B cases. In others individual immunity may be granted to specific individuals, or for all employees other than named individuals.

- 2.36 If there is already a pre-existing investigation, but the individual self-reports to the OFT about the cartel activity before any other individual or undertaking, the individual may still be granted individual immunity provided they add significant value to the OFT's investigation, subject to meeting the conditions for leniency (see paragraph 2.7). However, it is important to understand that the OFT always retains a residual discretion in such cases and will conduct a public interest assessment, weighing up the benefits of gaining additional evidence by reason of a grant of immunity against the disbenefit of making an immunity grant after an investigation has already commenced, resources have been expended and after the OFT may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.
- 2.37 The ability of an individual to apply for individual immunity independently of an undertaking, and before the undertaking has itself applied for immunity, is one of the key reasons why undertakings who discover potential wrongdoing should promptly make a Type A immunity application and not postpone it in the hope of being able to make a successful Type B immunity application once an investigation has started. Furthermore, undertakings should be aware that individuals may now also seek to take advantage of the OFT's informant reward programme to report cartel conduct which their employer has failed to report.¹⁷

'Blanket' criminal immunity

- 2.38 It is **not** a pre-condition for gaining a marker for Type A immunity that the applicant produces an up-front list of names of its current and former employees and directors who may be implicated in the cartel. Rather, where an undertaking benefits from Type A immunity, it can be assumed with certainty that any current or former employee or director of the undertaking, wherever they are in the world and whatever their precise role in the cartel activity, will receive a no-action letter if they would otherwise be at risk of prosecution for the cartel offence or an individual comfort letter if appropriate.¹⁸ Furthermore, the same principle applies to blanket immunity that the OFT has granted in Type B cases.

¹⁷ See '*Rewards for Information about cartels*' on the OFT's website at www.of.gov.uk.

¹⁸ See paragraphs 8.14 to 8.16 below that set out the way in which the OFT will decide whether individuals receive no-action letters or, alternatively, comfort letters.

- 2.39 Where an individual benefitting from blanket immunity would otherwise be at risk of prosecution for the cartel offence and is therefore eligible for a no-action letter, the individual must meet the conditions for leniency set out at paragraph 2.7 above, including cooperation with the OFT's investigation, or they will lose the benefit of the 'blanket' immunity.
- 2.40 References to employees and directors throughout this guidance should also be read as including other officers of the company, even where they are not technically directors or employees, such as company secretaries.

Cessation of availability of leniency generally

- 2.41 The OFT will not accept leniency applications from undertakings after the OFT has issued a statement of objections in relation to the reported cartel activity. The OFT will not accept immunity applications from an individual after that individual has been charged with a cartel offence in relation to the reported cartel activity.
- 2.42 In exercising its discretion in relation to the grant of immunity or leniency in cases where it has a pre-existing investigation into cartel activity, the OFT may in some cases conclude that it will no longer accept any further leniency applications.
- 2.43 This may be because the OFT considers that it already has sufficient information to establish the infringement or offence in relation to all relevant parties, or that any additional information is unlikely to add significant added value such as to justify the resources necessary to handle the application, or that it would not be a priority for the OFT to extend the investigation beyond its existing scope.

Guidance on the likelihood of criminal enforcement

- 2.44 Not all cases of cartel activity will involve the commission of any offence, and even where an offence has been committed the OFT may determine that, in all the circumstances, it is not appropriate to commence a criminal investigation. 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.
- 2.45 The OFT's thinking on which cartel cases it will be appropriate to investigate criminally will continue to evolve as the EA02 regime

becomes more established. For example, in recent years, it has become common for the early stages of cartel investigations to be carried out with a view to using both criminal and civil enforcement powers.

- 2.46 The prime consideration will be the extent to which there is likely to be evidence that one or more individuals behaved dishonestly. It is important to note that the individuals who acted dishonestly may be employees of a cartel member other than the applicant.¹⁹
- 2.47 Additionally, the factors set out in the OFT's published prioritisation principles such as the extent of consumer detriment will also be taken into account.²⁰ In cartel cases which have had an impact on a number of EU member states, it may be that unless there is a significant relative impact on the UK and/or the evidence for, or organisation of, the cartel is relatively 'concentrated' in the UK, that the OFT will conclude that action by the Commission under Article 101 of the TFEU alone would be more appropriate. However, each case will obviously turn on its own facts.
- 2.48 A potential applicant who is concerned about the likelihood of a criminal investigation can provide details of the relevant conduct to the OFT on a 'no names' basis (see further paragraphs 4.1 onwards), and the OFT may be able to give an assurance that criminal enforcement would not be in contemplation in the scenario given.
- 2.49 In cases where the OFT decides only to undertake an investigation under the CA98 or chooses not to investigate at all, it will not generally issue no-action letters to any individuals. Instead, if requested, a comfort letter will be sent to the undertaking qualifying for immunity and expressed to apply to all current and former employees of the undertaking.²¹ The 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. The

¹⁹ 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 this amended offence comes into force, 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.

²⁰ See *OFT Prioritisation Principles* (OFT 953, October 2008).

²¹ This only applies in Type A and Type B immunity situations.

OFT is satisfied in the light of experience that a comfort letter in these circumstances will be effective in achieving its objectives.

The application of the coercer test

- 2.50 Undertakings who have taken steps to coerce another undertaking to take part in the cartel activity are not eligible for corporate immunity (whether Type A or Type B) but can receive a maximum reduction in penalty of 50 per cent for Type C leniency.
- 2.51 It is always possible to contact the OFT for no-names confidential guidance about whether the bar on granting a coercer immunity may be an issue in a prospective application. The OFT has already given such guidance in past cases and then received successful immunity applications. The OFT believes the coercer bar will not lead to a significant number of refusals to grant immunity. The OFT has, at the time of the publication of this guidance never refused corporate immunity on coercer grounds.
- 2.52 The OFT does not believe that it would be fruitful to develop a detailed definition of 'coercer', but there must be evidence of clear, positive and ultimately successful steps from a participant (that is, the coercer) to pressurise an unwilling participant to take part in the cartel. The bar is high in relation to both the type of behaviour which will be regarded as coercive and the evidence necessary to prove that behaviour.
- 2.53 For example, conduct may amount to coercion 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),²² or
 - 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.

²² See paragraphs 2.2 and 2.3 above.

- 2.54 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 term contracts in a resale price maintenance case, even where there is a significant inequality of bargaining power.
- 2.55 Even if an undertaking were to lose eligibility for corporate immunity as a result of finding out subsequent to its initial application that it had been a coercer:
- it would still be eligible for up to a 50 per cent reduction in any financial penalty (Type C leniency), and
 - the undertaking's current and former employees or directors (except for the 'rogue' coercing employee(s) or officer(s)) would remain eligible for criminal immunity.²³

The coercer test as it applies to individuals

- 2.56 The coercer test for an individual under the no-action policy is fully aligned with that for an undertaking seeking corporate immunity.
- 2.57 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 criminal immunity on the coercer ground, save in the exceptional circumstance of an employee/director somehow enjoying a position of power independent of his/her position within the undertaking, who used that power to coerce another undertaking.
- 2.58 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 criminal immunity on coercer grounds.

²³ See also paragraph 2.57.

2.59 The OFT has, at the time of the publication of this guidance never had cause to refuse criminal immunity on the basis of the coercer test.

3 BEFORE APPLYING FOR LENIENCY

- 3.1 The OFT recognises that firms and individuals will want and need to consider carefully the decision whether to apply for leniency and that for firms, such a decision will ordinarily be made at a very senior level. The OFT appreciates that potential leniency applicants require sufficient information on which to base such a decision. This chapter sets out certain important considerations and guidance which firms, individuals and their advisers should have regard to before applying for leniency. Many of these matters will affect the OFT's ability to take effective enforcement action as a result of the leniency application. Disregarding these issues so that the OFT's own investigation might risk being prejudiced may therefore result in the applicant putting itself in a position where it cannot meet the requirement of continuous and complete cooperation which is a condition of immunity or leniency.
- 3.2 Firms and individuals considering applying for leniency should therefore ensure that they are familiar with the conditions of leniency (see paragraph 2.7) and in particular the requirements for the provision of information and for complete and continuous cooperation with the OFT's investigation, that will follow any application (see Annexe D and Chapter 5).

Seeking confidential guidance

- 3.3 Undertakings or individuals thinking about applying for leniency may, before doing so, approach the OFT for confidential guidance. For the avoidance of doubt, such guidance may be sought on any aspect of the OFT's leniency and no-action programmes – not just in those situations referred to in this guidance note where specific reference is made to the option of seeking such guidance. Confidential guidance discussions would usually involve a discussion on a no-names basis about a given factual matrix (perhaps expressed 'hypothetically') with a view to the undertaking or individual obtaining comfort on an issue before deciding whether to make an application.
- 3.4 The OFT handles many such requests on a wide range of topics, covering, for example:
- a) whether certain evidence amounts to a concrete basis for suspicion of cartel activity, sufficient to secure a marker

- b) whether particular investigative steps by the applicant prior to making an application are appropriate or necessary to secure a marker (see also paragraph 3.8 to 3.13)
 - c) the OFT's preferred approach to briefing/interviewing employees in the company's own pre-application investigation
 - d) the OFT's preferred approach to ceasing participation in a particular cartel activity
 - e) whether particular arrangements fall within the definition of cartel activities, where there is genuine and reasonable doubt as to the characterisation of conduct, for example where there is an absence of legal precedent,²⁴ or
 - f) the OFT's proposed handling of particular factual scenarios that are not covered by this guidance.
- 3.5 Any person seeking confidential guidance on leniency from the OFT should ring the Leniency Enquiry Line on 0207 211 8833. Once the purpose of your call has been assessed, you will be transferred to an appropriate senior officer experienced in leniency cases.
- 3.6 The OFT will give its views, by which it will consider itself bound, provided the discussion is followed-up by an application within a reasonable time and provided the information given when the advice was sought was not false or misleading and there has been no material change of circumstance.
- 3.7 The OFT will not use information given in consequence of seeking confidential guidance for any other purpose. In the event that leniency is not applied for, or not subsequently granted to the undertaking or individual on whose behalf the guidance was sought, the OFT will not attempt to establish the undertaking's identity by a process of 'reverse engineering'.

²⁴ As a general matter, it is for businesses and their advisers to self-assess their compliance with competition law. The OFT may decline to give guidance in circumstances when it considers that the caller is seeking general comfort on the OFT's assessment of conduct rather than genuinely with a view to making a leniency application.

Conducting internal investigations

- 3.8 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. The OFT only requires that undertakings act reasonably, reducing the risks as best they can having regard to all relevant considerations. The OFT accepts that what is reasonable for these purposes may depend upon the circumstances of the case. Undertakings can be guided by the established rules of evidence, particularly as they apply to criminal proceedings, and may wish to take advice from a criminal lawyer for this purpose.
- 3.9 Even where it appears that a criminal investigation is unlikely to result, potential applicants for leniency are asked to have regard to the importance of internal investigations being carried out with appropriate care.
- 3.10 Annexe C provides important guidance on the conduct of internal investigations. This sets out the steps and precautions the OFT expects applicants to take, with respect to:
- minimising the risk of 'tipping off' other parties to cartel activity
 - preserving and securing electronic evidence
 - preserving and securing physical evidence
 - interviewing witnesses, and
 - keeping a record of the investigative steps taken.²⁵
- 3.11 When conducting an internal investigation before making a leniency application, applicants should also bear in mind that the OFT sets a relatively low evidential threshold for the gaining of a marker. All that is necessary is to establish a concrete basis for a suspicion of cartel activity and a demonstration of a genuine intention to confess. Leniency applicants are encouraged to approach the OFT as early as possible. However, the OFT does accept that some other agencies set a higher

²⁵ Except in the case of an oral application, see paragraph 4.31.

threshold and that a more significant investigation may be necessary in order to make leniency applications in multiple jurisdictions. Potential applicants who are concerned about the interaction between the OFT's leniency application threshold and those in other jurisdictions can approach the OFT for confidential guidance.²⁶

- 3.12 Experience has shown that the way in which a (prospective) applicant and its advisers conduct their internal investigations both prior to and following²⁷ an approach to the OFT for leniency is capable of having a substantial bearing on the success of the OFT's own subsequent investigations and enforcement action, especially where these include a criminal investigation with a view to a possible prosecution. For this reason, the way in which internal investigations are conducted by an applicant cannot be considered exclusively a matter for the applicant concerned. It is crucial to ensure that such internal investigations are conducted in a manner that minimises the risk of tipping-off persons involved in the cartel as well as to ensure that such investigations are not conducted in such a way as would risk diminishing the probative value of the evidence obtained in that investigation or any subsequent investigation by the OFT.
- 3.13 Except in the case of an oral application,²⁸ all leniency applicants will be expected to take a careful note of all the actions they have taken as part of an internal investigation, including the identities of any witnesses who were interviewed in the investigation process, the nature of the questions asked and the replies obtained. The note will need to be retained until the conclusion of any proceedings. A refusal or inability to do so may mean that the applicant is not meeting the conditions for leniency.
- 3.14 In addition to enabling the OFT to focus its own investigative steps or to direct the applicant in making further enquiries following the application,

²⁶ See paragraph 3.3 and following, above.

²⁷ There may be some cases (usually civil investigations under CA98) where the OFT may agree with the applicant, after grant of the marker, that the applicant and its advisers should conduct relatively extensive further enquiries including some of the interviews

²⁸ Oral applications are discussed in paragraph 4.31. This includes discussion of the circumstances in which the OFT may accept an oral application as well as the cooperation expected from the oral applicant.

there may be circumstances where the OFT will need to rebut arguments that an internal investigation has compromised the integrity of the OFT's own case, and the provision of a clear note explaining the steps taken in such an investigation will be invaluable for this purpose.

Application of legal privilege

- 3.15 The OFT will not as a condition of leniency **require** waivers of legal professional privilege (LPP) over any relevant information²⁹ in either civil or criminal investigations.³⁰
- 3.16 However, save where the position is uncontroversial and clear to the OFT's satisfaction, the OFT will ordinarily require a review of any relevant information in respect of which LPP is claimed, by an independent counsel (IC) selected, instructed and funded on a case by case basis by the OFT.³¹ An IC in such a situation will be instructed by the OFT to provide an independent opinion to the OFT on whether the relevant information in question is protected by LPP.³² Failure or refusal in such a situation to provide the relevant information in question to an IC could result in the withdrawal of the leniency marker or revocation of the leniency agreement (as the case may be), on the grounds of non-compliance with the duty of complete and continuous cooperation.³³
- 3.17 During the course of such a review by an IC, the relevant information in respect of which LPP is claimed will not be provided to the OFT. A copy of an IC's opinion to the OFT on the matter will be provided to the leniency applicant after it has been received by the OFT.

²⁹ See paragraph 5.12 below for a definition of 'relevant information'.

³⁰ The OFT does not rule out **inquiring** as to whether a leniency applicant may be prepared to waive LPP over certain material during the course of a possible criminal cartel prosecution. In such circumstances, it will be made clear that any refusal to waive LPP **will not** have any adverse consequences for the leniency application and furthermore, that granting such a waiver **will not** yield any additional leniency discount or any other advantage to the leniency applicant. Any such inquiry would be made for the purposes of clarity in a possible criminal cartel prosecution, so that the defence and the court can know as early as possible the leniency applicant's position with respect to LPP material.

³¹ An IC will be instructed on a case by case basis. Any IC instructed for the purposes of a case will be a lawyer who is not an OFT official and who is regarded by the OFT as having suitable expertise in LPP and disclosure issues. An IC will not be instructed by the OFT to advise on any aspect of the case in question other than the claims to LPP made by a leniency applicant.

³² The instructions will be disclosed to the leniency applicant after they have been sent to the IC.

³³ See paragraph 10.6 and following for a discussion of the process of withdrawal or revocation.

- 3.18 When the leniency applicant provides the relevant information to an IC, it may make observations to that IC on why it considers that the relevant information in question benefits from LPP. While the OFT will not be provided with the relevant information in question at this time, the OFT reserves the right to make its own observations to that IC, which will be provided to the leniency applicant. Such observations might set out the OFT's understanding of the relevant law of LPP, for example. An IC may, if requested by the OFT, provide the OFT with a copy of the leniency applicant's observations (or parts or a summary thereof), insofar as in that IC's view this would not undermine the claim to LPP or disclose the substance of the information in respect of which LPP is claimed. An IC will be instructed by the OFT to take both sets of observations into consideration when formulating their opinion.
- 3.19 Where an IC advises the OFT that the relevant information is not protected by LPP, then the OFT will expect that relevant information to be provided to it by the leniency applicant as a condition of leniency. On the other hand, where an IC advises the OFT that the relevant information benefits from LPP, then the OFT will not require it to be provided by the leniency applicant as a condition of leniency.
- 3.20 Where an IC advises the OFT that only parts of the relevant information are protected by LPP, then the leniency applicant will be required to provide the non-privileged relevant information to the OFT. To assist the leniency applicant in doing so, an IC will identify to the leniency applicant the precise parts which can be redacted. An IC may be asked by the OFT to confirm that only these redactions have been made.
- 3.21 If the leniency applicant refuses or fails in any such situation to provide to the OFT relevant information that in the opinion of the instructed IC does not benefit from LPP, the OFT may decide to withdraw the leniency marker or to revoke the leniency agreement on the grounds of non-compliance with the obligation to provide all relevant information.³⁴
- 3.22 The IC process does not absolve the leniency applicant from their duty of complete and continuous cooperation.³⁵ When considering whether

³⁴ See paragraph 10.6 and following for a discussion of the process of withdrawal or revocation.

³⁵ See, for example, paragraphs 5.4 and following for a discussion of the duty of continuous and complete cooperation. See also paragraphs 10.1 and following for a discussion of the concept of bad faith.

the leniency applicant has discharged this duty in relation to the IC process, the OFT will consider case-specific factors, for example whether the leniency applicant had made what, on any objective view, were manifestly baseless claims to LPP; whether a blanket claim was made in respect of a large volume of documents without sufficient specificity in relation to individual documents or categories of documents; and whether the leniency applicant appeared to be motivated by a desire to delay or otherwise prejudice the OFT investigation.³⁶

- 3.23 The conclusions of the IC will ordinarily be regarded as determinative as between the leniency applicant and the OFT. However, the OFT will expect the leniency applicant to make available for review by the court, if required, any material over which LPP is claimed but where the claim is disputed, in order that the court can conclusively determine whether LPP is properly claimed.

Maintaining confidentiality and securing evidence

- 3.24 In order to avoid 'tipping off' other parties to the reported cartel activity of the likelihood of an OFT investigation,³⁷ it is essential that applicants maintain complete confidentiality of the fact that they have applied for leniency, or even that a leniency application is in contemplation.
- 3.25 Disclosures to lawyers with a view to obtaining legal advice about an intended or actual leniency application are acceptable. In addition, where parallel leniency applications have been made in other jurisdictions, there is no prohibition on those jurisdictions' appropriate competition authorities being informed that an application to the OFT is either pending or has been made as the case may be.
- 3.26 The OFT sometimes receives requests from leniency applicants to make disclosures to banks and/or auditors after an application for leniency has been made. In general this is acceptable provided the OFT is consulted in advance as to whether and when such disclosures can be made and how much information can be given. The OFT may insist that a list be

³⁶ See paragraph 10.6 and following for a discussion of the process of withdrawal or revocation.

³⁷ Where an applicant 'tips off' other parties to the cartel activity, this may amount to 'bad faith' on the part of the applicant. See paragraph 10.1.

maintained of all individuals who have knowledge of the leniency approach and that such individuals be required to enter into confidentiality undertakings. See also paragraph 10.3 below.

- 3.27 Clearly the need for the utmost confidentiality in the circumstance described above arises from the OFT's desire to maintain the element of surprise should it wish to use its statutory powers such as those relating to inspections and searches. Once the OFT's investigation has reached the 'overt' stage, disclosures by leniency applicants of their status – including public disclosures – are less of an issue, but even at this stage the OFT must be consulted in advance about any proposed disclosure.
- 3.28 To this end, the OFT recommends that undertakings maintain lists of all current (and indeed former) employees or directors of an undertaking who are aware of the potential or actual³⁸ leniency application and have access to potentially relevant material and that each such individual be required to sign a declaration that they will observe strict confidentiality and that they will not remove, destroy, tamper with, or otherwise interfere with potentially relevant material. The OFT also recommends that potentially relevant material be secured, as far as possible, to avoid such destruction or tampering. For example, if mobile devices such as laptops or phones may contain relevant evidence, it may be sensible for the undertaking's lawyers or security department to take those promptly into secure custody so that they cannot be interfered with.

³⁸ Up until the time when the OFT's investigation becomes overt.

4 CHECKING AVAILABILITY AND INITIAL APPLICATION

- 4.1 All initial contacts with the OFT with a view to making leniency applications or ascertaining the availability of leniency should be made by telephoning the Leniency Enquiry Line on 0207 211 8833. Once the purpose of your call has been assessed, you will be transferred to an appropriate senior officer experienced in leniency cases. Leniency enquiries should be made during office hours.

Ascertaining the availability of Type A immunity

- 4.2 Before making a leniency application, and if the undertaking is not aware of a pre-existing investigation, undertakings may wish to ascertain whether guaranteed immunity (Type A) is available. This can be done by either a representative from the undertaking or its legal adviser telephoning the OFT's Leniency Enquiry Line.³⁹ You will be asked for the following information and essential commitments:
- a) Confirmation from the legal adviser that he/she has instructions to apply for Type A immunity if it is available⁴⁰ (conditional instructions)⁴¹ and that the undertaking understands that such an application will entail a commitment to cooperate with the OFT in any subsequent investigation.
 - b) Confirmation that there is a 'concrete basis' for the suspicion of cartel activity, see paragraph 4.23.
 - c) Confirmation that the undertaking has a 'genuine intention to confess'. This 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, see paragraph 4.22.
 - d) Specify the relevant sector, dates and broad nature of the cartel activity, or otherwise provide sufficient information to allow the OFT to determine whether there is a pre-existing civil and/or criminal investigation and/or a pre-existing leniency applicant. The level of

³⁹ See paragraph 4.1.

⁴⁰ If the application is made by a representative of the undertaking rather than a legal adviser, they would be asked to confirm their intention to apply for Type A immunity if it is available.

⁴¹ The OFT will not require a professional undertaking from the legal adviser as to his/her conditional instructions to make a Type A immunity application.

detail required will depend on whether there have been previous investigations or applications in the sector.

- e) The name and telephone number of the person making the enquiry. The name of the undertaking or individual that they represent does not need to be disclosed at this point ('no-names enquiry').

4.3 The OFT officer will then make internal enquiries, and will revert to the named contact to confirm whether or not Type A immunity is in principle available. In the great majority of approaches, the OFT will be able to confirm within a short time (around one to two working days) whether Type A is available. However, this will not always be the case. For example, on some complex investigations, applicants may approach the OFT hoping to gain Type A immunity notwithstanding that an investigation is already underway. Applicants may claim to have discovered a 'new' related infringement. However, it will not always be possible for the OFT to determine quickly whether the 'new' matter is one which may properly be described as being outside the scope of its investigation and/or outside the scope of any earlier leniency application from another undertaking.⁴²

4.4 If Type A immunity is not available, the applicant is free to consider all the available options, including whether to submit an application for Type B or C leniency or whether to withdraw without its identity having been made known to the OFT. The OFT will not use for any other purpose information that a would-be leniency applicant has provided to enable the OFT to establish whether any type of leniency is available. Where, for example, an undertaking has had to disclose the precise sector concerned in order to determine the availability of Type A (or B) immunity only for it to be informed by the OFT that immunity is no longer available, the OFT will not attempt to establish the undertaking's identity by a process of 'reverse engineering'. In most cases this would in any event be impossible.⁴³

⁴² In such circumstances, if the applicant elects to continue the application and reveal its identity, it may be possible for a marker for Type C leniency to be given immediately, with the possibility that such a marker might in future 'convert' to Type A once the circumstances are clearer.

⁴³ The same applies in the case of a would-be applicant for individual immunity who is seeking to establish whether they will be entitled to automatic criminal immunity by reason of being the first to confess absent a pre-existing investigation.

- 4.5 If Type A immunity is available, the legal adviser/representative must disclose the identity of the applicant, unless paragraph 4.36 applies due to a parallel application to the Commission. During the same telephone call, the OFT will request the information required in order to grant a preliminary marker, as set out in the checklist at Annexe D. If the applicant has also applied to other competition authorities in respect of the same cartel activity, it must also give the OFT limited waivers of confidentiality⁴⁴ sufficient to enable the OFT to discuss jurisdiction and handling of the application with those other authorities.
- 4.6 The preliminary marker will then be given (that is, a marker pending consideration of the full application package). This will be operational from the moment the applicant's identity has been disclosed to the OFT, and from that time on, no other Type A or B marker will be granted for the same cartel activity, unless the preliminary marker is subsequently rejected.

Obtaining a marker when an investigation has started

- 4.7 In the event that the prospective applicant is already aware of an investigation into the cartel activity, it may wish to contact the OFT to ascertain whether any form of immunity or leniency is in principle available. Calls in relation to these issues should be made to the OFT's Leniency Enquiry Line.⁴⁵
- 4.8 The OFT will, where possible, give prospective applicants an indication of whether the applicant is in the Type B position and if so, whether corporate immunity and/or blanket criminal immunity are in principle available, before the undertaking's identity is revealed.
- 4.9 If the OFT states that Type B corporate immunity and/or blanket criminal immunity is indeed available in principle, the would-be applicant can then seek to establish whether the information it can provide would be sufficient to warrant a marker for Type B immunity in its particular case by specifying the form and substance of the information it expects to be in a position to provide to the OFT.⁴⁶ The OFT will then advise whether,

⁴⁴ Please see paragraph 4.40 for a discussion of such waivers.

⁴⁵ See paragraph 4.1.

⁴⁶ The OFT will be sensible about comparing this indication with the information actually given subsequently (that is, in the application package and beyond). Some variation is acceptable provided that, overall, the initial information does not turn out to have been misleading in a

if such evidence were to be provided, it would be minded to grant immunity (corporate and/or criminal) or only a reduction in penalties. 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.

- 4.10 If an approach is made to the OFT during or immediately after on-site inspections or other information requests, the OFT may have to defer a definite answer on whether corporate and/or criminal immunity is available, in order to assess the likelihood of information provided by the applicant adding significant value to the investigation in light of information gathered.⁴⁷ Similarly, for some time after the inspections or information requests, the OFT may not be in a position to assess whether a grant of corporate and/or criminal immunity is in the public interest (see paragraph 2.18). In those circumstances, it is up to the applicant whether to disclose its identity to mark the undertaking's position in the queue, in which case a Type B marker will be granted, with the extent of leniency protection to be assessed once the OFT has a better understanding of the evidence it has, including that which has been obtained during the inspection. Alternatively, if the applicant is not prepared to disclose its identity without a definite answer that immunity is available, no marker will be granted.
- 4.11 If the OFT already has one or more previous leniency applications in relation to the cartel activity, only Type C markers will be available. In some circumstances, the OFT will have determined that it is not prepared to accept any further leniency applications, and will respond to enquiries accordingly. (See paragraphs 2.41 to 2.43.)
- 4.12 If leniency, of whatever type, is in principle available, the legal adviser/representative must disclose the identity of the applicant to obtain a preliminary marker (that is, a marker pending consideration of the full application package). This will be operational from the moment

material way and the information actually provided has, in fact, added significant value and genuinely advanced the OFT's investigation.

⁴⁷ An application for leniency after commencement of an inspection or receipt of a formal information request will not interrupt or avoid the need for the applicant to comply with the formal investigative measures. Nor will information compulsorily obtained by the OFT under such measures be considered as information provided as part of the leniency application when assessing whether the application has added significant value to the OFT's investigation.

the applicant's identity has been disclosed to the OFT.⁴⁸ As in the case of an application for Type A immunity, the applicant will need to satisfy the OFT that:

- the evidential threshold for the grant of a marker has been reached, that is, that there is a 'concrete basis' for a suspicion of participation in cartel activity, and
- the undertaking must have a 'genuine intention to confess'.⁴⁹

4.13 During the same telephone call, the OFT will request the information required in order to grant a preliminary marker, as set out in the checklist at Annexe D, which should be followed by the application package (see below).

4.14 Note that the grant of a Type B or Type C preliminary marker will always be subject to applicants continuing to meet the conditions of leniency, and the information provided by the applicant adding significant value to the OFT's investigation, see paragraphs 2.7 above and 5.21 and 5.22 below.

Application package and next steps

4.15 During or immediately following the telephone call to grant the preliminary marker, the OFT and the applicant will discuss the timing and process for the prompt provision by the applicant of the application package. The minimum contents of the package are set out in the checklist at Annexe D. In complex or particularly urgent cases, the OFT may ask for certain information or material to be provided promptly, followed by the full package at a later date.

4.16 If the cartel activity is ongoing, the OFT and the applicant will also discuss cessation of the cartel activity without tipping off others and/or any requirement by the OFT for the applicant to continue to participate in the cartel (see paragraphs 4.44 to 4.48).

⁴⁸ If a Type B marker is granted no other Type B marker will be granted for the same cartel activity, unless the preliminary marker is subsequently rejected. For Type C markers, note that queue position does not determine the level of discount (see paragraph 6.10), so the timing of the marker is less critical than for Types A or B.

⁴⁹ As elaborated upon at paragraph 4.22 below.

4.17 Once the OFT has had an opportunity to consider the information provided it will revert to the applicant as soon as is reasonably practicable, having regard to all the circumstances of the case. The possible outcomes are:

a) Confirm marker but not launch investigation

Most likely in relation to Type A applications, the OFT may decide to accept the marker but not to proceed with an investigation. This may be because it has higher priorities for its resources at that point in time or because the Commission is investigating the undertakings and the OFT has decided not to proceed with a criminal investigation into individuals. In that situation, the OFT will tell the applicant what precautions it needs to take in order to preserve its marker for leniency protection.⁵⁰ Provided the applicant cooperates as instructed, in the (unlikely) event that the OFT were to change its assessment of its priorities and commence an investigation, the applicant would be able to proceed with its application with the same level of marker protection.

b) Confirm marker and discuss next steps

If the OFT intends to proceed with an investigation (whether criminal and/or civil) it will confirm the marker and promptly start discussions with the applicant on what cooperation is expected. See Chapter 5.

c) Reject preliminary marker

There are a number of reasons why, following consideration of the application package, OFT may reject the marker. For example: the activity described may not amount to cartel activity within the scope of the leniency policy; the information provided may not give reasonable grounds to suspect cartel activity (Type A) or add significant value (Type B or C) or; the information provided may disclose that the applicant does not have a genuine intention to confess to cartel activity.

⁵⁰ For example, securing physical and electronic evidence, keeping track of relevant witnesses who leave the applicant's employment and continuing to keep the application confidential.

d) Ask for more before confirming or rejecting

In some instances, the OFT may require more information before it can assess whether the application should be accepted or whether the case will be a priority for investigation. In those instances, the OFT will make clear to the applicant what more it is asking for, and why.

- 4.18 In some applications covering complex activities, the OFT's response may be a mixture of the above, for example because it is focusing its investigation on only part of the reported activity.
- 4.19 If the OFT confirms the marker, it will normally write to the applicant with this confirmation, unless the applicant has requested to receive such confirmation orally in which case this would typically be done in a telephone call.
- 4.20 A senior representative of the applicant undertaking, which the OFT considers should be a company director where the undertaking is a company ('the applicant's representative') - or in the case of an individual application, the applicant - 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 and continuous cooperation throughout the OFT's investigation and subsequent enforcement action. Where the confirmation of a marker has been given orally, such a document may be signed at the OFT's premises and retained in OFT's records, rather than forming a written communication between the OFT and the applicant.⁵¹ The OFT does not intend the applicant's representative to incur any personal liability to the OFT for the actions of the undertaking simply as result of signing such a letter. The original applicant's representative may be replaced in that role by another senior representative of the applicant undertaking,⁵² but the undertaking must promptly notify the OFT of the replacement and the new applicant's representative will be expected to sign a letter in the same terms as their predecessor. The undertaking must ensure that the position of applicant's representative is never vacant.

⁵¹ See, for example, paragraphs 5.7 and 5.20 below.

⁵² For example, if the original applicant's representative leaves the undertaking.

- 4.21 The OFT may be able to indicate to the applicant some of the particular actions or information that will be required from the applicant, but at this early stage of the investigation, will not be able to present an exhaustive list of requirements.

Meaning of key terms in the application process

Genuine intention to confess

- 4.22 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. It is recognised that in certain circumstances a party applying for a marker may be genuinely uncertain, at that stage, as to whether it has engaged in cartel conduct. In one case, for example, the applicant for a marker had received, via its compliance officer, an anonymous tip-off that its staff had been engaging in price-fixing. The tip-off had some credibility having regard to the information given, but at the stage at which a marker was sought the tip-off remained untested. The applicant accepted that if the tip-off was accurate, it would have been guilty of cartel conduct but the OFT considered that it was reasonable in the circumstances for the applicant to place a qualification on its possible involvement. However, there have been other cases where the OFT has been faced with requests for markers from applicants who believe that they are in possession of much of the basic facts but seek to deny that those facts constitute cartel conduct. They ask for a marker 'in case' the OFT were minded to take a different view. This will not satisfy the requirement of a genuine intention to confess.⁵³

'Concrete basis' to suspect cartel activity

- 4.23 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. Alternative plausible non-cartel explanations for documents do

⁵³ Parties with concerns or questions about how the genuine intention to confess might relate their specific situation can avail themselves of confidential guidance from the OFT. See paragraphs 3.3 and following, above.

not preclude those documents giving rise to a suspicion of cartel activity, provided the applicant can explain why a cartel is a likely explanation.⁵⁴

Emerging details and expanding the scope of applications for leniency and/or no-action

- 4.24 The OFT will discuss the scope of the application during the applicant's initial approach, based on the emerging details of the cartel activity as known to the applicant at that time. For these purposes, scope might include the extent of products or services affected, the geographic scope, the duration of the activity, the characterisation of the cartel activity and the number of undertakings or individuals involved.
- 4.25 The scope of the application should cover the suspected cartel activity. The OFT will be realistic about what can sensibly be identified at the initial application stage and the scope can be further specified/refined as progress is made with the OFT's investigation. Ultimately, the scope of leniency protection should be limited to the minimum necessary to protect the applicant, both to ensure that the OFT does not preclude future applications into similar but distinct cartels and so that the applicant does not confess to more than the evidence would support.
- 4.26 The OFT recognises that at the time of the initial approach to the OFT, and potentially at the time of submission of the application package, the full details of the cartel activity will not be known to those preparing and submitting the application (and, in relation to certain types of cartel activity, relevant details will only be apparent from information in the possession of other parties). The OFT will therefore be understanding where there is genuine uncertainty on the part of the applicant as to the extent or particulars of the activity, provided always that there remains a 'concrete basis' to suspect cartel activity. In complex cases, it may be appropriate to grant the preliminary marker on a wide basis that goes beyond the direct evidence available at the time of the initial application, provided the applicant can explain why such an approach is reasonable in the circumstances.

⁵⁴ Parties with questions about whether there is a concrete basis to suspect cartel activity can avail themselves of confidential guidance from the OFT. See paragraphs 3.3 and following, above.

- 4.27 The scope of the marker or preliminary marker may be adjusted in light of further emerging details and evidence as the investigation progresses, and will inform the scope of the leniency agreement or no-action letter, which are signed at a later stage of the investigation.
- 4.28 It is important for applicants to alert the OFT to any areas of doubt, for example by differentiating between known facts supported by evidence already uncovered, statements based on the belief or best recollection of witnesses and suspicions or assumptions. The applicant should inform the OFT of further enquiries it proposes to make to resolve any such doubts, noting that the OFT may wish to take such investigative steps directly, particularly where they relate to uncertainty on the part of potential witnesses.
- 4.29 Where an undertaking discovers any innocent omissions up to and after the signing of the leniency agreement it should inform the OFT immediately and satisfy the OFT that:
- the omission was indeed innocent, , and
 - the information subsequently discovered has been provided to the OFT without undue delay.
- 4.30 If the OFT is satisfied that the above is the case, and such information affects the scope of the suspected infringement, it will normally be prepared to draft (or modify) the scope of the leniency agreement and/or no-action letters accordingly.

Other material procedural points relating to markers and applications

Oral applications and written confirmation

- 4.31 The entire application process can be oral if requested and provided there is good reason for it.⁵⁵ However:
- all pre-existing written evidence of the cartel will need to be provided to the OFT

⁵⁵ When considering an oral application, the OFT will, among other things, have regard to paragraph 51 of the European Competition Network Model Leniency Programme Explanatory note (http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf). See paragraphs 4.41 and following of this guidance for further discussion of the Model Leniency Programme.

- witnesses will need to be made available for interview and to sign statements, setting out their evidence
- the leniency agreement and any no-action letters (usually entered into shortly prior to issue of a statement of objections) will be in writing, and
- If the case proceeds to a prosecution or statement of objections, reference to the leniency application(s) and identity of the applicant(s) will be made in formal documents disclosed to other parties and/or made public at that stage.⁵⁶

4.32 The grant of a preliminary marker or confirmation of a marker can be confirmed in writing if desired, for all types of leniency.

Joint approaches for leniency not accepted

4.33 The OFT will generally not accept joint approaches made simultaneously by or on behalf of two or more undertakings participating in the same cartel activity. If the OFT were to receive such approaches, the would-be applicants would not be able to 'share' Type A immunity and the OFT would not be able to confirm that a particular undertaking was the 'first' to apply and so grant it a marker for Type A (or Type B) immunity. Moreover, undertakings who discuss a possible leniency application with other participants in the cartel activity are at risk of being found to have acted in bad faith by having tipped off others of their intended approach to the OFT.⁵⁷

Applications during inspections

4.34 Where an approach is made during an inspection,⁵⁸ 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 will not be treated as having provided information under the OFT's civil leniency or no-action policies.

⁵⁶ Information provided by the applicant will also generally be disclosed as part of 'access to the file' for other recipients of the statement of objections or disclosure to criminal defendants. See further Chapter 7.

⁵⁷ See paragraphs 10.1 to 10.4 below

⁵⁸ On-site inspections under Sections 27 or 28 of the CA98 or Sections 193 and 194 of the EA02.

4.35 Markers can only be granted by certain senior OFT officials who will generally need to make checks within the OFT before they do so, so approaches during an inspection should be made by telephone in the normal way (see paragraph 4.7), not to the OFT officials present at the inspection.

OFT no-names markers in 'Commission immunity application' cases

4.36 As an exception to the usual rule, the OFT will be willing to allow no-names markers⁵⁹ for Type A applicants where the undertaking's legal adviser confirms that he/she also has instructions to make an application for immunity to the Commission under section II of the Commission Leniency Notice. The adviser will need to provide his/her own name and firm and sufficient details of the affected sector to enable the OFT to exclude the existence of a pre-existing UK civil and/or criminal investigation and/or applicant. The legal adviser would also need to confirm the applicant's genuine intention to confess. Once the marker has been given on this basis, the OFT will expect the adviser to revert to it within a specified (and generally short) time frame – to be agreed case-by-case – to confirm:

- that an application has been made to the Commission
- the identity of the applicant undertaking, and
- the nature and emerging details of the suspected infringement and the underlying evidence.

4.37 Where Commission immunity is no longer available, the applicant is free to withdraw its no-names marker without having to reveal its identity. Alternatively, the applicant may nevertheless decide to keep its OFT marker. In such a case the marker would be required to become a named marker and the applicant would need to submit an application package in the usual way (see paragraph 4.15 to 4.21, above).

4.38 It is the OFT's intention that allowing no-names markers in Type A immunity cases, in advance of an approach to the Commission, will provide certainty to undertakings on the issue of whether there is possible exposure to a risk of prosecution in the UK for the cartel

⁵⁹ This is a marker which is granted without the applicant having immediately to reveal its identity to the OFT.

offence of any of its current and former employees and directors. It is intended that this will give further encouragement to the Commission's leniency programme.

- 4.39 Apart from 'Commission immunity application' cases, strong justification will be needed for obtaining no-names markers, as the OFT will ordinarily expect the legal adviser to have obtained conditional instructions to apply for immunity if the availability of Type A immunity is confirmed.

Requests for waivers

- 4.40 In cases where leniency has been applied for in other jurisdiction(s), the OFT would expect to be given 'waivers' of confidentiality so as to be able to discuss appropriate matters with those other jurisdiction(s). Generally any transfer of information in these circumstances is limited to that which is necessary to coordinate planned concerted action such as on-site investigations. Where there are particular sensitivities for a leniency applicant about such waivers, these should be raised promptly with the OFT. Ideally, therefore, applicants' advisers should take instructions on the issue of waivers in advance of making the application because the OFT may need to discuss matters with other jurisdictions with some urgency once the application has been made.

OFT summary applications in 'Commission immunity application' cases

- 4.41 The OFT accepts short form 'summary applications' as contemplated in the European Competition Network (ECN) Model Leniency Programme⁶⁰ in cartel cases where:
- the Commission is 'particularly well-placed' to deal with a case in accordance with paragraph 14 of the Network Notice
 - the OFT is in its opinion also 'well-placed' to act in accordance with paragraph 8 of the Network Notice

⁶⁰ For a copy of the ECN Model Leniency Programme and the Explanatory Notes see the ECN website at http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf. The ECN Model Leniency Programme was launched on 29 September 2006 and was revised in November 2012. It sets out the principal elements which the ECN members believe should be common in all programmes. This includes the type of information an applicant should be prepared to provide in order to get immunity, a coherent set of termination and cooperation duties and a streamlined procedure for processing applications.

- the applicant has made or is in the process of filing an application for immunity with the Commission, and
- the applicant is in a Type A position in the UK.

4.42 Where the 'summary application' route is available to an applicant, the OFT will apply the procedures set out in paragraphs 22 to 25 of the ECN Model Leniency Programme. In addition to the information required in accordance with paragraph 22 of the ECN Model Leniency Programme, the OFT may also need to be provided with relevant UK-specific information relating to the reported cartel, such as the details of any UK-based individuals and conduct and an estimate of the size of the UK market and market shares of the parties. Where this is the case, the applicant should ensure that it is in a position to provide such additional UK-specific information promptly.

4.43 In the event that the OFT commences a criminal investigation in relation to the reported cartel, the OFT will require complete and continuous cooperation from the applicant, as further described in this guidance, even where it is not conducting a civil investigation into the undertaking (for example because the Commission is conducting such an investigation under Article 101 of the TFEU). Failure to cooperate with the OFT in this way will lead to rejection of the applicant's marker, with potential consequences for individual directors and employees of the applicant who will no longer benefit from the protection of the Type A immunity.

Directions to continue cartel activity

4.44 Ordinarily the applicant (whether an undertaking or an individual) will be required to refrain from further participation in the cartel activity unless the OFT directs otherwise. Such a direction will be rare. The objective in most such cases will be to protect the element of surprise of any forthcoming inspections.

4.45 The OFT will never expect individuals within an undertaking or an individual immunity applicant to take inappropriate risks. They will usually only be asked to carry on their basic activities in the same way as if they had never approached the OFT. The OFT will provide clear guidance as to what is expected in such cases.

- 4.46 In exceptional cases, the objective may also be to allow the coming into existence of further evidence of the cartel activity and this may involve the use by the OFT of its powers under the Regulation of Investigatory Powers Act 2000 (RIPA).
- 4.47 The general expectation is that, where necessary, individuals benefitting from criminal immunity will be expected to give evidence, including where the individual has been directed to continue his or her participation in ongoing cartel activity.
- 4.48 In cases where a person has had and/or continues to have an involvement in cartel activity and applies for immunity on his/her own account and is able to continue to make use of a relationship to obtain further information about a cartel for the OFT and under the OFT's close direction, the individual may be granted individual immunity but remain a secret source. The OFT will not disclose the identity or role of a secret source in any subsequent investigation or proceedings. An individual immunity applicant will generally only be treated as a secret source where the safety of the individual would be in jeopardy or other serious adverse consequences would follow if the person's approach to the OFT were to become known.

5 EXPECTED COOPERATION THROUGHOUT THE INVESTIGATION

- 5.1 Once the OFT has launched an investigation into any cartel activity, whether using its criminal or civil powers, it must take full control of all investigative steps to ensure that the investigation is carried out fairly, thoroughly and carefully. The case team will therefore engage in regular dialogue with the applicant regarding any steps that the OFT wishes the applicant to take and also to communicate steps that the OFT intends to undertake directly concerning the applicant, its premises or current or former employees/officers.⁶¹
- 5.2 Although this dialogue will provide applicants with an opportunity to suggest further or alternative steps, or ways to achieve the results required whilst reducing disruption to business, ultimately it will be for the OFT to determine what steps are necessary and appropriate. In general, the types of investigative steps that will be required will be similar to those required for non-leniency parties, albeit that they will be carried out with the cooperation of the applicant rather than through use of compulsory investigative powers.
- 5.3 In some cases, the need for the OFT to ensure that the investigation has been carried out to the requisite standard may involve the OFT repeating or conducting 'spot-checks' of searches or other steps already carried out by the applicant, for example to ensure that all relevant material has been correctly identified.

The requirement to maintain 'continuous and complete' cooperation

- 5.4 The requirement to maintain continuous and complete cooperation throughout the OFT's investigation and any subsequent proceedings is at the heart of the leniency process and is a condition for the grant of any immunity or type of leniency, whether for an undertaking or individual. Clearly the requirement necessitates compliance with the rules and principles set out in this guidance note. However, continuous and complete cooperation also implies that the overall approach to the leniency process by an applicant must be a constructive one, designed

⁶¹ This does not preclude the OFT from engaging directly with former employees/officers without informing the applicant. Direct engagement with current employees, without involving the applicant or its advisers, may also be appropriate in criminal investigations.

genuinely to assist the OFT in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct, so that the public policy objectives of the OFT's leniency policy are achieved.

- 5.5 This constructive approach would, for example, extend to positively and proactively engaging in discussions regarding efficient handling of procedural matters, for example where the OFT is considering streamlined access to file or alternative processes for providing confidentiality representations.
- 5.6 Cooperation must also be timely, with information being provided promptly and individuals being made available for interviews or preparation of witness statements in accordance with the reasonable requests of OFT investigators. If the applicant foresees or encounters difficulties meeting OFT deadlines or requests, these should be raised with the OFT as early as possible, but applicants should not expect that extensions to deadlines will be common.
- 5.7 If at any time, the OFT has concerns that the applicant is not adopting such a constructive approach,⁶² or that there are unreasonable delays in providing information or otherwise cooperating with OFT requirements, the matter will be raised with the applicant's representative and the applicant's legal advisers by the case team, and if necessary the applicant's representative will be invited to meet with the Senior Responsible Officer (SRO),⁶³ that is, the senior official responsible for the investigation to discuss those concerns.
- 5.8 If, following the meeting with the SRO, those concerns have not been adequately addressed to the satisfaction of the OFT, then the applicant may lose all protection under the leniency programme.

Continuing acceptance of cartel infringement

- 5.9 Leniency is given in exchange for admissions of participation in cartel

⁶² This will include where the leniency applicant has been careless in its approach to the leniency application.

⁶³ See '*A guide to the OFT's investigation procedures in competition cases*' (OFT1263, March 2011), in particular, Chapter 5 for a description of the role of the SRO.

conduct.⁶⁴ After the marker has been granted, the conditions of leniency necessitate that there should be a continuing acceptance of having engaged in cartel activity, including an acceptance that such activity infringed the Chapter I prohibition or Article 101 of the TFEU or, in the case of individual applicants, amounted to the cartel offence (see paragraph 2.7, condition (a)). Ultimately, this will be reflected in the leniency agreement (see paragraphs A.4(a) and B.3(a) of the pro forma leniency and no-action letters respectively).

- 5.10 One issue which has arisen is the extent to which a leniency applicant is entitled to dispute the OFT's analysis of the evidence or law. If, at any stage, the applicant's representations to the OFT, for example during the written and oral representations stage following the issue of a statement of objections, amount expressly or implicitly to a denial of cartel participation, the OFT will consider such representations to be inconsistent with any actual or proposed grant of leniency.
- 5.11 What if the applicant continues to accept that it has been a party to cartel behaviour but disputes specific elements of the OFT's analysis, for example, as to the precise duration of the infringement? The OFT does not exclude that the making of certain limited representations, such as identifying material factual inaccuracies, provided they are made in a spirit of cooperation, is consistent with the grant of leniency. However, the OFT does not consider that it would be possible or desirable to seek in the abstract to draw a clear dividing line between such representations and the sorts of representations that would transgress an applicant's duty to provide constructive and genuine assistance in proving admitted cartel conduct. The OFT will nevertheless take a common sense approach in each case and hear what the applicant has to say before making any decision as to how the applicant's leniency position may be affected. See also paragraph 6.2.

Information to be provided by leniency applicants

- 5.12 Leniency applicants must provide all non-legally privileged information, documents and evidence available to them regarding the existence and activities of the reported cartel activity (hereafter referred to as the 'relevant information').

⁶⁴ See also the points made at paragraph 4.22 above on the need for a genuine intention to confess.

- 5.13 A checklist of specific information that will be required in every case is included at Annexe D, but this should not be interpreted as a limitation on the previous paragraph.
- 5.14 This requirement to provide all relevant information should be interpreted widely so as to include any information, in whatever form, which is capable of having some reasonable bearing on the OFT's investigation of the cartel. As well as pre-existing documents, this will include the provision of evidence from current and former employees and directors, including the provision of witness statements by them as may be required by the OFT.
- 5.15 Information which has a bearing on the OFT's investigation will include information that supports a finding of cartel activity, information which suggests an absence of cartel activity (generally, or on the part of specific undertakings or individuals) – 'exculpatory' material⁶⁵ – and information on possible leads or sources of information that the OFT may wish to pursue.
- 5.16 Relevant information will typically be available to the applicant from a number of different sources. Applicants should note paragraphs A.4(b) and A.4(c) of the pro forma leniency agreement at Annexe A in relation to securing and making available documents, IT systems and evidence from current and former directors, officers, employees and agents. Such measures may be required from applicants at any time in the investigation, whether before or after the signing of the leniency agreement.
- 5.17 After receipt of the application package, the OFT will give advice to the applicant, as best it can, as to the broad categories of information the OFT considers are likely to be relevant in the context of the particular case and the form in which any further information should be provided. The OFT will also advise the applicant on steps which the OFT will take directly and steps which it expects the applicant to undertake as part of its ongoing cooperation. This guidance will be regularly updated and/or refined through ongoing dialogue between the OFT and the applicant as the OFT's investigation progresses.

⁶⁵ 'Exculpatory material' for these purposes will include information known to the leniency applicant which could reasonably be seen as calling into question the credibility, as a witness, of anyone who provides relevant information.

- 5.18 Furthermore, the applicant should, as part of this dialogue, inform the OFT of any developments that may affect the OFT's ability to gather or analyse relevant information. This might include, for example, changes to IT systems, change of employment/location of individual witnesses, or commencement of related investigations by other regulatory authorities.
- 5.19 When providing information to the OFT via e-mail, leniency applicants and their advisers should ensure that they use the CJSM (Criminal Justice Secure e-Mail) system, access to which is available free of charge.⁶⁶

Information insufficient for a credible investigation (Type A)

- 5.20 Information provided by applicants for Type A immunity must, as a minimum give the OFT a sufficient basis for taking forward a credible investigation.⁶⁷ If, after a reasonable opportunity following the initial application package (the duration of which will be assessed on a case-by-case basis), the relevant information provided by the applicant does not meet this minimum threshold the OFT will withdraw the applicant's marker. Before withdrawing the marker, the OFT will discuss with the applicant's representative its assessment that it does not have a basis for taking forward a credible investigation and consider with the applicant's representative any options or possibilities for producing sufficient evidence to reach that threshold.

Information does not add significant value (Types B and C)

- 5.21 Information provided by Type B and Type C applicants must, as a minimum, be such that it adds 'significant value' to the OFT's investigation, that is, it must genuinely advance the investigation.
- 5.22 If, after examining the information provided by the applicant and the material obtained from other sources prior to the application, the OFT considers that the relevant information provided by the applicant does not meet this minimum threshold, the OFT will withdraw the applicant's

⁶⁶ For more information on the CJSM, including how to create an account, please see www.cjasm.net

⁶⁷ The OFT may, for example, be of the view that there is no basis for taking forward a credible investigation in a case where the applicant has provided the OFT with documentary evidence which is prima facie probative of the reported cartel conduct (and was thereby sufficient for the initial grant of a marker) but the strength of which is then materially undermined by statements given by implicated current or former employees or directors of the applicant.

marker. Before withdrawing the marker, the OFT will discuss with the applicant's representative its assessment that the information provided does not add significant value and consider with the applicant's representative any options or possibilities for producing sufficient evidence to reach that threshold. Paragraphs 7.14 to 7.18 below include discussion of how the information provided by the applicant will be treated by the OFT, where the marker is withdrawn.

Discovery of genuinely unrelated material

- 5.23 There is no obligation to submit material which is clearly outside the scope of the leniency application to the OFT – the OFT will not be asking US-style 'omnibus questions'.
- 5.24 To the extent the information relates to an entirely separate infringement, it is treated in the normal way. Undertakings are, therefore, encouraged also to apply for leniency for that (entirely separate) infringement. To the extent that the undertaking is not benefiting from immunity in relation to the original leniency application, the OFT's leniency plus policy should be taken advantage of. (See paragraph 9.1 below.)

Investigative measures by OFT

- 5.25 It is the OFT's responsibility to ensure that investigations, whether criminal or civil, are carried out to the necessary standard. It is therefore normal practice for the OFT to carry out various investigative steps directly in relation to leniency applicants, in the same way that it does in relation to non-lenieny parties under investigation.
- 5.26 Leniency applicants will be expected to comply with requests to cooperate in such steps, including anything that could be required from a non-applicant by the use of OFT's formal powers, without the OFT having to resort to formal powers in relation to the applicant.
- 5.27 Bearing in mind that there may be strong financial and personal incentives for undertakings and individual witnesses to present the conduct as falling within the scope of the leniency policy, the OFT's investigation must robustly assess the probative value of information provided by the leniency applicant, including witness evidence from employees and directors. The OFT will need to probe any changes in story or inconsistencies, look for independent corroborative material

where possible, and pursue any lines of enquiry which call into question evidence from the leniency applicant. Where there is a clear dispute over the facts of the case between the leniency applicant and another alleged party to the cartel, the OFT will consider carefully both parties' accounts before deciding which it regards to be the most credible.

5.28 Cartel investigations vary, and so the following guidance is indicative rather than intended to list measures that will apply in every case. For example, the types of investigative steps required in criminal investigations may be more extensive and potentially more intrusive than those undertaken in purely civil investigations. Also, the OFT may need to undertake more steps directly where the applicant is genuinely unable to meet the cost of undertaking such steps to the standards required for a proper investigation.

5.29 Typical investigative steps that the OFT will or may wish to carry out directly include:

- Interviewing witnesses.
- Assisting to prepare witness statements.
- Retaining a secure, forensically sound image of relevant electronic material. As well as being important to enable verification of the authenticity of electronic evidence, the OFT may also wish to conduct searches of such material directly (with or without the assistance of specialist IT consultants), instead of/as well as receiving the results of electronic searches conducted by the applicant.⁶⁸
- Reviewing original hard copy documents (essential in criminal cases, where originals will be retained as evidence).
- Physical searches of relevant premises.
- Assessing the relevance of specific documents within categories identified by the applicant as potentially relevant (noting that the

⁶⁸ The OFT may also require information on the type of electronic software and hardware used by the applicant or its individual employees. The OFT may also require a record of the 'continuity of evidence' stating where electronic documents were initially produced or obtained. Please see footnote 124 for a definition of continuity of evidence.

OFT's assessment of relevance will be informed by information from other sources not available to the applicant).

- Spot checks of searches undertaken by the applicant or its advisers.

Interviews with leniency applicant witnesses where there is a criminal investigation

5.30 If an individual has applied for individual immunity and the OFT is, in principle, 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 7.20 to 7.24 below).

5.31 In Type A cases, or Type B cases where the OFT has confirmed that it is minded to grant blanket criminal immunity, the individual knows, before being interviewed, that they will be granted criminal immunity provided they satisfy all the usual conditions. The purpose of the interview is therefore to obtain all relevant information from the individual with a view to advancing the OFT's investigation – not to decide whether the individual will be granted criminal immunity in principle. However, in cases where the grant of individual immunity is discretionary, including other Type B and Type C cases, interviews of individuals may be conducted for two reasons:

- to elicit sufficient information to enable the OFT to decide whether it is in the public interest to exercise its discretion to grant a no-action letter in principle, and
- to obtain information from the individual with a view to advancing the OFT's investigation.

5.32 In Type A and B immunity cases the OFT will interview the individual under the protections laid out in paragraph 5.30. In Type B and C leniency cases the interview may also be under the protections laid out in paragraph 5.30. However, in Type B and C leniency cases where the

individual is a suspect and the OFT does not believe that it is in the public interest to offer an interview under the protections laid out in paragraph 5.30, interviews will be conducted under caution.⁶⁹ Where a voluntary interview has been conducted under caution in a Type B or C leniency case, the OFT may nonetheless decide later that the individual will be offered criminal immunity depending on the OFT's assessment as to what is in the public interest.

5.33 Where individuals have been granted interviews under the protections laid out in paragraph 5.30, the principle of protection of incriminating information given in the interview will also extend to the giving of information in documentary form, whether directly or through the applicant's legal adviser.

5.34 If desired, a Type B or C leniency applicant's adviser could seek confidential guidance from the OFT about whether interviews are likely to be offered under the protections laid out in paragraph 5.30. If the OFT is not conducting a criminal investigation into the cartel activity the issue of whether or not an interview will need to be conducted under caution will not arise.

Cooperation from current or former employees or directors

5.35 It is important to note that in the case of the standard form leniency agreement for corporate immunity/leniency, cooperation extends to an undertaking using its best endeavours to procure the ongoing cooperation of its current and former employees and directors in relation to any subsequent appeal proceedings before the Competition Appeal Tribunal.⁷⁰ Where the matter is being investigated criminally, the OFT will require such cooperation to extend also to any criminal investigation and subsequent proceedings.⁷¹ This is because it will not necessarily be the case that all current and former directors and employees will already be the subject of cooperation obligations under no-action or comfort

⁶⁹ If there are grounds to suspect that a person has committed an offence, the person must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to him/her in circumstances where the suspect's answers or refusal to answer may be given in evidence to a court in a prosecution. See Code C of the Codes of Practice issued to accompany the Police and Criminal Evidence Act 1984 (PACE). A caution in these circumstances does not indicate that the OFT is minded to charge the individual concerned, but will be used where the possibility of charge cannot be ruled out.

⁷⁰ Paragraph A.4(c) (x) of the pro forma leniency agreement in Annexe A.

⁷¹ Paragraph A.4(c) (xi) of the pro forma leniency agreement in Annexe A.

letters. There may be a number of employees or directors who are not recipients of such letters but who may still be called upon to assist in the criminal matter, including by being available as witnesses in criminal proceedings. The mechanism to help secure their cooperation will be the leniency agreement with the undertaking which employs or employed the individuals concerned.⁷² In the case of the standard form no-action letter, the cooperation requirement continues until the conclusion of any criminal proceedings – so that where required, the individual may have to give oral evidence in criminal proceedings.

- 5.36 In principle, leniency protection from individual sanctions can extend to former employees and directors even where those individuals now work for another company that is under investigation for the same cartel activity, provided that they fulfil the requirement to cooperate with the OFT's investigation. However, the OFT strongly recommends that applicant undertakings do not contact such individuals prior to discussing the approach with the OFT, given the issues of confidentiality and the risks of tip-off that may arise, and the potential consequences for the applicant if tip-off results.

Consequences for an undertaking applying for leniency of failure to cooperate by a current or former employee or director

- 5.37 A failure, at any stage, to cooperate with the OFT on the part of a current or former employee or director of an applicant undertaking will not necessarily mean that the undertaking's leniency application will fail or that leniency, once given, will be revoked. The leniency application will not fail or be revoked in cases where:
- the applicant can show that it used its best endeavours to secure the cooperation of that individual⁷³ (albeit unsuccessfully), and

⁷² The OFT recognises the limitations for the undertaking in relation to procuring the ongoing cooperation of former employees and directors who have no independent cooperation obligations under a no-action or comfort letter.

⁷³ Where the applicant proposes disciplinary action against an individual, including dismissal, arising from that individual's role in the cartel, the OFT will expect the undertaking to discuss this matter with the OFT. The OFT will be keen to ensure that any action proposed by the undertaking against an individual does not have the perverse effect of reducing incentives to cooperate with the OFT. So far as is reasonable, the incentives placed on the individual by the undertaking and the OFT should be aligned, that is, there should be the maximum possible incentive on the individual's part to tell the full truth about his or her involvement in the cartel. The OFT will expect to see cooperation in this respect from the undertaking.

- overall the applicant provided the OFT with sufficient evidence of the reported cartel activity to pass the applicable evidential threshold.⁷⁴

- 5.38 In this context, it should be noted that the applicant's general cooperation obligation includes a positive duty to inform the OFT without delay about any concerns the applicant may have as to the level of cooperation provided by any of its current or former employees or directors. In particular, the applicant must inform the OFT without delay about any concerns the applicant may have regarding the completeness and/or accuracy of any statements made by any of its current and former employees and directors during the course of the OFT's investigation.
- 5.39 It follows from the above that where an undertaking's application for Type A or B immunity does not fail, or is not revoked, despite an individual failing to cooperate, all other implicated current or former employees or directors of the undertaking who are maintaining cooperation will continue to qualify for immunity. By contrast, the non-cooperating individual will of course lose all protection under the leniency programme.
- 5.40 In the event of the undertaking's application failing, or being revoked, those current or former employees or directors of the undertaking who had cooperated throughout the investigation will no longer be eligible for 'blanket' criminal immunity but they will have been interviewed under the terms of paragraph 5.30 above and, as such, no information given by them whether orally or in writing as part of the leniency process will be used in evidence against them and they may still be able to apply for individual immunity.

⁷⁴ In this context, please also see footnote 67 above (which refers to the possible difficulty in achieving the relevant evidential threshold if an individual's account of events materially undermines documentary evidence provided by the undertaking that would otherwise have been probative of the existence of the cartel).

6 THE LENIENCY AGREEMENT OR NO-ACTION LETTER AND RELATED ISSUES

Timing of leniency agreements

- 6.1 Leniency agreements 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. At this point in time, the OFT will have received and assessed substantially all of the information that is relevant to its case, and will accordingly be in a position to ascertain the necessary scope/characterisation of the cartel activity to be covered in the leniency agreement and also the scope of the 'undertaking', that is, the relevant legal entities that need to benefit from leniency protection.
- 6.2 The OFT will share its proposals as to scope/characterisation with the applicant. Applicants will have an opportunity to comment and discuss the proposed scope/characterisation before signing the agreement,⁷⁵ which will include an acceptance that the reported cartel activity infringed the Chapter I prohibition and/or Article 101 of the TFEU.
- 6.3 In relation to Type B and C leniency, the OFT will also by this point be in a position to ascertain the appropriate level of reduction in penalty based on the value added by the leniency applicant (see paragraphs 6.8 to 6.10 below).
- 6.4 Before signing the leniency agreement, the OFT will need to be and remain⁷⁶ satisfied that the conditions for the grant of leniency have been and continue to be met, namely the continued acceptance of participation in cartel activity, the information requirements set out above,⁷⁷ the requirement of continuous and complete cooperation, that the applicant has refrained from any further participation in the cartel

⁷⁵ This is not, however, an opportunity for the applicant to negotiate changes to the OFT's ultimate findings.

⁷⁶ These requirements, in particular that of continuous and complete cooperation, also remain conditions of leniency after the signing of the leniency agreement.

⁷⁷ Although the OFT expects that signing of leniency agreements will take place towards the end of the OFT's investigation after the most substantial and most evidentially probative elements of the relevant information have been received, following signing, the applicant's duty to provide all relevant information will nonetheless be ongoing after that point. For example, the applicant may need to cooperate in the finalisation of witness statements, or to produce relevant information which comes to the attention of the applicant only at a late stage.

and, in relation to immunity agreements, that the applicant was not a coercer.

Timing of issue of no-action and comfort letters

- 6.5 A proper determination of whether a person should receive a no-action or comfort letter cannot generally be made until at or near the conclusion of the OFT's criminal investigation. It may not be necessary for all lines of enquiry to have been completed. However, as a minimum, the OFT will expect to have received and duly analysed the substantial and most probative elements of the relevant information in the possession or control of the immunity applicant and that of its current and former employees and directors before it issues any no-action or comfort letters.⁷⁸ This is likely to mean that relevant individuals will have been interviewed at least once about their role in the cartel activity and possibly more than once before a no-action or comfort letter is issued.⁷⁹ Where a person applies and qualifies in principle for criminal immunity on his or her own account, the position on timing is broadly analogous to that which applies as part of a corporate approach.
- 6.6 Where requested and where there is good reason to do so,⁸⁰ the OFT will be willing to issue interim comfort letters to certain individuals to the effect that, as at that time, the OFT is content that the individual(s) concerned appear to be cooperating fully and consequently that no-action or final comfort letters, where needed, will be issued in due course provided that cooperation and compliance with all the usual requirements continues.

Form of leniency and no-action agreements

- 6.7 Leniency and no-action agreements are in standard form. They are attached at Annexe A and Annexe B of this guidance. It should be noted that the OFT will not generally expect to negotiate amendments to the

⁷⁸ This accords with the position in regard to the timing of the issue of any leniency agreement. See paragraph 6.1 above.

⁷⁹ For the procedure under which such interviews will be conducted, see paragraphs 5.31 to 5.34 above.

⁸⁰ For example, where an investigation has been running on for an unusually long period or where the individuals are overseas nationals and there are particular anxieties given the unfamiliarity with the UK legal system.

terms of these agreements – however reasonable suggestions for minor variations addressing specific concerns will be considered.

Discounts granted in Type B and C leniency cases

- 6.8 The key criterion for determining the discount available will be the overall added value of the material provided by the leniency applicant. This will generally be a function of the stage at which the undertaking comes forward, the evidence already in the OFT's possession and the probative value of the evidence provided by the undertaking. The OFT will also take into account the overall level of cooperation provided.⁸¹
- 6.9 In Type B cases, it is possible that the value added by the application will be high, as it will be the OFT's first application in the case and, as such, even where the application does not result in a grant of corporate immunity, awards of up to 100 per cent are possible. However, the OFT has insufficient experience of Type B reductions in penalty to give any more guidance about the percentage reductions that are likely to be on offer in the majority of cases. That said, it should be noted that in general, awards are unlikely to be close to 100 per cent as the OFT would otherwise probably have granted corporate immunity to the Type B applicant. In Type C cases, however, experience suggests that applicants can generally expect to achieve discounts in the range of 25 per cent to 50 per cent. However, it is possible that low value and/or late applications may gain awards of less than 25 per cent.⁸²
- 6.10 Queue position in Type C cases is not decisive. It is possible that an applicant who is third in the queue may get a discount greater than an applicant who was second to apply. That said, it is the usual experience of the OFT that the further ahead in the queue an applicant is, the greater the value added by its application. Therefore, would-be applicants are encouraged to apply at the earliest possible stage.

⁸¹ In this respect the points in paragraphs 5.4 to 5.11 above should be noted.

⁸² While the OFT will consider any limited representations as to the amount of the award proposed, it will not negotiate over the matter. See also footnote 94 below to the effect that dissatisfaction with an award is not an 'exceptional circumstance' justifying withdrawal from leniency.

7 DISCLOSURE AND USE OF INFORMATION

Disclosure of leniency information during a civil or criminal investigation

- 7.1 The OFT recognises the importance of confidentiality for leniency applicants. Accordingly, the fact that an undertaking has applied for leniency will not normally be revealed to other undertakings until the statement of objections has been issued. However, in the course of the OFT's civil investigation it may be necessary, directly or indirectly, to disclose information provided by a leniency applicant to third party witnesses or to those suspected of direct involvement in the cartel. Consequently, there is a risk that parties will conclude that the information has been supplied by a leniency applicant, which may in turn reveal the identity of the applicant. The OFT will not formally confirm whether there is a leniency applicant, however.
- 7.2 Where there are particular sensitivities about the possibility of a leniency applicant's identity being revealed in the course of the investigation, these should be discussed with the OFT at the start of the application process.
- 7.3 Similar circumstances arise when the OFT is conducting a criminal investigation. Prior to interviewing suspects, the OFT is required to provide disclosure of any material to which the OFT wishes to refer or allude during the interview.

Disclosure of leniency material to support a statement of objections, infringement decision and as part of the access to file process

- 7.4 Where the OFT is conducting a civil investigation, the fact that a party has applied for leniency, together with the information it has submitted and on which the OFT intends to rely, will be set out in the statement of objections issued to the other parties to the proceedings.⁸³

⁸³ Once a formal investigation is opened, generally a case initiation letter will be sent to the parties under investigation containing basic details of the investigation. However for some cases, such as in cartel investigations, it may not be appropriate to do so as this may prejudice the investigation such as prior to unannounced inspections or witness interviews. If the OFT does consider it appropriate to send a case initiation letter to the parties it may limit any information provided in the letter to protect the identity of a leniency applicant. Generally once the parties have been informed of the investigation the OFT will generally publish on the OFT's website, a

- 7.5 Similarly, subject to the OFT's rules on the protection of confidential information,⁸⁴ material submitted as part of the leniency application will be disclosed to the parties during the course of access to the file.
- 7.6 Before making any disclosure either in the statement of objections or as part of access to the file, however, the OFT will give the leniency applicant a reasonable opportunity to make representations as to whether the OFT should treat any or all of the information as confidential within the meaning of the OFT's rules.
- 7.7 Disclosure of application statements may be of particular concern to applicants because application statements sometimes disclose certain aspects of the application that the OFT has chosen not to pursue or the applicant's own analysis of the emerging details of the cartel at the time of the application, and there is therefore a potential risk that any unnecessary disclosures may put leniency applicants at a disadvantage relative to non-leniency parties. Accordingly, whilst application statements, including transcripts of oral statements, will be placed on the OFT's file, when assessing the need for disclosure, the OFT will give weight to the strong public interest in encouraging full and frank applications, and notes that non-disclosure of such material may be in the public interest in order to protect the efficacy of the leniency regime. In practice, this means that the OFT will not ordinarily grant access to the application statement to other recipients of a statement of objections. However, in the event that the application statement contains relevant evidential material that has not been presented in other forms that can be made available as part of access to the file,⁸⁵ it may

case opening notice containing basic details of the case including the administrative timetable for the case. In the case of cartel investigations the OFT will limit the details in the notice to ensure the ongoing investigation is not prejudiced and would not mention publicly that any undertaking had applied for leniency. It is OFT normal practice publicly to announce the issue of the Statement of Objections on our website and to make an announcement on the Regulatory News Service, however the OFT would not mention publicly that any undertaking whose identity had been revealed as party to a statement of objections had applied. If, of its own volition, an undertaking wanted to disclose that it was a leniency applicant in these circumstances, then the applicant would be free to do so. See OFT's Competition Act Procedures Guidance, A guide to the *OFT's investigation procedures in competition cases* (OFT 1263rev, October 2012). www.of.gov.uk/news-and-updates/press/2012/91-12.

⁸⁴ Competition Act 1998 (OFT's Rules) Order 2004 (SI 2004/2751), Rules 1(1), 4(3) and 6. See also Section 244 of the EA02.

⁸⁵ The OFT expects applicants to provide all primary source material that led to the generation of the application statement that the OFT considers is relevant to its case, so this situation is expected to be exceptional, rather than the norm.

be necessary to grant access to the application statement, for rights of defence purposes.⁸⁶ In such cases, we will keep confidential any parts of the statement that are not relevant to the case in question. We will also discuss with the applicant whether any additional protective measures in relation to how information is disclosed, for example to third parties is appropriate. This protection will not extend to other documents provided by the applicant, such as witness statements, which refer to or include information from the application statement, which will ordinarily need to be disclosed.

- 7.8 Even in the case of an unsuccessful leniency applicant or in the case of a leniency applicant which is not proceeded against or where the leniency application was subsequently withdrawn, it cannot be excluded that disclosure of some or all of the material provided as part of the leniency application, including the identity of the applicant, may have to be disclosed to other parties in the course of access to the file.
- 7.9 Any person to whom information is disclosed in a statement of objections or as part of access to the file will be bound by the restrictions on further disclosure as set out in Part 9 of the EA02.⁸⁷
- 7.10 Where the OFT's investigation results in an infringement decision, the fact that a party to the proceedings has been granted leniency, together with the leniency information relied on by the OFT, will be apparent from the infringement decision. This will be notified to the parties and a non-confidential version published under the OFT's rules.⁸⁸ Undertakings applying for leniency should therefore be aware that at that stage, the fact that a party has been granted leniency, together with the nature of at least some of the evidence provided will become public.

Disclosure of leniency material to support a criminal prosecution

- 7.11 If a prosecution is commenced, full disclosure of 'used' and relevant 'unused' material must be made to defendants, to comply with requirements under the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003, and the associated Code

⁸⁶ Depending on the relevance of such information, it cannot be excluded that it may also need to be set out in the statement of objections and any subsequent infringement decision.

⁸⁷ See in particular Section 241(2) of the EA02.

⁸⁸ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751), Rule 7.

of Practice. This will inevitably include material provided by the leniency applicant, and would typically include application statements (whether written or transcripts of oral statements), where such statements are capable of having an impact on issues arising in the criminal case. Where individuals who have been issued with no-action letters provide witness statements, the fact of those letters having been issued will ordinarily have to be disclosed, although protection of the identities of individuals who are secret sources will be sought by applications for public interest immunity where necessary.

7.12 Given that one of the objectives of the leniency policy is to facilitate effective enforcement action, applicants will be expected to respond promptly and constructively to requests for information which the OFT is under a duty to disclose in order to proceed to a prosecution. In this regard, applicants should note that the grounds for withholding relevant material from defendants in a criminal prosecution are more limited than the scope to withhold information from disclosure in a civil investigation.

7.13 Material disclosed for the purpose of criminal proceedings remains subject to the prohibition on further disclosure imposed by Part 9 of the EA02 save to the extent that it has been disclosed to the public.⁸⁹ In the OFT's view disclosure to defendants in criminal proceedings would not of itself amount to disclosure to the public.

Disclosure of information to support private civil proceedings etc.

7.14 As a matter of general policy, the OFT would firmly resist, on public interest grounds, requests for disclosure of leniency material, or the fact that leniency has been sought, where such requests are made, for example, in connection with private civil proceedings whether in the UK or overseas.⁹⁰ In any event the OFT must observe the general prohibitions on disclosure in Part 9 of the EA02. It follows, however, from paragraphs 7.10 and 7.11 above, that the identity of leniency

⁸⁹ See, for example, section 241(2) EA02.

⁹⁰ Obviously where a court has made an order with which the OFT was bound to comply, the OFT would discharge its duty to the court. Additionally, if disclosure of leniency material, or at least the fact that a leniency applicant existed, was genuinely necessary for the OFT to defend general civil proceedings, for example a judicial review on the correctness of the OFT's decision to open an investigation, some limited disclosure may have to be made. However, the OFT would always give utmost consideration to the public interest in maintaining an effective leniency policy.

applicants and certain information they have provided, will enter the public domain through any published infringement decision or through any criminal proceedings held in open court.

Use of information submitted by a failed or withdrawn leniency applicant

- 7.15 Information which is self-incriminatory and which was submitted after a marker approach by an undertaking applying for leniency will not subsequently be relied on as evidence by the OFT against that undertaking (hereafter referred to as a 'failed bona fide applicant') or any of its cooperating current and former employees and directors which, despite having acted in good faith throughout, has failed to qualify for leniency.⁹¹ However, this does not preclude the OFT from pursuing a case against a failed bona fide applicant in such circumstances. The OFT may make use of such information against third parties. Where it proposes to do so, it will consider any representations from the failed bona fide applicant and whether, in using information in this way, it would be fair and reasonable to award a reduction of any fine which might be imposed on the failed bona fide applicant at the mitigation stage of the penalty-setting process.⁹²
- 7.16 If the OFT proposes to use information provided by the failed bona fide applicant which could have been obtained through public sources, such as material available on the internet, it will consider itself free to use that information whether it be to support a case against the failed bona fide applicant or against third parties and whether or not it can be regarded as self-incriminatory.⁹³

⁹¹ This may, for example, occur because (a) the information supplied was insufficient, in the absence of other information, to provide the OFT with a basis for taking forward a credible investigation, (b) the information failed to add significant value to an existing investigation (c) the applicant provided evidence of an infringement which had only a minimal impact on trade in the UK but was instead focused on other jurisdictions or (d) because at the time of the marker approach the parties and the OFT had a reasonable expectation that the reported conduct amounted to cartel activity but subsequent investigation revealed that the nature of the infringement was not such as to amount to cartel activity.

⁹² In particular, as to whether a reduction should be granted under paragraph 2.16 of the revised OFT's Penalty Guidance, *OFT's guidance as to the appropriate amount of a penalty* (OFT 423, September 2012).

⁹³ Assuming the material did not become publicly available only because of the leniency application.

- 7.17 Where the OFT proposes to use any information provided by a failed bona fide applicant which was not available from public sources and is of a purely factual nature (as distinct from being self-incriminatory) the OFT may make use of such information whether it be to support a case against the failed applicant or against third parties. Where it proposes to do so, it will consider any representations from the failed bona fide applicant (including as to whether the material should properly be regarded as 'factual' or 'self-incriminatory') and whether it would be fair and reasonable to award a reduction of any fine which might be imposed on that applicant at the mitigation stage of the penalty-setting process.
- 7.18 Where an undertaking, having made an application for leniency and received confirmation of a marker, has chosen to withdraw its application of its own volition, the OFT may use any information provided by the applicant either against the applicant or any third party.⁹⁴ However, in so doing the OFT will consider whether it is fair and reasonable to award a reduction of any fine which might be imposed on the withdrawn applicant at the mitigation stage of the penalty-setting process.
- 7.19 Some practitioners have expressed concern over the use of information in failed and withdrawn leniency application cases, but the OFT's experience is that disputes over the use of information in such circumstances arise rarely in practice. Where a bona fide application has failed, it will generally be because there was an insufficient basis to take forward a credible investigation or because the value added to an existing investigation was small. It is therefore relatively unlikely that the OFT will have any desire to use the information for any purpose. Instances of withdrawal of applications have proven to be rare and the OFT sees no reason why the frequency of such instances would increase in the future.

⁹⁴ However, there may be exceptional circumstances which, in the OFT's view, justify the withdrawal of the leniency application. If so, the OFT would apply the same principles as those relating to the use of information against a failed bona fide leniency applicant. Given the OFT's very limited experience of voluntary withdrawals, it does not intend to draw up a list of possible exceptional circumstances. However, the OFT will not regard as an exceptional circumstance justifying a withdrawal from leniency, that an applicant is dissatisfied with the level of award made in a Type B or C leniency case.

Use of information in cases of bad faith and non-cooperation

7.20 Where a leniency applicant, at any stage, acts in bad faith and/or fails to cooperate fully, the OFT reserves the right to use information derived from an approach or application against that failed applicant (and any third parties). Nonetheless, in such circumstances, the OFT will still consider whether the use of information makes it fair and reasonable to award a reduction of any fine which might be imposed on the failed applicant at the mitigation stage of the penalty-setting process.

Use of information in the case of failed no-action applicants

7.21 The principles governing the use of information in the case of failed no-action applications largely parallel the principles in relation to failed leniency approaches by undertakings.

7.22 As set out above at paragraph 5.30, if an individual has applied for individual immunity and been 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.

7.23 The effect of this, in conjunction with paragraph 10.11 below (concerning revocation), is that where an applicant has intentionally or recklessly misled the OFT or is in breach of the conditions in paragraph 2.7 above, in particular as a result of a failure to cooperate, the OFT will revoke the no-action letter, and consequently all information given under the no-action process may be used against the individual in evidence. In addition, the OFT would also consider itself free to use the information against any third party including any undertaking.⁹⁵

⁹⁵ It will be recalled from paragraph 5.40 of this guidance note that the position is different where an individual has cooperated fully under the no-action process but his/her application is under the umbrella of an immunity approach by an undertaking whose corporate application has failed. In those circumstances no information provided by any cooperating individual will be used against him/her because the protections laid out in paragraph 5.30 continue to apply.

- 7.24 Similarly, where a no-action letter is not issued following an interview under paragraph 5.30, information provided could only be used against the interviewed individual applicant in criminal proceedings if he/she knowingly or recklessly provided information that is false or misleading in a material particular. The OFT would also consider itself free to use the information against third parties and other undertakings in those circumstances.
- 7.25 The OFT has not had experience of voluntary withdrawals of applications for no-action letters, but would be likely to take a similar approach to that taken in relation to voluntary withdrawals by undertakings from leniency. See paragraph 7.17.

Use of information in the case of OFT deciding not to proceed

- 7.26 If the OFT decides, at any stage, that it does not wish to proceed with its investigation into the infringement on administrative priority grounds, the OFT will generally have no desire to use the information provided against the applicant or for any other purpose.
- 7.27 One exception to this position is where the OFT has decided to proceed against certain parties to a group of related infringements, but has not pursued all possible parties for administrative priority reasons. In those circumstances, the OFT may need to rely on evidence provided by a leniency applicant which is no longer under investigation, against third parties. Where it proposes to do so, it will consider any representations from the leniency applicant, for example as to whether the information can be provided in another form or disclosed in a way which does not reveal that it was received as part of a leniency application.
- 7.28 There may also be cases where, in criminal proceedings against an individual, material provided by a leniency applicant in relation to a separate case would be 'relevant' and may need to be disclosed, despite the fact that that case was not proceeded with. In such cases, the material will be treated as sensitive and only be disclosed to the defence if it meets the statutory test for disclosure.
- 7.29 Where the OFT decides not to open an investigation at all or a case is closed on administrative priority grounds, the applicant's marker will remain on the OFT's file and, provided the conditions for leniency

continue to be met,⁹⁶ the applicant's position would be preserved in the unlikely event that the OFT decided to open or re-open the investigation, for example if new information came to light. To the extent that the case closure is publicised, the OFT would seek to avoid disclosing the fact of any leniency application.

Transfer of information to other UK agencies

7.30 If the OFT considers it necessary or appropriate to pass information deriving from a leniency applicant to another UK agency, such as the Serious Fraud Office (SFO), the OFT would inform the applicant or its legal adviser first. However, applicants must accept that the OFT may refer cases to the SFO and the expectation should be that such referrals will be on the basis of a full disclosure of all material in the OFT's possession.

Transfer of information to overseas authorities, the Commission and other members of the ECN

7.31 Information supplied by an undertaking as part of an application for leniency will never be passed to an overseas agency without the consent of the provider save for one exception. Such information may be disclosed to the Commission and/or another EU national competition authority but only in accordance with the provisions and safeguards set out in paragraphs 40 and 41 of the Network Notice. Also, where such a disclosure was being contemplated by the OFT, the OFT would always consult the provider.

7.32 Information supplied as part of an application for individual immunity will also never be passed to an overseas agency without the consent of the provider save again for one exception. The OFT may wish to provide the information to the Commission or to another EU national competition authority for the purpose of applying Article 101 of the TFEU. In the case of the Commission and the vast majority of EU national competition authorities, the enforcement of Article 101 is by way of proceedings against the undertakings concerned and will not therefore expose any individual to the risk of personal sanctions. Even where this is not the

⁹⁶ For example, leniency applicants should consider preserving relevant documents so that they are in a position to offer full cooperation, and should preserve the confidentiality of their leniency applications.

case, however, the OFT would, in any event, only transmit such information in accordance with the provisions and safeguards set out in paragraphs 40 and 41 of the Network Notice. The Commission or national authority would also be required to guarantee to the OFT that the information would not be provided to any other agency. There should therefore be no risk of any personal exposure of sanction to the applicant. Again, and for the reasons set out above where the OFT was considering such a disclosure to the Commission or to another EU national competition authority and the disclosure might lead to the identity of the provider being revealed, the OFT would always consult the provider.

8 OTHER ISSUES RELATING TO CRIMINAL INVESTIGATIONS/PROSECUTIONS

Interaction between the cartel offence in the UK and the Commission Leniency Notice

- 8.1 The OFT is aware that some practitioners might have a concern that undertakings approaching the Commission under the Commission Leniency Notice might inadvertently increase exposure for the undertaking's current and former employees and directors to the risk of prosecution in the UK for the cartel offence, in those cases where the infringement had some effect on the UK. The OFT believes that the points set out in this section should be sufficient to allay any concerns which might exist.
- 8.2 Based on past experience, the OFT expects that most undertakings that qualify for immunity under the Commission Leniency Notice will also be able to gain 'blanket' criminal immunity in the UK for current and former employees and directors, by virtue of that undertaking applying separately to the UK and gaining Type A immunity. Thus any fears of exposure to prosecution for the cartel offence would be allayed. Indeed, using the procedure referred to in paragraph 4.36 above, applicants, if they so wish, are able to request a no-names marker in the UK before they even approach the Commission.
- 8.3 What happens if the result of such an approach under paragraph 4.36 is that the OFT tells the applicant that Type A immunity is not available (and that 'blanket' criminal immunity for a Type B applicant is not available either) and that relevant current and former employees and directors are not therefore guaranteed criminal immunity in the UK? In that situation, the OFT might still be able to reassure the undertaking's adviser, on the basis of the provision of a 'hypothetical' set of facts provided by him/her, that the case would not be of a type where the OFT would contemplate bringing a criminal prosecution.
- 8.4 What if individual immunity was not available and in addition, the OFT was not prepared to give any assurances that it would not contemplate bringing a criminal prosecution in a case of that kind? It is at least possible that in such cases an undertaking might nonetheless qualify for

immunity under the Commission Leniency Notice. If so, the OFT will normally be prepared to grant no-action letters⁹⁷ to any implicated current or former employee or director of such an undertaking. This would be so even if another undertaking had already qualified for UK Type A immunity and consequent criminal immunity for all of its current and former employees and directors.

- 8.5 In theory therefore, a possible outcome is that the current and former employees and directors of two undertakings could be granted criminal immunity – in the one case because the undertaking obtains Type A immunity in the UK and in the other case because the undertaking obtains immunity under the Commission Leniency Notice and then obtains criminal immunity for all of its current and former employees and directors on the back of its grant of Commission immunity. The OFT expects this to be very rare, however, as the great majority of undertakings that qualify for immunity under the Commission Leniency Notice will also have put down a prompt marker to secure Type A immunity in the UK. Indeed, attempting to secure criminal immunity by reason of the undertaking applying for Type A immunity is the safer option of the two because it is guaranteed and not subject to the qualification that it would **normally** be granted.
- 8.6 Why does the OFT say it would only **normally** grant criminal immunity on the back of immunity granted under the Commission Leniency Notice? First, where there is already a pre-existing criminal investigation in the UK (the chances of which will obviously be increased if there is already a Type A applicant in the UK), there should be no guarantee of no-action letters to current and former employees and directors of an undertaking even if it qualifies for immunity under the Commission Leniency Notice.⁹⁸ Second, the OFT will be mindful of any attempts to 'game the system'. For example, if an undertaking is too late for Type A immunity in the UK and the OFT suspects that an application has subsequently been made to the Commission largely as a device for trying to procure no-action letters, the OFT might decline to offer criminal immunity. The OFT is more likely to decline to grant criminal immunity in such instances where the cartel is not one which the Commission would be 'particularly well

⁹⁷ Or where appropriate, comfort letters as per paragraph 8.15 of this guidance.

⁹⁸ This would not preclude an undertaking from applying to the OFT for Type C leniency (or Type B if it is available), in which case the OFT may be willing to grant discretionary individual immunity to some of the undertaking's current and former employees and directors.

placed' to investigate within the terms of the Network Notice.⁹⁹ Third, the OFT might refuse to grant criminal immunity when there is unreasonable delay between the approach to the Commission and the subsequent approach to the UK.

8.7 Therefore, the best option when applying for immunity under the Commission Leniency Notice is also to make a prompt approach to the OFT to try to secure UK Type A immunity – through the no-names marker procedure or otherwise.

8.8 The final set of circumstances to be considered here are those where an undertaking:

- is not in a Type A position and is unable to secure discretionary Type B immunity in the UK
- is not given an assurance that a prosecution for the cartel offence would not be contemplated in a case of that type, and
- does not qualify for immunity, but only a reduction of fine, under the Commission Leniency Notice.

The OFT believes that even in such cases, potential Commission applicants need have no concern that an approach to the Commission will **increase** the probability of prosecution for the cartel offence of any of its current and former employees and directors. This is because of the various information restriction safeguards set out in Regulation 1/2003 as supplemented by the Network Notice, together with the OFT's commitment to use internal 'information barriers'.

8.9 The principal route for disclosure of information from the Commission to the OFT is Article 12 of Regulation 1/2003. However, any information disclosed by the Commission to the OFT under Article 12 can only be used for the purpose of applying Articles 101 or 102 of the TFEU and cannot be used as evidence to impose sanctions against natural persons. Notwithstanding this, there may still be a residual concern that any information disclosed by the Commission to the OFT for the purpose of applying Article 101, might still be used by the OFT as **intelligence** to

⁹⁹ See paragraph 14 of the Commission Notice on Co-operation Within the Network of Competition Authorities (OJ 2004 C101/3 for a description of the circumstances in which the European Commission will be 'particularly well placed'.

start or further a criminal investigation, even though it could not be used as **evidence** in such a criminal case. So far as information deriving from a Commission leniency applicant is concerned, there should be no such concerns, however, owing to the safeguards in paragraphs 37 to 42 of the Network Notice.¹⁰⁰ These safeguards generally act to prevent any leniency-derived material from being submitted to the OFT under Article 12. The same safeguards also apply to information that has been obtained by the Commission during, by means of, or following any fact-finding measure which could not have been carried out except as a result of leniency.

8.10 The OFT also receives information from the Commission:

- sent under the 'close cooperation' principle (Article 11(1) and (2))
- sent with a view to the OFT assisting the Commission during its investigations (Articles 19 to 22), and
- sent to the OFT as a member of the Advisory Committee (Article 14).

Such material (whether from a leniency source or otherwise) could not be used in evidence in a criminal cartel prosecution because of the limitation in Article 28 of the Regulation and the case law of the European Court.¹⁰¹

8.11 Furthermore, in leniency cases, the effect of paragraph 39 of the Network Notice is that if a Commission case started as a result of leniency, the OFT will not be able to rely on information received from the Commission in that case under any of the Articles mentioned above, as a basis for starting¹⁰² its own criminal investigation.¹⁰³

¹⁰⁰ The Commission would only be permitted to transmit leniency information to the OFT with the consent of the applicant or where the applicant had also made a leniency application to the OFT relating to the same case or where the OFT had made a written commitment not to use the information to impose sanctions on the leniency applicant or any current or former employee or director of the leniency applicant.

¹⁰¹ Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada a.o.* [1992] ECR I-4785 (Spanish Banks).

¹⁰² It might be argued that there is a 'lacuna' here in as much as there is apparently no prohibition on using such information for an existing criminal investigation. However, the OFT would consider that to interpret the provision in this way would be contrary to the spirit of the Network Notice and in any event the information barriers referred to in paragraph 8.12 would apply as a 'long-stop' assurance.

¹⁰³ Although the Network Notice only refers expressly to information exchanged under Articles 11 and 20 to 22 of Regulation 1/2003, the OFT would also not rely on such information to start

- 8.12 In summary, the OFT could not use, either as intelligence or evidence, any leniency-derived information obtained from the Commission to further its criminal cartel enforcement functions. Nevertheless, as a further measure designed to provide reassurance to potential Commission leniency applicants, the OFT will use an internal information barrier between staff having access to information derived from the Commission under the above-mentioned provisions on a given case and staff on a team investigating the same cartel activity under section 188 of the EA02.¹⁰⁴ The former group of staff would therefore not be permitted to pass on information directly or indirectly derived from the Commission to the latter group.
- 8.13 For the above reasons, the OFT believes that the existence of the cartel offence in the UK should not deter applications for immunity or leniency under the Commission Leniency Notice.

When will an individual have to admit to the cartel offence, in particular dishonesty, and when will 'comfort letters' instead of no-action letters be issued?

- 8.14 Concern has been expressed in the past that the OFT may require certain individuals who qualify in principle for criminal immunity to admit to participation in the cartel offence, including dishonesty, where such an admission is neither necessary nor appropriate. In particular, it has been said that if the OFT were to reach a view about the role of a particular individual in the cartel arrangements at an early stage of the OFT's investigation, the OFT may require an admission of participation which might later turn out to be inappropriate once the investigation has been completed and all the evidence has been thoroughly scrutinised. It is for this reason that the OFT will not reach a final decision on whether an individual will be required to admit participation in the offence, including dishonesty, until the investigation is at or near its conclusion and after

an EA02 investigation where it was received under Articles 14 (Advisory Committee) or 19 (Power to take statements).

¹⁰⁴ It may sometimes be the case that both the staff at the OFT assisting the Commission and the staff working on an EA02 case may all be based in the OFT's Cartels and Criminal Enforcement Group. In this situation, the information barrier is maintained through clear guidance and training to all staff. A clear breach of the information barrier will be viewed internally as a serious performance management issue for the staff member(s) concerned. In particular cases, the Commission will also expect the OFT to explain to it the measures the OFT will be taking to ensure that the information barrier is maintained.

specialist criminal counsel has had the opportunity to review sufficient evidence gathered in the case to be able to advise the OFT on the issue.¹⁰⁵ If the adviser to the would-be no-action letter recipient wishes to put forward any material relevant to the dishonesty point, this will be considered before a final decision is made.

8.15 If the OFT duly decides that it is appropriate that an individual in the cartel who qualifies for criminal immunity in principle should make an admission of participation in the cartel offence, including dishonesty, then that individual will only be offered a no-action letter on condition that such an admission is made. Alternatively, if such an admission is deemed not to be appropriate, then the individual will be offered a 'comfort letter'. The comfort letter will state that after analysis of the evidence it has been concluded that there is insufficient evidence to implicate the individual in the cartel offence and that the OFT does not, therefore, consider that there is any risk of prosecution for the cartel offence by either the OFT or any other agency. For those other individuals who qualify in principle for criminal immunity, but who are judged not to have had any, or any significant, role in the cartel at all, the OFT would generally not consider it necessary to issue them with either a no-action or comfort letter as they do not even face a hypothetical risk. Concern has previously been expressed that a comfort letter in the terms described does not give the would-be applicant sufficient certainty as to their position. However, given that the cartel offence has now been in force since June 2003 and a number of comfort letters have been issued in a number of cases, the OFT considers that the comfort letter procedure has proven to be effective in achieving its objectives.

8.16 In the majority of cases therefore only a small proportion of those who qualify for criminal immunity will ultimately receive a no-action letter. If at any stage an individual who qualifies for criminal immunity but has not received a no-action letter subsequently appears to be at risk of prosecution for the cartel offence, whether by the OFT or any other agency, a no-action letter will be issued.

¹⁰⁵ In most cases, the OFT will seek counsel's advice on the matter to assist the OFT in making its determination. However, the OFT is not bound to seek advice. For example, it is not likely to seek advice where the decision as to whether or not a dishonesty admission should be made is considered to be a relatively straightforward one.

Cartel cases referred to the Serious Fraud Office

- 8.17 Where an undertaking or individual approaches the OFT for immunity in respect of cartel activity that has already been referred to the SFO or in respect of which such a referral is in contemplation, the SFO will in such cases be consulted about the possible grant of criminal immunity. This is appropriate given that the SFO will be leading the investigation. The final decision on whether to grant a no-action letter rests with the OFT.
- 8.18 Where a case has already been referred to the SFO, the circumstances may be such that the granting of immunity is no longer in the public interest (see paragraph 2.36).
- 8.19 However, the ability of an applicant to obtain certainty is not reduced. The legal adviser may still ask the OFT if criminal immunity is available and there is simply a greater prospect that the answer will be no where a referral to the SFO has already been made.

Other criminal offences

- 8.20 The grant of a no-action letter cannot prevent prosecution for conduct which, though it may be related to the cartel activity, amounts to a separate and distinct offence, such as bribery. However, to the extent that the cartel conduct particularised in a no-action letter would also be capable of being prosecuted as another offence (for example under the Fraud Act 2006), the OFT would only refer the case to another UK agency, such as the SFO, on the understanding that that agency would not circumvent the effect of the no-action letter by using that other offence to prosecute the recipient for the conduct particularised in the letter. This is subject, of course, to the proviso that the applicant complies with the usual conditions as set out in this guidance.

Criminal immunity in Scotland

- 8.21 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.

- 8.22 The OFT is, as at the date of publication, in discussion with the Serious and Organised Crime Division of the Crown Office (SOCD), Scotland regarding the renewal of their Memorandum of Understanding (MoU) in relation to the 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).¹⁰⁶ 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.

¹⁰⁶ (OFT546, June 2009). The MoU has been renewed annually from 2009. The SOCD is the successor to the NCD within the Crown Office.

9 OTHER PROCEDURAL ISSUES: LENIENCY PLUS/PENALTIES

Leniency plus

- 9.1 An undertaking co-operating with an investigation by the OFT under CA98 in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel activity in another market (the second market). If the undertaking obtains total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial penalty because it is the Type A or Type B applicant in relation to its activities in the second market, it will also receive a reduction in the financial penalties imposed on it which is additional to the reduction which it would have received for its cooperation in the first market alone.¹⁰⁷ The additional reduction granted in the first market, because of the successful application in the second market, is known as 'leniency plus'.
- 9.2 For example, as a result of an investigation by the OFT of producers, including ABC Limited, in the widgets market, ABC Limited carries out an internal investigation and discovers that, as well as having participated in cartel activity in the widgets market, one of its divisions has participated in separate cartel activity in the sprockets market. ABC Limited has been co-operating with the OFT's widgets investigation and is interested in seeking lenient treatment by disclosing its participation in the sprockets cartel activity. Assuming ABC Limited qualifies for total immunity or a reduction of up to 100 per cent in the amount of the financial penalty because it is the Type A or Type B applicant in relation to its activities in relation to the sprockets market, it can also obtain a reduction in financial penalty in relation to the widgets market in addition to the reduction it would have received for co-operation in the widgets investigation alone, that is, the leniency plus reduction will apply in respect of the widgets market (the first market) as a result of its successful leniency application in the investigation into the sprockets market (the second market).
- 9.3 The key question here is whether the novel evidence relates to a 'completely separate cartel activity'. In determining what would be an

¹⁰⁷ For the avoidance of doubt, the undertaking does not need to be in receipt of leniency in respect of the first market to receive this reduction. It is sufficient for the undertaking to be receiving a reduction, by way of mitigation, for cooperation.

appropriate additional reduction by way of leniency plus, the OFT will have regard to all the relevant circumstances. As a general rule, however, the OFT considers that the primary benefit for an immunity applicant is immunity from financial penalties and, where the applicant qualifies for Type A or Type B immunity, criminal immunity for all its cooperating current and former directors and employees as well as protection from director disqualification proceedings for all directors of the undertaking. Leniency plus in respect of any existing OFT investigation should be regarded as a secondary benefit only.¹⁰⁸

Consistent with that principle, reductions for leniency plus are not likely to be high. The level of any discounts would depend on such factors as the scale of the consumer detriment involved in the additional reported cartel, including the number and size of the affected markets, the amount of effort gone to by the immunity applicant to investigate the additional cartel and the likelihood that the OFT would have uncovered the additional cartel in any event.¹⁰⁹

- 9.4 As a general rule, where an undertaking is already cooperating with the OFT in respect of more than one cartel investigation and it applies for immunity in respect of a further completely separate cartel, the OFT will only award the undertaking leniency plus in respect of one of those prior investigations. However, the OFT will consider all the relevant circumstances before reaching a decision.

Penalty calculations

- 9.5 In the past, the OFT has calculated financial penalties for successful corporate immunity applicants in the same way as for other parties and then reduced the figure to zero. However, where total immunity from financial penalties is being granted the OFT will no longer calculate penalties as a matter of course. This applies whether the immunity applicant is in the Type A or Type B position. In the event that the OFT considers that there are significant reasons why in a particular case it would be appropriate to calculate the level of penalty that an immunity applicant would have received, the OFT will discuss those reasons with the applicant.

¹⁰⁸ Similarly, where a Type B applicant is not granted immunity but is granted a reduction in financial penalties, any leniency plus awarded in respect of an existing cartel investigation should be regarded as a secondary benefit.

¹⁰⁹ The considerations cited here are not to be considered exhaustive.

'But for' test

- 9.6 Where a Type B or Type C applicant that is granted a reduction in financial penalties, has provided evidence of previously unknown facts relevant to the gravity or duration of the infringement, the OFT will not take account of such information to the detriment of the applicant when assessing the appropriate amount of penalties. In other words, if the finding of duration would have been shorter, or the infringement less serious, 'but for' the evidence provided by the applicant, the penalty for that applicant will be assessed against the short duration or lesser gravity that the OFT would otherwise have found.
- 9.7 The same principle applies where an OFT investigation covers multiple related infringements, and the OFT would not have investigated a particular infringement involving the applicant 'but for' evidence provided by that applicant. In that situation, the applicant would not be penalised for the particular infringement in question, even though it is granted a reduction in penalties, rather than corporate immunity, for the wider investigation.

10 BAD FAITH/WITHDRAWAL OF LENIENCY/REVOCAION OF NO-ACTION LETTERS

'Bad faith': unauthorised disclosure or destruction etc of material

10.1 The OFT uses the term 'bad faith' in this context to describe situations which go beyond non-cooperation and which instead involve positive steps to hinder an OFT investigation and any consequent enforcement action. For example, the OFT will consider bad faith¹¹⁰ to have been shown by a leniency applicant where the applicant:

- tips off another person or undertaking about an intended or actual approach for leniency to the OFT, or
- destroys or tampers with evidence either prior to or at any time after an approach to the OFT for leniency.¹¹¹

Consequences for individuals and companies where bad faith is shown

10.2 If bad faith has been shown, the potential consequences will depend on the stage at which it has been discovered. The consequences are likely to be:

- a refusal to grant a leniency marker or the withdrawal of a leniency marker as the case may be, or
- the revocation of a leniency agreement and any no-action or comfort letters granted pursuant to the undertaking's approach or, as the case may be, the withdrawal of a no-action letter arising out of an individual immunity approach, and
- possible prosecution of one or more individuals under sections 43 and 44 of the CA98 and section 201 of the EA02, depending on the precise circumstances.

10.3 In relation to the likely consequences referred to at paragraph 10.2, the OFT recognises that even where an undertaking took all reasonable steps

¹¹⁰ The list of bad faith examples here is not to be considered exhaustive.

¹¹¹ If the destruction or tampering occurred prior to the approach, these provisions only operate where the undertaking is contemplating applying for leniency. See also ECN Model Leniency Programme, Section V, paragraph 13(3).

to ensure that there was no 'tipping off' or document destruction or tampering by a current or former employee or director, a dishonest or negligent person may nonetheless act contrary to the undertaking's clear instructions and in spite of its precautions. In such cases, the OFT would be understanding¹¹² of the undertaking's position¹¹³ but it will be incumbent on the undertaking to demonstrate the reasonable steps it took to avoid the breach occurring. (See paragraphs 3.24 to 3.28 with respect to maintaining confidentiality and securing evidence.)

- 10.4 Where instances of bad faith on the part of individuals have been discovered by the undertaking they should be reported to the OFT promptly.

The relationship between non-cooperation and bad faith

- 10.5 There are similarities between non-cooperation as described in paragraphs 5.37 to 5.40 above and bad faith as described in paragraphs 10.1 to 10.4 above. In both cases, where an undertaking has acted reasonably as a whole, the consequences may be confined only to the individuals who failed to cooperate or showed bad faith as the case may be. In general though, bad faith is viewed more seriously than 'simple' failure to cooperate – in particular the OFT may consider that prosecution of relevant individuals is appropriate where the elements of the offences described in paragraph 10.2 above are met. As to the use by the OFT of information arising from leniency applications which have failed, or been revoked, due to non cooperation or bad faith, see paragraph 7.19 above.

Withdrawal of leniency marker/revocation of leniency agreement

- 10.6 Withdrawal of leniency is expected to be rare, but the OFT takes the conditions of leniency very seriously and will not permit applicants to benefit from reductions in fines or immunity from prosecution in

¹¹² This does not mean that the OFT will guarantee that the undertaking's application will always be safe in bad faith cases where the company took the various precautions described. There may be cases where the breach is so fundamental, for example a tip-off by a senior director or employee, that the public interest demands that the entire leniency application should fail. It is to be imagined that such cases will be extremely rare. Of course, in the hopefully equally rare instance of the bad faith having been corporately rather than individually sanctioned, the undertaking's leniency application is bound to fail.

¹¹³ The individual concerned is nevertheless likely to face some kind of sanction by the OFT, for example, the revocation of any actual or intended no-action letter protection.

circumstances where that applicant has failed to cooperate or otherwise failed to meet the conditions.

- 10.7 If at any time after the grant of a leniency marker, the OFT has concerns that an applicant has acted or is acting in a way that puts its leniency status at risk, it will raise those concerns with the applicant's representative and give the applicant an opportunity to respond, and if possible to address the concerns, prior to withdrawing the leniency marker.
- 10.8 If the OFT is minded to revoke a leniency agreement because it considers that the applicant has breached the terms of the agreement, the applicant will be notified in writing and given a reasonable opportunity to make representations.
- 10.9 The decision on withdrawal of a leniency marker or revocation of a leniency agreement will be taken by the OFT's Senior Responsible Officer (SRO) in the investigation. For cases where the SRO is not the Senior Director of Cartels and Criminal Enforcement, the SRO will consult the Senior Director prior to taking any decision on withdrawal of leniency.

Revocation of no-action letters

- 10.10 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 2.7 above), or
 - the recipient of a letter has knowingly or recklessly provided information that is false or misleading in a material particular.
- 10.11 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.
- 10.12 If the OFT is minded to revoke a no-action letter the recipient of the letter will be notified in writing and given a reasonable opportunity to make representations.
- 10.13 The decision on revocation of a no-action letter will be taken by the Senior Director of Cartels and Criminal Enforcement.

GLOSSARY OF TERMS

In this guidance note, the following terms have the following meanings:

- applicant – an applicant for any form of leniency, including after the applicant's marker has been confirmed and/or the leniency agreement and/or any no-action letters or comfort letters have been signed.
- CA98 – the Competition Act 1998.
- cartel offence – the offence contained in section 188 EA02.
- Chapter I prohibition – the prohibition contained in section 2 CA98.
- Commission – the European Commission.
- Commission Leniency Notice – Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p.17).
- EA02 – the Enterprise Act 2002.
- TFEU – the Treaty on the Functioning of the European Union.
- leniency – a 'catch all' term used throughout this document to refer collectively to all of (or, where it is clear from the context, some of) corporate immunity, corporate reductions in penalties or individual immunity. Where reference is made within this document to an **undertaking** having applied for 'leniency' that includes all the sub-types below but obviously excludes individual immunity.
 - criminal immunity – refers to immunity granted to an individual from prosecution for the cartel offence
 - 'blanket' criminal immunity – refers to a situation where all of the current and former employees and directors of an undertaking are granted criminal immunity.

- corporate immunity – refers to a situation where an undertaking is granted immunity from any financial penalty under the CA98¹¹⁴ and
 - individual immunity – refers to a situation where one or more individuals are granted criminal immunity but not as part of a 'blanket' grant of criminal immunity.
- Leniency Enquiry Line – Telephone number 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.
 - marker – a formal acknowledgement of a leniency application which records the timing of the application and priority relative to other applicants. The grant of a marker must be followed by the provision of a full application package and continued compliance with the conditions of leniency, in which case the marker will be retained pending signing of the formal leniency agreement or no-action letter later in the investigation.
 - Network Notice – Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p.43 - 53).
 - no-action letter – letter issued by the OFT pursuant to section 190(4) EA02 guaranteeing immunity from prosecution for the cartel offence in England and Wales.
 - OFT's Penalties Guidance – *OFT's Guidance as to the appropriate amount of a penalty* (OFT 423, September 2012).pre-existing investigation – refers to a situation where the OFT considers it has reasonable grounds to suspect cartel activity, such that it may conduct an investigation under one or both of s192 of EA02 and s25 CA98, and has taken active steps in relation to that investigation. Active steps may be overt or covert and

¹¹⁴ The OFT may impose financial penalties under the CA98 for infringements of the Chapter I prohibition and/or of Article 101 of the TFEU. Article 101 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Chapter I prohibition is based on Article 101 of the TFEU but applies to anti-competitive practices which affect trade within the United Kingdom. For further details see the competition law guidance *Agreements and Concerted Practices* (OFT 401, December 2004).

may or may not involve the use of statutory information gathering powers.

- Regulation 1/2003 – Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (Now Articles 101 and 102 of the TFEU) (OJ L 1, 4.1.03, p.1).
- SRO – Senior Responsible Officer. See '*A guide to the OFT's investigation procedures in competition cases*' (OFT1263rev, October 2012), in particular, Chapter 5 for a description of the role of the SRO.
- Type A, Type B, Type C – summary terms used to indicate the different levels of leniency protection available according to the stage at which a leniency application is received, as set out in Table A above.

ANNEXES

ANNEXE A. PRO FORMA CORPORATE LENIENCY AGREEMENT

COMPETITION ACT 1998 (the Act) AND ARTICLE 101 of the TFEU:

A.1 This letter sets out an agreement between [Applicant] (the Applicant) and the Office of Fair Trading (the OFT).

Grant of immunity

A.2 The OFT grants the Applicant [immunity from **OR** a reduction of [X] per cent in the amount of] any financial penalty which may otherwise be imposed by the OFT under section 36 of the Act (leniency) in respect of the reported cartel activity as defined in paragraph A.3 below. Leniency is granted on the terms and conditions set out below and in accordance with paragraph [3.9 **OR** 3.11 **OR** 3.13] of the *OFT's guidance as to the appropriate amount of a penalty*¹¹⁵ issued under section 38 of the Act (a copy of which is attached to the original signed version of this letter).

A.3 Leniency is granted on the application of the Applicant in connection with the following cartel activity in the United Kingdom [and, if appropriate relevant Member States], namely [description of the reported cartel activity] ('the reported cartel activity'). Subject to the provisions of paragraphs A.4 and A.7 below, this means that [immunity from **OR** a reduction of [X] per cent in the amount of] financial penalty will be imposed by the OFT on the Applicant in relation to any finding by the OFT that the reported cartel activity or any part of it constitutes an infringement of section 2 of the Act [and/or Article 101 of the TFEU].

Conditions

A.4 This grant of leniency is made and remains conditional on the Applicant throughout its dealings with the OFT in relation to the reported cartel activity having satisfied and continuing to satisfy each of the conditions set out below.

(a) The Applicant accepts that the reported cartel activity infringed section 2 of the Act [and/or Article 101 of the TFEU].

¹¹⁵ OFT 423, December 2004. Though please see footnote 1 above.

- (b) The Applicant has provided the OFT with all the non-legally privileged information, documents and evidence¹¹⁶ available to it as at the date of this agreement regarding the existence and activities of the reported cartel activity.
- (c) The Applicant maintains continuous and complete cooperation throughout the OFT's civil and any criminal investigations and until the conclusion of any action by the OFT arising as a result of the investigations, and reference to such action includes (a) any action taken by the OFT in any proceedings before the Competition Appeal Tribunal (CAT) arising from a decision of the OFT in connection with the reported cartel activity and (b) any action taken by the OFT, or any other prosecuting agency, to charge and prosecute any individuals in connection with the reported cartel activity. Save as otherwise agreed with the OFT, this includes but is not limited to:
 - (i) not disclosing (either directly or indirectly) to any third party without the OFT's express prior consent the fact that the Applicant has approached the OFT and is cooperating with the OFT under the provisions of the OFT's leniency programme
 - (ii) in addition to the non-legally privileged information, documents and evidence already provided, voluntarily and without prompting providing the OFT with all the facts that become known to the Applicant, together with all the non-legally privileged information, documents and evidence, wherever located, that come into the possession, custody or control of the Applicant, or otherwise become available to it, relating to the reported cartel activity
 - (iii) to the extent that they have not already been provided, voluntarily and without the OFT using its powers under any of sections 26 to 28A of the Act or any of sections 193 to 194 of the Enterprise Act 2002 [or any national

¹¹⁶ References to 'evidence' in this agreement include evidence in any form, and could include, for example, mobile telephones which may contain relevant material such as call logs and (deleted or undeleted) text messages.

competition authority exercising at the request of the OFT its powers under Article 22 of Council Regulation 1/2003/EC], promptly providing the OFT with all the non-legally privileged information, documents, evidence or other items in its possession, custody or control, or otherwise available to it, wherever located, requested by the OFT in the furtherance of its investigation into the reported cartel activity

- (iv) making the IT systems and equipment ¹¹⁷ under its control and/or accessible from its premises available for analysis by such means and in such manner as determined by the OFT to be most appropriate for the purposes of its investigation. In making this determination the OFT will have regard to the legitimate interests of the undertaking in protecting confidentiality of its information, and maintaining the protections of legal professional privilege
- (v) ensuring that any potentially relevant IT systems are not removed, destroyed, tampered with or modified, and that relevant data are not removed, destroyed, tampered with or modified prior to, during or following any analysis by the OFT in accordance with paragraph (iv) above
- (vi) using its best endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons voluntarily to provide the OFT with any information (directly or indirectly) relevant to the reported cartel activity
- (vii) facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the OFT may reasonably require at the times and places reasonably designated by the OFT

¹¹⁷ This would include, but not be limited to, servers, personal computers, laptops, mobile telephones, blackberries, palmtops, electronic organisers, digital media and all other similar networking or personal devices.

- (viii) using its best endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT respond completely and truthfully to all questions asked in interviews with the OFT
- (ix) using its best endeavours to ensure that current and former directors, officers, employees and agents who provide information to the OFT make no attempt either falsely to protect or falsely to implicate any undertaking in any infringement of the Act [and/or of Article 101 of the TFEU] or any individual in relation to the cartel offence under section 188 of the Enterprise Act 2002
- (x) in relation to CAT proceedings arising from a decision by the OFT in connection with the reported cartel activity, using its best endeavours to facilitate, and secure the complete and truthful cooperation, of its current and former directors, officers, employees and agents, even if the Applicant is not a party to the CAT proceedings, in:
 - (a) assisting the OFT or its counsel in the preparation for any CAT proceedings
 - (b) if requested by the OFT or its counsel attending any CAT proceedings, and
 - (c) speaking to their witness statements and being cross-examined on such witness statements in any CAT proceedings,
- (xi) in relation to any criminal proceedings in connection with the reported cartel activity, providing equivalent cooperation to the OFT or any other UK prosecuting agency (in a manner compatible with the rules and principles of criminal law and procedure) as that referred to at paragraph (x) above in relation to any CAT proceedings, and
- (xii) recording and retaining on a continuing basis any material which might have any bearing on the reported cartel activity and which remains in the possession of the

Applicant or under its control until the conclusion of any civil or criminal proceedings in connection with the reported cartel activity.

- (d) The Applicant has refrained from further participation in the reported cartel activity from and including [X], that is, the date of application for leniency, and shall continue to do so.
- (e) [The Applicant has not taken steps to coerce another undertaking to take part in the reported cartel activity [Only relevant for an Applicant seeking immunity].]

In addition to the above-mentioned conditions, the Applicant understands that it is bound by all the other relevant conditions, provisos and qualifications referred to in the OFT's published guidance documents on leniency.

Use of information provided by the Applicant

- A.5 All information, documents and other evidence provided by the Applicant to the OFT under this agreement shall, notwithstanding the termination of the agreement (whether by revocation, the conclusion of the case, including any proceedings before the CAT, in relation to the reported cartel activity, or otherwise), remain the property of the OFT and may be used by the OFT to facilitate the performance of its functions by or under any enactment.

Revocation

- A.6 If, at any time before the conclusion of the case (whether by the adoption of a decision or otherwise) including any proceedings before the CAT or other appeal proceedings, the OFT determines that any of the conditions in paragraph A.4 above have not been complied with, the OFT may, subject to the provisions of paragraph A.7 below, revoke the grant of leniency to the Applicant and impose any penalty in accordance with section 36 of the Act in relation to any finding by the OFT that the reported cartel activity or any part of it constitutes an infringement of section 2 of the Act and/or Article 101 of the TFEU.
- A.7 Before revoking the grant of leniency, the OFT will give written notice to the Applicant of the nature of the alleged non-compliance and that the

OFT is considering revoking the grant to the Applicant of leniency. The Applicant will be given an opportunity to respond to the notice and, if the OFT considers it possible and appropriate, to remedy any breach within a reasonable period of time from the service of the notice.

Entire agreement

A.8 This letter constitutes the entire agreement between the OFT and the Applicant and, save as may be expressly referred to, supersedes all prior representations, writings, negotiations or understandings, if any, whether oral or written, relating to the grant by the OFT of leniency to the Applicant in connection with the reported cartel activity.¹¹⁸

Jurisdiction

A.9 This agreement is subject to English law and the jurisdiction of English Courts.

Execution

A.10 The signatories to this letter on behalf of each party have all the authority and capacity necessary to sign this letter and to bind the respective parties hereto. 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: Senior Director of Cartels and Criminal Enforcement

For and on behalf of the Office of Fair Trading

Signed:

Date:

¹¹⁸ However, for the avoidance of doubt, this clause does not oust the application of the OFT's published leniency guidance.

Name:

Position:

For and on behalf of the Applicant

ANNEXE B. PRO FORMA INDIVIDUAL NO-ACTION LETTER

ENTERPRISE ACT 2002 (the Act) - NOTICE UNDER SECTION 190(4)

B.1 This letter gives written notice to [**Applicant**] (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 B.2 of this letter (except in the circumstances specified in paragraph B.6).

Grant of immunity

B.2 The offence for which immunity from prosecution is granted (the Reported Offence) is that [**describe**, for example, '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).

Conditions

B.3 This grant of immunity from prosecution is made and remains conditional on the Applicant having satisfied and continuing to satisfy each of the conditions set out below.

- (a) The Applicant must admit participation in the Reported Offence described in paragraph B.2 of this letter.
- (b) The Applicant must provide the Office of Fair Trading (the OFT) with all non-legally privileged 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 must maintain continuous and complete cooperation throughout the investigation of the Reported Offence and the Cartel Agreement and until the conclusion of any criminal proceedings arising as a result of the investigation. Save as otherwise agreed with the OFT, such cooperation includes but is not limited to the Applicant:

- (i) not disclosing (either directly or indirectly) to any third party without the OFT's express prior consent the fact that the Applicant is cooperating with the OFT under the provisions of the OFT's no-action policy
- (ii) 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 or the Cartel Agreement, in addition to any such Information already provided
- (iii) making the IT systems and equipment ¹¹⁹ under his/her control and/or accessible to him/her available for analysis by such means and in such manner as determined by the OFT to be most appropriate for the purposes of its investigation. In making this determination the OFT will have regard to the legitimate interests of the Applicant in protecting confidentiality of the information made available, and maintaining the protections of legal professional privilege.
- (iv) to the extent that it has not already been provided, providing voluntarily and 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 or the Cartel Agreement
- (v) where required providing evidence upon oath in any criminal proceedings arising out of the Reported Offence or the Cartel Agreement
- (vi) recording and retaining on a continuing basis any material which might have any bearing on the Reported Offence or the Cartel Agreement and which remains in the possession of the Applicant or under his/her control until the conclusion of any criminal proceedings arising out of the Reported Offence or the Cartel Agreement.

¹¹⁹ This would include, but not be limited to, servers, personal computers, laptops, mobile telephones, blackberries, palmtops, electronic organisers, digital media and all other similar networking or personal devices.

- (d) 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].
- (e) The Applicant must refrain from any further participation in the Cartel Agreement (except as may be directed by the investigating authority).
- (f) The Applicant must not have taken steps to coerce another undertaking to take part in the Cartel Agreement.

In addition to the above-mentioned conditions, the Applicant understands that it is bound by all the other relevant conditions, provisos and qualifications referred to in the OFT's published guidance documents on leniency.

- B.4 The Applicant hereby (i) admits having committed the Reported Offence, (ii) confirms that he/she has complied with conditions (b), (c), (d) and (e) above, and (iii) undertakes to continue to comply with condition (c) above and to comply with condition (f) above.

Revocation

- B.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 possible and appropriate, to remedy the breach within a reasonable period of time from the service of the notice.
- B.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.

- B.7 Irrespective of whether the OFT has revoked the grant of immunity, all Information provided to the OFT by the Applicant shall remain the property of the OFT.

Entire agreement

- B.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 representations, writings, negotiations or understandings, if any, whether oral or written, relating to the Reported Offence.¹²⁰

Execution

- B.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: Senior Director of Cartels and Criminal Enforcement

For and on behalf of the Office of Fair Trading

Signed:

Date:

Name:

¹²⁰ However, for the avoidance of doubt, this clause does not oust the application of the OFT's published leniency guidance.

ANNEXE C. CONDUCTING INTERNAL INVESTIGATIONS BEFORE A LENIENCY APPLICATION

- C.1 In addition to the detection of cartels, the purpose and function of the OFT's leniency policy is also to facilitate the bringing of successful enforcement action by the OFT, in part through the provision of direct 'insider' evidence of the cartel activity.
- C.2 In order to fulfil this objective, it is essential that applicants take precautions to ensure that they do not, either before or after making their applications, conduct their own investigations into the suspected cartel activity in ways that diminish the probative value of the evidence obtained in that investigation or any subsequent investigation by the OFT.
- C.3 This part of the guidance therefore highlights some of the potential risks that arise and some key points for those investigating to follow. Persons conducting such investigations should have regard to all relevant legal requirements (such, for example, those arising in relation to employment, data protection and privacy law) to ensure that their investigation is conducted lawfully and may wish to seek specialist legal advice for this purpose.

Limit enquiries to the necessary

- C.4 The OFT recognises that undertakings and their advisers will need to make sufficient enquiries to reach a decision as to whether to apply for leniency. However, due to the various possible risks described below, in conjunction with the OFT's responsibilities to ensure the standard of the investigation, it is important that the OFT is able to conduct its own investigation from the earliest possible opportunity. It is of prime importance that would-be applicants **conduct an enquiry that is as limited to what is necessary at the pre-lenieny stage in order to make a decision as to whether to apply for leniency**. The OFT accepts that what is necessary for these purposes will depend upon the circumstances of the case and that a business will need to have a suitable information base in order to make such a decision.

Tip-off

- C.5 On more than one occasion, the OFT has conducted 'surprise' inspections of premises only to find evidence to suggest that the

undertaking being visited had prior knowledge of the OFT's investigation. This could have occurred as a result of a tip-off emanating from the leniency applicant. Tip-off is obviously a real risk when individuals within a leniency applicant have close links with individuals working in a 'target' undertaking likely to be the subject of a surprise visit. The risk may be particularly high where individuals in the applicant undertaking previously worked for the target undertaking. It is also likely to be very risky to approach former employees or directors of the leniency undertaking and making such an approach during the pre-marker period (or indeed any time up to the OFT's own investigations becoming overt) should be an exceptional course. The OFT will expect an undertaking to take a sensible risk-based approach and to conduct its internal investigations in such a way as to minimise as far as possible the risk of tip-off.

- C.6 It should also be noted that, given the possibility of a subsequent criminal investigation, an individual may be prosecuted for any unauthorised disclosures¹²¹ and that such disclosures may, if discovered, also result in the undertaking and the individual losing the immunity which they would otherwise have qualified for.

Minimising risk of 'tip-off'

- Knowledge of any leniency application, already made or in contemplation, should be restricted to those who need to know.
- Consider carefully which individuals need to be approached and, as far as possible, avoid questioning 'high-risk' individuals about the cartel activity at all or in such a way as to increase the chance of tip-off.
- Consideration should also be given, to the extent that the relevant legal framework permits, to which covert investigations can be conducted to establish sufficient material to make the approach for leniency, for example, covert examination of relevant

¹²¹ See, in particular, section 201(4) of the EA02 which provides that any individual who knows or suspects that an investigation by the SFO or OFT into an offence under section 188 (the cartel offence) is being carried out **or is likely to be carried out** and falsifies, conceals, destroys or otherwise disposes of **or causes or permits the falsification etc** of information which he knows or suspects to be relevant to such an investigation is guilty of an offence carrying a prison term of up to five years and an unlimited fine.

individuals' email accounts or other electronic material.

- Take care when explaining the reasons why individuals are being questioned. For example, compare, bearing in mind any relevant legal requirements, the relative merits of telling an individual that the interview is with a view to a possible approach to the OFT and the full consequences of tipping off with the alternative approach of questioning the individual in a more low-key way such as to establish the facts, which may in some instances be a better way of reducing the chance of him or her tipping others off.
- The approach to be taken in a given case will depend on a risk assessment of the individual(s) concerned.

Tampering and 'corruption' avoidance

- C.7 It is a sensible precaution to secure any items of evidence, so far as possible, to prevent tampering or corruption of material such as would undermine its evidential value in any future legal proceedings, especially criminal proceedings. 'Corruption' in this context can mean any physical amendment to evidential sources that may affect their probative value, and could be inadvertent rather than deliberate. What precautions are possible and reasonable will naturally depend on the circumstances of the case and the OFT only expects undertakings to take sensible and prudent measures. The taking of such measures could have an impact upon the success of any future OFT investigation, as sophisticated cartels can often only be evidenced through fragmentary material, such as emails or text messages.
- C.8 When securing evidence (whether physical or electronic), the evidence should be physically located in such a way that access to it is limited to as few people as possible, who are aware of the importance of its preservation. Ideally, original materials should be kept in secure, locked storage. There should be clear records of how evidence has been secured and of who has had access to it and for what purposes (for example to review, to copy, to show to others).
- C.9 Ultimately, the applicant needs to be able to inform the OFT of where any evidential material originated from and be in a position to confirm

that evidential material has not been altered between being removed from that location and being handed to the OFT.

- C.10 Records of where evidence came from should indicate which person or persons had possession or control of the material and its location, including any description of the file(s) that particular papers were taken from and where the file or other document was kept. Any records, schedules or lists of evidence gathered as part of an internal investigation must give a sufficiently detailed description of the material to ensure there can be no confusion at a later stage in identifying the material referred to.

Preserving and securing electronic evidence

- When preserving and securing electronic evidence, relevant legal requirements should always be borne in mind and legal advice sought where necessary.
- If certain individuals have used laptop computers, mobile telephones or other electronic devices which might contain relevant evidence, consideration should be given to removing those items from further use, at the earliest possible opportunity, so as to prevent evidence loss or to allow a forensically sound image to be created.
- When examining any electronic media, take care to ensure that it is examined in such a way that the evidential integrity of the material in question is not adversely affected.
- Wherever practicable, forensic experts should be used, who are familiar with universally accepted standards for the recovery of electronic data.¹²²
- Back-up tapes of electronic media should be located and secured.

¹²² In determining whether electronic evidence is forensically sound, the OFT will in particular have regard to the *ACPO Good Practice Guide for Computer-Based Electronic Evidence*. If a small undertaking is concerned that cost is a barrier to precautions such as this, it is advised to seek confidential guidance from the OFT as to the best course of action (see paragraph 3.3 onwards).

Preserving and securing physical evidence

- Original hard copy documents which provide evidence of a cartel should be safely secured, including diaries and workbooks of relevant individuals.
- Working copies should be made if the documents are to be used at all for the purposes of the investigation and/or for any continued business use.
- No amendments or annotations should be made to original documents at any time during the investigation.
- A note should be kept of the source location, and where known, the author(s) of relevant documents that are removed in the course of the investigation.

Witness interviews

- C.11 The secret nature of cartels means that the evidence of witnesses can be of paramount importance to successful enforcement action. Any individual who has information relevant to establishing the existence of the cartel can be a witness for these purposes.
- C.12 Interviewing witnesses to obtain the maximum possible information but without distorting their evidence can be difficult. Because of these difficulties, it is preferable for applicants to limit the number and scope of interviews to the minimum necessary to decide whether to make a leniency application.
- C.13 The following precautions must be taken in any internal investigation, notwithstanding that the OFT will conduct its own interviews and prepare statements for witnesses to sign.

Interviewing witnesses

- Any interviews must be conducted in a balanced way with a view to establishing the facts, and without any pressure being placed on any witness to give or confirm a particular version of events.
- Witness evidence must not be 'contaminated' by exposure to the evidence of other witnesses. Do not tell any individual what another individual has said about the alleged cartel activity.
- Witness evidence must not be 'contaminated' by exposure to documents

or records that the witness did not create or have access to at the relevant time. Witnesses must be interviewed separately and asked not to discuss their evidence with any other witness.

- The importance of being able to provide an account of interviews with witnesses is particularly acute (see below).
- Careful consideration should be given to the conduct of the investigation where senior managers who are witnesses would normally expect to see the results of the investigation and be involved in decisions whether or not to apply for leniency.

Explanation of steps taken in the internal investigation

- C.14 Except in the case of an oral application,¹²³ all leniency applicants will be expected to take a careful note of all the actions they have taken as part of an internal investigation, including the identities of any witnesses who were interviewed in the investigation process, the nature of the questions asked and the replies obtained. The note will need to be retained until the conclusion of any proceedings. A refusal or inability to do so may mean that the applicant is not meeting the conditions for leniency.
- C.15 In addition to enabling the OFT to focus its own investigative steps or to direct the applicant in making further enquiries following the application, there may be circumstances where the OFT will need to rebut arguments that an internal investigation has compromised the integrity of the OFT's own case, and the provision of a clear note explaining the steps taken in such an investigation will be invaluable for this purpose.
- C.16 The OFT recommends that, from the moment a leniency application is in contemplation, all notes, including manuscript/rough notes, should be kept in a separate notebook from notes relating to unrelated matters. In

¹²³ Oral applications are discussed in paragraph 4.31. This includes discussion of the circumstances in which the OFT may accept an oral application as well as the cooperation expected from the oral applicant.

the event of a criminal case, the pre-trial disclosure requirements may extend to such material, and so this precaution will facilitate the protection of completely unrelated material from disclosure.

- C.17 Ultimately, and depending on whether the case results in a criminal prosecution, the OFT, and hence the applicant, may need to demonstrate a full audit trail of the enquiries that have been carried out and this may, in some cases, necessitate witness statements from those involved in conducting the investigation. An inability or refusal on the part of a leniency applicant to assist the OFT in doing so in an effective manner may mean that the leniency applicant cannot fulfil the conditions of leniency.
- C.18 Therefore, at a minimum, save to the extent that LPP applies, applicants should be able to provide an account of the following:

Interviews/meetings with potential witnesses
<ul style="list-style-type: none"><input type="checkbox"/> Names of interviewees, with time and date of interview(s)<input type="checkbox"/> Names of interviewers, any other persons present and the capacity in which they act (for example, legal representative (and who they represent), company representative)<input type="checkbox"/> Nature of pre-interview briefing, that is, what the interviewee was told about the purpose of the interview, what they knew about the company's position (whether they were aware of the potential leniency application), what they had been told about their own position or possible personal consequences arising from the investigation.<input type="checkbox"/> Whether the interview was recorded<input type="checkbox"/> If no tape recording or detailed transcript was made, details of questions asked and answers given

Physical Searches
<ul style="list-style-type: none"> <input type="checkbox"/> Locations searched (address, types of rooms searched, occupiers of particular offices/desks searched) <input type="checkbox"/> Search and sift criteria, for example the briefing given to persons conducting the search <input type="checkbox"/> Specific locations of relevant material, including any file names and information on who had possession or control of the material <input type="checkbox"/> Where and how relevant material has been secured <input type="checkbox"/> Who found relevant material, and the continuity of evidence¹²⁴
Electronic Searches
<ul style="list-style-type: none"> <input type="checkbox"/> Locations searched (servers, personal computers, laptops, mobile telephones, palmtops, electronic personal organisers, digital media, other similar networking or personal devices) <input type="checkbox"/> Means of searching, in particular whether searches were conducted on a forensically secure image or on the original data <input type="checkbox"/> Search and sift criteria, for example the briefing given to persons conducting the search, the list of search terms used <input type="checkbox"/> Number of hits generated through electronic searches, and details of any 'manual' sifts to assess relevance of those hits. <input type="checkbox"/> Where and how relevant material has been secured, and the continuity of evidence¹²⁵ <input type="checkbox"/> Who found/identified relevant material

¹²⁴ Continuity of evidence means being able to establish how a particular document or item has been handled from the time when it was first acquired or created to the point at which it is used in evidence (such as when it is cited in a statement of objections or produced in court). This is achieved by ensuring that items are stored securely, and by keeping full and accurate records of who has been in possession of the material, where and when.

¹²⁵ Please see footnote 124.

ANNEXE D. CHECKLIST OF INFORMATION REQUIREMENTS DURING A LENIENCY APPLICATION

Leniency applicants must provide all non-legally privileged information, documents and evidence available to them regarding the existence and activities of the reported cartel activity (hereafter referred to as the 'relevant information').

This checklist identifies specific information that will be required in every case, but this should not be interpreted as a limitation on the requirement to provide all relevant information (see further paragraph 5.12 onwards).

	Information regarding cartel	Other information/confirmations
Confidential guidance (optional)	<input type="checkbox"/> Sufficient details to enable the OFT to give the guidance required. The identity of the undertaking does not need to be disclosed at this point ('no-names enquiry')	<input type="checkbox"/> Name and contact telephone number of enquirer (legal adviser or representative of the undertaking)
Immunity availability enquiry (only relevant before investigation has started)	<input type="checkbox"/> Specify the relevant sector, dates and broad nature of the activity or otherwise provide sufficient information to allow the OFT to determine whether there is a pre-existing investigation and/or a pre-existing leniency applicant. <ul style="list-style-type: none"> ▪ The level of detail required will depend on whether there have been previous investigations or applications in the sector. ▪ The identity of the undertaking does not need to be disclosed at this point ('no-names enquiry') 	<input type="checkbox"/> Name and telephone number of the person making the enquiry. <input type="checkbox"/> Confirm that the legal adviser has instructions to apply for Type A immunity if it is available <input type="checkbox"/> Confirm that the undertaking understands that such an application will entail a commitment to cooperate with the OFT in any subsequent investigation; <input type="checkbox"/> Confirm that there is a 'concrete basis' for the suspicion of cartel activity; <input type="checkbox"/> Confirm that the undertaking has a 'genuine intention to confess'.

<p>Application for marker (all types of leniency)</p>	<ul style="list-style-type: none"> <input type="checkbox"/> The identity of the applicant <input type="checkbox"/> Emerging details of the cartel: <ul style="list-style-type: none"> ▪ Type of arrangement ▪ Affected product market(s) ▪ Dates (is it ongoing?) ▪ Evidence uncovered so far (sufficient to give a 'concrete basis' for suspicion of cartel activity, describe form and substance) ▪ Names and locations of employees involved ▪ To the extent known, names and locations of other involved undertakings and individuals ▪ Geographic scope 	<ul style="list-style-type: none"> <input type="checkbox"/> Contact names and details for the undertaking and its legal representative(s) <input type="checkbox"/> Information on whether those or any other legal advisers represent any individual employees/directors of the applicant undertaking. <input type="checkbox"/> Details of other competition authorities from whom markers have been obtained or will be requested <ul style="list-style-type: none"> ▪ Waivers to share information with other competition authorities sufficient to coordinate investigations
<p>Application package</p>	<ul style="list-style-type: none"> <input type="checkbox"/> All of the above, in a written or oral statement <ul style="list-style-type: none"> ▪ Clarity on which aspects are facts supported by evidence, assumptions, likely explanations, gaps in knowledge <input type="checkbox"/> All relevant documentary evidence uncovered so far (hard or electronic copies) and its provenance <input type="checkbox"/> Names of employees/directors who may give evidence, with an outline of matters of which they have personal knowledge 	<ul style="list-style-type: none"> <input type="checkbox"/> All of the above, in a written or oral statement <input type="checkbox"/> Description of enquiries and searches conducted so far by the applicant or its legal advisers

<p>On confirmation of the marker</p>	<ul style="list-style-type: none"> <input type="checkbox"/> OFT will direct further searches/inquiries to be made at this stage 	<ul style="list-style-type: none"> <input type="checkbox"/> Signed commitment from the applicant (direct) to complete and continuous cooperation
<p>Ongoing throughout investigation and enforcement proceedings (before and after signing of the leniency agreement/ no-action letters)</p>	<ul style="list-style-type: none"> <input type="checkbox"/> Applicant must continue to provide any emerging relevant evidence/information, whether inculpatory or exculpatory <ul style="list-style-type: none"> ▪ Applicant must draw OFT's attention to any information which alters the applicant's understanding as set out in the application statement <input type="checkbox"/> OFT will direct further searches/inquiries to be made <ul style="list-style-type: none"> ▪ Retention of forensically sound image of relevant IT material likely to be required, as well as information on the steps taken in obtaining the forensically sound image. <input type="checkbox"/> Individual witnesses must be made available (promptly on request) for interviews by OFT, and subsequently to sign witness statements 	<ul style="list-style-type: none"> <input type="checkbox"/> Description of ongoing enquiries and searches conducted by the applicant or its legal advisers <input type="checkbox"/> Any changes to contact details for the applicant, its advisers and individuals' advisers <input type="checkbox"/> Any changes to the employment status (and where possible, contact details) for key individuals (including any employees/directors interviewed by OFT) <input type="checkbox"/> Details of any significant developments regarding investigations by other competition authorities, such as formal findings, or interviews/other investigative steps that may uncover evidence or create documents relevant to the OFT's investigation