

Unclassified

English - Or. English

30 November 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Alternatives to Leniency Programmes – Contribution from United Kingdom

- Session II -

7-8 December 2023

This contribution is submitted by United Kingdom under Session II of the Global Forum on Competition to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: oe.cd/atlp.

Please contact Ms Lynn Robertson if you have questions about this document
[Lynn.Robertson@oecd.org]

JT03532989

Alternatives to Leniency Programmes

- Contribution from United Kingdom -

1. Introduction

1. The UK Competition and Markets Authority (CMA) welcomes the opportunity to contribute to the OECD's Roundtable 'Alternatives to leniency programmes'.¹
2. The CMA's leniency policy² continues to play a very important role in the detection and investigation of cartels in the UK. Leniency remains an important source of new cases for the CMA (through 'Type A applications',³ which are the source of around half of the CMA's cartel investigations) as well as an effective means of progressing existing investigations more efficiently (through the requirement for applicants to maintain 'continuous and complete' cooperation with the CMA that is at the heart of the leniency process). Moreover, an effective leniency programme may in itself destabilise and deter cartels (as cartel participants will be aware of the incentives placed on other participants to self-report).
3. Alongside leniency the CMA also has an established programme of activities for detecting cartels independently of any leniency application. As a result of our continuous focus on our intelligence development toolkit, approximately half of CMA cartel cases have been and continue to be 'intelligence-led' or 'own initiative' cases (by which we mean the investigation did not result from a report by a business participating in the cartel under our leniency programme).
4. The sources of non-leniency cases are varied and the CMA employs a range of detection tools. Together, leniency and other non-leniency detection tools complement and reinforce each other. As the risk of detection and the consequences of cartel activity are high and increasing in the UK, including through use of the CMA's proactive detection tools and increased sanctions, this in turn increases the incentives for businesses and individuals to comply with the law, or to apply for leniency.
5. This paper is structured as follows:
 - first, we consider some of the CMA's tools for detecting cartels, other than leniency;
 - second, we comment on the complementary nature of all of the CMA's tools to detect cartels, as well as the other vital ingredient of effective detection and

¹ See also CMA paper 'The Future of Effective Leniency Programmes: Advancing Detection and Deterrence', OECD June 2023.

² More detail on the UK's leniency regime can be found in [Leniency and no-action applications in cartel cases \(OFT1495\) \(the 'Leniency Guidance'\)](#) and see also CMA paper 'The Future of Effective Leniency Programmes: Advancing Detection and Deterrence', OECD June 2023.

³ That is, when the applicant is the first to report and provide evidence of a cartel, and when the CMA 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.

enforcement – the existence of strong sanctions (which increase the consequences of getting caught); and

- finally, we conclude there is a need for a suite of tools, all employed appropriately, in order to effectively detect cartels and enforce competition rules.

2. The CMA's alternative cartel detection toolkit

6. Despite the clear benefits of a strong leniency regime, the CMA does not rely exclusively on leniency as a means of cartel detection. Over a number of years the CMA has actively sought other means of detecting cartels.

7. As mentioned in paragraph 1.3 above, historically approximately half of the CMA's cartel cases do not result from a leniency application but are instead intelligence-led. The sources of these cases are varied and include both reactive and proactive tools. They include, for example, information we obtain from anonymous sources, intelligence from our other functions or from other enforcement agencies, and the use of industry monitoring tools.

8. We outline some of these tools below. However we note that, inevitably, there are limits to how much we can say publicly about our intelligence-development techniques.

2.1. Informants and whistleblowers

9. Informants and whistleblowers – for example, current or former employees of industry participants – can be an important source of information about cartel activity.

10. The CMA has dedicated contact routes (the CMA's Cartels Hotline and the CMA's whistleblower line)⁴ for those who might have 'insider' information about cartels and has stringent processes in place to protect those who come forward with information. For example, we have specially trained staff who act as dedicated contact points for informants in order to protect confidentiality. In addition, to protect the identity of the informant, we generally only use material provided by informants as intelligence.⁵

11. In addition to these protections, the CMA has an informant reward programme which allows it to pay financial rewards to individuals who provide information that leads to the detection and investigation of a cartel.⁶ The CMA has recently increased the maximum reward from £100,000 to £250,000.⁷

12. The level of reward an individual receives will depend on a number of factors such as (i) the value of the information to the CMA; (ii) the amount of harm to the economy and consumers which we believe the information given has helped to put a stop to and/or has

⁴ The CMA Cartels Hotline (020 3738 6888, cartelshotline@cma.gov.uk) is intended for general reporting of cartel conduct. The CMA Whistleblower Hotline (020 3738 6556, whistleblower@cma.gov.uk) is intended specifically for employees and ex-employees wishing to provide information about their (ex-)employer's possible involvement in anti-competitive or unfair trading practices.

⁵ Whistleblowers also qualify for employment protection rights under UK law. For further information see [Cartels: policy for witnessing and reporting and Whistleblowers at the CMA](#).

⁶ See [Cartels: policy for witnessing and reporting](#).

⁷ See [Blowing the whistle on cartels](#)

helped to disclose; (iii) the effort the individual has had to invest in order to give us the information; and (iv) the risk they may have taken in order to give us the information.

13. While we cannot disclose how many times we have paid rewards or the value of those rewards (in order to protect those who come forward with information), we can confirm that the financial rewards programme is a useful part of our cartel detection toolkit.

14. In our view, a successful whistleblower regime depends to a large part on the public being aware about competition rules, the confidentiality protections afforded to informants and the routes for reporting illegal conduct. The CMA therefore invests in education and outreach activities to raise awareness of cartels among businesses and consumers (see further paragraphs 2.10 – 2.15 below).

2.1.1. Encouraging reporting and raising awareness

15. The CMA has a well-established campaigns and advocacy programme which raises awareness of cartels among businesses and consumers to encourage compliance, reporting of cartel behaviour to the CMA's cartels and whistleblower hotlines and leniency applications.⁸

16. Alongside our general competition law awareness activities, the CMA also runs more targeted campaigns and has been taking targeted steps to strengthen our ability to reach potential informants and whistleblowers. We are increasingly likely to approach suitable individuals to act as informants to provide intelligence or information to the CMA, and have been making use of tools such as social media to reach potential informants in a targeted way.

17. The CMA is also looking to develop leads more proactively (assisted in part by our review of market data as outlined in paragraphs 2.16 and 2.17 below) in sectors that are most vulnerable to cartelisation by undertaking targeted outreach work in those sectors. These activities are aimed not only at raising awareness of (and compliance with) competition law in the sector but also at generating potential new leads such as from ex-employees of cartelists who want to do the right thing and report wrongdoing, and from businesses who suspect that they are the victim of cartel activity.

18. In this context we are increasingly working with potential victims of cartel activity to help them identify and report anti-competitive behaviour. In the past two years, this work has been largely – but by no means exclusively - centred on bid-rigging in public procurement (which is a particularly pernicious wrong with potentially serious impacts for taxpayers). We have been working with public procurers to ensure they are aware of the risks of bid-rigging, know how to design procurement processes to reduce the risk of collusion and, most importantly for generating cases, know the suspicious patterns to be on the lookout for and whom to report those suspicions to. To date, we estimate we have reached approximately 80,000 public sector officials and, as a result of this work, have started to see an increase in enquiries to the CMA from procurers raising concerns about suspicious tender patterns.

19. In addition to public sector victims, the CMA also works with private businesses who may have suffered as a result of cartel activity to gather and develop intelligence that may result in opening an investigation. Indeed, the CMA encourages any business that suspects they might be a victim of a cartel to contact the CMA Cartels Hotline and provide information because, even if the information held by a single victim appears limited, the CMA may be able to use this information in combination with other intelligence

⁸ See [*Cheating or Competing? It's your business to know the difference.*](#)

information it already holds, or that it could subsequently gather, in order to take forward an investigation.

20. Raising awareness of competition law amongst the business community, public sector procurers and the general public is a key element of the CMA's long-term strategy in the fight against cartels, including by changing the public's perceptions about cartels and fostering a climate in which anti-competitive practices are widely recognised as unacceptable.

2.1.2. Identifying suspicious 'visible' conduct – market data

21. Cartels may also make themselves visible in market data. As part of our engagement with public sector officials, we are also encouraging them to share tender data with the CMA so that the CMA's specialist data team can (building on work done by colleagues internationally) help identify potential collusion between bidders.

22. More broadly, the CMA's specialist data team – which includes data scientists and analysts – is actively exploring a multitude of ways of assisting in the detection of cartels by using open-source data, including in particular in those sectors that have been identified as being vulnerable to cartelisation as referred to in paragraphs 2.12 and 2.13 above. Data analysis can also be used to indicate anomalies within a particular sector (which can then be investigated in more detail).

2.1.3. Co-operation with international agencies

23. The fact that many cartels operate across national borders means that collaboration between competition authorities is vital. International cooperation enhances the risk of detection and of effective enforcement, which in turn should drive deterrence and, for those not deterred, cessation of the conduct and applications for leniency.

24. The CMA engages and cooperates with its international partners in various ways, both informally and formally. There are a number of provisions in UK domestic law which facilitate cooperation with international partners, including sharing information which may be commercially confidential.⁹ Some recent examples of the CMA's international cooperation in relation to cartel matters are:

- The establishment in February 2022 of an international working group of the 'Five Eyes' competition authorities to develop and share intelligence to detect and investigate suspected anti-competitive behaviour and collusion, using existing international cooperation tools.¹⁰
- The CMA's investigation into anti-competitive conduct in relation to fragrances. The CMA launched the investigation in March 2023, at the same time as and in consultation with the Antitrust Division of the US Department of Justice, the European Commission and the Swiss Competition Commission.¹¹ This

⁹ For example, the CMA can use 'information gateways' set out in part 9 of the Enterprise Act 2002 to share 'specified' information with overseas authorities, under certain conditions.

¹⁰ The 'Five Eyes' competition authorities are the UK CMA, the United States Department of Justice, the Australian Competition and Consumer Commission, the Canadian Competition Bureau and the New Zealand Commerce Commission. See [International agencies put supply chains on notice against collusion](#).

¹¹ See [CMA launches investigation into fragrances and fragrance ingredients](#); and [Suspected anti-competitive conduct in relation to fragrances and fragrance ingredients \(51257\)](#).

investigation was intelligence-led and is an example of the ability of competition agencies to launch investigations against international cartels in the absence of a leniency application.

- The CMA's investigation into suspected anti-competitive conduct in relation to the use of recycled materials in cars, their recyclability, and the arrangements for recycling of end-of-life vehicles, in which the CMA worked closely with the European Commission and launched its investigation on the same day in March 2022.¹²

25. Under UK law there are currently a number of statutory restrictions and limitations regarding what information can be shared and when with other agencies, and what use can be made of the information, including restrictions deriving from data protection law. However, the CMA expects our ability to cooperate and share information internationally to be further strengthened by the reforms proposed under the Digital Markets Competition and Consumer Reform Bill which is currently before the UK Parliament and which at the time of writing is anticipated to become law during 2024.¹³

3. Increased sanctions for cartel infringements

26. The effective detection of cartels is best achieved by employing a suite of detection tools, all working in parallel to ensure that illegal cartel activity is uncovered. This is backed up and reinforced by strong enforcement and the effective use of sanctions.

27. Given the need for strong sanctions to encourage self-reporting and compliance, the CMA is also ensuring that corporate sanctions and consequences for individuals involved in cartel activity in the UK are increasingly significant:

- *Increased use of competition disqualification orders:* the CMA has increased the use of its director disqualification powers,¹⁴ which ensures individual directors' accountability for a company's involvement in anti-competitive practices. Under this regime, directors of infringing companies can be disqualified from acting as a director for a period of up to 15 years if by reason of the infringement they are found to be unfit to act as directors. Directors may be subject to disqualification not only if they were directly involved in the conduct but also where they did not know but ought to have known that the conduct constituted a breach or had reasonable grounds to suspect that the conduct constituted a breach and took no steps to prevent it.¹⁵

The risk of disqualification is high: we now routinely consider director disqualifications in all cartel cases. To date, the CMA has disqualified 28 directors for competition law breaches and we continue actively to pursue others. In one of

¹² See [CMA launches investigation into recycling of cars and vans](#) and [Suspected anti-competitive conduct in relation to the recycling of end-of-life vehicles](#).

¹³ See [Digital Markets, Competition and Consumers Bill - Parliamentary Bills - UK Parliament](#).

¹⁴ Company Directors Disqualification Act 1986 and CMA's [Guidance on Disqualification Orders \(CMA102\) of 6 February 2019](#).

¹⁵ See CMA paper 'Director Disqualification and Bidder Exclusion in Competition Enforcement - OECD' for further information on director disqualification and bidder exclusion.

the more recent disqualification orders agreed,¹⁶ directors were banned from their roles for 12 and 11 years – the longest periods to date.

- *Higher penalties*: we have reviewed our penalties guidance¹⁷ having in mind in particular the need to ensure that the level of penalty guarantees effective deterrence, especially in cases involving large, often global, businesses.
- *Bidder exclusion*: The UK Government has recently adopted new legislation that provides that companies that engage in price fixing, market sharing, bid rigging or other cartel activities could face mandatory exclusion by a contracting authority from public procurements for up to 5 years.¹⁸ They are also at risk of being included on the central debarment register which would result in them automatically being excluded from all public procurement contracts for up to 5 years under new UK legislation. The new debarment regime will also maintain – and indeed enhance – incentives for cartel members to apply for leniency. Not only will successful immunity applicants continue to receive the current benefits for Type A immunity¹⁹ but, in addition, they will also fall outside the new exclusion and debarment regime.²⁰

28. The message is clear: risks for cartelists in the UK are high and increasing.

4. Conclusion

29. Leniency remains an important source of new cases for the CMA. However, over a number of years now the CMA has pursued a deliberate strategy of not relying exclusively on leniency as a means of cartel detection.

30. Cartelists are more likely to apply for leniency if they believe there is a real risk that the cartel will be detected (by whatever means) and that sanctions will be significant. Conversely, if the risk of getting caught and/or sanctions for breaking the law are low, there is less incentive to stay on the right side of the law or to come clean and apply for leniency or otherwise report the cartel.

31. The CMA is continuously looking for innovative ways to enhance its proactive detection toolkit and its ability to develop intelligence-led cases. The CMA has recently strengthened its informant reward programme and is investing in targeted outreach and education programmes, all to encourage the reporting of cartel activity. Alongside this, the CMA continues to consider innovative ways of monitoring market data to identify industries where cartelisation may be taking place. In addition, the CMA is working to develop its strong relationships with international partners and has made the case for

¹⁶ See [Directors disqualified over illegal construction cartel](#)

¹⁷ CMA's [Guidance as to the appropriate amount of a penalty \(CMA73\)](#), updated on 16 December 2021.

¹⁸ See [Procurement Act 2023 - Parliamentary Bills - UK Parliament](#).

¹⁹ Successful Type A immunity applicants receive guaranteed corporate immunity from fines, guaranteed immunity from criminal prosecution for all cooperating current and former employees and directors of the applicant and protection from director disqualification for all cooperating directors.

²⁰ See [UK Public Procurement - Increasing Risks for Cartel Participants](#) for further information on planned debarment regime.

enhancing its legal powers so that cartels can be detected and investigated across national borders.

32. It is the CMA's belief that all of these tools, working in parallel with each other and with leniency, employed appropriately and backed up by effective sanctions, provides a strong basis for effective cartel detection and enforcement in the UK.