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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by the
United Kingdom****5 June 2018**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm

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United Kingdom

1. Introduction

1. The UK's Competition and Markets Authority's (CMA) leniency programme provides protection for both civil cartel activity (by undertakings)¹ and criminal cartel conduct (by individuals).² Leniency protection includes immunity from, or reduction in, financial penalties for the undertaking, immunity from prosecution for the criminal cartel offence for co-operating individuals as well as immunity from director disqualification for co-operating directors.
2. The UK's leniency regime is set out in:
 - CMA's guidance as to the appropriate amount of the penalty (CMA73, 18 April 2018)³, and
 - Applications for leniency and no action guidance – detailed guidance on principles and process (OFT1495, July 2013)⁴ (CMA's Leniency Guidance).
3. The CMA has issued detailed guidance setting out how it will address various issues which can arise in the context of leniency. These include:
 - **the conduct of internal investigations** – providing guidance to would-be applicants, to ensure that they do not inadvertently take steps which would undermine the probative value of any witness or other evidence, so that leniency, as well as being a tool for the detection of cartels, also facilitates the bringing of successful enforcement action: see Annex C of the CMA's leniency guidance on conducting internal investigations before a leniency application,
 - **disclosure and use of information** – to ensure that before an application is made applicants are well-informed about how and when the information they provide will be used, and
 - **other issues relating to criminal investigations/prosecutions** – including the interaction between the UK criminal cartel offence and the Commission Leniency Notice: see section 8 of the CMA's leniency guidance.

¹ Subject to section 2 Competition Act 1998 and Article 101 Treaty on the Functioning of the European Union.

² Under section 188 of the Enterprise Act 2002 (as amended), it is a criminal offence for individuals to agree to engage in certain types of cartel activity (price-fixing, market sharing, bid-rigging and limiting output), subject to certain exclusions and defences. Individuals convicted of the UK cartel offence may be sentenced to up to five years' imprisonment and/or an unlimited fine. The CMA has published guidance setting out the principles the CMA will apply in determining whether proceedings for the cartel offence should be carried out against an individual: <https://www.gov.uk/government/publications/cartel-offence-prosecution-guidance>.

³ <https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation>

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf

4. This paper does not seek to cover all the areas addressed in our published guidance, but focuses on recent activity in the UK to address the following key challenges when operating a leniency regime:

- promoting awareness of the illegality of, and damage caused by, cartel activity and the availability of leniency protection,
- developing a strong intelligence function running alongside leniency, to avoid having to rely exclusively on the leniency regime as a means of detecting cartel activity, and
- the importance of building relationships with other stakeholders to manage the interplay of co-enforcement, co-ordination and co-operation (which in the UK includes sectoral regulators and other enforcement agencies, as well as competition authorities in other jurisdictions).

2. Promoting awareness of cartel activity and the leniency regime

5. In common with other competition authorities, a key challenge faced by the CMA is first, to raise awareness of competition law, so businesses and individuals know what cartel activity looks like, how damaging it can be, and that it is against the law; and second, to ensure that individuals and businesses are aware that they can apply to the CMA for leniency if they have been involved in unlawful cartel activity. If individuals and businesses do not know what constitutes cartel activity or that it is illegal and the consequences of being caught, they are clearly unlikely to apply for leniency.

6. In 2014, the CMA Board endorsed a compliance and awareness strategy which involved conducting benchmarking research to understand businesses' awareness and understanding of the law, then using the results to plan and deploy a targeted compliance strategy to run alongside the CMA's enforcement activity.

7. The aim was to amplify the deterrent effect of the CMA's enforcement action to promote compliance, as well as encouraging people to come forward with further intelligence thus creating a 'virtuous circle' of enforcement. By reaching out beyond the CMA's usual audience (such as competition practitioners) to those who may be less familiar with the CMA's mission and work, the CMA also hoped to increase its reach, thereby widening both its enforcement activity and deterrence effect.

8. The CMA has continued with this strategic focus on compliance:

- **using research / analysis to inform our targeting and messaging to businesses:** the research carried out in 2014 suggested that even though most UK businesses wanted to do the right thing, they did not know the law very well: less than a quarter (23%) claimed to know competition law either very well or fairly well, while approaching half said they did not know competition law at all well (25%) or had never heard of it (20%).⁵ When asked about specific behaviours, 44% of respondents either thought it was okay or didn't know whether it was illegal to attend a meeting at which competitors agreed prices, 45% of

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses_understanding_of_competition_law_-_report.pdf

respondents either thought it was okay or didn't know whether it was okay for competitors to agree prices to avoid losing money, and 52% of respondents either thought it was okay or didn't know whether it was illegal to discuss prospective bids with competing bidders,

- **targeting sectors ‘with a need’:** the low level of competition law awareness referred to above was particularly marked in the case of small and medium size business. The CMA, therefore, initiated a campaign to target relevant information to the sector.⁶ The CMA also instituted as standard practice the use of strategic campaigns to amplify lessons from enforcement cases to deter others from engaging in similar activity, and to encourage them to report unlawful activity if they see it. For example, following enforcement action against an estate agents cartel in the South West of England,⁷ which itself was the result of information received following earlier enforcement action and compliance activity in the sector, the CMA sought to amplify the message from this local case through press/media coverage, speeches at relevant trade organisations, and working closely with industry stakeholders⁸ to maximise reach in industry targeted publications. In terms of content, the CMA created a user-friendly case study,⁹ and a series of social media posts explaining the unlawful conduct, in each case using actual evidence from the case (in this case, extracts from emails) to bring the case alive,
- **focused messages and content:** delivering quick, simple materials that meet specific user needs, and which make compliance relevant and important for businesses. For example, ‘*Competing fairly in business: at a glance guide to competition law*’¹⁰ sets out in a short and accessible way the key elements of competition law that businesses should be aware of and how to report breaches. This is supported by case studies based on recent cases, as well as quizzes and animated videos, made available on the CMA website and promoted through social media (for example, LinkedIn, YouTube, Facebook and Twitter),¹¹
- **generating leads for new investigations:** in 2017 the CMA saw a 30% increase in tip offs following the launch of the CMA’s first digital compliance and awareness campaign. Most recently, the CMA has launched a further ‘Stop Cartels’ campaign¹² providing online videos and digital marketing material

⁶ <https://www.gov.uk/government/publications/how-small-businesses-can-comply-with-competition-law>

⁷ <https://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s>

⁸ Including for example, the Property Ombudsman, National Association of Estate Agents and National Trading Standards teams with responsibility for estate agents.

⁹ <https://www.gov.uk/government/case-studies/estate-agents-cartel-case-study>

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/477569/SME_Compliance_At-A-Glance.pdf

¹¹ <https://www.gov.uk/government/collections/competing-fairly-in-business-advice-for-small-businesses>

¹² <https://stopcartels.campaign.gov.uk/>

explaining cartel law, the routes to report such activity (including the cartels hotline and the leniency hotline) as well as promoting the CMA's informant reward scheme which offers up to £100,000 for relevant information.¹³ The new campaign:

- encouraged people to be '*Safe, not Sorry*' if they think they may have been involved in cartel activity and to make sure they are the first to report it to the CMA. Witnesses – those not involved themselves but who have seen something untoward – are also asked to '*Do the Right Thing*' by reporting it to the CMA,
- targeted a range of industries that are at a greater risk of cartels forming. These sectors include those that have either a history of reported cartel activity or characteristics that make them vulnerable to cartels, and was supported by Public Concern at Work which is an independent UK whistleblowing charity which provides confidential advice to workers who are unsure whether or how to raise a public interest concern.

3. Supporting the leniency regime with a strong intelligence function

9. The CMA recognises the importance of not relying solely on leniency as a means of cartel detection, not least because the incentive for businesses and individuals to self-report and apply for immunity will only be maintained if they perceive a significant risk of detection by the authorities if they fail to do so.

10. Developing the CMA's cartels intelligence function is one of the key areas in which the CMA has invested as part of a broader programme to enhance the CMA's intelligence, investigation and enforcement capacity. This has included a number of senior appointments, including a Director of Intelligence and Director of Digital Forensics and Intelligence, as well as investing in a more sophisticated digital and forensics capability. More recently the CMA has appointed Stefan Hunt as Chief Data and Digital Insights Officer; this role will allow us to better understand the impact that data, machine learning and other algorithms have on markets and people, as well as to develop further how we obtain and use data in our ongoing work.¹⁴

11. The CMA is also committed to using the full range of its investigatory powers, including covert investigation powers under the Regulation of Investigatory Powers Act 2000 (RIPA), under which the CMA can require the production of communications data, carry out surveillance (directed and intrusive) and use covert human intelligence sources.¹⁵ The CMA also operates a dedicated cartels hotline and an informant rewards programme, offering rewards of up to £100,000 for information about cartel activity.

¹³ <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>

¹⁴ <https://www.gov.uk/government/news/cma-appoints-stefan-hunt-to-top-digital-role>

¹⁵ These powers are available where it is necessary and proportionate for the purposes set out in the legislation, namely the prevention and detection of crime and/or, in the case of directed surveillance and the use of covert human intelligence sources, in the interests of the economic well-being of the UK.

12. Strong relationships with UK and international enforcement partners also provide further opportunities for accessing valuable sources of intelligence.

13. The CMA has thus been taking an increasingly proactive approach to cartel detection. Almost half of UK cartel investigations do not originate with a leniency application, recent examples being the 2017 decisions in the furniture parts cartel case,¹⁶ and the 2018 solid fuel products case, both of which originated with calls to the cartels hotline. The CMA's proactive approach is also reflected in the CMA's reliance on material gathered using covert surveillance powers, such as in the 2016 galvanised steel tanks decisions,¹⁷ where a meeting of competitors was recorded and relied on as evidence of unlawful information sharing.

14. An increasingly sophisticated cartels intelligence function and an effective leniency programme complement each other: an increased risk of detection as a result of intelligence activities (combined with a credible threat not only of corporate fines but also the criminal prosecution of individuals and disqualification from acting as a director) can be expected to strengthen incentives to apply for leniency – further increasing the level of enforcement and the resulting deterrence effect from both the CMA's intelligence work and its leniency programme.

15. The CMA is also looking to innovate and embrace opportunities offered by new technology, and has developed a cartel screening tool (using algorithms to spot unusual bidder behaviour and pricing patterns which may indicate that bid-rigging has taken place) which has been made freely available on the CMA's website.¹⁸ The hope is that this tool – together with an e-learning module on how to spot bid rigging - will help public procurement professionals identify suspicious behaviour by suppliers when bidding for contracts.

4. Interplay with other competition authorities and enforcement agencies

4.1. National sectoral regulators

16. In the UK there are a number of sectoral regulators which have concurrent competition enforcement powers with the CMA in their respective sectors.¹⁹ The CMA works closely with sector regulators in relation to leniency, and has recently published an information note setting out the arrangements for the handling of leniency applications in

¹⁶ <https://www.gov.uk/cma-cases/supply-of-products-to-the-furniture-industry-suspected-anti-competitive-arrangements>

¹⁷ <https://www.gov.uk/cma-cases/investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>

¹⁸ <https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool>

¹⁹ The sectoral regulators with concurrent competition powers that are full members of the UK Competition Network are the Office of Communications, the Gas and Electricity Markets Authority, the Utility Regulator (Northern Ireland), Water Services Regulation Authority, the Office of Rail and Road, the Civil Aviation Authority, the Financial Conduct Authority and the Payment Systems Regulator.

the regulated sectors.²⁰ This provides clarity as to the process that should be followed, and ensures the operation of a ‘single queue’ system for leniency applications in the UK.²¹

17. The approach is designed, among other things, to ensure that the process for granting leniency is fair, transparent, certain and consistent and that the incentives for applying for leniency are not undermined. It also reduces the burden on potential applicants, who only have to make one leniency application to the CMA to secure a place in the leniency queue with all authorities. The approach also avoids a duplication of work by authorities, and within the UK competition regime as a whole.

18. The CMA and sectoral regulators work together closely so that leniency applications within the regulated sectors are dealt with in accordance with the principles outlined in the note. Since enhanced concurrency arrangements came into effect four years ago, the CMA and sectoral regulators have built even closer working relationships, at both a senior and working level, which allows discussions around prospective cases to be carried out efficiently and quickly.

4.2. UK criminal cartel offence

19. As noted above, as well as infringements of competition law by undertakings, the UK’s leniency policy also covers the criminal cartel offence, which may also be prosecuted by other authorities.

20. In addition to the CMA, the UK’s Serious Fraud Office (SFO) also has the ability to prosecute the criminal cartel offence in England and Wales, and in Northern Ireland, where serious or complex fraud is suspected. In order to provide a transparent and consistent approach to the prosecution of the criminal cartel offence (including the treatment of leniency) the CMA and the SFO have entered into a Memorandum of Understanding²² which sets out the basis on which the CMA and the SFO will co-operate to investigate and/or prosecute individuals in respect of the criminal cartel offence. Alongside this, the CMA has developed close working relationships with individuals at the SFO, which also facilitates discussions on policy and potential cases.

21. In Scotland the criminal cartel offence may be investigated and prosecuted by the Crown Office and the Procurator Fiscal Service (COPFS). The CMA has also entered into a Memorandum of Understanding with COPFS which records the basis of co-operation to investigate and/or prosecute individuals in respect of the cartel offence, including as regards the operation of the leniency policy, where the offence may have been committed within the jurisdiction of the Scottish Courts, and has developed close working relationships with individuals in COPFS.²³

²⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656905/information-note-on-arrangements-for-handling-of-leniency-applications.pdf

²¹ Under this system, applicants need only make an application to the CMA and, provided the conditions for leniency are met, that application will secure the applicant’s place in the leniency queue with all authorities.

²² <https://www.gov.uk/government/publications/cma-and-sfo-memorandum-of-understanding>

²³ See <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-cma-and-the-crown-office-scotland>

22. The CMA seeks to provide as much certainty as possible for potential leniency applicants in the circumstances: publishing guidance setting out the procedure where an undertaking or individual approaches the CMA for immunity in respect of cartel activity that has already been referred to the Serious Fraud Office, or in respect of which such a referral is in contemplation, or where the application is in respect of a cartel that falls to be prosecuted in Scotland. The CMA also offers confidential guidance to potential applicants, coupled with early constructive discussions with other prosecuting authorities.

4.3. International competition authorities

23. With increasing globalisation of cartel activity, particularly in relation to online markets, close and continuous co-operation between international competition authorities is more crucial than ever in ensuring the effective enforcement of competition law.

24. The CMA (and its predecessor, the Office of Fair Trading) has a long history of co-ordination and co-operation with competition authorities internationally, and recognises the importance of building and maintaining close working relationships throughout partner organisations. The best known example of this is the 2008 Marine Hose case, which involved co-ordinated raids by the UK Office of Fair Trading, the US Department of Justice, the Japan Fair Trade Commission and the European Commission. The CMA also provided information to the Australian Competition and Consumer Commission to support enforcement action in Australia. More recently, the CMA co-ordinated with the US Department of Justice in connection with investigations into the online sale of posters/wall art in the UK and USA respectively,²⁴ and also worked closely with the Italian and French competition authorities in connection with investigations in the fashion model agency sector.²⁵

25. The CMA is an active member of the European Competition Network and has strong working relationships with other EU national competition authorities and the European Commission. The ECN plays an important role in enabling the co-ordination and co-operation of cartel investigations, allowing members to share information and co-ordinate investigations, as well as supporting each other's enforcement activity through mutual assistance with evidence-gathering, as recently evidenced by the assistance provided by the CMA to the Romanian Competition Council in connection with the latter's investigation in the aviation insurance sector. The CMA has also provided assistance to the UK Department of Business in connection with the proposed EU Directive to improve the effectiveness of national competition authorities (ECN+), which includes provisions aimed at ensuring all Member States have leniency programmes that can function alongside one another.

26. The CMA will continue to work to ensure effective cross-border co-ordination and co-operation following the UK's exit from the European Union, building on existing relationships with other authorities, including its European counterparts.

27. The CMA is also an active participant in the work of the OECD and the International Competition Network, both of which play a key role in the building and

²⁴ <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>

²⁵ <https://www.gov.uk/cma-cases/conduct-in-the-clothing-footwear-and-fashion-sector>

maintenance of close, trusting working relationships amongst competition authorities internationally, in mutual learning and assistance, and in the promotion of best practice.