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The Future of Effective Leniency Programmes – Note by the United Kingdom

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. Introduction

1. The UK Competition and Markets Authority (CMA) welcomes the opportunity to contribute to the OECD's Roundtable 'the Future of Effective Leniency Programmes: Advancing Detection and Deterrence'.

2. There is a clear relationship between the risk of detection of cartels, effective enforcement against - and the level of sanctions for - those involved in cartel activity, and leniency. Participants in cartel activity are more likely to apply for leniency if there is a real risk that the cartel will be detected, that there will be effective enforcement action and that sanctions will be significant.

3. The CMA's leniency policy continues to play an extremely important role in the detection and investigation of cartels in the UK, as well as in the deterrence of cartel activity (see further section 5 below). Indeed, the existence of an effective leniency policy can, in and of itself, destabilise a cartel since each cartel participant is aware that the other parties to the cartel have an incentive to be 'first through the door' for immunity.

4. However, the CMA also has an established programme 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 initiatives' cases (by which we mean the investigation did not result from a report by a business participating in the cartel under our leniency programme).

5. As the risk of detection and the consequences of cartel activity are 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.

6. This paper is structured as follows:

1. first, we describe the CMA's enhancement of its proactive detection and investigation toolkit (which increases the risk of getting caught);
2. second, we outline the increased sanctions for cartel activity in the UK (which increases the consequences of getting caught);
3. third, we explain how international cooperation contributes to effective enforcement and detection of cartels; and
4. finally, we reflect on the UK leniency regime and our proposed review to ensure that it remains as effective as it can be as a means of detection and deterrence.

2. The CMA's proactive detection and investigation toolkit

7. As mentioned in paragraph 1.4, approximately half of the CMA's cartel cases are intelligence-led rather than resulting from a leniency application. The sources of 'intelligence-led' cases are varied. They include, for example, information sent to us anonymously, intelligence from our other functions or from other enforcement agencies, and the use of data 'screening' tools.

8. The CMA has increasingly been trialling new and different ways of proactively detecting cartels both through (i) encouraging reporting by ‘insiders’ such as informants or whistleblowers and (ii) identifying suspicious ‘visible’ conduct, for example by engaging with victims of cartels and by reviewing market data.

2.1. Reporting by ‘insiders’

9. Whistleblowers – for example, current or former employees of industry participants – have historically been a key source of information for the CMA. The CMA has dedicated contact points (the CMA’s Cartels Hotline and the CMA’s whistleblower line) for those who might have ‘insider’ information about cartels and has stringent processes in place to protect those who come forward with information.¹

10. These protections work alongside an informant reward programme, which allows the CMA to pay financial rewards to individuals who provide us with information that leads to the detection and investigation of a cartel of up to £100,000.² 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 we have found the financial rewards programme to be useful and are currently considering enhancements to it.

11. We are also actively considering steps to strengthen our ability to reach potential informants and whistleblowers, for example by working with representatives (such as employment lawyers, unions or whistleblowing charities) who may be advising current or former employees of cartelists who have information about wrongdoing and want to report it.

12. The CMA is also looking to develop leads more proactively 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 competition law in the sector but also at generating potential new leads.

13. This work will complement our existing 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 cartel hotline and leniency applications.³

2.2. Identifying suspicious ‘visible’ conduct

2.2.1. Working with victims

14. Detecting cartels is particularly difficult because, in contrast to many other forms of wrongdoing, the conduct takes place in secret and victims may be unaware that they are being cheated.

15. That said, our experience from casework is that, while they may not be able to offer substantial evidence of cartel activity, direct customers may harbour (accurate) suspicions

¹ Cartels Hotline: [020 3738 6888](tel:02037386888) or a whistle-blower can fill out the CMA online reporting form or email: cartelshotline@cma.gov.uk. See also [CMA Reporting Form](#) and [Whistleblowers at the CMA - GOV.UK \(www.gov.uk\)](#).

² See [Cartels: policy for witnessing and reporting - GOV.UK \(www.gov.uk\)](#).

³ See [Cheating or Competing? It’s your business to know the difference](#).

that they are victims of collusion by their suppliers and may be able to provide intelligence which can ultimately assist in the successful opening of an investigation.

16. 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 not 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.

17. 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.

18. Deterring cartels in public procurement remains a focus for the CMA, as reflected in our Annual Plan 2023 to 2024.⁴

2.2.2. Market data

19. 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.

20. More broadly, the CMA’s specialist data team - which includes data scientists and analysts – are actively exploring various ways of assisting in the detection of cartels by using open-source data.

2.3. Intelligence development and investigation toolkit

21. Once we obtain intelligence that suggests the existence of a cartel, we can deploy a myriad of investigative techniques to develop such intelligence. This includes surveillance (for example, covertly recording meetings and conversations), access to communications data (for example, obtaining call records) and the use of covert human intelligence sources (for example, tasking individuals to obtain information on our behalf).⁵

22. For example, in two cartel cases in the construction sector, the CMA was able to rely on covert recordings of cartel meetings obtained using our surveillance powers to help prove the infringements.

23. We also have access to a wide range of ‘open source’ data to assist in this regard.

3. Increased sanctions for cartel infringements

24. Cartelists are more likely to either refrain from participating in illegal cartel activity or to apply for leniency if there is a real risk that the cartel will be detected and that sanctions will be significant. If the risk of getting caught and sanctions for breaking the law

⁴ See [CMA Annual Plan 2023 to 2024 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/115444/CMA_Annual_Plan_2023_to_2024.pdf).

⁵ These powers are regulated under the Regulation of Investigatory Powers Act 2000. See [Regulation of Investigatory Powers Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2000/48/section/1).

are low, there is less incentive to stay on the right side of the law or to come clean and apply for leniency.

25. For this reason, we are also ensuring that corporate sanctions and consequences for individuals involved in cartel activity in the UK are increasingly significant:

1. *Increased use of competition disqualification orders:* the CMA has increased the use of its director disqualification powers,⁶ 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.⁷

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 the more recent disqualification orders agreed,⁸ directors were banned from their roles for 12 and 11 years – the longest periods to date.

2. *Higher penalties:* we have reviewed our penalties guidance⁹ 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.
3. *Bidder exclusion:* The UK Government has proposed 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.¹⁰ 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

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

⁷ See CMA paper 'Director Disqualification and Bidder Exclusion in Competition Enforcement - OECD' for further information on director disqualification and bidder exclusion.

⁸ See [Directors disqualified over illegal construction cartel - GOV.UK \(www.gov.uk\)](#).

⁹ CMA's **Guidance as to the appropriate amount of a penalty (CMA73)**, updated on 16 December 2021.

¹⁰ See [Procurement Bill \[HL\] - Parliamentary Bills - UK Parliament](#).

immunity¹¹ but, in addition, they will also fall outside the new exclusion and debarment regime.¹²

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

4. International cooperation and cartel enforcement

27. 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.

28. Following the UK's exit from the European Union, the CMA has an increased role in international cartel enforcement, and greatly values the opportunity to work in collaboration with competition authorities across the globe. We expect our ability to cooperate 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 (see further paragraph 4.7 below).

4.1. Current cooperation

29. 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. The CMA can use 'information gateways' set out in Part 9 of the Enterprise Act 2002 to share 'specified' information with overseas authorities both for the purposes of the exercise of CMA's own functions (for example, where it is necessary for the CMA to share information to coordinate investigative activities) and also, under some circumstances, for the overseas authority to facilitate its own investigations.

30. In practice, the range of formal and informal tools available to the CMA means that the CMA can conduct high-level discussions with other authorities including on policy and legal matters, share and discuss intelligence (provided sources are protected) and, in some circumstances, share case-specific information. For example, the CMA is able to share information in order to coordinate dawn raids with other authorities.

31. Some recent examples of the CMA's international cooperation in relation to cartel matters:

- The establishment in February 2022 of an international working group of competition authorities to monitor and detect global supply chain collusion. The group aims to meet regularly to develop and share intelligence to detect and

¹¹ 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.

¹² See [UK Public Procurement - Increasing Risks for Cartel Participants \(competitionpolicyinternational.com\)](https://www.competitionpolicyinternational.com) for further information on planned debarment regime.

investigate suspected anti-competitive behaviour and collusion, using existing international cooperation tools.¹³

- 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.¹⁴ This 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 2022.¹⁵

32. However, there are currently a number of statutory restrictions and limitations regarding what information can be shared and when, and what use can be made of the information, depending on the reasons for its being shared, including restrictions deriving from data protection law. These are also supplemented in the case of leniency information with assurances given as part of our leniency policy as to how we will use leniency information.

4.2. Proposed UK reforms to strengthen the CMA’s international cooperation

33. Recognising the growing importance of international collaboration, in order to increase detection and effective enforcement action against international cartels, the UK Government has proposed to enact legislation to increase the CMA’s investigative powers. The proposed reforms would allow the CMA to use its domestic powers to gather information on behalf of overseas competition authorities (investigative assistance). Alongside this, the UK Government is also proposing reforms to make it easier for the CMA to share information with international partners while ensuring confidential information is protected (information sharing). These proposals, which form part of the Digital Markets, Competition and Consumer Bill, are currently before the UK parliament and at the time of writing it is anticipated that they may become law during 2024.¹⁶

¹³ See [International agencies put supply chains on notice against collusion - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/international-agencies-put-supply-chains-on-notice-against-collusion).

¹⁴ See [CMA launches investigation into fragrances and fragrance ingredients - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/cma-launches-investigation-into-fragrances-and-fragrance-ingredients); and [Suspected anti-competitive conduct in relation to fragrances and fragrance ingredients \(51257\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/suspected-anti-competitive-conduct-in-relation-to-fragrances-and-fragrance-ingredients-51257).

¹⁵ See [CMA launches investigation into recycling of cars and vans - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/cma-launches-investigation-into-recycling-of-cars-and-vans) and [Suspected anti-competitive conduct in relation to the recycling of end-of-life vehicles - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/suspected-anti-competitive-conduct-in-relation-to-the-recycling-of-end-of-life-vehicles).

¹⁶ See [Digital Markets, Competition and Consumers Bill - Parliamentary Bills - UK Parliament](https://www.parliament.uk/bills/2023-24/digital-markets-competition-and-consumers-bill).

5. Leniency

5.1. The UK leniency regime

34. The UK leniency regime¹⁷ provides protection for both ‘undertakings’ (businesses) and individuals. Leniency protection includes immunity from, or a reduction in, financial penalties for an undertaking, immunity from prosecution under the criminal cartel offence¹⁸ for co-operating individuals, and immunity from director disqualification for co-operating directors.¹⁹

35. Leniency remains an important source of new cases for the CMA (through Type A applications, which are the source of around half of the CMA’s cartel investigations) and 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).

36. The vast majority of leniency applications in the UK are made by corporate applicants, although individual employees and directors who have been involved in suspected cartel activity can also apply for leniency in their own right in order to obtain protection from director disqualification and/or criminal proceedings. The possibility that a current or former employee may bring suspected cartel activity to the CMA’s attention by applying for individual immunity creates an additional incentive for corporate applicants to apply promptly themselves.

37. There are three types of leniency available in the UK:

- **Type A immunity**, for the first applicant to report and provide evidence of a cartel where there is no pre-existing investigation. Successful Type A applicants receive guaranteed corporate immunity from penalties and, for all co-operating former and current employees/officers/directors, automatic blanket immunity from criminal prosecution and director disqualification.
- **Type B leniency or immunity**, for the first applicant where there is a pre-existing investigation. Successful Type B applicants receive discretionary immunity (corporate immunity from penalties and/or blanket criminal immunity) or up to 100% leniency discount in penalties (depending primarily on the value added to the CMA’s investigation) and discretionary individual immunity from criminal prosecution. All co-operating former and current directors of a successful Type B applicant (either immunity or leniency) receive guaranteed immunity from director disqualification.

¹⁷ See [Leniency and no-action applications in cartel cases \(OFT1495\) \(the ‘CMA Leniency Guidance’\)](#). The CMA Leniency Guidance was originally published in July 2013 by one of the CMA’s predecessors, the Office of Fair Trading. The Guidance was adopted by the CMA Board when the CMA came into operation in April 2014.

¹⁸ 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.

¹⁹ Details of Competition Disqualification Orders in the UK are set out in *Guidance on Competition Disqualification Orders (CMA102)*. See [Competition Disqualification Orders - GOV.UK \(www.gov.uk\)](http://www.gov.uk/government/publications/competition-disqualification-orders--2)<http://www.gov.uk/government/publications/competition-disqualification-orders--2>.

- **Type C leniency**, for the second or later applicants (there may be more than one Type C leniency applicant) or coercers.²⁰ Successful Type C applicants receive discretionary reductions in penalties of up to 50% (depending primarily on the value added by the application to the CMA's investigation), discretionary immunity from criminal prosecution for specific individuals and guaranteed immunity from director disqualification for all co-operating current and former directors.

38. Prior to the UK's exit from the European Union, if the CMA and European Commission received a parallel leniency application, the provisions of Regulation 1/2003 meant that, if the European Commission decided to investigate the conduct reported via that leniency application, the CMA did not have competence to investigate the same conduct. This ceased to apply following the end of the transition period on 31 December 2020. Accordingly, while the UK and European leniency regimes have always operated separately, since Brexit it has become more important than ever that potential applicants consider each jurisdiction individually.

39. The CMA is currently considering a review of the CMA Leniency Guidance to enhance the programme and in particular to respond to developments and changes in legislation, policy and practice.²¹ This includes, for example, changes to the UK competition regime following the UK's exit from the European Union, the significant increase in the use of director disqualifications (see paragraph 3.2 above), and the significant experience the CMA has gained in handling applications since the Leniency Guidance was first adopted.

40. Any review could also consider whether incentives to apply for Type A immunity may be further enhanced, albeit the CMA's leniency programme in its current form has in recent years, as noted above, continued to deliver its primary objective of assisting the CMA to detect and take enforcement action against illegal cartels in a variety of sectors.

41. The following factors have variously been put forward as potentially having an impact on incentives to apply for Type A leniency:

1. *The risk of consequences beyond public competition enforcement, including private damages* – in the UK, successful Type A applicants have since 2017 been provided with some protections in damages actions (such as preventing disclosure orders in respect of leniency statements in private damages proceedings)^{22,23} and may (as

²⁰ A condition of Type A and B leniency is that the potential applicant must not have taken steps to coerce another undertaking to take part in the suspected cartel activity. Where an undertaking has been a coercer, only Type C leniency will be available.

²¹ The current Leniency Guidance dates from 2013 and since then the CMA has issued two minor updates to the Guidance – an information note in November 2017 explaining arrangements for handling leniency applications in the regulated sectors, and an addendum in September 2020 explaining that the CMA would not generally expect to grant immunity or discounts on any financial penalty of more than 50% to Type B applicants in RPM cases. These updates are available at [Leniency and no-action applications in cartel cases: OFT1495 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61495/OFT1495_-_Leniency_and_no-action_applications_in_cartel_cases.pdf).

²² The UK Government has recently concluded that there is mixed evidence on the extent to which leniency programmes are frustrated by the private damages regimes, and that more time may be needed to observe any effects of the changes introduced in 2017 to protect leniency recipients in follow-on damages actions (see [Reforming competition and consumer policy: government response - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61495/OFT1495_-_Leniency_and_no-action_applications_in_cartel_cases.pdf)).

²³ The Digital Markets Competition and Consumers Bill, which was introduced to UK Parliament on 25 April 2023, would provide the UK Competition Appeal Tribunal with discretion to award exemplary damages in competition law claims. However, this should not deter potential leniency

described in paragraph 3.2 above) in the future be afforded protection from mandatory exclusion from public tenders.

2. *The perceived risk of detection by other means* – as noted above, where the perceived risk of detection (whether as a result of leniency applications by other cartel participants or otherwise) is high, potential applicants generally have greater incentives to apply for leniency.
3. *The sanctions for cartel activity and the extent to which those might be reduced through cooperation or settlement throughout the investigation* - this underlines the importance of ensuring that those who are the first to report cartel activity receive significant benefits from the programme. As noted above at paragraph 5.4, successful Type A immunity applicants in the UK and their cooperating directors and employees receive automatic full immunity not only from fines.

42. The incentives to apply for leniency might also be reduced if there is lack of certainty or interoperability in the application of leniency programmes in different jurisdictions. However, in practice, the CMA's experience is that authorities, in addition to sharing best practices, where necessary coordinate in specific cases to ensure that leniency applicants are not faced with irreconcilable requirements from different authorities.

6. Conclusion

43. 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.

44. There has been a strong drive to increase risks for cartelists in the UK. Steps taken include:

- Continuing to invest in the CMA's ability to take forward 'intelligence-led' cases, so that it effectively complements leniency as a means of cartel detection. As set out in section 2 above, the CMA continuously looks for innovative ways to enhance its proactive detection and investigation toolkit to develop intelligence-led cases.
- Taking steps to ensure that the level of penalties that can be imposed as a result of competition enforcement cases provides effective deterrence, especially in cases involving large, often global, businesses.
- Significantly increasing the use of our competition disqualification powers, therefore ensuring that individual directors are accountable for a company's involvement in anti-competitive practices.
- Proposing to increase the risks for cartelists in public procurement by strengthening the debarment regime.

45. As risks for those involved in cartel activity in the UK continue to increase, this in turn augments the incentive to comply with the law, or, if not, to apply for leniency (which in turn increases the risks of detection, in a 'virtuous circle'). Alongside those initiatives, the CMA is currently considering a review of the CMA Leniency Guidance.

applicants because, as the UK High Court found in *Devenish Nutrition / Sanofi-Aventis* (2007), the principle of *ne bis in idem* precludes the award of exemplary damages in a case in which the defendant has already been fined (or would have been but for a successful leniency application).

46. The CMA has been stepping up its international engagement as it tackles more cartel cases with an international dimension, following the UK's exit from the European Union. More effective international cooperation increases risks for international cartelists, which should drive more international leniency applications to agencies across the globe in the future. The CMA values discussions with international partners within the OECD, ICN, MMAC and bilaterally about our own experience and the successful approaches of other authorities.