

A lenient approach

The OFT wants to reform the UK leniency regime in cartel investigations

by **Peter Binning***

A new consultation was launched by the UK's Office of Fair Trading in October 2011 aimed at reforming the UK cartel leniency regime in criminal and civil cases (*Applications for leniency and no action in cartel cases* OFT803con). It closes on 26 January 2012. Setting out detailed guidance on the principles and processes involved in leniency under the UK competition regime, it has important implications for all those involved in competition litigation.

The OFT marked the end of 2011 by ending its only remaining public UK criminal cartel investigation, the third to be closed in a year. There are now no public criminal cartel investigations, although an unspecified number of inquiries are said to be in progress. The Office of Fair Trading has had an unhappy experience as a prosecutor, having lost its only contested cartel case in the BA/Virgin passenger fuel surcharge prosecution in May 2010. As it has discovered, prosecuting is never easy and this new consultation paper seeks to address some of the problems.

The OFT's record to date is certainly not going to generate new investigations of UK cartel behaviour through leniency applications made by companies in fear of the UK regulator as prosecutor. The very small number of UK cartel investigations suggests that there may already be a significant problem. Offending companies and individuals may seek to bypass the UK and make more use of the competition leniency regimes in the European Commission and the US because they cannot be sufficiently certain about the UK regime. In some cases, they may be able to avoid reporting UK-related conduct at all. A steady flow of leniency-driven intelligence and evidence is needed not only to generate prosecutions as an effective deterrent against criminal cartels in the UK but also to drive civil competition cases as well.

A difficult environment

To be fair, the OFT is operating in a uniquely complex international enforcement environment where differential criminal and civil penalty and leniency regimes apply. Some of its cases may fall under the parallel jurisdiction of the EC which has no power to prosecute individual wrongdoers, while others may fall within the jurisdiction of the US Department of Justice's antitrust division, which has developed a fierce reputation for prosecuting individuals and companies in cartel cases. To cap it all, unlike other competition regulators where criminal offences exist (such as in the US and Australia), the OFT has to prove that an individual acted dishonestly in order to secure a conviction.

In addition, UK criminal prosecutors are inexperienced, compared to their US counterparts, in mounting prosecutions based on immunised witnesses. "Turning" a suspect into a

reliable prosecution witness is time consuming and difficult. The SFO and CPS have some experience of this under the statutory immunity and co-operation regime provided by the Serious Organised Crime and Police Act 2005 (SOCPA) but even their experience is limited, particularly in business crime cases. The OFT is not a specified prosecutor empowered to give a SOCPA immunity notice and the cartel offence is specifically excluded from the SOCPA immunity regime. Despite this, there would be much to gain from prosecutors sharing their knowledge and experience to improve the operation of leniency in cartel cases and commercial crime cases more generally.

The possible reform of the cartel offence by the controversial removal of the dishonesty element remains subject to any new legislation that may emerge from a wider government consultation on reform of the UK competition regime which closed last year. Until any changes to the law are made, the OFT has recognised that it must improve its leniency arrangements by learning from the bad experiences of the last few years.

Themes for reform

The consultation paper on leniency and no action aims to reformulate the current guidance on leniency for undertakings (OFT436) and no action for individuals (OFT513). The current guidance on the handling of leniency and no-action letters (OFT803) has been in place for three years.

A major objective of the new guidance is to achieve greater certainty by improved clarity and predictability. Significant new guidance is set out for the conduct of internal investigations by undertakings and their advisers. Simplified rules are proposed on the availability of different types of leniency, and a revised marker procedure is introduced with model leniency agreements for undertakings and no-action letters for individuals. More detail is given on the expected commitment from leniency applicants and individuals, and the meaning of complete and continuous co-operation. Perhaps the most important areas, though – waiver of privilege in criminal cartel cases and the all-important question of whether a "confession" of dishonesty is required in a criminal cartel case from an immunised individual – are fudged, with the result that the proposals risk creating more problems than they solve.

The Office of Fair Trading intends to issue four documents to set out its revised leniency regime: penalty guidance (see OFT423); detailed guidance for legal practitioners (see OFT803); a quick guide on cartels and leniency for undertakings (see OFT436) and a quick guide on cartels and leniency for individuals (see OFT513).

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Leniency is available for undertakings and individuals who admit to cartel participation. They must also agree to provide information, maintain continuous and complete co-operation and refrain from further participation save, exceptionally, as directed by the OFT. The familiar Type A, B and C immunities/leniency are retained.

Coercers remain ineligible for immunity. It is interesting to note that the OFT has never refused immunity for an individual or an undertaking on the coercer ground and the bar is set very high. To be ineligible for immunity on the coercer ground, an undertaking must have forced another to take part in a cartel by extreme means such as the use of actual physical violence, blackmail or severe economic pressure to exclude a competitor from a market. Mere agreed punishment mechanisms, for example, will not amount to coercive behaviour. Even where an undertaking is later deemed ineligible for immunity on coercer grounds, it may still qualify for Type C immunity with up to 50% fine reduction, and employees and directors are likely to remain eligible for criminal immunity.

The new guidance provides a simplified guide to the different types of immunity particularly where criminal and civil cartel investigations are taking place.

A major theme of the proposed guidance relates to the conduct of internal investigations. The OFT feels that its relatively low test for the obtaining of a marker and the availability of confidential no-names guidance from the OFT means that undertakings need only do sufficient investigation to establish a “concrete basis for suspicion of cartel activity” and a “genuine intention to confess”. In practice, such premarker investigations may have to be more detailed and take longer than the OFT would like, both because overseas regulators may expect a higher threshold of evidence to obtain a marker and because it may be more difficult to establish the facts where there is a real concern about criminal liability for individuals. This means that there is always a danger of investigations being tainted at an early stage, thereby prejudicing a future criminal prosecution.

To address this, the OFT sets out detailed guidance on the conduct of internal investigations, including recordkeeping and the issue of legal privilege. The OFT stops short of saying that a waiver of legal privilege will be required of all immunity applicants, although it has conceded that no waivers will be required in civil cases. In criminal cases, all applicants must be prepared to be asked to waive privilege, especially in any documents representing “first witness account material”, including briefing documents for interviews as well as all documents shown to witnesses and the notes of interviews themselves. Failure to waive privilege will be seen as a breach of the obligation of complete and continued co-operation. Disclosure of documents in which privilege has been waived will be governed by the duties of the OFT as prosecutor under the Criminal Procedure and Investigations Act 1996 but it is very likely that in many cases any prior statements made by prosecution witnesses will be disclosable. The OFT takes the view that it will wait until it has evidence to charge before seeking waivers based on counsel’s advice.

Defence teams will probe this area rigorously in any future prosecutions, particularly given the specific guidance proposed.

Confession and the dishonesty question

The guidance addresses the problem of when an immunity applicant may be asked to admit to dishonesty. This is an extremely difficult issue that strikes at the heart of the UK cartel offence and whether it can be prosecuted effectively in reliance on immunised witnesses. The OFT proposed guidance states (see para 2.46) that, in a cartel situation, the individual immunity applicant may not have acted dishonestly but employees of other cartel members may have done. This is a particularly awkward aspect of criminal cartel participation for juries (and judges) to grapple with. If a defendant is to be convicted of dishonest cartel conduct on the basis of evidence provided by an employee of another cartel member, how is it that both witness and defendant are not both engaged in a dishonest activity?

The OFT guidance prefers to delay the timing of any admission of dishonesty until the investigation is “at or near its conclusion”, and after specialised counsel has reviewed the evidence. The problem arises when a would-be immunity recipient refuses to admit dishonesty at this late stage. The OFT will only offer a no-action letter on condition that dishonesty is admitted. It would seem that in any case where a prosecution hinges on an immunised witness, the defence will want to scrutinise most carefully the process by which the final admission of dishonesty was secured.

If an admission of dishonesty is deemed not appropriate, then a comfort letter will be offered to the effect that insufficient evidence of the recipient engaging in cartel conduct has been found and that the OFT considers there is no risk of prosecution for the cartel offence. The OFT confidently asserts that the comfort letter is an adequate safeguard for those that need it and says that a number of such letters have been issued since 2003.

Those with long memories will recall the problem that arose in the case of *R v Werner* (unreported) CA 12 March 1998 in the context of tax evasion. In *Werner*, a taxpayer who had entered a civil settlement for tax fraud was subsequently prosecuted by the CPS (which did not then prosecute revenue cases) for non-tax criminal offences arising from the same conduct. The Crown was divisible for the purposes of decisions made by different prosecuting bodies. In the cartel context, the OFT has recognised the risk of prosecution for offences under the Fraud Act 2006 and other criminal statutes but considers that any attempt to do so would amount to an abuse of process.

Conclusion

The OFT needs to improve its performance in the cartel arena. It faces some difficult challenges but criminalisation of cartel conduct appears popular with other international regulators as an effective last-resort deterrent. It seems that other countries may follow the recent trend towards criminalisation but any prosecutor needs evidence and there seems to be no substitute in cartel cases for leniency-driven evidence gathering. The OFT’s proposals go some way to addressing the worst of the problems that have arisen in their cases to date and they are welcome. It will, however, always be hard to persuade anyone to make a voluntary admission to dishonesty without the clearest of evidence and, even then, the defendant may argue that he or she is the one member of the cartel who was honest enough not to admit dishonesty.