

# **OFT's guidance as to the appropriate amount of a penalty**

Draft competition law guideline for consultation

April 2004

OFT423a

Articles 81 and 82 of the EC Treaty and the Competition Act 1998 are applied and enforced in the United Kingdom by the Office of Fair Trading (the OFT). In relation to the regulated sectors these provisions are applied and enforced, concurrently with the OFT, by the regulators for communications matters, gas, electricity, water and sewerage, railway and air traffic services (under section 54 and schedule 10 of the Competition Act 1998) (the Regulators). Throughout this guidance, references to the OFT should be taken to include the Regulators in relation to their respective industries, unless otherwise specified.

The following are Regulators:

- the Office of Communications (OFCOM)
- the Gas and Electricity Markets Authority (OFGEM)
- the Northern Ireland Authority for Energy Regulation (OFREG NI)
- the Director General of Water Services (OFWAT)
- the Rail Regulator<sup>1</sup> (ORR), and
- the Civil Aviation Authority (CAA).

This guidance is issued in performance of the statutory obligation on the OFT (not including the Regulators), contained in sections 38(1) and 38(1A) of the Competition Act 1998 (and pursuant to section 38(3) of the Competition Act 1998), to publish guidance as to the appropriate amount of a penalty, including guidance as to the circumstances in which, in determining a penalty, the OFT may take into account the effects of an infringement in another Member State. The OFT is required to have regard to the guidance for the time being in force when setting the amount of any penalty to be imposed. Although there is no equivalent statutory obligation on the Regulators to publish guidance as to the appropriate amount of a penalty, the Regulators are required to have regard to the guidance for the time being in force when setting the amount of any penalty to be imposed.

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<sup>1</sup> This will change to the Office of Rail Regulation on 5 July 2004.

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# 1 INTRODUCTION

- 1.1 The Office of Fair Trading (the OFT) (not including the Regulators) is issuing this revised guidance as to the appropriate amount of a penalty to reflect changes arising out of EC Regulation 1/2003 (the Modernisation Regulation)<sup>2</sup> and the entry into force of the Enterprise Act 2002 (the Enterprise Act). In addition, the guidance has been revised in the light of judgments of the Competition Appeal Tribunal and the OFT's experience in applying the guidance since the Competition Act 1998 (the Act) came into force.
- 1.2 The Modernisation Regulation allows national competition authorities of the Member States (NCAs) and the courts of the Member States to apply and enforce Articles 81 and 82 (Article 81 and Article 82 respectively) of the EC Treaty<sup>3</sup>. The Act gives the OFT powers to enforce both the Chapter I and Chapter II prohibitions of the Act and Article 81 and Article 82<sup>4</sup>. Further detail on the Modernisation Regulation is set out in the competition law guideline *Modernisation* (OFT442).
- 1.3 This revised guidance sets out the basis on which the OFT calculates financial penalties for infringements of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions, and the requirements for the grant of lenient treatment by the OFT. It is issued in performance of the statutory obligation on the OFT (not including the Regulators) to publish guidance as to the appropriate amount of a penalty, including guidance as to the

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<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1).

<sup>3</sup> The Treaty of Rome, establishing the European Community, as consolidated by the Treaty of Amsterdam.

<sup>4</sup> **Article 81** prohibits agreements (see footnote 7 below) 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. **Article 82** prohibits conduct by one or more undertakings (see footnote 6 below) which amounts to an abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States. **The Chapter I prohibition** and the **Chapter II prohibition** of the Act are based on Article 81 and Article 82 respectively but apply to anti-competitive practices which affect trade within the United Kingdom. For further details see the competition law guidelines *The major provisions* (OFT400), *Article 81 and the Chapter I prohibition* (OFT401) and *Article 82 and the Chapter II prohibition* (OFT402).

circumstances in which, in determining a penalty, the OFT may take into account the effects of an infringement in another Member State<sup>5</sup>.

## Policy objectives

1.5 The twin objectives of the OFT's policy on financial penalties are:

- to impose penalties on infringing undertakings<sup>6</sup> which reflect the seriousness of the infringement, and
- to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

The OFT has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements<sup>7</sup> between undertakings which fix prices or share markets and other cartel activities<sup>8</sup>, and serious abuses of a dominant position. The OFT considers that these are among the most serious infringements of competition law. The deterrent is aimed at other undertakings which might be considering activities contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibitions, as well as at the undertakings which are subject to the decision.

1.5 The OFT also wishes to encourage undertakings to come forward with information relating to any cartel activity in which they are involved. The OFT therefore sets out in part 3 of this guidance when lenient treatment will be given to such undertakings.

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<sup>5</sup> See **Statutory background** for further details.

<sup>6</sup> The term '**undertaking**' is not defined in the EC Treaty or the Act, but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (e.g. trade associations) non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

<sup>7</sup> References in this guidance to '**agreements**' should, unless otherwise stated or the context demands it, be taken to include decisions by associations of undertakings and concerted practices.

<sup>8</sup> For the purposes of this guidance, '**cartel activities**' are agreements which infringe Article 81 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.

## Statutory background

- 1.6 Section 36 of the Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently<sup>9</sup> committed an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibitions. It is therefore for the OFT to determine whether a financial penalty should be imposed.
- 1.7 Sections 38(1) and 38(1A) of the Act require the OFT to prepare and publish guidance as to the appropriate amount of a penalty, including guidance as to the circumstances in which, in determining a penalty, the OFT may take into account the effects of an infringement in another Member State. Section 38(2) of the Act provides that the OFT may alter the guidance on penalties at any time. Any alterations to the guidance on penalties must be made with the approval of the Secretary of State and following consultation with such persons as the OFT considers appropriate. Section 38(3) of the Act provides that, if altered, the OFT must publish the guidance as altered. These particular provisions apply to the OFT alone and not also to the Regulators.
- 1.8 This revised guidance was approved by the Secretary of State as required under section 38(4) of the Act on [date to be inserted].
- 1.9 By virtue of section 38(8) of the Act, the OFT must have regard to the guidance for the time being in force when setting the amount of any financial penalty to be imposed.
- 1.10 The financial penalty may not in any event exceed the maximum penalty of 10 per cent of the worldwide turnover of the undertaking<sup>10</sup>.

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<sup>9</sup> Section 36(3) of the Act provides that the OFT may impose a penalty on an undertaking only if it is satisfied that the infringement has been committed intentionally or negligently. It does not, for the purposes of crossing that threshold, have to determine specifically which it was. See *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading* [2002] CAT 1 at [455]–[457], [2002] CompAR 13 (Napp) and *Aberdeen Journals Limited v The Office of Fair Trading* [2003] CAT 11 at [484] and [485] (**Aberdeen Journals (No.2)**).

<sup>10</sup> Calculated in accordance with the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/[ ])).

1.11 This guidance on penalties will continue to be kept under review in the light of experience in its application.

## Exceptions

1.12 Sections 39 and 40 of the Act provide limited immunity from financial penalties for 'small agreements' in relation to infringements of the Chapter I prohibition and for 'conduct of minor significance' in relation to infringements of the Chapter II prohibition<sup>11</sup>. This immunity does not apply to any infringements of Article 81 or Article 82 or to infringements of the Chapter I prohibition which are price-fixing agreements. It may be withdrawn by the OFT in certain circumstances. Further details are set out in the competition law guideline *Enforcement* (OFT407).

## Cartel offence

1.13 Section 188 of the Enterprise Act introduces a criminal offence for individuals who dishonestly engage in cartel arrangements by agreeing with one or more other persons that undertakings will fix prices, limit supply or production, share markets or be involved in bid-rigging arrangements in the United Kingdom. The offence only applies to agreements between undertakings at the same level in the supply chain, i.e. horizontal agreements.

1.14 The new cartel offence operates alongside the provisions of the Act, and further information can be found in the Enterprise Act guidance *The cartel offence – guidance on the issue of no-action letters for individuals* (OFT513) and *Powers for investigating criminal cartels* (OFT505). For the purpose of setting the amount of financial penalties payable by undertakings under section 36 of the Act, prosecution or conviction of individuals under section 188 of the Enterprise Act in connection with an infringement is not relevant.

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<sup>11</sup> See further Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262).

## **Parallel application of Articles 81 and 82 and the Chapter I and Chapter II prohibitions**

- 1.15 In cases where an undertaking has committed an infringement of both Article 81 and/or Article 82 and the Chapter I and/or Chapter II prohibition, the OFT may impose penalties in respect of the infringements of both Article 81 and/or Article 82 and the Chapter I and/or Chapter II prohibition. However, when imposing penalties under Article 81, the OFT will, as a matter of policy, take into account any penalties imposed under the Chapter I prohibition in respect of the same aspects of the same agreements. Likewise, when imposing penalties under Article 82, the OFT will, as a matter of policy, take into account any penalties imposed under the Chapter II prohibition in respect of the same conduct.

## 2 STEPS FOR DETERMINING THE LEVEL OF A PENALTY

### Method of calculation

2.1 A financial penalty imposed by the OFT under section 36 of the Act will be calculated following a five step approach:

- calculation of the starting point having regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking
- adjustment for duration
- adjustment for other factors
- adjustment for further aggravating or mitigating factors
- adjustment if the maximum penalty of 10 per cent of the worldwide turnover of the undertaking<sup>12</sup> is exceeded and to avoid double jeopardy.

Details on each of these steps are set out in paragraphs 2.3 to 2.18 below.

2.2 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if the requirements for lenient treatment set out in part 3 of this guidance are satisfied.

### Step 1 – starting point

2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:

- the seriousness of the infringement, and
- the 'relevant turnover' of the undertaking.

In cases concerning infringements of Article 81 and/or Article 82, the OFT may take into account the effects in another Member State in

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<sup>12</sup> See footnote 10 above.

determining the starting point, provided the express consent of the relevant Member State or NCA, as appropriate, is given in each particular case.

- 2.4 The starting point will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 81 and/or the Chapter I prohibition. Conduct which infringes Article 82 and/or the Chapter II prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have a particularly serious effect on competition, for example, predatory pricing, is also one of the most serious infringements.
- 2.5 It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point for the financial penalty. When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment will be made on a case by case basis for all types of infringement, taking account of all the circumstances of the case.
- 2.6 The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market<sup>13</sup> affected by the infringement in the undertaking's last business year<sup>14</sup>. This may include turnover generated in another Member State if the relevant geographic market for the relevant product is wider than the United Kingdom and the express consent of the relevant Member State or NCA, as appropriate, is given in each particular case.

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<sup>13</sup> See the competition law guideline *Market definition* (OFT403) for further information on the relevant product market and relevant geographic market.

<sup>14</sup> 'Relevant turnover' will be calculated after deduction of sales rebates, value added tax and other taxes directly related to turnover.

- 2.7 The starting point may not in any event exceed 10 per cent of the 'relevant turnover' of the undertaking.
- 2.8 Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.

### **Step 2 – adjustment for duration**

- 2.9 The starting point may be altered to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.

### **Step 3 – adjustment for other factors**

- 2.10 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibitions. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement<sup>15</sup> and the special characteristics, including the size and profitability of the undertaking in question would also be considered. Where relevant, the

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<sup>15</sup> See Napp at [507]–[511].

OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration<sup>16</sup>. The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking.

2.11 This step may result in either an increase or a reduction in the financial penalty calculated at the earlier steps.

#### **Step 4 – adjustment for further aggravating and mitigating factors**

2.12 The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors.

2.13 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement
- involvement of directors or senior management (notwithstanding paragraph 1.14 above)
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement
- continuing the infringement after the start of the investigation
- repeated infringements by the same undertaking or other undertakings in the same group

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<sup>16</sup> For example, in a predation case the relevant market may be very small. However, the act of predation might provide an undertaking with a reputation for aggressive behaviour which it could use to its advantage in many other markets. In cases concerning infringements of Article 81 and/or 82, the gain in another Member State may be taken into account, provided the express consent of the relevant Member State or NCA, as appropriate, is given in each particular case.

- infringements which are committed intentionally rather than negligently<sup>17</sup>.

#### 2.14 Mitigating factors include:

- role of the undertaking, for example, where the undertaking is acting under severe duress or pressure
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement
- adequate steps having been taken with a view to ensuring compliance with Articles 81 and 82 and the Chapter I and Chapter II prohibitions
- termination of the infringement as soon as the OFT intervenes<sup>18</sup>
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily<sup>19</sup>.

**Note that** in cases of cartel activity an undertaking which co-operates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it satisfies the requirements for lenient treatment set out in part 3 of this guidance.

### **Step 5 – adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy**

2.15 The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide

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<sup>17</sup> In Napp at [456] and [457] the Competition Commission Appeal Tribunal (now the Competition Appeal Tribunal (the CAT)) stated that, in its judgment, an infringement is committed 'intentionally' if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition and an infringement is committed 'negligently' if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition. This approach was followed by the CAT in Aberdeen Journals (No.2) at [484] and [485].

<sup>18</sup> By the exercise of its powers under sections 26-28A of the Act.

<sup>19</sup> This will include respecting OFT time limits specified or otherwise agreed. Undertakings benefiting from the leniency programme (a condition of which is their full co-operation) will not receive an additional reduction in financial penalties under this head to reflect general co-operation.

turnover of the undertaking in its last business year<sup>20</sup>. The business year on the basis of which worldwide turnover is determined must, as far as possible, be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it.

- 2.16 The penalty will be adjusted if necessary to ensure that it does not exceed this maximum. This adjustment will be made after all the relevant adjustments have been made in steps 2 to 4 above and also, in cases of cartel activity, before any adjustments are made on account of leniency under paragraphs 3.12 and 3.13 of this guidance.
- 2.17 Where any infringement by an association of undertakings (e.g. a trade association) relates to the activities of its members, the penalty shall not exceed 10 per cent of the sum of the worldwide turnover of each member of the association of undertakings. See competition law guideline *Trade associations, professions and self-regulating bodies* (OFT408) for further details on the imposition and enforcement of penalties on associations of undertakings.
- 2.18 If a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the OFT must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct<sup>21</sup>. This is to ensure that where an anti-competitive agreement or conduct is subject to proceedings resulting in a penalty or fine in another Member State, an undertaking will not be penalised again in the United Kingdom for the same anti-competitive effects.

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<sup>20</sup> See footnote 10 above.

<sup>21</sup> See section 38(9) of the Act.

### **3 LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION**

#### **Immunity from or reduction in financial penalty for undertakings coming forward with information in cartel activity cases**

- 3.1 Undertakings participating in cartel activities<sup>22</sup> might wish to terminate their involvement and inform the OFT of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward, the OFT will offer total immunity from financial penalties for an infringement of Article 81 and/or the Chapter I prohibition to a participant in cartel activity who is the first to come forward and who satisfies the requirements set out in paragraph 3.8. Alternatively, the OFT may offer total immunity from financial penalties to a participant who is the first to come forward and who satisfies the requirements set out in paragraphs 3.10 and 3.11. An undertaking which is not the first to come forward, or does not satisfy these requirements may benefit from a reduction in the amount of the penalty imposed if it satisfies the requirements set out in paragraphs 3.12 and 3.13.
- 3.2 The OFT considers that it is in the interest of the economy of the United Kingdom, and the European Community more generally, to have a policy of granting lenient treatment to undertakings which inform it of cartel activities and which then co-operate with it in the circumstances set out below. It is the secret nature of cartel activities which justifies such a policy. The interests of customers and consumers in ensuring that such activities are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which participate in cartel activities but which co-operate to a significant degree with the OFT as set out below.

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<sup>22</sup> See meaning of cartel activities as set out in footnote 8 above.

## Leniency applications and the ECN

- 3.3 The European Commission and a number of NCAs also have leniency programmes that facilitate the detection of infringements<sup>23</sup>.
- 3.4 As set out at paragraph 1.2 above, the Modernisation Regulation creates a system in which NCAs and the European Commission can apply Articles 81 and 82. The European Competition Network (the ECN) has been set up to facilitate close co-operation between NCAs and the European Commission and to ensure an effective and consistent application of EC competition rules. An NCA will be considered well placed to deal with a case where the cumulative case allocation criteria are met. Details of these criteria are provided in the European Commission's *Notice on Co-operation within the Network of Competition Authorities* (the Notice)<sup>24</sup>.
- 3.5 In most instances, where the OFT receives a leniency application (and it is well placed to deal with the case), it will remain in charge of the case. An application for leniency to the OFT will not be considered as an application for leniency to another authority within the ECN, even where that other authority deals with the case in parallel with or in place of the OFT. It is therefore in the interest of the applicant to apply for leniency to all the competition authorities which have the power to apply Article 81 in the territory affected by the infringement and which may be considered well placed to deal with the infringement in question. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to make leniency applications to the relevant authorities simultaneously. Individual applications may be discussed with the Director of Cartel Investigations at the OFT<sup>25</sup>.

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<sup>23</sup> The European Commission's *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (OJ C45, 19.2.02, p 3) concerns 'secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports'. Therefore, it applies to horizontal agreements only. The OFT's civil leniency policy applies to cartel activities (as defined in footnote 8 above), namely horizontal agreements and any form of price-fixing including resale price maintenance.

<sup>24</sup> Reference to be inserted.

<sup>25</sup> See paragraph 3.18 as regards confidentiality.

- 3.6 Further details on how information may be exchanged within the ECN, and the safeguards in place to protect the position of a leniency applicant with regard to such information exchange, can be found in the Notice.

### **Total immunity from financial penalties in cartel activity cases**

- 3.7 Where an undertaking participating in cartel activity is the first to come forward to provide evidence of the existence and activities of the cartel activity, and it fulfils all the requirements in paragraph 3.8 below, it will benefit from total immunity from financial penalties in respect of that infringement; if it is the first to come forward to provide such evidence and it fulfils all the requirements of paragraphs 3.10 and 3.11 below, it may benefit from total immunity from financial penalties in respect of that infringement.

### **Total immunity for the first to come forward BEFORE an investigation has commenced**

- 3.8 In order to benefit from total immunity under this paragraph, the undertaking must be the first to provide the OFT with evidence of the existence and activities of cartel activity in a market before the OFT has commenced an investigation<sup>26</sup> of the undertakings involved; provided that the OFT does not already have sufficient information to establish the existence of the alleged cartel activity, and conditions (a) to (d) below are satisfied.

The undertaking must:

- a) provide the OFT with all the information, documents and evidence available to it regarding the existence and activities of the cartel activity
- b) maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation

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<sup>26</sup> By the exercise of powers under sections 26-28A of the Act.

- c) not have taken steps to coerce another undertaking to take part in the cartel activity, and
- d) 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).

3.9 If an undertaking does not qualify for total immunity under paragraph 3.8 above, it may still benefit from total immunity from financial penalties under paragraphs 3.10 and 3.11 below.

### **Total immunity for the first to come forward AFTER an investigation has commenced**

3.10 In order to benefit from the possibility of total immunity under this paragraph:

- the undertaking seeking immunity under this paragraph must be the **first**<sup>27</sup> to provide the OFT with evidence of the existence and activities of cartel activity in a market **before** the OFT has given written notice of its proposal to make a decision that Article 81 and/or the Chapter I prohibition has been infringed<sup>28</sup>, and
- conditions (a) to (d) in paragraph 3.8 above must be satisfied.

3.11 The grant of immunity by the OFT in these circumstances is, however, discretionary. In order for the OFT to exercise this discretion it must be satisfied that the undertaking should benefit from immunity, taking into account the stage at which the undertaking comes forward, the evidence in the OFT's possession and the evidence provided by the undertaking.

### **Reduction in the level of financial penalties in cartel activity cases**

3.12 Undertakings which provide evidence of the existence and activities of cartel activity before written notice of a proposed infringement decision is given, but are not the first to come forward, or do not qualify for total

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<sup>27</sup> This means that there must not be any undertaking which is benefiting from total immunity under paragraph 3.8 in relation to the same cartel.

<sup>28</sup> Under Rule 4 of the Competition Act 1998 (Office of Fair Trading's rules) Order 2004 (SI 2004/[ ]).

immunity under paragraphs 3.8 or 3.10 and 3.11 above, may be granted a reduction of up to 50 per cent in the amount of a financial penalty which would otherwise be imposed, if conditions (a) to (c) below are met.

The undertaking must:

- a) provide the OFT with all the information, documents and evidence available to it regarding the existence and activities of the cartel activity
- b) maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation, and
- c) 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).

3.13 Any reduction in financial penalty will be calculated taking into account the stage at which the undertaking comes forward, the evidence in the OFT's possession and the evidence provided by the undertaking.

3.14 The grant of a reduction by the OFT in these circumstances is, however, discretionary. In order for the OFT to exercise this discretion it must be satisfied that the undertaking should benefit from a reduction, taking into account the factors described in paragraph 3.13 above.

### **Procedure for requesting immunity or a reduction in the level of penalties**

3.15 An undertaking which wishes to take advantage of the lenient treatment set out in this part must contact the office of the Director of Cartel Investigations at the OFT, or his/her equivalent at the appropriate Regulator. This step has to be taken by a person who has the power to represent the undertaking for that purpose.

### **Additional reduction in financial penalties**

3.16 An undertaking co-operating with an investigation by the OFT under the Act in relation to cartel activities in one market (the first market) may also be involved in a separate cartel activity in another market (the

second market) which also infringes Article 81 and/or the Chapter I prohibition.

- 3.17 If the undertaking obtains total immunity from financial penalties under either paragraph 3.8 or paragraphs 3.10 and 3.11 above 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 co-operation in the first market alone<sup>29</sup>. For example, as a result of an investigation by the OFT of producers, including ABC Ltd, in the widgets market, ABC Ltd carries out an internal investigation and discovers that, as well as having participated in cartel activities in the widgets market, one of its divisions has participated in separate cartel activities in the sprockets market. ABC Ltd 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 Ltd qualifies for total immunity 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, i.e. an additional reduction in respect of the widgets market (the first market) as a result of its co-operation in the investigation into the sprockets market (the second market).

### **Confidentiality**

- 3.18 An undertaking coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The OFT will therefore endeavour, to the extent possible and allowing for the exchange of information as required within the ECN, to keep the identity of such undertakings confidential throughout the course of its investigation.

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<sup>29</sup> 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 co-operation.