

# **The Cartel Offence: No-action Letters for Individuals**

A consultation document

July 2002

Part of a series of consultation papers about how the provisions of  
the Enterprise Bill will work in practice

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**ENTERPRISE BILL - Guidance on the Cartel Offence: No-action Letters for Individuals**

The Enterprise Bill contains a power for the Office of Fair Trading (OFT) to issue 'no-action letters' that prevent a criminal cartel prosecution. The OFT is conducting a public consultation on guidance on this power. A copy of the proposed guidance, is enclosed. A copy of the guidance can also be found on OFT's website, [www.oft.gov.uk](http://www.oft.gov.uk). The introduction to the consultation draft will be available in Welsh from the OFT.

Details about the Enterprise Bill, including an explanatory note, can be found on the Department of Trade and Industry's website, [www.dti.gov.uk/enterprisebill](http://www.dti.gov.uk/enterprisebill).

The Enterprise Bill remains subject to parliamentary debate and approval. This draft guidance reflects the content and clause numbering of the bill as at 20 June.

The OFT considers that it is in the interest of the economic well-being of the United Kingdom to grant leniency to individuals who inform competition authorities of cartels and who then co-operate in the circumstances set out below. It is the secret nature of cartels and their damaging effects that justify such a policy. The interests of customers and end-consumers in ensuring that such practices are detected and brought to an end outweigh the policy objectives of imposing penalties on those individuals who have committed an offence but who co-operate with the OFT and, where appropriate, any other competition authorities.

It is proposed that this lenient treatment take the form of 'no-action letters', which will prevent a prosecution being brought against an individual in England, Wales or Northern Ireland for their participation in the cartel. Whilst guarantees of immunity from prosecution cannot be given in respect of prosecutions brought in Scotland, co-operation will be reported to the Lord Advocate who will take such co-operation into account. In suitable cases this may include an early decision as to whether or not a particular individual remains liable to be prosecuted.



## **How to respond**

Law firms representing business and other representatives of business as well as consumer bodies are invited to comment on the proposed guidance in order to improve its clarity. Consultees responding to this consultation are asked to supply a brief summary of the people and organisations they represent, where appropriate. We welcome suggestions of other individuals or organisations about who should be consulted.

We will be taking queries by phone, but any suggested changes or comments should be submitted in writing (by letter or e-mail as indicated below). We will reply to all written submissions or queries. The OFT can only consider suggested changes to the guidance, not the underpinning legislation, as the latter is a matter for Parliament and not covered by the consultation exercise. Responses may be made public unless confidentiality is specifically requested.

This consultation exercise will last for 12 weeks. The OFT therefore asks that your comments on the proposed guidance are submitted to it no later than 14 October 2002. It may not be possible to take into account any suggested changes or comments after the deadline for receipt.

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## **SUMMARY**

This consultation document introduces the proposals to give the OFT the power to issue letters that prevent a prosecution being brought against an individual in England, Wales or Northern Ireland for their participation in the cartel. It offers for consultation the circumstances in which such letters might be issued and the procedure that might be followed.

## **OFT publications order line**

OFT information leaflets and reports can be ordered free of charge on 0870 60 60 321

## **Information on the internet**

You can also order OFT publications online, and find advice and information on consumer rights and on the work of the OFT at [www.of.gov.uk](http://www.of.gov.uk)

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# 1 INTRODUCTION

- 1.1 The OFT considers that it is in the interest of the economic well-being of the United Kingdom to grant leniency to individuals who inform competition authorities of cartels and who then co-operate in the circumstances set out below. It is the secret nature of cartels and their damaging effects that justify such a policy. The interests of customers and end-consumers in ensuring that such practices are detected and brought to an end outweigh the policy objectives of imposing penalties on those individuals who have committed an offence but who co-operate with the OFT and, where appropriate, any other competition authorities.
- 1.2 This lenient treatment takes the form of ‘no-action letters’<sup>1</sup>, issued under clause 185(4) of Enterprise Bill, which prevent a prosecution being brought against an individual in England, Wales or Northern Ireland for their participation in the cartel. Whilst guarantees of immunity from prosecution cannot be given in respect of prosecutions brought in Scotland, co-operation will be reported to the Lord Advocate who will take such co-operation into account. In suitable cases this may include an early decision as to whether or not a particular individual remains liable to be prosecuted.
- 1.3 It should, however, be made clear from the outset that most of the employees of undertakings which have been involved in a cartel who co-operate with investigation authorities in their enquiries will have no need of a no-action letter. The description of the offence given in the Bill<sup>2</sup> makes it clear that the offence is only committed where there is dishonesty.
- 1.4 For England and Wales and Northern Ireland the test for dishonesty was set out in the Ghosh<sup>3</sup> case. Juries will be required to ask themselves whether what was done was ‘dishonest’ by the ordinary standards of reasonable and honest people

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<sup>1</sup> A draft no-action letter is attached at annex A.

<sup>2</sup> The full description of the offence is given in Clause 183 & 184 of the Enterprise Bill.

<sup>3</sup> R v Ghosh [1982] QB 1053, 75 Cr. AppR. 154CA, 2 All ER 689, CA.

and, if so, whether the defendant had realised that their actions were dishonest according to those standards. Only when the jury can answer, 'yes – beyond all reasonable doubt,' to both questions can dishonesty be proven.

- 1.5 In Scotland the legal concept of dishonesty is also well understood.
- 1.6 Managers or directors who become aware of the existence of a cartel and then take steps to end it and to report its existence to the OFT cannot be said to have behaved dishonestly.
- 1.7 Similarly, an employee who becomes aware of the existence of a cartel and, although not involved in its operation, does nothing to end it is not guilty of a criminal offence.
- 1.8 In other cases, employees may knowingly have engaged in cartel activity but, provided their involvement is or was peripheral, the exercise of prosecutorial discretion would mean that such individuals would not be prosecuted. Others may have been more closely involved, but their willingness to come forward and co-operate at an early stage of their involvement means that they would be unlikely to face prosecution. In both of the above cases a no-action letter will not be needed.
- 1.9 There will, however, be some individuals who although not ring leaders or instigators have participated fully in the activities of the cartel, sometimes over an extended period. Such individuals, were it not for the possibility of a no-action letter, could expect to face criminal prosecution and the possibility of imprisonment.

## 2 QUESTIONS

2.1 This consultation seeks your views on the proposed conditions and procedures for the issue of no-action letters. Copies have been sent to the organisations and individuals listed at Annex B and the paper has been placed on our website [www.offt.gov.uk](http://www.offt.gov.uk) with a facility to e-mail responses. We invite responses to the following questions:

- a) Are the conditions proposed for the issue of no-action letters the right ones? Should any conditions be added or removed? Are the conditions sufficiently objective?
- b) In particular, in condition 3.1 (d), should the bar on receiving no-action letters be applied to those who have acted as instigators or played the leading role (a condition rarely met given the collaborative nature of cartels) or should it be only those who have compelled others to take part who are denied the possibility of no-action letter?
- c) Is the procedure for the issue of no action letters sufficiently transparent and easy to use?
- d) Does the protection for the identity of individuals strike the right balance between the need to encourage individuals to come forward and the interests of justice in having the source of information known?
- e) Overall, is the guidance written in clear and unambiguous language and does it provide sufficient detail?

### 3 PROPOSED GUIDANCE

#### Conditions for the issue of no-action letters

3.1 The individual must

- a) admit participation in the criminal offence;
- b) provide the OFT with all the information, documents and other evidence available to them regarding the existence and activities of the cartel;
- c) maintain continuous and complete co-operation throughout the investigation until the conclusion of any criminal proceedings arising as a result of the investigation;
- d) not have [acted as the instigator or played the leading role in the cartel] [compelled others to take part in the cartel]; and
- e) refrain from further participation in the cartel from the time they disclose the cartel except as directed by the investigating authority.

3.2 These conditions are necessary but the fact that they are satisfied is not in itself sufficient for the issue of a no-action letter. When the OFT believes that it already has sufficient information to bring a successful prosecution it will not issue no-action letters.

#### Procedure

3.3 When an individual believes that they may require a no-action letter from the OFT or an early determination as to whether they are liable to be prosecuted in Scotland, they should approach the Director of Cartel Investigations at the OFT. The approach may be made

- a) directly by the individual,
- b) by a lawyer representing the individual, or
- c) on behalf of named employees, directors, ex-employees or ex-directors, by an undertaking seeking leniency in accordance with the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* ('the Director's

Guidance'), or the *Commission Notice on Immunity from Fines or Reduction of Fines in Cartel Cases (2002/C 45/03)* ('the Commission Notice on Immunity').

- 3.4 When an application is received, the Director of Cartel Investigations will give an early indication as to whether the OFT may be prepared to issue a no-action letter. In cases where leniency in accordance with the Director's Guidance or the Commission Notice on Immunity is granted the OFT will normally be prepared to issue no-action letters as well to those individuals who need such letters.
- 3.5 If the OFT may be prepared to issue a no-action letter the applicant will be interviewed. Any information they provide in such interviews will not be used against them in criminal proceedings unless they either knowingly or recklessly given false or misleading information, in which case any immunity granted will be withdrawn as if it had never been granted and the OFT may rely on *any* information given by the applicant in a prosecution against them for the cartel offence.
- 3.6 On completion of the interview (which may extend over several sessions), the applicant can discuss with the OFT the risk of being prosecuted for their part in the cartel. If it is considered by the OFT that:
- a) but for the operation of the leniency policy, there is a likelihood of prosecution, and
  - b) the conditions in paragraph 3.1 of this guidance are met;
- a no-action letter will be issued in due course or, in the case where any prosecution would be brought in Scotland, the co-operation given by the applicant will be reported to the Lord Advocate in due course with a request for an early decision as to whether the individual remains liable to prosecution.
- 3.7 A no-action letter may be withdrawn if the recipient ceases to satisfy conditions in paragraph 3.1 of this guidance; if it is discovered that there were material inaccuracies in the information given to OFT by the applicant; or if information, documents or other evidence in the possession or under the control of the applicant have been withheld.

## **Protecting the identity of individual**

- 3.8 Information from which the identity of individuals who have received no-action letters may be deduced shall not be made public, subject to disclosure obligations in criminal proceedings or when there is an overriding public interest in doing so.

# ANNEXES

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## A DRAFT LETTER

### ENTERPRISE [Bill] 2002 ('THE [Bill]') NOTICE UNDER SECTION [185(4)]

- A.1 The letter gives written notice to \_\_\_\_\_ ('the Applicant') that he/she will not be prosecuted in England and Wales or Northern Ireland for an offence under section [183] of the [Bill] that falls within the description in paragraph 2 of this letter except in the circumstances described in paragraph [6].
- A.2 The offence for which immunity from prosecution is granted ('the reported possible offence') is that [*describe* e.g. 'the Applicant dishonestly agreed with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to [Undertaking A] and [Undertaking B] to fix a price for the supply by [Undertaking A] in the United Kingdom (otherwise than to Undertaking B) of [a product or service] ('the cartel agreement')].
- A.3 This grant of leniency is made and remains conditional on the Applicant satisfying and continuing to satisfy each of the conditions set out below.

#### **Conditions**

- a) The Applicant must have provided the OFT with all the information, documents and evidence currently available to him/her regarding the existence and activities of the cartel to which the reported possible offence relates.
- b) The Applicant will maintain continuous and complete co-operation until the conclusion of any criminal proceedings arising as a result of the investigation. This includes but is not limited to:

- i) Voluntarily and without prompting, providing the OFT with all the facts that become known to him/her and all the information, documents and evidence that become available to him/her relating to the cartel agreement, in addition to any such information already provided;
  - ii) Providing promptly, and without the OFT using its powers under any section of the Act, all the information, documents, evidence or other items in its possession, custody or control, wherever located, requested by the OFT, to the extent that they have not already been provided;
- c) The Applicant has [not compelled others to take part in the cartel to which the reported possible offence relates] [has not acted as the instigator or played the leading role in that cartel. [TO BE FINALISED FOLLOWING CONSULTATION]
- d) The Applicant has refrained from participation in the arrangements to which the reported possible offence relates from and including [DATE] and agrees to refrain from any further participation in the arrangements to which the reported possible offence relates.

A.4 The Applicant confirms that he/she has complied with conditions (a) (c) and (d) above.

A.5 If, in the view of the OFT, at any time before the conclusion of the any criminal proceedings arising as a result of the investigation into the reported possible offence, the conditions which are set out in this letter have not been complied with in full by the Applicant, the OFT shall give immediate written notice to the Applicant of the nature of the alleged non-compliance and that the OFT is considering revoking the grant of immunity. The Applicant will be given a reasonable opportunity to explain the alleged non-compliance and, if the OFT considers it appropriate, to remedy the breach within a reasonable period of time from the giving of such explanation.

A.6 If the OFT then determines that the conditions which are set out in this letter have not been complied with, the OFT may revoke the grant of immunity from prosecution.

A.7 Irrespective of whether or not the OFT has revoked the grant of immunity, all information, documents and other evidence provided to the OFT shall remain the property of the OFT and can be used by the OFT to facilitate the performance of their functions by or under any enactment.

A.8 This letter sets out all of the terms and conditions on which the OFT grants immunity to the Applicant. It supersedes all prior understandings, if any, whether oral or written, relating to the reported possible infringements.

A.9 The signatories below acknowledge acceptance of the terms and conditions set out above which shall only take effect when both parties have signed this letter in duplicate, one original to be retained by each party.

Signed:

Date:

Name: Adrian Walker-Smith

Position: Director Cartel Investigations

For and on behalf of the Office of Fair Trading

Signed:

Date:

Name:

## B LIST OF THOSE CONSULTED

British Chamber of Commerce	Burgess Salmon
CBI – London	CMS Cameron McKenna
CBI – Brussels	Clifford Chance
Companies House	Dechert
Competition Commission	Denton Wilde Sapte
Competition Law Association	Dibb Lupton Alsop
Department of Enterprise, Trade and Investment	Eversheds
Department of Trade and Industry	Erskine Chambers
HM Treasury	Fountain Court
Institute of Directors	D J Freeman
Insolvency Practitioners Association	Freshfields Bruckhaus Deringer
The Law Society	Gouldens
The Law Society of Scotland	GKN
Scottish Assembly	Herbert Smith
Solicitors European Group	Hammond Suddards Edge
University of London	Hogarth Chambers
Welsh Assembly	Infracore Sub-Surface Ltd
	Linklaters & Alliance
	Lovells
1 Essex Court	MacFarlanes
3 Stone Buildings	Maitland Chambers
3/4 South Square	Martineau Johnson
24 Old Buildings	Monckton Chambers
Addleshaw Booth & Co	Nabarro Nathanson
Allen & Overy	P G Newman
Ashurst Morris Crisp	Nicholson Graham & Jones
Baker & McKenzie	Norton Rose
Beachcroft Wansbroughs	Olswang
Berwin Leighton	Osborne Clarke
Bird & Bird	Peters and Peters
S J Berwin	Pinsent Curtis Biddle
Brick Court Chambers	Richards Butler
Bristows	Serle Court

Shearman & Sterling  
Shepherd and Wedderburn  
Simmons & Simmons  
Singletons  
Slaughter & May  
Stephenson Harwood  
Stringer Saul

Theodore Goddard  
Travers Smith Braithwaite  
White and Case  
Wilberforce Chambers  
Wilmer Cutler Pickering  
Wragge & Co