



**International
Competition
Network**

**ANTI-CARTEL
ENFORCEMENT
TEMPLATE**

**CARTELS WORKING GROUP
Subgroup 2: Enforcement Techniques**

United Kingdom

date of completion: 28/10/2005

ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses which suffer from cartel activity to get information about the possibilities of lodging a complaint in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

1. Information on the law relating to cartels

A. Law(s) covering cartels:	<p>Competition Act 1998</p> <p>Enterprise Act 2002</p> <p>Home page address: www.offt.gov.uk</p> <p>Language: English</p>
B. Implementing regulation(s) (if any):	<p>The Competition Act 1998 (Office of Fair Trading Rules) Order 2004 Statutory Instrument 2004 No, 2751</p> <p>The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, Statutory Instrument 2004 No, 1259</p> <p>Home page address: www.offt.gov.uk</p> <p>Language: English</p> <p>Language: English</p>
C. Interpretative guideline(s) (if any):	<p>The Office of Fair Trading ('the OFT') has issued the following guidelines that have relevance to cartels;</p> <p>Agreements and Concerted Practices, OFT 401;</p> <p>Market definition, OFT 403;</p>

	<p>Powers of Investigation, OFT 404;</p> <p>Enforcement, OFT 407;</p> <p>Trade associations, professions and self-regulating bodies, OFT 408;</p> <p>The Cartel Offence OFT 513; and</p> <p>Powers for investigating criminal cartels, OFT 515.</p> <p>OFT home page: www.of.gov.uk</p> <p>Language: English</p>
D. Other relevant materials (if any):	<p>OFT's guidance as to the appropriate amount of a penalty, OFT 423 (December 2004)</p> <p>Cartels and the Competition Act 1998, OFT 435</p> <p>Leniency in cartel cases, OFT 436</p>

2. Scope and nature of prohibition on cartels

<p>A. Does your law or case law define the term “cartel”?</p> <p>If not, please indicate the term you use instead.</p>	<p>"Cartel activities" are agreements which infringe Article 81 and/or the prohibition in Chapter I of the Competition Act 1998 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.</p> <p>Under the Enterprise Act 2002, the cartel offence is the dishonest agreement to enter into cartel activities.</p>
<p>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing, bid rigging or production or sales quotas¹) and other types of “cartels”?</p>	<p>The Competition Act 1998 does not distinguish between different types of cartel, except in so far as price fixing agreements cannot benefit from an exemption from fines for small agreements as set out in section 39 of the Competition Act 1998, which is agreements between undertakings whose total turnovers is under £20 million. Under the Competition Act 1998, hard-core cartels attract severe financial penalties .</p> <p>Section 188 of the Enterprise Act 2002 creates a cartel offence which states that an individual is guilty of it if he dishonestly agrees with one or more other persons to implement a hard core cartel, i.e. price fixing, limiting or preventing the supply or production of a product or service, market sharing and bid-</p>

¹ In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

	<p>rigging.</p> <p>Under the Enterprise Act 2002, individuals who participate in hard core cartels can be punished with imprisonment.</p>
<p>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors.]</p>	<p>Any agreement between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition are prohibited.</p> <p>An individual exemption can be granted under section 9 of the Competition Act 1998 in cases where an agreement, decision or concerted practice is in the interest of consumers and does not eliminate competition.</p>
<p>D. Is participation in a hardcore cartel illegal <i>per se</i>?</p>	<p>Yes.</p>
<p>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</p>	<p>Participation in hardcore cartel activity may be a civil breach under the Competition Act 1998 and a criminal offence under the Enterprise Act 2003.</p>

3. Investigating institution(s)

<p>A. Name of the agency, which investigates cartels:</p>	<p>The Office of Fair Trading ('the OFT')</p> <p>The sectoral regulators set out below have similar powers to those of the OFT.</p> <p>The Office of Communications (OFCOM) The Gas and Electricity Markets Authority (OFGEM) The Northern Ireland Authority for Energy Regulation (NIAER) The Director General of Water Services (OFWAT) The Office of Rail Regulation (ORR) The Civil Aviation Authority (CAA)</p>
<p>B. Contact details of the agency:</p>	<p>The Office of Fair Trading Fleetbank House 2-6 Salisbury Square London EC4 Y 8JX</p> <p>Telephone:(0044) 020 7211 8000 Fax: (0044) 020 211 8800 Website: www.of.gov.uk</p>
<p>C. Information point for potential complainants:</p>	<p>Telephone: (0044) 08457 224499</p>

D. Contact point where complaints can be lodged:	Cartels hotline: (0044) 020 7211 8888
E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.	The Serious Fraud Office ('the SFO') in criminal cases

4. Decision-making institution(s)² [to be filled in only if this is different from the investigating agency]

A. Name of the agency making decisions in cartel cases:	The criminal courts in cases concerning criminal cartels under the Enterprise Act 2002.
B. Contact details of the agency:	Not applicable
C. Contact point for questions and consultations:	The OFT.
D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.	The OFT and/or the SFO would carry out the investigation, preparation and conduct of the case.
E. What is the role of the investigating agency if cartel cases belong under criminal proceedings?	The OFT and/or the SFO would carry out an investigation leading to criminal proceedings.

5. Handling complaints and initiation of proceedings

A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency]	Cartel investigations usually commence with a complaint, often anonymous, or a leniency applicant.
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² Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

application, notification, etc.]	
B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)?	No.
C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]	None.
D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect?	Any complaint in writing would be responded to, even those that are not proceeded with. Complaints are considered on their merits. The OFT has discretion as to which cases it will investigate fully.
E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?	It is unnecessary to provide a formal decision for all complaints that are not proceeded with. The length and complexity of the the response depends on the nature of the complaint and how much investigation has been carried out. It can vary from a short letter to a formal decision.
F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or reject it?	No.

6. Leniency policy³

A. What is the official name of your leniency policy (if any)?	The leniency scheme is set out in Section 3 of the "OFT's guidance as to the appropriate amount of a penalty OFT 423" (December 2004). The scheme is referred to as lenient treatment or leniency.
B. Does your jurisdiction offer full leniency as well as partial leniency (i.e.	The leniency scheme offers both full and partial immunity from fines.

³ For the purposes of this template the notion of 'leniency' covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like 'leniency' 'amnesty' and 'immunity' are considered as synonyms.

reduction in the sanction / fine), depending on the case?	
C. Who is eligible for full leniency?	The first undertaking to apply for leniency before the OFT has started an investigation receives 100 per cent immunity from fines as of right. The first to come forward after the OFT has started an investigation might be granted 100 per cent immunity from fines or a lesser amount.
D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation? In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?	See point 6C above and points 6F, G and J below..
E. Who can be a beneficiary of the leniency program (individual / businesses)?	Undertakings in relation to breaches of the Competition Act 1998. There is a scheme whereby individuals who admit that they are guilty of a cartel offence under the Enterprise Act 2002, may receive a "no action letter" in return for providing the OFT with information about a cartel.
F. What are the conditions of availability of full leniency:	For total immunity the undertaking must come forward before the OFT starts an investigation and: a) provide the OFT with all the information, documents and evidence available to it regarding the cartel activity; b) maintain continuous co-operation; c)generally, stop any further cartel activity; and d) not have taken steps to coerce another underatking to take part in the cartel activity.
G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment):	Reductions in the level of financial penalties of up to 50 per cent can be granted to undertakings which do not apply first. They are required to comply with conditions (a) to (c) in point 6F above.
H. Obligations for the beneficiary after the leniency application has been accepted:	See point 6F above.

I. Are there formal requirements to make a leniency application?	There are no formal requirements for the making of a leniency application. Once it has been confirmed, a formal agreement is entered into between the OFT and the undertaking.
J. Are there distinct procedural steps within the leniency program?	Leniency is granted provisionally and it is then dependent on the undertaking satisfying the OFT that it has complied with the conditions (see point 6F above). For those undertakings that are not granted 100 per cent immunity, the level of immunity is calculated taking into account the stage at which the undertaking comes forward, the evidence already in the OFT's possession and the evidence provided by the undertaking.
K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?	When the formal agreement is signed by the applicant and the OFT.
L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?	<p>Leniency is granted in accordance with the "OFT's guidance as to the appropriate amount of a penalty", OFT 423 as required by section 38 of the Competition Act 1998. It was approved by the Secretary of State in accordance with section 38(4).</p> <p>The Director of Cartels or the Deputy Director of Cartels or their counterparts at the sector regulators deal with leniency applications.</p>
M. Does your legislation have a marker system? If yes, please describe it.	The legislation does not have a marker system. The Director of Cartels applies an informal "marker" system to give an applicant a chance to provide information in support of his application for leniency.
N. Does the system provide for any extra credit⁴ for disclosing additional violations?	Yes. It is set out at paragraphs 3.16 and 3.17 of the "OFT's guidance as to the appropriate amount of a penalty", OFT 423.
O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.	There is no statutory requirement to keep the identity of a leniency applicant confidential. However, during the investigation stage the applicant will normally be kept confidential. When a Statement of Objections is issued the names of leniency applicants are mentioned.
P. Is there a possibility of appealing an agency's decision rejecting a leniency application?	By way of judicial review on the basis that the decision rejecting a leniency application was perverse.
Q. Contact point where a	

⁴ Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

leniency application can be lodged:	The Director or Deputy Director of Cartels: (0044) 020 7211 8117
R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?	Yes. The formal leniency agreement addresses this point and notes that leniency could be withdrawn if the conditions are breached. The OFT is required to set out its reasons for revocation in writing and allow the undertaking to make representations thereon.
S. Does your policy allow for “affirmative leniency”, that is the possibility of the agency approaching potential leniency applicants?	No.

7. Investigative powers of the enforcing institution(s)⁵

A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids⁶, electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant.	<p>Section 26 of the Competition Act 1998 gives the OFT formal powers to ask for specific information and documents by way of a notice served on an undertaking..</p> <p>Section 27 of the Competition Act allows the OFT to enter premises, with or without notice, and ask for documents to be produced and explanations relating to those documents to be given.</p> <p>Section 28 of the Competition Act 1998 gives the OFT the power to obtain a warrant from the High Court (or the Court of Session in Scotland) to enter premises without notice and to search them.</p> <p>The OFT can copy computer hard discs.</p>
B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?	Private residences and vehicles can be searched if authorised by a warrant. Briefcases on premises for which a warrant is obtained can be searched i.e. in an office. The OFT would not be authorised to search a person.
C. May evidence not falling under the scope of the	No.

⁵ “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

⁶ “Searches/raids” means all types of search, raid or inspection measures.

<p>authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?</p>	
<p>D. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</p>	<p>No.</p>

8. Procedural rights of businesses / individuals

<p>A. Key rights of defence in cartel cases:</p>	<p>Allegations of breaches of the Competition Act 1998 are notified to the undertaking in a Statement of Objections (see section 31 of the Competition Act 1998 and the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004. The Statement of Objections is generally accompanied by copies of all the documents on which the OFT relies. The undertaking has a right of access to the OFT's file of all the documents that relate to the investigation. The undertaking has the opportunity to make both written and oral representations (section 31(1)(b) of the Competition Act). It can use lawyers to make those representations. The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 sets out requirements in relation to the Statement of Objections and access to file.</p>
<p>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation?</p>	<p>The same rules apply to all confidential information, irrespective of where it was obtained. Commercial and personal information, which the OFT considers (after submissions from the undertaking) might significantly harm legitimate its interests, can be redacted. The relevant Rules are 1 and 6 of the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004.</p>

9. Limitation periods and deadlines

<p>A. What is the limitation period (if any) from the</p>	<p>There is no limitation period.</p>
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<p>date of the termination of the infringement by which the investigation / proceedings must begin or a decision in the merits of the case must be made?</p>	
<p>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision in the merits?</p>	<p>There is none.</p>
<p>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions?</p>	<p>An undertaking has two months from the issue of a decision to appeal to the Competition Appeal Tribunal.</p>

10. Types of decisions

<p>A. Please list which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1.</p>	<p>There is no action that the OFT can take that is specific to cartels. In a decision in which the OFT has found that an undertaking is in breach of the Chapter I prohibition (cartels) in the Competition Act, it may give directions to an undertaking to cease its infringement (if it has not already ended) and impose a financial penalty.</p>
<p>B. Please list which types of decisions on the merits of the case can be made in hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 10/A).</p>	<p>Not applicable.</p>
<p>C. Can interim measures⁷ be ordered during the proceedings in cartel cases? (if different measures for hardcore</p>	<p>The OFT can issue interim measures during the investigation of a cartel case. In practice once the investigation starts and the OFT has visited an undertaking, the cartel ceases.</p>

⁷ In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

cartels please describe both ⁸ .) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?	
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11. Sanctions for procedural breaches (non-compliance with procedural obligations)⁹

A. Grounds for the imposition of procedural sanctions / fines:	There are criminal sanctions in sections 42 to 44 of the Competition Act 1998 for persons who fail to comply with requirements to provide information, destroy documents or provide false or misleading information. Financial penalties for undertakings may take into account a failure to co-operate with the OFT. Criminal sanctions for similar offences are contained in the Enterprise Act 2002.
B. Type and nature of the sanction (civil, administrative, criminal, combined):	See point 11A above.
C. On whom can procedural sanctions be imposed?	See point 11A above.
D. Criteria for determining the sanction / fine:	Those that are generally applicable in the criminal courts.
E. Are there maximum and / or minimum sanctions / fines?	If convicted of a criminal offence under sections 42-44 of the Competition Act or the equivalent measures in the Enterprise Act 2002, an individual can be punished with a fine of a maximum of £5,000 and/or imprisonment for a maximum of two years.

12. Sanctions on the merits of the case

⁸ Only for agencies which answered “yes” to question 2.C. above

⁹ In some jurisdictions non-compliance with procedural obligations (e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.) can be sanctioned.

<p>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</p> <p>On whom can sanctions be imposed?</p>	<p>Civil and criminal.</p> <p>Under the Competition Act 1998 sanctions for cartel activity can only be imposed on undertakings, including associations of undertakings and undertakings that are sole traders.</p> <p>Cartel activity that is prosecuted under the Enterprise Act 2002 can result in fines and/or imprisonment for individuals. The penalties range from fines of £5,000 (or less) to unlimited fines and the term of imprisonment from six months or less to five years. The punishment depends upon which court the offence is tried in with less serious cases attracting the lower maximum penalties being tried in the Magistrates Court and the more serious, attracting the higher penalties being tried in the Crown Court. The decision as to where the case will be tried will depend on its seriousness.</p>
<p>B. Criteria for determining the sanction / fine: [</p>	<p>The scheme for assessing financial penalties is set out in full in the "OFT's guidance as to the appropriate amount of a penalty", OFT 423 at Section 2. There are five steps in the assessment:</p> <p>(i) a starting point based on the seriousness of the infringement and the relevant turnover of the undertaking (i.e. the turnover in the market in which the infringement took place);</p> <p>(ii) the duration of the infringement;</p> <p>(iii) other factors including deterrence, any economic or financial benefits resulting from the infringement and the size and financial position of the undertaking in question;</p> <p>(iv) aggravating and mitigating factors including aggravating factors such as the undertaking having acted as the instigator of the cartel, senior management having been involved and repeated infringements by the same undertaking and mitigating factors including ensuring compliance with the Competition Act 1998, terminating the infringement as soon as the OFT intervenes and co-operating with the OFT; and</p> <p>(v) adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy.</p>
<p>C. Are there maximum and / or minimum sanctions / fines?</p>	<p>Under the Competition Act 1998 the maximum fine for an undertaking is 10 per cent of its worldwide turnover in the year before the Decision was issued.</p>
<p>D. Guideline(s) on calculation of fines:</p>	<p>"OFT's guidance as to the appropriate amount of a penalty" OFT 423 (December 2004).</p> <p>Website: www.of.gov.uk</p>
<p>E. Does a challenge to a decision imposing a sanction / fine have an</p>	<p>Yes (see section 46(4) of the Competition Act 1998) but if the fine is upheld by the Competition Appeal Tribunal, interest on the fine runs from the date when it was originally due.</p>

<p>automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</p>	
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13. Possibilities of appeal

<p>A. Does your law provide for an appeal from a decision that there has been a violation of a prohibition of cartels? If yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</p>	<p>Yes. Those parties against whom the OFT has issued a Decision have an automatic right of appeal to the Competition Appeal Tribunal. Appeals from decisions of the Competition Appeal Tribunal are to the Court of Appeal on the following grounds:</p> <p>(i) a point of law arising from a decision of the Competition Appeal Tribunal; or</p> <p>(b) from a decision of the Competition Appeal Tribunal as to the amount of a penalty.</p>
<p>B. Before which court or agency should such a challenge be made? [if the answer to question 13/A is affirmative]</p>	<p>See point 13A above.</p>