

Leniency and no-action

**OFT's guidance note on the
handling of applications**

December 2008

OFT803

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FOREWORD

This document aims to provide the reader with a comprehensive understanding of the OFT's approach to leniency – the overarching principles as well as the detail. The OFT is indebted to the many practitioners who have provided insightful comments on the various drafts of this document. Many of their points have been incorporated and the document much improved as a result.

Leniency policy is constantly evolving and there will, no doubt, continue to be areas of the policy that the OFT will want to revisit in the light of experience and changing circumstances. The OFT always welcomes comments on how the policy can be improved further. Comments can be made to:

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Comments can also be submitted by email to simon.williams@oft.gsi.gov.uk.

Simon Williams
11 December 2008

1 INTRODUCTION

- 1.1 This guidance note sets out the detail of how the OFT will handle applications under the OFT's existing published civil leniency and no-action policies.¹ The note supplements and elaborates on the procedures set out in those publications.² It does not replace them. However, this note does make some significant amendments to the OFT's No-action guidance (OFT 513). Where this is the case, those substantive changes have been highlighted in this guidance note, together with the sections of the OFT's No-action guidance affected.
- 1.2 The OFT accepts that, in attempting to codify as far as possible the way in which leniency will be dealt with in the many scenarios which might arise, the result – set out here – is a quite complex guidance note. However, would-be applicants should find that, in the vast majority of cases, it is only the main rules and principles which are likely to affect their case. These are headlined in paragraph 1.7 below. In addition, it should always be remembered that would-be applicants who are unsure about particular aspects of the policies can seek further guidance – if necessary on a no-names basis. Finally, readers will hopefully be assisted by the leniency flow-chart which appears at Annexe C.
- 1.3 It is suggested that would-be applicants and their advisers should first consult the leniency section of the OFT's Penalty guidance (OFT 423) and the OFT's No-action guidance (OFT 513). These publications are short and lay out the general principles. Thereafter, reference should be made to this guidance note to determine the detailed rules and procedures relevant to a possible leniency approach.

¹ *OFT's guidance as to the appropriate amount of a penalty* (OFT 423, December 2004) and *The cartel offence - guidance on the issue of no-action letters for individuals* (OFT 513, April 2003). Both of these documents are hereafter referred to by short form terms (see 'General terms' at paragraph 1.6 below).

² As such, where this document refers to situations where an applicant will be granted leniency, this will always be subject to the well-established restrictions (such as the bar on granting a coercer immunity), obligations (such as the requirement to co-operate) and jurisdictional issues (that is concerning the grant of no-action letters for cartel activity in Scotland) set out in the OFT's Penalty and No-action guidance, as well as any further considerations set out in this guidance note.

- 1.4 This guidance note and the other two OFT leniency documents are all available on the OFT's website (www.offt.gov.uk).
- 1.5 This guidance note is not published pursuant to any statutory obligation and should obviously not be read as if it were akin to a statutory enactment. The OFT's policy in relation to the handling of leniency applications is evolving and the OFT reserves the right to depart from this guidance, where it considers it appropriate to do so in all the circumstances of the particular case. Furthermore, this guidance note cannot hope to deal in advance with every conceivable situation which might arise. Where there are particular issues of the policy which are of crucial significance to an applicant or would-be applicant for leniency and these are not considered to have been directly and specifically addressed in this guidance, or it is important for the applicant to be certain that a particular aspect of the note accurately reflects the OFT's current thinking, it is incumbent on the applicant to raise the matter as early as possible with the OFT so that specific guidance can be given.

Terms

- 1.6 The reader is asked to take careful note of the definitions used – in particular, the terms 'corporate immunity', 'individual immunity', 'Type A immunity' and 'Type B immunity' have specific and distinct meanings throughout this note. The following terms have the following meanings:

General terms

- applicant – an applicant for any form of leniency, including after the applicant's marker has been perfected and/ or the leniency agreement and/ or any no-action letters or comfort letters have been signed
- CA98 – the Competition Act 1998
- cartel offence – the offence contained in section 188 EA02
- Chapter I prohibition – the prohibition contained in section 2 CA98
- Commission – the European Commission
- Commission Leniency Notice – Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17)
- EA02 – the Enterprise Act 2002

- EC Treaty – the Treaty establishing the European Community
- Network Notice – Commission Notice on co-operation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p.43)
- no-action letter – letter issued by the OFT pursuant to section 190(4) EA02 guaranteeing immunity from prosecution for the cartel offence in England and Wales
- OFT's No-action guidance – *The cartel offence – OFT's guidance on the issue of no-action letters for individuals* (OFT 513, April 2003)
- OFT's Penalty guidance – *OFT's Guidance as to the appropriate amount of a penalty* (OFT 423, December 2004)
- pre-existing civil investigation – refers to a situation where the OFT has exercised one or more of its powers of investigation set out in sections 26 to 28A CA98 (see footnote 29 of the OFT's Penalty guidance)
- pre-existing criminal investigation – refers to a situation where the OFT believes it has sufficient information to conduct an investigation within the meaning of section 192 EA02 and the first investigative steps have been taken whether overt or covert and whether formal or informal
- Regulation 1 – Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.03, p.1).

Types of protection

- leniency – a 'catch all' term used throughout this document to refer collectively to all of (or, where it is clear from the context, some of) Type A or B immunity, Type B or C leniency, corporate immunity or individual immunity. Where reference is made within this document to an **undertaking** having applied for 'leniency' that includes all the sub-types above but obviously excludes individual immunity

- civil immunity – refers to immunity granted to an undertaking from any financial penalty under the CA98³
- criminal immunity – refers to immunity granted to an individual from prosecution for the cartel offence
- Type A immunity – refers to a situation where an undertaking is granted automatic civil immunity **and** all of its current and former employees and directors who co-operate with the OFT are granted automatic criminal immunity for cartel activity, in circumstances where the undertaking was the first to apply and there was no pre-existing civil and/or criminal investigation into such activity
- Type B immunity – refers to a situation where an undertaking is granted discretionary civil immunity **and** all of its current and former employees and directors who co-operate with the OFT are granted discretionary criminal immunity for cartel activity, in circumstances where the undertaking was the first to apply but there was already a pre-existing civil and/or criminal investigation into such activity
- 'blanket' criminal immunity – refers to a situation where all of the current and former employees and directors of an undertaking are granted criminal immunity, whether in the Type A automatic situation or in the Type B discretionary situation
- Type B leniency – refers to a situation where an undertaking is granted any level of reduction of, but not immunity from, a financial penalty imposed under the CA98 in circumstances where the undertaking was the first to apply but there was already a pre-existing civil and/or criminal investigation into the relevant cartel activity

³ The OFT may impose financial penalties under the CA98 for infringements of the Chapter I prohibition and/ or of Article 81 of the EC Treaty. Article 81 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices 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. The Chapter I prohibition is based on Article 81 but applies to anti-competitive practices which affect trade within the United Kingdom. For further details see the competition law guidance *Agreements and Concerted Practices* (OFT 401, December 2004).

- Type C leniency – refers to a situation where an undertaking is granted a reduction of up to 50 per cent of the level of a financial penalty imposed under the CA98 in circumstances where the undertaking was not the first to apply whether or not there was already a pre-existing civil and/or criminal investigation into the relevant cartel activity
- corporate immunity – refers to a situation where an undertaking is granted civil immunity but there is **no** related 'blanket' grant of criminal immunity for all of its current and former employees and directors, and
- individual immunity – refers to a situation where one or more individuals are granted criminal immunity but not as part of a 'blanket' grant of criminal immunity in connection with a grant of Type A or Type B immunity.

Key features of the UK leniency system

1.7 The key features of the UK leniency system are:

- the availability of informal guidance on a no-names basis about 'hypothetical' cases when asked
- the ability of legal advisers to determine if Type A or B immunity is available for their client prior to the client's identity being revealed
- the availability of 'markers' for leniency while the application is being perfected
- the possibility of oral applications, where appropriate
- guarantees of criminal immunity for all co-operating current and former employees and directors in Type A or B⁴ immunity cases
- the ready availability of Type B immunity – Type B immunity will be common rather than exceptional in cases where an undertaking is the

⁴ Assuming a decision has been taken that Type B immunity is available in **principle** in the case in question.

first to approach the OFT but there is already a pre-existing civil and/or criminal investigation

- the availability of a reduction of any penalty which might be imposed in cases of Type B and C leniency and the possibility that some co-operating current or former employees and directors in such circumstances will be granted individual immunity, and
- a high 'bar', both as to the circumstances and standard of proof, on when an undertaking or individual will be found to be a coercer and therefore ineligible for civil and/or criminal immunity.

In addition to the above, the OFT hopes that the following will also be considered to be key features of the UK leniency regime:

- a reputation for fair application of the guidance
- accessibility and approachability, and
- erring in favour of the applicant where it is genuinely a 'close call'.

2 SEEKING CONFIDENTIAL GUIDANCE

- 2.1 Undertakings or individuals thinking about applying for leniency may, before doing so, approach the OFT for confidential guidance. For the avoidance of doubt, such guidance may be sought on any aspect of the OFT's leniency and no-action programmes – not just in those situations referred to in this guidance note where specific reference is made to the option of seeking such guidance. Confidential guidance discussions would usually involve a discussion on a no-names basis about a given factual matrix (perhaps expressed 'hypothetically') with a view to the undertaking or individual obtaining comfort on an issue before deciding whether to make an application.
- 2.2 The OFT will give its views, by which it will consider itself bound, provided the discussion is followed-up by an application within a reasonable time and provided the information given when the advice was sought was not false or misleading and there has been no material change of circumstance.

3 SEEKING TYPE A IMMUNITY

3.1 How does it work in practice? Before contacting the OFT:

- the undertaking should ensure there is a 'concrete basis' for a suspicion of participation in cartel activity, and
- the undertaking must have a 'genuine intention to confess'. This means that there must be an acceptance by the undertaking that, as a matter of fact and law, the available information⁵ suggests that it has been engaged in cartel conduct in breach of the Chapter I prohibition and/ or Article 81 of the EC Treaty.⁶

If so, the legal adviser should contact the OFT – usually by telephone.

Ascertaining the availability of Type A immunity

3.2 The legal adviser would ask whether Type A immunity is available.

3.3 The legal adviser would confirm orally that he/she has obtained instructions to apply for Type A immunity if it is available (conditional instructions).

3.4 The legal adviser would specify the relevant sector or would otherwise provide sufficient information to allow the OFT to determine whether there is a pre-existing civil and/or criminal investigation and/or a pre-existing applicant. The legal adviser would also need to confirm the

⁵ It is recognised that in certain circumstances a party applying for a marker may be genuinely uncertain, at that stage, as to whether it has engaged in cartel conduct. In one case, for example, the applicant for a marker had received, via its compliance officer, an anonymous tip-off that its staff had been engaging in price fixing. The tip-off had some credibility having regard to the information given, but at the stage at which a marker was sought the tip-off remained untested. The applicant accepted that if the tip-off was accurate, it would have been guilty of cartel conduct but the OFT considered that it was reasonable in the circumstances for the applicant to place a qualification on its possible involvement. However, there have been other cases where the OFT has been faced with requests for markers from applicants who believe that they are in possession of much of the basic facts but seek to deny that those facts constitute cartel conduct. They ask for a marker 'in case' the OFT were minded to take a different view. This will not satisfy the requirement of a genuine intention to confess.

⁶ After the marker has been granted, the requirement of continuous and complete co-operation necessitates that there should be a continuing acceptance of having engaged in cartel behaviour. See the further guidance on this point at paragraphs 8.1 to 8.3 below.

would-be applicant's genuine intention to confess in accordance with the criteria in paragraph 3.1 above.

- 3.5 The OFT would then confirm whether or not Type A immunity is in principle available.⁷
- 3.6 If Type A immunity is available, the legal adviser would disclose his/her client's identity and apply for Type A immunity then and there, at the same time providing the information needed to secure a marker (see paragraphs 3.8 to 3.10).⁸
- 3.7 If Type A immunity is not available, the legal adviser and his/her client would be free to consider all the available options.

Information to be provided to secure a Type A marker

- 3.8 The applicant should be able to identify the concrete basis for suspicion that it participated in cartel activity.
- 3.9 Normally, the applicant would be expected to specify the nature and emerging details of:
- the suspected infringement, and
 - the evidence uncovered so far (that is, its form and substance).

⁷ In the great majority of approaches the OFT will be able to confirm within a short time whether Type A immunity is available. However, this will not always be the case. For example, in some complex investigations, applicants may approach the OFT hoping to gain Type A immunity notwithstanding that an investigation is already underway. Applicants may claim to have discovered a 'new' infringement arising from an internal investigation triggered by an OFT investigation into another matter. However, it will not always be possible for the OFT to determine quickly whether the matter is one which may properly be described as being outside the scope of its investigation and/or outside the scope of any earlier leniency application it may have received from another undertaking. In such circumstances, it may be possible for a marker for some other form of leniency, most likely Type C, to be given immediately but with the possibility that such a marker might in future 'convert' to Type A once the circumstances are clearer. In these circumstances, it is obviously for the would-be applicant to decide whether to proceed or whether to withdraw without its identity having been made known to the OFT.

⁸ The grant of a Type A immunity marker can be confirmed in writing if desired. Indeed the same applies for all forms of leniency.

- 3.10 Discussion of the timing and process of perfecting the marker by the prompt provision by the applicant of relevant information will then follow. Depending on how advanced the applicant's internal investigation is, the OFT may require an initial proffer setting out as a minimum the information referred to in paragraphs 3.8 and 3.9 and enclosing any key documentary evidence so far uncovered.

Information to be provided to perfect a Type A marker

- 3.11 An applicant for Type A immunity must provide all information, documents and evidence available to it regarding the existence and activities of the reported cartel activity (hereafter referred to as the 'relevant information'). This requirement to provide all relevant information should be interpreted widely so as to include any information, in whatever form, which is capable of having some reasonable bearing on the OFT's investigation of the cartel. It will include the provision of evidence from current and former employees and directors which the OFT may or may not incorporate into witness statements.
- 3.12 After receipt of the proffer or any initial proffer, the OFT will give advice to the applicant, as best it can, as to the broad categories of information the OFT considers are likely to be relevant in the context of the particular case and the form in which any further information should be provided. This guidance may need to be updated and/or refined as the OFT's investigation progresses.
- 3.13 The OFT will generally not require **all** relevant information to be received by it before any leniency agreement and no-action letters can be signed. However, as a minimum, the OFT will expect to have received and analysed at least the substantial and most evidentially probative elements of the relevant information available to the applicant before sign-up. This is likely to mean that relevant current and former employees and directors will have been interviewed at least once about their role in the cartel activity and possibly more than once before sign-up. Furthermore, following sign-up, the applicant's duty of co-operation will nonetheless be ongoing after that point as it finalises the process of information provision to the OFT, for example in the form of interviews with any other witnesses whose evidence is more peripheral to the case.

- 3.14 The marker will not be perfected if the relevant information provided does not give the OFT a sufficient basis for taking forward a credible investigation.⁹ In practice, this means that the information must be **at least** sufficient to allow the OFT to exercise its formal powers of investigation (for example, on-site inspections). This does not of course mean that once sufficient information has been provided to enable the OFT to exercise its formal powers, the applicant's duty to provide any further relevant information ceases. Rather, the requirement is always to provide **all** relevant information and in most cases it would be expected that the evidential value of this information will considerably surpass the minimum threshold.
- 3.15 In addition to the information provision requirements set out above, for the marker to be perfected, the OFT will also need to remain satisfied that the other key criteria for the grant of leniency have been and continue to be met, namely the requirement of continuous and complete co-operation, that the applicant has refrained from any further participation in the cartel and that the applicant was not a coercer.¹⁰

Other material procedural points

- 3.16 The OFT will not require a professional undertaking from the legal adviser as to his/her conditional instructions to make a Type A immunity application.
- 3.17 The marker will be operational from the moment the applicant's identity has been disclosed to the OFT.

⁹ The OFT may, for example, be of the view that there is no basis for taking forward a credible investigation in a case where the applicant has provided the OFT with documentary evidence which is prima facie probative of the reported cartel conduct (and was thereby sufficient for the initial grant of a marker) but the strength of which is then materially undermined by statements given by implicated current or former employees or directors of the applicant.

¹⁰ These various criteria are set out in paragraph 3.9 of the OFT's penalty guidance and 3.3 of the OFT's no-action guidance. In addition, see paragraphs 8.1 to 8.3 of this guidance note for further guidance on the requirement of continuous and complete cooperation and paragraphs 6.1 to 6.10 and 7.9 to 7.12 of this guidance note on coercer. Of course, these requirements, in particular that of continuous and complete co-operation, also remain conditions of leniency after the marker has been perfected.

- 3.18 The entire application process can be oral if requested and provided there is good reason for it. However:
- all pre-existing written evidence of the cartel will need to be provided to the OFT, and
 - witnesses will need to be made available for interview and to sign statements, setting out their evidence.
- 3.19 The OFT will generally not accept joint approaches made simultaneously by or on behalf of two or more participants in the same cartel activity. If the OFT were to receive such approaches, the would-be applicants would not be able to 'share' Type A immunity and the OFT would not be able to confirm that a particular undertaking was the 'first' to apply and so grant it a marker for Type A (or Type B) immunity. Moreover, undertakings who discuss a possible leniency application with other participants in the cartel activity are at risk of being found to have acted in bad faith by having tipped off others of their intended approach to the OFT.¹¹

OFT no-names markers in 'Commission immunity application' cases

- 3.20 As an exception to the usual rule, the OFT will be willing to allow no-names markers¹² for Type A applicants where the undertaking's legal adviser confirms that he/she also has instructions to make an application for immunity to the Commission under section II of the Commission Leniency Notice. The adviser will need to provide his/her own name and firm and sufficient details of the affected sector to enable the OFT to exclude the existence of a pre-existing UK civil and/or criminal investigation and/or applicant. The legal adviser would also need to confirm the applicant's genuine intention to confess. Once the marker has been given on this basis, the OFT will expect the adviser to revert to it within a specified (and generally short) time frame – to be agreed case-by-case – to confirm:
- that an application has been made to the Commission

¹¹ See paragraphs 8.11 to 8.17 below

¹² This is a marker which is granted without the applicant having immediately to reveal its identity to the OFT.

- the identity of the applicant undertaking, and
- the nature and emerging details of the suspected infringement and the underlying evidence.

Where Commission immunity is no longer available, the applicant is free to withdraw its no-names marker without having to reveal its identity. Alternatively, the applicant may nevertheless decide to keep its OFT marker. In such a case the marker would be required to become a named marker and would need to be perfected in the usual way (see paragraphs 3.11 to 3.15 above).

- 3.21 It is the OFT's intention that allowing no-names markers in Type A immunity cases, in advance of an approach to the Commission, will provide certainty to undertakings on the issue of whether there is possible exposure to a risk of prosecution in the UK for the cartel offence of any of its current and former employees and directors. It is intended that this will give further encouragement to the Commission's leniency programme.
- 3.22 Apart from 'Commission immunity application' cases, strong justification will be needed for obtaining no-names markers, as the OFT will ordinarily expect the legal adviser to have obtained conditional instructions to apply for immunity if the availability of Type A immunity is confirmed.

OFT summary applications in 'Commission immunity application' cases

- 3.23 The OFT accepts short form 'summary applications' as contemplated in the ECN Model Leniency Programme¹³ in cartel cases where:
- the Commission is 'particularly well-placed' to deal with a case in accordance with paragraph 14 of the Network Notice

¹³ For a copy of the ECN Model Leniency Programme and the Notes see the ECN website at http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf. The ECN Model Leniency Programme was launched on 29 September 2006. It sets out the principal elements which the ECN members believe should be common in all programmes. This includes the type of information an applicant should be prepared to provide in order to get immunity, a coherent set of termination and co-operation duties and a streamlined procedure for processing applications.

- the OFT is in its opinion also 'well-placed' to act in accordance with paragraph 8 of the Network Notice
- the applicant has made or is in the process of filing an application for **immunity** with the Commission, and
- the applicant is in a Type A position in the UK.

3.24 Where the 'summary application' route is available to an applicant, the OFT will apply the procedures set out in paragraphs 22 to 25 of the ECN Model Leniency Programme. In addition to the information required in accordance with paragraph 22 of the ECN Model Leniency Programme, the OFT may also need to be provided with relevant UK-specific information relating to the reported cartel, such as the details of any UK-based individuals and conduct and an estimate of the size of the UK market and market shares of the parties. Where this is the case, the applicant should ensure that it is in a position to provide such additional UK-specific information promptly.

When will Type A immunity cease to be available?

3.25 Type A immunity will be available until:

- the OFT exercises one or more of its investigatory powers under sections 26 to 28A of the CA98, that is, there is a pre-existing civil investigation
- the OFT has 'sufficient information to establish the existence' of the CA98 infringement in respect of the cartel activity¹⁴
- another undertaking has applied for Type A or corporate immunity or an individual has applied for individual immunity¹⁵, or

¹⁴ Paragraph 3.9 of the OFT's Penalty guidance.

¹⁵ Where an individual has already applied, Type A immunity is not guaranteed but the OFT may grant it at its discretion (see paragraphs 7.26 to 7.28 below).

- there is a pre-existing criminal investigation.¹⁶

3.26 Note that a marker for corporate immunity, that is, where there is a marker for civil immunity for the undertaking, without any related grant of a blanket marker for criminal immunity for current and former employees and directors, will be available even after a criminal investigation has commenced, provided none of the first three bullets in paragraph 3.25 above applies.

¹⁶ The OFT considers that a criminal investigation has commenced as soon as the OFT believes it has sufficient information to conduct an investigation within the meaning of section 192 EA02 and the first investigative steps have been taken, whether overt or covert and whether formal or informal.

4 SEEKING TYPE B IMMUNITY

Getting a marker in Type B cases

- 4.1 As in the case of an application for Type A immunity, the applicant will need to satisfy the OFT that:
- there is a 'concrete basis' for a suspicion of participation in cartel activity, and
 - the undertaking must have a 'genuine intention to confess'.¹⁷
- 4.2 The grant of Type B immunity remains discretionary and whether it is granted will ultimately depend on the OFT's assessment of what is in the public interest. In particular, the OFT must perform a balancing exercise, assessing the benefits of gaining additional evidence by reason of the grant of immunity against the disbenefit of making an immunity grant after an investigation has already commenced, resources have been expended and after the OFT may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession. This may of course include existing lines of enquiry and evidence specifically against the would-be applicant and its current and former employees and directors. However, in cases where the standard criteria are met, the grant of Type B immunity is expected to be common rather than exceptional. In practice, approaches for Type B immunity are most likely to be triggered by inspections.
- 4.3 The OFT will, if requested, inform the undertaking or its legal adviser whether Type B immunity is available in principle without a requirement to identify the undertaking or that the undertaking makes an immediate application.
- 4.4 If the OFT states that Type B immunity is indeed available in principle, the would-be applicant can then seek to establish whether the information it can provide would be sufficient to warrant a marker for Type B immunity in its particular case by making an informal 'proffer' specifying the form and substance of the information it expects to be in

¹⁷ As elaborated upon at paragraph 3.1 above and footnotes 5 and 6.

a position to provide to the OFT. The OFT will then confirm whether, if such evidence were to be provided, Type B immunity would be given. In principle, there is no reason why this cannot be done on a no-names basis. However, there would be no marker protection until disclosure of the applicant's identity.

- 4.5 Where such an informal proffer is 'accepted', that is, the OFT indicates that there would be a sufficient basis for immunity to be granted, the OFT will be sensible about comparing the informal proffer with the information actually given subsequently (that is, at the formal proffer stage and beyond). Some variation is acceptable provided that, overall, the informal proffer does not turn out to have been misleading in a material particular and the information actually provided has, in fact, added significant value and genuinely advanced the OFT's investigation.
- 4.6 If an approach is made to the OFT during or immediately after the inspections, the OFT may, for a limited time, have to defer a definite answer on whether Type B immunity is available. If requested, the OFT could mark the undertaking's position in the queue (once its identity has been given) until the OFT has a better understanding of the evidence it has, including that which has been obtained during the inspection. To do this, the undertaking will have to make a satisfactory informal proffer. If, later, it is decided that Type B immunity is not available, the undertaking may be offered a marker for Type B leniency instead of Type B immunity.
- 4.7 Where an approach is made during an inspection, the inspection will continue in the normal way. To the extent that an undertaking merely complies with its obligations pursuant to the OFT's mandatory powers of investigation it will not be treated as having provided information under the OFT's civil leniency or no-action policies.
- 4.8 Markers can only be granted by the OFT's Senior Director of Cartels and Criminal Enforcement, the OFT's Director – Cartels, or one of their deputies, so approaches during an inspection should be made by telephone in the normal way, not to the OFT officials present at the inspection.
- 4.9 To obtain a marker for Type B immunity, the undertaking initially needs to provide the same information as in a Type A immunity approach (see paragraphs 3.8 and 3.9 above) and in addition the same considerations, as set out in paragraphs 3.16 to 3.19 above, would apply.

Perfecting a marker for Type B immunity

- 4.10 Having obtained a marker, the undertaking would then be given a limited period of time to perfect the marker. The same principles set out in paragraph 3.10 above in relation to Type A immunity would apply.
- 4.11 An applicant for Type B immunity must provide all relevant¹⁸ information available to it in relation to the cartel and that information must, as a minimum, be such as to add 'significant value' to the OFT's investigation, that is, it must amount to information which genuinely advances the investigation. The same principles set out in paragraphs 3.11 to 3.15 above in relation to Type A immunity would also apply in relation to Type B immunity. The applicant must also comply with the other requirements of leniency. See paragraph 3.15 above and footnote 10.
- 4.12 The sooner an undertaking approaches the OFT for Type B immunity, the higher the likelihood of it being available and being granted. Should Type B immunity not be available, Type B leniency may still be on offer (see paragraph 5.3 below). The minimum evidential threshold would be the same as in Type B immunity cases, that is, significant added value.
- 4.13 Type A immunity, however, clearly remains the most attractive option as it is guaranteed and not discretionary and the risk of being beaten in the race to the OFT is significantly less than after the OFT has commenced an investigation. The risk of an individual self-reporting is another relevant consideration in this respect (see paragraphs 7.26 to 7.28 below). Furthermore, there is the added risk of an individual within an undertaking trying to take advantage of the OFT's informant reward programme, if the undertaking has been slow to consider an application under the leniency programme.¹⁹

When will Type B immunity cease to be available?

- 4.14 Type B immunity is discretionary in all circumstances. However, it will definitely cease to be available where:

¹⁸ 'Relevant' information in this context has the same meaning as that referred to in the context of Type A immunity – see paragraph 3.11.

¹⁹ See www.offt.gov.uk/advice_and_resources/resource_base/cartels/rewards.

- the OFT considers that it has sufficient information to establish the existence of the Chapter I prohibition or breach of Article 81 in respect of the cartel activity
- another undertaking or individual has successfully applied for Type B immunity or individual immunity respectively, or
- a criminal investigation has commenced and the OFT already has, or is in the course of gathering, sufficient information to bring a successful prosecution.²⁰

4.15 It should be noted that although Type B immunity may still be available where there is a pre-existing criminal investigation,²¹ it is in practice less likely that the public interest assessment will come out in favour of such a grant than where there was only a pre-existing civil investigation. However, if there is a pre-existing criminal investigation and the OFT determines that Type B immunity is not available, it is possible the OFT would still grant corporate immunity only. In addition, at least some of the undertaking's current or former employees or directors could be granted individual immunity,²² even if the 'blanket' criminal immunity for **all** current and former employees and directors of Type B immunity is not on offer. See, in particular, paragraphs 7.15 onwards below.

4.16 The permutations of possible circumstances inevitably mean that Type B immunity is less predictable than Type A immunity but the point made in paragraph 4.3 above should be remembered: it should be possible for the OFT to give an indication of whether it is available or not, on an informal 'proffer' basis and, where necessary, without the undertaking's identity being revealed. Would-be applicants therefore have nothing to lose by enquiring about the availability of Type B immunity.

²⁰ See paragraph 3.4 of the OFT's No-action guidance. The OFT interprets this phrase as a 'long-stop' applying where the level and probative value of evidence gathered is substantial. This will not usually apply until the later stages, or indeed the conclusion of, the criminal investigation.

²¹ Provided paragraph 3.4 of the OFT's No-action guidance does not apply.

²² Again, assuming the aforementioned paragraph 3.4 of the OFT's No-action guidance does not apply.

5 TYPE B AND C LENIENCY

Type B and C leniency

5.1 As in the case of an application for Type A or B immunity, the applicant will need to satisfy the OFT that:

- the evidential threshold for the grant of a marker has been reached, that is, that there is a 'concrete basis' for a suspicion of participation in cartel activity, and
- the undertaking has a 'genuine intention to confess'.²³

5.2 **To perfect** the marker, the applicant must provide all relevant²⁴ information available to it in relation to the cartel and that information must, as a minimum, be such as to add 'significant value' to the OFT's investigation, that is, it must amount to information which genuinely advances the investigation. The applicant must also comply with the other requirements of leniency. See paragraph 3.15 above and footnote 10.

Type B leniency: specific considerations

5.3 Where the OFT decides not to exercise its discretion to grant Type B immunity, it may decide to offer Type B leniency in accordance with paragraph 3.12 of the OFT's Penalty guidance. The grant of Type B leniency is expected to be somewhat rare – as Type B immunity is expected to be more common. Moreover, Type B leniency is itself discretionary and whether or not it will be granted will depend on the OFT's assessment of the public interest and, in particular, considerations analogous to those set out in paragraph 4.2 above in relation to Type B immunity.

Criminal immunity in Type B and C leniency cases

5.4 For the position of current and former employees and directors in the Type B and C leniency situation, see paragraphs 7.19 onwards. On the

²³ As elaborated upon at paragraph 3.1 above and footnotes 5 and 6.

²⁴ 'Relevant' information in this context has the same meaning as that referred to in the context of Type A immunity – see paragraph 3.11.

issue of whether there is likely to be any criminal investigation at all in a Type B or C leniency situation and the consequences of any assurance from the OFT that no such criminal investigation is underway or contemplated, see paragraphs 7.1 onwards and also paragraph 7.21 below.²⁵

Discounts granted in Type B and C leniency cases

- 5.5 The key criteria for determining the discount available will be the overall added value of the material provided by the leniency applicant. This will generally be a function of the stage at which the undertaking comes forward, the evidence already in the OFT's possession and the probative value of the evidence provided by the undertaking. The OFT will also take into account the overall level of cooperation provided.²⁶
- 5.6 In Type B leniency cases, it is possible that the value added by the application will be high, as it will be the OFT's first application on the case and, as such, awards of up to 100 per cent are possible. However, the OFT has insufficient experience of Type B leniency to give any more guidance about the percentage reductions that are likely to be on offer in the majority of cases, although it should be noted that in general, awards are unlikely to be close to 100 per cent as the OFT would otherwise probably have granted Type B immunity. In Type C cases, however, experience suggests that applicants can generally expect to achieve discounts in the range 50 per cent to 25 per cent, although it is possible that low value and/or late applications may gain awards of less than 25 per cent.²⁷
- 5.7 Queue position in Type C cases is not decisive. It is possible that an applicant who is third in the queue may get a discount greater than an applicant who came second in the queue. That said, it is the usual

²⁵ These set out in general terms some of the considerations as to whether or not the OFT would undertake a criminal investigation and note that the OFT may be able to give conditional assurances as to whether a criminal investigation is underway or in contemplation.

²⁶ In this respect the points in paragraphs 8.1 to 8.3 below should be noted.

²⁷ While the OFT will consider any limited representations as to the amount of the award proposed, it will not negotiate over the matter. See also footnote 66 below to the effect that dissatisfaction with an award is not an 'exceptional circumstance' justifying withdrawal from leniency.

experience of the OFT that the further ahead in the queue an applicant is, the greater the value added by its application. Therefore, would-be applicants are encouraged to apply at the earliest possible stage.

6 THE APPLICATION OF THE COERCER TEST IN TYPE A AND B AND CORPORATE IMMUNITY CASES

- 6.1 It is always possible to contact the OFT for no-names confidential guidance about whether the bar on granting a coerger immunity may be an issue in a prospective application.
- 6.2 The OFT has already given such guidance in past cases, allayed fears and then received successful immunity applications.
- 6.3 The OFT believes the coerger bar will not lead to any significant number of refusals to grant immunity and that therefore the UK regime will, in this respect, replicate that in the US.
- 6.4 The OFT does not believe that it would be fruitful to develop a detailed definition of 'coerger', but there must be evidence of clear, positive and ultimately successful steps from a participant (that is, the coerger) to pressurise an unwilling participant to take part in the cartel.
- 6.5 Conduct may amount to coercion in the following situations:
- actual physical violence or proven threats of violence which have a realistic prospect of being carried out, or blackmail (these would apply equally to cases of horizontal as well as vertical collusion), or
 - such strong economic pressure as to make market exit a real risk, where, for example, a large player organises a collective boycott of a small player or refuses to supply key inputs to such a small player – these scenarios are more likely to apply in cases where there is at least a significant vertical element and are less likely to be relevant where an arrangement is purely horizontal and there are no significant cross-supplies between competitors.
- 6.6 The OFT takes the view that there will not be a coerger issue in the following situations:
- harmful market pressure which falls short of risking market exit but may reduce profit margins
 - mere agreed enforcement or punishment mechanisms to enforce the operation of a cartel, and
 - standard term contracts in a resale price maintenance case, even where there is a significant inequality of bargaining power.

- 6.7 The bar is high in relation to both the type of behaviour which will be regarded as coercive and the evidence necessary to prove that behaviour.
- 6.8 The OFT has, to date, never refused civil immunity on coercer grounds. Nor is the OFT aware of any undertaking having been refused immunity on those grounds under the EU or US leniency programmes.
- 6.9 Even if an undertaking were to lose automatic corporate immunity as a result of subsequently finding out that it had been a coercer:
- it would still be eligible for up to a 50 per cent reduction in a financial penalty, and
 - the undertaking's current and former employees or directors (except for the 'rogue' coercing employee(s)) would remain eligible for criminal immunity.²⁸
- 6.10 More is said at paragraphs 7.9 to 7.12 below on coercion in the context of individual immunity.

²⁸ See also paragraph 7.11.

7 THE GRANT OF CRIMINAL IMMUNITY: NO-ACTION LETTERS

Which cases might be the subject of criminal enforcement?

- 7.1 An important consideration for many would-be leniency applicants is whether the OFT is likely to wish to undertake a criminal investigation in addition to or instead of a CA98 investigation. The OFT's thinking on which cartel cases it will be appropriate to investigate criminally will evolve as the EA02 regime becomes more established. However, the prime consideration will be the extent to which there is likely to be evidence that one or more individuals behaved dishonestly. Additionally, the factors set out in the OFT's published prioritisation principles such as the extent of consumer detriment will also be taken into account.²⁹ In cartel cases which have had an impact on a number of EU member states, it may be that unless there is a significant relative impact on the UK and/or the evidence for, or organisation of, the cartel is relatively 'concentrated' in the UK, that the OFT will conclude that action by the Commission under Article 81 alone would be more appropriate. However, the OFT's thinking in this area continues to develop and the decision in each case will obviously turn on its own facts.
- 7.2 It should be remembered that the legal adviser to an undertaking or individual may call the OFT and ask if a given 'hypothetical' scenario would, or would be likely to, lead to criminal enforcement for the cartel offence. The OFT may well be able to give an assurance that criminal enforcement would not be in contemplation in the scenario given.

When will an individual have to admit to the cartel offence, in particular dishonesty, and when will 'comfort letters' instead of no-action letters be issued?

- 7.3 Concern has been expressed in the past that the OFT may require certain individuals who qualify in principle for criminal immunity to admit to participation in the cartel offence, including dishonesty, where such an admission is neither necessary nor appropriate. In particular, it has been said that if the OFT were to reach a view about the role of a particular individual in the cartel arrangements at an early stage of the OFT's

²⁹ See *OFT Prioritisation Principles* (OFT 953 October 2008).

investigation, the OFT may require an admission of participation which might later turn out to be inappropriate once the investigation has been completed and all the evidence has been thoroughly scrutinised. It is for this reason that the OFT will not reach a final decision on whether an individual will be required to admit participation in the offence, including dishonesty, until the investigation is at or near its conclusion and after specialist criminal counsel has had the opportunity to review sufficient evidence gathered in the case to be able to advise the OFT on the issue.³⁰ If the adviser to the would-be no-action letter recipient wishes to put forward any material relevant to the dishonesty point, this will be considered before a final decision is made.

- 7.4 If the OFT duly decides that it is appropriate that an individual in the cartel who qualifies for criminal immunity in principle should make an admission of participation in the cartel offence, including dishonesty, then that individual will only be offered a no-action letter on condition that such an admission is made. Alternatively, if such an admission is deemed not to be appropriate, then the individual will be offered a 'comfort letter'. The comfort letter will state that after analysis of the evidence it has been concluded that there is insufficient evidence to implicate the individual in the cartel offence and that the OFT does not, therefore, consider that there is any risk of prosecution for the cartel offence by either the OFT or any other agency. For those other individuals who qualify in principle for criminal immunity, but who are judged not to have had any, or any significant, role in the cartel at all, the OFT would generally not consider it necessary to issue them with either a no-action or comfort letter as they do not even face a hypothetical risk. Concern has previously been expressed that a comfort letter in the terms described does not give the would-be applicant sufficient certainty as to their position. However, given that the cartel offence has now been in force since June 2003 and a number of comfort letters have been issued in a number of cases, the OFT

³⁰ In most cases, the OFT will seek counsel's advice on the matter to assist the OFT in making its determination. However, the OFT is not bound to seek advice. For example, it is not likely to seek advice where the decision as to whether or not a dishonesty admission should be made is considered to be a relatively straightforward one.

considers that the comfort letter procedure has proven to be effective in achieving its objectives.

7.5 Paragraphs 7.3 to 7.4 above refer to the situation where the OFT has undertaken a full criminal investigation. In cases where the OFT decides only to undertake an investigation under the CA98 or chooses not to investigate at all, it will not generally issue no-action letters to any individuals. Instead, if requested, a comfort letter will be sent to the undertaking qualifying for immunity and expressed to apply to all current and former employees of the undertaking.³¹ The letter will state that the OFT has decided not to commence a criminal investigation, having regard to the nature of the cartel behaviour reported, the role of the individuals and the overall public interest. Again, the OFT is satisfied in the light of experience that a comfort letter in these circumstances will be effective in achieving its objectives.

7.6 In the majority of cases therefore only a small proportion of those who qualify for criminal immunity will ultimately receive a no-action letter. If at any stage an individual who qualifies for criminal immunity but has not received a no-action letter subsequently appears to be at risk of prosecution for the cartel offence, whether by the OFT or any other agency, a no-action letter will be issued.

Timing of issue of no-action and comfort letters

7.7 As stated in paragraph 7.3 above, a proper determination of whether a person should receive a no-action or comfort letter cannot generally be made until at or near the conclusion of the OFT's criminal investigation. It may not be necessary for all lines of enquiry to have been completed. However, as a minimum, the OFT will expect to have received and duly analysed the substantial and most probative elements of the relevant information in the possession or control of the immunity applicant and that of its current and former employees and directors before it issues any no-action or comfort letters.³² This is likely to mean that relevant individuals will have been interviewed at least once about their role in

³¹ This only applies in Type A and Type B immunity situations.

³² This accords with the position in regard to the timing of the issue of any leniency agreement. See paragraph 3.13 above.

the cartel activity and possibly more than once before a no-action or comfort letter is issued.³³ Where a person applies and qualifies in principle for criminal immunity on his or her own account, the position on timing is broadly analogous to that which applies as part of a corporate approach.

- 7.8 Where requested and where there is good reason to do so,³⁴ the OFT will be willing to issue interim comfort letters to certain individuals to the effect that, as at that time, the OFT is content that the individual(s) concerned appear to be co-operating fully and consequently that no-action or final comfort letters, where needed, will be issued in due course provided that co-operation and compliance with all the usual requirements continues.

The coercer test as it applies to the grant of no-action letters

- 7.9 The coercer test for an individual under the no-action policy is fully aligned with that for an undertaking seeking civil immunity.
- 7.10 In other words the question is whether another **undertaking** has been coerced, not specifically whether one individual has coerced another or others within the undertaking. Therefore, if the undertaking is not deemed a coercer, no employee or director within it will be refused criminal immunity on the coercer ground, save in the exceptional circumstance of an employee somehow enjoying a position of power independent of his/her position within the undertaking, who used that power to coerce another undertaking.
- 7.11 If an undertaking **is** found to be a coercer, individuals within the undertaking who did not themselves play a coercing role will not be denied criminal immunity on coercer grounds.
- 7.12 The OFT has, to date, never refused criminal immunity on coercer grounds.

³³ For the procedure under which such interviews will be conducted, see paragraphs 7.30 to 7.33 below.

³⁴ For example, where an investigation has been running on for an unusually long period or where the individuals are overseas nationals and there are particular anxieties given the unfamiliarity with the UK legal system.

Criminal immunity in Type A immunity cases

- 7.13 The availability of criminal immunity will be automatic for all implicated current and former employees and directors of an undertaking which is granted Type A immunity.
- 7.14 It is **not** a pre-condition for gaining a marker for Type A immunity that the legal adviser of an undertaking produces an up-front list of names of its current and former employees and directors who may be implicated in the cartel. Rather, it can be assumed with certainty that any current or former employee or director of the undertaking, wherever they are in the world and whatever their precise role in the cartel activity, will receive a no-action letter if they would otherwise be at risk of prosecution for the cartel offence³⁵ or an individual comfort letter if appropriate.³⁶

Criminal immunity in Type B immunity cases

- 7.15 Where an undertaking has been able to perfect a marker for Type B immunity, all implicated current and former employees and directors who co-operate with the OFT will be guaranteed criminal immunity.
- 7.16 As stated in paragraph 4.15, Type B immunity is less likely to be available where there is a pre-existing criminal investigation. Indeed, where the criminal investigation is well-advanced, so that paragraph 3.4 of the OFT's No-action guidance applies,³⁷ no-action letters cannot be given and therefore Type B immunity will not be available.³⁸
- 7.17 It should be noted that in practice, where the 'in the course of gathering' part of the test in paragraph 3.4 of the OFT's No-action guidance is met as regards one individual within a cartel, it is likely also to be met in relation to all other individuals with any significant involvement in the

³⁵ Note that this represents a substantive change to paragraph 3.5 of the OFT's No-action guidance.

³⁶ See paragraphs 7.3 to 7.6 above that deal with the way in which the OFT will decide whether individuals receive no-action letters or, alternatively, comfort letters.

³⁷ This is where the OFT believes that it already has, or is in the course of gathering, sufficient information to bring a successful prosecution. See also footnote 20 above.

³⁸ However, as stated in paragraph 4.15 above, corporate immunity may still be available even where there is a pre-existing criminal investigation.

cartel since an investigation will invariably be of a 'holistic' nature examining the cartel as a whole.

- 7.18 The points made in paragraph 7.14 above in relation to no-action letters in Type A cases apply equally where an undertaking has been informed that it qualifies, in principle, for Type B immunity.

The criminal immunity situation in Type B or C leniency cases

- 7.19 'Blanket' criminal immunity, that is, immunity for all co-operating current and former employees and directors at risk of prosecution for the cartel offence, will not be granted in Type B or C leniency cases.

- 7.20 However, the OFT will consider, on an individual-by-individual basis, whether one or more current or former employees or directors of an undertaking qualifying for Type B or C leniency should be granted individual immunity. Whether the OFT will grant individual immunity will depend on an assessment of the overall public interest. The considerations to be weighed-up will be similar to those referred to in paragraph 4.2 above in relation to Type B immunity.³⁹

- 7.21 It should be noted that in many cases where a Type B or C approach is made, the OFT will not be pursuing a criminal investigation and nor will it have any intention of initiating one. Therefore if desired, a would-be applicant for Type B or C leniency could explore (including on a no-names basis) whether there is in fact any criminal exposure for the undertaking's current and former employees and directors at all. In many cases comfort is likely to be forthcoming. As to the types of cases which the OFT is more likely to treat criminally, see paragraph 7.1 above. Where the OFT has indicated that it is not conducting a criminal investigation and has no intention of initiating one and, partly in reliance on this, the undertaking has made an application for Type B or C leniency, the OFT will not use any information obtained from the application against any individual current or former employee or director

³⁹ However, whereas Type B immunity may be expected to be common where the standard conditions apply, there is not the same likelihood of individual immunity being granted in Type B and C leniency cases. Indeed, where there is a pre-existing criminal investigation, immunity grants in Type B or C leniency situations are expected to be rare. This is based on the OFT's experience to date. However, each case will turn on its own facts.

of the undertaking in question in the unlikely event that the OFT should later decide to conduct a criminal investigation into that cartel. The exception is where the OFT's change of position has arisen as a result of having been materially misled by the leniency applicant or by an individual who it is now intended to investigate criminally for the cartel offence.

When can individual immunity be granted?

- 7.22 Individual immunity in this guidance refers to a situation where one or more individuals are granted criminal immunity but not as part of a 'blanket' grant of criminal immunity to all current and former employees and directors of an undertaking which has itself also qualified for civil immunity. In other words, individual immunity is the grant of criminal immunity in all cases other than in Type A or Type B immunity cases.
- 7.23 Individual immunity is most likely to be granted when an individual makes an approach for criminal immunity on their own account, that is, entirely separately from any approach by an undertaking for Type A or Type B immunity.
- 7.24 That individual will be guaranteed a no-action letter or comfort letter, if they need it, provided they tell the OFT about the cartel activity before any other individual or undertaking and there is no pre-existing criminal or civil investigation.
- 7.25 If there is already a pre-existing criminal or civil investigation, but the individual self-reports to the OFT about the cartel activity before any other individual or undertaking, the individual may still be granted individual immunity provided they add significant value to the OFT's investigation and provided paragraph 3.4 of the OFT's No-action guidance does not apply. However, it is important to understand that the OFT always retains a residual discretion in such cases and will conduct an analogous public interest assessment to that referred to in paragraph 4.2 above.⁴⁰ Individuals or their advisers can approach the OFT, if

⁴⁰ The expectation of Type B immunity being common does not have direct read-across to the situation here, however. That said, the OFT may well consider it to be in the public interest more often than not to grant immunity following an application for individual immunity after the commencement of an investigation.

necessary on a no-names basis, in order to ascertain what the OFT's approach will be in a given case.

- 7.26 If an individual who is a current or former employee or a director of an undertaking applies for individual immunity for the cartel on his or her own account before the undertaking makes its own application, immunity covering both the undertaking and all its co-operating current and former employees and directors will become discretionary and not guaranteed.⁴¹ The OFT will take a view on the matter and consider, in particular, by how much the evidence offered by the undertaking is likely to advance the OFT's investigation and the stage of the investigation at which the undertaking made its approach.
- 7.27 The ability of an individual to apply for individual immunity independently of the undertaking, and before the undertaking has itself applied for immunity, is one of the key reasons why undertakings who discover potential wrongdoing should promptly make a Type A immunity application and not postpone it in the hope of being able to make a successful Type B immunity application once an investigation has started. Furthermore, undertakings should be aware that individuals may now also seek to take advantage of the OFT's informant reward programme to report cartel conduct which their employer has failed to report by making its own timely approach for leniency.⁴²
- 7.28 Some practitioners have expressed concern that the provisions permitting an individual to apply for immunity on his/her own account may be abused by an individual who, knowing that the undertaking is actively contemplating making a bona fide Type A or B immunity approach, attempts to scupper the undertaking's chances of immunity by making a pre-emptive individual application. The OFT has no experience of this situation arising and would not expect such a scenario to be very likely, given that the individual concerned would in any event gain immunity through the undertaking's application. However, the OFT remains alive to the theoretical possibility of abuse and would want to

⁴¹ Automatic corporate immunity, that is, civil immunity without any related grant of criminal immunity for co-operating current and former employees and directors, may still be available, however (see paragraph 3.26).

⁴² See www.of.gov.uk/advice_and_resources/resource_base/cartels/rewards.

treat an undertaking fairly where there was clear evidence of such abuse by an individual applicant. The same points apply in relation to a pre-emptive and genuine abuse case under the OFT's informant reward programme.

- 7.29 As mentioned in paragraphs 7.19 and 7.20 above, individual immunity may also be granted to one or more individuals in a case where an undertaking applies for Type B or C leniency.

How will current and former employees and directors of a leniency applicant be interviewed where there is a criminal investigation?

- 7.30 In Type A or B immunity cases, the individual knows, before being interviewed, that they will be granted criminal immunity provided they satisfy all the usual conditions. The purpose of the interview is therefore to obtain all relevant information from the individual with a view to advancing the OFT's investigation – not to decide whether the individual will be granted criminal immunity in principle. However, in Type B or C leniency cases and other cases where the grant of individual immunity is discretionary, interviews of individuals may be conducted for two reasons:

- to elicit sufficient information to enable the OFT to decide whether it is in the public interest to exercise its discretion to grant a no-action letter in principle, and
- to obtain information from the individual with a view to advancing the OFT's investigation.

- 7.31 In Type A and B immunity cases the OFT will interview the individual under the protections laid out in paragraph 3.7 of the OFT's No-action guidance.⁴³ In Type B and C leniency cases the interview may also be under the protections laid out in paragraph 3.7. However, some

⁴³ Paragraph 3.7 states that any information provided in such an interview will not be used against the person in criminal proceedings except in the following circumstances: where a no-action letter is not issued, the individual applying for immunity from prosecution has knowingly or recklessly provided information which is false or misleading in a material particular, or where a no-action letter is issued, it is subsequently revoked (for example because of non-co-operation at any time until the conclusion of any criminal proceedings).

interviews in Type B and C leniency cases will be conducted under caution where the individual is a suspect and the OFT does not believe that it is in the public interest to offer an interview under the protections laid out in paragraph 3.7. Where a voluntary interview has been conducted under caution in a Type B or C leniency case, the OFT may nonetheless decide later that the individual will be offered criminal immunity depending on the OFT's assessment as to what is in the public interest.

- 7.32 Where individuals have been granted interviews under the protections laid out in paragraph 3.7 of the OFT's No-action guidance, the principle of protection of incriminating information given in the interview will also extend to the giving of information in documentary form, whether directly or through the applicant's legal adviser.
- 7.33 If desired, a Type B or C leniency applicant's adviser could seek confidential guidance from the OFT about whether interviews are likely to be offered under the protections laid out in paragraph 3.7 of the OFT's No-action guidance. In many cases the OFT will not be conducting a criminal enquiry and therefore the issue of whether or not an interview will need to be conducted under caution will not arise.

Interaction between the cartel offence in the UK and the Commission Leniency Notice

- 7.34 The OFT is aware that some practitioners might have a concern that undertakings approaching the Commission under the Commission Leniency Notice might inadvertently increase exposure for the undertaking's current and former employees and directors to the risk of prosecution in the UK for the cartel offence, in those cases where the infringement had some effect on the UK. The OFT believes that the points set out in this section should be sufficient to allay any concerns which might exist.
- 7.35 Based on past experience, the OFT expects that most undertakings that qualify for immunity under the Commission Leniency Notice will also be able to gain 'blanket' criminal immunity in the UK for current and former employees and directors, by virtue of that undertaking applying separately to the UK and gaining Type A immunity. Thus any fears of exposure to prosecution for the cartel offence would be allayed. Indeed, using the procedure referred to in paragraph 3.20 above, applicants will

now, if they so wish, be able to request a no-names marker in the UK before they even approach the Commission.

- 7.36 What happens if the result of such an approach under paragraph 3.20 is that the OFT tells the applicant that Type A immunity is **not** available (and that discretionary Type B immunity is not available either) and that relevant current and former employees and directors are not therefore guaranteed criminal immunity in the UK? In that situation, the OFT might still be able to reassure the undertaking's adviser, on the basis of the provision of a 'hypothetical' set of facts provided by him/her, that the case would not be of a type where the OFT would contemplate bringing a criminal prosecution.
- 7.37 What if individual immunity was not available and in addition, the OFT was **not** prepared to give any assurances that it would not contemplate bringing a criminal prosecution in a case of that kind? It is at least possible that in such cases an undertaking might nonetheless qualify for immunity under the Commission Leniency Notice. If so, the OFT will, in accordance with paragraph 3.6 of the OFT's No-action guidance, **normally** be prepared to grant no-action letters⁴⁴ to any implicated current or former employee or director of such an undertaking. This would be so even if another undertaking had already qualified for UK Type A immunity and consequent criminal immunity for all of its current and former employees and directors.
- 7.38 In theory therefore, a possible outcome is that the current and former employees and directors of two undertakings could be granted criminal immunity – in the one case because the undertaking obtains Type A immunity in the UK and in the other case because the undertaking obtains immunity under the Commission Leniency Notice and then obtains criminal immunity for all of its current and former employees and directors on the back of its grant of Commission immunity. The OFT expects this to be very rare, however, as the great majority of undertakings that qualify for immunity under the Commission Leniency Notice will also have put down a prompt marker to secure Type A immunity in the UK. Indeed, attempting to secure criminal immunity by reason of the undertaking applying for Type A immunity is the safer

⁴⁴ Or where appropriate, comfort letters as per paragraph 7.4 of this guidance.

option of the two because it is guaranteed and not subject to the qualification that it would only **normally** be granted.

- 7.39 Why does the OFT say it would only **normally**⁴⁵ grant criminal immunity on the back of immunity granted under the Commission Leniency Notice? First, where there is already a pre-existing criminal investigation in the UK (the chances of which will obviously be increased if there is already a Type A applicant in the UK), there should be no guarantee of no-action letters to current and former employees and directors of an undertaking even if it qualifies for immunity under the Commission Leniency Notice. Second, the OFT will be mindful of any attempts to 'game the system'. For example, if an undertaking is too late for Type A immunity in the UK and the OFT suspects that an application has subsequently been made to the Commission largely as a device for trying to procure no-action letters, the OFT might decline to offer criminal immunity. The OFT is more likely to decline to grant criminal immunity in such instances where the cartel is not one which the Commission would be particularly well placed to investigate within the terms of the Network Notice. Third, the OFT might refuse to grant criminal immunity when there is unreasonable delay between the approach to the Commission and the subsequent approach to the UK.
- 7.40 In all the circumstances therefore, the best option is to make a prompt approach to the OFT to try to secure UK Type A immunity – through the no-names marker procedure or otherwise.
- 7.41 The final set of circumstances to be considered here are those where an undertaking:

⁴⁵ In paragraph 3.6 of the OFT's No-action guidance the word **normally** is also stated to qualify the grant of no-action letters where an undertaking gains full civil immunity under the OFT's Penalty guidance and not just where immunity is available under the Commission Leniency Notice. However, as is clear from this document, the OFT has departed from that qualification in UK Type A immunity cases – instead we say that individual criminal immunity for current and former directors and employees is **guaranteed**. (The OFT does not think it appropriate, however, to depart from the word **normally** as a qualification where applications for no-action letters derive solely from an undertaking obtaining immunity under the Commission Leniency Notice.)

- is not in a Type A position and is unable to secure discretionary Type B immunity in the UK
- is not given an assurance that a prosecution for the cartel offence would not be contemplated in a case of that type, and
- does not qualify for immunity, but only a reduction of fine, under the Commission Leniency Notice.

The OFT believes that even in such cases, potential Commission applicants need have no concern that an approach to the Commission will **increase** the probability of prosecution for the cartel offence of any of its current and former employees and directors. This is because of the various information restriction safeguards set out in Regulation 1 as supplemented by the Network Notice, together with the OFT's commitment to apply 'Chinese walls' principles.

7.42 The principal route for disclosure of information from the Commission to the OFT is Article 12 of Regulation 1. However, any information disclosed by the Commission to the OFT under Article 12 can only be used for the purpose of applying Article 81 or 82 of the EC Treaty and cannot be used as evidence to impose sanctions against natural persons. Notwithstanding this, there may still be a residual concern that any information disclosed by the Commission to the OFT for the purpose of applying Article 81, might still be used by the OFT as **intelligence** to start or further a criminal investigation, even though it could not be used as **evidence** in such a criminal case. So far as information deriving from a Commission leniency applicant is concerned, there should be no such concerns, however, owing to the safeguards in paragraphs 37 to 42 of the Network Notice.⁴⁶ These safeguards generally act to prevent any leniency-derived material from being submitted to the OFT under Article 12. The same safeguards also apply to information that has been obtained by the Commission during, by means of, or following any fact-

⁴⁶ The Commission would only be permitted to transmit leniency information to the OFT with the consent of the applicant or where the applicant had also made a leniency application to the OFT relating to the same case or where the OFT had made a written commitment not to use the information to impose sanctions on the leniency applicant or any current or former employee or director of the leniency applicant.

finding measure which could not have been carried out except as a result of leniency.

7.43 The OFT also receives information from the Commission:

- sent under the 'close co-operation' principle (Article 11(1) and (2))
- sent with a view to the OFT assisting the Commission during its investigations (Articles 19 to 22), and
- sent to the OFT as a member of the Advisory Committee (Article 14).

Such material (whether from a leniency source or otherwise) could not be used in evidence in a criminal cartel prosecution because of the limitation in Article 28 of the Regulation and the case law of the European Court.⁴⁷

7.44 Furthermore, in leniency cases, the effect of paragraph 39 of the Network Notice is that if a Commission case started as a result of leniency, the OFT will not be able to rely on information received from the Commission in that case under any of the Articles mentioned above, as a basis for starting⁴⁸ its own criminal investigation.⁴⁹

7.45 In summary, the OFT could not use, either as intelligence or evidence, any leniency-derived information obtained from the Commission to further its criminal cartel enforcement functions. Nevertheless, as a further measure designed to provide reassurance to potential Commission leniency applicants, the OFT will put up a 'Chinese wall' between staff having access to information derived from the Commission under the above-mentioned provisions on a given case and

⁴⁷ Case 67/91 *Dirección General de la Defensa de la Competencia v Asociación Española de Banca Privada a.o.* [1992] ECR 1-4785 (Spanish Banks).

⁴⁸ It might be argued that there is a 'lacuna' here in as much as there is apparently no prohibition on using such information for an **existing** criminal investigation. However, the OFT would consider that to interpret the provision in this way would be contrary to the spirit of the Network Notice and in any event the Chinese walls referred to in paragraph 7.45 would apply as a 'long-stop' assurance.

⁴⁹ Although the Network Notice only refers expressly to information exchanged under Articles 11 and 20 to 22 of Regulation 1, the OFT would also not rely on such information to start an EA02 investigation where it was received under Articles 14 (Advisory Committee) or 19 (Power to take statements).

staff on a team investigating the same cartel activity under section 188 EA02.⁵⁰ The former group of staff would therefore not be permitted to pass on information directly or indirectly derived from the Commission to the latter group.

- 7.46 For the above reasons, the OFT believes that the existence of the cartel offence in the UK should not deter applications for immunity or leniency under the Commission Leniency Notice.

⁵⁰ It may sometimes be the case that both the staff at the OFT assisting the Commission and the staff working on an EA02 case may all be based in the OFT's Cartels Group. In this situation, the Chinese wall is maintained through clear guidance and training to all staff. A clear breach of the wall will be viewed internally as a serious performance management issue for the staff member(s) concerned. In particular cases, the Commission will also expect the OFT to explain to it the measures the OFT will be taking to ensure that the wall is maintained.

8 CIVIL LENIENCY AND NO-ACTION POLICY: OTHER ISSUES IN COMMON TO BOTH

The requirement to maintain 'continuous and complete' co-operation

- 8.1 The requirement to maintain continuous and complete cooperation throughout the OFT's investigation and any subsequent proceedings is at the heart of the leniency process and is a stated requirement in both the OFT's penalty and no-action guidance. Clearly the requirement necessitates compliance with the rules and principles set out in those guidance documents and also in this guidance note. However, continuous and complete co-operation also implies that the overall approach to the leniency process by an applicant must be a constructive one, designed genuinely to assist the OFT in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct, so that the public policy objectives of the OFT's leniency policy are achieved.
- 8.2 One issue which has arisen is the extent to which a leniency applicant is entitled to dispute the OFT's analysis of the evidence or law. Leniency is given in exchange for admissions of participation in cartel conduct.⁵¹ If, at any stage, the applicant's representations to the OFT, for example during the written and oral representations stage following the issue of a statement of objections, amount expressly or implicitly to a denial of cartel participation, the OFT will consider such representations to be inconsistent with any actual or proposed grant of leniency.
- 8.3 What if the applicant continues to accept that it has been a party to cartel behaviour but disputes specific elements of the OFT's analysis, for example, as to the precise duration of the infringement? The OFT does not exclude that the making of certain limited representations, provided they are made in a spirit of co-operation, is consistent with the grant of leniency. However, the OFT does not consider that it would be possible or desirable to seek in the abstract to draw a clear dividing line between such representations and the sorts of representations that would transgress an applicant's duty to provide constructive and genuine

⁵¹ See also the points made at paragraph 3.1 and footnotes 5 and 6 above on the need for a genuine intention to confess.

assistance in proving admitted cartel conduct. The OFT will nevertheless take a common sense approach in each case and hear what the applicant has to say before making any decision as to how the applicant's leniency position may be affected.

Directions to continue cartel activity

- 8.4 Ordinarily the applicant (whether an undertaking or an individual) will be required to refrain from further participation in the cartel activity unless the OFT directs otherwise. Such a direction will be rare. The objective in most such cases will be to protect the element of surprise of any forthcoming inspections. In exceptional cases, the objective may also be to allow the coming into existence of further evidence of the cartel activity and this may involve the use by the OFT of its powers under the Regulation of Investigatory Powers Act 2000.
- 8.5 The OFT will never expect individuals within an undertaking or an individual immunity applicant to take inappropriate risks. They will usually only be asked to carry on their basic activities in the same way as if they had never approached the OFT. The OFT will provide clear guidance as to what is expected in such cases.
- 8.6 In cases where a person has had and/or continues to have an involvement in cartel activity and applies for immunity on his/her own account and is able to continue to make use of a relationship to obtain further information about a cartel for the OFT and under the OFT's close direction, the individual may be granted individual immunity but remain a secret source. The OFT will not disclose the identity or role of a secret source in any subsequent investigation or proceedings. An individual immunity applicant will generally only be treated as a secret source where the safety of the individual would be in jeopardy or other serious adverse consequences would follow if the person's approach to the OFT were to become known. The general expectation, however, is that, where necessary, individuals benefitting from criminal immunity will be expected to give evidence, including where the individual has been directed to continue his or her participation in ongoing cartel activity.

Consequences for an undertaking applying for leniency of failure to co-operate by a current or former employee or director

- 8.7 A failure, at any stage, to co-operate with the OFT on the part of a current or former employee or director of an applicant undertaking will

not necessarily mean that the undertaking's leniency application will fail or that leniency, once given, will be revoked. The leniency application will not fail or be revoked in cases where:

- the applicant can show that it used its best endeavours to secure the co-operation of that individual⁵² (albeit unsuccessfully), and
- overall the applicant provided the OFT with sufficient evidence of the reported cartel activity to pass the applicable evidential threshold.⁵³

8.8 In this context, it should be noted that the applicant's general co-operation obligation includes a **positive** duty to inform the OFT without delay about any concerns the applicant may have as to the level of co-operation provided by any of its current or former employees or directors. In particular, the applicant must inform the OFT without delay about any concerns the applicant may have regarding the completeness and/or accuracy of any statements made by any of its current and former employees and directors during the course of the OFT's investigation.

8.9 It follows from the above that where an undertaking's application for Type A or B immunity does not fail, or is not revoked, despite an individual failing to co-operate, all other implicated current or former employees or directors of the undertaking who are maintaining co-operation will continue to qualify for immunity. By contrast, the non-co-operating individual will of course lose all protection under the leniency programme.

⁵² Where the applicant proposes disciplinary action against an individual, including dismissal, arising from that individual's role in the cartel, the OFT will expect the undertaking to discuss this matter with the OFT. The OFT will be keen to ensure that any action proposed by the undertaking against an individual does not have the perverse effect of reducing incentives to co-operate with the OFT. So far as is reasonable, the incentives placed on the individual by the undertaking and the OFT should be aligned, that is, there should be the maximum possible incentive on the individual's part to tell the full truth about his or her involvement in the cartel. The OFT will expect to see co-operation in this respect from the undertaking.

⁵³ In this context, please also see footnote 9 above (which refers to the possible difficulty in achieving the relevant evidential threshold if an individual's account of events materially undermines documentary evidence provided by the undertaking that would otherwise have been probative of the existence of the cartel).

8.10 In the event of the undertaking's application failing, or being revoked, those current or former employees or directors of the undertaking who had co-operated throughout the investigation will no longer be eligible for 'blanket' criminal immunity but they will have been interviewed under paragraph 3.7 of the OFT's No-action guidance and, as such, no information given by them whether orally or in writing as part of the leniency process will be used in evidence against them.

'Bad faith': unauthorised disclosure or destruction etc of material

8.11 The OFT uses the term 'bad faith' in this context to describe situations which go beyond non-co-operation and which instead involve positive steps to hinder an OFT investigation and any consequent enforcement action. For example, the OFT will consider bad faith⁵⁴ to have been shown by a leniency applicant where the applicant:

- tips off another person or undertaking about an intended or actual approach for leniency to the OFT, or
- destroys or tampers with evidence either prior to or at any time after an approach to the OFT for leniency.⁵⁵

8.12 With regard to the first bullet point above, obviously disclosures to lawyers with a view to obtaining legal advice about an intended or actual leniency application are acceptable. In addition, where parallel leniency applications have been made in other jurisdictions, there is no prohibition on those jurisdictions' appropriate competition authorities being informed that an application to the OFT is either pending or has been made as the case may be.

8.13 The OFT sometimes receives requests from leniency applicants to make disclosures to banks and/or auditors after an application for leniency has been made. In general this is acceptable provided the OFT is consulted in advance as to whether and when such disclosures can be made and how much information can be given. The OFT may insist that a list be

⁵⁴ The list of bad faith examples here is not to be considered exhaustive.

⁵⁵ If the destruction or tampering occurred prior to the approach, these provisions only operate where the undertaking is contemplating applying for leniency. See also ECN Model Leniency Programme, Section V, paragraph 13(3).

maintained of all individuals who have knowledge of the leniency approach and that such individuals be required to enter into confidentiality undertakings. See also paragraph 8.16 below.

- 8.14 Clearly the need for the utmost confidentiality in the circumstance described above arises from the OFT's desire to maintain the element of surprise should it wish to use its statutory powers such as those relating to inspections and searches. Once the OFT's investigation has reached the 'overt' stage, disclosures by leniency applicants of their status – including public disclosures – are less in issue, but even at this stage the OFT would expect to be consulted in advance about any proposed disclosure.

Consequences for individuals and companies where bad faith is shown

- 8.15 If bad faith has been shown, the potential consequences will depend on the stage at which it has been discovered. The consequences are likely to be:
- a refusal to grant a leniency marker or the withdrawal of a leniency marker as the case may be, or
 - the revocation of a leniency agreement and any no-action or comfort letters granted pursuant to the undertaking's approach or, as the case may be, the withdrawal of a no-action letter arising out of an individual immunity approach, and
 - possible prosecution of one or more individuals under sections 43 and 44 of the CA98 and section 201 of the EA02, depending on the precise circumstances.
- 8.16 In relation to the likely consequences referred to at paragraph 8.15 above, the OFT recognises that even where an undertaking took all reasonable steps to ensure that there was no 'tipping off' or document destruction or tampering by a current or former employee or director, a dishonest or negligent person may nonetheless act contrary to the undertaking's clear instructions and in spite of its precautions. In such

cases, the OFT would be understanding⁵⁶ of the undertaking's position⁵⁷ but it will be incumbent on the undertaking to demonstrate the reasonable steps it took to avoid the breach occurring. To this end, the OFT recommends that undertakings maintain lists of all current (and indeed former) employees or directors of an undertaking who are aware of the potential or actual⁵⁸ leniency application and have access to potentially relevant material and that each such individual be required to sign a declaration that they will observe strict confidentiality and that they will not remove, destroy, tamper with, or otherwise interfere with potentially relevant material. The OFT also recommends that potentially relevant material be secured, as far as possible, to avoid such destruction or tampering. For example, if laptops may contain relevant evidence, it may be sensible for the undertaking's lawyers or security department to take those promptly into secure custody so that they cannot be interfered with.

- 8.17 Where instances of bad faith on the part of individuals have been discovered by the undertaking they should be reported to the OFT promptly.

⁵⁶ This does not mean that the OFT will guarantee that the undertaking's application will always be safe in bad faith cases where the company took the various precautions described. There may be cases where the breach is so fundamental, for example a tip-off by a senior director or employee, that the public interest demands that the entire leniency application should fail. It is to be imagined that such cases will be extremely rare. Of course, in the hopefully equally rare instance of the bad faith having been corporately rather than individually sanctioned, the undertaking's leniency application is bound to fail.

⁵⁷ Though of course the employee concerned is nevertheless likely to face some kind of sanction from the OFT and in particular the revocation of any actual or intended no-action letter protection.

⁵⁸ Up until the time when the OFT's investigation becomes overt.

The relationship between non-co-operation and bad faith

8.18 There are similarities between non-co-operation as described in paragraphs 8.7 to 8.10 above and bad faith as described in paragraphs 8.11 to 8.17 above. In both cases, where an undertaking has acted reasonably as a whole, the consequences may be confined only to the individuals who failed to co-operate or showed bad faith as the case may be. In general though, bad faith is viewed more seriously than 'simple' failure to co-operate – in particular the OFT may consider that prosecution of relevant individuals is appropriate where the elements of the offences described in paragraph 8.15 above are met. As to the use by the OFT of information arising from leniency applications which have failed, or been revoked, due to non co-operation or bad faith, see paragraph 8.38 below.

Conducting internal investigations

8.19 The OFT sets a relatively low evidential threshold for the gaining of a marker and it follows that where an approach is intended only to the OFT, there should be no reason to undertake significant internal enquiries before applying for a marker.⁵⁹ All that is necessary is to establish sufficient for a concrete basis for a suspicion of cartel activity and a demonstration of a genuine intention to confess. However, the OFT does accept that some other agencies set a higher threshold and that a more significant investigation may be necessary in order to make leniency applications in multiple jurisdictions.

8.20 Experience has shown that the way in which an undertaking and its advisers conduct their internal investigations both prior to and following⁶⁰ an approach to the OFT for leniency is capable of having a substantial bearing on the success of the OFT's own subsequent investigations and enforcement action, especially where these include a criminal investigation with a view to a possible prosecution. For this reason, the way in which internal investigations are conducted by an undertaking, can no longer be considered to be exclusively a matter for the undertaking concerned. The guidance in this section is designed to

