

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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USE OF MARKERS IN LENIENCY PROGRAMS

-- United Kingdom --

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. This paper is submitted by the United Kingdom's Competition and Markets Authority (CMA).¹

2. The CMA's leniency guidance² (the 'Leniency Guidance') covers requirements and procedures applicable to both civil cartel investigations against undertakings under the Competition Act 1998 (CA98) and criminal cartel investigations against individuals under the Enterprise Act 2002 (EA02). It sets out the detail of how the CMA handles applications for civil immunity/leniency for undertakings and criminal immunity from prosecution for individuals.³

3. The Leniency Guidance provides that a key feature of the UK leniency system is the availability of markers for leniency pending formal agreement on the scope of leniency protection. Leniency agreements in relation to undertakings and no-action letters granting criminal immunity from prosecution are only signed in the later stages of the CMA's investigation and the marker remains in place until then.⁴

4. In the UK system, a 'marker' is a formal acknowledgement of a leniency application which records the timing of the application and priority relative to other applicants. The grant of a marker must be followed by the provision of a full application package and continued compliance with the conditions of leniency, in which case the marker will be retained pending signing of the formal leniency agreement or no-action letter.

1. Low threshold

5. The establishment in the UK of a criminal cartel regime has made it particularly important for internal investigations prior to an approach for leniency to be conducted with care and precision and to be limited to that which is necessary.⁵ As a consequence, the threshold for the level of evidence and information required to obtain a marker in the UK is low: all that is required is a 'concrete' basis for suspicion of cartel activity, coupled with a genuine intention to confess.⁶

6. The low initial threshold reduces the need for pre-application investigations and the consequent risk that applicants 'taint' evidence, e.g. by altering physical/electronic evidence or by exposing witnesses to material that they were otherwise unaware of that might influence their evidence. This is of particular (but not exclusive) importance in criminal investigations.

7. It is the CMA's responsibility to ensure that investigations, whether criminal or civil, are carried out to the necessary standard. It is therefore normal practice for the CMA to carry out various investigative steps directly in relation to leniency applicants, in the same way that it does in relation to non-leniency

¹ From 1 April 2014, the CMA came into operation, taking over many functions of its predecessor bodies, the Office of Fair Trading (OFT) and the Competition Commission (CC).

² *Applications for leniency and no-action in cartel cases* (OFT1495, July 2013). This guidance was originally published by the OFT and has been adopted by the CMA Board. CMA guidance documents can be found on www.gov.uk/cma.

³ The CMA's general policy as to leniency (immunity from, or reductions in, penalties in civil cases) is set out in *OFT's guidance as to the appropriate amount of a penalty* (OFT423, September 2012), which was also originally published by the OFT and adopted by the CMA Board. The availability of criminal immunity is established in section 190(4) of the EA02.

⁴ See paragraph 0.

⁵ Annex C of the Leniency Guidance provides important guidance on the conduct of internal investigations.

⁶ Note however that the CMA will reject a Type A application which does not give the CMA a sufficient basis for taking forward a credible investigation or Type B/C applications which do not add significant value to the investigation.

parties under investigation. Typical investigative steps that the CMA will or may wish to carry out directly include:⁷

- Interviewing witnesses.
- Assisting with the preparation of witness statements.
- Retaining a secure, forensically sound image of relevant electronic material. As well as being important to enable verification of the authenticity of electronic evidence, the CMA may also wish to conduct searches of such material directly (with or without the assistance of specialist IT consultants), instead of or as well as receiving the results of electronic searches conducted by the applicant.
- Reviewing original hard copy documents (essential in criminal cases, where originals will be retained as evidence).
- Physical searches of relevant premises.
- Assessing the relevance of specific documents within categories identified by the applicant as potentially relevant (noting that the CMA's assessment of relevance will be informed by information from other sources not available to the applicant).
- Spot checks of searches undertaken by the applicant or its advisers.

8. Leniency applicants are therefore encouraged to approach the CMA as early as possible.⁸ However, the CMA does accept that some other agencies set a higher threshold,⁹ and that a more significant investigation may be necessary in order for the applicant to make leniency applications in multiple jurisdictions. Indeed, even once a marker is granted, the leniency applicant's lawyers will not cease their involvement in the investigation. It is therefore crucial that those conducting investigations or otherwise dealing with witnesses do so in a manner that minimises both the risk of tip-off and the contamination of evidence, and the CMA has published detailed guidance on internal investigation to assist leniency applicants in managing this risk.

9. Potential applicants who are concerned about the interaction between the CMA's leniency application threshold and those in other jurisdictions can approach the CMA for confidential guidance.

⁷ It is worth noting however that cartel investigations vary, and so this is an indicative rather than intended to list measures that will apply in every case. For example, the types of investigative steps required in criminal investigations may be more extensive and potentially more intrusive than those undertaken in purely civil investigations. Also, the CMA may need to undertake more steps directly where the applicant is genuinely unable to meet the cost of undertaking such steps to the standards required for a proper investigation. See paragraphs 5.25 to 5.29 of the Leniency Guidance.

⁸ It is worth noting that undertakings or individuals thinking about applying for leniency may, before doing so, approach the CMA for confidential guidance, with a view to the undertaking or individual obtaining comfort on an issue before deciding whether to make an application. The CMA will not use information given in consequence of seeking confidential guidance for any other purpose. In particular, in the event that leniency is not applied for, or not subsequently granted to the undertaking or individual on whose behalf the guidance was sought, the CMA will not attempt to establish the undertaking's identity by a process of 'reverse engineering'. See paragraphs 3.3 to 3.7 of the Leniency Guidance.

⁹ Although it is noted that the requirement of too detailed information, requiring more intensive internal investigations, may jeopardise the success of investigations in all relevant jurisdictions.

2. Availability and types of markers

10. Markers are available for all types of leniency and all leniency applicants, and are not, in particular, restricted to the first applicant in relation to a particular conduct. The first applicant¹⁰ to report and provide evidence of a cartel, when the CMA does not have a pre-existing investigation into the reported cartel activity and does not otherwise have sufficient information to establish the existence of the reported cartel activity, will be granted a marker for Type A immunity.

11. Markers for Type B (first applicant where there is a pre-existing investigation) and Type C (second or later applicant, or coercer) leniency are discretionary and depend on an assessment of whether the grant of leniency will be in the public interest. The CMA will perform a balancing exercise, assessing the benefits of gaining additional evidence against the disbenefit of granting immunity or a reduction in penalties after an investigation has already commenced, resources have been expended and after the CMA may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.

12. The key criterion for determining the discount available for Type B and C leniency applicants will be the overall added value of the material provided by the leniency applicant. For this reason, an applicant's 'place in the queue' (in terms of when it approached the CMA) will not be decisive for Type C cases.¹¹ It is possible that an applicant who is third in the queue may get a discount greater than an applicant who was second to apply. That said, it is the usual experience of the CMA 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 opportunity.

3. Procedure

13. The substantial requirements for granting a preliminary marker are confirmation that the undertaking has a genuine intention to confess and a concrete basis for suspicion, that is:

- 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 information suggests that it has been engaged in cartel conduct in breach of the Chapter I prohibition and/or Article 101 of the TFEU.¹²
- Concrete basis for suspicion of cartel activity – this may take many forms but might include, for example, documentary evidence which plainly indicates the existence of a cartel, or information from a potential witness alleging cartel activity, or a combination of evidence from documentary and/or witness sources which together point to cartel activity.¹³

14. The preliminary marker (that is, a marker pending consideration of the full application package) will be operational from the moment the applicant's identity has been disclosed to the CMA. From that time on, no other Type A or B marker will be granted for the same cartel activity, unless the preliminary marker is subsequently rejected.

¹⁰ Who is not a coercer - see paragraphs 2.50 to 2.59 of the Leniency Guidance.

¹¹ And although Type B does not offer guaranteed immunity, Type B applications made at an early stage of the CMA's investigation are inherently more likely to result in the grant of corporate immunity and/or criminal immunity than late-stage Type B applications or Type C applications.

¹² See Leniency Guidance, paragraph 4.22.

¹³ See Leniency Guidance, paragraph 4.23.

15. Once the applicant has described the conduct and been granted a preliminary marker on that basis (usually by telephone), the applicant is required to provide a more detailed application package usually within a fairly short time frame.¹⁴

16. Once the CMA has considered the application package, it will decide whether to:

- Confirm the marker but not launch an investigation

This may be because it has higher priorities for its resources at that point in time or because the European Commission is investigating the undertakings and the CMA has decided not to proceed with a criminal investigation into individuals. In that situation, the CMA will tell the applicant what precautions it needs to take in order to preserve its marker for leniency protection. If the applicant cooperates as instructed, in the (unlikely) event that the CMA were to change its assessment of its priorities and commence an investigation, the applicant would be able to proceed with its application with the same level of marker protection.

- Confirm the marker and discuss next steps

If the CMA intends to proceed with an investigation (whether criminal and/or civil) it will confirm the marker and promptly start discussions with the applicant on what cooperation is expected.

- Reject the preliminary marker

There are a number of reasons why, following consideration of the application package, CMA may reject the marker. For example: the activity described may not amount to cartel activity within the scope of the leniency policy; the information provided may not meet the evidential threshold (reasonable grounds to suspect cartel activity, in the case of Type A, or add significant value, in the case of Type B or C) or; the information provided may disclose that the applicant does not have a genuine intention to confess to cartel activity.

- Ask for more before confirming or rejecting the marker

In some instances, the CMA may require more information before it can assess whether the application should be accepted or whether the case will be a priority for investigation. In those instances, the CMA will make clear to the applicant what more it is asking for, and why.

17. If the CMA confirms the marker, it will normally write to the applicant with this confirmation.¹⁵ A senior representative of the applicant undertaking - or in the case of an individual application, the applicant - will be asked to sign a letter indicating that the applicant understands the conditions for the grant of leniency and in particular that it is committed to complete and continuous cooperation throughout the CMA's investigation and subsequent enforcement action.

18. The scope of the marker or preliminary marker may be adjusted in light of further emerging details and evidence as the investigation progresses, and will inform the scope of the leniency or no-action letter, which are signed at a later stage of the investigation.

¹⁴ Annexe D of the Leniency Guidance contains a checklist of minimum information requirements during a leniency application.

¹⁵ Unless the applicant has requested to receive such confirmation orally, in which case this would typically be done in a telephone call.

19. Leniency agreements will be signed shortly prior to the issue of the statement of objections in a CA98 investigation, or shortly before any individuals are charged with the cartel offence, provided the conditions for the grant of leniency are met (including, in particular, the requirement for complete and continuous cooperation). At this point in time, the CMA will have received and assessed substantially all of the information that is relevant to its case, and will accordingly be in a position to ascertain the necessary scope/characterisation of the cartel activity to be covered in the leniency agreement and also the scope of the ‘undertaking’, that is, the relevant legal entities that need to benefit from leniency protection.

20. The CMA recognises the importance of confidentiality for leniency applicants. Accordingly, the fact that an undertaking has applied for leniency will not normally be revealed to other undertakings until the statement of objections has been issued. However, in the course of the CMA’s investigation it may be necessary, directly or indirectly, to disclose information provided by a leniency applicant to third party witnesses or to those suspected of direct involvement in the cartel. Consequently, there is a risk that parties will conclude that the information has been supplied by a leniency applicant, which may in turn reveal the identity of the applicant. The CMA will not formally confirm whether there is a leniency applicant, however.

4. CMA no-names markers in ‘Commission immunity application’ cases

21. As an exception to the usual rule, the CMA is willing to grant markers without the applicant having immediately to reveal its identity to the CMA, where the undertaking’s legal adviser confirms that he/she also has instructions to make an application for immunity to the European Commission. The intention behind this diversion from the usual policy is to 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, before the European Commission is approached.