

EU & Competition

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New understanding will uncover more Scottish cartels

A new understanding between the Office of Fair Trading (OFT) and the Crown Office, announced on 11 June 2009 at a Scottish Competition Law Forum workshop held at D&W's Edinburgh office, will result in more cartels in Scotland coming to light. It is likely to lead to the first Scottish prosecutions for participation in cartels.

Companies involved in cartels face penalties of up to 10% of their turnover under the Competition Act 1998 (CA 1998), and individuals face unlimited fines and up to 5 years' imprisonment if convicted of the cartel offence created by the Enterprise Act 2002. However, a company or individual that brings a cartel to the attention of the authorities may be granted immunity from penalty. In England and Wales, the OFT decides on the grant of immunity to both companies and individuals (the latter in the form of a "no-action" letter). In Scotland, however, while the OFT can give immunity from penalty under the CA 1998, the decision whether to prosecute individuals is taken by the Lord Advocate. The new understanding is intended to give greater comfort to individual executives that they will not face prosecution in Scotland if they co-operate in uncovering a cartel. The previous arrangements in Scotland were perceived not to give sufficient comfort. Because cartel whistle-blowing - or applying for cartel immunity/leniency - is the principal means by which cartels in England and Wales are detected, the OFT believes that the lack of comfort available in Scotland has resulted in a lower degree of detection.

Under the new understanding, the Lord Advocate will now give serious weight to a recommendation by the OFT that a co-operating individual should not be

prosecuted for the cartel offence. In doing so, she will take account of the OFT's detailed guidance on leniency. This is an improvement on the previous commitment by the Lord Advocate merely to "take into account" the individual's co-operation with the OFT. Where possible, she will also endeavour to give an early indication - even on a no-names basis - as to whether she will grant criminal immunity or launch an investigation at all. Again, this reinforces the previous arrangement, under which the Lord Advocate "might give" an early indication. Various conditions will apply, including a requirement of full disclosure of existing criminal convictions and associations.

A particularly important and welcome development is that information provided to the Lord Advocate in order to assist her in reaching her decision will not now be used as evidence against the individual, in the event that immunity is not granted.

The new arrangements are not perfect. They still fail to guarantee conditional immunity in the way that other authorities, including the OFT, have been able to do. However, they are still an improvement on the previous arrangements. They provide a workable level of comfort that will allow individuals who might be exposed to prosecution in Scotland to approach the authorities. The perception that immunity applications can now be made with a degree of safety in is likely to have a destabilising influence on cartels in Scotland. There is likely to be a race to apply to the OFT and the Crown Office, as cartel members seek to protect themselves against the risk that fellow cartel members take advantage of the new rules first. The overall result is likely to be an increase in cartel enforcement in Scotland.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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