

CRACKING DOWN ON CARTELS - THE COMPETITION AND MARKETS AUTHORITY'S NEW MARKETING CAMPAIGN

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The Competition and Markets Authority ([CMA](#)) has announced the launch of a new campaign to crack down on cartels. The latest campaign, titled "Safe, not Sorry" will target a number of industries that are perceived to be more susceptible to cartel activity, including construction, manufacturing and business support services.

The Safe, not Sorry campaign follows a marketing campaign launched last year which is credited with having resulted in a 30% increase in tip offs through the [CMA's](#) informant rewards policy, although notably the [CMA](#) does not say what percentage of these tip offs have led to enforcement activity or, indeed informants being rewarded.

However effective the informant rewards policy has actually been to date, the [CMA](#) has made it clear that it intends to continue ramping up its enforcement activity, having been allocated an extra £2.8 million in last year's budget to allow it to "take on more cases against companies that are acting unfairly".^[1]

Notwithstanding this, with the volume of follow-on claims growing throughout the EU and criminal sanctions an ever more likely possibility for individual cartelists, it is important for companies and/or individuals considering whistleblowing to understand the full ramifications of cooperation.

The Safe, not Sorry campaign

The latest campaign highlights the [CMA's](#) leniency policy and encourages people who have been involved in illegal cartel activity to inform the [CMA](#) of their conduct as the "safest thing to do", noting that whistleblowers can avoid fines, director disqualification and even prison.

In addition, the campaign asks people who think they may have witnessed cartel conduct to "do what's right" and report their suspicions to the [CMA](#), re-iterating the possibility of a financial reward for innocent informants.

We provide overviews of the [CMA's](#) leniency programme and informant rewards policy below.

Self-reporting - the [CMA's](#) leniency programme

Individuals convicted under the "Cartel Offence" may face:

- up to five years imprisonment;
- an unlimited fine;
- director disqualification for up to fifteen years;
- the confiscation of assets pursuant to the Proceeds of Crime Act 2002;^[2] and/or
- an order requiring that they pay all or some of the costs of the prosecution.

Companies found to have participated in cartel conduct may be fined up to 10% of the worldwide group turnover.

The [CMA's](#) leniency programme, highlighted as part of the Safe, Not Sorry campaign, seeks to incentivise individuals and companies to proactively approach the [CMA](#) to report cartels.

For example, the [CMA's](#) leniency programme expressly provides that, in certain circumstances, individuals will receive guaranteed immunity from criminal prosecution and director disqualifications where they provide information which, at a minimum, gives the [CMA](#) a sufficient basis on which to take forward a credible investigation.

Similarly, the programme also provides for the possibility that, in certain circumstances, a cooperating company will receive guaranteed immunity from financial penalties, with its employees or officers receiving guaranteed immunity from criminal prosecution (as well as director disqualification).

Nevertheless, individuals and companies considering applying for leniency should be aware of the associated risks.

For example, companies considering applying for leniency should first consider the risk of follow-on claims being brought against them following the conclusion of the competition authority's investigation, an increasingly likely outcome.^[3] Importantly, the level of damages claimed in follow-on actions is often significant, as is the time and cost incurred

by defendants defending themselves.

Equally, individuals contemplating for criminal immunity should be aware that automatic criminal immunity is only available where: (1) the applicant is the first party to the cartel to apply for leniency; and (2) there is no pre-existing investigation being undertaken by the CMA in relation to the cartel.

'Doing what's right' and being rewarded for it - the CMA's informant rewards policy

The informant rewards policy provides individuals with the possibility of financial rewards of up to £100,000 in exchange for information that enables the CMA to uncover illegal cartel activity.

The reward will generally only be available to individuals who have not participated in any illegal activity (although civil and criminal immunity will still be available to such persons). In exceptional circumstances, however, the CMA indicates that it will consider a reward (in addition to immunity) for whistleblowers whose participation in the cartel was only peripheral.

Individuals contemplating blowing the whistle should bear in mind that the grant of a reward, as well as the amount granted, remains entirely at the discretion of the CMA. Where the CMA is minded to grant an award, the level of compensation will be determined on the basis of a range of factors:

- the value of the information in terms of what the CMA has been able to achieve from it;
- the amount of harm to the economy and consumers which the CMA believes the information given has helped to put a stop to and/or has helped to disclose;
- the effort the whistleblower has had to invest in order to give the CMA the information; and
- the risk the whistleblower has had to take in order to give the CMA the information.^[4]

As noted above, while the CMA notes the 30% year-on-year increase in tip offs, it is not clear what percentage of these tip offs have led to enforcement activity or, indeed informants being rewarded.

Guaranteeing the credibility of evidence provided by an informant in expectation of a financial reward is something with which the CMA will need to grapple. Indeed, in the US, an informant rewards policy was considered and rejected on the grounds that:

1. it risked jeopardising witnesses' credibility;
2. there was a risk of abuse by fraudulent whistleblowers; and
3. such a programme risked undermining companies' own internal compliance programmes.

While these concerns are likely to be equally applicable to the UK, it is too early to tell whether, in reality, the increase in tip offs will lead to a corresponding increase in successful cartel investigations.

Conclusion

While the CMA's leniency programme is likely to remain an important tool in the CMA's cartel-detecting arsenal, its latest campaign demonstrates that the CMA intends to continue investing in other methods of cartel detection, such as the informant rewards policy.

Both individuals and companies that suspect they may be at risk of being implicated in allegations of wrongdoing are well-advised to consider their exposure, and to take appropriate action and advice at the earliest possible opportunity.

As highlighted in this alert, while the CMA offers a number of incentives to cooperate, it is important to bear in mind the full implications of doing so before taking any action.

Gowling WLG's award winning EU, Trade & Competition team has expertise in both civil and criminal cartel investigations and has represented parties in a number of high-profile cartel investigations in the UK over the past 20 years, recently contributing the UK chapter to ICLG's "Cartels & Leniency 2018" publication.

Footnotes:

[1] For further background, see the speech made by Michael Greenfell, the CMA's Executive Director, on 29 November 2017, shortly after the Autumn 2017 budget, titled "UK competition enforcement - where next?". Available online at:

<https://www.gov.uk/government/speeches/uk-competition-enforcement-where-next>

[2] Section 190 of the Enterprise Act 2002 and part 2 of the Proceeds of Crime Act 2002.

[3] Claimants wishing to bring actions against leniency applicants in national courts across the EU can now rely on the various claimant-friendly provisions contained within the Damages Directive, such as the establishment of a minimum limitation period of 5 years, the creation of a rebuttable presumption that cartels cause harm and harmonisation of the legal status of European national competition authorities' decisions in private actions.

Damages Directive, Articles 10, 17(1) and 9 respectively.

[4] CMA, "Rewards for information about cartels", published 31 March 2014, page 4.

Available online at: <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>

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