Response to CMA consultation on leniency guidance

1 Mills & Reeve LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) consultation on proposed changes to its guidance on applications for leniency in cartel cases (the **Consultation**).

2 Mills & Reeve is a national UK law firm with 170 partners and over 750 lawyers operating from seven offices in Birmingham, Cambridge, Leeds, London, Manchester, Norwich, and Oxford.

3 Mills & Reeve's competition practice is made up of experts specialising in this field, with the lead partner having over 25 years of experience advising domestic and international clients across a wide range of UK and EU competition law matters. We act for a range of clients who have varying experience of the CMA's leniency policy. Our comments below are based on the experience of our competition team in advising on the CMA's leniency policy, both at Mills & Reeve and previous firms.

4 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. We would be happy to discuss our responses more generally, at the CMA's convenience.

5 We confirm that this response does not contain any confidential information, and we are happy for it to be published on the CMA website.

General Consultation questions

Q1. Do you agree with the proposed changes to the Current Guidance?

6 Overall, we agree with the proposed changes to the Current Guidance in that they reflect changes to the relevant legislation as well as developments in the CMA's practice.

Q2. Is the Draft Revised Guidance sufficiently comprehensive to give predictability to leniency applicants? Does it have any significant omissions, in your opinion?

7 We broadly agree that the Draft Revised Guidance is sufficiently comprehensive, although, as noted in the response to Q6 (below), we consider that additional predictability could be afforded through the inclusion of indicative timelines.

Q3. Is the content, format, and presentation of the Draft Revised Guidance and of the short guides sufficiently clear? If there are particular parts of the Draft Revised Guidance or of the short guides where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

8 We consider that the content, format and presentation of the Draft Revised Guidance and short form guides are sufficiently clear. In particular, we appreciate the structural changes that result in the Draft Revised Guidance following the normal chronology of a leniency application.

Q4. Do you consider that the short guides and the flowcharts are proportionate in striking the right balance between capturing the salient aspects of the regime and presenting them in a form that is of use for businesses and individuals?

9 Yes, although we consider that almost all leniency applicants will be supported by legal advisors who will advise on all aspects of the regime in any case.

Q5. Do you consider that, as a whole, the Draft Revised Guidance is effective in ensuring that the incentives offered to applicants by the CMA's leniency regime are correctly positioned in order to support and facilitate the effective detection and enforcement of cartel activity?

10 Yes, overall, we agree that the Draft Revised Guidance is effective in supporting and facilitating the detection and enforcement of cartel activity.

Q6. Do you consider that there are any other changes that should be made to the Current Guidance, in particular with regard to the application of the CMA's '4Ps' framework – pace, predictability, proportionality and process?

11 We consider that the 'pace' and 'predictability' aspects of the CMA's '4Ps' framework could be bolstered through the inclusion in the Revised Guidance of <u>indicative</u> timelines for when the CMA will respond to applicants at key points throughout the leniency process. The inclusion of indicative timelines would also support the CMA's new statutory duty of expedition, which requires the CMA to take action as soon as reasonably practicable when exercising its competition powers.

12 The current situation, whereby applicants have no indication as to when they will hear from the CMA, during what is inherently an anxious time for applicants, is unsatisfactory. Boards and internal legal advisors who may have given extensive and careful consideration to the decision to make a leniency application need certainty as to whether the application is successful and whether the CMA intends to take forward an investigation.

13 There may also be practical implications for a potentially long and uncertain waiting period. For example, businesses aiming to avoid any risk of tipping off may be struggling to balance this obligation with the need to preserve evidence and avoid inadvertent document destruction.

14 We appreciate that the CMA cannot commit to a definitive timeline, so the timeline would need to be expressed as indicative and qualified, for example, subject to the volume of available evidence and complexity of the case. However, to achieve the aims of 'pace' and 'predictability,' the CMA should commit as a matter of principle to working to the indicative timelines (to the extent that it is possible in the circumstances).

15 In addition, we believe that the inclusion of indicative timelines in the Revised Guidance would enhance the effectiveness of the CMA's leniency policy to the benefit of both the applicant and the CMA.

Q7. Do you have any other comments on the Draft Revised Guidance or on the short guides?

16 No comments.

Specific Consultation questions

Q8. Do you have any comments about the proposed changes to the definition of cartel activity? In particular: Do you have any comments regarding the inclusion of specific further examples of cartel activity (including any comments on the examples now included)? Are there any other examples of cartel activity that you think should be included?

17 Overall, we consider the inclusion of specific further examples of cartel activity to be helpful for (potential) applicants and their legal advisors. Notwithstanding the fact that the Draft Revised Guidance already states (at paragraph 24) that the list contains non-exhaustive examples of cartel activities, we consider that there could be a risk that over time it would come to be seen as a definitive list. It would therefore be helpful for the CMA to also include an explicit statement in the Revised Guidance to the effect that it is open to considering other types of cartel activity when applying the Revised Guidance.

Q9. Do you consider that the proposed changes to the process for a leniency applicant to admit to cartel activity address potential applicants' concerns regarding potential disincentives to apply for leniency?

18 The current requirement for applicants to admit upfront participation in cartel activity represents a substantial disincentive / deterrent for some (potential) applicants to report cartel activity in

circumstances where there may be genuine uncertainty about the extent and nature of the evidence and its legal characterisation. We therefore support the proposed deferral of an admission of participation in cartel activity until the leniency agreement is signed. We also envisage that this change is likely to help improve relations between the CMA and applicants (thereby supporting the "process" element of the CMA's 4Ps framework) and lead to more effective cartel investigations.

Q10. Do you have any comments regarding the CMA's proposed updates in respect of the levels of protection available to Type A immunity applicants, as compared to Type B and Type C leniency applicants, in particular:

(a) the removal of the availability of upfront grants of immunity for Type B applicants and the clarifications as to likely leniency discounts for Type B and Type C applicants;

(b) the removal of automatic immunity from CDOs for cooperating directors of Type B and Type C leniency applicants (including individual applicant directors);

(c) the clarifications regarding the level of cooperation expected from directors in order to benefit from CDO immunity;

(d) the clarifications to the process for removing CDO immunity from noncooperating directors; and/or

(e) the statement that the CMA is unlikely to exercise its discretion to grant criminal immunity in relation to Type B and Type C leniency applications??

19 We agree with the CMA that leniency discounts should be calculated primarily based on the value added by the leniency applicant to the CMA's investigation. We also acknowledge that it is unlikely, in practice, to be sufficiently clear at the outset whether a Type B application would merit upfront immunity.

20 However, our experience is that Type B and C applicants are capable of making important contributions to evidence gathering and the advancement of the CMA's investigation and should be treated accordingly. We would therefore support including in the Revised Guidance a statement to the effect that: (i) overall, the level of discount and leniency available to all applicants should reflect the value of the evidence provided; (ii) in each case, the CMA will assess the value of the evidence provided by the applicant; and (iii) for Type B applicants, the level of discount will typically be in the range of 20-70%, but the CMA may confer a discount of more than 70%, up to 100%, if such a discount reflects the value of the evidence provided by the applicant.

21 Immunity from CDOs, in some cases, provides a powerful incentive for (potential) applicants to self-report and for individual directors to co-operate and provide valuable information. The removal of automatic immunity from CDOs for cooperating directors of Type B and Type C leniency applicants may therefore, in some cases, materially reduce the incentives for (potential) applicants to apply for leniency, thereby impacting the effectiveness of the regime. For these reasons, we consider that automatic immunity from CDOs for Type B and C directors should be retained as a possibility.

22 We have no comments in respect of the clarifications regarding the level of cooperation expected from directors in order to benefit from CDO immunity, and the process for removing CDO immunity from noncooperating directors; or the statement that the CMA is unlikely to exercise its discretion to grant criminal immunity in relation to Type B and Type C leniency applications.

Q11. Do you have any comments regarding the proposed clarifications to the provision of criminal immunity?

23 No comments.

Q12. Do you have any comments on the external SharePoint Online site as the default method for the submission of leniency applications which would otherwise be submitted orally, including on its key features and based on your experience of using it in practice already?

24 We welcome the availability of SharePoint Online as a means of submitting leniency applications. However, we consider that the SharePoint Online should be made available as an optional alternative to the oral application process, for the reasons set out in our response to Q13 below.

Q13. Do you consider it important that the CMA retains the availability of the oral application process? Please provide reasons for your reply.

25 We consider it important that the CMA retains the availability of the oral application process. The oral application process offers a number of key benefits, the loss of which could pose serious risks, both to (potential) applicants and the CMA.

26 Firstly, and most importantly, the ability to make oral applications can make it easier for an applicant to report, which may be particularly valuable to individuals and smaller organisations with less ready access to the resources required to submit a written application. Dispensing with the oral application process could therefore disproportionately impact and disincentivise such (potential) applicants and thereby impede the effective detection and enforcement of cartel activity.

27 Secondly, the ability to make oral applications may help to protect the confidentiality of sensitive information within the organisation applying for leniency. By avoiding the need to create written records that could otherwise be discovered within the organisation, or (for some organisations) potentially the need to consult with IT teams to set up access SharePoint Online, could help to minimise the risk of “tip offs.”

Mills & Reeve

9 June 2025