

## Consultation: Guidance on applications for leniency in cartel cases – Response of Ashurst LLP

13 June 2025

### Introduction

Ashurst LLP welcomes the opportunity to respond to the Competition and Market Authority's (**CMA**) consultation on the revised guidance on applications for leniency in cartel cases (CMA210con, 29 April 2025) (**Draft Revised Guidance**). This response contains our own views, based on our experience of advising and representing clients on the application of the Competition Act 1998 (**CA98**) and Enterprise Act 2002 (**EA02**), and is not made on behalf of any of our clients.

We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

We have omitted questions to which we are not providing a response.

As set out in more detail below, our main suggestions are that the following changes be introduced to:

- (a) reconsider the role of leniency plus to maximise the incentives for self-reporting conduct in a second market. We also suggest that the CMA could consider increasing the discounts offered for leniency plus.
- (b) reconsider the CMA's current practice on witness interviews during the initial investigation. In particular, we suggest that the CMA could undertake witness interviews at an earlier stage in its investigation or it could grant permission to the applicant and its legal advisors to have document-led discussions with key witnesses under the supervision of the CMA.
- (c) provide further examples of other categories of information exchange that would come fall under the regime beyond pricing and pricing intentions and the factors that the CMA will consider when determining whether information is capable of being CSI.

- (d) provide guidance on how the CMA will decide whether immunity from CDOs will be granted. We also suggest clarifying experiences where a Type B or Type C applicant has been the subject of a CDO or CDU.
- (e) maintain oral application process as the default method for leniency applications.

## General questions

1. **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?**
  - 1.1 We consider that the Draft Revised Guidance, as a whole, does proportionately ensure the incentives offered to applicants are balanced against effective detection and enforcement of cartel activity. We consider that there are features within the CMA's current regime that could be enhanced to facilitate even more effective detection of cartel activity. In particular, we suggest that the CMA could consider increasing the discounts offered for leniency plus.
  - 1.2 We note that the Draft Revised Guidance indicates that "*reductions for leniency plus are not likely to be high*",<sup>1</sup> with footnote 144 stating that "*in the CMA's experience, leniency plus discounts are unlikely to exceed 5%*". While we understand that the level of any discount from fines will depend on various factors, a 5% discount may not, in practice, be sufficiently material to encourage applicants to report infringements to the CMA. Additionally, we note that discounts of above 5% have been awarded for leniency plus. For example:
    - (a) in *Dairy Products* (2011), the level of reduction was 10%;<sup>2</sup>
    - (b) in *Tobacco* (2010), the level of reduction was 10%;<sup>3</sup> and
    - (c) in *Replica Football Kit* (2003), the level of reduction was 25%.<sup>4</sup>
  - 1.3 In that context the CMA's public decisions provide little information on the application of its leniency plus policy. We therefore welcome the guidance in the Draft Revised Guidance on the factors that the CMA will consider when deciding the scale of a leniency plus uplift.

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<sup>1</sup> Draft Revised Guidance, paragraph 9.19.

<sup>2</sup> Case CE/3094-03.

<sup>3</sup> Case CE/2596-03.

<sup>4</sup> Case CP/0871/01.

- 1.4 The CMA could strengthen the attractiveness of its leniency plus policy to greater incentivise applicants to be the first to self-report cartels in second markets by offering a more significant discount for leniency plus recipients.
- 1.5 Given the proposed changes to make Type A leniency more attractive than Type B (including the clarification that Type B leniency recipients generally are unlikely to receive a discount greater than 75%), leniency plus could play a more significant role in encouraging leniency applications by incentivising recipients of type B and type C to undertake internal investigations and self-report conduct in other markets.
- 1.6 We therefore recommend the CMA reconsider the role of leniency plus and the level of additional discount generally available to maximise the incentives for self-reporting conduct in a second market.
- 2. 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?**
- 2.1 As acknowledged in response to question 9 below, we agree with the CMA's acknowledgment that there may be "*genuine uncertainty*" in practice for potential leniency applicants when they initially approach the CMA (and even at the time the leniency application is made) as to the full scope of the alleged infringement. Companies need to undertake extensive internal investigations (including document review exercises and interviewing witnesses) to gain a better understanding of the alleged infringement, its scope and duration.
- 2.2 The CMA's current practice generally does not allow for witness interviews until the CMA decides to interview a witness because "*it is crucial to ensure that such internal investigations are conducted in a manner that minimises the risk of tipping-off persons involved in the cartel as well as to ensure that such investigations are not conducted in such a way as would risk diminishing the probative value of the evidence obtained in that investigation or any subsequent investigation by the CMA*".<sup>5</sup> However, applicants' fact-finding processes would be more efficient if applicants and their legal advisers were able to make reasonable and proportionate requests to interview witnesses (with the permission and supervision of the CMA) as part of their initial fact-finding efforts.
- 2.3 Based on the CMA's practice, inefficiencies may arise where witness evidence may be required to verify core elements of the alleged infringement in order to prepare the leniency application or supplemental submissions. Where an applicant does not have permission to interview a witness, the responsibility for

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<sup>5</sup> Draft Revised Guidance, paragraph 3.4.

interpreting documentary evidence falls to the legal advisors, which could lead to inefficiencies in the investigative process.

- 2.4 Recognising that there is a risk of diminishing the probative value of evidence where the CMA is not the first interviewer, we consider there to be two alternatives which would align with the CMA's objectives of pace, process and proportionality. First, the CMA could undertake witness interviews at an earlier stage in its investigation rather than at a later stage. Alternatively, the CMA could grant permission to the applicant and its legal advisors to have document-led discussions with key witnesses to assist with the applicant's internal investigation under the supervision of the CMA. This would reduce any inefficiencies by allowing leniency applicants to directly clarify evidence that forms part of the leniency application or subsequent supplemental submissions.

### **Specific Questions**

3. **Q8. Do you have any comments about the proposed changes to the definition of cartel activity? In particular:**
- (a) **Do you have any comments regarding the inclusion of specific further examples of cartel activity?**
- (b) **Are there any other examples of cartel activity that you think should be included?**
- 3.1 We welcome the inclusion of additional specific examples of cartel activity at paragraph 2.4 of the Draft Revised Guidance, which we consider provide greater certainty and predictability for potential leniency applicants.
- 3.2 Paragraph 2.4(b) includes some examples of information exchange for which leniency may be available, including "*regarding current, as well as future, pricing intentions, as well as communication that takes place indirectly via a third party (including a platform operator / optimisation tool provider / other person enabling the use of a shared algorithm), a common agency (for instance a trade organisation), or a supplier or customer, or in certain circumstances, communication via public announcements*". We welcome the Draft Revised Guidance's guidance on the types of communication methods and channels that could result in the anti-competitive exchange or sharing.
- 3.3 While the Draft Revised Guidance does not provide guidance beyond exchanges regarding pricing and pricing intentions, the CMA's practice makes clear that there are other types of information that could be considered as competitively sensitive information (**CSI**). It would be helpful to clarify whether the CMA considers any categories of information could be appropriate for a leniency case based on the CMA's experience (e.g. information about volumes, capacity, strategy, etc).

- 3.4 In practice, it may not be straightforward for applicants to distinguish between legitimate exchanges and those that fall within the scope of the Draft Revised Guidance. We therefore consider that it would be helpful to provide guidance on the factors that the CMA will consider when determining whether information is capable of being CSI. This would assist applicant's ability to identify potential cartel activity that could fall within the scope of the leniency regime and streamline investigations.
- 4. Q9. Do you consider that the proposed changes to the process of a leniency applicant to admit to cartel activity address potential applicants' concerns regarding potential disincentives to apply for leniency?**
- 4.1 We welcome the proposed changes to the requirement for a leniency applicant to admit their participation in cartel activity, with such admission not being required unless and until a leniency agreement is signed as set out in the Draft Revised Guidance at paragraph 2.6(d).
- 4.2 We consider that the proposed approach ensures a more proportionate balance of incentives for applicants to apply for leniency while the precise scope of the conduct at issue is unclear. By delaying the requirement of admission until after the leniency agreement is signed, it allows applicants and their legal advisors more time to consider internal documents and the wider implications of the whole picture before the formal admission of guilt.
- 5. 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?**
- 5.1 We recognise that the removal of upfront grants of immunity for Type B reflects the CMA's objective of encouraging individuals to apply first for leniency while maintaining proportionate incentives for applicants to come forward. We welcome the clarification on the likely leniency discounts for Type B and Type C applicants and consider that this will improve transparency and certainty.
- 5.2 Paragraph 2.40 of the Draft Revised Guidance recognises the availability of automatic CDO immunity as a significant incentive to apply for leniency. While we support the CMA's objective in principle, it is important that the CMA acknowledges that the proposed removal of automatic immunity (particularly for Type B applicants) risks disincentivising applicants from coming forward. The threat of director disqualification is a key consideration for some businesses, and legal advisors and potential applicants may be discouraged if there is uncertainty about whether directors may be subject to a CDO.
- 5.3 Paragraph 2.42 of the Draft Revised Guidance notes that the decision on whether CDO immunity will be granted "*will usually be taken later in the investigation,*

*when the CMA is in a position to make an informed assessment of the public interest...In some cases, this may be as late as shortly before the issue of any statement of objections".* This ongoing uncertainty and lack of predictability until a later stage in the investigation for Type B and Type C applicants may further discourage applications for leniency, and may also make securing cooperation by directors more difficult.

- 5.4 We would welcome the guidance in the Draft Revised Guidance on the factors that the CMA will consider when deciding whether immunity from CDOs will be granted. This would increase legal certainty for Type B and Type C applicants in parallel to safeguarding administrative discretion.
- 5.5 Paragraph 3.16 of the Consultation Document sets out that the CMA has "*pursued CDOs or CDUs in nine separate cases, resulting in 28 CDUs and one CDO*", acknowledging the CMA's increasing reliance on this enforcement tool since its first disqualification case in 2016. It would be helpful for the Draft Revised Guidance to reference these experiences by clarifying situations where a Type B or Type C applicant has been the subject of a CDO or CDU.
- 6. 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?**
- 6.1 In our view, the external SharePoint Online site should not be the default method for the submission of leniency applications. We recommend that oral submissions remain the default method for the submission of leniency applications as this process minimises the documents created, and therefore held, by the leniency applicant. This is an important consideration for leniency applicants in light of the possibility of follow-on actions. Reducing the risk of the leniency application becoming subject to disclosure provides greater certainty and predictability for leniency applicants.
- 6.2 We welcome the use of the external SharePoint Online site for supplemental submissions, such as supporting appendices and annexes, and separate representations. We have found the key features of the SharePoint Online site to be user-friendly and easy to navigate for submissions and we appreciate the efficiency gains of using this tool. We therefore consider the oral process and SharePoint Online site to be complementary.
- 6.3 The Consultation Document notes at paragraph 3.31(c) that "*applicants are able to use the copy and paste and download functions (as well as other standard formatting tools), should they wish to do so*". Based on our experience, we were unaware that the SharePoint Online site has download functionality. We request that the CMA to disable the download functionality on the SharePoint Online site

to ensure that submissions cannot be downloaded by non-CMA users. This will help minimise the risk of documents being downloaded by the leniency applicant and then potentially being subject to disclosure which could discourage applications and therefore impact the effectiveness of the leniency programme.

6.4 Additionally, it is our experience that access to the SharePoint Online site by specific-nominated individuals is facilitated by the CMA case team, which can take time. In comparison, we note that the European Commission's leniency process allows applicants to automatically access the submission portal online by providing the relevant case number, which reduces the time waiting for access to be authorised.

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

7.1 As set out in response to question 12 above, our view is that the oral application process should remain the default process as written applications increase the risk that leniency applications are disclosable in civil proceedings. Access to file proceedings can disincentivise leniency applications and as a matter of public policy, it is therefore important to preserve the oral application process.

**Ashurst LLP**