

Eversheds Sutherland (International) LLP

Response to the CMA's consultation on
its proposed changes to the guidance on
applications for leniency and no-action in
cartel cases

9 June 2025

1. Introduction

- 1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the consultation on the proposed changes to the guidance on applications for leniency and no-action in cartel cases, as published by the Competition and Markets Authority ("**CMA**") on 29 April 2025 (the "**Guidance**").
- 1.2 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.
- 1.3 Our response reflects our experience in advising clients in respect of investigations by the CMA, sectoral regulators and other competition regulators globally.
- 1.4 We have commented below on certain aspects of the Guidance, in particular, where we consider that the CMA could provide additional guidance or clarification.
- 1.5 We confirm that this response does not contain any confidential information, and we are happy for it to be published on the CMA's website to the extent necessary.

2. Support for the "Genuine intention to confess" standard

- 2.1 We welcome the proposed revision in the CMA's Guidance to shift the requirement for leniency applicants to admit participation in cartel conduct from the initial point of contact to the stage at which a leniency agreement is signed (i.e. prior to the issuance of a Statement of Objections). In our view, this change strikes a more appropriate balance between encouraging early engagement and recognising the practical realities faced by potential applicants.
- 2.2 By allowing companies to approach the CMA without needing to make an immediate formal admission, the revised approach provides applicants with the necessary time to conduct a thorough internal investigation before committing to a position. In our experience, the current expectation of an upfront admission can act as a deterrent for potential leniency applicants, particularly where the evidentiary basis for the infringement is still being assessed. The proposed change is, therefore, likely to foster earlier and more open dialogue with the CMA, ultimately enhancing the effectiveness of the leniency regime.
- 2.3 We also note that this revised approach would bring the CMA's practice more closely into line with that of other major competition authorities, including the European Commission, which does not require a formal admission at the initial stage of a leniency application. This alignment is welcome, as it promotes consistency and predictability for businesses operating across multiple jurisdictions and enables better coordination.

3. Concerns regarding discretionary immunity from director disqualification

- 3.1 We do not support the proposal to introduce discretionary immunity from director disqualification in the context of Type B and Type C leniency applications (as outlined in paragraphs 3.16–3.22 of the consultation document). In our view, the existing distinction in financial penalties between leniency types already provides a meaningful and proportionate incentive structure. The potential for a Competition Disqualification Order ("**CDO**") is a significant consideration for individuals deciding whether to support a leniency application and the fact that a decision on whether or not to grant immunity may not be taken until as late as shortly before the issue of any statement of objections creates a significant incentive for directors not to cooperate given they would be taking the risk that their cooperation with the CMA under the leniency programme could put them at an increased risk of being targeted for a CDO. Removing automatic protection from the outset risks undermining a key motivator for cooperation.
- 3.2 The current framework, under which corporate and individual applicants under Type B and Type C leniency receive automatic immunity from CDOs, offers a clear, predictable, and effective incentive for individuals to come forward and engage fully with investigations. This certainty is particularly important in encouraging early cooperation, which is critical to the success of the CMA's enforcement efforts.

- 3.3 Introducing discretion into this process would create uncertainty and may deter individuals from participating in leniency applications, especially given the potentially severe personal and professional consequences of disqualification. This could, in turn, reduce the likelihood of early and voluntary disclosures, thereby weakening the overall effectiveness of the leniency regime.
- 3.4 We, therefore, urge the CMA to reconsider this proposal and retain automatic immunity from director disqualification for Type B and Type C leniency applicants, subject to appropriate safeguards. Preserving this clarity and certainty is essential to maintaining the attractiveness and effectiveness of the leniency programme.
- 3.5 However, if the CMA proceeds with this change, we strongly encourage that it provides clear guidance on the circumstances in which immunity from disqualification may or may not be granted. Greater certainty is essential to preserving the effectiveness of the leniency regime.

4. **Concerns around the scope of "Relevant Information"**

- 4.1 While we understand the CMA will want to obtain full cooperation from leniency applicants, we have concerns that the scope of an applicant's obligations (as outlined in paragraphs 2.10-2.12 of the consultation document) to provide "*all non-legally privileged information*" including "*the provision of evidence from current and former employees and directors, including making them available for interview and the provision of witness statements by them as may be required by the CMA*" is unreasonably high, and may not, in all circumstances, be achievable. In particular, while an applicant may use its best efforts to secure the cooperation of former employees or directors, in practice, which is often not achievable.
- 4.2 We would, therefore, urge the CMA to recognise in the Guidance that it can be extremely difficult for any applicant to be confident that they have been able to provide "*all*" Relevant Information and that reasonable and proportionate efforts to do so should be sufficient. This issue applies both to large companies where there may be a higher number of former employees concerned and smaller applicants who may have much more limited resources.

5. **Support for SharePoint Online with safeguards against disclosure risks**

- 5.1 We welcome the CMA's adoption of SharePoint Online for the submission of leniency applications and the provision of document access in this context (as outlined in paragraphs 3.27-3.32 of the consultation document). While, in practice, we already request this format to help manage litigation disclosure risks, its formalisation in the Guidance is a positive and practical step.
- 5.2 However, we would welcome assurances in the Guidance that documents submitted via the online platform, particularly leniency statements, will not be accessible to follow-on claimants in private damages actions. We note that the European Commission's practice provides a useful precedent: leniency statements and settlement submissions are explicitly protected from disclosure under the EU Damages Directive¹ and related guidance, in order to preserve the integrity and attractiveness of the leniency regime.

6. **Further clarity on evidence of self-cleaning in the context of disbarment**

- 6.1 Paragraph 3.42 of the consultation document refers to the possibility that a leniency application "*may*" be considered as evidence of self-cleaning in the context of exclusion from public procurement. While we welcome the recognition that cooperation with the CMA may be relevant to such assessments, we believe further guidance is needed on the circumstances in which leniency will or will not be treated as sufficient evidence of self-cleaning.
- 6.2 Given the serious commercial implications of disbarment, greater clarity would assist businesses in understanding how cooperation with the CMA, particularly through early and

¹ [EU Damages Directive](#), at Article 6(6)(a).

comprehensive leniency applications, can mitigate the risk of exclusion from public contracts. We would encourage the CMA to provide illustrative examples or criteria to guide decision-makers in assessing whether a leniency application constitutes adequate evidence of self-cleaning, and how this interacts with other remedial measures taken by the applicant.

- 6.3 In our experience, the CMA often expects leniency applicants to undertake a range of remedial actions, such as updating compliance policies, retraining staff, revising oversight structures, and reviewing trade association memberships. It would be helpful for the CMA to clarify that leniency will be treated as evidence of self-cleaning where such broader remedial efforts are also implemented and acknowledged at the conclusion of the investigation.

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