CMA CONSULTATION – GUIDANCE ON APPLICATIONS FOR LENIENCY IN CARTEL CASES

Response from the City of London Law Society Competition Law Committee

June 2025

1. Introduction

1.1 The City of London Law Society Competition Law Committee ("**CLLS**") welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**'s") review of OFT1495: Applications for leniency and no-action in cartel cases ("**Current Guidance**").

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership, including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent both complainants and those companies under investigation by regulators.

1.3 Our comments are based on our members' significant experience in engaging with the CMA's leniency regime, and other leniency regimes in key jurisdictions. Our response focuses on ways to ensure that leniency remains effective and sufficiently attractive to potential applicants, such that the regime can continue to play an important role in the CMA's strategy to deter anti-competitive conduct by supporting and facilitating the detection of and enforcement actions against cartel activity. We also take note of the CMA's new overarching framework for engaging with businesses: Pace, Predictability, Proportionality and Process (the "**4 Ps**").

1.4 The Committee members responsible for the preparation of this response are:

(a) Nicole Kar, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Chair of the Committee);

(b) Samantha Mobley, Baker & McKenzie LLP; and

(c) Aurora Luoma, Skadden, Arps, Slate, Meagher & Flom LLP.

1.5 Our comments below respond to select questions set out in section 5 of the "Guidance on applications for leniency in cartel cases: Consultation document" (CMA209con) dated 29 April 2025 (the "**Consultation Document**"). We would be pleased to discuss any of our comments in more detail and contribute to any further analysis on these topics.

2. Consultation questions

General questions

Q3. Is the content, format and presentation of the Draft Revised Guidance and of the short guides sufficiently clear?

2.1 The new structure is clear. **We recommend**:

(a) Adding hyperlinks in the digital version's contents page for rapid navigation; and

(b) Inserting an "abbreviations" table near the front.

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?

2.2 Removing up-front Type B immunity and automatic Competition Disqualification Order ("**CDO**") protection risks weakening incentives where there is already a pre-existing investigation. We urge retention of a narrow, clearly-defined pathway to exceptional Type B immunity / near-immunity and earlier confirmation of director protection.

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?

2.3 Paragraphs 7.10 to 7.11 of the Draft Revised Guidance state that applicants should discuss foreign language document issues at an early stage with the CMA and machine translations are usually acceptable for the application package. For applicants with large multilingual datasets, translation of documents for the application package imposes a cost and time burden.

2.4 **We ask** that the CMA offers the option of staged translation (key passages first) in order to expedite the Pace (one of the 4 Ps) of the leniency process.

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

A. <u>Witness interviews and statements</u>

Allow applicant's counsel to attend:

2.5 The CMA relies upon interviews with current and/or former employees and directors to uncover secret cartels and/or bring successful enforcement action (Draft Revised Guidance, paragraph 3.21). Footnote 129 of the Draft Revised Guidance states that the CMA will generally exclude the applicant's lawyer from these interviews, although the applicant may review the transcript afterwards and must correct any inaccuracy. Yet a witness often feels isolated and intimidated when the applicant's lawyer cannot attend.

2.6 This creates tension with the ability for applicants to add value to the CMA's investigation by providing a complete and truthful account of the reported conduct and identify inaccuracies in witness statements (Draft Revised Guidance, paragraph 9.9). Excluding the legal adviser makes it harder for the corporate applicant to meet its duty to identify and correct inaccuracies. In our practical experience, this also causes anxiety for the individual and a sense of separation from their employer at a key stage of a process that has felt like a corporate one up until that point.

2.7 **We ask** the CMA to allow the applicant's lawyer to attend interviews in circumstances where there is no clear indication that the individual's and the applicant company's interests diverge. This approach is also seen in other jurisdictions where legal advisors of the individual and the company may be present at interview. This presence:

(a) helps the witness give a full and accurate account; and

(b) lets the company spot and correct errors fast.

Weight of evidence:

2.8 The assessment of the corporate applicant's leniency cooperation should not be negatively affected by any inaccuracies or inconsistencies in the statements of its employees or former employees, where the company has otherwise fully co-operated with the CMA. **We suggest** that the CMA should weigh corporate records and statements more heavily than witness' recollections when they diverge, because individual employees rarely know the full facts (Annex C, Paragraph 13, Current Guidance).

Notes of interviews:

2.9 Paragraph 3.26 of the Draft Revised Guidance requires applicants to record questions asked and answers given where no transcript or recording exists. **We suggest** deleting this duty. Early interviews often occur before the full facts are known and this requirement risks privilege waiver in other jurisdictions.

Submission of witness statements:

2.10 We note the requirement at paragraph 2.11 of the Draft Revised Guidance (as amended from paragraph 5.14 of the Current Guidance) for the provision of witness statements by employees. **We request confirmation** that witness statements may be provided to the CMA via the secure SharePoint portal to avoid disclosure risks.

B. Type B Leniency for Resale Price Maintenance (RPM)

Remove the 50% cap:

2.11 Paragraph 2.21 of the Draft Revised Guidance says the CMA would not generally expect to grant discounts of more than 50% to Type B leniency applicants in resale price maintenance ("**RPM**") cases, as set out in its Addendum to OFT1495 of September 2020. In our view, capping RPM discounts at 50% for Type B leniency applicants blunts the incentive to self-report. **We propose** restoring full flexibility up to 100% where cooperation is fast and valuable.

Importance of flexibility:

2.12 The CMA's broad discretion in setting the level of discount for Type B leniency applicants allows the CMA to assess levels of cooperation on a case-by-case basis. The potential for receiving a larger discount is the core incentive for Type B leniency applicants. Leniency discounts should reflect the CMA's consideration of each applicant's leniency application, level of cooperation, value-add, and commitment to the process on its merits.

2.13 By capping discounts at 50%, there is less incentive for a potential applicant to come forward with evidence at an early stage, where only Type B leniency is available. Without a real "race" to cooperate, applicants may wait and see if the CMA drops the case, narrows its scope, or until the applicant has a better understanding of the case, while remaining eligible for the same maximum level of discount as a Type C applicant.

2.14 Early disclosure often decides whether the CMA can issue an infringement decision. Maintaining strong incentives for Type B applicants to self-report as quickly and fully as possible is crucial for this disclosure.

2.15 Instead of capping the available Type B leniency discounts including for applicants of quick, full and high value-add cooperation, **we ask** that the CMA clarify how its expectations on cooperation might translate into a higher leniency discount for a Type B applicant. For example, a supplier applicant in the context of RPM may add considerable value to the CMA's understanding and provide significant evidence necessary to establish the scope of problematic conduct.

2.16 **We also suggest** that the CMA clarify what may constitute significant value-add by providing (appropriately anonymised) examples drawn from recent cases.

C. Adjustment of scope of the leniency marker

2.17 We note that the CMA in its Current and Draft Revised Guidance indicates that the scope of the marker may be adjusted in light of further emerging details and evidence as the investigation progresses (paragraphs 5.13, 5.14 and 7.35 of the Draft Revised Guidance). In the interests of predictable and constructive engagement with leniency applicants **we suggest** the CMA provides further guidance that outlines the likely triggers for and timing of any proposed adjustment of the scope of an initial marker to allow leniency applicants fair opportunity to put

forward information in support of their application and to provide predictability as to the prospects of the scope of the marker being expanded if additional information is put forward to the CMA in respect of an infringement that may fall outside the scope of any existing marker.

D. Disclosures to third parties

2.18 The CMA's approach to disclosures to third parties is effectively unchanged in the Draft Revised Guidance. We understand the utmost importance of confidentiality surrounding leniency applications given the risks of tip-off and compromising evidence. However, in practice, auditors, banks, advisors and regulators often need basic information. Requiring CMA approval for every disclosure whilst an investigation is ongoing is impractical.

2.19 **We ask** that the CMA takes a more practical approach to this by publishing examples of permitted routine disclosures to banks, auditors, advisors and/or regulators to remove the need for applicant companies to consult the CMA in advance of even routine meetings, in particular where an investigation is already public. Ultimately it is for the company to take appropriate steps to ensure confidentiality is maintained by third parties, and requiring CMA approval adds limited value at the expense of efficiencies.

E. Other updates bringing the Current Guidance up to date

2.20 **We support** the updates that reflect:

(a) removal of dishonesty from the cartel offence (set out at section 188(1) of the EA02, as amended by section 47(2) of the Enterprise and Regulatory Reform Act 2013 ("**ERRA**"));

(b) transfer of OFT powers to the CMA, pursuant to ERRA;

(c) the Damages Directive and related protection from disclosure for damages claims;

(d) the UK's exit from the European Union and the extension of the commitment not to pass leniency information to an overseas agency to the European Commission and EU national competition authorities;

(e) the Digital Markets, Competition and Consumers Act 2024; and

(f) the new debarment regime governed by the PA23 – particularly the CMA's proposal that Type A immunity recipients (and any Type B leniency recipient that obtains a 100% reduction in penalties or discretionary criminal immunity) benefit from automatic protection from debarment or exclusion from procurement on competition law grounds. This further incentivises leniency applicants to self-report at an early stage, particularly if their sector is heavily involved in public procurement activities. We agree with the proposal that Type B and Type C leniency applicants may avoid exclusion or debarment on competition law grounds if they can demonstrate, to the satisfaction of a contracting authority or Minister, that they have 'self-cleaned' (i.e., that the circumstances giving rise to the application of the exclusion are not continuing or likely to happen again).

2.21 **We also suggest** that the CMA provide an annexed list of regulated sector contacts.

Specific 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 examples of cartel activity (including any comments on the examples now included)?***

2.22 The Draft Revised Guidance includes further examples of cartel activity that align with CMA practice, CMA guidance and case law. The definition also aims to retain sufficient flexibility to grant leniency, covering conduct not expressly listed that may fall within the scope of the policy in the future. These examples are helpful, but **we suggest** further examples of cartel activity be included to give companies certainty.

2.23 **We ask** that the CMA take a broader view on conduct that warrants leniency, as further described below.

2.24 **We also suggest** that the CMA adds an explicit paragraph confirming that inclusion in the illustrative list does not mean that an agreement will invariably be considered cartel activity – the legal assessment will depend on the facts of a particular case and applicants may seek confidential guidance where characterisation of the conduct is unclear.

- ***Are there any other examples of cartel activity that you think should be included?***

2.25 **We ask** that the examples be updated to provide further Predictability (one of the 4 Ps):

(a) **Paragraph 2.2**: "*market sharing or market-dividing*" should include agreeing to maintain specified market shares (see for example CMA Case 50299).

(b) **Paragraph 2.3**:

(i) Should explain that RPM includes minimum advertised price restrictions (see for example CMA Cases CE/9856-14 and 50565-5); and

(ii) Should include all hardcore vertical restraints listed in section 8 of The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (such as conduct amounting to prohibiting online sales, online price advertising (see for example CMA Cases 50230 and CE/9578-12), territorial and customer resale restrictions), and information exchange unlikely to be genuinely vertical because it is not required to implement a vertical agreement (i.e., see paragraph 6.26 of the CMA "Guidance on the Vertical Agreements Block Exemption Order" of 12 July 2022 (CMA166)).

(c) **Paragraph 2.4(a)**: should include agreements between competitors to:

(i) Coordinate discount activity (see for example CMA Case 50930); and

(ii) Fix a minimum level of commission fees (see for example CMA Case 50235).

(d) **Paragraph 2.4(b)**: should ensure clarity that the description is intended to cover all exchanges of commercially sensitive information (including, where applicable, information relating to individuals' compensation) where it has the object of preventing, restricting or distorting competition (and not just exchanges relating to current or future pricing intentions). The CMA should change "*[…] regarding current or future pricing intentions […]*" to "*[…] such as regarding current or future pricing intentions or current or future wages*".

(e) **Paragraph 2.4(c)**: should explain that bid-rigging includes coordinating responses to invitations to tender (see CMA Case 50366-1).

(f) **Paragraph 2.4(e)**: should include:

(i) Prohibitions on fee advertising (see CMA Case CE/9827/13); and

(ii) Agreements between competitors to restrict advertising (see for example CMA Case 51098).

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?

2.26 Paragraph 2.6 of the Draft Revised Guidance delays the requirement for admission of participation in cartel activity, with such admission not required until a leniency agreement is signed.

2.27 **We welcome** this change. This flexibility is important to support early engagement and the effectiveness of the leniency regime, and acknowledges the practical challenges that applicants face when potential misconduct is uncovered. At an early stage, it is rarely possible to determine the full extent of cartel activity until further investigation is carried out, typically in close coordination with the CMA. It is natural and expected that an applicant's view of the conduct crystallises later in the process.

2.28 Allowing applicants to admit liability only when the leniency agreement is signed encourages early engagement and allows for a better informed admission of conduct at a later stage. As the CMA notes in paragraph 3.9 of the Consultation Document, requiring early certainty may deter engagement, particularly if the facts are still being established.

2.29 This change also mirrors established practices in other jurisdictions (e.g., the USA and EU), where flexibility has proven effective in supporting enforcement outcomes while ensuring procedural fairness.

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:

- ***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 leniency applicants;***

2.30 **We welcome** the statement that applicants that provide evidence of new, but related infringements may benefit from the "but for" test if Type A leniency is not available (paragraph 6.11).

2.31 However, the Draft Revised Guidance proposes to limit the discounts and protections available to Type B and Type C applicants, which risks undermining the regime. This may be detrimental to Pace (one of the 4 Ps). Specifically, the Draft Revised Guidance:

(a) Removes upfront immunity for corporate Type B applicants (Consultation Document, paragraph 3.1(c)(i));

(b) Says that in practice, "*Type B discounts are unlikely to be above 75% and may be significantly lower*" (paragraph 2.21);

(c) Says that Type C applicants will only be eligible for "*discretionary reductions in corporate penalties of up to 50%*" (paragraph 2.28) and can "*generally expect […] discounts in the range of 25% to 50%*", but "*lower value and/or late applications may gain awards of less than 25%*" (paragraph 9.11);

(d) Says that discounts for successful Type B and Type C applicants are "*likely to be above 10%*" (footnote 38); and

(e) Says that "leniency plus" is unavailable to Type B applicants in the second market. This aligns the "novel evidence" requirement (for "leniency plus") with the condition for no

pre-existing CMA investigation relating to the reported cartel activity (for Type A immunity).

2.32 This will limit the financial incentives for Type B and Type C applicants to add value to investigations and cooperate expeditiously and effectively.

2.33 **We recommend** retaining the CMA's discretion to grant upfront immunity for Type B applicants where the evidence provided is decisive in uncovering cartel activity or genuinely "unlocks" a stalled investigation. **We also recommend** allowing discounts above 75% for Type B applicants where cooperation is prompt, complete, and valuable to maintain a strong incentive for early reporting.

2.34 Regardless of whether the CMA retains its discretion to grant upfront immunity for Type B applicants and award higher discounts than the percentages in the Draft Revised Guidance, **we ask** that the CMA provides more extensive guidance on the specific types of cooperation measures that are more likely to trigger higher leniency discounts within the relevant bands. If the CMA decides to retain its discretion to grant upfront immunity for Type B applicants, the CMA should provide guidance on the specific circumstances when this might be appropriate.

- ***the removal of automatic immunity from CDOs for cooperating directors of Type B and Type C leniency applicants (including individual applicant directors);***
- ***the clarifications regarding the level of cooperation expected from directors in order to benefit from CDO immunity;***
- ***the clarifications to the process for removing CDO immunity from non-cooperating directors; and/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?***

2.35 The Draft Revised Guidance also limits the protections for individuals available to Type B and Type C leniency applicants.

Protection from disqualification

2.36 Paragraph 2.20 of the Draft Revised Guidance says that cooperating directors of successful Type B or Type C applicants would no longer have automatic protection from disqualification. Immunity will instead be "*discretionary*" for "*cooperating current and former directors*" and only granted to "*specific individuals*" or "*all directors other than any named individuals*".

2.37 **We welcome** the clear statement that former directors are eligible for immunity. However, the other changes may lead to uncertainty and disincentivise individuals from cooperating fully with CMA investigations. Companies may also be disincentivised from leniency if their directors are not automatically protected.

2.38 **We ask** that the CMA continues to provide automatic immunity from director disqualification for cooperating directors of successful Type B and C applicants. **We also suggest** that the CMA publish non-exhaustive criteria and indicative timing for the CDO decision and confirm that good-faith cooperation will normally secure immunity.

Protection from criminal immunity

2.39 Paragraph 2.20 also says that criminal immunity for cooperating individuals would no longer be only "*discretionary*", but also only for use in "*exceptional cases*".

2.40 Tightening the circumstances for cooperating individuals to benefit from criminal immunity risks disincentivising Type B and Type C applications and the cooperation of key individuals.

2.41 **We suggest** that the CMA clarify that where an individual's cooperation is indispensable to the criminal case, immunity can still be granted, and set out factors that will be applied in determining whether immunity should be granted.

2.42 If the CMA considers this restriction is necessary and beneficial, **we ask** that the CMA at the least sets out clear and Predictable (one of the 4 Ps) criteria for when such immunity will be granted.

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?

2.43 We welcome the CMA's suggestion to use an external SharePoint Online site (the "**Online Procedure**") as the default method for submitting leniency applications. This cuts time and cost for both sides, improving the Pace (one of the 4 Ps) of the regime.

2.44 Paragraph 3.29 of the Consultation Document notes that the current process for submitting oral leniency applications requires numerous steps and is time-consuming. In practice, this is because:

(a) Generally, the CMA requires at least a few days' notice to arrange meetings and prepare recording equipment for the applicant to orally present the application;

(b) It can take a number of days to transcribe the submission (often over a week for longer submissions); and

(c) Typically, the CMA allows the applicant a week to review the transcript for accuracy.

2.45 Using the Online Procedure will accelerate this process and allow the CMA to access information relevant to its investigation faster. This will benefit the parties to an investigation by reducing the investigation's timeline.

2.46 Paragraph 3.29 of the Consultation Document also notes that the current process can be resource-intensive for both the applicant and the CMA. The Online Procedure will require less time to submit applications. We understand from paragraph 3.31(a) of the Consultation Document that multiple people may access the SharePoint Online site, enabling longer applications to be prepared by multiple individuals. The new process will also significantly reduce the burden on the CMA by entirely removing the requirement to transcribe applications.

2.47 **We suggest** the following tweaks to the Online Procedure described in the Consultation Document and Draft Revised Guidance:

(a) Allow applicants to self-access a blank SharePoint portal immediately, without the need for prior CMA approval or manual granting of access (similar to the EC's process). This will allow faster and more efficient submission of evidence.

(b) Disable copy, paste, and download functions within the SharePoint portal to ensure that the confidentiality and legal privilege of leniency submissions are protected to the same standards as the EC's eLeniency platform. This will minimise the risk of disclosure in other jurisdictions, such as disclosure requested in the context of private litigation.

2.48 As with witness statements (as outlined above), **we request** that the CMA permits the negotiation and exchange of draft leniency agreements and no-action letters within the SharePoint portal, with final execution taking place at the CMA office (which is an option that is available for cooperation letters) to maintain confidentiality and legal protection (see paragraph 8.8 of the Draft Revised Guidance).

2.49 **We also ask** that the CMA confirm that:

(a) Data is stored only on CMA-controlled UK servers;

(b) The oral process remains available on reasonable request; and

(c) For data protection reasons, use of SharePoint is optional where foreign blocking statutes or cyber-security policies require.

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

2.50 If the CMA takes into account our comments on the Online Procedure as set out above in paragraphs 2.43 to 2.49 of our response, and provides the same level of confidentiality and legal protection as the traditional oral application process, the oral process could be generally discontinued (though kept available on reasonable request).

2.51 However, if the Online Procedure does not fully protect against the risk of disclosure in follow-on litigation or in other jurisdictions, it is important that the oral process remains available as an alternative for applicants who require the highest level of confidentiality.

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The CLLS is ready to discuss these points and provide further input.

City of London Law Society Competition Law Committee

13 June 2025