

## **Type B leniency in RPM cases – draft Addendum to OFT1495 – Consultation**

### **Background to Consultation**

1. This is a consultation on a draft Addendum to the CMA's Leniency Guidance.<sup>1</sup>
2. The draft Addendum is intended to clarify the way in which the CMA will exercise its discretion in relation to the grant of Type B leniency in resale price maintenance (RPM) cases under the Competition Act 1998 (CA98), following reflection on the CMA's experience of applying its leniency policy in relation to RPM cases in practice.
3. The text of the draft Addendum can be found in the Annex to this document.
4. The CMA considers the proposed approach to be appropriate given the nature of RPM cases as compared with horizontal cartel cases, and in order to reduce the current limitations on deterrence.

### **Rationale for Change**

5. Leniency is available in relation to 'cartel activity', the definition of which includes price fixing in vertical arrangements by way of RPM.<sup>2</sup>
6. In RPM cases (as for other cartel cases), the CMA:
  - must grant successful Type A<sup>3</sup> applicants immunity;
  - may grant successful Type B<sup>4</sup> applicants immunity or up to a 100% discount on any financial penalty;
  - may grant successful Type C<sup>5</sup> applicants up to a 50% discount on any financial penalty.
7. The CMA considers that its policy as regards Type B leniency in RPM cases

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<sup>1</sup> OFT 1495, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, July 2013, available at: [OFT1495](#). This Leniency Guidance sets out the detail of how the CMA will handle applications for leniency.

<sup>2</sup> CMA73, *Guidance as to appropriate amount of a penalty*, 18 April 2018, paragraph 3.1; and OFT1495, paragraph 2.2.

<sup>3</sup> Type A immunity applies to the first applicant to report and provide evidence of a cartel when the CMA does not have a pre-existing investigation into the reported cartel activity and does not otherwise have sufficient information to establish the existence of the reported cartel activity.

<sup>4</sup> Type B leniency applies to the first applicant to report and provide evidence of a cartel, when the CMA is conducting a pre-existing investigation into the reported cartel conduct.

<sup>5</sup> Type C leniency applies where another undertaking has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity.

has the potential to be overly generous, limiting deterrence.

8. In reaching its current view, the CMA notes that RPM cases are by their nature different from horizontal cartel cases. For example:
- they tend not to be either as secretive or as complex, insofar as the evidence in RPM cases is less likely to be disparate from different sources and is more often in writing;
  - where the section 25 CA98 test has been met in an RPM case, the CMA is more likely already to be in possession of good evidence of an infringement; and
  - there are only ever two parties to an RPM agreement – a supplier and a reseller, whereas horizontal cartel cases often involve several parties.

Thus, the value that a Type B applicant can add is less than in a horizontal cartel case, and unlikely to be sufficient to justify immunity or a discount of up to 100% in any financial penalty.

9. The CMA further notes that because there are only ever two parties to any RPM agreement (the supplier and the reseller), the ability for a Type B applicant to obtain immunity or up to a 100% discount vastly reduces the CMA's ability to fine and so achieve deterrence.
10. This is exacerbated by the fact that, to date, the CMA has primarily received Type B leniency applications from suppliers, which are generally the larger party to a RPM case in terms of turnover and the more culpable, particularly where the case involves multiple infringements by the same supplier with a number of resellers. This has had two implications for the CMA's ability to deter RPM infringements through the imposition of financial penalties:
- the CMA has tended not to address the infringement decision to, or fine, the reseller in such cases,<sup>6</sup> with the result that the only party fined in such RPM cases with a Type B applicant is the supplier (i.e. the Type B applicant);
  - even where a reseller obtains a leniency marker in relation to an RPM agreement, the supplier concerned may still qualify for immunity or leniency in respect of its conduct in relation to all its other resellers, thus reducing the CMA's ability to fine across a number of additional cases.
11. The CMA therefore proposes, by way of an Addendum to its Leniency Guidance, to clarify the way in which it will exercise its discretion in granting Type B leniency in RPM cases, such that, in general:
- immunity would not be granted; and
  - the CMA would not grant a reduction in the level of any penalty of more than 50%.

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<sup>6</sup> See rule 5(3) and rule 10(2) of the CMA's Rules: SI 2014/458 *The Competition Act (Competition and Markets Authority's Rules) Order 2014*.

## Invitation to Comment

12. The CMA welcomes your comments on the draft Addendum.

13. Comments should be sent by 28 August 2020 to [RPMLeniency-Consultation](#)

## Statement about how the CMA uses information and personal data that is supplied in consultation responses

14. Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation, namely the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
15. The CMA will process this personal data for the purposes of its work. Such processing is necessary for the performance of the CMA's functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that the CMA properly consults on the draft Addendum.
16. For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact the CMA, details of the CMA's Data Protection Officer, and how long the CMA retains personal data, see the CMA's [Privacy Notice](#).
17. The CMA's use of information and personal data is also subject to Part 9 of the Enterprise Act 2002 (EA02). The CMA may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, the CMA will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in its opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
18. Information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, the CMA will take fully into consideration any representations made by you in support of confidentiality. The CMA will also be mindful of its responsibilities under the data protection legislation referred to above and under Part 9 of the EA02.
19. If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

## **Next Steps**

20. The CMA will publish in due course the final outcome of this consultation, taking into account the comments received in response to it.

**ANNEX**  
**DRAFT ADDENDUM TO OFT1495**

1. This Addendum to the Leniency Guidance<sup>7</sup> sets out the way in which the CMA will exercise its discretion in relation to the grant of Type B leniency in Resale Price Maintenance (RPM) cases.
2. The CMA may grant successful Type B applicants immunity or up to a 100% discount on any financial penalty.<sup>8</sup>
3. However, the CMA **would not generally expect to grant immunity or discounts on any financial penalty of more than 50% to Type B applicants in RPM cases, and the detailed provisions of the Leniency Guidance should be read accordingly.**
4. The provisions of this Addendum will apply to leniency applications made on or after [DATE on which the Addendum is published].

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<sup>7</sup> OFT 1495, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, July 2013.

<sup>8</sup> CMA73, *Guidance as to appropriate amount of a penalty*, 18 April 2018, paragraph 3.1; and OFT1495, paragraph 2.2.