

Type B leniency in RPM cases – draft Addendum to OFT1495 – Consultation – Summary of Responses and Outcome

Introduction and summary

1. On 30 July 2020, the CMA published a consultation on Type B leniency in RPM cases, inviting views on a draft Addendum to the CMA’s Leniency Guidance (the ‘Consultation’).¹
2. The draft Addendum sought 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 RPM cases in practice.
3. The draft Addendum provided that in granting Type B leniency in RPM cases, 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%.
4. The Consultation closed on 28 August 2020.

Issues raised by the Consultation and the CMA’s response

5. In the Consultation, the CMA stated that it considered the provisions of the draft Addendum to be appropriate given the generally less secretive and complex nature of RPM cases as compared with horizontal cartel cases, and in order to reduce the current limitations on deterrence. The CMA noted in particular that:
 - because there are only ever two parties to any RPM agreement (the supplier and the reseller),² the ability for a Type B applicant to obtain immunity or up to a 100% discount vastly reduces the CMA’s ability to fine;
 - given the nature of RPM cases, the value that a Type B applicant can

¹ 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.

² Noting also that the CMA typically receives Type B leniency applications from suppliers, which are generally the larger party to an RPM case in terms of turnover and the more culpable.

add is unlikely to be sufficient to justify immunity or a discount of up to 100% on any financial penalty.

6. The CMA received one response to the Consultation. A summary thereof is set out below, along with the CMA's response.³

Summary of response

7. The respondent acknowledged the CMA's concerns that fines in RPM cases involving a Type B leniency applicant have the potential to lead to 'overly generous' outcomes, limiting deterrence.
8. However, the respondent also set out the following views.
 - *Leniency applications should be considered on their own merits.* The CMA has a wide margin of appreciation in settling the level of discount in Type B leniency cases. There is no reason for the CMA to limit its discretion in this context and doing so may lead to lower levels of cooperation and compliance overall. The proposed approach may also reduce or limit incentives for a company to come forward with evidence as soon as possible.
 - *Leniency should be encouraged.* A Type B applicant in an RPM case can add enormous value to the CMA's understanding of the case and its scope, including by providing information about a wider course of conduct. The availability of a discount of up to 100% incentivises a supplier to reveal the extent of any conduct, and acts as a driver of compliance.
 - *RPM conduct is not limited to two parties and is increasingly secretive and complex.* RPM cases often involve conduct between a supplier and many or most of its resellers; and undertakings can make efforts to conceal RPM conduct. It remains important to maintain strong incentives for potential Type B applicants.
 - *Deterrence against suppliers is not undermined.* The possibility for a Type B applicant to obtain immunity or up to 100% discount on fines does not preclude the CMA from imposing significant fines, and fines are not the only deterrent aspect of a case.

The CMA's views

9. The CMA agrees that leniency applications should be assessed on their own merits, and considers issues on a case by case basis, exercising its discretion and judgment. The CMA also agrees that leniency is to be encouraged, and that there should be an incentive for prospective applicants to apply for leniency

³ Response from Baker McKenzie, *Response to the CMA Consultation on a Draft Addendum to OFT1495 on the CMA's approach to granting type B leniency in resale price maintenance cases*, August 2020.

early.

10. However, drawing on the CMA's experience in RPM cases, the CMA continues to consider that there are important differences in the nature of RPM and horizontal cartel cases, which are reflected in the value that a Type B applicant will generally be able to add. The CMA is further concerned to reduce the current limitations on deterrence in the context of (two party) RPM cases.
11. Based on its experience, the CMA believes that balancing the incentives for leniency for RPM conduct against the need to achieve deterrence through higher fines, is consistent with it generally being appropriate for the CMA to apply a maximum discount of 50% for Type B leniency.
12. The CMA is of the view that a 50% discount on any financial penalty for Type B leniency continues to provide an incentive for a party to apply for leniency. It further notes that Type A immunity remains available in RPM cases, so the provisions of the draft Addendum result in a stronger incentive for applicants to come in and self-report before the CMA is aware of the conduct.
13. Thus, having considered carefully the respondent's views, the CMA continues to believe that the provisions of the draft Addendum are appropriate.

Next Steps

14. On 24 September 2020 the CMA published the final version of the Addendum alongside its Leniency Guidance.
15. The Addendum applies to new leniency applications made on or after 24 September 2020.

24 September 2020