

Applications for leniency and no-action in cartel cases

CMA210con

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Foreword

1. The purpose of the Competition and Markets Authority (CMA) is to promote competition and protect consumers. The CMA helps people, businesses, and the UK economy by promoting competitive markets and tackling unfair behaviour. One way the CMA seeks to achieve this is by resolutely deterring anti-competitive behaviour.
2. Cartels are considered to be amongst the most serious types of anti-competitive behaviour. They include agreements between competitors to fix prices, share markets and rig bids. This type of conduct deprives people of genuine choice and fair deals. It also reduces incentives for business investment and innovation, which are key drivers of productivity and growth.
3. The CMA's leniency policy is an important part of the CMA's strategy to deter anti-competitive behaviour by supporting the effective detection and enforcement of cartel activity. The policy encourages firms and individuals who have been involved in cartel conduct to come forward and cooperate with the CMA in return for immunity from, or a reduction in, financial penalties, and immunity from criminal prosecution and/or protection from director disqualification proceedings.
4. The key benefits of offering leniency are:
 - **Detection:** most cartels are conducted in secret. Alongside intelligence leads and other detection tools, the leniency policy helps the CMA to uncover cartels that might otherwise go undetected.
 - **Enforcement:** by encouraging firms and individuals to provide direct 'insider' evidence and cooperate proactively with CMA investigations, the leniency policy helps the CMA to take efficient and robust enforcement action against cartel conduct.
 - **Termination:** a condition of leniency is that the applicant must refrain from further participation in cartel activity (even if the CMA does not launch a formal investigation).
 - **Redress:** by facilitating the detection of previously undetected cartels and improving the CMA's ability to take effective enforcement action, the leniency policy increases the CMA's ability to reach and publish infringement decisions in relation to cartel activity. Such decisions can be used as the basis of compensation claims for victims of the cartel.
5. The existence of the leniency policy, with the various benefits described above, can, in and of itself, **deter cartel activity**, in particular by increasing

the risk of detection and enforcement. By sowing distrust amongst cartel members, leniency destabilises cartels, making it less likely that they will endure. In addition, by increasing the risk of detection, leniency reduces the likelihood of cartels being formed in the first place. Further, if firms and individuals continue to engage in cartel activity despite the risks and consequences of doing so, the leniency policy helps the CMA to take efficient and robust enforcement action. Such enforcement action creates a further deterrence effect.

6. All of these benefits together ensure that the CMA's leniency policy can increase compliance with competition law, thereby building trust in the UK economy. More effective compliance with competition law increases competition, leading to lower prices, as well as more innovation, choice, quality, security of supply, productivity, investment, and economic dynamism. Although an offer of immunity or other lenient treatment to those who have infringed the law is not undertaken lightly, it is justified by the contribution it makes to tackling and deterring anti-competitive behaviour, in the public interest.
7. In applying the leniency policy, the CMA strives to ensure that it is recognised for the following key features:
 - the availability of detailed guidance, with a view to enhancing clarity, predictability, transparency and certainty for applicants and their legal advisers about the CMA's leniency policy and process;
 - a reputation for fair application of the guidance;
 - the availability of 'short guides' to leniency for both businesses and individuals to provide a short introduction to the CMA's leniency policy and process;
 - a commitment to accessibility, approachability, and constructive and open engagement with leniency applicants to ensure efficiency and proportionality of approach; and
 - erring in favour of the applicant where it is genuinely a 'close call.'

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1. Introduction

- 1.1 This guidance¹ sets out the detail of how the CMA will handle applications for civil leniency for undertakings (leniency agreements) and immunity from criminal proceedings (no-action letters) and Competition Disqualification Orders (CDOs) (individual immunity agreements) for individuals.² This document is primarily intended for legal practitioners, as it aims to provide the reader with a thorough understanding of the CMA's approach to leniency – the overarching principles, as well as the detail. It is accompanied by two 'short guides' which provide an overview of the CMA's leniency policy for individuals and businesses who are considering applying for leniency.³
- 1.2 The guidance is structured to follow the natural chronology of a leniency application and any subsequent investigation and enforcement action. The application process is summarised in two overview charts which appear at the end of this chapter:
- overview chart A sets out the process for enquiries and applications made before the launch of a formal investigation; and
 - overview chart B sets out the process for enquiries and applications where the prospective applicant is already aware of an investigation into the relevant cartel activity.⁴
- 1.3 The guidance covers requirements and procedures applicable to civil investigations into Competition Act 1998 (CA98) infringements by undertakings, criminal investigations into cartel offences by individuals under the Enterprise Act 2002 (EA02) and CDO investigations and proceedings under the Company Directors Disqualification Act 1986. Applicants should

¹ This guidance replaces *Applications for leniency and no-action in cartel cases* (OFT1495, issued July 2013). It came into effect on [date final guidance is published] and applies to all leniency applications made from that date onwards. OFT1495 will continue to apply to applications made before [date final guidance is published] (for this purpose, the applicable date will be the date on which the applicant first leaves a voicemail or speaks to a CMA officer on the CMA leniency enquiry line to make an enquiry about the availability of leniency). However, applicants may find it useful to refer to this guidance for details of the CMA's processes and updated legal provisions.

² The availability of leniency for undertakings in civil cases (immunity from, or reductions in, penalties) is set out in the CMA's Penalty Guidance, *CMA's guidance as to the appropriate amount of a penalty* (CMA73). The availability of criminal immunity is established in section 190(4) of the Enterprise Act 2002. The availability of CDO immunity is set out in the CMA's *Guidance on Competition Disqualification Orders* (CMA102).

³ *Short guide to cartels and leniency for businesses* and *Short guide to cartels and leniency for individuals*.

⁴ Cases where the CMA has commenced an investigation but then receives a related leniency application from an applicant who was not aware of that investigation (for example because the details of the investigation are not in the public domain) are expected to be rare. In such cases, the CMA will be able to advise the applicant of the appropriate procedure.

note from the outset that these types of investigation may arise regardless of whether the application is made by an undertaking or an individual. For this reason, the guidance sets out certain requirements designed to ensure that the CMA can pursue criminal investigations and prosecutions in appropriate cases,⁵ as well as setting out the process in CA98 investigations and the interaction with CDO investigations and proceedings. Leniency applicants will be required to cooperate with all relevant enforcement action, including any resulting appeals.

- 1.4 In the CMA's experience, applications from undertakings are more common than applications from individuals. Accordingly, most of this guidance deals with applications from undertakings. Chapter 12 outlines the relevant processes for individuals (both individual immunity applicants and the employees and directors of undertakings that apply for leniency), cross-referencing where appropriate to other parts of this guidance.
- 1.5 The interaction between civil, criminal and CDO procedures, and the variety of different circumstances that can give rise to leniency applications, mean that this is a complex topic. We aim to strike an appropriate balance in this guidance between detailed guidance offering certainty, and maintaining sufficient flexibility to adapt the policy as appropriate in specific cases, for example where novel points or circumstances arise. It should always be remembered that would-be applicants (whether undertakings or individuals) and their advisers who are unsure about particular aspects of the policy or how it will apply in their circumstances can seek further guidance – if necessary on a no-names basis.⁶
- 1.6 The CMA's policy in relation to the handling of leniency applications is likely to continue to evolve and the CMA reserves the right to depart from this guidance where it considers it appropriate to do so in all the circumstances of the particular case. Furthermore, although this guidance covers most of the points likely to be of immediate concern to businesses, individuals and their advisers, it makes no claim to be comprehensive or to address in advance every conceivable situation which might arise. It cannot be seen as a substitute for the law itself, nor can it be cited as a definitive interpretation of the law. Applicants (or potential applicants) should engage with the CMA at an early stage if they are concerned about an issue that is not directly addressed in this guidance.

⁵ Even if the applicant does not consider that any of its employees or directors has committed the criminal cartel offence, it is important to realise that criminal activity could have been undertaken by individual employees or directors of another undertaking involved in the cartel.

⁶ This is set out further in chapter 4.

- 1.7 The reader should take particular note of the definitions used. A glossary of terms is included at the end of this guidance.
- 1.8 This guidance and the other CMA leniency documents are all available on the UK government website (www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases).

Key features of the UK leniency system

- 1.9 The key features of the UK leniency system are:
- the availability of confidential guidance on a no-names basis about ‘hypothetical’ cases on request;
 - the ability of legal advisers to determine whether immunity is available for their client prior to the client’s identity being revealed;
 - a ‘single queue system’ for the handling of leniency applications within those regulated sectors where there is a regulator with concurrent powers to enforce the CA98 and to apply to the court for a CDO;
 - the availability of ‘markers’ for leniency pending formal agreement on the scope of leniency protection;
 - the possibility of applications by undertakings, associations of undertakings⁷ or individuals;
 - guarantees of immunity from financial penalties where an undertaking applicant informs the CMA of cartel activity that was not previously under investigation;⁸
 - guarantees of immunity from prosecution for the criminal cartel offence (criminal immunity) for all cooperating current and former employees and directors⁹ in cases where an undertaking applicant informs the CMA of cartel activity that was not previously under investigation;

⁷ See footnote 13.

⁸ Undertaking applicants who are granted immunity from financial penalties will also be exempt from exclusion or debarment from public procurement on competition law grounds under the Procurement Act 2023, as set out further at paragraph 2.69.

⁹ References to employees and directors throughout this guidance should also be read as including other officers of a company, such as company secretaries, even where they are not technically directors or employees.

- guarantees that the CMA will not apply for a CDO (CDO immunity) against any cooperating current or former¹⁰ director of an undertaking applicant that informs the CMA of cartel activity that was not previously under investigation;¹¹
- guarantees of criminal and CDO immunity for individual applicants who inform the CMA of cartel activity that was not previously under investigation, and the possibility (where the CMA considers that it would be in the public interest) of criminal and/or CDO immunity for individual applicants who are not the first to apply and/or where there is already a pre-existing investigation;
- the availability of a reduction of any penalty which might be imposed on applicants who are not the first to apply and/or whether there is already a pre-existing investigation, and the possibility (where the CMA considers that it would be in the public interest) that some cooperating current or former employees and directors in such circumstances will be granted individual criminal and/or CDO immunity;
- where the CMA agrees with the applicant that it is appropriate, the possibility of making an application online or orally;¹² and
- a high threshold, both as to the circumstances and standard of proof, for finding an undertaking or individual to be a coercer and therefore ineligible for corporate and/or criminal immunity.

Overview of types of leniency and the application process

1.10 Table A below summarises the different types of leniency that are available, by reference to the stage at which the application is made, the level of information provided, the conditions of leniency and the level of protection available. This is a quick reference guide and not intended as a substitute for the fuller guidance in Chapter 2 of this guidance. The table relates to

¹⁰ However, the CMA may still apply for a CDO against a director who has at any time been removed or has otherwise ceased to act as a director of a company owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency. For further guidance see *Guidance on Competition Disqualification Orders* (CMA102).

¹¹ Note that this does not preclude a criminal court from making a Director Disqualification Order following a conviction for a cartel offence. Orders can be made in such cases without an application by the CMA. See further paragraphs 12.14 to 12.18.

¹² Online applications refer to the process through which leniency statements and related submissions are made by typing into a document held on the CMA's server. Oral applications refer to the process through which leniency statements and related submissions are read aloud to be recorded and transcribed by the CMA.

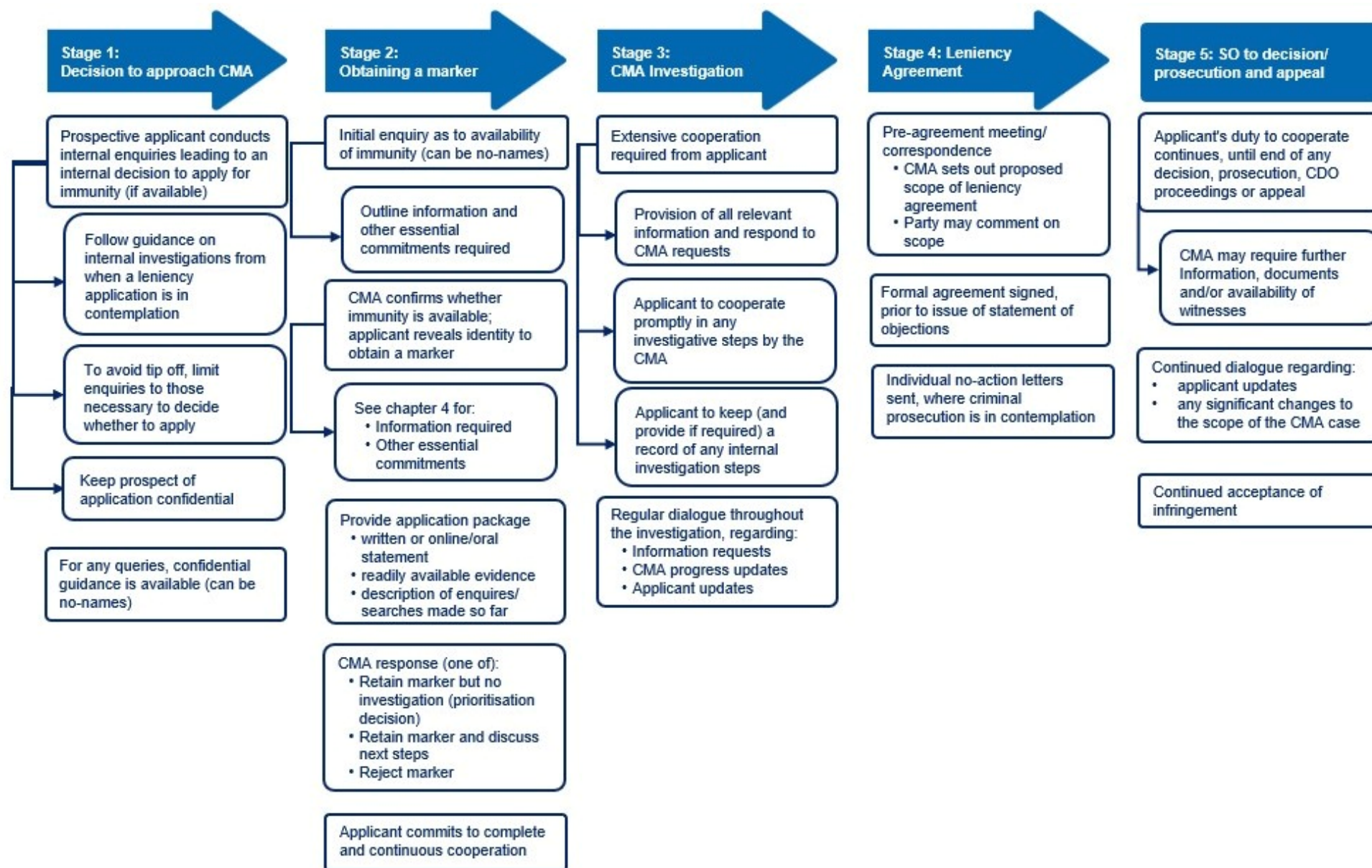
applications by undertakings; for details of the types of immunity that are available to individuals applying in their own right, please refer to Chapter 12.

- 1.11 Overview Charts A and B below illustrate the processes to be followed when applying for leniency. They refer principally to applications by undertakings, although they would also be a good starting point for any individuals contemplating making an application separately from a corporate application.

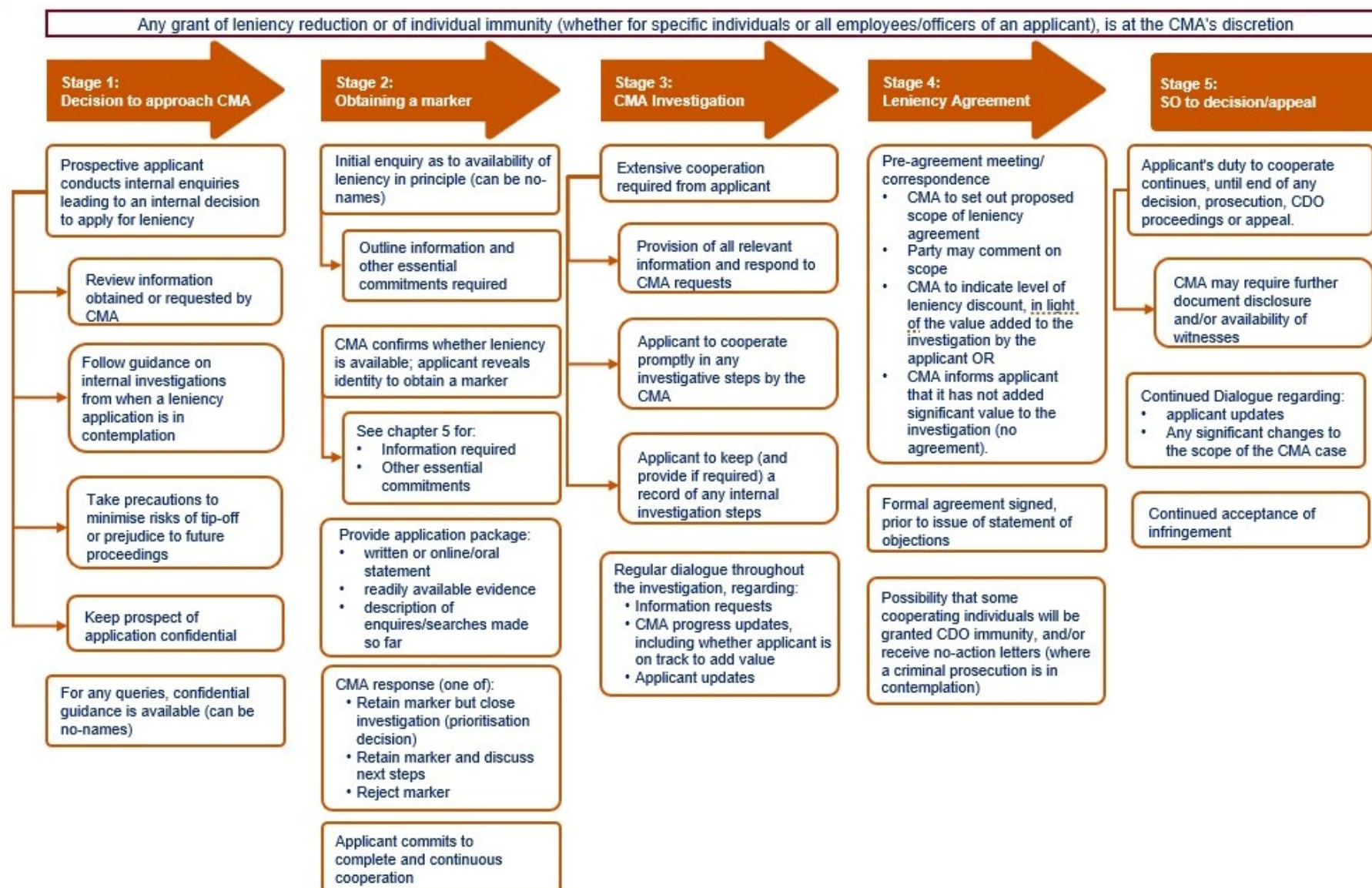
Table A: Types of leniency (summary)

Stage of application	Minimum information	Conditions	Level of protection
Type A • First applicant • No pre-existing investigation	Information must give the CMA a sufficient basis for taking forward a credible investigation	(a) Provide the CMA with all relevant information, documents and evidence (b) Maintain continuous and complete cooperation throughout the investigation (c) Refrain from further participation in the cartel activity (d) If a leniency agreement is reached, admit to participation in cartel activity (which, by definition, is a breach of the law) (e) Must not have coerced another to take part in the cartel	• Guaranteed corporate immunity from financial penalties • Guaranteed 'blanket' criminal immunity for cooperating current and former employees • Guaranteed CDO immunity for cooperating current and former directors
Type B • First applicant • Pre-existing investigation, but prior to statement of objections	Information must add significant value to the CMA's investigation	Conditions (a) to (e) as above	• Discretionary reductions in corporate financial penalties of up to 100% • Discretionary criminal immunity for cooperating current and former employees • Discretionary CDO immunity for cooperating current and former directors
Type C • Second or later applicant (or coercer) • Prior to statement of objections	Information must add significant value to the CMA's investigation	Conditions (a), (b), (c), and (d) as above.	• Discretionary reductions in corporate financial penalties of up to 50% • Discretionary criminal immunity for cooperating current and former employees • Discretionary CDO immunity for cooperating current and former directors

Overview Chart A: immunity applications (no pre-existing investigation)



Overview Chart B: leniency applications (after commencement of an investigation)



2. Overview of the leniency regime

Cartel activity

- 2.1 Leniency is available to undertakings and individuals who have participated in cartel activity.¹³
- 2.2 Cartel activity is defined for the purposes of the CMA's leniency policy as agreements and/or concerted practices which infringe the Chapter I prohibition¹⁴ **by object** and involve the fixing or coordinating of purchase or selling prices (including resale price maintenance), bid-rigging (collusive tendering),¹⁵ the establishment of output restrictions or quotas, market sharing or market-dividing, as well as certain forms of anti-competitive information exchange or sharing.¹⁶ The CMA notes that, by definition, cartel activities have as their object the prevention, restriction or distortion of competition and therefore neither the applicant nor the CMA will be required to assess the actual effects of the cartel activity before proceeding with an application.
- 2.3 Leniency in relation to vertical arrangements¹⁷ is limited to the fixing of selling prices (for example, resale price maintenance cases). The CMA's leniency policy does not cover other standalone vertical restrictions of competition as these tend to be (at least to an extent) visible on the market and therefore over time self-detecting. However, where vertical behaviour might be said to be facilitating horizontal cartel activity, leniency is available in principle to the parties involved in such behaviour (including the facilitator), as participation in such cartel activity can lead to exposure to significant sanctions.
- 2.4 The list below contains non-exhaustive examples of cartel activities for which leniency is likely to be available.

¹³ Trade associations may also apply for leniency, but only in respect of their own participation in and liability for cartel activity. As set out at paragraph 2.35, the CMA will not generally accept joint approaches for leniency. Accordingly, it is not possible for a trade association to apply for leniency on behalf of its members.

¹⁴ Criminal immunity is only available in relation to activity that would amount to the criminal cartel offence under section 188 EA02. See further paragraphs 12.6 and 12.7.

¹⁵ Including cover pricing.

¹⁶ For an explanation of circumstances when information exchange or sharing may be considered to amount to cartel activity, see paragraph 8.89 of the *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* (CMA184, August 2023).

¹⁷ Vertical agreements are agreements between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain (for example, between a supplier and a distributor). They are capable of infringing the Chapter I prohibition but do not fall within the scope of the criminal cartel offence.

- (a) Agreements between competitors to fix or coordinate prices for the supply or purchase of goods or services, including coordination on the extent of price rises or elements of a price as well as agreeing absolute or total prices, and including agreements to fix or coordinate wages or other trading conditions (including in relation to intellectual property rights).
- (b) Direct or indirect communication of specific, not publicly available information regarding current or future pricing intentions (or other relevant parameters of competition)¹⁸ between two or more competitors in a market, where such communication has as its object the prevention, restriction or distortion of competition. Indirect communication can include exchanges of information between direct competitors via a third party, such as a service provider (including a platform operator, an optimisation tool provider or other person enabling undertakings to use a shared algorithm), a common agency (for instance a trade organisation), a market research organisation, a supplier or a customer or, in certain circumstances, via public announcements (where these are used as a communication channel between competitors to signal future intentions to behave in a specific way, or to provide a focal point for coordination between competitors).^{19, 20}
- (c) Various forms of bid-rigging (also known as collusive tendering) including (but not limited to) bid rotation, cover pricing (which occurs when a potential bidder submits a price obtained from a competitor in a tender process which is not designed to win the contract but rather to give the appearance of competition) and agreements to pay compensation to unsuccessful competing bidders in a tender process.
- (d) Arrangements between suppliers and retailers of a good or service which restrict the ability of the retailers to determine their retail prices by reference to the prices charged by different suppliers.

¹⁸ See paragraph 8.84 of the *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* (CMA184, August 2023) for examples of exchanges of information that have been held to restrict competition by object.

¹⁹ As noted above, further guidance on the circumstances in which exchanges of information are deemed to amount to cartel activity is provided in *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* (CMA184, August 2023). See in particular Part 8.

²⁰ Generally speaking, the CMA considers that, if a pricing practice constitutes a 'by object' infringement of the Chapter I prohibition when implemented offline, such that it amounts to cartel activity, there is a high probability that it will also amount to cartel activity when implemented online (for example, through the use of an algorithm).

- (e) Arrangements that have as their object the prevention, restriction or distortion of competition by restricting commercial activities of competing undertakings, including:
 - (i) arrangements restricting marketing or selling to particular territories or groups of customers,
 - (ii) arrangements between undertakings to refrain from approaching or hiring each other's employees,
 - (iii) paying a competitor to delay launching competing products, and
 - (iv) arrangements restricting competing undertakings' abilities or incentives to innovate, including, for example, in order to meet or exceed a sustainability goal or to achieve that goal more quickly.²¹

2.5 When determining what constitutes cartel activity, the CMA will have regard to the case law of the UK courts, as well as assimilated EU law (to the extent that it remains relevant following EU Exit),²² including on the interpretation of the fixing or coordinating of purchase or selling prices, bid-rigging (collusive tendering), output restrictions or quotas, market sharing or market-dividing, and anti-competitive information exchange.

Conditions for the grant of leniency

2.6 In order to benefit from leniency, and subject to the limitations on availability described below, an applicant must meet the following conditions, each of which will apply throughout the application process and until final determination of any prosecution, infringement decision, appeal proceedings or CDO proceedings.²³

- (a) **Information:** the applicant must provide the CMA with all the non-legally privileged information, documents and evidence available to it regarding the reported cartel activity (see paragraph 2.10 onwards).
- (b) **Cooperation:** the applicant must maintain continuous and complete cooperation throughout the investigation and until the conclusion of any

²¹ See paragraph 4.6 of the *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements* (CMA185, October 2023).

²² See section 60A CA98 and *Guidance on the functions of the CMA after the end of the Transition Period* (CMA125) on the application of EU law following the UK's exit from the EU. Note, however, that section 4 of the Retained EU Law (Revocation and Reform) Act 2023 provides that with effect from 1 January 2024 general principles of EU law are no longer part of UK law.

²³ Details of how these conditions apply to individuals and/or in criminal cases are set out in Chapters 12 and 13 respectively.

action (including any criminal proceedings, CDO proceedings and appeals) by the CMA arising as a result of the investigation (see Chapter 8 of this guidance).

- (c) **Termination:** the applicant must refrain from further participation in the reported cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA) (see paragraphs 5.17 onwards).
- (d) **Admission:** if the CMA reaches the point of entering into a leniency agreement with the applicant (see Chapter 9), which usually takes place just before the issue of any statement of objections, the applicant must admit to having participated in the reported cartel activity (which by definition includes an acceptance of an infringement of the law) (see paragraph 2.2).
- (e) **Coercer test:** to qualify for Type A immunity or Type B leniency,²⁴ the applicant must not have taken steps to coerce another undertaking to take part in the reported cartel activity (see paragraphs 2.48 to 2.53).

2.7 The CMA recognises that in some cases prospective applicants may be concerned that they have engaged in cartel activity but uncertain as to the precise facts. This would not preclude the CMA from accepting a leniency application, provided that the applicant has a **‘concrete basis to suspect cartel activity’**. This may take many forms but might include, for example, documentary evidence which plainly indicates the existence of a cartel, or information from a potential witness alleging cartel activity, or a combination of evidence from documentary and/or witness sources which together point to cartel activity. Alternative plausible non-cartel explanations for documents do not preclude those documents giving rise to a suspicion of cartel activity, provided the applicant can explain why a cartel is a reasonable explanation.²⁵

2.8 Additionally, while the ‘admission’ requirement at paragraph 2.6(d) does not arise until and unless a leniency agreement is signed, applicants must have a **‘genuine intention to admit to cartel activity’** if the CMA reaches the point of issuing a statement of objections in relation to the reported cartel activity. This means that applicants must not, at any stage, conduct themselves in a way which would be inconsistent with such an admission.

²⁴ This condition does not apply to Type C leniency.

²⁵ Parties with questions about whether there is a concrete basis to suspect cartel activity can avail themselves of confidential guidance from the CMA. See chapter 4.

- 2.9 The CMA recognises that in certain circumstances an applicant may be genuinely uncertain, at the point of applying for a marker, as to whether the conduct it suspects did in fact take place.²⁶ The CMA may consider that it is reasonable in such circumstances for the applicant to state its uncertainty on this point, provided that the applicant has a concrete basis to suspect and a genuine intention to admit to cartel activity if the CMA is able to establish sufficient evidence that the conduct had taken place (such as to enable it to issue a statement of objections). However, the CMA will not accept or continue with leniency applications in cases where the applicant considers that the conduct it suspects would not, if proven, amount to an object infringement or constitute cartel activity.²⁷ This will not satisfy the requirement of a genuine intention to admit to cartel activity.

Relevant information

- 2.10 In relation to the 'information' condition, applicants must provide the CMA with all the non-legally privileged information,²⁸ documents and evidence available to them regarding the existence and activities of the reported cartel activity. This is referred to as the 'relevant information.'
- 2.11 The requirement to provide all relevant information should be interpreted widely so as to include any information, in whatever form, which is capable of having some reasonable bearing on the CMA's investigation of the cartel.²⁹ As well as pre-existing documents, this will include 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.
- 2.12 Information which has a bearing on the CMA's investigation will include information that supports a finding of cartel activity, information which suggests an absence of cartel activity (generally, or on the part of specific

²⁶ For example, in one case, the applicant for a marker had received, via its compliance officer, an anonymous tip-off that its staff had been engaging in price-fixing. The tip-off had some credibility having regard to the information given, but at the stage at which a marker was sought the tip-off remained untested.

²⁷ For example, there have been cases in which applicants believe that they are in possession of much of the basic facts but seek to deny that those facts constitute cartel conduct. In such circumstances, seeking a marker 'in case' the CMA is minded to take a different view will generally not satisfy the requirement of a genuine intention to admit to cartel activity.

²⁸ See paragraphs 7.12 to 7.15 for details of the CMA's approach to legally privileged communications.

²⁹ The CMA would not expect applicants to provide non-relevant information on a 'just in case' basis; this would place a disproportionate burden on applicants as well as requiring unnecessary resource for the CMA to review. Where applicants are uncertain whether certain information is capable of having a reasonable bearing on the CMA's investigation, they are encouraged to seek guidance from the CMA.

undertakings or individuals) – ‘exculpatory’ material³⁰ – and information on possible leads or sources of information that the CMA may wish to pursue.

Availability and benefits of different types of leniency

Type A immunity

- 2.13 The first applicant to report and provide evidence of a cartel, when the CMA (or, where relevant, a sectoral regulator) does not have a pre-existing investigation into the reported cartel activity (see paragraph 2.18) and does not otherwise have sufficient information to establish the existence of the reported cartel activity, will be granted Type A immunity.
- 2.14 Type A immunity provides the following in relation to the reported cartel activity:
- guaranteed corporate immunity (that is, total immunity from financial penalties under CA98),
 - guaranteed ‘blanket’ immunity from criminal prosecution for all cooperating current and former employees and directors of the undertaking (see paragraph 2.16),³¹
 - guaranteed CDO immunity for all cooperating current and former directors of the undertaking,³² and
 - exemption from debarment and exclusion from public procurement on competition law grounds under the Procurement Act 2023.³³

³⁰ ‘Exculpatory material’ for these purposes will include information known to the leniency applicant which could reasonably be seen as calling into question the credibility, as a witness, of anyone who provides relevant information.

³¹ There are specific arrangements in place in relation to immunity for alleged criminality wholly or partly in Scotland/that falls to be prosecuted in Scotland. This is set out at paragraphs 13.4 to 13.6 below.

³² As set out at footnote 10, however, the CMA may still apply for a CDO against a director who has at any time been removed or has otherwise ceased to act as a director of a company owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency.

³³ Undertakings that are immunity recipients and individuals who are immune from prosecution in respect of an agreement or concerted practice benefit from automatic protection from debarment and exclusion on competition law grounds. See paragraph 41(2), Schedule 6 of the Procurement Act 2023 (mandatory ground for competition law (cartel) infringements) and paragraphs 7(2) and 10(2), Schedule 7 of the Procurement Act 2023 (discretionary ground for potential competition infringements). See Annex 1 of Cabinet Office guidance on exclusions for ground-specific guidance: www.gov.uk/government/publications/procurement-act-2023-guidance-documents-procure-phase/guidance-exclusions-html#annex-1-ground-specific-guidance and see also paragraph 2.69 below.

- 2.15 The grant of Type A immunity is subject to the applicant meeting the conditions of leniency (see paragraph 2.6), including not having coerced another undertaking to take part in cartel activity. Where an undertaking has been a coercer only Type C leniency will be available (condition (e) of paragraph 2.6, see also paragraphs 2.48 to 2.53 below). The information provided in relation to condition (a) must, as a minimum, give the CMA a sufficient basis for taking forward a credible investigation.
- 2.16 Where an undertaking benefits from Type A immunity, it can be assumed with certainty that any current or former employee or director of the undertaking, wherever they are in the world and whatever their precise role in the reported cartel activity, will receive criminal and CDO immunity if applicable. It is not a pre-condition for gaining a marker for Type A immunity that the applicant produces an up-front list of names of its current and former employees and directors who may be implicated in the cartel. However, an individual benefitting from blanket immunity must meet the conditions for leniency set out at paragraph 2.6 above, including cooperation with the CMA's investigation, or they will lose the benefit of the 'blanket' immunity.
- 2.17 Type A immunity ceases to be available if:
- there is a pre-existing investigation into the reported cartel activity (see paragraph 2.18);
 - the CMA has previously received a leniency application regarding the reported cartel activity, whether from an undertaking or an individual;³⁴ or
 - the CMA has sufficient information to establish the existence of the reported cartel activity.
- 2.18 A pre-existing investigation will exist from the point where the CMA (or, where applicable, a sectoral regulator) considers that it has reasonable grounds to suspect cartel activity, such that it may conduct an investigation under one or both of section 192 of the EA02 and section 25 of the CA98 and has taken active steps in relation to that investigation. Active steps may be overt or covert and may or may not involve the use of statutory information gathering powers. Examples include (but are not limited to) interviews of witnesses

³⁴ The ability of an individual to apply for individual immunity independently of an undertaking, and before the undertaking has itself applied for immunity, is one of the key reasons why undertakings who discover potential wrongdoing should promptly make a Type A immunity application and not postpone it in the hope of being able to obtain a large discount via a Type B leniency application once an investigation has started. Furthermore, undertakings should be aware that individuals may also seek to take advantage of the CMA's informant reward programme to report cartel conduct which their employer has failed to report.

(whether voluntary or compelled), requests for information (including formal requests under section 26 of the CA98 or section 193 of the EA02), inspections of premises (under sections 27, 28 or 28A of the CA98 or section 194 of the EA02) and preparing applications for warrants.

Type B leniency

- 2.19 The first applicant³⁵ to report and provide evidence of a cartel when there is already a pre-existing investigation³⁶ into the reported cartel activity will be a Type B applicant. The grant of Type B leniency is always discretionary.
- 2.20 Type B applicants will be eligible for the following in relation to the reported cartel activity:
- discretionary reductions in penalty of up to 100% (subject to paragraph 2.21 below);³⁷
 - discretionary CDO immunity for cooperating current and former directors of the undertaking, which may be granted for specific individuals, or for all directors other than any named individuals; and
 - in exceptional cases, discretionary criminal immunity for cooperating current and former employees and directors of the undertaking, which may be granted on a 'blanket' basis, or for specific individuals, or for all employees other than named individuals.
- 2.21 Although successful Type B applicants may in principle be granted up to 100% discount on any financial penalty:
- in practice, Type B discounts are unlikely to be above 75%, and may be significantly lower;³⁸ and

³⁵ Where the first applicant (Type A or B) is an individual, that individual's employer (that is, the undertaking) will be eligible for Type B provided it remains the first undertaking to apply (noting, however, that the grant of Type B leniency is discretionary and that the applicant must satisfy the conditions of leniency). This applies only where the undertaking is the current employer of the individual applicant at the time of the undertaking applying for leniency.

³⁶ As defined at paragraph 2.18.

³⁷ Type B applicants that receive a 100% reduction in penalties will also be exempt from debarment and exclusion on competition law grounds as 'immunity recipients' under the Procurement Act 2023: paragraph 41(2), Schedule 6 and paragraph 7(2), Schedule 7. See fourth bullet of paragraph 2.14 and related footnotes above and paragraph 2.69 below.

³⁸ Paragraphs 9.7 to 9.13 explain how Type B and Type C discounts are determined. As set out at paragraph 9.12, the discount for a successful Type B or Type C applicant is likely to be above 10%.

- the CMA would not generally expect to grant discounts of more than 50% to Type B applicants in resale price maintenance cases.
- 2.22 The grant of any form of reduction in penalty to a Type B applicant is subject to the applicant meeting the conditions of leniency (see paragraph 2.6), including not having coerced another undertaking to take part in cartel activity.³⁹ The information provided in relation to condition (a) of paragraph 2.6 must, as a minimum, add significant value to the CMA's investigation, that is, it must be information which genuinely advances the investigation.
- 2.23 The CMA's exercise of its discretion to accept a Type B leniency application will depend on its assessment of where the public interest lies in the particular case. In particular, the CMA will perform a balancing exercise, assessing the benefits of gaining additional evidence by reason of a grant of leniency against the disbenefit of granting a reduction in penalties after an investigation has already commenced, resources have been expended and after the CMA may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession.
- 2.24 The decision on whether to accept a Type B leniency application will be made separately from the grant of any criminal or CDO immunity. The public interest in granting a reduction in fines to an undertaking may not extend to criminal and/or CDO immunity for some or all of its individual employees or directors. Further information about the availability of criminal and CDO immunity for individual employees and directors of Type B and Type C leniency applicants is set out at paragraphs 2.39 to 2.47 below.
- 2.25 In practice, approaches for Type B leniency are most likely to be triggered by inspections.⁴⁰ The CMA will usually be able to give prospective applicants an indication of whether Type B leniency is in principle available before the undertaking's identity is revealed. Would-be applicants therefore have nothing to lose by enquiring about the availability of Type B leniency after the commencement of an investigation. However, depending on the stage at which the application is made and the extent of the information already in the CMA's possession, it is possible that the CMA will only be able to assess whether the applicant could potentially add significant value to the investigation once it has fully assessed both the information already gathered from other sources and that put forward by the applicant, and hence it may

³⁹ Where an undertaking has been a coercer only Type C leniency will be available (condition (e) of paragraph 2.6, see also paragraphs 2.48 to 2.57).

⁴⁰ On-site inspections under sections 27 or 28 of the CA98 or sections 193 or 194 of the EA02.

not be able to confirm in principle whether or not leniency is available until a late stage.⁴¹

2.26 The grant of any reductions in penalties to Type B applicants is discretionary in all circumstances. However, Type B leniency will definitely cease to be available where:

- the CMA has previously received a leniency application regarding the reported cartel activity from an undertaking, or
- the CMA (or, where relevant, a sectoral regulator) has sufficient information to establish the existence of the reported cartel activity.

Type C leniency

2.27 In circumstances where another applicant⁴² has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C leniency is available. The grant of Type C leniency is always discretionary.

2.28 In the Type C position, the applicant will be eligible for:

- discretionary reductions in corporate penalties of up to 50% (although reductions may be significantly lower in some cases),⁴³
- discretionary CDO immunity for cooperating current and former directors of the undertaking, and
- in exceptional cases, discretionary criminal immunity to specific individuals.

2.29 The grant of Type C leniency is subject to the applicant meeting the conditions of leniency (see paragraph 2.6), save for condition (e) (coercer test). The information provided in relation to condition (a) must, as a minimum, add significant value to the CMA's investigation, that is, it must be information which genuinely advances the investigation.

⁴¹ Paragraphs 10.11 to 10.15 provide guidance on the use of information provided by an applicant who, despite having acted in good faith, has failed to qualify for leniency.

⁴² This includes individual applicants: if the CMA has granted Type A or Type B individual immunity in relation to the cartel activity in question, only Type C will be available (unless the scenario described in footnote 35 applies, in which case Type B may be available).

⁴³ Paragraphs 9.7 to 9.13 explain how Type B and Type C discounts are determined. As set out at paragraph 9.12, the discount for a successful Type B or Type C applicant is likely to be above 10%.

- 2.30 The CMA's exercise of its discretion to accept a Type C leniency application will depend on its assessment of where the public interest lies in the particular case. In particular, the CMA must perform a balancing exercise, assessing the benefits of gaining additional evidence by reason of a further grant of leniency against the disbenefit of granting leniency to multiple parties in a single investigation, when the CMA may already have some probative evidence and further fruitful lines of enquiry to pursue and already has the cooperation of at least one applicant.
- 2.31 The decision on whether to accept a Type C leniency application will be made separately from the grant of any individual criminal and/or CDO immunity. The public interest in granting a reduction in fines may not extend to immunity from criminal prosecution or CDO proceedings for any individual employees or directors of an undertaking applicant.
- 2.32 'Blanket' criminal immunity, that is, immunity for all cooperating current and former employees and directors at risk of prosecution for the criminal cartel offence, will not be granted in Type C leniency cases. In exceptional cases, the CMA may consider, on an individual-by-individual basis, whether one or more current or former employees or directors of an undertaking qualifying for Type C leniency should be granted criminal immunity. Whether the CMA will grant criminal immunity will depend on an assessment of the overall public interest.
- 2.33 In circumstances where the CMA (or, where relevant, a sectoral regulator) has sufficient information to establish the existence of the reported cartel activity in relation to an applicant, such that it could prove the involvement of that applicant in cartel activity, the CMA is highly unlikely to exercise its discretion to grant leniency, but may do so where it considers that the public interest is best served by using information and cooperation from the applicant to prove the participation by others in the cartel.
- 2.34 The CMA will usually be able to give prospective applicants an indication of whether Type C leniency is in principle available before the undertaking's identity is revealed. However, depending on the stage at which the application is made and the extent of the information already in the CMA's possession, it is possible that the CMA will only be able to assess whether the applicant could potentially add significant value to the investigation once it has fully assessed both the information already gathered from other sources and that

put forward by the applicant, and hence it may not be able to confirm in principle whether or not leniency is available until a late stage.⁴⁴

Joint approaches for leniency not accepted

- 2.35 The CMA will generally not accept joint approaches made simultaneously by or on behalf of two or more undertakings participating in the same cartel activity. If the CMA were to receive such approaches, the would-be applicants would not be able to ‘share’ Type A immunity and the CMA would not be able to confirm that a particular undertaking was the ‘first’ to apply and so grant it a marker for Type A immunity or Type B leniency. Moreover, undertakings who discuss a possible leniency application with other participants in the cartel activity are at risk of being found to have acted in bad faith by having tipped off others of their intended approach to the CMA.⁴⁵

Cessation of availability of leniency generally

- 2.36 The CMA will not accept leniency applications from undertakings after the CMA has issued a statement of objections in relation to the reported cartel activity.
- 2.37 In exercising its discretion in relation to the grant of leniency in cases where there is a pre-existing investigation into cartel activity, the CMA may in some cases conclude that it will no longer accept any further leniency applications.
- 2.38 This may be because the CMA considers that it already has sufficient information to establish the infringement in relation to all relevant parties, or that any additional information is unlikely to add significant value such as to justify the resources necessary to handle the application, or that it would not be a priority to extend the investigation beyond its existing scope.

Discretionary CDO immunity

- 2.39 Cooperating current and former directors of Type B and Type C applicants may, if the CMA considers it would be in the public interest, qualify for discretionary CDO immunity.
- 2.40 The CMA recognises that the availability of CDO immunity may be a significant incentive to apply for leniency. However, CDO immunity is only

⁴⁴ Paragraphs 10.11 to 10.15 provide guidance on the use of information provided by an applicant who, despite having acted in good faith, has failed to qualify for leniency.

⁴⁵ Paragraphs 11.11 to 11.15 below explain the concept of ‘bad faith’ in more detail.

guaranteed for the cooperating current and former directors of a Type A applicant,⁴⁶ reflecting the balance of the public interest described at paragraph 2.41 below. For this reason, an undertaking that uncovers its potential involvement in cartel activity and wishes to obtain CDO immunity is encouraged to make a Type A immunity application, which is the only route to obtaining guaranteed CDO immunity for all of an undertaking's cooperating current and former directors.

- 2.41 The CMA's exercise of its discretion to grant CDO immunity in a Type B or Type C application will depend on its assessment of where the public interest lies in the particular case. The CMA will perform a balancing exercise between the CMA's public policy objectives of, on the one hand, maintaining incentives for undertakings to apply for leniency and individual directors to cooperate (by reason of the grant of CDO immunity) whilst on the other hand, upholding the director disqualification regime – namely, protecting the public by removing unfit directors, improving the standard of management and deterring other directors from participating in competition law infringements or from failing to take action when they become aware of competition law infringements taking place within their businesses. The CMA will also have regard to the general principles in its published guidance on CDOs.⁴⁷
- 2.42 The CMA will not usually be in a position to indicate whether CDO immunity will be available, or to which directors, at the time of receiving an enquiry about the availability of Type B or Type C leniency. A decision on which directors (if any) of a Type B or Type C leniency applicant will benefit from CDO immunity will usually be taken later in the investigation, when the CMA is in a position to make an informed assessment of the public interest (as described at paragraph 2.41). In some cases, this may be as late as shortly before the issue of any statement of objections.
- 2.43 Any grant of CDO immunity is conditional on the individual in question meeting the conditions for leniency set out at paragraph 2.6 above, including cooperation with the CMA's investigation. As set out at paragraphs 12.60 to 12.62, individuals who fail to cooperate with the CMA will lose all protection under the leniency programme (including any grant of CDO immunity).

Discretionary criminal immunity

- 2.44 Criminal immunity is discretionary for cooperating current and former employees and directors of Type B and Type C leniency applicants and is

⁴⁶ Unless the position described in footnote 10 applies.

⁴⁷ See *Guidance on Competition Disqualification Orders* (CMA102).

only likely to be granted in exceptional circumstances. For details of how the CMA approaches discretionary criminal immunity where a Type B or Type C leniency application is made in relation to an ongoing criminal cartel investigation, please refer to paragraphs 13.7 to 13.9.

- 2.45 Where a Type B or Type C leniency application is made in relation to an ongoing civil investigation, the CMA will not generally expect to discuss the availability of criminal immunity. It is unlikely, although not impossible, that the CMA will launch a criminal cartel investigation once a civil investigation has commenced.
- 2.46 The CMA recognises that the possibility of a criminal cartel investigation is a relevant factor for applicants in deciding whether to proceed with an application for leniency. Not all cases of cartel activity will involve the commission of an offence, and even where an offence may have been committed the CMA may determine that, in all the circumstances, it is not appropriate to commence a criminal cartel investigation.
- 2.47 A potential applicant who is concerned about the likelihood of a criminal cartel investigation can provide details of the relevant conduct to the CMA on a 'no names' basis (see further chapter 4), and the CMA may be able to give an assurance that criminal cartel enforcement would not be (or is unlikely to be) in contemplation in the scenario given.

The application of the coercer test

- 2.48 Undertakings who have taken steps to coerce another undertaking to take part in the cartel activity are not eligible for Type A or Type B, but can receive a reduction in penalty of up to 50% for Type C leniency.
- 2.49 It is always possible to contact the CMA for no-names confidential guidance about whether the bar on granting a coercer immunity may be an issue in a prospective application. The CMA has given such guidance in past cases and then received successful Type A or Type B applications. At the time of publishing this guidance, the CMA has never refused a Type A or Type B application on coercer grounds, and the CMA has no reason to believe that the coercer bar will lead to a significant number of such refusals in future.
- 2.50 The CMA does not believe that it would be fruitful to develop a detailed definition of 'coercer', but there must be evidence of clear, positive and ultimately successful steps from a participant (that is, the coercer) to pressurise an unwilling participant to take part in the cartel. The bar is high in relation to both the type of behaviour which will be regarded as coercive and the evidence necessary to prove that behaviour.

2.51 For example, conduct may amount to coercion in the following situations:

- actual physical violence or proven threats of violence which have a realistic prospect of being carried out, or blackmail (these would apply equally to cases of horizontal as well as vertical collusion);⁴⁸ or
- such strong economic pressure as to make market exit a real risk, where, for example, a large player organises a collective boycott of a small player or refuses to supply key inputs to such a small player – these scenarios are more likely to apply in cases where there is at least a significant vertical element and are less likely to be relevant where an arrangement is purely horizontal and there are no significant cross-supplies between competitors.

2.52 The CMA takes the view that there will not be a coercer issue in the following situations:

- harmful market pressure which falls short of risking market exit but may reduce profit margins,
- mere agreed enforcement or punishment mechanisms to enforce the operation of a cartel, or
- standard term contracts in a resale price maintenance case, even where there is a significant inequality of bargaining power.

2.53 Even if an undertaking were to lose eligibility for Type A or Type B as a result of finding out subsequent to its initial application that it had been a coercer:

- it would still be eligible for up to a 50% reduction in any financial penalty (Type C leniency), and
- as explained at paragraph 2.56 below, the undertaking's current and former employees or directors (except for the 'rogue' coercing employee(s) or director(s)) may, if the CMA considers it would be in the public interest, qualify for discretionary CDO and/or criminal immunity.

The coercer test as it applies to individuals

2.54 The coercer test for an individual under the no-action policy is fully aligned with that for an undertaking seeking corporate immunity.

⁴⁸ See paragraphs 2.2 and 2.3 above.

- 2.55 In other words, the question is whether another **undertaking** has been coerced, not specifically whether one individual has coerced another or others within the undertaking. Therefore, if the undertaking is not deemed a coercer, no employee or director within it will be refused the protection against criminal or CDO proceedings for which they would otherwise be eligible.
- 2.56 If an undertaking is found to be a coercer, individuals within the undertaking who did not themselves play a coercing role will not be denied criminal or CDO immunity solely on coercer grounds, albeit that any criminal or CDO immunity would be discretionary, given that where an undertaking is found to have been a coercer it will only be eligible for Type C leniency.
- 2.57 The CMA has never, at the time of the publication of this guidance, refused criminal immunity on the basis of the coercer test.

Leniency applications in the regulated sectors

- 2.58 Certain sectoral regulators have concurrent powers with the CMA to enforce the CA98 prohibitions in their respective sectors.⁴⁹ Where a leniency enquiry or application is made in relation to a matter which a sectoral regulator may have concurrent powers to investigate, the CMA and the relevant sectoral regulator will work together closely.⁵⁰
- 2.59 Applicants should note that the jurisdiction of a sectoral regulator to enforce the CA98 prohibitions may differ from its regulatory remit. It may be the case that the affected product or service is not directly regulated but still falls within the remit of the sectoral regulator for the purpose of CA98 enforcement.
- 2.60 The CMA and sectoral regulators operate a ‘single queue system’ for handling leniency applications within the regulated sectors. Under this system, applicants should always approach the CMA for leniency in the first instance, regardless of whether the suspected cartel activity may fall within a regulated sector or is already under investigation by a sectoral regulator. In the event

⁴⁹ As at [date final guidance is published], the sectoral regulators with concurrent competition powers are the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Utility Regulator (Northern Ireland), Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA), and the Payment Systems Regulator (PSR). For the most recent information on sectoral regulators with concurrent competition powers (and their respective areas of concurrent jurisdiction), applicants are advised to check the most recent Annual Concurrency Report, which is published on the CMA website.

⁵⁰ The majority of this guidance refers only to the CMA, other than in certain key areas where it is particularly important to clarify the role of sectoral regulators. However, where a sectoral regulator has (or may have) concurrent jurisdiction in relation to the reported cartel activity, applicants should be aware that references to the CMA may also refer to the relevant sectoral regulator.

that any initial leniency enquiries or applications are made to a sectoral regulator, the sectoral regulator will immediately direct the person making the initial leniency enquiry or leniency application to the CMA. The applicant's place in the leniency queue is always determined by the order in which applications are made to the CMA for leniency.

- 2.61 Provided that the conditions for leniency are met, an application to the CMA will secure the applicant's place in the leniency queue with all authorities. This approach ensures that the applicant's place in the leniency queue is determined by the order in which an application is made to the CMA, even in cases that have been or will be allocated⁵¹ to a sectoral regulator to carry out the investigation.
- 2.62 If the CMA receives a leniency enquiry in an area in which it considers that a sectoral regulator may have concurrent powers, it will contact that sectoral regulator as part of its assessment as to whether there is a pre-existing investigation.⁵²
- 2.63 Once a marker has been granted, if the CMA considers that a sectoral regulator may have concurrent powers to investigate the reported activity, the CMA will typically share details of the leniency application with the sectoral regulator.⁵³ The CMA will inform the applicant or its legal adviser before doing so. However, applicants must accept that the CMA may share information with the relevant sectoral regulator and the expectation should be that this may include full disclosure of all the material in the CMA's possession. The relevant sectoral regulator may also attend meetings or calls between the CMA and the applicant regarding the leniency application.
- 2.64 Prior to case allocation, the CMA will be responsible for the following, in consultation with relevant sectoral regulators:
- checking the availability of leniency,
 - granting any leniency marker, and

⁵¹ Case allocation is covered by the Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536), the concurrency guidance (*Regulated Industries; Guidance on concurrent application of competition law to regulated industries*) and the memorandums of understanding (MoUs) between the CMA and each of the sectoral regulators (see www.gov.uk/government/collections/uk-competition-network-ukcn-documents#memorandums-of-understanding).

⁵² Paragraphs 5.3 and 6.4 explain the CMA's process of assessing whether there is a pre-existing investigation when it receives a leniency enquiry.

⁵³ In line with Regulation 3 of the Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536), sections 241(1) and 241(3) of the Enterprise Act 2002 and the MoUs between the CMA and each of the sectoral regulators.

- where appropriate, the withdrawal of any marker.

2.65 If a case is allocated to a sectoral regulator:

- all initial leniency enquiries relating to the case should still be made to the CMA, in line with paragraph 2.60 above. The CMA will be responsible for granting any marker, before handing the matter over to the sectoral regulator to which the case has been allocated;
- the sectoral regulator to which the case has been allocated will be responsible for:
 - where appropriate, the withdrawal of any marker,⁵⁴ and
 - the final grant or withdrawal of leniency;
- the sectoral regulator will apply this guidance in its dealings with any leniency applicants on the case, in consultation with the CMA as appropriate.

2.66 Sectoral regulators will also be responsible, in cases that have been allocated to them, for any grant of discretionary CDO immunity in Type B and Type C cases.⁵⁵ For the avoidance of doubt, the CMA will at all times remain responsible for the grant of criminal immunity, including where that criminal immunity applies automatically in connection with a grant of Type A immunity or is discretionary and arises in connection with a Type B or Type C leniency application.⁵⁶ This means that all enquiries regarding criminal immunity and any application for criminal immunity should be made to the CMA.

Interaction with other UK enforcement and/or regulatory regimes

- 2.67 The CMA recognises that in some cases, applicants may be concerned about consequences from other enforcement and/or regulatory regimes in the UK if the CMA reaches an infringement decision regarding the reported cartel activity.
- 2.68 Where appropriate, the CMA will consider requests from leniency applicants to write to the relevant enforcement authority to explain the public interest in protecting leniency incentives and confirm the applicant's engagement with

⁵⁴ As explained at paragraph 11.18, any decision by a sectoral regulator to withdraw leniency will be taken in consultation with the SRO for leniency at the CMA.

⁵⁵ In consultation with the CMA.

⁵⁶ In consultation with the Serious Fraud Office, where appropriate – see paragraphs 13.2 and 13.3. See also paragraphs 13.4 to 13.6 regarding criminal immunity in Scotland.

the leniency process and fulfilment of conditions of leniency (including the duty of cooperation).

2.69 In relation to the potential debarment⁵⁷ and/or exclusion⁵⁸ of suppliers under the Procurement Act 2023:

- as noted above, the competition law exclusion grounds do not apply to immunity recipients or (in relation to the criminal cartel offence ground) to individuals who are immune from prosecution in respect of the conduct⁵⁹ and the CMA would expect to confirm the immunity status of a particular supplier with the relevant authority when requested; and
- for other suppliers which have been granted leniency (but not immunity),⁶⁰ the CMA would expect to engage with the relevant authority as appropriate, including to explain that applying for and being granted leniency requires admitting to cartel conduct and providing complete and continuous cooperation throughout a cartel investigation, which may be

⁵⁷ The debarment regime under the Procurement Act 2023 enables Ministers to put suppliers on a centrally published debarment list. Inclusion on the list means that as a result of the supplier's past behaviour or circumstances it is not, or may not be, allowed to participate in covered procurements or be awarded public contracts. The Procurement Act 2023 contains mandatory and discretionary exclusion grounds that lead to a supplier being an 'excluded' or 'excludable' supplier. See CMA guidance on exclusion and debarment: www.gov.uk/government/publications/the-procurement-act-2023-information-note-on-exclusion-and-debarment-on-competition-grounds/exclusion-and-debarment-on-competition-grounds-what-suppliers-and-contractors-need-to-know.

⁵⁸ The exclusions regime provides a framework within which contracting authorities must consider a supplier's recent past behaviour and circumstances to determine whether it should be allowed to compete for or be awarded a public contract. The Procurement Act 2023 places a duty on contracting authorities to consider both mandatory and discretionary grounds for each procurement. Where a supplier is on the central debarment list, other than in limited cases, contracting authorities must or may exclude that supplier from the procurement, depending on whether the exclusion ground for which the supplier has been put on the debarment list is mandatory or discretionary. See CMA guidance on exclusion and debarment: www.gov.uk/government/publications/the-procurement-act-2023-information-note-on-exclusion-and-debarment-on-competition-grounds/exclusion-and-debarment-on-competition-grounds-what-suppliers-and-contractors-need-to-know.

⁵⁹ Paragraph 41(2), Schedule 6 (mandatory ground for competition law (cartel) infringements) and paragraphs 7(2) and 10(2), Schedule 7 (discretionary ground for potential competition infringements) of the Procurement Act 2023. See Annex 1 of Cabinet Office guidance on exclusions for ground-specific guidance: www.gov.uk/government/publications/procurement-act-2023-guidance-documents-procure-phase/guidance-exclusions-html#annex-1-ground-specific-guidance. An 'immunity recipient' is defined by reference to paragraph 14 of Schedule 8A to the CA98 as an undertaking that has infringed the Chapter I prohibition by participating in a cartel, and, in respect of its participation in the cartel infringement, has been granted immunity from financial penalties under a cartel leniency programme.

⁶⁰ Recipients of Type B or Type C leniency (with the exception of Type B applicants which receive a 100% reduction in penalties - see footnote 37 above) do not benefit from exemption from debarment or exclusion under the Procurement Act 2023. However, as part of the assessment of whether a supplier is an excluded or excludable supplier, consideration must be given as to whether the circumstances giving rise to an exclusion ground are continuing or likely to occur again (see sections 57(1) and (2) of the Procurement Act 2023).

relevant to whether a supplier has taken the circumstances giving rise to the application of an exclusion ground seriously.⁶¹

⁶¹ Suppliers who have engaged in cartel activity but who do not benefit from immunity from financial penalties will not be excluded or debarred on competition law grounds if they can demonstrate, to the satisfaction of a contracting authority (for exclusion) or Minister (for debarment), that they have 'self-cleaned' (i.e. that the circumstances giving rise to the application of the exclusion ground are not continuing or not likely to occur again). See section 58 of the Procurement Act 2023 which sets out the factors which may be taken into account in deciding whether the circumstances giving rise to the application of an exclusion ground are continuing or likely to occur again. See also paragraphs 53-66 on self-cleaning in Cabinet Office guidance on exclusions: www.gov.uk/government/publications/procurement-act-2023-guidance-documents-procure-phase/guidance-exclusions-html#what-is-the-legal-framework-that-governs-exclusions.

3. Guidance for applicants and prospective applicants on gathering evidence and maintaining confidentiality

- 3.1 The CMA recognises that undertakings will want and need to take various internal steps from the moment that a leniency application is in contemplation, and throughout the course of a leniency application and any formal investigation by the CMA. However, certain steps that an undertaking may wish to take could risk prejudicing the CMA's ability to take effective enforcement action, in particular by compromising evidence of the cartel activity or by tipping off other participants to the possibility of a CMA investigation. This would risk the applicant being unable to meet the requirement of continuous and complete cooperation, which is a condition of leniency.
- 3.2 This chapter sets out important considerations for applicants in two key areas:
- making internal enquiries and gathering documentary and/or witness evidence of the cartel activity (referred to as conducting an 'internal investigation'); and
 - maintaining confidentiality as to a prospective or ongoing leniency application, including managing necessary disclosures to third parties appropriately.
- 3.3 The CMA expects applicants (and prospective applicants) to have regard to these considerations from the moment that a leniency application is in contemplation so as to preserve the integrity of any CMA investigation of the cartel activity.

Conducting an internal investigation

- 3.4 The way in which applicants and advisers conduct their internal investigations both prior to and following⁶² an approach to the CMA for leniency is capable of having a substantial bearing on the effectiveness of the CMA's own subsequent investigations and any enforcement action, especially where these include a criminal cartel investigation with a view to a possible prosecution.⁶³ For this reason, the way in which internal investigations are

⁶² There may be some cases (usually civil investigations under CA98) where the CMA may agree with the applicant, after grant of the marker, that the applicant and its advisers should conduct relatively extensive further enquiries, which may include at least some interviews.

⁶³ Even where it appears that a criminal cartel investigation is unlikely to result, potential applicants for leniency are asked to have regard to the importance of internal investigations being carried out with appropriate care.

conducted by an applicant cannot be considered exclusively a matter for the applicant concerned. 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.

- 3.5 The CMA only requires that undertakings act reasonably, reducing the risks as best they can, having regard to all relevant considerations. The CMA accepts that what is reasonable for these purposes may depend upon the circumstances of the case. Undertakings can be guided by the established rules of evidence, particularly as they apply to criminal proceedings. If the suspected conduct for which the undertaking is considering applying for leniency may fall within the scope of the criminal cartel offence, the undertaking may wish to take advice from a criminal lawyer for this purpose. Undertakings and their advisers may also seek confidential guidance from the CMA on this point if needed.⁶⁴
- 3.6 The following sections highlight some of the potential risks that arise and some key points for those investigating to follow. Persons conducting such investigations should have regard to all relevant legal requirements (such as, for example, those arising in relation to employment, data protection and privacy law) to ensure that their investigation is conducted lawfully and may wish to seek specialist legal advice for this purpose.

Limit pre-application enquiries to the necessary

- 3.7 The CMA recognises that prospective applicants will want and need to consider carefully the decision whether to apply for leniency and that for undertakings, such a decision will ordinarily be made at a very senior level. The CMA appreciates that potential leniency applicants require sufficient information on which to base such a decision.
- 3.8 However, due to the various possible risks described below, in conjunction with the CMA's responsibilities to ensure that the investigation is carried out fairly, thoroughly and carefully, it is important that the CMA is able to conduct its own investigation from the earliest possible opportunity. It is of prime importance that when would-be applicants conduct an enquiry in order to make a decision as to whether to apply for leniency, that enquiry is limited to what is necessary to inform the decision. The CMA accepts that what is

⁶⁴ See chapter 4.

necessary for these purposes will depend upon the circumstances of the case and that a business will need to have a suitable information base in order to make such a decision.

- 3.9 Applicants should bear in mind that the CMA sets a relatively low evidential threshold for the gaining of a marker. All that is necessary is to establish a concrete basis for a suspicion of cartel activity and a demonstration of a genuine intention to admit to cartel activity (as set out at paragraphs 2.7 to 2.9). Leniency applicants are encouraged to approach the CMA as early as possible. However, the CMA does accept that some other agencies set a higher threshold and that a more significant investigation may be necessary in order to make leniency applications in multiple jurisdictions. Potential applicants who are concerned about the interaction between the CMA's leniency application threshold and those in other jurisdictions can approach the CMA for confidential guidance.⁶⁵ The CMA is not aware of any cases where this has in practice caused a problem.

Tip-off

- 3.10 On more than one occasion, the CMA has conducted 'surprise' inspections of premises only to find evidence to suggest that the undertaking being visited had prior knowledge of the CMA's investigation. This could have occurred as a result of a tip-off emanating from the leniency applicant. Tip-off is obviously a real risk when individuals within a leniency applicant have close links with individuals working in a 'target' undertaking likely to be the subject of a surprise visit. The risk may be particularly high for example where individuals in the applicant undertaking previously worked for the target undertaking. It is also likely to be very risky to approach former employees or directors of the leniency undertaking and making such an approach during the pre-marker period (or indeed any time up to the CMA's own investigations becoming overt) should be an exceptional course. The CMA will expect an undertaking to take a sensible risk-based approach and to conduct its internal investigations in such a way as to minimise as far as possible the risk of tip-off.
- 3.11 It should also be noted that, given the possibility of a subsequent criminal cartel investigation, an individual may be prosecuted for any unauthorised disclosures and that such disclosures may, if discovered, also result in the

⁶⁵ See chapter 4.

undertaking and the individual losing the immunity for which they would otherwise have qualified.⁶⁶

3.12 The following precautions should be taken to minimise the risk of tip-off.

- Restrict knowledge of any leniency application, already made or in contemplation, to those who need to know.
- Consider carefully which individuals need to be approached and, as far as possible, avoid questioning 'high-risk' individuals about the cartel activity at all or in such a way as to increase the chance of tip-off.⁶⁷
- Consideration should also be given, to the extent that the relevant legal framework permits, to which covert investigations can be conducted to establish sufficient material to make the approach for leniency, for example, covert examination of relevant individuals' email accounts or other electronic material.
- Take care when explaining the reasons why individuals are being questioned. For example, compare, bearing in mind any relevant legal requirements, the relative merits of telling an individual that the interview is with a view to a possible approach to the CMA and the full consequences of tipping off with the alternative approach of questioning the individual in a more low-key way such as to establish the facts, which may in some instances be a better way of reducing the chance of him or her tipping others off.

3.13 The approach to be taken in a given case will depend on a risk assessment of the individual(s) concerned.

Avoiding tampering and 'corruption' of evidence

3.14 It is a sensible precaution to secure any items of evidence, so far as possible, to prevent tampering or corruption of material such as would undermine its

⁶⁶ Where an applicant 'tips off' other parties to the cartel activity, this may amount to 'bad faith' on the part of the applicant. See paragraphs 11.11 to 11.15.

⁶⁷ In principle, leniency protection from individual sanctions can extend to former employees and directors even where those individuals now work for another company that is under investigation for the same cartel activity, provided that they fulfil the requirement to cooperate with the CMA's investigation. However, the CMA strongly recommends that applicant undertakings do not contact such individuals prior to discussing the approach with the CMA, given the issues of confidentiality and the risks of tip-off that may arise, and the potential consequences for the applicant if tip-off results.

evidential value in any future legal proceedings, especially criminal proceedings.⁶⁸

- 3.15 'Corruption' in this context can mean any physical amendment to evidential sources that may affect their probative value, and could be inadvertent rather than deliberate. What precautions are possible and reasonable will naturally depend on the circumstances of the case and the CMA only expects undertakings to take sensible and prudent measures. The taking of such measures could have an impact upon the success of any future CMA investigation, as sophisticated cartels can often only be evidenced through fragmentary material, such as emails or text messages.
- 3.16 When securing evidence (whether physical or electronic), the evidence should be physically located in such a way that access to it is limited to as few people as possible, who are aware of the importance of its preservation. Ideally, original materials should be kept in secure, locked storage. There should be clear records of how evidence has been secured and of who has had access to it and for what purposes (for example to review, to copy, to show to others).
- 3.17 Ultimately, the applicant needs to be able to inform the CMA of where any evidential material originated from and be in a position to confirm that evidential material has not been altered between being removed from that location and being handed to the CMA.
- 3.18 Records of where evidence came from should indicate which person or persons had possession or control of the material and its location, including any description of the file(s) that particular papers were taken from and where the file or other document was kept. Any records, schedules or lists of evidence gathered as part of an internal investigation must give a sufficiently detailed description of the material to ensure there can be no confusion at a later stage in identifying the material referred to.
- 3.19 The following points are particularly important in relation to preserving and securing **electronic** evidence.

⁶⁸ Such tampering or corruption may in any event give rise to fines under the CA98. Section 25B of the CA98 imposes a duty on a person who knows or suspects that an investigation under the CA98 is being, or is likely to be, carried out by the CMA not to falsify, conceal, destroy or otherwise dispose of a document (or cause or permit this to be done) which the person knows or suspects is or would be relevant to the investigation. See further *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), paragraphs 5.9 to 5.13. Similarly, section 201(4) of the EA02 provides that any individual who knows or suspects that an investigation by the SFO or CMA into an offence under section 188 (the cartel offence) is being carried out or is likely to be carried out and falsifies, conceals, destroys or otherwise disposes of or causes or permits the falsification etc. of information which the individual knows or suspects to be relevant to such an investigation is guilty of an offence carrying a prison term of up to five years or an unlimited fine.

- Relevant legal requirements should always be borne in mind and legal advice sought where necessary.
- Consideration should be given to putting in place a 'legal hold' on the accounts of all relevant custodians. A legal hold is a function often available for organisations using a cloud-based IT service such as Office 365. A legal hold will prevent any digital material being moved or deleted but will not prevent the continuance of business. Guidance should be sought from suitably qualified experts on how to do this.
- If individuals have used electronic communication devices (such as laptop computers, mobile telephones or other electronic devices) or channels which might contain relevant evidence, consideration should be given as to how to ensure that any relevant communications are preserved and secured at the earliest opportunity, in order to prevent evidence loss or to allow a forensically sound image to be created. Where it is known or suspected that individuals may have used such electronic communication devices or channels in relation to the suspected cartel activity, it is strongly recommended that the undertaking consults a forensic expert at the earliest opportunity in order to secure the relevant data correctly. Particular consideration should be given where it is suspected that individuals may have used 'ephemeral' messaging applications.⁶⁹ In all cases, prospective applicants concerned about the appropriate approach to preserving and securing electronic evidence may wish to contact the CMA to seek confidential guidance (see chapter 4).
- When examining any electronic media, care should be taken to ensure that it is examined in such a way that the evidential integrity of the material in question is not adversely affected.
- Wherever practicable, forensic experts should be used, who are familiar with universally accepted standards for the recovery of electronic data.⁷⁰

3.20 The following points are particularly important in relation to preserving and securing **physical** evidence.

⁶⁹ 'Ephemeral' messaging is the mobile-to-mobile transmission of multimedia messages that automatically disappear from the recipient's screen after the message has been viewed.

⁷⁰ In determining whether electronic evidence is forensically sound, the CMA will in particular have regard to the Forensic Science Regulator's code of practice. If a small undertaking is concerned that cost is a barrier to precautions such as this, it is advised to seek confidential guidance from the CMA as to the best course of action (see paragraph 4.1 onwards).

- Original hard copy documents which provide evidence of a cartel should be safely secured, including diaries and workbooks of relevant individuals.
- Working copies should be made if the documents are to be used at all for the purposes of the investigation and/or for any continued business use.
- No amendments or annotations should be made to original documents at any time during the investigation.
- A note should be kept of the source location, and where known, the author(s) of relevant documents that are removed in the course of the investigation.

Witness interviews

- 3.21 The secret nature of cartels means that the evidence of witnesses can be of paramount importance to successful enforcement action. Any individual who has information relevant to establishing the existence of the cartel can be a witness for these purposes.
- 3.22 Interviewing witnesses to obtain the maximum possible information but without distorting their evidence can be difficult. Because of these difficulties, it is preferable for applicants to limit the number and scope of interviews to the minimum necessary to decide whether to make a leniency application. Once an application has been made, any proposals to interview witnesses should be discussed with the CMA in advance. The CMA may prefer to conduct any interviews itself.
- 3.23 The following precautions must be taken in any internal investigation, notwithstanding that the CMA will conduct its own interviews.
- Any interviews must be conducted in a balanced way with a view to establishing the facts, and without any pressure being placed on any witness to give or confirm a particular version of events.
 - Witness evidence must not be ‘contaminated’ by exposure to the evidence of other witnesses. Do not tell any individual what another individual has said about the alleged cartel activity.
 - Witness evidence must not be ‘contaminated’ by exposure to documents or records that the witness did not create or have access to at the relevant

time.⁷¹ Witnesses must be interviewed separately and asked not to discuss their evidence with any other witness.

- The importance of being able to provide an account of interviews with witnesses is particularly acute (see below).
- Careful consideration should be given to the conduct of the investigation where senior managers who are witnesses would normally expect to see the results of the investigation and be involved in decisions whether or not to apply for leniency.

Explanation of steps taken in the internal investigation

- 3.24 All leniency applicants (including oral and online applicants) must be able to provide a clear explanation to the CMA of the actions they have taken as part of an internal investigation.
- 3.25 In addition to enabling the CMA to focus its own investigative steps or to direct the applicant in making further enquiries following the application, there may be circumstances where the CMA will need to rebut arguments that an internal investigation has compromised the integrity of the CMA's own case, and the provision of a clear explanation of the steps taken in such an investigation will be invaluable for this purpose. Ultimately, it is possible that the CMA, and hence the applicant, may need to demonstrate a full audit trail of the enquiries that have been carried out.⁷² An inability or refusal on the part of a leniency applicant to assist the CMA in doing so in an effective manner may mean that the leniency applicant cannot fulfil the conditions of leniency.
- 3.26 Therefore, at a minimum, save to the extent that legal professional privilege (LPP) applies, applicants (including online and oral applicants) should be able to provide an account of the following:
- in relation to interviews and/or meetings with potential witnesses:
 - names of interviewees, with time and date of interview(s);
 - names of interviewers, any other persons present and the capacity in which they act (for example, legal representative (and who they represent), company representative);

⁷¹ This includes documents relating to the reported cartel activity as well as to the leniency application.

⁷² This may, in some cases, necessitate witness statements from those involved in conducting the investigation.

- nature of pre-interview briefing, that is, what the interviewee was told about the purpose of the interview, what they knew about the company's position (whether they were aware of the potential leniency application), what they had been told about their own position or possible personal consequences arising from the investigation;
- whether the interview was recorded; and
- if no tape recording or detailed transcript was made, details of questions asked and answers given;
- in relation to physical searches:
 - locations searched (address, types of rooms searched, occupiers of particular offices/desks searched);
 - search and sift criteria, for example the briefing given to persons conducting the search;
 - specific locations of relevant material, including any file names and information on who had possession or control of the material;
 - where and how relevant material has been secured (including archived documents);
 - who found relevant material, and the continuity of evidence;⁷³ and
- in relation to electronic searches:
 - who assisted with the search (i.e. IT administrators etc.);
 - locations searched (servers, personal computers, laptops, mobile telephones, tablets, digital media, other similar networking or personal devices, cloud-based locations);
 - means of searching, in particular whether searches were conducted on a forensically secure image or on the original data;

⁷³ Continuity of evidence means being able to establish how a particular document or item has been handled from the time when it was first located or acquired to the point at which it is used in evidence (such as when it is cited in a statement of objections or produced in court). This is achieved by ensuring that items are stored securely, and by keeping full and accurate records of who has been in possession of the material, where and when.

- search and sift criteria, for example the briefing given to persons conducting the search, the list of search terms used;
- number of hits generated through electronic searches, and details of any ‘manual’ sifts to assess relevance of those hits;
- where and how relevant material has been secured, and the continuity of evidence;⁷⁴ and
- who found/identified relevant material.

- 3.27 Except in the case of an online or oral application,⁷⁵ the CMA expects leniency applicants to record this information in a careful note of all the actions they have taken as part of an internal investigation, including the identities of any witnesses who were interviewed in the investigation process, the nature of the questions asked and the replies obtained. The note will need to be retained until the conclusion of any proceedings. A refusal or inability to do so may mean that the applicant is not meeting the conditions for leniency.
- 3.28 The CMA recommends that, from the moment a leniency application is in contemplation, all notes, including manuscript/rough notes, should be kept in a separate notebook from notes relating to unrelated matters. In the event of a criminal case, the pre-trial disclosure requirements may extend to such material, and so this precaution will facilitate the protection of completely unrelated material from disclosure.

Disclosures to third parties

- 3.29 Given the risks of tip-off, tampering and corruption, it is essential that applicants maintain complete confidentiality of the fact that a leniency application is in contemplation.
- 3.30 Disclosures to lawyers with a view to obtaining legal advice about an intended or actual leniency application are acceptable. In addition, where parallel leniency applications have been made in other jurisdictions, there is no prohibition on those jurisdictions’ appropriate competition authorities being informed that an application to the CMA is either pending or has been made as the case may be.

⁷⁴ See footnote 73.

⁷⁵ Online and oral applications are discussed in paragraph 7.22 and following. Although the CMA does not impose specific requirements on online or oral applicants as to how they maintain records of steps they have taken, in line with paragraph 3.24 the applicant will still need to be able to provide the CMA with a clear explanation of the actions it has taken as part of an internal investigation.

- 3.31 The CMA sometimes receives requests from leniency applicants to make limited disclosures to banks, auditors or regulators after an application for leniency has been made. In general this is acceptable provided the CMA is consulted in advance as to whether and when such disclosures can be made and how much information can be given.
- 3.32 In assessing requests to make a limited disclosure, the CMA will require a brief explanation from the applicant as to why it is necessary to make the limited disclosure. The CMA will also need to be satisfied that the proposed disclosure is the minimum necessary for the purpose, and that it does not misrepresent either applicant's leniency status (for example by stating that the applicant has been granted immunity or leniency without also acknowledging that this is subject to the applicant continuing to satisfy the conditions of leniency) or any CMA investigation. Finally, the CMA may ask that a list be maintained of all individuals who have knowledge of the leniency approach and that such individuals be required to enter into confidentiality undertakings. See also paragraph 11.12 below.
- 3.33 Clearly the need for the utmost confidentiality in the circumstance described above arises from the CMA's desire to maintain the element of surprise should it wish to use its statutory powers such as those relating to inspections and searches. Once the CMA's investigation has reached the 'overt' stage, disclosures by leniency applicants of their status – including public disclosures – are less of an issue, but even at this stage the CMA must be consulted in advance about any proposed disclosure.

4. Seeking confidential guidance

- 4.1 The CMA recognises that undertakings and individuals may find it helpful to obtain guidance and comfort on particular issues when deciding whether to apply for leniency. For this reason, the CMA offers an option for undertakings or individuals thinking about applying for leniency to approach the CMA for confidential guidance. For the avoidance of doubt, such guidance may be sought on any aspect of the CMA's leniency and no-action programmes – not just in those situations referred to in this document where specific reference is made to the option of seeking such guidance. Confidential guidance discussions would usually involve a discussion on a no-names basis about a given factual matrix (perhaps expressed 'hypothetically') with a view to the undertaking or individual obtaining comfort on an issue before deciding whether to make an application.
- 4.2 The CMA handles many such requests on a wide range of topics, covering, for example:
- whether certain evidence amounts to a concrete basis for suspicion of cartel activity, sufficient to secure a marker;
 - whether particular investigative steps by the applicant prior to making an application are appropriate or necessary to secure a marker (see also paragraphs 3.7 to 3.9);
 - the CMA's preferred approach to briefing/interviewing employees in the company's own pre-application investigation;
 - the CMA's preferred approach to ceasing participation in a particular cartel activity;
 - whether particular arrangements fall within the definition of cartel activities, where there is genuine and reasonable doubt as to the characterisation of conduct, for example where there is an absence of legal precedent;⁷⁶ or
 - the CMA's proposed handling of particular factual scenarios that are not covered by this guidance.
- 4.3 Any person seeking confidential guidance on leniency from the CMA should ring the Leniency Enquiry Line on +44 (0)20 3738 6833. Once the purpose of

⁷⁶ As a general matter, it is for businesses and their advisers to self-assess their compliance with competition law. The CMA may decline to give guidance in circumstances when it considers that the caller is seeking general comfort on the CMA's assessment of conduct rather than genuinely with a view to making a leniency application.

the call has been assessed, that person will be referred to an appropriate senior officer experienced in leniency cases.

- 4.4 The CMA will give its views, by which it will consider itself bound, provided the discussion is followed up by an application within a reasonable time and provided the information given when the advice was sought was not false or misleading and there has been no material change of circumstance.
- 4.5 The CMA will not use information given in consequence of seeking confidential guidance for any other purpose. In the event that leniency is not applied for, or not subsequently granted to the undertaking or individual on whose behalf the guidance was sought, the CMA will not attempt to establish the undertaking's identity by a process of 'reverse engineering.'

5. Applying for leniency before the launch of a formal investigation

- 5.1 All initial contacts with a view to making leniency applications or ascertaining the availability of leniency should be made by telephoning the Leniency Enquiry Line on +44 (0)20 3738 6833.⁷⁷ Once the purpose of your call has been assessed, you will be referred to a senior CMA officer experienced in leniency cases. The date and time of your call will be logged so that your position in the leniency 'queue' can be reserved from that point until the CMA is in a position to confirm whether leniency is available and/or grant a marker.⁷⁸

Initial enquiry

- 5.2 Before making a leniency application, and if the undertaking is not aware of a pre-existing investigation, undertakings may wish to ascertain whether guaranteed immunity (Type A) is available. This can be done by either a representative from the undertaking or its legal adviser telephoning the Leniency Enquiry Line. You will be asked for the following information and essential commitments.
- (a) Confirmation from the legal adviser that they have instructions to apply for Type A immunity if it is available⁷⁹ (conditional instructions)⁸⁰ and that the undertaking understands that such an application will entail a commitment to cooperate with the CMA in any subsequent investigation.
 - (b) Confirmation that there is a 'concrete basis' for the suspicion of cartel activity (see paragraph 2.7).
 - (c) Confirmation that the undertaking has a 'genuine intention to admit to cartel activity.' This means that the undertaking must accept that, as part of any leniency agreement, it will be required to admit to having engaged in conduct which, as a matter of fact and law, amounts to cartel conduct in breach of the Chapter I prohibition, and that in the meantime it must not

⁷⁷ CMA officers will generally be available to answer the Leniency Enquiry Line during office hours. Outside office hours, or in case of CMA officers being unavailable, a voicemail service is available.

⁷⁸ The queue position will be reserved with effect from the time of the prospective applicant first speaking to someone or leaving a voicemail on the CMA Leniency Enquiry Line.

⁷⁹ If the application is made by a representative of the undertaking rather than a legal adviser, they would be asked to confirm their intention to apply for Type A immunity if it is available.

⁸⁰ The CMA will not require a professional undertaking from the legal adviser as to his/her conditional instructions to make a Type A immunity application.

conduct itself in a way which would be inconsistent with such an admission (see paragraph 2.8).

- (d) Specify the relevant sector, dates and broad nature of the cartel activity, or otherwise provide sufficient information to allow the CMA to determine whether there is a pre-existing civil and/or criminal cartel investigation and/or a pre-existing leniency applicant. The level of detail required will depend on whether there have been previous investigations or applications in the sector.
- (e) The name and telephone number of the person making the enquiry. The name of the undertaking or individual that they represent does not need to be disclosed at this point ('no-names enquiry').

5.3 Following this initial enquiry call, the CMA officer will make internal enquiries to determine whether or not Type A immunity is in principle available. If the CMA considers that the relevant sector is one in which one or more sectoral regulators may have concurrent competition powers, the CMA officer will also contact the relevant sectoral regulator(s) to ascertain whether they have a pre-existing civil investigation.

5.4 In some cases, the CMA may need to ask the prospective applicant for more information about the suspected cartel in order to rule out an overlap with a pre-existing investigation.

5.5 The CMA will not use for any other purpose information that a would-be leniency applicant has provided to enable the CMA to establish whether any type of leniency is available. Where, for example, an undertaking has had to disclose the precise sector concerned in order to determine the availability of Type A immunity only for it to be informed by the CMA that immunity is not available, the CMA will not attempt to establish the undertaking's identity by a process of 'reverse engineering'. In most cases this would in any event be impossible.

5.6 Once the CMA has completed its internal enquiries, the CMA officer will revert to the named contact to confirm whether or not Type A immunity is in principle available.

5.7 In the great majority of approaches, the CMA will be able to confirm within a short time (around one to two working days) whether Type A is available. However, this may not always be the case. For example, the CMA may need longer to determine whether there is an overlap with a pre-existing investigation if the relevant sector is one that is being or has previously been investigated.

Grant of Type A immunity marker

5.8 If Type A immunity is available, the legal adviser/representative must disclose the identity of the applicant.⁸¹ During the same telephone call, the CMA officer will request the information required in order to grant a marker. This will typically be the following:

- the type of arrangement (i.e. a description of the cartel activity),
- affected product(s) or service(s),
- geographic scope,
- dates (including whether the arrangement is ongoing),
- evidence uncovered so far, and
- names and locations of other involved undertakings (to the extent known).

5.9 The CMA officer will use the information provided to draft a marker. The marker is a brief outline of the conduct for which the applicant has been given a preliminary grant of leniency, pending consideration of the full application package. The wording of the marker will usually be provided to the applicant's representative shortly after the telephone call. This may be done by email or (for an online or oral application) in a further telephone call.

5.10 The Type A marker will be operational from the moment the applicant's identity has been disclosed to the CMA. From that time on, no other Type A or B marker will be granted for the same cartel activity, unless the Type A marker is subsequently withdrawn on the grounds that the conditions for immunity have not been met.

Scope of the leniency application and marker

5.11 The scope of the leniency application and marker should cover the suspected cartel activity. The CMA will be realistic about what can sensibly be identified at the initial application stage and the scope can be further specified/refined as progress is made with the CMA's investigation. Ultimately, the scope of leniency protection (as reflected in the marker) should be limited to the

⁸¹ Where there is strong justification, the CMA will consider providing a marker on a 'no-names' basis for a short and specified period, pending confirmation from another competition authority as to the availability of immunity under that authority's leniency policy. The CMA would expect this to happen only rarely.

minimum necessary to protect the applicant, so as to ensure that the CMA does not preclude future applications into similar but distinct cartels.

- 5.12 The CMA recognises that at the time of the initial approach to the CMA, and potentially at the time of submission of the application package (see chapter 7), the full details of the cartel activity may not be known to those preparing and submitting the application (and, in relation to certain types of cartel activity, relevant details may only be apparent from information in the possession of other parties). The CMA will therefore be understanding where there is genuine uncertainty on the part of the applicant as to the extent or particulars of the activity, provided always that there remains a 'concrete basis' to suspect cartel activity.
- 5.13 In complex cases, it may be appropriate to grant the marker on a wider basis that goes beyond the direct evidence available at the time of the initial application, provided the applicant can explain why such an approach is reasonable in the circumstances. In such cases, the CMA will seek to revisit and refine the scope of the marker as soon as it is practical to do so. The CMA also expects the applicant to engage proactively with the CMA if circumstances change such that it is in a position to refine the scope of its application (for example if the applicant's own investigation provides more clarity on the dates, products/services or geographical areas affected by the reported cartel activity).
- 5.14 In all cases, the scope of the marker may be adjusted in light of further emerging details and evidence as the investigation progresses.

Next steps

- 5.15 During or immediately following the telephone call to grant the marker, the CMA and the applicant will discuss the timing and process for the prompt provision by the applicant of the application package. If the applicant has applied to other competition authorities in respect of the same cartel activity, the CMA officer will also require the applicant to provide waivers of confidentiality to enable the CMA to discuss the application with those other authorities (see paragraphs 7.31 and 7.32).
- 5.16 If the affected sector is one in which a sectoral regulator may have concurrent competition powers, the CMA will provide the relevant sectoral regulator with details of the marker. As set out at paragraph 2.63, applicants must accept that the CMA may share information with the relevant sectoral regulator where it considers that the sectoral regulator may have concurrent competition

powers.⁸² The CMA will inform the applicant before sharing information with the sectoral regulator.

Directions to continue cartel activity

- 5.17 If the cartel activity is ongoing, the CMA and the applicant will also discuss cessation of the cartel activity without tipping off others and/or any requirement by the CMA for the applicant to continue to participate in the cartel.
- 5.18 Ordinarily the applicant (whether an undertaking or an individual) will be required to refrain from further participation in the reported cartel activity unless the CMA directs otherwise. Such a direction will be relatively rare. The objective in most such cases will be to protect the element of surprise of any forthcoming inspections (for example to avoid ‘tipping off’ other cartel members that the CMA is aware of the cartel activity). In exceptional cases, the objective may also be to allow the coming into existence of further evidence of the cartel activity. A direction by the CMA to the applicant to continue participating in the reported cartel activity may involve the use by the CMA of its powers under the Regulation of Investigatory Powers Act 2000 (RIPA).
- 5.19 The CMA will never expect individuals within an undertaking or an individual immunity applicant to take inappropriate risks. They will usually only be asked to carry on their basic activities in the same way as if they had never approached the CMA. The CMA will provide clear guidance as to what is expected in such cases.
- 5.20 The general expectation is that, where necessary, individuals benefitting from criminal immunity will be expected to give evidence, including where the individual has been directed to continue their participation in ongoing cartel activity.

⁸² The CMA may share leniency information with a relevant sectoral regulator (for example, for the purposes of that sectoral regulator determining whether it has concurrent powers to investigate), in line with Regulation 3 of the Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536), sections 241(1) and 241(3) of the Enterprise Act 2002 and the memoranda of understanding between the CMA and each of the sectoral regulators. Where a case is allocated to a sectoral regulator in accordance with Regulation 4 of the Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536), the CMA will share leniency information with that sectoral regulator.

Possible outcomes of a Type A immunity application

5.21 Once the CMA has had an opportunity to consider the full application package (see chapter 7), it will revert to the applicant as soon as is reasonably practicable, having regard to all the circumstances of the case. The possible outcomes are as follows.

- (a) **Retain marker but not launch investigation:** the CMA may decide to retain the marker but not to proceed with an investigation. This may be because it has higher priorities for its resources at that point in time. In that situation, the CMA will tell the applicant what precautions it needs to take in order to preserve its marker for leniency protection.⁸³ Provided the applicant cooperates as instructed, in the (unlikely) event that the CMA were to change its assessment of its priorities and commence an investigation, the applicant would be able to proceed with its application with the same level of marker protection.
- (b) **Retain marker and discuss next steps:** if the CMA intends to proceed with an investigation (whether criminal and/or civil) it will promptly start discussions with the applicant on what cooperation is expected (see chapter 8).
- (c) **Reject marker:** there are a number of reasons why, following consideration of the application package, the CMA may reject the marker. For example: the activity described may not amount to cartel activity within the scope of the leniency policy; the information provided may not give the CMA a sufficient basis for taking forward a credible investigation (see further paragraph 11.4) or the information provided may disclose that the applicant does not have a genuine intention to admit to cartel activity.
- (d) **Ask for more information:** in some instances, the CMA may require more information before it can assess whether the application should be accepted or whether the case will be a priority for investigation. In those instances, the CMA will make clear to the applicant what more it is asking for, and why.

5.22 If the CMA decides to retain the marker but not launch a formal investigation, it will normally write to the applicant to confirm this, unless the applicant has requested an online or oral application, in which case this would typically be done in a telephone call.

⁸³ For example, securing physical and electronic evidence, keeping track of relevant witnesses who leave the applicant's employment and continuing to keep the application confidential.

- 5.23 In some applications covering complex activities, the CMA's response may be a mixture of the above, for example because it is focusing its investigation on only part of the reported activity.

If Type A immunity is not available

- 5.24 If Type A immunity is not available, the applicant is free to consider all the available options, including whether to submit an application for Type B or C leniency or whether to withdraw without its identity having been made known to the CMA. The CMA will not use for any other purpose information that a would-be leniency applicant has provided to enable the CMA to establish whether any type of leniency is available.
- 5.25 In some cases, it will not be possible for the CMA to determine at the time of the leniency enquiry whether the reported cartel activity may properly be described as being outside the scope of a pre-existing investigation and/or outside the scope of any earlier leniency application from another undertaking. In such cases, if the applicant elects to continue the application and reveal its identity, it might be possible for a marker for Type C leniency to be given immediately, with the possibility that such a marker might in future 'convert' to Type A once the circumstances are clearer.⁸⁴
- 5.26 If the outcome of such an application is that the CMA decides to retain the marker but not launch an investigation (see paragraph 5.21), the CMA may conclude that it is not an appropriate use of resources to assess whether the application is outside the scope of the relevant pre-existing investigation and/or leniency application (such that the marker should 'convert' to Type A). Instead, the CMA would retain details of the date and time that the applicant entered the leniency queue as part of the applicant's leniency marker. If the CMA subsequently decided to launch an investigation into the reported cartel activity, it would then be able to assess whether the application should 'convert' to Type A.

⁸⁴ Given that it is expected to be relatively unusual for the CMA to be unable to confirm at the time of the leniency enquiry whether or not Type A is available, in such cases the CMA will continue to hold the prospective applicant's place in the leniency 'queue' for around two working days after informing the prospective applicant of the position. This is to allow the applicant's representative to take instructions on whether to proceed with the application. The CMA is unlikely to agree to any extension to this timeframe, in order to give any other prospective applicants a fair chance to apply.

6. Applying for leniency after the launch of a formal investigation

- 6.1 In the event that a prospective applicant is already aware of an investigation into the cartel activity, a representative from the undertaking or its legal adviser may wish to contact the CMA to ascertain whether any form of leniency is in principle available.⁸⁵ Calls for this purpose should be made to the Leniency Enquiry Line,⁸⁶ regardless of whether the investigation is being conducted by the CMA or by a sectoral regulator.

Initial enquiry regarding the availability of Type B or Type C leniency

- 6.2 For the purpose of the initial enquiry about availability of Type B or Type C leniency, the CMA will usually seek the following information:
- (a) details of the investigation to which the enquiry relates;
 - (b) the scope of the conduct for which leniency is sought, for example whether the scope is the same as the scope of the investigation (as set out in any case initiation letter or published information about the investigation) or, if not, details of any differences;
 - (c) confirmation that the prospective applicant has a 'concrete basis' for the suspicion of cartel activity, and a brief outline of what this is;⁸⁷
 - (d) a brief outline of the basis on which the prospective applicant considers that it can add significant value to the investigation (for example by producing new documentary evidence, witness evidence, and/or explanations of existing evidence);⁸⁸
 - (e) confirmation that the prospective applicant has a 'genuine intention to admit to cartel activity';
 - (f) confirmation that the prospective applicant understands that a leniency application involves an obligation to maintain continuous and complete

⁸⁵ If the CMA has launched a formal investigation, Type A immunity will be unavailable except in relation to 'new' related infringements (see paragraphs 6.10 and 6.11). Accordingly, enquiries and applications made at this stage will generally be in respect of Type B and Type C leniency.

⁸⁶ See paragraph 5.1.

⁸⁷ See paragraph 2.7. The fact that the prospective applicant has been subject to on-site inspections or other information requests is not in itself sufficient to provide a 'concrete basis' to suspect.

⁸⁸ See paragraph 9.9 for a non-exhaustive list of ways in which Type B and C applicants may be able to add value to an existing investigation.

cooperation with the CMA throughout the investigation and until the conclusion of any action;

- (g) the name and telephone number of the person making the enquiry (although as explained at paragraph 6.3, the identity of the prospective applicant does not usually need to be disclosed at this stage); and
- (h) confirmation that the legal adviser has instructions to apply on behalf of the prospective applicant if Type B is available.⁸⁹

- 6.3 It will not usually be necessary for the legal adviser to disclose the identity of the prospective applicant. In any event, the fact that a prospective applicant has enquired about the availability of leniency will not be used against it if the application does not proceed.
- 6.4 After taking initial details, the CMA officer will liaise with the relevant case team to ascertain whether leniency is available in principle.⁹⁰ This will usually take up to two working days, although it may be longer (for example in relation to some complex investigations). In the meantime, the prospective applicant's position in the leniency 'queue' will be reserved from the time of the initial call or voicemail to the Leniency Enquiry Line.
- 6.5 Once the CMA officer has liaised with the relevant case team, the CMA officer will update the prospective applicant.
- 6.6 As set out at paragraph 6.2(h), the prospective applicant will already have confirmed that it intends to apply for leniency if Type B is available. Accordingly, if Type B is available the CMA officer will proceed to grant a Type B marker (see paragraph 6.12 and following).
- 6.7 If the prospective applicant is in the Type C position, there will be no obligation to proceed with the application. The prospective applicant may wish to consider its position further before deciding whether to apply, in which case the enquiry would end and the prospective applicant would need to call the leniency enquiry line again if it subsequently decided to proceed.⁹¹

⁸⁹ There is no requirement that the person making the enquiry also have instructions to apply if Type C is available. However, it may be helpful for the prospective applicant to consider in advance whether it would apply for Type C if Type B is not available.

⁹⁰ If the current investigation is being undertaken by a sectoral regulator, the CMA will liaise with the sectoral regulator.

⁹¹ The prospective applicant's position in the leniency 'queue' will not be preserved if the prospective applicant decides not to proceed at this point. As set out at paragraph 9.13, queue position is not decisive in relation to Type C applications (other than in the very rare scenario that the Type A application fails or is withdrawn, in

Applications during inspections

- 6.8 Where an approach is made during an inspection,⁹² the inspection will continue in the normal way. To the extent that an undertaking merely complies with its obligations pursuant to the CMA's mandatory powers of investigation it will not be treated as having provided information under the CMA's leniency policy.⁹³
- 6.9 Markers can only be granted by certain senior CMA officials who will generally need to make checks within the CMA before they do so. This means that approaches during an inspection should be made to the Leniency Enquiry Line⁹⁴ in the normal way, not to the CMA officials present at the inspection.

'New' related infringements

- 6.10 On some complex investigations, applicants may approach the CMA hoping to gain Type A immunity notwithstanding that an investigation is already underway. Applicants may claim to have discovered a 'new' related infringement. However, it will not always be possible for the CMA to determine at the time of the leniency enquiry whether the reported cartel activity may properly be described as being outside the scope of its investigation and/or outside the scope of any earlier leniency application from another undertaking.
- 6.11 In such cases, if the applicant elects to continue the application and reveal its identity, it might be possible for a marker for Type C leniency to be given immediately, with the possibility that such a marker might in future 'convert' to Type A once the circumstances are clearer.⁹⁵ Applicants should also note that if Type A is not available in this situation, the 'but for' test (as described at paragraphs 9.15 and 9.16) may apply. If the CMA decides not to investigate

which case the first Type C applicant would become a Type B applicant). However, prospective applicants should be aware that delaying a decision on whether to apply for leniency may reduce the prospective applicant's ability to add significant value to the CMA's investigation.

⁹² On-site inspections under sections 27 or 28 of the CA98 or sections 193 and 194 of the EA02.

⁹³ An application for leniency after commencement of an inspection or receipt of a formal information request will not interrupt or avoid the need for the applicant to comply with the formal investigative measures. Nor will information compulsorily obtained by the CMA under such measures be considered as information provided as part of the leniency application when assessing whether the application has added significant value to the CMA's investigation.

⁹⁴ See paragraph 5.1.

⁹⁵ In such cases, the CMA will continue to hold the prospective applicant's place in the leniency 'queue' for around two working days after informing the prospective applicant of the position. This is to allow the applicant's representative to take instructions on whether to proceed with the application. The CMA is unlikely to agree to any extension to this timeframe, in order to give any other prospective applicants a fair chance to apply.

the 'new' related infringement, it may take the approach described at paragraph 5.26.

Grant of Type B or Type C marker

- 6.12 If the prospective applicant decides to proceed, the legal adviser/representative must disclose the identity of the applicant to obtain a marker. This will be operational from the moment the applicant's identity has been disclosed to the CMA.⁹⁶
- 6.13 During the same telephone call, the CMA officer will request the information required in order to grant a marker. This will typically be the following:
- the type of arrangement (i.e. the type of cartel activity),
 - affected product(s) or service(s),
 - geographic scope,
 - dates (including whether the arrangement is ongoing),
 - evidence uncovered so far, and
 - names and locations of other involved undertakings (to the extent known).
- 6.14 As with the process for granting a Type A marker, the CMA officer will use the information provided to draft a brief outline of the scope of the conduct for which the applicant has been given a preliminary grant of leniency (the marker). This will usually be provided to the applicant's representative by email or (for an online or oral application) in a further call. As set out at paragraphs 5.11 to 5.14, the scope of the leniency application and marker should cover the suspected cartel activity but may be adjusted in light of further emerging details and evidence as the investigation progresses.
- 6.15 Note that the grant of a Type B or Type C marker will always be subject to applicants continuing to meet the conditions of leniency set out at paragraph 2.6, and the information provided by the applicant adding significant value to the CMA's investigation.

⁹⁶ If a Type B marker is granted, no other Type B marker will be granted for the same cartel activity, unless the marker is subsequently rejected. For Type C markers, note that queue position does not determine the level of discount (see paragraph 9.13), so the timing of the marker is less critical than for Types A and B.

Discretionary CDO immunity

- 6.16 The case team will liaise with the applicant when it is in a position to confirm whether discretionary CDO immunity is available, and if so for which of the applicant's current or former directors. Applicants should be aware that the CMA may not be in a position to make an informed assessment of the public interest in granting CDO immunity until a relatively late stage of the investigation.
- 6.17 Once the CMA has confirmed that it intends to grant discretionary CDO immunity to a director, it will be bound by its decision unless that director fails to meet the conditions of leniency (in which case the director will lose CDO immunity).

Next steps

- 6.18 Once a marker has been granted in respect of an ongoing investigation, the CMA or sectoral regulator case team for the investigation will set out next steps, including the timing for the applicant to submit any application package (see chapter 7) and to provide waivers of confidentiality from any other competition authorities from which markers have been obtained or will be requested (see paragraphs 7.31 and 7.32).

7. Submitting an application package and next steps

- 7.1 Once a marker has been granted, applicants will usually be asked to submit an application package. As set out in further detail below, an application package usually consists of all documentary evidence available to the applicant regarding the reported cartel activity, along with an accompanying statement. The precise requirements will vary from case to case. This chapter sets out general expectations; the CMA will discuss with applicants what is appropriate in individual cases.
- 7.2 During or immediately following the telephone call in which the marker is granted, the CMA and the applicant will discuss the timing for the provision by the applicant of any application package. In complex or particularly urgent cases, the CMA may ask for certain information or material to be provided more promptly, followed by a full application package at a later date.

Contents of the application package

- 7.3 The application package will typically consist of all pre-existing, non-legally privileged documentary evidence⁹⁷ relevant to the reported cartel activity, along with an accompanying leniency statement.⁹⁸ For this purpose, applicants should have regard to the definition of ‘relevant information’ set out at paragraphs 2.10 to 2.12. They should also have regard to the principles in Chapter 3 on conducting internal investigations.

Leniency statement

- 7.4 As part of the application package, applicants will typically be required to submit a leniency statement setting out a detailed description of the reported cartel activity. At a minimum, this should include:
- (a) the name and address of the legal entity submitting the application, as well as the names and locations of its employees and directors who are suspected of being or having been involved in the reported cartel activity;
 - (b) the identity and location of all other undertakings that are suspected of participating or having participated in the reported cartel activity;
 - (c) a detailed description of the reported cartel conduct including, for example, the type of arrangement, the affected product and/or service

⁹⁷ Applicants should liaise with the CMA to discuss the format and method of providing pre-existing documents.

⁹⁸ ‘Leniency statement’ is defined in the Glossary of Terms at the end of this document.

market(s), the geographic scope, the duration, and a chronology and narrative of events;

(d) evidence uncovered so far and, where appropriate, the applicant's interpretation of the evidence;

(e) the provenance of the evidence; and

(f) names and locations of employees and directors who may provide evidence, with an outline of matters of which they have personal knowledge.

7.5 The leniency statement should make clear which aspects of the statement are facts supported by evidence, and which aspects are supported by inferences or assumptions. It should also highlight any gaps in the applicant's knowledge of the reported cartel activity.

7.6 In relation to Type B and Type C applications, the application package should also include details of the applicant's corporate structure and current and former directors (covering the period for which the applicant has applied for leniency). The CMA will use this information when making an assessment on the availability of CDO immunity.

7.7 As set out at paragraphs 7.22 to 7.24 below, the leniency statement can be submitted online or orally where there is a good reason for it. Otherwise, the CMA will usually expect the leniency statement to be submitted by email.

7.8 Applicants should note the provisions at paragraph 10.6 regarding the potential disclosure of leniency statements in the event that the statement contains relevant evidential material that has not been presented in other forms. In the CMA's experience, this is most likely to arise in cases where the leniency statement draws on the recollections of individuals or includes information provided by the applicant that is not derived from contemporaneous documents. Where this is the case, applicants are encouraged to engage with the CMA in advance of submitting the application package to discuss its proposed content and form.⁹⁹

7.9 It is often the case that applicants will submit additional leniency statements during the course of a leniency application, for example to respond to questions from the CMA or to provide updates on the applicant's

⁹⁹ For example, where an applicant holds relevant information in the form of individual recollections of the reported cartel activity, it may be appropriate to provide this information in a separate statement so that, if it becomes necessary to disclose this information, material provided in the main application statement is protected from disclosure.

understanding of the reported cartel activity if new evidence is uncovered. The CMA will treat these in the same way as the initial leniency statement.

Foreign language documents

- 7.10 If the documentary evidence of the reported cartel activity includes foreign language material, it is likely that applicants will be asked to provide English translations of this material (or, as appropriate, of the parts of foreign language documents that are relevant to the reported conduct). Applicants who have a substantial number of foreign language documents in their possession that are relevant to the reported cartel activity are encouraged to discuss this issue with the CMA at an early stage so that an appropriate approach can be agreed.
- 7.11 For the purpose of an application package, the CMA will usually accept translations produced by the applicant or using automated software, provided that the applicant has verified and is satisfied that the translations are of a sufficiently good quality to allow the CMA to carry out a robust review of the material. However, the CMA may later require the applicant to obtain certified translations from a qualified translator of any foreign language material that will be relied upon in, for example, an application for search warrants, a statement of objections or an infringement decision.

Application of legal privilege

- 7.12 The CMA will not require waivers of LPP over any privileged communications¹⁰⁰ (or parts thereof) containing relevant information¹⁰¹ as a condition of leniency in either civil (including CDO) or criminal cartel investigations.¹⁰²
- 7.13 However, applicants must maintain a record of any communications containing relevant information which have not been provided to the CMA because, in the applicant's assessment, they benefit from LPP. Applicants may be required to produce a log of any such material alongside their production of any non-privileged pre-existing documentary evidence relevant

¹⁰⁰ As defined in section 30 of the CA98.

¹⁰¹ See paragraph 2.10 for a definition of 'relevant information'.

¹⁰² The CMA does not rule out inquiring as to whether a leniency applicant may be prepared to waive LPP over certain material during the course of a possible criminal cartel prosecution. In such circumstances, it will be made clear that any refusal to waive LPP will not have any adverse consequences for the leniency application and furthermore, that granting such a waiver will not yield any additional leniency discount or any other advantage to the leniency applicant. Any such inquiry would be made for the purposes of clarity in a possible criminal cartel prosecution, so that the defence and the court can know as early as possible the leniency applicant's position with respect to LPP material.

to the reported cartel activity. This log must contain sufficient information to demonstrate that the material being withheld fulfils the conditions for LPP, so that the CMA can satisfy itself that the material does indeed benefit from LPP.¹⁰³

- 7.14 In certain circumstances (for example, if the CMA considers that the log does not contain sufficient information to demonstrate that the material being withheld fulfils the conditions for LPP), the CMA may require the material in question to be provided to a lawyer not involved in the CMA's investigation. Having first invited and considered the party's representations, that lawyer will consider and determine whether the material is protected by LPP.
- 7.15 The conclusions of the lawyer will ordinarily be regarded as determinative as between the leniency applicant and the CMA. The leniency applicant will therefore be expected to provide to the CMA any communications (or parts of communications) containing relevant information that the lawyer has concluded are not protected by LPP.

Foreign law

- 7.16 The CMA recognises that there may be circumstances in which producing relevant information to the CMA could put the applicant in breach of a foreign law (such as privacy laws or 'blocking statutes'). The CMA will ordinarily accept that the applicant is unable to produce relevant information where the applicant can show that it is prohibited from doing so by an express legislative barrier. In such circumstances, applicants will be expected to consider proactively whether there are any steps that the applicant could feasibly take (including but not limited to the use of redactions and confidentiality rings) to provide the affected material to the CMA.
- 7.17 While the CMA will not take the view that an applicant has failed to cooperate if it is not able to provide certain relevant information in circumstances where there is an express legislative barrier and no steps it could feasibly take to provide the material, applicants should note that:
- the leniency application will fail if the information that is provided does not give the CMA a sufficient basis for taking forward a credible investigation (Type A) or add significant value to an existing investigation (Type B and Type C);¹⁰⁴ and

¹⁰³ The CMA will not require the applicant to include in the log any details which are themselves subject to LPP, such as, for example, the detailed subject matter of the communication.

¹⁰⁴ As set out at paragraphs 11.4 and 11.5.

- the key criterion for determining the discount available for Type B and Type C applications will be the overall added value of the material provided by the leniency applicant.¹⁰⁵

Discovery of genuinely unrelated material

- 7.18 There is no obligation to submit material which is clearly outside the scope of the leniency application to the CMA – the CMA does not require applicants to answer questions as to whether they are aware of any further cartel activity.
- 7.19 To the extent that an applicant identifies information relating to an entirely separate infringement, it is treated in the normal way. Applicants are, therefore, encouraged also to apply for leniency for that (entirely separate) infringement. To the extent that an undertaking is not benefiting from immunity in relation to the original leniency application, the CMA's leniency plus policy would apply (see paragraph 9.17 below).

Leniency applications in the regulated sectors

- 7.20 If the leniency application is one for which a sectoral regulator may have concurrent powers to investigate, and the application package is received before any decision has been made on allocation, the CMA may share the application package with the sectoral regulator.¹⁰⁶ This is to allow the sectoral regulator to determine whether it has concurrent jurisdiction, and (in relation to Type A applications) for both the sectoral regulator and the CMA to determine whether to open an investigation in relation to the reported cartel activity.
- 7.21 For this purpose, the CMA may ask the applicant to identify instances within the application package of (i) personal data¹⁰⁷ that is not relevant to the cartel activity being reported, and/or (ii) special categories of personal data.¹⁰⁸ This will assist the CMA in meeting its obligations under data protection legislation when sharing the application package with the relevant sectoral regulator.

¹⁰⁵ As set out at paragraphs 9.7 to 9.14.

¹⁰⁶ See footnote 82.

¹⁰⁷ As defined at Article 4(1) of the General Data Protection Regulation (GDPR).

¹⁰⁸ As defined at Article 9(1) of the GDPR.

Online and oral applications

7.22 The entire application process can be online or oral if requested and where the CMA agrees that there is good reason for it.¹⁰⁹ In line with the obligation on applicants to maintain continuous and complete cooperation with the CMA, and in view of reasons of administrative efficiencies, the CMA will expect applicants to submit either a written or online application wherever possible. However, the oral application process remains available where the CMA is satisfied that this is appropriate.

7.23 Applicants making online or oral applications should note that:

- all pre-existing written evidence of the cartel will need to be provided to the CMA;
- witnesses will need to be made available for interview and to sign statements, setting out their evidence;
- the leniency agreement and any no-action letters (usually entered into shortly prior to issue of a statement of objections) will be in writing; and
- if the case proceeds to a prosecution or statement of objections, reference to the leniency application(s) and identity of the applicant(s) will be made in formal documents disclosed to other parties and/or made public at that stage.¹¹⁰

7.24 The grant of a marker can be confirmed in writing if desired, for all types of leniency.

Making applications in multiple jurisdictions (parallel applications)

7.25 In cases where an applicant has also applied to competition authorities in other jurisdictions for leniency in respect of the same cartel activity (referred to as 'parallel applications'), the CMA would expect the applicant to manage the parallel applications constructively so as to enable the CMA to coordinate with those other jurisdictions as needed. This is particularly relevant for Type A

¹⁰⁹ In particular, the CMA will accept online or oral applications where an applicant has a legitimate concern that leniency statements may become subject to discovery in civil damages proceedings in other jurisdictions. However, applicants should note the protections against disclosure of leniency statements in the UK, as outlined at paragraph 10.10.

¹¹⁰ Information and documents provided by the applicant may also be disclosed as part of 'access to the file' for other recipients of the statement of objections or disclosure to criminal defendants. See further Chapter 10.

applications given the potential need for the CMA to coordinate planned concerted action such as on-site investigations.

- 7.26 The CMA recognises that applicants that have also applied for leniency from competition authorities in other jurisdictions in respect of the same cartel activity will need to cooperate with each competition authority involved. The CMA has longstanding relationships with many other competition authorities and works carefully to ensure that the process is as efficient as possible for all involved. As outlined below, applicants can also take steps to make the process efficient by managing the timing and content of their applications, as well as by providing waivers promptly when requested.
- 7.27 Should there be any conflict arising from the requirement on applicants to cooperate with multiple competition authorities, this will typically be handled between the competition authorities in discussion with the applicant. The CMA is not aware of any cases in which an applicant has been unable to fulfil its obligations to the CMA due to obligations to competition authorities in other jurisdictions (or vice versa).

Timing of parallel applications

- 7.28 The CMA would generally expect Type A immunity applicants to consider carefully, in advance of applying, which competition authorities may have jurisdiction in respect of the cartel activity. This should enable applicants to make parallel applications on similar timeframes.¹¹¹
- 7.29 Similarly, the CMA would expect Type A applicants making parallel applications to ensure that they provide application packages to the CMA on a similar timescale as to other competition authorities.
- 7.30 This is important to enable the CMA to coordinate planned concerted action if the other competition authorities also decide to launch formal investigations. It also minimises the risk of the CMA requiring the applicant to produce relevant information very quickly so that the CMA can assess the case and, if necessary, launch an investigation in parallel with other competition authorities.

¹¹¹ However, the CMA recognises that the threshold for applying for leniency can vary between authorities, and that this may make it difficult to align on timing. Where this raises a concern, prospective applicants are encouraged to engage with the CMA for advice on how to proceed, for example by seeking confidential guidance (see chapter 4).

Waivers of confidentiality

- 7.31 The CMA would expect to be given ‘waivers’ of confidentiality in respect of parallel applications so as to allow the CMA to discuss appropriate matters with those other competition authorities.¹¹² Where there are particular sensitivities for a leniency applicant about such waivers, these should be raised promptly with the CMA.
- 7.32 In some cases, the CMA may need to discuss matters with other jurisdictions with some urgency. Ideally, therefore, applicants’ advisers should take instruction on the issue of waivers in advance of making the application.

Content of application package in parallel applications

- 7.33 It is likely that in parallel applications there will be at least some overlap between the relevant information for the purpose of the CMA investigation and the material produced in application packages for other competition authorities. However, there will generally also be material that is only relevant to individual authorities, such as an assessment of the extent to which the reported activity affected the jurisdiction in question. For this reason, the CMA would not generally expect to be sent an identical version of an application package prepared for another competition authority.¹¹³

Emerging details and refining the scope of applications

- 7.34 As set out at paragraph 7.5, it is important for applicants to alert the CMA to any areas of doubt, for example by differentiating between known facts supported by evidence already uncovered, statements based on the belief or best recollection of witnesses and suspicions or assumptions. The applicant should inform the CMA of further enquiries it proposes to make to resolve any such doubts, noting that the CMA may wish to take such investigative steps directly, particularly where they relate to uncertainty on the part of potential witnesses.
- 7.35 As set out at paragraph 5.14, the scope of the marker may be adjusted in light of further emerging details and evidence as the investigation progresses.

¹¹² A uniform template waiver has been developed by the International Competition Network for this purpose: www.internationalcompetitionnetwork.org/portfolio/leniency-waiver-template. The CMA would normally expect applicants to provide a full waiver of confidentiality in respect of a parallel application.

¹¹³ See also footnote 29.

- 7.36 Where an undertaking discovers any innocent omissions up to and after the signing of the leniency agreement it should inform the CMA immediately and satisfy the CMA that:
- the omission was indeed innocent, and
 - the information subsequently discovered has been provided to the CMA without undue delay.
- 7.37 If the CMA is satisfied that the above is the case, and such information affects the scope of the suspected infringement, it will normally be prepared to draft (or modify) the scope of the leniency agreement and/or no-action letters accordingly.

Next steps

- 7.38 After receipt of the application package, the CMA will give advice to the applicant, as best it can, as to the broad categories of information the CMA considers are likely to be relevant in the context of the particular case and the form in which any further information should be provided. The CMA will also advise the applicant on steps which the CMA will take directly and steps which it expects the applicant to undertake as part of its ongoing cooperation. This guidance will be regularly updated and/or refined through ongoing dialogue between the CMA and the applicant as the CMA 's investigation progresses.
- 7.39 Furthermore, the applicant should, as part of this dialogue, inform the CMA of any developments that may affect the CMA's ability to gather or analyse relevant information. This might include, for example, changes to IT systems, change of employment/location of individual witnesses, or commencement of related investigations by other regulatory authorities.
- 7.40 The CMA may withdraw leniency if the information provided does not give the CMA a sufficient basis for taking forward a credible investigation (Type A applications) ¹¹⁴ or does not add 'significant value' to the CMA's investigation (Type B and Type C applications). This is set out in further detail at paragraphs 11.4 to 11.7 below.

¹¹⁴ The CMA may, for example, be of the view that there is no basis for taking forward a credible investigation in a case where the applicant has provided the CMA with documentary evidence which is prima facie probative of the reported cartel conduct (and was thereby sufficient for the initial grant of a marker) but the strength of which is then materially undermined by statements given by implicated current or former employees or directors of the applicant.

8. Cooperation expected of leniency applicants

- 8.1 The requirement to maintain continuous and complete cooperation throughout the CMA's investigation and any subsequent proceedings is at the heart of the leniency process and is a condition for the grant of any immunity or type of leniency. Clearly the requirement necessitates compliance with the rules and principles set out in this guidance. However, continuous and complete cooperation also implies that the overall approach to the leniency process by an applicant must be a constructive one, designed genuinely to assist the CMA in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct, so that the public policy objectives of the CMA's leniency policy are achieved.
- 8.2 The CMA strives to take a reasonable and proportionate approach to what it expects from applicants, balancing the needs of the specific investigation against the requirements placed on the applicant. Although ultimately it will be for the CMA to determine what steps are necessary in each case, the CMA is keen to engage constructively and openly with applicants about, and applicants are welcome to suggest, how they can best satisfy their cooperation requirement.
- 8.3 The precise nature of what is expected from applicants to maintain continuous and complete cooperation will vary according to the circumstances of each case. The following list, drawn from the CMA's experience, gives some common types of cooperation that may be expected of applicants:
- (a) providing a leniency statement designed genuinely to assist the CMA in understanding the reported conduct;¹¹⁵
 - (b) proactively updating the CMA as to any relevant developments, including those relating to the reported conduct, relevant individuals and other cartel participants;
 - (c) taking a positive and proactive approach to responding to any requests or questions from the CMA;
 - (d) adhering to deadlines set by the CMA or, where this is not possible, requesting extensions promptly and keeping the CMA updated on progress;¹¹⁶

¹¹⁵ See further Chapter 7.

¹¹⁶ If the applicant foresees or encounters difficulties meeting CMA deadlines or requests, these should be raised with the CMA as early as possible, but applicants should not expect that extensions to deadlines will be common.

- (e) using best endeavours to secure the ongoing cooperation of current and former employees and directors, including making such individuals available for voluntary interviews as required by the CMA (this may include, for example, making arrangements to allow the individual to attend the interview at a CMA office);¹¹⁷
- (f) not initiating disciplinary proceedings against individual employees or directors involved in the reported conduct without first discussing with the CMA;¹¹⁸
- (g) engaging constructively in discussions regarding the efficient handling of procedural matters – for example agreeing to a streamlined access to file processes or alternative processes for providing confidentiality representations; and
- (h) cooperating as needed with any appeals, criminal investigations,¹¹⁹ or criminal or CDO proceedings.

8.4 Other examples of cooperation that have been required of applicants in the past include:

- (a) assisting the CMA by reviewing and/or sifting documents for relevance as directed (for example by focusing on particular lines of enquiry);
- (b) providing translations of foreign language documents;¹²⁰
- (c) arranging and funding independent legal advice for individual employees and directors where needed; and
- (d) where leniency applicants are not themselves party to ongoing settlement discussions,¹²¹ engaging constructively with the underlying settlement process in order to assist the CMA in achieving efficient handling of procedural matters – for example complying with the timetable and any streamlined access to file processes.

¹¹⁷ See further paragraphs 8.17 to 8.19.

¹¹⁸ See further footnote 165.

¹¹⁹ As outlined at paragraphs 13.10 and 13.11.

¹²⁰ See paragraphs 7.10 and 7.11.

¹²¹ This will primarily apply to Type A immunity applicants, as there is no need for the CMA to enter into settlement discussions with Type A immunity applicants. However, in principle it could also apply to Type B or Type C applicants as there is no obligation on leniency applicants to enter into settlement discussions.

- 8.5 Applicants who fail to meet the requirement to maintain continuous and complete cooperation risk losing all protection under the leniency programme.¹²²

Cooperation letter

- 8.6 If the CMA is actively considering proceeding with a formal investigation (whether criminal and/or civil) in relation to cartel activity reported for the purpose of a Type A immunity application, it will usually ask a senior representative of the applicant undertaking to sign a letter (the cooperation letter) indicating that the applicant understands the conditions for the grant of leniency and in particular that it is committed to complete and continuous cooperation throughout the CMA's investigation and subsequent enforcement action. Similarly, the CMA will ask a senior representative of a Type B or Type C applicant in an ongoing investigation to sign a cooperation letter soon after the application has been made. A pro forma cooperation letter is at [Appendix A](#).
- 8.7 The CMA would generally expect the cooperation letter to be signed by a senior representative of the applicant, such as a company director. The CMA does not intend the applicant's representative to incur any personal liability to the CMA for the actions of the undertaking simply as a result of signing such a letter. The original applicant's representative may be replaced in that role by another senior representative of the applicant undertaking,¹²³ but the undertaking must promptly notify the CMA of the replacement and the new applicant's representative will be expected to sign a letter in the same terms as their predecessor. The undertaking must ensure that the position of the applicant's representative is never vacant.
- 8.8 Where an applicant is submitting an online or oral application, the cooperation letter may be signed at a CMA office and retained in the CMA's records, rather than being sent as a written communication from the applicant to the CMA.

Investigative measures by the CMA

- 8.9 Once the CMA has launched an investigation into any cartel activity, whether using its criminal or civil powers, it must take full control of all investigative steps to ensure that the investigation is carried out fairly, thoroughly and carefully. It is therefore normal practice for the CMA to carry out various

¹²² This is explained in more detail at paragraphs 11.8 and following.

¹²³ For example, if the original applicant's representative leaves the undertaking.

investigative steps directly in relation to leniency applicants, in the same way that it does in relation to non-lenieny parties under investigation.

- 8.10 The case team will therefore engage in regular dialogue with the applicant from the outset (including, in relation to Type A applications, before the launch of a formal investigation) regarding any steps that the CMA wishes the applicant to take and also to communicate steps that the CMA intends to undertake directly concerning the applicant, its premises or current or former employees/directors.¹²⁴
- 8.11 Although this dialogue will provide applicants with an opportunity to suggest further or alternative steps, or ways to achieve the results required whilst reducing disruption to business, ultimately it will be for the CMA to determine what steps are necessary and appropriate. In general, the types of investigative steps that will be required will be similar to those required for non-lenieny parties, albeit that they will be carried out with the cooperation of the applicant rather than through the use of compulsory investigative powers.
- 8.12 In some cases, the need for the CMA to ensure that the investigation has been carried out to the requisite standard may involve the CMA repeating or conducting 'spot-checks' of searches or other steps already carried out by the applicant, for example to ensure that all relevant material has been correctly identified.
- 8.13 Leniency applicants will be expected to comply with requests to cooperate in such steps, including anything that could be required from a non-applicant by the use of the CMA's formal powers, without the CMA having to resort to formal powers in relation to the applicant.
- 8.14 Bearing in mind that there may be strong financial and personal incentives for undertakings and individual witnesses to present the conduct as falling within the scope of the leniency policy, the CMA's investigation must robustly assess the probative value of information provided by the leniency applicant, including witness evidence from employees and directors. The CMA will need to probe any changes in story or inconsistencies, look for independent corroborative material where possible, and pursue any lines of enquiry which call into question evidence from the leniency applicant. Where there is a clear dispute over the facts of the case between the leniency applicant and another

¹²⁴ This does not preclude the CMA from engaging directly with former employees/directors without informing the applicant. Direct engagement with current employees, without involving the applicant or its advisers, may be particularly appropriate in criminal cartel investigations.

alleged party to the cartel, the CMA will consider carefully both parties' accounts before deciding which it regards to be the more credible.

8.15 Cartel investigations vary, and so the following guidance is indicative rather than intended to list measures that will apply in every case. For example, the types of investigative steps required in criminal cartel investigations may be more extensive and potentially more intrusive than those undertaken in purely civil investigations. Also, the CMA may need to undertake more steps directly where the applicant is genuinely unable to meet the cost of undertaking such steps to the standards required for a proper investigation.

8.16 Typical investigative steps that the CMA may wish to carry out directly include:

- interviewing witnesses;
- assisting to prepare witness statements;
- retaining a secure, forensically sound image of relevant electronic material (as well as being important to enable verification of the authenticity of electronic evidence, the CMA may also wish to conduct searches of such material directly, with or without the assistance of specialist IT consultants, instead of or as well as receiving the results of electronic searches conducted by the applicant);¹²⁵
- reviewing original hard copy documents (essential in criminal cases, where originals will be retained as evidence);
- physical searches of relevant premises;
- assessing the relevance of specific documents within categories identified by the applicant as potentially relevant (noting that the CMA's assessment of relevance will be informed by information from other sources not available to the applicant); and
- spot checks of searches undertaken by the applicant or its advisers.

¹²⁵ The CMA may also require information on the type of electronic software and hardware used by the applicant or its individual employees. The CMA may also require a record of the 'continuity of evidence' stating where electronic documents were initially produced or obtained. Please see footnote 73 for a definition of continuity of evidence.

Procuring cooperation from current or former employees or directors

- 8.17 It is important to note that in the case of the standard form leniency agreement for corporate immunity/leniency, cooperation extends to an undertaking using its best endeavours to procure the ongoing cooperation of its current and former employees and directors in relation to the CMA's investigation and any subsequent appeal proceedings before the Competition Appeal Tribunal.¹²⁶ Where relevant, the CMA will require such cooperation to extend also to any criminal cartel investigation and subsequent proceedings and/or CDO proceedings.¹²⁷ This is because it will not necessarily be the case that all current and former employees and directors will be at risk of criminal or CDO proceedings. The mechanism to help secure their cooperation will be the leniency agreement with the undertaking which employs or employed the individuals concerned.¹²⁸
- 8.18 In this context, it should be noted that the applicant's general cooperation obligation includes a positive duty to inform the CMA without delay about any concerns the applicant may have as to the level of cooperation provided by any of its current or former employees or directors. In particular, the applicant must inform the CMA without delay about any concerns the applicant may have regarding the completeness or accuracy of any statements made by any of its current or former employees or directors during the course of the CMA's investigation.¹²⁹
- 8.19 However, applicants must avoid the risk of 'tainting' the recollections of current and former employees or directors. For example, applicants and their legal advisers must be careful not to coach individuals on how to respond to the CMA's questions, as this would undermine the credibility of the

¹²⁶ Paragraphs 4(c)(vi) to 4(c)(x) of the pro forma leniency agreement in [Appendix B](#).

¹²⁷ Paragraphs 4(c)(xi) and 4(c)(xii) of the pro forma leniency agreement in [Appendix B](#). See also paragraphs 13.10 and 13.11 regarding the cooperation expected of undertaking applicants in a criminal cartel investigation.

¹²⁸ The CMA recognises the limitations for the undertaking in relation to procuring the ongoing cooperation of former employees and directors who have no independent cooperation obligations under a no-action or comfort letter.

¹²⁹ As set out at paragraphs 12.43 to 12.47, the CMA may wish to interview current or former employees or directors of an undertaking applicant. The CMA's starting point is that it will generally be inappropriate for a legal adviser acting for the undertaking to be present at the interview unless they are also the legal representative of the interviewee. However, the undertaking will usually have an opportunity to review the interview transcript afterwards, which will usually take place as part of the 'access to file' process. The positive duty to inform the CMA about any concerns the applicant may have about the accuracy of statements made at interview will only arise once the applicant has had an opportunity to review the interview transcript.

account.¹³⁰ Rather, the applicant should impress upon the individual the importance of answering the CMA's questions openly and truthfully.

- 8.20 Applicants should also be aware of paragraphs 12.43 to 12.47 regarding the CMA's expectations when interviewing individuals as part of a leniency application.

Acceptance of cartel infringement

- 8.21 As set out at paragraph 2.6(d), it is a condition of leniency that applicants admit to having participated in a cartel activity (including accepting that such activity infringed the Chapter I prohibition) if the CMA reaches the point of issuing a statement of objections in relation to the reported activity. This will be reflected in the leniency agreement (see paragraph 4(a) of the pro forma leniency agreement at [Appendix B](#)).
- 8.22 One issue which has arisen is the extent to which a leniency applicant is entitled to dispute the CMA's analysis of the evidence or law. If, at any stage, the applicant's representations to the CMA, for example during the written and oral representations stage following the issue of a statement of objections,¹³¹ amount expressly or implicitly to a denial of cartel participation, the CMA will consider such representations to be inconsistent with any actual or proposed grant of leniency.
- 8.23 What if the applicant continues to accept that it has been a party to cartel behaviour but disputes specific elements of the CMA's analysis, for example, as to the precise duration of the infringement? The CMA does not exclude that the making of certain limited representations, including identifying manifest factual inaccuracies, provided they are made in a spirit of cooperation, is consistent with the grant of leniency. However, the CMA does not consider that it would be possible or desirable to seek in the abstract to draw a clear dividing line between such representations and the sorts of representations that would transgress an applicant's duty to provide constructive and genuine assistance in proving admitted cartel conduct. The CMA will take a common-sense approach in each case and hear what the applicant has to say before making any decision as to how the applicant's leniency position may be affected.

¹³⁰ See further paragraphs 3.21 to 3.23 above.

¹³¹ Or an equivalent document, such as a summary statement of facts, draft statement of objections or supplementary statement of objections.

9. Leniency agreements, leniency discounts and penalties

- 9.1 A leniency agreement formally sets out the agreement between an undertaking applicant and the CMA in respect of the reported cartel activity.¹³² It confirms the grant of immunity from, or reduction in, financial penalties that would otherwise have applied. This is subject to the applicant having met, and continuing to meet, the conditions of leniency (including, for Type B and Type C applicants, the requirement to add significant value to the CMA's investigation).

Timing and process for signing a leniency agreement

- 9.2 Leniency agreements will be signed in the later stages of the CMA's investigation, shortly prior to the issue of the statement of objections in a CA98 investigation. At this point in time, the CMA will have received and assessed substantially all of the information that is relevant to its case, and will accordingly be in a position to ascertain the necessary scope/characterisation of the cartel activity to be covered in the leniency agreement and also the scope of the 'undertaking', that is, the relevant legal entities that need to benefit from leniency protection.
- 9.3 The CMA will share its proposals as to scope/characterisation with the applicant. Applicants will have an opportunity to comment and discuss the proposed scope/characterisation before signing the agreement,¹³³ which will include an acceptance that the reported cartel activity infringed the Chapter I prohibition.
- 9.4 In cases where the scope of the applicant's leniency marker is wider than the scope of the cartel activity to be covered by the statement of objections,¹³⁴ the leniency agreement will only cover the cartel activity set out in the statement of objections. The applicant will continue to hold a leniency marker covering the remainder of the reported cartel activity (provided that the applicant has met the necessary conditions and evidential threshold in respect of that activity).

¹³² Where a case has been allocated to a sectoral regulator under the concurrency arrangements, the leniency agreement will be between the applicant and the relevant sectoral regulator.

¹³³ This is not, however, an opportunity for the applicant to negotiate changes to the CMA's ultimate findings.

¹³⁴ This may occur if the CMA decides that it is not an administrative priority to investigate every aspect of the reported cartel activity.

- 9.5 Before signing the leniency agreement, the CMA will need to be and remain¹³⁵ satisfied that the conditions for the grant of leniency have been and continue to be met, namely the information requirements set out above,¹³⁶ the requirement of continuous and complete cooperation, that the applicant has refrained from any further participation in the cartel and, in relation to Type A and Type B applications, that the applicant was not a coercer. At this point, the applicant will also be required to admit to participation in cartel activity in breach of the Chapter I prohibition. This is set out in the leniency agreement.¹³⁷

Form of leniency agreements

- 9.6 Leniency agreements are in standard form. A pro-forma leniency agreement is attached at [Appendix B](#) of this guidance. The CMA will not generally expect to negotiate amendments to the terms of these agreements – however reasonable suggestions for minor variations addressing specific concerns will be considered.

Leniency discounts in Type B and Type C leniency cases

- 9.7 The CMA will usually inform a Type B or Type C leniency applicant of the level of discount it has been awarded at the same time as it shares its proposals as to scope/characterisation in preparation for signing a leniency agreement.¹³⁸ At this stage in the investigation, the CMA will be in a position to ascertain the appropriate level of reduction in penalty. While the CMA will consider any limited representations as to the amount of the award proposed, it will not negotiate over the matter.¹³⁹
- 9.8 The key criterion for determining the discount available will be the overall added value of the material provided by the leniency applicant. This will

¹³⁵ These requirements, in particular that of continuous and complete cooperation, also remain conditions of leniency after the signing of the leniency agreement.

¹³⁶ Although the CMA expects that signing of leniency agreements will take place towards the end of the CMA's investigation after the most substantial and most evidentially probative elements of the relevant information have been received, the applicant's duty to provide all relevant information will nonetheless continue after that point. For example, the applicant may need to cooperate in the finalisation of witness statements, or to produce relevant information which comes to the attention of the applicant only at a late stage.

¹³⁷ See paragraph 4(a) of the pro-forma leniency agreement at [Appendix B](#).

¹³⁸ In cases where the CMA issues a summary statement of facts (or a draft statement of objections) and draft penalty calculation for the purpose of pre-statement of objections settlement discussions, the CMA will usually inform a Type B or Type C leniency applicant of the level of leniency discount shortly before issuing these documents. However, the leniency agreement will not be signed until the final statement of objections is issued.

¹³⁹ See also footnote 159 below to the effect that dissatisfaction with an award is not an 'exceptional circumstance' justifying withdrawal from leniency.

generally be a function of the stage at which the undertaking comes forward, the evidence already in the CMA's possession and the probative value of the evidence provided by the undertaking.¹⁴⁰ The CMA will also take into account the overall level of cooperation provided.¹⁴¹

- 9.9 The following non-exhaustive list gives examples of steps that the CMA has previously recognised when assessing the appropriate level of discount for a Type B or Type C applicant:¹⁴²
- (a) providing a prompt and comprehensive application package which brought key evidential material to the CMA's attention and/or assisted the CMA's understanding of the cartel activity at an early stage (for example by providing helpful explanations of the reported conduct, and/or the background and market context);
 - (b) producing new documentary evidence of which the CMA was previously unaware;
 - (c) reviewing a dataset of material obtained from the applicant by the CMA during inspections prior to the leniency application being made, and producing all relevant information contained within the dataset;
 - (d) responding promptly and constructively to requests from the CMA;
 - (e) facilitating witness interviews that added value to the CMA's investigation through the witness providing a complete and truthful account of the reported conduct;
 - (f) proactively and promptly bringing to the CMA's attention inaccuracies in statements made by a witness at interview;
 - (g) taking active steps to ensure that departing staff could be relied upon to cooperate with the CMA's investigation if required; and

¹⁴⁰ As noted at footnote 93, however, where an application is made following the commencement of an inspection or receipt of a formal information request, information that was compulsorily obtained by the CMA via those measures will not be considered as having been provided as part of the leniency application. This means that it will not be included in the CMA's assessment of whether, or the extent to which, the application has added significant value to the CMA's investigation.

¹⁴¹ In this respect CMA's expectations regarding cooperation set out in Chapter 8, and particularly paragraphs 8.1 to 8.3, should be noted.

¹⁴² It should be noted, however, that whether, or the extent to which, any given step will add value to an investigation is necessarily case-specific.

(h) providing and funding independent legal advice for witnesses where appropriate.

- 9.10 In Type B cases, it is possible that the value added by the application will be high, as it will be the CMA's first leniency application in the case. Type B discounts are generally unlikely to be above 75%, given that there will already be a pre-existing investigation of the reported cartel activity at the time of the application being made. However, awards of up to 100% will be considered in exceptional circumstances. It is also possible that Type B discounts may be significantly lower than 75%.
- 9.11 In Type C cases, experience suggests that applicants can generally expect to achieve discounts in the range of 25% to 50%. However, consistent with paragraph 2.28, it is possible that lower value and/or late applications may gain awards of less than 25%.
- 9.12 In both Type B and Type C cases, the CMA considers that the level of cooperation expected from leniency applicants and the requirement to add significant value to the CMA's investigation mean that discounts are likely to be above 10%.
- 9.13 Queue position in Type C cases is not decisive. For example, it is possible that an applicant who is third in the queue may get a discount greater than an applicant who was second to apply. That said, it is the usual experience of the CMA that the earlier in the investigation an applicant applies for leniency, the greater the value added by its application. Therefore, would-be applicants are encouraged to apply at the earliest possible stage.
- 9.14 The leniency discount is entirely separate from any settlement discount that may be available if the case is settled, and the two are not mutually exclusive. A Type B or Type C applicant may benefit from both a leniency discount and a settlement discount.

'But for' test

- 9.15 Where a Type B or Type C applicant that is granted a reduction in financial penalties has provided evidence of previously unknown facts relevant to the gravity or duration of the infringement, the CMA will not take account of such information to the detriment of the applicant when assessing the appropriate level of penalty. In other words, if the finding of duration would have been shorter, or the infringement less serious, 'but for' the evidence provided by the applicant, the penalty for that applicant will be assessed against the shorter duration or lesser gravity that the CMA would otherwise have found.

- 9.16 The same principle applies where a CMA investigation covers multiple related infringements, and the CMA would not have investigated a particular infringement involving the applicant ‘but for’ evidence provided by that applicant. In that situation, the applicant would not be penalised for the particular infringement in question, even though it is granted a reduction in penalties, rather than corporate immunity, for the wider investigation.

Leniency plus

- 9.17 An undertaking co-operating with an investigation by the CMA under the CA98 in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel activity in another market (the second market). If the undertaking obtains total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial penalty because it is the Type A applicant in relation to its activities in the second market, it will also receive a reduction in the financial penalties imposed on it which is additional to the reduction which it would have received for its cooperation in the first market alone.¹⁴³ The additional reduction granted in the first market, because of the successful application in the second market, is known as ‘leniency plus’.
- 9.18 For example, as a result of an investigation by the CMA of producers, including ABC Limited, in the widgets market, ABC Limited carries out an internal investigation and discovers that, as well as having participated in cartel activity in the widgets market, one of its divisions has participated in separate cartel activity in the sprockets market. ABC Limited has been co-operating with the CMA’s widgets investigation and is interested in seeking lenient treatment by disclosing its participation in the sprockets cartel activity. Assuming ABC Limited qualifies for immunity because it is the Type A applicant in relation to its activities in relation to the sprockets market, it can also obtain a reduction in financial penalty in relation to the widgets market in addition to the reduction it would have received for co-operation in the widgets investigation alone, that is, the leniency plus reduction will apply in respect of the widgets market (the first market) as a result of its successful immunity application in the investigation into the sprockets market (the second market).
- 9.19 The key question here is whether the novel evidence relates to a ‘completely separate cartel activity.’ In determining what would be an appropriate additional reduction by way of leniency plus, the CMA will have regard to all

¹⁴³ For the avoidance of doubt, the undertaking does not need to be in receipt of leniency in respect of the first market to receive this reduction. It is sufficient for the undertaking to be receiving a reduction, by way of mitigation, for cooperation.

the relevant circumstances. As a general rule, however, the CMA considers that the primary benefit for an immunity applicant is immunity from financial penalties and, where the applicant qualifies for Type A immunity, criminal immunity for all its cooperating current and former directors and employees as well as CDO immunity for all directors of the undertaking. Leniency plus in respect of any existing CMA investigation should be regarded as a secondary benefit only. Consistent with that principle, reductions for leniency plus are not likely to be high.¹⁴⁴ The level of any discounts would depend on such factors as the scale of the consumer detriment involved in the additional reported cartel, including the number and size of the affected markets, the amount of effort gone to by the immunity applicant to investigate the additional cartel and the likelihood that the CMA would have uncovered the additional cartel in any event.¹⁴⁵

- 9.20 As a general rule, where an undertaking is already cooperating with the CMA in respect of more than one cartel investigation and it applies for immunity in respect of a further completely separate cartel, the CMA will only award the undertaking leniency plus in respect of one of those prior investigations. However, the CMA will consider all the relevant circumstances before reaching a decision.

Penalty calculations for Type A immunity applicants

- 9.21 The CMA will generally not calculate the penalty that a Type A immunity applicant would have received. In the event that the CMA considers that there are significant reasons why in a particular case it would be appropriate to do so, the CMA will discuss those reasons with the applicant.

¹⁴⁴ In the CMA's experience, leniency plus discounts are unlikely to exceed 5%.

¹⁴⁵ The considerations cited here are not to be considered exhaustive.

10. Disclosure of leniency material and use of information

Disclosure of leniency information during a civil investigation

- 10.1 The CMA recognises the importance of confidentiality for leniency applicants. Accordingly, the fact that an undertaking has applied for leniency will not normally be revealed to other undertakings until the statement of objections has been issued.¹⁴⁶ However, in the course of the CMA's civil investigation it may be necessary, directly or indirectly, to disclose information provided by a leniency applicant to third party witnesses or to those suspected of direct involvement in the cartel. Consequently, there is a risk that parties will conclude that the information has been supplied by a leniency applicant, which may in turn reveal the identity of the applicant. The CMA will not formally confirm whether there is a leniency applicant, however.
- 10.2 Where there are particular sensitivities about the possibility of a leniency applicant's identity being revealed during the course of the investigation, these should be discussed with the CMA at the start of the application process.

Disclosure of leniency material to support a statement of objections, infringement decision and as part of the access to file process

- 10.3 Where the CMA is conducting a civil investigation, the fact that a party has applied for leniency, together with the information it has submitted and on which the CMA intends to rely, will be set out in the statement of objections issued to the other parties to the proceedings.¹⁴⁷

¹⁴⁶ Note that where parties under investigation enter into settlement discussions prior to the issuance of a statement of objections, the existence of any leniency applications will be revealed to the other settling parties at the point where the draft statement of objections or draft summary statement of facts is issued, as part of settlement proceedings.

¹⁴⁷ Once a formal investigation is opened, generally a case initiation letter will be sent to the parties under investigation containing basic details of the investigation. However, for some cartel cases, it may not be appropriate to do so as this may prejudice certain investigative steps such as unannounced inspections or witness interviews. If the CMA does consider it appropriate to send a case initiation letter to the parties, it may limit any information provided in the letter to protect the identity of a leniency applicant. Once the parties have been informed of the investigation, the CMA will generally publish on the CMA's website a case opening notice containing basic details of the case including the fact that the case is being investigated under the Chapter I prohibition, a brief summary of the suspected infringement, the industry sector involved, the administrative timetable for the case and the identities of the parties under investigation (unless this may prejudice the case). The CMA will limit the details in the notice to ensure the ongoing investigation is not prejudiced and would not

- 10.4 Similarly, subject to the CMA rules on the protection of confidential information,¹⁴⁸ material submitted as part of the leniency application will be disclosed to the parties during the course of access to the file.
- 10.5 Before making any disclosure either in the statement of objections or as part of access to the file, however, the CMA will give the leniency applicant a reasonable opportunity to make representations as to whether the CMA should treat any or all of the information as confidential within the meaning of the CMA rules.
- 10.6 Disclosure of leniency statements may be of particular concern to applicants because leniency statements sometimes disclose certain aspects of the application that the CMA has chosen not to pursue or the applicant's own analysis of the emerging details of the cartel at the time of the application, and there is therefore a potential risk that any unnecessary disclosures may put leniency applicants at a disadvantage relative to non-leniency parties. Accordingly, whilst leniency statements, including statements submitted online and transcripts of oral statements, will be placed on the CMA's file, when assessing the need for disclosure, the CMA will give weight to the strong public interest in encouraging full and frank applications, and notes that non-disclosure of such material may be in the public interest in order to protect the efficacy of the leniency regime. In practice, this means that the CMA will not ordinarily grant access to the leniency statement to other recipients of a statement of objections. However, in certain circumstances it may be necessary to grant access to the leniency statement (or parts of it) for rights of defence purposes¹⁴⁹ – in particular, in the event that the leniency statement contains relevant evidential material that has not been presented in other forms that can be made available as part of access to the file.¹⁵⁰ In such cases, the CMA will keep confidential any parts of the statement that are not relevant to the case in question. The CMA will also discuss with the applicant whether any additional protective measures in relation to how information is

mention publicly that any undertaking had applied for leniency. It is the CMA's normal practice publicly to announce the issue of the statement of objections on our website, and to make an announcement to the media, and, where the matter is judged market sensitive, on the Regulatory News Service; however, the CMA would not mention publicly that any undertaking whose identity had been revealed as party to a statement of objections had applied for leniency. If, of its own volition, an undertaking wanted to disclose that it was a leniency applicant in these circumstances, then the applicant would be free to do so. See Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8, December 2024) and Transparency and disclosure - statement of CMA's policy and approach (CMA6, December 2024).

¹⁴⁸ CMA rules, Rules 1(1), 5(3) and 6. See also Section 244 of the EA02.

¹⁴⁹ Depending on the relevance of such information, it cannot be excluded that it may also need to be set out in the statement of objections and any subsequent infringement decision.

¹⁵⁰ The CMA expects applicants to provide all primary source material that led to the generation of the application statement that the CMA considers is relevant to its case, so this situation is not expected to occur frequently.

disclosed, for example to third parties, are appropriate. This protection will not extend to other documents provided by the applicant, such as witness statements, which refer to or include information from the leniency statement, which will ordinarily need to be disclosed.

- 10.7 Even in the case of an unsuccessful leniency applicant or in the case of a leniency applicant which is not proceeded against or where the leniency application was subsequently withdrawn, it cannot be excluded that some or all of the material provided as part of the leniency application, including the identity of the applicant, may have to be disclosed to other parties in the course of access to the file.
- 10.8 Any person to whom information is disclosed in a statement of objections or as part of access to the file will be bound by the restrictions on further disclosure or use for another purpose as set out in Part 9 of the EA02.¹⁵¹
- 10.9 Where the CMA's investigation results in an infringement decision, the fact that a party to the proceedings has been granted leniency, together with evidential material provided by the leniency applicant that is relied on by the CMA, will be apparent from the infringement decision. The infringement decision will be notified to the parties and a non-confidential version published under the CMA rules.¹⁵² Undertakings applying for leniency should therefore be aware that, at that stage, the fact that a party has been granted leniency, together with the nature of at least some of the evidence provided will become public. Such information and/or material may also be disclosed during the course of CDO proceedings.

Disclosure of information to support private civil proceedings etc.

- 10.10 As a matter of general policy, the CMA would firmly resist, on public interest grounds, requests made to it for disclosure of leniency statements, or the fact that leniency has been sought, where such requests are made, for example, in connection with private civil proceedings whether in the UK or overseas.¹⁵³

¹⁵¹ See in particular Section 241(2) and 241(2A) of the EA02.

¹⁵² CMA rules, Rule 7.

¹⁵³ Obviously where a court has made an order with which the CMA was bound to comply, the CMA would discharge its duty to the court. Additionally, if disclosure of leniency material, or at least the fact that a leniency applicant existed, was genuinely necessary for the CMA to defend general civil proceedings, for example a judicial review on the correctness of the CMA's decision to open an investigation, some limited disclosure may have to be made. However, the CMA would always give utmost consideration to the public interest in maintaining an effective leniency policy.

Cartel leniency statements, as defined in Schedule 8A of the CA98¹⁵⁴ (whether or not they have been withdrawn), are not admissible in evidence in competition proceedings in the UK, and UK courts, as well as the Competition Appeal Tribunal, are not permitted to make disclosure orders in respect of them.¹⁵⁵ However, it follows from paragraph 10.9 above that the identity of leniency applicants and certain information they have provided will enter the public domain through any published infringement decision. This may also occur through any criminal proceedings held in open court (see paragraphs 13.27 to 13.30).

Use of information submitted from a failed or withdrawn leniency application

10.11 Information which is self-incriminatory and which was submitted after a marker approach by an undertaking applying for leniency will not subsequently be relied on as evidence by the CMA against that undertaking (hereafter referred to as a 'failed bona fide applicant') or any of its cooperating current and former employees and directors which, despite having acted in good faith throughout, has failed to qualify for leniency.¹⁵⁶ However, this does not preclude the CMA from pursuing a case against a failed bona fide applicant in such circumstances. The CMA may make use of such information against third parties. Where it proposes to do so, it will consider any

¹⁵⁴ For the purposes of Schedule 8A, CA98, 'Cartel leniency statement' means a set of information provided, orally or in writing, to a competition authority by or on behalf of a person which: consists of information about a cartel and the person's role in relation to the cartel,

(a) is provided voluntarily, and

(b) is provided specifically for the purposes of the competition authority's cartel leniency programme, excluding any pre-existing information (see paragraph 4(4), Schedule 8A, CA98).

For the purposes of Schedule 8A, CA98, 'Cartel' means an agreement or concerted practice between two or more competitors aimed at:

(a) co-ordinating their competitive behaviour in a market, or

(b) otherwise influencing competition in a market,

through practices such as (but not limited to):

(a) fixing or co-ordinating purchase or selling prices or other trading conditions, including in relation to intellectual property rights,

(b) allocating production or sales quotas, and

(c) sharing markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors (see paragraphs 4(1) and 4(2), Schedule 8A, CA98).

¹⁵⁵ See paragraphs 28(b) and 32(2), Schedule 8A, CA98.

¹⁵⁶ This may, for example, occur because (a) the information supplied was insufficient, in the absence of other information, to provide the CMA with a basis for taking forward a credible investigation, (b) the information failed to add significant value to an existing investigation, (c) the applicant provided evidence of an infringement which had only a minimal impact on trade in the UK but was instead focused on other jurisdictions, or (d) at the time of the marker approach, the parties and the CMA had a reasonable expectation that the reported conduct amounted to cartel activity but subsequent investigation revealed that the nature of the infringement was not such as to amount to cartel activity.

representations from the failed bona fide applicant and whether, in using information in this way, it would be fair and reasonable to award a reduction of any fine which might be imposed on the failed bona fide applicant at the mitigation stage of the penalty-setting process.¹⁵⁷

- 10.12 If the CMA proposes to use information provided by the failed bona fide applicant which could have been obtained through public sources, such as material available on the internet, it will consider itself free to use that information whether it be to support a case against the failed bona fide applicant or against third parties and whether or not it can be regarded as self-incriminatory.¹⁵⁸
- 10.13 Where the CMA proposes to use any information provided by a failed bona fide applicant which was not available from public sources and is of a purely factual nature (as distinct from being self-incriminatory) the CMA may make use of such information whether it be to support a case against the failed applicant or against third parties. Where it proposes to do so, it will consider any representations from the failed bona fide applicant (including as to whether the material should properly be regarded as 'factual' or 'self-incriminatory') and whether it would be fair and reasonable to award a reduction of any fine which might be imposed on that applicant at the mitigation stage of the penalty-setting process.
- 10.14 Where an undertaking, having made an application for leniency and received confirmation of a marker, has chosen to withdraw its application of its own volition, the CMA may use any information provided by the applicant either against the applicant or any third party.¹⁵⁹ However, in so doing the CMA will consider whether it is fair and reasonable to award a reduction of any fine which might be imposed on the withdrawn applicant at the mitigation stage of the penalty-setting process.
- 10.15 Some practitioners have historically expressed concerns over the use of information in failed and withdrawn leniency application cases, but the CMA's experience is that disputes over the use of information in such circumstances arise rarely in practice. Where a bona fide application has failed, it will

¹⁵⁷ In particular, as to whether a reduction should be granted under paragraph 2.17 of the CMA's guidance as to the appropriate amount of a penalty (CMA73, 16 December 2021).

¹⁵⁸ Assuming that the material did not become publicly available only because of the leniency application.

¹⁵⁹ However, there may be exceptional circumstances which, in the CMA's view, justify the withdrawal of the leniency application. If so, the CMA would apply the same principles as those relating to the use of information against a failed bona fide leniency applicant. Given the CMA's very limited experience of voluntary withdrawals, it does not intend to draw up a list of possible exceptional circumstances. However, the CMA will not regard as an exceptional circumstance justifying a withdrawal from leniency, that an applicant is dissatisfied with the level of award made in a Type B or C leniency case.

generally be because there was an insufficient basis to take forward a credible investigation or because the value added to an existing investigation was small. It is therefore relatively unlikely that the CMA will have any desire to use the information for any purpose. Instances of withdrawal of applications have proven to be rare and the CMA sees no reason why the frequency of such instances would increase in the future.

Use of information submitted by individual employees or directors when an undertaking's application fails or is withdrawn

- 10.16 In the event of an undertaking's application for Type A immunity failing, or being revoked, those current or former employees or directors of the undertaking who have cooperated throughout the investigation will no longer be eligible for 'blanket' criminal or CDO immunity. However, the CMA will not look to rely on information they have given as part of the leniency process (whether orally or in writing) in evidence against them personally in either criminal or CDO proceedings unless the CMA considers that their own actions contributed significantly to the undertaking's application for Type A immunity failing or being revoked (or that they otherwise fail to comply with the conditions of leniency). It is also possible that individuals in this position may be able to apply for individual immunity (provided that the CMA is satisfied that the individual has complied with all the conditions of leniency including, where relevant, having given a full and frank account at interview).
- 10.17 The same principle applies if an undertaking's application for Type B or Type C leniency fails and its current or former employees or directors have previously been granted discretionary criminal or CDO immunity.

Use of information in cases of bad faith and non-cooperation

- 10.18 Where a leniency applicant, at any stage, acts in bad faith and/or fails to cooperate fully, the CMA reserves the right to use information derived from an approach or application against that failed applicant (and any third parties). Nonetheless, in such circumstances the CMA will still consider whether the use of information makes it fair and reasonable to award a reduction of any fine which might be imposed on the failed applicant at the mitigation stage of the penalty-setting process.

Use of information in the case of CMA deciding not to proceed

- 10.19 If the CMA decides, at any stage, that it does not wish to proceed with its investigation into the infringement on administrative priority grounds, the CMA

will generally have no desire to use the information provided against the applicant or for any other purpose.

- 10.20 One exception to this position is where the CMA has decided to proceed against certain parties to a group of related infringements, but has not pursued all possible parties for administrative priority reasons. In those circumstances, the CMA may need to rely on evidence provided by a leniency applicant which is no longer under investigation, against third parties. Where it proposes to do so, it will consider any representations from the leniency applicant, for example as to whether the information can be provided in another form or disclosed in a way which does not reveal that it was received as part of a leniency application.
- 10.21 There may also be cases where, in criminal proceedings against an individual, material provided by a leniency applicant in relation to a separate case would be ‘relevant’ and may need to be disclosed, despite the fact that that case was not proceeded with. In such cases, the material will be treated as sensitive and only be disclosed to the defence if it meets the statutory test for disclosure.
- 10.22 Where the CMA decides not to open an investigation at all, or a case is closed on administrative priority grounds, the applicant’s marker will remain on the CMA’s file and, provided the conditions for leniency continue to be met,¹⁶⁰ the applicant’s position would be preserved in the unlikely event that the CMA decided to open or re-open the investigation, for example if new information came to light. To the extent that the case closure is publicised, the CMA would seek to avoid disclosing the fact of any leniency application. However, the CMA may consider it appropriate to send advisory or warning letters to one or more other parties to the reported cartel conduct.¹⁶¹ The CMA will inform the leniency applicant if it is considering sending advisory or warning letters, and will take account of any representations from the applicant on this point. The decision on whether to send letters is ultimately one for the CMA.

Transfer of information to other UK agencies

- 10.23 If the CMA considers it necessary or appropriate to pass information deriving from a leniency applicant which is not in the public domain to another UK agency, such as the Serious Fraud Office (SFO), the CMA would inform the

¹⁶⁰ For example, leniency applicants should consider preserving relevant documents so that they are in a position to offer full cooperation, and should preserve the confidentiality of their leniency applications.

¹⁶¹ For information about the CMA’s use of advisory and warning letters, please refer to www.gov.uk/guidance/warning-and-advisory-letters-essential-information-for-businesses.

applicant or its legal adviser first. However, applicants must accept that the CMA may refer cases to the SFO and the expectation should be that such referrals will be on the basis of a full disclosure of all material in the CMA's possession.

Transfer of information to overseas authorities

- 10.24 Information supplied by an undertaking as part of an application for leniency will not be passed to an overseas agency without the consent of the applicant.

11. Withdrawal of leniency by the CMA

- 11.1 If an applicant fails to satisfy the conditions of leniency,¹⁶² the CMA will withdraw leniency. If a current or former employee or director of an undertaking applicant fails to satisfy the conditions of leniency, the CMA will withdraw leniency protection from the individual in question but may decide not to withdraw leniency from the undertaking, depending on whether the conduct of the employee or director can be distinguished from that of the undertaking and provided the undertaking has met the conditions of leniency.¹⁶³
- 11.2 There are different types of withdrawal of leniency depending on the stage at which issues arise and whether leniency is withdrawn from the undertaking as a whole or from one or more individuals:
- (a) withdrawing a leniency marker;
 - (b) revoking an existing leniency agreement;
 - (c) withdrawing individual leniency protection from a current or former employee or director of an applicant; or
 - (d) revoking no-action letters granted to one or more current or former employees or directors of an applicant (see Chapter 13).
- 11.3 Withdrawal of leniency is expected to be rare, but the CMA takes the conditions of leniency very seriously and will not permit an applicant to benefit from immunity or a reduction in fines, or from immunity from CDO proceedings or criminal prosecution in circumstances where that applicant has failed to cooperate or otherwise failed to meet the conditions of leniency.¹⁶⁴ Paragraphs 10.11 to 10.15 above include discussion of how the information provided by the applicant will be treated by the CMA, where the marker is withdrawn.

Information insufficient for a credible investigation (Type A)

- 11.4 Information provided by applicants for Type A immunity must, as a minimum give the CMA a sufficient basis for taking forward a credible investigation. If,

¹⁶² See paragraph 2.6.

¹⁶³ The process of withdrawing leniency protection from individuals is set out in more detail at paragraphs 12.60 to 12.66.

¹⁶⁴ Although further guidance is given in this chapter about certain specific ways in which applicants may fail to meet the conditions of leniency, applicants should note that failure to meet any of the conditions will be grounds to withdraw leniency.

after a reasonable opportunity following the initial application package (the duration of which will be assessed on a case-by-case basis), the relevant information provided by the applicant does not meet this minimum threshold the CMA will withdraw the applicant's marker. Before withdrawing the marker, the CMA will discuss with the applicant's representative its assessment that it does not have a basis for taking forward a credible investigation and consider with the applicant's representative any options or possibilities for reaching that threshold.

Information does not add significant value (Types B and C)

- 11.5 Information provided by Type B and Type C applicants must, as a minimum, be such that it adds 'significant value' to the CMA's investigation, that is, it must genuinely advance the investigation.
- 11.6 If, after examining the information provided by the applicant and the material obtained from other sources prior to the application, the CMA considers that the relevant information provided by the applicant does not meet this minimum threshold, the CMA will withdraw the applicant's marker.
- 11.7 Before withdrawing the marker, the CMA will discuss with the applicant's representative its assessment that the information provided does not add significant value and consider with the applicant's representative any options or possibilities for reaching that threshold.

Failure to cooperate

- 11.8 Chapter 8 sets out details of the cooperation expected of leniency applicants. If applicants fail to meet the CMA's expectations, they may, subject to the process described at paragraphs 11.16 to 11.18 below, lose all protection under the leniency programme.

Consequences for an undertaking applying for leniency of failure to cooperate by a current or former employee or director

- 11.9 A failure, at any stage, to cooperate with the CMA on the part of a current or former employee or director of an applicant undertaking will not necessarily mean that the undertaking's leniency application will fail or that leniency, once given, will be revoked. The leniency application will not fail or be revoked in cases where:

- the applicant can show that it used its best endeavours to secure the cooperation of that individual¹⁶⁵ (albeit unsuccessfully), and
- overall the applicant provided the CMA with sufficient evidence of the reported cartel activity to pass the applicable evidential threshold.¹⁶⁶

11.10 It follows from the above that where an undertaking's application for Type A immunity does not fail, or is not revoked, despite an individual failing to cooperate, all other implicated current or former employees or directors of the undertaking who are maintaining cooperation will continue to qualify for immunity. By contrast, the non-cooperating individual will of course lose all protection under the leniency programme.

'Bad faith'

11.11 The CMA uses the term 'bad faith' to describe situations which go beyond non-cooperation and which instead involve positive steps to hinder a CMA investigation and any consequent enforcement action. For example, the CMA will consider bad faith to have been shown by a leniency applicant where the applicant:

- tips off another person or undertaking about an intended or actual approach for leniency to the CMA, or
- destroys or tampers with evidence either prior to or at any time after an approach to the CMA for leniency.¹⁶⁷

11.12 Where an applicant knowingly or recklessly provides information to the CMA that is false or misleading, this may also be viewed as bad faith.

11.13 The CMA recognises that even where an undertaking took all reasonable steps to ensure that there was no 'tipping off' or document destruction or

¹⁶⁵ Where the applicant proposes disciplinary action against an individual, including dismissal, arising from that individual's role in the reported cartel, the CMA will expect the undertaking to discuss this matter with the CMA. The CMA will be keen to ensure that any action proposed by the undertaking against an individual does not have the perverse effect of reducing incentives to cooperate with the CMA. So far as is reasonable, the incentives placed on the individual by the undertaking and the CMA should be aligned, that is, there should be the maximum possible incentive on the individual's part to provide a complete, honest and truthful account about their involvement in and knowledge of the reported cartel. The CMA will expect to see cooperation in this respect from the undertaking.

¹⁶⁶ In this context, please also see footnote 114 above (which refers to the possible difficulty in achieving the relevant evidential threshold if an individual's account of events materially undermines documentary evidence provided by the undertaking that would otherwise have been probative of the existence of the reported cartel).

¹⁶⁷ If the destruction or tampering occurred prior to the approach, these provisions only operate where the undertaking is contemplating applying for leniency.

tampering by a current or former employee or director, a dishonest or negligent person may nonetheless act contrary to the undertaking's clear instructions and in spite of its precautions. In such cases, the CMA would be understanding¹⁶⁸ of the undertaking's position¹⁶⁹ but it will be incumbent on the undertaking to demonstrate the reasonable steps it took to avoid the breach occurring. (See paragraphs 3.10 to 3.20 with respect to minimising the risk of tip-off and avoiding tampering and corruption.)

11.14 In general, bad faith is viewed more seriously than 'simple' failure to cooperate – in particular, the CMA may consider that prosecution of relevant individuals is appropriate under sections 43 and 44 of the CA98 or section 201 of the EA02, or the CMA may fine a person under section 40ZE(1) of the CA98 for breaching the duty to preserve documents relevant to an investigation under section 25B of the CA98, depending on the precise circumstances.

11.15 Where instances of bad faith on the part of individuals have been discovered by the undertaking they should be reported to the CMA promptly.

Process for withdrawing leniency

11.16 If at any time after the grant of a leniency marker the CMA has concerns that an applicant has acted or is acting in a way that puts its leniency status at risk,¹⁷⁰ the case team will raise those concerns with the applicant's representative and give the applicant an opportunity to respond, and if possible to address the concerns.¹⁷¹

11.17 If the applicant fails to address the concerns to the case team's satisfaction, the case team will notify the applicant's representative that the matter will be referred to the Senior Responsible Officer (SRO) for the investigation. If

¹⁶⁸ This does not mean that the CMA will guarantee that the undertaking's application will always be safe in bad faith cases where the company took the various precautions described. There may be cases where the breach is so fundamental, for example a tip-off by a senior director or employee, that the public interest demands that the entire leniency application should fail. It is expected that such cases will be extremely rare. Of course, in the hopefully equally rare instance of the bad faith having been corporately rather than individually sanctioned, the undertaking's leniency application is bound to fail.

¹⁶⁹ The individual concerned is nevertheless likely to face some kind of sanction by the CMA, for example, the revocation of any actual or intended no-action letter protection.

¹⁷⁰ The process set out in this subsection does not apply to situations in which the only concern is that the information provided by the applicant is insufficient for a credible investigation (Type A applications) or to add significant value (Type B and C applications). Such cases will be dealt with in line with the process described at paragraphs 11.4 and 11.7 respectively and will not typically be escalated to the SRO for leniency.

¹⁷¹ A similar process applies if the CMA is concerned about the conduct of an individual employee or director of the applicant. This is outlined at paragraphs 12.63 to 12.66.

necessary, the applicant's representative will be invited to meet with the SRO to discuss the CMA's concerns.

- 11.18 The decision on withdrawal of leniency will be taken by the SRO for the investigation, in consultation with the SRO for leniency (if different from the SRO for the investigation – including, for example, cases where a sectoral regulator is conducting the investigation).

12. Guidance for individuals involved in the leniency process

- 12.1 The aim of this chapter is to provide guidance to individuals (and their legal advisers) involved in the leniency process. The chapter sets out:
- (a) the availability of CDO and/or criminal immunity for individuals;
 - (b) the process for applying for individual immunity;
 - (c) the cooperation expected of individuals seeking to obtain CDO and/or criminal immunity;
 - (d) the use of no-action letters;
 - (e) the circumstances in which information provided by individuals may be used or disclosed; and
 - (f) the circumstances and the process through which immunity may be withdrawn from individuals.
- 12.2 Chapter 13 outlines some further specific considerations relating to the criminal cartel offence and criminal cartel investigations. This will be relevant to individuals who are seeking criminal immunity.

When might an individual need criminal or CDO immunity?

- 12.3 An individual may wish to seek immunity if they are at risk of CDO and/or criminal proceedings in respect of the cartel activity in question.

CDO proceedings

- 12.4 An individual may be at risk of CDO proceedings if they are a current or former director¹⁷² of a UK company that has committed a breach of competition law. A CDO can be made against such individuals where the court considers that their conduct as a director makes them unfit to be concerned in the management of a company.¹⁷³

¹⁷² Including a de facto director or a shadow director.

¹⁷³ For further details, please refer to the CMA's published *Guidance on Competition Disqualification Orders* (CMA102).

- 12.5 It is possible to apply for CDO immunity in relation to any type of cartel activity covered by the CMA's leniency policy (see paragraphs 2.1 to 2.5).

Criminal proceedings

- 12.6 An individual may be at risk of criminal proceedings if they have participated in cartel activity that falls within the scope of the criminal cartel offence at section 188 of the EA02. In summary, an individual commits the criminal cartel offence if they agree with one or more other individuals that two or more undertakings will engage in price fixing, market sharing, bid-rigging or limiting output.¹⁷⁴
- 12.7 The scope of the criminal cartel offence is narrower than the definition of cartel activity for the purpose of the leniency regime (as set out at paragraphs 2.1 to 2.5), which reflects the range of conduct deemed to be cartel activity for the purpose of the CA98. The issue of criminal immunity will not arise in relation to cartel activity that falls outside the criminal cartel offence.

Individuals who are unsure whether they need immunity

- 12.8 If individuals consider that they may be at risk of CDO and/or criminal proceedings, the CMA recommends that they take independent legal advice. Whether an individual is legally represented or not, where there is genuine uncertainty as to whether immunity is needed, it may be possible to seek confidential guidance from the CMA on a no-names basis.¹⁷⁵

How can individuals obtain immunity under the leniency policy?

- 12.9 Individuals can potentially obtain CDO and/or criminal immunity via either of the following routes:
- (a) by applying for immunity in their own right (individual immunity); or
 - (b) as a cooperating current or former employee or director of an undertaking applicant (cooperating individuals).

¹⁷⁴ This offence is subject to certain exclusions and defences.

¹⁷⁵ See chapter 4.

Availability of CDO and criminal immunity

Cooperating individuals

12.10 As set out in Chapter 2, cooperating current or former employees or directors of undertakings that apply for leniency may be eligible for the following:

- Type A applications: guaranteed CDO and criminal immunity; or
- Type B and Type C applications: if the CMA considers that it would be in the public interest, discretionary CDO immunity and (in exceptional circumstances) discretionary criminal immunity.

Individual immunity applications

12.11 As with applications by undertakings, the availability of individual immunity will depend on whether there is a pre-existing investigation¹⁷⁶ and/or an existing leniency application (from either an undertaking or another individual) in relation to the reported cartel activity:

- the first applicant to report and provide evidence of a cartel, when there is no pre-existing investigation into the reported cartel activity and the CMA does not otherwise have sufficient information to establish the existence of the reported cartel activity, will be granted Type A immunity;¹⁷⁷
- the first applicant to report and provide evidence of a cartel, when there is a pre-existing investigation into the reported cartel activity will be a Type B applicant;¹⁷⁸ and
- in circumstances where another applicant has already reported the cartel activity, or where the applicant has coerced another undertaking to participate in the cartel activity, only Type C is available (see further paragraph 12.24 below).

12.12 There is a single ‘queue’ for both individuals and undertakings to apply for leniency; once either an individual or an undertaking has secured the Type A position in relation to a particular cartel activity, only Type C will be available in respect of that activity.¹⁷⁹

¹⁷⁶ As defined at paragraph 2.18.

¹⁷⁷ Unless they have coerced another undertaking to participate in the cartel activity – see paragraph 12.24.

¹⁷⁸ Unless they have coerced another undertaking to participate in the cartel activity – see paragraph 12.24.

¹⁷⁹ Unless the scenario described at footnote 35 applies.

12.13 Individual applicants will be eligible for the following:

- (a) Type A: guaranteed CDO and criminal immunity;
- (b) Type B applications: discretionary CDO immunity and (in exceptional circumstances) discretionary criminal immunity; or
- (c) Type C applications: discretionary CDO immunity only.

Interaction between CDO and criminal immunity

12.14 As set out above, in some cases an individual will be eligible for CDO immunity but not criminal immunity. For example, an individual Type C applicant will never be eligible for criminal immunity but may be granted discretionary CDO immunity.

12.15 In this context, individuals should be aware that although CDO immunity provides a guarantee that the CMA (or, where relevant, a sectoral regulator) will not apply for a CDO against the individual in question in respect of the reported cartel activity, this does not preclude a criminal court from making a Director Disqualification Order following a conviction for a criminal cartel offence. Orders can be made in such cases without an application by the CMA (or by a sectoral regulator). This means that an individual who receives CDO immunity but not criminal immunity under the CMA's leniency policy may still be disqualified as a director if they are convicted of the criminal cartel offence.

12.16 For this reason, individuals who are aware of potential wrongdoing and are at risk of CDO and criminal proceedings should consider making an application for individual Type A immunity so as to be sure of obtaining guaranteed CDO and criminal immunity. An individual Type A immunity applicant will, subject to meeting the conditions of leniency, qualify for both criminal and CDO immunity.

12.17 The CMA recognises that the limited availability of criminal immunity may cause some uncertainty for individuals in Type B and Type C applications. However, in most cases Type B and Type C applications are prompted by a formal CMA investigation. The individual will therefore be aware, when applying, of whether the CMA is conducting the cartel investigation under civil or criminal powers (or both).¹⁸⁰ Further, as set out at paragraphs 2.46 and 2.47, individuals who are concerned about the prospect of future criminal

¹⁸⁰ It is unlikely, although not impossible, that the CMA will launch a criminal cartel investigation once a civil investigation has commenced.

enforcement may be able to obtain confidential guidance from the CMA as to the likelihood of a criminal cartel investigation before deciding whether to apply.

- 12.18 In practice, it is unlikely that discretionary CDO immunity would be granted in a Type B or C application if the CMA had sufficient evidence of wrongdoing to contemplate a criminal cartel investigation of the reported cartel activity.

Making an individual immunity application

- 12.19 Individuals considering making an immunity application should bear in mind the provisions in Chapter 3 of this guidance.

Conditions for the grant of immunity

- 12.20 The conditions at paragraphs 2.6(a) to 2.6(c) will apply to individual immunity applicants in the same way as to undertaking applicants.
- 12.21 In relation to the admission condition (see paragraph 2.6(d)), if the CMA reaches the point of entering into an individual immunity agreement with the applicant (as described at paragraph 12.49 below), which usually takes place just before the issue of any statement of objections, the applicant will be required to admit to having participated in cartel activity.¹⁸¹ Paragraph 13.13 sets out details of the admissions that will be required from an individual immunity applicant in cases where the CMA is contemplating or conducting a criminal cartel investigation.
- 12.22 While individual applicants are not required to admit to having participated in cartel activity at the point of applying for immunity, they must, from that point onwards, have a 'genuine intention to admit to cartel activity.' This means that individual applicants must not, at any stage, conduct themselves in a way which would undermine any CMA investigation into the reported cartel activity. In particular, the CMA will not accept or continue with applications in cases where the applicant seeks to deny that the basic facts are capable of constituting cartel activity.
- 12.23 In line with paragraph 2.7, an individual applicant must also have, at the point of applying, a 'concrete basis to suspect cartel activity'. In this respect, however, the CMA understands that individual applicants may not be in a

¹⁸¹ There will be no requirement on individual applicants to accept that the cartel activity in which they admit participating constitutes an infringement of the law, given that the Chapter I prohibition of the CA98 applies to the conduct of undertakings, rather than individuals.

position to provide significant documentary evidence of the cartel activity. Where an individual applicant can provide credible witness evidence of cartel activity, this will be sufficient to qualify for immunity provided that it gives the CMA a sufficient basis for taking forward a credible investigation (Type A) or adds significant value to the CMA's investigation (Types B and C).

12.24 The coercer test as described at paragraph 2.6(e) also applies to Type A and Type B individual immunity applicants. For the purpose of an application by an individual, an individual will ordinarily be ineligible for Type A or Type B if the CMA considers that (i) the relevant undertaking was a coercer and (ii) the individual played an active role in this coercion. If this applies, that individual would only be eligible for discretionary Type C individual immunity.¹⁸²

Cessation of the availability of individual immunity

12.25 The CMA will not accept individual immunity applications:

- after the CMA has issued a statement of objections in relation to the reported cartel activity; or
- after the individual in question has been charged with the criminal cartel offence in relation to the reported cartel activity.

Applying for individual immunity before the launch of a formal investigation

12.26 Prospective individual immunity applicants should refer to the process outlined in Chapter 5 for making an initial enquiry and application.

Directions to continue cartel activity

12.27 As set out at paragraphs 5.17 to 5.20, in rare cases, once a Type A application has been made the CMA may ask an applicant to continue with ongoing cartel activity rather than refraining from further participation. This may arise if an individual applicant has had and/or continues to have an involvement in cartel activity and is able to continue to make use of a relationship to obtain further information about a cartel for the CMA and under the CMA's close direction.

12.28 The CMA is aware that in such cases, the individual may be concerned about the consequences that might follow if their role in the CMA's investigation

¹⁸² If a prospective applicant is concerned as to whether this may apply to them, they may wish to seek confidential guidance from the CMA (see chapter 4).

were to become known. Paragraphs 12.52 to 12.57 below cover the CMA's approach to disclosure (or otherwise) of the identity of individual immunity applicants.

Applying for individual immunity after the launch of a formal investigation

- 12.29 In the event that a prospective individual applicant is already aware of an investigation into the cartel activity in which they have been involved, they may wish to contact the CMA to ascertain whether any form of immunity is available. Calls for this purpose should be made to the Leniency Enquiry Line,¹⁸³ regardless of whether the investigation is being conducted by the CMA or a sectoral regulator. Prospective applicants should make clear to the CMA during the initial enquiry that they are enquiring for an individual rather than an undertaking.
- 12.30 It will be necessary for the person making the enquiry to disclose the identity of the prospective applicant in order for the CMA to determine whether Type B or Type C individual immunity is available.¹⁸⁴ However, the fact that a prospective applicant has enquired about the availability of individual immunity will not be used against them if the application does not proceed.
- 12.31 For the purpose of the initial enquiry, the CMA will usually seek the following information:
- (a) the name of the prospective applicant, and their position in relation to the parties under investigation (for example, current or former employee or director of [party]);
 - (b) details of the investigation to which the enquiry relates;
 - (c) the scope of the conduct for which individual immunity is sought, for example whether this is the same as the scope of the investigation (as set out in any case initiation letter or published information about the investigation) or, if not, details of any differences;¹⁸⁵

¹⁸³ See paragraph 5.1.

¹⁸⁴ In particular, if the CMA has already launched a criminal cartel investigation, the CMA will need to understand the status of the individual applicant in the investigation (for example that they have already been arrested or interviewed) in order to consider whether it would be in the public interest to grant Type B or Type C individual immunity.

¹⁸⁵ The CMA recognises that a prospective individual applicant may not be aware of the precise scope of the existing investigation. Where this is the case, the CMA will ask the prospective applicant to provide sufficient high-level details to allow the CMA to determine the extent of overlap with the existing investigation. This may include, for example, the dates and broad nature of the cartel activity in which the prospective applicant has been involved.

- (d) a brief outline of the basis on which the prospective applicant considers that they can add significant value to the investigation (for example by producing new evidence, witness evidence, and/or explanations of existing evidence);
- (e) confirmation that the prospective applicant has a 'concrete basis' for the suspicion of cartel activity, and a brief outline of what this is;¹⁸⁶
- (f) confirmation that the prospective applicant has a 'genuine intention to admit' to cartel activity;
- (g) confirmation that the prospective applicant understands that an immunity application involves an obligation to maintain continuous and complete cooperation with the CMA throughout the investigation and until the conclusion of any action; and
- (h) the name and telephone number of the person making the enquiry.

12.32 Unless the CMA has an active criminal investigation into the cartel activity in question, the CMA will also require confirmation that the prospective applicant intends to proceed with the application if CDO immunity is available (either Type B or Type C). Given that criminal immunity is only available on an exceptional basis for individual Type B applicants, and not at all for individual Type C applicants, the CMA will not accept initial enquiries if the individual only intends to apply if both criminal and CDO immunity are available.

12.33 If the CMA is conducting a criminal cartel investigation into the activity in question, the CMA will require confirmation that the prospective applicant intends to proceed with the application if criminal immunity is available. The prospective applicant may also enquire about the availability of CDO immunity, if applicable, at this stage. However, if the CMA concludes that it is not in the public interest to grant criminal immunity, CDO immunity will not be considered further until the conclusion of the criminal investigation. Once the criminal investigation has concluded, the individual may enquire again about the availability of CDO immunity if they have not been charged with the criminal cartel offence.

12.34 After taking initial details, the CMA officer will liaise with the relevant case team to ascertain whether CDO and/or criminal immunity are available in principle. This will usually take up to two working days, although it may be

¹⁸⁶ See paragraph 2.7. The fact that an undertaking with which the prospective applicant is associated (for examples as a current or former employee) has been subject to on-site inspections or other information requests is not in itself sufficient to provide a 'concrete basis' to suspect.

longer (for example on some complex investigations). The prospective applicant's position in the leniency 'queue' will be reserved from the time of the initial call or voicemail to the Leniency Enquiry Line.

12.35 Once the CMA officer has liaised with the relevant case team, they will revert to the person making the enquiry to confirm whether individual immunity (CDO and/or criminal immunity) is available.

12.36 If individual immunity is available, paragraphs 6.12 to 6.15 on the grant of a marker will apply.

Submitting an application package

12.37 Chapter 7 applies to individual applications, with the exception of paragraphs 7.3 to 7.7 on the contents of the application package.

12.38 The contents and nature of the application package in an individual application will depend on the circumstances of the case.

12.39 In all cases, individual applicants will be required to produce any pre-existing documents relevant to the reported activity that are already in the individual's possession. However, applicants **must not** take any steps to obtain further documents or information without first discussing this with the CMA.

12.40 In some cases, the CMA may also require the individual applicant to attend an initial interview regarding the reported cartel activity as part of the initial application package. Thereafter, further interviews may be required and ultimately the individual applicant may also be required to sign a witness statement and to appear as a witness at any subsequent proceedings.

Cooperation expected of individuals

12.41 Individuals seeking to benefit from CDO and/or criminal immunity (either via an individual immunity application or as a cooperating individual) must maintain continuous and complete cooperation throughout the CMA's investigation and any subsequent proceedings. Failure to do so will, subject to the process described at paragraphs 12.63 to 12.66, result in immunity being withdrawn from the individual in question.

12.42 The CMA will require individual applicants to sign a cooperation letter, in line with paragraph 8.6, in cases where it is actively considering launching a formal investigation or (in Type B and C applications) where a formal investigation is already underway. The precise nature of the cooperation letter will depend on the circumstances of the case and will be discussed with the individual applicant at the appropriate time.

Interviews

- 12.43 The CMA may wish to conduct interviews of individuals benefitting from CDO and/or criminal immunity (whether as an individual applicant or as a cooperating individual). In this context, the requirement on individuals to maintain continuous and complete cooperation extends to attending an interview if requested and, if so, providing a candid and complete account of their conduct in relation to the reported cartel activity.¹⁸⁷
- 12.44 This does not mean that such interviewees must adhere to the CMA's understanding of the case or (in the case of cooperating individuals) the position taken by the undertaking applicant. Rather, they must provide complete and truthful answers to the CMA's questions. This includes, where relevant, telling the CMA about any exculpatory information and making clear where they are unsure or do not recall certain details.
- 12.45 The CMA recognises that individuals may find it difficult to recall details of historic events. In some cases, individuals may be provided with details of the broad topics and copies of documentary evidence to be covered in advance of the interview taking place. The CMA would expect interviewees to consider any such material carefully in advance of attending the interview in order to refresh their memories. However, the CMA will not penalise individuals who are genuinely and credibly unable to recall precise details.
- 12.46 Interviewees may ask to have a legal adviser present at the interview to represent their interests. In some cases, cooperating individuals may choose to be represented by a legal adviser who is also acting for the undertaking applicant. However, the starting point for the CMA is that it will generally be inappropriate for a legal adviser who is **only** acting for the undertaking applicant to be present at the interview. There may also be a risk in certain circumstances that the presence of a legal adviser acting for the undertaking applicant will prejudice the investigation, for example if their presence reduces the incentives on the individual being interviewed to be open and honest in their account.
- 12.47 Paragraphs 12.52 to 12.59 set out details of the circumstances in which information provided by individual immunity applicants and/or cooperating individuals at interview may be disclosed, used or transferred.

¹⁸⁷ The expectation is that such interviews will be on a voluntary basis rather than under a compulsory basis under section 26A of the CA98. However, the CMA will consider issuing compulsory notices in exceptional circumstances.

Cooperating with appeals, CDO proceedings and criminal proceedings

12.48 Where appropriate, the CMA may also require individual applicants and cooperating individuals to appear as witnesses in any appeals, CDO proceedings or criminal proceedings.

Individual immunity agreements and no-action letters

12.49 If the CMA conducts a civil investigation and reaches the point of issuing a statement of objections, it will enter into an individual immunity agreement with an individual applicant who has been granted CDO immunity. The individual immunity agreement formally sets out the agreement between the individual applicant and the CMA in respect of the reported cartel activity. It confirms that, subject to the individual applicant having met and continuing to meet the conditions of leniency, they will benefit from CDO immunity. A pro-forma individual immunity agreement is at [Appendix C](#).

12.50 Where the applicant is an undertaking, the CMA will not enter into separate individual immunity agreements with any of the undertaking's cooperating current or former directors who obtain CDO immunity as a result of the undertaking's application. However, if the undertaking is a Type B or Type C applicant (such that CDO immunity is discretionary rather than guaranteed), the CMA will confirm in writing to the applicant which of its directors have been granted CDO immunity.

12.51 If the CMA conducts a criminal cartel investigation, it will issue no-action letters to individuals who have qualified for criminal immunity and would be at genuine risk of criminal prosecution for the criminal cartel offence had they not done so (either individual immunity applicants or cooperating individuals). For further details, please see paragraphs 13.19 to 13.24.

Disclosure of leniency material and use of information

12.52 As set out in Chapter 10, the CMA recognises the importance of confidentiality for applicants and will not normally reveal the existence of a leniency application until or unless it becomes necessary to do so.

Disclosure in a civil investigation

12.53 Paragraphs 10.1 to 10.9 (regarding disclosure of leniency material) usually apply to individual applications during a civil investigation. Individual applicants should also note that where they have been interviewed as part of an application package (in line with paragraph 12.40 above), it will usually be necessary to disclose a transcript of the interview to recipients of a statement

of objections for rights of defence purposes.¹⁸⁸ This applies to both the initial interview and any subsequent interviews. It may also be necessary to disclose interview transcripts during the course of CDO proceedings.

12.54 The CMA recognises that in certain circumstances, an individual applicant may be concerned that their safety would be in jeopardy or other serious adverse consequences would follow if their approach to the CMA were to become known.¹⁸⁹ If an individual immunity applicant considers that this may apply, they must raise this with the CMA at the point of applying for immunity so that the CMA can take appropriate precautions in any investigation, including considering whether it would be appropriate to treat the individual immunity applicant as a confidential source.¹⁹⁰

12.55 Prospective individual immunity applicants who are concerned about the possible consequences if their proposed approach to the CMA were to become known may wish to seek confidential guidance (see chapter 4) as to whether the CMA considers that the particular circumstances mean that it would be appropriate to treat them as a confidential source if they were to apply.

Disclosure in a criminal cartel investigation

12.56 Paragraphs 13.27 to 13.30 set out some considerations relating to disclosure in a criminal cartel investigation.

12.57 As set out at paragraph 13.28, where necessary the CMA will consider protecting the identity of individuals who are confidential sources in criminal cases by applying for public interest immunity. As with civil cases, therefore, where an individual immunity applicant considers that their safety would be in jeopardy or other serious adverse consequences would follow if their approach to the CMA were to become known, they must raise this with the CMA at the point of applying for immunity.

¹⁸⁸ The applicant will have the usual reasonable opportunity to make representations as to whether any information in the transcript should be treated as confidential within the meaning of the CMA rules.

¹⁸⁹ This includes the rare circumstances described at paragraph 12.27 in which an individual applicant may be asked to continue with ongoing cartel activity in order to obtain further information about a cartel for the CMA. It may also apply in other contexts.

¹⁹⁰ Treating an individual as a confidential source means that the CMA would not voluntarily disclose, and would seek to avoid being required to do so (for example by resisting on public interest immunity grounds an application for a court order), the identity or role of the individual in any subsequent investigation or proceedings. Prospective individual applicants may wish to consider seeking confidential guidance (see chapter 4) as to whether the CMA considers that the particular circumstances mean that it would be appropriate to treat them as a confidential source if they were to apply.

Use and transfer of information

- 12.58 Paragraphs 10.11 to 10.15, regarding the use of information submitted by a failed or withdrawn applicant, apply to individual immunity applicants. The relevant provisions for cooperating individuals if the undertaking's application fails or is withdrawn are set out at paragraphs 10.16 and 10.17.
- 12.59 Both individual applicants and cooperating individuals should have regard to the remainder of the provisions in Chapter 10 (paragraph 10.18 onwards) regarding the circumstances in which information may be used or transferred.

Withdrawal of immunity by the CMA

- 12.60 In line with paragraphs 11.1 to 11.3, if an individual applicant fails to satisfy the conditions of leniency, the CMA will withdraw immunity by withdrawing the existing immunity marker and/or revoking any individual immunity agreement or no-action letter that has previously been granted. Similarly, if a cooperating individual fails to satisfy the conditions of leniency, the CMA will withdraw immunity from that individual.
- 12.61 The following provisions of Chapter 11 apply to individual applicants:
- information insufficient for a credible investigation (Type A) (paragraph 11.4), and
 - information does not add significant value (Types B and C) (paragraphs 11.5 to 11.7).
- 12.62 The following provisions of Chapter 11 apply both to individual applicants and to cooperating individuals:
- failure to cooperate (paragraph 11.8, read in conjunction with paragraphs 12.41 to 12.48 above), and
 - bad faith (paragraphs 11.11 and 11.14).

Process for withdrawing immunity

- 12.63 The process for withdrawing immunity outlined at paragraphs 11.16 to 11.18 also applies in cases where the CMA has concerns about the conduct of either an individual applicant or a cooperating individual. The case team will raise concerns with the individual's representative in the first instance and if needed escalate the matter to the Senior Responsible Officer (SRO) for the investigation for a decision on whether to withdraw immunity from that

individual. If necessary, the applicant's representative will be invited to meet with the SRO to discuss the CMA's concerns.

- 12.64 The decision on withdrawal of immunity will be taken by the CMA's SRO for the investigation, in consultation with the SRO for leniency (if different from the SRO for the investigation).
- 12.65 If the CMA decides to withdraw immunity from a cooperating individual, it will also inform the applicant undertaking of this decision.
- 12.66 In cases where the CMA has conducted a criminal cartel investigation and issued a no-action letter, it may in certain circumstances decide to revoke the no-action letter. This is set out at paragraphs 13.36 to 13.40 below.

13. Specific considerations relating to the criminal cartel offence and criminal cartel investigations

- 13.1 This chapter sets out specific considerations for applicants (and, in the case of undertaking applicants, their current and former employees and directors) in cases where the reported cartel activity may fall within the scope of the criminal cartel offence, and/or be subject to a criminal cartel investigation.

The role of the Serious Fraud Office

- 13.2 The criminal cartel offence may be investigated by the CMA, by the SFO,¹⁹¹ or by way of a joint investigation between the two. The CMA has a Memorandum of Understanding with the SFO which sets out the basis on which the CMA and SFO will cooperate to investigate and/or prosecute individuals in respect of the criminal cartel offence.¹⁹²
- 13.3 Decisions in respect of leniency or the issue or withdrawal of no-action letters (see paragraphs 13.19 to 13.24 and 13.36 to 13.40 below) rest with the CMA. However, if any such decision could have an impact on the outcome of an existing SFO-led cartel investigation or prosecution, the CMA will consult the SFO.

Criminal immunity in Scotland

- 13.4 Guarantees of immunity from prosecution cannot be given by the CMA in relation to alleged criminality that falls to be prosecuted in Scotland, as the Lord Advocate has the final say on such matters.
- 13.5 The CMA has a Memorandum of Understanding with the Crown Office and Procurator Fiscal Service (COPFS) in Scotland in relation to the investigation and/or prosecution of individuals who may have committed the criminal cartel offence within the jurisdiction of the Scottish courts.¹⁹³ This includes provisions on how applications for immunity will be handled in respect of a cartel that falls to be prosecuted in Scotland.

¹⁹¹ Where the case meets the SFO Director's Statement of Principle, and provided that the alleged offence would not fall to be prosecuted in Scotland (see paragraphs 13.4 to 13.6).

¹⁹² Memorandum of Understanding between the Competition and Markets Authority and the Serious Fraud Office, October 2020.

¹⁹³ Memorandum of Understanding between the Competition and Markets Authority and the Crown Office and Procurator Fiscal Service, July 2014.

- 13.6 Where a prospective applicant is concerned to know the likely approach of the Scottish prosecution authorities, the CMA will, if desired, seek an early indication (where possible on a ‘no-names’ basis) from the Lord Advocate as to whether criminal immunity is likely to be granted, assuming full ongoing cooperation with the authorities were to be maintained and on the basis that there are no criminal convictions or associations to be disclosed.

Availability of criminal immunity after the launch of a criminal cartel investigation

- 13.7 As stated at paragraphs 12.10 to 12.13 above, once a criminal cartel investigation has been launched, the CMA will only consider granting criminal immunity in exceptional circumstances. This means that applications for individual criminal immunity are unlikely to be accepted once a criminal cartel investigation has been launched. The CMA will consider applications from undertakings for Type B and Type C leniency in the normal way but, where such applications are accepted, the CMA is unlikely to grant criminal immunity to the applicant’s current and former employees and directors.
- 13.8 However, if an individual has potentially committed the criminal cartel offence, they can still seek to assist the CMA’s investigation and any prosecution for the criminal cartel offence under the terms of the Serious Organised Crime and Police Act 2005 (SOCPA05), as amended by the Sentencing Act 2020.¹⁹⁴ Under SOCPA05, a defendant can seek to enter into a written agreement with the CMA under which they commit to pleading guilty and assisting the CMA with its criminal investigation and prosecution of the criminal cartel conduct (a SOCPA agreement), including by giving evidence on behalf of the prosecution. The CMA would in turn ensure that the full details of such assistance are placed before the court at which the defendant then appears for sentencing following their guilty plea. In determining what sentence to pass on the defendant, the court, in such cases, may take into account the extent and nature of the assistance given or offered.¹⁹⁵
- 13.9 In Scotland, the Police, Public Order and Criminal Justice (Scotland) Act 2006¹⁹⁶ established a similar (but not identical) statutory framework in relation to assistance by offenders, including the issuing of conditional immunity notices¹⁹⁷ and written assistance agreements concerning sentence

¹⁹⁴ The CMA became a designated prosecutor for the purposes of section 73 SOCPA05 (as amended by the Sentencing Act 2020) on 1 January 2025, Digital Markets, Competition and Consumers Act 2024, section 328.

¹⁹⁵ Section 73(2) SOCPA05

¹⁹⁶ Sections 91-97.

¹⁹⁷ Section 97.

reduction¹⁹⁸ for accused persons who assist law enforcement. Under Section 91, the court, when sentencing accused persons who plead guilty in proceedings on indictment and who have entered into a written assistance agreement with a prosecutor to provide assistance in relation to any investigation or prosecution, must take account of the nature and extent of that assistance. Often a reduction in sentence is applied but this is not mandatory.

Cooperation expected of undertaking applicants in a criminal cartel investigation

13.10 In the event that the CMA conducts a criminal investigation in relation to the reported cartel, the CMA will require continuous cooperation from an undertaking applicant even where it is not currently conducting a civil investigation into the undertaking.¹⁹⁹ This is because it will not necessarily be the case that all current and former employees and directors will already be the subject of cooperation obligations under no-action letters. There may be a number of employees or directors who are not recipients of such letters but who may still be called upon to assist in the criminal investigation and/or proceedings, including by being available as witnesses in criminal proceedings.

13.11 Failure to cooperate with the CMA in this way will lead to the rejection of the applicant's marker. This will leave the applicant without leniency protection should the CMA later open a civil investigation into the reported cartel. It will also have potential consequences for the individual employees and directors of the applicant, who will no longer benefit from any criminal or CDO immunity previously held by virtue of the applicant's leniency marker.²⁰⁰

Cooperation expected of individuals in relation to a criminal investigation

13.12 Similarly, if the CMA is contemplating or has commenced a criminal investigation in relation to the reported cartel, the CMA will require continuous and complete cooperation from an individual immunity applicant (and, in the case of undertaking applicants, their current and former employees and directors).

¹⁹⁸ Section 91.

¹⁹⁹ This applies in relation to both the criminal cartel investigation and any subsequent proceedings.

²⁰⁰ However, the protections described at paragraphs 10.16 and 10.17 will apply to any information previously supplied by such individuals.

13.13 In relation to the admission condition of leniency (see paragraph 2.6(d)), individuals who benefit from criminal immunity (either as an individual immunity applicant or as a cooperating current or former employee or director of an undertaking applicant) will be required to make admissions during their interviews with the CMA as to the factual conduct that they have been engaged in that amounts to a breach of the criminal cartel offence. They will then be required to admit that breach of the criminal cartel offence as specifically particularised in the no-action letter issued by the CMA at a more advanced stage in its investigation (see paragraph 2 of the pro-forma no-action letter at [Appendix D](#)).

Interviews in a criminal cartel investigation

13.14 In Type A cases, the individual knows, before being interviewed, that they will be granted criminal immunity provided they satisfy all the usual conditions.²⁰¹ The purpose of the interview is therefore to obtain all relevant information with a view to advancing the CMA's investigation – not to decide whether the individual will be granted criminal immunity in principle.

13.15 The exact process under which interviews will be conducted with individuals in Type A cases will depend on the circumstances of the investigation and the individual in question. However, it is anticipated that an initial scoping interview will be held.

13.16 Thereafter, if it is anticipated that an individual applicant's account is to be relied on as evidence in any future criminal prosecution, the initial interview is likely to be followed by further in-depth interviews. The CMA would expect these further interviews to be held under caution²⁰² if the conduct of the individual would have made them liable to being charged with the criminal cartel offence absent the possibility of a no-action letter.²⁰³

13.17 In Type B and Type C cases, the grant of individual criminal immunity is discretionary and interviews of individuals may be conducted for two reasons:

- to elicit sufficient information to enable the CMA to decide whether it is in the public interest to exercise its discretion to grant a no-action letter in principle, and

²⁰¹ This applies regardless of whether the individual being interviewed is an individual immunity applicant or the current or former employee or director of an undertaking applicant.

²⁰² Having regard to PACE 1984, Code C.

²⁰³ If the CMA is not conducting a criminal cartel investigation into the cartel activity the issue of whether or not an interview will need to be conducted under caution will not arise

- to obtain information from the individual with a view to advancing the CMA's investigation.

13.18 The exact process under which interviews in a criminal cartel investigation will be conducted with individuals in Type B and Type C cases will depend on the circumstances of the investigation and the individual in question. However, it is anticipated that the process will broadly follow that anticipated in relation to Type A applicants.

No-action letters

13.19 No-action letters are issued to individuals who would be at genuine risk of prosecution for the criminal cartel offence had they not qualified for criminal immunity.²⁰⁴ The letter formally confirms that an individual will, subject to having met and continuing to meet the conditions of leniency (including admitting to having engaged in cartel activity),²⁰⁵ benefit from immunity from prosecution from the criminal cartel offence. A pro-forma no-action letter is at [Appendix D](#).

13.20 The CMA would not generally consider it necessary to issue a no-action letter to individuals who qualify in principle for criminal immunity but are not judged to have had any, or any significant, role in the cartel at all. Such individuals do not even face a hypothetical risk of criminal prosecution.

13.21 If at any stage an individual who qualifies for criminal immunity but has not received a no-action letter subsequently appears to be at risk of prosecution for the criminal cartel offence, whether by the CMA or any other UK agency, the CMA will issue a no-action letter.

13.22 Where the issue of a no-action letter concerning a suspect or defendant in an SFO-led case is under consideration, the CMA will be reliant on the SFO's assessment as to the degree to which that individual has cooperated with the criminal case. The CMA will liaise closely with the SFO in such scenarios to ensure consistency of approach in the operation of the leniency policy.

13.23 Where the CMA has received an application for immunity from prosecution in respect of a cartel that falls to be prosecuted in Scotland, the SRO for

²⁰⁴ This means that only a small proportion of those who qualify for criminal immunity in principle will ultimately receive a no-action letter, as it will generally be the case that only a small proportion of an undertaking applicant's current and former employees and directors would be at genuine risk of criminal prosecution.

²⁰⁵ As explained at paragraph 13.13.

leniency will report the level of cooperation of relevant individual(s) to the Lord Advocate, via the COPFS.

Timing of no-action letters

13.24 A proper determination of whether a person should receive a no-action letter cannot generally be made until at or near the conclusion of the CMA's criminal investigation. It may not be necessary for all lines of enquiry to have been completed. However, as a minimum, the CMA will expect to have received and duly analysed the substantial and most probative elements of the relevant information in the possession or control of the applicant and that of its current and former employees and directors before it issues any no-action letters.²⁰⁶ This is likely to mean that relevant individuals will have been interviewed at least once about their role in the cartel activity and possibly more than once before a no-action letter is issued.²⁰⁷

Other criminal offences

13.25 The CMA may make referrals to other law enforcement agencies, such as the SFO, if upon assessment of the cartel activity it considers that there are grounds to do so. This assessment may take place at any time during the CMA's investigation.

13.26 The grant of a no-action letter cannot prevent prosecution for conduct which, though it may be related to the cartel activity, amounts to a separate and distinct offence, such as bribery or fraud. However, to the extent that the cartel conduct particularised in a no-action letter would also be capable of being prosecuted as another offence (for example under the Fraud Act 2006), the CMA would only refer the case to another UK agency on the understanding that that agency would not circumvent the effect of the no-action letter by using that other offence to prosecute the recipient for the conduct particularised in the letter. This is subject, of course, to the proviso that the applicant complies with the usual conditions as set out in this guidance.

Disclosure and use of information in criminal cases

13.27 Before a person is interviewed in a criminal cartel investigation, they must usually be given sufficient information to enable them to understand the

²⁰⁶ This accords with the position in regard to the timing of the issue of any leniency agreement. See paragraph 9.2 above.

²⁰⁷ For the procedure under which such interviews will be conducted, see paragraphs 13.14 to 13.18 above.

nature of the offence being investigated, and why they are suspected of committing it, in order to allow for the effective exercise of their rights of defence. As a result, there is a risk that the interviewee will conclude that such information has been supplied by a leniency applicant, which may in turn reveal the identity of the applicant.

- 13.28 If a prosecution is commenced, full disclosure of ‘used’ and relevant ‘unused’ material must be made to defendants, to comply with requirements under the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003, and the associated Code of Practice. This will inevitably include material provided by the leniency applicant, and would typically include leniency statements (whether written or transcripts of oral statements), where such statements are capable of having an impact on issues arising in the criminal case. Where individuals who have been issued with no-action letters provide witness statements, the fact of those letters having been issued will ordinarily have to be disclosed, although where a witness is also a confidential source an application for public interest will be sought where appropriate to protect this information.
- 13.29 Given that one of the objectives of the leniency policy is to facilitate effective enforcement action, applicants will be expected to respond promptly and constructively to requests for information which the CMA is under a duty to disclose in order to proceed to a prosecution. In this regard, applicants should note that the grounds for withholding relevant material from defendants in a criminal prosecution are more limited than the scope to withhold information from disclosure in a civil investigation.
- 13.30 Material disclosed for the purpose of criminal proceedings remains subject to the prohibition on further disclosure imposed by Part 9 of the EA02 save to the extent that it has been disclosed to the public.²⁰⁸ In the CMA’s view, disclosure to defendants in criminal proceedings would not of itself amount to disclosure to the public.

Use of information in the case of failed no-action applicants

- 13.31 The principles governing the use of information in the case of failed no-action applications largely parallel the principles in relation to failed leniency approaches by undertakings.
- 13.32 If an individual is eligible for criminal immunity (either as an individual Type A or Type B immunity applicant, or as the cooperating employee or director of

²⁰⁸ See, for example, section 241(2) EA02.

an undertaking applicant) and has been interviewed, any information they provide in such interviews will not be used against them in criminal proceedings except in the following circumstances:

- where a no-action letter is not issued, if the individual has failed to comply with the conditions of leniency (see paragraph 2.6), including knowingly or recklessly providing information that is false or misleading in a material particular, or
- where a no-action letter is issued, it is subsequently revoked.

13.33 The effect of this, in conjunction with paragraph 13.36 below (concerning revocation), is that where an applicant has intentionally or recklessly misled the CMA or is otherwise in breach of the conditions in paragraph 2.6 above, in particular as a result of a failure to cooperate, the CMA will not issue a no-action letter or, if a no-action letter has already been issued, will revoke it. Consequently, all information given under the no-action process may be used against the individual in evidence. In addition, the CMA would also consider itself free to use the information against any third party including any undertaking.²⁰⁹

13.34 Similarly, where a no-action letter is not issued following an interview, information provided could only be used against the interviewed individual applicant in criminal proceedings if they failed to comply with the conditions of leniency. The CMA would also consider itself free to use the information against third parties and other undertakings in those circumstances.

13.35 The CMA has not had experience of voluntary withdrawals of applications for no-action letters but would be likely to take a similar approach to that taken in relation to voluntary withdrawals by undertakings from leniency. See paragraph 10.14).

Revocation of no-action letters

13.36 A no-action letter may be revoked if the recipient of a letter ceases to satisfy in whole or in part any of the relevant conditions (set out at paragraph 2.6

²⁰⁹ As set out at paragraphs 10.16 and 10.17 of this guidance, the position is different where an individual has cooperated fully under the no-action process but their application is under the umbrella of an immunity approach by an undertaking whose corporate application has failed. In those circumstances no information provided by any cooperating individual will be used against them unless the CMA considers that their own actions contributed significantly to the undertaking's application failing or being revoked (or that they otherwise fail to comply with the conditions of leniency).

above), including where they have knowingly or recklessly provided information that is false or misleading in a material particular.

- 13.37 On revocation, any immunity granted by the no-action letter will cease to exist as if it had never been granted and the CMA may rely on any information given by the applicant in a prosecution against them for the criminal cartel offence.
- 13.38 If the CMA is minded to revoke a no-action letter the recipient of the letter will be notified in writing and given a reasonable opportunity to make representations. If the recipient fails to address the concerns, the matter will be referred to the SRO for the investigation. If necessary, the applicant's representative will be invited to meet with the SRO to discuss the CMA's concerns.
- 13.39 The decision on revocation of a no-action letter will be taken by the SRO for the investigation, in consultation with the SRO for leniency (if different from the SRO for the investigation).
- 13.40 Where the issue or withdrawal of a no-action letter concerning a suspect or defendant in an SFO-led case is under consideration, the CMA will be reliant on the SFO's assessment as to the degree to which that individual has cooperated with the criminal case. The CMA will liaise closely with the SFO in such scenarios to ensure consistency of approach in the operation of the leniency policy.

14. Appendix A: Pro forma cooperation letter for undertakings

[To be printed on leniency applicant's letterhead]

Dear Sirs,

[Insert name of the applicant] – Cooperation letter

1. I, [insert full name], am [insert job title] of [company name] (the '**Applicant**'). The Applicant has made an application for leniency pursuant to the Competition and Markets Authority's ('**CMA**') leniency programme described in CMA210, Applications for leniency and no action in cartel cases (the '**Leniency Guidance**') in respect of cartel conduct relating to [insert description of the cartel conduct] (the '**Leniency Application**').
2. I have been nominated by the Applicant to act as its representative (the '**Applicant's Representative**') and to be a direct point of contact for the CMA, for the purposes of the Leniency Application. My contact details are as follows: [insert contact details]. The CMA may also, at its discretion, choose to contact the Applicant's legal advisers: [insert contact details].
3. I confirm on behalf of the Applicant that it understands the conditions for the grant of leniency set out in the Leniency Guidance and that these conditions will apply throughout the application process and until final determination of any action by the CMA arising as a result of the investigation (including any director disqualification proceedings, criminal proceedings and civil or criminal appeals). For the purpose of clarity, these conditions are summarised below.
4. The Applicant must:
 - provide the CMA with all the non-legally privileged information, documents and evidence available to it regarding the cartel activity;
 - maintain continuous and complete cooperation throughout the CMA investigation and until the conclusion of any action (including any director disqualification proceedings, criminal proceedings and appeals) by the CMA arising as a result of the investigation;
 - refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA);

- accept that if the CMA reaches the point of entering into a leniency agreement with the applicant, the applicant will be required to admit to having participated in cartel activity (which by definition includes an acceptance of an infringement of the law), and in the meantime the applicant must not conduct itself in a way which would be inconsistent with such an admission; and
 - **[delete for Type C applications]** not have taken steps to coerce another undertaking to take part in the cartel activity.
5. The Applicant understands the importance of the requirement to maintain continuous and complete cooperation throughout the CMA investigation and any subsequent proceedings and that the requirement of continuous and complete cooperation implies that the Applicant's overall approach to the leniency process must be a constructive and proactive one, designed genuinely to assist the CMA in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct.
 6. The Applicant also understands the need to maintain complete confidentiality of the fact that it has applied for leniency and that the Applicant must consult with the CMA before making any disclosure of this fact, regardless of whether the CMA has used any of its statutory powers.
 7. The Applicant understands that a failure to comply with any or all of the conditions set out in the Leniency Guidance may result in the failure of the Leniency Application and the termination of any leniency agreement that has been signed between the CMA and the Applicant. The Applicant understands that in the event that the Leniency Application fails as a result of the Applicant's bad faith or non-cooperation, the CMA reserves the right to use the information received from the Applicant against the Applicant and any third parties.
 8. The Applicant also understands that, under section 44 of the Competition Act 1998, it is a criminal offence punishable by a fine and/or imprisonment knowingly or recklessly to provide false or misleading information. The Applicant also understands that section 25B of the Competition Act 1998 imposes a duty on a person who knows or suspects that an investigation under the Competition Act 1998 is being, or is likely to be, carried out by the CMA not to falsify, conceal, destroy or otherwise dispose of a document (or cause or permit this to be done) which the person knows or suspects is or would be relevant to the investigation and that the CMA may impose a penalty on a person in accordance with section 40A where the CMA considers that the person has, without reasonable excuse, failed to comply with a requirement imposed on the person by section 25B.

9. In the event that I cease to be the Applicant's Representative, I will inform the CMA and the Applicant will ensure that a replacement is appointed without delay.
10. Insofar as any of the actions of the Applicant with respect to the Leniency Application may lead to a financial penalty being imposed by the CMA, this letter shall not create or be deemed to create or permit any personal liability in respect of the Applicant's Representative for that financial penalty.
11. I confirm that I have all the authority and capacity necessary to sign this letter.

Signed:

Name: [insert name of signatory]

Company: [insert name of Applicant]

15. Appendix B: Pro forma leniency agreement

Competition Act 1998 (the Act)

1. This letter sets out an agreement between [INSERT NAME OF APPLICANT] (the '**Applicant**') and the Competition and Markets Authority (the '**CMA**').

Grant of leniency

2. The CMA grants the Applicant [immunity from **OR** a reduction of [x]% in the amount of] any financial penalty which may otherwise be imposed by the CMA under section 36 of the Act ('**Leniency**') in respect of the Reported Cartel Activity as defined in paragraph 3 below. Leniency is granted on the terms and conditions set out below.
3. Leniency is granted on the application of the Applicant in connection with the following cartel activity in the United Kingdom, namely, [INSERT DESCRIPTION OF CONDUCT] (the '**Reported Cartel Activity**'). Subject to the provisions of paragraphs 4 and 7 below, this means that the Applicant will [be immune from any penalty that would otherwise be imposed **OR** benefit from a reduction of [x]% in the amount of any financial penalty imposed] by the CMA in relation to any finding that the Reported Cartel Activity or any part of it constitutes an infringement of section 2 of the Act.

Conditions

4. This grant of Leniency is made and remains conditional on the Applicant throughout its dealings with the CMA in relation to the Reported Cartel Activity having satisfied and continuing to satisfy each of the conditions set out below.
 - (a) The Applicant accepts that the Reported Cartel Activity infringed section 2 of the Act.
 - (b) The Applicant has taken all reasonable steps to identify all the relevant information, documents and evidence²¹⁰ available to it regarding the existence and activities of the Reported Cartel Activity, and has provided all such non-legally privileged information, documents and evidence to the CMA. The Applicant has further brought to the CMA's attention the existence of non-legally privileged information, documents and evidence

²¹⁰ References to 'evidence' in this agreement include evidence in any form, and could include, for example, mobile phones which may contain relevant material such as call logs and (deleted or undeleted) text messages.

that have not been provided to the CMA but have been identified as potentially relevant to the Reported Cartel Activity.

- (c) The Applicant maintains continuous and complete cooperation throughout the CMA's civil and any criminal cartel investigations and until the conclusion of any action by the CMA arising as a result of the investigations, and reference to such action includes (a) any action taken by the CMA in any proceedings before the Competition Appeal Tribunal (the '**CAT**') arising from a decision of the CMA in connection with the Reported Cartel Activity (b) any action taken by the CMA, or any other prosecuting agency, to charge and prosecute any individuals in connection with the Reported Cartel Activity and (c) any action taken by the CMA under the Company Directors Disqualification Act 1986 in connection with the Reported Cartel Activity. Save as otherwise agreed with the CMA, this includes but is not limited to:
- (i) not disclosing (either directly or indirectly) to any third party without the CMA's express prior consent the fact that the Applicant has approached the CMA and is cooperating with the CMA under the provisions of the CMA's leniency programme, unless such information has already been publicly disclosed by the CMA
 - (ii) in addition to the non-legally privileged information, documents and evidence already provided, voluntarily and without prompting providing the CMA with all the relevant facts that become known to the Applicant, together with all the relevant non-legally privileged information, documents and evidence, wherever located, that become known to the Applicant and are in the possession, custody or control of the Applicant, or otherwise become available to it, relating to the Reported Cartel Activity, as well as bringing to the CMA's attention the existence of any non-legally privileged information, documents and evidence that is identified and viewed as potentially relevant to the Reported Cartel Activity
 - (iii) to the extent that they have not already been provided, voluntarily and without the CMA using its powers under any of sections 26 to 28A of the Act or any of sections 193 to 194 of the Enterprise Act 2002, promptly providing the CMA with all the non-legally privileged information, documents, evidence or other items in its possession, custody or control, or otherwise available to it, wherever located, requested by the CMA in the furtherance of its investigation into the Reported Cartel Activity

- (iv) making the IT systems and equipment²¹¹ under its control and/or accessible from its premises available for analysis by such means and in such manner as determined by the CMA to be most appropriate for the purposes of its investigation. In making this determination the CMA will have regard to the legitimate interests of the undertaking in protecting the confidentiality of its information, compliance with the UK's data protection legislation, and maintaining the protections of legal professional privilege
- (v) ensuring that, save with the prior consent of the CMA, any potentially relevant IT systems are not removed, destroyed, tampered with or modified, and that relevant data are not removed, destroyed, tampered with or modified prior to, during or following any analysis by the CMA in accordance with paragraph (iv) above
- (vi) using its best endeavours to secure the complete and truthful cooperation of its current and former directors, officers, employees and agents and encouraging such persons voluntarily to provide the CMA with any information (directly or indirectly) relevant to the Reported Cartel Activity
- (vii) facilitating the ability of current and former directors, officers, employees and agents to appear for such interviews as the CMA may reasonably require at the times and places reasonably designated by the CMA
- (viii) using its best endeavours to ensure that current and former directors, officers, employees and agents who provide information to the CMA respond completely and truthfully to all questions asked in interviews with the CMA
- (ix) using its best endeavours to ensure that current and former directors, officers, employees and agents who provide information to the CMA make no attempt either falsely to protect or falsely to implicate any undertaking in any infringement of the Act or any individual in relation to the criminal cartel offence under section 188 of the Enterprise Act 2002
- (x) in relation to CAT proceedings arising from a decision by the CMA in connection with the Reported Cartel Activity, using its best endeavours to facilitate, and secure the complete and truthful

²¹¹ This would include, but not be limited to, servers, cloud-based data, personal computers, laptops, mobile telephones, tablets, digital media and all other similar networking or personal devices.

cooperation, of its current and former directors, officers, employees and agents, even if the Applicant is not a party to the CAT proceedings, in (i) assisting the CMA or its counsel in the preparation for any CAT proceedings; (ii) if requested by the CMA or its counsel attending any CAT proceedings; and (iii) speaking to their witness statements and being cross-examined on such witness statements in any CAT proceedings

(xi) in relation to any criminal proceedings in connection with the Reported Cartel Activity, providing equivalent cooperation to the CMA or any other UK prosecuting agency (in a manner compatible with the rules and principles of criminal law and procedure) as that referred to at paragraph (x) above in relation to any CAT proceedings

(xii) in relation to any action under the Company Directors Disqualification Act 1986 in connection with the Reported Cartel Activity, providing equivalent cooperation to the CMA as that referred to at paragraph (x) above in relation to any CAT proceedings, and

(xiii) recording and retaining on a continuing basis any relevant material which might have any bearing on the Reported Cartel Activity, and which remains in the possession of the Applicant or under its control, until the conclusion of any civil or criminal proceedings in connection with the Reported Cartel Activity.

(d) The Applicant has refrained from further participation in the Reported Cartel Activity from and including [INSERT DATE], that is, the date of application for leniency, and shall continue to do so.

(e) **[Only relevant for Types A and B:** The Applicant has not taken steps to coerce another undertaking to take part in the reported cartel activity].

5. In addition to the above-mentioned conditions, the Applicant understands that it is bound by all the other relevant conditions, provisos and qualifications referred to in the CMA's published guidance documents on leniency.

Use of information provided by the Applicant

6. All information, documents and other evidence provided by the Applicant to the CMA under this agreement shall, notwithstanding the termination of the agreement (whether by revocation, the conclusion of the case, including any proceedings before the CAT, in relation to the Reported Cartel Activity, or

otherwise), remain the property of the CMA and may be used by the CMA to facilitate the performance of its functions by or under any enactment.²¹²

Revocation

7. If, at any time before the conclusion of the case (whether by the adoption of a decision or otherwise) including any proceedings before the CAT or other appeal proceedings, the CMA determines that any of the conditions in paragraph 4 above have not been complied with, the CMA may, subject to the provisions of paragraph 8 below, revoke the grant of Leniency to the Applicant and impose any penalty in accordance with section 36 of the Act in relation to any finding by the CMA that the Reported Cartel Activity or any part of it constitutes an infringement of section 2 of the Act.
8. Before revoking the grant of Leniency, the CMA will give written notice to the Applicant of the nature of the alleged non-compliance and that the CMA is considering revoking the grant to the Applicant of Leniency. The Applicant will be given an opportunity to respond to the notice and, if the CMA considers it possible and appropriate, to remedy any breach within a reasonable period of time from the service of the notice.

Entire agreement

9. This letter constitutes the entire agreement between the CMA and the Applicant and, save as may be expressly referred to, it supersedes all prior representations, writings, negotiations or understandings, if any, whether oral or written, relating to the grant by the CMA of Leniency to the Applicant in connection with the Reported Cartel Activity.²¹³

Jurisdiction

10. This agreement is subject to English law and the jurisdiction of English Courts.

Execution

11. The signatories to this letter on behalf of each party have all the authority and capacity necessary to sign this letter and to bind the respective parties hereto.

²¹² The CMA's personal information charter explains how the CMA collects, uses and shares personal data. See: www.gov.uk/government/organisations/competition-and-markets-authority/about/personal-information-charter.

²¹³ However, for the avoidance of doubt, this clause does not oust the application of the CMA's published leniency guidance.

The signatories below acknowledge acceptance of the terms and conditions set out above which shall only take effect when both parties have signed this letter in duplicate, one original to be retained by each party.

Signed:

Date:

Name:

Position: Senior Director of Competition Enforcement

For and on behalf of the Competition and Markets Authority

Signed:

Date:

Name:

Position:

For and on behalf of the Applicant

16. Appendix C: Pro forma individual immunity agreement (CDO immunity)

1. This letter sets out an agreement between [Applicant] (the '**Applicant**') and the Competition and Markets Authority (the '**CMA**').

Grant of immunity

2. The CMA will not apply for a Competition Disqualification Order ('**CDO**') under the Company Directors Disqualification Act 1986 against the Applicant in respect of the following cartel activity in the United Kingdom, namely [INSERT DESCRIPTION OF THE CONDUCT] (the '**Reported Cartel Activity**').

Conditions

3. This grant of immunity is made and remains conditional on the Applicant having satisfied and continuing to satisfy each of the conditions set out below.
 - (a) The Applicant must admit participation in the Reported Cartel Activity described in paragraph 2 of this letter.
 - (b) The Applicant has taken all reasonable steps to identify all relevant facts, statements, documents, evidence or any other items ('**Information**') identified and available to him/her relating to the Reported Offence and the existence and activities of the Cartel Agreement and has provided all such non-legally privileged Information to the CMA. The Applicant has further brought to the CMA's attention the existence of non-legally privileged Information that has not been provided to the CMA but has been identified as potentially relevant to the Reported Cartel Activity.
 - (c) The Applicant must maintain continuous and complete cooperation throughout the investigation of the Reported Cartel Activity and until the conclusion of any proceedings arising as a result of the investigation. Save as otherwise agreed with the CMA, such cooperation includes but is not limited to the Applicant:
 - (i) not disclosing (either directly or indirectly) to any third party without the CMA's express prior consent the fact that the Applicant is cooperating with the CMA under the provisions of the CMA's leniency programme, unless such information has already been disclosed by the CMA
 - (ii) voluntarily and without prompting, providing the CMA with all relevant Information that becomes known to him/her or available to him/her

relating to the Reported Cartel Activity, in addition to any such Information already provided

- (iii) making the IT systems and equipment²¹⁴ under his/her control and/or accessible to him/her available for analysis by such means and in such manner as determined by the CMA to be most appropriate for the purposes of its investigation. In making this determination the CMA will have regard to the legitimate interests of the Applicant in protecting the confidentiality of the information made available, and maintaining the protections of legal professional privilege
- (iv) to the extent that it has not already been provided, providing voluntarily and promptly, and without the CMA using its powers under the Competition Act 1998, all Information available to him/her wherever located, requested by the CMA in relation to the Reported Cartel Activity
- (v) making himself/herself available for such interviews as the CMA may reasonably require at the times and places reasonably designated by the CMA
- (vi) responding completely and truthfully to all questions asked in interviews with the CMA
- (vii) not knowingly or recklessly providing information that is false or misleading
- (viii) not attempting either falsely to protect or falsely to implicate any undertaking in any infringement of the Competition Act 1998 or any other individual in relation to the criminal cartel offence under section 188 of the Enterprise Act 2002
- (ix) where required, providing evidence upon oath in any criminal proceedings arising out of the Reported Cartel Activity, any proceedings before the Competition Appeal Tribunal arising from a decision of the CMA in connection with the Reported Cartel Activity, and any proceedings under the Company Directors Disqualification Act 1986 in connection with the Reported Cartel Activity and
- (x) recording and retaining on a continuing basis any relevant material which might have any bearing on the Reported Cartel Activity, and

²¹⁴ This would include, but not be limited to, servers, cloud-based data, personal computers, laptops, mobile telephones, tablets, digital media and all other similar networking or personal devices.

which remains in the possession of the Applicant or under his/her control, until the conclusion of any criminal proceedings arising out of the Reported Cartel Activity.

- (d) The Applicant must have refrained from participation in the Reported Cartel Activity (except as may have been directed by the investigating authority) from and including [date of disclosure to CMA].
 - (e) The Applicant must refrain from any further participation in the Reported Cartel Activity (except as may be directed by the investigating authority).
 - (f) **[Only relevant for Types A and B]** The Applicant must not have played an active role in coercing another undertaking to take part in the Reported Cartel Activity.
4. In addition to the above-mentioned conditions, the Applicant understands that it is bound by all the other relevant conditions, provisos and qualifications referred to in the CMA's published guidance documents on leniency.
5. The Applicant hereby (i) admits having participated in the Reported Cartel Activity, (ii) confirms that he/she has complied with conditions (b), (c), (d) and (e) above, and (iii) undertakes to continue to comply with condition (c) above **[only relevant for Types A and B: and to comply with condition (f) above]**.

Revocation

6. If, in the view of the CMA, at any time before the conclusion of any proceedings arising as a result of the investigation into the Reported Cartel Activity, the conditions which are set out in this letter have not been complied with in full by the Applicant, the CMA shall give immediate written notice to the Applicant of the nature of the alleged non-compliance and that the CMA is considering revoking the grant of immunity. The Applicant will be given a reasonable opportunity to explain the alleged non-compliance and, if the CMA considers it possible and appropriate, to remedy the breach within a reasonable period of time from the service of the notice.
7. If the CMA then determines that the conditions set out in this letter have not been fully complied with, the CMA may revoke the grant of immunity. On revocation, the grant of immunity will cease to exist as if it had never been granted and any Information provided by the Applicant may be used against him/her.
8. Irrespective of whether the CMA has revoked the grant of immunity, all Information provided to the CMA by the Applicant shall remain the property of the CMA.

Entire agreement

9. This letter sets out all of the terms and conditions on which the CMA agrees not to apply for a CDO against the Applicant in respect of the Reported Cartel Activity. It supersedes all prior representations, writings, negotiations or understandings, if any, whether oral or written, relating to the Reported Cartel Activity.²¹⁵

Execution

10. The signatories below acknowledge acceptance of the terms and conditions set out above which shall only take effect when both parties have signed this letter in duplicate, one original to be retained by each party.

Signed:

Date:

Name:

Position: Senior Director of Competition Enforcement

For and on behalf of the Competition and Markets Authority

Signed:

Date:

Name:

²¹⁵ However, for the avoidance of doubt, this clause does not oust the application of the CMA's published leniency guidance.

17. Appendix D: Pro forma individual no-action letter (criminal immunity)

Enterprise Act 2002 (the Act) – notice under section 190(4)

1. This letter gives written notice to [Applicant] (the '**Applicant**') that he/she will not be prosecuted in England and Wales or Northern Ireland for an offence under section 188 of the Act that falls within the description specified in paragraph 2 of this letter (except in the circumstances specified in paragraph).

Grant of immunity

2. The offence for which immunity from prosecution is granted (the '**Reported Offence**') is that [**describe**, for example, 'the Applicant agreed with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to [Undertaking A] and [Undertaking B] to fix a price for the supply by [Undertaking A] in the United Kingdom (otherwise than to Undertaking B) of [a product or service]] (the '**Cartel Agreement**').

Conditions

3. This grant of immunity from prosecution is made and remains conditional on the Applicant having satisfied and continuing to satisfy each of the conditions set out below.
 - (a) The Applicant must admit participation in the Reported Offence described in paragraph 2 of this letter.
 - (b) The Applicant has taken all reasonable steps to identify all relevant non-legally privileged facts, statements, documents, evidence or any other items ('**Information**') available to him/her relating to the Reported Offence and the existence and activities of the Cartel Agreement, and has provided all such non-legally privileged Information to the Competition and Markets Authority ('**CMA**'). The Applicant has further brought to the CMA's attention the existence of non-legally privileged Information that has not been provided to the CMA but has been identified as potentially relevant to the Reported Cartel Activity.
 - (c) The Applicant must maintain continuous and complete cooperation throughout the investigation of the Reported Offence and the Cartel Agreement and until the conclusion of any criminal proceedings arising as a result of the investigation. Save as otherwise agreed with the CMA, such cooperation includes but is not limited to the Applicant:

- (i) not disclosing (either directly or indirectly) to any third party without the CMA's express prior consent the fact that the Applicant is cooperating with the CMA under the provisions of the CMA's no-action policy, unless such information has already been disclosed by the CMA
- (i) voluntarily and without prompting, providing the CMA with all relevant Information that becomes known to him/her or available to him/her relating to the Reported Offence or the Cartel Agreement, in addition to any such Information already provided
- (ii) making the IT systems and equipment²¹⁶ under his/her control and/or accessible to him/her available for analysis by such means and in such manner as determined by the CMA to be most appropriate for the purposes of its investigation. In making this determination the CMA will have regard to the legitimate interests of the Applicant in protecting confidentiality of the information made available, and maintaining the protections of legal professional privilege.
- (iii) to the extent that it has not already been provided, providing voluntarily and promptly, and without the CMA using its powers under any section of the Act, all relevant Information available to him/her wherever located, requested by the CMA in relation to the Reported Offence or the Cartel Agreement;
- (iv) making himself/herself available for such interviews as the CMA may reasonably require at the times and places reasonably designated by the CMA
- (v) responding completely and truthfully to all questions asked in interviews with the CMA
- (vi) not knowingly or recklessly providing information that is false or misleading
- (vii) not attempting either falsely to protect or falsely to implicate any undertaking in any infringement of the Competition Act 1998 or any other individual in relation to the criminal cartel offence under section 188 of the Enterprise Act 2002

²¹⁶ This would include, but not be limited to, servers, cloud-based data, personal computers, laptops, mobile telephones, tablets, digital media and all other similar networking or personal devices.

- (viii) where required providing evidence upon oath in any criminal proceedings arising out of the Reported Offence or the Cartel Agreement, any proceedings before the Competition Appeal Tribunal arising from a decision of the CMA in connection with the Cartel Agreement, and any proceedings under the Company Directors Disqualification Act 1986 in connection with the Cartel Agreement
 - (ix) recording and retaining on a continuing basis any relevant material which might have any bearing on the Reported Offence or the Cartel Agreement and which remains in the possession of the Applicant or under his/her control until the conclusion of any criminal proceedings arising out of the Reported Offence or the Cartel Agreement.
 - (d) The Applicant must have refrained from participation in the Cartel Agreement (except as may have been directed by the investigating authority) from and including [date of disclosure to CMA].
 - (e) The Applicant must refrain from any further participation in the Cartel Agreement (except as may be directed by the investigating authority).
 - (f) The Applicant must not have taken steps to coerce another undertaking to take part in the Cartel Agreement.
4. In addition to the above-mentioned conditions, the Applicant understands that it is bound by all the other relevant conditions, provisos and qualifications referred to in the CMA's published guidance documents on leniency.
5. The Applicant hereby (i) admits having committed the Reported Offence, (ii) confirms that he/she has complied with conditions (b), (c), (d) and (e) above, and (iii) undertakes to continue to comply with condition (c) above and to comply with condition (f) above.

Revocation

6. If, in the view of the CMA, at any time before the conclusion of any criminal proceedings arising as a result of the investigation into the Reported Offence, the conditions which are set out in this letter have not been complied with in full by the Applicant, the CMA shall give immediate written notice to the Applicant of the nature of the alleged non-compliance and that the CMA is considering revoking the grant of immunity. The Applicant will be given a reasonable opportunity to explain the alleged non-compliance and, if the CMA considers it possible and appropriate, to remedy the breach within a reasonable period of time from the service of the notice.

7. If the CMA then determines that the conditions set out in this letter have not been fully complied with, the CMA may revoke the grant of immunity from prosecution. On revocation, the grant of immunity will cease to exist as if it had never been granted and any Information provided by the Applicant may be used against him/her in criminal proceedings.
8. Irrespective of whether the CMA has revoked the grant of immunity, all Information provided to the CMA by the Applicant shall remain the property of the CMA.

Entire agreement

9. This letter sets out all of the terms and conditions on which the CMA grants immunity from prosecution to the Applicant for the Reported Offence. It supersedes all prior representations, writings, negotiations or understandings, if any, whether oral or written, relating to the Reported Offence.²¹⁷

Execution

10. The signatories below acknowledge acceptance of the terms and conditions set out above which shall only take effect when both parties have signed this letter in duplicate, one original to be retained by each party.

Signed:

Date:

Name:

Position: Senior Director of Competition Enforcement

For and on behalf of the Competition and Markets Authority

Signed:

Date:

Name:

²¹⁷ However, for the avoidance of doubt, this clause does not oust the application of the CMA's published leniency guidance.

18. Glossary of terms

In this guidance, the following terms have the following meanings:

- Applicant – an applicant for any form of leniency, including after the applicant's marker has been confirmed and/or the leniency agreement and/or any no-action letters or comfort letters have been signed.
- CA98 – Competition Act 1998.
- Criminal cartel offence – the offence contained in section 188 EA02.
- CDO – Competition Disqualification Order – an order made by the court under which a person is disqualified, for a specified period, from becoming a director of a company, or directly or indirectly being concerned or taking part in the promotion, formation or management of a company without permission from the court. See further *Guidance on Competition Disqualification Orders* (CMA102).
- Chapter I prohibition – the prohibition contained in section 2 CA98.
- CMA rules - Competition Act 1998 (Competition and Market Authority's Rules) Order 2014 (SI 2014/458).
- Cooperating individuals – current and former employees and directors of an undertaking applicant who will benefit from CDO and/or criminal immunity provided that they cooperate with the CMA's investigation and otherwise comply with the conditions of leniency.
- Cooperation letter – a letter signed by the leniency applicant indicating that the applicant understands the conditions for the grant of leniency and in particular that it is committed to complete and continuous cooperation throughout the CMA's investigation and subsequent enforcement action.
- COPFS – Crown Office and Procurator Fiscal Service.
- EA02 – Enterprise Act 2002.
- GDPR – General Data Protection Regulation.
- Individual immunity agreement – a formal agreement between the CMA and an individual immunity applicant which confirms that the CMA will not apply for a CDO against that individual in respect of the reported cartel activity, subject to the applicant having met, and continuing to meet, the conditions of leniency.

- Leniency – a ‘catch all’ term used throughout this document to refer collectively to all of (or, where it is clear from the context, some of) corporate immunity, corporate reductions in penalties or individual immunity. Where reference is made within this document to an undertaking having applied for ‘leniency’ that includes all the sub-types below but obviously excludes individual immunity.
 - criminal immunity – refers to immunity granted to an individual from prosecution for the criminal cartel offence
 - ‘blanket’ criminal immunity – refers to a situation where all of the current and former employees and directors of an undertaking are automatically granted criminal immunity as a result of the undertaking applying for leniency.
 - CDO immunity – refers to a guarantee that the CMA will not apply for a CDO against an individual
 - corporate immunity – refers to a situation where an undertaking is granted immunity from any financial penalty under the CA98 and
 - individual immunity – refers to a situation where one or more individuals are granted criminal immunity and/or CDO immunity in their own right, rather than as the employee or director of an undertaking applicant.
- Leniency agreement – a formal agreement between the CMA and an undertaking applicant which confirms the grant of immunity from, or reduction in, financial penalties in respect of the reported cartel activity, subject to the applicant having met, and continuing to meet, the conditions of leniency.
- Leniency statement – a set of information provided, orally or in writing, to the CMA by or on behalf of a person which:
 - consists of information about a cartel and the person’s role in relation to the cartel,
 - is provided voluntarily, and
 - is provided specifically for the purposes of the CMA’s leniency programme,
 - excluding any pre-existing information.

- Leniency Enquiry Line – Telephone number +44 (0)20 3738 6833. For all initial contacts with the CMA with a view to making leniency applications, ascertaining the availability of leniency or seeking confidential guidance (including in relation to suspected cartel activity that may fall within a regulated sector or is already under investigation by a sectoral regulator).
- LPP – legal professional privilege.
- Marker – a formal acknowledgement of a leniency application which records the timing of the application and priority relative to other applicants. The grant of a marker must be followed by the provision of a full application package and continued compliance with the conditions of leniency, in which case the marker will be retained pending signing of the formal leniency agreement, individual immunity agreement or no-action letter later in the investigation.
- No-action letter – letter issued by the CMA pursuant to section 190(4) EA02 guaranteeing immunity from prosecution for the criminal cartel offence in England and Wales.
- Online application – the process through which leniency statements and related submissions are made by typing into a document held on the CMA's server.
- Oral application - the process through which leniency statements and related submissions are read aloud to be recorded and transcribed by the CMA.
- Parallel application – a situation in which an applicant has applied for leniency to both the CMA and one or more other competition authorities in respect of the same cartel activity.
- Penalties Guidance – CMA's Guidance as to the appropriate amount of a penalty (CMA73).
- Pre-existing investigation – refers to a situation where the CMA (or, where relevant, a sectoral regulator) considers it has reasonable grounds to suspect cartel activity, such that it may conduct an investigation under one or both of s192 of EA02 and s25 CA98, and has taken active steps in relation to that investigation. Active steps may be overt or covert and may or may not involve the use of statutory information gathering powers.
- Queue – the leniency queue is the order in which leniency applications are made. The first successful applicant in the queue will be in the Type A or B

position (depending on whether the application is made before or after there is a pre-existing investigation into the suspected conduct).

- Relevant information - all non-legally privileged information, documents and evidence available to the leniency applicant regarding the existence and activities of the reported cartel activity.
- Sectoral regulator – a regulator which has concurrent powers with the CMA to enforce the CA98 prohibitions and apply for Competition Disqualification Orders in a specific sector.
- SOCPA05 - the Serious Organised Crime and Police Act 2005.
- SOCPA agreement - an agreement under section 73 of the Serious Organised Crime and Police Act 2005, as amended by the Sentencing Act 2020.
- SFO – Serious Fraud Office
- SRO – Senior Responsible Officer. See *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8).
- Type A, Type B, Type C – summary terms used to indicate the different levels of leniency protection available according to the stage at which a leniency application is received, as set out in Table A above.