9 June 2025

LENIENCY AND NO-ACTION IN CARTEL CASES
Cleary Gottlieb's Response to CMA Consultation

I. INTRODUCTION

1. Cleary Gottlieb welcomes the CMA's decision to review its Guidance on applications for leniency and no-action in cartel cases (OFT1495).

2. In general, we agree that the CMA's Guidance is helpful for companies and their advisers who are considering making an application to the CMA. In particular, we agree that the most effective way to present guidance on leniency and no-action in cartel cases is by explaining each stage of the process in turn.

3. There are, however, aspects of the CMA's existing policy that discourage applications. These include the need to confess to an infringement of the Chapter 1 Prohibition when making an application to the CMA, and the definition of "cartel activity" for which immunity and leniency are available. We welcome the CMA's decision to review these aspects of its Guidance but believe further changes are required to address these issues.

4. We are also concerned that other proposed changes could create additional barriers to companies considering applying for immunity or leniency. These include the proposal to remove immunity from director disqualification orders and criminal liability in Type B and C cases and the proposed changes in the way companies could be required to provide leniency statements to the CMA.

5. We explain these points below, along with our responses to the other specific questions set out in the CMA's consultation document.

II. RESPONSE TO CMA QUESTIONS

Q8. Do you have any comments about the proposed changes to the definition of cartel activity? In particular:

- **Do you have any comments regarding the inclusion of specific further examples of cartel activity (including any comments on the examples now included)?**
- **Are there any other examples of cartel activity that you think should be included?**

6. We welcome the inclusion of other by-object restrictions in the definition of cartel activity. Under the previous CMA Guidance, it could be difficult to determine whether certain types of agreement fell within the definition. In borderline cases, parties could therefore be discouraged from approaching the CMA, fearing they would be confessing to an infringement without the guarantee of immunity/leniency. In these situations, the

CMA's existing policy could also create perverse incentives to overstate conduct in order to secure immunity/leniency.

7. We nevertheless caution against adopting an overly broad interpretation of by-object restrictions, which could inadvertently capture benign or even pro-competitive arrangements. The revised Guidance suggests in this connection that agreements might be assessed by reference to the CMA's Guidance on Horizontal Agreements. Applying the Horizontal Guidance is not, however, always straightforward in practice and often involves judgement and an assessment of the relevant market context. The same principle applies to the same, or even greater, extent when assessing vertical agreements.

8. The revised Leniency Guidance should therefore recognise that there may be horizontal and vertical arrangements falling within the expanded definition that do not raise cartel concerns and would not be presumptively unlawful.

9. To take account of the uncertainty that may arise in individual cases, we suggest the following.

- The CMA should be prepared to discuss the nature of the conduct in question in borderline cases on a no-names basis and to provide guidance on whether the conduct in question would be considered "cartel activity" before an application is made.

- The CMA should express a clear policy that it will not withdraw immunity/leniency based on the definition of "cartel activity" where an applicant has received CMA guidance in this way.

Q9. Do you consider that the proposed changes to the process for a leniency applicant to admit to cartel activity address potential applicants' concerns regarding potential disincentives to apply for leniency?

10. The current condition that applicants must confess to participating in cartel activity creates a significant disincentive to potential immunity/leniency applications.

11. In particular, a confession that a company believes it has breached UK competition law can be extremely damaging in possible damages actions, especially in courts outside the UK and EEA. It is also difficult for companies considering making an immunity/leniency application to confess to an infringement when they are not aware of all of the facts and cannot know whether the conduct will ultimately be viewed as rising to the level of an infringement. Together, these factors discourage companies from seeking immunity or leniency in the UK.

12. The CMA does not need to extract a confession of this nature to be able to operate an effective leniency regime or reach robust infringement decisions. By way of illustration, the European Commission requires companies to describe the conduct in

question and admit their participation in that conduct.[1] It does not require companies to confess that the conduct amounted to an infringement of Article 101 TFEU.

13. For these reasons, we welcome the CMA's proposal that applicants should not be required to confirm a genuine intention to confess cartel activity when they first approach the CMA. We question, however, why the CMA still intends to require parties to confess to an infringement when a leniency agreement is signed. It should be sufficient that the CMA require parties to confess their participation in the conduct without having to confess to an infringement of the Chapter 1 Prohibition specifically.

Q10. Do you have any comments regarding the CMA's proposed updates in respect of the levels of protection available to Type A immunity applicants, as compared to Type B and Type C leniency applicants?

14. We understand that the CMA is proposing these changes as a way of encouraging more firms to confess cartel activity: by reducing the relative benefits of applying for Type B or Type C leniency compared with Type A immunity, firms may have stronger incentives to confess cartel activity before there is an existing CMA investigation.

15. For the reasons explained below, we are not convinced that the proposed changes will have this effect. To the contrary, some of the changes are likely to discourage Type B and Type C leniency applications, without any impact on Type A applications.

In particular:

(a) the removal of the availability of upfront grants of immunity for Type B applicants and the clarifications as to likely leniency discounts for Type B and Type C applicants;

16. Reducing the leniency discounts available to Type B and Type C applicants will, as a general rule, reduce the incentives on firms considering making an application. The decision to apply for immunity or leniency is often difficult and finely balanced; the potential reduction in fines is only one of several factors that influence this decision. Reducing the benefits of obtaining leniency will discourage applications in these cases.

17. We do not agree that the possible benefits of certainty and predictability, cited in the consultation document, outweigh the downside of removing the possibility of upfront immunity in Type B cases. Even if the CMA has rarely granted Type B immunity in practice, we see no benefit in removing the flexibility to do so in some cases.

(b) the removal of automatic immunity from CDOs for cooperating directors of Type B and Type C leniency applicants (including individual applicant directors);

18. We do not agree with this proposal. The decision on whether to apply for leniency often rests with a company's board of directors. A significant factor in that decision is, rightly or wrongly, the risk that those same directors might face disqualification. Under the current CMA policy, directors have the assurance that they will not be exposed to director disqualification orders if the company applies for leniency and the directors co-

[1] See Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), paragraph 8 ff.

operate with the CMA's investigation. Without that guarantee, directors will naturally feel cautious about the company admitting its participation in cartel activity. This concern is relevant to many directors, not only those who might have been involved in the conduct in question, given the CMA's ability to apply for orders where a director "*did not know but ought to have known that the conduct of the undertaking constituted the breach*" of competition law.[2] Removing the guarantee of immunity will therefore reduce incentives to apply for leniency, even if the CMA in practice decides to grant immunity on a discretionary basis in most cases.

19. The Office of Fair Trading (the "OFT") previously consulted on introducing this change of policy. In 2010, it determined not to introduce this change following overwhelming concern expressed by respondents. Specifically, the OFT accepted that "*the success of the leniency regime is dependent on the alignment of the interests of individuals with those of the company and it agrees that this proposal has the potential to create a conflict between those interests.*"[3] The current proposal would similarly result in a conflict, with directors having different personal incentives from the incentives of the company.

(c) the clarifications regarding the level of cooperation expected from directors in order to benefit from CDO immunity;

20. We welcome the additional guidance as to the level of co-operation expected from directors to benefit from CDO immunity. We propose one further clarification.

21. The draft Guidance states that "*it will generally be inappropriate for a legal adviser who is* ***only*** *acting for the undertaking applicant to be present at the interview*" of a director because "*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*." Where a company benefits from leniency and the director benefits from CDO immunity, there is unlikely to be any conflict of interest. Moreover, solicitors are bound by professional duties not to take advantage of their clients or others.[4] The circumstances in which the presence of a lawyer would prejudice a CMA investigation are therefore remote. Moreover, insisting on separate counsel without detailed knowledge of the case could undermine a director's rights of defence.

22. While we recognise the emphasis in the draft Guidance on the word "only", we would welcome further clarification in the Guidance that lawyers acting for the company may attend interviews on behalf the company's directors unless the director objects.

(d) the clarifications to the process for removing CDO immunity from non cooperating directors; and/or

23. We welcome this additional clarification.

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[2] Company Directors Disqualification Act 1986, section 9A(6).

[3] Director disqualification orders in competition cases, Summary of responses to the OFT's consultation, and OFT's conclusions and decision document, May 2010 (OFT1244), paragraph 5.29.

[4] SRA Code of Conduct for Solicitors, Rule 1.2.

(e) the statement that the CMA is unlikely to exercise its discretion to grant criminal immunity in relation to Type B and Type C leniency applications?

24. This statement is unhelpful and unlikely to encourage leniency applications. The CMA has the discretion whether to grant criminal immunity or comfort letters to individuals in Type B and Type C cases. It has, until now, exercised that discretion on the facts of the case.

25. Today, firms have a realistic expectation that their employees may be protected from exposure to criminal prosecution if they apply for leniency. The proposed statement that criminal immunity is "unlikely" will therefore discourage firms from seeking leniency.

26. In cases where directors or senior management were involved in the conduct in question, it may also create conflicting incentives on those decision makers considering whether to apply for leniency.

27. This concern should not be read to suggest that firms are seeking to condone or conceal criminal behaviour. Firms have to decide whether to apply for leniency in short timeframes with incomplete information, taking into account a range of factors pulling in different directions. The mere risk that the firm may be exposing its employees to criminal prosecution, or increasing the risk of prosecution, will discourage companies in that position from deciding to apply for leniency.

28. The proposal would also create a perceived unfairness. Under the CMA's proposal, individuals who may have engaged in criminal cartel behaviour would benefit from a decision by their employer to seek Type A immunity but not if their employer applied for leniency later in the process. In many cases, the individuals involved will have no say in whether the firm applies to the CMA or when and may be entirely unaware of the CMA's leniency regime, let alone its intricate details.

Q11. Do you have any comments regarding the proposed clarifications to the provision of criminal immunity?

29. See our response to Question 10. We otherwise welcome the additional guidance provided in Chapter 13.

Q12. Do you have any comments on the external SharePoint Online site as the default method for the submission of leniency applications which would otherwise be submitted orally, including on its key features and based on your experience of using it in practice already?

30. We welcome the CMA's use of SharePoint in leniency cases and agree that it can provide efficiencies. For example, using SharePoint allows applicants and their advisers to check and correct transcripts of oral leniency statements quickly and efficiently.

31. We have no objection to the use of SharePoint as an option for submitting leniency applications in appropriate cases, but we strongly object to any proposal that applicants should be required to use SharePoint. Applicants should retain the option of submitting oral applications, not only in situations where the CMA "*agrees that there is good*

reason for it." The CMA is not well placed – particularly at the point where no application has been made – to determine the risks that an applicant faces and the reasons why an oral application may be appropriate.

32. The oral statement procedure is a well-established mechanism for mitigating the risk of adversely affecting litigation, particularly in jurisdictions outside the UK and EEA (where leniency statements may not be automatically protected from disclosure by law). Applicants use the oral statement procedure (in many jurisdictions) to avoid the risk of creating incriminating materials that could be disclosable in private litigation. The threat of litigation is already a significant disincentive to any potential immunity/leniency applicant, sometimes outweighing the potential benefit of immunity from, or a reduction in, fines. Refusing to allow oral applications will therefore discourage applications further.

33. We understand that the motivation for suggesting the use of SharePoint as a default method of submitting leniency statements is to reduce the administrative burden on the CMA staff, who would otherwise have to prepare transcripts. There are other ways of addressing this concern. For example, the CMA could use speech-to-text software to convert its recordings of oral statements into text, and the applicant or its advisers could then correct the CMA's text using SharePoint.

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

34. For the reasons explained in response to Question 12, it is important that applicants be permitted to make oral submissions at their request.

Cleary Gottlieb Steen & Hamilton LLP