THE CMA'S CONSULTATION ON PROPOSED CHANGES TO ITS LENIENCY GUIDANCE: OFT1495: APPLICATIONS FOR LENIENCY AND NO-ACTION IN CARTEL CASES

RESPONSE BY FRESHFIELDS LLP

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Response to the CMA's Consultation on proposed changes to its leniency guidance: OFT1495 - Applications for leniency and no-action in cartel cases

1. Introduction

1.1 Freshfields LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation (the ***Consultation***) on proposed changes to its leniency guidance: OFT1495: Applications for leniency and no-action in cartel cases (the ***Current Guidance***) and the draft revised text of the current leniency guidance issued alongside the Consultation (the ***Draft Revised Guidance***).

1.2 This response (the ***Response***) is based on our significant experience and expertise in advising clients in relation to leniency applications and cartel cases. We rely on this breadth of experience to provide these comments on the Draft Revised Guidance.

1.3 We have confined our comments to those areas of the Draft Revised Guidance which we consider are most significant. This Response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

2. General observations

2.1 We welcome the Draft Revised Guidance and agree with the CMA's proposal to update the Current Guidance. For the most part, the Draft Revised Guidance is appropriate in terms of scope, and is generally sufficiently clear and helpful. We welcome, in particular, changes in the CMA's Draft Revised Guidance that address previous uncertainties or concerns for potential applicants applying for leniency, such as the CMA's proposal to broaden and update the examples of cartel activity for which leniency is likely to be available.

2.2 We also welcome the inclusion (at paragraph 7 of the Foreword to the Draft Revised Guidance) of the clear articulation of the CMA's guiding principles, in particular that the CMA will err on the side of the applicant where it is a 'close call', given the substantial uncertainties and the risks that an applicant undertakes. We note, however, that the CMA also says at paragraph 1.6 that it will look to "*continue to evolve*" the policy and to "*depart from it*" where appropriate. This should not be at the expense of applicants, and the value of certainty (as acknowledged by paragraph 7 of the Foreword) must be borne in mind.

2.3 Further, there are certain areas where we consider the Draft Revised Guidance would benefit from further clarification or explanation to ensure that the incentives offered by the CMA's leniency regime remain attractive, thereby ensuring that leniency continues to play an important part in both (i) bringing matters for potential enforcement action to the CMA's attention and (ii) ensuring investigations are progressed effectively and efficiently. We note, in particular, that parties involved in an investigation will have legitimate concerns about the prospect of potential damages claims arising from regulators' investigations and decisions, and where there is also increasing pressure for disclosure of materials submitted in connection with competition investigations: this will be front of mind for many parties considering a leniency application. The CMA will appreciate that leniency is not a panacea, and it is therefore important to make leniency and subsequent steps, such as settlement, attractive, in particular where damages actions (whether follow-on

or quasi-follow-on, often brought across multiple jurisdictions) can result in damages that outweigh regulators' fines, as well as significant investments of time and costs.

2.4 Our comments on the Draft Revised Guidance are set out in the remainder of this Response.

3. Definition of cartel activity

3.1 We are generally supportive of the proposed amendments to the definition of cartel activity, set out at paragraphs 2.1–2.5 of the Draft Revised Guidance, but would propose that:

(a) the Draft Revised Guidance makes clear that, as a matter of law, the question of whether cartel activity amounts to a by object restriction will need to be established having regard to the context in which the agreement takes place; and

(b) the availability of leniency treatment be extended to cover those vertical restraints that amount to hardcore restrictions of competition under Article 8(2) of the Vertical Agreements Block Exemption Order (***VABEO***).

3.2 Regarding the first proposal, we appreciate that for the purposes of deciding whether to proceed with an application, it may make sense to include a presumption that the cartel activity amounts to a by object restriction. Nevertheless, we suggest amending paragraph 2.2 to clarify that, as part of an infringement finding, the CMA will ultimately need to consider whether the conduct amounts to a by object restriction, having regard to the legal and economic context in which the conduct takes place. We consider that this clarification is particularly important given the broadening of examples of cartel activity to include forms of conduct for which there have been no or relatively few Chapter I (or Article 101 Treaty on the Functioning of the European Union) infringement decisions and where careful consideration of the conduct at issue would be particularly warranted, such as the exchange of competitively sensitive information via public announcements.

3.3 As regards the second proposal, we welcome the CMA's proposal to broaden and update the examples of cartel activity for which leniency is likely to be available, but consider that leniency should be made available for a broader range of vertical restraints.

3.4 In line with the Current Guidance, the Draft Revised Guidance provides that, with the exception of resale price maintenance (***RPM***), standalone vertical restraints will generally fall outside the scope of 'cartel activity'. By way of justification, the Draft Revised Guidance states that vertical restraints tend to be visible on the market and therefore self-detecting over time. The Draft Revised Guidance also appears to distinguish between: (i) vertical restraints that facilitate horizontal collusion (for which leniency is available); and (ii) standalone vertical restraints (for which leniency is not available), on the basis that the former can lead to exposure to significant sanctions.

3.5 We do not consider that either of these considerations justifies the withholding of leniency from standalone vertical restraints (other than RPM) that would typically be deemed to amount to by object restrictions.

3.6 First, it is not clear that by object vertical restraints are necessarily more likely to be detected than RPM or certain forms of horizontal cartel activity. To take two examples:

(a) Establishing that a supplier's pricing is being restricted by a wide retail parity obligation (which effect on price competition can be similar to RPM[1]) would likely require close monitoring of the supplier's pricing across a number of sales channels over time, which may not be an efficient use of resources in circumstances where the CMA does not have prior evidence of such a restriction having been imposed.

(b) Equally, it is not clear that by object customer or territorial restrictions imposed by a supplier on its distributors would be more easily detected than, say, customer or territorial restrictions agreed between horizontal competitors, which can qualify for leniency.[2] Indeed, as the fact pattern underpinning the European Court of Justice's recent preliminary ruling in *Beevers Kass v Albert Heijn*[3] demonstrates, it will often not be readily apparent to outside observers whether a supplier operates an exclusive distribution model (in which the imposition of active sales restrictions on non-exclusive distributors may qualify for block exemption) or a free distribution model (in which active sales restrictions are a hardcore restriction).

3.7 Second, while CMA enforcement action in relation to vertical restraints has primarily focused on RPM in recent years, the CMA's £1.25 million fine levied on Ping for online sales restrictions shows that significant sanctions can be imposed on suppliers for other forms of vertical restraint.[4]

3.8 In light of the above considerations, and given the general alignment between the concepts of cartel activity and by object restrictions, we consider that the scope of conduct for which leniency treatment is available should be extended to the hardcore restrictions of competition set out under Article 8(2) of the VABEO, which as noted in the VABEO Guidance "*are generally restrictions of competition by object which fall within the Chapter I prohibition*".[5]

4. Timing for admission to cartel activity

4.1 As a matter of principle, we welcome the proposed changes for the timing for admission to cartel activity. We consider that this reflects the reality that, during

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1 See CMA166, VABEO Guidance, paragraph. 8.84.

2 See paragraph 2.5(e)(i) of the Draft Revised Guidance.

3 EU:C:2025:323, *Beevers Kass BV v Albert Heijn BV*, Case C-581/23. The ECJ ruled that Cono, a supplier of food products, had failed to satisfy the parallel imposition requirement under Article 4(b)(i) of the EU's 2010 Vertical Block Exemption Regulation. As a result, its attempt to impose territorial sales restrictions on certain of its distributors did not qualify for block exemption.

4 While the €337.5 million fine imposed by the European Commission on Mondelēz was in part driven by internal market and abuse of dominance considerations, we consider it unlikely that the CMA would take a materially more lenient approach to the customer and territorial restrictions identified if the CMA identified similar restrictions being imposed on distributors in relation to the UK.

5 CMA166, VABEO Guidance, paragraph 8.4.

the early stages of a prospective applicant's investigation, the precise scope of the conduct at issue is often not clear.

4.2 While we consider this to be an important clarification that removes an often significant disincentive for parties to apply for leniency, in practice we are concerned that the same disincentives and uncertainty would nonetheless remain for prospective leniency applicants in light of the contrary indication at paragraph 3.8 of the CMA's Consultation Document[6], which still requires a leniency applicant to "*continuously have a genuine intention to admit to cartel activity should the CMA conclude that the reported conduct amounts to an infringement*", before having formally made such an admission. We recognise the CMA's concerns and intentions at paragraph 3.10 of the Consultation Document. However, the discrepancy between the requirement to have a genuine intention to admit before that formal admission is made at a later stage in the process will continue to create uncertainty for potential leniency applicants where the scope of the potential admission may not be clear at the outset of an investigation.

4.3 Moreover, we are concerned that on the face of the Draft Revised Guidance, the need for a leniency applicant to "*not act in a way which would be inconsistent with such an [leniency] admission*" until that formal admission is made is not apparent, as this obligation is not included in Chapter 8 of the Draft Revised Guidance, which outlines the scope of the 'continuous and complete cooperation' obligation.

4.4 We would welcome further clarification as to how the revised timing of the formal admission interacts with the requirement to maintain continuous and complete cooperation.

5. Changes to Type B and Type C leniency protections

5.1 In response to question 2 of the Consultation Document, we consider that the Draft Revised Guidance provides welcome and sufficiently comprehensive guidance to allow predictability for leniency applicants and (save for the points below) it does not suffer from significant omissions.

5.2 To ensure that the incentives offered by the CMA's leniency regime are clear, however, we would suggest the CMA considers including some additional clarificatory wording to paragraphs 9.15 and 9.16 (in relation to the 'but for' test) to explain that the CMA not taking the provided information into account "*to the detriment of the applicant*" in effect means that no penalty will be payable and/or a 100% discount will apply in respect of that particular conduct, and that that conduct will be excluded from the CMA's penalty assessment, even though the applicant has been determined to have been involved in prohibited conduct.

5.3 In response to question 10(a) of the Consultation Document, regarding the changes to the leniency discounts available to Type B and C corporate immunity applicants, we consider that this section of the Draft Revised Guidance (paragraphs 9.7–9.14) is generally clear.

5.4 We would, however, suggest that it may be helpful to include at paragraph 9.10 an example based on CMA previous experience and/or an indication of the level and

[6] CMA209con, Guidance on applications for leniency in cartel cases: Consultation document (the ***Consultation Document***).

type of 'added value' that a Type B applicant would need to provide to exceptionally benefit from a 100% discount. It may also be helpful to provide at paragraph 9.10 an indication of the typical discounts that the CMA has previously offered to Type B applicants, as the Draft Revised Guidance currently indicates the discount available could range between 10-75% (and indeed up to 100%).

5.5 We note that the CMA's Draft Revised Guidance removes the availability of 'leniency plus' discounts for Type B applicants (paragraphs 9.17–9.20). Whilst we recognise the CMA statement that it has not, in practice, granted 'leniency plus' to Type B applicants in the second market under the Current Guidance, we do not consider this is reason to remove the incentive altogether. Moreover, whilst we understand the CMA's rationale for restricting the availability of 'leniency plus' to Type A applicants only (given that the very nature of being a Type B applicant in a second market means that the CMA has an awareness of the activity in question by virtue of a Type A applicant), we consider that limiting the availability of 'leniency plus' in this way may remove an incentive for gathering further information from a Type B applicant (which would not be in the public interest), particularly in circumstances where the investigation in the second market is confidential or the Type B applicant is unaware of the existence of a Type A application.

6. Changes to leniency protections for individuals

6.1 We recognise the CMA's motives for updating the availability of immunity of different types to Type B and Type C individual applicants. However, as an overarching policy point, it is not clear why the CMA has opted to introduce a discrepancy between the availability of criminal immunity to an individual, depending on whether the immunity application is made by the individual themselves (in which case, criminal immunity is only available if a Type B application) or whether the individual is protected as a 'cooperating individual' of an undertaking applicant (in which case, criminal immunity is available if a Type B or Type C application).

6.2 In general, we consider that the paragraphs relating to this issue are clear in the Draft Revised Guidance, subject to our comments below, where we consider that further clarification is required and/or would be helpful in respect of certain points.

6.3 In particular (and with reference to question 10(b) of the Consultation Document), paragraphs 12.10 and 12.13 of the Draft Revised Guidance set out the types of immunity available to 'cooperating individuals' of undertaking applicants and individual applicants respectively, depending on what category of leniency application has been made. However, no explanation is provided as to the circumstances in which the CMA may exercise its discretion to grant either Competition Disqualification Order (***CDO***) and/or criminal immunity to an individual in Type B or C applications. Without examples of the factors that the CMA would consider when exercising its discretion as set out in paragraphs 12.10 and 12.13, it is difficult to understand how this protection will be available in practice and how the CMA will exercise this discretion.

6.4 Further, paragraph 12.33 of the Draft Revised Guidance concerns the confirmation to proceed that an individual applicant would need to provide where there is an active criminal cartel investigation. In the event there is an active criminal cartel

investigation afoot, criminal cartel immunity would only be available in exceptional circumstances and for a Type B applicant only. Paragraph 12.33 would benefit from further clarification:

(a) to make clear that, in any event, criminal immunity will only be available in exceptional circumstances; and

(b) to explain on what basis the CMA would be able to confirm that criminal immunity is available at the time of the initial enquiry. For example, whether the CMA would assess at the time of the initial enquiry whether 'exceptional circumstances' are present such as to allow it to agree that criminal immunity is available (if the applicant would benefit from Type B immunity), and how this would interact with paragraph 13.24 of the Draft Revised Guidance.

6.5 With reference to question 10(d) of the Consultation Document:

(a) We would welcome a clarification at paragraph 12.60 that where a 'cooperating individual' fails to satisfy the condition of leniency such that the CMA decides to withdraw immunity from that individual, it is not automatic that immunity would similarly be withdrawn from the undertaking applicant to which that 'cooperating individual' belongs.

(b) We consider that it would be helpful if the CMA confirmed in the Draft Revised Guidance whether withdrawal of immunity from an individual (whether granted to them as an individual or as a 'cooperating individual' of an undertaking applicant) is permanent, or whether an individual is able to re-initiate cooperation such that the CMA may consider re-instating immunity and, in which case, how that may affect the individual's position in the leniency 'queue'.

6.6 With reference to questions 10(a) and (e) of the Consultation Document and paragraph 12.18 of the Draft Revised Guidance, it is not clear whether this paragraph should be read to mean that where the CMA has launched an investigation under its criminal powers, it is unlikely that discretionary CDO immunity would be granted to a Type B or C immunity applicant. The drafting suggests that where the CMA has only contemplated investigating under its criminal powers, even if formally the investigation has been launched under its civil powers, that would be sufficient to make it unlikely to exercise its discretion to grant CDO immunity. It is also not clear whether this paragraph refers to either or both of individual applicants or 'cooperating individuals' of undertaking applicants. We would welcome clarification of this paragraph.

6.7 We also note that there appears to be a small (but potentially significant) error in paragraph 12.12. We consider the second to third lines should read: "*…once either an individual or an undertaking has secured the Type A or Type B position in relation to a particular cartel activity, only Type C will be available*…".

7. Clarifications regarding criminal immunity

7.1 In response to question 11 of the Consultation Document, we consider that the new chapter 13 of the Draft Revised Guidance is generally clear, subject to aligning paragraphs 13.24 and 12.33 (as set out above, at paragraph 6.4(b)).

7.2 For completeness and clarity, we think it would be beneficial to re-state at paragraph 13.7, where the Draft Revised Guidance currently states that criminal immunity may only be granted in exceptional circumstances once a criminal cartel investigation has commenced, that while criminal immunity is available for the 'cooperating individuals' of both Type B and C undertaking immunity applicants (per paragraph 12.10), such immunity is only available for Type B individual immunity applicants (per paragraph 12.13). Similarly, we consider that paragraphs 13.17 and 13.18 require clarification regarding whether they refer to criminal immunity granted to an individual as an individual immunity applicant or to a 'cooperating individual' of an undertaking applicant (given criminal immunity is only available to Type B applicants of the former).

Comfort letters

7.3 The CMA appears to have removed the availability of comfort letters (including interim comfort letters), and any reference to them, save for two references at footnote 128 and the Glossary of terms at page 136 of the Draft Revised Guidance (it is unclear if this was an oversight, or if the CMA intends to keep these references to comfort letters and provide more detailed guidance on comfort letters in separate guidance). There is no explanation for this removal in the Consultation Document: it would be helpful to understand the CMA's rationale underlying this change.

8. Process for making leniency applications and provision of information

Proposal for default online application process

8.1 We welcome the option for prospective applicants to use the SharePoint online application process and can understand the CMA's rationale for its introduction. We see the introduction of the SharePoint online application process as a positive addition and can see that it may be appropriate in a range of circumstances. However, and in response to question 12 of the Consultation Document, we consider that the CMA should not default to use the SharePoint online application process instead of the oral application process, and that the oral application process should remain available to all applicants.

8.2 Leniency applicants should instead have the right to choose between the oral and SharePoint online application processes. As a minimum, leniency applicants should have the option to relay certain matters orally rather than via the SharePoint online process and the CMA should not exercise a high bar for the provision of "*good reason*" as is contemplated in the Draft Revised Guidance (paragraph 7.22).

8.3 While leniency submissions should be protected from disclosure under Schedule 8A of the Competition Act 1998 (CA1998) (see definition of 'Cartel Leniency Statement'), we note that Schedule 8A of CA1998 provides that a UK court or the Competition Appeal Tribunal may apply its discretion in determining whether

information constitutes a cartel leniency statement. This could create some uncertainty for leniency applicants as to whether each of their submissions would fit the relevant definition of a 'Cartel Leniency Statement', and thereby whether they benefit from the Schedule 8A protection from disclosure.

8.4 Leniency applicants will, understandably in light of the risk of potential follow-on damages actions, want to take every measure possible to ensure that any and all statements made in the context of a leniency application are protected from disclosure (both in the UK and elsewhere). Whilst it is incumbent on leniency applicants to ensure the statements made fall within the definition of a 'cartel leniency statement' under Schedule 8A of CA1998, the system of providing leniency statements orally is a tested approach which can provide additional comfort to applicants as regards future disclosure risks (and is a system applied in other jurisdictions).

8.5 Leniency applicants' concerns with a default SharePoint online application process are also justified in circumstances where:

(a) the extent to which submissions made via the SharePoint online portal will be protected from disclosure is an untested issue to date, both in the UK and in other jurisdictions; and

(b) there are potential issues in not following a uniform approach across various jurisdictions in which leniency applicants might be making a leniency application and where oral processes are used (and, indeed, are the default) in other jurisdictions (e.g. in the European Commission's process).

8.6 Furthermore, the operation of the SharePoint online platform also raises concerns, which are currently not addressed in the Draft Revised Guidance:

(a) There are no clear protocols for when documents will be removed from the SharePoint in each case; absent such protocols there will be uncertainty for potential leniency applicants.

(b) The process to submit complex documents must be simple. The CMA's systems will need to ensure that they can support complex formatting that is often used in these types of documents (e.g. numerous sub-headings, integrated tables and an ability to switch between landscape and portrait within a document).

8.7 The CMA needs to ensure that there are no discrepancies between the different "*modes*" of viewing the same word document. Any such discrepancies can make it difficult to ascertain the previous version that will be reviewed by the CMA and how to format a document correctly.

8.8 Whilst we recognise the administrative advantages and potential efficiency savings for the CMA in using the external SharePoint online application process as the default method of making leniency submissions, in light of the points raised above we suggest that parties retain the option to make any submissions either via the SharePoint platform or orally if they prefer. We welcome the CMA's confirmation that the oral application process will remain available (per the current Draft Revised Guidance) but suggest that any threshold for satisfying the CMA that the oral application process is "*appropriate*" not be unnecessarily high such that leniency

applicants are, in practice, unable to use the oral application process. In our view, removal of the option to make submissions orally will act as a deterrent to future leniency applicants.

Provision of information

8.9 As regards the provision of documents, we note that the Draft Revised Guidance introduces uncertainty for applicants as to the scope of their obligations to provide the CMA with relevant information, documents and evidence.

8.10 In the Overview Charts, the CMA has amended the reference to "*provision of information identified as relevant by the applicant*" to "*provision of all relevant information*" (emphasis added). We consider that this may result in over-inclusivity by applicants when producing information for fear that what the applicant considers relevant is not as wide as what the CMA may consider as "*all*" relevant information. This would of course be inconsistent with the general principle outlined at footnote 29 of the Draft Revised Guidance, that "*[t]he 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*".

8.11 Paragraphs 2.6(a), 2.10, and subsequent sections of the Draft Revised Guidance (including paragraph 7) then make reference to an obligation on the applicant to "*provide the CMA with all the non-legally privileged information, documents and evidence available to it regarding the reported cartel activity*". This drafting introduces two concerns:

(a) It excludes the "*relevance*" requirement that is set out in the principle at footnote 29. We consider this can be resolved by ensuring that the word "*relevant*" is always present when describing the information that applicants are to provide the CMA.

(b) The use of the word "*available*" when referring to the need to provide "*information that is available to the applicant*" is not reflective of reality. There may be information that, while technically "*available*" to an individual or undertaking, has not yet been identified by the applicant at the time of making a leniency application (which, as the CMA knows, is a time-sensitive exercise). It is common for an initial application to contain one set of documents identified by the applicant, and for the applicant to subsequently provide additional information as and when that is identified. This can be resolved by referring to information that becomes known or is identified by the applicant (per the wording in the Overview Charts in the Current Guidance).

8.12 We therefore propose that the wording across the Draft Revised Guidance (in particular, paragraphs 2.6(a), 2.10 and across section 7) is appropriately adjusted to refer to "*the **relevant** non-legally privileged information, documents and evidence available to **and identified by it** regarding the reported cartel activity*". As referred to above, references to "*relevant*" information should also be added, as appropriate (as they are not always added consistently in the document).

Record keeping / logs

8.13 At paragraphs 3.26–3.27 of the Draft Revised Guidance, the CMA introduces a series of recommendations as to record keeping by leniency applicants, such as requirements for logs and accounts that applicants should be able to provide to the CMA regarding the applicant's evidence gathering processes, including online and physical searches as well as details surrounding the conduct of witness interviews. The drafting currently suggests that these requirements are what an application should "*at a minimum*" be able to provide the CMA. We recognise the need for detailed record keeping of evidence gathering processes and would note that it is common practice for relevant logs and records to be maintained by applicants and their advisers. We do not, however, consider that the prescriptive nature of the requirements set out at paragraphs 3.26 and 3.27 of the Draft Revised Guidance assist either the CMA or potential applicants given that precise approaches to record keeping will vary according to the circumstances of particular cases and may be challenging in the context of fast-paced investigations. We agree that there is benefit in parties being aware of what the CMA might expect in terms of record keeping and would suggest that this can be achieved by reframing what currently should "*at a minimum*" be provided to what might "*for example*" be provided.

*Legal Professional Privilege (**LPP**)*

8.14 We note the CMA's introduction at paragraphs 7.13–7.15 of the Draft Revised Guidance of a requirement to produce a log of documents over which LPP is claimed, with sufficient information to demonstrate that withheld material satisfies LPP so the CMA can consider and challenge this if needed. We are concerned about the introduction of this requirement and are unclear as to its purpose. The CMA has not articulated why it considers the introduction of such a log to be necessary, including whether it considers investigations have been compromised, or if during previous investigations there has been any basis to refuse or withdraw leniency because of the contested withholding of privileged information. It appears to us that this requirement has been carried across from the procedure that is followed in the context of requests for information (***RFI***). In an RFI context, there is a defined scope for the information that should be provided to the CMA, and a log is created for privileged material that whilst within scope of the RFI will be withheld from the CMA. The purpose for such a log is clear. The circumstances of a leniency application are, however, entirely different. A leniency applicant is actively seeking to cooperate and provide the CMA with the relevant information to procure leniency, and to assess whether it should apply and, if so, for what identified conduct. Given those circumstances, it is not clear what purpose the proposed log would serve. Furthermore, the introduction of a general obligation to identify and record what is privileged on a rolling basis fails to take account of the practical realities for applicants in the midst of a fast-paced internal investigation. The proposed requirement is disproportionate, and the CMA has not explained why it is necessary.

8.15 Aside from the necessity of the requirement for a log, we are also concerned about the introduction of a purportedly binding process whereby LPP claims will be determined by one lawyer with no routes of appeal, as set out at paragraphs 7.14 and 7.15. No clarity is given as to who the lawyer will be who will be tasked with the determination of the question of LPP, nor as to their qualification to determine such matters of fundamental importance. There is also no guidance as to the process and

timing for making representations or any discussion of rights of appeal or challenge should the parties disagree with the lawyer's determination. It would be concerning if an issue of such fundamental importance were to fall to be determined by one lawyer, whose determination is said to be binding on the parties, without any right of appeal.

9. Global perspective

9.1 The Draft Revised Guidance is understandably UK-focused. We welcome the CMA's recognition that, as is often the case, leniency applicants may make separate applications in multiple jurisdictions. The Draft Revised Guidance would benefit, however, from doing more to situate the CMA's own leniency programme within the broader context of leniency applications being made in a range of other jurisdictions (particularly the EU). Many leniency applicants are multinational companies that will need to assess the merits, benefits and disadvantages of making a leniency application in a given jurisdiction. Absent more detail as regards the CMA's own approach to cross-authority engagement and interaction, there is a risk that prospective applicants may approach the CMA leniency process cautiously.

9.2 For example, paragraph 7.25 suggests that "*the CMA would expect the applicant to manage parallel applications constructively so as to enable the CMA to coordinate with those jurisdictions as needed*". Further clarity and guidance would be welcomed as to what the CMA's expectations would be in practical terms.

9.3 We consider that paragraphs 7.25–7.27 of the Draft Revised Guidance could and should be more practically focused addressing the CMA's expectations when dealing with a leniency applicant who has made submissions in several jurisdictions. For example, the Draft Revised Guidance would benefit from sections addressing the following:

(a) the interplay with the leniency applications submitted to the European Commission;

(b) practicalities, including: (i) investigation timings; (ii) disclosure risks; (iii) status of leniency applicant in various jurisdictions; and (iv) cross-authority interactions; and

(c) requests (including by parties in non-UK litigation, non-UK courts and other non-UK government authorities) for disclosure of information that an applicant has provided to the CMA. In particular, it would be helpful for the CMA to provide further clarity on its expectations in such situations, including how parties should liaise with the CMA. More generally, there is currently a lack of guidance on the CMA's position and steps it might take in the event a party receives such requests (such as the possibility of the CMA providing a letter to resist requests in appropriate circumstances). The CMA is proposing to change the previous text at 7.14 of the Current Guidance, to the text now at paragraph 10.10 of the Draft Revised Guidance, as follows:

> "*As a matter of general policy, the ~~OFT~~CMA would firmly resist, on public interest grounds, requests made to it for disclosure of leniency ~~material~~statements, where such requests are made, for example, in*

connection with private civil proceedings whether in the UK or elsewhere".

While the addition of "*or elsewhere*" is helpful, the new wording seems to limit the CMA position to requests made to the CMA only (rather than requests made generally / to applicants). It also narrows the scope to leniency "*statements*" instead of the wider "*material*". It would be helpful to have further clarity from the CMA on what parties should do when they receive requests to disclose leniency material, particularly in view of the strict confidentiality requirements of the leniency programme (given there is likely to be a tension between compliance with a request and confidentiality obligations to the CMA as part of a leniency application) and the need to ensure parties are not discouraged from providing information to the CMA, which may be jeopardised if there is a persistent risk of disclosure elsewhere.

10. Procurement Act 2023 changes

10.1 We welcome the CMA's statement at paragraph 2.69 of the Draft Revised Guidance that, in relation to the potential debarment and/or exclusion of suppliers under the Procurement Act 2023, for suppliers which have been granted leniency, the CMA is willing to engage with the relevant authority to explain the leniency process to assist with the relevant authority's determination of whether the supplier is an excluded or excludable supplier, including with respect to the 'self-cleaning' provisions under sections 57 and 58 of the Procurement Act 2023.

10.2 In order to provide further clarity as to the reasons why the CMA would engage with the relevant authority, we suggest the following amendments are made to the second bullet of paragraph 2.69 to explicitly cite the relevant 'self-cleaning' provisions for which the granting of leniency may be relevant evidence:

"*for other suppliers which have been granted leniency (but not immunity), 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 relevant evidence as to whether a supplier has taken the circumstances giving rise to the application of an exclusion ground seriously, to assist the relevant authority's assessment of whether the circumstances are continuing or likely to occur again for the purposes of section 57 and 58(1) of the Procurement Act 2023.*"

11. Overall presentation of Draft Revised Guidance, streamlined flowcharts and quick guides

Overall presentation of Draft Revised Guidance

11.1 We welcome the re-ordering of the Draft Revised Guidance, which we find logical and helpful. We do consider that, overall, the Draft Revised Guidance is proportionate in striking the right balance between capturing the salient aspects of the regime and presenting them in a form that is of use for businesses and individuals.

11.2 In terms of formatting, we would propose that the document is justified in its final version for better readability.

Overview Chart A and Overview Chart B

11.3 We welcome the updates to Table A, Overview Chart A and Overview Chart B. We have a number of observations on content and format.

11.4 In relation to Overview Chart A (and, where applicable, Overview Chart B):

(a) For the box at the end of Stage 1 ("*For any queries, confidential guidance is available (can be no-names)*"), we suggest adding "*from CMA*" after "*guidance*".

(b) For the box at the top of Stage 2 ("*Initial enquiry as to availability of immunity (can be no-names)*"), we suggest adding "*to CMA*" after "*enquiry*".

(c) In the penultimate box of Stage 2: we note the removal of "*Ask for more before confirming of rejecting*" as a potential outcome following a marker query. We understand that the CMA is likely attempting to reflect what the "*final*" decisions on a marker might be. However, we consider that parties may find it helpful to keep the point in the Chart that a possible outcome of an initial discussion seeking a marker is that the CMA may ask further questions before making a decision. We note this would be consistent with the position outlined in paragraph 5.21 of the Draft Revised Guidance which does refer to "*Ask for more information*" as a possible outcome.

(d) Stage 3, first sub-box: we note the change from "*provision of information identified as relevant by the applicant" to "provision of all relevant information*". We would suggest that "*identified by the applicant*" is added after "*information*" to reflect the position in other parts of the Draft Revised Guidance (and our comments at paragraph 8.10 above on this issue).

(e) Stage 3, last final box: we note the removal of references to "comfort letters". See comments on this issue at paragraph 7.3 above.

11.5 We have one formatting-related observation on the Overview Chart A and Overview Chart B. The font used in the Current Guidance is sharper and easier to read than that of the Draft Revised Guidance. The CMA may want to consider formatting changes to make the text sharper (e.g. slightly increasing the font size).

Short guides

11.6 We consider the revised 'Business Guide' and 'Individual Guide' short guides (collectively, the ***Guides***) to be helpful. Certain of the points raised above (such as the definition of cartels) also apply to these Guides.

11.7 We have a small number of observations:

(a) Paragraph 4.5 of the Business Guide / last final bullet of 4.18 of the Individual Guide: it is not currently obvious in what form the CMA will respond on the availability of immunity. It would be helpful for businesses and individuals referring to the Guides to know if they expect to hear back in writing or via e.g. a call.

(b) Paragraph 3.17 of the Business Guide / paragraph 4.12 of the Individual Guide could benefit from further clarity, if necessary by cross-referring to paragraphs 4.6-4.7 of the Business Guide and paragraph 4.19 of the Individual Guide. In particular, it would be helpful to clarify who/ or what is meant by "*another public body*" and who leniency would be available from (i.e. if it is the CMA or another authority).

(c) We note that paragraph 4.7 of the Business Guide and paragraph 4.19 of the Individual Guide state, as a fact, that "*The public body will deal with the application in the same way as the CMA would*". We note, firstly, that this may depend on the public body, and secondly, that there is some ambiguity here, affecting predictability for businesses and individuals (e.g. it is unclear if the CMA is suggesting that the other "*public body*" would follow the CMA Draft Revised Guidance or separate guidance applicable to the relevant public body).

12. Appendices

12.1 We have one comment in relation to Appendices B, C and D. Paragraph 4(b) in Appendix B and paragraph 3(b) in Appendices C and D include the following condition (albeit with slight variations in wording):

> "*The Applicant has taken all reasonable steps to identify all the relevant information, documents and evidence available to it as at the data of this agreement 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 that have not been provided to the CMA but have been identified as potentially relevant to the Reported Cartel Activity.*" (emphasis added).

12.2 This is not a requirement we have previously seen, and the basis for the CMA including this is not apparent. It is problematic for a number of reasons. The requirement will place a disproportionate burden on the applicants, as well as the CMA (we note it is contrary to the principle outlined in footnote 29 not to provide "*non-relevant information*"). The requirement may capture information that the parties have reasonably and fairly considered fall below the threshold for cartel conduct: the obligation to provide relevant documents is already covered by other obligations, including the duty of continuous and complete cooperation. It is also not clear what "*brought to the CMA's attention*" would entail in practice.

13. Further observations

13.1 We have a small number of further observations in respect of the Draft Revised Guidance:

(a) Paragraph 1.5 of the Current Guidance refers to the status of the guidance, i.e. "*[t]he guidance is not published pursuant to any statutory obligation and should not be read as if it were akin to a statutory enactment*". This has been deleted from the Draft Revised Guidance and does not appear to have been replaced with an equivalent paragraph. We consider that it would benefit

parties and their legal advisors, as well as the CMA, to include a section that clarifies the status of the guidance. This could perhaps be covered at paragraph 1.6 of the Draft Revised Guidance, which makes clear that the Guidance cannot be seen as a substitute for the law itself or cited as a definitive interpretation of the law.

(b) Paragraph 2.11 refers to a requirement to make current and former employees and directors available for interview. We consider that, for clarity, this should refer to "*best endeavours*", in particular in relation to former employees. This change should be uncontroversial as it reflects the drafting at paragraph 8.3(e) of the Draft Revised Guidance.

(c) Paragraph 8.3 specifies what is expected from applicants to maintain continuous and complete cooperation, including providing examples of the common types of cooperation that may be expected. This includes an obligation at paragraph 8.3(h) to cooperate "*as needed with any appeals*": it is not clear what type of circumstance or support is envisaged here. The Draft Revised Guidance would benefit from greater clarity as regards the CMA's expectation that applicants will provide cooperation "*as needed with any appeals*".

(d) Paragraph 8.7 of the Draft Revised Guidance states that "*the CMA would generally expect the cooperation letter to be signed by a senior representative of the applicant, such as a company director*". We are aware that there may be (and have experience of) cases where, for example, a leniency application is made on behalf of a parent company given the CMA's likely attribution of parental liability, however that parent company may only be a holding vehicle, in which case it would be unable to provide the type of specific, substantive cooperation that is envisaged by the cooperation letter. We consider that it would be helpful in these circumstances if the CMA were to retain the flexibility to accept that an applicant's representative may be a suitable senior individual from elsewhere in the applicant's corporate group, and we would welcome revised drafting at paragraph 8.7 of the Draft Revised Guidance to reflect this.

(e) Paragraph 8.23 describes the CMA's process in the event a leniency applicant accepts it has been a party to cartel behaviour but disputes parts of the CMA's analysis. Further to the guiding principles set out at paragraph 7 of the Foreword to the Draft Revised Guidance, we consider that it would be helpful to expressly reiterate here that the CMA will err on the side of the applicant in cases that are a genuine 'close call', when it is deciding how the applicant's dispute may affect their leniency position.

Freshfields LLP

9 June 2025