Herbert Smith Freehills Kramer LLP response

CMA consultation on Guidance on applications for leniency in cartel cases

Consultation document CMA209con of 29 April 2025

Herbert Smith Freehills Kramer LLP welcomes the opportunity to provide comments in response to the CMA's consultation on Guidance on applications for leniency in cartel cases (Draft Revised Guidance) of 29 April 2025.

The comments set out below are those of Herbert Smith Freehills Kramer LLP and do not represent the views of any of our individual clients.

We have set out our responses to the General Questions (Q1 – Q7) in the round and have answered the Specific Questions (Q8 – Q13) individually.

1. GENERAL QUESTIONS

1.1 We welcome the Draft Revised Guidance, which is long overdue and now reflects the CMA's experience with the regime over the last ten years and changes in cartel enforcement. Clear and up-to-date guidance on applications for leniency is important for companies that are considering making an application as it enables them to make more informed decisions.

1.2 An area for improvement in this regard is the CMA's confidential guidance set out in the current and Draft Revised Guidance. The confidential guidance process is helpful in principle but appears to apply in narrow circumstances. On the key issue as to whether or not a particular arrangement falls within the definition of cartel activities for example, confidential guidance can only be sought where there is genuine and reasonable doubt as to the characterisation of the conduct, such as where there is a lack of legal precedent and should not be considered a substitute for self-assessment. In certain circumstances, in particular in the context of information exchange, there may be uncertainty regarding the characterisation of the conduct because of the particular factual circumstances, not because there is lack of legal precedent in respect of information exchange generally. If the CMA were to apply its confidential guidance more flexibly this would assist potential applicants and could result in more applications for the CMA.

1.3 Potential applicants will also make a cost-benefit analysis when deciding whether to apply for leniency, particularly when set in the context of the risk of follow-on damages, and it is important for there to be sufficient incentives to justify a leniency application. Reducing the benefits for Type B and Type C applicants could deter applications which may be beneficial to the CMA as they enable cases to be run more efficiently. The removal of automatic CDO immunity for Type B applicants in particular could be an issue here and we do not consider that removing benefits from Type B or Type C applicants more generally will result in more companies applying for Type A leniency.

2. **SPECIFIC QUESTIONS**

2.1 **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*

2.1.1 We welcome the proposed changes to the definition of cartel activity. There is very much a need for greater clarity as to the type of conduct that qualifies for leniency, as applying for leniency where the conduct ultimately does not qualify leads to the worst possible outcome. Lack of clarity will inevitably deter applications, so it is in the interest of a well-functioning leniency regime for the CMA to provide as much clarity as possible around this key concept.

2.1.2 The Consultation document states that the Draft Revised Guidance clarifies that information exchange may be considered to amount to a cartel activity and that it has not set out further details (beyond brief examples of indirect communication) because each case tends to be context-specific. However, information exchange can be a difficult concept to confess to as it is not always clear-cut what type of information exchange qualifies as cartel conduct. Therefore, some illustrative examples on characterisation of the conduct which could at least be considered by way of analogy would be helpful. As mentioned above, uncertainty often arises in the context of the factual circumstances not because there is a lack of legal precedent/guidance on information exchange.

2.1.3 The confidential guidance process should be able to assist in this regard, as it applies to circumstances where it is not clear whether particular arrangements fall within the definition of cartel activities. However, the confidential guidance process also specifies that it only applies where there is a "genuine and reasonable doubt as to the characterisation of conduct, such as absence of legal precedent". As flagged in our general comments (at para 1.2), in relation to information exchange there may be uncertainty regarding the characterisation of the conduct because of the particular factual circumstances, not because there is lack of legal precedent. Absence of legal precedent may be only one example of genuine and reasonable doubt but from a practical perspective its inclusion as an example does seem, in the eyes of potential applicants, to limit the types of doubt that may be relied on to seek confidential guidance. Access to the confidential guidance process in those circumstances would be very helpful. We note that the existing guidance contemplates seeking confidential guidance in the context of a discussion on a no-names basis about a given factual matrix without a briefing paper. However, the dynamics of certain markets are so complicated and the genuine doubt about characterisation so integral to those dynamics, that it can be difficult to conceive how a discussion of this nature would allow a constructive discussion to take place, particularly on a no-names basis. The existing guidance states that the CMA will not attempt to reverse engineer the identity of parties, but in more concentrated markets, requesting guidance could carry risk for the market players who will be well-known.

2.2 **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?**

2.2.1 The removal of the genuine intention to confess at the outset of the leniency application is a welcome change as this requirement acts as a deterrent to applying for leniency, given that the precise scope of the conduct at issue may not yet be clear at the time of making a leniency application. Under the Draft Revised Guidance an admission will not be required unless and until a leniency agreement has been signed, reducing the upfront obligations that may discourage prospective leniency applicants.

2.2.2 The Draft Revised Guidance however states that applicants must not act in a way that would be inconsistent with such an admission, which means they must cautiously have a genuine intention to admit to cartel activity if the CMA were to conclude that the reported conduct amounts to an infringement.

2.2.3 The CMA claims that this is necessary in order to deter potential applicants from making speculative 'just in case' applications. In our view this is unnecessary as it is very unlikely that a decision to apply for leniency will be taken that lightly. On balance we believe that the CMA will receive more applications without this additional requirement.

2.3 **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, 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;*

2.3.1 The CMA is removing upfront immunity from financial penalties for Type B applicants as it has never granted this in the past. The Draft Revised Guidance also clarifies that although successful 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.

2.3.2 The CMA justifies these changes in the interest of greater certainty and predictability for leniency applicants. Whereas we welcome greater clarity around the CMA's practices and the likely levels of discounts, we are not convinced that this requires removing the option of upfront immunity altogether. The CMA could instead describe scenarios where this may continue to be an option.

2.3.3 The same applies in the context of the CMA's proposal to remove the potential availability of leniency plus for Type B applicants. The fact that the CMA has not in practice granted leniency plus to Type B applicants in the second market under the current guidance does not necessarily justify removing the option altogether.

2.3.4 Type B applications allow the CMA to run its cases more efficiently and should therefore be encouraged. We don't believe that removing benefits from Type B would result in more companies applying for Type A leniency, and it is unlikely that the CMA will gain anything from doing so.

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

2.3.5 Immunity from CDO's is the second most important incentive after immunity or reduction in fines. This is the case in particular in board rooms, where the decision around whether to apply for leniency will often be made.

2.3.6 Removing this automatic immunity will not bring any benefits to the CMA and will reduce incentives to apply for leniency. There is already sufficient differentiation built into the various tiers. Type A leniency will not become more attractive by making Type B and Type C less attractive.

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

2.3.7 We welcome the clarification around the level of cooperation required in order to benefit from CDO immunity now included in the Draft Revised Guidance.

2.3.8 Individuals seeking to benefit from CDO immunity must maintain continuous and complete cooperation throughout the CMA's investigation and sign a cooperation letter to that effect. It would be helpful for the Draft Revised Guidance to expand on what constitutes continuous and complete cooperation, in addition to the details around the duty to attend interviews and provide a candid and complete account of their conduct in relation to the reported cartel activity.

2.3.9 The Draft Revised Guidance states that the transcript of any interviews with the CMA will be disclosed to recipients of an SO for defence purposes, including interview transcripts during the course of CDO proceedings. Concerns over the applicant's safety must be raised upfront and the CMA recommends seeking confidential guidance where this is an issue, as to whether the CMA considers they could be treated as a confidential source. This scenario is not considered in the confidential guidance chapter and although we note the general comment at paragraph 4.1 that such guidance may be sought on any aspect of the CMA's lenience programme, we believe that it would be helpful to include this under the specific topics listed at paragraph 4.2.

(d) *the clarifications to the process for removing CDO immunity from non-cooperating directors;*

2.3.10 We consider that the process for removing CDO immunity from non-cooperating directors is clearly set out in the Draft Revised Guidance at paragraphs 12.63 to 12.66.

(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?*

2.3.11 The risk of criminal proceedings, despite being uncommon, will be of great concern to individuals concerned and the CMA's statement that it is unlikely to exercise its discretion to grant criminal immunity for Type B and Type C applications is likely to deter applications that may be beneficial to the CMA. As mentioned above, we do not consider that Type A leniency will become more attractive by making Type B and Type C less attractive.

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

2.4.1 The CMA defends its position not to grant criminal immunity for Type B and Type C applications on the basis that the public interest in pursuing offenders is unlikely to be outweighed by the level of assistance any individual will be able to provide in a Type B or Type C situation. The CMA goes on to refer to its recent designation as a prosecutor under the Serious Crime and Policing Act 2005, which will facilitate the cooperation of individuals who were engaged in criminal cartel conduct under investigation but have not been granted immunity from prosecution. We note the CMA's comment that, in exchange for an individual's assistance, the CMA will place the full details of such assistance before the court at which the individual appears for sentencing, after they have entered a guilty plea to the offence. In our view this does in no way compensate for the lack of criminal immunity for type B and type C applicants.

2.5 **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?**

2.5.1 We support the SharePoint Online tool for leniency submissions provided the CMA is comfortable that this will provide the applicant with the same level of protection against disclosure as under the current oral process.

2.5.2 In our experience there have been a number of unhelpful technical issues with the EU Commission's eLeniency tool which the CMA should aim to avoid in its SharePoint Online tool. Robust testing of the process and the availability of technical support for applicants will be important in this regard.

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

2.6.1 We do not consider it necessary for the CMA to retain the availability of the oral application process, which is cumbersome and open to errors, provided the CMA is comfortable that the SharePoint Online tool will provide the same protection against disclosure in civil damages procedures.

Herbert Smith Freehills Kramer LLP

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