

Linklaters LLP response to the CMA's consultation on draft revised leniency guidance

9 June 2025

1 Introduction

- (1) Linklaters LLP ("**Linklaters**") welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation on the proposed changes to the guidance on applications for leniency and no-action in cartel cases (the "**Proposed Leniency Guidance**"). We thank the CMA for its openness throughout the reform process, including through the very helpful roundtable discussions organised by the CMA.
- (2) We also commend the CMA's ongoing efforts to consolidate and clarify its approach towards leniency, including the interaction between the leniency policy and the broader regulatory framework. In our view, the Proposed Leniency Guidance represents a positive step forward, providing important clarity for businesses and their advisers at a time when transparency and certainty are increasingly valued.
- (3) We particularly support the CMA's ambition to ensure that the leniency process is accessible, transparent, and predictable, thereby encouraging companies to self-report infringements at an early stage. However, we consider that there remain a number of important issues where additional clarification would further enhance the effectiveness of the UK leniency framework as a cornerstone of cartel enforcement. We encourage the CMA to ensure that the final guidance fully reflects each element of the CMA's 4Ps strategy — pace, predictability, proportionality and process — so that the regime continues to deliver its core objective: deterring cartel conduct, promoting competition, and, as a result, supporting growth, innovation and consumer protection in the UK.
- (4) In our response below we provide responses to the general consultation questions and discuss issues raised by Questions 5, 7, 8, 9 and 10 of the consultation. We also provide observations on the confidentiality vis-a-vis other regulators and interaction with the Procurement Act 2023.
- (5) We would be happy to discuss any aspects of our response with the CMA.

2 Definition of cartel activities (Q8)

- (6) Paragraph 2.4 of the Proposed Leniency Guidance sets out a non-exhaustive list of cartel activities likely to benefit from leniency, including "*arrangements between suppliers and retailers of goods or services which restrict the ability of the retailers to determine their retail prices.*" While providing concrete examples is helpful, we note that this particular example illustrates a vertical arrangement — resale price maintenance — rather than an example of horizontal cartel conduct. This particular example is also inconsistent with the CMA's published position on what constitutes a cartel.¹
- (7) Vertical restrictions, such as resale price maintenance, may in some cases be pro-competitive or may fall within an exemption; it should not be equated with cartel conduct for the purposes of leniency. We are concerned that the current wording of the Proposed Leniency Guidance may inadvertently suggest that vertical restrictions will be treated as cartel activity by the CMA,

¹ See [Avoid and report anti-competitive activity: Types of anti-competitive activity - GOV.UK](#)

and for the CMA to invite leniency applications in relation to vertical issues, which we expect is not the case.

- (8) We recommend that the CMA amends the drafting in the Proposed Leniency Guidance to more clearly distinguish between cartel conduct (which, by definition, concerns horizontal arrangements) and anti-competitive conduct in vertical relationships, both of which may in principle fall within the scope of the leniency programme. Clearer drafting in this section would ensure that the Proposed Leniency Guidance is consistent with established principles and assists businesses and advisers in accurately assessing leniency eligibility.

3 Changes to the process for the admission of participation in cartel activity (Q9)

- (9) We strongly support the CMA's proposal to move the requirement for admission of cartel participation to a later stage in the leniency process.
- (10) In our experience, businesses considering a potential leniency application must navigate significant uncertainty, often with only partial knowledge of the relevant conduct, including the precise scope of potential infringements, the identities of all participants, and the specific roles of each entity involved. At the critical decision-making stage, an early requirement to admit participation can be a considerable deterrent. It may also delay companies from bringing conduct to the CMA's attention while their internal investigation is still ongoing and before they have definitively understood all the relevant facts and concluded their legal assessment of the circumstances.
- (11) Shifting the admission obligation to a later point would better reflect the realities of multi-party investigations and encourage more companies to approach the CMA at an earlier stage. This shift is likely to enhance the attractiveness and uptake of leniency without reducing its value to CMA enforcement.

4 Type B leniency and "significant value"

- (12) We welcome the CMA's continued commitment to maintaining a broad, case-specific approach when assessing whether a Type B leniency application provides "*significant value*" to an investigation. In our view, the absence of prescriptive criteria in the Proposed Leniency Guidance is appropriate, as "*significant value*" may be demonstrated in many forms, reflecting the wide variety of circumstances in the CMA investigations.
- (13) However, we are concerned by the limitations proposed in Paragraph 2.26 of the Proposed Leniency Guidance, namely that "*Type B leniency will definitely cease to be available*" where (i) a prior leniency application regarding the reported cartel activity has been received, or (ii) the CMA or a relevant sectoral regulator has sufficient information to establish the existence of the reported cartel activity. In our view, this is unnecessarily strict (and inconsistent with the approach taken in some cases), given the fundamentally discretionary nature of Type B leniency and the CMA's established practice of determining how the public interest is best served on a case-by-case basis.
- (14) We respectfully suggest that the CMA should retain the flexibility to consider all relevant circumstances, including the timing, quality, comprehensiveness and presentation of information, when evaluating applications. Removal or softening of the rigid "*definitely cease*" formulation would preserve the CMA's ability to maximise enforcement impact in appropriate cases, and help to ensure that the companies are not deterred from submitting leniency applications for fear of Type B leniency no longer being available.

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- (15) For the benefit of businesses considering leniency, the Proposed Leniency Guidance could be supplemented with practical examples of the kinds of information and cooperation that might constitute “*significant value*.” More concrete illustrations will support legal certainty and improve the predictability and transparency of the regime, in turn making it more attractive for businesses.
- (16) We further note the reference in Paragraph 2.25 to Type B leniency applications typically being prompted by inspections. In this context, it would be helpful for the CMA to clarify that “*significant value*” does not require the provision of evidence of conduct not referenced in the authorisation letter or inspection warrant. In many cases, the most valuable contribution will be a prompt and comprehensive account of the facts, supported by evidence, provided at a time and in a manner that materially advances the investigation. An applicant that swiftly supplies a full and coherent description of events can enable the CMA to conserve resources, accelerate its investigation, and achieve proportionate outcomes — fully consistent with the CMA’s objectives of efficiency, pace, and proportionality.
- (17) Overall, we recommend that the CMA ensures its guidance preserves sufficient discretion to recognise and reward added value in all its forms, alongside clear worked examples to assist prospective applicants and their advisers.

5 Type B discretionary CDO immunity (Q10)

- (18) We have significant reservations regarding the proposal to make immunity from Competition Disqualification Orders (“**CDOs**”) for directors of Type B and Type C leniency applicants discretionary rather than automatic.
- (19) In practice, the key decision makers for any corporate leniency application are its current directors — individuals who are expected to commit fully to the CMA’s process and to ensure the company’s cooperation throughout the investigation. If the prospect of immunity from disqualification is uncertain and provided only at the CMA’s discretion, directors may quite reasonably be deterred from supporting a company’s decision to seek leniency. This risk is particularly acute where there is the potential for divergent interests between the company and its directors, especially in situations where directors’ own exposure is not clearly protected.
- (20) Automatic immunity for directors has been a critical feature supporting the effectiveness of the regime to date. In our experience, corporate clients consistently weigh the risks and consequences for their directors as a central consideration in whether to pursue the leniency route at all. Despite adding an additional chapter offering guidance on the level of cooperation expected from directors to benefit from CDO immunity, removal of the automatic immunity, especially for active (not former) directors, inevitably introduces additional uncertainty which is likely to have a chilling effect, which runs counter to the CMA’s stated objective of predictability and process.
- (21) While we understand the CMA’s aim to preserve the unique status of Type A immunity applications and avoid undermining incentives at the Type A level, we do not believe that maintaining automatic, or at least presumptive, CDO immunity at the Type B and C levels would materially detract from that goal. The substantive benefits of Type A leniency, including the guarantee of immunity from both financial penalty and director disqualification, remain distinct and sufficiently motivating.
- (22) We therefore recommend that the CMA carefully reconsider the proposed change.

6 Type B and Type C leniency discounts for corporate applicants (Q10)

- (23) For similar reasons, we encourage the CMA to reconsider proposed changes to the levels of protection from financial penalties for corporate Type B and C applicants. While it is helpful that the CMA is intending to increase legal certainty and transparency by clarifying what types of financial benefits applicants are likely to receive and to build on its experience from case law whereby in reality most discounts are significantly lower than the statutory maximums, we caution against the CMA reducing financial incentives significantly.
- (24) Rather than decreasing incentives to approach the CMA for leniency at various stages of an investigation, we would urge the CMA to encourage and incentivise leniency applications, not least through giving generous discounts in line significantly more in line with the statutory maximum. We would urge the CMA to reconsider whether these changes are necessary and may not deter leniency applications.

7 Public disclosure of the names of the companies under investigation (Q7)

- (25) We encourage the CMA to return to its previous practice — departed from in recent years — of not disclosing the names of companies under investigation, including in statements of objections (i.e. ahead of the final decision being issued). Confidentiality throughout the investigation process can be a decisive factor for companies considering whether to make a leniency application.
- (26) One of the primary risks considered by potential applicants is their broader exposure, whether from other authorities — including those outside the UK — that may choose to open a parallel investigation, or from private damages actions (the threat of which have increased significantly in recent years). The timing and procedures for these claims are rarely synchronised, and early public disclosure of a company's identity can result in significant legal and commercial prejudice before the full legal process has concluded. This can create particular issues in the case of private actions brought on a "standalone" basis following a CMA announcement.
- (27) In this context, clear reassurance from the CMA that identifying information will not be disclosed prior to the public announcement of a final infringement decision would be invaluable. Confidentiality protections are fundamental to upholding the integrity and attractiveness of the leniency regime and ensuring that the procedural and substantive objectives of the CMA — including proportionality and efficacy — are achieved.

8 Confidentiality

- (28) We welcome the CMA's express recognition in paragraph 3.31 that limited disclosures to banks, auditors, or regulators are generally acceptable. However, have at times experienced inconsistencies in CMA approach to the terms of consent, and we believe further flexibility is warranted to allow businesses to manage internal and external communications effectively, while remaining in full compliance with confidentiality obligations under the CMA's leniency framework. For example, it is often necessary for companies to engage external public relations advisers to manage public scrutiny, and the ability to act swiftly in such scenarios is critical. Furthermore, audit requirements typically require businesses to disclose ongoing investigations, possible risk exposures and any provisions the relevant company has made to its auditors.
- (29) Paragraph 3.33 of the Proposed Leniency Guidance requires companies to consult the CMA in advance regarding any such disclosures. In practice, preparing a suitable justification and securing internal approvals can be time-consuming, whereas disclosure needs can arise unpredictably and may be time-sensitive. In these urgent situations, the requirement for prior

consent could delay essential risk management steps and create unnecessary burdens, which conflicts with the CMA's principles of pace and proportionality.

- (30) To address these concerns, the CMA could permit companies to conduct reasonably necessary notifications to certain categories of internal contacts and third parties (such as auditors or public relations advisers) without the need for prior notification. As an alternative, the CMA could permit companies to notify the authority of the need for certain disclosures as soon as possible, rather than mandating advance clearance in every case.
- (31) Leniency applicants take confidentiality extremely seriously and understand their duty of continued and comprehensive cooperation throughout the CMA's investigation. As such, increased flexibility would not compromise the secrecy or integrity of the leniency process, but would better reflect the realities businesses face, support trust in the process, and more fully align with the CMA's own procedural principles.

9 Interaction with the Procurement Act 2023

- (32) As set out in paragraph 2.69 of the Proposed Leniency Guidance, Type B and Type C leniency applicants — except for those Type B applicants receiving a 100 per cent penalty reduction — do not benefit from automatic exemption from exclusion or debarment under the Procurement Act 2023. The same paragraph indicates that the CMA may engage with the relevant authority to explain that a leniency applicant has admitted to cartel conduct and has provided complete and continuous cooperation. The Proposed Guidance also recognises that such engagement may be relevant in assessing whether a supplier has “self-cleaned” within the meaning of the Procurement Act, and therefore whether exclusion or debarment is warranted.
- (33) We welcome the CMA's stated willingness to assist Type B and Type C leniency applicants in demonstrating that they have self-cleaned for the purposes of the Procurement Act. To make this support as effective as possible, we would encourage the CMA to provide further clarification on the process for CMA involvement with a contracting authority or Minister, as well as on how Type B and Type C leniency applicants may seek this support from the CMA.

10 Short guides and flowcharts (Q5)

- (34) We welcome the inclusion of short guides and flowcharts within the Proposed Leniency Guidance. These resources strike an effective balance between accessibility and detail, offering an invaluable overview of the leniency regime's essential features, conditions and processes in a concise format.
- (35) Clear and practical reference materials such as these are especially valuable for businesses and their advisers — both in initial risk assessments and in developing internal training programmes to ensure robust compliance cultures. We encourage the continued use of user-friendly summary materials across all key areas of policy.