

## REVISITING LENIENCY:

# THE CMA'S PROPOSED REVISED GUIDANCE FOR LENIENCY AND “NO ACTION” IN CARTEL CASES

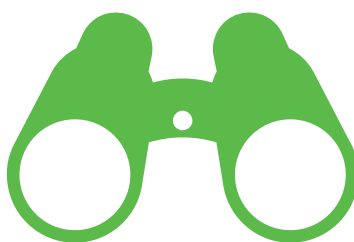


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## Introduction

The Competition and Markets Authority (“CMA”) recently consulted on its draft revised guidance on applications for leniency and “no action” in cartel cases (the “Draft Guidance”), marking the first significant review of leniency in twelve years.<sup>1</sup> The review presents a welcome opportunity for the CMA to align its guidance with latest practice, enforcement trends, and significant developments not captured in the current guidelines published in 2013 (“Current Guidance”).

*Through this process, the CMA seeks to ensure that “the incentives offered by the CMA’s leniency regime are in the right place to support the CMA’s enforcement objectives” including by encouraging applications and ensuring investigations are efficient and effective.<sup>2</sup>*



## The key proposals at a glance

- updated definition of “cartel activity”;
- revised levels of protection afforded to “Type B” and “Type C” applicants;
- changes to admission requirements;
- creation of an online application process; and
- amendments to reflect additional legal and practice developments over the past 12 years.



## Updated definition of “cartel activity”

The CMA proposes to retain the core definition of “cartel activity” as set out in the Current Guidance,<sup>3</sup> but the CMA has helpfully incorporated more specific language relating to the fixing or coordination of purchase prices. The CMA also proposes to expand upon its non-exhaustive list of cartel activity for which leniency is likely to be available to reflect the CMA’s decisional practice, developments in case law and technology, and its enforcement priorities.<sup>4</sup> For example, further detail is helpfully provided on the parameters of information exchange and its ability to constitute a “by object” infringement,<sup>5</sup> including indirect information exchange through platform operators or the use of a shared algorithm. The updated list also includes no-poach arrangements

<sup>1</sup> See <https://connect.cma.gov.uk/41217/widgets/122407/documents/83275> and <https://connect.cma.gov.uk/41217/widgets/122407/documents/83276>.

<sup>2</sup> “Consultation on draft revised leniency guidelines” (“Consultation Document”), paragraph 1.11.

<sup>3</sup> Consultation Document, paragraph 3.3, which proposes to retain the core definition outlined in paragraph 2.2 of the Current Guidance.

<sup>4</sup> See Paragraph 2.2-2.5 of the Draft Guidance.

<sup>5</sup> See *Lexon (UK Limited) v Competition and Markets Authority* [2021] CAT 5.

and pay-for-delay agreements, reflecting recent enforcement trends in the UK and beyond.<sup>6</sup> If adopted, the additional detail provided by the CMA should provide businesses and practitioners with greater certainty about the scope of qualifying conduct and accordingly encourage applications.



## Updated levels of protection for Type B and Type C Applicants

The most significant revisions to the Current Guidance concern the scope of protection offered to “Type B” applicants (those who are the first to apply in respect of a pre-existing investigation) and “Type C” applicants (the second or later applicant in respect of a pre-existing investigation, or applicants who have coerced others to participate in the cartel). Namely, the CMA has proposed to remove:

- immunity from financial penalties in respect of corporate Type B applicants at the time of application (i.e., “upfront immunity”), reflecting the fact that discounts are primarily calculated based on the value added by the applicant which cannot realistically be known at the outset (see below regarding the value of discretionary discounts offered later in the process);
- the additional financial protection potentially available to Type B applicants under the ‘leniency plus’ regime, since such protection has not, in practice, been granted;<sup>7</sup>

- automatic protection from a competition disqualification order (“CDO”) for successful Type B and Type C applicants. If adopted, only “Type A” applicants (those who are the first to provide the CMA with evidence of a cartel not currently being investigated) will receive this protection automatically and discretionary protection will be available for Type B and Type C applicants.<sup>8</sup> This proposal is intended to balance incentives for prospective applicants with protecting the public by removing unfit directors and deterring anti-competitive conduct.<sup>9</sup>

Further, the Draft Guidance clarifies that discretionary criminal immunity for current and former employees and directors of Type B and C applicants is likely to be granted only in “exceptional circumstances”, with the public interest in pursuing offenders generally outweighing the assistance that any individual will be able to provide in a Type B or C application.<sup>10</sup>

The CMA has also helpfully clarified the level of discount that can generally be anticipated for Type B and C applicants in practice, noting that Type B applicants should expect no more than 50% in resale price maintenance investigations or 75% in other cases,<sup>11</sup> and Type C applicants should expect significantly less than the maximum 50%.<sup>12</sup>



## Amendment to admission obligation

The Current Guidance requires leniency applicants to have a ‘genuine

intention to confess’ at the outset of an application, which is often interpreted as a requirement to admit participation in a cartel.<sup>13</sup>

*In response to concerns that this may disincentivise applicants, the CMA proposes that admission will not be required until a leniency agreement is signed (though continuous and complete cooperation throughout an investigation would still be required).<sup>14</sup>*

It is hoped that this amendment will mitigate any apprehension on the part of prospective applicants in circumstances where the precise scope of the cartel activity may not yet be clear when submitting an application.<sup>15</sup> Crucially, there are no proposed changes to the obligation not to act in a way that is inconsistent with an admission.



## Other updates of note

The CMA has also proposed:

- removal of the dishonesty element of the criminal cartel offence;<sup>16</sup>
- implementation of the changes to the private damages regime by the EU Damages Directive;<sup>17</sup>
- introduction of the debarment regime covered by the Procurement Act 2023, which came into force in February 2025;

6 See, for example the CMA’s ongoing investigation in respect of no-poach arrangements in the fragrance and fragrance-ingredient markets (Investigation 51257).

7 Under the “leniency plus” regime, the CMA may grant an additional reduction in financial penalties in relation to cartel conduct in the first market, due to a successful leniency application in the second market.

8 Consultation Document, paragraph 3.18.

9 Consultation Document, paragraph 3.17.

10 Draft Guidance, paragraph 2.44; Consultation Document, paragraph 3.24. There are no proposed changes to the availability of criminal immunity in Type A applications.

11 Draft Guidance, paragraph 2.21.

12 Draft Guidance, paragraph 2.28; Consultation Document, paragraph 3.14.

13 Current Guidance, paragraph 4.2(c); Consultation Document, paragraph 3.8.

14 Draft Guidance, paragraph 2(6)(d).

15 Consultation Document, paragraph 3.9.

16 Enterprise and Regulatory Reform Act 2013.

17 Implemented by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017/385.

- changes to reflect the introduction of the Digital Markets, Competition and Consumer Act 2024; and
- changes to reflect the UK's exit from the EU, for example, the CMA's commitment not to share leniency information with overseas agencies without the consent of the provider now extends to the European Commission and EU national authorities.<sup>18</sup>

Finally, the CMA has proposed a new online procedure using SharePoint to serve as the default method of submitting applications for leniency which would otherwise be made orally. This is intended to modernise and improve efficiency of the process for both the CMA and applicants.



## Consultation responses

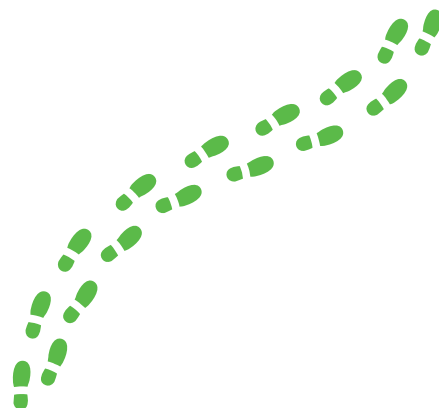
The consultation closed on 9 June 2025. Although the CMA has not published any feedback received, the City of London Law Society Competition Law Committee ("CLLS") has published its response.<sup>19</sup>

*The CLLS raised a number of concerns with the proposed changes, noting, for example, that removing up-front Type B immunity*

*and automatic Type B and C CDO protection may disincentivise applicants when there is a pre-existing investigation, to the detriment of the quality or pace of the investigation.*

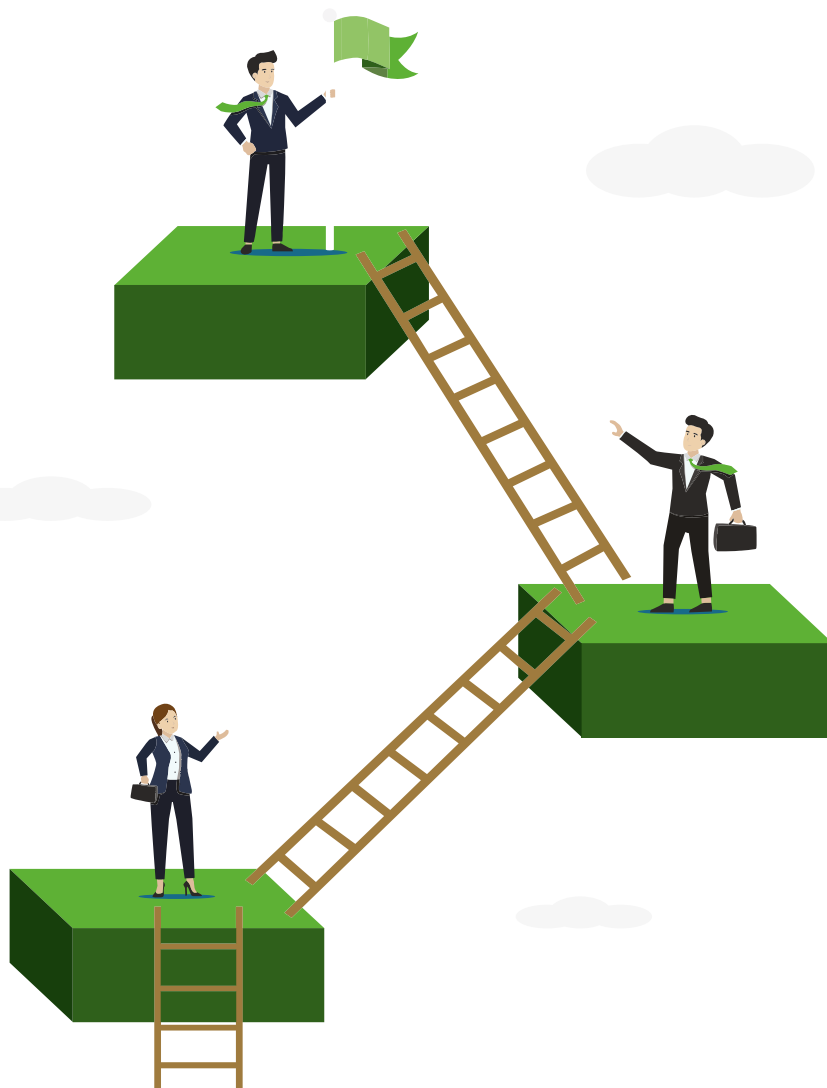
Similar concerns are expressed in respect of the exceptional nature of criminal immunity, the removal of leniency plus, and the cap on discounts in practice.

It remains to be seen whether the CMA will incorporate this feedback. Nonetheless, the proposed revisions to reflect legislative developments, the CMA's decisional practice and enforcement priorities, should generally be received as a welcome development. If adopted, the CMA's proposed changes should offer prospective applicants with greater clarity around the leniency policy and process so that applicants have a better understanding of what is expected of them, and what they can expect from an application.



## Next steps

The CMA has not provided a timetable for next steps, but we know that following review of feedback under the consultation, the CMA will publish the updated guidance, which will take effect from the date of publication. Any leniency applications made prior to this date will be governed by the Current Guidance.



<sup>18</sup> Draft Guidance, paragraph 10.24.

<sup>19</sup> See <https://clls.org/resource/competitionlawcmareponsejun25.html>