Law Council
OF AUSTRALIA

Office of the President

29 July 2024

Ms Melinda McDonald
Executive General Manager
Competition
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By email: ImmunityReview@accc.gov.au

Dear Ms McDonald

Review of the ACCC immunity and cooperation policy for cartel conduct

1. The Law Council of Australia welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (**ACCC**) on its draft consultation revisions to the *Immunity and cooperation policy for cartel conduct* (**Policy**) and *Immunity and cooperation policy: frequently asked questions* (**FAQs**).

2. The Law Council gratefully acknowledges the contribution of the New South Wales Bar Association and the Competition and Consumer Committee (**Committee**) of the Business Law Section to this submission.

3. In making these comments the Law Council has taken into consideration the ACCC's policy aims of enhancing clarity and providing greater transparency in relation to the Policy. We have also referred to two key principles set out in our *Policy Statement—Rule of Law Principles*:[1]

   - **Principle 1**—the law must be both readily known and available, and certain and clear; and

   - **Principle 2**—the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.

4. In principle, we question the need for a separate immunity policy for cartel conduct. We disagree with the principle that it should only be available to the first party to apply for immunity in respect of the cartel because this is likely to result in arbitrary outcomes. This has the potential to result in inconsistency with the rule of law principle that the law should not discriminate between people on arbitrary grounds. Our preferred position is for the general '*Prosecution Policy of the Commonwealth*'[2] applied by the Commonwealth Director of Public Prosecutions (**CDPP's Policy**) with respect to applications for immunity—to be applied to cartel participants. This position is further outlined below.

[1] Law Council of Australia, Policy Statement—Rule of Law Principles (Policy Statement, March 2011).
[2] Commonwealth Director of Public Prosecutions, Prosecution Policy of the Commonwealth—Guidelines for the making of decisions in the prosecution process (Guidelines, 19 July 2021). ('***CDPP's Policy***')

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5. However, if this primary position is not accepted, and a separate immunity and cooperation policy for cartel conduct is retained, we endorse the objective of improving certainty and providing greater guidance for entities when deciding whether to seek immunity and making subsequent decisions.

6. To that end, we recognise that the Policy and FAQs contain some very welcome proposed changes that will promote greater certainty, in particular:

   - the guidance for corporate applicants and practitioners when undertaking investigations and interviews after making an application;
   - extending the ability for corporate entities to apply for immunity for attempted cartel conduct; and
   - the removal of the requirement that individual derivative immunity applicants must admit to engaging in cartel conduct to be eligible for conditional derivative immunity.

7. This submission identifies four areas where the proposals may make it more difficult for corporate entities to decide whether to seek immunity, make subsequent decisions about their immunity applications, and to ensure compliance with conditions attached to their immunity. The proposed changes also make it more difficult for corporate applicants to make decisions as to whether they will include derivative immunity as part of their applications and if so, for whom. As explained below, we are concerned that certain changes are inconsistent with regulatory arrangements in comparable international jurisdictions—this creates obstacles for corporate entities who are seeking immunity in other jurisdictions. Accordingly, we suggest that the following elements of the Policy require further consideration:

   - derivative immunity and presence of corporate legal representatives;
   - the requirement that the immunity applicant must provide 'all records of factual accounts' irrespective of any claim of client legal privilege;
   - further guidance on extending eligibility for immunity to attempts to engage in cartel conduct; and
   - the continued exclusion of concerted practices conduct.

'First in' principle for *criminal* immunity

8. We note that the central feature of the Policy, both in its existing and amended form, is that civil immunity and criminal immunity are only available to 'the first party to apply for immunity in respect of the cartel'.[3] In this regard, Annexure B to the CDPP's Policy states:[4]

> *This policy is based on a recognition by Government that, in respect of serious cartel offences, it is in the public interest to offer immunity from prosecution to a party who is willing to be the first to break ranks with other cartel participants by exposing the illegal conduct and fully cooperating with the Australian Competition and Consumer Commission (ACCC) and the DPP.*

9. While the Law Council recognises that this public interest may be sufficient to justify a separate policy with respect to civil immunity, the Law Council remains unpersuaded

[3] Policy, [23(b)], [36(c)], [44], [48].
[4] CDPP's Policy, Annexure B, [1.2].

that criminal immunity should only be available to the first party to apply for immunity in respect of the cartel.[5]

10. Except for certain exceptions,[6] the CDPP's Policy with respect to applications for immunity (or undertakings under section 9(6), 9(6B) or 9(6D) of the *Director of Public Prosecutions Act 1983* (Cth)) contains well-accepted principles to determine the availability of criminal immunity:

> *[6.6] An undertaking under the Act will only be given provided the following conditions are met:*
>
> *a) the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources. In this regard, the stronger the case without the evidence the accomplice can give, the less appropriate it will be to grant an undertaking to the accomplice; and*
>
> *b) the accomplice can reasonably be regarded as significantly less culpable than the defendant.*
>
> *[6.7] The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. In determining where the balance lies, account should be taken of the following matters:*
>
> *a) the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;*
>
> *b) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;*
>
> *c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;*
>
> *d) the need to assess whether the prosecution's evidence is likely to be strengthened if an accomplice testifies, which requires the prosecution to consider a range of factors, including examination of corroborative evidence; assessment of the weight the fact finder will place on the evidence; and an assessment of whether the evidence itself is cogent, complete and truthful;*

[5] The Law Council raised similar concerns in 2018: Law Council of Australia, Submission to Australian Competition and Consumer Commission, Review of the ACCC immunity and cooperation policy for cartel conduct (Submission, 11 October 2018) 4 [16] – [19].

[6] Except for applications for immunity in respect of the offences in sections 45AF and 45AG of the *Competition and Consumer Act 2010* (Cth).

e) *the likelihood of any weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);*

f) *whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act; and*

g) *whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.*

11. The Law Council considers that these considerations, outlined above, should also guide decisions about whether to grant criminal immunity in respect of cartel conduct. A 'first party to apply for immunity in respect of the cartel' policy has the potential to allow a significantly more culpable participant to obtain immunity while significantly less culpable participants are precluded. It is plainly inconsistent with the generally applicable policy which imposes a condition that 'the accomplice can reasonably be regarded as significantly less culpable than the defendant' and which requires consideration of 'the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant'.[7]

12. The 'first in' policy creates the real risk that cartel participants will not be treated equally and fairly. The potential for a significantly more culpable cartel participant to be treated more favourably compared to a less culpable participant is likely to be inconsistent with the rule of law principle that the law should not discriminate between people on arbitrary grounds. The suggested public interest to offer immunity from prosecution to a party 'who is willing to be the first to break ranks with other cartel participants by exposing the illegal conduct and fully cooperating with'[8] the ACCC and the DPP should not be determinative where that party is significantly more culpable than other participants.

13. We consider that application of the general policy would still provide a powerful incentive to less culpable participants to expose the illegal conduct and fully cooperate with the ACCC and the DPP. Accordingly, we consider that the CDPP's Policy with respect to applications for immunity should be applied to cartel participants.

Scope for uncertainty

14. The Law Council is concerned that the changes discussed below make it incrementally more difficult for corporate entities to make the decision to seek immunity which have flow on effects for the efficacy of the Policy overall.

15. Additionally, as described below, some of the Policy changes are inconsistent with approaches taken by international regulators—this creates obstacles for corporate entities who are seeking immunity in other jurisdictions.

Derivative immunity and presence of corporate legal representatives

16. Proposed new paragraphs [60] and [61] to the Policy have the effect of generally precluding the legal representatives of a corporate immunity applicant being present during ACCC interviews with a derivative immunity applicant. Instead, the proposed

[7] CDPP's Policy, [6.6(b)], [6.7(a)]
[8] Ibid, Annexure B, [1.2].

changes state that a corporate applicant will be provided with 'sufficient information' to enable it to understand how its application is progressing and to identify and provide further information relevant to its application, without providing clarity on, or committing to, the nature and form of that information.

17. The Law Council shares the concern expressed by the Committee that formalising, as a presumptive position, the exclusion of legal representatives of the immunity applicant from interviews—rather than considering the position on a case-by-case basis, in light of the relevant circumstances—is likely to lead to a loss of confidence by corporate immunity applicants in the immunity process. In particular, there is a risk of three significant, and possibly unintended, impacts:

    (a) The Policy requires a corporate entity to make an admission and, prior to the conclusion of the ACCC's investigation, to certify that it, and derivative immunity applicants, have complied with all obligations under the Policy including those concerning the provision of all relevant information, witnesses and documents.[9] However, generally excluding the legal representatives of the immunity applicant from interviews will constrain the corporate entity's understanding of evidence that may support that admission—and perhaps the certification obligation. This may significantly delay corporate entities in coming forward by creating a greater need for comprehensive internal investigations to properly ascertain their factual and legal position before any approach to the ACCC occurs.

    (b) It will be very difficult for corporate entities to assess whether:

        (i) they continue to seek immunity; or

        (ii) extend the scope of the immunity requested,

        if they do not know the information that has been provided to the ACCC by derivative immunity applicants. To illustrate the issues that arise in this scenario, the Law Council refers to a case study provided by the Committee at Annexure A.

    (c) Each of these uncertainties could extend to whether a corporate applicant is willing to continue to extend derivative immunity to individuals, maintain such derivative immunity or provide derivative immunity to others. There is a risk, therefore, that corporate entities will not have confidence when making decisions about whether to offer to extend derivative immunity to individuals.

18. These risks are amplified in the case of multijurisdictional cartels, where a corporate applicant may have overlapping obligations of disclosure, including obligations to keep regulators informed of developments in other jurisdictions. Additionally, there will be immunity applications that will enliven the ACCC's obligations to share information with other Australian or overseas regulators. In these circumstances, the proposed Policy and FAQs will result in there being a significant information asymmetry between the corporate applicant and the relevant regulator. This may in turn result in an inability of the applicant to understand matters relevant to its immunity applications (wherever made) and to respond properly to the investigation of the relevant regulator. This can only be remedied by allowing the corporate applicant's legal representative to attend interviews conducted as part of the immunity process, or at the very least by provision of transcripts of the interviews.

19. The Law Council notes that the approach of equivalent regulators in the EU, USA and UK to derivative immunity and the presence of corporate legal representatives at

[9] Paragraph [13] of the current and draft Policy.

interviews is managed on a case-by-case basis. The Law Council refers to the table at Annexure B, provided by the Committee, which compares the difference in approach to various issues that the amendments to the Policy and FAQs raise across the EU, USA and UK. The Law Council considers that the proposed Policy and FAQs do not allow for a nuanced approach that can be adapted to reflect the unique circumstances of each immunity application, as is available in comparable jurisdictions.

20. It is acknowledged that these changes may be aimed at enhancing unencumbered disclosure during interviews by reducing any unintended influence on derivative immunity applicants which may be consequent on the presence of a corporate's legal representatives. However, the Law Council agrees with the Committee that the policy objective of increasing scope for unencumbered disclosure may be more proportionately addressed by other amendments contained in the Policy, for instance:

    - The removal of the requirement for a derivative immunity applicant to make admissions, replacing it with a requirement of 'full, frank and truthful disclosure' as to involvement as set out in paragraph 32 of the proposed changes to the policy (and question 57 of the FAQs). This creates a requirement of honest, candid, and fulsome disclosure that derivative immunity is contingent upon.

    - The further guidance on internal investigations and derivative immunity interviews provided in the FAQs.[10]

21. The Law Council submits that these considerations make it unnecessary to presumptively exclude corporate legal representatives from interviews as a general rule. The Law Council considers there is merit in the Committee's suggestion that, in these circumstances, further consideration be given to whether the existing balance is reasonable. That is, provided that there is no evidence of obstruction or coercion, legal representatives of corporate entities should be permitted to attend these interviews.

22. Additionally, there is inadequate specification of what is meant by 'sufficient information'. Views may differ as between the ACCC and the corporate immunity applicant as to what constitutes 'sufficient information' for the corporate applicant to enable it to understand how its application is progressing whether the information provided by the derivative immunity applicant is consistent or inconsistent with its application and to be able to provide further information or evidence. Particularly at an early stage of the investigation, the ACCC may not have enough understanding of the facts and potential issues in the case to determine what is 'sufficient information'. This further puts at risk the corporate applicant's immunity by reason of failure to provide ongoing full and frank disclosure as required by the Policy. This is particularly so where there are obligations to keep regulators informed in other jurisdictions in the context of multi-jurisdictional cartels.

23. On balance, given the concerns highlighted by the Committee, the Law Council, is of the view that a more nuanced position should be adopted. For example, a more proportionate alternative is to make available to the legal representatives of the corporation a transcript or recording of the interviews with derivative immunity applicants, as well as any key information given to the ACCC.

First accounts

24. While not the subject of the changes to the Policy and FAQs that are the subject of the current consultation, the statements that were added to the FAQ, in what is now question

[10] Draft FAQs, Questions 28-30, 32-33.

57 (as of May 2023), provide that the immunity applicant must provide 'all records of factual accounts' irrespective of any claim of client legal privilege which applies.

25. The Law Council understands that this amendment to the FAQs was considered by the ACCC not as reflective of a change in approach, but as a clear statement of current practice. In circumstances where not every cartel investigated by the ACCC proceeds as a criminal prosecution (or indeed is pursued in civil penalty proceedings), the Law Council considers that the absolute requirement in all immunity applications to provide factual accounts at an early stage of perfecting a marker may both chill internal investigations and reduce incentives to seek immunity.

26. This is particularly the case where, for a possible cartel with multijurisdictional impacts, first accounts may have been taken by overseas legal advisors, where an obligation to hand over first accounts does not exist. Guidance from the Competition and Markets Authority (**CMA**) in the United Kingdom is explicit in this regard:

    - it will not as a condition of leniency require waiver of privilege over any relevant information; and
    - it may inquire whether an applicant is willing to waive privilege in a *criminal* investigation. (See further Annexure B).

Attempts guidance and uncertainty

27. The Law Council supports extending eligibility for immunity to attempts to engage in cartel conduct (as set out in proposed question 14 to the FAQs). However, it is suggested that the draft examples should be clarified or expanded.

28. The Law Council notes that the Policy will provide that in certain circumstances 'corporations or individuals who have themselves unilaterally attempted to cause others to engage in cartel conduct will not be eligible for immunity under this Policy'.[11] While it is acknowledged that the concept of a 'unilateral attempt to cause others to engage in cartel conduct' is a feature of the existing Policy, it should be noted that it can be difficult to establish who unilaterally attempted to cause others to engage in cartel conduct and the circumstances in which immunity will not be provided are too limited.

29. Regardless of who may have instigated the alleged cartel conduct, there needs to be an explicit reference to the objective seriousness of the alleged conduct in the Policy as a factor for consideration by the ACCC. This is fundamental to a policy of this nature.

30. Regarding Example 3, the example states that Company A made attempts over several years to induce Company B to engage in bid-rigging, and that Company B subsequently approached Company A and both agreed to a bid-rigging arrangement. There is some ambiguity as to how Company A, in these circumstances, is eligible for immunity in relation to the earlier attempts to engage in cartel conduct with Company B, and Example 3 seems to be at odds with Examples 1 and 2 which suggest that immunity is not available for attempts. Example 3 makes the point that immunity is available to Company A in connection with earlier attempts because 'those attempts were part of a broader set of conduct involving the making' of the arrangement.

31. This is, on its face, difficult to reconcile with Example 1. It is suggested that the specific interaction between the 'broader set of conduct' and the disqualifying operation of unilateral attempts be made clearer. It is further suggested that the differentiating factors between Examples 1 and 3 be made explicit.

[11] Policy, [17].

32. There are further concerns relating to the clarity of the Policy as it applies to attempts and the absence of concerted practices which are discussed below.

Absence of concerted practices

33. Paragraph 8 of the Policy continues the exclusion of concerted practices conduct, with the effect that those involved in such conduct cannot seek immunity. The Law Council considers that it would be timely to reconsider extending the policy to concerted practices conduct especially in circumstances where:

- the Draft Policy will extend to attempts and where it may be that an attempt goes no further than the exchange of information which gives rise to a concerted practices risk, but a view cannot be formed as to whether this amounts to an attempt to engage in cartel conduct until an investigation has substantially progressed; or

- the evidence arguably indicates the existence of both cartel conduct and a concerted practice, which is mentioned in the ACCC's Guidelines on Concerted Practices at paragraph 8.4 (released in 2018).

34. In both situations, the absence of availability of immunity for concerted practices reduces the likelihood that those involved would engage with the ACCC due to the risk that the conduct may fall on the other side of the relevant line, thereby derogating from the central goal of the Policy. This is exacerbated given the lack of jurisprudence on the concerted practices prohibition.

35. The Law Council is of the view that concerted practices should be considered for inclusion in the Policy as a basis for immunity for the following reasons:

- If the ACCC wishes to encourage applications, particularly at an early stage of an investigation, it may be difficult to know whether conduct constitutes a contract, arrangement or understanding, or a concerted practice. Indeed, Courts and the ACCC have often taken different views on the appropriate characterisation of conduct, e.g., ACCC *v Australian Egg Corporation Limited* [2016] FCA 69.

- Evidence provided as part of an immunity application in relation to cartel conduct or an attempt to engage in cartel conduct may subsequently be used to establish a concerted practice without any protections available for the parties providing the evidence. The inclusion of immunity for concerted practices enhances certainty, furthers the central aim of the Policy and ensures that businesses can be confident in approaching the ACCC as opposed to being left to the uncertainty surrounding factual and legal ambiguities; and

- The inclusion of concerted practices in the Policy will align Australia's regulatory approach with related overseas jurisdictions, including the EU, UK, Singapore, Hong Kong.

Contact

36. Please contact Shounok Chatterjee, Senior Policy Lawyer, on +61 02 6246 3703 or at shounok.chatterjee@lawcouncil.au in the first instance should you require any further information or clarification.

Yours sincerely

Greg McIntyre SC
President

Annexure A—Case study: Access to information by corporate applicant

1. A corporate applicant seeks a marker, undertakes an internal investigation in the time available and makes a proffer to the ACCC disclosing conduct in which one of its employees attempted to rig a bid with a competitor in 2023. The applicant seeks immunity for itself and derivative immunity for its employee, D1. In the course of its investigation, the ACCC conducts an interview with D1, who reveals that the conduct goes back to 2020 and includes various instances of successful bid rigging in a different area but involving the same competitor as described in the marker and proffer. Such conduct is clearly not covered by the applicant's proffer, but may fall within the conduct described in the marker. D1 never revealed this earlier conduct to the applicant and in any case the applicant is unable to engage with D1, as part of its compliance with the immunity policy. No documents in the applicant's or D1's possession or control evidence this earlier conduct; however, the ACCC identifies documents held by other parties and conducts examinations of their employees. These substantiate the earlier contraventions, and confirm the involvement of the applicant and D1 in this additional conduct.

2. Close to the conclusion of its investigation, the ACCC identifies to the applicant high-level facts pertinent to the earlier and broader conduct—which is outside the scope of the applicant's proffer—and asks the applicant if it wishes to make further admissions.

3. Alternatively, it may be that D1 discloses to the ACCC that other employees were also involved in the conduct. The ACCC in its 'sufficient information' identifies these individuals to the applicant and ask if they wish to extend their admissions and the scope of derivative immunity to then, [before] seeking to interview then. This gives risk to additional issues for the corporate applicant who has no sound basis on which to assess whether to extend derivative immunity or consider broader admissions based on what they have said or may say.

4. In its provision of 'sufficient information', the ACCC refers to the type of materials it has identified from other parties and the interview evidence from D1 and other unnamed individuals. However, there are no documents in the applicant's control or possession that provide the foundation for further admissions, and the applicant remains unable to engage with its employee.

5. Under the Policy, the applicant must make admissions of contravention to obtain conditional immunity. This will raise the following issues for the corporate applicant in these circumstances:

    (a) The applicant is aware D1 may have engaged in additional cartel conduct. It must decide whether to admit to the broader conduct on the basis of the ACCC's characterisation alone, or risk ACCC action being taken against it (with such action likely only being possible as a result of the applicant bringing the conduct to the ACCC's attention). This gives rise to procedural unfairness concerns.

    (b) The consequences of admitting to conduct, without a proper basis, may be mitigated to the extent that the cartel conduct relates to Australia only (i.e. where the applicant obtains immunity for that conduct), but is potentially significant in cases involving international conduct – where admissions in Australia may expose an applicant to overseas liabilities. In any case, other non-legal consequences may arise in Australia, such as reputational damage or being barred from bidding for future projects.

    (c) The ACCC's use of this process (along the lines of Draft Policy [60]) could act as a disincentive for businesses seeking immunity where there is a risk that an

applicant may not have all the facts (which is likely to be almost all cases) – because of the corresponding risk of the ACCC identifying further conduct and the applicant needing to choose between admitting to that conduct in the absence of supporting evidence or not making admissions and risking ACCC or CDPP action.

(d) If a business does make a decision to seek immunity, businesses will be incentivised to seek as broad as possible markers to guard against the risk of having conduct identified outside of the marker.

6. From a transparency and procedural fairness perspective, the most appropriate solution would be to share with the corporate applicant a copy of the transcript of D1's examination. As an alternative solution to this issue, it may be appropriate for the ACCC to provide key documents that support the ACCC's contentions in relation to the broader conduct (shared with appropriate confidentiality obligations) – or alternatively for the ACCC to accept conditional admissions from the applicant, which are made subject to the underlying facts provided by the ACCC being found to exist. This approach would provide the following solutions to the issue outlined above:

(a) Applicants will have an evidentiary basis from which to make further admissions. This may increase the likelihood of success in ACCC or CDPP actions and/or minimise the time and cost required to substantiate non-admitted conduct.

(b) Reduced risks of making unfounded admissions that lead to international liabilities, domestic business consequences or seeking overly-broad markers.

(c) Maintains attractiveness of immunity regime—and no punishment of 'well-intentioned' applicants who are simply unaware of broader conduct (and unable to become aware through immunity policy restraints on conduct, e.g. engaging with derivative immunity applicants).

Annexure B—Approaches across the EU, USA and UK

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Issue	EU	USA	UK
First accounts Does a cooperating party need to provide the Agency with copies of any interview notes, even if that means waiving privilege?	No	No	No. Under the CMA's guidance (OFT1495 - Applications for leniency and no-action in cartel cases),[12] it '*will not as a condition of leniency require waivers of legal professional privilege (LPP) over any relevant information, in either civil or criminal investigations'.*[13] The guidance explicitly notes that the CMA does not rule out inquiring as to whether a leniency applicant may be prepared to waive LPP over certain material during the course of a possible criminal cartel prosecution, but the guidance makes clear that any refusal to waive LPP will not have any adverse consequences for the leniency application and that granting such a waiver will not yield any additional leniency discount or any other advantage.
Concerted practices Are concerted practices breaches eligible for immunity?	Yes.	Generally no. The Law Council understands from the draft policy/FAQ that there is a distinction under Australian law between cartel conduct and concerted practices and that there is civil and criminal immunity	Yes. CMA guidance defines cartel activity for the purposes of the CMA's leniency policy for undertakings as '*agreements* ***and/or concerted practices*** *which infringe … the Chapter I prohibition and*

[12] See further, Competition and Markets Authority (UK) and Office of Fair Trading, Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process (Guidance, July 2013).
[13] Ibid, 33 [3.15].

		available for cartel conduct but not for concerted practices. In the US, only criminal conduct is eligible for immunity/leniency, and the DOJ only treats per se / hard core cartel conduct (and some monopoly conduct, e.g., attempts to collude) as criminal.	*involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing'* (emphasis added).[14]
Company legal counsel attendance at derivative immunity applicant interview Is external legal counsel for a corporate immunity applicant permitted to attend an Agency interview with a derivative immunity applicant?	Not applicable for the EU as there is no concept of derivative immunity in the EU. The European Commission would usually not conduct interviews of employees of the immunity applicant but rather rely on the corporate statements provided by the undertaking. In general, according to EU cartel procedure regulations, no third parties are allowed to attend interviews of witnesses. Representatives of the employer undertaking may still attend the interview but only in case the interviewee explicitly agrees to it.	Not applicable for the US as there is no concept of derivative immunity in the US. In any event, the DOJ would typically only allow outside counsel to attend interviews for clients they directly represent.	Not applicable for the UK as there is no concept of derivative immunity in the UK. In any event, the CMA would typically only allow outside counsel to attend interviews for clients they directly represent.
Company legal counsel attendance at employee witness interviews Is external legal counsel for a corporate immunity applicant permitted to attend an Agency interview with an	According to EU cartel procedure regulations, generally no third parties are allowed to attend interviews. Representatives of the undertaking may still attend the interview but only in case the interviewee explicitly agrees to it.	In theory, yes. It depends on the potential culpability of the company and the employee. If the employee and the company are asserting that they are NOT guilty, the company and employee may have a common interest such that external legal counsel could advise both the employee and the company and attend any DOJ interviews. However, to the extent the employee faces criminal liability, which is certainly possible in the US, the employee almost	In the Committee's experience the CMA generally does not allow external legal counsel for a company to attend a witness interview with an employee, both in respect of leniency applicants and parties who have not applied for leniency. Although external legal counsel may not be able to attend an interview they will normally be provided with a transcript of the interview. This will be produced by the CMA and is normally circulated

[14] 14 [2.2].

employee of the applicant company?		certainly would have his/her own counsel. In that case, company counsel likely would not attend any interviews with the DOJ. In short, there is no rule prohibiting company counsel from attending interviews with employees, but it depends on the circumstances.	several weeks (or sometimes months) after the interview.
Legal representatives Does the Agency generally permit Company legal counsel to represent individual employees?	Joint representation of a company and individuals is generally possible in Europe, but it will depend on the bar regulations / lawyers ethics codes of the relevant jurisdiction. For instance, in Germany bar rules would prevent lawyers from representing both the individual and the company, unless there is a clear common interest.	See above. Yes, but in certain circumstances, it would not be ethically appropriate (e.g., when the employee faces individual, criminal liability).	Generally speaking, it is best practice for individual employees to receive separate independent legal representation (which can be arranged and paid for by the company). The CMA's investigatory guidance notes that the CMA generally considers it inappropriate for a legal adviser only acting for the undertaking to be present at an interview. It states that in some circumstances the presence at interview of a legal adviser only acting for the business may prejudice the investigation (e.g. their presence may reduce the individual's incentive to be open and honest).