



**Criminal Bar Association Response to the Supplementary Consultation on OFT  
Guidance**

**(OFT803 supcon)**

1. The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. The CBA is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy of members of the CBA guarantee the delivery of justice in our courts.
2. The CBA welcomes the opportunity to comment on this important aspect of the OFT’s Draft Revised Guidance on Applications for leniency and no-action in cartel cases. As the Supplementary Consultation recognises, any undermining of the leniency incentives would plainly be contrary to the public interest in reducing the economic harm caused by cartels and damage the efficacy of the cartel enforcement regime as a whole.
3. The Supplementary Consultation proposes a further policy option that would not require LPP waivers as a condition of leniency. It further proposes the use in some circumstances of independent counsel to advise the OFT on the merits of LPP claims made by leniency applicants.

**Question 1:**

4. In our view, the OFT must in no circumstances require the production of privileged communications or documents as a condition of leniency, nor must it refuse to grant leniency because a leniency applicant has not produced information that genuinely attracts LPP. Waiving LPP should not be a prerequisite to a leniency applicant being viewed as cooperative. Any such requirement would erode the fundamental importance of legal professional privilege and potentially deter applications for leniency. In so submitting, we note that other major competition enforcement agencies, including the Anti-Trust Division of the US Department of Justice, do not require LPP waivers.
5. It is acknowledged that some leniency applicants may conclude that voluntary disclosure of privileged communications and/or documents is in their best interest. We see no difficulty in requests for material that genuinely attracts LPP being made, solely where it is sought to enable the OFT to comply with its duties of disclosure (as opposed to assisting in the furtherance of any other criminal prosecutions) provided that it is clear that any refusal is in no way detrimental to the leniency applicant.

**Question 2:**

6. The proposed introduction of the IC procedure does not deal with OFT concerns about compliance with a prosecutor's duties of disclosure in criminal proceedings – in the absence of voluntary disclosure by the leniency applicant, the OFT retains no power to compulsorily require the product of

legally privileged material. Rather the IC procedure addresses concerns expressed in the initial Consultation document about LPP claims. If concerns about such claims are genuinely held, then the involvement of independent counsel, unconnected with the OFT, will assist in the resolution of this problem. We are concerned, however, about the precise procedure to be adopted – those concerns are set out below.

**Question 3:**

7. We make the following observations about the proposed amendments set out from paragraph 6.3 of the supplementary consultation:
  - a. It is unclear why any reasonable observations by the leniency applicant as to the choice of counsel could not be taken into account by the OFT;
  - b. The “IC’s opinion to the OFT”, irrespective of its conclusions, must be careful not to circumvent any possible contrary finding by a judicial authority by revealing any part of the material over which LPP is claimed. To avoid any inadvertent revelation of LLP material in the body of the advice, it might be prudent for the leniency applicant to have sight of the advice in the first instance, so that any concerns of that nature can be raised with the IC prior to the advice being provided to the OFT;
  - c. Where the IC advises that the relevant information is not protected by LPP, that material must not be provided to the OFT by the IC;
  - d. The mechanism by which judicial oversight of this process is achieved is unclear. Is this a process that is triggered by a continued claim of LPP after an IC decision to the contrary? If so, can it be triggered by

either party? Is there a mechanism for such oversight during the investigation stage? Have the judiciary been consulted on the introduction of this quasi-appellate function? Is the determination made 'on the papers' or is it the subject of an ex parte hearing, with the leniency applicant and IC present, but the OFT absent? Who would bear the cost of any such hearing? What mechanism is there for appeal or judicial review of the Court's decision?