CMA's Consultation on leniency applications in the regulated sectors

(30 June 2017)

Response by Freshfields Bruckhaus Deringer LLP

Dated 28 July 2017

RESPONSE TO THE CMA'S CONSULTATION ON LENIENCY APPLICATIONS IN THE REGULATED SECTORS

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the CMA's consultation on 'Leniency applications in the regulated sectors' published on 30 June 2017 (the ***Consultation Document***).

1.2 Our comments are based on our substantial experience of representing clients in investigations by the CMA and the sector regulators under the Competition Act 1998 (***CA98***) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (***TFEU***), as well as competition and regulatory investigations by authorities across Europe, the US and Asia. Such investigations frequently involve leniency applications to multiple authorities, which require effective coordination and cooperation across the regimes.

1.3 The comments in this response do not purport to represent the views of our clients.

2. Question for consultees: 'Do you agree with the proposal that the CMA should act as a single port of call for all leniency applications in the regulated sectors? Please give reasons for your view. Please also provide any additional comments you may have on the draft information note.'

2.1 We agree with the proposed 'single queue system' for leniency applications. In our view, making an application for leniency to one single authority (the CMA) will help ensure certainty and fairness in the procedure. We have already experienced the benefits of this system in practice and we therefore welcome the CMA clarifying the procedure in the information note.

2.2 We also agree that the proposed system facilitates the CMA's role as the sole authority able to grant criminal immunity in relation to the cartel offence in the Enterprise Act 2002 (***EA02***).

2.3 However, we recommend that the draft information note should provide clarity in relation to the following issues:

(a) ***regulatory duties to disclose conduct to the Financial Conduct Authority (FCA):*** we understand that although the CMA will be the first port of call for all initial leniency applications under the CA98 or TFEU, this should not preclude FCA-regulated businesses from satisfying their duties to provide prompt notification of any suspected significant infringement of competition law under Principle 11 of the FCA's Principles for Businesses. In order to avoid any potential conflict between the two regimes, it would be helpful if the information note could confirm that the grant of a provisional marker by the CMA would not be jeopardised in circumstances where the conduct is reported simultaneously to the FCA under Principle 11;

(b) ***confidentiality of leniency information:*** it would also be helpful if the information note could confirm how confidentiality of leniency information is

protected when information is shared with a sector regulator. We suggest the information note confirms:

(i) that disclosure by the CMA and the subsequent use by the sector regulator (whether pursuant to its competition powers or its wider sector regulation or supervisory powers) of leniency information is strictly limited by the provisions of Part 9 EA02; and

(ii) the circumstances in which the CMA may disclose leniency information under a Part 9 'gateway' (e.g. to facilitate the exercise by the regulator of its functions under the CA98); whether waivers of confidentiality will be sought from the parties before such disclosure; and, in the absence of a waiver, whether parties will always be informed before leniency information is shared (in line with the CMA's guidance on transferring information to other UK agencies in 'Applications for leniency and no-action in cartel cases' (paragraph 7.30) and the Memoranda of Understanding between the CMA and the sector regulators (e.g. the MoU between the CMA and Ofgem, paragraphs 50-51)).

It may be helpful if the information note referred to the relevant provisions of the Memoranda of Understanding between the CMA and each of the sector regulators which deal with restrictions on disclosure of information, specifically where procedures have been agreed with each regulator with regard to disclosure of leniency information.

We consider that clear and consistent guidance on preserving the sanctity of leniency information by the CMA and sector regulators would encourage effective use of the system and facilitate cooperation between the parties and authorities. This is particularly important when information related to a leniency application may be used by a regulator in the exercise of its wider, non-concurrent competition powers and when the parties are subject to separate reporting obligations and confidentiality regimes which give rise to risks of disclosure of highly sensitive information.

2.4 We would be happy to discuss any of these issues in more detail if that might be helpful.

Freshfields Bruckhaus Deringer LLP

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