



CMA consultation
Leniency applications in the regulated sectors
Consultation document of 30 June 2017

1. Introduction

1.1 Herbert Smith Freehills LLP welcomes the opportunity to provide comments on the CMA's consultation document of 30 June 2017 on Leniency applications in the regulated sectors ("**Consultation Document**"). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

2. 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

2.1 We welcome the CMA's initiative to issue an information note which sets out the arrangements for the handling of leniency applications in the regulated sectors. To date the system has relied on informal arrangements between the CMA and the sector regulators, which operated on a case by case basis, and involved the operation of a single queue system under which leniency applicants only need to apply to one regulator in order to secure their place in the queue for leniency.

2.2 Putting the arrangement on a formal footing and publishing an information note setting out the arrangements for the handling of leniency applications in the regulated sector is a welcome move which will provide greater clarity for potential applicants and result in greater consistency.

2.3 The main change from the current informal arrangements which is being proposed in the information notice is the role for the CMA to act as a single port of call in the first instance for all leniency applicants. Currently businesses operating in the regulated sectors in the UK can apply for leniency either to the relevant sector regulator or the CMA. As the CMA is the only UK competition regulator who can grant immunity from criminal prosecution under the criminal cartel offence, this ensures that only one body needs to be approached at all times in order to secure either civil or criminal immunity and leniency.

2.4 We agree with the stated rationale that this approach will provide greater certainty for businesses, as it may not be clear at the time of the application whether or not conduct is already under investigation and by which authority.

2.5 The draft information note does not address the issue of interplay between leniency and other regulatory reporting requirements. As the information note specifically aims to address leniency applications in the regulated sectors, it would be helpful for it to refer to



other regulatory reporting requirements and their interplay with the leniency regime, for example clarifying that other reporting obligations will not be a substitute for a leniency application to the CMA. By way of example, since the amendment to the FCA's Supervision Manual, which expressly referred to the reporting duty under Principle 11 for competition law infringements, there has been considerable uncertainty as to how this requirement interacts with the CMA's leniency policy. With all leniency applications now to be made to the CMA further clarification on this becomes even more important. Guidance on sequencing – should companies apply for leniency first, then report under Principle 11 in order not to jeopardise a 'value added' leniency application? - would be very helpful.

- 2.6 We agree with the CMA's proposal to publish the information note on the CMA's website with a link to the note also published on the webpages of the sectoral regulators and the UKCN. We also recommend that the sector regulators should update any existing guidance on their concurrent competition powers and their procedures under these powers in order to ensure that these are in line with the CMA's information note.

3. **Additional comments on the draft information note**

- 3.1 The draft note provides that all businesses should in the first instance approach the CMA by calling the CMA's leniency number in order to secure their place in the leniency queue and goes on to describe both the processes where the application is made prior to case allocation and after a case has already been allocated under the Concurrency Regulations. It would also be helpful for the information note to flag that the CMA's leniency number can be used for prospective applications, with businesses approaching the CMA on a no names basis in order to explore whether there is an existing investigation and whether there is an existing applicant for leniency. Although the process is set out in the CMA's leniency guidance, to which the draft information note cross refers, this is the type of information businesses will find useful at the early stages when considering a leniency application. In the context of what will often be a stressful process given the importance of the decision combined with the time pressure involved, it will be helpful for businesses to have all options set out in the same information note.
- 3.2 As mentioned above (paragraph 2.5) we believe that it would be helpful for the information note to contain an extra section on the interplay between regulatory reporting obligations and leniency, with guidance on sequencing etc.

Herbert Smith Freehills LLP
27 July 2017