Hogan Lovells

LENIENCY APPLICATIONS IN THE REGULATED SECTORS

CONSULTATION DOCUMENT DATED 30 JUNE 2017

RESPONSE OF HOGAN LOVELLS INTERNATIONAL LLP

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INTRODUCTION

1. This document contains the response of Hogan Lovells International LLP to *Leniency applications in the regulated sectors – Consultation document* published by the Competition and Markets Authority ("**CMA**") on 30 June 2017 (the "**Consultation Document**") regarding the handling of leniency applications within regulated sectors amongst the full members of the UK Competition Network ("**UKCN**"). We welcome the opportunity to respond to the proposal set out in the Consultation Document.

2. In summary, we agree with the proposed change, and agree that it will provide clarity for leniency applicants as to the processes that should be followed. However, we note that certain practical points will have to be worked out to ensure that the system functions effectively, and we have made a number of observations in this regard in this response. In particular, the CMA will have to consider how the proposed change will affect entities regulated by the Financial Conduct Authority ("**FCA**"), which are subject to various reporting requirements.

3. We have not sought to address every practical point that should be considered if the proposal is to be implemented, but have rather focused our comments on points of key importance on which we believe further clarification will be required. We therefore do not repeat points made in the Consultation Document in this response.

4. If there is anything you would like us to elaborate on, please contact Christopher Hutton or Aniko Adam in the first instance. Their contact details are set out below.

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THE CMA AS A SINGLE PORT OF CALL

5. We agree with the proposal that the CMA should act as a single port of call for all leniency applications in the regulated sectors:

   (a) Promoting certainty

   Deciding whether or not to apply for leniency in any industry context is a complex decision. The current regime adds further, unnecessary, complexity for businesses within regulated sectors.

   Having the CMA act as a single port of call for all leniency applications would:

   (i) reduce the risk of inconsistency between the approaches adopted by members of the UKCN, ensuring a uniform and consistent approach, (particularly to the extent that the CMA gains experience in handling the leniency enquiries and applications from businesses in the regulated sectors);

   (ii) clarify the steps businesses in the regulated sectors should take in order to apply for leniency;

(iii) remove any concerns that applying for leniency to the CMA could risk harming the relationship between the regulated business and the relevant sectoral regulator.

(b) Criminal immunity

As the Consultation Document observes, any application for criminal immunity in relation to the cartel offence contained in the Enterprise Act 2002 should be made to the CMA.

It makes sense that the CMA should be the single port of call for all leniency applicants due to its exclusive competence to grant criminal immunity in relation to the cartel offence.

PRACTICAL CONSIDERATIONS

6. Although we support the proposal, we recommend that the CMA consider the following practical points when implementing the proposed change to ensure that the system functions effectively.

Lines of communication between the CMA and the concurrent regulators

7. As explained in paragraph 2.16 of the Consultation Document, on being approached by a leniency applicant and before granting a marker, the CMA will have to contact the concurrent regulators to check whether there is a pre-existing investigation in relation to a particular conduct. For this reason, the interaction between the CMA and sectoral regulators needs to work efficiently. The lines of communication between the CMA and the concurrent regulators should be clear and smooth, in order to ensure that leniency applicants are not left in the dark as to whether a marker is available for longer than is necessary.

8. In addition, paragraph 2.15 of the Consultation Document explains that, in the event that an enquiry or leniency application is made to a sectoral regulator, that regulator will immediately direct the applicant to the CMA. This redirection of the applicant to the CMA must also be sufficiently swift to reduce the chances of the applicant losing a marker simply as a result of approaching the wrong regulator.

The relationship between leniency and regulated entities' disclosure obligations

9. Regulated businesses are subject to various regulatory disclosure and reporting obligations. If a regulated entity applies for leniency, it must continue to meet these regulatory obligations alongside the requirements of the CMA's leniency regime. It is therefore important for the CMA to consider how the new change would fit with the pre-existing regulatory regimes.

10. In particular, we believe that that there should be clear mechanisms in place to ensure that FCA-regulated firms are not disadvantaged in the leniency process as a result of having complied with their reporting obligations under Principle 11 of the FCA Handbook and/or SUP[1] 15.3.32. The CMA should put in place a clear mechanism to ensure that compliance with Principle 11 and SUP 15.3.32 does not impact upon the availability of a Type A leniency marker.

[1] See FCA Supervision manual: https://www.handbook.fca.org.uk/handbook/SUP/1A/.

11. In essence, a potential problem results from the obligation under SUP 15.3.32 to report to the FCA "*as soon as*" the firm becomes aware that it "*may have*" committed a competition law infringement. This reporting obligation can, in some cases, arise before two key conditions of leniency have been met. Specifically, the threshold for making a report to the FCA may have been met before:

    (a) the firm has satisfied itself that it definitely has committed an infringement, and therefore can make the necessary admission required as a condition of leniency[2];

    (b) the firm is able to provide sufficient information for the CMA to take forward a credible investigation.[3]

12. If the FCA begins a competition investigation immediately after receipt of a SUP 15.3.32 report, this could lead to a Type A marker being refused when the applicant subsequently applies to the CMA for leniency.

13. Although the FCA has publicly stated[4] that the proposed change will not affect this reporting obligation, the proposed change provides an opportune time for the FCA and CMA to publish clear guidance on the relationship between the reporting and the leniency regimes, covering *inter alia* the following points:

    (a) The FCA's protocol for dealing with any report it might receive from a regulated entity under SUP 15.3.32, including whether or not the FCA informs the CMA of the fact of the report and/or its contents.

    (b) The protections in place to ensure that, by complying with its reporting obligations under Principle 11 and SUP 15.3.32, a firm does not reduce its chances of successfully obtaining a Type A marker. For example:

        (i) If the FCA (or CMA) immediately launches an antitrust investigation following a report under SUP 15.3.32, that should not automatically preclude the granting of Type A leniency to the reporting firm.

        (ii) Even if Type A leniency is not available, as a result of its compliance with its regulatory obligations, a firm may have less "new" information to offer (thereby adding less "value" to the investigation) for the purposes of Type B or C leniency. In these circumstances, the discount available to the applicant should reflect the value added to the investigation by the reporting firm.

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2 See paragraph 2.7 of *Application for leniency and no-action in cartel cases* (OFT 1495, July 2013).

3 Ibid, paragraph 5.20.

4 See FCA statement titled "How we use our competition law powers", updated 13/07/2017: https://www.fca.org.uk/about/promoting-competition/powers.