

INFORMATION NOTE

ARRANGEMENTS FOR THE HANDLING OF LENIENCY APPLICATIONS IN THE REGULATED SECTORS

Summary

1. This note provides businesses with information on the arrangements for the handling of leniency applications within the regulated sectors amongst the full members of the UK Competition Network (UKCN), so that there is clarity as to the process that should be followed, and to ensure the operation of a single queue system.
2. This note is published by the Competition and Markets Authority (CMA) and has been endorsed by the sectoral regulators that are the other full members of the UKCN.¹
3. For the avoidance of doubt, the arrangements described in this information note apply **only** in respect of leniency applications in the UK, and do not reduce the need for applicants to apply for leniency to non-UK authorities (such as the European Commission and other National Competition Authorities) in order to obtain protection under the applicable leniency regimes of those authorities.
4. Case allocation is not covered by this information note. Case allocation is covered instead by the Concurrency Regulations,² the concurrency guidance³ and the memorandums of understanding (MoUs) between the CMA and each of the sectoral regulators.
5. Any disclosure of leniency information under the leniency concurrency arrangements set out in this information note is subject to the provisions of Part 9 of the Enterprise Act 2002. Information sharing arrangements are set

¹ The UK Competition Network (UKCN) is an alliance of the Competition and Markets Authority (CMA) with all the UK regulators that have a specific role to support and enable competition within their sectors. The network aims to encourage stronger competition across the economy for the benefit of consumers and to prevent anti-competitive behaviour in the regulated industries. The sectoral regulators with concurrent competition powers that are full members of the UKCN are the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Utility Regulator (Northern Ireland), Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR).

² The Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536).

³ CMA10 ([Regulated Industries: Guidance on concurrent application of competition law to regulated industries](#)).

out in the relevant paragraphs of the MoUs between the CMA and each of the sectoral regulators.⁴

6. **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. The CMA's leniency number is 020 3738 6833.**
7. The CMA's leniency number can be used for prospective leniency applications. That is, businesses may approach the CMA on a 'no names' basis in order to explore whether there is an existing investigation or an existing applicant for leniency.⁵
8. In the event that any initial leniency enquiries or leniency applications are made to a sectoral regulator, the sectoral regulator will immediately direct the person making the leniency enquiry or leniency application to the CMA. The applicant's place in the leniency queue is always determined by the order in which any business applied **to the CMA** for leniency.
9. From the earliest stage of any application, the CMA and sectoral regulators will work together closely so that leniency applications within the regulated sectors are dealt with swiftly and efficiently, and in accordance with the principles outlined below.
10. In all cases, decisions about the ultimate grant of leniency will be made by the authority to which the case has been allocated in accordance with the Concurrency Regulations.⁶
11. The approach of the CMA and the sectoral regulators is designed to ensure that:
 - the process for granting leniency is fair, transparent, certain and consistent;

⁴ The relevant paragraphs provide: '...if the CMA or [the sectoral regulator] consider it necessary or appropriate to pass leniency information to each other (or to another UK authority with concurrent powers), the transmitting authority will inform the applicant or its legal adviser first.' 'In addition..., where [the sectoral regulator] or the CMA receives leniency information from the other (or from another UK authority with concurrent powers) for the purpose of applying the Competition Prohibitions or, in the case of the CMA, the cartel offence under section 188 of the Enterprise Act 2002, that information will not be used for any other purpose. This restriction on use also applies to any information obtained by the receiving authority as a result of investigative measures relating to the Competition Prohibitions or the cartel offence following the receipt of leniency information from the other authority. This does not affect the use that may be made by the CMA or [the sectoral regulator] of information received from other sources, or if the leniency applicant's consent is obtained. ...' The MoU with the FCA further provides that when leniency information is shared with the FCA, the FCA may also contact the applicant to let it know it is aware of the leniency application and remind the applicant of any obligations it may have to notify relevant conduct, under Principle 11 of the FCA's Principles for Business or Principle 4 of the FCA's Statement of Principle for Approved Persons. The MoU with the PSR further provides that when leniency information is shared with the PSR, the PSR may also contact the applicant to remind it of its obligations under General Direction 1.

⁵ For further detail, see [Leniency and no-action applications in cartel cases: OFT1495](#), Chapter 3.

⁶ Competition Act 1998 (Concurrency) Regulations 2014, SI 2014/536

- no more than one business is granted Type A and Type B leniency in any one case;
- the incentives for applying for leniency are not undermined; and
- the CMA can properly retain control over the grant of criminal immunity and the management of investigations in relation to the cartel offence.

Background

12. The sectoral regulators have concurrent powers with the CMA to enforce the competition prohibitions⁷ in their respective sectors and, where they find that an infringement has taken place, to impose penalties on the businesses concerned.
13. When setting the level of a penalty, the CMA and the sectoral regulators are required to have regard to the [Guidance as to the appropriate amount of a penalty](#) (OFT423).⁸
14. In order to help detect and take action against cartels, OFT423 includes provision for the grant of immunity from, or a reduction in, financial penalties for businesses that report their participation in cartel activity and satisfy certain conditions.
15. The approach taken by the CMA in handling applications for leniency for businesses is set out in more detail in the [Applications for leniency and no-action in cartel cases](#) (OFT1495).
16. Three different types of leniency are available, subject to specified conditions being met:
 - **Type A (first-in and no pre-existing investigation)** – guaranteed corporate immunity from financial penalties, automatic blanket immunity from criminal prosecution for individual employees and officers, and guaranteed protection from competition disqualification orders (CDOs).
 - **Type B (first-in where there is a pre-existing investigation but a Statement of Objections has not yet been issued)** – discretionary corporate immunity from financial penalties or reductions of up to 100%, discretionary immunity from criminal prosecution for employees or officers, and CDO protection if immunity/leniency reduction is granted.

⁷ As set out in Chapter I and Chapter II of the Competition Act 1998 (CA98) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

⁸ [Section 38\(8\)](#) CA98.

- **Type C (second or later applicant or coercer, and a Statement of Objections has not yet been issued)** – discretionary reduction in financial penalty of up to 50%, discretionary immunity from criminal prosecution for specific individuals, and CDO protection if a leniency reduction is granted.

The single queue system

17. The CMA and sectoral regulators operate a 'single queue system' for the handling of leniency applications within the regulated sectors.
18. Under this system, applicants need only make an application to the CMA and, provided the conditions for leniency are met, that application will secure the applicant's place in the leniency queue with all authorities.
19. This approach ensures that the applicant's place in the leniency queue is determined by the order in which any business applied for leniency. This, in turn:
 - makes it clear that the granting of more than one type A or type B marker is precluded, as both require an applicant to be 'first-in';
 - maximises the incentives to come in for leniency early: since it is clear that there can only be one type A or type B marker in respect of the same conduct, there is **no 'second chance'** for businesses which have waited to see how their fellow cartelists will act. This promotes fairness more generally: there is no reason why, as a point of principle, an applicant in a regulated sector should have an additional opportunity to obtain a type A or type B marker as compared with those in unregulated sectors;
 - allows for certainty around an applicant's place in the queue and the type of marker granted. In particular, there is no risk that an applicant will become (significantly) worse off because the case has been transferred to another authority (with which the applicant may not have secured first place in the queue). This, in turn, deters any 'gaming' of the system, for example, by parties:
 - waiting to see how their fellow cartelists will act; or
 - lobbying for their case to be taken forward by a particular authority;
 - reduces the burden on businesses, which only have to make one leniency application;
 - provides certainty for businesses, which need not concern themselves with whether they have submitted applications to all the relevant authorities;

- avoids a duplication of work by the authorities, and within the competition regime as a whole.

The single queue system in practice

20. It may not be clear at the time a leniency application is made whether any particular conduct is under investigation (ie whether there is a pre-existing investigation) and by which authority. Therefore, in order to provide certainty for businesses, all initial leniency enquiries and applications, whether for types A, B or C leniency, should *begin* with the CMA.
21. Put simply, this means that **all businesses should approach the CMA for leniency in the first instance in order to secure their place in the leniency queue**. From that point onwards, the CMA and any relevant sectoral regulators will work together closely.
22. In the event that any initial leniency enquiries or leniency applications are made to a sectoral regulator, the sectoral regulator will immediately direct the person making the leniency enquiry or leniency application to the CMA. This approach ensures that the applicant's place in the leniency queue is determined by the order in which any business applied **to the CMA** for leniency.
23. However, given that CA98 cases may be investigated by either the CMA or the sectoral regulators, it would be neither sensible nor workable for the CMA to assess whether the conditions for leniency are met going forward, in a case for which it is no longer responsible.
24. Therefore, prior to case allocation under the Concurrency Regulations, the CMA will be responsible for the following, in consultation with all other relevant sectoral regulators:
 - checking the availability of leniency and the grant of any provisional marker;
 - the confirmation of any provisional marker (ie the grant of a confirmed marker);
 - determining the scope of any confirmed marker; and
 - where appropriate, the withdrawal of any marker.
25. Once a case has been allocated under the Concurrency Regulations:

- all initial leniency enquiries should still be made to the CMA.⁹ In the event that any initial leniency enquiries or leniency applications are made to a sectoral regulator, the sectoral regulator will immediately direct the person making the leniency enquiry or leniency application to the CMA. This approach ensures that the applicant's place in the leniency queue is determined by the order in which any business applied **to the CMA** for leniency;
- the CMA will be responsible for the grant of any provisional marker, before handing the matter over to the authority to which the case has been allocated (if that is an authority other than the CMA);
- the authority to which the case has been allocated will be responsible for:
 - the confirmation of any provisional marker (ie the grant of a confirmed marker);
 - determining the scope of any confirmed marker;
 - where appropriate, the withdrawal of any marker; and
 - the final grant or withdrawal of leniency.

Criminal immunity

26. For the avoidance of doubt, the CMA will at all times remain responsible for the grant of criminal immunity, including where that criminal immunity arises 'automatically' in connection with a grant of type A immunity or is discretionary and arises in connection with a type B or type C leniency application, as described in OFT1495.
27. This means that all enquiries regarding criminal immunity and any application for criminal immunity should be **made to the CMA**.
28. In the event that such an enquiry or application is made to a sectoral regulator, the sectoral regulator will immediately direct the person making the leniency application or leniency enquiry to the CMA.

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⁹ Where an existing leniency applicant is providing supplementary evidence after a case has been allocated, it should consider whether this might amount to a new leniency application (eg because it relates to a new product, party or time period). If so, the applicant will need to apply to the CMA to secure its place in the queue.