Response to the CMA's consultation document regarding leniency applications in the regulated sectors

Linklaters welcomes the opportunity to comment on the Competition and Market Authority's ("**CMA**") proposal to provide guidance on the procedure for handling leniency applications within the regulated sectors. We broadly agree with the approach proposed by the CMA and find the Draft Information Notice set out in Appendix A of the Consultation Document ("**Draft Notice**") to be clear and helpful.

We have three comments regarding the proposal.

1 CMA as the first point of contact for all leniency applicants

We agree that it is appropriate for the CMA to act as a single point of call for all leniency applications. We consider that this will achieve the aims set out in paragraph 2.1 of the Consultation Document, in particular of allowing the CMA to retain control and exclusive jurisdiction over the grant of criminal immunity. We expect the arrangements to result in greater certainty around the leniency process and in procedural efficiencies for both the CMA, sector regulators and business in the majority of cases.

There will be some cases where it may not be most efficient for the CMA to be the first point of contact for a leniency applicant. An example is where a sector regulator is already considering the regulatory implications of certain forms of conduct which may also raise competition concerns and the prior regulatory inquiry (e.g. self-reporting under Principle 11 of the FCA handbook) triggers a decision by the regulated company to seek leniency from the CMA for the same conduct.

We do not consider that this situation would justify a different approach to that proposed by the CMA. However, we consider that it will be important for the CMA and sector regulators to identify these cases as early as possible and to involve the relevant sector regulator in the leniency process (whether informally by inviting them to observe or participate in any discussions with the CMA on leniency or formally by allocating the case as quickly as possible). This would also ensure procedural efficiency.

2 Application to all regulators with concurrent powers

The proposals apply to leniency applications within regulated sectors amongst the full members of the UK Competition Network ("**UKCN**").[1] This excludes sector regulators who are not full members of the UKCN (e.g. NHS Improvement).

We suggest that the procedure should apply to all leniency applications including those where a sector regulator has concurrent competition powers but is not a full member of the UKCN. As a matter of principle, we do not see a reason for treating undertakings differently because their sector regulator is not part of the UKCN. There is a risk that such undertakings could be disadvantaged due to a lack of certainty around the effect of any leniency application made to the CMA or may incur additional costs in making leniency applications to both the CMA and their sector regulator.

[1] Paragraph 1, Draft Notice

3 Formal consultation with the CMA in certain circumstances

Under the procedure set out in paragraph 21 of the Draft Notice, prior to case allocation the CMA will be responsible for making certain decisions on leniency including granting confirmed markers and determining the scope of any confirmed marker. Once the case has been allocated under the Concurrency Regulations,[2] paragraph 22 of the Draft Notice indicates that the relevant sector regulator will be responsible for certain decisions including determining the scope of any marker (to the extent not determined by the CMA) and withdrawal of any marker.

To guarantee procedural fairness, where a sector regulator may make a decision that could vary an earlier decision of the CMA, we would suggest that there is a stage of formal consultation with the CMA prior to any decision being adopted.

By way of example, a leniency applicant may discuss with the CMA the appropriate scope of its internal investigation when making a leniency application and the CMA may indicate that, if the undertaking undertakes the internal investigation as described, this will amount to full and continuous cooperation. If a sector regulator were later to find that additional internal investigations or evidence gathering should have been undertaken, it should not be open to that regulator to withdraw or vary the marker without first consulting with the CMA to ensure that all relevant facts are taken into account.

Whilst we understand that the CMA and sectoral regulators will work together closely in all cases, we consider a formal consultation step would provide an appropriate procedural safeguard where a sector regulator is minded to vary a decision of the CMA.

4 Conclusion

Overall, Linklaters welcomes the CMA's intention to clarify the leniency process in the regulated sectors, in light of the concurrency regime in the UK, and considers that this will result in greater certainty and efficiency for both the authorities and the parties involved.

We are available to discuss this submission further should it be useful to the CMA.

Linklaters LLP, July 2017

[2] CMA (2014), Regulated industries: Guidance on the concurrent application of competition law to regulated industries (CMA 10).