Non-confidential

Norton Rose Fulbright LLP's response to the Competition and Markets Authority consultation on "Leniency applications in the regulated sectors"

1 Introduction

1.1 Norton Rose Fulbright LLP welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) consultation on "Leniency applications in the regulated sectors" published on 30 June 2017.

1.2 Overall, we support the CMA's proposal that it should act as a single port of call for all leniency applications in the regulated sectors. We consider this to be a pragmatic approach which is compatible with the framework of the existing concurrency regime. In particular, it allows for necessary certainty around an applicant's place in the queue and the type of marker that will be granted.

1.3 Furthermore, given there is no existing guidance in relation to the handling of leniency applications in the regulated sectors, the draft information note provides welcome clarity for leniency applicants as to the specific arrangements that apply.

1.4 We note and support the stated intent in paragraph 2.3 of the consultation paper that the arrangements have been designed to ensure that leniency applications are dealt with swiftly and efficiently.

2 Timing and case allocation

2.1 A key issue with timing is of course however the length of time it takes for the case allocation process itself to be resolved. We note that paragraphs 21 and 22 of the draft information note outline the differences in approach to assessing leniency that will apply depending on whether a case has or has not already been allocated under the Concurrency Regulations. This is helpful.

2.2 There are of course no timelines set out in paragraph 4 of the Concurrency Regulations for determining who is to exercise Part I functions in respect of any particular case or in the associated guidance. Some assistance is offered by the disputes provisions in paragraph 5 of the Regulations which states that such provisions only apply if parties are unable to reach agreement under paragraph 4(2) within a "reasonable time". No guidance is however offered as to what constitutes a reasonable time and this process is not transparent to third parties. So, while businesses may take comfort from the fact that there is a single port of call for leniency applicants, a concern nonetheless remains regarding the interaction between the case allocation and leniency processes.

2.3 One specific concern is that any sector regulator to whom a case might be but has not yet been allocated is not privy to the details of the leniency process. From the leniency applicant's perspective, this could potentially be prejudicial should the relevant sector regulator ultimately take over the case. We note that this concern is partially addressed in paragraph 21 of the information note through the proviso that the CMA must act *"in consultation with all other*

relevant sectoral regulators" when assessing leniency applications prior to case allocation.

2.4 It would however be helpful if the CMA could further expand upon this statement so as to elaborate on the degree of involvement as between the CMA and the other regulators that is envisaged by this provision. This should include the extent to which any such communications might be transparent to the leniency applicant which would wish to understand what information had been shared.

2.5 The specific concern about the interaction and timing of the leniency and case allocation process is not however addressed by the information note, and it would be helpful if the CMA could provide further guidance and/or comfort in this regard. In particular, it will be critical to ensure that the leniency assessment process does not in any way prejudice or infect the case allocation process. For example, if CMA resources are focused on assessing leniency applications rather than case allocation, one might perceive of there being a greater likelihood of the CMA assuming ultimate responsibility for an investigation in the event that it had already confirmed multiple markers on a particular case because of its degree of familiarity of the case, even if the case was confined to a specific sector. This might mean fewer cases being allocated to the sector regulators, potentially undermining the concurrent regime. It will be important therefore that the case allocation process not be delayed by any ongoing leniency assessment.

3 Criminal immunity

3.1 The CMA will of course remain responsible for the grant of criminal immunity under the new single queue system. The logical conclusion is that any cases which have both a criminal and civil element will be determined by the CMA and not transferred to a sectoral regulator. Yet this proposition is not to be found within the information note. It would be beneficial if the CMA could confirm whether this is its working assumption. If so, the CMA should also address the position that will apply in circumstances where an application for criminal immunity is made at a later stage i.e. once a civil investigation has already commenced by a sector regulator. For example, would the CMA assess this aspect of the case separately or would the case ultimately be transferred back to the CMA for review? It would be helpful to have clarity from the CMA on the expected process and timing.

4 Conclusion

4.1 We would be happy to participate in any further consultation or engagement on this subject and are available to provide additional information in relation to these submissions, should the CMA find it helpful.

Mark Simpson (Partner) / Susanna Rogers (Of Counsel)
Norton Rose Fulbright LLP
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