Leniency applications in the regulated sectors

Consultation response

3 November 2017

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1. Introduction

1.1 On 30 June 2017, the Competition and Markets Authority (CMA) launched a consultation on proposals for the publication of an information note describing the handling of leniency applications within regulated sectors amongst the full members of the UK Competition Network (UKCN).[1] The CMA has not previously published any specific guidance on this topic. The aim of the information note is therefore to provide clarity for businesses and individuals as to the arrangements for the handling of leniency applications in the context of the competition concurrency regime, as between the CMA and the sectoral regulators who are full members of the UKCN (the 'leniency concurrency arrangements').

1.2 The information note broadly reflects the arrangements that have been in place to date, which have been operated on a case-by-case basis and which involve the operation of a 'single queue' system.[2] However, as part of its consultation, the CMA proposed a key new element in these arrangements, namely that **the CMA should be the first point of contact for all leniency applicants** in the regulated sectors.

Consultation question for consideration

1.3 The consultation document set out the following question for consideration:

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. Please also provide any additional comments you may have on the draft information note.

1.4 In the next section, we summarise the main points raised in relation to this question and our response.

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[1] The UKCN is an alliance of the 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] Under the 'single queue' system, applicants need apply for leniency to only one authority and, provided the conditions for leniency are met, that application will secure the applicant's place in the leniency queue, irrespective of which authority ultimately takes forward enforcement action. It should be noted, however, that the single queue system described in this consultation response applies only in respect of leniency applications in the UK, and does 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.

1.5 This consultation response and the final version of the information note are endorsed by the sectoral regulators that have concurrent competition powers and are full members of the UKCN.

2. Issues raised by the consultation and our response

2.1 The CMA has carefully considered the submissions made in response to the consultation and would like to thank those stakeholders who made a submission.

2.2 Respondents welcomed the CMA's proposals, and in particular the initiative to publish an information note setting out the arrangements for handling leniency applications in the regulated sectors.

2.3 The consultation responses were valuable in identifying specific areas where the information note could provide additional clarification in relation to those arrangements, and this document highlights the amendments made in this respect. Where necessary, this document also explains our proposals further and highlights other relevant guidance.

CMA as 'single port of call' for leniency applications in regulated sectors and the publication of an information note

2.4 All of the responses supported the proposal that the CMA should act as a single port of call for leniency applications in the regulated sectors and publish an information note addressing the arrangements for handling leniency applications in the regulated sectors.

2.5 Consistent with the reasons put forward in the consultation document, respondents cited the following key benefits:

- greater clarity for businesses as to the processes involved, such that leniency applicants are aware of the specific arrangements and procedures that apply in the relevant circumstances;
- greater certainty and predictability (both as to the authority to which leniency applications should be directed and as to the applicant's place in the queue and the type of marker granted), which helps to ensure fairness in the procedure;
- a reduction in the burden on businesses, as they will have to make only one leniency application in respect of any particular conduct; and
- a reduction in the risk of inconsistency in decision-making between the approaches adopted by the CMA and the sectoral regulators.

2.6 Several submissions noted that, as the CMA is the only authority able to grant immunity for the criminal cartel offence, it is appropriate for the CMA to act as

the single authority to which leniency applications may be made, as such applications will cover both civil liability under the Competition Act 1998 ('CA98') and criminal liability under the Enterprise Act 2002 ('EA02').

2.7 One submission stated that it will be important for the CMA and sectoral regulators to identify as early as possible those cases where a sectoral regulator is already considering the regulatory implications of certain conduct, and the prior regulatory inquiry triggers a decision by the regulated company to seek leniency from the CMA for the same conduct. The respondent stated that early identification of such cases will ensure that the relevant sectoral regulator can be involved in the leniency process as soon as possible, and will help to ensure procedural efficiency.

CMA response

2.8 The CMA is of the view that the information note will provide certainty, clarity, fairness and efficiency for businesses, and welcomes the support of respondents as regards this initiative.

2.9 The CMA agrees that it is important to identify cases where a sectoral regulator is already considering the regulatory implications of certain forms of conduct as early as possible. Under the leniency concurrency arrangements, the CMA will continue the current approach of consulting with the sectoral regulators at the earliest possible stage when checking the availability of leniency and granting any provisional marker.

Additional comments on the draft information note

2.10 A number of respondents made general comments in relation to the draft information note, and included suggestions as to how it might provide further guidance and clarification. These comments and suggestions are considered below.

Obtaining a place in the leniency queue

2.11 It was proposed in the CMA's consultation and draft information note that, where an initial leniency application is made to a sectoral regulator, the sectoral regulator will immediately direct that person to the CMA.

2.12 Respondents emphasised that the redirection of an applicant to the CMA must be swift and efficient.

2.13 One respondent noted the potential for possible confusion or dispute over a situation in which applicant A first contacts a sectoral regulator, and applicant

B subsequently approaches the CMA, but before applicant A is able to do so (having been 'immediately directed' by the sectoral regulator). In order to address this concern, the respondent stated that it would be helpful to add some additional wording to the information note, in order to clarify that an applicant's place in the leniency queue is determined by the order in which any business applied '*to the CMA*' for leniency.

CMA response

2.14 A key tenet of the leniency concurrency arrangements is that the CMA will act as a single port of call for leniency applicants, with applicants approaching the CMA for leniency in the first instance in order to secure their place in the queue.

2.15 The CMA and the sectoral regulators recognise that, in order to ensure that the envisaged system works effectively and fairly, the redirection of applicants to the CMA must be swift and efficient; and have put processes in place in order to ensure that this will be the case, building on existing channels of communication between the CMA and sectoral regulators.

2.16 In order to provide maximum clarity, and to avoid any potential confusion or dispute, the CMA agrees that it would be helpful for the information note to state explicitly that an applicant's place in the queue is determined by the order in which any business applied 'to the CMA'. The CMA has amended the information note accordingly.

Risk of delays

2.17 A number of respondents noted the need for the CMA and the sectoral regulators to minimise any delays that may result from any consultation as regards the availability of leniency and the grant of any provisional marker, highlighting in particular the importance of having efficient communication channels in place to prevent bottlenecks from developing.

2.18 One respondent further observed:

> The CMA in its guidance on Applications for leniency and no-action in cartel cases ('the Leniency Guidance'[3]) has committed that in the great majority of cases it '…will revert to the named contact to confirm whether or not Type A immunity is in principle

[3] *Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and processes* (OFT1495) (July 2013).

available… within one to two working days'. We believe that this should continue to be the goal.

The respondent suggested that the CMA's leniency guidance should be updated to ensure that a marker (if available) is granted as of the day and time when the first call inquiring about the availability Type A immunity has been placed with the CMA.

CMA response

2.19 The CMA and sectoral regulators understand the importance of checking the availability of leniency, and granting any provisional marker, quickly and efficiently.

2.20 The leniency concurrency arrangements broadly reflect the arrangements that have been in place to date, and the CMA and the sectoral regulators will continue to cooperate closely, building on existing channels of communication between the CMA and sectoral regulators, in order to ensure the successful operation of the arrangements going forward.

2.21 In accordance with the leniency guidance, it remains the CMA's goal to revert to the named contact to confirm whether or not Type A immunity is in principle available within one to two working days.

2.22 The CMA notes the suggestion regarding the date and time at which the marker is deemed to have been granted. The amendment of the CMA's leniency guidance is outside the scope of this consultation. However, in general, the CMA is able to provide comfort to prospective applicants that their place in the leniency queue will be preserved while the CMA assesses whether Type A immunity is in principle available.

Subsequent approaches to the sectoral regulators

2.23 One respondent suggested that the information note should make it clear that, once a case has been allocated, all subsequent contacts in relation to a party's leniency application should be with the authority that is in charge of the investigation, including where the party wishes to provide information to supplement its original leniency application.

CMA response

2.24 The CMA has considered this issue carefully, but does not consider that it would be appropriate to amend the information note in this way.

2.25 The risk with the suggested amendment is that a party may wish to supplement its original leniency application with information that in fact amounts to a *new* leniency application, requiring the grant of a new marker (for example, because the information relates to a different time period, product, party or conduct from that already reported).

2.26 In those circumstances, as with any other 'initial' leniency application, under the leniency concurrency arrangements, the party should make any new leniency application to the CMA in order to secure its place in the queue. By first going to a sectoral regulator, the party may lose its place in the queue in respect of that conduct.

2.27 In any event, an applicant can never be worse off by approaching the CMA in the first instance. If the supplementary evidence provided in fact amounts to new information within the scope of an existing case, the CMA will simply re-direct the applicant to the relevant regulator.

The CMA's leniency number

2.28 One respondent suggested that it would be helpful for the information note to flag that the CMA's leniency number can be used for prospective leniency applications, with businesses approaching the CMA on a 'no names' basis in order to explore whether there is an existing investigation or an existing applicant for leniency.

CMA response

2.29 The CMA agrees that it would be helpful to highlight the possibility of making a 'no names' approach to the CMA, and has accordingly supplemented the part of the information note which sets out the CMA's leniency number with an explanation of this.

2.30 The CMA's leniency guidance contains further detail for approaching the CMA on a 'no names' basis.[4] The CMA does not consider it would be appropriate to repeat this information in the information note, which is simply intended to provide information and clarity on the way in which the leniency concurrency arrangements work.

[4] OFT 1495, Chapter 3.

Application to all regulators with concurrent powers

2.31 One respondent suggested that the arrangements for leniency applications in the regulated sectors should apply to all leniency applications, including those where a sectoral regulator has concurrent competition powers but is not a full member of the UKCN.

2.32 The respondent stated that there is no reason why undertakings should be treated differently because their sectoral regulator is not a member of the UKCN, and that 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 the CMA and their sectoral regulator.

CMA response

2.33 At this stage, the new leniency concurrency arrangements set out in the information note will apply only in relation to the regulated sectors of the full members of the UKCN. This is because the full members of the UKCN operate under slightly different arrangements from the ones that apply to NHS Improvement. For example, the provisions for the sharing of information under the memorandum of understanding (MoU) between the CMA and NHS Improvement are tailored to the health care sector.

Formal consultation with the CMA in certain circumstances

2.34 One respondent stated that, once a case has been allocated to a sectoral regulator under the Concurrency Regulations,[5] where the sectoral regulator may make a decision that could vary an earlier decision of the CMA (for example, if the sectoral regulator wishes to withdraw, or vary the scope of, a marker granted by the CMA), there should be a stage of formal consultation with the CMA prior to any decision being adopted, in order to ensure that all relevant facts are taken into account.

CMA response

2.35 The CMA notes that the CMA and sectoral regulators are committed to keeping each other informed of any developments relating to an application for leniency for which they are responsible, including in relation to any proposed withdrawal or variation in the scope of a marker.

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[5] Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536) (the 'Concurrency Regulations').

2.36 The CMA also notes that the MoUs between the CMA and each of the sectoral regulators that are full members of the UKCN provide further safeguards as regards the treatment of leniency information. For example, the MoUs provide that where the submission of leniency information to either the CMA or the sectoral regulator

> affords or might, under certain circumstances, have afforded the applicant, its subsidiaries, or its employees protection from sanctions (including a reduction in penalties) under the leniency programme operated by that authority, the passing of that information to the other authority shall not result in that other authority affording the applicant any lesser protection.

2.37 The CMA considers that such safeguards within the MoUs, combined with informal consultations between the relevant regulators, are sufficient to provide prospective leniency applicants with certainty as to their position without the need to provide for a formal consultation process. Given this, the CMA does not consider that it is necessary or appropriate to include further detail on this issue in the information note.

Timing and case allocation

2.38 One respondent raised a number of issues around the timing and interaction of the leniency and case allocation processes. The respondent suggested that the CMA should expand further on these issues in the information note, including in relation to the sharing of information with sectoral regulators to whom a case might be, but has not yet been, allocated and the allocation of cases which involve both a criminal and civil element (querying the extent to which such cases would be allocated to sectoral regulators).

CMA response

2.39 The CMA recognises that there is an important interaction between leniency and case allocation. However, the CMA does not consider it necessary or appropriate to cover these issues within the information note, which is concerned with the handling of leniency applications in the regulated sectors. The processes for allocating cases and for sharing information with sectoral regulators which have concurrent jurisdiction to investigate cases are covered instead by the Concurrency Regulations, the CMA's concurrency guidance[6] and the MoUs between the CMA and each of the sectoral regulators. The

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[6] CMA, Regulated industries: Guidance on the concurrent application of competition law to regulated industries, CMA10, March 2014.

CMA has therefore amended the information note to make it clear that case allocation is not covered by the information note and to refer to the various other documents identified above that contain the relevant provisions on case allocation.

Confidentiality of leniency information

2.40 One respondent stated that it would be helpful if the information note could confirm how the confidentiality of leniency information will be protected when shared with a sectoral regulator.

CMA response

2.41 The CMA and the sectoral regulators recognise the importance of keeping leniency information confidential and agree that it would be helpful for the information note to include references to the protections afforded to leniency information within the competition regime (for example, contained within Part 9 of the EA02 and the MoUs between the CMA and each of the sectoral regulators). The CMA has amended the information note accordingly.

Updates to regulators' existing guidance

2.42 It was suggested that the sectoral regulators should update any existing guidance on their concurrent powers and procedures in order to ensure that these are in line with the information note.

CMA response

2.43 The sectoral regulators are each currently considering whether their existing guidance requires updating in line with the arrangements for the handling of leniency applications in the regulated sectors. Some sectoral regulators will amend their guidance while others consider that their guidance does not need amending (eg because their guidance already indicates that the CMA is to be the first port of contact for leniency) and some are considering whether there are other means for drawing attention to the arrangements, eg by amending their websites.

FCA's Principle 11

2.44 Three respondents stated that the information note should provide some clarity and guidance in relation to the interplay between leniency and the

regulatory reporting obligations under Principle 11[7] and SUP 15.3.32 of the FCA Handbook.[8]

2.45 Respondents stated 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 regulatory reporting obligations. That is, compliance with Principle 11 and SUP 15.3.32 of the FCA Handbook should not impact upon the availability of a Type A leniency marker or jeopardise a 'value added' leniency application.

2.46 It was suggested that the information note should contain guidance on the relationship between leniency and other regulatory reporting obligations, for example, clarifying that regulatory reporting obligations are not a substitute for a leniency application to the CMA, and providing guidance on sequencing (for example, whether companies should apply for leniency first, and then report under their regulatory obligations).

CMA response

2.47 Principle 11 and SUP 15.3.32 of the FCA Handbook impose regulatory obligations that are outside the scope of the information note, which is intended to cover the approach of the CMA and sectoral regulators to handling leniency applications within the regulated sectors. Nothing has changed with regard to the relationship between the regulatory reporting obligations under Principle 11 and leniency and the FCA has provided guidance on that relationship in PS15/18.[9]

2.48 With regard to the specific concerns raised regarding the sequencing of applications, the CMA and FCA do not think that the Principle 11 regime and the leniency regime conflict: firms that act promptly can both comply with the requirements of Principle 11 and benefit from the leniency regime. However, firms that are concerned about the interaction of notifications under Principle 11 to the FCA and the CMA's leniency regime should contact the authorities and we will work together and discuss how to proceed based on the individual circumstances of the case.

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[7] A firm must deal with its regulators in an open and cooperative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.
[8] The obligation to report to the FCA 'as soon as' the firm becomes aware or has information which reasonably suggests that it 'has or may have' committed a significant infringement of any applicable competition law. See FCA Supervision Manual.
[9] FCA, Competition Concurrency Guidance and Handbook amendments: Feedback on CP15/01, finalised guidance and rules, PS15/18, July 2015

Appendix: List of consultation responses

Consultation responses were received from the following:

- Baker McKenzie LLP
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Hogan Lovells International LLP
- Linklaters LLP
- Norton Rose Fulbright LLP
- South West Water
- White & Case LLP