

Leniency applications in the regulated sectors

Consultation document

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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting 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), which is designed to provide clarity for applicants as to the processes that should be followed.
- 1.2 This consultation is endorsed by the sectoral regulators that have concurrent competition powers and are full members of the UKCN.¹

Background

- 1.3 The CMA and sectoral regulators have concurrent powers to enforce the competition prohibitions contained 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) in their respective sectors, and to impose financial penalties following a decision that an infringement of one or both of the prohibitions has taken place.
- 1.4 When setting the level of a penalty, the CMA and the sectoral regulators are required to have regard to *Guidance as to the appropriate amount of a penalty* (OFT423).²
- 1.5 OFT423 includes provision for granting lenient treatment to undertakings who come forward with information in relation to cartel activity and who then cooperate fully with any subsequent investigation. This leniency policy enables the detection of cartels that otherwise would remain hidden, and facilitates effective enforcement action against those cartels, which, in turn, deters others from engaging in cartel activity.
- 1.6 The process for applying to the CMA for leniency together with the CMA's approach to handling such applications is set out in *Applications for leniency and no-action in cartel cases OFT1495* (the 'leniency guidance').

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 Section 38(8) CA98.

1.7 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.
- 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.

Scope of this consultation

1.8 To date, the CMA has not published any specific guidance in relation to the handling of leniency applications in the regulated sectors.³ As a result, there may be a lack of predictability for potential applicants, and the risk of an inconsistent approach between cases.

1.9 The CMA and the sectoral regulators therefore propose to provide clarity for businesses and individuals by publishing an information note setting out the arrangements between them for the handling of leniency applications in the context of the competition concurrency regime. The note will be published on the webpages of the CMA, and accessible via the UKCN and sector regulators' own webpages. A draft of the proposed information note can be found in the appendix to this consultation document.

1.10 The proposed information note broadly reflects the leniency concurrency 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, as set out in paragraphs 2.6 to 2.12 below. However, the proposed note also describes a key new element in these arrangements, namely that

³ The memorandums of understanding between the CMA and each sectoral regulator deal with leniency insofar as they relate to the transfer of leniency information.

the CMA should be the first point of contact for all leniency applicants for the purpose of the single queue system.

- 1.11 Subject to the responses received to this consultation, it is proposed that the information note will be published on the CMA website, with a link to the note also published on the webpages of the sectoral regulators and the UKCN.
- 1.12 For the avoidance of doubt, case allocation is not covered by the arrangements described in this consultation document. Case allocation is covered instead by the Concurrency Regulations,⁴ the CMA's concurrency guidance⁵ and the memorandums of understanding between the CMA and each of the sectoral regulators.
- 1.13 It should be noted that the single queue system described in this consultation document 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.

Question for consultees

- 1.14 We are asking consultees the following question:

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.

⁴ Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536) (the 'Concurrency Regulations').

⁵ CMA (2014), *Regulated industries: Guidance on the concurrent application of competition law to regulated industries* (CMA10).

2. The leniency concurrency arrangements

Role and objectives

- 2.1 The leniency concurrency arrangements described in the draft information note seek to:
- (a) provide certainty, consistency and transparency for leniency applicants, so that there is greater clarity as to the process for handling leniency applications in the regulated sectors;
 - (b) ensure that leniency is granted in a fair manner, maximising the incentives for applying for leniency, and protecting the integrity of the leniency regime. This is crucial given that leniency is an essential tool in detecting and destabilising cartels; and
 - (c) ensure that the CMA can properly retain control over the grant of criminal immunity and the management of investigations in relation to the cartel offence contained in the Enterprise Act 2002.
- 2.2 The arrangements are also intended to be compatible with the framework of the concurrency regime,⁶ maintaining and strengthening the cooperation between the concurrent regulators as key strategic partners, and operating consistently with the rules and procedures for the allocation and conduct of CA98 cases in the regulated sectors.
- 2.3 Under the arrangements, the CMA and sectoral regulators work together closely so that leniency applications are dealt with swiftly and efficiently; and in all cases, decisions about the ultimate grant of leniency are made by the authority to which the case has been allocated in accordance with the Concurrency Regulations.
- 2.4 Leniency applications are dealt with in a manner that is consistent with the policies and procedures set out in the leniency guidance.
- 2.5 Any disclosure of information pursuant to the leniency concurrency arrangements is subject to the provisions of Part 9 of the Enterprise Act 2002.

⁶ As set out in [CMA10](#). The enhanced concurrency regime put in place under the Enterprise and Regulatory Reform Act 2013 aims to increase enforcement in the regulated sectors through measures designed to ensure greater accountability, cooperation and mutual support.

The single queue system

- 2.6 It is inherent in the nature of the concurrency regime that the CMA and sectoral regulators operate a 'single queue system' for the handling of leniency applications.
- 2.7 This means that applicants need only make an application for leniency to 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.
- 2.8 This approach ensures that the granting of more than one type A or type B marker is precluded, as both require an applicant to be first in.
- 2.9 It also maximises the incentives to come in for leniency early. Since there can only be one type A/type B marker in respect of the same conduct, there is no 'second chance' for undertakings who 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.
- 2.10 The single queue system also provides certainty as regards an applicant's place in the leniency queue and the type of leniency 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). Businesses would be far less likely to come in and make a full admission with the prospect of obtaining immunity, if there was a possibility that such immunity could be lost as the result of a case transfer. This is particularly important given that a case may change hands as a result of the procedure for allocating cases under the concurrency arrangements⁷ or, more unusually, if the CMA decides to take over a case which has already been allocated to a regulator⁸ or if the case is transferred to another regulator during the course of the investigation.⁹
- 2.11 This, in turn, deters any 'gaming' of the system, for example, by parties:
- (a) waiting to see how their fellow cartelists will act; or

⁷ Pursuant to Regulations 4 and 5 of the Concurrency Regulations.

⁸ The CMA has the power under Regulation 8 to direct a sector regulator to transfer a case to the CMA in certain circumstances, for example, where the CMA considers itself best placed to make a decision that sets out an appropriate precedent, in particular when similar issues arise across different sectors or parts of the UK, or to enforce the CA98 prohibitions more effectively, or where the regulator lacks the necessary resources.

⁹ Pursuant to Regulation 7 of the Concurrency Regulations.

(b) lobbying for their case to be taken forward by a particular authority.

- 2.12 Finally, the single queue system reduces the burden on businesses, which only have to make one leniency application and need not concern themselves with whether they have submitted applications to all the relevant authorities. This is particularly important for small businesses which may not have good knowledge of the regime. It also provides a clear approach in circumstances where it is uncertain whether a regulator has concurrent jurisdiction.

The operation of the single queue system – the CMA as a single port of call

- 2.13 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, it is proposed that all initial leniency enquiries and applications, whether for types A, B or C leniency, should begin with the CMA.
- 2.14 That is: it is proposed that the CMA will act as a single port of call for all leniency applicants, with applicants approaching the CMA for leniency in the first instance in order to secure their provisional marker and place in the leniency queue.
- 2.15 In the event that such an enquiry or application is made to a sectoral regulator, it is proposed that the sectoral regulator will immediately direct the person making the application or enquiry to the CMA.

Communication and cooperation

- 2.16 The proposed single port of call approach relies on close communication and cooperation between the CMA and the sectoral regulators. For example, before granting a type A or type B leniency marker, the CMA will liaise with any other relevant regulator in order to establish whether there is, or has been, any pre-existing CA98 investigation in respect of the conduct in question.
- 2.17 In addition, each authority will maintain its own leniency register, with the CMA maintaining a single, central leniency register.

Criminal immunity

- 2.18 An important consideration in relation to the proposal for the CMA to act as a single port of call flows from the fact that the leniency policy covers not only civil but criminal immunity.¹⁰
- 2.19 The CMA is the only concurrent regulator with jurisdiction over the criminal cartel offence contained in the Enterprise Act 2002, and only the CMA can grant immunity from criminal prosecution.
- 2.20 As such, the CMA will at all times remain responsible for:
- (a) 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; and
 - (b) dealing with any enquiries regarding criminal immunity and with any issues arising regarding the leniency applicant’s duty to cooperate under the CMA’s leniency policy, insofar as the cooperation relates to any criminal investigation.
- 2.21 For the avoidance of doubt therefore: any application for criminal immunity should be made to the CMA, and where an application for criminal immunity or enquiry in relation to criminal immunity is directed to a sectoral regulator, the sectoral regulator will immediately direct the person making that application or enquiry to the CMA.
- 2.22 A single queue system in which the CMA is the first port of call will support the operation of this regime, and ensure that the CMA has early sight of any conduct which ought to be taken forward as a criminal cartel investigation.¹¹
- 2.23 Question for consideration:
- Do you agree with the proposal that the CMA should act as a single port of call for all leniency applications? Please give reasons for your view.

¹⁰ Type A immunity provides guaranteed ‘blanket’ immunity from criminal prosecution for all cooperating current and former employees and directors of the undertaking; type B applicants are eligible for discretionary criminal immunity for cooperating current and former employees and directors of the undertaking; type C leniency includes discretionary criminal immunity for specific individuals.

¹¹ The CMA will always consider opening a criminal cartel case if there are reasonable grounds to suspect that the offence has been committed.

Roles and responsibilities within the single queue system

2.24 The grant of leniency could only ever be partially administered by the CMA given that CA98 cases may be investigated by either the CMA or by the sectoral regulators, and applications for leniency may be made at any time up to the issue of a statement of objections (and the grant of leniency is not usually confirmed until the issue of the statement of objections). In such circumstances, 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.

2.25 The draft information note therefore explains that 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.

2.26 Once a case has been allocated under the Concurrency Regulations:

- all initial leniency enquiries should still be made to the CMA. 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 enquiry or application to the CMA;
- the CMA will decide whether or not to grant 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 with responsibility for that case 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.

2.27 Each authority will respect any marker or leniency properly granted in accordance with the arrangements described in the information note. This is without prejudice to the ability of an authority to withdraw or modify the scope of any marker or leniency granted (as appropriate in the circumstances of that particular case) to the extent that it is responsible for doing so, as set out in paragraphs 2.25 and 2.26 above.

3. Consultation process

3.1 This consultation is being published on the CMA webpages. A link to this consultation will also be published on the UKCN's webpages.

3.2 The CMA is seeking views on the following question:

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.

3.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role.

3.4 In accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages, along with a summary of responses received that fall within the scope of the consultation. A link to those documents will also be published on the UKCN's webpages. Respondents will be notified when they are available.

3.5 If your response contains any information you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication and explain why you regard the information excluded as sensitive.

3.6 The consultation will run for four weeks, from 30 June 2017 to 28 July 2017. Responses should be submitted by post or email, by no later than 5pm on 28 July 2017 and should be sent to:

Victoria Ellis
Sector Regulation Unit
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Email: victoria.ellis@cma.gsi.gov.uk

Compliance with government consultation principles

- 3.7 In consulting, we have taken into account the [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Data use statement for responses

- 3.8 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 3.9 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

After the consultation

- 3.10 Subject to the responses received, a final version of the information note on the leniency concurrency arrangements will be published on the webpages of the CMA, and accessible via the UKCN and sector regulators' own webpages.

Appendix A: Draft information note

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.¹²
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. 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.
5. 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 application to the CMA.
6. From the earliest stage of any application, the CMA and sectoral regulators will work together closely so that leniency applications within the regulated

¹² 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).

sectors are dealt with swiftly and efficiently, and in accordance with the principles outlined below.

7. 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.¹³
8. 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;
 - 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

9. The sectoral regulators have concurrent powers with the CMA to enforce the competition prohibitions¹⁴ in their respective sectors and, where they find that an infringement has taken place, to impose penalties on the businesses concerned.
10. 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).¹⁵
11. 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.

¹³ Competition Act 1998 (Concurrency) Regulations 2014, SI 2014/536.

¹⁴ 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).

¹⁵ Section 38(8) CA98.

12. The approach taken by the CMA in handling applications for leniency for businesses is set out in more detail in [Applications for leniency and no-action in cartel cases](#) (OFT1495).
13. 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.
 - **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

14. The CMA and sectoral regulators operate a ‘single queue system’ for the handling of leniency applications within the regulated sectors.
15. 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.
16. 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: as 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 that 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

17. 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.
18. 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.
19. 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 enquiry or application to the CMA.
20. 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.

21. 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.
22. Once a case has been allocated under the Concurrency Regulations:
- All initial leniency enquiries should still be made to the CMA. 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 enquiry or application to the CMA.
 - 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

23. 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.
24. This means that all enquiries regarding criminal immunity and any application for criminal immunity should be made to the CMA.

25. 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 application or enquiry to the CMA.