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Consultation Response

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Draft guidance on the CMA's approval of voluntary redress schemes

1. About Which?

Which? is the largest consumer organisation in Europe with over 800,000 members. We operate as an independent, a-political, social enterprise working for all consumers and are funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

2. Summary of our response

Which? welcomes the introduction (via the Consumer Rights Act 2015) of the CMA's new power to approve voluntary redress schemes for victims of competition law infringements. This is an important ADR mechanism that complements the suite of redress options now available to consumers and small businesses under Schedule 8 of the Act.

Like all effective ADR mechanisms, this regime needs to offer swift and cost-effective resolution of disputes if it is to be used by infringing businesses and championed by the CMA. However, it is also important to keep in mind that the ultimate purpose of the regime is to provide a fair level of compensation to those harmed by an infringement. This means that sufficient checks and balances need to be built into the system to ensure that the interests of victims – who will not directly participate in the establishment of schemes – are properly taken into account.

With that in mind, we welcome the CMA's comprehensive guidance, and have comments in the following areas.

- Where a Board does not unanimously agree a scheme, it should be made clear that the CMA will always be able to take into account the view of the minority. Currently, this is not the case where conditional approval has been given for an outline scheme.

- We believe that further detail is needed around how harm will be assessed by the Board and the evidence that the Board can and should take into account in that assessment.
- We are concerned that certain aspects of the constitution and role of the Board will reduce transparency and could lead to a perception of bias.
- The guidance would benefit from additional detail in relation to the application process for claims by beneficiaries.
- The flowchart in the guidance is helpful; we would advocate also including a flowchart setting out the claims process for scheme beneficiaries.
- A feedback mechanism should be built into the regime, by which the compensating party is required to provide statistics on a scheme once it has closed to enable the regime as a whole – and its success in achieving its objectives – to be monitored.

3. Consultation questions

Q1. Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

In our view, the general content and format of the guidance is clear and immensely helpful in putting flesh on the bones of the relatively sparse provisions in the Act and Regulations in this area. We welcome the level of detail in which the CMA and has set out the requirements for establishing a scheme.

While the guidance is unlikely to be "user friendly" for individual scheme beneficiaries (whether consumers or small businesses), we would not anticipate that beneficiaries would have cause to consult the guidance in the usual course. Scheme literature for individuals will be produced on a case-by-case basis to give beneficiaries tailored information about the particular scheme. We would expect the beneficiary representative on the Board to assist in ensuring that such literature is in plain intelligible language that is accessible to its target audience.

In relation to clarifying and adjusting specific aspects of the guidance, we would make the following comments.

Collective responsibility

Paragraph 3.28 of the guidance provides that, whether a decision of the Board is unanimous or not, the Board will take "collective responsibility" for any decision made by it.

We agree that the Board should take collective responsibility for unanimous decisions, and that individual members should take responsibility for their own vote (whether in the majority or minority). However, we believe it should be clarified that those who vote in the minority will not be held responsible for the determination of the majority and can publicly state that they held the minority view.

This is an important transparency measure. In our view, it would not be in anyone's interests - whether beneficiaries, the CMA, the Board, or the integrity of the regime as a whole – for a dissenting voice to be prevented from disclosing the fact of its dissent. It is difficult to reconcile this with the attributes of independence, integrity and honesty that Board members must display at all times. At a practical level, we would envisage potential Board members (in any role on the Board) having significant concerns with this requirement, given that it could have serious reputational consequences for an individual or organisation.

If the concern is one of confidentiality in relation to the underlying facts upon which the minority view is based, then this concern is more appropriately addressed by the existing obligation on all Board members not to disclose confidential information. That obligation will curtail a minority voter's ability to make clear *why* it dissented. But the Board member should not be prevented from making clear that it did in fact dissent.

Conflicts of interest

Paragraph 3.18 of the guidance sets out examples of conflicts of interest that a Board member might experience. Those examples include "*any form of past or current employment with, or engagement by, the compensating party* ***within the previous two years****, with the exception of their employment as members of a Board*".

In our view, two years is a very short period, particularly in the context of competition law infringements. The industry representative could have been employed by the compensating party during the infringement period but, since they left its employ more than two years ago, would not be disqualified from Board membership. We believe that individuals who were *ever* employed or engaged by the compensating party have an inherent conflict of interest that could at least be perceived to influence their independence on the Board. The starting point should be that such persons have a conflict of interest, unless they can demonstrate otherwise on a case by case basis.

Language clarification

We would find clarification of two additional points helpful.

The first relates to the terms used to describe the person / body that administers a scheme. The guidance contains references to a "scheme administrator" (in paragraphs 4.1 and 4.20), the "compensating party" (paragraphs 4.5, 4.7, 4.8 etc) and "those administering the scheme" (paragraph 4.22). It would be helpful to understand whether these are all references to the same party and, if so, whether that party is the infringing business in all cases. If not, is it intended that scheme administration could be outsourced to a third party? If that is the intention, then further guidance around the parameters of any outsourcing would be useful.

The second relates to the ability of beneficiaries to make a complaint. There is mention in paragraph 4.20 of the option to "appeal to an independent reviewer". It would be helpful to clarify whether this is something different to the complaints process described in paragraph 4.15.

Q2. Is the flowchart in the guidance helpful? Are there any improvements that you feel would increase its clarity and/or usefulness? Please identify any other diagrams you think would be helpful to include.

The flowchart in the guidance is helpful in demonstrating the various pathways to approval of a scheme. It would be helpful to make it clear in the blue box in the right hand flow - which reads "*Business submits scheme agreed by the Board to the CMA*" - that the only issue for consideration at this stage is whether the CMA is satisfied that the conditions have been fulfilled. Otherwise, it might be confusing as to why the scheme, which has already been approved, needs to be sent back to the CMA at this stage.

We would suggest also including a flowchart showing the journey of a scheme beneficiary through the claims process. This will be helpful for compensating parties when designing a scheme and could also be used in communications with beneficiaries. The flowchart could include indications of the possible outcomes of a claim under a scheme and the points in the process at which:

- beneficiaries will receive certain information (such as being told their claim has been rejected);
- a complaint could be made;
- beneficiaries might consider formally enforcing the scheme or asking the CMA to enforce the scheme;
- beneficiaries might consider making a claim outside the scheme,

and so on.

Q3. Is the level of detail on specific topics in the draft guidance appropriate? Are there any parts of the draft guidance which you feel would be improved by being more, or less, detailed?

<u>Evidence of harm</u>

The Board's role in assessing the effect of the relevant infringement on the market and the distribution of loss between market participants - and thus the level of redress that should be paid to beneficiaries – is its central and most important task. The parameters for the Board's assessment are contained predominantly in the following parts of the guidance:

- Paragraph 3.3 (at the end of the second sub-bullet point): "*It should be recognised that expert evidence may be necessary in certain situations. For example, it may be needed to determine the level of, or any passing on of, any overcharge caused by the infringement in order to facilitate indirect/consumer purchaser redress. The need for such evidence may vary case by case. For example, there might be a greater need for it where a full scheme is submitted for approval prior to a CMA infringement decision.*"

- Paragraph 3.31: "*The compensating party is expected to cooperate fully with the Board within the timescales agreed with the Board. In particular, it is expected to provide the Board with all assistance and information it may reasonably and proportionately require in order to discharge its functions. This may include, but is not limited to:*

    - *providing evidence of harm (by way of, for example, an expert report and the information/data used to prepare that report);*

    - [other types of evidence follow]."

We welcome this clarification of the extent to which the Board will have fact-finding powers and the nature of the evidence that will be available to it. However, we believe that further clarification is needed as to what the Board should do with the evidence it obtains.

The guidance needs to establish a clear mandate for the Board to take such steps as it considers necessary to satisfy itself that it has fully performed the duties and functions set out in section 3 of the guidance. We recognise the competing objectives of efficiency and proportionality on the one hand, and adequacy of redress on the other. However, it is necessary to clearly set out the nature of the work that the Board is expected to undertake, especially since there is an inherent conflict in the fact that the Board's activities are funded by the infringing business. There is no clear indication in the guidance of the degree to which the Board should rely on the infringing business' assessment of harm. Around this theme, there are a number of questions that we feel are not, but should be, answered in the guidance. For example:

- Is the Board expected to review the business' report, assess it against the data provided with it, and accept it as evidence of the actual harm caused? Or is the Board expected to probe, test and question the business' assessment using evidence gathered proactively from other sources (such as public information about market conditions)? To what extent is the Board expected to run its own analysis, independently of what the business provides?

- It is evident on the face of the European Commission's practical guide to quantifying harm (referred to in footnote 40) that even a simplified process of assessing loss is a highly involved process that requires considerable resource and evidence. Where will the Board get the resource to carry out the processes in the Commission's guidance? Is it really expected that an individual economist will be able to perform this function alone? Or even be able to assess the economic data provided by the business alone?

- Who decides how much work the Board should do? If the Board is funded by the infringer, can the business refuse to fund certain types of work, claiming that it is unnecessary or disproportionate? The requirement for the business to respond to "proportionate" information requests is referred to at paragraphs 2.24 and 3.31, but how is proportionality measured and by whom?

While it is important to provide infringing businesses with incentives to use the voluntary regime, is it imperative that the Board determination process does not become an opportunity for an applicant to present data in a way that results in an artificially low quantum of redress, without the Board having the resources or mandate to adequately scrutinise what is presented to it. This is where it becomes crucial to strike the right balance between safeguarding victims' interests and ensuring the process is proportionate and efficient. As drafted, we are concerned that the guidance accounts for efficiency (in setting out that the business must provide a report and supporting data etc.) but accounts less so for substantive fairness (by providing only limited guidance to the Board on the extent to which it is expected to test that evidence and make independent assessments).

We would encourage the CMA to expand section 3 of the guidance to answer the questions posed above and provide a clear steer to the Board that it needs to do more than merely review the business' proposal in order to fulfil its mandate.

Claims process

Paragraph 2.10 of the guidance provides that an application for scheme approval must include "*details of the application process for claims for redress*". We would welcome further detail in the guidance as to the minimum standards the CMA would expect in this regard. For example, it would be helpful if the guidance noted that:

- online and offline claims should be possible;
- the application process should be straightforward and accessible;
- the application process should not contain any unduly burdensome or time-consuming steps that are likely to deter legitimate claims.

We would also welcome more detail around the information that beneficiaries will be able to access in relation to the Board's assessment of the merits of the scheme. In our view, the Board's report should be made available to the public at the time a scheme comes into effect. Concerns about maintaining without prejudice privilege (as noted at paragraph 3.25 of the guidance) should have diminished by that stage, since a settlement has been reached. At the very least, beneficiaries should be given sufficient information from the Board's report to allow them to take an informed decision as to whether it is in their interests to compromise their claim via the scheme.

Finally, we would take this opportunity to welcome the approach of making the complaints mechanism freely available to beneficiaries as part of the claims process. Victims will not have as much information as the compensating party about the scheme and it may not be entirely clear from published information whether a particular individual has a good claim. We agree that beneficiaries should not bear the burden of resolving such cases. Free complaints will also encourage better information provision to beneficiaries at all stages of the process (to minimise the number of complaints and thus keep costs down).

Q4. Is the draft guidance overall sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?

Conditional approval

We welcome the clarification in paragraph 2.24 as to the conditions that the CMA expects to impose where it grants approval of an outline scheme. It is axiomatic that the CMA must have a "back stop" power to revoke approval where it has serious concerns about the Board's constitution, methodology or ultimate determination, or where it is clear that the guidance has not been followed. We would expect the conditions set out in paragraph 2.24 to be imposed in the vast majority of cases and departed from only in the most exceptional circumstances; it is unlikely that there will ever be a case where these conditions are not both appropriate and vitally important, particularly as the infringer is responsible for appointing the Chair of the Board.

There is one further condition that we believe is equally important and should be included in the list at paragraph 2.24; namely, a condition which would allow the CMA to take into account the minority view in cases where the Board does not come to a unanimous determination. This is necessary notwithstanding the condition that the CMA "does not have significant concerns with the Board's determination", since that condition will be relied upon to revoke approval only in exceptional circumstances (e.g. deception or withholding of evidence).

As noted in paragraph 1.18 of the guidance, the Regulations provide that any redress scheme submitted for approval must contain confirmation that the majority of the Board has approved the scheme. If the redress scheme does not contain this information when approved, the CMA must impose conditions requiring the provision of the information at a later stage (paragraph 1.20). However, as soon as there is a majority vote and the CMA is informed, that information condition *is immediately fulfilled*. What happens if the CMA agrees with the minority of the Board? There is nothing in the Regulations to enable the CMA to consider the minority's view. In order for the CMA to do this, it would need to have imposed a specific condition at the outset to this effect.

The guidance appears to recognise the importance of this. Paragraph 3.27 of the guidance provides: "*Where the Board's decision is not unanimous, the Board's report on the scheme should make it clear that there are dissenting opinions, and should include details of the points of dissent and the reasoning behind them. The CMA will consider the Board's view, including dissenting views.*"

This must be right; if a Board member has concerns about the majority's determination then this is relevant information for the CMA to consider (in all cases, not only in exceptional circumstances). The CMA should be able to conclude that the minority view has merit and the scheme proposal should not be approved. This principle applies equally to cases of conditional approval of outline schemes as to unconditional approval of full schemes. Yet the guidance in paragraph 3.27 only applies in the latter. We consider this to be an undesirable and incongruous outcome.

To this end, we would urge the CMA to consider adding a further condition to the list in paragraph 2.24 to the effect that: "*in cases where the Board's determination is not unanimous, the CMA does not prefer the minority view*". No other change to the guidance would be necessary and paragraph 3.27 would become relevant in all cases.

We would also advocate including a check-box in Section B of the application forms, indicating that applicants should annex a report of any minority views as well as the Board's approval decision.

Reporting and review

There is currently no mechanism in the regime for monitoring how it is used or whether it is serving its intended purpose. We believe it would be helpful for victims, independent third parties, businesses that are considering applying for scheme approval, the CMA and Government if the compensating party was required to provide a brief evaluative report upon closure of a scheme. This could contain objective data and statistics covering: the types of beneficiaries that made claims, the number of beneficiaries that claimed out of the anticipated or maximum number, the number and types of complaints made, and so on. As this would contain aggregate / anonymised data, it would be possible and appropriate to make the report public.

This process would allow the efficacy of the regime to be monitored over time and also ensure that schemes (on the whole) are being administered in a way that achieves the intended policy objectives.

We would also advocate including in the guidance that the outcome of complaints should be reported on the scheme's web page (anonymously) so that other potential beneficiaries can get an idea of whether their complaint is likely to be successful / worthwhile. This should reduce the level of complaints over time.

The above measures will also promote transparency and give beneficiaries confidence in engaging with a relatively novel and unfamiliar process.

Q5. Are the draft application forms for seeking approval sufficiently clear and user friendly? Do you have any suggestions as to how the forms might be improved?

Q6. Are there particular changes and improvements to the guidance that you consider would encourage businesses to apply to the CMA for approval of a voluntary redress scheme in appropriate cases?

Which? does not have any comments in relation to questions 5 and 6.

Which?
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