RESPONSE TO THE CMA'S CONSULTATION ON GUIDANCE FOR THE APPROVAL OF VOLUNTARY REDRESS SCHEMES (CMA40CON, MARCH 2015)

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1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the Competition and Market Authority's (***CMA***) draft for public consultation of its *Guidance on the approval of voluntary redress schemes* dated March 2015 (the ***Draft Guidance***).

1.2 Our comments are based on our experience of representing clients in a wide range of proceedings by competition authorities in respect of alleged infringements of the Chapter I or Chapter II prohibitions of the Competition Act 1998 (***CA98***) and of Articles 101 and 102 of the Treaty on the Functioning of the European Union (***TFEU***), and in the defence of proceedings arising from or relating to those alleged infringements. We rely on this breadth of experience to provide these comments on the CMA's proposed approach to approval of voluntary redress schemes. The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.3 We have confined our comments to those areas which we feel are most significant in terms of the effective operation of the regime, and in particular to the changes and improvements to the guidance that we consider would encourage businesses to apply for CMA approval of a voluntary redress scheme in appropriate cases (consultation question Q6).[1] Our comments should be read as applying equally to the other consultation questions insofar as they also relate to the key issue of providing incentives for businesses to apply to the scheme in appropriate cases.[2]

1.4 We have had the opportunity to give prior input to the development of the Draft Guidance as an external stakeholder chosen by the Department for Business, Innovation and Skills (***BIS***).[3] As a result of that process, we consider that the CMA's overall approach to the Draft Guidance is helpful. In particular, we welcome a number of features of the Draft Guidance which will together help to fulfil what we understand to be the underlying purpose of the CMA's civil redress power, being to incentivise business to put forward readily available compensation outside of the Court system in appropriate cases. These features include:

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[1] See Draft Guidance on the CMA's approval of voluntary redress schemes: Consultation document, 2 March 2015 (***Consultation Document***), paragraph 4.1. Our comments are also made within the constraints of the Consumer Rights Bill as enacted (for example, taking as given the policy decision that conditional approval is not available where an infringement decision has already been made).

[2] For example, in relation to clarity (Q1), detail (Q3) and comprehensiveness (Q4).

[3] See Consultation Document, paragraph 1.11.

(a) express recognition that a scheme is intended to provide a swift and relatively low cost way of providing redress, which is convenient and inexpensive for consumers;[4]

(b) fine reduction where a scheme is approved at the same time as a CMA infringement decision, to reflect amongst other things the likely cost to business of administering the scheme;[5]

(c) the determination of quantum by an independent panel of experts (the ***Board***), with limited discretion for the CMA to reject that determination other than in exceptional circumstances;[6]

(d) express recognition that all communications with the Board, and from the Board to the CMA as necessary, are to be without prejudice and confidential, in order to avoid stimulating the very market-wide litigation that the scheme is designed to avoid;[7]

(e) an opportunity for the compensating business(es) not to proceed with an application where they disagree with the level of fine reduction and/or conditions of approval proposed by the CMA, in order to ensure that participation in the scheme remains entirely voluntary;[8]

(f) the option to submit and gain approval of an "*outline*" scheme at the same time as a CMA infringement decision, in order to avoid the compensating business(es) having to submit detailed evidence of harm while the CMA investigation is ongoing and to establish and fund an independent Board during that time;[9]

(g) the option for the compensating business(es) to refer complaints about the operation of the scheme back to the independent Board rather than to an independent reviewer retained for that purpose, given the substantial additional cost and delay that would entail;[10] and

(h) the availability of joint applications in the case of multi-party infringements.[11]

1.5 However, we consider that the Draft Guidance omits a further incentive which is crucial to the effectiveness of the package referred to above, and which will

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[4] See Draft Guidance, paragraphs 3.3, 4.8.

[5] See Draft Guidance, paragraphs 2.34-2.40.

[6] See Draft Guidance, paragraphs 2.12, 2.14, 2.24, 4.10.

[7] See Draft Guidance, paragraphs 1.3, 2.19, 3.25.

[8] See Draft Guidance, paragraphs 2.22, 2.36.

[9] See Draft Guidance, paragraphs 2.20-2.26.

[10] See Draft Guidance, paragraphs 3.4, 4.15.

[11] See Draft Guidance, paragraphs 1.24, 2.2-2.3.

be fundamental to the success of the scheme and to its use by business in appropriate cases. In particular:

(a) we consider it essential that compensating businesses are provided with costs protection in the event that an award of compensation is rejected by an alleged victim in favour of Court proceedings. As explained in further detail in Part 2 below, without this further incentive we can foresee only very limited circumstances in which a legal advisor would advise use of the scheme; and

(b) we consider this and the other incentives referred to above to form a finely balanced and carefully calibrated package, with the consequence that failure to include any one of them in the final version of the Guidance would risk fundamentally undermining the likelihood of businesses applying for CMA approval of a voluntary redress scheme in appropriate cases.

1.6 In Part 3 of this submission we provide comments on specific aspects of the Draft Guidance which we consider may impact on the incentive for businesses to apply to the CMA in appropriate circumstances. This includes the amount of fine reduction and the composition of the independent Board.

1.7 We would be very happy to discuss any aspect of this response in more detail should that be of assistance to the CMA.

2. Consequences of Rejecting an Offer under the Scheme: Cost Shifting

2.1 Our key concern with the Draft Guidance is that it does not provide costs protection to the compensating business(es) where a consumer applies to the scheme but rejects an offer made pursuant it, and recovers in litigation less than was offered under the scheme (***cost shifting***).

2.2 The Draft Guidance makes clear that a redress scheme approved by the CMA is a mechanism to settle claims that may otherwise be brought in court,[12] cheaply and quickly,[13] consistent with the government's objective for infringing businesses to offer compensation voluntarily as an alternative to private litigation in the courts.[14] In this respect we note that:

(a) Cost shifting is a proven and effective mechanism for promoting the efficient settlement of disputes and incentivising the making of settlement offers to avoid court proceedings. It is enshrined in relevant case law,[15] Part 36 of the Civil Procedure Rules (***CPRs***),[16] and in Part IV of the Draft Competition Appeal Tribunal (***CAT***) Rules 2015.[17]

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[12] See Draft Guidance, paragraph 1.3.

[13] See Draft Guidance, paragraph 1.3.

[14] See Consultation Document, paragraph 3.2.

[15] See, for example, *Calderbank v Calderbank* [1975] 3 All ER 333.

(b) Any offer made pursuant to a voluntary redress scheme will have been determined by a panel of experts which:

(i) meets strict criteria for independence and expertise, and has had access to all assistance and information from the compensating business(es) that it may reasonably and proportionately require in order to discharge its functions;[18]

(ii) will expressly have assessed how reasonable the compensation offered is, taking into account the evidence of harm caused to victims, the way this has been aggregated, and any justifications for the proposed level of redress;[19] and

(iii) will have produced a report justifying its decisions.[20]

In those circumstances, there can be no serious question as to the reasonableness of offers made pursuant to the scheme, or the ability for potential beneficiaries to assess the reasonableness of those offers based on the information available to them.[21]

(c) Any offer made pursuant to the scheme will also have been in writing and have been open for a reasonable period of time, and otherwise have been consistent with the spirit and intent of the procedural requirements set out in the *Calderbank* case law and Part 36 of the CPRs.

2.3 A key objective for businesses in voluntarily establishing a redress scheme will be to avoid, to the extent practicable, costly and lengthy litigation and long-lasting contingent liability exposure. The incentive of cost shifting will be a crucial means of achieving this objective and for disincentivising litigation in respect of infringements for which a scheme has been established. Conversely, absence of cost shifting would act as a disincentive to potential beneficiaries accepting offers under a scheme, and therefore to businesses establishing such a scheme in the first place.

2.4 We note our proposal would apply only to consumers who make an application to the scheme. It would not apply to eligible consumers who do not apply to the scheme or engage with it. Those consumers who apply to the

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[16] See, in particular, CPR 36.14(1)(a), (2) and (4).

[17] See, in particular, Draft CAT Rule 48.

[18] See Draft Guidance, Chapter 3, particularly paragraphs 3.14-3.22 and 3.31.

[19] See Draft Guidance, paragraph 4.9.

[20] See Draft Guidance, Chapter 3.

[21] In this respect, also see Draft Guidance, paragraph 2.10 ("*schemes should...include a clear statement of the type and extent of compensation that is being offered in order that potential beneficiaries can evaluate appropriately whether to accept redress under a scheme or pursue redress through another route*").

scheme but who reject an offer made pursuant to it would be fully aware of the potential cost consequences of that decision. In our view there is little or no prospect that a subsequent order for cost shifting could be considered "*unjust*" in those circumstances.[22]

2.5 On the basis of the above, we consider cost shifting to be an essential part of the package of incentives for businesses to apply for the scheme in appropriate cases, and that without it we would not be able to recommend use of the scheme save in the most exceptional circumstances. We accordingly propose inclusion of drafting to the following effect in the Guidance:

The consequences of rejecting redress under a scheme

4.15 Where a potential beneficiary applies to the scheme but rejects an offer made pursuant to it, and recovers in litigation (whether individually or as part of an opt-in or opt-out collective action) less than was offered under the scheme, the CMA considers that this may be a relevant factor in the court or tribunal's assessment of any costs award in that litigation. In particular, the CMA considers that in those circumstances, the court or tribunal would be likely to order that the compensating business(es) are entitled to costs from the date on which the offer was rejected by the potential beneficiary, and interest on those costs.

3. Other Incentives for Application to the Scheme

Penalty reduction

3.1 The Draft Guidance provides that in determining the amount of any penalty reduction, the CMA may "*take into account evidence from the parties offering the scheme relating to the likely administrative costs of implementing such a scheme*", as well as the terms of the redress scheme.[23] We consider the Guidance should make clear that:

(a) the amount of any penalty reduction offered to the compensating business(es) should in every case be at least equal to the anticipated cost to those parties of establishing and administering the scheme;

(b) a penalty reduction of greater than 10% may be necessary to achieve that effect in certain cases (for example, where the proposed fine is low relative to the anticipated costs of the scheme); and

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[22] Applying, in particular, the factors set out in CPR36.14(4) and Draft CAT Rule 48(2), including: (i) the stage in proceedings the offer was made; (ii) the information available to the potential beneficiary when the offer was made; and (iii) the conduct of the compensating business(es) with regard to the giving of information to enable the offer to be made or evaluated: see paragraphs 2.2(b) and 2.2(c) above.

[23] See Draft Guidance, paragraph 2.39.

(c) in many cases, only an outline of the terms of the redress scheme will be available to the CMA when it is deciding on the amount of penalty reduction to offer the compensating business(es).

3.2 In addition, we note it is presently unclear how the Guidance will promote incentives for immunity applicants (who are already exempted from fine) to make use of the scheme in appropriate cases. We consider such incentives could be promoted by exempting immunity applicants from the costs of funding a scheme which is submitted jointly by a number of parties to an infringement.

Eligibility of Chair and economist

3.3 The Draft Guidance provides that the Chair or economist on the independent Board must not have "*a history of acting predominantly for claimants or defendants that risks impeding their ability to perform Board functions impartially*".[24] We consider that this proposed requirement should be removed from the Guidance as it:

(a) is unnecessary in order to secure the independence of the Board in light of the other stringent independence requirements set out in the Draft Guidance;[25]

(b) would be very difficult or impossible for the compensating business to apply in practice; would unnecessarily and unfairly expose the constitution of the independent Board, and therefore the scheme as a whole, to challenge by third parties; and would risk the Board being constituted by members of inferior expertise or experience than would otherwise be the case; and

(c) for all of these reasons, would act as a material disincentive for businesses to make an application to the CMA for a scheme in appropriate cases, with no corresponding benefit to the operation of the scheme.

CMA discretion - "exceptional circumstances"

3.4 There are a number of indications in the Draft Guidance that the CMA will have discretion to reject a determination of the independent Board only in certain exceptional circumstances.[26] We welcome these indications and

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[24] See Draft Guidance, paragraph 3.18.

[25] Including: not having acted in a professional capacity in relation to the infringement or a related infringement, not having certain past or current employment with a compensating party, not having published views on the compensating party or the infringement, not having a financial interest in the compensating party, and not having a close personal association or relationship with a person who is working for or advising the compensating party (see Draft Guidance, paragraph, paragraph 3.18).

[26] See Draft Guidance, paragraphs 2.12, 2.14, 2.24, 4.10. Those circumstances include where there are material or manifest errors in the methodology followed by the Board; information or evidence has

consider them to be a key incentive to businesses making use of the scheme in appropriate cases. However, we consider the Guidance should clarify that the CMA's discretion will be so limited both in the case of conditional approval (where the CMA is assessing whether the conditions of approval have been met) and approval of a full scheme (where the Board report will be provided at the same time as the full application).

Confidentiality and privilege

3.5 As noted above, the Draft Guidance provides that all communications from compensating business(es) to the Board, and from the Board to the CMA where requested by the CMA in accordance with paragraph 2.19 of the Draft Guidance,[27] are to be without prejudice and confidential.[28] We welcome this indication and consider it vital to ensuring that the operation of the scheme does not stimulate the very market-wide litigation that the scheme is designed to avoid.

3.6 However, the Draft Guidance also states that "*as an exception, the Board may share with the CMA – and the CMA may use – details of communications where necessary in the performance of their roles in the CA98 approval process.*"[29] We consider that this part of the Guidance should clarify that:

(a) such information provided by the Board to the CMA will be on a confidential and limited waiver basis and will continue to attract without prejudice privilege, save where this is expressly waived by the person entitled to assert that privilege (consistent with paragraph 2.19 of the Draft Guidance); and

(b) any public statement or reasons given by the CMA in relation to the scheme approval process will refer only to the information and reasons provided directly to it by the compensating business(es) and/or set out in the Board's report, rather than referring expressly to privileged communications between the itself, the Board and/or the compensating business(es).

Procedure where CMA investigation ongoing

3.7 The Draft Guidance provides that where approval of a redress scheme is sought during the course of an ongoing CMA investigation:

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been withheld from the Board; or there are strong indications that there has been an attempt to deceive the CMA or the Board.

[27] In particular, where the CMA is considering rejecting a full scheme submitted to it for approval, or revoking approval where conditions imposed under an outline scheme have not been met.

[28] See Draft Guidance, paragraphs 1.3 (footnote 3), 2.19, 3.25.

[29] See Draft Guidance, paragraph 3.25.

(a) any application to the scheme will most likely be made once a party has seen the case against it in a Statement of Objections;[30]

(b) the CMA will not consider it inconsistent for a party to seek CMA approval of a scheme while exercising its rights of defence during the course of an investigation. Ultimately, however, it is likely to be impracticable for a party to contest liability at the point of infringement decision and at the same time seek CMA approval for a scheme;[31] and

(c) if, after considering any written and oral representations made on the Statement of Objections, the CMA is considering reaching an infringement decision and imposing a financial penalty on a party, it will issue a draft penalty notice which will, where possible, indicate the intention to grant a penalty discount in light of any redress scheme application.[32]

3.8 We consider the Guidance should make clear that the window for submitting a redress scheme will remain open until after a party has made written and/or oral representations on the Statement of Objections, and the CMA has considered and given a preliminary view on those representations. We consider this would:

(a) ensure that parties are able to exercise their full rights of defence during the course of an investigation, should they wish to do so, without prematurely precluding use of the scheme;

(b) avoid the CMA being placed in the difficult and artificial position of assessing a redress scheme at the same time as it is considering representations on the Statement of Objections which may contest liability;

(c) still provide the CMA with sufficient opportunity to consider an application in advance of making its infringement decision;[33] and

(d) not preclude compensating business(es) from submitting a scheme for approval or entering pre-application discussions with the CMA before or shortly after the CMA has issued its Statement of Objections, should the compensating business(es) wish to do so.

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[30] See, for example, Draft Guidance, Figure 1 (Flowchart).

[31] Draft Guidance, paragraph 2.4.

[32] Draft Guidance, paragraph 2.34 and footnote 33.

[33] We note, in this regard, that the Draft Guidance states that in the majority of cases where the CMA plans to approve a scheme, it would expect to give compensating parties a preliminary indication of that fact within approximately three months of receiving a formal application for approval: see Draft Guidance, paragraph 2.25.

Other drafting comments and clarifications

3.9 In addition to our comments above, we make the following drafting comments and clarifications:

(a) Distribution of monies: The Draft Guidance provides that the Board will consider "*proposals for the distribution of redress money where beneficiaries cannot be identified or do not come forward*".[34] We consider this provision should be removed as it does not accurately reflect how a scheme of this nature will operate. The compensating business(es) will make payments to consumers as they apply and are accepted to the scheme on the basis of an estimation of the harm that they have suffered. Funds will not be made available or distributed on a more general basis.

(b) Independent complaints process: As set out above, we welcome the indication in the Draft Guidance that the complaints process could be carried out by reconvening the Board for that purpose.[35] We suggest, however, that it would be sufficient in most cases for a single member or some members of the Board to perform this function (for example, the independent Chair acting alone).

(c) Quantum in Board report: We note that the Draft Guidance contains various descriptions of how the level of redress will be specified in the Board's report. We consider the most helpful formulation is that contained in paragraph 2.13 of the Draft Guidance ("*the [exact] level of redress to be provided under the scheme and/or the methodology to be applied by the compensating party in determining the amount of redress for each beneficiary*"),[36] rather than the more restrictive formulations to be found elsewhere in the Draft Guidance (for example "*the exact level of redress to be offered*").[37] We consider that the former provides the Board with the appropriate level of flexibility to adjust its determination to the particular facts of the infringement it is considering.

(d) Use of experts: We agree that the use of independent economic experts (beyond the members of the Board) in setting up and assessing the terms of the scheme should be kept to the minimum level necessary

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[34] See Draft Guidance, paragraph 3.3.

[35] See Draft Guidance, paragraphs 3.4, 4.15.

[36] Also see Draft Guidance, paragraph 3.3 ("*The Board will consider...the appropriate level of redress for each beneficiary (although in some cases it may be more appropriate for the Board to calculate the aggregate level of redress owed to beneficiaries) and/or the methodology to be applied by the compensating party in determining that level of redress*").

[37] See Draft Guidance, paragraph 2.21, bullet point 1. Also see Draft Guidance, paragraph 2.29 ("*The Board then determines the precise levels of compensation...*").

to assess compensation,[38] and consider that this should be clarified in the requirements for co-operation by the compensating party.[39]

(e) "Terms" and "conditions": To avoid confusion, we would suggest that the Guidance use the word "*conditions*" to refer to the conditions upon which an outline scheme is approved, and the word "*terms*" to refer to the terms of an approved scheme to which the statutory duty in section 49E of the amended CA98 applies. We would suggest that the phrase "*terms and conditions*" accordingly be avoided where possible. We also note that it is the information provided pursuant to a condition of scheme approval, rather than the information condition itself, [40] which may form part of the terms of the scheme for the purpose of the duty in section 49E.

(f) Definition of conflict of interest: We note that the independence of the Chair and other members of the Board is described inconsistently in paragraphs 3.7 and 3.11 of the Draft Guidance. We consider that the latter formulation should be preferred ("*free from any conflict between their own interests and the interests of the compensating party or those who may seek compensation under the scheme*").

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[38] Draft Guidance, paragraph 3.3.

[39] In particular, we consider that the first bullet point of paragraph 3.31 of the Draft Guidance could be amended to state that the compensating party may be required to provide evidence of harm to the Board "*by way of, for example, an expert report and the information and data used to prepare this report to the extent an expert report is necessary in accordance with paragraph 3.3 above*".

[40] See Draft Guidance, paragraph 5.2; CA98 sections 49C(7) and 49E as introduced by CRA15.