HAUSFELD

12 Gough Square
London EC4A3DW
Tel: (+44) 0207 665 5000

CMA Redress Power Guidance Team
Policy, Precedent and Procedures Unit
Competition and Markets Authority
6th Floor
Victoria House
37 Southampton Row
London
WC 1B 4AD

Email: rsa.consultation@cma.gsi.gov.uk

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CONSULTATION RESPONSE:
GUIDANCE ON THE CMA'S APPROVAL OF VOLUNTARY REDRESS SCHEMES

Hausfeld & Co.

Hausfeld & Co. LLP is a claimant litigation practice, specialising in recovery of compensation for losses caused by cartels and other anti-competitive conduct. In the last 5 years we have been involved in 19 private enforcement actions in Europe which are a matter of public record, together with a number of confidential settlement dialogues. In a number of those claims we have acted for groups of claimants collectively seeking redress for competition infringements, including a number of smaller businesses who would not have been in a position to bring their claims individually. We have also been involved in 2 global voluntary settlement schemes in relation to the marine hose cartel Parker settlement and the BA/Virgin air passenger settlement.

Overview of response

We welcome the introduction of CMA approved voluntary redress schemes as a means of encouraging prompt payment of compensation to consumers and business affected by competition infringements, in a cost effective and accessible way. We fully support the aim of this providing swift and proportionate resolution of claims, but consider it key that there are sufficient safeguards to ensure that it provides a fair level of compensation for the harm suffered and strikes the appropriate balance.

This is key, in particular, in circumstances in which consumers and businesses will often lack the information to analyse the harm and the CMA's approval of the scheme will be relied on as the validation that the compensation has been considered and determined via an independent and fair process. Nothing of course prevents a defendant from otherwise setting up a redress scheme without the CMA's approval, and use of a statutory scheme should therefore provide the appropriate level of

protection to beneficiaries. The aim of this proving to be a lower cost and viable alternative to litigation also depends on it providing fair and reasonable compensation for the harm.

Our comments below are aimed principally at ensuring that:

- the Board appointed to consider the scheme has sufficient information to carry out an independent analysis of the harm to determine fair compensation, that the remit of how it carries out this role is clear and strikes the appropriate balance with the aim of early and cost effective resolution;
- use of the outline approval process is subject to the same conditions and right of final approval by the CMA as under an application for full scheme approval; and
- the application process is accessible and its terms make sufficiently clear to potential beneficiaries the ambit of claims that are covered by the scheme and those that are excluded.

Q.1 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 change that you feel would improve them.

We found the guidance generally to be clear and comprehensive.

(a) The process relating to the outline scheme process is less straight forward, but we believe the flow chart at Figure 1 and explanation at 2.21 – 2.25 is helpful and important that this makes clear that this alternate route does not change in substance the information which the CMA will consider before providing final approval.

(b) The terminology in relation to the complaint process varies slightly at different points. It is not clear initially that this should be an independent process, but later clarified that it should be a third party rather than the compensating business itself, so we think that could usefully be made clear/consistent throughout.

Q.2 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.

(a) The flowchart at Figure 1 is helpful in showing the alternate routes for applying for approval of a redress scheme, in particular due to the additional complications surrounding the approval for an outline scheme. Our understanding from the chart and paragraph 2.28 of the draft guidance is that where a business submits a full scheme in conjunction with an existing infringement investigation, it should still give advance notice to the CMA of the intended Board members, so that the CMA has the opportunity to raise any objections. We assume this should be no different to a situation in which an applicant intends to submit a full scheme during the course of an investigation, and, if so, we think it helpful to make this clear in the flowchart. It may also be useful to add any guideline time periods.

(b) It would be helpful to provide an additional flowchart showing the process for a consumer or business applying for redress under an approved scheme, including the option to pursue a complaint if their application is rejected, seek to enforce the scheme or ask the CMA to do

so (if required) or pursue a claim if their application is rejected or the scheme does not cover all aspects of their loss.

Q.3 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?

- We appreciate the level of detail in the Guidance, which we think is important given the limited nature of the Act and implementing Regulations. This also means that requirements to follow the Guidance are important.

- We believe additional clarity would be helpful in relation to: (a) how the Board will assess the harm; and (b) the appropriate information required for them to reach an appropriate view, as set out in our response to Question 4 below.

Q.4 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?

4.1 Evidence, and analysis of, harm:

(a) Our key concern relates to ensuring that the Board (and, in particular the economist), has sufficient information at its disposal and sufficient time/resource to reach an impartial and sufficiently informed view on whether the level of compensation is reasonable.

(b) We agree with the proposition that the level of analysis would be expected to fall well short of that which would take place in litigation and will vary on a case by case basis. In principle we see no issue with this approach. We have worked successfully in a number of settlement dialogues with an initial information exchange and preliminary economic analysis to assist clients in reaching a sufficiently informed view to reach an early settlement. Our experience is, however, that there is often very divergent views between economists with defendants typically taking the position that there has been no or negligible harm. Given the anticipation that an applicant business would be likely to put forward its own expert analysis, we think it key that the information and resource available to the Board allows it to reach a sufficiently balanced view, including obtaining additional information and analysis where it thinks necessary, rather than just reviewing the business' proposal. This will be key to ensuring that schemes achieve fair compensation.

(c) Against that background, we have the following comments:

- We welcome the confirmation at paragraphs 3.3. and 3.31 that the Board should have the ability to obtain additional information beyond that provided by the Defendant if required and that expert evidence may be necessary in certain cases.

- It is not clear from the Guidance whether it is envisaged that the economist on the Board will carry out his/her own analysis and have the resource to do this, and/or

rely on independent expert input in appropriate cases. It would be helpful to clarify this and make clear that one or other may be necessary in appropriate cases (particularly in circumstances where the Board is funded by the applicant business). If it is anticipated that the economist on the Board will carry out his/her own analysis, ensuring that they have the time/resource to do so will be a relevant criteria in their appointment.

- There are a number of references (e.g. in 3.31) to proportionality of information requests. We agree with this in principle, but on the basis that proportionality should include a consideration of the information reasonably necessary for the Board to reach a sufficiently informed and impartial view as to the appropriate level of compensation.

- We think it important that the Board Report delivered to the CMA should identify the information on which the view was reached, alongside the methodology. The situations in which the CMA can revoke outline approval where it has significant concerns regarding the Board's approval should include a situation which it felt that the Board had lacked sufficient impartial information on which to reach a decision.

- We note the references at paragraphs 2.19 and 2.24 suggest that all information provided to the Board and/or CMA will attract "without prejudice privilege". We understand the rationale behind this to the point where an open offer is put forward and where the applicant will retain the right to withdraw the scheme up to that point. Once an offer has, however, been made, we believe beneficiaries should be entitled to understand the basis on which the offer has been made.

- It would be helpful to expand at paragraph 2.32 on what the summary of the scheme which the CMA intends to publish on approval will contain. We think this should summarise the key findings of the Board and the information on which its approval of the Scheme is based. If consumers and business are expected to decide whether to accept the offer and it could have cost consequences for them in deciding whether otherwise to pursue an independent claim, we think it reasonable that they understand on what basis the offer has been determined.

4.2 Conditions attached to outline scheme approval

(a) We welcome the explanation at 2.24 of the core conditions which the CMA would expect to attach to any outline scheme approval. We think this is important to ensure that schemes submitted via an outline approval application do not ultimately differ in substance from a full scheme approval, including the CMA's ability to revoke approval if it has serious concerns about the way in which the Board has reached its determination and/or the outcome. We find it hard to see in what circumstances these conditions should ever not be appropriate.

(b) We believe helpful to add to this section additional conditions that:

- the CMA should consider any minority view of the Board and not prefer this view. This is consistent with the principle in 3.27 that the CMA should consider the Board's views, including dissenting views; and
- the Board had sufficient information to reach a sufficiently informed and impartial decision.

4.3 Information regarding terms of the scheme

The review of the ambit of the redress scheme and eligibility criteria (4.14) should also include review of the explanation to be provided to potential beneficiaries regarding the ambit of the scheme. This will be key to ensuring beneficiaries understand the scope of the claims covered and which are compromised by accepting an offer; and any which are not covered. It should also assist in reducing the number of applications/appeals by applicants who are not covered by the scheme. It should also make clear that the time for bringing a claim outside of the scheme is not affected by the application process.

Q.5 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?

- We have no comments on this question.

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

- We have no comments on this question.

Hausfeld & Co LLP
29 March 2015