Response to consultation

Draft guidance on the CMA's approval of voluntary redress schemes

1. Introduction

1.1 This paper is submitted by Slaughter and May in response to the consultation document issued by the Competition and Markets Authority ("**CMA**") on 2 March 2015 in relation to the "*Draft guidance on the CMA's approval of voluntary redress schemes*" (the "**Guidance**").[1]

1.2 We welcome the opportunity to provide comments on the Guidance. We consider it important that the Guidance be as clear and instructive as possible to achieve the objective of encouraging such schemes as a viable form of alternative dispute resolution.

1.3 In this paper, we do not respond to each of the CMA's six consultation questions individually.[2] Instead, we set out below our thoughts on the Guidance by theme, bearing in mind the CMA's questions.

1.4 In this paper, we use the terms "*claimant*" and "*defendant*" even though formal proceedings may not – in practice – already be initiated when voluntary redress schemes are established.

1.5 We would be happy to discuss with you in further detail any of the comments contained in this paper if that would be helpful.

2. Privilege, confidentiality and disclosure

2.1 We believe that it is crucial to the success of voluntary redress schemes that they be conducted in a manner that protects any sensitive information disclosed in the process of approving them. We consider that clearer and more definitive guidance is required on this aspect.

Without prejudice communications

2.2 We agree that communications among the CMA, businesses applying for scheme approval, and independent boards should be conducted on a "*without prejudice*" basis. Without this, businesses may fear that the CMA will treat an application for approval of a scheme as an admission of liability, and therefore may be more reluctant to apply. In our view, this point is crucial to the success of schemes, and deserves greater

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[1] Competition and Markets Authority (2 March 2015), "*Draft guidance on the CMA's approval of voluntary redress schemes: Consultation document*", CMA40con.

[2] *Ibid*., section 4.

prominence in the Guidance. Currently, it first appears in a footnote to paragraph 1.3 of the Guidance, and then later in section 3.

Third parties and confidentiality

2.3 Paragraph 2.3 of the Guidance states that the CMA "*would generally expect*" to treat applications for approval as confidential. This language creates uncertainty that should be avoided. It is vital that sensitive information in applications be handled confidentially. Otherwise, businesses may fear that this information will fall into the hands of potential claimants, who could use the information in litigation. Again, this may make businesses more reluctant to use voluntary redress schemes. Accordingly, we suggest that the Guidance instead state that sensitive information in applications shall always be treated as confidential except by agreement with the business to which the information pertains or as otherwise required by law.

2.4 Paragraph 2.3 of the Guidance also states that the CMA will put scheme applications "*on its investigation file for inspection*". Businesses contemplating voluntary redress schemes may be deterred by this policy. There should be certain safeguards to prevent sensitive information and without prejudice material from being used against applicants by third parties (who might, for example, see such information during access to the file or by applying to court for a disclosure order).

2.5 Such safeguards exist in the context of leniency applications. The CMA's guidance in that area states, for example:

> *"Disclosure of application statements may be of particular concern to applicants because application statements sometimes disclose certain aspects of the application that the* [CMA] *has chosen not to pursue or the applicant's own analysis of the emerging details of the* [infringement] *at the time of the application, and there is therefore a potential risk that any unnecessary disclosures may put leniency applicants at a disadvantage relative to non-leniency parties. Accordingly, whilst application statements, including transcripts of oral statements, will be placed on the* [CMA]*'s file, when assessing the need for disclosure, the* [CMA] *will give weight to the* ***strong public interest in encouraging full and frank applications, and notes that non-disclosure of such material may be in the public interest in order to protect the efficacy of the leniency regime****. In practice, this means that the* [CMA] *will not ordinarily grant access to the application statement to other recipients of a statement of objections."*[3] [emphasis added].

2.6 An analogous argument should apply to voluntary redress schemes. As the CMA acknowledges, there is a strong public interest in encouraging businesses to establish schemes.[4] If third parties can access scheme documents before they become public, businesses may be exposed to increased litigation risks. This may cause the disadvantages of applying for a scheme to outweigh the potential advantages. The

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[3] Office of Fair Trading (July 2013), "*Applications for leniency and no-action in cartel cases*", OFT1495, paragraph 7.7.

[4] Competition and Markets Authority, *op. cit.*, section 4, question 6.

Guidance should therefore give assurances similar to those found in the leniency context to mitigate the (real or perceived) risk that third parties may use scheme documents to support possible claims against applicants.

2.7 Once schemes open to the public, it is clear that some information relating to them will need to be made public. However, we consider that neither sensitive information nor without prejudice material should be made available unless it is necessary for the operation of the scheme.

Withdrawn applications

2.8 Businesses contemplating schemes will also want to know that, if they later withdraw from the scheme approval procedure, or if the CMA closes its investigation, the CMA will disregard any statements they have made to the CMA as part of the scheme approval procedure.

2.9 Such safeguards exist in the context of leniency applications. The CMA's guidance in that area states, for example (under the heading "*Use of information submitted by a failed or withdrawn leniency applicant*"):

> "*Information which is self-incriminatory and which was submitted after a marker approach by an undertaking applying for leniency will not subsequently be relied on as evidence by the* [CMA] *against that undertaking.*"[5]

Similarly, it states (under the heading "*Use of information in the case of* [CMA] *deciding not to proceed*"):

> "*If the* [CMA] *decides, at any stage, that it does not wish to proceed with its investigation into the infringement on administrative priority grounds, the* [CMA] *will generally have no desire to use the information provided against the applicant or for any other purpose.*"[6]

2.10 The Guidance should provide similar safeguards in the context of redress schemes, again with a view to encouraging more businesses to apply.

3. Double recovery

Direct and indirect purchasers

3.1 Paragraph 2.10 of the Guidance states that businesses will need to decide whether a scheme will cover indirect as well as direct purchasers. There is a risk that double recovery may, however, arise if a direct purchaser and an indirect purchaser both seek to recover the same overcharge. Litigation before the UK courts handles this issue

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[5] Office of Fair Trading, *op. cit.*, paragraph 7.15.

[6] *Ibid.*, paragraph 7.26.

using the passing-on defence, where defendants invoke the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement in question.[7] Businesses may or may not wish to follow precisely this approach in voluntary redress schemes, but the Guidance should acknowledge that businesses will need to deal with the issue.

3.2 Businesses may also need to address circumstances where overlapping claims are made by different claimants through the courts and through a voluntary redress scheme. Should there be a disparity between a scheme's and a court's approach to a particular infringement, it is conceivable that a business could end up providing compensation twice for the same loss but in different forums (for example, if a direct purchaser were to claim under a voluntary redress scheme and an indirect purchaser were to claim through the courts for the same loss). The Guidance should therefore make it clear that the CMA accepts the need for businesses to design and run schemes in a way that rules out the risk of double recovery.

4. Contribution proceedings

4.1 Where a claimant accepts a payment from a defendant in full and final settlement of a competition claim, as paragraph 1.25 of the Guidance envisages, there are two possible results. The first is that the claimant's right to bring proceedings in respect of that competition infringement against any party is completely extinguished. The second is that the claimant's right to bring such proceedings against the settling defendant is extinguished, but its right to pursue the settling defendant's fellow cartelists remains. Which result occurs will depend on the terms of the relevant settlement agreement.

4.2 In the second possibility, the defendant will remain exposed, despite its settlement with the claimant, to further financial risk. This is because the claimant may, after accepting a settlement payment from the defendant, go on to claim further redress from the defendant's fellow cartelists. If the claimant is successful in so doing, the fellow cartelists may then bring contribution proceedings against the original defendant to recover a proportion of whatever they had to pay out to the claimant (on the basis that the defendants are jointly and severally liable).

4.3 For this reason, businesses may wish to try to avoid the second possibility. It may therefore be appropriate for the Guidance to recognise this, and make it clear that the CMA will be prepared to approve schemes which require settling claimants not to bring claims against any other party in respect of the same infringement.

5. Appropriate level of compensation

5.1 The Guidance is currently silent on the level of compensation that the CMA expects voluntary redress schemes to provide. The Guidance refers at paragraph 3.3 to the European Commission's guide to quantifying harm, and at paragraph 1.13 to the courts'

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[7] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, article 13.

recognition of the right to "*full compensation for harm caused by competition law infringements*". However, it is not clear from the Guidance whether the CMA expects schemes to offer full compensation or a lesser amount in settlement of potential claims.

5.2 It is very common in civil claims for claimants to settle for less than the total loss claimed, regardless of the strength of their case on liability. Indeed, the courts encourage this approach as an efficient means of resolving disputes and as part of their duty to further the overriding objective of the Civil Procedure Rules ("**CPRs**") by actively managing cases.[8] The benefit to claimants is that they are able to mitigate the litigation risk inherent in any claim and receive compensation earlier and at a lower cost.

5.3 This approach is common in, for example, pensions cases, where potentially large classes of members can be affected by breaches of duty such as maladministration. The court will often approve a settlement negotiated by the representative member or members on behalf of the relevant class or classes. When determining the appropriate amount of the settlement, the parties and their legal advisers will take into account all relevant factors, including:

(i) the maximum potential loss to the members;

(ii) the documentary, witness and expert evidence available (or likely to become available);

(iii) the legal strengths and weaknesses of the members' claim;

(iv) the costs of taking the case to trial;

(v) the administrative costs of each member proving his or her precise loss, and of distributing any damages fairly across the class or classes of members; and

(vi) the general uncertainties of litigation and a trial.

5.4 In all cases, the final settlement sum will represent a discount to the maximum potential damages award at trial.

5.5 Voluntary redress schemes ought to follow the overriding objective at the heart of the CPRs and take account of all factors (including those listed above) to arrive at a settlement sum which is likely to attract early settlement. If schemes required defendants to compensate victims fully, there would be little advantage to them. Defendants would be likely to wait and see what, if any, private actions were commenced, and would then defend or settle them on an *ad hoc* basis, as appropriate. Precedent suggests that it is often difficult for claimants to win damages actions and that – whether they win or lose – it is an expensive process. Therefore, early settlement for a proportion of the likely losses is beneficial to claimants and ought to be encouraged.

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[8] CPR, Rule 1.4(2)(f).

5.6 We acknowledge that one benefit of a scheme is the potential 10% fine reduction, but this benefit might easily be outweighed by the cost of having to compensate victims for their full loss without recognition of the inherent uncertainty and cost of litigation.

6. Other financial matters

Costs

6.1 Paragraphs 2.41 to 2.47 of the Guidance address the recovery of the CMA's costs. However, the Guidance does not provide any details of how the CMA proposes to calculate its costs. This lack of certainty may affect businesses' willingness to apply for voluntary redress schemes.

6.2 Paragraph 2.45 of the Guidance states that the CMA will "*seek to recover all its reasonable costs in the vast majority of cases*". This could be perceived as unduly punitive. The CMA does not recover its costs in antitrust investigations, and the Guidance does not make it clear why the CMA considers it appropriate to do so routinely in the context of voluntary redress schemes. Businesses are already required to bear the costs of establishing and running a scheme. A business that has behaved quite reasonably, offering adequate compensation quickly and with minimal prompting, might take the view that it ought not to have to pay the CMA's costs as well. If businesses are required to pay the CMA's costs, there is a risk that schemes could become too expensive for businesses to consider them a viable alternative to litigation.

Reduction in fines

6.3 We agree with the CMA's proposal at paragraph 2.38 of the Guidance to provide an incentive to use schemes by offering a possible fine reduction. We question, however, whether a limit of 10% is appropriate. If a scheme is sufficiently generous or timely, or if it is costly to administer, it may be appropriate for the fine reduction to reflect this. If the fine reduction does not take such matters into account, it may not be sufficient to encourage businesses to apply for schemes. Instead, they may prefer simply to defend private actions, which experience shows are difficult for claimants to win.

6.4 There is also support for higher levels of fine reductions in previous cases. For example, in the investigation into the "*exchange of information on future fees by certain independent fee-paying schools*", the Office of Fair Trading imposed a fine of only £10,000. Part of the reason for imposing such a low fine was that the parties under investigation offered to pay £3 million to establish the Schools Competition Act Settlement Trust.[9] Further examples can be found in the energy sector, where Ofgem has in previous cases imposed nominal fines of £1 while requiring the parties under

[9] Decision of the Office of Fair Trading No. CA98/05/2006 of 20 November 2006 (Case CE/2890-03).

investigation to set up compensation funds.[10] The CMA may wish to retain the flexibility to act in this way, and so ought not to restrict itself to a maximum reduction of 10%.

6.5 We also consider that it would be appropriate for the CMA to provide guidance on the factors that it may take into account when setting a fine reduction. This would provide potential applicants with greater certainty when assessing schemes as an alternative to litigation, and help to ensure due process in setting the final level of any fine.

6.6 Paragraph 5.15 of the Guidance suggests that the CMA may strip an applicant of the benefit of any fine reduction if a scheme is established but not used. The Guidance does not set out when or how the CMA would do this, or explain the mechanism it would use. We consider that it would be helpful for these matters to be made clear in the Guidance, so that there is greater certainty over the way in which any scheme that a business establishes will affect its financial position.

6.7 In any event, we consider that the potential loss of any fine reduction is an unattractive proposition that may reduce the likelihood that businesses will apply for approval of voluntary redress schemes. If a scheme is approved by the CMA and administered properly, the business ought not to be held accountable if no claimants claim under the scheme. If fine reductions could be lost in this way, one of the main benefits of establishing a scheme would be rendered uncertain, reducing the incentives to use them.

Distribution of redress money

6.8 The last bullet point in paragraph 3.3 of the Guidance states that boards should consider "*the proposals for distribution of redress money where beneficiaries cannot be identified or do not come forward*". It is unclear what this means. It could be interpreted to mean that businesses will be required to provide funds up-front when establishing a scheme, and that they will not be allowed to recover any remaining funds when the scheme closes. This is unlikely to be an attractive proposition for businesses considering applying. At any rate, it would be helpful if this statement were clarified, because the rest of the Guidance seems compatible with businesses simply compensating scheme claimants out of their general cash reserves (without setting up separate funds). It is also unclear how the separate-fund mechanism would interact with the CMA's ability to claw back fine reductions where no claimants claim under a scheme.

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[10] "*Decision of the Gas and Electricity Market Authority to impose a financial penalty, following an investigation into compliance by E.ON Energy Solutions Limited with its obligations under conditions 25 and 23 of the Standard Conditions of the Electricity and Gas Supply Licences*", 2 July 2014; "*Decision of the Gas and Electricity Markets Authority to impose a financial penalty, following an investigation into Scottish Power Energy Retail Ltd's compliance with standard condition 25 of its electricity and gas supply licences*", 4 December 2013.

7. Contesting liability

7.1 Paragraph 2.4 of the Guidance states that "*it is likely to be impracticable for a party to contest liability at the point of infringement decision and/or appeal a CMA infringement decision on liability grounds – or other grounds challenging material aspects of the CMA's infringement finding – and at the same time seek CMA approval for a scheme*". This statement is, in our view, too general. A business could quite conceivably seek CMA approval for a scheme while contesting, for example, the precise geographic or product scope of the infringement decision. For instance, in an infringement relating to white goods, a business should be able to seek approval for a scheme to benefit consumers who bought washing machines, while at the same time contesting the CMA's infringement finding insofar as it applied to refrigerators.

8. Release from scheme obligations

8.1 Paragraph 5.16 of the Guidance explains that the CMA will expect a business that has established a scheme to remain bound by the scheme even where it has successfully appealed against the CMA's corresponding infringement decision. Businesses may find this unattractive. It should be open to businesses to close their schemes in line with an appeal's findings if circumstances justify it. If, for example, the business is found on appeal not to have infringed competition law, it should be released from its scheme obligations to reflect this.

9. Timing

9.1 Paragraph 2.15 of the Guidance states that the CMA "*will aim to assess applications and notify applicants of the outcome within a three month timescale in the majority of cases*". Although we welcome the CMA's willingness to provide a timescale, we consider that the estimate could be clearer. There are at least four different tracks for having schemes approved:

(i) waiting until after a CMA decision, then submitting a full scheme;

(ii) waiting until after another regulator's decision, then submitting a full scheme;

(iii) submitting a full scheme before a CMA decision; and

(iv) submitting an outline scheme before a CMA decision.

9.2 We presume that the timing for obtaining approval will vary depending on which track a business is on. Where, for example, a business submits an outline scheme, we expect that the CMA will be able to reach a (conditional) decision more quickly than if the business had submitted a full scheme. It would be helpful for the Guidance to explain this in more detail, giving indicative timescales for each track.

10. Conflicts of interest

10.1 Paragraph 3.18 of the Guidance provides examples of board members' conflicts of interest. All of the examples are of conflicts influencing board members in favour of defendants. No example is given of a conflict which would influence a board member in

favour of claimants, notwithstanding that conflicts of interest can clearly operate in either direction.

11. Appropriate form of compensation

11.1 The Guidance does not discuss the forms in which businesses might be able to offer compensation other than cash, even though the Consumer Rights Act contemplates the possibility of businesses offering non-cash compensation. The flexibility to offer non-cash compensation could be attractive to businesses considering applying for a scheme, and so the Guidance should describe alternative forms of compensation that the CMA might find acceptable.

12. Appeals

12.1 The Guidance ought to explain how parties can appeal CMA decisions in relation to voluntary redress schemes. If, for example, the CMA were to reject a scheme or refuse to release a business from a scheme, the applicant business might want that decision reviewed (in particular, if the other option would be to withdraw the application).

13. Flowchart

13.1 We find the flowchart at page 7 of the Guidance helpful. We do, however, have the following comments:

(i) In the left-hand branch of the flowchart, there is a box describing pre-application discussions with the CMA. This description does not appear in the right-hand branch, even though in the right-hand branch there is a box containing the words "*Pre-application discussions with the CMA*". This discrepancy makes it appear as though pre-application discussions may differ depending on which branch applies. Unless this is intended (in which case it should be explained), the description should be removed from the flowchart and moved to the main body of the text. This would also make the flowchart shorter and more readable.

(ii) Near the top of the right-hand branch of the flowchart, there is a box containing the words "*The CMA issues a Statement of Objections*". Paragraph 2.17 of the Guidance states that the CMA will <u>normally</u> expect parties to submit schemes only after it has issued a statement of objections. The box, on the other hand, suggests that parties must <u>always</u> wait until the CMA has done so. It would be helpful for the flowchart to reflect paragraph 2.17 by omitting the box or indicating that this box is optional.

14. Structure, consistency, repetition and clarity

14.1 Finally, turning more generally to the structure and consistency of the Guidance, we consider that, in places, these could be improved.

Inclusion of summary

14.2 As currently drafted, the introduction consists of eight pages of text (almost a quarter of the Guidance). We consider that it would be helpful for the Guidance to include a brief summary at the beginning that outlines the purpose and process of establishing voluntary redress schemes. It should be written for the widest possible audience, and should not, therefore, assume a high level of knowledge about voluntary redress schemes or other competition matters, as the Guidance does currently.[11] This will allow readers who are unfamiliar with voluntary redress schemes to understand easily what they are for and how they should work.

14.3 If a summary were included, much of the detail currently in the introduction could be moved to specific sections. This would also reduce duplication. For example, paragraph 2.7 of the Guidance lists what an application for approval of a scheme must contain, but the list appears incomplete: paragraphs 2.10 and 1.18 purport to list the same requirements, but in each case the list is different.

Clarification of headings

14.4 Some paragraph headings appear misleading. For example, the heading above paragraph 1.14 of the Guidance is "*Scope of the CMA's power to approve redress schemes*". However, the following paragraphs do not address this point. They instead address the CMA's approval process.

14.5 Similarly, the heading above paragraph 1.24 of the Guidance is currently "*How approved voluntary redress schemes fit within the overall redress framework*". The following paragraphs explain in detail existing redress mechanisms, but do not explore how voluntary redress schemes are intended to fit into the existing framework. It is not necessary for the Guidance to summarise the law on private redress in general. Instead, we consider that these paragraphs should focus specifically on how voluntary redress schemes change the landscape (i.e., by offering a chance at early settlement and avoiding litigation altogether).[12] We also consider that these paragraphs should explain how the CMA expects voluntary redress schemes to interact with collective settlements, the other new settlement procedure introduced by the Consumer Rights Act.

Other suggestions

14.6 The Guidance does not consistently make clear that an application may be submitted during the course of an ongoing investigation only if the investigation is being conducted by the CMA. For example, at paragraph 1.16 of the Guidance, the CMA states that an

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[11] For example, the role of the board is not explained until section 3 on page 26.

[12] Alternatively, if it is thought necessary to include details of existing private redress mechanisms, this information could be confined to an appendix. This appendix might also include a flowchart representing the various options and showing how voluntary redress schemes fit into the framework.

application "*can also be submitted during the course of an ongoing investigation*". It would be better in such instances to clarify that an application "*can also be submitted during the course of an ongoing **CMA** investigation*".

14.7 More generally, the Guidance tends to focus on CMA investigations to the exclusion of those conducted by sector regulators or the European Commission. The Guidance could be improved by devoting more attention to voluntary redress schemes that arise from non-CMA investigations.

14.8 Paragraph 2.10 of the Guidance uses air travel, electronics and everyday goods as illustrations of how the schemes might work in practice. We find the illustrations helpful, and consider that they could be usefully deployed throughout the document – for example, through the use of a fictional case study.

14.9 At paragraph 1.18 of the Guidance, it is not clear what "*confirmation that a third party may not submit a claim*" means. In particular it is unclear whether this refers to the principle that claimants benefitting from a scheme should do so in full and final settlement of any claims they may have against the defendant for breaches of competition law. If this is the CMA's intention, this should be stated more precisely. If not, it should be made explicit who these third parties might be, and what their claims might be for.

14.10 The fourth bullet point in paragraph 2.7 of the Guidance states that "*relevant matters*" are further detailed in paragraph 2.10, but it is not clear where in paragraph 2.10 those relevant matters appear.

14.11 Paragraph 2.10 of the Guidance (in the second round bullet point on page 15) states that it "*may be appropriate*" for businesses to notify consumer bodies of their schemes, but does not explain in what circumstances or for what reasons. It would be helpful for the Guidance to indicate when the CMA would typically regard this as appropriate.

14.12 Paragraph 5.13 of the Guidance states that the CMA may release a business from a scheme where the scheme "*has clearly become obsolete*". It would be helpful for the Guidance to explain when the CMA might consider a scheme obsolete (for example, by reference to the number of claimants claiming under it), since this would allow businesses to judge how successful their schemes have been, and when they might expect their scheme obligations to expire.

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