COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE DRAFT GUIDANCE ON THE VOLUNTARY REDRESS SCHEME ISSUED BY THE UNITED KINGDOM COMPETITION AND MARKETS AUTHORITY

April 13, 2015

The Sections of Antitrust Law and International Law of the American Bar Association ("ABA") (the "Sections") welcome the opportunity to comment on the Draft Guidance on the Voluntary Redress Scheme ("Draft Guidance") issued by the Competition and Markets Authority of the United Kingdom (the "CMA") under the Consumer Rights Bill of 2015.[1] The Sections commend the CMA for its leadership in crafting a comprehensive, transparent, and potentially useful program to promote voluntary schemes as an alternative to private litigation in the courts.[2]

The Draft Guidance contains a number of innovative features designed to meet its goal of "providing a swift and relatively low cost way of providing redress, while ensuring the interests of those harmed are properly considered and safeguarded."[3] These features include: (1) a compensated independent Board including an experienced competition attorney, an economist, a consumer representative, and an industry or market expert, with access to the defendant's records, documents, and employees, to determine total damages to be awarded and calculate pay-outs on claims;[4] and (2) a detailed redress program including the category of persons eligible for compensation, and the terms and conditions of the scheme, all based on the Board's determinations.[5] The Sections also recognize the importance of allowing for flexibility within the proposed system and appreciate certain choices left open within the Draft Guidance. In particular, the Sections interpret the Draft Guidance as leaving open the possibility that defendants can use either a current account model (no limits and specific payouts) or a dedicated fund as the basis for the voluntary redress scheme.

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[1] The voluntary redress program will be authorized by the Consumer Rights Act of 2015 (*see* Draft Guidance, paras. 1, 1.17), as set out in bill form. *See* Consumer Rights Bill, 2014-15, H. L. Bill [64] (Gr. Brit. Nov. 11, 2014) (hereinafter "Consumer Rights Bill 2015"), Para. 82 & *id.* Schedule 8, *available at* http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0064/15064.pdf. The Draft Guidance also refers to the submission of a conditional redress program in cases under investigation by the CMA itself. *See* Draft Guidance, para. 1.16. To the extent relevant, these comments also apply to that program.

[2] *See* Draft Guidance, paras. 1.2, 1.6. 1.15 & 2.10.

[3] *Id.*, para. 3.3.

[4] *See id.*, paras. 2.7, 3.31-3.32.

[5] *Id.* para. 2.12; *see also, id.* para. 2.10. Specifically, the Draft Guidance anticipates that the proposed Board will have fully investigated the issues raised by the voluntary redress scheme and produced a report that provides details of the proposed scheme for review by the CMA. *See id.* paras. 2.12, 2.13, 2.28-2.29, 3.1-3.4.

The ABA has long encouraged the development of alternative dispute resolution processes[6] that can achieve a resolution more expeditiously and efficiently than litigation with coverage that would include injured consumers as well as businesses.[7] The proposed scheme aligns well with related approaches used internationally. These include, for example, parallel collective settlement of mass action processes used in other European Union Member States,[8] and similar approaches used under Canadian law.[9] It also parallels important facets of the collective settlement processes implemented by federal courts in the United States, which rely on appointed special masters who work with the parties to address conflict, allocation, and distribution issues involving multiple layers of purchasers once a settlement amount has been determined.[10]

The Sections anticipate that the CMA's Draft Guidance will help to fulfill the EU's Damages Directive's call for such schemes to play an important role in ensuring the widest coverage for legitimate victims to be compensated appropriately for injury caused by the infringement.[11] For the purposes of predictability in the UK context, it is important that the Board can use the Damages Directive as its starting point for the legal and economic assessment of the appropriate amount of compensation under a voluntary redress scheme. The Draft Guidance recognizes this, while also providing for sufficient flexibility to permit a more efficient and expeditious outcome based on independent assessments and analysis.[12]

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[6] *See, e.g.,* ABA, House of Delegates, Resolution 114 (adopted 2009) (speaking to international commercial arbitration).

[7] *See, e.g.,* ABA, Section of Dispute Resolution, Report of the Discussion of the Consumer Study Arbitration Group (Jan. 15-16, 2010).

[8] Karen Jelsma & Manon Cordewener, *The Settlement of Mass Claims: A Hot Topic in the Netherlands*, THE INTERNATIONAL LAW QUARTERLY (SUMMER 2011) (discussing Netherlands with its opt-out collective settlement process in contrasting that process to Sweden and Germany with their collective opt-in settlement process), *available at* http://www.hoganlovells.com/files/Publication/035a19d4-5aa9-4e43-b651-363f3031a0b9/Presentation/PublicationAttachment/28345212-16e0-43be-9bcd-4199cce6ca23/The_Settlement_of_Mass_Claims_A_Hot_Topic_in_The_Netherlands.pdf.

[9] *See Option comsommateurs v. Infineon Technologies AG et al.*, 2013 CarswellQue 10520 (Sup. Ct. Canada Oct. 31, 2013); *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 CarswellBC 3257 (Sup. Ct. Canada Oct. 31, 2013); *Syn-Ripe Products, Ltd. v. Archer Daniels Midland Co.*, 2013 CarswellBC 3259 (Sup. Ct. Canada Oct. 31, 2014).

[10] *See, e.g.,* Emilio Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-on in State and Federal Court*, 20 COMPETITION: J. ANTI. & UNFAIR COMPETITION LAW SECTION OF THE STATE BAR OF CALIFORNIA, 28, 45-46 (SPRING 2011). For example, in the *DRAM* price-fixing case, the United States District Court for the Northern District of California appointed a special master to address allocation and distribution issues involving a class of indirect purchasers that not only encompassed end-user natural persons and businesses but also covered resellers such as Best Buy and Costco and even covered contract manufacturers such as Celestica. After the various parties, with separate counsel, submitted differing expert opinions on pass-through, the special master brokered a compromise allocation plan between counsel for these differing groups that ensured the widest possible compensation for the injuries of these different groups. *See* Report and Recommendations of Special Master, Part I, MDL No. 1486, *In re DRAM Antitrust Litig.* (Jan. 8. 2013), *available at* http://dramclaims.com/settlement-details/court-documents/; Order Adopting Report and Recommendations of Special Master, Part I, MDL No. 1486, *In re DRAM Antitrust Litig.* (Jan. 17, 2014), *available at* http://dramclaims.com/settlement-details/court-documents.

[11] *See* DIRECTIVE OF THE EUROPEAN PARLIAMENT AND COUNCIL ON CERTAIN RULES GOVERNING ACTIONS UNDER NATIONAL LAW FOR INFRINGEMENTS OF THE COMPETITION LAW PROVISIONS OF THE MEMBER STATES AND THE EUROPEAN UNION ("DAMAGES DIRECTIVE"), 2013/0185 (COD), PE/CONS 80-14, Paras. 47, 48, and 50 (Oct. 24, 2014), *available at* http://ec.europa.eu/competition/antitrust/ actionsdamages/damages_directive_final_en.pdf.

[12] *See* Draft Guidance, para. 3.3.

While the Sections commend the CMA for this initiative, based on the broad experience of their members as defense counsel, plaintiffs' counsel, and/or government enforcers in collective actions for damages, the Sections respectfully suggest that the CMA may wish to consider refinements to its Draft Guidance. As outlined below, these suggested refinements focus on: (1) approaches to further incentivize defendants to participate in these schemes and the interface of these schemes with the collective action litigation flowing from the Consumer Rights Bill of 2015; (2) potential confidentiality and due process issues; (3) possible notice and proof-of-claim issues raised for plaintiffs; and (4) certain process issues involving transparency, public comment, and conflicts of interests among claimants. The Sections hope that these suggestions will aid the CMA in making the United Kingdom's voluntary redress scheme even more robust, efficient, and effective in meeting the goals of the Damages Directive and the Consumer Rights Bill of 2015.[13]

A. Refining Incentives for Defendants to Participate in Voluntary Redress Schemes and Addressing the Interface of Those Schemes with Collective Actions

The Sections recognize that the CMA gave considerable thought to developing a proposal that would incentivize defendants to participate in the voluntary redress program. This is evidenced by approaches in the Draft Guidance concerning: (1) damages principles;[14] (2) the potential for a penalty reduction of up to 10% for participating defendants;[15] and (3) opportunities to avoid actions for damages in the courts, including the new opt-in and opt-out collective antitrust damage actions that are set to come into force later this year.[16] However, the Sections respectfully suggest that the CMA might give additional consideration as to whether the incentives, as presently constituted, suffice to induce defendants to participate in voluntary redress schemes.

Importantly, the Sections' experience has been that defendants value global releases of *all* competition law claims against them as a quid pro quo for the kind of payouts necessary to ensure fair compensation for injured direct and indirect purchasers.[17] However, pursuant to the Draft Guidance, defendants could find themselves in a situation in which they would either (a) have to provide substantially larger payouts that would go beyond their individual liability for damages to reflect joint and several liability as well as umbrella damages,[18] or (b) risk being sued for said damages in parallel collective opt-out or opt-in actions.[19] In our view, this risk and unpredictability raises the concern that the voluntary redress scheme could prove unattractive to defendants.

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[13] If primary legislation is required to implement any of these suggestions, it may be appropriate to do so upfront although the Consumer Rights Bill of 2015 itself has just been enacted. *See* http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted.

[14] Draft Guidance, para. 3.3.

[15] *See id.* paras. 2.34-2.38.

[16] *See* Consumer Rights Bill 2015, *supra*, para. 82 & *id.* Schedule 8.

[17] *See, e.g., Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 310-11 (3rd Cir. 2011) (*en banc*).

[18] Whether umbrella damages can be recovered in the United States is still under debate. For a discussion as to how umbrella damages may be recoverable under state law, in contrast to federal law, *see County of San Mateo v. CSL Limited*, Case No. 10-cv-05686-JSC, 2014 WL 4100602 (N.D. Cal. Aug. 20, 2014). The Sections do not take a position here as to whether, and under what circumstances, umbrella damages should be recoverable under antitrust or competition laws.

[19] *See* Draft Guidance, para. 2.10.

Accordingly, the Sections suggest that the CMA might well consider enhancing incentives for defendants to participate in these programs, for example by providing in any final guidance approaches that would: (1) calculate the defendant's payout according to its individual responsibility, e.g., the harm resulting from its own sales; (2) allow for a release of all damage claims based on United Kingdom law against participating defendants, including claims based on joint and several liability or umbrella theories; and/or (3) prevent contributory actions from non-participating defendants. As an analogous example, the Sections refer the CMA to the U.S. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), applicable to civil damage actions against leniency applicants in parallel criminal proceedings.[20] Although the goals of ACPERA differ from those of the CMA's Voluntary Redress Scheme, ACPERA offers robust incentives for defendants' participation, similar to those proposed above, that have led significant numbers of defendants to participate.[21]

Moreover, though the CMA envisions that, in the normal course, direct and indirect purchasers will be encompassed in a defendant's voluntary redress scheme,[22] elsewhere it acknowledges that a claimant with both direct and indirect purchaser claims (a common set of circumstances in our experience) may be able to proceed with indirect purchaser claims in a private action even if the direct claims are subject to a voluntary redress program.[23] Though a defendant that wishes, for its own reasons, to set up a fund for *only* direct purchasers should not necessarily be barred from doing so, the CMA may want to further encourage the goal of the expeditious creation of a common fund from which *all* direct and indirect purchasers can be fairly and timely compensated so as to enable defendants to obtain a global release of claims.[24] In this regard, the CMA may wish to explore a collective opt-out settlement process similar to the one provided for in the Consumer Rights Bill of 2015 and to the one used by the Netherlands for mass actions.[25]

Ultimately, the Consumer Rights Bill of 2015 suggests that the voluntary redress scheme is intended as an alternative to the collective opt-in and opt-out actions envisioned under that bill. With regard to collective actions, the Bill envisions that defendants can, with the approval of the Competition Appeal Tribunal, enter into global collective settlements. Absent a sufficient global

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[20] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(a), (b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note). Such enhanced incentives would not appear to clash with the Damages Directive. *See* DAMAGES DIRECTIVE, *supra*, paras. 13, 37, 38, 46-48.

[21] *See id.* § 213(a) (If the requirements of the statute are met, amnesty defendants have to pay only single damages, without trebling or joint and several liability.).

[22] Draft Guidance, paras. 2.10, 4.13.

[23] *See id.* para. 4.13.

[24] *Compare* Draft Guidance, paras. 2.10, 3.3 *with, e.g.,*Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-on in State and Federal Court*, *supra* (discussing the advantages of such common funds in cases in which direct and indirect purchasers have been consolidated into a single action).

[25] *See, e.g.,* Willem H. Van Boom, Collective Settlement in Mass Actions in the Netherlands, 8-16 (May. 2009), *In AUF DEM WEG ZU EINER EUROPAISCHEN SAMMELKAGE?*, 171-192 (Matthias Casper, Andre Jassen, Petra Pohlmann, & Reiner Schulze eds., 2009). Such an expansion of the scope of the voluntary redress programs in the Draft Guidance would not seem to conflict with the Consumer Rights Bill authorizing those programs. *See* Consumer Rights Bill of 2015, *supra*, Schedule 8, para. 12 (no restriction on such programs to opt-ins). It is also consistent with other forms of settlement schemes used to compensate consumers in the UK. *See e.g.,* the CPP card and identity protection compensation scheme approved by the Financial Conduct Authority that was the subject of a redress scheme approved by the English High Court, http://www.fca.org.uk/news/compensation-for-card-and-identity-protection-policyholders.

release scheme with appropriate inducements to participate in the voluntary redress schemes covered by the Draft Guidance, defendants may simply resort to the more expensive alternative of a collective settlement in court in lieu of proceeding via a voluntary redress scheme to ensure a global release.

More generally, the Sections further suggest that the CMA may wish to give further consideration to the interface between the voluntary redress scheme and collective action litigation.[26] One example of the need for greater clarity concerns the issue of double recovery.[27] For example, if direct purchasers participate in a voluntary redress scheme and indirect purchasers participate in a collective action, the potential for duplicative recovery would need to be addressed by one or both fora.[28] Further consideration of the interface between the systems would be welcomed.

Finally, the CMA's proposed penalty reduction is expected to incentivize defendants to participate in voluntary redress schemes. While the Sections support this concept, the lack of guidance as to the factors the CMA will take into account in calculating these reductions may undermine the CMA's goal of incentivizing the proposal of these schemes. The Sections suggest that the CMA consider including guidance on these factors in its final program, and that the CMA may find the factors used to calculate penalty reductions as a condition of settlement in both its and the European Commission's cartel settlement procedures to be a useful starting point in developing such guidance.[29]

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[26] *See* DAMAGES DIRECTIVE, *supra*, para. 48; *see also Amer. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (majority opinion); *id.* at 2313-16, 2319 (dissenting opinion); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066, 2068-69 (2013).

[27] *See. e.g., Clayworth v. Pfizer*, 233 P.3d 1066, 1086 (Cal. 2010); *see also, e.g.,*Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-on in State and Federal Court*, *supra*, at 33-34.

[28] *See, e.g., Clayworth*, 233 P.3d at 1086; *see also, e.g.,*Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-on in State and Federal Court*, *supra*, at 36-37, 63-64. The underlying issue is not an insurmountable one to remedy, regardless of the forum in which it is addressed. For example, in the United States, it involves determining the appropriate offset among the amounts to be received by multiple groups of claimants in these multiple proceedings via the calculation of pass-on or the consideration of other factors. *See, e.g., Clayworth*, 233 P.3d at 1086; s*ee also, e.g.,* footnote 10, *supra*; Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-on in State and Federal Court*, *supra*, at 36-37; *id.* at 46-47 (discussing Canadian practice).

[29] *See* European Commission, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, 2008 O.J. (C176)5, paras. 32-33; *cf.* European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 O.J. (C210)2, paras. 28-34; United Kingdom, Office of Fair Trading, OFT's guidance as to the appropriate amount of a penalty, OFT 423, paras. 2.13-2.21, 2.26, 3.18-3.23 (Spring 2012), since adopted by the CMA). There may be additional issues that without further clarification may inhibit participation by defendants in its voluntary redress schemes. For example, paragraph 2.3 of the Draft Guidance suggests that the CMA's published prioritization principles may guide the CMA's willingness to consider schemes for approval without being more explicit as to how that would work in practice and where that would leave an applicant if the CMA decides not to consider the proposed scheme. Also, the Draft Guidance does not indicate how a voluntary redress scheme would operate in relation to the CMA's settlement and leniency regimes. In particular, because settlement discussions, or leniency applications, involve an admission of guilt, defendants in either category are arguably the most likely to be interested in considering the use (and early discussion) of voluntary redress schemes.

B. Addressing Due Process and Confidentiality Interest Concerns

The Sections suggest that certain beneficial attributes of the proposed voluntary redress schemes may also raise certain unintended due process and confidentiality issues that the CMA may wish to consider as it refines the Draft Guidance.[30] These include preconditioning approval of a scheme based on a detailed redress program,[31] and allowing the Board latitude to determine whether compensation should go beyond the level identified by a defendant with the CMA.[32]

Paragraph 3.30 of the Draft Guidance proposes that if the Board's decision includes elements of compensation that go beyond the scope of the scheme proposed by a defendant, and if the compensating party wishes only to proceed on the basis of the original approved scheme, the CMA's options are limited to revoking its approval for the original scheme. That defendant would have no opportunity to argue for an alternate course of action. The Sections suggest that, in such instances, the defendant be afforded an opportunity to present its case to the CMA in favor of its original scheme or its own modification thereto for a timely decision by the CMA.

The Sections also would welcome additional clarity in any final guidance with regard to safeguarding more strongly the confidentiality of a defendant's communications with, or submissions to, the Board in the crafting of a voluntary redress scheme. By analogy to mediation and arbitration process, [33] the Sections view the confidentiality interest in these communications and submissions as sufficiently strong to warrant confidentiality protections. Paragraph 3.25 of the Draft Guidance already contains a brief reference to these interests, stating that all communications with the Board are on a "without prejudice" basis and are not to be adduced in court proceedings. However, while that position is likely to be sufficiently clear to protect the communications from use in court proceedings under English law, it may not be deemed to be a sufficient statement of the confidentiality interests at stake to protect the communications globally, for example against orders for production by U.S. courts in U.S. proceedings.[34] In order

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[30] There may be other issues that may involve due process. For example, the Sections note that the CMA can recover its own costs from a defendant in addressing its application for a voluntary redress scheme. Although this is limited to reasonable costs, the Section believes that the Draft Guidance would benefit from greater clarity as to the basis on which the CMA would calculate its costs or what they might involve. The Sections further question whether an appeal to the CAT against the amount is an efficient or cost effective means of challenge. The Sections propose instead that an alternative non-judicial means of assessing the reasonableness of the CMA's costs ought to be available in the first instance (e.g. making use of the CMA's Procedural Officer).

[31] Draft Guidance, para. 2.12; *see also, id.* para. 2.10. Specifically, the Draft Guidance anticipates the proposed Board will have fully investigated the issues raised by the voluntary redress scheme and produced a report that spells out the details of the proposed scheme for review by the CMA. *See id.* paras. 2.12, 2.13, 2.28-2.29, 3.1-3.4.

[32] *Id.* paras. 3.29-3.30.

[33] *See, e.g., Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011) (discussing the extensive scope of confidentiality protections from disclosure accorded to mediation-related submissions and communications pursuant to statute and case law); *Pasternak v. Dow Kim,* No. 10 Civ. 5045 (LTS)(JLC) 2013 WL 1729564, *3-4 (S.D.N.Y. 2013) (finding confidentiality to be important in arbitration and declining to order disclosure of arbitration materials to a third party not involved in that proceeding).

[34] *See, e.g., In re Rubber Chemicals Antitrust Litig.*, 486 F.Supp.2d 1078, 1080-84 (N.D. Cal. 2007) (affording comity to the European Union as a sovereign entity, court held that corporate statements and voluntary submissions should be protected from disclosure because safeguarding their confidentiality was indispensable to ensure the viability and effectiveness of the Commission's leniency program); *see also, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2014 WL 6602711, *3-4 (N.D. Ca. Nov. 20, 2014) (rejecting motion for disclosure of confidential version of Commission's decision on similar grounds).

to maximize the probability that communications will be protected as intended from disclosure under applicable comity doctrines in jurisdictions such as the United States, the CMA may wish to consider protecting such confidentiality interests in a more robust fashion.

C. Considering Certain Potential Notice and Claims Issues

The Draft Guidance develops a detailed notice and claims process for victims that provides flexibility to meet the goal of providing a swift and relatively low-cost method of affording redress. For example, it provides that notice be afforded in a wide fashion so as to encourage the submission of claims pursuant to a detailed notice plan in which a defendant would pay the cost of direct notice,[35] and that claimants be required to submit only what is fair and reasonable to receive compensation on their claims.[36]

Nevertheless, the CMA may wish to consider additional avenues for notifying potentially injured parties to meet the ultimate policy goal of ensuring that the most likely direct and indirect victims will learn of the redress scheme and file claims. Whereas the CMA focuses on providing notice on government and defendant/individual claimant web sites or using retailer e-mail lists, it might consider additional avenues such Internet advertising and social media campaigns now being used to extend the reach of notice and increase the number of filed claims.[37] Recognizing that the extension of such notice efforts also raises the cost of notice, the CMA might consider providing some sort of credit for these additional costs.[38]

In addition, the CMA may wish to consider clarifying its list of examples of the kind of proof of claims that may be submitted to the Board. For example, the CMA might look to the experiences of other jurisdictions in elaborating on the list as those experiences may be germane to the U.K.[39] More broadly, it might also consider elaborating that the Board can consider any other method of proving claims so long as: (i) it is fair and reasonable; (ii) the costs to defendants of processing such claims are addressed; and (iii) it complies with U.K. law. In this manner, the

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[35] *See* Draft Guidance, para. 4.4-4.7.

[36] *See id.* para. 2.10.

[37] *Compare* Draft Guidance, paras. 4.5-4.7 *with, e.g.,* Report and Recommendations of Special Master, Part II, MDL No. 1486, *In re DRAM Antitrust Litig.* (June 24. 2013), *available at* http://dramclaims.com/settlement-details/court-documents/; Order Adopting Report and Recommendations of Special Master, Part II, MDL No. 1486, *In re DRAM Antitrust Litig.* (Jan. 17, 2014), *available at* http://dramclaims.com/settlement-details/court-documents/; http://dramclaims.com/ (setting out example of social media advertising campaign).

[38] While a defendant that wishes to set up a voluntary redress program is already required to pay notice costs, Draft Guidance, para. 4.7, those costs are, in the experience of the Sections, limited compared to a fuller notice campaign to increase reach.

[39] Courts in the United States have used a number of approaches, including allowing claims from individuals to be submitted under proof of perjury, with audits of a certain percentage of claims based on certain criteria to prevent fraud. Costs are either paid out a common fund or out of separate funds pursuant to the settlement agreement reached. For one example of such a process that involved both examples of cost payment, *see* Report and Recommendations of Special Master, Part I, MDL No. 1486, *In re DRAM Antitrust Litig.* (Jan. 8. 2013), *available at* http://dramclaims.com/settlement-details/court-documents/; Report and Recommendations of Special Master, Part II, MDL No. 1486, *In re DRAM Antitrust Litig.* (June 24. 2013), *available at* http://dramclaims.com/settlement-details/court-documents/; Order Adopting Report and Recommendations of Special Master, Parts I and II, MDL No. 1486, *In re DRAM Antitrust Litig.* (Jan. 17, 2014), *available at* http://dramclaims.com/settlement-details/court-documents/; http://dramclaims.com/ (setting out example of claims form for end-user individuals and setting out separate claims forms for businesses).

CMA can make these schemes even more attractive to defendants and useful to direct and indirect purchaser claimants.

D. Clarification of Other Process Issues

Finally, though the Sections also commend the CMA for crafting a process to ensure maximum stakeholder input into a voluntary redress scheme, the Sections respectfully suggest that the CMA may want to address some potentially lingering issues more expressly. Most noticeably, the CMA may want to consider providing more explicit information on the jurisdictional applicability of the scheme so that potential users better understand how the voluntary schemes implicate other jurisdictions that may have investigations or civil actions involving the same conduct.[40]

With regard to confidentiality, paragraph 2.3 of the Draft Guidance suggests that, in multi-party cases, the CMA would "generally" expect to treat applications for approval from one party as confidential with regard to the other parties under investigation and third parties. It further provides for the possibility that those parties would still become aware that an application has been made as the CMA would place a statement to that effect in its investigation file for inspection. Because this would seem to place the defendant requesting approval for a voluntary redress scheme at the same disadvantage as an amnesty applicant whose status becomes known at such a preliminary and confidential stage, the CMA may wish to provide that the application be made to a ringfenced team within the CMA, separate from the investigations team, and that no information about the application would be shared with the investigation team. This is the approach taken when applying for leniency to the CMA and we believe that a similar approach could be taken in relation to the redress scheme approval application.

Moreover, the CMA may wish to address more expressly confidentiality and access issues, in particular whether, and at what point, the public should have the ability to offer input,[41] and the relationship of this access to the confidentiality protections identified in the Draft Guidance. To better address the functioning of the program and whether, based on experience, additional refinements may be warranted, including with regard to transparency and

[40] The Draft Guidance is not limited to direct and indirect purchasers in the United Kingdom. The Consumer Rights Bill of 2015 provides that the voluntary redress scheme can apply to victims elsewhere who in some manner choose to voluntarily participate. Consumer Rights Bill 2015, *supra*, Schedule 8, Paras. 10(10)(b), 11(10)(b). Furthermore, it is left open as to whether a voluntary redress scheme may reach even more broadly. *See id.*, Schedule 8, Paras. 49E(1)-(9); *see also, e.g.* DAMAGES DIRECTIVE, *supra*, para. 13. This raises cooperation, comity, and jurisdictional concerns that may arise regarding approval of a voluntary redress scheme that extends beyond its citizens. *See DAMAGES* DIRECTIVE, *supra,* paras. 17, 44, 46; *see also,* COUNCIL REGULATION 44/2001, 2001 O.J. (L. 012/4). For example, the institution of a voluntary redress scheme in the U.K. may need to be coordinated with the institution of a collective settlement scheme for mass damages in the Netherlands that could also encompass foreign nationals. *See, e.g.,*Willem H. Van Boom, Collective Settlement in Mass Actions in the Netherlands, *supra,* 8-16 (May 2009).

[41] Once the CMA makes a decision on a redress program, it will publish a summary of its decision to approve that program along with links to details of the scheme as set out on the defendant's web site. Draft Guidance, paras. 2.30-2.33. For an example of the issues that may arise (at least under U.S. law) when a voluntary redress scheme under government imprimatur is not open to public input in any aspect prior to its approval, *see Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510, 518-21 (3rd Cir. 2013) (majority opinion); *but see id.* at 525-26 (dissenting opinion).

confidentiality, the Sections suggest that the CMA provide for a review of the voluntary redress program, approximately three years after it comes into force, on which public comments could be solicited.[42]

Finally, while the CMA mandates the Chair of the Board to appoint a board representative for the claimants, the CMA may wish to require the Chair to appoint a board representative for each of the differing groups of claimants (e.g., direct purchasers, resellers, and indirect purchasers). This would avoid potential conflicts of interest where a global fund is concerned.[43]

Conclusion

The Section appreciates the opportunity to provide these comments, which they hope are helpful as the CMA further refines this important program. We remain available to provide additional comments or clarification as may be helpful to the CMA.

[42] *See, e.g.,* Remarks of Chairwoman Edith Ramirez, Retrospectives at the FTC: Promoting an Antitrust Agenda, ABA Retrospective Analysis of Agency Determinations in Merger Transactions Symposium, George Washington University Law School, Washington D.C., at 1 (June 28, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/retrospectives-ftc-promoting-antitrust-agenda/130628aba-antitrust.pdf.
[43] *See, e.g., Sullivan*, 667 F.3d at 327.