Draft guidance on the CMA's approval of voluntary redress schemes

Dr Sebastian Peyer, Lecturer in Law, University of Leicester and Associate Member of the ESRC Centre for Competition Policy[1]

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This is a response to the CMA's consultation on its powers to approve voluntary redress schemes ('Consultation'). The views presented here are those of the author, Dr Sebastian Peyer, and not those of the University of Leicester or the ESRC Centre for Competition Policy. This document may be published by the CMA in connection with the CMA's consultation on voluntary redress schemes.

In the first part of this document, I will comment on some general issues in the Guidance on the CMA's approval of voluntary redress schemes ('Guidance') whereas the second part provides responses to some of the Consultation questions. It would have been beneficial to this Consultation if the *Competition Act 1998 (Redress scheme) Regulations 2015* had been disclosed. Throughout the document I will assume that private enforcement pursues the objective of compensation and that compensation is desirable although I have real doubts that it is.

Part I

The Guidance document covers most aspects of the redress scheme. Some issues remain with regards to the **scope of the redress scheme**, the **protection of interests of compensated parties** and the **interaction of the new redress scheme with class actions**. In my view, the Guidance should address these issues.

The scope of the redress scheme

In **section 1.6** the guidance clarifies that the CMA can approve redress schemes based on decisions of the CMA, UK sector regulators and the European Commission. While decisions of the CMA and national regulators will mostly relate to national markets, there may be cases where non-UK victims are affected. This is certainly the case with regards to EU decisions that will usually cover markets across several EU countries. Section 49C(8) of the Consumer Rights Bill includes EU decisions as basis for redress schemes and this wide scope of section 49(C) is required to comply with the principle of equivalence. However, the wide scope creates a problem that the Guidance document does not address.

The Guidance should be clearer about how it plans to administer redress schemes that include non-UK compensated parties. Redress schemes – independent of whether the underlying decision is UK or non-UK – should normally be restricted to compensated parties from the UK. Victims of cartels and other types of anticompetitive conduct are often consumers. Consumers' inertia normally prevents them from seeking redress in their own jurisdiction, let alone in another jurisdiction. Consumers from

[1] The author may be contacted at sp520@le.ac.uk.

other jurisdictions are unlikely to seek redress in the UK. Consequently, it would be helpful if the Guidance could make clear that redress schemes should normally address UK markets rather than the whole of the EU. The guidance should also be clearer on the requirements for approving redress schemes that include compensated parties in other jurisdictions, for example, translations.

Protecting the interests of compensated parties

In **section 3** the Guidance document sets out how the Board has to be constituted. The Board is the controlling body that decides on compensation claims. The Board's members are selected by the compensating company. This raises the question of how the interests of compensated parties are to be protected. None of the acting parties' interests (compensating company or the Board) are aligned with the compensated parties' interests in full compensation. The Guidance should address this governance problem by, for example, including consumer interest groups in the Board.

Even a careful selection of the Board members may not be able to avoid the problems inherent in the composition of the scheme. The CMA is likely to be interested in closing the matter expediently. Companies will only submit an application for a redress scheme if such an application has some benefit compared to compensation claims in the courts. The benefit for companies may stem from either the settlement offer being lower than the actual damages if the case went to court (this is the nature of settlements) or from the savings in litigation cost and time. Assuming that both considerations induce a company to offer voluntary redress, it will normally make an offer that is lower than perfect compensation.

Without the control of those who are actually harmed, the following problem may occur: For example, a compensating firm offers £100 per victim. The actual harm was £200 per individual, i.e. damages in court should be £200. Consumers would sue for £200 if it was not for the uncertainty and the cost of litigation. Consequently, consumers would take the hassle-free £100, foregoing £100 in compensation.[2] From an efficiency point of view, this calculation makes sense. The problem is that the current setup could potentially create incentives for compensating companies to set very low offers. Rational victims would be likely to accept offers as low as £10 or £20 (even if the actual harm was £200) because this is going to be worth more than the risk of litigating the full amount. However, this may reduce the deterrence effect of private enforcement. Compensation paid to claimants can be regarded as a 'private fine', incentivising companies to comply with the competition rules. If this 'private fine' is very low, the deterrence effect is being lost. This, in turn, may have repercussions for the effectiveness of competition law enforcement.

The guidance should be clearer on these aspects and make sure that victims are represented in a suitable manner to avoid both unfair settlement offers that will nevertheless be accepted by consumers and repercussions for the effectiveness of enforcement. If private enforcement is about compensation, as the Court of Justice of the European Union has stated in *Courage* and *Manfredi*,[3] a settlement that is considerably lower than full redress ought to be avoided. At least, the difference between full compensation and compensation offered under the redress scheme should be

[2] If the probability of success is taken into account, the expected value from legal action will be lower than £200 and so will be the difference between the expected value of the claim and the compensation offered under the redress scheme.

[3] C-453/99 *Courage Limited v Bernard Crehan*, [2001] ECR I-06297; C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

minimised. A Board member that presents the interests of consumer may help to improve the outcome of redress scheme with regards to full compensation.

The new section 49C(3) of the Competition Act 1998 (as amended by the Consumer Rights Act) enables the CMA to take into account the amount that is being offered when approving a redress scheme. This should be stressed in the Guidance and the CMA should make extensive use of this power to avoid low compensation redress schemes.

As for the **type of redress offered, section 49C(9)** would allow both monetary and non-monetary compensation. Non-monetary compensation, for example in the form of coupons, may further reduce the actual compensation payment of the compensating firm. Coupon redemption rates are unlikely to reach 100%.[4] This Guidance should make clear that non-monetary offers are the exemption and if included in the scheme, must be justified.

Interaction of redress schemes and the new class action regime

The approval of redress, especially for consumers, may undermine the group action regime envisaged in section 47B of the Competition Act 1998 (as amended by the Consumer Rights Act). The redress scheme encourages individuals to seek (potentially lower) compensation under the approved redress scheme. Those who claim compensation in an approved redress scheme will not be able to claim compensation in the Competition Appeal Tribunal or the High Court. This may allow for strategic behaviour on part of the compensating party. A successful redress scheme will reduce the size of the potential class of claimants. As for estimating the size of the class, this should not pose problems because the compensating companies holds information about the number of settled claims. However, the redress scheme could undermine the base of a class action. A group action requires a big-enough class, so that potential gains from bringing the action outweigh the cost of litigation. The gains are particularly important as the opportunities to fund class actions are limited in the current framework, e.g. with the prohibition of damages-based agreements in opt-out group actions. If a sufficiently large group of consumers signs up for a redress scheme, this may erode the basis of the class. Uncertainty as to the size of the putative class may question the economic viability of a class action. If the size of the class has been lowered below the economically viable level, no compensation will be sought in the Competition Appeal Tribunal.

An example: A class action is being brought with 1,000 consumers in the class. To make it profitable a minimum of 800 consumers is needed. If the redress scheme attracts 500, it would leave another 500 consumers without a realistic chance of obtaining compensation. It may suffice if the redress scheme creates uncertainty as to the actual number of claimants that have sought compensation under an approved redress scheme to deter group claims.

The Guidance could partially address this problem by requiring companies to reveal the size of a potential class. The Guidance should provide greater powers for the CMA to oversee the redress scheme. The Guidance currently limits the CMA's powers of oversight in **section 2.14**. These powers should be extended to enable the CMA to prevent a 'gaming of the system'.

[4] For the economic effects of coupon settlements see, for example, Borenstein, Severin, "Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits" (1996) 39(2) Journal of Law and Economics 379-404; Blair, Roger D.; Piette, Christine A., "Coupon Settlements: Compensation and Deterrence" (2006) 51 Antitrust Bulletin 661.

Part II

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

Overall, the content, format and presentation of the draft guidance is clear. At times the Guidance document is rather stretched and it would benefit from some redactions. For example, **Section 4.13** is rather long and **section 4.18** provides numerous examples for non-eligibility. This does not improve the clarity of the document.

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

The flowchart is helpful.

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

Section 1.11 is unclear. If it is meant to limit the scope of redress schemes to those based on decisions of the CMA, this should be made clear. If not, what is section 1.11 trying to say?

Section 2.7 lays out the requirements for an application. Section 2.7 could be improved. The application should contain an estimation of harm caused. This would help consumers to evaluate their own claim and provide a mechanism to reveal information.

Section 2.10 details the requirement for a redress scheme. It requires inter alia that the scheme stipulates the proof a potential beneficiary must provide. This is a crucial point. Most individuals will have some proof of purchase of, for example, airline tickets in the form of their bank statements. But what is going to happen if this is a redress scheme based on cartel conduct that took place five or ten years ago? The Guidance document should stress that for certain types of violations proof of loss can be facilitated, including a **reversal of the burden of proof.** Compensating companies are likely to have customer data, e.g. from airline ticket sale, and should be asked to reveal this information rather than requiring compensated parties to come forward with evidence of their purchases. This would address the problems victims frequently face in litigation and facilitated access to compensation.

Section 2.14 limits the CMA's role in assessing whether the scheme has been set up according to the process specified in the Regulations. It is said that the CMA will not undermine the work of a properly-constituted Board. This is a severe limitation of the CMA's role and this limitation should be reconsidered. The Guidance document should allow for more discretion on part of the CMA. Especially with regards to strategic behaviour (see **Part I**), it would be important for the CMA to have the powers to assess the overall impact and working of the redress scheme in question.

Section 2.16 details the scenarios in which a redress scheme application can be submitted. The scenarios are incomplete. The CMA should consider whether it should allow the submission of redress schemes during or after the appeal process. If the appeal affects only the fine in question, it should allow the application as the applicant no longer contests the existence of an infringement. Similarly, can the infringer submit a redress scheme after the appeal process against a CMA decision has been

exhausted? This should be possible as the company is no longer contesting the existence of an infringement. The guidance needs some clarification on this point.

Section 2.20 The CMA should generally not consider a redress scheme before it has handed down a decision and the decision has become final. The current proposal makes the bargaining process more complicated and could induce companies to refrain from appealing the decision on the substance.

Section 2.30 It should be clarified whether compensating firms can appeal the CMA's approval decision or are allowed to submit a new redress scheme.

Section 2.34 allows for a penalty reduction in certain cases. The CMA should reconsider its decision to offer a penalty reduction or it should make explicit that this is an exemption rather than the rule. A penalty reduction may undermine the effectiveness of competition law enforcement. As I have outlined above in **Part I**, settlements will normally occur when settling offers a benefit to the compensating firm. The benefit is normally a reduction of the damages payment or saved litigation expenses. The compensated party will accept the potentially lower payment if this allows a risk averse individual to avoid the cost and uncertainty of litigation. Consequently, a redress scheme will not achieve full compensation, i.e. the infringing firm will not make good all the loss it has caused. The CMA's proposal to offer a discount on the public fine further reduces the effective punishment, thus, reducing the deterrence effect of competition law enforcement. It is also questionable why companies should be rewarded for something they are legally obliged to do, i.e. paying damages to those they have harmed. It also raises the question as to why compensating companies receive a discount on the public fine and the inherent discount in the redress scheme, namely the litigation savings or lower pay-out. This reduces damages payments, i.e. the effective 'private fine'. If the CMA intends to keep this provision, it should make clear that this is a bonus companies receive in rare circumstances.

Section 3.30 states that one of the functions of the Board is to assess evidence about the harm caused. While the function of the Board is not problematic as such, the question is whether the compensating party has an incentive to fully disclose the available evidence. Under the current scheme the Board is unable to verify the information or cross-check the facts that is has been given. As I have pointed out above, those who have an interest in compensation do not take part in the decision making process. This, in turn, may potentially lead to the acceptance of lower damages awards.

Section 4.13 is too long. It should simply state that victims can sue for compensation that has not been covered by the redress scheme.

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

See my comments in **Part I**.

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

No comment.

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

No, the redress scheme and the advantages outlined in **Part I** provide sufficient incentives for businesses to apply for an approval.