Guidance on the CMA's approval of voluntary redress schemes

Summary of responses to the consultation

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CMA40resp

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This publication is also available from the CMA's webpages at www.gov.uk/cma.

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1. Introduction and summary

1.1 In March 2015 the Competition and Markets Authority (CMA)[1] consulted on draft guidance on its new power to approve voluntary redress schemes in cases where a competition authority has found an infringement of the Chapter I or Chapter II prohibitions of the Competition Act 1998 (CA98) or of Articles 101 and 102 of the Treaty on the Functioning of the European Union (competition law). This power is introduced by the Consumer Rights Act 2015 (CRA15) which creates a new section 49C of the CA98. The CRA15, including the CMA's new power, is expected to come into force in October 2015.

1.2 The CMA's new power is intended to make it easier for consumers and businesses to gain access to redress for harm caused by infringements of competition law, and for businesses that have infringed competition law to offer compensation to affected parties quickly, and at a lower cost than through court proceedings. As such, the power is designed to encourage parties to resolve disputes voluntarily as an alternative to private litigation in the courts.

Purpose of this document

1.3 The consultation document that accompanied the draft guidance set out a series of specific questions on which respondents' views were sought. This document sets out a summary of the responses received to each of those questions and the CMA's views on those responses.

Responses to the consultation

1.4 The CMA received 14 written consultation responses.[2] The CMA also received views on the draft guidance through meetings with a number of stakeholders.[3]

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[1] The CMA was established under the Enterprise and Regulatory Reform Act 2013 as the UK's economy-wide competition and consumer authority, taking over a number of functions formerly carried out by the Office of Fair Trading and the Competition Commission. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy as a whole.
[2] Annex A lists the 14 written responses received. These are available on the consultation page.
[3] We met with the City of London Law Society, GC100 and the Joint Working Party of the Bars and Law Societies of the United Kingdom.

Consultation document questions

1.5 The table below sets out the questions on which the consultation document sought views, and which chapter of this document summarises those responses and the CMA's views on them.

Question		Chapter
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 changes that you feel would improve them.	2, 3, 4, 5, 6
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.	2
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 either more, or less, detailed?	2, 3, 4, 5
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?	3, 6
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?	2
6.	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?	5, 6

1.6 This document should be read in conjunction with the consultation document and the final published version of the guidance on the CMA's approval of voluntary redress schemes (CMA40). It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full written responses are available on the consultation page.[4] Nor is this summary of responses a definitive statement of, or substitute for, the law itself or the CMA's policy or procedures in relation to the power to approve redress schemes, and it should not be relied upon as such. Parties seeking guidance

[4] See the full written responses on the consultation page.

on those procedures should refer to the guidance itself, also available on the CMA's webpages.

2. Applications for approval and CMA assessment of applications

2.1 Respondents' views on questions 1, 2, 3 and 5 addressed a wide range of issues in relation to the overall application process for redress scheme approval set out in the draft guidance, including its format and clarity. In view of overlaps in responses to these questions, these have been grouped together by issue and set out below.

- **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.
- **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.
- **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 either more, or less, detailed?
- **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?

Format and presentation of the guidance

Summary of responses

2.2 A number of respondents made suggestions about how the clarity and format of the guidance could be improved, for example the inclusion of a summary in the introduction, revised headings in certain parts of the guidance, and a defined list of key terms used in the guidance.

The CMA's views

2.3 In light of respondents' views, the CMA has revised the structure of the guidance, to make navigation easier. In particular, the CMA has separated out more clearly the process for applying for and setting up a scheme from the CMA's assessment of schemes, which the guidance now includes as a new chapter.

New structure	*Old structure*
1. Introduction • Power to approve voluntary redress schemes • Breaches of competition law that may be covered by an Authority-approved redress scheme • Authority-approved voluntary redress schemes as part of the overall redress framework 2. Applying Authority-approval and devising voluntary redress scheme • Applications for Authority-approval of voluntary redress schemes • Terms of voluntary redress schemes • Appointment and role of the Chairperson and the Board 3. The Authority's assessment of applications for redress scheme approval • Prioritisation and timeframe • Scope of the Authority's assessment • Approval process and outcomes • Notification of the Authority's decision • Possibility of penalty reductions in certain cases • Recovery of the Authority's costs 4. Enforcement of and release from an Authority-approved voluntary redress scheme • Enforcement of Authority-approved voluntary redress schemes • Release from a redress scheme	1. Introduction • Scope of the guidance • Breaches of competition law that may be covered 2. Content of applications for redress scheme approval and CMA assessment process • Application content • CMA assessment and approval processes • Possibility of penalty reductions in certain cases • Recovery of CMA costs 3. Constitution and role of the Board • Appointment of the Board • Duties of the Board • Decision-making of the Board 4. Claiming of redress • How redress can be claimed and what potential beneficiaries can expect from a redress scheme • Complaints process 5. How a redress scheme may be enforced and release from a redress scheme • Right of a scheme beneficiary to enforce a redress scheme • Enforcement of a scheme by the CMA • Release from a redress scheme

2.4 In addition, the CMA has included an overview of the CMA approval process in the introductory section, added a glossary of key terms to the guidance, and made a number of drafting revisions to enhance clarity.

Application process

Summary of responses

Clarity on timing of applications and interaction with appeals of infringement decisions

2.5 Two respondents stated that it would be useful for the flowchart to make clear that applications could be made at any time prior to the adoption of an infringement decision, in particular between the issue of a statement of objections and the making of an infringement decision.

2.6 Two respondents also queried whether the CMA would consider an application while an appeal was pending, and in particular where a party was contesting liability. In a similar vein, one respondent suggested that parties should be able to appeal certain aspects of an infringement decision and retain CMA scheme approval, for example where they were contesting liability in relation to a finding of infringement on one product but not another, and wished to set up a scheme regarding the product in relation to which liability was not contested.

2.7 One respondent queried whether applications should be possible where an infringement decision had not been made, on the grounds that it might make the bargaining process more complicated and could induce companies to refrain from appealing the decision on the substance.

Template application form

2.8 A number of respondents made suggestions about the clarity and content of the application forms, including the following main points:

- Addition of a check-box to the forms, indicating that applicants should annex a report of any minority views of the Chairperson and Board members.
- Clarification as to whether the same application form would be used where an infringement decision was taken by a concurrent regulator.
- Requests that the draft guidance be amended to provide further information on the level of detail required on the face of the application form.

The CMA's views

2.9 The CMA has considered carefully respondents' requests for clarifications in respect of the issues above and has amended the flowchart in Chapter 1 of the draft guidance, Chapter 2 on when to make applications, and the content of the application forms to address the concerns raised.

2.10 As regards considering applications where a party has appealed against the CMA's infringement decision, on balance the CMA considers that it would normally do so where a business contested the fine only but not its liability or the existence of a competition law infringement. While considering applications in other circumstances of appeal is not ruled out, Chapter 2 of the guidance notes that in practice this will be exceptional in view of the tension between challenging the existence of an infringement on the one hand, and providing compensation for harm caused by that same infringement on the other.

2.11 As regards whether it is appropriate to allow applications during an ongoing investigation, the CMA notes that the possibility of businesses applying for scheme approval prior to an infringement decision being issued is provided for explicitly in the statutory framework for the operation of redress schemes. In any event, the CMA notes that businesses are under no obligation to set up redress schemes since they are voluntary.

CMA's assessment of applications

Summary of responses

Approval process and protection of vulnerable consumers

2.12 One respondent suggested that further information as to how the CMA would apply its prioritisation principles when deciding whether to consider applications for approval would be helpful. In particular, they queried the circumstances in which an application might not be prioritised where an application was made during an ongoing, prioritised investigation. The same respondent also suggested that, should the CMA decide not to consider an application on prioritisation grounds, parties should be given the opportunity to withdraw their application and have any documentation submitted regarding the application returned. The respondent also raised equal treatment concerns around the possibility that the CMA might choose not to prioritise an application during an ongoing investigation in one case but not in another.

2.13 Another respondent requested more detail in the guidance as to the likely timeframe for the CMA's assessment depending on the stage an investigation had reached.

2.14 One respondent stated that the CMA should take into account when considering applications how compensating businesses offering a scheme intended to communicate with potential beneficiaries who were consumers, particularly vulnerable ones. Another respondent suggested that the CMA should also review the explanation to be provided to potential beneficiaries regarding the scope of the scheme, in order to ensure that such a person had the key information required to make an informed decision on whether an offer of compensation under a scheme should be accepted.

The CMA's views

2.15 In light of the point raised regarding the application of its prioritisation principles, the CMA has clarified its approach to prioritising applications in the guidance. In particular, Chapter 3 of the guidance now states that the CMA would expect to prioritise applications in all ongoing investigations. Given this, neither the question of whether to return an applicant's documents if an application was not considered in an ongoing investigation nor the potential equal treatment issue noted arise. However, the summary of responses discusses other circumstances in which issues around return of documents might arise, in paragraphs 2.24 and 2.27 below.

2.16 As regards timeframes for CMA assessment of applications, the CMA considers that it is not practicable or appropriate for the guidance to provide detailed timeframes, since redress schemes are voluntary, with many of the steps to be performed by the compensating party rather than being in the CMA's gift. However, Chapter 3 of the guidance now clarifies that, in the majority of cases, the CMA expects to assess applications and notify applicants of the outcome within three months of receiving a complete formal application, in respect of both full and outline schemes.

2.17 As regards the treatment of consumers, whilst the CMA's role is not to consider in detail the underlying elements of a scheme (particularly where this duplicates the role of the expert Chairperson and Board), the CMA recognises that it is important for consumers, in particular those who are vulnerable, to be supported. Chapter 3 of the guidance now therefore states explicitly that the CMA may take into account whether the scheme ensures vulnerable consumers' access to redress when deciding whether to approve a scheme.

Level of potential penalty reduction

2.18 A number of respondents argued that the penalty reduction available for approved schemes should be higher than the 10% reduction provided for in the draft guidance. Respondents cited a number of reasons for this, including the concern that a 10% reduction might not cover the costs of operating a scheme in some cases, and that a higher discount might counteract some of the potential drawbacks of offering schemes (such as concerns over disclosure of potentially incriminating documents created in relation to a scheme, and over interaction between schemes and other elements of the broader private actions framework – see further paragraph 2.20 below).

2.19 A number of other points were made including:

- A reduction in penalty for implementing a redress scheme should be the exception rather than the rule.
- The guidance should include:
  - — further detail as to the factors the CMA will take into account when assessing the level of penalty reduction, including clarity as to the penalty calculation step at which the reduction would apply;
  - — the circumstances in which the CMA might seek to recover a penalty reduction from a party; and
  - — how parties with immunity from penalties under the CMA's leniency programme could be incentivised to offer a redress scheme.

The CMA's views

2.20 The CMA acknowledges respondents' concerns in respect of the level of penalty reduction available for approved schemes. The CMA recognises that there may be material cost implications of running a scheme and it understands that this may make applying for approval less attractive, in particular in light of other elements of the overall legal framework in which the approval power sits, for example the risk that businesses could operate schemes but still face separate judicial claims and the lack of specific adverse court cost consequences if a claimant obtains the same or a lower sum in litigation than had been available under an approved redress scheme.

2.21 The CMA has therefore increased the potential maximum level of penalty reduction from 10 up to 20%, which would be applied at Step 6 of the CMA's penalty calculation (leniency and settlement discounts are also applied at this

step). Chapter 3 of the guidance now sets out in further detail the factors that it may take into account in assessing what level of penalty reduction to apply.

2.22 Chapter 3 of the guidance also sets out in broad terms where the CMA would generally expect to seek recovery of any penalty reduction.

Treatment of information in application and supporting documentation provided to the CMA

2.23 Many respondents provided comments on how the CMA should deal with documents provided to it to enable approval applications to be assessed, including the extent to which such documents should be placed on the CMA's investigation file. Respondents also questioned whether such documents would be protected from disclosure to third parties, whether in the context of matters arising in the CMA's administrative processes, such as rights of defence, or in court-ordered disclosure in litigation.

2.24 In this context, respondents made the following main points related to the possible consequences of sharing potentially incriminating documents with the CMA:

- A number of respondents queried what information would be placed on the CMA's investigation file, and noted that safeguards should be put in place to prevent disclosure of sensitive and without privilege prejudice (WPP) material created in relation to a scheme. A few respondents were concerned that if documents were placed on the CMA's investigation file, other parties under investigation or third parties could become aware of the application, and that such documents should therefore be afforded the protection the CMA gives to leniency applications.

- One respondent queried whether the CMA should place documents in relation to a scheme on its file in circumstances where the application was treated as distinct from the related investigation, while another sought clarification that documentation provided in respect of an application which was rejected would not be placed on the CMA's investigation file, and would be returned to the applicant. Similarly, a respondent noted that where a party withdrew an application, the CMA should return any documentation received from the party.

- A number of respondents considered it unlikely that potentially incriminating documents about the harm caused by an infringement which were shared with the expert Chairperson and Board, and in particular the CMA, as part of an approved scheme would be protected from disclosure as a result of being covered by either WPP or litigation privilege. The key

concern expressed was that disclosure of documents to the CMA might result in disclosure of the relevant documents being ordered in related court proceedings, particularly outside of the UK. This was viewed by many of these respondents as a strong disincentive to parties considering applying for scheme approval. In this context one respondent asked that if the CMA considered that documents produced were protected in some way from onward disclosure, this be made clearer on the face of the guidance. This respondent and one other noted that it would be helpful if the position could be resolved via legislation.

- A respondent commented that if information provided to the CMA did attract WPP, this protection should only apply up to the point at which an offer of redress to potential beneficiaries is made, in order that potential beneficiaries can understand the basis on which the offer has been made.

- One respondent noted that the CMA expected generally to treat applications for approval as confidential, and observed that as such the guidance should make clear that sensitive information in applications would always be treated confidentially unless a party agreed otherwise.

The CMA's views

2.25 The CMA has considered carefully the concerns raised by respondents in relation to the provision of documents to the CMA during the application and approval process. Whilst it is not within the CMA's power to give documents additional protection other than that which may be afforded under general legal principles such as WPP, to the extent possible the CMA expects to treat documents in a way that will mitigate the concerns expressed by respondents. In this context, the guidance has been amended to make it clear that: the CMA would expect to receive only those documents necessary to allow it to carry out its approval role, that it would treat such documents in confidence and would expect to resist any claim for onward disclosure in favour of any third parties to the extent possible under law, and that (insofar as it is consistent with applicable legal duties) the CMA would only use such documents for the purpose of carrying out any assessments required under the redress scheme approval process.

2.26 Similarly, in terms of concerns around whether documents submitted as part of the redress scheme process would become part of the CMA's file, the Guidance has been amended to note that the CMA would generally expect to withhold applications and supporting documents from disclosure, and that in assessing whether exceptionally it might be necessary to disclose material relating to an application, for example for rights of defence reasons, the CMA would normally apply the principles it uses for assessing potential disclosure

of certain documents in relation to the use of its leniency and settlement tools.[5]

2.27 In addition the guidance has been amended to clarify that documentation provided in respect of a rejected or withdrawn application will be returned to the applicant.

2.28 The CMA has raised respondents' concerns about the risk of potential disclosure to third parties of incriminating documents shared with Chairpersons and Boards and/or the CMA with the Department for Business, Innovation & Skills (BIS). We will keep this under review and should this emerge as a problem, we will explore with BIS whether any legislative protection might be afforded to such documents.

Publication of scheme approval decisions

2.29 One respondent requested further detail on the information that is likely to be in the summary of the scheme that the CMA intends to publish on approving a scheme. Another respondent requested that the CMA's summary refer only to information provided directly by the compensating party and/or information contained in the Chairperson and Board's report.

The CMA's views

2.30 The CMA does not consider that it is appropriate to be prescriptive on the level of detail that the brief summary of a scheme will contain in the context of this new power, before it has sufficient experience, for example, of the level of detail that strikes the right balance between the interests of potential beneficiaries and those of compensating parties. Further transparency on the CMA's approach will become apparent from the CMA's practice going forward, and in addition the CMA would expect to inform parties in a particular case before publishing such a summary. However, in light of the concerns expressed, the CMA has provided slightly more detail in the guidance on what its published summaries of approved schemes are likely to contain.

Appeals against CMA scheme decisions

2.31 Two respondents suggested that the guidance should explain how parties could challenge a decision to reject an application for scheme approval.

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[5] See the CMA's leniency guidance (OFT1495, adopted by the CMA Board) and its guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8).

The CMA's views

2.32 As with other decisions of public bodies, the CMA's decision to reject an application for scheme approval, as well as other substantive decisions in relation to schemes, could potentially be challenged via judicial review. The CMA has clarified this in the guidance.

Recovery of CMA costs

2.33 A few respondents requested further details as to how the CMA will calculate its costs and in which cases it would seek to recover them. One respondent noted that businesses may be disincentivised from applying for a scheme in circumstances where the CMA intends to recover its costs, given the likely cost to compensating businesses of running a redress scheme.

2.34 Two respondents noted that the CMA does not recover costs in other areas of its competition enforcement work, noting also that if a party had to pay the CMA's costs, schemes may be too expensive to operate and therefore a less attractive alternative to litigation.

The CMA's views

2.35 The CMA has carefully considered respondents' responses in relation to recovery of CMA costs. Whilst the CMA notes the concerns expressed, it considers that given that the approval of schemes will require additional time and resource outside of the CMA's core enforcement role and that government considered it appropriate to provide an explicit power for costs to be recovered, it will be appropriate to seek recovery of reasonable costs in the majority of cases.

2.36 Nevertheless, the CMA is mindful that this may be an area of potential concern to businesses considering applying for redress schemes. Chapter 3 of the guidance therefore provides further information on how the CMA expects to calculate its costs and on the factors it may take into account in determining the amount of costs to be recovered.

Role of concurrent regulators

Summary of responses

2.37 Many respondents queried how redress schemes would be approved where a concurrent regulator was investigating and deciding a case. Some respondents suggested that concurrent regulators should also be given the power to approve schemes.

The CMA's views

2.38 Further to respondents' comments, the CMA has liaised with BIS, which has decided to change its policy position and extend the approval power so that both the CMA and concurrent regulators may approve and enforce voluntary redress schemes. The Guidance has been updated to reflect this. The Regulations[6] that set out the framework for the approval of schemes and complements the guidance also states that concurrent regulators may approve schemes.

2.39 The CMA notes that, as a consequence, under section 49C(9) of CA98 as amended, regulators are also obliged to publish guidance on the approval power. Should a regulator choose to publish separate guidance to meet that obligation[7] (for example if it considered that was necessary to reflect particular industry specific factors), both regulators and the CMA recognise the need for appropriate consistency in the operation of the power by the CMA and regulators, and the CMA expects that regulators would take the CMA's guidance into account when producing any such guidance. In those circumstances, a regulator would also need to obtain Secretary of State approval for that guidance. The Secretary of State's decision would also take account of the need for appropriate consistency.

[6] The Competition Act 1998 (Redress Scheme) Regulations 2015, SI 2015/1587.
[7] A regulator might decide simply to adopt the CMA's published guidance.

3. Appointment of the Chairperson and constitution and role of the Chairperson and independent Board

3.1 Respondents' views on questions 1, 3 and 4 addressed a wide range of issues in relation to the operation of the independent Board (which was originally set out in Chapter 3 of the draft guidance). In view of overlaps in the responses to these questions, these have been grouped together by issue and set out below.

- **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.
- **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 either more, or less, detailed?
- **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?

Chairperson and Board constitution

Summary of responses

Conflicts of interest

3.2 A few respondents requested further explanation of certain terms used in the draft guidance when explaining the need to avoid conflicts, for example 'independence' and 'close personal association'.

3.3 Also, some respondents commented that some of the examples given of potential conflicts of interest were too restrictive and could exclude a large number of suitable, well-qualified individuals, including for example where individuals had published views and comments relating to the compensating party and/or the infringement in question, or where a person had a history of acting predominantly for claimants or defendants.

3.4 By contrast, one respondent thought that the proposed time period for ineligibility to be a Chairperson or Board member arising from potential conflict because of employment, in any form, by the compensating party was

too short. It was argued that such persons should be presumed to have a conflict of interest unless they can demonstrate otherwise.

3.5 Another respondent suggested that there could also in principle be a conflict of interest that influenced a Chairperson or Board member to act in favour of potential beneficiaries to a scheme, or put another way, potentially against the interest of a compensating party – the examples of potential conflicts in the draft guidance related only to conflicts against the interests of potential beneficiaries.

Chairperson and Board composition and appointment

3.6 Many respondents commented on this area. The main points raised were that:

- it may be difficult to find and retain Chairpersons and Board members of the calibre specified in the draft guidance;
- the Board member representing the interests of potential beneficiaries should not need to be independent of the compensating party; and
- those who have been harmed by the infringement in question are not sufficiently represented on the Board.

3.7 A few respondents requested clarification as to the appointment process for the Chairperson and Board, including that:

- the selection process for the Chairperson of the Board should be open and transparent, with the CMA playing a role in the Chairperson's appointment;
- the CMA should consider requiring the appointment of different Board representatives for differing groups of potential beneficiaries;
- the guidance should include a description of how the Chairperson should select Board members; and
- the guidance should clarify whether the Chairperson or applicant would determine the Board's remuneration.

The CMA's views

3.8 In respect of requests for more detailed explanations of terminology, the CMA has added to the guidance a glossary of terms. The guidance also now contains sample text to assist applicants in producing a statement confirming that Chairpersons and Board members are independent, committed and do not have a conflict of interests.

3.9 The CMA notes the view of some respondents that examples of potential conflicts of interest given within the draft guidance were too restrictive. Given the core role of the Chairperson and Board in setting the level of compensation and ensuring the proper operation of a scheme, the CMA is mindful that it should provide sufficient examples to assist in the assessment of potential conflicts. In order to assist further, the CMA has therefore clarified and provided further examples where appropriate in Chapter 2 of the guidance.

3.10 As regards the suggestion that the CMA should play a role in appointing the Chairperson, the CMA considers that its ability to object to a proposed Chairperson if it has concerns provides it with sufficient involvement in relation to this issue. The CMA does not consider that a greater degree of involvement is necessary or appropriate.

3.11 Further to respondents' comments in respect of the appointment of the Chairperson and Board members, additional drafting has been included in the guidance to clarify how a Board is to be formed, Board members' terms of appointment, and the role of the Chairperson in this process. Whilst the CMA notes the concerns of some respondents around the availability and costs of appropriate persons who could be Chairpersons and Board members, it also notes the balance to be struck in ensuring that schemes are properly assessed and administered with potential beneficiaries in mind. Given this, on balance, the CMA remains of the view that it is appropriate for the Chairperson and all Board members (including the Board member representing the interests of potential beneficiaries) to be independent of the compensating party. In terms of the other queries raised around how the Chairperson should appoint the Board, the CMA considers that, in circumstances where the CMA can object to the Chairperson or Board members, the level of detail in the draft guidance provides sufficient guidance for Chairpersons without being too prescriptive.

Role of the Chairperson and Board

Summary of responses

Decision making

3.12 Many respondents made suggestions regarding the operation of the Chairperson and Board, including giving the Chairperson a casting vote and that a member with a minority view should be able to state this publicly.

3.13 In respect of the Chairperson and Board's fact-finding powers, a number of respondents requested clarification regarding the sufficiency of the information that the Chairperson and Board should expect the compensating party to provide to them and the level of review the Chairperson and Board would be expected to conduct when assessing the appropriate level of compensation.

3.14 One respondent requested clarification that the compensating party would not be required to provide the Chairperson and Board with privileged material and/or material relating to leniency and settlement.

3.15 Some respondents thought it should be made clear that the Chairperson and Board may require additional resource to assess complex information from the compensating party; for example, the economist Board member might require a more junior economist for support in certain cases. In particular one respondent suggested that more information could be provided on the Chairperson and Board's powers in relation to challenging the compensating party's responses to information requests.

3.16 A few respondents questioned whether it was appropriate in principle for Chairpersons and Boards to assess the loss suffered by potential beneficiaries and in turn determine the actual level of compensation to be offered, given the potential complexities of such a determination. Additionally, one respondent expressed the view that the anticipated role of the Board introduced a major element of uncertainty in the voluntary redress scheme process as regards the costs of the Board, given that the Board itself would be responsible for calculating the level of redress. It also noted that the involvement of the Board as currently envisaged could increase time, costs and duplication in the process. It was suggested that the Board's role should be limited to carrying out a more basic assessment of whether a scheme proposed by a compensating business was fair, or that the CMA could instead carry out such an assessment.

3.17 Finally, one respondent requested clarification as to how the level of redress would be specified in the Chairperson and Board's report, while another respondent suggested that the Chairperson and Board's report provided to the CMA identify the information relied upon, and methodology for, determining the level of compensation.

Independent complaints process in relation to applications for compensation by potential beneficiaries

3.18 One respondent requested clarification as to whether the Chairperson and entire Board would be required to reconvene to deal with a complaint. Another

respondent requested further information on the relationship between the complaints process and civil proceedings to enforce a redress scheme.

The CMA's views

3.19 The CMA acknowledges that many respondents considered that the Chairperson should be given a casting vote. On balance, however, the CMA considers that where half the number of the Chairperson and Board members do not consider it appropriate to approve a scheme, that may indicate there are material concerns with a scheme. Given this, the CMA remains of the view that a scheme must be approved by majority vote. In any event, in circumstances where there is a tied vote, the report of the Chairperson and Board will be required to explain dissenting views which would allow the CMA to seek a replacement scheme addressing the concerns from the compensating party, if appropriate.

3.20 To address respondents' comments regarding the transparency of any dissenting votes, Chapter 2 of the guidance outlines how dissenting opinions and the reasons behind them should be recorded.

3.21 In respect of fact finding by the Chairperson and Board, additional drafting has been included in the guidance to highlight that the Chairperson and Board should seek sufficient information from compensating parties so that they are fully satisfied that the terms of the scheme and the amount of redress offered are appropriate.

3.22 As regards the suggestion that a compensating party should not be required to provide the Chairperson and Board with privileged material and/or material relating to leniency and settlement, the CMA considers that while ultimately it will likely be for a compensating party to decide whether to provide such material, it should be possible for such a party to provide such documents to a Chairperson and Board on a confidential and, where relevant, privileged/without prejudice basis. The guidance has been revised to reflect that point more clearly, as well as noting that parties may wish to consider marking all documents appropriately and entering into suitable confidentiality agreements to provide expressly for the terms on which information is provided to the Board and the Chairperson, and how documents should be treated.

3.23 The CMA acknowledges that the Chairperson or one or more Board members may require some support from, for example, junior colleagues from the same specialism, in assessing information provided by the compensating party. This has been noted expressly in Chapter 2 of the guidance. The CMA notes, however, that even where work is delegated, the Chairperson and Board

remain accountable for the work undertaken and are expected to take an active role. Accordingly, decisions regarding the operation of the scheme and the appropriate level of redress must ultimately be made by the Chairperson and Board. In appointing the Board, the Chairperson will be required to ensure that the appropriate level of experience is available in order to assess the loss and determine the level of redress for the scheme at hand.

3.24 The CMA has considered carefully the suggestions that there are potential drawbacks to using a Board to determine compensation under a scheme. While the CMA recognises that the Chairperson and Board will have to carry out a relatively complex task in determining the level of compensation, and that a framework under which they played a less involved role in approving schemes and determining the level of compensation could potentially result in a more streamlined process in some cases, it is noted that the legal framework under section 49C of the CA98 and the associated Regulations provide a mandatory role for the Chairperson and Board as described in the guidance. In any event, the CMA considers that the role of the Chairperson and Board provide an important safeguard for potential beneficiaries in ensuring that there is expert, independent scrutiny of redress schemes outside any assessment carried out by the compensating business.

3.25 As regards requests for clarification of how the level of redress would be specified in the Chairperson and Board's report, the CMA has clarified in the guidance that the Chairperson and Board would be expected to determine and set out in their report the exact level of redress to be provided under the scheme and/or the methodology to be applied by the compensating party in determining the amount of redress for each beneficiary, as well as identifying the information the determination was based on.

3.26 Regarding the independent complaints process, the CMA has provided further details in the guidance on how it envisages this process operating and how it interacts with the potential for enforcement of schemes, including noting that complaints might be considered by an independent party or by reconvening one or more of the Chairperson and Board, depending on the scheme (ie there is no obligation to reconvene all the Board members and Chairperson).

CMA interaction with the Chairperson and Board

Summary of responses

3.27 One respondent noted that whilst it was welcome that the CMA would only reject determinations of the Chairperson and Board in exceptional

circumstances, it would be helpful to clarify that this applied to both conditional and full scheme approval.

3.28 Another respondent suggested that the CMA should have special regard to the amount of compensation offered when approving a scheme.

3.29 One respondent requested clarification regarding the options of a compensating party in circumstances where the CMA had granted conditional approval and the Chairperson and Board made a decision that includes elements of compensation going beyond the scope of the approved outline scheme.

The CMA's views

3.30 The CMA notes respondents' comments in respect of its assessment of whether to reject determinations of the Chairperson and Board's decisions and has made a number of clarifications as suggested. In respect of the request for the CMA to have special regard to the amount of compensation offered when approving a scheme, the CMA considers that it will be important to satisfy itself that it has no concerns with the Chairperson and Board's determination in this respect. However, it is outside the scope of the CMA's role to go behind the determination of compensation in detail or to re-assess the Chairperson and Board's determination of compensation.

4. Claiming of redress

4.1 Respondents' views in respect of questions 1, 3 and 4 covered a wide range of views in respect of claiming compensation and the potential operation of redress schemes. In view of overlaps in responses to these questions, these have been grouped together by issue and set out below.

- **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.
- **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 either more, or less, detailed?
- **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?

Type and scope of redress offered

Summary of responses

Jurisdictional scope

4.2 Two respondents suggested that the draft guidance could be clearer on how schemes would operate if potential beneficiaries were in a different jurisdiction, and how the CMA would administer such schemes.

General

4.3 Many respondents provided comments and requested further explanation on a number of issues relating to the type and level of redress that would be available under redress schemes.

4.4 One respondent requested further explanation of whether the level of compensation expected under a redress scheme would be akin to that awarded where settlement occurred in the context of litigation, as opposed to full compensation of actual harm, given that redress schemes should operate in a timely fashion.

4.5 Another respondent asked to what extent a compensating party could limit the amount of compensation available under the scheme, for example by setting a maximum amount of available compensation.

4.6 Three respondents commented that the draft guidance did not discuss whether non-monetary compensation could be offered and when this may be suitable.

4.7 With respect to redress schemes covering indirect purchasers, respondents made a number of comments, including:

- that it may not be appropriate to always include indirect purchasers, and that it should be an option appropriate to the facts of the case;
- that the guidance should deal with the issue of double recovery and the consequences of 'passing-on'; and
- that consideration should be given to setting up a collective opt-out settlement process, where a common fund is created from which all purchasers can obtain redress.

4.8 Finally, three respondents asked for further explanation of the way in which unclaimed redress money would be distributed. One respondent asked whether this meant that there would be an upfront fund that compensating parties would pay into, which covered the aggregate harm determined by the Chairperson and Board, and from which compensation would be available for the term of the scheme, or whether instead parties would provide compensation from their general cash reserves to meet claims as they arose.

The CMA's views

4.9 With respect to respondents' questions regarding the level of compensation a compensating party could offer, as set out in the draft guidance it will be for the Chairperson and Board to assess the appropriate level of compensation depending on the circumstances of the case, although applicants may suggest parameters within which they should devise a scheme, for example that a scheme should compensate only direct purchasers. Whilst the guidance provides the Chairperson and Board with an indication of what to do in order to reach a determination, it is not intended to prescribe the level of compensation that should be available, say compared to compensation that may be obtained via litigation.

4.10 Further to respondents' comments, the guidance has been amended to make clear that it may be appropriate to provide redress by non-monetary means, such as vouchers or coupons, in limited cases where appropriate.

4.11 The CMA acknowledges respondents' responses in respect of how redress schemes may operate for indirect purchasers. The CMA notes that whether or not compensation will be available to indirect purchasers will be a decision for the compensating party and will depend on the facts in each case. The guidance clarifies this and also provides that compensating parties may wish to consider taking steps to minimise double recovery as necessary.

4.12 The CMA has considered whether it would be appropriate for compensating parties to set up and run a redress scheme along the lines of a collective opt-out settlement process. However, the CMA considers – and BIS has confirmed – that this was not the policy intention behind BIS's introduction of the redress scheme power.

4.13 The CMA notes the questions asked by respondents regarding unclaimed compensation and whether an upfront fund or general cash reserves would be used for compensation. Whilst the CMA acknowledges that there may be some merit in establishing an upfront aggregate pot of money from which compensation is paid (for example in terms of increasing deterrence in respect of infringing businesses), we consider that this approach may place a significant burden on the compensating party and give rise to a risk of double compensation if the leftover monies were not returned to the compensating party, which then had to pay out compensation to claimants in litigation when the damage caused to them had already been paid into an upfront pot for a redress scheme. Therefore, on balance, the CMA considers that the Chairperson and Board should assess the appropriate level of redress for each beneficiary (noting however that in some cases it may be more appropriate to calculate the aggregate level of harm) and that compensating businesses should not have to pay into an aggregate upfront pot of money.

Evidence and advertising requirements of redress schemes and eligibility to claim compensation

Summary of responses

4.14 One respondent thought that the burden should be on the compensating party to find evidence of who had been harmed by their infringement, in circumstances where they were likely to hold the requisite evidence.

4.15 Two respondents provided comments with regards to the examples in the draft guidance of what potential beneficiaries may have to provide by way of evidence of loss. One suggested that loyalty cards and photographs may be insufficient evidence. The other requested that the list of examples of possible evidence be clarified.

4.16 One respondent argued that it would be too onerous for a compensating party to have to search for and contact potential beneficiaries, and that such a requirement would go beyond even obligations in the context of litigation. Another respondent suggested that social media and the internet could be used to advertise schemes, but that this may raise costs to the compensating party which the CMA might consider providing some credit for.

4.17 Another respondent noted that the draft guidance states that it may be appropriate for compensating parties to notify consumer bodies of their schemes, and asked in what circumstances or for what reasons this might be required.

4.18 One respondent thought that the guidance should be clearer as to whether redress could be claimed by both individuals and legal persons.

The CMA's views

4.19 The CMA has considered carefully the comments provided with regard the evidence requirements of redress schemes. Whilst the CMA envisages that potential beneficiaries will generally be expected to provide evidence that they are due compensation under a scheme, it acknowledges that in some cases the compensating party may have evidence readily available that identifies individuals who will be due compensation under a scheme. The guidance has therefore been amended to take into account this possibility.

4.20 With regards to the examples provided in the draft guidance, the purpose of these examples is to give an idea of the types of evidence that might be required in order to substantiate a claim rather than be exhaustive. However it is clear that the evidence required will be dictated by the particular infringement in question, and it will be for the Chairperson and Board to decide what evidence is required. Therefore the CMA has not amended this part of the guidance.

4.21 Whilst the CMA notes that the respondent's comment regarding the expectation that compensating parties search for and contact all potential beneficiaries, the CMA does not agree that such a task is necessarily onerous, for example it would not be in circumstances where a compensating party has email addresses for potential beneficiaries. The CMA considers that parties' obligations in the context of litigation are not necessarily analogous in considering what may be appropriate in respect of a voluntary redress scheme.

4.22 The CMA has made some drafting changes to note that social media and the internet may be appropriate channels to advertise schemes. However the

CMA does not believe that the use of online media to advertise schemes would raise costs to a level for which a further reduction in penalty would be required. The guidance does, however, recognise that whether some rather than all these means of publicising a scheme are appropriate should be determined case by case.

4.23 The guidance has been clarified in respect of when it may be appropriate for compensating parties to contact consumer bodies to advertise a redress scheme, and also to confirm that redress may be claimed by both individuals and legal persons in their own right.

5. How a redress scheme may be enforced, and release from a redress scheme

5.1 Respondents' views in respect of questions 1, 3 and 4 covered a range of views in respect of the circumstances in which compensating parties may be released from schemes. In view of overlaps in responses to these questions, these have been grouped together by issue and set out below.

- **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.
- **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 either more, or less, detailed?
- **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?

Conditional approval and release from schemes

Summary of responses

5.2 One respondent requested that the situations in which the CMA could revoke outline approval be widened to include a situation where the CMA considered that the Chairperson and Board had lacked sufficient impartial information when approving a scheme.

5.3 Another respondent suggested that a condition should be added whereby the CMA may revoke approval of a scheme where it agrees with the minority view of the Chairperson and Board.

5.4 One respondent argued that in circumstances where a compensating party successfully appealed an infringement decision to which a scheme related, it should be released from the scheme. Another respondent requested an explanation of when the CMA might consider a scheme to have become obsolete.

5.5 Another respondent stated that it may encourage parties to apply for approval if the CMA disregarded all statements regarding the scheme approval in circumstances where a scheme was either withdrawn or the CMA closed its investigation.

The CMA's views

5.6 The CMA has carefully considered all respondents' comments in respect of conditional approval and release from schemes.

5.7 Given that the CMA will not be considering in detail the information the Chairperson and Board have been provided with, the CMA considers that it will be for the Chairperson and Board to decide whether they have been provided with sufficient impartial information, and to request further information as necessary. Accordingly, this will not be a matter for the CMA to consider directly when considering whether to revoke outline approval. However, the CMA can revoke approval or seek a replacement scheme where a condition is not met which might in practice include a situation where the Chairperson and Board themselves identified that they had not been provided with sufficient impartial information when making a decision contrary to a CMA condition.

5.8 The CMA's ability to revoke approval for breach of conditions might also include scenarios where the CMA agreed with the stated concerns of the minority of the Chairperson and Board who did not vote to approve the scheme and the concerns amounted to a breach of a CMA condition. This might, for example, be the case where the CMA and the minority of Chairperson and Board members had concerns with the amount of compensation offered under a scheme. The CMA has amended the guidance to clarify that it would be able to revoke approval for breach of conditions in these scenarios.

5.9 The CMA notes the suggestion that where a business has obtained approval for a redress scheme but then successfully appeals liability, it should be released from the scheme. Given the voluntary nature of redress schemes, on balance, the CMA considers that in such circumstances it would be appropriate to consider releasing the compensating party from the scheme. The guidance has been amended to reflect this.

5.10 With regards to the request for clarification as to when a scheme may be considered obsolete, the CMA has reviewed this area of the guidance and considers that Chapter 4 of the guidance provides sufficient information as to the circumstances which may lead the CMA to release a compensating party from a scheme.

5.11 In respect of one respondent's comment regarding the return of documents, the CMA has already noted in paragraphs 2.24 and 2.27 above that it will return documents where an application is rejected or withdrawn, and has

reflected this in the guidance. Equally, the CMA may also return documentation in circumstances where it closes its investigation.

6. Other comments/changes to the guidance

6.1 Comments received on a number of other issues, and a number of other changes made to the guidance, are noted below.

- **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?
- **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?
- **Q6**: 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?

Interaction with the wider litigation framework

Summary of responses

6.2 Many respondents provided comments on the interaction of redress schemes with damages actions. A number of respondents commented that the continued availability of other mechanisms for redress[8] where a redress scheme was in existence provided a level of uncertainty that could make offering a redress scheme unattractive to parties.

6.3 Two respondents noted that the availability of other mechanisms for redress might lead to redress schemes being regarded as providing a 'floor' level for litigants who may then seek to obtain higher levels of compensation via litigation.

6.4 Some respondents suggested ways in which, to address this issue, potential beneficiaries might be incentivised to obtain compensation via a redress scheme rather than litigation, including:

- making redress schemes opt-out only;
- linking the existence of a redress scheme to the Competition Appeal Tribunal (CAT) decision whether to certify a collective action;

[8] For example, potential beneficiaries under a scheme could decide not to seek compensation through the scheme but instead do so through the courts.

- the provision of litigation cost consequences where a potential beneficiary to a redress scheme obtains less compensation in litigation than they would have under the scheme; and

- the introduction of CAT rules to cover the issues above.

6.5 Respondents also made a number of other comments about interactions between schemes and the wider litigation framework, including for example that a party operating a redress scheme should not face joint and several liability, and that an infringing party who has not set up a scheme should not be liable for any element of the loss for which a claimant has already been compensated via a redress scheme offered by another infringing party.

The CMA's views

6.6 As regards the interaction of the new approval power with the wider competition private actions landscape (as reformed by the changes introduced by the CRA15) and alternative dispute resolution (ADR) the CMA recognises that currently this cannot be predicted fully, creating a degree of uncertainty as to how redress schemes will work in practice. Given this, the CMA considers that the interaction between litigation and approved redress schemes will need to be refined through experience. In this context, the CMA intends to keep the guidance and wider operation of the enhanced private actions regime under review, as discussed in paragraph 6.11 below.

6.7 The CMA also highlights that, as described in the introduction to the guidance, voluntary redress schemes are an additional option for businesses wishing to offer redress. The existence of a redress scheme is not intended to extinguish the rights of claimants to seek redress via other means.

6.8 The CMA has considered the range of comments received on this issue (which overlap to a large extent with one another). In consequence, the CMA has amended the guidance to note explicitly that the CAT Rules of Procedure allow the CAT to:

- take into account the offer of redress under an approved scheme in its costs assessment where in the litigation the defendant formally makes a 'without prejudice save as to costs' offer to settle based on the terms of the voluntary redress scheme; and

- encourage and facilitate, as part of its active case management powers, the use of an ADR procedure if it considers it appropriate.

Review of the guidance/role of the redress power as part of the competition redress landscape

Summary of responses

6.9 One respondent provided a number of a comments relating to the overall design of the voluntary redress scheme. In particular, the respondent noted that there was a lack of clarity as to how the schemes would work in practice and about the costs of running a scheme. The respondent felt that introducing such a scheme at a time when other reforms to the private enforcement landscape were happening might make redress schemes less attractive to parties and potential beneficiaries. The respondent also queried whether the CMA's role, whilst appearing limited, in approving schemes would not just create further uncertainty around the regime.

6.10 Two respondents suggested that the guidance should in some way be monitored and/or reviewed, in order to ensure that it is serving its intended purpose and to allow for consideration of whether any changes should be implemented.

The CMA's views

6.11 The CMA notes respondents' comments, both specific and general, as to the operation of the redress schemes and their role within the wider reforms of the private action and ADR landscape, and considers that to some extent they overlap with some of the issues in the previous section of the summary of responses. The CMA will monitor and keep the guidance under review and will consider after an appropriate period whether any changes need to be made based on its experience of using the redress power. The CMA would also expect to seek input from BIS in order to assist in assessing how the overall private actions landscape in which the redress scheme sits is working.

Amendments to the draft guidance arising from changes to the Regulations

6.12 As explained in paragraph 3.5 of the consultation document accompanying the draft guidance, at the time the draft guidance was issued the Secretary of State was expected to issue regulations relating to the CMA's approval of redress schemes under the CRA15, which would also set out certain parameters for the operation of the redress scheme power. The draft guidance therefore summarised the expected provisions of the regulations and the requirements they imposed on the operation of the approval power.

6.13 The regulations have now been finalised and issued,[9] and they contain a number of differences in terminology and structure from the draft regulations referred to in the draft guidance. While BIS has confirmed that these changes relate to the terminology and structure of the regulations rather than changing them substantively, the changes necessitated a number of revisions to text throughout the guidance. In particular, the draft regulations referred to the CMA being able to approve a scheme that contained certain required information (including the fact that the Chairperson and Board had considered relevant matters and had by majority vote approved the scheme). The final Regulations, however, permit the CMA or a Regulator to approve schemes that have (a) been devised in accordance with a process specified in the Regulations, (b) contain certain required information, and (c) contain certain required terms. Revisions to the guidance have been made to reflect these changes to the Regulations. The CMA has endeavoured to reflect the terminological and structural changes accurately while maximising the clarity of the guidance and maintaining consistency with the draft guidance where possible and appropriate.

[9] See note 6 above.

Annex A: List of consultation respondents

Written consultation responses were received from the following:[10]

- American Bar Association
- Ashurst LLP
- City of London Law Society
- Civil Aviation Authority
- Freshfields Bruckhaus Deringer LLP
- Hausfeld & Co. LLP
- Herbert Smith Freehills LLP
- Hogan Lovells International LLP
- Slaughter and May
- Ombudsman
- Oxera
- Office of Gas and Electricity Markets
- Dr Sebastian Peyer
- Which?

[10] Comments on the draft guidance were also received in meetings from a number of stakeholders – see note 3 above.