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The City of London Law Society
Competition Law Committee

RESPONSE TO CMA CONSULTATION DOCUMENT "DRAFT GUIDANCE ON THE CMA'S APPROVAL OF VOLUNTARY REDRESS SCHEMES"

The City of London Law Society ('CLLS') represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the following members of the Competition Law Committee and nominated experts from member firms of the CLLS:

- Robert Bell, Partner, *Bryan Cave LLP* (Chairman, CLLS Competition Law Committee);
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- Becket McGrath, Partner, *Cooley (UK) LLP*;(Chairman, Voluntary Redress Schemes Working Party)
- Elaine Whiteford, Partner, *King & Wood Mallesons;* and
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Introduction

The CLLS welcomes the opportunity to respond to this consultation. As discussed with CMA staff, while we welcome the willingness of Government and the CMA to explore innovative ways of facilitating redress for victims of anticompetitive behaviour in an efficient manner without having to recourse to litigation, including through the use of 'CMA-approved' voluntary redress schemes, we have concerns with the details of the proposed mechanism adopted in this instance.

Since Government has sensibly decided to adopt a voluntary, rather than compulsory, mechanism for approved redress schemes, it is clear that the regime will stand or fall by how attractive it is to participants. The manner in which any voluntary redress procedure interacts with the wider litigation regime is clearly a key factor in this calculation, on the assumption that litigation will generally remain the primary alternative for claimants to recourse to a voluntary redress scheme. Given this, it is unfortunate the Government is introducing a voluntary redress mechanism at the same time as implementing potentially far-reaching reforms to private enforcement, in the form of opt-out collective actions, since it will inevitably take some time for the reformed private enforcement regime to bed down and its impact to become clear.

It has been suggested by one commentator that a voluntary redress scheme may be most effective where an opt-out claim is most likely to be ineffective, namely small dispersed mass damage situations.[1] This seems to us to underplay the degree of interaction between the regimes, since it is hard to envisage circumstances where businesses would embark on setting up a costly voluntary redress scheme without there being a real risk of damages claims if this is not done. As noted below, a

[1] See, for example, Christopher Hodges *Delivering Competition Damages in the UK*, at page 24.

reduction in fine is unlikely to be enough of a motivation, at least when the prospective reduction is as low as contemplated under the CMA scheme. While we can certainly see that the speed and relative simplicity of a voluntary redress scheme may well be more attractive to all sides than protracted litigation, whether such schemes are adopted in practice ultimately depends on the detailed aspects of the redress and litigation regimes and the nature of their interaction.

Given the shortcomings of the proposed UK voluntary redress scheme described below, and the uncertainties over how the new opt-out regime will operate, we consider that it is unlikely that any use will be made of voluntary schemes until potential participants (whether on the defendant or claimant side) are able to make an informed choice between options. We would therefore suggest that it would be easier and probably more effective to design, and implement, an attractive voluntary scheme once the operation of the new private enforcement regime is clear and tolerably certain.

We also have serious doubts as to whether the proposed mechanism draws the appropriate balance between the costs and benefits for settling businesses or claimants that would be needed to provide a sufficient incentive for participation in such a scheme. Even if a business were to consider creating some form of redress scheme as a way or reducing litigation risk, it is hard to envisage circumstances where it would be worth embarking on the CMA approval process, instead of creating a private redress scheme, given the additional cost, lack of certainty and lack of flexibility associated with the CMA procedure.

In light of these factors, we have doubts over whether any businesses will choose to offer approved schemes in practice, based on the current CMA proposal. Given the nature of our concerns, our comments focus on key aspects of system design, rather than examining the wording of the Draft Guidance or dealing specifically with each of the questions raised in the CMA Consultation Document.

Policy background

It appears to us that the problems with the current proposal may flow, at least in part, from the rather convoluted policy background, in which the design of the voluntary redress system has been developed in parallel with a more wide-ranging reform of the private actions framework (which received most attention during the consultation process). It may therefore be instructive to consider this policy background, before returning to the shortcomings of the proposed regime.

The origin of the proposed voluntary redress regime appears to be the statement in the BIS Consultation Document "*Private Actions in Competition Law: A Consultation on Options for Reform*" (April 2012) (the 'BIS Consultation Document') that "alongside a strong private actions regime, the Government recognises that there are some situations where it may be appropriate for the public enforcement body to consider mechanisms for redress, *as part of its administrative settlement of cases*".[2]

In making this point, the BIS Consultation Document referred to the OFT's *Independent Schools* decision as an example of such a situation.[3] The document went on to state that there were "potential advantages in providing the [CMA] with a power, in appropriate cases, to take some role in facilitating redress" and that this could provide a "helpful adjunct" to the Government's parallel reforms to the private actions regime.[4]

The January 2013 *Government Response to the Consultation on Private Actions in Competition Law* (the 'Government Response') contained relatively little further information on the redress schemes proposal. Other than making the sensible concession that the power to certify a redress scheme should be voluntary rather than compulsory, the section in the Government Response dealing with redress schemes is most notable for its confirmation that the role of the OFT (now CMA) should be limited to certifying that the compensating business followed a "reasonable process", rather than certifying (let alone calculating) the amount to be offered.[5]

While the Government Response also introduced the concept of the "independent panel" (now the Board), the proposed role of such a body appeared to be more limited than what is now envisaged, it being described as overseeing "the process of determining the redress scheme" rather than taking an active role in the creation of the scheme itself.[6] The details of the proposed mechanism for voluntary redress schemes, in which the Board appears to be given a central role in determining the level of compensation to be given under a scheme, only became clear once the CMA published its Consultation Document and Draft Guidance on 2 March this year.

Concerns with current proposal

Since the system described in the CMA Consultation Document is (rightly) a voluntary one, it will stand or fall on whether prospective defendants or claimants choose to use it. We consider that the current proposal offers insufficient incentives for either group to make such a choice.

The proposed redress scheme process does not offer businesses that have been found to have infringed competition law (or that face such a finding at the conclusion of ongoing proceedings) sufficient incentives to participate.

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2 BIS Consultation Document, at paragraph 6.27 (emphasis added).

3 It is notable that the OFT's press release of 23 November 2006 (166/06) announcing its final decision in the *Independent Schools* case noted that the fines imposed by the OFT (£10,000 per school) were "relatively low" due to "the exceptional circumstances of the case", which included "the fact that all the schools will make payments totalling £3 million into an educational charitable trust". While it is not clear from the public record, it seems likely that the OFT's fines would have been significantly higher in the absence of such payments and that its decision to impose such low fines was a material factor in the schools' proposal to make the payments. It was left unclear in the BIS Consultation Document why a new statutory regime was needed, given that the OFT had managed to negotiate such an outcome in that case under the existing regime.

4 BIS Consultation Document, at paragraphs 6.29 and 6.32.

5 Government Response, at paragraph 6.39.

6 *Ibid*., at paragraph 6.40.

First, the potential reduction in fines is too small. While the prospect of participating parties receiving a reduction of up to 10% in any administrative fine is welcome, we would suggest that this reduction is insufficient for it to be the main driver for a decision to offer a redress scheme. Although their public reputation is certainly important for businesses, especially those that interact directly with consumers, it is unclear how far this will in itself persuade a business to participate in a redress scheme, particularly in circumstances where the business may strongly dispute the existence or extent of any harm. Rather, the prospect of rapidly resolving potential or actual private litigation with a degree of certainty and finality is likely to be the determining factor in such a decision. As a result, the remainder of this response focuses on this issue.

As with any form of voluntary settlement, we assume that a potential participant in a redress scheme will have to make a rational decision on whether or not to participate. Such a decision would be based on a careful calculation of the costs and benefits of participation in a scheme, compared with the alternative of not participating. This calculation requires the potential participant to have a reasonable degree of certainty as to the costs and benefits of each option, with a premium being placed on scenarios to which it can attach a greater degree of confidence in a given outcome in the shortest time period.

From the standpoint of a defendant business, the greater the likelihood that a settlement will resolve all pending or potential litigation relating to a given infringement, and the greater the level of certainty over the cost of the settlement in the shortest period of time, the more likely it is to settle. The extent to which claimants will be bound by a redress scheme or, if they are not bound, the likelihood that they will voluntarily accept a solution offered by the scheme rather than continue with litigation, will be a key factor in this calculation. Businesses considering creating a voluntary redress scheme will also need to consider the relative benefits and disadvantages of seeking CMA approval for their scheme, rather than implementing one on a private basis. For claimants, the key factors are likely to be the cost and risk of continued litigation and the likelihood that it will deliver a better outcome for the claimant than what is on offer under a redress scheme.

The current proposal suffers when considered in this context. It is currently proposed that the approval of a redress scheme would not have any automatic effect on the ability of a potential beneficiary to bring an individual private action for damages or to join a collective action.[7] Rather, it would merely be open to participating businesses to specify that an individual scheme beneficiary who accepts redress under a scheme cannot subsequently make an individual damages claim or join a collective action with respect to the harm covered by the scheme. As a result, an unknown portion of affected claimants would be free to continue with litigation should they

[7] Although the "availability of alternative dispute resolution and any other means of resolving the dispute" is identified in the new draft CAT Rules as a factor in the CAT's decision as to whether claims are suitable to be brought in collective proceedings (see draft Rule 78(2)(g)), this is a discretionary factor. It is not yet clear how far the existence of a redress scheme (whether CMA-approved or otherwise) would lead to the CAT refusing to certify claims as eligible for inclusion in collective proceedings on this ground.

wish, thus removing the element of finality that is a key element of other schemes.[8] This is a major flaw.

While the BIS Consultation Document claimed that the ability of consumers to continue with claims if they considered a scheme was not "satisfactory" is "an important check as it ensures that the scheme must provide genuine restitution for the wrong done",[9] this purported rationale appears to ignore the fact that it is the CMA certification process itself that is supposed to provide this reassurance. If the Board and CMA are doing their jobs, then there should be no need for such a "check", at least as far as compensation for the harm that is covered by the scheme is concerned.

The current proposal also offers no obvious benefits to claimants, who have little or no incentive to participate in a scheme and would suffer no penalty for instead deciding to pursue proceedings, even if such action ultimately produces nothing more than what was offered under the voluntary redress scheme. Without providing for strong incentives for claimants to participate in a redress scheme, any such scheme is likely simply to set a 'floor' for future damages awards. As such, a scheme would not preclude additional recovery through litigation for those claimants who wish to try that route to see if they can recover more than the baseline level set by the voluntary redress route, which may itself provide little more than an easy option for lazy claimants.[10] It is unlikely that a potential defendant would be sufficiently incentivised to embark on the onerous, expensive and uncertain process of establishing a CMA certified scheme in such circumstances.

We also have doubts over the proposed role of the Board. In particular, it now appears that the Board would be responsible for determining what the actual level of compensation should be, rather than for example confirming that a proposal by participating businesses is reasonable or coming up with its own 'approximated solution'.

Settlement of civil litigation usually involves a degree of compromise, through which each party accepts less than they might have wished to receive through litigation in return for a certain outcome and an end to proceedings. Although calculations of

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8 For example, we understand that the Dutch procedure for settlement of mass damages claims, in which a settlement is binding upon all persons to whom damage was caused, albeit with the ability for individual claimants to opt out – see van Boom, 'Collective Settlement of Mass Claims in the Netherlands', in Casper, Janssen, Pohlmann and Schulze (eds.) *Auf dem Weg zu einer Europäischen Sammelklage?* (2009).

9 BIS Consultation Document, paragraph 6.39.

10 As noted by the CLLS in its response to the original BIS Consultation Document, the Government's proposed redress mechanism appears to be modelled to a significant extent on a proposal by the Confederation of British Industry ('CBI'). While we cannot speak for the CBI, it is notable from the CBI's response to the BIS Consultation Document that it presented the proposed mechanism for 'redress through ADR' as an *alternative* to the introduction of an opt-out claims system. It is also notable that the CBI's proposed model anticipated there being a costs penalty for claimants who ultimately decided to pursue a claim through the courts, rather than accepting compensation approved through an 'ADR panel'. We would suggest that the introduction of a voluntary redress system similar to that proposed by the CBI, *in addition to* a new opt-out collective actions regime, has disrupted the balance of the CBI's proposal while creating new uncertainties that reduce its potential benefits. Although the highly prescriptive nature of the CMA's proposed procedure might be appropriate for a scheme with more far-reaching consequences, as was proposed by the CBI, the relatively limited benefits of the procedure put forward in the Consultation Document simply do not justify such an onerous and inflexible process.

loss suffered may well form part of the process leading to such a resolution, there may be a difference between the result of such calculations and final settlement sums, reflecting the value of the benefit attributable to the resolution itself. While it is possible to delegate the calculation of a settlement sum to a third party such as an expert adjudicator to assist in resolution, such an ADR process would generally leave some flexibility for a pragmatic approach, given the overriding objective of arriving at a mutually acceptable settlement as an alternative to continued litigation. A settlement process may also be suitable for constructing a creative non-cash solution, such as the distribution of vouchers, granting credits against future purchases or implementing temporary price reductions.[11]

The CMA's proposal, in contrast, appears to anticipate the Board calculating a precise redress figure, with the role of participating businesses being limited to providing information needed by the Board to reach its determination, paying for the Board's work and funding the resulting scheme. Although the basic principles by which competition damages are calculated are generally accepted by economists, the variety of calculation techniques and number of variables mean that there will inevitably be a broad range of possible outcomes for such an exercise. As a result, the level of uncertainty for participating businesses regarding the likely cost of the scheme at the outset of a redress process would be very high and it would be difficult for them to do anything to reduce this.

While a participating business will presumably craft any proposed scheme with care, and would retain the ability to abandon its efforts to put a scheme in place if the appointed Board comes up with a proposal that it considers unacceptable, the Board will have the final say and the business will still be liable for the wasted costs and effort expended in setting up the Board in the first place, if it disagrees with the Board's approach. Even if the business ultimately accepts the Board's proposal, the potentially unpredictable nature of the costs of the Board, for which participating businesses will be responsible, increases uncertainty. While the role of the CMA appears to be more limited, its involvement in the scheme approval process lengthens the process and introduces a further element of uncertainty, as well as increasing costs.

As well as materially reducing participating businesses' control over the process, and potentially introducing an unacceptable element of uncertainty, it appears to us that such an approach risks undermining the key advantages of a voluntary redress mechanism, namely that it should offer fast and relatively cheap redress and enable creative 'approximated solutions' by participating businesses. While the CMA brand clearly has value, in terms of providing a form of public validation of any approved scheme, we do not think that this is likely to outweigh the disadvantages of the CMA approval process as currently proposed, namely enforced submission to the highly prescriptive Board structure, additional cost and uncertainty and loss of control and flexibility. In our view, this makes it more likely that any business considering a redress scheme is more likely simply to implement its own scheme, without seeking CMA approval. We therefore consider that the CMA needs to create materially

[11] As, indeed, was negotiated with the OFT in the *Independent Schools* case.

greater benefits to participating businesses (as well as claimants) than are currently proposed to alter this equation.

Finally, it should be noted that the proposed scheme process creates positive *disadvantages* for participating businesses. As well as the cost and uncertainty already noted, the process for creating and administering a scheme will inevitably necessitate the creation of a 'honeypot' of documents (for example, relating to the assessment of harm caused by an infringement), which could subsequently be used against participating parties in related proceedings, thus making it harder for a participating party to defend itself against continuing court claims that fall outside the scope of the scheme, whether in the UK or beyond.[12]

While we note the CMA's comments that the Board's deliberations would be kept confidential, and that communications between parties and the Board would be on a without prejudice basis, we are not convinced that this would be sufficient to protect all documents created through the scheme process from disclosure in related legal proceedings, given the context in which the documents would be created. In the first instance, designation of documents as confidential would not prevent them being disclosable to a confidentiality ring in English proceedings. In other jurisdictions' courts the level of protection may be even less, given the absence of the strict contempt penalties for breach of confidentiality rings applied by the English courts.

We also have concerns over the extent to which 'without prejudice' privilege can be relied upon with confidence to protect all documents created pursuant to the approval and operation of a redress scheme from disclosure in related court proceedings, particularly if these were to take place outside the UK. This uncertainty may make businesses even more reluctant to embark on the creation of a redress scheme, given the potentially very large exposure that can arise from such litigation (particularly in the US) and hence the potentially asymmetric impact of sensitive documents being used in such proceedings. Since defendants must consider the global impact of any local resolutions, they are likely to adopt a risk-averse approach in such circumstances.

Possible improvements

Given the shortcomings highlighted above, we would suggest that the procedure for redress schemes should be adapted to increase the chances of adoption by increasing the benefits to participating businesses and reducing the disadvantages.

We naturally appreciate that the CMA must operate within a policy framework set by Government and that it is rightly subject to the constraints placed on it by statute. Although the new section 49C of the Competition Act 1998 ('CA98'), as introduced by the Consumer Rights Act 2015, anticipates that a system for redress schemes will now be put in place, it is fortunate that the provision is not prescriptive as to the

[12] We accept that considerations of the procedure's potential impact on non-UK proceedings are unlikely to arise in the case of strictly domestic infringements.

mechanism for such schemes. There is therefore significant flexibility as to how such a system is implemented, whether by the Secretary of State (through regulations under section 49C(8) CA98) or by the CMA (through guidance under section 49C(9) CA98). As a result, there remains significant scope within the new statutory framework provided by section 49C CA98 for BIS and the CMA to improve material aspects of the regime, compared with what is currently proposed.

Increasing benefits

We would suggest that the use of a voluntary redress scheme would be more attractive if it gave participants greater certainty that it will resolve all pending or actual litigation.[13] While we accept the basic principle that injured parties should be entitled to bring a claim in the courts, we would suggest that this right should be significantly constrained once a CMA-approved redress scheme has been created and that there should be a much stronger presumption that seeking compensation through an approved redress scheme is the default option. Such an outcome could be achieved, for example, through specifying that a redress scheme will automatically apply to everyone covered by its scope, subject to injured parties being able formally to opt out of the scheme within a limited period.[14] Alternatively, an injured party who decides to litigate a claim rather than taking compensation under an approved scheme could incur adverse costs consequences, in the event that it recovers an amount through litigation that is the same as or less than what was offered under the scheme.

A further option would be to specify in the CAT Rules that the existence of a redress scheme would expressly prevent certification of claims by any beneficiaries covered by the scheme as eligible for opt-out collective proceedings,[15] with potential beneficiaries who chose not to take advantage of the scheme instead having to opt in to collective proceedings. Alternatively, the creation of an approved scheme could suspend the certification process for period of time (e.g. a year) to give time for the scheme to work and enable the CAT to observe its effectiveness before deciding whether certification of collective proceedings is appropriate.

We would also suggest that additional measures should be considered to limit the exposure of those choosing to offer a redress scheme. For example, participating businesses could be given express protection from contribution claims from defendants in continuing proceedings based on the same infringement, in circumstances where the contribution claim relates to damages paid to claimants that had already benefited from the scheme.

We would also suggest that more thought be given to increasing the potential discount from fines available to businesses agreeing to set up redress schemes. As

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13 As we noted in our response to the BIS Consultation Document, "a company submitting to [a scheme that was binding only on purchasers who accepted the result] would not be getting any certainty and might be wasting a lot of costs for little gain".

14 As, for example, under the Dutch procedure for settlement of mass damages claims.

15 In some respects, such an approach would have similarities with the Danish system, in which the Consumer Ombudsman's unique ability to bring opt-out class action claims is apparently used as leverage to persuade businesses to set up voluntary redress schemes.

noted above, we consider it unlikely that a 10% reduction in fines would be sufficient, in itself, to persuade an infringing business to set up an approved redress scheme. While we understand the concerns expressed in the BIS Consultation Document concerning the potential for significant fine reductions to undermine deterrence,[16] we would suggest that this concern should not arise where a business commits to incurring substantial costs by creating a scheme, since this directly increases the cost of its infringement and hence contributes to the deterrence effect.

The above measures should increase the level of confidence of businesses that the creation of a scheme represents the likely limit of their liability and hence enhance their incentives to participate.

Reducing disadvantages

As noted above, we consider that the anticipated role of the Board introduces a major element of uncertainty in the voluntary redress scheme process, given that the Board itself would be responsible for calculating the level of redress. We would suggest that a more streamlined approach, in which it is left to participating businesses to craft a redress scheme, which would then be subject to a basic fairness review by a Board or indeed by the CMA itself (in which case any need for a Board would fall away), would be more appropriate and more likely to be taken up in practice. Adopting such a procedure would reduce the degree to which participants may feel that they are being asked to give a 'blank cheque' to claimants, as well as saving time and reducing both costs and duplication.

We would also suggest that further consideration be given to the question of whether additional measures could be taken to protect documents created during the creation and operation of a scheme. For example, would it increase the chances of a foreign court declining to order disclosure from the Board if the Government made the public policy rationale for protecting such documents more explicit through primary or secondary legislation? We appreciate that we do not have an answer on this point but, given its importance, we do suggest that it should be given further thought by BIS and the CMA.

Conclusion

For the reasons noted above, while we continue to consider that there is a role for officially certified voluntary redress schemes, we have significant reservations as to the likely utility of the current proposal in practice compared with, for example, a privately constructed redress scheme or standard settlement process, for example under Part 36 of the CPR or the proposed new mechanism for collective settlements under the CAT Rules. In addition, we note that there are significant uncertainties over how the regime will interact with the private actions regime, which are exacerbated by the parallel introduction of an entirely novel opt-out collective actions

[16] At paragraph 6.30.

regime. Given these circumstances, we anticipate limited take-up of such schemes if implemented as currently proposed.

Given these concerns, our preferred outcome would be for BIS and the CMA to leave more time for the opt-out collective actions regime (in particular its own settlement mechanism) to bed down, and for further reflection on fundamental aspects of the voluntary redress scheme proposal, before proceeding with implementation of a voluntary redress regime.

The City of London Law Society
13th April 2015