

# Draft guidance on the CMA's approval of voluntary redress schemes

Consultation document

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This publication is also available from the CMA's webpages at [www.gov.uk/cma](http://www.gov.uk/cma).

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# **1. About the consultation**

## **Introduction**

- 1.1 The Competition and Markets Authority (CMA)<sup>1</sup> is consulting on draft guidance on its new power to approve voluntary redress schemes in cases where a competition authority has found an infringement of the Chapter I or Chapter II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 (TFEU) (Competition Law). This power will be brought into force by the Consumer Rights Act 2015 (currently the Consumer Rights Bill) (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 which have infringed Competition Law to offer compensation to affected parties quickly, and at 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.

## **Scope of this consultation**

- 1.3 This consultation seeks the views of interested parties on the draft guidance on the operation of the CMA's new power to approve redress schemes. The CMA is required to publish guidance on applications for approval of redress schemes, CMA approval of such schemes and the CMA's power to enforce approved schemes.<sup>2</sup> This consultation document also provides wider context on the legal basis for, and objectives of, redress schemes and their approval by the CMA. It sets out the specific questions on which we are seeking respondents' views.
- 1.4 The geographical scope of this consultation is primarily the UK.
- 1.5 This consultation is aimed at those who have an interest in Competition Law investigations and how compensation is provided to those affected by

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<sup>1</sup> 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.

<sup>2</sup> Section 49C(9) of the CA98 as amended by the CRA15.

Competition Law infringements. It may be of particular interest to consumers, businesses and their legal and other advisors.

## **Consultation process**

- 1.6 We are publishing this consultation on the CMA website and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the content of the draft guidance. We want to ensure that the advice is clear, comprehensive and useful for its intended users, including consumers, businesses, their legal and other advisors and potential members of independent boards<sup>3</sup> under the power.
- 1.7 Please provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email or alternatively by letter) using the contact details provided at paragraph 1.9 below.
- 1.8 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If responding on behalf of an organisation, please make it clear who you are representing and, where applicable, how the views of the members of the organisation were assembled. We intend to publish individual responses we receive. In responding, please confirm you are happy for us to do so (see further paragraphs 1.12 to 1.15 below).

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<sup>3</sup> The role of the independent board is explained in paragraphs 3.15 to 3.17 below.

## ***Duration***

- 1.9 The consultation will run for four weeks, from 2 to 29 March 2015. Responses should be submitted by post or email, by no later than 29 March 2015, and should be sent to:

CMA Redress Power Guidance Team  
Policy, Precedent and Procedures Unit  
Competition and Markets Authority  
6th Floor  
Victoria House  
37 Southampton Row  
London WC1B 4AD

Email: [rsa.consultation@cma.gsi.gov.uk](mailto:rsa.consultation@cma.gsi.gov.uk)

## ***Compliance with government consultation principles***

- 1.10 In consulting, the CMA has taken into account the published principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on [GOV.UK](#).
- 1.11 The consultation period is four weeks. We consider that this is appropriate in light of the extent of previous consultation in relation to the CMA's power to approve redress schemes. In particular, we note that BIS carried out a number of in-depth public consultations in relation to the Consumer Rights Bill, which gives the CMA its power to approve redress schemes.<sup>4</sup> This included public workshops on the statutory provisions setting out the framework for the CMA's approval power. Further, BIS consulted on the CMA's power as a part of its earlier consultation on *Private Actions in Competition Law*.<sup>5</sup> This extensive consultation process yielded a number of valuable stakeholder responses on issues related to this guidance consultation, which have informed the CMA's proposed approach to the operation of its redress power set out in the draft guidance. Finally, it should be noted that the draft guidance was developed with input from a group of external stakeholders chosen by BIS who represent a cross-section of those likely to use the guidance, including law firms, consumer organisations, and business organisations.

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<sup>4</sup> See the [Consumer Rights Bill](#).

<sup>5</sup> See the consultation on [Private Actions in Competition Law](#).

### ***Data use statement for responses***

- 1.12 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, (i) any commercial information whose publication we think might significantly harm the legitimate business interests of the business it relates to, or (ii) any information relating to the private affairs of an individual that we think might significantly harm the individual's interests. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 1.13 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.
- 1.14 If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

### ***After the consultation***

- 1.15 After the consultation, we will decide whether any changes are necessary to the draft guidance. We will then submit the guidance to the Secretary of State for approval. If the Secretary of State's approval is obtained, we will publish the final version of the guidance on our webpages at [www.gov.uk/cma](http://www.gov.uk/cma). We will also publish a summary of the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.

## **2. Legal framework**

### **Competition Law infringements within the scope of the scheme**

- 2.1 As noted at paragraph 1.1 above, a CMA approved redress scheme may relate to decisions by certain competition authorities that one or more of the prohibitions against anti-competitive agreements and abuses of a dominant position contained in Chapters I and II of the CA98 and Articles 101 and 102 of the TFEU have been infringed.<sup>6</sup>
- 2.2 Applications for approval to the CMA must relate to infringement decisions made by the CMA, sector regulators with concurrent powers under the CA98 or the European Commission.
- 2.3 However, only the CMA may approve a redress scheme in respect of a relevant infringement decision.

### **Duty to publish guidance**

- 2.4 The CMA is required to publish guidance on applications for approval of redress schemes, CMA approval of such schemes, and the CMA's power to enforce approved schemes.<sup>7</sup>
- 2.5 Section 49C(10) of the CA98 provides that the Secretary of State must approve the CMA's guidance before it is published.

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<sup>6</sup> Further guidance on Articles 101 and 102 TFEU and the Chapter I and Chapter II CA98 prohibitions can be found on the [CMA's webpages](#), in particular Guidance OFT401 (Agreements and concerted practices) and OFT402 (Abuse of a dominant position) adopted by the CMA.

<sup>7</sup> Section 49C(9) of the CA98 as amended by the CRA15.

### **3. Role and objectives of the CMA's redress power**

#### **Objectives of the redress power**

- 3.1 Anyone harmed by Competition Law infringements has the right to full compensation for the harm suffered. This potentially covers compensation for actual loss, loss of profit, plus the payment of interest. This right is recognised by the courts<sup>8</sup> and is also laid down in the 2014 European Directive on competition damages actions.<sup>9</sup>
- 3.2 The government is keen for parties found liable for an infringement of Competition Law to, where appropriate, consider offering compensation voluntarily to those who have suffered harm as a result, as an alternative to private litigation in the courts.
- 3.3 While such redress may be offered without recourse to a formal redress scheme, the new CMA power to approve voluntary redress schemes places a voluntary redress scheme on a statutory footing. As such, it may provide a suitable, alternative mechanism to multiple private actions being pursued before the courts. To that extent, it is a form of alternative dispute resolution.
- 3.4 In order to encourage infringing businesses to step forward and voluntarily offer redress, the CMA expects to treat a voluntary redress scheme that it has approved as a mitigating factor meriting a reduction in any penalty it imposes for a Competition Law infringement. This is explained further in paragraph 3.13 below and in Chapter 2 of the draft guidance.

#### **How the CMA will assess applications for approval**

- 3.5 The draft guidance sets out how the redress power will work. In due course, the Secretary of State will issue regulations relating to the CMA's approval of redress schemes under the CRA15, which will also set out certain parameters for the operation of the redress scheme power (these are expected to be known as *The Competition Act 1998 (Redress scheme) Regulations 2015*)

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<sup>8</sup> The Court of Justice of the European Union confirmed the availability of damages where harm results from a competition law infringement in the case of *Courage v Crehan* [2001] ECR I-6297. This has been further confirmed and developed in a number of subsequent cases.

<sup>9</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Directive). Following the Directive's publication on 5 December 2014, Member States have two years in which to implement its provisions into national law.

(the Regulations). The draft guidance therefore also summarises the expected provisions of the Regulations.

- 3.6 Chapter 1 of the draft guidance sets out the scope of the guidance, an overview of the broader competition private actions framework and how the CMA power fits within that, and an overview of the scope of the CMA's power to approve redress schemes. It includes a flowchart that sets out the end-to-end scheme approval process (see figure 1 on page 7).
- 3.7 Chapter 2 of the draft guidance sets out how the CMA will assess applications for scheme approval. Draft application forms are also included in the consultation.
- 3.8 It notes the relatively limited nature of the CMA assessment of schemes, in that the CMA's role is to consider whether a scheme has been set up in accordance with the Regulations, and that detailed determination of compensation is carried out by an independent Board (the Board).<sup>10</sup> The chapter explains that a business can submit an application for approval of a redress scheme to the CMA:
  - (a) prior to a CMA infringement decision being issued, most likely when a party has seen the CMA's case against it in a Statement of Objections. In such a case, an applicant may submit either a redress scheme outline or a full redress scheme for approval; or
  - (b) after an infringement decision has already been made by the CMA, a sector regulator, or the European Commission. In such a case, only a full redress scheme will be considered for approval.
- 3.9 The CMA may consider an application before an infringement decision has been made, but may only approve the scheme after the decision has been made or, in the case of a CMA decision, at the same time as it is made.
- 3.10 Where a redress scheme that is submitted for approval contains all the required information, if the CMA decides to approve the scheme it may only do so unconditionally.
- 3.11 Conversely, where the redress scheme does not contain all the required information specified in the Regulations (for example if only a scheme outline is submitted for approval), the CMA may approve the scheme subject to a condition or conditions. These conditions may require the provision of further information about the operation of the scheme (including about the amount or

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<sup>10</sup> See paragraphs 3.15 to 3.17 below.

value of compensation to be offered under the scheme or how this will be determined) and any additional conditions the CMA considers appropriate. The draft guidance also sets out the conditions that the CMA would expect to impose when outline schemes are approved.

- 3.12 Where approval is conditional, the CMA may revoke approval if any of the conditions are not met. However, where the CMA considers that the conditions are not met, it is also possible for a business to offer a replacement scheme. The CMA may approve such a replacement scheme if it meets the requirements of the Regulations and the CMA considers that it is appropriate to do so. However, the CMA may not impose conditions in relation to a replacement scheme.
- 3.13 Chapter 2 also sets out that the CMA would expect to grant a penalty reduction of up to 10% to a business whose scheme is approved at the time the CMA makes an infringement decision.
- 3.14 Finally, the chapter notes that under the legislative framework the CMA may recover its reasonable costs relating to an application for approval of a redress scheme.

## The Board

- 3.15 As noted at paragraph 3.8 above, a Board rather than the CMA is responsible for determining detailed compensation under a redress scheme. Chapter 3 of the draft guidance sets out how the Board should be constituted (to ensure its expertise and independence) and how it is expected to carry out its assessment. Further details on the requirements of the redress scheme and the role of the Board are set out in Chapter 3 of the draft guidance.
- 3.16 An applicant for approval of a scheme must establish a Board comprised of independent experts to carry out this role. The applicant will appoint a Chair who must be a senior lawyer or judge who meets the strict eligibility criteria. The Chair must be free from any conflict of interest between the interests of the applicant and those who may seek compensation under the scheme.
- 3.17 To ensure the Board's independence, the Chair will be responsible for appointing the other members of the Board, who must include an appropriately experienced economist, an individual with knowledge of the industry to which the infringement relates, and a representative of the scheme's potential beneficiaries. The Chair may also appoint any other person they deem suitable. The terms of engagement of the Board and the duties owed in the carrying out of their functions will ensure the members' independence and objectivity.

## **Claiming redress**

- 3.18 Chapter 4 of the draft guidance sets out the practical arrangements relating to the claiming of redress by potential beneficiaries.
- 3.19 Approved redress schemes will need to contain details of the terms and conditions according to which redress can be claimed. There will also be advertising requirements to ensure that potential beneficiaries are made aware that a scheme has been set up. Approved schemes will be publicised on certain websites including the CMA's website and the compensating business' website.
- 3.20 Participation in a redress scheme is entirely optional for a potential beneficiary under the scheme, and such a person could choose to pursue a compensation claim in the courts, if it so wished. The consequences of accepting redress under a scheme are set out in this chapter of the draft guidance.
- 3.21 There will need to be a complaints process in relation to applications for compensation under redress schemes approved by the CMA, access to which must be free of charge for potential beneficiaries. The CMA will not have a role in considering complaints or other forms of appeal against a scheme's terms or its administration.

## **Enforcing a redress scheme and release from a scheme**

- 3.22 A compensating party under a CMA approved scheme will be under a statutory duty to comply with the terms of the scheme. Chapter 5 of the draft guidance sets out how this duty can be enforced and the possibility for a business to be released from the scheme.
- 3.23 If a party fails to comply with obligations under the scheme, a scheme beneficiary may bring proceedings to enforce the scheme. The CMA may also bring such proceedings. This power is discretionary, and the CMA does not generally expect to bring such proceedings. It will assess the position case by case, taking relevant factors into account, including for example the nature and gravity of the suspected breach of obligation and the feasibility of the scheme beneficiary bringing civil proceedings in respect of it.
- 3.24 Where the CMA considers that it is no longer appropriate for a compensating party to remain under a duty to comply with the terms of the redress scheme, it may release the compensating party from that duty. The draft guidance sets out the CMA's approach to considering such a release.

## **4. Consultation questions**

- 4.1 The CMA invites views on the overall structure and content of the draft guidance, by reference to the following questions:
- 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 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?
- 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.** 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?