



Draft guidance on the CMA's approval of voluntary redress schemes (CMA40con)
Herbert Smith Freehills LLP Response

Herbert Smith Freehills LLP welcomes the opportunity to comment on the draft guidance on the CMA's approval of voluntary redress schemes. In addition to this response we have also contributed to the City of London Law Society response and we therefore fully endorse the comments made in that response.

We have structured our response by highlighting the key issues as opposed to responding to each of the consultation questions.

The comments in this response are those of Herbert Smith Freehills LLP and do not represent the views of our individual clients. We are happy for the CMA to publish this response and to engage in further discussion with the CMA.

1. Introduction

1.1. We support the Government's approach to promoting voluntary ADR in order to ensure that, in the appropriate circumstances, the courts are the option of last resort. More particularly, voluntary redress schemes have the potential to address the consequences of infringement of the competition rules in a fair and effective way, whilst at the same time avoiding the costs of litigation. Whilst there is nothing to stop parties from creating their own purely private redress schemes¹ we agree that, as a matter of public policy, there should be additional incentives to set up such schemes and that it is appropriate that such schemes that meet the relevant criteria should be approved by the CMA. CMA approval will in particular be valuable where the schemes are directed at consumer redress.

1.2. In order to be sufficiently attractive, the framework for voluntary redress schemes needs to be designed in such a way that businesses are sufficiently incentivised to go down this route. Flexibility, speed, limited administrative costs, the degree of certainty and finality will all be key factors in deciding whether to participate in a redress scheme. In view of the recent changes to the private enforcement regime there will be considerable and unavoidable uncertainty and little incentive for infringers to establish redress schemes in general. As currently designed, the CMA approved voluntary redress scheme in particular is unlikely to be attractive to businesses as there are few incentives, yet a

¹ Apart from the redress scheme in respect of claims based on the *Replica Football Kit* decision we are not aware of any redress schemes being established to date in the UK which suggests that additional incentives may be needed.

number of disadvantages, in seeking to establish such a scheme. We would therefore advocate that the CMA consider whether greater flexibility could be introduced as to the kind of schemes it will approve, and whether greater incentives can be given to encourage businesses to implement such schemes. Our main concerns with the CMA's current proposals are set out below.

2. Design of the scheme and role of the Board

- 2.1. The proposed design for approved schemes is highly prescriptive and requires a relatively expensive model which is unlikely to be attractive as compared to a private scheme. Under the draft proposals anyone who applies for approval of a redress scheme must establish a Board, which will be responsible for determining compensation and must consist of a number of independent experts.
- 2.2. By delegating responsibility for determining the level of compensation to the Board the scheme introduces a considerable degree of uncertainty as to the liability for those who participate in an approved scheme, as they will not know upfront what the likely cost implications of the scheme will be. Alternative options under which the participating company specifies the broad parameters of the redress offered with the Board deciding the amount due to individual claimants, or under which the company sets aside a fixed pool for compensation with the Board deciding on a fair way of allocating this between the claimants, would offer participating businesses greater certainty and thereby make the scheme more attractive. These options are all precluded under the current proposals.
- 2.3. The scheme does also not seem to support any alternative and more creative non-cash compensation settlements such as vouchers or credits against future purchases or temporary price reductions. A 'creative' settlement in the Independent Schools case, on which the voluntary redress scheme is to some extent inspired, was seen as an important benefit of a redress scheme and it would be unfortunate to limit an approved scheme to cash compensation only.
- 2.4. We believe that the scheme would be far more attractive if participants were given the flexibility to put forward their own redress scheme (or aspects of them) which would subsequently be approved by the Board.
- 2.5. A participating business is expected to cooperate fully with the Board and to provide a wide range of documents including evidence of harm and full access to all personnel, books, records, documents and information of the compensating party that the Board may require. Although the draft Guidance provides that all communications with the Board must be on a confidential and without prejudice basis and are not to be adduced as evidence in court proceedings, there is nevertheless a risk that claimants may argue that documents have to be disclosed in court proceedings in the UK and a greater risk in

respect of proceedings which take place outside the UK. This uncertainty will be a major disincentive to participation in a CMA approved scheme and these issues require further consideration.

3. Lack of sufficient incentives

- 3.1. The current proposals do not offer sufficient incentives to encourage infringers to participate in the approved redress scheme.
- 3.2. In considering the approval of a scheme, the CMA will consider whether it would be appropriate to make a penalty reduction in light of the infringing party's voluntary provision of redress, but any such penalty reduction is likely to be up to a maximum of 10% of the penalty the CMA would otherwise have imposed. In addition, such a reduction will only be available if the scheme is proposed before an infringement decision. Such limited reduction in fines is unlikely to encourage businesses to participate in voluntary redress schemes, which are likely to involve substantial costs particularly at this stage in the public enforcement process. In order to incentivise participation in the scheme, any such reduction in fines would as a minimum need to take into account those costs.
- 3.3. Although speed in resolving any actual or potential litigation, combined with a sufficient degree of certainty and finality will ultimately be far greater drivers for encouraging redress schemes, the extra incentive of a realistic reduction in fines is likely to be an additional incentive. Moreover, the reduction in fines does not weaken the overall deterrent effect since in return the infringer commits to making redress at a financial cost which is likely to exceed materially the level of any fine reduction.

4. Lack of protection from litigation

- 4.1. As currently designed the scheme does not provide participating businesses with protection from claims in respect of the same infringement, which is a major shortcoming. The approval of a redress scheme by the CMA does not itself prevent a potential beneficiary from bringing an individual private action for damages against an undertaking found liable for breach of the competition rules, from participating in an opt-in or opt-out collective action or from otherwise seeking to obtain compensation. Although a redress scheme may typically state that a scheme beneficiary who has accepted redress offered under the scheme cannot bring an individual private action for damages or participate in a collective action with respect to that loss, there will remain a number of claimants who may instead decide to litigate their claims in the courts.
- 4.2. In addition, the proposed scheme does not offer claimants any incentives to participate in a redress scheme. A claimant will not be penalised for choosing not to participate in a

scheme but to litigate instead, even where the subsequent litigation does not result in a better outcome for the claimant. As a result the terms of compensation of a scheme risk being seen as nothing more than a 'floor' level for recoveries by litigants who may want to try and see if they can recover more.

- 4.3. The position could be improved by linking the existence of an approved redress scheme to a collective action certification. The existence of a redress scheme could become a bar to opt-out collective proceedings for the beneficiaries of a redress scheme who would instead have to opt-in to collective proceedings, or the certification process could be suspended for a period of time while the impact of the redress scheme is assessed.
- 4.4. Cost consequences for a claimant who fails to achieve a better outcome than the terms of the redress scheme should also incentivise more claimants to join the scheme.

5. Conclusion

- 5.1. Whereas we support the idea of a CMA approved voluntary redress scheme in principle, we believe that the current proposals are unlikely to result in a widely used mechanism for offering and administering redress. This could be addressed in part by improving the incentives for entering a scheme and making the criteria more flexible. However, a number of key changes have recently been made to the UK private enforcement regime and the resulting uncertainty and its impact on redress schemes may prevent these being taken up. It may be appropriate for the CMA to commit to review the approved voluntary redress schemes guidance once the new private enforcement regime has bedded down and there is greater certainty as to how the various new mechanisms such as the opt-out collective actions and collective settlement regime will operate in practice.

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