Response to CMA consultation document: guidance on the CMA's approval of voluntary redress schemes

29 March 2015

Consultation response

1 Introduction

Oxera Consulting LLP ('Oxera') is an economic consultancy in the fields of competition, regulation, and finance. Oxera provides comprehensive economic advice to clients across jurisdictions in all types of competition law matters, including merger control proceedings, market inquiries, investigations of agreements and abuse of dominance, state aid investigations, and commercial litigation and arbitration cases.

We have reviewed the Competition & Markets Authority's ('CMA') guidance on the approval of voluntary redress scheme, and set out below our response in relation to the consultation document dated 2 March 2015.[1] We have drawn on experience in the UK, and also on experience with other regimes such as France, Germany and the Netherlands, in terms of both litigation and collective redress.

We are happy for the CMA to publish this response, and to engage in any further discussion with the CMA about this topic.

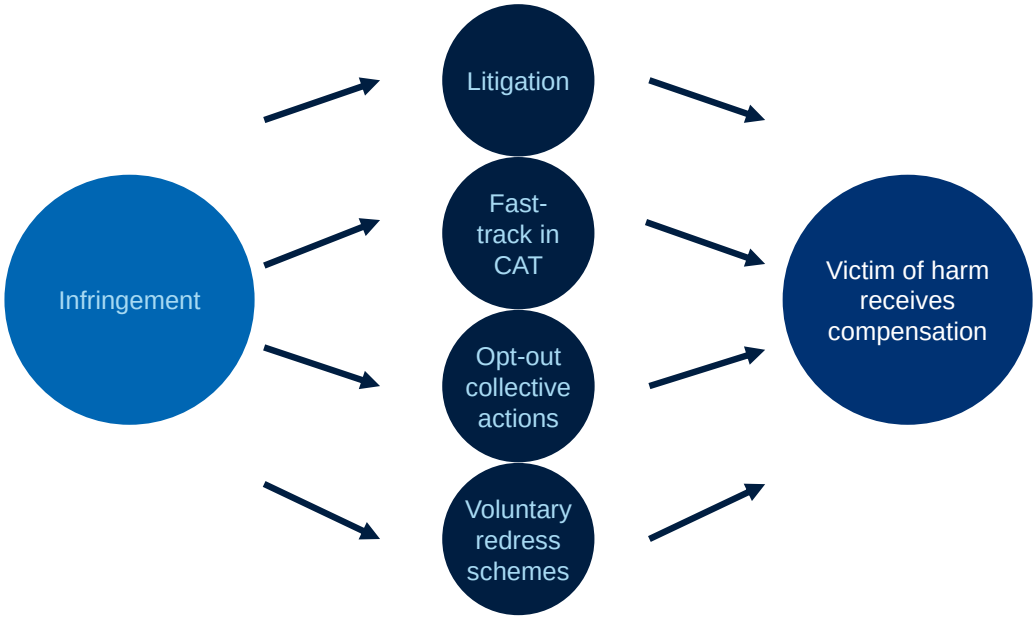
Oxera sees the merits of the voluntary redress scheme as an alternative to private litigation in courts, and agrees that it has the potential to provide a convenient and inexpensive way for people and companies that have suffered harm from a competition law infringement to receive compensation for that harm.

With the impending introduction of the Consumer Rights Act and the Competition Appeal Tribunal ('CAT') Rules consultation running alongside this consultation,

[1] Competition & Markets Authority (2015), 'Guidance on the CMA's approval of voluntary redress schemes', March.

this is an important time for the field of competition law. It is clear that there is a policy focus on assisting those who might otherwise not be able to claim for compensation, perhaps owing to a low claim value or practical obstacles. It is important to highlight the interaction between these two consultations, since, combined, they provide four routes to redress for those seeking compensation.

The diagram below illustrates the interaction between the two consultations: Litigation is a route that is currently available as a route to redress. The Consumer Rights Act and CAT Rules Consultation together provide for fast track procedures, focussed on smaller claimants such as SMEs, and collective opt-out actions. This consultation concerns a fourth route, via a voluntary redress scheme proposed by the infringer.



Oxera has considered the consultation questions as set out in the consultation document and provide comments below in relation to questions 3, 4 and 6. We have focused our response on the questions that are most relevant to our expertise—i.e. the process surrounding the appointment of the board, in particular the economist, and the powers and resources available to the economist to ensure that all evidence can be properly considered.

We also discuss the expectation for the board to include indirect purchasers in the scheme; our comments highlight the potential complexity in carrying out analysis of harm to both direct and indirect purchasers, and what can be done to address this. We provide comments on whether the guidance has fully considered the incentives on offer to the applicant, in particular questioning whether the 10% reduction in fees will appeal only to a certain category of applicant. Finally, we discuss the potential advantages of including a damages cap within the guidance with the aim of encouraging businesses to apply for the scheme.

2 Responses to specific questions in the consultation document

Question 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 more, or less detailed?

Oxera has considered the appointment of the board in detail and sets out below some areas where further clarity in the guidance may be beneficial.

First, the guidance highlights the importance of ensuring that the board members act with independence.[2] Board members must be free from any conflict between their own interests and the interests of the applicant or those who seek compensation. Oxera agrees on this point, it is vital that neither the Chair nor the economist on the board has a history of acting predominantly for claimants or defendants, as this could pose a risk to the board's ability to provide an impartial report.[3] On this point, Oxera suggests that the guidance would benefit from more clarity in defining what is meant by an 'independent' board. It is important to consider how a Chair or economist might demonstrate that he or she is sufficiently independent.

Second, Oxera has considered the process surrounding the appointment of the board. Oxera understands that the board will consist of a Chair who is appointed by the applicant. The Chair is then required to appoint an economist, an industry figure and a representative concerned with the interests of those entitled to compensation under the scheme.[4] The Chair may also appoint any other suitable person where specialist knowledge is required. Bearing in mind the issues set out above regarding the importance of independence, an alternative process could require the CMA to carry out the initial appointment of the Chair, similar to the procedures found at other dispute resolution bodies. For example, in the dispute settlement system (DSS) of the World Trade Organisation (WTO), the panel members are proposed to the parties and appointed by the institution, and parties have the right to reject the proposed panel. Such an approach could perhaps be adapted to suit the redress scheme, with the Chair perhaps proposing members, and the CMA, the infringing firm and/or a claimant-representative having some role in terms of accepting or rejecting them.

Further, the guidance would benefit from more detail in describing how the Chair is to select the board members. In particular, express reference to whether the Chair will have free choice on the board members selected and detail on whether remuneration for the board is decided by the applicant or by the Chair. In a situation where the applicant offers a low level of remuneration, this may restrict the Chair's freedom in appointing the board. This suggests that a balance will need to be struck between the CMA's aim of ensuring that a low-cost route to redress is available, and the need to ensure that boards can attract high-quality independent members.

Moreover, Oxera's experience in competition and litigation has shown that complex analysis often requires not only the expertise of a senior economist but also the support of a team to assist with data analysis. With this is mind, Oxera suggests that the guidance would benefit from more clarity on the definition of 'an economist'—i.e. does the appointment relate to a sole economist or to a senior economist and their team. There are likely to be cases where a team is required to evaluate thoroughly the evidence put forward by the applicant, whether this is raw data or analysis produced by experts employed by the compensating party or parties. Such evidence will need to be assessed critically to ensure that the victims of the infringement receive fair compensation.

Finally, it would be helpful if the CMA could provide more guidance on the resources and powers available to the board in relation to the information the

[2] Para. 3.14.
[3] Paras 3.11 and 3.18.
[4] Para. 3.8.

latter requires. Oxera understands that the board may be provided with evidence of harm (in the form of an expert report), access to all personnel, books, records, documents and information of the compensating party that it may require, and any information not related to the compensating party which is reasonably available or accessible to the board.[5] It would be helpful to include further guidance detailing the board's powers in relation to challenging certain of the information provided by the applicant, or alternatively challenging why certain information has not been provided, and how this would be funded should it become necessary.

Question 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?

Oxera notes the reference in the guidance which details the factors to be included within the application.[6] In particular, the guidance states that the CMA would normally expect schemes to cover harm that has been caused to both direct and indirect purchasers. It goes on to state that an applicant will need a compelling reason in order for the CMA to approve an application that does not cover harm caused to indirect purchasers. Oxera agrees that there are sound policy reasons why a voluntary redress scheme should be available to both direct and indirect purchasers. However, pass-on analysis to determine the extent to which different layers of the value chain suffered harm is case-specific and can be relatively data- and resource-intensive. Therefore, the guidance would benefit from more detail surrounding how the board will be resourced to ensure that it is able to deal with these complexities.

The CMA should also consider whether the guidance should make explicit reference to the Directive on Antitrust Damages Actions, adopted by the EU Council of Ministers on 10 November 2014.[7] The Directive clarifies the legal consequences of 'passing-on' in relation to indirect purchasers. It recognises that it will often be difficult for indirect purchasers to prove that they have suffered a loss due to price increases made by direct purchasers, and, as a result, the Directive establishes a rebuttable presumption that indirect purchasers suffered as part of the price increase. The CMA may consider it appropriate to provide its interpretation of how this might interact with the role being played by a redress scheme.[8]

In terms of omissions, Oxera suggests that the guidance perhaps misses an important question relating to incentives. It is important to consider the implications of a new regime from an incentives perspective and, in particular, what incentives the regime creates for different groups. This question is at the heart of why some previous policy changes in competition law have been so ground-breaking. For example, the leniency programmes in cartels have been so effective because they create the incentives that destabilise cartels and encourage firms to self-report in exchange for leniency. It is therefore important

[5] Para. 3.31.
[6] Para. 2.10.
[7] European Commission (2014), 'Directive of the European Parliament and of the Council of 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', 2013/0185 (COD).
[8] Oxera has previously raised concerns about the use of rebuttable presumptions in private competition law actions. See Oxera (2012), 'Presuming too much? The UK consultation on private actions in competition law', August.

to consider whether a potential 10% penalty discount is large enough, or perhaps even too large.

In this regard it is important to consider the incentives to engage with a voluntary redress scheme in conjunction with the other options available to different parties; for example, will companies only consider this route if they face a very large fine, meaning that a 10% reduction is sufficiently important in absolute terms? Or will the primary motivation be the likelihood of the firm facing other types of claims, either individually, or in the form of opt-out collective actions; and if so, how attractive is the voluntary redress scheme when compared to those alternatives?

Question 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?

We note that the guidance in its current format provides for a situation in which the applicant is signing up to a compensation scheme with the potential for unlimited liability. Businesses may feel encouraged to sign up to the scheme if the guidance allowed for an overall damages cap. This would, for example, protect applicants from inflated liability resulting from frivolous claims. The damages cap could be linked to the level of harm suggested by the infringement decision, in order to allow for all affected parties to be compensated while protecting the compensating parties from inflated claims.

It appears that the incentives for a business to apply for a voluntary redress scheme may be stronger where the chances of litigation are likely and the compensation value awarded through litigation could be large. However, if the individual claims are likely to be low in volume and low in value, for example claims by individual consumers, the compensating parties may have a reduced incentive to apply for a voluntary redress scheme or may only be willing to do so on terms that do not fully compensate those harmed. This could result in claimants being left uncompensated or under-compensated.

The interaction between the voluntary redress scheme and the current CAT Rules consultation is highly relevant here, since the prospect of facing private litigation through a collective action could incentivise businesses to apply for a voluntary redress scheme even where individual claims are low in volume or value.