

Guidance on the approval of voluntary redress schemes for infringements of competition law



We are asking for comments on this Consultation Paper by 5pm on Wednesday 9 December 2015.

You can send your comments and responses to our consultation questions by emailing us at psrconsultations@psr.org.uk.

We would be grateful if you could provide your response in a Word document (rather than, or in addition to, providing your response as a PDF).

You may respond in writing to the address below (although we ask for respondents to provide their responses electronically wherever possible).

Payment Systems Regulator
Concurrency consultation response team
25 The North Colonnade
Canary Wharf
London E14 5HS

We will make all non-confidential responses to this consultation available for public inspection.

We will not regard a standard confidentiality statement in an email message as a request for nondisclosure. Stakeholders who wish to claim commercial confidentiality over specific items in their response should identify those specific items which they claim to be commercially confidential.

We may nonetheless be required to disclose all responses which include information marked as confidential in order to meet legal obligations, in particular if we are asked to disclose a confidential response under the Freedom of Information Act 2000. We will endeavour to consult you in handling such a request. Any decision we make not to disclose a response is reviewable by the Information Commissioner and the Information Rights Tribunal.

You can download this Consultation Paper from our website: <http://www.psr.org.uk>

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1

Introduction and context

This consultation paper explains our proposed approach to exercising our powers to approve and enforce redress schemes under the Competition Act 1998 (CA98) as amended by the Consumer Rights Act 2015 (CRA15) and seeks views on our proposal to adopt the Competition and Markets Authority's previously published guidance.

These new powers aim to encourage businesses that infringe competition law to pay compensation to victims voluntarily.

- 1.1 If an organisation infringes competition law, it may have to pay compensation to affected consumers and businesses. It can do this with a voluntary redress scheme. We are required to publish guidance on how we approve these schemes.
- 1.2 We propose to follow the approach of the Competition and Markets Authority (CMA), and to adopt their previously published guidance.¹

The PSR's background

- 1.3 The Payment Systems Regulator Ltd (PSR) was incorporated on 1 April 2014 as a subsidiary of the Financial Conduct Authority (FCA), and became fully operational on 1 April 2015. We regulate payment systems operating in the UK, and have a range of regulatory powers under the Financial Services (Banking Reform) Act 2013 (FSBRA), as well as concurrent competition powers under the Competition Act 1998 and Enterprise Act 2002 (EA02).

We have statutory objectives to promote effective competition, innovation and the interests of service users.

The context of this consultation

- 1.4 Our competition law powers² include powers covering agreements and conduct relating to participation in payment systems.³

The concept of 'participation' in payment systems is defined in section 42 FSBRA and includes the operation of the payment system and the provision of infrastructure and payment services.⁴ The powers relate to all payment systems falling within the definition of section 41 FSBRA, not just the systems that the Treasury has designated for regulation under section 43 FSBRA.

¹ Guidance on the approval of voluntary redress schemes for infringements of competition law, CMA40, 14 August 2015. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf

² Under sections 59 to 66 FSBRA.

³ Under CA98.

⁴ The Bank of England is not to be regarded as a participant of any kind in any payment system (see section 42(8) FSBRA).

1.5 The CMA, the UK's primary competition authority, also has these competition powers, covering all sectors of the economy. So for payment systems, the CMA and the PSR have concurrent competition law functions, and the PSR is a 'concurrent regulator'.

1.6 From 1 October 2015, these competition powers include the power to approve and enforce voluntary redress schemes for competition law infringements.⁵ The application of this power is subject to regulations made by the Secretary of State for Business, Innovation and Skills.⁶

1.7 This new power is intended to make it easier for:

- consumers and businesses to get compensation for harm caused by competition law infringements at a lower cost than through court proceedings
- businesses that have infringed competition law offer compensation quickly for any harm caused.

It's designed to encourage parties to resolve disputes voluntarily, instead of through private litigation in the courts.

1.8 Under section 49C(9) CA98, the PSR, the CMA and other regulators with competition powers have a duty to publish guidance on:

- applications for approval of redress schemes
- the approval of redress schemes
- the enforcement of approved schemes, particularly the criteria for bringing enforcement proceedings⁷

1.9 The guidance must be approved by the Secretary of State.

1.10 We've set out specific questions for consideration in section 2, but would welcome any other feedback.

1.11 We don't consider that our proposals raise any equality or diversity issues, but welcome any comments on this.

1.12 This consultation is relevant to:

- payment system operators
- banks
- building societies and other payment service providers (PSPs)
- infrastructure providers
- service-users of UK payment systems (including businesses)
- trade bodies
- consumer groups

⁵ Under section 49C CA98 – this was inserted into CA98 by section 81 and Schedule 8 of the Consumer Rights Act 2015.

⁶ The Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587).

⁷ Under section 49E(4) CA98.

- other parties interested in UK payment systems

1.13 Please provide your comments by email to psrconsultations@psr.org.uk by 5pm on 9 December 2015. We'll reflect on the feedback we receive before publishing our response.

2

Consultation on guidance on the approval of voluntary redress schemes for infringements of competition law

- 2.1 The PSR, the CMA and other regulators with competition powers are required to publish guidance on applying for approval of a voluntary redress scheme, the approval itself, and the power to enforce a scheme.⁸
- 2.2 The CMA has published guidance on voluntary redress schemes ('the CMA Guidance')⁹, on 14 August 2015¹⁰. It includes the process for approving redress schemes, which applies to the CMA and other regulators with competition powers – including the PSR.
- 2.3 We propose to follow the CMA's approach to the approval of voluntary redress schemes for infringements of competition law.
- 2.4 Therefore we propose to adopt the CMA Guidance, in accordance with our duty under section 49C CA98 to publish guidance on approval of these schemes.
- 2.5 However, when we decide whether to consider a scheme for approval, we will apply our Administrative Priority Framework¹¹ instead of the CMA's Prioritisation Principles (as envisaged in the CMA Guidance).

Annex 2 lists the sections of the CMA Guidance that we propose to amend to reflect this difference.

- 2.6 We've considered:
- whether adopting the CMA Guidance is appropriate, with regard to our functions
 - our processes under CA98, in particular those that provide the context for applications for approval of schemes – these are largely equivalent to the CMA's

In our view, this is an appropriate approach which reduces complexity and avoids the unnecessary duplication of publishing substantially similar guidance.

- 2.7 If we adopt the CMA Guidance as amended, we would take it into account when carrying out our approval role under the CA98. A link to the CMA Guidance would be made available on the PSR website.
- 2.8 We would also publish two application forms for approval of a redress scheme – one for cases where there's an existing infringement decision, and one for cases where there isn't.

⁸ Section 49C(9) of the CA98.

⁹ <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>

¹⁰ It was approved by the Secretary of State as required under section 49C(10) CA98 on 6 August 2015.

¹¹ <https://www.psr.org.uk/administrative-priority-framework>

2.9 We would keep our approach and the CMA Guidance under review in light of our developing experience or changes in the law.

Q1: Do you agree with our proposal to adopt the CMA Guidance (see <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>) including the amendments in Annex 1?

Q2: Do you have any comments on the scope or content of the approval application forms in Annexes 2 and 3?

Annex 1

Key proposed changes to CMA Guidance for adoption by PSR

Key proposed changes to CMA Guidance for adoption by PSR

The PSR proposes to adopt CMA's *Guidance on the approval of voluntary redress schemes for infringements of competition law* (CMA40)¹² subject to certain changes outlined in this Consultation. The following table lists sections of the CMA Guidance which would be amended by these changes.

CMA Guidance on the approval of voluntary redress schemes for infringements of competition law reference	PSR Amendment
Paragraph 3.2, footnote 14	See Prioritisation Principles for the CMA (CMA16) <u>PSR Administrative Priority Framework (March 2015)</u>

¹² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf

Annex 2

Approval application form: existing infringement decision

Application to the Payment Systems Regulator (PSR) for approval of a voluntary redress scheme under section 49C of the Competition Act 1998

Pre-existing infringement decision

Notes about this form

1. Use this application form if an infringement decision has already been made.
If an infringement decision hasn't been made, use the form available at www.psr.org.uk.
2. Before filling in this form, you may find it useful to consult:
 - the Competition Act 1998 (Redress scheme) Regulations 2015
 - the guidance on the CMA's approval of voluntary redress schemes (the Guidance), which the PSR has adoptedThese are available at www.psr.org.uk.
3. Complete the form as fully as possible, and provide any relevant supporting documentation with your application.
If you can't provide all the required information, we may still consider the application. We may need you to provide the missing information at a later stage before we can decide whether to approve or reject the scheme.
4. If we decide to consider your application, we usually aim to tell you our decision within three months of beginning our formal consideration.
5. Submit the form by email to redress.scheme@psr.org.uk.

Or by post to: Consumer redress team
Payment Systems Regulator
25 The North Colonnade
Canary Wharf
London
E14 5HS

Your details

Title

Forename

Surname

Email

Telephone number

Are you representing yourself or an organisation?*

If you are representing an organisation:

Name of the organisation

Name of contact person (if different)

Email (if different)

Telephone number (if different)

A) Details about the redress scheme

Please provide the following:

1. Details about the agreement or conduct and the aspects of the relevant infringement decision(s) in relation to which the scheme is being offered.

2. Details about the proposed starting date of the redress scheme.

3. Details about the terms and duration of the redress scheme. In particular, please confirm that the scheme will operate for a period of at least 9 months.

4. Details about the persons who will be entitled to compensation under the scheme. Please specify whether both direct and indirect purchasers as well as umbrella claims (see paragraph 2.11 of the Guidance) will be covered by the scheme. The applicant must confirm that a third party may not submit a claim on behalf of those entitled to compensation under the redress scheme.

5. Details about the scope of the compensation to be offered under the scheme, including whether both direct and indirect losses are covered.

6. Details about the compensation to be offered under the scheme, including clarifications as to whether there are (or may be) varying levels of compensation between different potential beneficiaries or groups of beneficiaries etc. (see the Guidance for further details).

B) Details about the Chairperson and Board members

7. Details about the appointed Chairperson and Board members, including their names and qualifications as well as confirmation that they have no conflict of interest.

8. Details of the arrangements made to ensure the Chairperson and Board members had access to relevant information held by the applicant during their devising the scheme.

9. Confirmation that the Chairperson and Board members considered the relevant matters, as defined in the Competition Act 1998 (Redress Scheme) Regulations 2015, and anything else deemed relevant, and that they recommended the terms of the redress scheme for approval by majority vote.

C) Details about the process for applying for compensation under the redress scheme

10. Details about the process for applying for compensation under the redress scheme, including estimates as to how long it will take to determine applications for compensation.

11. Details about the possible types of evidence that persons entitled to compensation may submit in support of their application.

12. Details about the independent complaints process available for those applying for compensation under the scheme.

13. Details about the broad terms of settlement that will apply for persons accepting compensation under the scheme.

D) Details about advertising and monitoring of the redress scheme

14. Details about how the redress scheme will be advertised and those entitled to compensation will be notified of their entitlement.

15. Details about how the applicant will monitor whether the scheme is operating successfully.

16. Information about the expected cost to the applicant of administering the scheme, including details as to how the scheme will be resourced.

E) Other information

17. Details about any other matter considered to be relevant.

18. Contact details for those who can deal with queries about schemes when the PSR announces that it has approved a scheme

F) Supporting documents

Please provide:

Summary of the redress scheme

Chairperson’s and Board’s recommendation on the redress scheme, including any minority views

Other documents, if appropriate

Please specify:

Declaration and signature

The application form must be signed by an authorised person.

I understand that:

- It is a criminal offence for a person to knowingly or recklessly supply information to the PSR which that person knows to be false or misleading in a material particular, subject to the conditions of section 44 of the Competition Act 1998.
- The PSR may reject an application for approval of a redress scheme if it is suspected that it contains information which is false or misleading in a material particular.

Signature

Name (in block letters)

Position (in block letters)

Date

Annex 3

Approval application form: no existing infringement decision

Application to the Payment Systems Regulator (PSR) for approval of a voluntary redress scheme under section 49C of the Competition Act 1998

No pre-existing infringement decision

Notes about this form

1. Use this application form if no infringement decision has been made.

If an infringement decision has already been made, use the form available at www.psr.org.uk.

2. Before filling in this form, you may find it useful to consult:

- the Competition Act 1998 (Redress scheme) Regulations 2015
- the Guidance on the CMA's approval of voluntary redress schemes (the Guidance), which the PSR has adopted

These are available on www.psr.org.uk.

3. Complete the form as fully as possible, and provide any relevant supporting documentation with your application.
4. If you can't provide all the required information, we may still consider the application. We may need you to provide the missing information at a later stage before we can decide whether to approve or reject the scheme.

Alternatively, we may decide to approve the scheme when the infringement decision is made. This approval may be subject to the relevant information being provided within a specified period.

On the form, indicate clearly:

- where you have not provided the required information
- why you have not provided the required information
- whether you expect the information to be available before we complete our assessment the scheme

Include outline details or preliminary proposals if available, but indicate their preliminary status clearly.

5. If we decide to consider your application, we usually aim to tell you our decision within three months of beginning our formal consideration.

6. Submit the form by email to redress.scheme@psr.org.uk.

Or by post to: Consumer redress team
Payment Systems Regulator
25 The North Colonnade
Canary Wharf
London
E14 5HS

Your details

Title

Forename

Surname

Email

Telephone number

Are you representing yourself or an organisation?*

Yourself / An organisation
(please delete as appropriate)

If you are representing an organisation:

Name of the organisation

Name of contact person (if different)

Email (if different)

Telephone number (if different)

A) Details about the redress scheme

Please provide the following:

1. Details about the agreement or conduct under investigation in relation to which the scheme is being offered.

2. Details about the starting date of the redress scheme.

3. Details about the terms and duration of the redress scheme. In particular, please confirm that the scheme will operate for a period of at least 9 months.

4. Details about the persons who will be entitled to compensation under redress the scheme. Please specify whether both direct and indirect purchasers as well as umbrella claims (see paragraph 2.11 of the Guidance) will be covered by the scheme. The applicant must confirm that a third party may not submit a claim on behalf of those entitled to compensation under the redress scheme.

5. Details about the scope and amount of redress to be offered under the scheme, including whether both direct and indirect losses are covered, whether there are (or may be) varying levels of redress between different potential beneficiaries or groups of beneficiaries etc. (see the Guidance for further details).

B) Details about the Chairperson and Board members

6. Details about the Chairperson whom the applicant proposes to appoint, including his/her name and qualifications as well as confirmation that he/she has no conflict of interest.

7. Details about the persons that the Chairperson intends to appoint as members of the Board, including their names and qualifications as well as confirmation that they have no conflict of interest.

8. Details about the arrangements the applicant has made or intends to make to ensure that the Chairperson and the Board members will have adequate access to relevant information held by the applicant during their devising the scheme.

C) Details about the application process for obtaining redress

9. Details about the process for applying for compensation under the redress scheme, including estimates as to how long it will take to determine applications for redress.

10. Details about the possible types of evidence that persons entitled to compensation may submit in support of their application.

11. Details about the independent complaints process available for those applying for compensation under the scheme.

12. Details about the broad terms of settlement, and consequences of accepting redress, that may apply for persons accepting redress under the scheme.

D) Details about advertising and monitoring of the redress scheme

13. Details about how the redress scheme will be advertised and how those entitled to compensation will be notified of their entitlement.

14. Details about how the applicant will monitor whether the scheme is operating successfully.

15. Information about the expected cost to the applicant of administering the scheme, including details as to how the scheme will be resourced.

E) Other information

16. Details about any other relevant matter.

17. Contact details for those who can deal with queries about schemes when the PSR announces that it has approved a scheme

F) Supporting documents

Please provide:

Summary of the redress scheme

Other documents, if appropriate

Please specify:

Declaration and signature

The application form must be signed by an authorised person.

I understand that:

- It is a criminal offence for a person to knowingly or recklessly supply information to the PSR which that person knows to be false or misleading in a material particular, subject to the conditions of section 44 of the Competition Act 1998.
- The PSR may reject an application for approval of a redress scheme if it is suspected that it contains information which is false or misleading in a material particular.

Signature

Name (in block letters)

Position (in block letters)

Date

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