



## Guidance consultation

# FCA GUIDANCE ON VOLUNTARY REDRESS SCHEMES UNDER THE COMPETITION ACT 1998

January 2016

# 1 Consultation

- 1.1 The FCA obtained concurrent competition powers on 1 April 2015. This means we have powers to enforce the prohibitions on anti-competitive behaviour in the Competition Act 1998 (CA98) and the Treaty on the Functioning of the European Union (TFEU) in relation to the provision of financial services. We also have powers to carry out market studies, and make market investigation references to the Competition and Markets Authority (CMA) under the Enterprise Act 2002 (EA02), in relation to the provision of financial services.
- 1.2 With effect from 1 October 2015, the Consumer Rights Act 2015 introduced various amendments to CA98. These include, in section 49C CA98, a power to approve a redress scheme in relation to an infringement of the prohibitions on anti-competitive behaviour in CA98/TFEU. Once approved, a scheme becomes binding on the firm offering redress.
- 1.3 Our concurrent competition powers include the power in section 49C CA98. The application of this power is subject to the Competition Act 1998 (Redress Scheme) Regulations 2015 made by the Secretary of State (the Regulations).
- 1.4 Section 49C(9) CA98 places a duty on us to publish guidance with regard to:
  - applications for approval of redress schemes
  - the approval of redress schemes, and
  - the enforcement of approved schemes, and in particular as to the criteria we intend to adopt in deciding whether to bring proceedings under section 49E(4) CA98 in relation to the enforcement of approved redress schemes
- 1.5 This guidance is issued pursuant to our duty in section 49C(9) CA98. The CMA has also issued guidance under section 49C(9) CA98 (CMA Redress Scheme Guidance). The CMA Redress Schemes Guidance will apply to applications for approval received by the CMA. Where stated in this guidance, we will take the CMA Redress Scheme Guidance into account when we receive applications for approval that relate to the provision of financial services.
- 1.6 We are seeking comments from interested parties on this draft guidance. When providing comments, interested parties may wish to keep in view the following questions:
  - Do you agree with our proposals on how we will carry out the review and assessment of voluntary redress schemes under CA98?
  - Is the content, format and presentation of the draft guidance sufficiently clear?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.

- Do you have any comments on the scope or content of the draft guidance? Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?

1.7 We may revise our guidance from time to time, for example, in light of our experience or because of changes in the law. Our website will always contain the most up-to-date version.

1.8 We are consulting on this guidance for 4 weeks and welcome any comments you may have by 15 February 2016. You can send your response or any queries to:

**Ajinkya M Tulpule**

Competition Division  
Strategy & Competition  
Financial Conduct Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

or by email to [gc16-01@fca.org.uk](mailto:gc16-01@fca.org.uk).

1.9 Following consultation, we intend to publish the final guidance on our website.

### **Who does this guidance affect?**

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1.10 The purpose of this guidance is to help businesses understand our expectations when we review redress scheme applications for approval under CA98.

1.11 Although this consultation does not directly affect consumers, it does explain how we will review and approve redress scheme applications. Therefore, consumers, and organisations that advocate consumer interests, may be interested to learn more about how we will use our new redress scheme approval powers.

### **Cost Benefit Analysis**

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1.12 Under section 138I FSMA, when the FCA wishes to introduce any new rules it must publish a cost benefit analysis (CBA) along with the proposed rules. This is an estimate of the costs and of the benefits that will result from the rule being made. However, the guidance on redress schemes is made under section 49C(9) CA98 and is not subject to the FSMA CBA requirement. Therefore, a CBA has not been prepared.

1.13 A redress scheme application is voluntary and when considering whether to make an application a firm may wish to weigh up the benefits and costs of doing so. We adopt a flexible approach, where possible, to ensure the application and approval costs incurred by firms are proportionate.

## Equality and Diversity

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- 1.14 We have considered the equality and diversity issues that may arise from this guidance. We do not consider that this guidance raises concerns with regards to equality and diversity issues.
- 1.15 We also do not consider that the proposals in this consultation adversely impact any of the groups with protected characteristics, i.e., age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment.
- 1.16 We will continue to consider the equality and diversity implications of the proposals during the consultation period, and will revisit them when publishing the final guidance.

## Draft Guidance

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- 1.17 We are seeking comments on Chapters 2 through 6 (inclusive), which comprise our proposed redress schemes guidance under section 49C(9) CA98. Nothing in the proposed guidance alters or interferes with any other mechanism available to the FCA for providing redress.

## 2 Introduction to Draft Guidance

### Introduction

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- 2.1 This guidance explains how we will exercise our powers to approve and enforce redress schemes under the Competition Act 1998 (CA98).
- 2.2 It is aimed at firms looking to provide compensation under a CA98 redress scheme. It will also be useful to those who set up or recommend redress schemes to us under CA98. However, it does not alter or interfere with any other mechanism available to us for providing redress.
- 2.3 This guidance was approved by the Secretary of State on [date] 2016 and came into effect on [date] 2016.
- 2.4 We also have powers under other legislation relating to redress schemes. This guidance refers to some of those powers in order to provide context and to give a brief indication of other potential avenues for redress.

### Breaches of competition law that may be covered by a CA98 redress scheme

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- 2.5 Redress schemes under CA98 must relate to decisions that the prohibitions against anti-competitive agreements or abuse of a dominant position contained in Chapter 1 and Chapter 2 CA98 and Articles 101 and 102 of the TFEU (the competition prohibitions) have been infringed.
- 2.6 Further guidance on the competition prohibitions can be found on the CMA's webpages.<sup>1</sup> We have published guidance on how we will exercise our concurrent competition law powers.<sup>2</sup>
- 2.7 We may approve a voluntary redress scheme where it relates to an infringement decision in respect of a breach of one or more of the competition prohibitions in relation to the provision of financial services.<sup>3</sup> The infringement decision can be one taken by the FCA or the European Commission, or, by the CMA or a concurrent regulator if the matter has been transferred to us under the Competition Act 1998 (Concurrency) Regulations 2014 (Concurrency Regulations). See also paragraph 4.5 of this guidance for more details.

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<sup>1</sup> See in particular, OFT Guidance on *Agreements and concerted practices* (2004):

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284396/oft401.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf) and OFT Guidance on *Abuse of a dominant position* (2004):

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284422/oft402.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf)

<sup>2</sup> FG15/8: *The FCA's concurrent competition enforcement powers for the provision of financial services – A guide to the FCA's powers and procedures under the Competition Act 1998* (2015):

<https://www.fca.org.uk/static/documents/finalised-guidance/fg15-08.pdf> (FCA Guidance FG15/8)

<sup>3</sup> See section 49C CA98, section 234J FSMA and the Regulations.

- 2.8 This guidance is aimed principally at businesses seeking to provide compensation under a redress scheme and the chairpersons and members of independent boards appointed to determine compensation in relation to such a scheme. It provides guidance to such businesses, chairpersons and board members as to how we will consider applications for approval and how they should carry out their roles and obligations under the Regulations.

### **Redress schemes as part of the overall redress framework**

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- 2.9 Anyone who has suffered harm caused by an infringement of the competition prohibitions may be able to seek compensation for that harm in the courts.
- 2.10 Redress schemes under CA98 provide firms with an opportunity to offer and administer redress to those affected by a breach of the competition prohibitions, thereby reducing the risk of lengthy and costly court proceedings.<sup>4</sup> Moreover, we may in certain circumstances give a discount on any penalty we impose in respect of the underlying CA98 infringement to a firm that sets up an approved redress scheme.

### **The FCA's redress framework**

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- 2.11 The power to approve redress schemes under CA98 is an important tool in our redress toolkit. We also have a number of powers under FSMA to require authorised firms (i.e. firms regulated by us) to pay redress or provide restitution. These powers can be exercised on our own initiative, and in some instances, following an application from a firm.
- 2.12 Under section 55L FSMA, we can require a firm to review or take remedial action in respect of past conduct. This power can be exercised following an application from a firm (section 55L(5) FSMA) or on our own initiative (section 55L(3) FSMA). In principle, the power could be used to require a firm to pay compensation following a competition law infringement, provided the relevant conditions in section 55L FSMA are met. Details on the use of section 55L to impose redress schemes are set out in our guidance.<sup>5</sup>
- 2.13 Section 55L is one of the six specified powers listed in section 234K(3) FSMA to which the 'primacy' obligation applies. This means that, before exercising our power under section 55L, we have a duty to consider whether it would be more appropriate to proceed under CA98.<sup>6</sup>
- 2.14 Similarly, when considering an application for approval of a redress scheme under CA98 we may also consider exercising our power to impose a requirement under section 55L FSMA. Firms may wish to provide redress through a FSMA mechanism rather than

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<sup>4</sup> The CMA Redress Scheme Guidance provides additional guidance on how CA98 redress schemes fit in the wider context of private actions for breaches of the competition prohibitions. See paragraphs 1.27 to 1.32 of the CMA Redress Scheme Guidance for more details.

<sup>5</sup> We consulted on updating our guidance on section 404 in chapter 5 of our Quarterly Consultation Paper (No. 10) of September 2015 (CP15/28)

<sup>6</sup> Further information about this obligation, and how we address it, is available in paragraphs 2.23-2.26 of FCA Guidance FG15/8.

applying for approval of a redress scheme under CA98. For example, where the ability to bind the ombudsman service is an important consideration, a firm may wish to apply to have a requirement imposed under section 55L FSMA and ask the FCA to consider binding the ombudsman service. Where a firm voluntarily applies to the FCA to impose a requirement under section 55L in relation to redress, the FCA will consider whether it is appropriate to apply a discount to any penalty imposed by the FCA in respect of the underlying CA98 infringement. See paragraph 5.32 of this guidance for more details.

- 2.15 Where a firm is considering providing redress to consumers, it should contact us at an early stage to discuss the best possible means of doing so. See paragraphs 4.4 to 4.6 of this guidance for more details.

## 3 Requirements of a voluntary redress scheme

- 3.1 Under section 49C CA98, a person may apply to us for approval of a redress scheme. The Regulations impose requirements in relation to the approval of redress schemes. Under these, we may approve a scheme unconditionally if it:
- has been devised in accordance with the process specified in Regulation 5 (the Required Process)
  - contains all of the information required by Regulation 6 (the Required Information) and
  - contains all of the terms required by Regulation 7 (the Required Terms)
- 3.2 This guidance refers to the Required Process, the Required Information and the Required Terms collectively as the “Regulation Requirements”.
- 3.3 In this guidance, a scheme submitted to the FCA with a view to obtaining unconditional approval (i.e. a scheme that complies with the Regulation Requirements) is referred to as a “full scheme”.
- 3.4 We may approve a scheme subject to conditions where it does not yet meet all the Regulation Requirements. A scheme that is submitted to us before an infringement decision is issued with a view to obtaining conditional approval (i.e. a scheme that does not yet comply with all the Regulation Requirements) is referred to in this guidance as an “outline scheme”.
- 3.5 An applicant can apply for approval of an outline scheme during the course of an investigation and we may approve an outline scheme when we make our infringement decision. However, where a firm applies for approval of a redress scheme after an infringement decision has been made, it must submit a full scheme, and our approval cannot be subject to conditions.

### **Unconditional approval of a redress scheme**

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- 3.6 As set out in paragraph 3.1, we may approve a redress scheme unconditionally where it meets the three Regulation Requirements. We describe those requirements in turn.



## The Required Process

- 3.7 A person wishing to apply for approval of a full scheme will need to appoint a chairperson<sup>7</sup> who will in turn appoint the members of a board.<sup>8</sup> This is because under Regulation 5, the chairperson and the board must devise the redress scheme, including the level of compensation. The chairperson must recommend the scheme to us for approval, before or at the same time as the application for approval is made. The chairperson may only recommend the scheme if the chairperson and the board have considered the 'relevant matters' (described in paragraph 3.8 below), and agree by majority vote that the scheme should be recommended to us.
- 3.8 In accordance with Regulation 5(7), the relevant matters that must be considered by the chairperson and the board are:
- evidence of loss caused to persons entitled to compensation relating to the infringement decision
  - who is to be entitled to compensation under the redress scheme
  - the process for applying for compensation under the redress scheme, including any requirements to produce evidence in support of an application and
  - how those entitled to compensation under the scheme will be notified of their entitlement
- 3.9 Although the chairperson and the board are responsible for devising the scheme and recommending it to us, it is the applicant firm that will have to apply to us for approval of the scheme. As such, the applicant firm may wish to assist the chairperson and board by suggesting key parameters and sharing ideas about how specific aspects of the scheme might operate.

## The Required Information

- 3.10 Regulation 6 requires that the application for approval of a redress scheme must contain the following information:
- The names of the redress scheme's chairperson and members of the redress scheme's board, and confirmation that none of them had a conflict of interest when they were appointed and when they considered whether to recommend approval of the scheme to us.
  - Details of the arrangements to ensure that the chairperson and the board had access to relevant information held by the applicant prior to deciding whether to recommend the redress scheme for approval to us.
  - Details of the process for applying for compensation under the redress scheme, and estimates as to how long it will take to determine such applications for compensation.

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<sup>7</sup> The term 'chairperson' in Regulation 5 does not refer to any chairperson of the applicant firm, but to the chairperson appointed under the Regulation 5(2)(a).

<sup>8</sup> The term 'board' in Regulation 5 does not refer to the board of directors of the applicant firm, but to the board constituted under the Regulation 5(2)(b).

- Details of an independent complaints process available for those applying for compensation under the redress scheme.

### **The Required Terms**

- 3.11 Regulation 7 requires that the application for approval of a redress scheme must contain both of the following terms:
- That a third party may not submit a claim on behalf of those entitled to compensation under the redress scheme.
  - That the scheme will operate for a period of at least nine months.

### **Approval of a redress scheme subject to conditions**

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- 3.12 Section 49C(4) CA98 provides that a scheme approved at the time an infringement decision is made can be approved subject to condition(s) requiring the provision of further information about the operation of the scheme. Where a scheme is approved subject to such a condition, under section 49C(5)(a), it may also be approved subject to other conditions. Any conditions attached will typically be designed to ensure that the final scheme is of a type that would have been approved by the FCA had it been submitted as a full scheme.
- 3.13 Where we approve a scheme subject to conditions, we may withdraw approval if any of the conditions are not met, or may approve a redress scheme as a replacement for the original scheme (but the replacement scheme may not be approved subject to conditions).
- 3.14 Under the Regulations, we can only approve a scheme subject to conditions if:
- the applicant has provided information to us about the time when, and how, the scheme will comply with the Regulation Requirements, and
  - we are satisfied that any conditions imposed under section 49C(4) or 5(a) CA98 will ensure that the scheme will comply with those requirements within a period of time specified in those conditions.

## 4 Applying for FCA approval of a redress scheme under CA98

- 4.1 This chapter provides information on when and how parties should apply to us for approval of a redress scheme. It also provides information on the content of applications.

### When to apply

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- 4.2 A firm may apply for approval of a redress scheme either before or after an infringement decision has been issued. Where an investigation is ongoing, a firm may apply for approval of a redress scheme by submitting either a full or an outline scheme. In practice, we expect applications for scheme approval during the course of an investigation to be submitted after we have issued a Statement of Objections, since that is the point at which the parties will have seen the infringement(s) alleged against them in detail. Nevertheless, it is possible for a firm under investigation to apply for redress scheme approval at any time before an infringement decision is adopted.
- 4.3 After an infringement decision has been issued, a firm may only submit a full scheme. We may consider a redress scheme even where a firm has challenged the infringement decision, though we expect that this would be where it contests only those parts of the decision that do not form the basis of the proposed redress scheme, for example, the amount of fine imposed.

### Pre-application discussions

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- 4.4 We encourage firms considering applying to us for approval of a redress scheme to contact us at an early stage. Pre-application discussions provide an opportunity to discuss whether any of our other powers might be a more appropriate tool to provide redress. The discussions may also give the potential applicant a better understanding of our expectations in relation to the scheme and whether we are minded to prioritise assessment of the application. As such, the discussions are likely to reduce the risk that we will reject an application.
- 4.5 Pre-application discussions also provide an opportunity to consider whether we are the most appropriate authority to consider the application. Where the proposed redress scheme relates to an infringement decision made by the European Commission, we will consider whether the application should be directed or transferred to another authority,

or dealt with by us.<sup>9</sup> The FCA cannot approve a redress scheme in relation to an infringement decision of the CMA or another concurrent regulator, unless the matter to which the application relates has been transferred to the FCA in accordance with the Concurrency Regulations 2014.<sup>10</sup>

- 4.6 Where a potential scheme relates to an ongoing FCA competition investigation, we will not consider any expression of interest in setting up a redress scheme as an admission of the suspected underlying CA98 infringement.

### How to apply

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- 4.7 Applications must be made to the FCA in writing.<sup>11</sup> Applications could be sent to the following postal address:

Competition Division, Strategy & Competition  
The Financial Conduct Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

- 4.8 Applications may also be submitted to the case team / manager by email at [CompetitionMailbox@fca.org.uk](mailto:CompetitionMailbox@fca.org.uk). Applications must be signed by an appropriate senior representative of the firm who is authorised to act on behalf of that firm, such as a director.

### Content of application

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- 4.9 Applications for approval of a full scheme should contain sufficient information and evidence to satisfy us that the redress scheme complies with the Regulation Requirements. See paragraphs 3.1 and 3.7 to 3.11 of this guidance for more details.
- 4.10 In addition, we will consider whether it is appropriate for us to approve the redress scheme. Paragraphs 5.7 to 5.19 of this guidance set out the factors we may take into account when deciding whether to approve a redress scheme.

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<sup>9</sup> Any decision that an application should be transferred or directed to another authority will be taken having regard to the Competition Act (Concurrency) Regulations 2014 and CMA Guidance on *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (2014): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288958/CMA10\\_Guidance\\_on\\_concurrent\\_application\\_of\\_competition\\_law\\_to\\_regulated\\_industries.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288958/CMA10_Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf)

<sup>10</sup> See in particular Regulations 6 and 7 of the Competition Act (Concurrency) Regulations 2014.

<sup>11</sup> Article 3(2) of the Regulations. Applicants may choose to adapt the forms available on the CMA's website (Approval Application Form - where there is no existing infringement decision: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/453885/Application-No-infringement-decision.odt](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453885/Application-No-infringement-decision.odt) and Approval Application Form where there is an existing infringement decision: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/453886/Application-Existing-infringement-decision.odt](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453886/Application-Existing-infringement-decision.odt)).

4.11 The following information will assist us in determining whether the Regulation Requirements have been met, and whether it is appropriate to approve the redress scheme.

- Evidence that the chairperson and the board members satisfy the criteria in the Regulations and have been appointed in accordance with the Regulations. We encourage applicants to include details of the qualifications of the chairperson and the board members and evidence that they do not have a conflict of interest. Such evidence could include, for example, a signed declaration from the chairperson and each of the board members that they did not have a conflict of interest when they were appointed or when they approved the scheme.
- Details of the arrangements for ensuring that the chairperson had access to all relevant information held by the applicant and evidence that the applicant cooperated with the chairperson and the board members. Such evidence could include a list of the documents (or types of documents) requested by the chairperson, a schedule of documents provided by the applicant, and minutes of any meetings held between the applicant and the chairperson and board members.
- Details of the relevant matters as defined in Regulation 5(7) considered by the board (set out at paragraph 3.8 above).
- Evidence that the chairperson and board members devised the redress scheme, considered the relevant matters (as defined in Regulation 5(7)) and that they agreed to recommend the redress scheme for approval by majority vote.<sup>12</sup> Such evidence could include, for example, minutes of any relevant meetings of the chairperson and the board members.
- Details about the agreement or conduct and the aspects of the relevant infringement decision or investigation in relation to which the redress scheme is being offered.
- The terms of the redress scheme, including terms setting out:
  - the Required Terms
  - the proposed start date of the redress scheme
  - who is eligible to claim under the scheme
  - details about the amount or value of the compensation to be offered under the redress scheme<sup>13</sup> and
  - the consequences of accepting redress under the scheme.
- Details about how the redress scheme will be advertised and those entitled to compensation under the scheme notified of their entitlement, as well as copies of any proposed customer communications.

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<sup>12</sup> This is part of the process that must be followed under Regulation 5. We consider that for a majority to be established, the combined total of votes of the board members and chairperson must be greater than 50% of the number of people required to vote (i.e. the board members and the chairperson). Any absent board members will be deemed to have voted not to recommend the scheme to the FCA.

<sup>13</sup> Under section 49C(3), in deciding whether to approve a scheme the FCA may take into account the amount of value to be offered under the scheme.

- Details about how the applicant will monitor whether the redress scheme is operating successfully, and how often the applicant proposes to update the FCA on the progress of the scheme.
- Information about the expected cost to the applicant of administering the redress scheme, including details as to how the redress scheme will be resourced.
- Details about any other matter considered relevant.
- Contact details for those who can deal with queries about the redress scheme from customers affected by the competition infringement.

4.12 We note that not all of the information set out in paragraph 4.11 will be available when applying for conditional approval of an outline scheme. In such cases, the application should explain when the applicant expects to be able to comply with the Regulation Requirements and when it will be in a position to provide any further relevant information to us.

### Confidentiality

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- 4.13 Confidential information received in an application or during the course of pre-application discussions will be handled carefully and in line with any applicable legal requirements, for example, those in Part 9 of the Enterprise Act 2002. Save for discussions that take place in the context of settling a CA98 case, we will apply the same policy for handling information in relation to redress schemes as we do in CA98 investigations, as set out in FG15/8: The FCA's concurrent competition enforcement powers for the provision of financial services – A guide to the FCA's powers and procedures under the Competition Act 1998.<sup>14</sup> This allows us to exercise our powers under other statutes, such as FSMA, and to use the most appropriate tool when approving a consumer redress scheme.
- 4.14 Information received during discussions that take place in the context of settling a CA98 case and form part of the settlement negotiations (for example, where a firm is seeking a penalty reduction in light of an offer of redress) will be treated in line with our general policy.<sup>15</sup> We expect to hold these discussions on the basis that neither we nor the party concerned would seek to rely against each other on any admissions or statements made if settlement discussions fail and the matter becomes contested, or in other proceedings. This will not, however, prevent the FCA from following up, through other means, on any new issues of regulatory concern which come to light during settlement discussions.

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<sup>14</sup> The FCA's policy on disclosure and use of information in CA98 investigations is in Chapter 7 of FCA Guidance FG15/8.

<sup>15</sup> As set out in FCA Guidance FG15/8, paragraph 6.18.

## 5 Assessment and decision process

5.1 This chapter explains the process we expect to follow when assessing an application for approval of a redress scheme.

5.2 We expect that firms will enter into pre-application discussions before a formal application is submitted (see paragraphs 4.4 to 4.6 above). During the course of these discussions we may indicate the likely timescales for our consideration of the redress scheme. The time taken to consider and approve a redress scheme will depend, among other things, on the size and complexity of the redress scheme, the extent to which the details of the redress scheme have been considered in the pre-application process and the availability of FCA resources to consider the redress scheme. We will typically aim to determine applications within 3 months. However, this will depend on the complexity of the financial product or service involved, the number of consumers likely to benefit from the scheme and the number of firms involved in the infringement. Where the details of the redress scheme are considered in the pre-application process, then we expect to reach a decision quickly once the formal application has been received.

5.3 When determining whether, and to what extent, we prioritise consideration of an application, we may take into account the following factors, amongst others:

- Whether the application relates to an ongoing investigation. Where applications are made during the course of an investigation or as part of settlement discussions, we will seek to approve/reject the application when we issue the infringement decision.
- Any statutory limitation period in respect of potential claims to which the redress scheme relates.
- The harm suffered by consumers and whether consumers are likely to be suffering financial hardship.
- The significance of the case, the number of consumers involved, and whether any of the affected consumers are particularly vulnerable.
- Whether we have received redress scheme applications from more than one firm involved in the infringement. Where we receive applications from a number of firms in relation to the same infringement, if possible, we will consider the applications together in order to ensure a consistent approach.

### Assessment of redress schemes

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5.4 Our role is to approve the redress scheme where appropriate. We will only unconditionally approve a redress scheme where the application provides sufficient

evidence that the Regulation Requirements have been met. Details of the kind of information and evidence that may assist our assessment are set out in paragraphs 4.9 to 4.12 above.

- 5.5 In the case of conditional approval, we will assess whether the requirements for conditional approval have been satisfied (see paragraph 3.14 of this guidance for more details).
- 5.6 Where a firm (and where appointed, the chairperson and the board) has engaged with us in the pre-application stage and taken on board any suggestions that we have made, we expect that a recommendation from the chairperson is likely to be a persuasive factor in our determination. However, section 49C(3) CA98 provides that we may take into account the amount and value of compensation to be offered under the redress scheme. We may also take into account other factors before granting approval, conditional or unconditional. These include, but are not limited to, factors set out in paragraphs 5.7 to 5.19 below.

### **Entitlement to compensation under the redress scheme**

- 5.7 We may consider whether the redress scheme is intended to offer compensation to all affected customers or just a category of customers, for example, whether the redress scheme is intended to cover direct and indirect customers.<sup>16</sup> Where a firm is proposing a redress scheme that will only compensate a sub-set of affected customers, we may seek to understand why the firm does not intend the redress scheme to cover all affected customers.

### **Scope of compensation offered under the redress scheme**

- 5.8 We may consider whether the compensation offered to customers will partially or fully compensate customers. We may also look at whether the proposed redress is consistent with any award that the ombudsman service would make or any decisions the ombudsman service has made on similar cases. Where full compensation is not offered, we expect to see a clear explanation for this approach and how this will be explained to customers in the relevant communications.<sup>17</sup>
- 5.9 We may take into account whether a firm proposes to tailor its redress offers to individual customers or provide a blanket approach. We expect to see an explanation for whichever process is chosen.

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<sup>16</sup> An indirect customer is a customer that does not purchase goods directly from the infringing party, but from another party further down the supply chain. An indirect customer can suffer loss as a result of a competition breach where, for example, higher prices are passed through the supply chain.

<sup>17</sup> We note that an applicant could be liable for all losses arising out of an anti-competitive agreement or abusive conduct, even where some of those that suffered harm are not customers of the applicant (for example, where they are customers of other participants to the agreement or abusive conduct). In such cases, it may be appropriate to approve a redress scheme that only offers redress to customers of the applicant.



### **The process for applying for compensation, duration of resolution and commencement of scheme**

- 5.10 We encourage firms to make the application process as easy and accessible as possible, which could mean that firms accept electronic, postal and telephone applications. We are unlikely to approve a redress scheme where the application process is unnecessarily lengthy or burdensome.
- 5.11 Redress schemes should provide for the prompt resolution of claims: we are unlikely to approve a redress scheme that does not.
- 5.12 We expect that the start date of the redress scheme will be no more than three months after the date of approval or, in the case of conditional approval, no more than three months after we have confirmed that the conditions of the redress scheme have been met. However, where the firm provides convincing reasons, we may consider a later commencement date.

### **Evidence requirements**

- 5.13 We consider that the evidential requirements for those wishing to claim under a redress scheme should be fair and reasonable. We may reject a redress scheme where the evidential requirements are likely to deter or prevent potential claimants from making a successful claim. Where a firm is in possession of data allowing it to identify all the individuals that have suffered harm, it may not be appropriate to require potential redress scheme beneficiaries to produce evidence of harm.

### **The independent complaints process**

- 5.14 As noted in paragraph 3.10, details about the independent complaints process form part of the Required Information. We are unlikely to approve a redress scheme where customers will be charged if they make a complaint about the scheme. Where relevant, firms should ensure that any complaint handling procedures are compliant with any applicable rules on complaint handling (for example, those in the Dispute Resolution: Complaints chapter of the FCA handbook (DISP)). Nothing in this guidance affects the duties or responsibilities of regulated firms under the DISP rules.
- 5.15 We may consider whether the ombudsman service could provide adequate safeguards for potential claimants seeking compensation under a scheme. An applicant firm may wish to structure its scheme so that claims under the scheme amount to complaints to be dealt with in accordance with the rules on complaints handling in DISP. In such cases, if a complainant is unhappy with the determination of their complaint, they can refer it to the ombudsman service.<sup>18</sup> Any determination by the ombudsman service would be in line

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<sup>18</sup> In order to rely on the ombudsman service, a firm must ensure that the complaint falls within the jurisdiction of the ombudsman service (see Chapter 2 of DISP, *Jurisdiction of the Financial Ombudsman Service* (2014): <https://www.handbook.fca.org.uk/handbook/DISP/2/1.html>).

with the processes and criteria that it applies when adjudicating complaints.<sup>19</sup> However, even where a firm relies on the ombudsman service to provide an independent complaints process, it should also consider the process it will put in place for those claimants that are not eligible to refer a complaint to the ombudsman service.

### **Notifying those entitled to compensation under the redress scheme**

- 5.16 We consider that there should be an effective method for notifying those entitled to compensation under the redress scheme of their entitlement. Where customer contact details are available, we generally expect firms to contact customers individually. We encourage firms to advertise redress schemes on their websites and in other appropriate channels (for example, on websites, on brochures, in retail outlets or branches).
- 5.17 We may consider the appropriateness of any customer communications. We are unlikely to approve a scheme where the proposed customer communications are unclear and/or likely to be ineffective.

### **The consequences of accepting redress under a scheme**

- 5.18 Firms may wish to offer compensation under a redress scheme subject to conditions. For example, a redress scheme may state that a scheme beneficiary who has accepted redress under the scheme does so subject to full and final settlement of its claim against the firm.
- 5.19 However, we are unlikely to approve a redress scheme which prevents a scheme beneficiary from bringing an individual private action (including making a complaint to the ombudsman service) or from participating in a collective action against:
- the firm for losses not falling within the scope of the redress scheme
  - other parties to the competition infringement which have not set up a voluntary redress scheme for the harm inflicted by their conduct or
  - the firm where the beneficiary's claim under the scheme was rejected.

### **Approval process and outcomes**

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- 5.20 Having assessed an application for approval of a redress scheme, we may:
- in the case of a full redress scheme, approve or reject it, and
  - in the case of an outline redress scheme, approve it with conditions or reject it
- 5.21 If, during our assessment, we have concerns, we expect to provide the applicant firm with the opportunity to respond and where appropriate amend the proposed redress scheme.

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<sup>19</sup> Nothing in the guidance interferes with the jurisdiction of the ombudsman service. The ombudsman service determines complaints on the basis of what it considers is fair and reasonable in the circumstances of any complaint it receives.

- 5.22 Where we are unable to approve the redress scheme because it does not contain sufficient information for us to be satisfied that the Regulation Requirements are met, we expect to give the firm the opportunity to provide further information in support of the application.

### **Determination of applications received after an infringement decision is made**

- 5.23 Where an infringement decision has already been made, we can only consider a full redress scheme.<sup>20</sup> There will be no reduction or repayment of any penalty amount imposed where the application for approval is received after the infringement decision has been made.
- 5.24 Even though the redress scheme must be a full redress scheme, we encourage firms to enter into pre-application discussions with us (see paragraphs 4.4 to 4.6 of this guidance for more details). When an application is submitted formally for approval, we will then determine whether to approve the redress scheme unconditionally or to reject it.

### **Determination of applications received during the course of an investigation**

- 5.25 Before an infringement decision has been made, an applicant may submit an outline redress scheme. However, we can only approve the redress scheme if we make an infringement decision against the applicant. We do not expect to publicise that an application for approval of a redress scheme has been submitted during the course of an ongoing investigation. Similarly, compensating parties are expected not to disclose that they have applied, or taken steps to apply, for approval of a redress scheme without prior authorisation from us.
- 5.26 Where we approve an outline redress scheme, we will do so subject to conditions (see paragraphs 3.12 to 3.14 of this guidance for more details). We expect to discuss with the applicant any conditions we plan to impose. If the applicant does not accept the conditions proposed, it may withdraw its application.

### **Notification and publication of the FCA's decision**

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- 5.27 Once we have determined an application, we will notify the applicant. This notification will constitute our formal approval or rejection of a redress scheme. Where we reject an application, or approve an application subject to conditions, we will provide the applicant with a short document which sets out the reasons for our decision.
- 5.28 We expect to publish our decision to approve a redress scheme, whether subject to conditions or not, on our webpages. In doing so, we will typically draw attention to the firm's commitment to compensate individuals and firms for the harm that they have suffered as a result of its anticompetitive behaviour. However, we do not expect to make

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<sup>20</sup> See Regulations 4(1) and 4(2).

any public announcement in relation to an application prior to reaching our formal decision.

- 5.29 Where we issue an infringement decision at the same time as we approve a redress scheme, the infringement decision will generally note the existence of an approved redress scheme as well as any penalty reduction granted in connection with it. We may also include on our webpages a link to the details of the redress scheme held on the firm's website or other contact details for the firm as appropriate.

### Penalty reductions in certain cases

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- 5.30 If we are considering approving a redress scheme in relation to a potential infringement decision, we will consider whether it would be appropriate to make a penalty reduction in light of the infringing party's voluntary provision of redress. Where possible, the intention to grant a penalty discount in light of a redress scheme will be noted in the draft penalty statement (issued in accordance with our procedures in CA98 cases).<sup>21</sup> Any penalty discount granted in light of a redress scheme is additional to any other discount provided by us, for example, discounts granted for settlement. It should however be noted that, since draft penalty statements are put on the investigation file for inspection in multi-party cases, other parties to the investigation may become aware of the fact that an application has been submitted for approval in such a case.
- 5.31 We retain discretion to decide whether a redress scheme merits a penalty reduction – there is no absolute right to a penalty reduction. However, we expect that in the majority of cases where we approve a redress scheme, we will reduce the penalty we would otherwise have imposed to recognise the provision of redress through the redress scheme.
- 5.32 We will have regard to the CMA's policies in determining the amount of any penalty and the size of any discount in connection with the approval of a redress scheme. As such, any penalty discount is likely to be up to a maximum of 20% of the penalty we would otherwise have imposed. Where an authorised firm commits to provide redress by applying for the imposition of a requirement under section 55L FSMA, we will consider whether it is appropriate to discount any financial penalty to be imposed in respect of the underlying CA98 infringement. Where possible, we expect that any penalty discount for such a redress scheme will be calculated as if that scheme was an approved redress scheme under CA98. There will be no discount available where a penalty has already been imposed.
- 5.33 If a firm disagrees with the amount of the penalty reduction (if any), it may withdraw its application before it is formally approved.

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<sup>21</sup> Once any written and oral representations made on the Statement of Objections have been considered, if the FCA is considering reaching an infringement decision and imposing a financial penalty on a party, it will provide that party with a draft penalty statement. This will set out the key aspects relevant to the calculation of the penalty that the FCA proposes to impose on that party, based on the information available to the FCA at the time.

## Recovery of FCA's costs

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- 5.34 Section 49D CA98 provides that we may require a person making an application for approval of a redress scheme to pay some or all of our costs relating to the application.
- 5.35 We may impose such a requirement by giving the relevant person written notice that specifies:
- the amount to be paid
  - how that amount has been calculated and
  - by when that amount must be paid
- 5.36 Generally we expect to calculate our costs on the basis of the total number of hours devoted to assessing the application multiplied by an average hourly rate depending on the level of staff involved. We will seek to recover all reasonable costs in the vast majority of cases but, in exceptional circumstances, we may seek to recover only a portion of our costs. In determining the amount of costs to be recovered, we may consider the size and financial position of the firm. We are unlikely to seek to recover costs where to do so would impact on the compensation available to customers.
- 5.37 If we reject an application, we may seek to recover some or all of our costs for reviewing the application. Similarly, if an applicant withdraws their application before it has been determined, we may seek to recover any costs incurred prior to the withdrawal of the application.
- 5.38 If the costs that need to be paid under this section relate to an approved redress scheme, we may revoke redress scheme approval if the costs have not been paid by the date specified in the written notice.<sup>22</sup>
- 5.39 Costs that need to be paid under this section are recoverable by us as a debt.<sup>23</sup>
- 5.40 A person required to pay costs under this part may appeal to the Competition Appeal Tribunal against the amount.<sup>24</sup>

## Review of the FCA's decision

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- 5.41 FCA decisions relating to a redress scheme are subject to judicial review under usual principles.
- 5.42 A decision in relation to the penalty imposed for an infringement of the competition prohibitions (and consequently any penalty reduction in respect of a redress scheme) may be appealed to the Competition Appeal Tribunal.

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<sup>22</sup> Section 49D(4) CA98

<sup>23</sup> Section 49D(5) CA98

<sup>24</sup> Section 49D(3) CA98

## 6 Enforcement of and release from an approved redress scheme

- 6.1 This chapter explains how an approved redress scheme can be enforced and sets out the criteria we intend to apply in deciding whether to bring proceedings under section 49E CA98 to enforce a redress scheme. It also provides information on how parties can seek to be released from the obligations of an approved redress scheme.

### Enforcement of approved voluntary redress schemes

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#### Duty of a firm to comply with a redress scheme

- 6.2 The firm is under a statutory duty to comply with the terms of an approved redress scheme.<sup>25</sup>
- 6.3 This statutory duty is owed to any natural or legal person entitled to compensation under the terms of the redress scheme,<sup>26</sup> whether or not they have made a formal application under the redress scheme.

#### Enforcement of a redress scheme by a redress scheme beneficiary

- 6.4 If a firm breaches its duty to comply with the terms of an approved redress scheme, a redress scheme beneficiary who suffers loss or damage as a result of the breach may bring civil proceedings before the court for damages, an injunction or interdict or any other appropriate relief or remedy.<sup>27</sup> However, it is a defence for the firm to show that it took all reasonable steps to adhere to the terms of the approved redress scheme.<sup>28</sup>
- 6.5 In practice, the loss that a beneficiary suffers is likely to be the compensation they have not received. The beneficiary does not need to have used the complaints process under the scheme before they exercise their right to bring civil proceedings, but may wish to consider doing so.

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<sup>25</sup> Section 49E(1) CA98

<sup>26</sup> Section 49E(2) CA98

<sup>27</sup> Section 49E(3) CA98

<sup>28</sup> Section 49E(6) CA98

## Enforcement of a redress scheme by FCA

- 6.6 In addition to enforcement by a beneficiary, if we consider that the firm is in breach of the duty to comply with the terms of a redress scheme, we may bring civil proceedings before the court for an injunction or interdict, or any other appropriate relief or remedy.<sup>29</sup> Again, it is a defence for the firm to show it took all reasonable steps to comply with the duty to adhere to the terms of the approved redress scheme.
- 6.7 The power to initiate enforcement proceedings is discretionary and we will consider its use on a case by case basis by taking into account the following non-exhaustive list of factors.
- The nature and gravity of the suspected breach.
  - Whether the independent appeals process under the redress scheme is potentially capable of resolving issues relating to the suspected breach.
  - The feasibility of the redress scheme beneficiary bringing civil proceedings in respect of the suspected breach
- 6.8 Where relevant, we will generally apply the criteria set out in paragraph 5.3 above when considering whether to enforce a redress scheme.

## Release from approved voluntary redress schemes

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- 6.9 If we consider that it is no longer appropriate for the firm to be subject to its duty to comply with the terms of an approved redress scheme, we may release it from its duty by giving it notice in writing.<sup>30</sup> However, we expect that we will only consider releasing a firm from its obligations in exceptional circumstances.

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<sup>29</sup> Section 49E(4) CA98

<sup>30</sup> Section 49E(7) CA98