EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (REDRESS SCHEME) REGULATIONS 2015

2015 No. 1587

1. This explanatory memorandum has been prepared by Department for Business, Innovation and Skills (BIS) and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order sets out how the Competition and Markets Authority (CMA) and concurrent regulators should consider applications for a voluntary redress scheme under section 49C of the Competition Act 1998.

3. Matters of special interest to the Joint Committee

3.1 None.

4. Legislative Context

4.1 This Instrument is being made further to the Consumer Rights Act 2015 - http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted/data.htm. The instrument will give the Secretary of State, the power conferred by section 49C(8) of the Competition Act 1998 to set out how the CMA and concurrent regulators should consider applications for a voluntary redress scheme. The purpose is to make it easier for businesses and consumers to gain compensation for harm caused by infringements of competition law, and for businesses which have infringed competition law to offer reparation to affected parties quickly, and at lower cost than through court proceedings. As such, it is designed to encourage parties to resolve disputes voluntarily as an alternative to private litigation in the courts, which can prove costly to both parties. It also enables a business who has infringed competition law to try and improve its reputation through voluntarily offering compensation.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales, Scotland and Northern Ireland.

6. European Convention on Human Rights

Nick Boles MP, Minister of State for Skills has made the following statement regarding Human Rights:

In my view the provisions of the Competition Act 1998 (Redress Scheme) Regulations 2015 are compatible with the Convention rights.

7. Policy background

7.1 The Office of Fair Trading previously concluded that private actions are the least effective aspect of the UK's competition regime. Businesses have also informed us that the current regime is too costly and slow, with it being especially difficult for SMEs and consumers to be able to obtain redress.

7.2 The Government therefore published a consultation "Private Actions in Competition Law" in April 2012 and considered the role of Alternative Dispute Resolution (ADR) as part of this - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf. The majority of respondents who answered the questions on ADR were in favour of Government adopting a voluntary rather than mandatory approach.

7.3 In January 2013, the Government then published its response to the consultation on Private Actions in Competition Law, and confirmed that it would not make ADR mandatory as it would be too restrictive for it to be prescribed as a default route before collective actions can be undertaken. A mandatory approach could also undermine the basic right of parties to take matters to court. A copy of the Government's response and accompanying impact assessments can be viewed here: https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform.

7.4 These reforms emerge from the Consumer Rights Act 2015 which sets out in one place key consumers' rights and what they are entitled to if something goes wrong. This covers goods, services and, for the first time, digital content. The reforms will also build on and enhance the success of the current consumer and competition law enforcement regimes. Through this parent Act, Government is enabling the CMA and concurrent regulators to approve voluntary redress schemes.

7.5 On 21 January 2014 the Consumer Rights Bill was introduced into Parliament and gained Royal Assent on 26 March 2015. Schedule 8 of the Consumer Rights Act 2015 specifies that "After section 49B (inserted by paragraph 11) insert – "49C Approval of redress schemes by the CMA". During the passage of the CRA, the Government decided that the policy intention was for only the CMA to be able to approve voluntary redress schemes as the lead Competition Authority in the UK. It was also decided that schemes could relate to

its own infringement decisions, as well as the infringement decisions of concurrent regulators and the European Commission. However, the CMA can only award a penalty reduction in relation to its own infringement decisions.

7.6 Concerns were subsequently raised that parties could not benefit from a penalty discount in cases where a scheme relates to a decision by a concurrent regulator. This could incentivise parties to seek a right to be heard on case allocation decisions (with a preference for the CMA because of its ability to award penalty reductions), which could result in case allocation decisions taking months, rather than a few days. This issue was raised just before Royal Assent so it was too late to communicate a change of the policy position. However, as s.54(2) of the Competition Act 1998 enables the regulators to exercise concurrent powers (through ensuring references to the CMA are treated as references to the regulators), they are able to approve voluntary redress schemes and these Regulations also include reference to the regulators. This change of approach will also be reflected in the final version of the CMA Voluntary Redress Schemes Guidance, which is due to be published shortly.

7.7 In March 2015, the CMA then published the consultation on its draft guidance on the approval of voluntary redress schemes - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408326/Consultation_-_draft_guidance_-_voluntary_redress_schemes.pdf. This covered the objectives of the redress power; how the CMA will assess applications for approval; the role of the Board (responsible for determining detailed compensation under a redress scheme); claiming redress and enforcing a redress scheme.

7.8 Responses to the CMA's consultation responses welcomed in principle the approval power as part of the overall redress toolkit (alongside other CRA changes, such as collective actions and fast track cases for SMEs). However, several respondents considered that, overall, there were limited incentives for businesses to incur voluntarily the costs of operating approved schemes given a number of factors. One concern was the perceived low penalty reduction for approved schemes and concerns about having to pay the CMA's costs of considering applications, in circumstances where the mandatory use of an expert independent Board may make schemes relatively costly. We have reflected on concerns that a penalty discount of up to 10% of the penalty that the Authority would otherwise have imposed was too low. Any penalty discount is now likely to be up to a maximum of 20% of the penalty the Authority would otherwise have imposed in order to incentivise businesses to submit schemes. Section 49D of the Competition Act 98 still however provides that the CMA may recover its reasonable costs relating to an application for approval of a redress scheme. Generally the Authority expects to calculate its costs on the basis of the total number of hours that Authority staff have devoted to assessing the application for approval of a redress scheme multiplied by an average hourly rate. Where appropriate, the calculated amount may be revised downwards if proportionality so requires. The Authority will seek to recover all its reasonable costs in the vast majority of cases but, in exceptional circumstances, it may decide to seek to recover only a portion of its costs. In determining the amount of costs to be recovered

from a party or parties, the Authority may also consider the size and financial position of the relevant parties applying for approval as well as the compensating party's cooperation with the Authority.

7.9 Another concern was that sharing incriminating documents with the Board and CMA under a scheme might make them disclosable to claimants in litigation (in particular in the US). We do not however consider that we have a suitable legislative vehicle to prevent such documents from being disclosed to claimants in litigation. However, we judge that the risk of this discouraging applicants from putting forward voluntary redress schemes is low but the CMA and BIS will keep this under review. The CMA has also clarified in its guidance and summary of responses that it would only expect to be provided with the minimum documents necessary to enable applications to be assessed.

7.10 A further concern was the interaction of redress schemes with the broader litigation framework, and in particular the risk that businesses could operate approved schemes but still face separate judicial damages claims. Whilst the Government is keen to promote the use of voluntary redress schemes as it enables both parties to resolve disputes more speedily and cheaply than through court proceedings, claimants should still have the option to pursue a private action where they believe that this is the most appropriate means to seek the redress they are entitled to. We have however worked with the Competition Appeal Tribunal (CAT), as the specialist tribunal whose function it is to hear and decide cases involving competition issues to ensure that the introduction of such redress schemes does not conflict with the broader litigation framework. The CAT will therefore have regard to whether a voluntary redress scheme exists when deciding whether to certify a collective action, and could decide to stay a case where a voluntary redress scheme has been established while the parties attempt to reach a resolution. This will act as a safeguard to reduce the risk that a business could operate an approved scheme but still face separate judicial damages claims. The existence of a redress scheme may also in itself reduce the likelihood of a claimant pursuing litigation, as they will be able to access the compensation they are entitled to more quickly than through court proceedings, and they will also be able to avoid the financial uncertainty created through pursuing a private claim.

7.11 Another concern raised was the lack of specific adverse court costs consequences where a claimant recovers less in litigation than the amount of compensation that they could have accepted under an Authority-approved scheme. In relation to this concern, both the ordinary courts and the CAT have a wide discretion as to the costs and expenses which are recoverable, and they will take a number of factors into account. In relation to the CAT, the factors will be set out in the revised CAT rules of procedure (which are expected to come into force on 01 October 2015), and will include any admissible offer to settle made by a party, which is drawn to the CAT's attention. In certain circumstances, the CAT may take into account in its assessment as to costs any 'without prejudice save as to costs' offers to settle that the business formally makes in litigation. Such an offer might be based on the amount of compensation that the compensating party had proposed earlier in the context of a voluntary redress scheme. This should encourage claimants to carefully consider whether to reject an initial offer of compensation, as they could potentially face

adverse cost consequences if they subsequently recover a lower amount through pursuing private litigation.

8. Consultation outcome

8.1 Details of the consultation process for the private actions reforms are given in paragraphs 7.2 and 7.3 whilst details of the subsequent consultation on the CMA's Voluntary Redress Scheme Guidance are given in paragraphs 7.7 – 7.9.

9. Guidance

9.1 Guidance has been produced for the Consumer Rights Act 2015 which can be viewed here: http://www.businesscompanion.info/. Guidance will also be produced on the CMA's and concurrent regulators' approval of voluntary redress schemes before the power comes into force on 01 October 2015.

10. Impact

10.1 Private Actions reforms are judged to be zero-net-cost as the costs fall on businesses that are not compliant with existing competition law. The use of Redress schemes is also voluntary and will make it easier for businesses and consumers to gain compensation for harm caused by infringements of competition law, and for businesses which have infringed competition law to offer reparation to affected parties quickly, and at lower cost than through court proceedings.

10.2 An Impact Assessment has not been prepared for this instrument. However, the Impact Assessments produced for the consultation on Private Actions, published in January 2013 can be viewed here - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31529/12-743-private-actions-in-competition-law-impact-assessment.pdf.

11. Regulating small business

11.1 This Order applies to small business to the extent that it will enable them to access redress more easily by being able to benefit from participation in a redress scheme, which would give them access to compensation following a competition infringement. It would not however prevent them from taking forward private litigation should they wish to pursue that option instead. It will also enable small businesses that have been accused of a breach of competition law to offer this compensation quickly, and at lower cost than through court proceedings. A key incentive for a compensating business is the potential discount in their fine.

12. Monitoring & review

12.1 The Consumer Rights Act 2015 will remain subject to regular reviews to ensure it is operating efficiently and providing consumers and businesses with access to redress from those who have breached competition law and caused them harm. In addition, the regulations provide for a formal review before 1st October 2020.

13. Contact

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