

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

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Any enquiries regarding this publication should be sent to us at: Policy, Precedent and Procedures Unit, Competition and Markets Authority, Victoria House, 37 Southampton Row, London, WC1B 4AD or by email to [redress.scheme@cma.gsi.gov.uk](mailto:redress.scheme@cma.gsi.gov.uk).

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# Contents

	<i>Page</i>
1. Introduction and overview .....	2
Power to approve voluntary redress schemes .....	2
Breaches of competition law that may be covered by an Authority-approved redress scheme .....	10
Authority-approved voluntary redress schemes as part of the overall redress framework .....	11
2. Applying for Authority approval and devising a voluntary redress scheme .....	14
Applications for Authority approval of voluntary redress schemes .....	14
Terms of voluntary redress schemes .....	18
Appointment and role of the Chairperson and the Board .....	25
3. The Authority's assessment of applications for redress scheme approval .....	36
Prioritisation and timeframe .....	36
Scope of the Authority's assessment .....	37
Approval process and outcomes .....	38
Notification of the Authority's decision .....	44
Possibility of penalty reductions in certain cases .....	45
Recovery of the Authority's costs .....	47
4. Enforcement of and release from an Authority-approved voluntary redress scheme .....	49
Enforcement of Authority-approved voluntary redress schemes .....	49
Release from a redress scheme .....	50
Annex A: Glossary .....	53
Annex B: Template undertaking .....	55
Annex C: Summary of private actions framework for competition law breaches .....	57

# 1. Introduction and overview

## Power to approve voluntary redress schemes

### *The legal background*

- 1.1 This guidance outlines the provisions in the Competition Act 1998 (CA98), introduced by the Consumer Rights Act 2015 (CRA15),<sup>1</sup> which permit a person (the applicant) to submit a voluntary redress scheme to the Competition and Markets Authority (CMA)<sup>2</sup> or a concurrent regulator (Regulator)<sup>3</sup> for approval.
- 1.2 Under the CA98 as amended and the Competition Act 1998 (Redress Scheme) Regulations 2015, the CMA and Regulators are empowered to approve certain voluntary redress schemes. The remainder of this guidance uses the term ‘the Authority’ (which means the CMA or a Regulator as appropriate),<sup>4</sup> in order to reflect that both the CMA and Regulators may approve schemes. Where an application for scheme approval is made to the CMA or a Regulator, where appropriate it may be referred to the CMA or another Regulator to assess instead.<sup>5</sup>
- 1.3 Where a business offers a redress scheme, those affected by the infringement are able to claim compensation through such a scheme without the need to pursue litigation in the courts.

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<sup>1</sup> Section 49C of the CA98, as amended by the CRA15.

<sup>2</sup> The CMA was established under the Enterprise and Regulatory Reform Act 2013 as the UK’s economy-wide competition and consumer authority. It is responsible for ensuring that competition and markets work well for consumers, businesses and the economy as a whole. Further information on the CMA can be found on the [CMA’s webpages](#). The CMA’s primary duty is to promote competition, both within and outside the UK, for the benefit of consumers. To enable it to carry out its functions, the CMA has a range of statutory powers.

<sup>3</sup> As at 13 August 2015, the concurrent regulators, and the scope of their competition concurrency, are:

- Civil Aviation Authority (CAA) (air traffic services and airport operation services) ([www.caa.co.uk](http://www.caa.co.uk))
- Financial Conduct Authority (FCA) (the provision of financial services) ([www.fca.org.uk](http://www.fca.org.uk))
- Monitor (the provision of health-care services in England) ([www.gov.uk/government/organisations/monitor](http://www.gov.uk/government/organisations/monitor))
- Ofcom (electronic communications and post) ([www.ofcom.org.uk](http://www.ofcom.org.uk))
- Ofgem (gas and electricity markets in Great Britain) ([www.ofgem.gov.uk](http://www.ofgem.gov.uk))
- Ofwat (water and sewerage markets in England and Wales) ([www.ofwat.gov.uk](http://www.ofwat.gov.uk))
- Office of Rail and Road (ORR) (railway services in Great Britain) ([www.orr.gov.uk](http://www.orr.gov.uk))
- Payment Systems Regulator (participation in payment systems) ([www.psr.org.uk](http://www.psr.org.uk))
- Utility Regulator, Northern Ireland (NIAUR) (gas, electricity, water and sewerage services in Northern Ireland) ([www.uregni.gov.uk](http://www.uregni.gov.uk))

<sup>4</sup> See definition of ‘the Authority’ in Annex A.

<sup>5</sup> The CMA and Regulators together form the UK Competition Network (UKCN), save that Monitor is an observer only of the UKCN. Any decision to transfer an application to another UKCN member or to Monitor will be taken having regard to the Competition Act Concurrency Regulations 2014 and the published guidance on the [Concurrent application of competition law to regulated industries](#) (CMA10).

- 1.4 The CMA and Regulators are required to publish guidance on applications for approval of redress schemes, the approval of such schemes, and the power to enforce approved schemes.<sup>6</sup> This is the CMA's guidance and was approved by the Secretary of State as required under section 49C(10) of the CA98 on 6 August 2015. It was published and came into effect on 14 August 2015. The CMA will take this guidance into account when carrying out its approval role under the CA98.<sup>7</sup>
- 1.5 The guidance is aimed principally at businesses seeking to provide compensation under a redress scheme and chairpersons and members of independent boards<sup>8</sup> appointed to determine compensation in relation to such a scheme. Businesses, Chairpersons and Board members appointed to devise redress schemes are expected to have regard to this guidance as appropriate when applying for approval of schemes or carrying out their roles and obligations under the legislative framework for scheme approval.
- 1.6 The guidance will be kept under review and may be revised from time to time to reflect the Authority's developing experience of its approval role and any relevant developments in the wider competition redress landscape.

### ***Overview of the process for the Authority's approval of voluntary redress schemes***

#### *General*

- 1.7 Approved voluntary redress schemes are a form of alternative dispute resolution (ADR). A flowchart of the process for the Authority's approval of redress schemes is set out in Figure 1 on page 9 below.
- 1.8 A person (which may include more than one undertaking applying jointly) who has infringed competition law<sup>9</sup> may apply to the Authority for approval of a voluntary redress scheme. An application can be submitted to the Authority either during the course of an ongoing investigation or where an infringement decision has already been made by the Authority or the European Commission. Although the Authority may consider an application before it adopts an infringement decision, it may only approve the scheme at the time it makes an infringement decision (if the scheme relates to that decision) or

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<sup>6</sup> Section 49C(9) of the CA98, as amended by the CRA15.

<sup>7</sup> The CMA expects that regulators will take this CMA guidance into account when producing their own guidance on the approval power.

<sup>8</sup> The roles of the Board and the Chairperson are explained in paragraphs 2.42–2.78 below.

<sup>9</sup> See paragraphs 1.22–1.26 below.

after the infringement decision has been made (if the scheme relates to a decision of the European Commission).<sup>10</sup>

- 1.9 The Secretary of State has made regulations relating to the Authority's approval of redress schemes under section 49C(8) of the CA98 – the Competition Act 1998 (Redress Scheme) Regulations 2015 (the Regulations) – which govern how the Authority considers redress schemes.<sup>11</sup>

#### *Unconditional approval of full schemes*

- 1.10 The Regulations provide that the Authority may approve a redress scheme only if it:

- has been devised in accordance with the process specified in the Regulations (Required Process);
- contains all of the information required by the Regulations (Required Information); and
- contains all of the terms required by the Regulations (Required Terms).<sup>12</sup>

- 1.11 As regards the **Required Process**, a person wishing to offer a voluntary redress scheme will need to appoint a Chairperson who will in turn appoint the members of the Board in accordance with paragraphs 2.42 to 2.59 below. The Chairperson and the Board will then devise the terms of the redress scheme, including the level of compensation, taking into consideration the relevant matters.<sup>13</sup> According to the Regulations, the relevant matters include:

- evidence of loss caused to persons entitled to compensation relating to the infringement decision;
- who is 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

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<sup>10</sup> Redress schemes for these purposes arise where there is a decision by a relevant authority and not in the context of a private action (see Annex C for the distinction between follow-on and stand-alone actions).

<sup>11</sup> SI 2015/1587. The Regulations will come into force on 1 October 2015.

<sup>12</sup> Article 4(1) of the Regulations.

<sup>13</sup> See paragraphs 2.60–2.78 below.

- how those entitled to compensation under the scheme will be notified of their entitlement.<sup>14</sup>

1.12 Although under the Regulations it is the responsibility of the Chairperson and Board to devise a scheme, applicants will need to decide on the key parameters within which a scheme will be devised, and ensure that they are communicated clearly to the Chairperson and Board. Also, an applicant may have an idea as to how it would like specific aspects of a redress scheme to operate. For example, it may have explored internally various options for a redress scheme, including what evidence may be required from potential beneficiaries, or arrangements to advertise a scheme. An applicant can share its ideas with the Chairperson and the Board, so as to assist them in devising the scheme, and the Chairperson and the Board may take into account any initial suggestions made by the applicant, should it consider them to be appropriate.

1.13 The **Required Information** includes:

- the names of the Chairperson and Board members and confirmation that none of them had a conflict of interest, neither when they were appointed nor when they considered whether to recommend approval of the scheme to the Authority;
- details of the arrangements to ensure that the Chairperson and Board members had access to relevant information held by the applicant prior to deciding whether to recommend the redress scheme for approval to the Authority;
- 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; and
- details of an independent complaints process available for those applying for compensation under the redress scheme.<sup>15</sup>

1.14 The **Required Terms** that the redress scheme must include are:

- that a third party may not submit a claim under the scheme on behalf of those entitled to compensation under the scheme; and

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<sup>14</sup> Article 5(7) of the Regulations.

<sup>15</sup> Article 6(1) of the Regulations.

- that the scheme will operate for at least nine months.<sup>16</sup>

1.15 For ease of reference, the remainder of this guidance refers to the Required Process, the Required Information, and the Required Terms collectively as the **Regulation Requirements**.

#### *Conditional approval of outline schemes*

1.16 Even if all the Regulation Requirements have not been met yet (for example a Chairperson or Board have not been appointed), if the applicant has provided the Authority with information about the time when, and how, the scheme will comply with the Regulation Requirements, the Authority may approve an outline scheme subject to conditions which must include conditions to ensure such compliance by a particular date.<sup>17</sup> An applicant will also need to provide the Authority with sufficient information for it to consider that it is appropriate to approve a scheme in principle (see further paragraph 1.20 below). The deadline the Authority sets for satisfying the Regulation Requirements will depend, among other things, on how quickly the Chairperson and the Board members can be appointed and the complexity of the case. However, the Authority will expect businesses to act as quickly as reasonably possible.

1.17 As well as imposing conditions relating to the Regulation Requirements, the Authority may also impose further conditions requiring the provision of information about the operation of the scheme more generally,<sup>18</sup> including for example about the amount or value of compensation to be offered under the scheme and how this will be determined. Moreover, where such information conditions relating to the Regulation Requirements or other matters are imposed, the Authority may also impose other conditions,<sup>19</sup> such as, for example:

- that other information required is provided by a particular date;
- that the Authority, the Board and the Chairperson must be provided with complete and accurate information in all material respects; and

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<sup>16</sup> Article 7 of the Regulations.

<sup>17</sup> Sections 49C(4) and (5)(a) of the CA98 and Article 4(2) of the Regulations.

<sup>18</sup> That is, information not falling within the Regulation Requirements. See section 49C(4) of the CA98.

<sup>19</sup> Section 49C(5)(a) of the CA98.

- that the Authority must be satisfied with the Chairperson and Board members' final determination of, and the level of compensation ultimately offered under, the scheme.<sup>20</sup>

1.18 The Authority may revoke conditional approval of an outline redress scheme if any of the conditions (information and/or non-information related) are not met.<sup>21</sup> The Authority may take into account any representations made by the compensating party and/or any discussions with the Chairperson and Board before reaching its decision. Alternatively, where appropriate, the Authority's concerns about a breach of one or more conditions may be addressed by the offer of a suitable full replacement scheme from the applicant, which must satisfy the Regulation Requirements and be capable of unconditional approval, since no further conditions can be imposed in relation to a replacement scheme.

1.19 The Authority is not able to grant conditional approval of schemes that relate to existing infringement decisions of the Authority or the European Commission. In respect of such infringement decisions, the Authority is able to consider only full schemes rather than outline schemes and, if granting approval, will do so without conditions.

1.20 A business wishing to submit an outline scheme for conditional approval will in practice need to provide the Authority with sufficient information for it to assess whether it considers the outline scheme being offered is – in principle, and subject to the Chairperson and Board devising the detailed scheme in due course – appropriate for approval. The information required for that assessment may to some extent vary case by case, but the Authority would expect an outline scheme submitted for conditional approval to include sufficient information on the key parameters of the scheme set out at paragraph 2.9 below. In particular, applicants should provide available details about:

- the agreement or conduct, and the aspects of the relevant investigation in relation to which, the scheme is being offered;
- the persons who will be entitled to claim compensation under the redress scheme;
- the scope of the compensation to be offered under the scheme, as initially proposed by the applicant;

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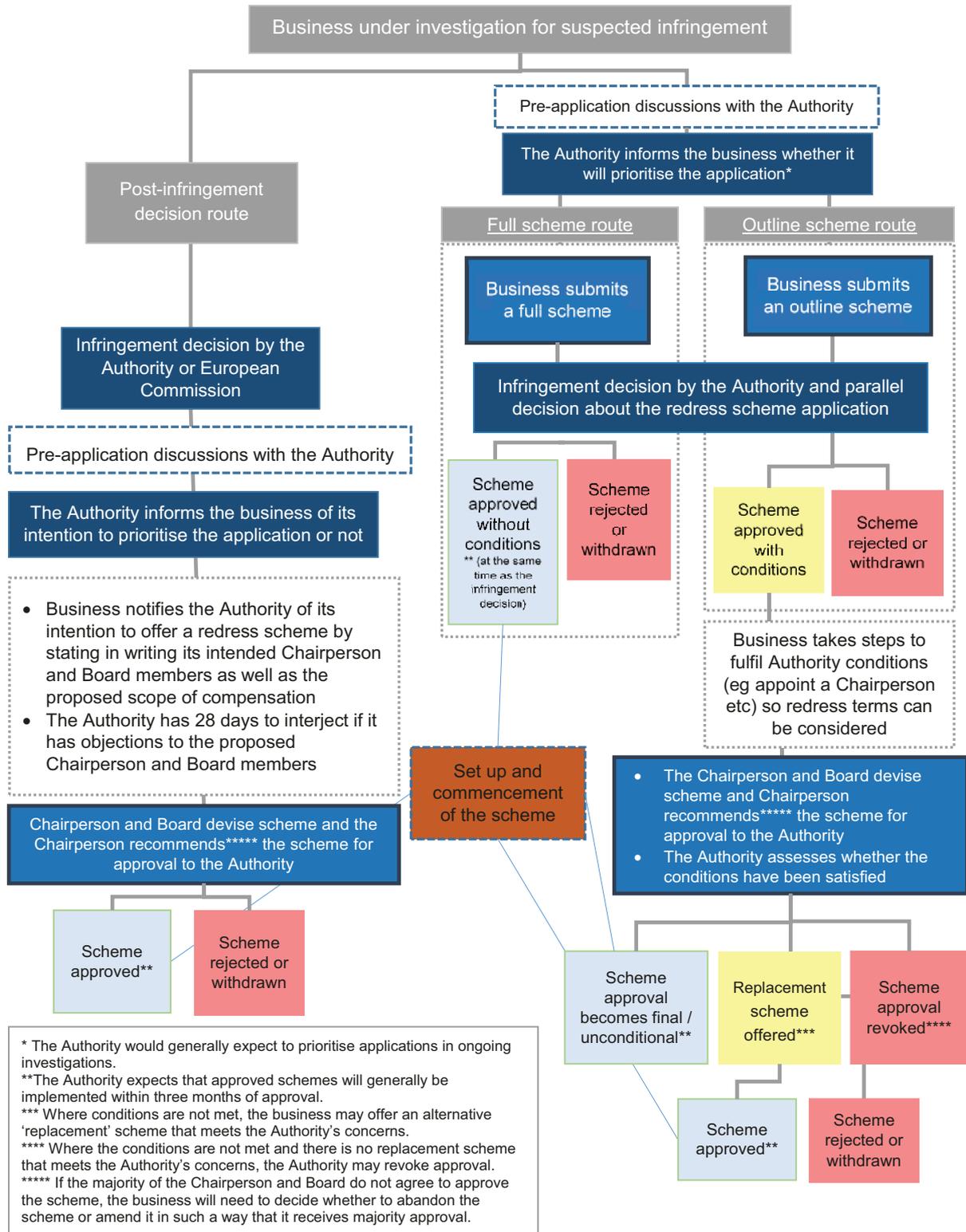
<sup>20</sup> For further details on the conditions that the CMA may impose, see paragraph 3.14 below.

<sup>21</sup> Section 49C(5)(b) of the CA98.

- the proposed Chairperson and Board members, and proposed arrangements to ensure they will have access to relevant information held by the applicant;
- the process for applying for compensation under the redress scheme;
- the possible types of evidence that potential beneficiaries may submit in support of an application under the proposed scheme;
- the independent complaints process available for those applying for compensation under the redress scheme;
- how the redress scheme will be advertised and those entitled to compensation under the scheme will be notified of their entitlement; and
- evidence or information about the expected cost to the applicant of administering the scheme, including details as to how the scheme will be resourced.

1.21 Further details about applications for redress scheme approval and the assessment and approval process can be found in chapters 2 and 3 of this guidance.

**Figure 1: The redress scheme approval process**



## **Breaches of competition law that may be covered by an Authority-approved redress scheme**

- 1.22 Redress schemes eligible for Authority approval may relate to decisions made by the Authority or the European Commission. These decisions may find that the UK and/or EU prohibitions against anti-competitive agreements or abuse of a dominant position have been breached. These prohibitions are contained, respectively, in the Chapter I and Chapter II prohibitions of the CA98 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
- 1.23 Article 101 of the TFEU and Chapter I of the CA98 prohibit any agreements or concerted practices between businesses which prevent, restrict or distort competition, unless an exemption applies. The types of agreement most likely to be caught by these prohibitions include those that:
- fix the prices to be charged for goods or services;
  - limit production; or
  - allocate customers or share markets.
- 1.24 Article 102 of the TFEU and Chapter II of the CA98 prohibit the abuse of a dominant position. A business will hold a dominant position in a market if it is able to behave independently of the normal constraints imposed by competitors, suppliers and customers. It is the abuse, rather than the holding, of a dominant position that is unlawful. In general, a business will be found to be abusing its dominant position if it behaves in a way that exploits customers or has an exclusionary effect on competitors to the detriment of competition. The types of conduct most likely to be caught by these prohibitions include:
- charging excessively high prices;
  - predatory low pricing aimed at driving a rival competitor out of business; and
  - refusing to supply an existing long-standing customer without good reason.
- 1.25 Articles 101 and 102 of the TFEU apply to agreements or conduct that have the potential to affect trade between EU countries, while Chapter I and Chapter II of the CA98 apply to agreements or conduct which have the potential to affect trade in the UK.

1.26 Further guidance on Articles 101 and 102 of the TFEU and Chapters I and II of the CA98 can be found on the CMA's webpages, in particular Guidance OFT401 (Agreements and concerted practices) and OFT402 (Abuse of a dominant position).<sup>22</sup>

## **Authority-approved voluntary redress schemes as part of the overall redress framework**

1.27 Anyone who has suffered harm caused by an infringement of Chapter I or Chapter II of the CA98 or Articles 101 or 102 of the TFEU has a right to compensation for that harm. Authority-approved voluntary redress schemes constitute an additional redress option, alongside individual and collective private actions.<sup>23</sup>

1.28 As noted above, approved voluntary redress schemes are a form of ADR and are intended to serve as an additional option for businesses to offer, and harmed persons to receive, compensation for loss suffered as a result of a competition law breach.

1.29 The potential advantage of an Authority-approved voluntary redress scheme is that it provides a statutory process through which:

- consumers and businesses can gain access to compensation more quickly, easily and without the costs of litigation; and
- businesses that have infringed the competition rules may voluntarily offer and administer redress to those affected by the breach, thereby avoiding lengthy and costly court proceedings. This may also have reputational benefits for businesses. Moreover, businesses may in certain circumstances receive a discount on any penalty imposed by the Authority in respect of the infringement the redress scheme relates to.<sup>24</sup>

Therefore, voluntary redress schemes offer both businesses and individuals a chance of early compromise and avoiding litigation altogether.

1.30 Applying for compensation under a redress scheme approved by the Authority is entirely optional. Potential beneficiaries who decide not to apply for redress under an approved scheme do not lose their right to seek compensation

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<sup>22</sup> These are available on the CMA's [webpages](#). Several of these guidance documents were published by the CMA's predecessor, the Office of Fair Trading, and have been adopted by the CMA.

<sup>23</sup> See Annex C for further details on the private actions framework for competition law.

<sup>24</sup> See chapter 3 below.

through other means. For example, the approval of a redress scheme by the Authority does not itself prevent a potential beneficiary from:

- bringing an individual private action for damages against an undertaking found liable for breach of the competition rules;
- participating in an opt-in or opt-out collective action; or
- otherwise seeking to obtain compensation.

1.31 The Competition Appeal Tribunal (CAT) may, however, as part of its active case management powers, consider whether ADR has been undertaken for these purposes.<sup>25</sup> This may include use of an Authority-approved redress scheme. In particular, the CAT Rules of Procedure provide that:

- a collective proceedings claim form must state whether the parties have used an ADR procedure;<sup>26</sup>
- in the first case management conference, the CAT may consider staying proceedings while the parties attempt to reach a compromise to avoid proceedings, by ADR or other means;<sup>27</sup>
- as part of the CAT's certification of whether claims are eligible for inclusion in collective proceedings, one of the factors the CAT will take into account includes the availability of ADR and any other means of resolving the dispute;<sup>28</sup> and
- the CAT will also take into account the availability of ADR in determining whether collective proceedings should be opt-in or opt-out.<sup>29</sup>

1.32 In relation to the costs of bringing litigation, both the ordinary courts and the CAT have a wide discretion as to the costs and expenses which are recoverable. In making an order in relation to the payment of costs, the ordinary courts and the CAT will take into account a number of factors. In relation to the CAT, the factors are set out in the CAT Rules of Procedure<sup>30</sup> and include any admissible offer to settle made by a party which is drawn to the CAT's attention. Moreover, in certain circumstances the CAT may take into account in its assessment as to costs any 'without prejudice save as to

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<sup>25</sup> As set out in the Governing principles of the CAT Rules of Procedure (the CAT Rules).

<sup>26</sup> See the CAT Rules on collective proceedings.

<sup>27</sup> See the CAT Rules on the response to a collective proceedings claim form.

<sup>28</sup> See the CAT Rules on the certification of claims as eligible for inclusion in collective proceedings.

<sup>29</sup> See the CAT Rules on the certification of claims as eligible for inclusion in collective proceedings.

<sup>30</sup> See the CAT Rules on costs.

costs' offers to settle that the business formally makes in litigation.<sup>31</sup> 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.

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<sup>31</sup> So-called Calderbank offers. Offers made pursuant to the Part 36 regime of the Civil Procedure Rules in the ordinary courts are not discussed in further detail here; such offers attract cost consequences for refusing offers to settle in certain circumstances in order to encourage parties to settle their disputes.

## 2. Applying for Authority approval and devising a voluntary redress scheme

- 2.1 This chapter provides information on: (a) how to apply for Authority approval of a voluntary redress scheme; and (b) how to devise a redress scheme. In particular, the chapter presents the requirements that according to the CA98 and/or the Regulations a redress scheme must satisfy in order to be approved as well as the additional specifications that the Authority would expect a voluntary redress scheme to contain.

### Applications for Authority approval of voluntary redress schemes

#### *When to apply*

- 2.2 A business wishing to obtain the Authority's approval for a voluntary redress scheme may apply after an infringement decision has been issued by the Authority or the European Commission by submitting a full scheme. The Authority may consider a redress scheme even where a business has challenged the infringement decision, though normally this would be where it contests only the fine (if a fine has been imposed) and not its liability or the existence of a competition law infringement.<sup>32</sup>
- 2.3 Equally, if there is no infringement decision yet but the Authority is investigating conduct that may constitute a breach of the competition rules, the undertakings under investigation may still apply for approval of a voluntary redress scheme by submitting either a full or an outline scheme. Applications for scheme approval during the course of an ongoing Authority competition investigation are in practice expected to be submitted after the Authority has issued its Statement of Objections to parties under investigation, since that is the point at which businesses will have seen the infringements alleged against them in detail. Nevertheless, it is possible for an undertaking under investigation to apply for redress scheme approval at any time before an infringement decision is adopted. The Authority will not consider it inconsistent for a party to seek approval of a scheme while exercising its rights of defence during the course of an investigation. In multi-party infringements or investigations, parties may choose to seek approval for schemes jointly with one or more other parties to the infringement or the investigation.

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<sup>32</sup> The Authority does not rule out that it might consider applications for redress scheme approval in other circumstances of appeal. In practice, however, it will do so only exceptionally in view of the tension between challenging the existence of the infringement and providing compensation for harm caused by that same infringement.

## ***Pre-application discussions***

- 2.4 Where a potential applicant is considering offering a redress scheme it wishes the Authority to approve, it should approach the Authority at the earliest opportunity for an initial discussion in order to avoid wasting resources. At the end of the pre-application discussions the Authority will inform the potential applicant whether it is minded to prioritise assessing an application for scheme approval or not (see paragraph 3.2 below).
- 2.5 Where a potential scheme relates to an ongoing Authority competition investigation, the Authority will not consider any expression of interest in setting up a redress scheme as an admission of the suspected infringement being considered by it.

## ***How to apply***

- 2.6 The application must be made in writing<sup>33</sup> using the relevant template application form available on [the Authority's webpages](#).<sup>34</sup> There are two application forms available – one where an infringement decision has already been issued at the time of application, and the other (to be used in relation to an Authority investigation only) where no infringement decision has been issued yet.
- 2.7 The relevant form must be signed by an appropriate senior representative of the business who is authorised to act on behalf of the business, such as a director or a delegated proxy with power of attorney. Forms may be submitted electronically.

## ***Application content***

- 2.8 The application form must comply with the Regulation Requirements and must contain the information set out in paragraph 2.9 below, which includes some information that would ultimately form part of the final terms of a redress scheme under which potential beneficiaries would seek compensation.<sup>35</sup> Where an applicant is seeking unconditional approval of a full scheme, all the information should be supplied with the application for approval. However, as explained above,<sup>36</sup> while an application for conditional approval of an outline

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<sup>33</sup> Article 3 of the Regulations.

<sup>34</sup> The application form contains CMA contact details, and different details will apply if an application is being submitted to a Regulator. See note 3 above for details of Regulators' websites.

<sup>35</sup> The accompanying footnotes indicate where the information specified a Regulation Requirement. In the absence of a reference to the Regulations, the information is required by the Authority in the exercise of its discretion.

<sup>36</sup> See paragraphs 1.16–1.20.

scheme must contain sufficient information to enable the Authority to decide whether it is appropriate to grant conditional approval, it will not need to contain all of the information in the first instance.

2.9 The information is as follows:

- Details about the agreement or conduct and the aspects of the relevant infringement decision or investigation in relation to which the scheme is being offered.
- Details about the proposed starting date of the redress scheme. Generally, this should be no more than three months after the date of approval by the Authority or, in the case of conditional approval, no more than three months after the Authority has confirmed that the conditions of the scheme have been met. However, where the compensating parties provide convincing reasons, for example because of complexities around the business' internal governance required to execute the scheme, a later commencement date may be considered appropriate.
- Details about the terms and duration of the redress scheme, and confirmation that it will operate for a period of at least nine months.<sup>37</sup>
- Details about the persons who will be entitled to compensation under the redress scheme,<sup>38</sup> and confirmation that a third party may not submit a claim on behalf of those entitled to compensation under the redress scheme.<sup>39</sup>
- Details about the **scope** of the compensation to be offered under the scheme as determined by the Board and the Chairperson (within any parameters previously suggested by the business).
- Details about the **level** of compensation to be offered under the scheme as determined by the Board and the Chairperson.
- Details about the appointed Chairperson and Board members, including their names and qualifications, as well as confirmation that none of them had a conflict of interest, neither at the time they were appointed nor when

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<sup>37</sup> Article 7(b) of the Regulations.

<sup>38</sup> Article 5(7)(b) of the Regulations.

<sup>39</sup> Article 7(a) of the Regulations.

they considered whether to recommend approval of the scheme to the Authority.<sup>40</sup>

- The arrangements the applicant made to ensure the Chairperson and Board members had access to relevant information held by the applicant prior to deciding whether to recommend the scheme for approval to the Authority (in the case of a full scheme).<sup>41</sup>
- Confirmation that the Chairperson and Board members considered the relevant matters as defined in the Regulations<sup>42</sup> and anything else deemed relevant, and that they agreed by majority vote that it should be recommended to the Authority for approval.<sup>43</sup>
- 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.<sup>44</sup>
- Details about the possible types of evidence that persons entitled to compensation under the redress scheme may submit in support of their application.<sup>45</sup>
- Details about the independent complaints process available for those applying for compensation under the redress scheme.<sup>46</sup>
- Details about 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.<sup>47</sup>
- Details about how the applicant will monitor whether the scheme is operating successfully.
- Information about the expected cost to the applicant of administering the scheme, including details as to how the scheme will be resourced.
- Details about any other matter considered to be relevant.

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<sup>40</sup> Article 6(1)(a) of the Regulations.

<sup>41</sup> Article 6(1)(b) of the Regulations.

<sup>42</sup> Articles 5(6)(a) and (7) of the Regulations.

<sup>43</sup> Article 5(6)(b) of the Regulations.

<sup>44</sup> Article 6(1)(c) of the Regulations.

<sup>45</sup> Article 5(7)(c) of the Regulations.

<sup>46</sup> Article 6(1)(d) of the Regulations.

<sup>47</sup> Article 5(7)(d) of the Regulations.

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

2.10 The application form must also contain:

- a summary of the redress scheme;<sup>48</sup>
- the Chairperson and Board members' recommendation that the Authority approves the redress scheme, along with a report of any minority views; and
- any other relevant document.

### **Terms of voluntary redress schemes**

2.11 The terms of a voluntary redress scheme must provide potential beneficiaries with sufficient information to make an informed decision as to whether they should seek compensation under the scheme. While under the Regulations it is for the Chairperson and Board to devise a scheme, applicants may wish to decide on the key parameters within which the scheme will be devised and ensure that it is communicated clearly to the Chairperson and Board. For example, an applicant may wish to specify that a scheme should compensate direct purchasers only, or that it should compensate so-called umbrella<sup>49</sup> claims.

2.12 The terms should specify the following:

- (a) the requirements to produce evidence in support of an application for redress under the scheme;
- (b) who is to be entitled to compensation under the scheme;
- (c) the process for applying for compensation under the redress scheme;
- (d) how the redress scheme will be advertised and how those entitled to compensation under the scheme will be notified of their entitlement;
- (e) the independent complaints process available for those applying for compensation under the scheme;

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<sup>48</sup> Article 3 of the Regulations.

<sup>49</sup> See paragraph 2.14 below.

- (f) the scope of compensation to be offered by the scheme; and
- (g) the consequences of accepting redress under the scheme.<sup>50</sup>

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

2.13 The terms of the scheme must define the category of persons that the scheme is intended to compensate, ie those who are entitled to apply for compensation under the scheme. In this regard, the applicant will need to decide, for example, whether a scheme will cover indirect as well as direct purchasers. If a scheme covers both direct and indirect purchasers, the applicant may wish to consider taking appropriate steps to minimise the risk of double recovery.<sup>51</sup> This risk may arise where, for instance, a direct and indirect purchaser both seek to recover the same overcharge under the scheme, or where a direct purchaser seeks redress under the scheme and an indirect purchaser claims compensation for the same loss through the courts.

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

2.14 The applicant must determine the scope of compensation to be offered under the scheme. For example, the applicant may need to decide whether compensation will cover only direct loss (such as the overcharge resulting from the infringement), or also other losses such as any reduced sales resulting from a potential beneficiary charging higher prices to customers because of the infringement overcharge.<sup>52</sup> Similarly, the applicant may need to determine whether redress under the scheme will compensate loss in respect of purchases made from infringing parties only, or also those from vendors not party to an infringement but who adapted to a price increase resulting from a cartel by increasing their own prices (so-called ‘umbrella claims’). Furthermore, the applicant may need to determine whether the scheme will cover harm inflicted within the UK only, or also harm outside the UK. This may be appropriate, for example, where the redress scheme is offered in connection with a European Commission infringement decision.

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<sup>50</sup> Article 5(6)(a) of the Regulations – read in conjunction with Article 5(7) – requires the Chairperson and Board members to consider the matters at points (a) to (e).

<sup>51</sup> According to article 2(23) and (24) of the Damages Actions Directive (Directive 2014/104/EU of 26 November 2014), ‘direct purchaser’ means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law, whereas ‘indirect purchaser’ means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

<sup>52</sup> Applicants should bear in mind that individuals who have suffered harm from their competition law infringement may still seek compensation in court for heads of loss which are not covered by the redress scheme. See also paragraph 2.40 below.

- 2.15 Depending on the circumstances, the applicant may also need to make decisions about variable compensation, where victims may have suffered differing levels of harm depending on how much of the good or service affected by the competition infringement they purchased. For example, if the harm resulted from overcharges on airline tickets, a victim's harm would depend on the number of tickets they purchased during the relevant period. It might also depend on the precise ticket purchased. For example, there may be a greater overcharge on a ticket costing £1,000 than on one costing £100, although it would depend on the type of ticket purchased.
- 2.16 The applicant should also specify whether redress under the scheme will be provided in monetary or non-monetary form.<sup>53</sup> For example, in some limited circumstances it may be appropriate for compensation under the scheme to be provided in the form of non-monetary solutions, such as vouchers or coupons. However, potential beneficiaries should generally be given the option of choosing between monetary and non-monetary solutions.
- 2.17 Redress schemes should include a clear statement of the ambit of the redress scheme and in particular of the entitlement criteria and the type and extent of compensation that is being offered. This should enable potential beneficiaries to evaluate appropriately whether they are entitled to compensation and to decide whether to accept redress under a scheme or pursue redress through another route.

### ***The process for applying for compensation under the redress scheme***

- 2.18 The scheme must set out the process by which potential beneficiaries should apply for compensation and the procedures for handling applications. This may vary on a case by case basis, but as a minimum it should include an identification number per application and a reasonable timetable for notifying potential beneficiaries whether their application has been accepted and when compensation will be paid.
- 2.19 It is expected that a scheme will specify a scheme administrator (which may be an employee of the business or a third party) to whom applications for redress will be submitted, along with evidence of harm suffered that is capable of satisfying the evidential requirements of the scheme.
- 2.20 A scheme must also state specifically the closing date by which applications for redress must be submitted. According to the Regulations, schemes must

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<sup>53</sup> See section 49C(12)(a) of the CA98 as amended by the CRA15.

be open for a period of at least nine months,<sup>54</sup> and applicants are expected to consider carefully whether in all the circumstances a particular scheme should be open for longer.

### ***Evidence requirements***

2.21 The terms of the scheme must stipulate what evidence a potential scheme beneficiary<sup>55</sup> needs to provide in support of an application for compensation under the redress scheme. Such evidence requirements must be fair and reasonable.

2.22 For example:

- in an infringement relating to air travel, the names of the passengers and the dates and place of departure and destination may be appropriate evidence;
- in an infringement relating to items of significant value, such as, for instance, televisions, laptops or manufacturing equipment, the receipt of purchase or the warranty for the product may be appropriate evidence. Other evidence such as entries on bank or credit card statements may also be acceptable;
- in an infringement relating to the sale of small-value items or everyday goods (such as milk or toothpaste) by a retailer, presentation of a loyalty card for the relevant retailer may constitute appropriate evidence. The Authority would expect businesses offering a redress scheme to use information at their disposal to facilitate applications for compensation by potential scheme beneficiaries, for example, by providing customer records; and
- in an infringement relating to items that potential scheme beneficiaries may have bought a long time ago, such as clothing or tools, a photograph of the item in question may be appropriate evidence.

2.23 The methods by which evidence would have to be submitted would need to be fair and reasonable. For example, a range of different methods such as post and electronic methods should be accepted.

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<sup>54</sup> Article 7(b) of the Regulations.

<sup>55</sup> In this guidance, references to 'scheme beneficiary' or 'potential scheme beneficiary' include consumers and/or businesses as appropriate.

2.24 Where compensating parties have in their possession data allowing them to identify all the individuals that have suffered harm as a result of the competition infringement, it may not be appropriate to require potential scheme beneficiaries to produce evidence of their harm. This approach would also reduce the cost to the compensating party of having to check and verify the evidence of harm submitted by potential scheme beneficiaries.

### ***The independent complaints process***

2.25 The terms of the redress scheme must set out an independent complaints process that can be followed if a complaint arises in the course of an application for compensation under the scheme and must explain in detail how it will operate. As set out below, the complaints process covers both complaints about rejection of an application for compensation on non-entitlement grounds and failure to deliver compensation.

2.26 Recourse to the complaints process shall be free of charge for potential beneficiaries, and there should be no fee, whether refundable or not, for using it. The complaints process should be carried out by a person independent of the compensating party (the 'independent reviewer'), which might be a third party, the Chairperson or the Board. In the latter case, it may not be necessary to reconvene the whole Board; depending on the issue in question, a single Board member may be sufficient to perform this function.

2.27 The outcome of the complaints process will not affect the complainant's right to otherwise seek compensation for their loss. The Authority will not take part in considering complaints or any other forms of appeal against the scheme, its terms or its administration.

### ***Complaints about the rejection of a potential beneficiary's application for compensation under the redress scheme on grounds of non-entitlement***

2.28 There may be various reasons why an application for compensation under the redress scheme may be rejected on grounds of non-entitlement. For example:

- the potential beneficiary may mistakenly believe that they fall within the scope of the scheme as a result of having misunderstood its terms;
- the potential beneficiary may not have produced sufficient evidence of their entitlement to compensation under the scheme; or
- the compensating party may be applying the terms of the scheme too strictly.

- 2.29 While the former two reasons might be legitimate grounds for rejecting an application, the latter would not be.
- 2.30 A potential beneficiary whose initial application for compensation under the scheme has been rejected must be informed by the scheme administrator of the reasons for the rejection. They must also be informed of their right:
- to complain to an independent reviewer,<sup>56</sup> as specified in the scheme, through the independent complaints process; or
  - if appropriate, to resubmit their original application for compensation under the scheme. For instance, if a potential beneficiary falls within the scope of the scheme but did not supply all the relevant evidence they have, they should have the chance to supply the missing evidence as an addition to their original application without having to go through the complaints process.

*Complaints about the compensating party's failure to deliver compensation to those found entitled to compensation under the scheme*

- 2.31 It is possible that the compensating party or parties may fail to deliver compensation to those found entitled to compensation under the scheme.
- 2.32 When potential beneficiaries are informed that their application for compensation under the scheme has been accepted, they must also be notified by the scheme administrator about the complaints process in the event of a potential failure of the compensating party to deliver compensation. If compensation is not delivered, a potential beneficiary may wish, through the complaints process, to make a final request for the compensating party or parties to award redress in accordance with the terms of the scheme, before taking formal enforcement action (see chapter 4 for further details) and/or bringing the matter to the Authority's attention.

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<sup>56</sup> Where the submitted complaints suggest the existence of a systemic problem with the decision-making or the administration of the scheme, it may be appropriate for the independent reviewer to bring this to the attention of the Chairperson and the Board.

## **Advertising requirements**

- 2.33 The terms of the scheme must also set out how it will be advertised<sup>57</sup> and those entitled to compensation under the scheme will be notified of their entitlement.
- 2.34 Compensating parties will be expected to consider what level of advertising is appropriate in their case, for example:
- targeting the advertising of their scheme through appropriate channels taking into account the nature of the product or service the compensation relates to and the geographical scope of the infringement, as appropriate, such as specialist press, internet advertising and social media campaigns;
  - advertising the scheme on their own website (if they have one); and/or
  - contacting potential beneficiaries they have contact details for (eg from the operation of a loyalty scheme).
- 2.35 Compensating parties should also consider advertising at point of sale if this is appropriate to the nature of the infringement, for example where the infringement relates to repeat purchase goods, such as milk or toothpaste.
- 2.36 Moreover, it may also be appropriate for compensating parties to notify consumer bodies and/or small business representatives (for example, Which?, Citizens Advice, or the Federation of Small Businesses). This may be the case, for example, where the infringement affects a large number of consumers and/or small businesses, or where consumers and/or small businesses are likely to contact such bodies and organisations to enquire about their redress options.
- 2.37 In addition to any specific forms of advertising provided for in a scheme, existing approved redress schemes will be publicised on the webpages of:
- the [government](#);
  - the [Department for Business, Innovation & Skills](#); and
  - the [CMA](#) and/or the relevant Regulator.<sup>58</sup>

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<sup>57</sup> Advertising would need to comply with applicable consumer protection laws, including the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. Relevant sectoral legislation and rules may also be relevant to communications with customers.

<sup>58</sup> The Regulator webpages are provided in footnote 3 above.

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

- 2.38 The terms of the scheme must specify what the consequences of accepting redress under it are for potential beneficiaries.
- 2.39 A redress scheme may typically state that a scheme beneficiary who has accepted redress offered under the scheme does so on the basis of a full and final settlement and therefore cannot bring an individual private action for damages or participate in a collective action with respect to that loss. This may be necessary in order to ensure that the compensating party will not pay twice for the same harm.
- 2.40 Nevertheless, a redress scheme may not prevent a scheme beneficiary from bringing an individual private action or from participating in a collective action against:
- the compensating party for losses not falling within the scope of the scheme. For example, if the scheme covers only direct losses, beneficiaries will still be able to seek redress for their indirect losses through other means, including litigation;
  - other parties to the competition infringement which have not set up a voluntary redress scheme for the harm inflicted by their conduct; or
  - the compensating party where the beneficiary's claim under the scheme was rejected.
- 2.41 As set out at paragraph 1.31 above, in considering individual or collective actions for damages the CAT may take into account the existence of an alternative dispute resolution procedure, including an Authority-approved redress scheme. The time limits for a person to bring a claim outside of an Authority-approved scheme are not affected by the process of applying for compensation under the redress scheme.

### **Appointment and role of the Chairperson and the Board**

- 2.42 As already noted above, a Chairperson and Board will need to be appointed to devise a scheme according to the Required Process. The Chairperson and

all members of the Board must possess appropriate qualifications and experience to carry out their functions effectively.

### ***Appointment of the Chairperson and the Board members***

2.43 The applicant will appoint a Chairperson who must be a senior lawyer or judge. Specifically, the Chairperson must:

- satisfy the judicial appointment eligibility condition for England and Wales on a five-year basis;<sup>59</sup>
- be an advocate or solicitor in Scotland of at least five years' standing; or
- be a member of the Bar of Northern Ireland or solicitor of the Court of Judicature of Northern Ireland of at least five years' standing.

2.44 The Authority would also expect the Chairperson to demonstrate appropriate experience and knowledge of competition law and practice, or any other relevant law and practice.

2.45 The Chairperson, rather than the applicant, will be responsible for appointing the members of the Board. The Board must comprise:

- an economist with appropriate experience and knowledge of competition economics to be able to consider the redress scheme. The Authority would expect the economist Board member to demonstrate the requisite technical or specialist knowledge and expertise. This would be through a number of years' experience working as an economist and through having obtained the appropriate academic qualifications;
- a person with experience of the industry of the applicant;
- a person who is able to represent the interests of those who may be entitled to compensation under the redress scheme. If potential beneficiaries include consumers, the representative should be from a recognised consumer body (for example, Which? or Citizens Advice), a group specific to a particular industry (such as a passenger group), or an independent academic institution.<sup>60</sup> If the potential beneficiaries also include businesses, it may be appropriate for there to be an additional representative, such as from a trade association. Chairpersons should

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<sup>59</sup> The eligibility condition is to be a solicitor or barrister, or hold any other relevant legal qualification in England and Wales and have experience in law, for at least five years – for example, exercising judicial functions in a court or tribunal, giving legal advice, arbitration, teaching or researching law.

<sup>60</sup> Such as a university.

also consider carefully whether it may be appropriate for there to be more than one Board member representing the interests of potential beneficiaries. For example, where both direct and indirect purchasers have suffered harm from the infringement in question, it may be appropriate for the Chairperson to appoint a Board member for each of these categories of potential beneficiaries in order to ensure that their interests are adequately represented; and

- any other person considered suitable by the Chairperson, for example an accountant or a market expert where specialist knowledge of a particular sector, industry or consumer demographic is required (beyond the expertise provided by the industry representative).

2.46 In appointing the members of the Board, the Chairperson must take the requirements above into account.

2.47 The Chairperson and the Board are to be remunerated by the applicant. Before appointing the members of the Board, the Chairperson will consult with the applicant to ensure that it will undertake to pay the cost of their appointment. The Authority would expect the parties to agree a suitable and adequate remuneration structure and would expect the Chairperson and Board members to be remunerated in a way that does not impede their independence and objectivity. In particular, the Chairperson's and the Board members' remuneration must not be dependent on the outcome of any aspects of their assessment of the scheme as this would be a conflict of interest.

2.48 Depending on the circumstances, administrative or other support may be required to assist the Chairperson and the Board members in performing their functions. For example, depending on the case, the economist Board member may require support to consider questions relating to the amount of overcharge caused by an infringement. However, the Chairperson and the Board shall retain oversight at all times and cannot delegate its functions and responsibilities to other persons.

### ***Duties of the Chairperson and the Board members***

2.49 The Chairperson and the Board members must act with:

- independence;
- impartiality;
- objectivity;

- integrity; and
  - honesty.
- 2.50 The Chairperson and the Board members must act on the basis of the evidence, which may – where appropriate – include drawing reasonable inferences from that evidence or an absence of evidence.
- 2.51 The Chairperson and the Board members must act in accordance with their respective capacities and roles.
- 2.52 The Chairperson and the Board members must perform their functions:
- with reasonable skill and care;
  - in accordance with the law; and
  - where appropriate, in accordance with the rules governing their professional conduct.
- 2.53 Whether there is an actual or potential conflict of interest should be determined case by case. A conflict may be likely to arise where a Chairperson and Board members have interests that might reasonably be perceived to, or might actually, influence their independence and/or impartiality in performing their functions. In relation to the Chairperson or the economist Board member, where that person has a history of acting predominantly for claimants or defendants, the Authority does not consider that necessarily risks impeding their ability to perform Chairperson and Board functions impartially in the absence of specific evidence or concerns in a particular case.
- 2.54 Actual or potential conflicts of interests may arise out of, but are not limited to:
- acting or having acted in a professional capacity in relation to the competition infringement in question or a related infringement of the CA98 or the TFEU;
  - any form of past or current employment with, or engagement by, the applicant within the previous two years, with the exception of their employment as members of a Board under an Authority-approved scheme;
  - any financial interest in the applicant;

- publication of views or comments relating to the applicant and/or the specific competition infringement at hand;<sup>61</sup>
- a close personal association or relationship with a person who is working for or advising the applicant, such as close family or personal ties (for example spouse, partner, child, sibling, parent or close friend).

- 2.55 While the above examples illustrate potential conflicts of interest that could favour the applicant, the Chairperson and Board members must equally be free of conflicts of interest that may be expected to favour potential scheme beneficiaries.
- 2.56 Even without an actual or potential conflict, the Chairperson and Board members must refrain from any activities that might interfere with or in any way compromise the performance of their functions.
- 2.57 The Board members must disclose to the Chairperson any circumstances likely to give rise to any doubts about their impartiality and independence as soon as they become aware of their existence. In the case of the Chairperson, such disclosure should be made to the compensating party and the Authority.
- 2.58 The Chairperson and the members of the Board must sign a formal undertaking declaring that they will act in accordance with the principles and duties set out in this section of the guidance. A template undertaking can be found in Annex B.
- 2.59 If after appointment it becomes clear that the Chairperson or a Board member does not meet the impartiality criteria (for example, because they have an undisclosed conflict of interest), they should be removed and replaced with a new person who meets the relevant criteria described above. The applicant should make the Authority aware of such an eventuality at the earliest opportunity.

### ***Function of the Chairperson and the Board***

- 2.60 The primary function of the Chairperson and the Board will be to devise the redress scheme, whether prior to the Authority's full unconditional approval or

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<sup>61</sup> Having published views or comments in relation to the type of the competition infringement in question will generally be insufficient to trigger a conflict of interest.

pursuant to a condition of outline approval. In particular, the Chairperson and the Board will consider the following matters:

- The scope of compensation to be offered under the scheme (within any parameters set by the applicant); for example, where a scheme covers both direct and indirect purchasers, the Chairperson and the Board will need to consider carefully where in the supply chain the loss has been suffered as well as any initial proposals made by the applicant for addressing the risk of double recovery.<sup>62</sup>
- The evidence that the applicant has provided about the loss caused to potential scheme beneficiaries, and how this has been aggregated. In certain cases it may also be necessary for the Chairperson and the Board to obtain further evidence of harm.<sup>63</sup>
- The appropriate level of redress for each potential category of scheme beneficiary (although in some cases it may be more appropriate for the Chairperson and the Board to determine the aggregate level of redress owed to potential scheme beneficiaries) and/or the methodology to be applied in determining that level of redress.
- Who is entitled to compensation under the redress scheme, the application process, including any evidence requirements, the independent complaints process available for those applying for compensation under the redress scheme and how the scheme will be advertised and those entitled to compensation will be notified of their entitlement.

2.61 In devising a redress scheme within any parameters suggested by the applicant, the Chairperson and the Board may take into account any initial suggestions made by the applicant as to how the redress scheme might operate, and its terms.

2.62 It is for the Chairperson and the Board to determine the amount of compensation they consider appropriate, based on relevant factual and economic evidence provided by the applicant, and using an appropriate framework/methodology. The Chairperson and the Board are expected to produce a report determining the exact level of redress to be provided under the scheme and/or the methodology to be applied by the applicant in determining the amount of redress for each beneficiary.

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<sup>62</sup> See also paragraph 2.13 above.

<sup>63</sup> See also paragraphs 2.75 and 2.78 below.

- 2.63 In this regard, the principles contained in the European Commission’s practical guide to quantifying harm in private actions for damages for national courts may be of assistance to the Chairperson and the Board.<sup>64</sup> The Authority notes that the government created the possibility for the Authority to approve schemes in order to provide a swift and relatively low cost way of providing redress, while ensuring the interests of those harmed are properly considered and safeguarded. In those circumstances, it is expected that the use of independent economic evidence and experts (beyond the economist on the Board) in setting up and assessing the terms of the scheme should be significantly less than in, for example, a contested judicial process. As a result, such use should be kept to the minimum reasonably necessary to assess compensation. That said, it should be recognised that expert evidence may be necessary in certain situations. For example, in order to facilitate indirect/consumer purchaser redress, it may be needed to determine the level of, or any passing on of, any overcharge caused by the infringement. The need for such evidence may vary case by case. For instance, there might be a greater need for it where a full scheme is submitted for approval prior to a CMA infringement decision.
- 2.64 In addition to their primary function, the Chairperson and Board may, at the request of the compensating party, reconvene at a later date in order to provide any guidance it considers necessary. The guidance may be in relation to the implementation, interpretation or application of any determination the Chairperson and the Board have made, or regarding the administration of the scheme in respect of individual customers or customer classes. Whether such an approach is taken may vary case by case.
- 2.65 The Chairperson and the Board are expected to comply with the approach set out in this guidance when performing their roles in relation to the scheme, unless it can be demonstrated to the Authority’s satisfaction that there are good reasons for taking a different approach.

### ***Recommendation of the Chairperson and the Board***

- 2.66 Once the Chairperson and Board have devised a redress scheme, they must then vote on whether to recommend it to the Authority for approval. The scheme can only be recommended to the Authority if a majority vote in favour of it. If the number of votes is equal, the majority requirement is not met.

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<sup>64</sup> See the guide published in the [Official Journal of the European Union](#).

- 2.67 If at least a majority of the Chairperson and the Board agree that a scheme should be recommended to the Authority, the Chairperson should make that recommendation to the Authority as soon as possible.<sup>65</sup>
- 2.68 If a majority of the Chairperson and Board members do not agree that the scheme should be recommended for approval (for example because of a difference of opinion over the level or scope of compensation), it cannot be put to the Authority. In those circumstances, the applicant will need to decide whether it is prepared to amend the scheme in a way that satisfies the concerns raised by those who voted against the scheme. If it was, the scheme would then need to be returned to the Chairperson and Board to reconsider recommending it for approval. If the applicant is unwilling or unable to amend the scheme in a way that garners majority approval, the applicant will need to abandon the scheme.
- 2.69 The Chairperson's and Board members' recommendation on the scheme must identify the information on the basis of which they reached their decision on the level of redress, alongside the methodology they applied. Moreover, where the recommendation for Authority approval is not unanimous, the report on the scheme should make it clear that there are dissenting opinions, and should include details of the material points of dissent and the reasoning behind them.
- 2.70 Whether a recommendation is unanimous or not, the Chairperson and the Board members will take collective responsibility for any decision made by them. However, the Authority would expect each member to take lead responsibility for the assessment of their particular area of expertise. For example, the economist member of the Board is likely to take the lead in assessing the economic evidence in determining the appropriate level of redress.
- 2.71 While the Chairperson and Board are normally expected to devise schemes with regard to the parameters suggested by the applicant (and, in the case of conditional outline approval, conditionally approved by the Authority), they may consider that a scheme should go beyond those parameters. In those circumstances, the Chairperson and Board might vote not to recommend a scheme for approval by the Authority on the grounds that the parameters suggested by the applicant were inappropriate. Equally, they might vote to recommend a scheme to the Authority that was wider than that specified by the applicant. The Authority would expect the applicant and the Chairperson

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<sup>65</sup> The Chairperson's role in making the recommendation is to convey the views of those who have considered the scheme.

and Board to explore whether an appropriate solution could be found. If ultimately the Chairperson and Board chose not to recommend a scheme for approval by the Authority, the scheme could not proceed. If instead the Chairperson and Board chose to recommend a scheme for approval, the Authority would consider whether it was appropriate to explore whether the application should be withdrawn and a new application made (in the case of a full scheme), or whether a replacement scheme could be approved (in the case of an outline scheme – see paragraphs 3.16 to 3.19 below).

### ***Confidentiality and privilege***

- 2.72 The Chairperson and the Board members are required to treat as confidential any information supplied to them in confidence (and appropriately identified as confidential) by the applicant and any other persons from whom they may obtain relevant information, unless otherwise agreed with the provider of that information. This includes any information that would be covered by privilege.<sup>66</sup> While it should not often be necessary, disputes over confidentiality should be settled by an independent person with appropriate experience and expertise.<sup>67</sup>
- 2.73 The Chairperson and the Board members must not disclose confidential (and, where relevant, privileged) information other than as permitted or required by law, or with the consent of the party to which the information relates. They may only use such information for the purposes of performing their functions in devising and recommending the scheme at hand. All communications with the Chairperson and the Board members must be made on a confidential and where relevant on a privileged/without prejudice basis. Any privilege over those communications is to be retained unless and until it is expressly waived by the person entitled to assert it. As a matter of practicality, parties may wish to consider marking all documents appropriately and entering into suitable confidentiality agreements to expressly provide for the terms on which information is provided to the Chairperson and the Board members, and how documents, electronic or otherwise, should be treated.
- 2.74 However, as an exception, the Chairperson and the Board may share with the Authority where necessary – and the Authority may use – details of communications in the performance of their roles in the redress scheme approval process. The Authority does not consider it is incompatible with any claims to privilege for documents associated with the redress scheme process

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<sup>66</sup> Including legal advice privilege, litigation privilege, without prejudice privilege. Joint or common interest privilege may be relevant in certain circumstances.

<sup>67</sup> This may, for example, be independent legal counsel.

to be shared by the Chairperson and the Board with the Authority for the limited purposes of the Authority carrying out its assessment. Documents that may be protected by privilege (whether in whole or in part) may be disclosed to the Authority in confidence and on a limited waiver basis. The Authority would continue to treat such documents in confidence<sup>68</sup> and would expect to resist any claim for onward disclosure in favour of any third parties to the extent possible under law. In the Authority's view, it would not be a waiver (implied or express) of any privilege for it to be provided with material in confidence for this specific and limited purpose. Insofar as it is consistent with applicable legal duties, the Authority would only use such documents for the sole purpose of carrying out any assessments required under the redress scheme approval process. In certain circumstances, it may be sufficient for the Authority to be provided with only a summary of the underlying information provided to the Chairperson and the Board members. However, the underlying information could be provided subsequently on request if the Authority considered it was required in order to carry out its assessment.

***Fact-finding by the Chairperson and the Board members and cooperation by the applicant***

2.75 The applicant is expected to cooperate fully with the Chairperson and the Board members within the timescales agreed with them. In particular, it is expected to provide the Chairperson and the Board with all the assistance and information they may reasonably and proportionately require in order to discharge their functions. This may include, but is not limited to:

- providing evidence of harm (by way of, for example, an expert report and the information/data used to prepare that report);
- providing full and complete access to all the applicant's personnel, books, records, documents and information that the Chairperson and the Board may require, in addition to the evidence referred to above;
- providing information that is not related to the applicant but is reasonably available to, or accessible by, them. What is considered reasonable may vary case by case, but it is not expected that the Chairperson and the Board members will need to request that an applicant obtains information that will require it to incur significant costs relative to the likely level of compensation; and

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<sup>68</sup> The Authority has a common interest in maintaining the confidentiality of all such communications for the proper functioning of the redress scheme approval process. The Authority considers that the restrictions on disclosure in Part 9 of the Enterprise Act 2002 would also apply.

- providing any office and supporting facilities that the Chairperson and the Board members may require.
- 2.76 The applicant must not obstruct the Chairperson and the Board members from performing their functions, and the information and evidence it provides to the Authority as well as the Chairperson and the Board, must be complete and accurate in all material respects.<sup>69</sup> Provision of false or misleading information may in certain circumstances also amount to a criminal offence.<sup>70</sup>
- 2.77 The extent to which the Chairperson and the Board will take into account any evidence of harm submitted by the applicant will depend on its scope and quality. In any event, the Chairperson and the Board members are expected to take reasonable steps to obtain appropriate information from the applicant and/or third parties in order to satisfy themselves that the terms of the redress scheme and the amount of redress to be offered under it are appropriate, having regard to the principles in paragraph 2.75 above.
- 2.78 The applicant may ask the Chairperson and the Board to provide it with an estimate of the anticipated costs of the Chairperson and the Board early in the process so as to enable it to calculate the overall cost of running the redress scheme. If the estimated amount exceeds what the applicant had expected, the applicant will have to decide whether it is willing and able to cover the additional cost or whether it prefers to abandon the redress scheme altogether. If a business took the latter course of action where an outline scheme had already been approved, the Authority considers that would amount to a breach of conditions imposed. For example, the requirement in the Regulations that the Chairperson and the Board members have considered the relevant matters and have by majority vote recommended the scheme to the Authority for approval (which the Authority would have made a condition of outline approval) would not be met. Consequently, the Authority would expect to revoke scheme approval. In such circumstances the Authority would consider whether to seek recovery of any penalty reduction granted in recognition of conditional scheme approval.

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<sup>69</sup> The Authority may reject an application for approval of a redress scheme, or revoke conditional approval of such an application, if it is suspected that a compensating party has supplied to the Board, the Chairperson or the Authority information that is false or misleading in a material respect. Additionally, as noted in footnote 70 below, in certain circumstances provision of false or misleading information may amount to a criminal offence

<sup>70</sup> It is a criminal offence for a person to knowingly or recklessly supply information to the Authority in connection with a CA98 investigation which that person knows to be false or misleading in a material particular (section 44 of the CA98).

### 3. The Authority's assessment of applications for redress scheme approval

- 3.1 This chapter sets out guidance on the process the Authority expects to follow when assessing applications for approval of a voluntary redress scheme.

#### Prioritisation and timeframe

- 3.2 The Authority has discretion whether or not to consider schemes for approval. At the end of the pre-application discussions the Authority will tell the potential applicant whether it intends to prioritise an application for redress scheme approval or not. The Authority would generally expect to prioritise applications for redress scheme approval in relation to an ongoing investigation. In the case of an application for approval after an infringement decision has been made, the Authority will decide whether to consider it or not on a case by case basis according to its published prioritisation principles,<sup>71</sup> as appropriate.
- 3.3 If the Authority decides to consider an application for redress scheme approval (whether in respect of a full scheme or an outline scheme), it will in the majority of cases aim to assess it and notify applicants of the outcome within a three month timescale from the day when a complete formal application<sup>72</sup> is received.
- 3.4 In the case of applications submitted during the course of a competition investigation, formal scheme approval cannot take place until the point at which the Authority makes its infringement decision. However, if the Authority planned to approve a scheme, it would in the majority of cases expect to give compensating parties a preliminary indication of that fact within approximately three months of receiving a complete formal application<sup>73</sup> for approval, even if any approval is not formalised until later. Any preliminary indication that the Authority planned to approve a scheme would not prevent the Authority from making a later final decision to reject a scheme. Where the Authority has conditionally approved an outline scheme, it will in the majority of cases aim to assess whether the conditions have been satisfied and whether to confirm or revoke approval or seek a replacement scheme within a two to three month timescale after the Board and the Chairperson have produced their report on the scheme.

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<sup>71</sup> See [Prioritisation Principles for the CMA](#) (CMA16).

<sup>72</sup> A complete formal application is one that provides the Authority with sufficient information to assess whether conditional or full approval should be granted or whether the application should be rejected.

<sup>73</sup> See note 72 above for definition of a complete formal application.

## Scope of the Authority's assessment

3.5 In assessing whether it is appropriate to approve a scheme (including whether the scheme has been set up according to the Regulation Requirements), the Authority will not consider in detail the underlying elements of the scheme, particularly where such a detailed assessment would duplicate or undermine in practice the work of a Chairperson and a properly-constituted Board.

3.6 Nevertheless, the Authority may, although it is not obliged to, take into account:

- the terms of the redress scheme, and in particular:
  - the duration of the scheme;
  - the adequacy of the advertising plans;
  - the fairness and reasonableness of the evidence requirements;
  - the Chairperson's and the Board members' terms of engagement, which must be clear and ensure their independence and objectivity in carrying out their functions;
  - the consequences of accepting redress under the scheme; and
  - whether the scheme ensures vulnerable consumers' access to redress.
- whether the Chairperson and the Board members took into account all the relevant matters and complied with this guidance (or any explanation of why it was necessary to take a different approach to the guidance);
- the scope and level of compensation offered under the scheme<sup>74</sup> and the Chairperson's and the Board's relevant determination. For example, where on the face of the case indirect purchasers are likely to have suffered harm from the competition infringement, the Authority would normally expect schemes to cover damage that has been caused to both direct and indirect purchasers, unless a good reason for taking a different approach is provided;
- any dissenting views from Board members or the Chairperson; and

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<sup>74</sup> Section 49C(3) of the CA98 as amended by the CRA15.

- the views of the applicant where the recommendation of the Chairperson and the Board includes elements of compensation that go beyond the scope of the scheme initially proposed by the applicant in the context of an outline scheme conditionally approved by the Authority.<sup>75</sup>

## Approval process and outcomes

### *General*

3.7 Having assessed an application for approval of a redress scheme, the investigating Authority may:

- in the case of a full scheme, approve or reject it; and
- in the case of an outline scheme, approve it with conditions (see paragraphs 3.13 to 3.19 below) or reject it.<sup>76, 77</sup>

3.8 Given that the expert independent Board members and the Chairperson will have determined, or will subsequently have to determine, both the compensation under the scheme, and that they consider the terms of the scheme are appropriate, the Authority expects that in practice it will revoke conditional approval of an outline scheme or unconditional approval of a full scheme in exceptional circumstances only (see further paragraph 3.16 below). If during its assessment the Authority has concerns regarding any of the matters it may take into account when deciding whether to approve a scheme (whether outline or full) and is considering rejecting a scheme, it would expect to provide the applicant and the Chairperson and Board (as appropriate) with the opportunity to respond (including providing more information) before finally approving or rejecting the scheme. If the Chairperson and the Board provide any such information to the Authority, it should be with notice to the party that provided them with the information. Provision to the Authority by the Chairperson and the Board or by the applicant will be on a confidential and limited waiver basis, and will continue to attract ‘without prejudice privilege’ (save where this is expressly waived by the person entitled to assert that privilege).

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<sup>75</sup> Consistent with paragraph 2.8 above, an applicant seeking conditional approval of an outline scheme will not need to have provided full details of the scheme. Consequently, when considering whether to conditionally approve an outline scheme the Authority assessment described at paragraph 3.6 above will be based on the available information provided by the applicant.

<sup>76</sup> Sections 49C(3) and (4) of the CA98 as amended by the CRA15.

<sup>77</sup> As with other decisions of public bodies, the Authority’s decision to approve or reject an application for scheme approval could potentially be challenged via judicial review.

3.9 If any changes to the terms of the scheme initially submitted to the Authority result from this exercise, or otherwise, the applicant will be given an opportunity to confirm the new terms of the scheme by which they would be bound if the Authority approved the scheme. A sufficiently senior representative of the compensating party, such as a director, will be expected to sign the final version of the scheme they are content to be bound by before any Authority approval of the scheme.

***Approval process where there is already an infringement decision at the time of the application for approval***

3.10 Where an infringement decision has already been made, the Authority can only consider a full redress scheme. There will be no repayment of any penalty amount imposed and the Authority cannot consider an outline redress scheme. Because the Authority is unable to impose conditions where scheme approval relates to an infringement decision that has already been made, prior to submitting a formal application for approval of a full scheme, the applicant must:

- notify the Authority of its intention to offer a redress scheme by stating in writing the proposed Chairperson it has chosen and the Board members that the proposed Chairperson has chosen; and
- inform the Authority of the intended scope of compensation.

3.11 If the Authority considers that the Chairperson and the Board do not meet the relevant criteria, it has 28 days in which to object. If the Authority does not object, the applicant can proceed with formally appointing the Chairperson of the Board who will, in turn, formally appoint the members of the Board that he or she had proposed. The Chairperson and the Board members then determine the precise levels of compensation and decide, by majority vote, whether or not the scheme will be recommended to the Authority for approval.

3.12 If the application is submitted formally to the Authority for scheme approval, the Authority will then determine whether to reject the application or approve the scheme unconditionally, taking into account the relevant matters set out in paragraphs 3.5 and 3.6 above. If an application is rejected by the Authority, or withdrawn by the applicant, the Authority will return to the applicant all scheme-related documentation received from it.

### ***Approval process where there is no pre-existing infringement decision at the time of the application for approval***

3.13 Where a scheme is submitted for approval before an infringement decision has been made in an investigation, an outline scheme or a full scheme may be submitted to the Authority. Approval of the redress scheme will come into force only if the investigating Authority makes an infringement decision against the applicant.<sup>78</sup> The Authority does not expect to publicise that an application for approval of a scheme has been submitted during the course of an ongoing investigation. Similarly, applicants are expected not to disclose that they have applied, or taken steps to apply, to the Authority for approval of a scheme without first consulting the Authority.

3.14 Where an applicant submits an outline scheme, the Authority will consider whether or not to approve it. In accordance with section 49C of the CA98, the Authority's approval of an outline redress scheme will be subject to conditions requiring the applicant to comply with the Regulation Requirements by a specified time (likely to be after the Chairperson's and the Board's assessment).<sup>79</sup> The Authority may also set other conditions for approval:

- Most other conditions will require the applicant to provide further information to the Authority. Such information conditions will include (but are not limited to) applicants providing the Authority with information about how the redress scheme ultimately will satisfy the unfulfilled Regulation Requirements.<sup>80</sup> For example, the applicant may be requested to provide:
  - details of the Chairperson and Board members actually appointed; and
  - a copy of the Chairperson's and the Board's determination, specifying the exact level of redress to be offered under the scheme, and explaining the methodology that the Chairperson and the Board members applied to arrive at that level (and including details of any minority views where their determination was not unanimous).
- The Authority will consider whether, and if so, what, further conditions should be imposed alongside information conditions case by case. However, it would generally expect to impose at least the following conditions that:

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<sup>78</sup> Section 49C(2) of the CA98 as amended by the CRA15.

<sup>79</sup> Article 4(2)(b) of the Regulations and section 49C(3) of the CA98 as amended by the CRA15.

<sup>80</sup> Article 4(2)(b) of the Regulations and section 49C(4) of the CA98 as amended by the CRA15.

- any further information required under conditions must be provided by a particular date;
- the Authority does not have significant concerns with the Chairperson's and the Board's subsequent determination of the precise level and details of compensation, or the compensation that businesses ultimately offer under the scheme;<sup>81</sup>
- the applicant cooperates fully with the Chairperson and the Board members (including, for example, in relation to reasonable and proportionate information requests and providing all assistance the Chairperson and the Board may reasonably require in order to discharge its functions) and that the information it provides to the Chairperson and the Board, as well as the Authority, is accurate and complete in all material respects;
- the Authority is satisfied that the specific Chairperson and individuals subsequently appointed to the Board meet the strict eligibility criteria regarding the terms of their appointment; and
- the Chairperson, the Board members and the applicant comply with the terms of this guidance document (unless they demonstrated to the Authority's satisfaction that there were good reasons for taking a different approach).

3.15 The Authority will discuss any conditions it plans to impose with the applicant before they are imposed. If agreement on the conditions cannot be reached, the applicant will be given the opportunity to withdraw its application before conditional approval is given, and therefore before a scheme binds them. This will ensure that participation in the scheme by the applicant remains entirely voluntary. If an application is rejected by the Authority, or withdrawn by the applicant, the Authority will return to the applicant all scheme-related documentation received from it. The Authority would also expect to return documents if the Authority closes its investigation without reaching an infringement decision.

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<sup>81</sup> This scenario might arise where, for example, the Board and the Chairperson determined compensation that went further than the scope of the outline scheme approved by the Authority (and the Authority agreed that was appropriate) but the business was not prepared to offer that level of compensation through a replacement scheme. See further paragraph 3.16 below.

3.16 Once conditions have been agreed and the applicant states that it has taken all necessary steps to fulfil them, the Authority may undertake the following actions:

- Approve the scheme unconditionally and finally, where it is satisfied that all conditions imposed have been met. Any Required Information or other information provided pursuant to a condition of approval will form part of the terms of the scheme.<sup>82</sup>
- Revoke approval of the scheme if any conditions imposed by the Authority are not met. Save in respect of a failure to meet the Regulation Requirements, the Authority expects only in exceptional circumstances to find that the conditions it has imposed have in its view not been satisfied. For example, the Authority may find that the imposed conditions have not been fulfilled if:
  - it considers that there are material/manifest errors in the methodology followed by the Chairperson and the Board in calculating the precise level of compensation. In those circumstances the Authority may choose to request that the Chairperson and the Board reconsider and re-make their determination, or the relevant parts of it, with approval revoked only if the same or similar issues persist;
  - it becomes apparent to the Authority that significant information and evidence was withheld from the Chairperson and the Board members when they were making their determination; or
  - there are strong indications that there has been an attempt to deceive the Authority about the appropriate level of compensation to be offered under the scheme.
- Approve an alternative redress scheme voluntarily offered by the applicant as a replacement for the original scheme, where it considered that was necessary to ensure that the scheme operated as intended, or otherwise to ensure an appropriate outcome for potential beneficiaries. The replacement scheme must be capable of being approved without conditions:<sup>83</sup>
  - The Authority might consider a replacement scheme offered by an applicant where it considered that the scheme devised by the Chairperson and Board should be revised. This might for example be

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<sup>82</sup> Section 49C(7) of the CA98 as amended by the CRA15.

<sup>83</sup> Section 49C(5)(c) of the CA98 as amended by the CRA15.

the case where, exceptionally, the Authority had identified concerns about the methodology followed by the Chairperson and the Board, or there had been a material change of circumstances necessitating a change.<sup>84</sup> In those circumstances, in order to meet the Regulatory Requirements the applicant would need to go back to the Chairperson and Board and ask them to consider and recommend the replacement scheme to the Authority.

- The Authority might also consider a replacement scheme offered by the applicant where the scheme devised and recommended for approval by the Chairperson and Board went beyond the parameters of the outline scheme that the Authority had approved preliminarily, and the Authority agreed fully with that recommendation. This might for example be the case where the applicant had initially specified explicitly that it wished to offer compensation to only direct purchasers of a cartelised product but the Chairperson and Board recommended a scheme that covered indirect purchasers also.<sup>85</sup>
- The Authority is unlikely to approve a replacement redress scheme where the need for such a scheme results from the applicant having acted in bad faith.

3.17 If the Authority considers that a replacement scheme is necessary, the applicant will need to consider whether it is willing to proceed with the expanded scheme the Authority considers is appropriate, or whether instead it is willing to proceed only with the scheme originally approved by the Authority (or a variant of that scheme that did not go as far as the Authority considered was appropriate).

3.18 If the applicant is willing to proceed with the expanded replacement scheme the Authority considers is appropriate, the Authority will consider approving it. If the applicant does not choose to do that, the Authority will provide it with an opportunity to present its views before determining whether it is appropriate to revoke or finally approve the original or modified replacement scheme (as appropriate).

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<sup>84</sup> As noted above, in order to allow for the fact that the Authority might exceptionally have concerns with the Chairperson and Board's recommendation, the Authority will, when approving an outline scheme, generally impose a condition that its ultimate approval is subject to it not having significant concerns with the actual compensation ultimately offered for approval by the business.

<sup>85</sup> The Authority considers that if the Chairperson and Board recommended a scheme that covered both direct and indirect purchasers where the outline scheme did not restrict the categories of purchaser to be compensated, a replacement scheme would not be required.

3.19 If the Authority revokes the conditional approval, the business would not be forced nonetheless to proceed with an (unapproved) scheme with which it did not agree. In those circumstances, the Authority would consider whether to seek recovery of any penalty reduction granted previously in recognition of conditional scheme approval.

### **Notification of the Authority's decision**

3.20 The Authority does not expect to publicise any preliminary intention to approve or reject an application for approval of a redress scheme.

3.21 After it has finalised its assessment of an application, the Authority will provide applicants with a short reasoned document that sets out:

- whether it has approved or rejected a scheme;
- on what grounds it has approved or rejected a scheme; and
- if an application for conditional approval of an outline scheme was made during the course of an Authority investigation, a brief description of any conditions to which its approval is subject (including any associated deadlines by which such conditions must be met).

3.22 Issue of this document will constitute the Authority's formal approval or rejection of a scheme.<sup>86</sup> If a scheme is approved, the decision document will include the agreed terms of the scheme that the Authority has approved and by which the business will be bound if the scheme ultimately proceeds, as well as any conditions that the Authority may have imposed.

3.23 The Authority will publish a brief summary of its decision to approve a scheme, whether subject to conditions or not, on its webpages, drawing attention to the compensating party's commitment to compensate individuals and businesses for the harm caused by its infringement.

3.24 Where the Authority issues an infringement decision at the same time as it approves a redress scheme, the infringement decision would generally note the existence of an Authority-approved voluntary redress scheme as well as any penalty reduction granted in connection with it. The Authority will also include on its webpages a link to the details of the scheme held on the

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<sup>86</sup> If the Authority has completed its assessment of an application in advance of having made an infringement decision, the Authority will typically provide the compensating party with a draft of this document. When the Authority makes its infringement decision, it will issue the document formally.

compensating party's website or other contact details for the compensating party as appropriate.

## **Possibility of penalty reductions in certain cases**

- 3.25 If it is considering approving a scheme in relation to a potential Authority infringement decision,<sup>87</sup> the Authority will consider whether – were it to approve the scheme – 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 that the Authority issues in accordance with its procedures in CA98 cases. It should be noted that, since draft penalty statements are put on the investigation file for inspection in multi-party cases, other parties to the investigation will become aware of the fact that an application has been submitted for approval in such a case.<sup>88</sup>
- 3.26 However, it is noted that, to the extent possible having regard to legal obligations, the Authority would in this context not expect to disclose the application for approval itself, nor any supporting documents, to other parties to the investigation. In particular, as noted at paragraph 2.74 above, documents that may be protected by privilege and that are disclosed to the Authority in confidence and on a limited waiver basis will be treated in confidence by the Authority, and it would expect to resist any claim for onward disclosure in favour of any third parties to the extent possible under law. In assessing whether exceptionally it might be necessary to disclose material relating to an approved application, the CMA would expect to apply the principles it uses for assessing potential disclosure of certain documents in relation to the use of its leniency and settlement tools.<sup>89</sup>
- 3.27 The Authority retains discretion to decide whether a scheme merits a penalty reduction – there is no absolute right to a penalty reduction.
- 3.28 However, if an applicant disagrees with the amount of any penalty reduction proposed by the Authority, it will be provided with an opportunity to withdraw its application before the Authority formally gives conditional approval to the

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<sup>87</sup> The Authority will only be able to consider making penalty reductions in its own investigations.

<sup>88</sup> Once any written and oral representations made on the Statement of Objections have been considered, if the Authority 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 Authority proposes to impose on that party, based on the information available to the Authority at the time. See the CMA's [guidance on investigation procedures in CA98 cases](#) (CMA8).

<sup>89</sup> See the [CMA's leniency guidance](#) (OFT1495, adopted by the CMA Board) and its [guidance on investigation procedures in CA98 cases](#) (CMA8).

outline scheme. This will ensure that participation in the scheme by the business remains entirely voluntary.

- 3.29 While there is no right to a penalty reduction, the Authority expects that in the majority of cases where it approves a scheme at the time of issuing an infringement decision it will reduce the penalty it would otherwise have imposed to recognise the provision of redress through the offer of the scheme.
- 3.30 Any penalty discount is likely to be up to a maximum of 20% of the penalty the Authority would otherwise have imposed.
- 3.31 When deciding the precise level of any penalty discount, the Authority may take into account, among other factors:
- the terms of the redress scheme;
  - the size of the penalty imposed by the Authority;
  - any appropriate evidence of the likely administrative costs of implementing the scheme; and
  - any other discounts awarded to the compensating parties in the particular case, such as for leniency or settlement.

By contrast, the Authority expects that other factors it would generally consider when imposing a penalty – for example, the gravity of the infringement – are unlikely to be relevant in this respect.

- 3.32 The discount will be taken into account at step 6 of the Authority's framework for calculating financial penalties.<sup>90</sup>
- 3.33 The Authority would generally expect to seek recovery of any penalty reduction where:
- a business seeks to withdraw from a scheme after it has been approved;
  - a business did not comply with conditions imposed on approval of an outline scheme and such approval was revoked by the Authority; or
  - the scheme has been established but not used.<sup>91</sup> In this case, in deciding whether to recover some or all of the penalty discount that it has granted,

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<sup>90</sup> Penalty reductions for leniency and settlement are also applied at this step. See [OFT's guidance as to the appropriate amount of a penalty](#) (OFT423, adopted by the CMA Board).

<sup>91</sup> See also paragraph 4.14 below.

the Authority will take into account whether the compensating party has acted in good faith as well as the administrative costs that it has already expended in running the scheme. If the penalty discount did not exceed the costs of scheme administration, the Authority may not be minded to recover its costs (as to which, see below).

## **Recovery of the Authority's costs**

3.34 Section 49D of the CA98 provides that the Authority may recover its reasonable costs relating to an application for approval of a redress scheme.

3.35 The Authority 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
- the deadline by which that amount must be paid.<sup>92</sup>

3.36 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.

3.37 If the costs that need to be paid under this section relate to an approved scheme, the Authority may revoke scheme approval if the costs have not been paid by the date specified in the written notice.<sup>93</sup>

3.38 Costs that need to be paid under this section are recoverable by the Authority as a debt.<sup>94</sup>

3.39 The Authority will seek to recover its reasonable costs in the vast majority of cases but, in exceptional circumstances, it may seek to recover only a portion of its costs. In determining the amount of costs to be recovered, 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.

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<sup>92</sup> Section 49D(2) of the CA98, as amended by the CRA15.

<sup>93</sup> Section 49D(4) of the CA98, as amended by the CRA15.

<sup>94</sup> Section 49D(5) of the CA98, as amended by the CRA15.

- 3.40 If a party withdraws an application before the Authority has decided whether to approve or reject the scheme, the Authority has no power to enforce the scheme. However, in such a case the Authority would nevertheless generally expect to recover from the party in question the full amount of its reasonable costs of assessing the application.
- 3.41 A person required to pay costs under this section may appeal to the CAT against the amount.<sup>95</sup>

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<sup>95</sup> Section 49D(3) of the CA98, as amended by the CRA15. It should also be noted that authority decisions relating to voluntary redress schemes would be subject to judicial review under usual principles.

## 4. Enforcement of and release from an Authority-approved voluntary redress scheme

- 4.1 This chapter considers how a voluntary redress scheme may be enforced, either by a scheme beneficiary or the Authority. It also considers the circumstances under which the Authority may release the compensating party from complying with the redress scheme.

### Enforcement of Authority-approved voluntary redress schemes

#### *Duty of a compensating party to comply with a redress scheme*

- 4.2 The compensating party is under a statutory duty to comply with the terms of an approved redress scheme, which also include any information conditions attached to an outline scheme.<sup>96</sup>
- 4.3 This statutory duty is owed to any natural or legal person entitled to compensation under the terms of the scheme,<sup>97</sup> whether or not they have made a formal application under the scheme.

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

- 4.4 If a compensating party breaches its duty to comply with the terms of an approved redress scheme, legislation states that a scheme beneficiary who suffers loss or damage as a result of the breach may bring civil proceedings before the court<sup>98</sup> for damages, an injunction or interdict or any other appropriate relief or remedy.<sup>99</sup> In practice, the loss that such a beneficiary suffers is likely to be the compensation they have not received. The beneficiary does not need to have used the complaints process described at paragraphs 2.25 to 2.32 above before they exercise their right to bring civil proceedings, but in practice they may wish to consider doing so.
- 4.5 In any civil proceedings to enforce a scheme, it is a defence for the compensating party to show that it took all reasonable steps to comply with the duty to adhere to the terms of the approved redress scheme.<sup>100</sup>

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<sup>96</sup> Section 49E(1) of the CA98, as amended by the CRA15.

<sup>97</sup> Section 49E(2) of the CA98, as amended by the CRA15.

<sup>98</sup> In England and Wales/Northern Ireland, the High Court or county court; in Scotland, the Court of Session or the sheriff.

<sup>99</sup> Section 49E(3) of the CA98, as amended by the CRA15.

<sup>100</sup> Section 49E(6) of the CA98, as amended by the CRA15.

## ***Enforcement of a redress scheme by the Authority***

- 4.6 In addition to enforcement by a scheme beneficiary who has suffered loss or damage, if the Authority considers that the compensating party is in breach of the duty to comply with the terms of a redress scheme, it also has the power to bring civil proceedings before the court for an injunction or interdict, or any other appropriate relief or remedy.<sup>101,102</sup>
- 4.7 This power is discretionary. The Authority will consider whether to use the power on a case by case basis, considering factors such as (but not limited to):
- 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; and
  - the feasibility of the scheme beneficiary bringing civil proceedings in respect of the suspected breach.
- 4.8 The Authority would also expect generally to apply its prioritisation criteria<sup>103</sup> when it is considering whether to enforce a redress scheme.

## **Release from a redress scheme**

### ***The Authority's approach to considering release from a redress scheme***

- 4.9 If the Authority considers that it is no longer appropriate for the compensating party to remain under a duty to comply with the terms of a redress scheme, it may release the compensating party from that duty.<sup>104</sup> In this context, the Authority would take into account the desirability of giving appropriate notification to beneficiaries under the scheme. The Authority would also consider the desirability of ensuring that any person who had relied reasonably on the scheme as their means of achieving compensation, and as

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<sup>101</sup> Section 49E(4) of the CA98, as amended by the CRA15. Again, it is a defence for the compensating party to show it took all reasonable steps to comply with the duty to adhere to the terms of the approved redress scheme (section 49E(6) of the CA98, as amended by the CRA15).

<sup>102</sup> It should be noted that the fact a scheme is no longer open for new applications does not mean a compensating party is released from its duty to comply with its terms. For example, if an application for compensation had been accepted under the scheme but the compensation had not been paid, a beneficiary or the Authority would still be able to enforce that obligation.

<sup>103</sup> See paragraph 3.2 above.

<sup>104</sup> Section 49E(7) of the CA98, as amended by the CRA15.

a result was unable to claim separately through judicial means because the statutory limitation period for doing so had expired, was not prejudiced by releasing the compensating party from the duty.

- 4.10 Where a person has entered into a settlement agreement with the compensating party, that agreement remains enforceable as a matter of contract law, regardless of any subsequent release of the compensating party from the statutory duty to comply with the terms of the redress scheme.<sup>105</sup>
- 4.11 In considering the release of a compensating party from the duty to comply with the terms of a redress scheme, the Authority will consider whether there has been a material change of circumstances since the scheme commenced. The precise nature of the Authority's consideration will depend on the individual circumstances affecting a particular redress scheme. However, the change of circumstances must be such that it is no longer appropriate in the Authority's view for the compensating party to be bound to comply with the terms of the redress scheme.
- 4.12 The types of circumstances which may lead to the release of a compensating party may include (but are not limited to):
- a situation in which the redress scheme is superseded by a new (non-statutory) redress scheme; and
  - a situation in which the redress scheme is obsolete, for example where the redress scheme has fulfilled its purpose. This may be the case, for example, where claims from all those entitled to claim under the scheme have been satisfied, but the period for which the scheme is open for applications is still to expire.
- 4.13 By contrast, the Authority is unlikely to release the compensating party from its duty to comply with the terms of the redress scheme where there remain outstanding obligations arising under it, regardless of whether the scheme has closed or not. Where obligations under a scheme have been satisfied and the scheme has closed, there will be no need for the Authority to release a compensating party.
- 4.14 The complexity of analysis the Authority will need to undertake in deciding whether to release a compensating party from its duty to comply with the terms of a redress scheme is likely to vary significantly depending on the change of circumstances identified and the nature and severity of the competition infringement. In some cases, a detailed investigation may be

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<sup>105</sup> Section 49E(8) of the CA98, as amended by the CRA15.

required in order to evaluate whether there has been a change of circumstances and, if so, whether the compensating party should be released. In some exceptional cases where a party is released from its obligations – for example where no compensation has been paid under a scheme – the Authority does not rule out reconsidering whether it would be appropriate for the party to retain its reduction in fine.

- 4.15 Where a scheme is approved and established but a compensating party has successfully appealed the relevant infringement decision, the Authority would consider on a case-by-case basis whether it would be appropriate to release that compensating party from its obligations under the scheme, or for those obligations to continue.

### ***The ways in which a release from the redress scheme may be initiated***

- 4.16 A release from the terms of the redress scheme may be on the basis of:

- a review undertaken on the Authority's own initiative; or
- a request to the Authority by the compensating party.

- 4.17 A request from the compensating party must be set out clearly in writing and be accompanied by appropriate supporting evidence setting out:

- what the material change of circumstances is;
- how and why this makes it appropriate to release the compensating party from the redress scheme;
- the possible consequences for scheme beneficiaries; and
- whether the request is being made in order to avoid a breach of the redress scheme.

- 4.18 The Authority will consider whether and in what detail to carry out its review on a case-by-case basis. Parties can approach the Authority prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request.

- 4.19 If the Authority has decided to undertake a review, and plans to release a compensating party from its duty to comply with the terms of a redress scheme, it will consult with the people it considers appropriate on its proposed decision.

## Annex A: Glossary

In this guidance:

1. **'the approved scheme'** means a redress scheme approved by the Authority;
2. **'the applicant'** means a person making an application to the Authority for approval of a redress scheme under section 49C of the CA98;
3. to the extent this guidance is applied or taken account of by the CMA or a Regulator, **'the Authority'** means either the CMA or a Regulator as appropriate;
4. **'the Board'** means a group of people appointed by the Chairperson who do not have a conflict of interest, comprising: an economist with appropriate experience and knowledge of competition economics to be able to consider the redress scheme; a person with experience of the industry of the applicant; a person who is able to represent the interests of those who may be entitled to compensation under the redress scheme; and any other person deemed suitable by the Chairperson;
5. the **'Chairperson'** means a person appointed by the applicant who does not have a conflict of interest and satisfies the judicial-appointment eligibility condition on a five-year basis, or is an advocate or solicitor in Scotland of at least five years' standing, or is a member of the Bar of Northern Ireland or solicitor of the Court of Judicature of Northern Ireland of at least five years' standing;
6. **'the compensating party'** means a person offering compensation under an Authority-approved scheme;
7. **'the conditions of redress scheme'** means the conditions that the Authority may impose on the applicant under section 49C of the CA98 when approving an outline scheme;
8. **'full scheme'** means a scheme submitted to the Authority for approval under section 49C of the CA98 which complies with all the Regulation Requirements;
9. **'the independent reviewer'** means any person who has been designated under the scheme as responsible for assessing complaints by potential scheme beneficiaries whose applications for compensation under the redress scheme have been rejected or have not been fulfilled by the compensating party;

10. **'outline scheme'** means a scheme submitted to the Authority for approval under section 49C of the CA98 which does not yet comply with all the Regulation Requirements;
11. **'redress scheme'** means a scheme under which a person offers compensation as a consequence of an infringement decision made in respect of that person;
12. **'the Regulations'** means The Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587);
13. **'the relevant matters'** means the matters specified in Article 5(7) of the Regulations;
14. **'the Regulation Requirements'** means the requirements that according to Article 4(1) of the Regulations any redress scheme submitted to the Authority for approval must (either at the date of submission or at a specified later date) satisfy for the Authority to approve it;
15. **'the scheme administrator'** means any person who is responsible for examining applications for compensation under the redress scheme and verifying whether the entitlement and evidence requirements are satisfied;
16. **'scheme beneficiary'** or **'potential scheme beneficiary'** means any person whose application for compensation under the redress scheme has been approved or who is *prima facie* entitled to compensation under an Authority-approved redress scheme;
17. **'the terms of the redress scheme'** means the provisions that specify the scope, operation and consequences of a redress scheme.

## Annex B: Template undertaking

### DECLARATION OF INDEPENDENCE, COMMITMENT AND ABSENCE OF CONFLICT OF INTEREST

**NOTE:** *The sample text below provides an example of how Chairpersons and Board members might provide the required confirmations in respect of their roles in the context of an application for redress scheme approval.<sup>106</sup> However, Chairpersons and Board members must amend the sample text below, or use alternative text, as appropriate in view of their individual circumstances.*

I, [Chairperson / Board member's name], hereby declare that:

- I do not have, nor have I become exposed to, a conflict of interest that impairs my objectivity and independence in discharging my duties as a Chairperson/Board member.
- If a conflict of interest or circumstances likely to give rise to any doubts about my impartiality and independence arise or may arise during the execution of my tasks, I shall immediately notify the Chairman/the Authority<sup>107</sup> in writing without delay. In the event of such conflicts of interest, I undertake to immediately take all necessary steps to resolve it.
- I hereby undertake not to be bound by any instructions from the compensating party restricting my ability to determine whether compensation is appropriate, and shall be completely independent in the performance of my duties.
- I hereby undertake to take all necessary measures to prevent any situation that could compromise the impartial and objective performance of my tasks.
- I hereby undertake to perform my functions as a Chairperson/Board member with reasonable skill and care and in accordance with the law as well as any applicable rules governing my professional conduct.
- I undertake to abstain from any contact or conduct that could compromise, or appear to compromise, my independence as a Chairperson/Board member.

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<sup>106</sup> See paragraphs 2.43–2.59 above.

<sup>107</sup> As appropriate.

- Save for the remuneration agreed with the compensating party for the performance of my role in devising a scheme, I declare that:
  - I will not derive any kind of advantage from the execution of my tasks as a Board member.
  - I have not granted and will not grant, have not sought and will not seek, have not attempted and will not attempt to obtain, and have not accepted and will not accept, any advantage, financial or in kind, from any party whatsoever, where such advantage constitutes an illegal practice or involves corruption, either directly or indirectly, inasmuch as it is an incentive or reward relating to performance of my functions as a Chairperson/Board member.

Done at [...] on [...]

Signature [...]

## Annex C: Summary of private actions framework for competition law breaches

1. Anyone who has suffered harm caused by an infringement of Chapter I or Chapter II of the CA98 or Articles 101 or 102 of the TFEU has a right to compensation for that harm.
2. A natural or legal person who has suffered loss as a result of a relevant infringement of competition law may seek redress through the courts by bringing a private action.<sup>108</sup> Two forms of private action should be distinguished:
  - **Follow-on actions** – if a relevant competition authority, such as the CMA, a Regulator or the European Commission, has made a decision that competition law has been infringed, a claimant may rely on the decision as proof of the breach.
  - **Stand-alone actions** – if there is no previous decision by a competition authority finding an infringement of the competition rules, the claimant will have to obtain and submit evidence to the court to prove the breach of competition law.
3. As well as showing that the defendant breached competition law, the claimant (in both follow-on and stand-alone actions) will also have to prove that the breach actually caused the claimant loss. In practice, a claimant will need to prove that its loss would not have occurred 'but for' the competition law breach.
4. A private action may be brought on a collective basis by a representative<sup>109</sup> on behalf of a class of potential claimants who can be consumers or businesses, or a combination of the two. Under the CA98 (as amended by

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<sup>108</sup> Other forms of private action in competition law, for example an application to a court for an injunction or a declaration, are beyond the scope of this guidance. The UK courts that have jurisdiction to hear competition law cases are the following:

- the Chancery Division of the High Court of England and Wales (and in some circumstances, the Commercial Court) may hear cases. See the [Practice Direction on competition law](#) and Rule 58.1(2) of the [Civil Procedure Rules](#);
- the Court of Session and Sheriff Court in Scotland;
- the High Court of Northern Ireland; and
- the Competition Appeal Tribunal (CAT).

For the remainder of this guidance, the term 'ordinary courts' is used to refer to the High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, and the High Court of Northern Ireland.

<sup>109</sup> Government policy is that only those who would fairly and adequately act in the interests of the class members will be authorised to act as the class representative in accordance with Rule 77 (Authorisation of the class representative).

CRA15), it is possible for a class representative to bring collective proceedings before the CAT.<sup>110</sup> Such collective proceedings<sup>111</sup> must be brought by a person who proposes to be the representative in the proceedings. The CAT is required to authorise the class representative and certify whether the claims in question are eligible for inclusion in collective proceedings. The CAT will also determine whether collective proceedings should be on an 'opt-in' or an 'opt-out' basis:<sup>112</sup>

- **Opt-in collective proceedings** are brought on behalf of each class member who joins or 'opts-in' by notifying<sup>113</sup> the class representative that the claim should be included in the proceedings. This means that a person will be included in the action only if they expressly join the proceedings.
- **Opt-out collective proceedings** are brought on behalf of members of a class. To be included, a person must fall within the class described in the collective proceedings: they will be included in the proceedings unless they 'opt-out' by a certain date and in the manner prescribed by the CAT.<sup>114</sup>

5. Collective proceedings are possible for both follow-on and stand-alone cases. The CAT Rules of Procedure<sup>115</sup> provide for a range of safeguards within the collective actions regime to protect against frivolous or unmeritorious cases being brought.<sup>116</sup>
6. In addition to individual and collective private actions for damages, the CRA15 also introduces a new collective settlement regime for competition law cases in the CAT to allow victims of competition law infringements and businesses which have breached the competition rules to quickly and easily settle cases on a voluntary basis.<sup>117</sup> Further details on the operation of collective actions

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<sup>110</sup> Section 47B of the CA98 allows proceedings before the CAT combining two or more claims to which section 47A applies ('collective proceedings'). Collective proceedings are subject to the provisions of the CA98 and the CAT Rules of Procedure. The CAT also has general powers of case management including, where there are multiple claims, its power to consolidate proceedings, hear two or more claims together or transfer proceedings.

<sup>111</sup> Collective proceedings are possible in the ordinary courts but under separate legal provisions. These are beyond the scope of this guidance, which refers to CAT collective proceedings only.

<sup>112</sup> Section 47B of the CA98.

<sup>113</sup> Notification must be made in the manner and by the time specified by the CAT.

<sup>114</sup> However, any class member who is not domiciled in the UK at a time specified will need to opt-in by notifying the class representative that the claim should be included in the collective proceedings.

<sup>115</sup> The CAT Rules of Procedure are available on [the CAT webpages](#).

<sup>116</sup> For example, the CAT may only authorise a person to act as the class representative in the collective proceedings if it considers that it is just and reasonable for that person to do so and will take into account a number of factors in its discretion, including whether that person would fairly and adequately act in the interests of the class members, according to the relevant provisions of the CAT Rules of Procedure. The CAT will also certify that the claims in question are eligible for inclusion in collective proceedings according to the relevant CAT Rules of Procedure.

<sup>117</sup> Sections 49(A) and 49(B) of the CA98, as amended by the CRA15. The collective settlements regime is set out in the CAT Rules of Procedure.

and the CAT's approval of collective settlements are set out in the CAT Rules of Procedure.

7. Certain regulators have other redress powers that may be used related to their sector specific powers. For example, the FCA has separate redress powers under the Financial Services and Markets Act 2000 which the FCA can exercise using its own initiative.<sup>118</sup>

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<sup>118</sup> The Financial Ombudsman Service (FOS) is also an option for customers in certain circumstances if the customer is unhappy with the response received (further information is available at [the FOS website](#)).