

# Guidance on the CMA's approval of voluntary redress schemes

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This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

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## 1. Introduction

### Scope of guidance

- 1.1 This guidance outlines the provisions in the Competition Act 1998 (CA98), introduced by the Consumer Rights Act 2015 (CRA15), which permit a person (the applicant) to submit a voluntary redress scheme to the Competition and Markets Authority (CMA) for approval.<sup>1</sup>
- 1.2 The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.<sup>2</sup> To enable it to carry out its functions, the CMA has a range of statutory powers.
- 1.3 Under the CA98 as amended, the CMA is empowered to approve voluntary redress schemes, enabling consumers and businesses affected by a breach of competition law to come forward and claim compensation. Where a business sets up 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. While businesses are free to set up redress schemes and make compensatory payments of their own initiative and without CMA approval, CMA approved voluntary redress schemes provide a statutory process through which multiple redress offers can be made quickly and easily, as a lower cost alternative to litigation. A redress scheme is therefore a mechanism to settle claims that might otherwise be brought in court.<sup>3</sup> Accordingly, it is similar to a form of alternative dispute resolution (ADR).
- 1.4 The CMA is required to publish guidance on applications for approval of redress schemes, CMA approval of such schemes, and the CMA's power to enforce approved schemes.<sup>4</sup> This guidance was approved by the Secretary of State as required under section 49C(10) of the CA98 on [date] 2015. It was published and came into effect on [date] 2015. The CMA will have regard to this guidance when carrying out its approval role under the CA98.
- 1.5 Businesses seeking to provide compensation under schemes – and members of independent boards<sup>5</sup> appointed to determine compensation in relation to a

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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](#).

<sup>3</sup> For that reason, disclosures between the CMA, businesses applying for scheme approval and independent boards appointed under the scheme will be conducted without prejudice.

<sup>4</sup> Section 49C(9) of the CA98, as amended by the CRA15.

<sup>5</sup> The role of the independent board (referred to as the Board) is explained in paragraphs 3.1 to 3.32.

scheme – are also expected to have regard to this guidance when applying for approval of schemes and carrying out their roles and obligations under the legislative framework for scheme approval.

## **Breaches of competition law that may be covered by a CMA approved redress scheme**

- 1.6 Redress schemes eligible for CMA approval may relate to decisions made by the CMA, sector regulators with concurrent powers under the CA98, and the European Commission. These decisions may find, as appropriate, 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 II prohibitions of the CA98 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
- 1.7 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 which:
  - fix the prices to be charged for goods or services;
  - limit production; or
  - carve up or share markets.
- 1.8 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.
- 1.9 Articles 101 and 102 of the TFEU apply to agreements or conduct which 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.

- 1.10 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>6</sup>
- 1.11 While a redress scheme may also concern decisions made by sector regulators or the European Commission, the UK government's policy is for only the CMA to approve redress schemes. Accordingly, references in this guidance to the CMA do not also include sector regulators.

### **Right of those who have suffered harm from competition breaches to obtain redress**

- 1.12 Anyone who has suffered harm caused by an infringement of Chapter I and Chapter II of the CA98 and/or Articles 101 and 102 of the TFEU has a right to full compensation for that harm.
- 1.13 The right to full compensation for harm caused by competition law infringements, recognised by the courts,<sup>7</sup> is also laid down in the 2014 European Directive on certain rules governing actions for damages which has to be transposed into national law by 27 December 2016.<sup>8</sup> On the right to full compensation, Article 3(2) of the Directive provides that 'full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed'. Article 3(2) states this shall cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

### **Scope of the CMA's power to approve redress schemes**

- 1.14 An overview of the process for CMA approval of redress schemes is set out in Figure 1 on page 7 below.

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<sup>6</sup> Available at [www.gov.uk/cma](http://www.gov.uk/cma). 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>7</sup> The Court of Justice of the European Union confirmed the availability of damages where harm results from a competition law infringement in the case of *Courage v Crehan* [2001] ECR I-6297. This has been further confirmed and developed in a number of subsequent cases.

<sup>8</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Directive). Following the Directive's publication on 5 December 2014, Member States have two years in which to implement its provisions into national law.

- 1.15 A person (which may include more than one business applying jointly) who has infringed competition law<sup>9</sup> may apply to the CMA for approval of a voluntary redress scheme.<sup>10</sup>
- 1.16 An application can be submitted to the CMA where an infringement decision has already been made by the CMA, a sector regulator or the European Commission. An application can also be submitted during the course of an ongoing investigation. The CMA may consider an application before an infringement decision has been made. However, it may only approve the scheme after the infringement decision has been made or, in the case of a CMA decision, at the same time as it is made.
- 1.17 The Secretary of State has made regulations relating to the CMA's approval of redress schemes under section 49C(8) of the CA98<sup>11</sup> – *The Competition Act 1998 (Redress scheme) Regulations 2015* (the Regulations) – which govern how the CMA considers redress schemes.<sup>12</sup>
- 1.18 The Regulations provide that any redress scheme submitted to the CMA for approval must contain certain information (Required Information). Required Information includes:
- details of the redress scheme;
  - the names of the Chair and other Board members;
  - confirmation that Board members have no conflict of interest;
  - confirmation that the majority of the Board approved the scheme;
  - arrangements to ensure the Board had access to relevant information held by the applicant;
  - confirmation that the scheme will operate for at least nine months; and
  - confirmation that a third party may not submit a claim.
- 1.19 Where the CMA considers that a redress scheme contains all the Required Information specified in the Regulations, it may approve the scheme unconditionally.

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<sup>9</sup> See paragraphs 1.6 to 1.10 above.

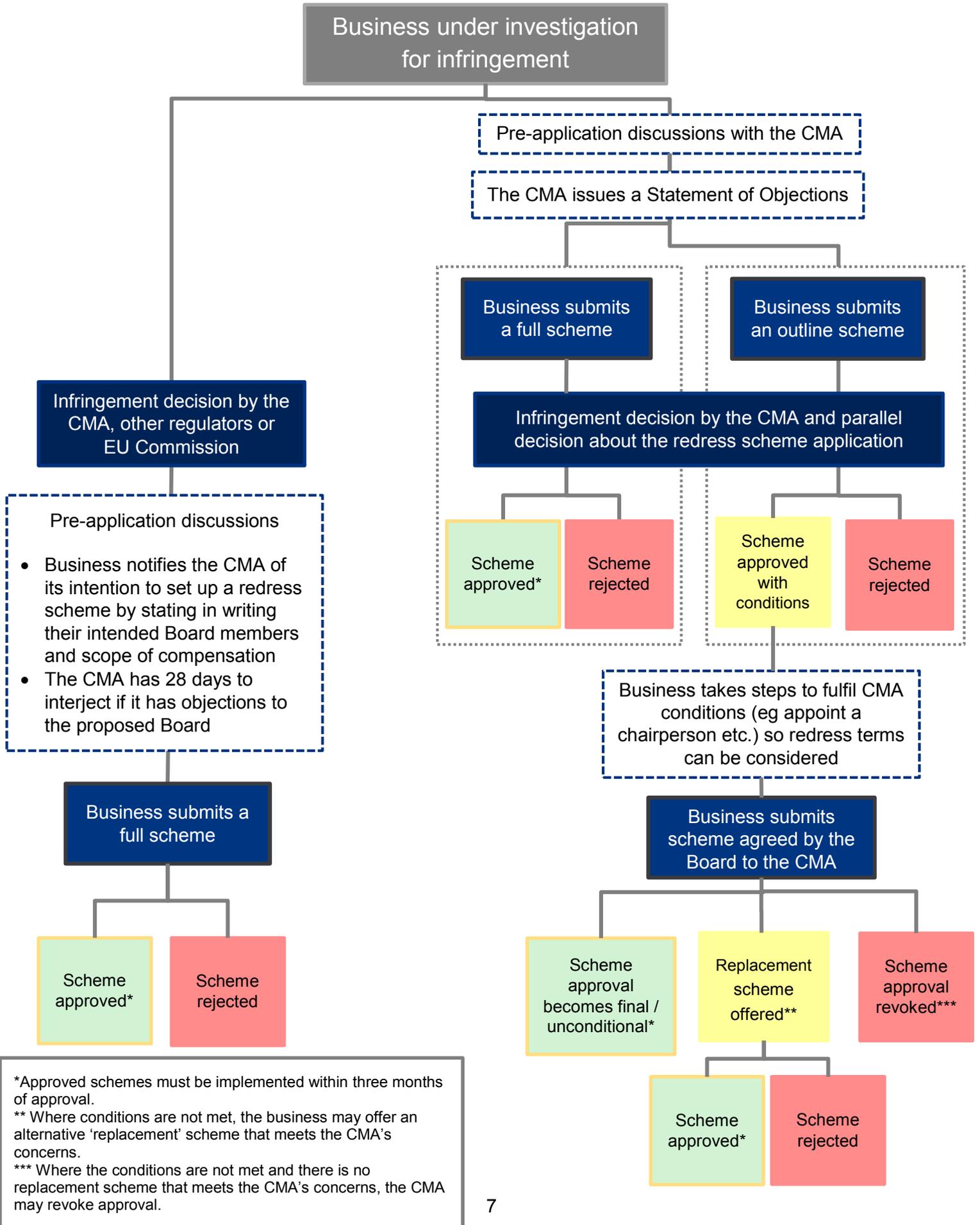
<sup>10</sup> Only the CMA may approve schemes. Regulators with concurrent powers under the CA98 do not have this function.

<sup>11</sup> As introduced by the CRA15.

<sup>12</sup> SI [to be confirmed]/2015. The Regulations will come into force on [to be confirmed] 2015.

- 1.20 If the redress scheme does not contain all of the Required Information when the CMA reaches an infringement decision, the CMA may still approve an outline scheme, but it must impose conditions requiring the provision of the missing Required Information. The CMA may also impose conditions requiring the provision of other information about the operation of the scheme, including about the amount or value of compensation to be offered under the scheme and how this will be determined. Where such information conditions are imposed, the CMA may also impose other conditions, such as the provision of the information by a particular date or that the CMA and the Board must be provided with complete and accurate information in all material respects.
- 1.21 The CMA may revoke such conditional approval if any of the conditions (information and/or non-information related) are not met. Alternatively, the CMA'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, although no further conditions can be imposed in relation to a replacement scheme.
- 1.22 The CMA is not able to grant conditional approval of schemes that relate to infringement decisions of a concurrent regulator or the European Commission. In respect of such infringement decisions, the CMA is able to consider only full schemes rather than outline schemes and, if granting approval, do so without conditions.
- 1.23 Further details about applications for redress scheme approval and the CMA's assessment and approval process can be found in Chapter 3 of this guidance.

Figure 1



## How approved voluntary redress schemes fit within the overall redress framework

- 1.24 A person (which may include more than one business applying jointly) found liable for a breach of competition law is able to voluntarily offer redress to those affected by the breach. A CMA approved redress scheme is designed to make it easier and quicker for consumers and businesses to gain access to compensation following a competition law infringement than seeking redress through the courts, as it provides a statutory mechanism for businesses voluntarily to offer and administer redress.
- 1.25 A CMA approved redress scheme is similar to a form of ADR insofar as it provides an alternative mechanism to pursuing private actions for compensation in the courts. A redress scheme should include a requirement that anyone who receives compensation under it does so in full and final settlement. This means that they would not be able to pursue a private action for the same loss. For the consequences consumers or businesses may face by participating in a redress scheme, and the right to bring a private action for damages, please refer to paragraphs 4.11 to 4.14 below.
- 1.26 In terms of seeking redress through the courts where voluntary redress schemes are not used or are not available, private actions for damages<sup>13</sup> may be brought by an individual or business before a court if it has suffered loss as a result of a relevant infringement of competition law. The following UK courts have jurisdiction to hear competition law cases:
- The Chancery Division of the High Court of England and Wales.<sup>14</sup>
  - The Court of Session and Sheriff Court in Scotland.
  - The High Court of Northern Ireland.
  - The Competition Appeal Tribunal (the CAT).
- 1.27 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.

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<sup>13</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.

<sup>14</sup> In some circumstances, the Commercial Court may hear cases. See Rule 58.1(2) of the [Civil Procedure Rules](#).

1.28 Two forms of private action should be distinguished:

- **Follow-on actions:** If a relevant competition authority, such as the CMA, a sector 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.

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.

1.29 A claimant may bring a private action for damages on an individual basis. A private action for damages may also be brought on a collective basis by representatives on behalf of a group of claimants. Collective proceedings are intended to facilitate claims where a large number of persons have suffered similar losses, but each loss may be too small for an individual claim to be practically or financially viable or attractive. They may also be appropriate where individuals are vulnerable/disadvantaged and unlikely to take actions themselves. This might happen, for example, where a large number of consumers have each been overcharged a relatively small sum as the result of a cartel.

1.30 Under the CA98 (as amended by CRA15), it is possible for a person or body representing a number of claimants<sup>15</sup> or a representative of a class of claimants to bring collective proceedings for damages. For collective proceedings brought in the CAT,<sup>16</sup> the CAT is required to certify whether a case is suitable for a collective action, and whether such an action should proceed on an 'opt-in' or an 'opt-out' basis:<sup>17</sup>

- **Opt-in collective actions:** collective actions may be brought on behalf of named victims of a competition infringement. This means that a person will

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<sup>15</sup> For example, the Consumers Association (known as Which?) brought a representative action in the CAT in *The Consumers Association v JJB Sports plc* (Case No 1078/7/9/07).

<sup>16</sup> Collective actions are possible in the ordinary courts but under separate legal provisions. These are beyond the scope of this guidance, which refers to CAT collective actions only.

<sup>17</sup> Section 47(B) of the CA98.

be included in the action only if they expressly agree to join or 'opt-in' to the action.

- **Opt-out collective actions:** collective actions may be brought on behalf of a class of victims of a competition law infringement at large and they will be included in the action unless they 'opt-out' of it by a certain date in the manner prescribed by the CAT.

- 1.31 In either case, the underlying claimants could be consumers or businesses, or a combination of the two. As noted above, claims may be brought either by an appropriate claimant on behalf of their fellow claimants, or by a body that is a genuine representative of the claimant, such as a trade association or consumer association (the government policy is that this may not include law firms, third party funders or special purpose vehicles). Collective proceedings are possible for both follow-on and stand-alone cases.
- 1.32 The CAT Rules of Procedure<sup>18</sup> provide for a range of safeguards within the collective actions regime to protect against frivolous or unmeritorious cases being brought.<sup>19</sup>
- 1.33 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 to quickly and easily settle cases on a voluntary basis.<sup>20</sup> Further details on the operation of collective actions and the CAT's approval of collective settlements are set out in the CAT Rules of Procedure.

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<sup>18</sup> The CAT Rules of Procedure are available on [the CAT webpages](#).

<sup>19</sup> The precise content of the CAT Rules is to be confirmed, but safeguards are expected to include, among others, a process of certification, including a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case; applying the loser-pays rule in the assessment of costs and expenses; and prohibiting contingency fees, also known as Damages Based Agreements or DBAs (for opt-out only).

<sup>20</sup> Sections 49(A) and 49(B) of the CA98, as inserted by the CRA15.

## 2. Content of applications for redress scheme approval and CMA assessment process

- 2.1 This chapter sets out guidance on (i) the information and additional content that the CMA would expect to see in redress schemes submitted for approval and (ii) the process the CMA expects to follow when assessing applications for approval. As noted above, the Regulations also set out the Required Information.

### Pre-application discussions with the CMA

- 2.2 Where a potential applicant is considering setting up a redress scheme it wishes the CMA to approve, in order to avoid wasting resources it should approach the CMA at the earliest opportunity for an initial discussion of whether the CMA is likely to prioritise assessing an application for scheme approval. In multi-party infringements, parties may choose to seek CMA approval for joint schemes.
- 2.3 The CMA has a discretion whether or not to consider schemes for approval. It will decide whether to consider applications for approval on a case by case basis according to its published prioritisation principles, as appropriate.<sup>21</sup> In multi-party cases, the CMA would generally expect to treat applications for approval made by a party as confidential regarding both the other parties under investigation and third parties until the point it issues a draft penalty statement. However, as the CMA puts such statements on its investigation file for inspection,<sup>22</sup> other parties may become aware of the fact that an application has been submitted for approval. As noted below, the CMA would expect to place a summary of a decision to approve a scheme on its website.
- 2.4 The CMA will not consider any expression of interest in setting up a redress scheme as an admission of the infringement being considered by the CMA. Neither will the CMA consider it inconsistent for a party to seek CMA approval of a scheme while exercising its rights of defence during the course of an investigation. Ultimately, however, it is likely to be impracticable for a party to contest liability at the point of infringement decision and/or appeal a CMA infringement decision on liability grounds – or other grounds challenging material aspects of the CMA’s infringement finding – and at the same time seek CMA approval for a scheme. Paying compensation in order to meet

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<sup>21</sup> See the [CMA Prioritisation Principles](#).

<sup>22</sup> In accordance with the CMA’s procedures and the relevant legal framework. See the CMA guidance document [Guidance on the CMA’s investigation procedures in Competition Act 1998 cases: CMA8](#).

scheme obligations will usually be inconsistent with challenging the CMA's decision that there was an infringement.

## **Application content<sup>23</sup>**

- 2.5 The application must be in writing and must contain a summary of the scheme. As explained in further detail below, applications to the CMA for approval of a voluntary redress scheme should be made using the relevant template application form available on the CMA webpages at [to be confirmed]. 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 a CMA investigation only) where no infringement decision has been issued yet. The relevant form must be signed by an appropriate senior representative of the business, such as a director. Forms may be submitted electronically.
- 2.6 The application form should be supported by evidence that the process for setting up the scheme, as well as the scheme's terms, comply with the requirements of the Regulations. This must include the matters in paragraphs 2.7 and 2.8 below.
- 2.7 The application must contain details of the Board<sup>24</sup> that has considered or will consider the scheme. This must include:
- the names of the Chair and members of the Board;
  - a declaration that the members of the Board have no conflict of interest;
  - details of the arrangements to ensure the Chair and the other Board members will have access to relevant information held by the applicant or evidence that they have had such access;
  - confirmation that the Chair and other Board members have considered the 'relevant matters'<sup>25</sup> (as further detailed below at paragraph 2.10 below) and anything else deemed relevant, and otherwise complied with this guidance (or an explanation of why it was necessary to take a different approach to the guidance); and

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<sup>23</sup> The Regulations set out the Required Information to be included in an application for approval (Regulation 5(1)).

<sup>24</sup> Chapter 3 of this guidance sets out further information as to the Board, including how it is appointed and its composition.

<sup>25</sup> As defined under Articles 5(2)(a) to (e) of the Regulations.

- evidence that the majority of the persons comprising the Chair and the Board members have approved the terms of the redress scheme.
- 2.8 As set out in the Regulations,<sup>26</sup> if, when the CMA makes an infringement decision, the redress scheme does not contain all of the Required Information, the CMA may approve the outline redress scheme subject to conditions at the same time as it reaches its infringement decision. These conditions must include the satisfactory provision by the compensating party of the missing Required Information and may include further conditions, such as a requirement that the information be provided by a particular date. For example, where the names of the Board members were not yet available when the CMA made an infringement decision, the CMA could nevertheless approve an outline scheme subject to the condition that the names of the Board's members would be provided by a specified date and that the CMA was satisfied with the Board members actually appointed. The need for the CMA to be satisfied that the required conditions have been met applies to all information conditions and other conditions imposed.
- 2.9 As noted at paragraph 2.22 below, conditions will not be imposed on the applicant that have not first been discussed with and agreed by it.
- 2.10 The application must also include the following:
- Confirmation that those eligible to claim compensation must do so in an individual capacity.
  - The terms of the redress scheme.
  - Confirmation that the scheme will operate for at least nine months from the date it commences, as specified by the Regulations. However, the CMA would expect a party to consider carefully whether in all the circumstances schemes should be open for longer.
  - Details of the application process for claims for redress and estimates as to how long it will take to determine applications for compensation.
  - Details of who is eligible to claim compensation and about the scope of compensation offered under the scheme. There are likely to be two key aspects to this:
    - First, there will be a need for an outline scheme put to the CMA for approval to define the category of persons that the scheme is intended

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<sup>26</sup> Article 4(2) of the Regulations.

to compensate, ie those who are eligible to claim under the scheme. In this regard:

- compensating parties will need to decide, for example, whether a scheme will cover indirect as well as direct purchasers. Other decisions for compensating parties might include whether compensation will cover 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'); and
- compensating parties will also need to make decisions about variable compensation. For example, depending on the circumstances, victims may have suffered varying 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.

The CMA would normally expect schemes to cover harm that has been caused to both direct and indirect purchasers. The CMA would be unlikely to approve schemes that did not cover harm that had been caused to indirect purchasers unless there was a compelling reason for such an approach.

- Second, there will be a need to stipulate what proof of harm a potential beneficiary under the scheme needs to provide. Such evidential requirements must be fair and reasonable. The CMA will either consider these requirements before it approves the scheme, or make its approval conditional on the CMA being satisfied in due course that the requirements are fair and reasonable. For example:
  - in an infringement relating to air travel, the names of the passengers, the dates and the flight itinerary 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 CMA would expect businesses setting up a scheme to use information at their disposal to facilitate claims 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.
- The process by which potential beneficiaries should apply for compensation under the scheme and the procedures for handling claims, including any evidential requirements. This may vary on a case by case basis, but as a minimum it should include an identification number per claim and a reasonable timetable for notifying potential beneficiaries whether their claim has been accepted and for when compensation will be paid.
  - Details of how the scheme will be advertised and those eligible notified of their entitlement. Compensating parties will be expected to target the advertising of their scheme through appropriate channels, taking into account the nature of the product or service the compensation relates to, including specialist and social media. The CMA will also generally expect parties to advertise the scheme on their own website (if they have one), and to contact potential beneficiaries they have contact details for where this is reasonable (for example, if the compensating parties are able to do so by email). It may also be appropriate for parties to notify consumer bodies who might be approached by potential beneficiaries regarding the scheme (for example Which?, Citizens Advice, and the Federation of Small Businesses). Parties should also include in their application contact details for those who can deal with queries about schemes when the CMA announces that it has approved a scheme.<sup>27</sup>
  - Specifics of when the scheme is expected to commence, which should be no more than three months after the date of approval by the CMA or, in the case of conditional approval, no more than three months after the CMA has confirmed that the conditions of the scheme have been met.

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<sup>27</sup> See paragraphs 2.32 and 2.33 below.

Compelling reasons should be given if compensating parties consider that a later commencement date is appropriate.

- Details of the complaints process available for those seeking compensation.
- Information about what the consequences of accepting redress under the scheme are for potential beneficiaries. It should be clear that a scheme beneficiary who has accepted redress offered under the scheme is precluded from bringing an individual private action for damages or from participating in a collective action with respect to that loss. Equally, it should be clear that accepting redress for one particular type of loss or only part of the loss suffered should not prevent a beneficiary from pursuing redress for any additional loss not covered by the scheme.<sup>28</sup> If the scheme covers only direct losses, beneficiaries will still be able to seek redress for any indirect losses they have also suffered through other means. Schemes should also include a clear statement of the type and extent of compensation that is being offered in order that potential beneficiaries can evaluate appropriately whether to accept redress under a scheme or pursue redress through another route.

2.11 The CMA would normally expect this to include information on how a party will resource the scheme and how they will monitor whether the scheme is operating successfully.

## **CMA assessment process**

2.12 It is the responsibility of an appropriately constituted Board, meeting the requirements of the Regulations and having regard to this guidance, to fully assess key matters relating to the redress offered under the scheme. These key matters include the evidence of harm caused, whether the level of compensation offered is appropriate in light of that, the category of persons eligible for compensation under the scheme, and the terms and conditions of the scheme. Both the Board and businesses seeking approval are expected to comply with the approach set out in this guidance when performing their roles in relation to the scheme, unless they can demonstrate to the CMA's satisfaction that there are good reasons for taking a different approach.

2.13 The Board is 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 compensating party in determining the amount of redress for

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<sup>28</sup> See further paragraphs 4.13 and 4.14 below.

each beneficiary. The CMA will take the Board's report into account when deciding whether to approve a full scheme (where one is submitted during a CMA investigation, or following the infringement decision of the CMA, the European Commission or a sector regulator) or whether any conditions imposed have been met (where an outline scheme during a CMA investigation is approved subject to conditions).

- 2.14 The CMA's role is limited to assessing whether the scheme has been set up according to the process specified in the Regulations, and will not involve considering in detail the underlying elements of the scheme, particularly where such a detailed assessment would duplicate or undermine in practice the work of a properly-constituted Board. The CMA may nevertheless take into account any information that has been provided to it on proposed compensation under the scheme, and the justification for it, when deciding whether to approve an outline scheme or whether any conditions imposed have been met. The CMA may, but is not obliged to, take into account the level of compensation offered.
- 2.15 If the CMA decides to consider an application (see paragraphs 2.2 to 2.4 above), it will aim to assess applications and notify applicants of the outcome within a three month timescale in the majority of cases.<sup>29</sup> However, formal scheme approval will not take place until the CMA makes its infringement decision.
- 2.16 The CMA may approve a scheme in one of the following three scenarios, depending on whether an infringement of competition law has already been established when the application is submitted. The scenarios are:
- where the compensating party is under CMA investigation for a suspected infringement and wishes to submit a scheme outline for approval;
  - where the compensating party is under CMA investigation for a suspected infringement and wishes to submit a full redress scheme for approval; and
  - where an infringement decision has already been made by the CMA, the European Commission or a sector regulator against the compensating party and the latter wishes to submit a full redress scheme for approval.
- 2.17 Applications for approval of an outline scheme or a full scheme during the course of an ongoing CMA competition investigation are normally expected to

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<sup>29</sup> Article 4(6) of the Regulations requires the CMA to notify an applicant of its decision to approve or not 'within a reasonable period of time'.

be submitted after the CMA has issued its Statement of Objections to parties under investigation.

- 2.18 During its assessment, if the CMA has concerns regarding any of the matters it may take into account when deciding whether to approve a scheme, it will inform the applicant and give it an opportunity to respond before finally approving or dismissing the scheme. If any changes to the terms of the scheme initially submitted to the CMA 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 CMA 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 by which they are content to be bound before any CMA approval of the scheme.
- 2.19 If the CMA is considering rejecting a full scheme submitted to it for approval, or revoking approval where conditions imposed under an outline scheme have not been met, based on the assessment described at paragraphs 2.14 to 2.16 above, it may request further justification or evidence of harm from the Board. If the Board provides any such information to the CMA, it will do this with notice to the party that provided the information. Provision to the CMA 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).

### **Approval process during the course of an ongoing CMA competition investigation**

- 2.20 Where a scheme is submitted for approval before an infringement decision has been made in a CMA investigation, an outline scheme or a full scheme may be submitted to the CMA. It should be noted that the CMA will not consider applications for approval before an infringement decision is made in respect of infringements being pursued by sector regulators or the European Commission.
- 2.21 Where the compensating party submits an outline of the scheme, the CMA will consider whether or not to approve it. In accordance with section 49C of the CA98, the CMA would expect to approve an outline of a redress scheme subject to a condition or conditions requiring the provision of further information about the operation of the scheme. This information is likely to include the amount or value of compensation to be offered under the scheme, or how this will be determined. The CMA would expect to make its approval of a redress scheme subject to certain such information conditions. These might

typically include (but are not limited to) compensating parties providing the CMA with:

- a copy of the Board's report specifying the exact level of redress to be offered under the scheme, and explaining the methodology that the Board applied to arrive at that level (and including details of any minority views where the Board's determination was not unanimous); and
- details of the Board members actually appointed.

2.22 As noted above, where the CMA makes its approval conditional upon certain information conditions being satisfied, it may also set other conditions for approval. The CMA will discuss any conditions it plans to impose with the applicant before they are imposed. If agreement on the conditions cannot be reached, the compensating business will be given the opportunity to withdraw its application before conditional approval is given, and therefore before a scheme binds the compensating business. This will ensure that participation in the scheme by the compensating party remains entirely voluntary.

2.23 Any missing information required by the Regulations provided after the CMA's approval, including any information provided in accordance with the information conditions, will form part of the terms of the scheme.

2.24 In respect of further conditions imposed alongside information conditions, the CMA will consider conditions case by case. However, it would generally expect to impose at least the following conditions that:

- any information required under conditions must be provided by a particular date;
- the CMA does not have significant concerns with the Board's subsequent determination of the precise level and details of compensation, or the compensation that businesses ultimately offer under the scheme;<sup>30</sup>
- the compensating party cooperates fully with the Board (including, for example, in relation to reasonable and proportionate information requests and providing all assistance the Board may reasonably require in order to discharge its functions) and that the information it

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<sup>30</sup> This scenario might arise where, for example, the Board determined compensation that went further than the scope of the outline scheme approved by the CMA – and the CMA agreed that was appropriate – but the business was not prepared to offer that level of compensation through a replacement scheme. See further the final bullet point of paragraph 2.24, below.

provides to the Board and the CMA is accurate and complete in all material respects;

- the CMA is satisfied that the specific Chair and individuals subsequently appointed to the Board meet the strict eligibility criteria regarding the terms of their appointment; and
- the Board and compensating parties comply with the terms of this CMA guidance document (unless they demonstrated to the CMA's satisfaction that there were good reasons for taking a different approach).

Any condition relating to the operation of the Board and/or the provision of further information will ensure that the parties' communications with the Board (and, as necessary, the CMA) continue to attract without prejudice privilege.

- The CMA may revoke approval of the scheme if any conditions imposed by the CMA are not met. If the CMA has approved a redress scheme subject to the condition that the CMA will not have significant concerns with the Board's determination of the precise level and details of compensation, the CMA may revoke approval for a redress scheme in exceptional circumstances only. The CMA may decide to revoke its approval of the scheme if, for example:
  - it considers that there are material/manifest errors in the methodology followed by the Board for the purposes of calculating the precise level of compensation. In those circumstances the CMA may choose to request that the Board reconsiders and re-takes its decision, or the relevant parts of it, with approval revoked only if the same or similar issues persist;
  - it becomes apparent to the CMA that significant information and evidence was withheld from the Board when the Board was making its determination; or
  - there are strong indications that there has been an attempt to deceive the CMA about the appropriate level of compensation to be offered under the scheme.
- The CMA may approve a redress scheme as a replacement for the original scheme. In some circumstances, the CMA may find it appropriate to approve a replacement scheme which has been voluntarily offered by the compensating parties. As an infringement decision will have already been made, the replacement scheme must be capable of being approved

without conditions, as a full scheme will be required rather than an outline scheme. The CMA is likely to approve a replacement redress scheme where that replacement scheme improves the scheme preliminarily approved by the CMA. In addition:

- the CMA may approve a replacement redress scheme where this amends the scheme preliminarily approved by the CMA in order to ensure that the scheme will operate as intended. This may be the case, for example, where the CMA has identified errors in the methodology followed by the Board that the compensating parties are willing to rectify by offering a replacement redress scheme, or there has been a material change of circumstances necessitating a change;
- the CMA is unlikely to approve a replacement redress scheme where the compensating parties have acted in bad faith as a result of which a replacement scheme has become necessary; and
- the CMA may also consider approving a replacement scheme that has been amended by the Board following the outline scheme approved by the CMA, where it considers the amendments are beneficial. If the applicant does not offer a replacement scheme incorporating the Board's changes, the CMA may revoke its earlier conditional approval and the scheme will not go ahead. As noted above, in order to allow for such a possibility, the CMA will generally impose a condition that approval is subject to the CMA not having significant concerns with the actual compensation ultimately offered by the business.

2.25 As noted previously, in cases where the CMA considers a scheme for approval during the course of an ongoing CMA investigation under the CA98, any formal approval of a scheme (with or without conditions) cannot be given until the CMA makes its final infringement decision. The scheme may then be approved at the same time. However, in the majority of such cases, if the CMA planned to approve a scheme, it would expect to give compensating parties a preliminary indication of that fact within approximately three months of receiving a formal application for approval, even if any approval is not formalised until later. In order to facilitate this, parties are expected to provide either an outline or full scheme. Any preliminary indication that the CMA planned to approve a scheme would not prevent the CMA from making a later final decision to reject a scheme.

2.26 The CMA does not expect to publicise that an application for approval of a scheme has been submitted during the course of an ongoing investigation. Neither does it expect to publicise any preliminary intention to approve or reject such an application. Similarly, compensating parties are expected not to

disclose that they have applied, or taken steps to apply, to the CMA for approval of a scheme without first consulting the CMA.

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

- 2.27 Where an infringement decision has already been made, including by another regulator, the CMA can only consider a full redress scheme. It cannot consider an outline redress scheme.
- 2.28 The CMA is unable to impose conditions where scheme approval relates to an infringement decision that has already been made. Therefore, prior to submitting a formal application for approval in such a case, the applicant must first notify the CMA of its intention to set up a redress scheme by stating in writing the proposed Board Chair it has chosen and the other Board members that the proposed Chair has chosen. The applicant must also inform the CMA of the intended scope of compensation. If the CMA considers that the Board does not meet the relevant criteria, it has 28 days in which to interject. If the CMA does not interject, the applicant will proceed with formally appointing the Chair of the Board who will, in turn, formally appoint the remaining members of the Board it had proposed.
- 2.29 The Board then determines the precise levels of compensation and decides, by majority vote, whether or not the scheme will be submitted for approval to the CMA. If the application is submitted formally to the CMA for scheme approval, the CMA will then determine whether to reject the application or approve the scheme unconditionally, taking into account the relevant matters set out in paragraphs 2.5 to 2.19 above.

### **Notification of the CMA's approval decision**

- 2.30 After it has finalised its assessment of an application, the CMA 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 the application was made during the course of a CMA investigation, a brief description of any conditions to which its approval is subject (including any associated deadlines by which such conditions must be met).

- 2.31 Issue of this document will constitute the CMA's formal approval or rejection of a scheme.<sup>31</sup> If a scheme is approved, the decision document will include the agreed terms of the scheme that the CMA has approved and by which the party will be bound, as well as any conditions that the CMA may have imposed.
- 2.32 The CMA will publish a brief summary of its decision to approve a scheme, whether subject to conditions or not, on its webpages.
- 2.33 The CMA will also include on its webpages a link to the details of the scheme held on the compensating party's website or other contact details for the compensating party as appropriate.

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

- 2.34 If it is considering approving a scheme in relation to a potential CMA infringement decision,<sup>32</sup> the CMA will consider whether – were it to decide 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 CMA issues in accordance with its procedures in CA98 cases.<sup>33</sup>
- 2.35 The CMA retains discretion to decide whether a scheme merits a penalty reduction – there is no absolute right to a penalty reduction.
- 2.36 However, if a compensating party disagrees with the amount of the penalty reduction (if any) proposed by the CMA, it will be provided with an opportunity to withdraw its application before the CMA formally approves the scheme. This will ensure that participation in the scheme by the compensating party remains entirely voluntary.
- 2.37 While there is no right to a penalty reduction, the CMA expects that in the majority of cases where it approves a scheme it will reduce the penalty it

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<sup>31</sup> If the CMA has completed its assessment of an application in advance of having made an infringement decision, the CMA will typically provide the compensating party with a draft of this document. When the CMA makes its infringement decision, it will issue the document formally.

<sup>32</sup> The CMA will only be able to consider making penalty reductions in its own investigations.

<sup>33</sup> Once any written and oral representations made on the Statement of Objections have been considered, if the CMA is considering reaching an infringement decision and imposing a financial penalty on a party, the CMA 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 CMA proposes to impose on that party, based on the information available to the CMA at the time. See CMA8, referred to at note 22 above.

would otherwise have imposed to recognise the provision of redress through the setting up of the scheme.

- 2.38 Any penalty discount is likely to be up to a maximum of 10% of the penalty the CMA would otherwise have imposed.
- 2.39 When deciding the precise level of any penalty discount, the CMA may take into account, among other factors, the terms of the redress scheme. However, the CMA 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. The CMA may also take into account evidence from the parties offering the scheme relating to the likely administrative costs of implementing such a scheme, if provided.
- 2.40 As set out in Chapter 5 below, if a party seeks to withdraw from a scheme after it has been approved, the CMA will consider whether it is appropriate to exercise its legislative power to enforce adherence to the scheme. The CMA would expect to take steps to recover from the business in question any penalty discount they had received in such a case. The CMA would also expect to seek recovery of any penalty discount where a business did not comply with conditions imposed on approval of an outline scheme and such approval was revoked by the CMA.

### **Recovery of CMA costs**

- 2.41 Section 49D of the CA98 provides that the CMA may recover its reasonable costs relating to an application for approval of a redress scheme.
- 2.42 The CMA 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.
- 2.43 If the costs that need to be paid under this section relate to an approved scheme, the CMA may revoke scheme approval if the costs have not been paid by the date specified in the written notice.
- 2.44 Costs that need to be paid under this section are recoverable by the CMA as a debt.

- 2.45 The CMA will seek to recover all its reasonable costs in the vast majority of cases but, in exceptional circumstances, it may decide to seek to recover only a portion of its costs. In determining the amount of costs to be recovered from a party or parties, the CMA may also consider the size and financial position of the relevant parties applying for approval.
- 2.46 If a party withdraws an application before the CMA has decided whether to approve or reject the scheme, the CMA has no power to enforce the scheme. However, in such a case the CMA would nevertheless generally expect to recover from the party in question the full amount of its reasonable costs of assessing the application.
- 2.47 A person required to pay costs under this section may appeal to the CAT against the amount.

### 3. Constitution and role of the Board

#### The Board

##### *Function*

- 3.1 The redress scheme involves the applicant setting up a Board which will be responsible for determining compensation under the scheme and which will consist of at least four people.<sup>34</sup>
- 3.2 To determine appropriate compensation, the Board will need to examine the broader scheme framework. For example, this may include the proposed application process and terms and conditions, as well as evidence relating to the harm caused by the infringement. In making this assessment, the Board may decide to confirm some proposed terms, but to revise others.
- 3.3 The Board will consider the following matters:
- The evidence that the compensating party has provided about the harm caused to potential beneficiaries,<sup>35</sup> and how this has been aggregated. It may also be necessary for the Board to obtain further evidence of harm itself in certain cases.<sup>36</sup> In addition:
    - it is for the Board to decide on the amount of compensation it considers appropriate, based on relevant factual and economic evidence provided by the parties, and using an appropriate framework/methodology;
    - the European Commission has published a practical guide to quantifying harm in private actions for damages for national courts,<sup>37</sup> and the principles contained in this guide may be of assistance to the Board. However, the CMA notes that the government created the possibility for the CMA 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 will be

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<sup>34</sup> See paragraphs 3.5 to 3.13 below.

<sup>35</sup> In this guidance, references to the 'scheme beneficiary' or 'potential scheme beneficiary' must be understood as references to either consumers or businesses, or both.

<sup>36</sup> See also paragraphs 3.31 and 3.32 below.

<sup>37</sup> See the guide published in the [Official Journal of the European Union](#).

significantly less than in, for example, a contested judicial process. As a result, such use will 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, it may be needed to determine the level of, or any passing on of, any overcharge caused by the infringement in order to facilitate indirect/consumer purchaser redress. The need for such evidence may vary case by case. For example, there might be a greater need for it where a full scheme is submitted for approval prior to a CMA infringement decision.

- The terms and conditions of the redress scheme.
- The appropriate level of redress for each beneficiary (although in some cases it may be more appropriate for the Board to calculate the aggregate level of redress owed to beneficiaries) and/or the methodology to be applied by the compensating party in determining that level of redress.
- The details of the application process for potential beneficiaries, including any evidence that is required.
- Details of how complaints about the rejection of an application for redress under the scheme will be dealt with.
- The plans for how the scheme will be advertised and identifiable potential beneficiaries notified.
- The proposals for distribution of redress money where beneficiaries cannot be identified or do not come forward.

3.4 The primary function of the Board will be to determine the terms of the redress scheme, whether prior to CMA approval or pursuant to a condition of approval. However, the Board may, at the request of compensating businesses, 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 it has made, or regarding the administration of the scheme in respect of individual customers or customer classes, for example in relation to complaints about the rejection of an application for approval. Whether such an approach is taken may vary case by case.

### ***Appointment of the Chair of the Board***

- 3.5 The applicant (the compensating party) will appoint a Chair who must be a senior lawyer or judge. Specifically, the Chair must:
- satisfy the judicial appointment eligibility condition on a five-year basis;<sup>38</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.
- 3.6 The CMA would also expect the Chair to demonstrate the appropriate experience and knowledge of competition law and practice, or any other relevant law and practice.
- 3.7 The Chair must be free from any conflict of interest between the interests of the applicant and those who may seek compensation under the scheme.

### ***Other members of the Board***

- 3.8 The Chair will be responsible for appointing the other members of the Board. In addition to the Chair, the Board must consist of:
- an economist with appropriate experience and knowledge of competition economics. The CMA 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;
  - an industry figure with experience of the industry of the compensating party and/or its customers; and
  - a representative concerned with the interests of those entitled to compensation under the scheme (the potential beneficiaries). 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. If the potential beneficiaries also include

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<sup>38</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.

businesses, there may be an additional representative, such as a trade association.

- 3.9 The Chair may also appoint any other suitable person they deem suitable, 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).
- 3.10 All members of the Board must possess appropriate qualifications and experience to carry out their functions effectively.
- 3.11 Each member of the Board must also be free from any conflict between their own interests and the interests of the compensating party or those who may seek compensation under the scheme.
- 3.12 As a condition of scheme approval, the CMA would expect the Board's terms of engagement to be clear, and to ensure the independence and objectivity of the Board in carrying out its functions (see further paragraphs 3.14 to 3.30 below).
- 3.13 The Board is to be remunerated by the compensating party. The CMA would expect the parties to agree a suitable and adequate remuneration structure and would expect members to be remunerated in a way that does not impede the Board's independence and objectivity. In particular, the Board's remuneration must not be dependent on the outcome of any aspects of its assessment of the scheme.

### ***Duties of the Board***

- 3.14 The Board members must act with:
- independence;
  - impartiality;
  - objectivity;
  - integrity; and
  - honesty.
- 3.15 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.

- 3.16 The Board members must act in accordance with their respective capacity and role.
- 3.17 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.
- 3.18 Whether there is an actual or potential conflict of interest should be determined case by case. A conflict may be likely to arise where the Board members have interests which might reasonably be perceived to, or might actually, influence their independence and/or impartiality in performing their functions. Such 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 compensating party within the previous two years, with the exception of their employment as members of a Board;
  - any financial interest in the compensating party;
  - publication of views or comments relating to the compensating party and/or the competition infringement in question;
  - a close personal association or relationship with a person who is working for or advising the compensating party;
  - in relation to the Chair or the economist, a history of acting predominantly for claimants or defendants that risks impeding their ability to perform Board functions impartially.
- 3.19 Even without an actual or potential conflict, the Board members must refrain from any activities that might interfere with or in any way compromise the performance of their functions.
- 3.20 The Board members must disclose to the Chair 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 Chair, such disclosure should be made to the compensating business and the CMA.

- 3.21 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.
- 3.22 If after appointment it becomes clear that a Board Member does not meet the impartiality criteria (for example, because they have an undisclosed conflict of interest), they should be removed from the Board and replaced with a new member who meets the relevant criteria described above. The compensating business should make the CMA aware of such an eventuality at the earliest opportunity.

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

- 3.23 The Board members are required to treat as confidential any information supplied to them in confidence (and appropriately identified as confidential) by the compensating party and any other persons from whom they may obtain relevant information, unless otherwise agreed with the provider of that information. While it should not often be necessary, disputes over confidentiality should be settled by an independent reviewer with appropriate experience and expertise.
- 3.24 The Board members must not make any disclosure of confidential 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 as members of the Board in assessing the scheme at hand.
- 3.25 All communications with the Board must be on a without prejudice basis, and are not to be adduced as evidence in court proceedings. Privilege over those communications is to be retained unless and until it is expressly waived by the person entitled to assert it. However, as an exception, the Board may share with the CMA – and the CMA may use – details of communications where necessary in the performance of their roles in the CA98 approval process.<sup>39</sup>

### ***Decision-making of the Board***

- 3.26 When the Board is examining a redress scheme, it may only approve the scheme by majority vote. If the number of votes are equal, the majority requirement is not met. In this case, the scheme may not be put to the CMA to confirm approval.

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<sup>39</sup> See paragraph 2.19 above.

- 3.27 Where the Board's decision is not unanimous, the Board's report on the scheme should make it clear that there are dissenting opinions, and should include details of the points of dissent and the reasoning behind them. The CMA will consider the Board's views, including dissenting views.
- 3.28 Whether a decision is unanimous or not, the Board will take collective responsibility for any decision made by it. However, the CMA would expect each member to take individual 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. The Board may take into account as appropriate the European Commission's published guidance on calculating redress.<sup>40</sup>
- 3.29 The Board's decision may include elements of compensation that go beyond the scope of the scheme initially proposed by the compensating party and approved by the CMA. In those cases, the compensating party will have the opportunity to state on the record its views on the Board's decision about the scheme. Such views may be taken into consideration by the CMA in its assessment of whether the imposed conditions have been met, or of an application for redress scheme approval.
- 3.30 If the Board's decision does go beyond the scope of the outline scheme approved by the CMA, the party may wish to proceed with the expanded scheme, or may instead be prepared to proceed with only the scheme as originally approved. If the party is willing only to proceed with the expanded scheme, the CMA will consider approving a replacement scheme. If the party wishes to proceed with the original scheme, the CMA will consider whether it is appropriate to revoke approval of the scheme or whether it is satisfied that the scheme should go ahead on the basis that was originally approved.

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<sup>40</sup> See the European Commission practical guide [Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union](#).

***Cooperation by the compensating party***

- 3.31 The compensating party is expected to cooperate fully with the Board within the timescales agreed with the Board. In particular, it is expected to provide the Board with all assistance and information it may reasonably and proportionately require in order to discharge its 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 personnel, books, records, documents and information of the compensating party that the Board may require, to the extent necessary and proportionate, in addition to the evidence referred to above;
  - providing information which is not related to the compensating party 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 Board will need to request that a compensating party obtains information that will require it to incur significant costs relative to the likely level of compensation; and
  - providing any office and supporting facilities that the Board may require.
- 3.32 The compensating party must not obstruct the Board from performing its functions, and the information and evidence it provides to the CMA and the Board must be complete and accurate in all material respects. If the CMA approves an outline scheme, it would generally expect to impose a condition to that effect, and may revoke approval if this condition is not met (see paragraph 2.24 above). Provision of false or misleading information may in certain circumstances also amount to a criminal offence.<sup>41</sup>

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<sup>41</sup> It is a criminal offence for a person to knowingly or recklessly supply information to the CMA in connection with a CA98 investigation which that person knows to be false or misleading in a material particular: section 44 of the CA98. The CMA 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 or the CMA information which is false or misleading in a material particular.

## 4. Claiming of redress

### How redress can be claimed

- 4.1 Schemes approved by the CMA will contain details of the terms and conditions under which redress may be claimed. To participate in a redress scheme, potential scheme beneficiaries must submit to the scheme administrator:
- an application for redress according to the process set out in the scheme; and
  - evidence of harm suffered that is capable of satisfying the evidential requirements of the scheme.
- 4.2 Claims for redress must be submitted before the closing date as specified in the scheme, unless otherwise stated. Redress schemes must be open for at least nine months, and their closing date must be specifically stated.
- 4.3 As noted at paragraph 2.10 above, the evidence requirements of a redress scheme must be fair and reasonable, and will be considered by the Board. They may vary according to the circumstances of the case.

### Where potential scheme beneficiaries can go to find details of approved redress schemes

- 4.4 As noted in Chapter 2, redress schemes must contain details of how they will be advertised to potential beneficiaries. The adequacy of the advertising plans is one of the factors that the Board will consider when examining a proposed scheme. It is also one of the factors that the CMA will consider when assessing applications for approval.
- 4.5 In addition to any specific forms of advertising provided in the scheme, existing approved redress schemes will be publicised on the websites of:
- the government ([www.gov.uk](http://www.gov.uk));
  - the Department for Business, Innovation and Skills ([www.gov.uk/bis](http://www.gov.uk/bis));
  - the CMA ([www.gov.uk/cma](http://www.gov.uk/cma)); and
  - the compensating party/parties.

- 4.6 Information about redress schemes that are already in place may be also available on the websites of relevant consumer organisations, such as Which? and Citizens Advice, or in specialist press.
- 4.7 If affected individuals can be reasonably identified, for instance, through a loyalty scheme, they must be notified directly by the compensating party or parties about the potential to claim redress. 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 milk or toothpaste.

### **What potential beneficiaries can expect from a redress scheme**

- 4.8 Redress schemes approved by the CMA are intended to provide a convenient and inexpensive way in which people who have suffered harm from a competition law infringement can expect to receive compensation for that harm. If a scheme is approved, the compensating party is under a legal duty to comply with the terms of an approved redress scheme.<sup>42</sup>
- 4.9 In particular, potential beneficiaries of a redress scheme can expect that its terms and conditions have been examined by a Board acting in an impartial manner. Among other factors, the Board assesses how reasonable the compensation offered is, taking into account the evidence of harm caused to victims, the way this has been aggregated, and any justifications for the proposed level of redress.
- 4.10 Additionally, when the CMA decides whether to approve a redress scheme, or whether conditions have been met where an outline scheme has been approved, as explained at paragraph 2.24 above, it may take into account any concerns it has with the compensation determined by the Board in exceptional circumstances.

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

- 4.11 Participation in a redress scheme approved by the CMA is entirely optional. Potential beneficiaries who decide not to claim redress under an approved scheme do not lose their right to seek compensation through other means, such as a private action before the CAT.

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<sup>42</sup> Section 49E CA98 as introduced by CRA15.

4.12 For example, the approval of a redress scheme by the CMA 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.

4.13 Nevertheless, a redress scheme may typically state that a scheme beneficiary who has accepted redress offered under the scheme 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. However, this should not be interpreted as preventing a 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.
- against other parties to the competition infringement which have not set up a voluntary redress scheme for the harm inflicted by their conduct.
- against the compensating party where the beneficiary's claim under the scheme was rejected.

4.14 The CMA will consider these terms of settlement in deciding whether to approve a scheme.

### **The complaints process**

4.15 Redress schemes approved by the CMA will include a complaints process that can be followed if a complaint arises in the course of a redress claim by a scheme beneficiary. Approved schemes must set out in detail how the complaints process operates. Recourse to the complaints process shall be free of charge for potential beneficiaries, and there will be no fee, whether refundable or not, for using it. The complaints process should be carried out by a third party independent of the compensating business, or by reconvening the Board for this purpose.

4.16 The outcome of the complaints process does not affect the consumer's right to otherwise seek compensation for their loss.

4.17 The CMA does 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 claim for redress on grounds of non-eligibility***

4.18 There may be various reasons why a claim may be rejected on grounds of non-eligibility. 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 eligibility; or
- the compensating party may be applying the terms of the scheme too strictly.

4.19 While the former two reasons might be legitimate grounds for rejecting an application, the latter would not be.

4.20 Potential beneficiaries whose initial claim for redress 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 appeal to an independent reviewer, as specified in the scheme, through the independent complaints process; or,
- if appropriate, to resubmit their original claim for redress. 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 the original claim without having to go through the complaints process.

***Complaints about the compensating party's failure to deliver compensation to those found eligible to join the scheme***

4.21 It is possible that the compensating party or parties may fail to deliver compensation to those found eligible to obtain redress under the scheme.

4.22 When potential beneficiaries are informed that their application for redress has been accepted under the scheme, they must also be notified by those administering the scheme 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 can, through the

complaints process, 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 5 for further details) and/or bringing the matter to the CMA's attention.

## **5. How a redress scheme may be enforced and release from a redress scheme**

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

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

- 5.2 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>43</sup>
- 5.3 This statutory duty is owed to any natural or legal person entitled to compensation under the terms of the scheme, whether or not they have made a formal application under the scheme.

### **Right of a scheme beneficiary to enforce a redress scheme**

- 5.4 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>44</sup> for damages, an injunction or interdict or any other appropriate relief or remedy.<sup>45</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 4.15 to 4.22 above before they exercise their right to bring civil proceedings, but in practice they may wish to consider doing so.
- 5.5 However, 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>46</sup>

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<sup>43</sup> Section 49E CA98 as introduced by CRA15.

<sup>44</sup> In England and Wales/Northern Ireland, the High Court or county court; in Scotland, the Court of Session or the sheriff.

<sup>45</sup> Section 49E(3) CA98 as introduced by CRA15.

<sup>46</sup> Section 49E(6) CA98 as introduced by CRA15.

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

- 5.6 In addition to enforcement by a scheme beneficiary who has suffered loss or damage, if the CMA 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>47</sup> The power to enforce schemes applies while obligations under the scheme still exist. So, for example, if an application for compensation had been accepted under the scheme but the compensation had not been paid, a beneficiary or the CMA would be able to enforce that obligation even if the scheme was no longer open for new applications.
- 5.7 This power is discretionary and the CMA does not generally expect to bring such proceedings. It is likely to do so in exceptional circumstances only.
- 5.8 The CMA 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.
- 5.9 The CMA would also expect generally to apply its prioritisation criteria<sup>48</sup> when it is considering whether to enforce a redress scheme.

## **Release from a redress scheme**

- 5.10 If the CMA 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>49</sup> In this context, the CMA would take into account the desirability of giving appropriate notification to beneficiaries under the scheme. The CMA would also consider the desirability of ensuring that any person who had relied reasonably on the scheme as their

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<sup>47</sup> 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 (CA98 section 49E(6) as introduced by CRA15).

<sup>48</sup> See note 21 above.

<sup>49</sup> CA98 section 49E(7) as introduced by CRA15.

means of achieving compensation, and as 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.

- 5.11 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>50</sup>

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

- 5.12 In considering the release of a compensating party from the duty to comply with the terms of a redress scheme, the CMA will consider whether there has been a material change of circumstances since the scheme commenced. The precise nature of the CMA'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 CMA's view for the compensating party to be bound to comply with the terms of the redress scheme.

- 5.13 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 has clearly become obsolete;
- a situation in which the redress scheme is superseded by a new (non-statutory) redress scheme; and
- a situation in which 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.

- 5.14 By contrast, the CMA 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 out of it, irrespective 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 CMA to exercise this power.

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<sup>50</sup> CA98 section 49E(8) as introduced by CRA15.

- 5.15 The complexity of analysis required in a review by the CMA 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 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 CMA does not rule out considering whether it would be appropriate for the party to retain its reduction in fine.
- 5.16 Where a scheme is approved and established but a compensating party has successfully appealed the infringement decision to which the scheme relates, the CMA would nevertheless expect the party's obligations under the scheme to continue, because the scheme was set up voluntarily.

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

- 5.17 A release from the terms of the redress scheme may be on the basis of:
- a review undertaken on the CMA's own initiative; or
  - a request to the CMA by the compensating party.
- 5.18 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;
  - why a review of the redress scheme meets the CMA's prioritisation criteria; and
  - whether the request is being made in order to avoid a breach of the redress scheme.
- 5.19 The CMA will consider whether and in what detail to carry out its review on a case by case basis. Parties can approach the CMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request.
- 5.20 If the CMA 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.