RESPONSE OF ASHURST LLP TO THE CMA'S CONSULTATION ON ITS

DRAFT GUIDANCE ON THE CMA'S APPROVAL OF VOLUNTARY REDRESS SCHEMES

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on the draft Guidance on the CMA's approval of voluntary redress schemes ("**the draft Guidance**"). For the avoidance of doubt, this response is made in our own name and contains our own views, based on our experience in advising and representing our clients on matters relating to the work of the CMA and other UK and EU competition law enforcement bodies. This response is not made on behalf of any client.

We confirm that nothing in this response is confidential.

We have set out below in Section A our main comments in relation to the draft Guidance. The consultation questions then follow in section B, with a brief answer or cross reference to our general comments.

A: GENERAL COMMENTS

We have concerns in particular regarding:

- the risk that documentation created in relation to developing and seeking approval of the scheme, which is likely to contain information about liability, causation and quantum, could be subject to disclosure in damages actions;
- treatment of the application and related documents by the CMA, in particular the suggestion that such documents would be placed on the investigation file;
- the degree of detail which the CMA has prescribed concerning the Board and its members and the assessments which it must undertake; and
- the expectation of the CMA that indirect purchasers will be included in all redress schemes.

In addition, we have commented on the application of the prioritisation principles to approval applications, on the presentation of the information in the draft Guidance on the development and contents of a scheme, and on the issue of the CMA recouping the costs of the approval process from the parties. Each of these issues is discussed below.

1. **The application of privilege to the development of a voluntary scheme of redress**

1.1 Development of a voluntary redress scheme which meets the CMA's requirements will involve the creation by the compensating business(es) and the Board of documentation dealing with:

   - understanding the types of loss which have resulted from the infringement;
   - the identification of businesses or individuals who might be entitled to compensation for such losses; and
   - calculations regarding both overall and individual levels of compensation.

On the other hand, the existence of an approved redress scheme does not alter the ability of victims to launch private damages actions through the High Court or CAT. The extent to which such underlying scheme documents might be required to be produced to claimants who elect not to claim through the scheme but to bring a separate action for damages will therefore be a significant concern for parties considering whether to take this option.

1.2 The draft Guidance makes a number of references to "without prejudice privilege" applying in relation to scheme documentation (see for example paragraphs 2.19[1], 2.24[2], 3.25[3] of the draft Guidance) and appears to proceed on an assumption that this privilege would be engaged, protecting the underlying scheme documents. The CMA comments:

> "*A redress scheme is … a mechanism to settle claims that might otherwise be brought in court*", followed by the footnote "*For that reason, disclosures between the CMA, businesses applying for scheme approval and independent boards appointed under the scheme will be conducted without prejudice.*" (see paragraph 1.3 and footnote 3 of the draft Guidance).

1.3 However, it is far from clear that without prejudice privilege would apply simply because the business concerned is seeking to avoid litigation generally and to disincentivise potential damages claimants. We note in particular that:

(a) without prejudice privilege attaches to communications between parties between which there is a dispute and which take the form of a negotiation between those parties to try to settle that dispute. In this situation there is no negotiation with the party with which the compensating business has a dispute – indeed the dispute itself does not yet exist. This form of privilege can apply to pre-action communications but even so, it is not clear that any documentation created by the compensating parties (and *a fortiori* the Board), or any disclosures to or discussions with the CMA, would qualify for without prejudice privilege. We note also that internal preparatory documents for pre-action negotiations would not benefit from without prejudice privilege;

(b) without prejudice privilege does not attach to discussions concerning repayment of an admitted liability (as opposed to settlement of a disputed liability); and

(c) once approved by the CMA, the offer under the scheme and some of the detail surrounding it will be made public. In this situation, it is difficult to see how without prejudice privilege could continue to protect any of the underlying documentation in relation to the scheme.

1.4 Clearly, the risk that scheme-related documentation could become admissible in a separate damages action arising from the same infringement would be a very significant disincentive to developing a scheme.

1.5 Given that a voluntary redress scheme would be created in contemplation of litigation, litigation privilege might perhaps be a more obvious protection to consider. This could potentially extend to both documents created by the business(es) and the Board since the ambit of litigation privilege includes communications between the client and its lawyer and

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[1] "*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).*"

[2] "*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.*"

[3] "*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.*"

also with third parties. However, there are again difficulties and we do not consider that it can be clearly stated that litigation privilege would protect scheme development documentation from disclosure in a separate damages action relating to the same infringement:

(a) although damages actions are increasingly foreseeable in relation to competition law infringements, litigation must be a real likelihood rather than a mere possibility for litigation privilege to apply;

(b) the dominant purpose for creating the documents in question must be the contemplated litigation. In situations where the parties are hoping not only to dissuade potential litigants but also to secure a reduction from the penalty, the development of the scheme arguably has a dual purpose. The courts have noted that it can be particularly tricky to identify the *dominant* purposes for dual purpose documents. At best, this would come down to the facts of each case to identify whether contemplation of litigation was the dominant purpose for each document in question; and

(c) by notifying the scheme to the CMA and explaining the workings of the scheme, the parties risk waiving privilege. The position as regards disclosure to the Board could arguably be managed with express provisions that:

- the documents are privileged;
- disclosure does not amount to a waiver of privilege;
- the recipient will hold the documents in confidence; and
- further provisions controlling use of the documents by the recipient.

However it is not clear whether the CMA would be prepared to enter into corresponding commitments.

1.6 We do not consider that parties can be confident at present that any documents created by the parties and/or the Board when developing a scheme would be protected from disclosure to third parties bringing actions for damages against the compensating parties in relation to the same infringement. Disclosures made to the CMA and the status of the application forms (which require very extensive information about the scheme) are a particular concern, given the risk that they constitute waivers of any applicable privilege.

1.7 We consider that this degree of doubt operates as a serious disincentive to the creation of a voluntary redress scheme. If the CMA is satisfied (as the draft Guidance suggests) that scheme documentation is unlikely to be disclosable or admissible in related damages actions, the reasoning underlying this view should be explained clearly in the draft Guidance. It would be very welcome if this issue could be resolved by in legislation – perhaps in the Secretary of State's order to be issued under new section 49C(8) of the Competition Act 1998.

2. Scheme approval applications and antitrust investigation procedure issues

2.1 The CMA states in paragraph 2.2 that applications for approval of a voluntary redress scheme will be put on the file for the related investigation. We have commented above on the concern that any form of privilege which might attach to scheme documentation might be waived through the process of applying to the CMA for approval. If the CMA is to place the application documents and related communications on its file, likely to be accessed by third parties, it is far from clear that the risk of waiver could be managed at all.

2.2 Even ignoring the privilege concerns, placing documentation containing implicit or express admissions of liability, causation and quantum on the CMA's file, which will become accessible to other parties and which could be subject to disclosure in actions for damages, gives rise to serious concerns. This contrasts strongly with the care taken in relation to leniency and settlement applications to avoid creating disclosable documents, together with the policy of absolute protection for leniency and settlement statements which will be enacted across the EU as a consequence of the EU Damages Directive.[4] If the voluntary redress scheme policy is to have any success in practice, it is important that the parties' concerns regarding protecting these documents from disclosure in related third party damages actions are taken into account in the CMA's procedure.

2.3 Given that the CMA will not be undertaking a full merits appraisal of a proposed scheme, we consider that one approach might be to treat the scheme approval process as a distinct matter from the related investigation. Such an approach would mean that there would be no reason to place documentation relating to the application on the main antitrust investigation file, dealing with the disclosure concerns. This would also be consistent with the CMA's proposal in paragraph 2.2, namely to apply prioritisation principles to an approval application. Finally, it would mean that the treatment of a scheme approval process would be procedurally the same, regardless of whether the infringement investigation was ongoing or closed and would avoid the scheme contents with the implicit admissions of liability, causation and quantum, from influencing an ongoing investigation process.

2.4 In the event that the scheme approval process is not treated as a separate matter but as part of the underlying investigation, it would be helpful to understand whether the documentation relating to an application for approval which is rejected on prioritisation grounds still be put onto the file for the related infringement investigation (as indicated in paragraph 2.3 of the draft Guidance). This would seem unfair to the parties.

2.5 Generally, we would welcome the CMA giving the parties the opportunity to withdraw an application in circumstances where the CMA is planning to reject it on prioritisation grounds or to decide not to approve the scheme on substantive grounds. Following a withdrawal of an application, we consider that the CMA should return any documentation received from the parties. In this way no scheme-related documents need to be placed on the CMA's investigation file. We note that the recent proposed amendments to European Commission procedure in light of the Damages Directive take this approach to leniency and settlement applications, in order to avoid putting leniency or settlement documents on the Commission's investigation file.

3. Requirements for the scheme architecture

3.1 In earlier consultations on the idea of introducing a statutory voluntary redress scheme, concerns were expressed about the diversion of CMA public enforcement resources to analysis of the merits, or even a certification process for, voluntary redress schemes. On the other hand, there was a view that it would not be appropriate for the CMA to ignore completely the amount or value of compensation offered under a scheme. There was a view that the approval of a scheme by the CMA should carry some degree of reassurance of potential claimants that the scheme was reasonable and sensible.

3.2 It appears that the solution adopted to balance these considerations is to require the compensating parties to create a Board which equates almost to an arbitration panel to review the scheme and decide on the compensation to be offered. The intention would appear to be to ensure a degree of impartiality and to represent the interests of all sides in reaching decisions about compensation.

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[4] 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 (OJ 2014 L349/1)

3.3 The draft Guidance indicates that the Board must be chaired by a senior lawyer or judge, together with (as a minimum) an appropriately experienced economist, an individual with knowledge of the industry concerned and a representative of the potential beneficiaries of the scheme (paragraphs 3.5 to 3.8 of the draft Guidance).

3.4 We note that retaining this number of people of this calibre for an extended period is likely to be expensive.

3.5 We note further that the process of evaluating the actual loss suffered by the potential beneficiaries of the scheme is potentially very complex. The disparity between the amount of damages claimed by a claimant and that calculated by a defendant is typically considerable. To require the Board to act as a proxy for the court in assessing actual loss could be very difficult and time consuming.

3.6 We would query, moreover, whether this degree of prescription about the Board is necessary. There are a number of inherent safeguards in relation to redress schemes:

(a) if the proposal is not sufficiently attractive to the potential beneficiaries, they can simply decline to participate and bring an action for damages;

(b) from 1 October 2015, moreover, it will be possible for an opt-out collective action to be brought before the CAT so it is conceivable that any voluntary scheme might find itself competing for claimants with a collective action procedure, also offering victims of the infringement a simple route to compensation, requiring no direct involvement in legal process;

(c) if the sum offered does not cover the whole of the potential loss of a victim of the infringement, then acceptance of the scheme compensation will not prevent that person from bringing a separate claim for the remaining losses (paragraph 4.13 of the draft Guidance); and

(d) for schemes developed in relation to an infringement finding by the CMA there is a further incentive on the compensating parties to offer suitable compensation in that the CMA would presumably not grant a discount from the fine for a redress scheme which it did not consider to be a sufficiently meaningful offer.

There are therefore significant incentives on all concerned to ensure that any redress scheme is attractive to the potential beneficiaries and sufficiently comprehensive in its scope.

3.7 We note that there is to be a representative of the potential beneficiaries on the Board and an individual with knowledge of the industry concerned (paragraph 3.8). We would welcome an express acknowledgement that the latter person does not need to be independent of the compensating parties. It would seem fair to have representation from both sides of the matter included on the decision-making Board, not one side only. This is particularly the case given that the Board's role is to investigate and decide on compensation itself, not merely to assess proposals put forward by the compensating parties.

3.8 Finally, we note that the draft Guidance requires approval of the scheme to be taken by majority vote (paragraph 3.26). However the required structure of the Board sets up a body of four people. We consider that it would be appropriate, given his or her judicial or legal qualifications, to give a casting vote to the Chairman of the Board and we would welcome express recognition in the draft Guidance that this would be acceptable.

4. Identifying the victim – inclusion of indirect purchasers

4.1 The CMA states in paragraph 2.10, 5th bullet, that it would not normally approve a redress scheme unless indirect purchasers were able to claim under the scheme.

However, whether loss has been passed on to indirect purchasers would seem to be a question of fact to be considered on a case by case basis. As such, we consider that this should a matter for the Board, not a blanket rule. The draft Guidance states that:

> "*It is the responsibility of an appropriately constituted Board … 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.*
>
> "*… 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 each beneficiary.*" (paragraphs 2.12 and 2.13)

4.2 Moreover, the draft Guidance emphasises that:

> "*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.*" (paragraph 2.14)

4.3 The purpose of the redress scheme is to compensate those who have suffered loss. Accordingly it is a key issue for the Board to identify where in the supply chain the loss has in fact been suffered and to structure the redress scheme accordingly. It certainly cannot be *assumed* that in the vast majority of schemes, both direct and indirect purchasers should be entitled to compensation. Moreover, it would be a duplication of the role of the Board for the CMA to investigate this issue. The draft Guidance should therefore reflect the fact that the question of whether to include indirect purchasers in a redress scheme is a matter for the Board and the CMA will expect simply to see evidence that this issue has been properly considered and reflected in the terms of the scheme (whatever the outcome).

5. Prioritisation and applications for approval of voluntary redress schemes

5.1 The draft Guidance states clearly that the CMA will apply prioritisation principles in deciding whether to consider an application for approval of a voluntary redress scheme (see paragraph 2.2). However, in the event that a scheme application is not treated as a distinct matter (as discussed above), it would be useful to understand whether the prioritisation principles would be applied to an application for approval of a redress scheme where there is an on-going (and prioritised) investigation into the alleged infringement to which the proposed scheme relates. To decline on prioritisation grounds to consider a redress scheme in such a situation raises the potential of discrimination concerns where one group of infringing parties are able to secure a discount from the infringement penalty for adopting a voluntary redress scheme, but in a different case, no discount is available because of a prioritisation decision rather than a substantive objection to the scheme proposals put forward by the parties.

6. Guidance on the development and contents of a scheme

6.1 There is no explicit section of the draft which sets out guidance on the design and development of a scheme, including the assessment of loss, identification of victims and calculation of losses. However, the draft Guidance does include extensive information on these issues. For example, paragraph 2.10 of the draft Guidance is ostensibly about information which should be included in the application but in fact contains extensive guidance on issues which should be taken into account in constructing a voluntary redress scheme. Similarly, section 3 of the draft Guidance is formally about the constitution and

role of the Board but in fact contains much useful information about the design and development of a scheme (see for example paragraph 3.3). We consider that this content is very useful and merits a section of its own. Whilst the CMA's role is not to evaluate the contents and detail of a voluntary redress scheme. there is no doubt that an overview of the types of issues which the parties and a Board should consider in designing a compensation scheme would be welcome and helpful.

7. **Payment of the CMA's costs**

7.1 Although the draft Guidance explains how the CMA will go about recovering its costs from the parties, there is no concrete information on the basis of which parties can estimate the likely financial impact of this provision. As far as we are aware, the CMA does not recover its costs in any other area of its public competition enforcement work (ignoring possible costs orders in relation to litigation). There is therefore no comparator or benchmark for the parties to use to estimate the likely cost of approval. Given that the decision whether to develop and offer a voluntary redress scheme will be, to a significant degree, a financial decision, there is a risk that the lack of information about the likely level of the CMA's fees will operate as a disincentive on parties from developing a scheme.

B: THE CONSULTATION QUESTIONS

1. **Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

1.1 The content, format and presentation of the draft Guidance is generally clear. We have made suggestions as to areas where greater clarity would be useful in the General Comments above.

2. **Is the flowchart in the guidance helpful? Are there any improvements that you feel would increase its clarity and/or usefulness? Please identify any other diagrams you think would be helpful to include.**

2.1 The flowchart is helpful. Given that the CMA will be applying its prioritisation principles to redress scheme applications, it might be sensible to make reference in the flowchart to the CMA's prioritisation decision, since this is also a key step in the process.

3. **Is the level of detail on specific topics in the draft guidance appropriate? Are there any parts of the draft guidance which you feel would be improved by being more, or less, detailed?**

3.1 Our General Comments contain a number of suggestions for areas where more detail would be useful.

4. **Is the draft guidance overall sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional content that you would find helpful?**

4.1 Our General Comments contain a number of suggestions for areas where the draft Guidance could be usefully expanded.

5. **Are the draft application forms for seeking approval sufficiently clear and user friendly? Do you have any suggestions as to how the forms might be improved?**

5.1 As explained above, we have significant concerns about the risk that information provided to the CMA would become available to third parties bringing damages actions against the compensating parties. As drafted, the application forms require extensive written information and detail about a proposed scheme, which is likely to go beyond the

information which will ultimately be disclosed publicly about the scheme. It is essential for the success of the voluntary redress scheme initiative that a solution is found to address this concern.

6. **Are there particular changes and improvements to the guidance that you consider would encourage businesses to apply to the CMA for approval of a voluntary redress scheme in appropriate cases?**

6.1 Our General Comments contain a number of suggestions for areas where more information would be useful to enable parties to understand the impact of seeking approval for a voluntary redress scheme.

Ashurst LLP