GUIDANCE ON THE CMA'S APPROVAL OF VOLUNTARY REDRESS SCHEMES

RESPONSE OF HOGAN LOVELLS INTERNATIONAL LLP

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INTRODUCTION

1. Hogan Lovells International LLP ("**Hogan Lovells**") welcomes the opportunity to comment on the CMA's draft guidance on the CMA's approval of voluntary redress schemes of March 2015 (the "**Draft Guidance**"). This document contains our comments on the Draft Guidance.

2. Although we consider the Draft Guidance generally helpful and positive, we do have a number of concerns, which we highlight in this document.

3. We have not sought to address every subject area of the Draft Guidance. Rather, we have focused our comments on those points that are, in our view, of key importance to ensure the success and practical use of voluntary redress schemes.

4. If there are any issues that we have not commented upon but in relation to which you would like our views, or if there is anything that you would like us to elaborate upon, please contact Nicholas Heaton, Christopher Hutton or Helen Bignall of Hogan Lovells in the first instance. Their contact details are set out below.

HOGAN LOVELLS' COMMENTS ON THE DRAFT GUIDANCE

Scope of the CMA's power to approve redress schemes

1. Paragraph 1.16 of the Draft Guidance states that an application for approval of a voluntary redress scheme can be submitted to the CMA where a sectoral regulator or the European Commission has reached an infringement decision. In the case of competition law infringements being investigated or decided upon by regulators other than the CMA, it would be helpful if the Draft Guidance explained how applications for voluntary redress schemes should be communicated to the investigating / deciding authority (eg whether this would be done automatically by the CMA).

Figure 1

2. **Timeframes:** Figure 1 of the Draft Guidance provides a helpful overview of how a request to the CMA for a voluntary redress scheme approval fits within the CMA investigation process. However, it does not provide any indication of the timeframes for the various procedural steps. This will make it difficult for parties to assess the effect on timing, and therefore costs, of offering a voluntary redress scheme. It would be useful to have, if not specific timelines, at least some general guidance as to how long each step might be expected to take.

3. **Pre-Statement of Objections:** Further, Figure 1 contemplates pre-application discussions with the CMA taking place before a Statement of Objections is even issued. Prior to the Statement of Objections, parties may not be in a position to be able to decide if a voluntary redress scheme is an option to be considered in their case. As a result, in practice, it is more likely that parties who have potentially infringed competition law will await the Statement of Objections before engaging in discussions regarding a voluntary redress scheme with the CMA.

4. **Withdrawal:** Figure 1 does not appear to reflect paragraph 2.22 of the Draft Guidance which allows a party to withdraw its application for a voluntary redress scheme where the CMA plans only to approve the scheme with conditions. This is an important provision of the Draft Guidance which we consider ought to be reflected in Figure 1 accordingly.

Voluntary redress schemes in the context of the overall redress framework

5. **Advantages of participation:** The CMA emphasises at paragraph 1.24 of the Draft Guidance that voluntary redress schemes are a means of encouraging settlement outside the Courts. In light of this we would encourage the CMA to set out clearly in its guidance the advantages of participating in a voluntary redress scheme for all parties concerned, not just the party being compensated.

6. By way of example, issues in need of clarification include the following:

   (a) Consequences of damages claims being brought as soon as the Statement of Objections is issued, ie before compensating parties have submitted an application for a voluntary redress scheme. As applications are not published, claimants will not know about the voluntary redress schemes until their final approval.

   (b) Consequences if a voluntary redress scheme is in place, but damages claims are brought in court as well (eg cost consequences in litigation).

   (c) Consequences regarding joint liability / contribution claims where some cartelists

have submitted voluntary redress schemes while other cartelists of the same cartel have not done so, exposing themselves to damages claims in the courts.

(d) The relationship between the new collective settlement regime introduced in CRA15 and mentioned in paragraph 1.33 of the Draft Guidance and the voluntary redress scheme.

(e) The relationship between the complaint process described in paragraphs 4.15 to 4.22 of the Draft Guidance and civil proceedings to enforce voluntary redress schemes.

Pre-application discussions with the CMA

7. **Contesting liability:** Paragraph 2.4 of the Draft Guidance states that the CMA will not consider an expression of interest in setting up a redress scheme as an admission of the infringement being investigated. Further, the CMA states that it will not consider it inconsistent for a party to submit a voluntary redress scheme while exercising its right of defence during the course of an investigation. However, the Draft Guidance then states that it would be impractical for a compensating party to contest liability (or other material grounds of the infringement finding) whilst at the same time seeking approval for a voluntary redress scheme. In addition, the Draft Guidance indicates that compensation payments by the compensating party would be inconsistent with challenging the CMA's infringement decision. As drafted this paragraph in the Draft Guidance could in practice mean that parties to an on-going investigation may be discouraged from seeking approval for a voluntary redress scheme prior to the relevant authority reaching an infringement decision. This would appear to negate one of the potential advantages of avoiding the initiation of follow-on damages actions at an early stage (although please note our comments in relation to the relationship between voluntary redress schemes and actions brought at an early stage of the investigation at paragraph 6(a) above).

8. Paragraph 2.4 of the Draft Guidance is highly ambiguous and results in considerable uncertainty as to what consequences an application of a voluntary redress scheme would have for a party to an on-going infringement investigation. Clarification of this point is essential, as the potential for adverse effects for submitting parties are extensive. Should this uncertainty remain unresolved, it would greatly impact the use of voluntary redress schemes in practice, seeing as the risks for compensating parties to suffer repercussions during the course of an infringement investigation would simply be too high.

9. A solution to the abovementioned issue may be for the CMA to approve a voluntary redress scheme on a hypothetical basis, ie the scheme would be submitted to and approved by the CMA in the event that the compensating party would subsequently be found liable of having committed a competition law infringement.

10. **Access to file:** We are also concerned that applications for voluntary redress schemes will be included on the CMA's investigation file, as set out at paragraph 2.3 of the Draft Guidance, in particular given that the CMA itself notes the possibility that third parties may become aware that an application for approval has been submitted. This does not seem to be in line with how the CMA treats settlement negotiations.

Application Content

11. **Defining the available compensation:** It is not clear from the Draft Guidance to what extent a compensating party is able to circumscribe the compensation available under the scheme. For example, whether the compensating party would set the maximum total

amount of compensation available, or prescribe that the redress available to a beneficiary is a particular percentage of the loss suffered by that beneficiary. Or, alternatively, whether all aspects of the value of redress available (and therefore the financial exposure of the compensating party) is entirely in the hands of the Board, once the category of beneficiaries that are eligible to claim under the scheme, the evidence that is required in order for a beneficiary to be eligible for a payment, and the mechanism by which a beneficiary must make a claim have been identified.

12. The extent to which a would-be compensating party is able to understand and limit its financial exposure at the time of setting up a voluntary redress scheme will be key to the attractiveness of the regime – a would-be compensating party cannot be expected to sign a blank cheque. On the flip side, if the would-be compensating party seeks to overly limit the compensation available under the scheme, the Board and the CMA will presumably not approve the scheme. It may be that the Draft Guidance already envisages a would-be compensating party circumscribing the compensation available under the scheme as part of "*the terms of the redress scheme*", however we consider that the Guidance would benefit from this being made explicit.

13. **Direct and indirect purchasers:** Paragraph 2.10 of the Draft Guidance states that the CMA would expect voluntary redress schemes to cover harm caused to both direct and indirect purchasers, and that schemes which do not cover harm caused to indirect purchasers are unlikely to be approved unless there is a compelling reason for such an approach. It is not clear why the CMA adopts this approach. In practice, it will be important for compensating parties to have the option of designing a scheme that is appropriate to the facts of the case, which may or may not include either direct or indirect purchasers.

14. **Proof of harm:** At paragraph 2.10, the Draft Guidance lists examples of the kind of evidence a potential beneficiary may be asked to produce in order to be admitted to a scheme. The third example of proof of harm states that for an infringement relating to the sale of small-value items or everyday goods by a retailer, appropriate evidence may be the presentation of a loyalty card for the retailer in question. This constitutes extremely weak evidence, which would not reach the threshold of circumstantial evidence and would be insufficient to establish causation of the potential loss suffered. A general loyalty card can be used to buy all kinds of goods from the relevant retailer and is insufficient to prove the purchase of a specific product for which a competition infringement was committed.

15. In relation to items bought a long time ago, the fourth example of proof of harm under paragraph 2.10 of the Draft Guidance suggests that a photograph of the item in question may be appropriate evidence. Such evidence would be unreliable and without causal connection.

16. **Actively contacting potential beneficiaries:** Paragraph 2.10 of the Draft Guidance states that a compensating party should advertise a voluntary redress scheme through "appropriate channels" and on the party's website. This seems sensible and useful in targeting potential beneficiaries with a right to compensation. However, the Guidance further states that where compensating parties have contact details of potential beneficiaries, they will be expected to contact them, for example by email. The same duty is mentioned in paragraph 4.7 of the Draft Guidance in connection with contacting customers through a loyalty scheme. An obligation compelling compensating parties actively to search for and contact potential beneficiaries appears to be too onerous, in particular given that it goes above and beyond the parties' obligations in the context of litigation.

17. Finally, we have two minor points in connection with the application content concerning the form in which the application must be made and the level of detail required.

    (a) First, the application for a voluntary redress scheme must contain a summary of the scheme. However, it is unclear what the essential points are which need to be included in the summary. It would be helpful to list the minimum information necessary to fulfil the CMA's requirements.

    (b) Secondly, paragraph 2.10 of the Draft Guidance states that the application must include "*confirmation that those eligible to claim compensation must do so in an individual capacity*" without further clarifying what the term "*individual capacity*" signifies. It is unclear whether this includes individuals (ie natural persons) only or whether legal persons who have suffered a loss as a result of a competition law infringement may claim but only outside a collective scheme or claims management company.

Penalty reductions

18. **Application of penalty reduction:** Paragraphs 2.34 to 2.40 of the Draft Guidance state that the CMA will consider a penalty reduction for infringing parties submitting voluntary redress schemes. However, it is not clear at which of the six steps of the CMA's fine calculation method that any reduction would be applied: as a mitigating factor at step 3 or at step 6 (in the same way as a settlement discount). Depending on the stage of the calculation at which any reduction is applied, the size of reduction may vary considerably. Therefore, this point would benefit from further clarification.

19. **Concurrent regulators:** Moreover, it appears to be the case that a penalty reduction will only be considered in cases where a penalty is imposed by the CMA, and not by a concurrent regulator. As a matter of policy there would seem to be no reason to distinguish penalties set by the CMA and penalties set by concurrent regulators.

Recovery of CMA costs

20. Paragraphs 2.41 to 2.47 of the Draft Guidance provide guidance on recovery of the CMA's costs relating to an application for approval of a redress scheme. Although information is provided concerning the CMA's costs in general, there is no indication as to the manner in which such costs will be calculated. This, however, may be of considerable importance for parties assessing the pros and cons of making an application. As a result, it would be helpful if the final Guidance provides further detail on this issue.

Distribution where beneficiaries do not come forward

21. Paragraph 3.3 of the Draft Guidance sets out the matters to be considered by the Board, which includes "*The proposals for distribution of redress money where beneficiaries cannot be identified or do not come forward*". This appears to envisage a scenario where a charitable (or similar) payment is made if the total value of compensation determined by the Board for those beneficiaries that do seek redress under the scheme is less than the total value of the redress available under the scheme. Such a scenario does not appear to sit well with the purpose of the regime, which is to compensate those that have suffered loss, not to punish parties that have committed competition law infringements.

22. Moreover, the reason that a would-be beneficiary does not claim under the voluntary redress scheme may be because it has made a conscious decision to bring a private action instead. In those circumstances, if the unclaimed redress monies are distributed, a compensating party may in effect end up paying twice for the loss suffered by that would-be beneficiary. This cannot be the intention. Further guidance would therefore be

welcomed.

Board Members' Conflicts of Interest

23. Paragraph 3.18 of the Guidance lists examples of situations that may result in an individual having a conflict of interest that may disqualify that individual from serving as a Board member. There is a significant risk that some of the examples listed in paragraph 3.18 could have unintended consequences.

24. First, in bullet point 4, conflicts of interest are deemed to arise where an individual has published "*views or comments relating to the compensating party and/or the competition infringement in question*". This is potentially very broad. If "*views or comments relating to … the competition infringement in question*" means, for example, views or comments about resale price maintenance, then this may have the unintended consequence of disqualifying a large number of individuals – especially in the case of economists – including those with the most knowledge of the relevant issues. If, on the other hand, this is designed only to capture individuals who have published views or comments about the specific infringement at hand (rather than the *type* of infringement), that would seem a reasonable approach. Further clarification would be welcomed.

25. Secondly, bullet point 6 provides that, in relation to the Chair or the economist, "*a history of acting predominantly for claimants or defendants*" may amount to a conflict of interest. In practice, the vast majority of lawyers and economists with the requisite skills and knowledge to perform the role are likely to have acted either predominantly for claimants or predominantly for defendants. This provision is likely therefore to narrow the field of candidates, possibly to such an extent that it would be very difficult to identify appropriate individuals to appoint as Chair and economist.

26. Thirdly, in bullet point 5, a close personal association or relationship with a person who is working for or advising the compensating party is listed as a source for a conflict of interest. There is, however, no further elaboration of the term "close" in this context. For example, would a former partner of the law firm or economic consultancy advising the compensating party be considered to have a "close" relationship for these purposes? Further clarification would be welcomed.

Confidentiality and privilege of communications with the Board

27. Paragraph 3.25 of the Draft Guidance states that all communications with the Board are to be privileged. The protection of such communications will be critical to the success of the regime. In particular, the disclosure to a claimant in a private action of communications between a compensating party and the Board, especially those that take place prior to the approval of any voluntary redress scheme, would be likely to be a severe disadvantage to the compensating party in its defence of that action. As a result, the possibility of any such disclosure would be very likely to deter a would-be compensating party from seeking to put in place a voluntary redress scheme. It is not clear from the Draft Guidance on what basis such communications with the Board would attract privilege. Further clarification should be provided.

Cooperation by the compensating party

28. Paragraph 3.31 of the Draft Guidance states that the compensating party shall provide the Board with "*full and complete access to all personnel, books, records, documents and information of the compensating party that the Board may require*". The Guidance should explicitly exclude from this requirement privileged material, leniency material, and material relating to any settlement discussions with a relevant competition authority.

The consequences of accepting redress

29. Paragraph 4.13 of the Draft Guidance states that a beneficiary under a voluntary redress scheme should not be prevented from bringing a private action against other parties to the competition infringement which have not set up a voluntary redress scheme. Given that breaches of competition law result in joint and several liability, the Guidance should make it clear that a party that has not set up a voluntary redress scheme should not be liable for any element of the loss that has already been compensated through the voluntary redress scheme. In addition, if a contribution defendant in a private action has set up a voluntary redress scheme, this is something that should also be taken into account by the Court when determining that party's liability.

Miscellaneous

30. The Draft Guidance refers to a Scheme Administrator and an Independent Reviewer (eg paragraphs 3.25, 4.1, 4.20), but does not provide any guidance on the purpose of these positions or the nature of their roles.