

**COMPETITION COMMISSION MARKET INVESTIGATION  
PRIVATE MOTOR INSURANCE**

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**ACCIDENT EXCHANGE'S  
RESPONSE TO THE COMPETITION  
COMMISSION'S NOTICE OF  
POSSIBLE REMEDIES (PUBLISHED  
ON 17 DECEMBER 2013)**

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**DATED 17 JANUARY 2014**

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## 1. INTRODUCTION

1.1 This submission ("**Response**") is made on behalf of Accident Exchange Limited ("**AX**") in response to the Notice of Possible Remedies ("**Remedies Notice**") issued by the Competition Commission (the "**CC**") to AX and others on 17 December 2013 in its Private Motor Insurance Market Investigation. The Remedies Notice was issued alongside the CC's Provisional Findings ("**PFs**") and in order to invite comments on the possible action the CC might take to remedy, mitigate or prevent the AEC's found in the PFs.

1.2 The CC provisionally concludes, at paragraph 10.6 of the PFs, that there are two features of the supply of motor insurance and related services which, in combination, create an adverse effect on competition ("**AEC**"):

*"(a) separation - that is, that the insurer liable for the non-fault drivers' claim, i.e. the insurer to the at-fault driver, is often not the party controlling the costs; and*

*(b) various practices and conduct of the other parties managing such non-fault drivers' claims which (i) were focused on earning a rent from control of claims rather than competing on the merits; and (ii) gave rise to an inefficient supply chain involving excessive frictional and transactional costs.*

*We provisionally concluded that these features distorted competition in the motor insurance market. Our reasons are set out in Section 6."*

1.3 The CC also provisionally concludes, at paragraph 10.9 of the PFs, that the following features of the supply of motor insurance and related services, in combination, create an AEC:

*"(a) insurers and CMCs do not monitor effectively the quality of repairs; and*

*(b) there are significant limitations to claimants' ability to assess the quality of car repairs.*

*We provisionally concluded that these features distorted competition between repairers to obtain business from insurers and other managers of drivers' claims. Our reasons are set out in Section 7."*

1.4 In Section 6 of the PFs, the CC sets out the reasons underpinning its provisional conclusions on the AEC set out in paragraph 10.6 of the PFs. The CC describes the separation of cost liability and cost control as its Theory of Harm 1 ("**ToH 1**"). In Section 7 of the PFs, the CC

sets out the reasons underpinning its provisional conclusions on the AEC set out in paragraph 10.9 of the PFs. The CC describes the possible underprovision of services to those involved in accidents as its Theory of Harm 2 ("ToH 2"). The Remedies Notice then groups the proposed remedies by reference to the CC's theories of harm and invites comments on those proposed remedies.

- 1.5 AX has addressed certain of the proposed remedies that it is in a position to comment on but does not comment in detail on potential remedies 1D (non-fault repair costs) and 1E (non-fault write-off costs) in respect of ToH 1 or the remedies relating to ToH 2 to 5.
- 1.6 AX notes that the CC has required a response to its Remedies Notice prior to the deadline for responding to the CC's PFs. AX has serious concerns about the CC's administrative procedure in this regard. It is impractical and seriously disadvantageous to AX for it to have to respond to the Remedies Notice first as the PFs underpin the proposed remedies and considering and responding to the proposed remedies before responding to the CC's PFs inhibits and prejudices AX's ability to make a full and considered response to the Remedies Notice. The CC should not require parties to respond to a Remedies Notice in advance of responding to the PFs and consequently, AX reserves the right to make further submissions on the Remedies Notice at the same time as it provides its written submissions on the PFs.
- 1.7 However, without prejudice to the submissions AX will make in due course on the PFs this Response is submitted on the basis that AX does not accept the CC's provisional finding that there is an AEC in the market for the supply of private motor insurance, within the meaning of section 134(2) of the Enterprise Act 2002 (the "**Act**"), as concluded by the CC at paragraphs 10.6 and 10.9 of its PFs.
- 1.8 Nevertheless, AX welcomes some of the CC's proposed measures, or at least formulations of these measures, that will strengthen and enhance the rights of consumers under common law. AX's business (and the credit hire business per se) came into existence in order to champion the rights of consumers who had been involved in an accident that was not their fault. Any proposed changes that can help consumers to protect their interests are to be welcomed.
- 2. KEY BACKGROUND POINTS IN RELATION TO CREDIT HIRE AND THE CC'S PFS**
- 2.1 AX's reasons for disagreeing with the CC's conclusions on the alleged AEC will be explained fully in its response to the PFs. However, in order to put this Response in context AX has set out below its principal concerns about the CC's PFs and its ToH 1 (leading to the provisional AEC set out in paragraph 10.6 of the PFs).

- 2.2 The CC's AEC<sup>1</sup> appears to turn on two necessary elements: (i) separation between cost control and cost liability leading to an inefficient supply chain, and (ii) excessive frictional and transactional costs borne by the at-fault insurer. Absent either, on AX's understanding, the AEC would not arise.
- 2.3 The CC's characterisation of the AEC allegedly caused by these two elements is by reference to a notional world in which at-fault insurers continue to provide direct hire and also replace mobility currently provided under credit hire with direct hire, which according to the CC would eliminate the frictional costs identified by the CC<sup>2</sup>.
- 2.4 AX has serious concerns in relation to each of the elements alleged by the CC to cause the AEC.
- 2.5 AX has serious concerns about the CC's reference to separation as forming the basis of the AEC because:
- 2.5.1 The consequence of separation is a positive one in that non-fault drivers benefit from having access to services such as credit hire that allow them to obtain their legal entitlement through a provider that has the consumers' interests at heart. By identifying separation as intrinsic to the AEC, the corollary must be that the CC believes that the AEC is addressed by putting non-fault drivers in the hands of at-fault insurers. Yet at-fault insurers have interests which are fundamentally misaligned with those of accident victims.
- 2.5.2 The CC has so far failed to examine the clearly harmful extent of the misalignment of incentives between non-fault drivers and at-fault insurers. The consequences of this misalignment is clearly evidenced by the behaviours and response of insurers to the emergence and existence of credit hire as a means by which the victims of motor accidents were able to access mobility and vehicle repairs. Indeed, insurers have taken significant measures to thwart consumers receiving their legal entitlement over the years. Notwithstanding the development of the GTA (see further paragraph 2.7.4 below) insurers have

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<sup>1</sup> Paragraph 10.6, PFs.

<sup>2</sup> The CC states, "*we considered a benchmark 'well-functioning market' to be a market which delivered consumers' legal entitlements in an efficient way...and therefore looked at two dimensions. In assessing how separation affects insurers' costs and revenue streams, we considered that this implied using the excess of credit hire over direct hire as the measure of the cost associated with separation*", FN 15, paragraph 6.16 of the Remedies Notice.

resisted their legal obligations to non-fault drivers and thereby (rather than through any efficiency) reduce their costs at the expense of the non-fault drivers. Consequently, non-fault drivers have been disadvantaged by these challenges and attempts to limit recovery of their reasonable costs.

2.5.3 For example:

*Legal challenges*

2.5.3.1 Insurers have instigated many of the most significant, costly and time consuming legal challenges to the costs incurred by non-fault drivers. Details of these have already been submitted to the CC (see paragraphs 3.1.1 to 3.1.2 of AX's Response to the CC's Issues Statement<sup>3</sup>), in particular:

- (a) In *Giles v Thomson*<sup>4</sup>, insurers sought to prevent credit hire by consumers by arguing that credit hire represented a danger to the administration of justice by encouraging motorists to hire cars which they did not really require at inflated rates. The House of Lords dismissed this as an exaggeration and it was held that credit hire was a valuable service which enabled non-fault claimants to recover a valid claim which would otherwise go unsatisfied;
- (b) In *Dimond v Lovell*<sup>5</sup> insurers again sought to prevent credit hire by consumers by challenging the enforceability of CHCs' hire agreements with customers. Again the House of Lords held that credit hire was fulfilling a real need which was an additional valuable service. In particular, the House of Lords held that credit hire redressed "*the imbalance between the individual car owner and the insurance companies*";

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<sup>3</sup> Submitted to the CC on 11 January 2013.

<sup>4</sup> [1993] UKHL 2

<sup>5</sup> [2000] UKHL 27

- (c) In 2006/7 insurers sought to challenge the enforceability of AX's customer agreements again to try to prevent credit hire. This challenge was defeated after a lengthy legal process and the Courts again upheld the cost involved in credit hire on the basis that it met a real consumer need.
- (d) More recently, insurers have sought to challenge the enforceability of credit hire agreements on the basis of that they do not comply with the requirements of the Cancellation of Contracts made in a Consumers Home of Place of Work Regulations 2008. This challenge was also ultimately successfully defended after a protracted legal process.

#### *Intervention strategies*

2.5.3.2 Insurers have also initiated a number of strategies aimed at preventing or discouraging non-fault drivers from entering into credit hire agreements (see paragraph 3.2.1 and 3.2.2 of AX's Response to the CC's Issues Statement in order to reduce their own costs at the expense of the consumer). These strategies included:

- (a) Intervention - this is when at-fault insurers seek to offer to provide a temporary replacement vehicle ("TRV") directly to the non-fault driver. The Courts have criticised insurers for carrying out these intervention strategies in ways which threaten consumers and pressurise them into accepting their offer; an offer which may underprovide<sup>6</sup>; and
- (b) Bilateral agreements - these are bilateral agreements whereby insurers have sought to prevent non-fault drivers from entering into arrangements with CHCs in

cases where they or counterparty insurers are the at-fault insurer. These arrangements involve a group of insurers agreeing to ensure that their own policyholders are not referred to a CHC in circumstances where a counterparty insurer is the insurer of the at-fault driver. Therefore, the consumer involved in a bilateral agreement with another insurer could receive lower service provision than they are entitled to if they are not referred to a CHC or dissuaded from seeking their own provision.

2.5.3.3 Insurers have also consistently challenged credit hire operators' commercial rates of hire and in particular through the commissioning of Autofocus Ltd, which it subsequently transpired was using false evidence of credit hire operators' commercial rates of hire to support these challenges (see paragraph 3.3 of AX's Response to the CC's Issues Statement).

2.5.4 Absent the threat of credit hire there would not be direct hire; the CC has recognised the incentive effect it provides for at-fault insurers to provide good quality service<sup>7</sup>. However, the CC has not recognised the corollary of this, i.e. it does not recognise the fundamental benefit of separation is that mobility is provided to all and gives consumers choice (through direct hire or credit hire).

2.5.5 Separation between costs liability and costs control exists as a function of the law of tort and consumers' rights under the Road Traffic Act 1988. It is intended to provide positive outcomes for consumers. To remove any of the effects of this feature of the market would fundamentally diminish consumers' rights to the benefit of at-fault insurers.

2.6 The CC's identification of excessive frictional costs as intrinsic to the AEC is also flawed as follows:

2.6.1 Frictional costs represent the costs incurred by CHCs in obtaining a non-fault drivers' legal entitlement (i.e. making the subrogated claim). The level of those costs reflects the strong incentives on at-fault insurers to resist this.

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See, for example, paragraphs 3.73, 6.16, 6.40, 6.69 and 6.90 of the PFs.



- 2.6.2 AX disputes these frictional and transactional costs are excessive. These "frictional costs" arise because CHCs act as effective advocates, or champions for non-fault drivers. They seek to ensure that such motorists enjoy the legal rights bestowed upon them by the law of tort, notwithstanding the resistance of at-fault insurers.
- 2.6.3 The CC accepts that there is competition among CHCs and they do not earn excessive rents.<sup>8</sup> The CC should therefore also accept that CHCs have incentives to minimise frictional costs (so they have more rents which are used to compete in the form of referral fees). Moreover, this ability to earn a rent is also a function of the law of tort and the non-fault driver's right to claim its reasonable costs from the at-fault insurer. The level of those rents is itself also constrained by the law of tort.
- 2.6.4 Moreover, in the absence of CHCs, consumers themselves would bear frictional costs. Those costs may well be higher: consumers lack the efficiency and expertise of CHCs. In a world without separation, individual consumers would have to expend their own time and effort trying to obtain their legal entitlement from at-fault insurers, who would have no incentive to provide it. The CC has failed to consider at all (or even recognise) these displaced (and increased) frictional costs.
- 2.6.5 Frictional costs may prove prohibitive for some consumers to exercise their legal right, and the consequence would be underprovision of mobility.
- 2.7 In addition, there are a number of overarching points that AX (and indeed the Credit Hire Organisation - CHO) has raised with the CC during the course of the administrative procedure which do not appear to have been properly (or at all) considered by the CC in its PFs and in its Remedies Notice. These points are fundamental to a proper consideration of the benefits that arise from credit hire and which should be taken into account by the CC when considering whether its provisional findings of an adverse effect on competition can be correct and in any provisional decision on the proposed remedies. These include:
- 2.7.1 In a world without separation, and without credit hire, at-fault insurers have limited (if any) incentives to provide direct hire. The CC has recognised that

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Paragraph 6.17, PFs.

credit hire provides at-fault insurers with an incentive to provide a service to consumers that would otherwise be absent<sup>9</sup>. Any removal of credit hire would remove that incentive and consumers would return to a world in which at-fault insurers were under no incentive to provide non-fault drivers with their full legal entitlement given that in reality consumers (without credit hire companies acting on their behalf) are in a very weak position to exercise their rights.

- 2.7.2 A credit hire company is able to provide a vehicle immediately to a non-fault driver, to assume the commercial risk of non-recovery from the at-fault insurer, and to ensure that the driver's rights are fully vindicated. If the at-fault insurer delays, or ultimately evades liability, the costs fall upon the CHC, not the motorist. This is a particularly important benefit for economically vulnerable consumers, or in cases where the establishment of liability is uncertain.
- 2.7.3 The House of Lords recognised the value of credit hire services in "*redressing the imbalance between the individual car owner and the insurance companies.*"<sup>10</sup> Notwithstanding this, the CC's PFs (and proposed remedies) represent a huge success for insurers at the expense of non-fault drivers. The CC does not express any explicit disapproval of credit hire services; yet the practical effect of its PFs taken together with certain of its proposed remedies will be to eliminate such services from the market altogether, and/or to transfer risks or costs to the non-fault driver away from the at-fault insurer.
- 2.7.4 The benefits arising from the GTA and in particular from the fact that approximately 80% of credit hire and credit repair claims are settled under the terms of the GTA. This avoids the need for litigation and reduces the impact of any such litigation on insurers' costs. Moreover, it is an insurer / credit hire joint protocol and its continued existence and operation over the past 11 years demonstrates its ability to meet the commercial interests of both insurers and credit hire operators.

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<sup>9</sup> See, for example, paragraph 6.90 of the PFs.

<sup>10</sup> *Dimond v Lovell* [2002] 1AC 384 at paragraph 391 per Lord Nicholls.

- 2.8 AX is seriously concerned that these benefits have not been quantified by the CC, and will provide further detailed submissions on the benefits of credit hire in its response to the PFs. *Inter alia*, AX is concerned that the CC has dismissed benefits as being immaterial in aggregate without considering their materiality to those consumers to which they apply, i.e. the non-fault victims of accidents.
- 2.9 AX would like to also make a final observation, which relates to the CC's ToH 2 and its proposed remedy in this regard. As set out at paragraphs 1.3 to 1.4 above, the CC provisionally concludes in section 7 and paragraph 10.9 of the PFs that insurers and CMCs do not monitor the quality of repairs, that there is a significant limitation to claimants' ability to assess the quality of car repairs, and that these in combination are an AEC. This is of serious concern. The data collected by MSXI appears to include a significant amount of evidence which demonstrates such practices were wide-spread, and causing significant harm to consumers, and, in light of reviewing this data, it seems to AX that the CC's AEC in relation to this theory of harm is understated.
- 2.10 The harm suffered by consumers as a result of these practices includes: (i) receiving a lower value for their cars once sold after the repair; (ii) consumers being unaware of the below standard repairs and (iii) the safety issues associated with below standard / insufficient repairs. In light of these issues, AX considers the remedies proposed by the CC to address this AEC are disproportionately light, in comparison to the strikingly intrusive approach the CC has taken in relation to the possible remedies for ToH 2. Any serious failings in monitoring the quality of repairs should be remedied appropriately and the remedy proposed to address ToH 2 does not appear to be capable of being effective in this respect.

### **3. RESPONSE TO THE CC'S REMEDIES NOTICE**

#### **The CC's duties under the Enterprise Act 2002 (the "Act") and the principle of proportionality**

- 3.1 As set out in paragraph 3 of the Remedies Notice, where the CC finds an AEC it is required, under s.134(4) of the Act, to decide whether it should take any action and/or whether it should recommend that others take action to remedy, mitigate or prevent the AEC or any resulting detrimental effects.
- 3.2 If the CC decides that action is appropriate it must then decide what action should be taken and it has a duty in this respect under s.134(6) of the Act to:

*"in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on consumers so far as resulting from the adverse effect on competition".*

3.3 To fulfil this requirement, the CC's Guidance states that, *"the CC will consider how comprehensively possible remedy options address the AEC and/or its detrimental effects and whether they are effective and proportionate"*<sup>11</sup>.

3.4 In considering the reasonableness of its proposed action the CC is required to have regard to the principles of proportionality. The principles of proportionality are summarised in the Competition Appeal Tribunal's judgment in *Tesco*:

*"A useful summary of the proportionality principle is contained in the following passage from the judgement of the ECJ in Case C-1/88 R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa [1990] ECR I-4023, paragraph [13], to which we were referred by the Commission:*

*"By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".*

*That passage identifies the main aspects of the principles. These are that the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued"<sup>12</sup>.*

3.5 AX considers a number of the CC's proposed remedies are disproportionate.

3.5.1 For the reasons which will be fully developed in AX's response to the PFs, the CC has failed to properly assess the costs and benefits of separation.

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<sup>11</sup> See paragraph 329, *Competition Commission Guidelines for market investigations: Their role, procedures, assessment and remedies*, April 2013 (CC3 Revised).

<sup>12</sup> Paragraphs 136 to 137, *Tesco Plc v Competition Commission ("Tesco")*, [2009] CAT 6.

Accordingly it cannot satisfy the test for proportionality in respect of the proposed remedies.

3.5.2 A number of the remedies do not address the AEC at all.

3.5.3 In a number of respects the remedies introduce drastic and far-reaching changes which are disproportionate to the modest benefits the CC claims to have identified. In particular a number of the remedies would substantially curtail victims' rights in favour of insurers and lead to the elimination of the credit hire industry. Moreover, Remedy 1A may well lead to increased motor insurance premiums for consumers as they will have to buy add on policies to ensure access to a TRV.

#### **4. RESPONSE TO PROPOSED REMEDIES 1A - 1G**

##### **Preliminary comments**

- 4.1 AX considers any remedies that confer more power to at-fault insurers risks operating against consumers' interest. This is because the at-fault insurer has an incentive to minimise costs which translate into an incentive to limit or deny the victim his/her rights (the at-fault insurer and the victims' interest are diametrically opposed).
- 4.2 While the CC has acknowledged that direct hire and credit hire come hand in hand and direct hire would not exist without the constraint of credit hire, it has completely failed to investigate the consequence of a world without credit hire and the risk that this causes to consumers. The CC should have analysed the likely costs of this world and could have done so by reference to all the instances of insurer behaviour adverse to the consumer identified above (see paragraph 2.5.2 above). Without doing so, it cannot advance any remedy that would give insurers more power. The CC has chosen not to investigate likely insurer behaviour if given (more) control of non-fault claims for TRVs (in an investigation into private motor insurance) and therefore is not in a position to know the consequences of any such remedies.
- 4.3 The CC's approach to assessing the AEC and remedies should not be asymmetric. The CC should not impose any remedy giving insurers more power, as this would introduce a market distortion (by putting consumers in the hands of someone adverse to their interest) which if it had been the status quo, might well (and in AX's view, should) itself have been identified as an AEC in the first place.

4.4 It is clear from the CC's proposed remedies that the credit hire model is at stake. Any remedy which had the effect of removing the victims' champion would likely result in further harm to the consumer and be disproportionate.

4.5 AX sets out below its response to the following proposed remedies:

4.5.1 Remedy A: improving claimants' understanding of their legal entitlement ToH 1 and ToH 2;

4.5.2 Remedy 1A: first party insurance for replacement cars (relating to ToH 1);

4.5.3 Remedy 1B: at-fault insurers to be given the first option to handle non-fault claims (relating to ToH 1);

4.5.4 Remedy 1C: measures to control the cost of providing replacement cars to non-fault claimants (relating to ToH 1);

4.5.5 Remedy 1F: improved mitigation in relation to the provision of replacement cars to non-fault claimants (relating to ToH 1); and

4.5.6 Remedy 1G: prohibition of referral fees (relating to ToH 1).

## **PROPOSED REMEDY A: MEASURES TO IMPROVE CLAIMANTS' UNDERSTANDING OF THEIR LEGAL ENTITLEMENTS**

### **Summary**

4.6 AX supports any remedy which would have the effect of improving consumers' understanding of their legal entitlements, and would be happy to engage with the CC further on the specifics of such a remedy (for example what information ought to be provided, at what point and by whom).

### **Overview**

4.7 The CC states that *"We have provisionally found under [ToH 1 and 2] that consumers have a poor understanding of their legal entitlements following an accident. This affects how they*

*are able to enforce their legal entitlements under both tort law and their own insurance policy"*<sup>13</sup>.

- 4.8 The CC states that this proposed informational remedy is intended to support the other remedies proposed in relation to ToH 1 and 2 and finds it will do so by educating claimants about their rights under tort law and enabling them to assess the service levels provided to them and whether these services levels meet their needs.
- 4.9 The CC proposes that this remedy would ensure consumers are provided with better information at two points by: (i) requiring motor insurers to set out the policy holder's legal entitlements in the event of an accident with appropriate prominence in the annual insurance policy documentation (i.e. pre-accident); and (ii) requiring insurers, CMCs or any other party to which a claimant makes the first notification of loss following an accident to inform the claimant more clearly of their legal entitlements (i.e. post-accident). The CC has set out at paragraphs 18 (a) - (d) of the Remedies Notice the particular information it would expect to see provided.

#### **Does the remedy address the AEC?**

- 4.10 As a standalone measure, this remedy would not remedy the AEC (it would not remove separation or reduce frictional costs). To the extent that the remedy is proposed alongside any of the CC's other proposed remedies, AX refers below to its comments on the effect of those remedies on the AEC.
- 4.11 AX broadly supports any remedies which are aimed at ensuring customers have all necessary information about their legal entitlements (i.e. in relation to repairs and temporary replacement vehicles). Any appropriate information provision to consumers could remedy an AEC that involved a concern about competition on the merits in the provision of post-accident services. AX supports this remedy provided that the information to be provided under the remedy, or the manner in which it is provided, does not have the adverse effect (or unintended consequence) of narrowing consumers' choices of TRV or repair service providers (see paragraph 4.12.5 below), which is a real risk as at-fault insurers have incentives to misinform consumers about their legal rights.

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<sup>13</sup> Paragraph 16 of the Remedies Notice.

4.12 In relation to the CC's proposals on the detail of the remedy as set out in paragraph 18 of the Remedies Notice, AX makes the following observations:

- 4.12.1 Whilst it might make sense in principle for consumers to be provided with information on their legal entitlements in the event of an accident at two points in time (as the CC describes at paragraph 18 of the Remedies Notice) the information that can be provided will differ depending on when it is given and by whom. At a most basic level, motor insurance policies and CMC or other third party documents could contain a separate sheet informing the policyholder about their basic legal entitlements under tort law in the event of an accident. This basic information cannot be supplemented by anything more specific to the individual claimant's legal position in the event of an accident at any point in time unless it is provided by that individual's insurer.
- 4.12.2 The information capable of being provided to consumers by insurers in the annual policy statements or at the time of notifying a loss would necessarily be different to the information that could be provided by CMCs or any other party to which a claimant makes a first notification of loss ("**FNOL**"). For instance, the information set out in 18(b) depends on the terms of the claimant's insurance policy. Moreover, the information that an insurer would be able to provide to a claimant under 18(b) at the FNOL stage would also depend on whether the FNOL was being made to the claimant's insurer or to the other driver's insurer.
- 4.12.3 Finally, in relation to 18(d) this could only be complied with by a CMC, other third party or an insurer if that undertaking was arranging for any repairs. If this remedy were implemented in a world in which separation continued to exist then only the undertaking with control of the repairs process could provide this information.
- 4.12.4 In light of the above, it is clear that any remedy imposing the provision of the information set out in paragraph 18(a) to (d) or any other information would need to be carefully designed to ensure that the party under the obligation to provide the information was actually able to do so.
- 4.12.5 In addition, any information provision that requires providers to explain to consumers what their legal rights are in obtaining TRVs and repairs should clearly explain to consumers that there are many different sources of provision. Otherwise



this risks favouring the insurer's own provision or could imply to consumers that they have to opt for such services via their own insurer<sup>14</sup>.

- 4.12.6 The same concern would occur in relation to information provision by CMCs or other third parties handling any claim. If all available sources were not made clear to claimants then this could have the effect of reducing consumers' choice of TRV or repair service providers if insurers were not informing claimants about all the available options. In practice, this could lead to bias towards insurer-provided services when a claimant makes the FNOL following an accident to its insurer. In turn, this could lead to consumers approaching insurers for TRV services, and then being provided poor quality services (i.e. slow, underprovision or even no provision at all) and the threat of credit hire would be diminished because even though consumers would be more aware of their right to a TRV, they may have been influenced to believe such services are only available from the at-fault insurer or it may simply be that by the time the problems with the provision by the at-fault insurer have manifested, the consumer has made other arrangements or their (repaired) car has been returned. Thus, inappropriate information could undermine victims' awareness of credit hire, and thereby reduce insurers' incentives to provide direct hire, leading to a lower provision of mobility overall.

### **Impact on consumers**

- 4.13 As a champion of victims' rights, AX considers measures aimed at providing consumers with more information and/or clarity in relation to their legal entitlements would be of benefit to them (subject to these measures not having the effect of reducing consumers' sources of provision outlined above).

### **Proportionality**

- 4.14 As a standalone measure and provided it was appropriately designed, AX has no concerns as to the proportionality of this remedy.

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Fault insurers have every incentive to misinform consumers and the CC ought to be cautious this remedy does not give them the ability to do this.

### **The CC's specific questions**

- 4.15 AX has addressed the CC's questions at paragraphs 21(a), (b) and (d) in paragraphs 4.6 to 4.13 above.
- 4.16 In relation to the CC's question at 21(c) AX does not believe it would be appropriate for an organisation such as the Association of British Insurers ("**ABI**") to be made responsible for providing information to drivers. The ABI is, by definition, a trade organisation which is partisan in favour of insurers and their commercial interests. Accordingly, if this remedy is aimed at improving motorists' understanding of their legal entitlements, AX would suggest that only an independent body, such as the Law Society, could provide any generalised statement to consumers as to their legal entitlements following an accident. Any explanation of motorists' entitlements under their policies of insurance (as opposed to those which arise by law) would be a matter for each insurer depending on the relevant policy terms.
- 4.17 In relation to the CC's question at 21(c), AX is not aware of any obvious circumvention risks if the exact nature and content of the information to be provided was specified.
- 4.18 In relation to the CC's questions at 21(f)-(g), these depend on the exact nature and can only be answered when that is identified.
- 4.19 In relation to the CC's question at 22(h), there is no reason why an enforcement order would be required in relation to this proposed remedy. There is no need for immediate intervention by way of an order and if the parties are willing to negotiate then this should be preferred. Undertakings would be sufficient and more appropriate as it would allow for the proper negotiation on the terms and information to be provided by each category of market participant. As set out in CC4 of the CC's guidance at paragraph 7.6, the CC will generally prefer to proceed by accepting undertakings.
- 4.20 In summary, AX broadly supports any remedies which are aimed at better informing consumers before and following an accident of their legal entitlements, but is concerned about the room for bias towards insurer-provided services when a claimant makes the FNOL following an accident to its insurer. The effect of this bias would be to undermine consumers' awareness of / readiness to use credit hire which in turn would diminish the incentives of at-fault insurers to provide direct hire. This gives rise to the risk of consumers receiving poorer quality TRV services and excluding third party suppliers of services such as TRV's and repairs (such as AX) as a result of the remedy. However, AX considers this ought to be capable of being addressed by ensuring that the information to be communicated to non-fault

drivers is determined by an independent body and requiring insurers to inform consumers about all the different sources of provision for TRV and repairs in particular at the time when the claimant makes the FNOL.

## **PROPOSED REMEDY 1A: FIRST PARTY INSURANCE FOR REPLACEMENT CARS**

### **Summary**

- 4.21 AX fundamentally objects to this incredibly draconian remedy, which would have a drastic effect on consumers. This remedy would severely curtail the rights of the non-fault drivers in accidents and would lead to the elimination of the credit hire industry and the loss of the benefits that it brings to innocent drivers. Moreover, the claimed benefits do not justify this.
- 4.22 Whilst this remedy would serve to remove separation, it would introduce frictional costs since consumers would have to incur frictional costs themselves to seek to obtain TRVs from their insurers under their policies. Those costs may well be higher than the costs which drive the AEC, and in any event have not been assessed by the CC. It would also absolve at-fault drivers of the costs they impose on others.
- 4.23 Finally, and perhaps most importantly motorists may well face increased motor premiums to ensure they have access to a TRV following a non-fault accident. The CC has not analysed this at all in its Remedies Notice.

### **Overview**

- 4.24 This proposed remedy requires replacement cars to be insured on a first party basis such that a policyholder is provided with a replacement car by the policyholder's own insurer in the event of an accident, whether the policyholder is at-fault or not.
- 4.25 The CC considers that this would address the provisional AEC by removing the separation of costs control and costs liability. The CC considers that because the non-fault insurer bears the cost of providing the replacement car then the non-fault insurer will be incentivised to procure the replacement car for the lowest cost. The CC also considers that this would reduce the overall costs of providing replacement cars to non-fault drivers as they would only be entitled to replacement cars according to the policy cover they held (and paid for).
- 4.26 Additionally, the CC considers that this remedy would reduce frictional costs because there would no longer be any reason for disputes. Moreover, the CC considers this would result in

a move away from credit hire towards direct hire which the CC considers "should"<sup>15</sup> lead to some reduction in costs.

### **Does the remedy address the AEC?**

- 4.27 Despite the CC's conclusion that the proposed remedy will address the provisional AEC by removing the separation of cost liability and cost control, the CC can only reach this conclusion if (among other things) the CC can demonstrate that removal of separation decreases the insurers' costs and this flows through into competition between insurers on the merits (i.e. on price).
- 4.28 However, the CC provides no analysis in the Remedies Notice to demonstrate what this proposed remedy means for the reduction of allegedly excessive transactional and frictional costs. On the contrary, the remedy will in fact introduce unquantified frictional costs since consumers would have to incur frictional costs themselves to obtain TRVs from their insurers under their policies.

### **Impact on consumers**

- 4.29 As recognised by the CC, this proposed remedy cannot be implemented without a change of law as it would affect non-fault claimants' rights.
- 4.30 AX considers that any such effect would be a reduction in these claimants' rights and would lead to the following severe adverse effects:
- 4.30.1 First, it represents a fundamental departure from the law of tort at the expense of the non-fault driver. Instead of having a right to look to the tortfeasor to be put back in the position they would have been in but for the accident (subject to a duty of reasonable mitigation) and the right to choose which service provider will fulfil their needs, the non-fault driver can only look to their own insurer. The CC has not attempted to quantify the potential detriment to consumers of having their legal rights altered and without doing so cannot propose a remedy which would plainly harm a subset of consumers.
- 4.30.2 Second, the non-fault driver must choose to pay the costs of insurance against this risk – a cost which under the current law is (rightly) borne by the

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<sup>15</sup> Paragraph 32, Remedies Notice.

tortfeasor. Thus, part of the cost which currently falls upon the at-fault insurer, and ultimately on negligent motorists, is transferred to motorists who may be blameless, but wish to protect themselves against the consequences of the negligence of others (and over which they have no control).

- 4.30.3 Third, non-fault drivers may be deterred from making such claims for fear of compromising their no-claims bonuses – a cost which many CHCs currently provide protection from.
- 4.30.4 Fourth, the likely practical consequence is that economically vulnerable consumers may choose not to pay for such cover, in order to minimise premium costs, and be left without recourse despite being entirely non-fault drivers. In the event of a non-fault accident, this motorist would be left without mobility which would impact society both economically and socially as motorists would, in some cases for a considerable period of time, be unable to undertake the usual activities for which they required their motor vehicle (commuting to work, school run etc.).
- 4.30.5 Fifth, this remedy also effectively excludes the possibility of any credit hire given that: (i) all TRVs would be provided for by insurers; (ii) it would be highly unlikely that any insured would opt for credit hire when they had a TRV covered by an insurance policy (i.e. credit hire would be excluded); and (iii) it potentially removes the ability of a non-fault driver to recover the costs of hiring a TRV (including the costs of credit hire) if they chose to do so.
- 4.30.6 The CC recognises that this proposed remedy would mean the provision of TRVs would move away from credit hire towards direct hire but find that this would reduce costs. However, the CC has not carried out any quantification of the cost to consumers (and society) of this shift and the effective loss of credit hire as a consequence. This is surprising given the CC's acknowledgement that it does not have a concern about credit hire per se and any prohibition of credit hire would leave impecunious non-fault claimants in a position where they might not be able to access a replacement car.<sup>16</sup>

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See paragraph 69 of the Remedies Notice and paragraph 6.90 of the Provisional Findings.

- 4.30.7 Sixth, the CC has not addressed the fact that this remedy would, in fact, eliminate competition at the point of provision of the TRV. Insurers and CHCs currently compete to capture or provide services to non-fault drivers. However, the proposed remedy would eliminate this as all insurers would be obliged to provide replacement cars to their own policyholders in non-fault claims (substituted for the much weaker competition at the point of taking out a policy (see paragraph 4.30.9 below)). This gives rise to a risk that the cost of providing a TRV will be increased (and/or the service in the event of an accident being reduced) and the CC has not considered the consequence of this for the levels of consumers' car insurance premiums. If premiums were to rise then the remedy will not address the AEC and will, therefore, not be effective.
- 4.30.8 Seventh, under this remedy, high-risk drivers would not bear all the costs of their actions. Their insurer would not bear the costs of the TRV provided to the victim. The costs imposed by the risky driver are borne by someone else.
- 4.30.9 Finally, it also seems that this remedy would contradict the CC's own PFs. A requirement for third party insurance would lead to a whole new set of costs, but borne by consumers. Insurers would no doubt add a mark-up to retail insurance policies; consumers would face increased frictional costs in: (i) dealing with their insurers when negotiating their entitlements after an accident; (ii) dealing with their insurers when taking out a policy and choosing the add-on; and (iii) dealing with their insurer to arrange hire mobility provision. Forcing consumers to consider adding mobility on to their insurance policies is striking in light of the CC's findings in the PFs that policy add-ons create an AEC<sup>17</sup>.

- 4.31 The CC has made no attempt to quantify or even analyse these detrimental consequences of its proposed remedy. AX contends that this proposed remedy manifestly fails the test of proportionality.

### **Proportionality**

- 4.32 AX contends this remedy is plainly disproportionate:

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<sup>17</sup> Paragraph 10.11, Remedies Notice.

- 4.32.1 It would erode the rights of non-fault drivers in favour of tortfeasors and their insurers;
- 4.32.2 it would eliminate the credit hire industry, leading to the loss of the benefits that it brings;
- 4.32.3 the result is likely to be that at least some motorists will receive less than their full legal entitlement; and
- 4.32.4 the CC has not demonstrated it would give rise to any net benefit and/or be effective in addressing the AEC.

### **The CC's specific questions**

- 4.33 In relation to the CC's question at 34(a), the RTA 1988 would need to be amended. Whilst the UK could introduce laws mandating that all drivers have first party insurance for TRV, all insurers of UK drivers would still bear the cost risk of providing a TRV for non-UK based non-fault drivers.
- 4.34 In relation to questions 34 (b), (d) and (f), as a CHC, AX is not in a position to answer these questions.
- 4.35 In relation to question 34(c) AX considers that the CC would have to analyse this. Any such analysis will show winners and losers and as such the CC is not in a position to advance a remedy that benefits all consumers (which it is what is obliged to do).
- 4.36 In relation to question 34(e), AX has addressed this effect on credit hire in paragraph 4.30.5 above. The effect on direct hire is also addressed above in that direct hire companies would be likely to become monopoly providers of TRVs. This plainly gives rise to competition risks in terms of price and quality of service. This has been recognised by the CC in its PFs and its acknowledgement at paragraph 6.38 that the existence of credit hire constrain at-fault insurers in terms of service provision to their customers.
- 4.37 AX has also addressed question 34(g) above.
- 4.38 In relation to question 34(h), it cannot be known how long this remedy would take to implement until, at least, the extent of the necessary changes to the current law was known. In any event, any recommendation by the CC to change the law in this regard would no doubt

require extensive consultation with interested parties, impact assessments and legislative drafting. On any view, this would be a very time consuming process.

- 4.39 Finally, in relation to question 34(i) it cannot be known at this stage what, if any supporting measures would be necessary.

## **PROPOSED REMEDY 1B: AT-FAULT INSURER TO BE GIVEN THE FIRST OPTION TO HANDLE NON-FAULT CLAIMS**

### **Summary**

- 4.40 AX considers this remedy would diminish consumer rights and would inevitably result in a reduction of service provision to the claimant, as claimants would be compelled to seek TRV services from at-fault insurers (whose interests are diametrically opposed to theirs) and lead to monopoly power in the provision of such services by at-fault insurers. Moreover, any time window in which the at-fault insurer can consider the position and decide whether to intervene or not would operate as a delay to the provision of services to victims (at-fault insurers will wait until the last minute to offer services), instead of the current situation where those needs are addressed immediately by CHCs. In practice a short period of delay by the at-fault insurer may cause serious detriment to the consumer, or even defeat the entitlement to a TRV altogether if by then a vehicle has been repaired.
- 4.41 Artificially suppressing CHCs' ability to compete to provide TRV services in favour of at-fault insurers would diminish (and quite possibly eradicate) CHCs such that any existing incentives on at-fault insurers to offer direct hire will be removed leaving consumers with no access to a TRV. The proposals would also therefore shift frictional costs to consumers, who would bear the costs of trying to force at-fault insurers to provide TRVs either at all, or timeously, despite it not being in the at-fault insurers' interests to do so.

### **Overview**

- 4.42 This proposed remedy would "*give at-fault insurers first option to handle either the whole of a non-fault claim...or only the replacement car part of a non-fault claim*"<sup>18</sup>.
- 4.43 The CC considers the "*aim of this remedy would be to make it easier for at-fault insurers to capture non-fault claims, thus removing the separation of cost liability and cost control of the*

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<sup>18</sup> Paragraph 35, Remedies Notice.



*non-fault claim. By introducing competition from at-fault insurers at the first notification of loss, a greater constraint would be placed on the behaviour of non-fault insurers and other parties (such as CMCs)"<sup>19</sup>.*

- 4.44 In practice, the CC proposes that when a non-fault driver makes the FNOL to their own insurer or CMC (or to a broker who refers the claim to either), the insurer or CMC should inform the at-fault insurer of the claim. The at-fault insurer would then have a limited period of time to contact the non-fault claimant to offer to provide a replacement car and/or manage the repairs. The at-fault insurer would not be obliged to make this offer and the proposed remedy would not apply when liability was undecided or split.<sup>20</sup>
- 4.45 The non-fault claimant would then have the choice to reject the offer, and elect either their own insurer, broker or CMC to handle the claim<sup>21</sup>. AX refers to this as "**Non-Compulsory Variant**".
- 4.46 In light of the CC's acknowledgement that the Non-Compulsory Variant would not address the AEC, the CC goes on to propose a "**Compulsory Variant**", which would allow the at-fault insurer to capture the claim having seen the circumstances of the case, and the claimant would be obliged to accept the at-fault insurer managing the claim and arranging provision of services, including TRVs and repairs<sup>22</sup>. However, the CC states that it is "*mindful that this variant would remove the legal entitlement that the non-fault claimant currently has to choose the service provider. A further downside is that it risks underprovision to the non-fault claimant, as the at-fault insurer is incentivised to minimise the cost of the claim*"<sup>23</sup>. The CC considers these concerns may be higher in relation to repairs, because consumers may wish to choose the repairer, therefore it may be more appropriate to apply this remedy only to the provision of TRVs. Therefore, separation would be removed only in relation to TRVs.
- 4.47 The CC essentially proposes two versions of the Compulsory Variant for TRVs:

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<sup>19</sup> Paragraph 36, Remedies Notice.

<sup>20</sup> Paragraph 37, Remedies Notice.

<sup>21</sup> Note the CC states that "*this remedy would not apply in cases where liability is undecided or split such that the distinction between the at-fault insurer and non-fault insurer cannot be made*", paragraph 37, Remedies Notice.

<sup>22</sup> Paragraph 9, Remedies Notice.

<sup>23</sup> Paragraph 39, Remedies Notice.

- 4.47.1 The first involves the claimant being compelled to accept the provision of a TRV (if the at-fault insurer elects to provide the TRV) and the type of vehicle being provided will somehow be agreed at the outset (we assume via information the claimant has given to his/her own insurer); or
- 4.47.2 The second involves the at-fault insurer offering a TRV, making clear that it was going to pay a lower hire rate for the vehicle than the non-fault insurer, and the claimant can decide whether to accept the offer or reject the offer, and pay the increased cost associated with getting the TRV from another provider (this is likely to result in claimants *de facto* obtaining these services through the at-fault insurer).

#### **Does the remedy address the AEC?**

- 4.48 The Non-Compulsory Variant would not remedy the AEC. The CC itself recognises this at paragraph 38 of the Remedies Notice. This is because: (i) it would not remedy the alleged AEC identified by the CC (which is here described by the CC as the separation of cost liability and cost control giving rise to a lack of competition on the merits between suppliers of motor insurance) as the non-fault driver could still use CMCs/CHCs, and (ii) the non-fault driver would still only be assessing the different offers on the basis of service. For this reason alone, the Non-Compulsory Variant plainly fails the proportionality test.
- 4.49 The Compulsory Variant addresses separation but not the frictional or transactional costs (even if implemented as suggested by the CC at paragraphs 40 at 41 of the Remedies Notice). That would lead to frictional costs arising between innocent motorists and at-fault insurers, because there remains an irreconcilable conflict between the non-fault driver and the at-fault insurer. Moreover, there would be no CHC to act efficiently as the victim's advocate. The CC has not sought to quantify the net implication of this.

#### **Impact on consumers**

- 4.50 This remedy would have severely detrimental impact upon consumers.
- 4.51 Firstly, like Remedy 1A, the Compulsory Variant represents a diminution of the rights of the non-fault driver to the benefit of the at-fault insurer and (ultimately) the tortfeasor. This is particularly acute in relation to the proposal at paragraphs 40(a) - (d). Even the Non-Compulsory Variant would require motorists to wait a period of time until the at-fault insurer makes an offer.

- 4.52 Secondly, either variant would result in a reduction of service provision to the claimant and/or a reduction of competition.
- 4.53 Thirdly, insurers currently evaluate claims to establish if there might be any potential fraud involved. This vetting procedure can take several days to initiate and, depending on the threat level, several weeks to resolve. Any delay by the insurer (especially a positive response) to the not-fault driver creates an economic and social disbenefit. In order for the CC's proposed remedy not to perpetuate this delay and disbenefit, insurers would need to either: (i) accelerate the pace of investigation (at increased cost to policyholders) or (ii) accept that they are likely to receive a greater number of claims which might later prove to be fraudulent and the costs for which they become incapable of avoiding. Insurers currently have a considerably longer period of time to consider a CHC claim for any potential fraud and this delay does not impact on consumers. The remedy proposed by the CC gives rise to a dilemma: either (i) the insurer will be required to provide a car before the issue of fraud has been investigated, or (ii) the provision of a TRV will be delayed far beyond the kind of time lines achieved by CHCs.
- 4.54 As to (i), a remedy imposed by the CC which undermines the insurance industries' ability to properly investigate and avoid fraudulent claims has the potential to undermine the significant efforts of the insurance industry and the Police to drive down premium increases arising from fraud. Accordingly, an unintended consequence of this proposed remedy would be to expose insurers to a greater degree of fraud whilst potentially increasing the time delay that all non-fault drivers would face before being provided with a TRV. As to (ii) innocent accident victims will suffer a serious detriment as compared to the position where CHC is provided.
- 4.55 In the case of the Compulsory Variant, compulsory intervention by the at-fault insurers reduces competition and this will lead to a reduction in the quality of service provided to non-fault claimants. This is because quality of service has a large number of dimensions (not only car type and duration but also location of car, ease of contacting the provider, terms and conditions of hire etc). In the case of the Compulsory Variant set out in paragraph 40 of the Remedies Notice, the at-fault insurer would be a monopoly provider to the accident victim with non-aligned interests. Such a victim is unlikely to be a customer of the at-fault insurer. In the case of the compulsory variant set out at paragraph 41 of the Remedies Notice, the at-fault insurer could render itself a monopoly provider by always offering a lower hire rate. However, offering the lowest rate is likely to be at the expense of the non-fault claimant getting the service provision to which he/she is legally entitled.

- 4.56 Moreover, the Compulsory Variant would also eliminate CHCs (on the first sub-variant where only the at-fault insurer could make provision). On the second sub-variant (where the at-fault insurer rate would operate as a cap) it would be likely on the basis of the CC's PFs to eliminate almost all CHCs from the provision of post-accident services via credit hire, as the at-fault insurers would provide a TRV on the basis of direct hire rates which are allegedly lower than the CHC rates. This will reduce the ability of all but the largest CHCs to compete and ultimately push them out entirely, to the detriment of consumers.
- 4.57 The CC has recognised the incentive effect credit hire provides for at-fault insurers to provide direct hire and a good quality service<sup>24</sup>. Therefore, in a post CC remedy world, consumers would be worse off: they would start off by receiving less credit hire and with the eventual elimination of credit hire they would receive either very poor quality TRV services or no TRV services at all (due to the absence of the incentive effect on the at-fault insurer).
- 4.58 Thus, the overall effect of the Compulsory Variant would be to provide very little incentive to the at-fault insurer to provide a high quality of service to the accident victim. In particular, neither variant makes any provision for the periods of hire and there would be no incentive on the at-fault insurer to ensure that the non-fault driver was provided with the type of vehicle for the length of time necessary to meet the non-fault driver's needs. Having this be determined by the at-fault insurer could severely harm the non-fault motorist and leave them without any control over this critical issue.
- 4.59 Furthermore, in relation to the Non-Compulsory Variant AX submits that the introduction of a period of delay for consumers in having to consider alternative service offers would also have serious detrimental implications for consumers. This proposal raises a very real practical issue: what is the position of the non-fault driver during the period that the at-fault insurer will require in order to decide whether to accept liability and/or offer to handle the claim? Under the current arrangement, the non-fault driver can enter into a credit hire agreement without exposure to financial risk and immediately obtain a TRV. Under the CC's proposal, such a motorist may face a very significant delay during which they must either do without a vehicle or (if able to do so) fund hire themselves. This issue is serious because the disutility of being unexpectedly deprived of a vehicle is likely to be highest in the immediate aftermath of an accident and is also likely to be particularly acute for economically vulnerable

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<sup>24</sup> See, for example, paragraphs 3.73, 6.16, 6.40, 6.69 and 6.90 of the PFs.

claimants, or those with an urgent need for a vehicle for (for example) school runs, or deliveries.

### **Proportionality**

4.60 Overall, for the reasons given, AX contends that both variants of this remedy do not remedy the AEC and therefore plainly fail the test of proportionality.

### **The CC's specific questions**

4.61 In relation to the CC's questions 43(a)-(d), AX has set out its views on the effectiveness at paragraphs 4.40 to 4.60 above.

4.62 In relation to question 43(e), AX notes that applying this remedy to TRV services and not repairs may cause confusion for the consumer, as this would increase the number of parties they would have to deal with.

4.63 In relation to question 44(f) and (g), AX has set out its views on the distortions, unintended consequences and potential circumventions at paragraphs 4.40 to 4.60 above.

4.64 In relation to question 44(h), the issue of monitoring can only be addressed once the detail of the proposed remedy is resolved.

4.65 In relation to question 44(i), the same considerations as set out in relation to Proposed Remedy 1A apply to the necessary legal changes and to the time these would take. In addition, on either variant, there would need to be substantive administrative steps put in place which would involve significant input from both the claimant and their insurer, any CMC or broker and the at-fault insurer. These risk being cumbersome, time consuming and very costly. There is also a significant risk that protracted administrative steps may lead to the non-fault drivers not having a clear view of their entitlements and obligations throughout the process.

## **PROPOSED REMEDY 1C: MEASURES TO CONTROL THE COST OF PROVIDING A REPLACEMENT CAR TO NON-FAULT CLAIMANTS**

### **Summary of AX Response**

4.66 AX is supportive of a remedy which aims to improve the *efficiency* of the settlement of claims, which ought to be capable of being achieved under the GTA. However, AX does not support a remedy which seeks to cap daily hire rates in the manner proposed as, for the

reasons set out below, the setting of daily hire rates could not take into account all the circumstances of any given case and it would, therefore, be almost impossible to achieve an appropriate maximum rate.

- 4.67 Moreover, the CC's proposals for price control risk causing significant harm to consumers without the prospect of achieving any corresponding consumer benefit.

#### **Overview of CC's Proposed Remedy**

- 4.68 The CC's proposed remedy aims to control the cost to at-fault insurers of subrogated claims for the provision of replacement cars to non-fault claimants. The CC also provisionally concludes that this remedy would reduce the alleged frictional costs arising in relation to the provision of replacement cars both directly (through making the administration of claims more efficient) and indirectly (through lower claims leading to fewer disputed claims).

- 4.69 The CC considers that there are several possible measures which it could include in this proposed remedy but fundamentally, the GTA would be replaced.

#### **Does the remedy address the AEC?**

- 4.70 In relation to the provisional AEC identified by the CC, AX disputes the CC's provisional conclusion that at-fault insurers' costs are too high. AX's response to the PFs will deal with its reasoning on this issue but its basic objection to the CC's view is that: (i) the direct comparison between direct hire rates and credit hire rates is not the correct comparison; (ii) even if it were the correct comparison, the ratio between the two is smaller than the ratio identified by the CC; and (iii) frictional and transactional costs incurred by the insurer are not excessive.

- 4.71 However, even if the alleged AEC is correct, the proposed remedy could only be effective if prices were set and capped at a level that did reduce insurers' costs and which did not lead to any further market distortion. AX submits that whilst the proposed remedy to impose cost control measures might in principle be capable of remedying the potential AEC identified by the CC, this proposed remedy is more onerous than necessary and in fact produces extremely large risks that the price set will have unintended and detrimental consequences further explained below.

- 4.72 The CC's proposal to introduce guidance on the duration of the hire periods would require the elaboration of detailed metrics (e.g. the criteria under which durations are warranted). However, because it is unlikely that the metrics will cover all possible cases or a case could

fit within more than one criterion, this could introduce new potential frictional *costs* surrounding the precise duration category the non-fault driver was or the alleged needs of the at-fault driver. Accordingly, this would considerably diminish the effectiveness of the proposed remedy.

- 4.73 For the reasons set out below, the price regulation at the centre of this possible remedy is likely to have severe and potentially fatal consequences for the provision of credit hire services and, as a consequence, at-fault insurers' incentives to provide direct hire, and therefore to the provision of mobility overall.

**Price regulation is highly intrusive, problematic and costly to implement and maintain**

- 4.74 Introducing a cap on daily hire rates would introduce price regulation in place of the current GTA rates and/or individual negotiation and bargaining. This remedy would require on-going supervision and monitoring and is: (i) a highly unusual remedy to propose, and (ii) notoriously difficult to get right on an industry wide basis without serious risk of setting prices too high (and not remedying the potential AEC) or too low (and causing market failure).

- 4.75 The proposal that an independent body should set rates is extremely problematic on a number of grounds, including:

4.75.1 **Difficulty in comparing rates:** It is incredibly difficult to compare rates across different providers, and to allow for factors such as: geographical differences, excess applicable, mileage, waiver charges, age restrictions, etc. .

4.75.2 **Difficulty in setting rates:** Even if the existing rates could be accurately compared, it would also be incredibly difficult to set rates that allow for different factors such as: vehicle category (allowing for type variations) , geographical differences, excess applicable, mileage, waiver charges, age restrictions etc. and as such it would be almost impossible to set an appropriate cap on daily hire rates.

**Alternative proposal**

- 4.76 AX submits that prior to implementing the draconian remedy of prescribing guidance on hire periods and daily hire rates, the CC should consider that, in the context of the GTA, an electronic claims management portal is being specifically developed (at significant cost). But for the OFT's and CC's investigations, it is likely that this electronic claims portal would

already be operational. Both CHCs and insurers have been willing to invest in this electronic system on the basis that it would enable more efficient settlement of claims and reduce frictional costs for all parties i.e. the CHCs and insurers. AX considers that if the market is allowed to develop (and self-regulate) and not have a costly, archaic and cumbersome price control system imposed on the market, that there will be renewed impetus to complete this electronic portal. AX contends that the CC should analyse the likely reduction in frictional costs that this could generate (and whether these would be sufficient to address the AEC) prior to considering the implementation of the CC's proposed remedy.

### **Impact on consumers of the CC's Proposed Remedy**

- 4.77 The CC has acknowledged its provisional findings that at-fault insurers are incentivised to provide TRVs due to the existence of credit hire. If price regulation reduced *in any way* the availability of credit hire provision (e.g. even if smaller CHCs are driven out of business), this would reduce (and potentially eradicate) any incentive currently on at-fault insurers to provide direct hire with the effect that consumers would be underprovided. See further paragraph 4.85 for a description of this risk.
- 4.78 Accordingly, the price regulation aspects of this possible remedy could potentially lead to fewer non-fault motorists having access to a TRV with the greatest impact on impecunious non-fault motorists whose socio-economic wellbeing will be most impacted by this remedy.
- 4.79 Moreover, any guidance set by the CC on the duration of hire periods which is designed to limit the hire period would potentially infringe the non-fault claimant's rights under tort law to determine what they consider to be reasonable (which is always subject to the need to mitigate their loss). This could potentially harm consumers significantly if hire periods were limited in a generic way at the outset without taking into account individual consumers' needs.

### **Proportionality**

- 4.80 In substance, the remedy substitutes a form of price control for the current system where the hire rates payable by at-fault insurers are determined either by the GTA or by the law of tort, (subject to the obligation on non-fault drivers to reasonably mitigate their loss).
- 4.81 Therefore, AX submits that this remedy is not necessary on the basis that the current legal system already has a form of price capping protection for the at-fault insurer: under tort law, hire charges cannot be recovered to the extent that they exceed the 'basic hire rate' for an equivalent vehicle in the local area.



- 4.82 AX also submits that this remedy is not necessary as the private motor insurance industry already has in place the GTA which is intended to: (i) make the management of claims more efficient, and (ii) allows claims to be settled using specific rates that are generally discounted for early settlement. As recognised by the CC, 80% of credit hire claims are settled under the GTA and replacing it with a system that favours insurers by reducing rates to a new set of rates that are calculated by reference to direct hire rates will give rise to adverse effects for CHCs. The CC has not quantified or analysed this adverse effect in assessing the proportionality of this remedy.
- 4.83 The CC has not identified an AEC in relation to hire duration and therefore to the extent that this remedy impacts hire periods, it goes beyond the AEC which the CC has identified. It is not, therefore, a necessary remedy.
- 4.84 In any event, AX notes that each TRV case is different and hire periods must be reasonable in order for the associated hire charges to be recoverable. Accordingly, AX does not agree that any meaningful or universal guidance can be given on the duration of hire periods for TRV beyond that which currently exists under the present system
- 4.85 The CC has acknowledged that there is competition among credit hire companies and that competition effectively dissipates what would otherwise be the gross margin of credit hire companies in the form of referral fees. Referral fees in turn are passed on to consumers to a significant extent. If credit hire rates were progressively reduced by regulation *below current levels*, the first effect would be to reduce referral fees (the available gross margin to dissipate would be smaller). Since referral fees are to a significant extent passed back to consumers, the overall benefit to consumers of the lower credit hire rates would at most be very small. However, as credit hire rates were reduced further, referral fees may become too small to attract significant business to credit hire companies and may make the provision of TRVs uneconomic for credit hire companies (because the regulated prices would not exceed the costs of provision). As credit hire becomes uneconomic and market exits occur, so the incentives for at-fault insurers to provide direct hire are diminished and ultimately eliminated (as the CC itself has acknowledged in a number of places in PFs). Therefore a price control remedy can have at most very small consumer benefit but risks extremely large cost, in particular the reduction and quite conceivable loss of provision of TRVs whether under credit hire or direct hire.
- 4.86 In addition to the effects above, as credit hire rates were reduced by regulation, different credit hire companies would become uneconomic at different points. The result is that

competition among credit hire companies may become less intense and referral fees may start to be retained by credit hire companies rather than passed back to insurers and ultimately consumers. As the scope for price competition decreases smaller CHCs will be forced to exit the market because of their lack of scale. With the continued loss of CHCs there will be less incentive on insurers to provide direct hire (which the CC recognises has only arisen to compete with/substitute credit hire) and accordingly direct hire will also diminish over time with a net loss to consumers.

- 4.87 This remedy would also not allow for individual companies to set their rates which would reduce the incentive on CHCs to compete and strive for more efficient settlement.
- 4.88 As set out in above, there is a very real risk that if price control is founded on unsubstantiated and unsustainable direct hire rates, this could give rise to market failure, resulting in short term consumer detriment in the form of underprovision and, in the long term, of either over-charging or even greater under-provision. To introduce such a risk of market failure cannot be a proportionate response to the potential AEC that the CC has identified.

#### **The CC's specific questions**

- 4.89 In relation to the CC's question at 48(a), AX submits that the proposal to impose a rigid remedy in place of the GTA could have significant adverse consequences and could not be implemented either in its proposed form or any more effectively than the GTA currently is.
- 4.90 In relation to the CC's question at 48(b), AX submits that if the CC imposes this remedy, which AX submits it should not on the grounds that it would be disproportionate and/or unnecessary, then AX submits that the proposed remedy should apply to all non-fault driver TRVs. AX submits that to do otherwise would result in CHCs or CMCs being potentially disadvantaged vis-à-vis insurers who, through the network of bilateral agreements are attempting to exclude CHCs and CMCs from providing services to non-fault drivers.
- 4.91 In relation to the CC's question at 48(c), AX considers that it is impossible to specify for all circumstances when repairs must be commenced because the circumstances of accident and repair are unique and accordingly, the existing tort test of "reasonableness" (as currently applies) is appropriate.
- 4.92 In relation to the CC's question at 48(d), as set above, it is not appropriate to have a new mechanism to set hiring rates for replacement cars given that the GTA has been operating

successfully for both insurers and CHCs for the last 11 years and does not need to be replaced by a new mechanism.

- 4.93 In relation to the CC's question at 48(e), whilst AX would potentially like to see administrative charges included as a recoverable expense, it considers that it would not be possible or proportionate to set a level of administrative charges at a fixed level on the basis that to do so would give an advantage to operators with scale and disadvantage small operators potentially creating a barrier to entry into the CHC market.
- 4.94 In relation to the CC's question at 48(f), as set out in paragraph 4.76 above AX's view is that the development and implementation of GTA's electronic portal could address the provisional AEC identified without the need for any more intrusive remedy.
- 4.95 In relation to the CC's question at 48(g), AX considers that the cost measures entailed in this remedy are unquantifiable at this stage (but are likely to be substantial) and in any event would be disproportionate to the aim to be achieved.
- 4.96 In relation to the CC's question at 48(h), as set out in 4.85 and 4.86 above, this remedy carries a high risk of distortion in the provision of credit hire services and unintended consequences to the market: including likely market exist of CHCs leading to consumer detriment and potential future detriment caused by underprovision by at-fault insurers.
- 4.97 In relation to the CC's question at 48(i), AX considers that if there is a risk of circumvention by the introduction of new business models, then this is a risk inherent in any drastic remedy. The CC cannot attempt to constrain the future development of new businesses as this would be wholly disproportionate and inappropriate consequence of regulation. If anything, the CC should enable greater competition rather than trying to stifle any new business models at the outset.

## **PROPOSED REMEDY 1F: IMPROVED MITIGATION IN RELATION TO THE PROVISION OF REPLACEMENT CARS TO NON-FAULT CLAIMANTS**

### **Summary**

- 4.98 The proposed remedy seeks to strengthen the application of an already existing legal requirement (the requirement to assess and demonstrate the non-fault claimant's need). AX supports the principle of mitigation but subject to the caveat that at-fault insurers may seek to impose overly demanding mitigation questions with a view to deterring victims from taking up credit hire, and thereby reducing their incentives to provide direct hire.

## Overview

- 4.99 In proposing this remedy, the CC is aiming to improve the already existing mitigation process. Essentially, the current position is that a non-fault claimant is entitled to a broadly equivalent replacement car while their own vehicle is unavailable, subject to a duty to mitigate their loss with consideration to their need.
- 4.100 The CC states that it has found that often non-fault insurers and CMCs do not enquire in detail about a non-fault claimant's need for a broadly equivalent replacement car. Mitigation statements are currently only signed by claimants upon receiving a replacement car.
- 4.101 This proposed remedy would require non-fault insurers and CMCs to ask non-fault claimants standard questions about their need for a replacement car. The type of vehicle provided and hire duration should take account of the responses.
- 4.102 In addition the CC states, "*non-fault insurers and CMCs would be required to provide the at-fault insurer with adequate documentation showing that the appropriate vehicle had been provided by completing a 'mitigation declaration' setting out details of the claimant's responses and written confirmation that the cost of the replacement car has been appropriately mitigated*"<sup>25</sup>. Under this proposal the at-fault insurer would be entitled to be sent the mitigation declaration and to review the non-fault insurer's or CMC's call record in the event of a dispute.
- 4.103 The CC states that "*the aim of this remedy is to reduce the amount of subrogated claims by ensuring that replacement cars are provided to non-fault claimants only in accordance with their needs. This remedy would also aim to reduce the frictional costs incurred by insurers and CMCs that arise when there is a dispute over the replacement car provided to a non-fault claimant because the at-fault insurer alleges that the replacement car exceeds the non-fault claimant's needs*"<sup>26</sup>.
- 4.104 AX would not support a version of this remedy which enables the at-fault insurer to have access to its call records. On the basis that providing access to all call records would reveal internal processes and procedures, AX would not wish for the at-fault insurer to have access

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<sup>25</sup> Paragraph 59, Remedies Notice.

<sup>26</sup> Paragraph 59, Remedies Notice.

to such records. AX is also concerned about the data protection implication of such a measure.

### **Does the remedy address the AEC?**

- 4.105 This remedy does not address the separation, nor does it address frictional costs in AX's view given that it already rigorously applies mitigation questions.

### **Impact on consumers**

- 4.106 AX does not consider this remedy will impact consumers too much, as long as the mitigation questions are not over-burdensome. As noted above, at-fault insurers may seek to impose overly demanding mitigation questions with a view to deterring victims from taking up credit hire, and thereby reducing their incentives to provide direct hire.

### **Proportionality**

- 4.107 AX already makes an assessment /asks questions in order to determine the non-fault claimants needs. In light of this, AX questions the reasonableness of implementing such a remedy, if it is unlikely to reduce the amount of subrogated claims (as need is already an existing legal requirement and indeed, this is assessed at the outset by AX, which ensures loss is mitigated in light of this needs based assessment).

### **The CC's specific questions**

- 4.108 In relation to the CC's question at 61(a), AX believes this remedy could operate on a stand-alone basis.
- 4.109 In relation to the CC's question at 61(b), this remedy could be implemented together with Remedy A (informational remedy), with the focus on making sure that the non-fault driver understands his/her legal rights and responds to the questions about his/her needs truthfully.
- 4.110 In relation to the CC's question at 61(c), AX takes the verifying of need very seriously. Its current procedure for assessing claims already provides questions to assess need and ensure the provision of a TRV is appropriately mitigated. In the case of customers who AX assess as having been involved in a non-fault accident, AX explains the credit hire services they are able to offer. AX then assess whether the customer has the need for a replacement vehicle (AX would not offer to provide a credit hire vehicle if the customer has access to another suitable alternative vehicle) and establish the type of vehicle they need. AX always seek to

provide a vehicle which is equivalent to their own damaged vehicle, and this ensures provision is appropriately mitigated.

- 4.111 In relation to the second question, AX would refer the CC back to its submissions at paragraphs 4.98 to 4.107 above. Non-fault claimants have the right to hire a replacement vehicle whilst their own vehicle cannot be used and recover the reasonable costs of doing so from the at-fault insurer. If a non-fault driver is in need of a replacement car, the fact that their own insurance policy may provide for a replacement car in the event of an at-fault claim is irrelevant. The no-fault driver has a right to a replacement car under tort law regardless.
- 4.112 In relation to the CC's question at 61(d), a right to see the 'mitigation declaration' setting out details of the claimant's responses and written confirmation that the cost of the replacement had been appropriately submitted ought to be sufficient, as this will likely be signed As mentioned at paragraph 4.104 above, a requirement to provide call records may have data protection issues.
- 4.113 In relation to the CC's question at 61(e), as mentioned above, in respect of AX at least, it already assesses need.

## **PROPOSED REMEDY 1G: PROHIBITION OF REFERRAL FEES**

### **Summary**

- 4.114 The CC's own calculations of the alleged net detriment to consumers of its provisional AEC do not support the inclusion of this proposal as an effective or logical remedy. Referral fees are the means by which CHC profits are competed away and (even on the CC's analysis) to at least a significant degree passed back to consumers in the form of reduced premiums.

### **Overview**

- 4.115 The CC considers that this remedy would prohibit:
- 4.115.1 Referral fees or commissions paid by CMCs/CHCs/repairers/others to non-fault insurers/non-fault brokers/others for referring non-fault claimants in relation to the provision of TRVs, repairs and paint; and
  - 4.115.2 Referral fees or commissions paid by salvage companies to non-fault insurers.

### **Does this remedy address any AEC?**

- 4.116 The CC's proposed remedy 1G is proposed as a supporting remedy to assist in ensuring the effectiveness of other possible remedies (i.e. that they are not undermined). The CC does not assert that this possible remedy would address any specific AEC in itself.
- 4.117 It would not, in any event be effective in addressing the AEC because a reduction in referral fees would have a perverse effect of increasing the net cost borne by insurers.

### **Impact on consumers**

- 4.118 AX fundamentally objects to this proposed remedy for a number of reasons, as set out below.
- 4.119 According to the CC, CHCs impose additional costs of £193m on insurers. On the other hand, these costs are mitigated by an amount of £98m in referral fees to insurers. Accordingly, a ban on referral fees would, therefore, materially increase insurers costs (to consumers' detriment).
- 4.120 AX, and indeed the wider credit hire industry, considers referral fees to be the key element of their distribution model insofar as CHCs use referral fees to promote themselves to insurers, repair shops etc. In addition, as the CC has itself recognised, CHCs compete to obtain referrals by offering high levels of referral fee (i.e. referral fees are a mechanism on which CHCs compete).<sup>27</sup> This is a form by which credit hire companies' gross profits are currently competed away to the benefit of consumers.
- 4.121 If referral fees were prohibited, it would be necessary for CHCs to advertise themselves (to compensate for this lost opportunity to market themselves) and this would be in the form of print, audio-visual or other media or promote themselves in other ways. These promotion/advertising costs would also need to be accounted for in their business models. Like referral fees, this advertising/promotion would benefit consumers by making credit hire available and thereby also incentivising at-fault insurers to provide direct hire, although is likely to be less effective in so doing. However, unlike referral fees, this advertising/promotion would not have an effect of reducing premiums.
- 4.122 If repair shops, insurers etc. did not have this income stream, then they would likely have to find this income from an additional source in order to compensate for this revenue loss. In

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<sup>27</sup>

Final Report at paragraph 6.17.

the case of garages, this might be from increasing their repair prices, in the case of insurers, increased premiums.

### Proportionality

4.123 AX submits that this is a drastic and disproportionate remedy having potentially unintended consequences. It would likely result in a reduction in CHCs ability to capture non-fault drivers needs, thereby resulting in a decrease in credit hire with the consequential harm to consumers. As previously stated in response to the other potential remedies, any reduction of credit hire would correspondingly lead to reduced incentives on insurers to provide direct hire.

### The CC's specific questions

4.124 In relation to the CC's question at 64(a), AX considers that this remedy cannot operate on a standalone basis insofar as, at least in the Remedies Notice, the CC has not identified:

- 4.124.1 the potential AEC that it seeks to address;
- 4.124.2 the effectiveness of the proposed remedy;
- 4.124.3 the reasonableness and proportionality of the proposed remedy; or
- 4.124.4 the possible remedy outcomes.

4.125 In relation to the CC's question at 64(b), for the reasons set out in the response above, AX considers that a prohibition on referral fees would not benefit consumers. On the contrary, the CC itself has identified that overall, *"the revenue stream (from referral fees etc) to insurers is likely to reduce motor insurance premiums"*<sup>28</sup>.

4.126 In relation to the CC's question at 64(c), AX notes that the CC itself has indicated that *"the revenue stream (from referral fees etc) to insurers is likely to reduce motor insurance premiums"*<sup>29</sup> and accordingly the corollary of this must be that prohibiting referral fees would likely increase motor insurance premiums.

4.127 In relation to the CC's question at 64(d), for the reasons set out above in section 4.118 to 4.123, the prohibition of referral fees would likely result in a dramatic reduction in CHCs' ability to promote themselves and capture the needs of non-fault drivers. This would result in

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<sup>28</sup> Provisional findings at paragraph 6.59

<sup>29</sup> Provisional findings at paragraph 6.59



a decrease in the ability of credit hire companies to operate efficiently and would remove the competitive pressure that insurers are under to compete for non-fault claims. As CHCs exit the market or are able to attract less business, insurers would then have reduced incentives to provide TRVs under direct hire.

- 4.128 In relation to the CC's question at 64(e), AX considers that where there are vertical relationships, there might be potential to circumvent the prohibition on referral fees.
- 4.129 In relation to the CC's question at 64(f), for the reasons set out above in section 4.118 to 4.123, AX considers that a ban on referral fees is not justified and is a disproportionate remedy.

**DLA Piper UK LLP for and on behalf of Accident Exchange**

**17 January 2014**