

PRIVATE MOTOR INSURANCE MARKET INVESTIGATION

Response to Notice of Possible Remedies from ACIS Limited

Non-Confidential Version

1. ACIS is a paint marketing association association (PMA) that [REDACTED] and has participated in the Commission's investigation.
2. ACIS has reviewed the Commission's Provisional Findings and the Notice of Possible Remedies. In this response, ACIS will provide comments on the proposed remedies that have the potential to affect it most directly, i.e. those that relate to arrangements for the sale and distribution of paint for use in motor repairs.
3. The comments in this response concern remedies 1G (the prohibition of referral fees) and 1D (measures to control non-fault repair costs). These remedies are addressed in that order. We have not provided a response to each of the Commission's questions but have added some general comments and observations.

Remedy 1G: Prohibition of referral fees

General comments: [REDACTED]

1. **Views are invited on the effectiveness and proportionality of this remedy and, in particular, on the following:**

- (a) **Could this remedy operate on a stand-alone basis?**

For the reasons set out further below, ACIS does not consider that prohibiting referral fees in respect of the distribution of paint is an effective or proportionate remedy for the issues identified in the Provisional Findings, whether applied on a stand-alone basis or in conjunction with other remedies.

- (b) **Would remedies 1A to 1F benefit from a prohibition of referral fees as a supportive measure? Or would remedies 1A to 1F have the effect of reducing referral fees in any event?**

Measures to prevent subrogated claims from being marked-up, as set out in Remedy 1D, might have the effect of reducing referral fees without the requirement for a separate remedy, if [REDACTED]. Further comments about the proposed price control mechanism and referral fees are set out in the response to Remedy 1D.

- (c) **What would be the impact on premiums if referral fees were prohibited?**

Commentary about the likely effect on premiums is necessarily speculative. However, ACIS's view is that [REDACTED], with no resulting reduction in premiums. [REDACTED]

We note that an alternative potential effect of a prohibition on referral fees is that insurers would [REDACTED]. This would also be unlikely to result in a decrease in premiums

if, as the Commission reports, in the absence of such agreements any savings would likely be retained by the repairer¹. In this scenario, other efficiencies and cost savings that the Commission acknowledges can result from such arrangements would be lost.

- (d) **Would this remedy give rise to distortions or have any other unintended consequences? In particular, would a prohibition on referral fees create a greater incentive for insurers to vertically integrate?**

It is possible that insurers might seek vertical integration with other parties in the supply chain in order to internalise sums that were previously paid out as referral fees. Such vertical integration could reduce competition among the suppliers to this market.

- (e) **What circumvention risks would this remedy pose and how could these be mitigated? In particular, how could other monetary transfers (eg discounts) having the same effect as referral fees be prevented?**

- (f) **How could this remedy best be monitored and what costs would be incurred in doing so?**

These two questions are addressed together. In ACIS's view, it would be extremely difficult to prevent other financial measures having equivalent effect. A remedy that seeks to prevent any monetary transfers (including discounts) would need to be drafted in broad and principle-based terms to avoid circumvention; however, this would make it difficult and intrusive to monitor and risk creating considerable uncertainty among businesses. We also note that the Remedies Notice does not indicate an intention for this potential remedy to be time-limited, raising the prospect of long-term monitoring.

Remedy 1D: Measures to control non-fault costs

General comments

The aim of this remedy is, according to the Commission's paper, to prevent subrogated claims for repair costs from being marked up by the non-fault insurer. Two alternative mechanisms for controlling the costs that non-fault insurers pass on to at-fault insurers are proposed. The Commission also links this remedy to a proposed ban on referral fees, because it considers that referral fees from repairers to insurers might undermine the effectiveness of the price control remedy.

ACIS is aware of the case-law on the subject of what sums an insurer can recover in a subrogated claim. Our understanding is that, as set out by the Court of Appeal in Coles v Hetherton², the "reasonable cost of repair" in these circumstances is to be determined by reference to what the claimant would have paid if arranging the repair himself on the open market. It is unclear to us how this approach under tort law can be reconciled with the Commission's proposals for price controls based on actual or standardised costs of repair.

¹ Para 61, Appendix 9, Provisional Findings

² Judgment of 20 December 2013

Nevertheless, it appears to ACIS that the Commission's primary concern is that the benefit of referral fees is not passed on by the non-fault insurer³. If the Commission considers that such conduct contributes to a feature of the market having an adverse effect on competition, we submit that [X]. We note that Remedy 1E(b) concerning write-off costs considers including referral fees as part of the total salvage proceeds to the insurer.

Finally, ACIS notes that there is no direct connection between the referral fees that [X] and the ability of repairers to influence the billed cost of repairs. There is therefore no mechanism for [X] referral fees to undermine any remedy that focuses on the cost of repairs incurred. In the event that the Commission decides to proceed with this remedy, ACIS suggests that a distinction might be made between those referral fees that directly contribute to the costs billed by repairers and those that do not.

17 January 2013

³ Paragraph 43, Appendix 9.1