1. INTRODUCTION AND SUMMARY

1.1 esure welcomes this opportunity to respond to the CC's Notice of Possible Remedies ("**CC Remedies Notice**") under Rule 11 of the Competition Commission Rules of Procedure.

1.2 While esure considers that the CC's provisional findings report[1] ("**Provisional Findings**") correctly identifies some features of the private motor insurance ("**PMI**") industry which merit remedial action (for example, the overcosting arising from credit hire), it has concerns regarding certain conclusions reached in the Provisional Findings, which it will address separately in its response to that report. This response to the CC Remedies Notice should be read in that context.

1.3 In undertaking its assessment of the CC Remedies Notice, esure has had specific regard to the CC's Guidelines for market investigations ("**CC Guidance**"), which states that a remedy is proportionate if it:

(i) is one which is effective in achieving its legitimate aim;

(ii) is no more onerous than necessary;

(iii) is the least onerous of all effective measures; and

(iv) does not produce disadvantages disproportionate to its aim.[2]

Summary of esure's views on proposed CC remedies

Remedy A

1.4 esure supports the CC's proposals in Remedy A to increase consumers' understanding of their legal entitlements following a road traffic accident. It considers that it is appropriate to expand the remit of the remedy to include a recommendation that the provision of credit hire and credit repair are incorporated within the consumer credit regime.

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[1] 19 December 2013.

[2] CC Guidelines for market investigations: their role, procedures, assessment and remedies (April 2013); §344. http://www.competition-commission.org.uk/assets/competitioncommission/docs/2013/publications/cc3_revised_.pdf

Theory of Harm 1

1.5 esure considers both Remedy 1A (first party insurance for replacement cars) and 1B (at-fault insurers given first option to handle non-fault claims) to be disproportionate solutions to the features identified by the CC as giving rise to an adverse effect on competition ("**AEC**") under Theory of Harm 1 for the reasons, among others, set out below:

Remedy 1A:

- introduces a significant risk of delay due to the requirement for primary legislation, as well as the risk that the legislative process departs from the remedy recommended by the CC, or worse still is not taken up or passed by the Government;

- has a detrimental effect on the operation of PMI policies arising out of the replacement of a policyholder's tortious entitlement to a replacement vehicle with a voluntary add-on, which has implications for consumers' understanding of their policy and will also either decrease the service quality enjoyed by consumers or increase premia levels (particularly for safer drivers, who are more likely to claim as a non-fault driver); and

- will incur costs to educate consumers on these radical changes and increase frictional costs associated with the administration of claims (with a consequential effect on premia) due to, *inter alia*, the potential separation of repairs and replacement vehicle management (decreasing the ability of non-fault insurers to control costs by reducing repair times, despite their (partial) cost liability).

Remedy 1B:

- is highly unlikely to be workable in practice, due to a non-fault driver's preference to have claims handled by their insurer, in the absence of significant overprovision by the at-fault insurer to entice them away from their own insurer;

- will increase claims administration costs and lead to pronounced delays in replacement vehicles for consumers through the introduction of a significantly more complicated claims administration system, while insurers negotiate to secure management of the non-fault claim; and

- as with Remedy 1A, could lead to a separation of the responsibility for repairs and replacement vehicles (decreasing the at-fault insurer's ability to limit repair duration and thus control costs of the replacement vehicle while at the same time increasing related frictional costs).

1.6 esure therefore considers that a combination of Remedies 1C, 1F and 1G is the proportionate and appropriate package of remedies to address the features of the market which give rise to the AEC identified by the CC in relation to Theory of Harm 1. Together these remedies are more targeted and can be implemented more quickly,

without the distortions and unintended adverse consequences for consumers which are likely to arise from the implementation of either Remedy 1A or 1B. In particular:

Remedy 1C:

- directly addresses the key cause of the AEC, i.e. overcosting of replacement hire services by credit hire companies ("**CHCs**") through (i) a body to set independently daily rate caps for replacement vehicles and (ii) the issuance of objective guidance on the reasonable duration of replacement vehicle provision with reference to repair duration;

- is capable of effective enforcement via the courts through the introduction of judicial guidance; and

- retains the incentives upon insurers and replacement vehicle providers to generate efficiencies.

Remedy 1F:

- reduces the staff and administrative costs incurred by at-fault insurers in monitoring and disputing whether this obligation has been met.

Remedy 1G:

- by banning referral payments made for credit hire and credit repair, will address a significant cause of the CC's identified AEC in Theory of Harm 1 (overcosting of credit hire and credit repair); and

- by extending only to referral payments for credit hire and credit repair, will retain incentives on market participants to continue to invest in attaining efficient claims handling systems.

1.7 esure does not consider that, on the CC's own criteria (see §1.3), Remedies 1D or 1E are proportionate solutions to the AECs identified by the CC:

- Remedy 1D does not target the primary source of harm identified by the CC, namely overcosting due to credit repair. Moreover, in both guises proposed by the CC, esure has concerns about the workability of the proposals.

- Remedy 1E risks removing efficiency incentives in connection with the handling of salvage claims and is also likely to increase the costs of handling salvage claims without any discernible consumer benefit.

Theory of Harm 2

1.8 While esure disagrees with the CC's provisional finding of an AEC in connection with Theory of Harm 2 (which it will address in its response to the Provisional Findings), as a

general proposition, it is supportive of proposals which would allow the expansion of the current audit system on an industry-wide basis to ensure continuing high quality repairs.

Theory of Harm 4

1.9 As with the CC's Remedy A, subject to the practicalities of implementation and ensuring consistent application across the industry, esure is supportive of any measures which enhance consumers' understanding of, and provide maximum clarity in connection with, add-ons.

Theory of Harm 5

1.10 esure agrees with the CC that a ban on wide 'most favoured nation' ("**MFN**") clauses in contracts with price comparison websites ("**PCWs**") is a proportionate remedy to address the anti-competitive effects of such clauses on innovation, pricing and PCW entry, as identified by the CC under Theory of Harm 5.

Scope of CC terms of reference creates a remedies lacuna

1.11 The scope of the CC's reference was set out in the Terms of Reference dated 28 September 2012 to include only insurance cover for privately owned motor cars. This definition, therefore, does not encompass the provision of insurance for private motorbikes, commercially owned private vehicles (i.e. fleet) or commercial vehicles (e.g. vans and buses).

1.12 The Terms of Reference form the 'relevant market' and, when conducting a market investigation, the CC must decide whether there are features of this relevant market which result in an AEC.[3] Therefore, unless the CC amends the Terms of Reference[4] or considers effects on neighbouring markets[5] (neither of which has been done in this investigation to date), the remedies implemented must address the AEC identified in the relevant market, as set out in the Terms of Reference.

1.13 Given that a PMI provider insurer encounters claims which involve vehicles outside of the CC's Terms of Reference, the implementation of any of the CC's proposed remedies to only claims covered by the CC's Terms of Reference is likely to have undesirable consequences. For some of the remedies proposals, a distinction between insurance policies which fall within the CC's Terms of Reference and a different insurance category (e.g. commercial or motorcycle) is liable to create significant practical difficulties and give rise to increased frictional costs.

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[3] Enterprise Act 2002, section 134.

[4] *Ibid*, section 135.

[5] CC Guidance, §153.

2. REMEDY A

Measures to improve claimants' understanding of their legal entitlements

2.1 While esure considers that insurers already provide claimants with a substantial amount of useful information in relation to their legal entitlements following an accident, it has no objection to the introduction of the measures proposed by the CC under Remedy A. As with any remedy, the design of these measures needs to be given careful consideration for them to be effective, proportionate and consistent across the whole industry.

Information to be provided pursuant to Remedy A

2.2 The level of information to be provided to consumers (whether upon the entry into, or renewal of, a policy or upon notification of loss) will need to strike a balance between providing sufficient information to allow a policyholder to understand clearly their legal position following an accident and providing an excess of information, given the material risk that policyholders will not read lengthy documents.

2.3 In addition to the information set out at §18 of the CC Remedies Notice, some consumers may enter into a credit agreement with a credit repairer or CHC unaware of their potential liability in the event that the credit repairer/CHC is unable to recover their costs from the other side.

2.4 While credit repair and credit hire arrangements may fall within the consumer credit regime (as established under the Consumer Credit Act 1974 (the "**CCA**")), as a debtor-creditor-supplier agreement for fixed-sum credit (section 12 CCA), it is easy for credit repairers and CHCs to avoid the obligations of the CCA by ensuring that their contracts fall within the exemption set out in paragraph 3(1)(a) of the Consumer Credit (Exempt Agreements) Order 1989 (the "**1989 Order**").

2.5 By avoiding this regulation, credit repairers and CHCs also avoid the stringent disclosure obligations imposed upon businesses which offer products within the CCA. Such disclosure obligations would be highly beneficial to ensure that individuals receive sufficient information when entering into credit agreements in relation to their non-fault accident.

2.6 Therefore, in introducing informational remedies as considered under Remedy A, esure requests that the CC consider whether it ought to also introduce a recommendation that the 1989 Order is amended to ensure that the exemptions at paragraph 3(1)(a) do not apply to debtor-creditor-supplier agreements entered into for credit hire or credit repairs in the context of a private motor insurance claim.

Implementation of Remedy A

2.7 In order to be effective the disclosure obligations under Remedy A would need to apply consistently to all firms involved in the sale of PMI insurance and all firms which may receive the first notification of loss ("**FNOL**") (e.g. insurers, brokers, sellers of white label

policies, claims management companies ("**CMCs**"), breakdown service providers, solicitors etc.).

2.8 Given the large number of PMI providers and claims handlers, if each individual business was required to prepare their own guidance there is a high risk that different policyholders would be provided with varying amounts of information and the guidance is likely also to vary in quality. There is also the potential for inconsistent information to be provided between the documents received through the annual policy information (i.e. provided by the PMI provider) and those received upon FNOL where FNOL is made with someone other than the policyholder's insurers.

2.9 Responding to the CC's question at §21(c) of the CC Remedies Notice, it is esure's view that a representative body (or combination thereof) ought to be charged with the task of preparing and, when necessary, updating an industry-wide statement of consumers' rights.

2.10 Due to the range of businesses to which this remedy would apply, it may be that more than one representative body will need to be consulted on the precise details of such statement; however, esure considers it most sensible for a co-ordinating role to be adopted by the Association of British Insurers ("**ABI**") and the British Insurance Brokers' Association ("**BIBA**").

2.11 The ABI's role is to "*promote the highest standards of customer service"* and *"support a competitive insurance industry*."[6] In addition, the ABI has prior experience of preparing and publishing guidance for consumers in similar contexts.[7] The preparation of industry-wide guidance is therefore well within the ABI's current area of responsibility and expertise.[8]

2.12 The ABI and BIBA have worked alongside each other in preparing consumer guidance and accordingly are well placed to carry out this role in consultation with other relevant representative bodies.

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[6] https://www.abi.org.uk/About/What-we-do

[7] The ABI has published consumer guides on, *inter alia*, travel insurance, motor warranties and extended warranties.

[8] esure notes that the ABI is currently assisting the OFT with the development and implementation of remedies in lieu of a market investigation reference in relation to the OFT's market study of defined contribution workplace pensions. As such, the ABI is in the process of building its expertise in relation to the particular requirements of enforcing competition-focused remedies.

3. REMEDIES TO THEORY OF HARM 1

3.1 esure strongly supports the CC's conclusion that a remedy (or combination of remedies) is required to address the overcosting of replacement vehicles and repairs, as identified under Theory of Harm 1. However, neither Remedy 1A nor 1B satisfy this test. esure is thus unable to support either remedy and instead considers that a more targeted and proportionate remedy can be found through the proposals set out at 1C, 1F and 1G, as developed below.

Remedy 1A: First party insurance for replacement cars

3.2 In summary, esure opposes Remedy 1A as it:

- introduces a substantial change in the legal system that would require primary legislation, which introduces a risk that the remedy will not ultimately be implemented (at least in the form recommended by the CC) or, at the very least, involves significant delay.

- risks introducing additional costs into the industry – due to the need for drivers to pay an extra premium for replacement vehicle cover in the event that they are involved in a non-fault accident – which would be borne disproportionately by safer consumers (i.e. those with lower risk profiles).

- gives rise to new sources of frictional costs – namely in the form of the informational campaign required to make such a radical change to the existing insurance system – which diminish further any benefits the remedy might bring in terms of addressing the overcosting that arises, primarily due to the use, and cost of, credit hire.

<u>First party insurance penalises safe drivers and reduces incentives for carefulness</u>

3.3 Under a first party system, where the level of replacement car provision for a non-fault driver is set by an add-on to the PMI policy, a policyholder will be required to pay an additional premium in order to obtain the level of service to which they are currently entitled pursuant to the law of tort. The implementation of Remedy 1A would therefore take away a non-fault driver's current tortious entitlement, a long standing right of redress which has been adapted and refined for over a century.[9] This should not be undertaken lightly.

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[9] As far back as 1826 the courts have considered the cost of hire of replacement transportation during the period of repair as recoverable (*The Yorkshireman, 1826, 2 Hagg. Adm. 30n.*). Case law has since confirmed that, where the damaged car is owned by the non-fault claimant, it is reasonable to hire a car meeting the same requirements (prestige): the starting point is an equivalent car. This is, of course subject to the need for the claimant to mitigate losses.

3.4 Removing the tortious entitlement of drivers who are involved in an accident despite being non-fault is likely to have a number of detrimental effects including: adverse effects on costs (and thus premia) due to less effective incentives for safer driving; the introduction of frictional costs (and thus higher premia costs); and lower service quality for non-fault drivers.

Less effective incentives for safer driving

3.5 The tortious entitlement model allows insurers to charge riskier drivers more as there is increased probability of being at-fault in an accident, which has the important effect of rewarding, and thereby incentivising, safer driver behaviour. By removing the responsibility of at-fault insurers to compensate non-fault drivers for their replacement vehicle in the event of an accident, the premia charged to risky drivers will fall and the incentives for safer driving behaviour will weaken. Comparative statistical studies indicate that legal systems relying on first party provision for all or part of motoring insurance are, in general, associated with higher accident rates.[10]

Adverse effects on costs and service quality

3.6 Under the proposal for Remedy 1A, a non-fault driver who has not chosen to pay extra premium for a like-for-like vehicle will not be entitled to be put back in the position they would have been in had the accident not happened. By removing non-fault drivers' tortious entitlement to a replacement vehicle, the CC's proposed remedy will, in effect, require drivers either to increase the price of their insurance policy (by purchasing a replacement vehicle add-on) or face a reduced service level when they are the non-fault party and have not opted for first party replacement vehicle insurance. As a result, the remedy is likely either to:

(i) raise premium prices for safer drivers who are risk averse and therefore choose to purchase the first party insurance to protect themselves when they are non-fault in an accident; or

(ii) lower quality outcomes for drivers who are unable or unwilling to bear the extra cost of an improved replacement car service when they are non-fault in an accident.

3.7 Indeed, the cost implications on safer drivers of a first party replacement vehicle system for the current structure of car insurance may go further. For example, if a non-fault driver required a replacement car to be provided by his/her insurer, this would suggest that his/her no-claims bonus will be affected (since his/her insurer has incurred costs),

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[10] See, for example, Devlin (1992) who found that accidents involving bodily injury increased by about 9.6% after the introduction of no-fault insurance in Quebec and Swan (1984) and McEwin (1989) which found an increase of 16 to 20% in the number of road traffic fatalities in New Zealand and the Northern Territory of Australia after the switch to a no-fault system.

despite the fact that he/she was the non-fault party. This would remove a material aspect of the current link between low risk drivers and lower premia and would affect a significant number of customers. To illustrate the impact this would have, esure believes that **[CONFIDENTIAL]** of its customers per annum benefit from a replacement vehicle when they are the non-fault party, all of whom would risk having their no claims bonus affected under the first party replacement vehicle system.[11]

3.8 The first party insurance model gives rise to a mandated bundling of drivers' replacement vehicle services when they are non-fault and when they are at-fault. Presently, most customers do not purchase a like-for-like vehicle replacement add-on (to the extent they are available) which indicates that customers do not want an equal service in these situations or are not willing to pay for them and are instead willing to accept a lower level of replacement car hire when they are at-fault than they receive by operation of tort law when they are non-fault. In line with other PMI providers, esure does not even offer a like-for-like replacement vehicle option for at-fault drivers **[CONFIDENTIAL]**.[12]

3.9 To avoid complexities that arise, for example, in joint liability accidents, it is likely that insurers would sell replacement vehicle cover that applied equally when their insured driver was non-fault or at-fault. The proposed remedy would thus require that drivers, who are willing to bear the risk of a lower quality replacement car when they are at-fault but wish to protect themselves when they are non-fault, have no choice but to take a more comprehensive replacement vehicle option. This is likely to result in overprovision of car replacement services for at-fault customers, which can only be expected to lead to increases in the premia. Indeed, the additional cost of providing like-for-like vehicle replacements to all at-fault drivers under a first party system could easily lead to greater additional costs than the level of overcosting identified by the CC in the AEC under Theory of Harm 1.[13]

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[11] esure sold **[CONFIDENTIAL]**. esure instructed a CHC or provided a replacement vehicle **[CONFIDENTIAL]** and estimates that **[CONFIDENTIAL]** of its customers who were at-fault in an accident were captured by a third party. Therefore, esure estimates that **[CONFIDENTIAL]** non-fault customers required a replacement vehicle.

[12] As noted in esure's response to the CC's questionnaire for insurers dated 22 April 2013, esure offers a Car Hire add-on which provides a guaranteed courtesy car for up to 21 days to its policyholders where their vehicle was stolen or involved in an accident and is a total loss. The courtesy car will also be available for the period before a car is repaired, if necessary. esure sold **[CONFIDENTIAL]** (direct phone and direct website) with a start date in 2012, **[CONFIDENTIAL]** included the Car Hire add-on **[CONFIDENTIAL]**.

[13] Of the **[CONFIDENTIAL]** at-fault claims settled by esure in 2012, only **[CONFIDENTIAL]** required the provision of a hire vehicle. If we assume that only **[CONFIDENTIAL]** of customers would want a hire vehicle add-on to be protected when non-fault, this would represent **[CONFIDENTIAL]** extra vehicle hires per year just for esure. **[CONFIDENTIAL]** this would represent an extra cost of **[CONFIDENTIAL]** or **[CONFIDENTIAL]** of esure's Gross Written Premium in 2012, which is more than the **[CONFIDENTIAL]** of total industry GWP identified by the CC.

Increased frictional and administrative costs

3.10 A fundamental change like this would involve significant set-up costs. For example, it will require a significant information campaign to educate customers on the requirement to choose and pay for replacement vehicle cover at the start of each premium year and what the implications of this change are for their car insurance policy, which is likely to result in a substantial transitional cost. A radical change of this type would also place administrative burdens on insurance companies and their customers to change any existing policies in line with the new regime. There is also the potential for customer confusion.

3.11 Overall, there is the risk that the proposed remedy would have the effect of increasing, rather than lowering, the frictional costs incurred:

(i) *Where the repair is captured by the at-fault party's insurer, while the replacement vehicle is managed by the non-fault insurer*: Here, additional costs of separate claims management will increase overall costs as there will be duplication of administrative costs across two claims processes and the need for correspondence and coordination between the two claims. Moreover, given drivers' preferences for a one-stop shop for all components of the claims handling process, this remedy is ultimately likely to result in a reduction of insurers' incentives and ability to capture repair claims from third party non-fault drivers, which could – by the terms of the CC's Provisional Findings – increase the costs of handling repairs.

(ii) *Where a customer has third party, fire and theft cover ("**TPFT**")*: Under the current system, a TPFT policy will not cover the costs of repair or replacement vehicles when the policyholder is at-fault. If a TPFT policyholder's tortious entitlement is removed and replaced by an add-on, they could be able to take out an add-on which entitles them to a like-for-like replacement vehicle whether they are at-fault or non-fault. This would result in a perverse outcome where an at-fault insurer would be required to provide a replacement vehicle without any cover in place for the repairs.[14]

(iii) *If first party insurance is limited to PMI policies:* It is assumed from the CC Remedies Notice that CC's Terms of Reference (the PMI market) mean that the remedy will be limited only to PMI policies (see §1.11 *et seq*). If this is the case, the first party model for replacement vehicles presumably would not apply where a commercial vehicle or fleet is involved in an accident, giving rise to scope for confusion and disputes as to the legal principles that would apply.

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[14] Alternatively, if a TPFT policyholder is restricted in their ability to obtain a replacement vehicle add-on, the will be left without any recourse to a replacement vehicle, despite having no responsibility for the accident. If the add-on is only permitted where the TPFT policyholder is non-fault, it is not clear how this would apply where liability is split.

Practicalities of implementation

3.12 The requirement for changes in legislation means that this remedy is unlikely to be implemented in a timely manner and carries with it the implementation risks inherent in a legislative process. The CC Guidance notes that the CC will need to take into account the fact that a recommendation to Government to introduce new legislation may not be accepted when determining the appropriateness of making such a recommendation, since it is for the UK Government to decide whether to act.[15]

3.13 Remedies adopted by the CC in previous market investigations demonstrate that recommendations for legislation ought to be considered a remedy of last resort. Of the completed market investigations, the CC has only considered it appropriate to make recommendations for legislation in the local bus services market investigation.[16] Despite the CC recommending that the Government pass legislation, for a number of the CC's recommendations the Government elected only to implement recommendations and guidance.

3.14 As a result of the tight legislative agenda and the political repercussions of removing consumer entitlements in the lead up to the next election, there can be no certainty as to how the Government will respond to a recommendation of this nature.[17]

3.15 It follows that even if the Government accepts a recommendation to introduce legislation implementing Remedy 1A and proceeds through the legislative process (and this process is not disturbed by the general election), the first party system will be introduced, if at all, only after significant delays. The CC Guidance also provides that the CC will favour a remedy that can be expected to show results in a relatively short period, which would suggest that a remedy available through an enforcement order or undertakings would be preferable.[18]

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[15] CC Guidance, §390.

[16] Competition Commission's Market Investigation into Local Bus Services http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/local-bus-services-market-investigation

[17] The date of the next general election has been set for 7 May 2015. There are currently over 170 bills before Parliament and nine draft bills under consultation in session 2013-14 which indicates a full legislative agenda. This has been highlighted by both the Minister for Immigration, Mark Harper and the Leader of the House, Andrew Lansley, '*As the Leader of the House has said, the legislative agenda is quite packed.*' (Hansard 19/12/2013). With a timeframe of less than two years, a legislative remedy offered by the CC appears highly unlikely to occur in this Parliament.

[18] CC Guidance, §392.

Remedy 1A is not a proportionate or effective remedy

3.16 The introduction of this radical change to the current legal position, requiring primary legislation, does not meet the test of proportionality, as it is not the least onerous of all effective measures (see §1.3 above).

3.17 Moreover, in light of esure's significant concerns around the ability of the CC to ensure that the recommended legislation is passed, the impact that the first party model (and the introduction of replacement vehicle add-ons) will have on additional frictional costs, the determination of premia and incentives for inferior service quality resulting from the first party model, esure does not consider that this remedy would address the AEC under Theory of Harm 1 and may cause significant unforeseen detriment across the market.

Alternative proposal for Remedy 1A

3.18 esure understands that some insurers may support a first party model based upon the CC's proposal for Remedy 1A, but retaining the ability to subrogate costs. esure understands that this proposal would implement a partial first party insurance system for replacement cars, where the replacement vehicle costs would be controlled by the non-fault driver's insurer, but the at-fault insurer will ultimately be liable for the costs.

3.19 esure notes that the CC Remedies Notice does not propose this structure as a remedy (and esure considers that there are good reasons not to).[19] However, since other members of the industry have raised the point, esure explains below why it does not consider this alternative version of Remedy 1A to be a workable or appropriate remedy to the AEC on replacement vehicle hire.

3.20 Fundamentally, esure is unable to see how this remedy – if it is designed not to affect tortious rights of non-fault drivers – would differ from the current industry set up. In particular, non-fault drivers who do not take a like-for-like hire add-on are not likely to accept a courtesy car if their tortious rights allow for a greater entitlement, and would still be able to contact CHCs to receive their full legal entitlement. Similarly, the insurer of a non-fault driver may still provide a vehicle through a CHC if it is clear that its driver is non-fault (subject to other remedies on referral fees which esure is supportive of).

3.21 Therefore, esure considers that this proposal could only be effective in remedying the AEC identified by the CC if it is implemented in combination with Remedies 1C and 1G, which are designed to control the costs of any replacement vehicle subrogation, and the incentives of non-fault insurers to rely on credit hire. However, over and above these remedies, it would appear to add no further protection against the risks of overcosting

[19] In addition esure notes that the CC's duty to consult under section 169 of the Enterprise Act would need to be satisfied before it could consider adopting this remedy (on the basis that it did not form part of the CC Remedies Notice).

and, indeed, carries with it certain of the undesirable consequences outlined above in response to the CC's proposed Remedy 1A.

3.22 The only way that the revised Remedy 1A could have any impact on over costing would be if it were accompanied by a mandatory provision of an amended Road Traffic Act, which stipulated a PMI policyholder must claim car hire provision from his/her own policy, thus restricting their tortious rights (and recourse to credit hire) (see §3.12 *et seq*). In such form, the only benefit it would appear to offer over and above the CC's proposed 1A is that the subrogation of non-fault claims would help to incentivise safer driving (as discussed at §3.5 above).

3.23 As with Remedy 1A proposed by the CC, esure considers that the CC should not pursue this remedy proposal any further. Neither variant is able to satisfy the CC's remedies criteria for proportionality (see §1.3). Rather, the more targeted remedies that directly address the excessive charges of credit hire, such as Remedies 1C, 1F and 1G proposed by the CC, are far more likely to be effective in dealing with the AEC identified by the CC.

Remedy 1B: At-fault insurers to be given the first option to handle non-fault claims

3.24 Regardless of whether this remedy applies to all aspects of a claim (§37 to 39 CC Remedies Notice) or only replacement vehicles (§40 to 41 CC Remedies Notice), the implementation of this remedy:

- is unlikely to be workable in practice in that competition between non-fault and at-fault insurers is unlikely to be effective, because non-fault policyholders will, in the absence of material overprovision by the at-fault insurer, prefer for their insurer to handle their claim; and

- would be highly detrimental to consumers with:

    - adverse effects on price due to the increased frictional costs that will arise from, *inter alia*, transferring claims from non-fault to at-fault insurers and/or splitting the components of the claim (i.e. replacement vehicle and repairs) across two insurers; and

    - adverse effects on service quality in the form of delays while claims are transferred to at-fault insurers and/or forcing policyholders to take provision of claims handling services from at-fault insurers and not their own insurer.

<u>Proposals under Remedy 1B for at-fault insurer to handle all of non-fault claims are not workable</u>

3.25 The CC Remedies Notice (§36) suggests that under this form of Remedy 1B there could be competition between the at-fault insurer, the non-fault insurer and a CMC/CHC for the right to handle the claim. It is not clear how this remedy would operate in practice to reduce the identified AEC (overcosting in relation to replacement vehicles and repairs).

3.26 First, it is not clear that actual competition would occur in practice. After an accident, a non-fault driver will either:

(i) be captured by the at-fault insurer at FNOL, before he/she has informed his/her own insurer of the accident (in which case, the non-fault insurer will not have an opportunity to compete); or

(ii) inform his/her own insurer of the accident, at which point they will not be inclined to be captured by an at-fault insurer unless there is a real difference in service being offered (which will only lead to overprovision).[20] This is particularly likely to be the case if the non-fault insurer has 'warned' their policyholder about an approach from an at-fault insurer and is providing a high level of service to their customer from the point of FNOL.

3.27 Whether Remedy 1B generates competition between the at-fault and non-fault insurers to handle the claim (§36 CC Remedies Notice) or the claim is automatically offered to the at-fault insurer to handle (§39), the proposal will not be workable where liability cannot be established at FNOL or is split between more than one party (which accounts for approximately 25%).[21] This will potentially incentivise non-fault insurers to delay deciding the liability of their driver as non-fault – thus triggering the options proposed by the CC – until repairs and replacement vehicles have been arranged.

Proposals under Remedy 1B for at-fault insurer to handle all of non-fault claims will adversely affect consumer's quality of service

Proposal to offer at-fault insurer the opportunity to compete to handle the claim (§36 to 37)

3.28 Pursuant to this remedy, if a non-fault driver informs their insurer of an accident, that insurer would then have an obligation to contact the at-fault insurer to discuss whether the at-fault insurer wishes to capture the claim. In practice, this contact will not happen instantly and it may be at least the next working day before initial contact with the at-fault insurer can be made.

3.29 After that initial discussion, the at-fault insurer will need to have sufficient time to decide whether it wishes to capture the non-fault driver. If, following an assessment of the likely costs of the claim, the at-fault insurer elects to capture the claim, it will then need to make contact with the non-fault driver and arrange for the transfer of the claim to its systems and make its own assessment of liability, which may take at least another

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[20] A customer's preference to have their repairs and replacement vehicles managed by their own insurer is demonstrated by at-fault insurers' low success rate in capturing claims. By way of example, the proportion of non-fault claims esure was able to capture **[CONFIDENTIAL]**.

[21] Provisional Findings, §3.56.

working day. By the time that a replacement vehicle has been arranged and delivered, with the intervention of non-working days, this could mean that a non-fault driver could easily be without a driveable vehicle for a week.[22]

3.30 By contrast, under the current system, esure would expect to provide a non-fault customer with a replacement vehicle **[CONFIDENTIAL]**. This additional delay constitutes an unacceptable lowering of service quality at what will be a customer's greatest moment of need.

Proposal for at-fault insurers to have absolute right to capture non-fault driver (§39)

3.31 As acknowledged by the CC, the alternative proposal in the CC Remedies Notice that the competition between potential claims handlers is removed (§39) may introduce incentives to underprovide services (which was the CC's initial concern in relation to Theory of Harm 2) due to the fact that, when capturing claims, at-fault insurers would no longer face competition from non-fault insurers. In removing the threat of a captured non-fault driver to switch to take a replacement vehicle from elsewhere as a constraint upon at-fault insurers, this proposal gives at-fault insurers a monopoly on handling non-fault claims, which is unlikely to result in superior competitive outcomes for consumers, at least in terms of quality of service.

3.32 A requirement imposed upon non-fault insurers to insist that a customer has his/her needs dealt with by another insurer, with no ability to control the quality of that service, would also raise significant concerns about each insurer's ability to continue to meet their obligations under the Financial Conduct Authority's ("**FCA**") principle of Treating Customers Fairly (of which Outcome Five requires that "*consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect*").[23]

3.33 This requirement to refer a claim to the at-fault insurer will also increase the risk that a non-fault driver who is dissatisfied with the services provided could bring a claim against their insurer on that basis that they transferred them to the at-fault insurer, which then resulted in poor quality repairs. This will increase the administrative costs of resolving disputes with customers and risk each insurer's relationship with their policyholders.

<u>Proposals under Remedy 1B for at-fault insurer to handle all of non-fault claims will have an adverse effect on insurer costs and thus PMI prices</u>

3.34 Pursuant to this remedy, insurers are likely to face significant additional administrative costs as a result of, *inter alia*:

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[22] Additional complexities (and, therefore, delays) are likely to occur where the FNOL is made to somebody other than the driver's own insurer.

[23] http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers

(i) a requirement for additional staff and other resources and processes to handle referrals to and from other insurers and the increased time taken to resolve the competition or negotiation over responsibility (see §3.28 *et seq*);

(ii) the additional complexity of a structure which operates entirely differently for single fault and partial fault claims (see §3.27);

(iii) additional frictional costs arising from the incentive to delay a decision on liability, as described at §3.27; and

(iv) the potential requirement to run two separate administrative systems for PMI and other insurance claims (see §1.11).

3.35 Due to the competitiveness of the PMI market, increased costs arising out of this remedy are likely to be passed on to consumers in the form of higher premia.

Proposals under Remedy 1B for at-fault insurer to handle non-fault capture replacement vehicles only is not workable

3.36 As is the case under the Remedy 1B proposals for the capture of all claims (§36 and 39), the options set out at §40 to 41 of the CC Remedies Notice are not applicable to partial or non-established liability. This will provide a significant (and not easily resolved) risk that insurers will be able to circumvent the proposed remedy by delaying decisions on liability, as set out at §3.28 to 3.29 above.

3.37 Significantly, under the Remedy 1B proposal provided for in §41 of the CC Remedies Notice, an at-fault insurer who was not successful in capturing the customer would be able to reduce the amount it was required to pay to a figure below the actual costs of a replacement vehicle, potentially creating a loss at the non-fault insurer. This is demonstrated by the following example:

- After completing the steps set out at §40(a), the non-fault insurer informs the at-fault insurer that it would charge a daily rate of £80 to provide the vehicle to its policyholder.

- The at-fault insurer then reviews its daily rate for an equivalent vehicle and finds that it would be able to charge a daily rate of £78; however, the at-fault insurer informs the non-fault insurer that its daily rate is £70.

- In the event that the customer agrees to have its replacement vehicle requirement captured by the at-fault insurer, the at-fault insurer will have saved £2 a day on the hire (as it would have done if it had been honest).

- However, if the customer wishes to stay with its insurer (as is likely, due to the existing relationship the driver has with their insurer), the non-fault insurer will only be permitted to charge the at-fault insurer at a daily rate of £70 (£8 a day less than if the at-fault insurer had quoted its actual daily rate).

3.38 In effect, this remedy would mean that if a non-fault driver chose to deal with its own insurer, at-fault insurers would have full control over the price charged by the non-fault insurer: clearly, there is a danger that such a remedy might result in perverse incentives for the at-fault insurer.

3.39 Under such a remedy there is no efficient way to ensure that the rates quoted by the at-fault insurer are accurate. In the event that the driver is captured, the non-fault insurer will not have sight of the at-fault insurer's costs. Where the driver is not captured, the non-fault insurer is not in a position to check the arrangements between a rival insurer and his direct hire providers. Such a position would lead to insurers incurring additional costs in challenging the costs quoted by at-fault insurers.

3.40 Furthermore, and unlike the industry wide caps on rates proposed by esure for Remedy 1C, this remedy requires an extensive exchange of information between competitors about their cost structure. This may harm legitimate commercial arrangements; for example, as between direct hire companies and insurers.

Proposals under Remedy 1B for at-fault insurer to handle non-fault capture replacement vehicles only will adversely affect consumers' quality of service

3.41 The requirement for at-fault and non-fault insurers to liaise between themselves before a replacement vehicle has been provided will cause material delays in the provision of a replacement vehicle (see the explanation above at §3.28 to 3.29) in relation to negotiations over the capture of a full claim).

3.42 As explained above at §3.31, a requirement for a non-fault driver to accept being 'captured' by the at-fault insurer (i.e. the proposal at §40 of the CC Remedies Notice) will incentivise the at-fault insurer to minimise its costs. By way of example, under the proposed remedy, the at-fault insurer could avoid providing common benefits such as replacement car pick-up and drop-off. These features would be difficult to reflect in the exchange of daily hire rates between insurers without rendering the entire process too complicated to be efficient.

3.43 Furthermore, a non-fault insurer would not be able to ensure that its customer is being provided with a suitable quality repair vehicle, which may affect a non-fault insurer's obligations under the FCA principles (see §3.32 above).

Proposals under Remedy 1B for at-fault insurer to handle non-fault capture replacement vehicles only will have an adverse effect on cost and price

3.44 This structure will result in substantial additional frictional costs as insurers' claims teams are required to navigate split claims (with one handling the replacement vehicle and the other handling the repair). Each insurer will still incur a majority of the administration costs they would incur if managing the whole claim, resulting in greater overall administrative costs to handle a single claim. These additional frictional costs are likely to have an overall effect on premia.

3.45 Similarly, having separate parties handling the repair and replacement vehicle process will likely lead to additional frictional costs in disputing hire durations. In particular, if the non-fault party handled a repair, while the vehicle hire had been captured by the at-fault insurer, this could create an incentive for the non-fault party to delay the repair.

3.46 Due to the incentive for at-fault insurers to offer to pay a lower rate than their actual daily rate (see §3.37), non-fault insurers may face a loss upon subrogation, despite incurring highly reasonable costs for the provision of a vehicle. These losses will have an overall effect on premia.

3.47 If the CC's intention under Remedy 1B is to address issues of overcosting in connection with the provision of non-fault replacement vehicles, esure considers Remedy 1C (combined with Remedy 1G) to be the more appropriate and proportionate response. Remedy 1C does not detrimentally affect customers and would still allow the CC to limit the costs of replacement vehicles to a reasonable rate.

Practicalities of recommending legislation to implement Remedy 1B

3.48 As the CC acknowledges in the CC Remedies Notice (at §42), it will be necessary to change the law in order to remove a non-fault claimant's right under tort law to choose their service provider under §39 and 40. As a result, each of the concerns identified at §3.12 to 3.15 above in relation to Remedy 1A will also be applicable to proposals under Remedy 1B which require legislation.

3.49 Due to the uncertainty and additional delays caused by a remedy requiring legislation and, in any event, the substantive concerns set out above in relation to the efficacy and distortive effect of Remedy 1B (in any of its four formats), esure does not consider that this is a proportionate remedy to the Theory of Harm 1 AEC (overcosting of replacement vehicles).

Remedy 1C: Measures to control the cost of providing a replacement car to non-fault claimants

3.50 esure agrees with the CC that the overcosting of replacement vehicle cars – in particular through credit hire – is the main cause of the AEC identified by the CC in connection with non-fault replacement vehicles. However, it considers that, provided it is well designed, Remedy 1C can, in conjunction with Remedies 1F and 1G, address the CC's concerns in a timely, effective and proportionate manner.

3.51 In particular, this remedy can address directly the key cause of the AEC, i.e. overcosting of hire services by credit hire companies, while minimising any unintended consequences that a more radical interference of the PMI industry might bring about.

3.52 esure is clear that the remedy developed by the CC must go beyond the current General Terms of Agreement ("**GTA**"), to address the chief weaknesses of the current system, by introducing:

(i) a cap on daily rates for hire vehicles, which is set transparently by an independent body;

(ii) a separate cap for rates of credit;

(iii) a requirement to control over-provision, in terms of car hire duration, as well as daily rates, so as to ensure that lower daily rates are not offset by longer hire duration; and

(iv) judicial guidance to ensure that the principles of the system are enforceable by courts and adhered to in contentious cases.

3.53 The cap, as described above, would need to be mandatory to all providers of replacement car services to non-fault insurers.

Independent enforcement

3.54 While it is esure's view that to ensure a proper working of this mechanism, the rules for setting the cap on daily rate would have to be sufficiently clear and straightforward to ensure transparency, it would also be essential that an independent body would be used to set and review these rates.

3.55 This could be achieved via the provision of undertakings from all providers of non-fault replacement vehicles. Alternatively, this role could be taken on by the Financial Ombudsman,[24] a body which has existing statutory powers and is familiar with the motor insurance market,[25] or either of the FCA or CMA. The ABI would be another potential alternative. The CC would need to order all providers of non-fault replacement vehicles to provide such vehicles in accordance with the rates and guidance on duration.

3.56 Given that the rules should be simple, esure believes that the Financial Ombudsman would incur very limited costs. To ensure that the price caps remain in line with the hire market, it is esure's view that any such remedy would require the price caps to be updated reasonably frequently (for example every six or 12 months) and to reflect any regional variations in the costs of providing hire cars.

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[24] See esure's suggestion at §2.6 above that the 1989 Order be amended to ensure that CHCs and credit repairers fall within the requirements of the CCA. These businesses would then fall within the statutory jurisdiction of the Financial Ombudsman.

[25] http://www.financialombudsman.org.uk/publications/technical_notes/motor-insurance.html

3.57 Moreover, the use of an independent body, such as the Financial Ombudsman, to set and review hire rates caps would also avoid the competition law issues identified by the OFT in its investigation into the provisions of the GTA in 2004.[26]

3.58 esure does not consider that a system where rates are set after negotiation between stakeholders can be effective.

Transparent cap on daily rates

3.59 esure agrees with the CC that it is essential that a cap on daily rates is set according to a transparent methodology and proposes a daily cap on hire rate which is set with reference to a blended average of the High Street rates of the top five providers of direct hire vehicles (by vehicle class), less 'Y', where 'Y' represents a reasonable discount to reflect the stronger negotiating position of market participants (e.g. insurers). This remedy would provide caps for all classes of vehicles supplied by the various providers of replacement vehicles.

3.60 For those drivers that may require help to cover the upfront costs of hiring a vehicle and therefore prefer to rely on credit hire, a cap could also apply to the cost of credit. This could be set with reference to recognisable financial market benchmarks. Such a cap would have the benefit of properly reflecting the additional benefits and costs provided by credit hire. An added benefit of this approach would be to render a ban on referral fees proposed under Remedy 1G more effective by limiting the profits that CHCs have available for referral fees.

The need to control over-provision

3.61 As the CC recognises, while the majority of overcosting in relation to replacement vehicles are caused by the significantly higher daily rates for credit hire,[27] an effective remedy will need to ensure that the reduction in daily rates cannot be recovered by CHCs through an extension of the hire duration.[28] As such, esure would consider it necessary to also provide a mechanism for assessing the appropriate duration of repairs (upon which the duration of replacement vehicle hire ought to be based).

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[26] The OFT's original decision in April 2004 concluded that certain provisions and associated features of the GTA infringed the Chapter I prohibition, namely the provision for the centralised setting of daily credit hire rates, the settling of a flat-rate administration fee and the process of annually revising rates. The OFT noted that, if certain amendments were made, the GTA would qualify for individual exemption. The OFT closed the investigation in 2007, concluding that there was a lack of consumer benefit taking the case forward and it was not an administrative priority.

[27] The Provisional Findings estimate that credit hire costs between 2.1 and 2.5 times as much as direct hire (pages 6-8).

[28] This is implicitly acknowledged by the CC in its question at §48(c), which requests comments on how to monitor the appropriate hire period.

3.62 While it is difficult to establish a standardised duration for repairs (for the reasons set out in relation to Remedy 1D, below), insurers and repairers agree estimated labour rates through cost estimation software. On this basis, the maximum duration of car hire could be linked to the labour hours necessary to repair the vehicle (divided by the working hours in a day), plus an allowance for administration of the repair and the sourcing of parts, i.e. a repair period + 'X' formula ('X' being an allocation of time for administration etc.).

3.63 In the event that a vehicle hire and associated repair continues for longer than the maximum duration, the subrogating party (e.g. non-fault insurer) would have an obligation to explain to the at-fault insurer the reason for the delay, which point the at-fault insurer would then have the opportunity to challenge. This limit on repair duration would allow at-fault insurers to monitor the duration of replacement vehicles and ensure that they are not provided for longer than necessary, which would in turn lower any costs of litigation in the event that the at-fault insurer believes overprovision to have occurred. In doing so, this could be expected to provide a strong incentive on the CHCs not to provide a period of credit hire which is longer than a reasonable repair (plus administration) timeframe.

Scope of the remedy

3.64 A voluntary arrangement (similar to the way in which the GTA currently operates) is not suitable because it creates a dual system. For example, since the GTA is voluntary, a CHC will need to weigh up the constraints the GTA places on its ability to price above the GTA rates for credit hire against the benefits of an established cost recovery process and the risk that some insurers will insist upon dealing only with CHCs within the GTA.

3.65 The consequences of this voluntary system can be seen in the difference between average costs for credit hire provided pursuant to the GTA and those provided outside of the GTA[29] and the extra frictional costs to insurers of challenging non-GTA claims.[30]

3.66 Therefore, in order to ensure that Remedy 1C is effective, it ought to be made legally binding by a CC order on all industry participants who provide hire services to non-fault insurers, including insurers, brokers, CMCs/CHCs, repairers (where they provide replacement vehicles) and direct hire companies.[31] As noted at §3.54, this could be via the provision of undertakings from all such parties or including them in any CC enforcement order or recommendation.

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[29] See the analysis of GTA and non-GTA claims at Appendix 6.1 of the CC's Provisional Findings.

[30] **[CONFIDENTIAL]**

[31] CC Question at §48(b) of the Remedies Notice.

Proposal for more effective enforcement

3.67 An effective system under Remedy 1C, such as the proposal supported by esure, is likely to reduce significantly the number of disputes that arise in connection with the cost of replacement vehicles being subrogated to at-fault insurers and the costs of such disputes. However, as proposed in the CC Remedies Notice, Remedy 1C is not complete as it does not provide for enhanced enforcement measures.

Introduction of judicial guidance

3.68 esure is firmly of the view that one of the key reasons that insurers have not been able to address excessive replacement vehicle costs is due to the courts' inability to adjudicate effectively over such disputes, due to the absence of judicial guidance. This was confirmed to the CC by esure in the course of its hearing before the CC.[32]

3.69 The absence of any objective information on reasonable costs of replacement vehicles means that at present the judiciary is ill equipped to assess whether an award of costs gives rise to overcosting and therefore is not reasonable. This is well illustrated in a number of relevant cases.

3.70 By way of example, on appeal in the Court of Appeal, in *Bent v Highways and Utilities Construction Ltd*,[33] Aikens L.J. observed in connection with statements made by Jacob L.J. in an earlier appeal in this case that:

> *I understand him* [Jacob L.J.] *to be recognising that it may be difficult to produce evidence of an exact BHR* [base hire rate] *for the car that was actually hired on credit terms. The judge has to deal with the evidence available. It is in that sense that Jacob L.J. said that a judge would "not be going wrong" if he considered a bracket of BHRs for cars rather "better" or "worse" than the one hired.*[34]

3.71 The complexity of the burden currently imposed on the judiciary is illustrated by Aikens L.J.'s stipulation in *Bent* of the test that ought to have been applied by Judge Plumstead in the County Court:

> *So the exercise that Judge Plumstead should have conducted was to find, as she could on the evidence, what was the BHR for the Aston Martin DB9 that was actually hired on credit hire terms.*[35]

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[32] Transcript of hearing with DLG, NFU Mutual, Admiral, esure and AXA on 16 July 2013, page 32.

[33] [2011] EWCA Civ 1384. Heard together with *Pattno v First Leicester Buses Ltd.*

[34] *Ibid*, §78.

[35] *Ibid*, §80.

3.72 In the absence of caps on daily hire rates for a wide range of categories of replacement vehicles and guidance on the appropriate duration for a repair (both of which would be provided by the Remedy 1C model supported by esure), it is not realistic to expect the judiciary to be able to determine disputes over replacement vehicle costs with sufficient specificity so as to limit awards to an amount that does not involve overcosting.

3.73 However, with the implementation of a remedy providing daily hire rate caps for both direct hire and credit hire, esure believes that the provision of judicial guidance by Executive of the Judiciary or the Judicial College, directing the judiciary to be guided by the daily hire rates and duration formulae in the prescribed model,[36] would be significantly beneficial to adjudication of claims for the costs of replacement vehicles before the courts.

3.74 In this way, esure proposes that this judicial guidance could take a similar form to the Guidelines for the Assessment of General Damages in Personal Injury issued by the Judicial College (the "**PI Guidelines**"), albeit that the judicial guidance required in this context is likely to be considerably less complicated than that required for personal injury.

3.75 The benefits of the PI Guidelines have been recognised as providing much needed consistency in assessing the levels of compensation.[37]

3.76 The mere existence of judicial guidance will reduce the number of disputed claims which require review through the court, because the increased certainty of what a judge will consider 'reasonable' means that both parties will be able to assess the appropriate level to settle a claim before reaching court.

3.77 As such, the adoption of judicial guidance will lead to significantly lower frictional costs for at-fault insurers in challenging replacement vehicle costs and will also increase incentives upon non-fault insurers, CHCs or any other party providing replacement car services to ensure that they do not exceed the costs provided for in the Remedy 1C guidance.

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[36] Alternatively, the independent body tasked with establishing and monitoring the daily rates could express the intention that the rates so established were reasonable and the judicial guidance would require that judges apply those costs.

[37] See, Professor Andre Tettenborn and David Wilby QC *The Law of Damages* 29.07-8, who state: *The importance of consistency* [in awards of compensation] *was recognised by the Judicial Studies Board and rustled in the publication* [of the PI Guidelines] [...] *In a forward to that work, Lord Donaldson MR succinctly identified the problem posed to judges in assessing compensation for personal injury and other disability, and the importance of consistency of awards.* [...] *The sophistication of the JSB Guidelines has steadily evolved.*

Remedy 1C is the optimal remedy to address replacement vehicle overcosting

3.78 esure believes a clear and simple mechanism backed by judicial guidance would be very likely to limit both actual replacement vehicle costs and frictional costs, as providers would be less incentivised to attempt to overcharge for the hire services.

3.79 esure believes that, by directly addressing the issue of excessive charges and excessively high hire periods, this remedy is less likely to lead to unintended consequences. Furthermore, by setting clear and straightforward rules for the costs to be subrogated, both in terms of the daily rate and the duration, this remedy will require very limited costs to deliver. Finally, by ensuring that the remedy is backed by proper judicial guidance, there is the advantage that the cost caps might not ultimately be overturned by court decisions.

3.80 For the reasons set out above esure strongly believes that the CC should adopt its proposed Remedy 1C. esure believes that this is the most effective mechanism to control the overcosting of hire services, which represent at least 60%[38] and may be up to 90% of the total AEC identified by the CC.[39] As noted below, esure believes that the efficacy of this remedy in containing hire costs would be improved significantly if used in conjunction with Remedies 1F and 1G.

Remedy 1D: Measures to control non-fault repair costs

Remedy 1D does not address the AEC evidenced by the CC

3.81 esure does not consider that either Remedy 1D(a) or 1D(b) address the AEC identified in relation to Theory of Harm 1 as:

- they do not draw a distinction between credit repair (where the vast majority of the overcosting identified by the CC in relation to repairs is located) and insurer managed repairs;
- Remedy 1D(a) removes or, at the very least weakens, insurers incentives to invest in efficient repair systems by requiring them to pass on the benefit of their efficiency gains to their competitors (when acting as at-fault insurers); and
- in practice, the proposals in both 1D(a) and 1D(b) are unworkable, due to the complexity of repair costs or, at very best, are vastly disproportionate to the minimal effect they are likely to have.

[38] As per the calculations in the Provisional Findings, §3.82.

[39] See Provisional Findings, §6.83.

3.82 As esure has indicated previously, the majority of overcosting for non-fault repairs is accounted for by credit repair. The CC's Provisional Findings indicate that there is a very substantial difference between the extent of overcharge identified between repairs managed by CMCs (£325) and those managed by non-fault insurers (£95).[40]

3.83 The impact of the additional costs from insurer-to-insurer subrogated non-fault repairs are recovered by insurers as revenue and, therefore, even by the CC's analysis, these costs can be expected to have a very limited impact on premia.[41] Furthermore, as esure has submitted previously, the overcosting caused by non-fault insurers is likely to be even lower, because the at-fault insurer will save on the costs of managing a non-fault repair.[42] By contrast, overcharging by CMCs (over and above referral fees) represents a cost to the insurance system as a whole and would therefore be expected to lead to much more significant consumer harm. Despite representing only one quarter of all repairs,[43] the CC finds that credit repair creates a total harm of £23 million,[44] while even on the CC's extremely aggressive assumptions the total harm from insurer-to-insurer repair is at most £21 million.[45]

3.84 In light of the material differences between credit repair and insurer-to-insurer subrogated repairs the CC's proposed remedy ought to draw a distinction between credit repairs and repairs managed by non-fault insurers (being focused on the former).[46] The absence of such a focus means that Remedy 1D does not meet the requirements of the CC Guidance as set out at §1.3(i) and 1.3(ii) above. A more

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[40] See Provisional Findings §6.71(b).

[41] See Provisional Findings. The total impact of separation on insurers' costs from non-fault insurers handling repairs is £22.8 million (Table 6.3), which is the same as the total impact on insurers' revenues (Table 6.4). While the CC claims to find some effect on premia might arise, because it expects cost increases to be passed onto consumers to a greater extent than revenue increases, this is (a) questionable because the CC in its estimates of insurer-to-insurer overcosting ignores the costs of claims management; (b) based on questionable assumptions on pass-through and (c) in any event only a second order effect. Furthermore, the CC's own estimates of the AEC do not include any effect of direct insurer-to-insurer subrogation (Provisional Findings, §6.83).

[42] **[CONFIDENTIAL]**

[43] Provisional Findings, §6.19.

[44] See Provisional Findings Appendix 6.6. There are a total of 85,000 credit repairs, where the average overcharge to the at-fault insurer is £325, while the non-fault insurer recovers £53 as a referral fee. This means a net harm of £275 per repair.

[45] See Provisional Findings Appendix 6. This is based on the fact that the total overcosting of insurer-to-insurer repairs is gained as revenues by the at-fault insurer, while there is an extra management cost of £88 per repair for the non-fault insurer for 240,000 repairs. However, as the CC recognizes the extra frictional costs that the at-fault insurer incurs are more likely to be higher for credit repair. In the CC's other calculations (Provisional Findings, §6.83), the CC finds no harm from insurer to insurer repair, while finding a harm of £35 million from credit repair.

[46] In fact, the Remedy 1D(a) only refers to non-fault insurers being required to pass on wholesale costs, which fails to take into account the fact that in a credit repair, the non-fault insurer will not be the one subrogating the repair costs to the at-fault insurer.

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proportionate remedy is ought to be pursued by the CC, namely Remedy 1G (a ban on referral fees).

Remedy 1D(a) is not workable

3.85 There is an inherent difficulty in determining a single definition of the 'wholesale' cost of repair, particularly in light of the wide range of repair structures adopted by different insurers. In particular, esure is very concerned that the remedy risks creating a distortion between vertically integrated insurers, and structures adopted by non-vertically integrated insurers which are designed to replicate the efficiency benefits of such integration.

3.86 By way of example, where an insurer refers its claims to a vertically integrated repairer, the overall corporate group is not affected by the level at which profits are generated. As such, a vertically integrated repairer would be able to increase the costs charged to the insurer for non-fault claims (e.g. through higher hourly labour rates). Similarly, the insurer has no real incentive in challenging overcharging from its vertically integrated repairers.

3.87 Without a clear definition of how 'wholesale' costs will be calculated to ensure that non-fault insurers would not be able to circumvent the provision by inflating the relevant figure, Remedy 1D(a) will be ineffective in reducing the amount of subrogated repairs.

Remedy 1D(a) will reduce efficiency incentives and increase consumer prices

3.88 There is a further danger that Remedy 1D(a) would limit the incentives for (non-vertically integrated) insurers to invest in increasing the efficiencies of their repairer networks because the benefits of those efficiencies that they would retain would be limited only to at-fault claims and therefore substantially reduced in number. Any efficiencies attained for non-fault customers would directly benefit their competitors (who may not have invested in efficient claims handling). Should the remedy reduce the overall incentives to invest in efficient repair networks, or encourage insurers to find means of limiting efficient repair only for their at-fault customers, the undesirable cost implications could far outweigh any benefits of reducing any over-costing to the extent this constitutes a return on investment in efficient repair networks.

3.89 esure is aware that the Italian Antitrust Authority ("**AGCM**") has recently published its report following an inquiry into the Italian motor insurance industry. The AGCM concluded that there was a statistically significant relationship between premia and compensation costs, so that insurers' productive inefficiencies were being passed on to consumers through increased premia. In considering remedies, the AGCM emphasised the need to incentivise efficiency within any claims handling model. esure agrees that this is a very important consideration.

3.90 Remedy 1D(a) is at odds with these efficiency seeking goals as it will weaken insurers' incentives to invest in efficient repair systems, which is highly undesirable in terms of its potential impact on premia. Without incentives to invest in efficient repair/claims handling systems repair costs will increase, due to the gradual introduction of

inefficiencies. These additional costs will ultimately result in a higher premia to be paid by consumers.

Remedy 1D(b) is not workable

3.91 Remedy 1D(b) would not be workable in practice due to the inability to reconcile the often significantly different costs arising from the complexity and number of variables which are involved in a repair, many of which are necessarily a judgement call for the repairer.

3.92 esure has set out below examples where, all other costs being equal, a particular element of a repair can have a significant impact upon the overall cost of the repair. These tables demonstrate that to assess the appropriate costs of repair any calculation will need to take into account:

(i) whether each damaged part is to be repaired or replaced (which will also affect the appropriate labour time) (see Table 3.1);

(ii) whether each damaged part replacement is to be OEM or non-OEM (see Table 3.2); and

(iii) the car make, model and specification. [47]

Table 3.1
[CONFIDENTIAL]

Table 3.2
[CONFIDENTIAL]

3.93 Therefore, it would not be possible to create a workable standardised price model, even through cost estimation systems, which would be able to take into account the sheer number of variables which are required for an accurate calculation of the appropriate repair cost.

3.94 An attempt to avoid the granularity necessary for an accurate reflection of the specific repair costs (as demonstrated above) would necessarily involve taking a blended average of significantly different costs. Any such cost standardisation would increase incentives to reduce the quality of a repair where the actual cost of a high quality repair is below the generated standardised cost.

[47] **[CONFIDENTIAL]**

Remedy 1D(b) is likely to increase costs

3.95 Even if such granularity were possible, the costs of establishing and maintaining the accurate assessment of repair costs and the database required to be able to easily calculate such costs would result in significant extra costs, which would outweigh any of the limited potential benefits of this remedy.[48] This is especially so when, as discussed at §3.82 above, the overcosting that arises in connection with non-fault repairs is overwhelmingly due to credit repairs, yet this remedy would apply to the much greater quantity of insurer to insurer repairs.

3.96 Since decisions on the method of repair would become vital to determining whether the standardised costs had been applied correctly, esure considers it is possible that insurers may look to challenge or opt-out of the previous use of the reduction in paper exchange ("**RIPE**"). Therefore, insurers are likely to incur additional costs in reviewing the relevant repair paperwork and, where relevant, disputing repair costs.

Remedy 1D – esure's proposal to focus upon duration caps

3.97 The remedy set out at 1G will largely resolve the concerns of overcosting in relation to credit repair and is thus a much more targeted remedy. In light of the concerns identified above, esure considers that the focus of a remedy in relation to repair costs ought to be on establishing thresholds for the duration of repairs, which will assist with preventing overcosting of replacement vehicles and repairs (see esure's proposals for Remedy 1C, above).

Remedy 1E: Measures to control non-fault write-off costs

3.98 esure notes that there are certain practical implications of introducing such measures, which are likely to result in higher costs across the industry.

Remedy 1E(a) – increased costs resulting from double handling

3.99 This proposal requires the non-fault insurer to offer the handling of the salvage of non-fault claims to the at-fault insurer after the pre-accident value of the vehicle has been agreed.

3.100 The determination of the pre-accident value by the non-fault insurer's salvage agent invariably takes a not insignificant amount of time, so the non-fault insurer will incur a number of costs prior to any transfer of the salvage to the at-fault insurer. Further duplication of frictional costs will then also arise, resulting in an overall increase in frictional costs.

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[48] By contrast, esure's proposal for Remedy 1C set out above is perfectly manageable, because replacement vehicles are already standardised by reference to vehicle categories and, as such, there are only small variations in costs between vehicles within the same category and standardised prices can be established for such vehicle categories.

3.101 Examples of such additional frictional costs for insurers include:

(i) storage costs incurred as the insurers determine which party will have management of the salvage process;

(ii) additional collection and delivery of the salvage to the at-fault insurer's salvage agent (this is also likely to increase the time taken to resolve the salvage payment);

(iii) both insurers will incur costs in preparing the salvage for sale;

(iv) administration of document processing and a review of MOT Service History will need to be conducted by both parties; and

(v) additional staff and resources will need to be allocated in order to make the necessary arrangements for the capture of salvage.

3.102 The salvage agent of the at-fault insurer will be required to conduct a relatively detailed assessment of the likely salvage value it would be able to achieve for the non-fault vehicle prior to deciding whether to take over the handling of the salvage. These additional frictional costs are likely to be fed into the level of fees charged by the salvage agent to the at-fault insurer and, ultimately, will lead to higher premia.

Remedy 1E(b) – increased costs through additional frictional costs and lower efficiency incentives

3.103 The time taken to finalise payments between insurers in relation to write-offs will be increased significantly by the introduction of this remedy (esure estimates that the average case would take an additional **[CONFIDENTIAL]** to close if it was necessary to wait for the actual salvage costs).

3.104 This delay in the at-fault insurer receiving the salvage payment will increase the frictional and administrative costs incurred by both insurers in managing the write-off claims process (see above). Moreover, this delay may have consequences for a customer whose no-claims bonus would remain open during the renewal process.

3.105 Furthermore, similar to the concerns esure has in relation to Remedy 1D(a) (see §3.85 *et seq*), the use of actual salvage values to offset the subrogated claim will reduce the current incentives upon salvage agents and insurers to manage salvage claims efficiently in order to benefit from lower costs or better procurement practices.

Remedy 1F: Improved mitigation in relation to the provision of replacement cars to non-fault claimants

3.106 esure agrees that it is important to ensure that non-fault drivers are mitigating their losses and that temporary replacement vehicles are not overprovided beyond the needs of the customer. A requirement to mitigate, implemented in parallel with esure's

suggestions for Remedies 1C and 1G, is likely to have a positive incentive effect in ensuring that non-fault insurers take the mitigation obligation into account.

Proposals for ensuring effectiveness

3.107 esure notes that an at-fault insurer is unlikely to challenge the non-fault insurer's choice of vehicle where it will incur significant frictional costs with no real prospect of success.

3.108 In order to reduce the staff costs incurred where at-fault insurers push back where mitigation does not appear to have been correctly assessed, it would be prudent to incorporate this remedy proposal within the judicial guidance esure has suggested in connection with Remedy 1C (§3.68 *et seq*).

3.109 In addition to the CC's proposal to allow an at-fault insurer to review the relevant non-fault insurer or CMC's documents if that insurer is concerned that the genuine needs of the non-fault driver have not been taken into account, judicial guidance could also direct the judiciary to have regard to the relevant mitigation documentation.

3.110 As such, the overprovision of replacement vehicles will be curtailed so the bills subrogated to at-fault insurers will be lower, reducing costs across the industry. These savings will be passed on to consumers by way of lower premia.

Remedy 1G: Prohibition of referral fees

Scope of prohibition

3.111 The CC's Provisional Findings clearly identify the fact that referral fees for credit hire have the largest inflationary impact on costs incurred in managing a non-fault claims (with the CC estimating that the overcharge created through credit hire includes an average of £340 paid out on referral fees).[49] The Provisional Findings also conclude that the overcharge in credit repairs costs also reflect an average referral fee of £55 per claim.[50] These figures are the two referral fee costs cited in the section '*summary of costs and revenue effects'* (§6.28 of the Provisional Findings).

3.112 esure agrees with this view of the market and considers that Remedy 1G ought to prohibit payments for credit hire and credit repairs. These payments allows a service provider to charge above the economically efficient rate for the product[51] and, in

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[49] CC Provisional Findings, §6.17.

[50] CC Provisional Findings, §6.24.

[51] Passmore, C and Roy, A, *Referral Fees – Access to Justice or Road to Hell?*, http://www.legalservicesboard.org.uk/what_we_do/Research/research_events/pdf/referral_fees-access_to_justice_or_road_to_hell.pdf

increasing the sum paid to the referring party, reduces the level of resources employed in the provision of the service.[52]

3.113 However, if the CC were to implement Remedy 1G in relation to repairer networks (which may offer volume rebates and other such forms of loyalty/volume discounts), this would give rise to a number of distortions and unintended consequences.

3.114 First, some insurers have vertically integrated repairers through which they could charge a high price for all repairs (whether the insurer is at-fault or non-fault). In such circumstances, the costs subrogated to third party (at-fault) insurers would be increased; however, the vertically integrated insurer has merely increased the level of profits in their upstream business, rather than their insurance unit (see, for example, §3.86). This structure would not be available to insurers who do not have a vertically integrated repairer network.

3.115 Second, the payments made by repairer networks, such as volume discounts, have significant efficiency incentives and encourage investment which, in turn, lowers the costs of repairs (which is then passed on to consumers by lower premia) and improves the quality and timing of the repair services.

3.116 These discounts reflect the economies of scale which are generated by the greater use of capacity and, therefore, the better recovery of fixed costs by the repairer. Competition law recognises that discount and rebate type payments of this nature are likely to be efficiency enhancing in that, amongst other things, as rebates reduce the marginal costs of an input, the *buyer* will pass on at least part of the price reduction resulting from the rebate to end consumers (i.e. in the form of premia).[53]

3.117 In some ways, these payments and discounts can be seen as a replication of the efficiencies made through vertical integration by certain insurers and their removal would create a significant disparity between the two repairer structures.

3.118 esure considers that similar principles apply to encouraging efficiencies and cost reductions in relation to salvage recovery.

3.119 For completeness, esure acknowledges that, to the extent that any PMI provider has common ownership with a CHC, they would also be able to use the loophole set out at §3.114; however, in conjunction with Remedy 1C, such credit hire companies would not be able to increase their costs beyond the price cap established through that remedy.

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[52] Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, December 2009, p. 203.

[53] See for example: Kjolbye, L, *Rebates under article 82 EC: navigating uncertain waters*, European Competition Law Review 2010, 66; and Osorio, I N, *"A test to ban rebates": which test is applicable to rebates under TFEU art.102?,* European Competition Law Review 2012, 91.

The prohibition of referral fees in personal injury – lessons to be learnt

3.120 Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**") was introduced to ban referral fees in relation to personal injury. LASPO defines the prohibited payments by reference to the parties who pay and receive the payment. esure considers that this would be the most appropriate approach to take in order to maintain efficiency incentives for the reasons set out above.

3.121 While the ban on referral fees only became effective in April 2013, enforcement of the ban in this initial stage has been problematic. By way of example, service providers within the personal injury industry have been able to circumvent the ban through non-transfer of data models.[54]

3.122 Therefore, in order to ensure that Remedy 1G is effective, the CC will need to consider how to ensure that a credit repairer or credit hire provider cannot restructure their payments in order to avoid the prohibition (e.g. through the use of benefits in kind). An example of such an arrangement may be the provision of direct hire vehicles to an insurer (for use in captured claims when the insurer is at-fault) for a significantly lower daily rate when that CHC is provided with the insurer's non-fault claims.

Remedies the CC is not minded to consider further

3.123 esure does not consider that either remedy set out at §65 *et seq* of the CC Remedies Notice would meet the requirements for proportionately reproduced above at §1.3.

3.124 In particular, the implications of a first party motor insurance structure would result in the same consumer detriments as identified in relation to Remedy 1A (see above) and, as recognised by the CC at §67 of the CC Remedies Notice, would have significant unintended detrimental effects.

[54] http://www.postonline.co.uk/post/news/2299405/pressure-mounts-on-government-to-close-referral-fee-ban-loophole

4. REMEDIES TO THEORY OF HARM 2

4.1 The CC's provisional finding of an AEC in Theory of Harm 2 is based entirely on the findings of the MSXI Report. Consistent with the views outlined in its response to the CC's MSXI working paper,[55] esure considers that the MSXI Report has a number of flaws which raise significant questions about the reliability of MSXI's findings (see esure's MSXI Report response dated 26 November 2013). esure will respond separately to the CC's Provisional Findings in connection with Theory of Harm 2.

4.2 Consequently, in esure's view no remedy is required in relation to Theory of Harm 2 (as there is no AEC to address). esure's responses to the proposals for remedies under Theory of Harm 2 set out below are without prejudice to that view.

Remedy 2A: Compulsory audits of the quality of vehicle repairs

4.3 esure considers that if it the CC finds it necessary to impose a remedy in relation to Theory of Harm 2, an enhanced standardised audit system will ensure that a high standard of repair quality is maintained. esure is supportive of any effective measures that ensure a high standard of repair quality across the insurance industry. It is however important to ensure that the costs of such measures do not outweigh their contribution to ensuring positive outcomes for consumers.

Application of Remedy 2A to insurers

4.4 In response to the CC's question at §78(c) of the CC Remedies Notice, esure considers it vital that a compulsory audit regime makes use of an independent third party to conduct standardised audits. An obligation which allowed insurers to undertake individualised audits would not be effective. Amongst other things, due to the inherently subjective nature of audits, an individualised approach would not allow for a comparison to be made between insurers, an important factor in light of the CC's finding that customers may be unable to verify the quality of their own repairs.[56]

4.5 This is a particularly relevant consideration if the results of such audits are to be published (on which, see esure's comments below).

BSI Kitemark PAS 125 as a basis for Remedy 2A

4.6 esure considers the current BSI Kitemark PAS 125 system to be an appropriate starting point for the design of a compulsory audit process. In addition to assessing the overall quality of the repair, a PAS 125 audit will also include an assessment of, *inter alia*:

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[55] esure's Response to MSXI Vehicle Inspection Report, 26 November 2013.

[56] Provisional Findings at §7.20.

- the parts used in the repair;
- the materials used in the repair (for example, where all paint used is still within its shelf life);
- the chosen methods of repair are adhered to;
- the equipment used during the repair meets the required standards; and
- the qualifications and competence of the operator carrying out the repair.

4.7 As a result of considering this broad range of factors, the PAS 125 audit process is significantly more thorough and precise than an audit of the quality of a single repair after that repair has been completed (such as the one carried out by MSXI in connection with this market investigation).

4.8 Since the audits consider factors which apply more generally to the ability of a repairer to meet the necessary quality standard, as well as the quality of individual repairs, the requirements of BSI Kitemark are already aimed at ensuring that the quality of repairs are at a consistently high standard.

4.9 esure considers that the feature of the market identified by the CC as creating an AEC in this area (i.e. that insurers and CMCs fail to monitor the quality of repairs effectively) would be resolved by a compulsory audit remedy that:

(i) makes compliance with the Kitemark compulsory for all repairers who undertake repair work for insurers, brokers or CMCs;

(ii) increases the frequency of audits carried out by the responsible independent body; and

(iii) provides sufficient enforcement powers for the auditing bodies.

4.10 The BSI Kitemark regime would need to be compulsory for all repairers who are repairs cases by anyone involved in managing motor insurance claims in order to prevent the possibility that these requirements could be circumvented; however, the standards of the BSI Kitemark would apply across all repairs conducted by that firm.

4.11 Currently, BSI carry out audits of all PAS 125 compliant repairers to ensure that they are meeting the necessary quality set out under that Kitemark; while esure does not believe there is a problem with repair quality, and especially not with repairers who are PAS 125 compliant, the CC could increase the frequency and type of audits (for example, to include a sample of post-repair audits as suggested by the CC) if it felt that was necessary to increase the quality of repairs.

4.12 In order to be effective, the auditing bodies will need to have sufficient enforcement powers to require that repairers who are not currently meeting the PAS 125 standards improve their repair quality. The current PAS 125 regime allows BSI to:

(i) issue a non-conformity notice and require a repairer to rectify the identified problems within a specified time period;

(ii) after such time period, conduct a repeat audit to assess whether the concerns have been addressed; and

(iii) if BSI is still not satisfied, the repairer's licence to display their PAS 125 accreditation will be revoked until such time as the BSI is satisfied that the necessary standards have been met.

4.13 esure considers that upon implementation of Remedy 2A it would be necessary to require that no insurer refer claims to repairers who have had their licence to display a PAS 125 certification revoked. This would increase incentives upon repairers to maintain the necessary repair quality, while also ensuring that the remedy cannot be circumvented.

Unintended consequences of Remedy 2A: additional costs

4.14 esure notes that this proposal may create additional barriers to entry for repairers, since the start-up costs of becoming PAS 125 credited are estimated to be approximately **[CONFIDENTIAL]**, a not insignificant cost for many repair businesses. This additional cost may also lead to some repairers exiting the market or refusing to provide services to insurers and CMCs.

4.15 Similarly, while the costs of these audits will be born initially by repairers, they are likely to be passed on to insurers through repair invoices with the effect that increased audit costs ultimately are likely to increase premia.

4.16 A single, authorised audit firm would have an effective monopoly once such audits had become mandatory audits. It will therefore be essential to have multiple firms authorised to undertake audits in order to ensure there is price competition for the cost of these audits. If audit costs were to increase due to a lack of competition between auditors this would ultimately affect premia pricing.

Publication of results

4.17 esure does not object to the publication of audit results. Care would need to be taken to ensure that the information published was of use to customers, allowing them to have confidence in the quality of repairs they will be receiving. By way of example, customers who are concerned about repair quality may wish to take into account not only the overall quality of repairs across the UK but also whether any insurer has poor quality repairs locally (i.e. where that customer is most likely to require repair services in the event of an accident).

Remedies the CC is not minded to consider further

4.18 esure agrees with the CC's assessment that a proposal which gives drivers the right to have their repairs assessed by independent experts where there is a problem with that

repair would lead to significant additional costs. Amongst other things, the CC has found that drivers are not well placed to assess the quality of repairs: this would indicate that if drivers were given the free option of using independent experts they may well have an incentive to do so for every single repair, which would risk an overuse of these experts with substantial cost implications and very limited benefit.

4.19 This remedy does not meet the CC Guidance (outlined at §1.3) and the CC is correct to reject this proposal.

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5. REMEDIES TO THEORY OF HARM 4

5.1 esure supports measures to ensure that customers fully understand the details of their policy cover and accordingly is supportive of the three remedies proposed by the CC in relation to the AEC identified pursuant to Theory of Harm 4.

5.2 In relation to certain add-on products, and no-claims bonuses or protected no-claims bonuses in particular, esure has some concerns as to the workability of the proposals advanced by the CC.

Remedy 4A: Provision of all add-on pricing from insurers to PCWs

5.3 esure agrees that enhancing a customer's ability to compare the pricing of add-ons products is likely to improve that customer's ability to identify the most suitable policy. esure supports the introduction of this additional information on PCWs.

Implementation arrangements

5.4 In order for customers to be able to compare add-on prices quoted on PCWs accurately, esure considers that an independent body ought to be put in place with powers to review the information and ensure that it is comparable across both insurers and PCWs.

5.5 For the reasons set out at §2.11 and 2.12, esure considers the most appropriate body to assume this role would be the FCA.

Workability of providing no-claims bonus protection quotations

5.6 Insurers ought to be able to calculate quotes for protected non-claims bonuses through their risk algorithms, which the insurer would be able to make available to the PCW (potentially in the format of a quotation with and without protected no-claims bonuses). However, esure is not in a position to comment on whether it is a viable proposition for the PCWs readily to display this quotation information. esure therefore leaves it for the relevant PCWs to comment on this point.

Remedy 4B: Transparent information concerning no-claims bonus

5.7 As the CC recognises in its Provisional Findings (§8.38), there are significant difficulties across the motor insurance industry in publishing an accurate no-claims bonus scale for customers to review.

5.8 **[CONFIDENTIAL]**

5.9 Therefore, while insurers such as esure would be able to publish a scale which sets out an approximation of the variable scale used to calculate a customer's no-claims bonus, it would not be possible for a customer to use such a scale to accurately calculate the precise final premium (and no-claims bonus value) applicable to their circumstances from such a scale.

5.10 This leads esure to query whether Remedy 4B will address the AEC identified under Theory of Harm 4, because it is not clear what benefit customers would receive from publication of a no-claims bonus scale. Consumer understanding of the terms and conditions and operation of no-claims bonuses would be better achieved via Remedy 4C.

Remedy 4C: Clearer descriptions of add-ons

5.11 esure agrees that clearer information will facilitate more rigorous competition, allowing consumers to easily compare between insurers. The scope and extent of any further information needs to be designed carefully as there is a risk of over-provision of information, at which point the volume of information becomes excessive and customers will not find it accessible (i.e. will not read it). In order to ensure that this remedy is effective, the information should be easily available to consumers in order to allow for ease of review.

5.12 A requirement that all add-ons descriptions meet Plain English standards will require a representative body to confirm that such standards have been met by all PMI providers. While it is often the case that a remedy such as this would be monitored by the OFT (see, for example, the informational remedy imposed in relation to the CC's PPI market investigation), esure considers that the ABI and BIBA would be best placed to assess and monitor insurers' descriptions of add-ons, with reference to a standardised industry-wide set of descriptions prepared by those representative bodies (please see esure's comments in relation to Remedy A for an explanation of the particular strengths of the ABI and BIBA in this context). The CC would need to ensure that all PMI providers – including those selling as agents or brokers – were subject to any such remedy.

6. REMEDIES TO THEORY OF HARM 5

Remedy 5A: Prohibition of wide MFNs

6.1 esure agrees with the CC that a prohibition on wide MFN clauses is the most proportionate and effective remedy for the AEC identified in relation to Theory of Harm 5.

Ensuring that Remedy 5A is effective

6.2 In order to ensure that the remedy is effective, the prohibition will need to be tightly drafted. As such, in response to the question at §101(a) of the CC Remedies Notice, esure consider it more appropriate to draft the enforcement order so that it prohibits all MFN clauses other than those which relate only to prices quoted on the insurers' own website. An attempt to draft a description which would cover all potential formats of wide MFN clauses is likely to leave loopholes.

6.3 To prevent any inconsistencies between the contractual obligations of a PMI provider and/or a PCW and the prohibition, esure considers that the remedy would be best implemented through an order rather than voluntary undertakings. Furthermore, PCWs are in the best position to ensure that the prohibition is complied with (particularly since the order would apply to a much smaller pool of firms and, therefore, would be easier to monitor and enforce).

6.4 **[CONFIDENTIAL]** in order to ensure that there is no confusion across the market as to what terms apply to pricing on alternative sales channels, a brief adjustment period (as suggested at §101(b) of the CC Remedies Notice) may be appropriate to allow parties time to renegotiate contracts.

6.5 Overall, esure agrees with the CC's assessment that Remedy 5A is the most proportionate means of addressing the anti-competitive effects of wide MFNs.