CMA MARKET INVESTIGATION

INTO PRIVATE MOTOR INSURANCE

AXA UK PLC

RESPONSE TO THE PROVISIONAL DECISIONS ON REMEDIES

4 July 2014

1. EXECUTIVE SUMMARY

1.1 This is AXA's response to the Competition and Markets Authority's ("**CMA**") Provisional Decision on Remedies ("**PDR**"), published 12 June 2014.

1.2 AXA's key submissions are summarised as follows:

Scope

1.3 AXA reiterates its previous submissions that for the identified adverse effects on competition ("**AEC**") to be fully resolved, the remedies proposed must apply across the entire motor insurance industry. Applying a different set of rules where the not-at-fault ("**NAF**") driver is a private motorist is not only arbitrary but is also expected to cause significant confusion and generate unforeseen and unintended adverse consequences. The CMA is therefore urged to consider carefully whether the application of these remedies to cover private motor insurance ("**PMI**") only is effective and appropriate.

Theory of Harm 1

1.4 AXA maintains that the only remedy to address the CMA's AEC linked to separation of cost liability and control is Remedy 1A (first party insurance for replacement vehicles and removal of subrogation).

1.5 AXA would, however, support a remedy that would deliver effective cost control even if not removing separation (and therefore, the ability for each insurer, when liable, to control its own costs as far as possible to consumers' benefit). AXA supports, in principle, a proposal to set a rate cap on replacement vehicles so long as this rate cap is based on direct hire rates and is not capable of being overridden by circumvention tactics.

1.6 AXA is, however, unable to assess whether the proposal to set a rate cap on replacement vehicle hire costs will deliver real cost control without knowing what the actual level of the rate cap will be set at. Although the proposal appears to be based around direct hire rates, this is not yet finalised, nor is the level of the cap established. We believe that AXA and other parties must be given the opportunity to comment on the CMA's proposed initial rates in advance of them being incorporated into the enforcement order.

1.7 In addition, AXA has a number of residual concerns about the overall effectiveness of Remedy 1C and queries whether it will in fact be an improvement on the current GTA (see paragraphs 4.2.1 and 4.2.21 for a further explanation of these concerns). In particular, AXA is concerned that:

1.7.1 the incentive to litigate for claims management companies ("**CMCs**") and credit hire companies ("**CHCs**") will not be removed;

1.7.2 the relevance of the rate cap in court proceedings is unclear;

1.7.3 the rate cap will not prevent disputes over other factors, such as need and duration;

1.7.4 the "acceptance of customer" principle cannot override the defendant's rights under tort law; and

1.7.5 the three day window for accepting liability is too short.

1.8 AXA has carefully considered the alternative remedy proposed by an unnamed insurer to limit the amount a replacement vehicle provider could charge a customer[1] by requiring that the rate caps are reflected in the contract between replacement vehicle hire provider and customer, and believes that it would resolve some of its concerns. In particular, this alternative would remove the incentive for CMCs and CHCs to litigate claims, and in doing so, it would be more effective at keeping replacement vehicle hire costs down at a reasonable level and, in principle, mitigate the circumvention risk. AXA therefore strongly believes that this alternative remedy must be adopted as part of the remedy proposed by the CMA or else there is a significant risk that the remedy will not constitute a material change from the current GTA.

1.9 AXA is disappointed that the CMA has declined to take any action to address the cost of repairs in relation to NAF claims. AXA is concerned that more insurers that are not currently inflating repair costs are now highly likely to be considering doing so, therefore increasing the amount of consumer harm identified by the CMA and undermining any consumer harm avoided by Remedy 1C. AXA is therefore concerned that it is inappropriate to view repair costs (and the associated consumer detriment) in isolation but rather they must be viewed in conjunction with the costs of replacement vehicle hire. Otherwise, there is a risk that any benefit saved in relation to replacement vehicle hire costs is simply lost through an increase in activity in relation to inflating repair costs.

[1] Thereby limiting the amount for which the customer would be liable under their contract with the replacement vehicle provider, which in turn would limit the liability of the at-fault motorist to that customer.

1.10 AXA is also disappointed that the opportunity to ban referral fees has not been taken. Whilst the CMA makes the point that the reduced cap will reduce margins and in turn impact the potential for referral fees, this does not recognise that referral fees, whether reduced or not, will still be undesirable, and that circumvention of the cap (for example, by leveraging hire duration) or maximising revenue where the remedies do not apply will reduce or extinguish any pressure on margins with which to pay referral fees. Rather than hoping to reduce the potential for referral fees indirectly through the proposed rate cap, the CMA should simply ban the fees if that is the intended by-product of the rate cap.

1.11 In addition, AXA believes that the ban on referral fees should extend to repairs as well as replacement vehicle hire. This is particularly the case in circumstances where the CMA chooses not to adopt any cost control measures for repair, or else – as noted above – any saving in relation to replacement vehicle hire will be undermined.

Theory of Harm 2

1.12 AXA is pleased that the CMA has agreed with AXA and other industry participants that there is insufficient evidence to support a finding of an AEC in relation to the quality of repairs.

Theory of Harm 4

1.13 AXA is not convinced that additional disclosure around NCBs will outweigh the costs, but it supports the CMA's proposal to recommend the FCA's involvement in relation to descriptions of add-on and the provision of add-ons' pricing details to price comparison websites ("**PCWs**").

Theory of Harm 5

1.14 AXA supports the banning of wide MFNs, but has residual concerns as to how circumvention tactics will be monitored and prevented.

2. SCOPE CONCERNS

2.1 In its response to the Provisional Findings ("**PF Response**"), AXA expressed concerns about the scope of the market investigation and potential remedies. In particular, AXA considered that in order for any potential remedies to be effective, it would be necessary to apply the remedies across the whole of the motor insurance industry, not just PMI, but it also recognised that the terms of reference was expressly limited to PMI. Accordingly, AXA, as well as other parties, sought clarification from the Competition Commission as to how it saw the remedies being applied in practice, with particular reference to scope.

2.2 AXA is disappointed that the CMA has failed to address adequately its (and the industry's) concern.

2.3 While the CMA has clarified that the proposed remedy applies only where the NAF driver is a private motorist (with PMI cover), and irrespective of the cover held by the AF motorist, it has failed to address the concern that this will result in an inappropriate and therefore unacceptable distortive effect in the market.

2.4 The following exemplifies the unsatisfactory and confusing position that will apply when two cars have an accident:

- At-fault ("**AF**") PMI driver / NAF PMI driver: the remedies apply
- AF PMI driver / NAF commercial lines ("**CL**") driver: the remedies do not apply
- AF CL driver / NAF PMI driver: the remedies apply
- NAF CL driver / AF CL driver: the remedies do not apply
- AF non-motor insurer driver / NAF CL driver: the remedies do not apply
- AF non-motor insurer driver / NAF PMI driver: the remedies apply
- AF self-insured body driver / NAF PMI driver: the remedies apply
- AF self-insured body driver / NAF CL driver: the remedies do not apply
- AF PMI driver / NAF self-insured body driver: the remedies do not apply
- AF CL driver / NAF self-insured body driver: the remedies do not apply

2.5 In addition, AXA anticipates practical difficulties in the claims handling process if it is required to make distinctions between PMI and CL claims.

2.6 For example, when an insurer is notified of a claim at FNOL, the claim will fall under one of two claim processes, depending on the status of the claimant. This will inevitably add an additional layer of complexity to the claims handling process. In particular, it will be more important to clarify at the outset what sort of policy the third party has in order to initiate the correct claims process.

2.7 Furthermore, insurers will be obliged to comply with remedies that ultimately do not apply to them. For example, insurers will need to apply the processes for a three day liability decision (or try to establish the nature of the third party insurance within that period) in case they are eligible to receive the benefit of a capped replacement vehicle hire rate. However, if the NAF driver later turns out to be a CL policyholder, the insurer will not see the benefit of a capped replacement vehicle rate, despite the operational cost and input into achieving the three day timescale.

2.8 There is also a risk that the maintenance of a "two stream" approach within the business models of CMCs/CHOs will undermine the remedies proposed. CMCs/CHCs will be incentivised to increase the profits they receive when supplying a vehicle to a NAF CL customer where the replacement vehicle rates are uncapped (and where the arrangement will likely be accompanied by the payment of a referral fee to the CL insurer). As such, AXA believes that an unforeseen and unintended consequence of this remedy is that it will result in much higher CL replacement vehicle costs and an inexplicable differentiation between the two classes of insurance over the treatment of hire costs.

2.9 AXA would therefore appreciate a fuller explanation from the CMA as to how the proposed remedies are expected to apply in practice, in particular addressing AXA's concerns that the limitation to PMI only in this context appears arbitrary and will simply result in additional claims complexity and unintended and unforeseen adverse consequences. The CMA should therefore consider carefully whether the application of these remedies only where the NAF motorist is covered by PMI is effective and appropriate.

3. THEORY OF HARM 1

3.1 The CMA has proposed the following remedies to address the AEC in relation to the provision of replacement vehicles:

3.1.1 Information on consumers' rights following an accident (Remedy A); and

3.1.2 Measures to keep the cost of replacement vehicle hire down, including a rate cap on the cost of replacement vehicle hire (Remedy 1C) and mitigation statements (Remedy 1F).

3.2 AXA wishes to express its disappointment that the CMA has failed to capitalise on the opportunity presented by this inquiry to make significant long-lasting improvements to the PMI sector. AXA maintains that the only way to cure the AEC is to address the separation of cost control and cost liability issue. As advocated in its submission on the proposed remedies ("**Remedies Submission**"), AXA believes this could be achieved by introducing first party insurance for replacement vehicle hire and by removing the right to subrogate (i.e. Remedy 1A). However, the CMA has not sought to address the AEC arising out of the separation of cost liability in its remedies package. Instead, it has focused on controlling the costs of replacement vehicle hire.

3.3 Although AXA believes Remedy 1A is the most effective and desirable solution, in this submission AXA has chosen to focus its comments on the CMA's shortlist of provisional remedies, which are discussed in turn below.

Remedy A

3.4 The CMA is proposing additional disclosure in the form of:

3.4.1 a statement of consumer rights and responses to FAQs to be distributed with annual policy documentation and replicated on the websites of insurers and brokers ("**policy documentation information**"); and

3.4.2 communication of specified information at FNOL to reiterate the claimant's key tortious entitlements (verbally and in writing if requested by the customer) ("**FNOL information**").

3.5 AXA is generally supportive of measures that help ensure customers are properly informed about their rights and obligations following an accident. However, AXA remains unconvinced that there is currently any issue with the information its policyholders receive. AXA is not aware of any customers complaining that they have not received sufficient information about their rights following an accident. Therefore, despite the CMA's view that consumers do not understand their entitlements under their own insurance policy or under tort law, AXA does not believe that additional measures as proposed by the CMA are necessary.

3.6 AXA is also wary of measures to increase information disclosure to customers as this can sometimes have the negative effect of confusing and overwhelming the customer.

3.7 AXA comments on the CMA's two proposals below.

Policy documentation information

3.8 AXA sees little value in providing a statement of consumer rights and responses to FAQs with the policy documentation. AXA believes customers already have sufficient information contained within the policy documentation and suspects that it will not be effective if more information is provided at this point of the customer journey. In this regard, AXA notes the finding in the GfK research undertaken by the CMA that information provided with policy documentation is likely to have limited impact, as it is likely to be filed unread along with the policy documentation.[2]

3.9 AXA believes that a more effective and cost-efficient way of providing this additional information to customers would be through the website of the insurer or intermediary from whom the insurance was sold. Through this channel, the information would be easily accessible by customers who may not have thoroughly reviewed the policy documentation but want to understand better their rights and obligations following an accident.

FNOL information

3.10 Again, AXA believes that its customers are already accurately and sufficiently informed of their rights and obligations following an accident (in relation to both their insurance policies with AXA as well as under tort law) at the FNOL stage. Moreover, the FCA can use certain powers in the event it believes certain insurers are not providing adequate information to consumers. An enforcement order requiring insurers to provide such additional information at FNOL stage is therefore unnecessary.

3.11 AXA is concerned that the statement of consumer rights informs customers that where they are NAF, the customer is "entitled under law to be put back into the position you would have been in had the accident not occurred". Insurance companies are concerned with claims arising from policies of indemnities, and therefore AXA considers that statements like these are not appropriate for an insurance company to make. Such statements are more relevant for a claims management company which requires a different licence and falls under a different regulatory regime compared to insurance companies.

---

[2] PDR, para 2.22(c).

Specific comments on statement of consumer rights (Appendix 2.2)

3.12 Notwithstanding the comments above, we comment on the draft document at Appendix 2.2 (using the same paragraph numbers):

- Paragraph 2: AXA does not believe it is correct that the consumer is "required by law" to report the accident to the "your" insurer. Unless this is a reference to the claims conditions in policies, there is no other compulsion to notify an insurer and in fact many NAF claims are managed by AF insurers without the NAF consumer's insurer even being aware of the incident.

- Paragraph 3: the wording implies joint discussion between the insurers to the exclusion of the consumer. The reality is that the consumer's insurer will discuss with the consumer a position on liability – it may be necessary to ensure that any uninsured loss claims the consumer has are not prejudiced and that in any event any acceptance of liability in the name of the consumer is made with the consumer's engagement.

- Paragraph 5: it is important (and reference is made elsewhere in this submission) to ensure that the consumer is not misled into thinking that their insurer will simply act as a claims management company in a NAF situation, acting only to assist in making a claim against the AF insurer. The reality is that the claim will be dealt with under the policy, and the NAF insurer will then seek recovery against the AF insurer. Consumers must not be misled into thinking that their policy cover will not be utilised or that the insurer can provide a claims management service.

- Paragraph 5: there also needs to be clear guidance that the consumer must take reasonable steps to keep any losses to a minimum, meaning any losses should be avoided or reduced to the extent possible.

- Paragraph 6(a)(ii): this should not feature here and AXA does not believe that through this statement a wider principle around repair should be set. The use of non–original manufacturer parts is widespread, has not been shown to be detrimental to the quality of repairs and may (and often is) referred to within policies.

- Paragraph 6(b)(ii): this statement does not provide any guidance on the circumstances in which the consumer may be without the vehicle and entitled to a replacement vehicle. A link needs to be made to: being without the vehicle because the accident damage immediately made the vehicle unroadworthy; there being no chance of emergency repairs to make the vehicle roadworthy; the vehicle, having been roadworthy and driven, being taken in for repairs at the latest point possible; the hire stopping when repair work has been completed; and the consumer making sure that they are monitoring repairs in the same way they would if they were paying for the bill.

- Paragraph 6(b)(ii): stating that a claimant "might" be held liable for the costs misleads the consumer for there is no doubt that the terms will make the consumer liable for the costs. The statement should read: on credit terms,

"you should note that these terms will make you liable for the hire costs and you will have to pay them if they cannot be recovered from the other driver".

- Paragraph 6(c): this statement should carry the useful rider "provided you did sustain injury in the incident".

- Paragraph 8: this statement should include a reference to the consumer needing to make a claim under the policy if there is no resolution on liability and the consumer is accruing hire costs which could be avoided by using the policy. Note, whilst the issue of whether a claimant's own policy should be used is contentious, this is nothing more than advising a consumer of the best way to avoid a risk of accruing substantial hire costs which the consumer may have to pay personally.

- Paragraph 11(a): this statement should make it clear that "insurer handled" means handled under the policy and not just handled against the AF insurer (linking back to point above).

3.13 Many of the points above also apply to the FNOL statement.

3.14 While AXA queries the need for such additional disclosure statements, AXA does accept that an enforcement order will be required to ensure that non-insurers (such as CMCs) provide sufficient information to claimants.

Costs

3.15 AXA will incur additional costs in order to comply with this remedy, even though it does not believe the CMA has presented a clear case as to why additional information is required. That being said, AXA continuously works on improving the customer journey and the CMA's proposal are not inconsistent with some of the initiatives being considered internally.

Timing

3.16 If the CMA proceeds with this remedy, it would not be possible for AXA to comply with its requirements within three months of an enforcement order. AXA expects that a number of internal processes will need to be carried out and a number of IT changes will be required before it will be able to comply with the new disclosure requirements. For example, AXA expects that all call scripts will need to be updated; additional training of call centre staff will need to be carried out and there will of course be changes to AXA CRM systems which will need to undergo system testing. In addition, further time will be required in respect of policies that are provided through intermediaries (i.e. where AXA does not have control over the policy wording).

3.17 Accordingly, AXA estimates that it would require a minimum of 12 months to implement the changes proposed. This estimate is based on the time taken to implement the recent FCA disclosure requirements, which took no less than 12 months. AXA further notes that the CMA has factored in time between its final decision and the enforcement order (which AXA assumes could be anywhere from just a few weeks up to 6 months, extendable by 4 months) when calculating the implementation period. In order for insurers to make adequate use of this period (e.g.

by initiating any necessary administrative and IT changes), it will be necessary that the precise details of the remedy are made known and finalised in the CMA's final decision. Otherwise, there will be a real risk of certain implementation efforts and changes being wasted. In addition, AXA notes that the time period between the CMA's final report and the making of the enforcement order could in practice be relatively short. In these circumstances, AXA respectfully submits that this time period should not be taken into account when calculating the implementation period - which, in AXA's view and as noted above, needs to be a minimum of 12 months.

Monitoring and enforcement

3.18 AXA supports in principle the CMA working with the FCA and Ministry of Justice ("**MOJ**") to determine how best to monitor compliance with this remedy. However, AXA notes that while the FCA has powers in relation to insurers, it does not have any such powers in relation to non-insurers that will be required to comply with the remedy, such as CMCs and CHCs.

3.19 AXA queries the need and the value in completing compliance statements as per the CMA's proposal in Remedy A. In particular, AXA questions whether the use of compliance statements will lead to effective enforcement for this remedy. We do not fully understand what the CMA has in mind, but the integrity of such statements will be substantially influenced by the possibility of validation by regulators and as a minimum should extend not just to statements confirming that the advice was given, but to control mechanisms and audit activity which positively confirms and supports the compliance statement. Call recording and call sampling will, for example, be required otherwise there will always be a lack of certainty as to the robustness of the compliance statements.

4. REMEDY 1C

4.1 AXA supports in principle the setting of a rate cap for the provision of replacement vehicles as a way of implementing some form of control (in the absence of removal of separation) over costs incurred by AF insurers. However, to achieve these aims, the cap must be set at a level which most closely replicates the cost control available to an AF insurer if separation was removed. This means that the rate cap must reflect direct hire rates. If that is not the case, it is AXA's view that the remedy will not provide an effective solution to the AEC in the absence of removal of separation.

4.2 Despite support for the rate cap remedy in principle, AXA does have some substantive concerns regarding the CMA's proposed remedy, as well as strong views on how the remedy can be implemented effectively. These views are as follows:

4.2.1 **Measures must be put in place to avoid circumvention of the rate cap:** "A dual rate price cap for *subrogated* claims" must be applied in a way that prevents technical arguments from being made that a claim is not a subrogated one (either in the narrow insurance context or the wider doctrine) with the result being that the rate cap is circumvented and does not apply. Accordingly, the enforcement order will need to be carefully drafted and consulted on with the industry. The rate caps may also be circumvented indirectly. For example, when faced with a rate cap, CMCs and CHCs have

more reason to see longer hire periods to compensate for the reduction in hire rates.

4.2.2 **Rate cap must be determined in advance to understand whether this remedy would be effective at controlling costs:** AXA cannot reasonably comment on the effectiveness of this remedy without knowing how the rate cap will be calculated and what the actual initial rates will be. AXA therefore requests that it (and other insurers) is given adequate opportunity to comment on the initial rates before they are adopted in an enforcement order.

4.2.3 **Rate cap must be based on direct hire rates:** AXA's strong view is that this remedy will only be effective at controlling the costs of replacement vehicle hire if direct hire rates are used. In other words, the cost that the AF insurer would pay if it were to provide the replacement vehicle hire directly. Any rate cap other than that based on direct hire costs would not amount to effective cost control. Given the CMA's remedy does not address the separation of cost control and cost liability issue, it is essential that it at least allows AF insurers to control its costs adequately.

4.2.4 **There needs to be certainty when reviewing the rate cap methodology to apply:** although subsequent rate reviews will be necessary, these reviews should focus only on changes in underlying drivers of costs and should not extend to the methodology for setting the rate. In other words, costs should remain based on the equivalent to AF insurer cost control, i.e. direct hire rates or supplier rates capable of being negotiated by AF insurers with their suppliers. In addition the add-on costs should be specified. The enforcement order should set out clearly the basis and methodology for rate calculation to be used at each review.

4.2.5 **The incentive to litigate for CMCs and CHCs will not be removed:** despite support for the rate cap remedy in principle, AXA is concerned that the remedy will fail to prevent litigation of replacement vehicle costs and therefore will not be the most effective way of allowing AF insurers to control their costs.

4.2.6 In essence, AXA is concerned that this remedy simply represents another version of the GTA, which has proven to be largely unsuccessful at controlling the costs of replacement vehicle hire. Although the rate cap would be binding on insurers, brokers, CMCs and CHCs via an enforcement order, this would not prevent claimants from exercising their tortious rights (through CHCs and CMCs) in litigation proceedings to recover the "basic hire rate", or the full commercial credit hire rate (subject to the issue of impecuniosity).[3]

4.2.7 To be clear, the proposed dual rate cap is not the equivalent of basic hire rates. A basic hire rate is a hypothetical valuation of a credit hire claim which the court applies post-hire, which has the intention of removing the costs of claims management services which are non-recoverable from a defendant. The basic

[3] As per the case law (*Clark v Ardington* [2003] QB 36), a claimant is only entitled to recover the actual costs of the hire (i.e. basic hire rate) and not the accident management services unless the claimant is impecunious.

hire rate takes into account factors which are not included within the CMA's proposal, such as location of hire, whether the claimant's vehicle is a similar vehicle to the one hired, and is not necessarily a daily rate. The basic hire rate is therefore very different to the rate cap proposed by the CMA.

4.2.8 So, even if the rate cap were based on direct hire rates (as advocated by AXA), the rate cap would *not* be the equivalent of what a claimant is potentially entitled to under tort law. The basic hire rate would inevitably be a substantially higher rate than the rate cap. In addition, if the CHO or CMC litigates and the claimant is impecunious,[4] the full cost of the rate hire would be recoverable. Accordingly, the incentive to litigate would remain as (i) there is nothing preventing claimants from pursuing a claim in tort (i.e. there is no primary legislation that would remove the right to claim in tort or deem the rate cap as the limit of the claimant's entitlement) and (ii) CHCs and CMCs would be incentivised to litigate as many claims as possible to avoid the rate cap applying.

4.2.9 If the CMA fails to deliver a solution that applies the rate cap post-litigation, the AF insurer loses all control of the cost of replacement vehicles at the point of litigation. CMCs and CHCs will therefore continue to be incentivised to litigate, and develop tactics to circumvent the remedies and obtain replacement vehicle costs on the current common law basis.

4.2.10 **The relevance of the rate cap in court proceedings is unclear:** in the absence of legislation, it does not follow that the courts will adopt the CMA's proposed capped rate. Accordingly, AXA sees no value in producing judicial guidance or an explanatory memorandum as these are unlikely to have any impact on the court's jurisprudence. Assuming the rate cap is based on direct hire rates, it is difficult to see how the guidance/explanatory memorandum would be relevant to the court's assessment of a claimant's tortious entitlement, which is based on basic hire rates. In these circumstances, only primary legislation can override such claimants' rights under tort law.

4.2.11 Accordingly, AXA does not find the treatment of the capped rates post-litigation at all clear in the CMA's PDR, and it believes that the CMA must provide more concrete proposals perhaps after discussion with the MOJ. Moreover, the reference to "assistance to the parties" in the closing sentence of paragraph 2.140 does not address in what way the explanatory memorandum will assist the parties if the court is under no obligation to pay any regard to it.

4.2.12 **The rate cap will not prevent disputes over other factors, such as need and duration:** it must be remembered that the CMA's proposal only targets replacement vehicle hire rates. The removal of separation would allow the NAF insurer to control the duration of the repair which, combined with the daily direct hire cost, provides the real basis for cost control and remedy for the AEC. Without separation, CMCs/CHOs will remain in control of period and can use this to drive up costs and undermine the reduction in the overall

[4] As per *Lagden v O'Connor* [2003] 3 WLR 1571, impecunious means "where a claimant is in a situation where if they paid themselves for car hire would equate to an unreasonable financial sacrifice."

replacement vehicle costs intended by the cap. CMCs/CHOs will be able to litigate for many other reasons, such as need, duration, insurance costs, waiver costs, add-ons (navigation systems costs being a common one) and, once the litigation is initiated, include uncapped replacement vehicle hire rates within the claim. This will especially be the case where a claimant is impecunious and the full rate of hire (including all accident management services) is recoverable. AXA therefore struggles to see how this remedy is any improvement on the currently unsuccessful GTA, and believes it is susceptible to circumvention.

4.2.13 **Claims may be litigated quickly to gain advantage:** It should be borne in mind that most credit hire litigation is at a cost level which makes referral to the Small Claims Court likely. Through this route, arguments over conduct and premature litigation are not easy ones to advance. Moreover the limited costs via this route make it comparatively attractive to litigate. Whilst it would be possible for a defendant to argue that premature litigation should be punished in costs, the only effective remedy in this instance would be an argument that if litigation was premature, the claim should be considered on the basis of the capped rates, notwithstanding the commencement of litigation. However, AXA sees this as a difficult argument to make given it remains unclear what the status of the rate cap would be when a claim was being considered by the courts.

4.2.14 **The "acceptance of customer" principle cannot override the defendant's rights under tort law:** while AXA agrees that preventing third party capture can generate certain benefits for customers (i.e. it can prevent delay and remove duplication of costs), this proposal removes the defendant's ability to offer to supply the claimant with a replacement vehicle directly which is the defendant's right to do so under tort law, and has been the subject of a number of decisions setting out the right but also the approach to be followed.

4.2.15 The apparent prohibition on this activity directly impacts an existing legal right, supported by the courts and AXA doubts that the CMA can remove the right, or that it is appropriate to do so. In other words, this proposal cannot be fully effective without legislative change amending existing tortious entitlements. Furthermore, this element of the remedy would have the effect of constraining an AF insurer's obligation to minimise the costs of its customers' liability (and hence the claims experience) which is implied into the contract of insurance. AXA's view is that the adoption of the "acceptance of customer" principle is not necessary for Remedy 1C to be effective, nor that it is possible to remove a tort right in the manner envisaged. It is of course possible that the remedies provisionally set out by the CMA will produce an outcome which reduces or removes the need for AF insurers to intervene (as the approach was one to remedy the high replacement vehicle costs arising from the separation of costs liability and control). However, it is not possible to make that assumption at this point and therefore the ability to intervene should be preserved and the utility of it will be determined by other factors.

4.2.16 **The three day window for accepting liability is too short:** AXA understands and supports in principle the proposal to adopt a dual rate cap in order to encourage the speedy determination of liability. However, a three

day period[5] to determine liability is practically impossible. There is no obvious reason why the high rate cap should be triggered after only three days and the CMA has not set out the reasoning behind the selection of that period. AXA has not seen any evidence that for CHOs, the three day threshold has any internal or financial implication.

4.2.17 AXA suggests that a 15 day period, in line with the personal injury portal would be more realistic and effective. This period would not only be more workable but would also ensure that there is consistency between the processes required to address liability in both personal injury and property damage instances, particularly where both types of claims usually appear following an incident. A three day period would incentivise poor behaviour amongst CMCs and CHCs in order to try and obtain the higher rate. It also needs to be clarified whether "three days from being informed" applies to the date information is sent out, or the date it is received, and how, for either situation, the relevant start date would be established. AXA often sees correspondence that goes to the wrong office address or sent to an incorrect email address, which could inadvertently create significant additional inflated costs for insurers.

4.2.18 There is also the additional risk of the hire vehicle being withdrawn in the event of the insurer not accepting liability given that CHOs are not obliged in any way to provide a vehicle.

4.2.19 **The guidance which aims to govern hire duration is not helpful:** whether under the GTA or common law, a claimant cannot continue to hire when they no longer need a car. The proposal to prevent recovery of hire costs for the period 24 hours after the repairs have completed is therefore simply the current position. Similarly, the proposal to prevent recovery of hire costs for the period seven days after the submission of the total loss payment is again a reflection of the time by which a replacement permanent vehicle should be obtained. However, the problems over duration arise in relation to the hire period prior to completion of repairs where repair periods may be delayed by deliberate postponing of repairs, or prolonged repair periods are claimed due to non-availability of parts (the "completion" of repair is a point in time which can easily be "managed" to achieve a repair period). The proposed 24 hour restriction will therefore not moderate the excesses around the repair period.[6]

4.2.20 Moreover, the time limits on recovery of hire costs that are proposed by the CMA will not be binding on a court. The courts will make rulings largely based on the facts of the case, and using existing common law principles, regardless of the CMA's remedy. For example, were a hire period to continue for five days after the completion of the repairs, it would only take a CHO to litigate against an insurer limiting hire to one day after repair to have the whole hire claim (including the five days post-repair) considered within

[5] Three days from the AF insurer being informed that a replacement vehicle is being provided to the NAF claimant.

[6] The information previously considered by the CMA indicated that longer repair periods eventuated when repairs were not controlled by the AF insurer.

litigation, on the normal "what is reasonable in all the circumstances" basis. That would lead to circumvention of the remedy limits.

4.2.21 **Absence of a dispute resolution procedure**: in the PDR the CMA has said it does not propose any form of dispute resolution procedure similar to that adopted under the GTA to deal with principle or interpretation issues. The CMA prefers to rely on the "force" of the remedy and parties taking claims to court in the event of disputes. Given that it is currently unclear whether the courts will have any regard to the remedies (and the content of any enforcement notice and/or explanatory memorandum) it cannot be assumed that the courts will provide any forum for resolving disputes arising in the application of the proposed remedy. In effect there will be no means by which parties bound by the new approach can raise, discuss and settle practical or interpretative issues which are bound to arise. It is inevitable that differences will arise and this may be another way in which litigation rates will increase if the only way to deal with interpretation and principle, as well as issues specific to individual cases, is to litigate. AXA believes that a body, perhaps for a set period of time, should be set up to assist the parties (subject to the remedies) govern behaviour. This is similar to the GTA Technical Committee, and also the MOJ Portal Behavioural Committee, but the body should have the ability to issue guidance to be complied with (and therefore be distinct from the behavioural committee).

Potential solution – alternative remedy

4.3 AXA has considered the alternative proposal reference by the CMA at paragraph 2.62 and 2.63 of the PDR. The proposal would involve the CMA making an enforcement order limiting the amount a replacement vehicle provider could charge a customer, thereby limiting the amount for which the customer would be liable under their contract with the replacement vehicle provider.[7]

4.4 AXA supports this proposal and believes that it must be incorporated into the CMA's rate cap proposal, in particular because it addresses AXA's concerns in relation to the incentive to litigate, and the lack of any clarity over how the courts will approach the rate cap.

4.5 Under this alternative proposal, as the claim throughout remains that of the NAF vehicle owner who has been deprived of their vehicle and who (subject to certain thresholds) is entitled to a replacement vehicle, the imposition of the rate caps must inevitably be delivered through the charges levied by the CHO on the innocent motorist, and which then form part of the NAF claimant's claim for damages pursued

[7] AXA considers this remedy to be within the CMA's powers to impose remedies and would be consistent with previous remedies adopted by the CMA's predecessor, the Competition Commission. [Under section 161(1) and Schedule 8 of the Enterprise Act 2002, the CMA has the power to make an order to regulate the prices to be charged for any goods or services where the CMA identifies the prices charged for the goods or services as requiring remedial action. The Competition Commission has previously imposed remedies to control prices to be charged for goods and services (or measures to ensure that consumers were no longer paying prices higher than they would in a competitive market), for example, in the classified directory advertising services market investigation (2006), the home credit market investigation (2006) and the prescription only veterinary medicine market investigation (2003).]

in their name by the "subrogating"[8] CHO. On the basis that the claimant cannot recover from the defendant more than their liability for the hire costs, incorporating the capped rates into the hire contract will have the effect of capping the claim that can be made in the name of the NAF claimant.

4.6 It would be essential that the hire contract does not refer to one rate in relation to claims settled prior to litigation and another contingent rate for litigated claims, or in some way make charges dependent on negotiations with the wrongdoer or insurer. The capped rates must be stated as the basis of the hire costs and hence the claimant's liability to the hirer. It seems that if the basis of charging and the hire contract between the NAF claimant and the replacement vehicle provider limited the claimant's liability to the rate cap, this would provide a basis on which the courts would adopt the rate cap post-litigation when assessing the damages that the claimant is entitled to recover from the defendant. AXA is not of the view that the issue is about consequential loss as set out at paragraph 2.62 of the PDR, but rather the existing principle as to the quantification of a claimant's claim for replacement vehicle hire costs based on the costs for which the claimant is liable to pay to the hire provider. The claimant cannot recover more in his own claim than he has lost represented by the liability to the hirer for the provision of the replacement vehicle.

4.7 Consequently AXA believes this proposal must be adopted. All parties caught by the enforcement order must be obliged to enter into contractual arrangements with the NAF motorist on a basis that reflects the rate cap, and should not be permitted to make any arrangements with the aim of circumventing the rate cap that is reflected in the claimant's liability to the hirer, and hence the defendant's liability to the claimant.

Timing / implementation

4.8 AXA would need to know well in advance what the rate cap would be in order to ensure its systems were ready to acknowledge the change. Furthermore, it would be extremely challenging to implement this remedy in the short time between the CMA's final report and the making of the enforcement order, particularly when taking into account other changes that will need to be rolled out by the business at the same time. For example: changes will be need to made to internal best practice documentation, case management systems and training guidance documents; training will need to be rolled out to the large number of handlers involved in such claims; [CONFIDENTIAL TO AXA] the MI and data systems will need to be modified and then the impact of such changes will need to be monitored.

4.9 AXA therefore considers that it would need a minimum of six months from the making of the enforcement order before the rate caps could be effectively implemented. However, it is difficult to assess this until there is more clarity around what the proposal will ultimately look like and how it is intended to be rolled out across the industry.

Monitoring and enforcement

4.10 To be effective, this remedy requires careful monitoring, particularly in the early stages of implementation where parties try and find ways to circumvent the rate caps.

[8] See 3.19.1 above

Although this would come with a cost to the industry, AXA believes that any monitoring role must be conducted by an independent body, and AXA believes that the CMA can play an effective role arbitrating between competing views.

Remedy 1F

4.11 AXA does not believe the requirement to complete mitigation statements by FNOL providers and countersigned by NAF claimants upon receipt of a replacement vehicle would have any significant impact on the cost of replacement vehicle hire. This would simply increase costs at the FNOL stage, for little benefit. The heading to the Mitigation Declaration statement refers to the statement being completed by the "non-fault insurer or CMC/CHC". However, AXA considers the statement should be completed not by the insurer but by the CMC/CHC, which will be providing the vehicle, pursuing the claim in the name of the claimant and therefore has most incentive to ensure that the statement is accurate and diligently completed. That said, the current process within the GTA of the provision of mitigation statements is treated as a 'tick the box' exercise by CMCs and CHCs and it does little to assess the needs of the customer. It is AXA's belief that the proposed mitigation statement will have similar effects. It should also be made clear that the mitigation statement does not constrain the defendant from asking additional questions on a case by case basis to establish the real needs of the claimant and the appropriate level of hire costs.

4.12 Turning to the draft mitigation statement (Appendix 2.3), AXA has the following comments:

- Paragraph 1(a): AXA believes this needs amending to ensure that the statements contained in (a) to (c) are also explained by the CHC as it may not always be the case that an insurer has been at the start of the process (see opening line "prior to the insurer…")

- Paragraph 1(b): this statement should say "…they are entitled to a temporary replacement vehicle from the time that the vehicle is un-drivable or, if the vehicle has been drivable post-accident, the date the repairs start, until 24 hours after …."

- Paragraph 2: further details should be included on the age and condition of the vehicle, and reference should be made to the fact that a like-for-like new vehicle is unlikely to be appropriate for an older vehicle.

- Paragraph 3(b): there should be a further question following this paragraph: "If the vehicle is un-drivable, have you explored the possibility of emergency repairs to some of the damage so as to make the vehicle drivable and reduce the hire period?"

- Paragraph 3(c): this question should be extended to include the following: "Were you advised of a different rate of hire for a replacement vehicle – if so, what was it and what was the rate of hire?

- Paragraph 3(f): this question should be extended to include "provide the details of your current insurer and say whether you have asked them if they are

prepared to extend your own insurance to the hire vehicle and what was the response?

- Paragraph 4 and Section B: these sections currently envisage being completed by a "claims handler" whereas this activity needs to be carried out by the provider of the vehicle (an insurer may not be involved at all).

Other remedies not taken up by the CMA

No measures to control NAF repair costs

4.13 The CMA has justified not adopting any remedy in relation to NAF repair costs on the basis that the net detriment associated with repair is considerably smaller than that associated with credit hire, and that Remedy options 1D(a) and 1D(b) would therefore likely be disproportionate. It also provisionally concluded that the remedy options would be impracticable.

4.14 AXA is disappointed that the CMA has taken this approach and remains of the view that cost control measures in relation to NAF repair would have been beneficial for consumers. In addition, in the absence of any such measures, AXA is concerned that more insurers that are not currently inflating repair costs are highly likely to now be considering doing so and therefore increasing the amount of consumer harm identified by the CMA. In this way, by omitting any measures to control repair costs, there is a high risk that the CMA will inadvertently undermine the effectiveness of its proposed remedy in relation to replacement vehicle hire. For this reason, it is important not to view the concern about repair costs (and the associated consumer detriment) in isolation but rather in conjunction with replacement vehicle hire and therefore for remedies to be addressed at both issues.

No ban on referral fees

4.15 The CMA has justified not banning referral fees on the basis that the vehicle replacement rate cap will result in smaller margins for CMCs and CHCs which will in turn mean that referral fees become less and less common. However, there are potentially four scenarios which could undermine this theory:

4.15.1 If the rate cap is not based on direct rate hires, and is based on retail or basic hire rates, this may not result in the level of reduced margins expected by the CMA. The ability of replacement vehicle providers to pay referral fees would therefore not be eliminated by the rate cap approach;

4.15.2 While it is difficult to assess without knowing the relevant rate cap levels, if a higher rate cap is to apply after the currently proposed three day period, this could well result in larger margins for the replacement vehicle provider, which could in turn give it the financial ability to pay referral fees;

4.15.3 The ability of CHOs to leverage repair period may simply lead to the lost revenue on the hire rate being obtained through longer hire periods, with the end result that the same margin exists to fund referral fees; and

4.15.4 The only partial extension of the remedy to CL means that CHOs will still have a market for activity (CL NAF provision) at the current replacement vehicle costs level which can be used to subsidise activity in the personal lines areas – this may create sufficient margins to continue to drive referral fees in both PMI and CL areas with the outcome of little impact on the issues that a ban on referral fees would address.

4.16 AXA is concerned that despite all efforts, parties will find ways to circumvent the rate cap on replacement vehicles. It is therefore important that the CMA does not simply rely on its remedies achieving smaller margins to discourage referral fees. AXA therefore echoes its previous submissions on this point and maintains that referral fees should be prohibited in their own right.

4.17 Further, AXA believes that prohibiting referral fees in relation to repairs as well as vehicle hire will be critical – not only to mitigate the potential harm to consumers in circumstances where the CMA chooses not to adopt any other cost control measures in relation to repairs but also to avoid the remedy in relation to replacement vehicle hire being undermined through an increased activity in inflating repair costs.

5. THEORY OF HARM 4

5.1 The CMA has proposed not to take forward Remedy 4A (provision of add-on pricing from PMI providers to PCWs) and Remedy 4C (clearer descriptions of add-on). Instead, it has recommended that the FCA consider whether these remedies should be implemented. AXA believes that such a recommendation is appropriate in light of the FCA's current work in relation to insurance add-ons and its general responsibility for ensuring that insurance consumers are provided with appropriate information so that they can make an informed buying decision.

5.2 However, AXA remains unconvinced that the additional disclosure proposed in relation to NCB will be helpful to consumers. As previously submitted, there is a risk that making generalisations about NCB scales and how a policyholder's premium may increase following an accident will leave the consumer less informed and more confused. AXA also has practical reservations about how to calculate the additional disclosures. For example, the CMA has indicated that the average NCB discount should be for "Private Motor Insurance" but it is not clear whether or how these averages should be split between car, motorbike, motor home, van etc. The CMA would need to explain how exactly it envisages the average NCB discount to be calculated in this respect.

5.3 Nevertheless, AXA is prepared to work with the CMA to try and strike the right balance in the required disclosures. Based on the current proposal, and in light of recent experiences (namely the FCA disclosure), AXA estimates that it will require a minimum of 12 months from the making of the enforcement order.

6. THEORY OF HARM 5

6.1 AXA supports the CMA's proposal to ban "wide" MFNs, as well as behavior that has a similar effect as wide MFNS by reducing competition between PCWs. However, AXA still has concerns that narrow MFNs can also have an adverse effect on

competition as insurers are not able to offer low premiums directly from their own sales channels.

6.2 Despite the proposal to require PCWs to complete quarterly compliance statements, recording the instances of "delisting", AXA doubts whether this will sufficiently discourage PCWs from adopting tactics that have a similar effect to wide MFNs. For example, it is the threat of delisting which can have the anticompetitive effect, and this type of conduct is not easily recorded in a compliance statement. Furthermore, PCWs can manufacture legitimate reasons for delisting an insurance provider.

CMA MARKET INVESTIGATION
INTO PRIVATE MOTOR INSURANCE

AXA INSURANCE LIMITED ("AXA NI")
RESPONSE TO THE PROVISIONAL DECISIONS ON REMEDIES

4th April 2014

This is AXA NI's response to the Competition and Markets Authority's ("CMA") Provisional Decision on Remedies ("PDR"), published on 12th June 2014.

AXA NI agrees with the points raised in the submission of AXA UK plc in relation to the CMA's PDR. However there are some important additional points we would like to provide.

Theory of Harm 1:

Legislative differences between Great Britain ("GB") & Northern Ireland ("NI")

- Northern Ireland has a unique and distinct legal jurisdiction and it is difficult to understand how some of the remedies will apply here. In particular motor claims are excluded from the Small Claims Court. Most credit hire and repair claims are at a cost level that make them suitable for hearing in the County Court (which incorporates the District Court). In terms of legal costs on such cases, a statutory scale fee applies. In the rest of GB the Small Claims Court, where there are no costs, has jurisdiction to hear these cases.

- The MOJ reforms do not operate in NI. Therefore the MOJ portal is not designed to deal with the NI legal jurisdiction. In light of this, the CMA needs to set out how it intends to implement the proposed remedies in NI.

- The County Court has no binding rules regarding incentives or penalties that encourage positive behaviours that drive a speedy resolution of claims. From a defence perspective an example of this could be where there is no requirement to produce vouching documentation at an early stage to support a claim. Often we will only become aware that a claim is instigated for credit hire, credit repair etc through receipt of a Solicitor's communication and/or a Civil Bill, which brings with it associated legal costs.

- We believe the concept of a proposed rate cap is positive. However it is important to note that as there is the suggestion that the two tier rate proposal will have no bearing on current law. This implies that once cases are litigated the "rate caps" will have no effect (under tort law the plaintiff is entitled to recover the losses they incur). Due to the exclusion of motor claims from the Small Claims Court and the fact that a claimant has the right to receive legal costs in the County Court as outlined above, we believe that the rate cap will be ineffective in the NI market.

- It is not clear from the proposed remedies if there will be any measures, balances or checks in the NI jurisdiction that will counteract the loophole described in the previous point. An example of the type of litigation suggested above would be

where an incident that comes within the PDR is presented to the at-fault ("AF") insurer by a claimant's solicitor providing a payment pack (or other vouching documentation) as their claim. In NI this situation currently results in the AF insurer being obliged to pay the claimant's legal costs.

Remedy A – Statement of consumer rights

- In addition to the comments outlined by AXA UK, AXA NI observes the first notification of loss ("FNOL") process would be much more onerous for an insurer than a CMC/CHC. The AXA NI FNOL process currently provides customers with information regarding their policy benefits. If and when the suggested remedies have been enacted an insurer will have to provide legal entitlement information to customers in addition to policy benefits, which will result in the FNOL process being increased significantly for each customer. This seems excessive, particularly when a not-at-fault ("NAF") insurer will play no part in a hire claim against the AF insurer. A CMC/CHC would only be liable to explain to the FNOL customer their legal entitlement and would not be obliged or indeed in a position to explain the policy benefits that uniquely apply to such a customer through an insurance product not underwritten by them.

- TOH 1: Par 2.78 (a): in addition to the AXA UK commentary, AXA NI observe that the date of notification of the fact that a claimant is receiving car hire is an artificial point in time on which to base the admission of liability time period. This notification could happen at different times during the claims process. It could happen days before or weeks after FNOL. The period should only start at a time when the allegedly AF insurer has all the information it requires to make a decision. What that information is, needs to be decided but should include at least the circumstances of the incident and the fact that the claimant has received/is receiving car hire. This will also prevent CMCs/CHCs from sending letters to insurers simply stating that they hold the insurer's customer liable without providing any details or a reason why.

- TOH 1: Par 2.78 (a) (continued): There do not appear to be any proposals for regularisation of the conduct of CMCs/CHCs in the remedies; there are no penalties or facility to report a CMC/CHC if they are not providing the necessary information to enable an at-fault insurer to deal with the claim properly. CMCs/CHCs will be encouraged to send notifications to incorrect companies (eg AXA UK will receive AXA NI cases, which already happens quite regularly now), which, under the new proposals, would result in the CMC/CHC receiving the higher rate (liability would not be agreed within the 3 day period and if we refuse to pay the higher rate they will resort to litigation, where the court will not apply these remedies and will award the higher rate (or indeed a greater amount again) plus the claimant's legal costs).