

## Response to the CMA's Provisional Decision on Remedies

### 1. Introduction and Summary

- 1.1 esure welcomes and supports the remedies package proposed by the Competition and Markets Authority ("**CMA**") in its Provisional Decision on Remedies ("**PDR**"). Importantly, the CMA's proposed remedies address the detriment identified by the CMA, but are also proportionate within the terms of the CMA's Guidelines on Market Investigations.<sup>1</sup>
- 1.2 In particular, for Theory of Harm 1, esure considers that the CMA is right to pursue Remedy 1C (in combination with Remedy 1F) as this remedy is targeted at, and proportionate to, the detriment identified by the CMA in this area. With the possible exception of Remedy 1G, the other remedies proposed by the CMA in its Notice of Possible Remedies for Theory of Harm 1 would not have been.
- 1.3 However, while the remedies package proposed by the CMA is likely to provide an effective remedial framework for the detriment provisionally identified, as the CMA itself acknowledges, further detail is required to ensure that the remedies achieve as comprehensive a solution as is reasonable and practicable. esure is therefore grateful for this opportunity to provide comments on the more detailed aspects of the CMA's proposed remedies package, most notably Remedy 1C.
- 1.4 esure fully supports the response submitted by the Association of British Insurers ("**ABI**"), of which it is a member, save for in relation to the CMA's proposed remedy for Theory of Harm 5 (see section 3 below). In particular, esure agrees with the ABI's comprehensive submissions on Remedy 1C<sup>2</sup> and, additionally, sets out some further submissions on this remedy.
- 1.5 Finally, esure also welcomes and fully supports the CMA's revised provisional finding of no adverse effect on competition in relation to Theory of Harm 2.

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<sup>1</sup> A remedy is proportionate if it: (i) is effective in achieving its legitimate aim; (ii) is no more onerous than needed to achieve its aim; (iii) is the least onerous if there is a choice between several effective measures; and (iv) does not produce disadvantages which are disproportionate to the aim (section 134(6), Enterprise Act 2002).

<sup>2</sup> For example, esure agrees with the ABI's suggestions that clarification is required as to: (i) the term of the period to decide liability for payment of TRV costs; (ii) the method of notification; (iii) the content of the notification; and (iv) the way in which the fixed and variable elements of the dual rate caps will be calculated.

## 2. Remedy 1C

### *Reference to acceptance of liability*

- 2.1 esure agrees with the ABI's submission that insurers would not be incentivised to swiftly accept liability in respect of the temporary replacement vehicle ("**TRV**") portion of a claim where this may prejudice their position on liability for an associated personal injury or subrogated repair claim. esure would be particularly concerned about the efficacy of Remedy 1C if an acceptance to pay for TRV costs within the three (or five (see paragraph 2.13 to 2.14 below)) day window gave rise to evidence of an admission or acceptance of legal liability for the private motor insurance ("**PMI**") accident, and thus the personal injury claim, capable of being adduced before a court.
- 2.2 Therefore, in addition to the ABI's submission, esure considers it essential that the cut-off point for acceptance of liability for payment of TRV costs must not be determined by reference to any acceptance of liability (which could be deemed to constitute an admission of legal liability for any other aspect of a PMI claim), but rather framed by reference to an insurer becoming contractually committed to pay TRV costs.

### *Carve-out for fraudulent claims*

- 2.3 esure is concerned that Remedy 1C, as currently proposed, does not make provision for fraudulent claims. Insurers should not be bound by an acceptance of liability for payment of TRV costs in respect of claims that are subsequently found to be fraudulent. The proposed position would be contrary to recent proposals by the Ministry of Justice for courts to repudiate claims in full where claimant has been "fundamentally dishonest" and would, at best, likely give rise to restitutionary claims being brought by insurers seeking recovery of such monies. Therefore, esure considers it imperative that the CMA makes provision in Remedy 1C for fraudulent claims.

### *A mandated portal for the notification / settlement of claims*

- 2.4 esure considers that a portal is essential for Remedy 1C to be effective. As the CMA itself notes, a portal would result in consumer benefits as it would allow for the expedient and efficient settling of hire claims.<sup>3</sup> Further, esure agrees with the ABI's submission that a portal would be the only effective way to monitor hire duration.
- 2.5 However, it is unlikely that TRV providers would support the creation of a portal as, for reasons such as those outlined in paragraph 2.10 below, it is contrary to their incentives to achieve TRV provision at the high rate cap. Therefore, esure strongly believes that the creation of a portal ought to be mandated by the CMA to ensure that the full potential benefits of a portal are realised through Remedy 1C.

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<sup>3</sup> PDR, paragraph 2.129.

*Ban on financial inducements*

- 2.6 esure supports the proposal to prohibit TRV providers from using financial inducements to encourage claimants to take a TRV at rates above the cap. In practice, it is likely to be difficult to detect whether TRV providers are complying with the ban on financial inducements. For the ban to operate effectively, esure submits that the CMA ought to require TRV providers to submit regular compliance statements (for example, quarterly) to confirm and evidence compliance with the ban.
- 2.7 In addition, such compliance statements should also require disclosure of the number of TRV claims being settled within the low rate cap and the high rate cap. This would have the additional benefit of allowing the CMA to monitor whether Remedy 1C is operating effectively when it carries out its periodic reviews of the rate caps.

*Period in which liability must be settled*

- 2.8 As the CMA notes, the dual rate cap should be structured in a way that incentivises insurers to settle payment liability more quickly, thereby reducing TRV costs.<sup>4</sup> However, as structured, the dual rate cap system risks creating incentives (and providing the means) for TRV providers to manipulate the system to their advantage; namely, to achieve TRV provision at the high cap rate, putting the cost and efficiency gains of the dual rate cap structure at risk. Some of the most important points that will need to be addressed by the CMA include the following:

Time, method and content of notification of provision of vehicle

- 2.9 First, the CMA proposes that the period in which TRV payment liability must be settled is being triggered when an insurer is “*informed that a replacement vehicle is being provided to the non fault claimant*”.<sup>5</sup> esure is concerned that a TRV provider could attempt to force an insurer to accept payment liability at the lower rate (irrespective of the merits of their position on liability) by, for example, providing a TRV to a potentially at-fault or partially at-fault claimant before notifying the insurer. Once the insurer is finally notified of the TRV provision, it would be under additional pressure to accept payment liability due to the longer hire period for which it might be liable. esure therefore considers that TRV providers should be required to notify insurers as soon as they have knowledge that a TRV is to be provided. A specific point in time (e.g. within three hours of provision of any TRV) should be mandated by the CMA.
- 2.10 Second, the method for notifying provision of a TRV has not been prescribed. esure is concerned that, if not stipulated, TRV providers will have every incentive to comply with the notification requirement through intentionally obscure means; for example, by sending emails to inactive or unmonitored email accounts of the relevant insurer. In

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<sup>4</sup> PDR, paragraph 2.82.

<sup>5</sup> PDR, paragraph 2.78(a).

order to ensure that insurers are properly put on notice of provision of a TRV, and thus can immediately begin to evaluate their position on liability for payment of the TRV costs, Remedy 1C must mandate how TRV providers are to provide notification. The optimal solution would be for notification to occur through a portal (see paragraph 2.4 and 2.5 for esure's submission on the need for a portal). At the very least, notification should be required to be made in writing to a centralised email address.

- 2.11 Third, esure supports the ABI's view that the notification of TRV provision must include sufficient information to allow the insurer to: (i) contact their client with accident details; and (ii) decide whether the need and the vehicle category seems reasonable and to ask questions if appropriate. esure agrees with the ABI that a penalty should apply if a notification is insufficient such as an extension of the liability window.

#### Detailed provision on when time starts to run

- 2.12 It is also not currently clear precisely when the three day period would start to run from – whether from the exact time of notification or the date of notification. Clarification is required from the CMA to avoid TRV providers taking advantage of any ambiguity in order to push unknowing insurers into the higher daily rate (something that is likely to lead to disputes between TRV providers and insurers).

#### Duration of liability determination period

- 2.13 Insurers could be unduly forced into paying the higher rate or accepting liability for payment when their policyholder is non fault or only partially at-fault if the period for them to determine liability for TRV payment is too short, potentially thwarting the efficiency gains and cost savings the CMA seeks to achieve from Remedy 1C.
- 2.14 esure notes that the ABI's submission considers that the three days proposed by the CMA is insufficient and proposes a period of five days, in line with the current GTA notification period. For its part, esure considers that a five day period is the maximum required for an efficient insurer to determine liability for payment of TRV costs; a period that is any longer risks undermining the efficiencies and cost savings that Remedy 1C seeks to achieve.

#### *Referral fee ban*

- 2.15 esure notes that the ABI proposes that a referral fee ban is required to support the operation of Remedy 1C.
- 2.16 esure agrees with the CMA that if Remedy 1C is effectively implemented, a ban on referral fees would not be required as TRV providers would not generate sufficient excess revenue on TRVs to pay them. However, to the extent that there is scope for TRV providers to push insurers into the higher rate cap (as identified in the preceding paragraphs), it is likely that referral fees could still be paid. In these circumstances, esure considers that Remedy 1C ought to be supplemented with a ban on referral fees from TRV providers to ensure the remedy is effective; however, the CMA's provisional findings and revised findings on detriment do not justify a broader ban on referral fees across the PMI industry.

### **3. Remedy 5: Most Favoured Nation (“MFN”) clauses**

- 3.1 esure welcomes the CMA’s proposal to introduce a ban on “wide” MFN clauses. Equally, esure agrees with the CMA’s conclusion that “narrow” MFN clauses lead to consumer benefits through the preservation of the price comparison website’s (“**PCW**”) business model.
- 3.2 esure is aware of the ABI’s concerns in connection with the effective implementation of the ban, but considers that these concerns are unfounded because the CMA has pre-empted these concerns by structuring the ban by way of a prohibition on all MFN clauses with a carve-out for “narrow” MFN clauses. In doing so, the CMA has ensured the narrowest possible definition of “narrow” MFN clauses (namely, clauses that require the premium price on an insurer’s direct website is no less than on a PCW). Therefore, esure does not consider there to be a risk of circumvention.
- 3.3 esure also notes the ABI’s request that the CMA make recommendations to the FCA to review MFN clauses in two years’ time. In light of the thorough and detailed review of MFN clauses that the CMA has already conducted, esure is of the view that such a review would be unnecessary and would represent a significant additional cost to the PMI industry.