Quindell

Quindell Plc

"Sector Leading Expertise in Insurance and Telecoms"

Consulting, Software & Outsourcing

QUINDELL'S RESPONSE TO THE CMA'S PROVISIONAL DECISION ON REMEDIES & WP23 ON ALLEGED DETRIMENT - 8TH JULY 2014

Quindell

1. EXECUTIVE SUMMARY

Quindell has throughout the market investigation into the Private Motor Insurance market always considered the CMA has erred in understanding the basis for the structure of the various relationships in our CHC sector, where we interact with consumers as clients, and at-fault insurers as parties who need to settle legitimate claims on behalf of their policyholders. There is an inherent conflict of interests here, which the CMA has missed in terms of incentives. The insurer's incentive as defendant in a litigation involving claims is to pay little or nothing, and the claimant has the obligation to prove their loss was reasonable for recovery, and caused by the wrong doing of the tortfeasor. These are the dynamics which underlie how our sector evolved and is currently structured.

Whilst complex, the arrangements and relationships involving (a) at-fault insurer, who indemnify the wrong doer in an accident, (b) the claimant who suffers loses as a result of those wrongs and (c) the service providers developed to assist the victim and is well founded in common law stretching over more than a hundred years. To upset the balance surrounding the principles of subrogation and the law of tort by introducing remedies so fraught with risk (to consumers losing partly or wholly their remedies against at-fault insurers) that it should only be considered necessary where serious consumer detriment is found, and the CMA can be sure their remedies will work without unintended adverse effects.

- This is not the case with this market investigation where on the CMA's own calculations (which Quindell challenge), only £2 per policyholder per year has been found to be the additional costs borne be consumers (i.e. policy holders) to offset benefits which could amount to more than £1000 when they are involved in a non-fault accident and get our service for free. In our view, Remedy 1C would not produce this current outcome, but something very damaging to hundreds of thousands of potential claimants a year, and our existing CH sector

We question the approach adopted by the CMA to arrive at its conclusions that an Adverse Effect on Competition (AEC) occurs, and the data used by the CMA for this purpose. We think bias has crept into this process to push an agenda that favours insurers over consumers (ie non fault claimants). The at-fault insurer is not part of a 'market' to provide services to those who have suffered an accident (ie non fault claimants and there is no contractual relationship here).

Nor, in our view, do the insurers act in the interests of those consumers who have needs for mobility and car repairs in these circumstances where they are accident victims – they act to protect their own position and disregard those of consumers. Accordingly, when these at-fault insurers contract with a car hire firm to provide their car hire service to captured claimants (only around 25% of all claims in a year) they seek the cheapest option to meet this obligation, and ignorant claimants will never know they did not receive what they were entitled under the law.

CHCs ensure the non-fault claimants get what they are entitled under the law, and this service is skilled and provided free of charge. Our costs for this are recovered, from the insurers only when the case is settled and we bear the risk of errors with claims until that point of settlement. It is not what a direct hire car contractor needs to bother about – i.e. their 'employer' is the at-fault insurer. Because CHCs operate in the sector so well and efficiently, we maintain our share at some 70% of all claims for the benefit of consumers. The CMA investigation will/may upset these dynamics with the remedies it proposes.

In this response to the CMA's PDR (and WP23), Quindell will highlight many challenges with regards the CMA's thinking, the approach taken in the CMA's [weak] understanding the legal structure of the market, and the rights of consumers. We also comment on the data used to calculate any alleged detriment.

We will also consider, comment and challenge the proposed remedies to indicate whether they (i) address the alleged AEC, (ii) are proportionate and (iii) workable (not circumventable), and (iv) don't cause consumers to lose the benefits they enjoy [for free] currently from our service to hundreds of thousands of people a year.

In particular, Quindell draws attention to the following statements of our views at this advanced stage of the investigation;

1.1 MARKET INVESTIGATION HAS BEEN BIASED AND UNFAIR

Whilst acknowledging engagement has occurred, the CMA has erred in failing:-

- to understand the legal structure of the market
- to provide a paper on its understanding of how the market operates within the legal framework of tort
- to engage with participants, in particular CHCs, on its Provisional findings
- to engage with participants, such as CHCs on its 1C remedy, which effect us directly, and benefit the proponents of these ideas [ie insurers and Enterprise]
- to properly recognise relevant consumer benefits, and their loss if the remedies threaten the continued viability of some or all of existing CHCs.

1.2 THERE IS NO AEC CAUSED BY THEORY OF HARM 1 (TOH1)

Consumers' (uninsured) needs after an accident are served by our specific Credit Hire sector, interacting with the at-fault insurers when they promptly accept liability in non-fault claims. But as the CMA knows, insurers only accept a minority of all claims, around 25%. So without us, some 300,000 claims a year may never get to settlement with consumers being left to bear their losses, or find money to litigate for recovery of their losses. Is this the outcome that the CMA wants from its proposed remedies?

Separation is good for consumers. At-fault insurers have direct and unavoidable conflicts of interest with the consumer who purses claims against their Policyholders. Why does the CMA think insurers will accept claims from consumers without friction or challenge? Without CHCs to step in with our service, at our risk, claimants would be told to make do, after accidents, or told to sue the insurer. Or they might complain ineffectually to the Ombudsman. There is no evidence to support *'over charging'*, *'poor behaviour'* by suppliers, or those procuring their services for their customers, or *'inefficiency'*. So there is much that we disagree with the CMA.

1.3 DIRECT HIRE MARKET (DHM) – THE ARTIFICIAL COUNTER FACTUAL

The CMA has created an idealised world by deciding arbitrarily that DHM (a service to insurers with only 1 participant – Enterprise) is the counter factual to the credit hire sector. This is wrong. In fact, we believe Basic Hire (BHM) is the true comparator to the credit hire sector (and is so recognised by courts, including the Supreme Court). The basic hire market is transparent with prices available to consumers. However, the

DHM is based on secret agreements which even the CMA's investigation has kept secret from us – an absurd outcome for a fair investigation process.

Without the DHM as a so-called benchmark, there can be no AEC, no TOH1 and no consumer detriment. The DHM is not a market - it is an in-house solution for insurers. It is dominated by one player who uses, in our view, a predatory pricing model to ensure its dominance. It offers, in our view, an inferior and not like-for like service solution for consumers. The GTA which governs the way most CHCs operate does ensure like-for-like fair solutions for consumers.

The power of Enterprise in the DHM was not properly investigated in WP23, and all evidence regarding its activities is hidden from us, so we can not comment on its practices or relationships with insurers. If disclosure is not possible, its evidence should be dismissed as tainted.

1.4 CMA OVERSTEPPING ITS SCOPE AND POWERS IN MARKET INVESTIGATIONS

Quindell is reminded that this inquiry is into Private Motor Insurance (PMI), and not the law of tort. The CMA is seeking to dismantle the very principles of tort law that allows for one to be placed back in the position they were in as if the incident had not occurred ie compensation. Those principles stem from legal precedent developed over more than a hundred years and have evolved over that time.

To limit, reduce or in any way, to influence a consumer's right in common law, is not the role of the CMA, and it is the role of the Government.

1.5 REMEDIES PROPORTIONALITY

Whilst Quindell welcomes anything which would improve service to consumers after accidents and reduce transactional and frictional cost with at-fault insurers, it is a symptom of the common law system of tort, and not any defect in competition. These are not PMI claims, they are claims for restitution and founded on common law principles. As such any package of remedies, either needs to work within the current legal framework, and without compromising, the developed common law understanding of consumer rights developed over more than a hundred years of precedent.

Or the CMA needs to recommend to Government that a change in law is necessary, which Quindell does not believe is proportionate, nor justified.

1.6 REMEDIES WORKABILITY

The remedies, especially 1C and 1F, are unworkable, infringe on consumer rights in common law, restrict and distort the market by reducing or removing competition, and are fundamentally built without a correct and thorough understanding of the principles of subrogation, and the law of tort and negligence.

Due to this error in understanding, the remedies fail their objective to reduce both the cost of supply and related transactional and frictional costs. Not only do they fail to address the AEC/TOH1 in that they do not remove separation, they fail to address the causes of transactional and frictional cost.

But the low pricing caps could destroy the viability and independence of CHCs to serve consumers, and leave insurers with a monopoly over non-fault claimants, with a tied supplier. None of this appears pro-competition or pro-consumer.

There remains a very high likelihood of increased friction if the proposed remedies were introduced.

1.7 Circumvention of Remedies

As drafted, and due to the lack of legal consideration by the CMA, the remedies are in our view, circumventable and cannot be made to work without removing the law of tort. The example (for circumvention) provided by the CMA in the PDR is **precisely how the market operates to today**. It worries us that our business is not properly understood before remedies are even considered.

1.8 Remedies – Economic Consequences for CHCs

Due to the creation of this artificial DHM, the CMA has built remedies which, if successfully implemented, would lead to the exit of many companies offering services to consumer due to insufficient scale to operate ie being starved of revenues under the caps and inability to find clients. The DHM is dominated by one predatory pricing international rental player, who apparently makes little margin, even with economies of scale and risk business model. The CMA could have investigated this, but it has been apparently overlooked.

1.9 GTA is the solution

Quindell has been instrumental in the evolution of the GTA from its infancy in June 2000 (Auto Indemnity was the 1st subscriber to the protocol), through its thorough review, leading to a rewrite in 2005 (including dozens of pages of Frequently Asked Questions) and introduction of better, more transparent controls, pricing and governance in more recent years.

The GTA protocol is an example of players in a market, through maturity and professional engagement, having developed an efficient way of working, for the good of consumers. The needs of consumers after an accident and those of the at-fault insurer are polarised, and the balance is fine.

Quindell fully supports the GTA as the fair, reasonable and equitable solution for the market, where participants with polarised views and competing priorities work together, to provide exceptional service whilst controlling inefficiencies and costs.

Quindell would ask the CMA to recognise the work of the GTA, its technical committee, and seek to promote it, mandate it, with an electronic portal for the settlement of claims.

[In this regard, Quindell intends sending the CMA a separate paper on the evolution of the GTA, where there has been compromise for the good of consumers and how pricing reflects the true balance between DHM, BHR and credit hire rates].

2. THERE IS NO THEORY OF HARM

Quindell remain convinced that the CMA has not found any actual evidence to support a conclusion of Adverse Effect on Competition (AEC) from Theory of Harm 1 (TOH1) in the Private Motor Market (i.e. estimation of detriment from separation of cost liability and cost control). We previously gave submissions on this alleged detriment being non-existent or negligible, or more than offset by relevant consumer benefits. We do not think the PDR or WP23 has properly resolved these issues.

We are further concerned that after 22 months of this investigation into Private Motor Insurance (PMI), (and additional time spent on the earlier OFT inquiry), the CMA appears to lack some basic understanding of how the relationship between the parties exists with specific reference to (a) the principles of indemnity and subrogation and (b) how these interlink with tort, consumer and contract law.

Whilst Quindell appreciates the subject is hugely complex and has evolved over more than a century of common law and legislation, the legal principles and regulatory framework of how a consumer is indemnified and compensated, following an accident, are clear and well founded.

The law of negligence/tort, as set out in your Provisional Findings (PFs), references Livingstone v Raywards Coal Co and dates back to 1880, more than 130 years ago. Essentially, a person who suffers a loss as a result of another person's negligence is entitled to be compensated by being put into 'as good a position as he or she would have been if no wrong had occurred'. Those principles have held true for more than 130 years and there is no reason to move away from them today.

In the PFs the CMA set out what 'Theories of Harm' were identified in its Summary paragraph 37. These highlighted different ways in which competition could be harmed in some way. In paragraph 38 the CMA stated:

- 'For competition to function effectively, customers need to be willing and able to: access information about the various offers available in the market; assess these offers to identify the goods or service that provides the **best value** for them, taking account of the full costs of provision as well as the benefits; and act on this assessment by switching to purchasing the goods or service from their preferred supplier.'

- We note that the definition of the word **"value"** means *the regard that something is held to deserve; the importance, worth, or usefulness of something)*

It seems odd that the CMA conclude therefore where a consumer suffers damage in an accident, and a sector has developed to look after the specific interests of these consumers, that the procurement of this service being separated from the causers of the damage is considered harmful in any way to consumers generally. The arrangement arises entirely from the operation of the law of tort, a structural feature that has been down played in this investigation, or simply overlooked.

Whilst Quindell understands that *all* consumers who pay premiums lose out if the market is inefficient, in that they will incur greater expense (without gains), we disagree with a conclusion that the tortfeasor's insurer (i.e. the party causing harm) should somehow influence the decision of the consumer who was

wronged (i.e. the victim) to forego their rights to reasonable compensation, or accept losses, in order to protect the wider community. Surely cannot be right.

And if it is a consideration for a competent competition authority, the power to make these changes are with Government and not the competition authorities. ALL this is omitted in the PFs, Remedies Notice, and the PDR. We would like to know how far the CMA's authority stretches on these issues, relating to rights and claims between individuals i.e. tortious rights and NOT competition law. Somehow this investigation has drifted away from competition policy, and we hope to see more clarity on this before the inquiry closes with the final report.

2.1 ERRORS IN THE CMAS UNDERSTANDING OF WHAT HAPPENS IN THE PMI MARKET

The PMI is a market where insurers sells products and services to consumers through multiple sales channels. It is not a 'market' for the services to consumers who have suffered damage as a result of an accident. Insurers sell contracts of insurance to protect *their* customer, whether to indemnify him where his own property has been damaged, or to *indemnify* him (for the liability) where he has damaged someone else.

To suggest that the at-fault insurer, who is indemnifying the consumer who committed the wrong is in some way part of a market that serves the needs of consumers who have suffered a loss after an accident is simply wrong. There is a major distinction here, namely that competition arises in selling premiums, not in the paying of liabilities from claims (which are enforceable at law). To link the two as separate markets is plainly wrong.

- It follows that the CMA has misled itself to think that paying claims to settle liabilities has created a 'market'. Even worse is to say this is a market that serves the needs of consumers who have suffered a loss after an accident. By definition, the defendant or the insurer standing in their shoes, cannot be on the same side as the Claimant – that alone shows there is no market. This argument has not been answered, and the CMA's PDR takes the mistaken view what it has understood that it is doing. We fundamentally disagree as stated above.

For the CMA to seek to control or encroach upon (a) the value of the compensatory service, or (b) decision of the consumer (i.e. the victim) as to who should provide their compensatory service, based on (c) the arbitrary and biased opinions and personal motives of the tortfeasor, and/or their indemnifying insurer, compromises the very principles which underpin the law of tort and negligence. Additionally we think Competition Law from which the CMA draws its powers under the Enterprise Act 2002 has no say in the issue – again this is a legal subject which has been ignored over the past 22 months of this investigation. We must now formally object and request that the CMA explains its reasoning and power to deal with the problems we noted above.

Further, given that the CMA has a role to promote competition for the benefit of consumers must mean that the CMA should see this investigation from the consumers' point of view, i.e. by ensuring they have choices as to who provides their service, at their time of need.

We think that separation is a feature of how the law of tort operates in the UK, but it does not lead to any theory of harm creating an AEC. Separation is critical to protect consumer from detriment, which would undoubtedly occur if separation were forbidden – i.e. the victim must have the option of accepting the tortfeasors or their insurers' offer, or taking independent control of their rights of redress. But it is these

rights to compensation and redress that the CMA is seeking to dismantle by its proposed remedies, and we object on behalf of consumers. It must be outside the CMA's powers.

- Not at any time over 130 years of common law, where the issue of costs (reasonably incurred to put the Claimant back into the position he was in prior to the incident) has been considered, nor has the judiciary considered that a Claimant should place reliance on the tortfeasor or their indemnifying insurer. Nor have the courts used evidence of what costs the insurer would incur if they were the providers of service, in order to settle liabilities. It is simply irrelevant and an abuse of justice to impose caps to losses in this way on victims. The individual consumer has a right to make a decision as to who provides the service, so long as the cost of providing the service is reasonable.

- Also we believe this inquiry has shown our services as CHCs are reasonable and we do not make excess profits. The CMA also previously noted that CHCs are competitive, and we do compete for consumers, in competition with at-fault insurers. So there is nothing that the CMA should have attacked by this late stage in the investigation.

As previously stated in earlier submissions, the at-fault insurer is prejudiced with conflicts to disregard the rights of the Claimant, the consumer who has a need for restitution.

- The ONLY reason the at-fault insurer seeks to provide a service to the consumer is to protect its own position (by reducing cost, if they are able to persuade the Claimant that their offer of service is fair). However, if the credit hire market had not developed to provide services to consumers after accidents, consumers would today still be 'getting the bus' and finding their claims refused, or disputed, or compromised. If the CMA is allowed to change the market to either remove separation and/or control the service offering to consumers by indirectly introducing the same solution by another means, again consumers would be exposed to the same behaviours, and inequality.

  In other words, how does the impecunious victim recover their losses when told by a large insurer to go away? This risk is barely covered by hundreds of pages of investigation. Does the CMA really believe that large insurers will consider, compassionately, the needs of consumers they have absolutely no relationship with? Does the CMA believe insurers willingly settle claims, provide compensatory service willingly unless they are compelled to do so by the law or tort and negligence?

- Equally bad, it seems the CMA has usurped the role of the courts to settle claims, by abrogating itself the role of justice, and mandating how insurers settle claims – which to us appears to be the effect of the commentary on high and low caps for TRVs appears to us. Whether the CMA has stretched its powers to intervene in the place where the law of tort and negligence has developed, could well be beyond its powers and may need challenging once this inquiry draws to a conclusion.

2.2 THOUGHTS ABOUT THE FUTURE SHAPE OF OUR SECTOR

Given our comments above, Quindell finds the discussion between the CMA panel and Insurers at the multilateral hearing in February 2014 remarkable. It initially appeared that the CMA understood there was a conflict of interest and, in effect, cross-examined insurers as to the allegations set out above, but then appeared to be placated simply by insurers saying they would provide the service in the absence of a strong credit hire market (just like they didn't do in the 1990s and before). It was an empty promise and one which consumers cannot rely on, nor can the CMA provide assurances of.

In arriving at the conclusion that there was an Adverse Effect on Competition (AEC) born out of separation and certain practises adopted as a result of that separation, we believe the CMA has failed to produce any credible, transparent and objective evidence to support its conclusions.

- All it has done is declare an arbitrary and secret benchmark (called direct hire), which is unproven with any public and transparent scrutiny through disclosure in WP23. The CMA then declares insurers are being over charged when settling credit hire claims, or they can do equally well at a lower cost. The CMA concluded that hundreds of thousands of claims can be settled by these means, consumers can continue to enjoy service provision when suffering an uninsured loss of mobility and do so at costs lower that Basic Hire Rates. This is usurping the role of the courts who need to deal with each case on its own merits, and not apply a general rule of indemnification, as the CMA suggests under its remedy 1C proposals. All this appears wrong when set against our comments above.

The CMA concluded that there were two features of the supply of motor insurance and related services which in **combination** create an AEC:

(a) **Separation** – the insurer liable for paying the non fault driver's claim (the insurer to the at fault driver) is often not the party controlling the costs:

AND

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

Quindell has throughout the inquiry and indeed through the earlier work of the OFT, challenged the basic principle of this conclusion. The OFT originally concluded that there was 'over-costing'and 'over supply', in some way suggesting consumers were being over charged or provided a service greater than their needs. This use of words was challenged and the words used by the OFT when referring the market for investigation were watered-down to ***'costs higher than they could otherwise be'***.

We have asked on many occasions for reference to evidence which support a view that consumers who need services after an accident are in any way exposed to a market without sufficient competition, or which cause harm to these claimants.

The market that provides after accident services to consumers is dominated by insurers who, through their buying power, can drive cost down and gain efficiency through scale, and dictate the level of service they wish to provide. For those of us who provide services to insurers, brokers and/or other affinity players (road side recovery, vehicle manufacturers and dealers), tenders for that service are thorough and demanding – The focus is not on price alone, but on sustainability, service and alignment with corporate and cultural values.

When representing the non-fault consumer, we are not serving the tortfeasor, nor their indemnifying insurer – ***we are serving only the needs of the consumer who contracts with us***. It is his claim, against the at-fault driver, which is governed by the principles of tort law. Those principles protect the interests of the wrongdoer in that those services ***need to be mitigated*** and the cost of the service ***needs to be reasonable***. These are important and critical points and have been tested by the highest courts on a number of occasions over more than 100 years of tort law.

With regards to mitigation, Quindell refers to its engagement with the CMA at its bilateral hearing where the panel asked whether the current mitigation statement in the GTA was sufficient. Our response was to clarify the understanding of the panel with regards the common law principle of mitigation, as it appeared that the panel thought it meant more than it does. The principle of mitigation is not to find the lowest cost solution as a remedy; it is the action of ***reducing the severity, seriousness or painfulness of something***. So long as the Claimant acts ***reasonably*** when incurring cost to ***rectify the wrong*** that was committed, allowing for him to be placed back in to the position he was prior to the incident; ***those costs are recoverable in common law.***

2.3 SUMMARY

Taking account of all that we have presented previously and what is stated above, Quindell still cannot find any evidence to support the CMA statements set out in (b) (i) or (ii) [noted above]. It is plainly not true that either the procurers of the services of credit hire companies (CHCs), usually insurers and brokers, or those providing the service, are ***focused on earning a rent*** from the control of claims rather than ***competing on the merits***. The language is so pejorative to be emotive.

- With such strong negative language one would have thought the evidence of such behaviour would be transparently evident – it is not. To further assert that this gave rise to an ***inefficient supply chain involving excessive frictional and transactional cost***, without firm evidence in support, demonstrates to us that the inquiry has always been biased on finding fault with our CHC sector and trampling on victims' rights to proper redress and compensation under existing law. Fortunately, we think the CMA has failed to prove there is an AEC, or indeed any consumer detriment, despite its assertions that is has achieved it goal.

Our market was accused of 'over costing' and 'over supplying' by the OFT, without any evidence to back up these statements. The CCC, now the CMA, make the statements above and the inquiry Chairman himself used language on Sky News saying the CMA were correcting 'artificially high' pricing (which we say is not true, and would lead to remedies that harm consumers, which of course was also not stated). These statements are purposely made for impact, and are prejudicial. Surely they can only be made where there is compelling and clear evidence of wrong doing, either in WP23, or the PDRs. There is no such evidence of wrong doing, and there is much that we disagree with, notably the CMA's assessment of an alleged detriment from separation as shown in Table 1 of the PDR.

In conclusion, consumers are free to choose who provides their services. Consumers wronged after an accident are no different to any other consumer, and they have equal choice of an at-fault insurer or a CHC. The fact that some 70% of claimants choose CHCs shows we are doing much good, and no harm to hundreds of thousands of consumers every year.

What a consumer can recover in common law is limited to what is reasonably incurred to place him back in the position he was in **prior to the incident**. No more and certainly no less. The consumer does not need to make personal sacrifice, he does not need to utilise his own insurer policy, nor use the services of the at fault insurer. That is the law today, and unless the CMA are seeking in some way to change the law, restrict consumer choice and/or restrict the services consumers are able to avail themselves of, after an accident, the CMA decision makers should not seek to change the efficient operation of the market through the back door with the proposed package of remedies, which we discuss later in this document.

Even if we were to accept the CMA's own conclusions on separation, on poor behaviours, on inefficiencies and the CMA's own calculations (which quite plainly we do not), the extra cost assumed to be charged to consumers is no more than £2 per policyholder per year. How the CMA can take a gamble with relevant consumer benefits, to drive a truck through the law or tort to find a fictional saving of £2 per policyholder per year is remarkable. We ask the CMA to think again.

3. THE AEC IS OVERSTATED OR DOES NOT EXIST

Whilst Quindell are grateful to the CMA in that the AEC calculations have been restated following a further call for data/evidence, it is disappointing that some of our objections remain, e.g. regarding sampling and lack of transparency as to how the calculations have been arrived at. The following will explain our latest thinking on this important subject.

We remain concerned that despite the CMA recognising the principle of the law of tort in some way causes our sector to operate in the way we do, on behalf of consumers; it nevertheless insists that separation is a cause of significant consumer detriment. We disagree, and can prove separation is not a detriment when all relevant issues are considered.

Without the principles in common law, which allows for a consumer who has suffered loss or damage being able to be placed back in the position they were **prior to the incident**, consumers would suffer (civil) wrongs without redress. Of course, with one party causing damage and another party seeking compensation, transactional and frictional cost will occur – it is the inevitable consequence of the system of justice where one party wants to minimise their liability, and the other seeks to recover their losses (and costs). That is what the law recognises, as well as the system of justice in the UK and around the world. But, however, this has slipped through the CMA's thinking, which by now must be on purpose.

These principles of redress arise where a Policyholder pursues a claim in contract, by seeking indemnity from his insurance policy (it is why we have a financial ombudsman to assist in resolving disputes) and a County Court legal system to assist those in dispute (i.e. the claimant). To suggest that these 'disputes', which undoubtedly lead to frictional cost, are in any way a consumer detriment, or that they can be settled by some pre-arranged mechanism [to allocate costs] is wishful thinking, when claims by some 500,000 people each year are considered.

- All cases have their unique facts and circumstances, based on the nature of the accidents, the injuries, damage to cars, and losses sustained. The time to solve each claim is also variable. It is not a simple process of pressing buttons and agreeing a formula for replacement cars, or directing victims to a particular supposedly 'low-cost' supplier who does not take instructions from the victim, but the defendant! When this is understood, the CMA's idea that there is an AEC from TOH1 is most clearly wrong, and the CMA's assumptions are wrong. Quindell make these points as it appears the CMA has taken account of ALL frictional costs in the calculation of the AEC, which cannot be the case in a properly functioning market that recognises the limitations and constraints from the law of tort, and the right of victims to full redress **as a matter of law and justice**.

Effectively, the CMA thinks it has a better solution to supersede the above situation, with which we strongly disagree. We also do not think each remedies package can achieve some of the aims of the CMA, without a prior change in the law of tort – this applies regarding the application of the remedy 1C proposals.

3.1 DIRECT HIRE COUNTER FACTUAL – IS IT AN OPAQUE MEANINGLESS SHADOW-MARKET?

Quindell remain convinced that direct hire rates are not the basis for any calculation on the TOH1 separation question. Direct hire is not a market. The services and pricing of direct hire are akin to an in-house service, like a help-desk. For direct hire to be a market in a competition sense, it would allow buyers and sellers to interact and compete freely in a way where rivalry, innovation, customer service, and price make a

difference for consumers. None of these parameters are visible from the CMA's so-called benchmark using direct hire, but are clearly visible if our benchmark using basic hire rates are used for the TOH1 costing exercise. But none of this is noted in the PDR or WP23.

- Equally problematic, the CMA's Annex A to WP23 does not explain how direct hire is a suitable and credible benchmark for TOH1. Through investigation and searching, we cannot find any information to assist us understanding the so-called 'Direct Hire' market envisaged by the CMA. Those services and prices are not available (a) to consumers, nor (b) are they available to other procurers of the service. There is (c) no advertising of the service, and (d) the buyers of these services are equally mysterious.

- The CMA has also failed to reveal the nature of the contracts in this shadow market, where it notes one supplier, Enterprise Rent a Car (**ERAC**) is effectively the sole supplier with an undisclosed market share, which we infer is close to 100 per cent – hardly a feature of competition!

- Only the CC/CMA Panel, in this investigation seems to know about this alleged shadow-market. And all of their data on this is hidden in their WP23 document. Therefore, we can not even comment or challenge their errors[1]. Table 10 of WP23 is full of problematic data on direct hire, which is totally concealed from any scrutiny – how is this fair, in a process where the CMA is claiming to arrive at a benchmark, and quantify a detriment?

We object to opaque and secret approaches to conducting a competition investigation, where market transparency should be a feature of the investigation. Whilst we remain unconvinced by its existence, for the ease of discussing its attributes, we will refer to it as direct hire 'shadow-market' (DHM) in this document.

3.2 ENTERPRISE IN THIS SHADOW MARKET CALLED DHM

As said, the main player in the DHM is Entertprise (ERAC), a US independent business, which operates in the UK, and where the main focus is supplying vehicles to insurers, on direct billing arrangements. Its business model is different to many other rental operators in that it buys and sells its own fleet (as opposed to others who take vehicles from vehicle manufactures on 'buy back schemes'). In effect ERAC take their fleet on what is known as 'risk'.

- It is Qundell's understanding that operating in this way, which carries significant more risk (as residual values of vehicles is unknown when placed on fleet), allows for aggressive pricing in the UK on a direct bill basis, perhaps due to being able to amortise the risk across the world-wide fleet of the operator. It is without doubt that ERAC are the dominant player in the direct bill (to insurers) service provision [2].

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[1] This problem is not new to the CMA and by now should have been answered. We alerted the CC/CMA about this in our response to the Provisional Findings – and Table 6 to Appendix 6.1 earlier in the year. But our objections have not been answered.

[2] We note the CC/CMA said in its provisional findings at para 6.17 that CHCs may … not benefit to the same extent from negotiating power with suppliers as larger hire companies used for direct hire by insurers. As we now know, this refers to no other party, but ERAC. We objected to this narrative, and it has not been answered in the section of WP23 dealing with Enterprise from paras 73 to 80. In this section, other large car hire firms like Hertz, Avis and Europcar are mentioned, but have apparently a negligible share, say less than 5% in this shadow direct hire market. So

We are concerned that the CMA has failed to be transparent about the DHM it uses at its benchmark. There is little information in terms of its size, dominance of ERAC, profitability and sustainability, and whether it is open to free competition by alleged alternative suppliers such as Avis, Hertz and Europcar. Yet, the whole basis for calculating consumer harm through the alleged AEC under TOH1 is based on an idealised world where:

(a) direct hire dominates (**100% domination**);

(b) consumer choice is restricted; and

(c) frictional/transactional costs are avoided because the defendant in the dispute (i.e. the insurer dictates what the victim is entitled to receive).

This so-called bench-mark model is clearly not a market, and turns the law of tort **in favour of the defendant against the plaintiff, contrary to principles of justice.** These are issues for government and not the CMA. So far the CMA has failed to answer these challenges, which are significant on the scope of its powers under TOH1, and whether its remedy 1C proposal is lawful in these circumstances. On this, we can say the CMA has remained silent to date, but apparently recognised in its PDR that it could not make remedy 1A work, because this required a change in the law of tort.

- We say the 2-tier pricing cap under remedy 1C is a variant of remedy 1A, especially the lower cap, and equally requires a change of law to work. That is beyond the powers of the CMA under the Enterprise Act 2002.

Even with the CMA's proposed package of remedies, it is recognised that DHM could not supply at 100% all TRV needs of consumers, in the same way or better than CHCs do now. We believe consumer choice should remain and being first to the customer, under the GTA is an important principle which may be lost under the CMA's remedy package. We also believe consumers' rights (under tort) should remain intact. How can the CMA conclude that the principle of tort results in a consumer detriment? Consumers who have suffered a wrong, have no access to DHM, unless of course they are referred by the at-fault driver's insurer to this service once their claim is captured. Without a viable and independent CHC sector, why should insurers capture any driver making a non-fault claim. Consumers would pay more in the long-run, as losses from non-fault claims mount, and massive opportunity costs augment their losses in money and time, and frustration.

Quindell is not able to quantify the magnitude of this over-statement without proper access to the counter-fractural market data, used as a benchmark for the AEC calculation. We request the CMA makes this available without delay.

To remind the CMA of the dimensions of people involved, we note that non-fault accidents per year are c.500,000, of which CHCs handle approximately 300,000. The CMA's alleged detriment of c.£87m, which we dispute, only results in a premium uplift of perhaps £2 per year, compared with premiums costing policy holders approximately £440 a year. We add that premiums to consumers have fallen in the last year, showing the market will be better, without any CMA misguided intervention.

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the inference is not buyer power, but potentially predatory pricing or other features and practices, not identified or investigated by the CMA. But all this shows issues for serious investigation as a non-functioning market, that is not an efficient supply chain. Indeed the direct hire prices used by the CMA may be understated from the proper level that Hertz, Avis and Europcar can compete on. All this evidence makes the CMA's conclusions flawed and misleading.

The benefit from a CHC claim could be worth more than £1,000 with no cost to the non-fault claimant. Additionally consumers get extras, such as uninsured loss recovery, when they do not have MLEI cover. They also recover excess payments paid to their insurers, and probably no mark of fault to inflate premiums, which not a fault. Also the cars provided under GTA are better like-for-like matches based on need, rather than what the direct hire provider might provide. All this is missed.

Also we say that the direct hire path sometimes leads to consumers incurring more costs than would happen if CHCs were involved (e.g. due to time wasting, not having a car from day one, needing to go to branches, and paying money for upsold cars and services). The insurers also subsidise direct hire providers, who are shielded from marketing and needing to find claimants, plus the insurers cover all the costs of managing the consumer relationship which CHCs need to do. So when the real costs of the two paths are compared, we say the CHC path is efficient, cost effective and produces massive relevant customer benefits. All this is ignored in the CMA's thinking, as we note from the PDR.

- The costs allocated under Table 1, appear wrong, regarding the CMA's thinking on frictional costs shown therein.

Therefore, we think the work done by the CMA is not adequate and not carried out correctly. It leads to flawed and misleading conclusions, to which we object.

3.3 DIRECT HIRE PROPORTION WITHOUT SEPARATION

Taking this point forward and applying it to the approach by the CMA to calculate the AEC, the population of consumers who still require credit hire, at current GTA rates, cannot be included in the AEC. According to the CMA, the AEC is born out of ***separation and inefficiency***.

- In the case of no-liability admission, the DHM will not be an option to consumers. Hence the consumer is left with only CHC as an option for claims resolution, and only credit hire meets this need (based on GTA rates). As the CMA has found nothing wrong with CHCs, and we note the CMA is not seeking to control what a claimant can recover in tort law; nor has it suggested CHCs earn abnormal profits, we believe **we are a properly working, efficient market**.

- DHM, working for insurers as said, would not help in these cases, but we supply hire vehicles to claimants and do not cause any harm to them, and our prices are controlled via the GTA. Where CHCs are the only suppliers of TRVs (as DHM is not an option), those charges cannot be included in the AEC calculation – we logically cannot be a cause of problems in these situations – but the CMA fails to address this practical reality for large numbers of claimants each year, using the CHC service.

The CMA concluded in its PFs that c.25%[3] of consumers receive a vehicle from insurers after an accident (i.e. captured claims), through intervention and at DHM rates. Accordingly, **75% of consumers receive a credit hire vehicle** (partly due to separation and partly due to insurers not willing to admit liability or to offer provision of a replacement vehicle:

[3] Para 6.5(a) said:

Our non-fault survey results suggested that at-fault insurers were successful in capturing about 32 per cent of claims (see para-graph 3.68)
Footnote 3 said: Data from insurers suggests that the percentage of captured claims is lower, about 25 per cent.

- In a post remedy world, what percentage of claims will insurers admit liability **in 3 days,** as envisaged by the CMA in para 2.78 of the PDR? Some insurers who indemnify commercial/fleet risks would **rarely** have the opportunity to admit liability due to late reporting of the accident, and others have enquiries to make before committing to the non-fault claimant. Some insurers, likely to be direct [under]writers, would be able to admit liability in as many as 70% of cases.

- As such Quindell, for its modelling on the effects of the CMA's proposed remedy 1C, has assumed that **50% of claims** would attract an early admission of liability, leaving c. 50% to credit hire. Would enough CHCs be able to survive in this new remedy environment, where they not only have to cover their costs, but provide most cars at half the GTA rate, as noted in para 2.90 of the PDR[4]? Has the CMA modelled what the market may look like post remedies?

This is important to understand the real AEC, pre and post remedy. If it is accepted by the CMA that credit hire in itself is good for consumers, especially where no admission of liability is forthcoming, where the consumer would be left with serious detriment in the absence of CHCs, it cannot conclude that where credit hire is the ONLY option for consumer, that and AEC is present. The only detriment (AEC) that can be included is where separation creates higher cost – in the case set out above, that only applies to 25% of the market today, or only one third of credit hire claims today.

We set out in two pie charts below of our thinking, described above, to show how these relative shares of consumers might change, for the worse.

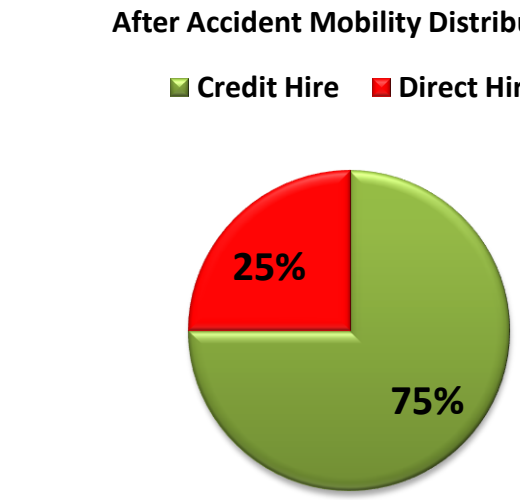
[4] Para 2.90 says:

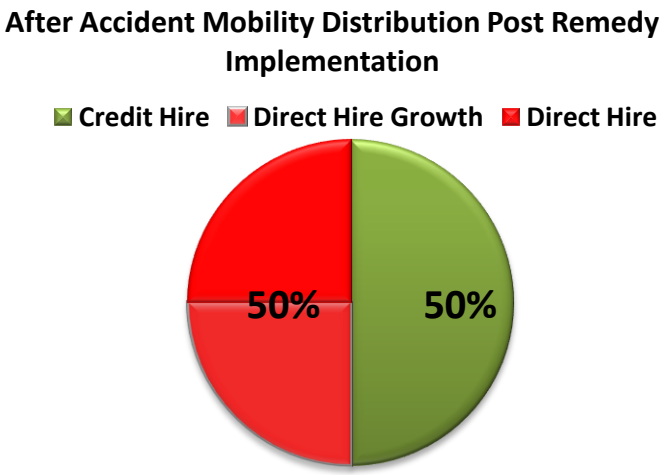
In the light of this, and the evidence from insurers that there was not a large amount of [4] Para 2.90 says:

> In the light of this, and the evidence from insurers that there was not a large amount of disagreement about liability, we would expect the high rate cap to occur rarely. Moreover, this rate cap structure would discourage some of the disagreement which currently exists. Consequently, we believe:
>
> (a) the low rate cap will apply in a high proportion of situations, in particular those where initial information suggests claimants are non-fault; and
>
> (b) excess frictional costs will be low (since they only occur under the high rate cap which applies in a low proportion of cases).
>
> For these reasons, we believe a dual rate cap will be effective in addressing the AEC.

We infer from para 2.88 that the low rate cap is meant to be half the GTA rates, based on the following text:

> As a high rate cap of double the low rate cap is approximately similar to the current GTA level, we considered it would imply a broadly similar incentive to at present for a replacement vehicle provider to provide a replacement vehicle to a claimant, who was probably but not certainly non-fault





What we are seeking to illustrate is that by removing separation (giving the at-fault insurer the rate they would incur if there was no separation), you only remove a third of the credit hire cost. In the absence of a change in law, the cost of rental is recoverable at the high rate (GTA/BHR).

The CMA AEC calculation assumes ALL credit hire should be charged at direct hire. This logic is simply not true and relies on an 'idealised world' scenario, where liability is admitted in ALL claims and direct hire would be offered to ALL consumers. The AEC compares credit hire rates (GTA rates) with DHM rates (ERAC rates) in 100% of cases, so as to assume that ALL claimants would be offered a vehicle by the at-fault insurer if no separation occurred – this is plainly not true as, on many occasions the insurers would not offer such a service. The default position, even if no separation existed today, means claimants would be left to 'get the bus', or rely on other service providers, i.e. CHCs. The charges of CHCs in such circumstances is measured by the principles of tort law, those charges have to be 'reasonable'. The CMA has erred in calculating the AEC based on the difference between credit hire and direct hire charges in ALL cases.

If Quindell's thinking is correct, the AEC, on the CMA calculations for TRVs, is overstated by as a much as two thirds and therefore the alleged AEC is more likely to be c. £30m, and not £87m as quoted e.g. in Table 1 in

the PDR. If the CMA wishes to discuss this further, either through not understanding the logic, or to test Quindell's thinking, we would of course be happy to engage in such discussions.

- In this connection, we object to the cost allocations under frictional costs, which we say are not explained in any detail, in e.g. paras 2 to 8 of Appendix E to WP23. As we did not have advisers available to access the CMA's confidentiality ring on this disclosure, we cannot comment further, but we assume other parties, who have inspected this information, will be able to comment. We would request the CMA communicates such reports, and we think the allocations of say, £78, and £57, and £27 in Table 1 of Appendix E needs further investigation. Similarly, the allocations shown in table 3 of Appendix E also need further investigation. From inspection, all of these allocations look wrong. So there is no misunderstanding, we reproduce these tables as follows:

TABLE 1 **Information on at-fault insurers' costs**

£

		Subrogated claims	
	Captured claims	*Claims managed by non-fault insurers with the hire component referred for credit hire*	*Claims managed by CMCs*
Repair/write-off	53	32	45
Replacement vehicle	27	78	78
Other	57		

Source: Insurers.

Note: The 'other' category includes the costs of capturing a claim that cannot be easily allocated to either the repair or the replacement vehicle components. Different insurers adopted different approaches with respect to these costs. Some allocated all or most of them, others reported high figures under this category.

TABLE 3 **Estimates of management costs saved by the at-fault insurer**

	Allocation of 'other' costs	
	All to repair/ write-off	*Equal split*
Saved management cost of replacement vehicles	£27	£55
Saved management costs of repair/write-off	£111	£82

Source: CMA.

We request that the CMA provides full and transparent information on how it made the above estimates, and the margins of error in these figures, as well as the assumptions. We reserve our position to comment further. For example, para 4 in Appendix G on sensitivity analysis noted:

> *One insurer gave us very low estimates of the frictional costs it incurs when at fault and relatively high estimates of the cost of managing captured claims. This results in a low net detriment, both on credit hire and overall. On the other hand, another insurer provided very high figures for frictional costs and low estimates of management costs. These figures result in a very high detriment.*

This means insurers had no idea of what they were doing. Alternatively, the results of the detriment will be reduced substantially by using the very low estimates for frictional costs, and high estimate for managing captured claims, as noted here. Where are these results shown, and if omitted from WP23, why? This variation from sources of input data shows the CMA's estimate of an alleged CH detriment is flawed, lacks credibility and is misleading.

For completeness on this outstanding work, we note that Table 1 in the PDR showed how these allocations were used, to which we object as noted above. For example, if the £78 shown was only £10, which we think is what insurers need to incur for most normal CH claims under the GTA ie approve final bill and supporting documentation, then the detriment will diminish for this one factor alone.

TABLE 1 **Summary of detriment calculations: repair, write-off and credit hire**

	Insurer-managed repair	*Credit repair*	*Insurer-managed write-off*	*Credit write-off*	*Credit hire*
Average bill less cost to at-fault insurer of captured claim (£)	95	290	53	125	566
At-fault insurer's average transactional/ frictional costs (£ per claim)	32	45	32	45	78
At-fault insurer's average management costs saved (£)	(111)	(111)	(111)	(111)	(27)
Average cost of separation to at-fault insurer (£ per claim)	17	224	(25)	59	618
Average revenue to non-fault insurer (referral fees etc, £ per claim)	(20)	53	(62)	53	328
Net detriment (£ per claim)*	37	170	37	6	289
Number of claims (thousand)	240	85	64	21	301
Net detriment (£ million)*	9	15	2	0	87

Source: CMA calculations.

*Net detriment is average cost of separation to non-fault insurer less average revenue to non-fault insurer.

To summarise, Quindell believe the AEC for CH (in the final column in Table 1 above), is overstated by two thirds as a result of this error in drafting, [before adjusting down for the cost allocation errors noted above], and further adjustments noted below.

3.4 Direct Hire v Credit Hire – Other differences

Turning to other factors, which Quindell believe the CMA has overlooked in terms of evaluating the AEC, we believe these include (i) quality and bracketing issues, (ii) other costs borne by insurers when managing claims directly through DHM and frictional cost borne by insurers in dealing with credit hire claims (iii) costs borne directly by the consumer (consumer detriment) when faced with a service from the dominant player in the DHM, (iv) VAT and (v) Referral fees for credit hire. There may be need for an additional adjustment for the consumer benefit from CHC's providing better cars under the GTA, compared with Enterprise. We discuss each issue in turn.

3.4.1 (I) BRACKETED ERAC RATES V GTA RATES

Quindell is confused as to why the CMA has chosen to use one (dominant supplier in DHM) supplier's structure of rates for the purpose of Table 10 in WP23, rather than the industry adopted structure to rates, i.e. the GTA. In the process of adopting bracketed rates, the CMA leaves it open for errors when comparing credit hire and direct hire. The effort to build the GTA rate structure was considerable and supported widely by both at-fault insurers and rental providers, including ERAC. It ensures like for like, which the Enterprise classifications inherently do not do. In this connection, we refer the CMA to para 51[5] in WP23 and para 14[6] in Appendix G of WP23, where quality differences i.e. superiority of CH provision over DH is, in our view, not properly considered. We reserve our position to comment further.

Quindell is not in possession of the data so is unable to quantify the scale of the overstatement.

3.4.2 (II) ESTIMATION OF COSTS INCURRED BY INSURERS IN DEALING WITH CLAIMS DIRECTLY

As mentioned earlier, transactional and frictional cost is part of a properly functioning insurance market, whether dealing directly with Policyholders who make a claim on their own policy, or in dealing with non-fault third parties. The CMA has erred in that it has assumed that ALL frictional cost contributes to consumer detriment/AEC.

In Appendix E the CMA sets out the costs incurred by at-fault insurers in dealing either with a claim directly, or one presented as credit hire on behalf of the consumer. Sensitivities to these calculations are contained in Appendix G. The conclusion reached by the CMA is that where the at-fault insurer is presented with a credit hire claim, it incurs, on average, £78 per claim, whereas, where it manages the claim directly, on average it incurs £27 per claim.

Surely the CMA can understand that these conclusions do not make very much sense. Quindell wonders what effort has been made to understand why insurers believe it costs them three times the amount to handle a claim presented versus dealing directly.

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[5] Para 51 includes the following:

> On the second issue, the most direct way to evaluate the presence of quality differences would be to compare the distributions of replacement vehicles among the GTA classes for credit and direct hire. Unfortunately, we could not get the numbers of cars provided under direct hire according to the GTA classification. Therefore we have estimated the maximum size of the problem, assuming that Enterprise always provides the cheapest car within each of its classes. Looking at the cars provided under credit hire in 2012, we computed the total fraction of hire days for GTA classes which do not correspond to the cheapest models within one of Enterprise's classes. We have found that a quality difference may potentially arise in at most 20% of cases. The potential mismatches between GTA classes and direct hire vehicles are mostly concentrated in the 'premium' and 'sport' segments.

[6] Para 14 from App G says:

> With regard to the type of vehicle (see the second bullet in paragraph 11), our main estimate of the net detriment assumes that, in the benchmark, car hire classes are similar to current credit hire car classes, ie that currently credit hire claimants receive their legal entitlement and no more than that. On average, direct hire currently involves less expensive car classes than credit hire and this may be associated with a higher level of mitigation under direct hire.[10] Therefore we considered an alternative assumption, under which hire classes in our benchmark situation (where claimants receive their legal entitlement but there is no separation) were similar to existing direct hire averages. We recognised that an implication was that credit hire claimants on average received a higher quality of replacement car than their legal entitlement (ie the benchmark assumption) and we took this into account.

In providing the vehicle directly (via ERAC), the insurer will need to assess the consumer's need, instruct a partner to provide a vehicle, monitor the duration and arrange for settlement after off-hire. When dealing with a credit hire, much of this administration is removed. What is not removed is the resolving of liability and discussing settlement.

Quindell suggests that in calculating the AEC, the CMA has erred by including this transactional/friction cost. **Insurers incur cost handling claims**. If insurers challenge too many claims which are valid, their transactional/frictional cost increases and they have a diminishing return from that investment. If they challenge too few, they are likely to have higher claims costs than would otherwise be the case.

Taking this point forward, if the CMA is seeking out the most efficient market, why has it chosen to 'average' insurer transactional/frictional cost? Surely, the correct approach would be for the CMA to use the lowest? We refer to the comments in Appendix G paragraph 4 where the CMA makes the following comment;

> *'One insurer gave us a very low estimate of the frictional costs it incurs when at fault and relatively high estimate of the cost of managing captured claims. This results in a low net detriment, both on credit hire and overall. On the other another insurer provided very high figures for frictional costs and low estimates of management costs. These figures result in a very high detriment'*

Quindell would suggest that the first insurer is running an efficient operation, where they are proportionately challenging claims, perhaps have worked hard to build protocols to reduce transactional/frictional cost with the CHC, one could argue is running their claims operation efficiently. The second insurer (we do not even know whether they are both signatories to the GTA, or whether insurer 1 is a direct [under]writer and insurer 2 a commercial [under]writer of PMI) appears to be inefficient, unless of course, its additional frictional cost delivers a better claims result.

In addition to the points above, it appears the CMA has asked insurers to split their estimation of costs between TRVs and repairs. On the basis that no insurer would even measure the macro cost of handling credit hire claims and capture claims, to ask the insurer to break that estimate (which **can only be a guess**) down between the component parts (TRV and repair) will create a huge question over the validity, integrity, relevance and credibility, of the data and, as such, its use in the calculations is perhaps worthless. For the CMA to accept the conclusion that the insurer incurs far greater transactional and frictional cost in dealing with TRV over repairs, rather than linear distribution appears illogical and flawed.

Even if the CMA is unable to accept Quindell's logic, it must accept the over-statement when credit hire will remain for those consumers, where liability is not admitted and DHM provides mobility. The costs insurers incur where liability is admitted today must be lower than where it is disputed.

Quindell would suggest that the at-fault insurer incurs 'reasonable' transactional and frictional cost in handling claims presented to it by non-fault consumers. We would not go so far as to say there is a net saving having the claim managed by a CHC, but the net cost should be zero. As such the AEC is overstated by the net difference used in Appendix E Table 4, which is £51 per claim, or c. 15.4m.

3.4.3 (III) Consumer Detriment – Cross selling/Add ons

Quindell is surprised that the CMA has concluded that there is no evidence to support the allegation that the dominant DHM provider (ERAC) charges consumers directly for add ons and cross selling (what we call **upselling**). It is widely known in the sector that this does occur. Has the CMA sought disclosure from ERAC in

terms of its accounts and how they apportion the revenue generated through direct hire from insurers and consumers separately? In addition, with this being the hard benchmark for others to follow, has the CMA sought opinions from insurers as to whether their Policyholders and/or third parties are charged for such add ons?

We believe this is a very material adjustment, and any upselling income paid by consumers is also evidence that they get a lesser and inferior service compared with credit hire, where the consumer gets the full service for free i.e. CHCs bear all the risks and costs. It is an unbeatable service to benefit the consumer. What does the CMA have to say about this, and why has it been ignored? We request a response, once this submission is received.

3.4.4 (iv) VAT

Quindell has considered the position taken by the CMA to base its AEC on the gross value of rental invoices, inclusive of VAT. We maintain that this is incorrect, in that the beneficiary of the VAT amount is consumers, through the treasury. VAT being charged on invoices does not benefit the supplier, nor is it incurred due to separation and/or transactional or frictional cost. The proceeds of the VAT element of the claim go back to the Government through taxation and is spent for the broader community as the government sees fit.

Quindell would suggest the AEC is directly overstated by 20% for the reasons stated.

3.4.5 (v) Referral Fees for Credit Hire

3.4.6 Summary of Quindell views on the CMA's alleged AEC

1. DHM is wrong for use as a benchmark for an efficient market – indeed basic hire rates should be used as they come from a recognised market, facing the consumer and the CMA says it will allow consumers to recover their basic hire costs, when claiming personally – see para 2.156 – this inconsistency is not resolved as we have noted in correspondence with the CMA.

2. Using DHM as an 'idealised world' (assuming 100% as DHM) over-states the AEC by two thirds.

3. Adopting one dominant supplier 'bracketed rates' rather than industry adopted rates, leads to errors and failure to give consumers a like-for-like replacement TRV.

4. Using average frictional cost for insurers leads to inefficiency and over statement of AEC – actual results are much lower than numbers used by CMA.

5. Using insurer estimates (guesses) to segment costs for TRV and repairs leads to inaccurate calculations and overstates the AEC – we suggest lowest estimates are used for the most efficient insurer.

6. Encouraging the dominant DHM supplier to take market share exposes more consumers to the hard sell of add-ons and cross-selling, i.e. **upselling**, showing consumers receive poorer service than from CHCs.

7. The CMA's approach on VAT overstates the AEC by 20%.

8. The referral fees for credit hire have been understated, leading to an overstatement of the AEC – but the detriment needs allowance for fair marketing and advertising, which is ignored at present.

The table below estimates the overstatement of the AEC by the CMA by only referencing 2,4,5 and 7 above (i.e. ONLY for purpose of illustration, ignoring DHM is not a market where pricing is predatory and purposely priced low to restrict competition, bracketed rates and consumer detriment);

	CMA	Quindell	Difference	Reason for difference
Volume	301,000	301,000	No	N/A
Average difference between credit and direct hire	566	566	No	Quindell maintains there are differences but is unable to quantify it due to a lack of data on DHM
Net insurer management and frictional cost (£m)	51	0	51	See sections 4 and 5
Referral Fees (£m)	328			See section 8
Sub total (£m)	87	64	17	
VAT excluded (£m)	87	54	33	See section 7
Proportion of market where separation leads to AEC (£m)	**87**	**18**	**69**	

If Quindell's points are accepted by the CMA the AEC, if there is one at all, is de minimis at a maximum of £18m. With other challenges and questions about the validity of the data, risk of adoption of the remedies package and risks to consumer detriment, the remedies are unnecessary. If implemented, they will lead to greater friction and worse outcomes for consumers. All this needs to be resolved before this report is finalised, and we are happy to engage with the CMA, as needed.

3.5 REMEDY 1C – MEASURES TO CONTROL THE COST OF PROVIDING REPLACEMENT VEHICLES TO NON FAULT CLAIMANTS

3.5.1 SUMMARY OF REMEDY

"...2.45 In the Remedies Notice, we said that we were considering a remedy to control the cost of providing a replacement vehicle to non-fault claimants (Remedy 1C). We said that these measures could replace the relevant parts of the General Terms of Agreement (GTA) and would include:

(a) guidance on the duration of hire periods for replacement vehicles; and

(b) a cap on daily hire rates for each category of replacement vehicle..."

2.48 In the provisional findings, we found that disputes between at-fault insurers and CHCs/CMCs (and hence frictional costs) typically relate to one or more of the following aspects of replacement vehicle provision:

(a) liability;
(b) hire rate;
(c) hire duration; and
(d) need

2.49 We have therefore considered ways in which each of these aspects could be addressed through our remedies.

2.50 The intention of this remedy is to reduce the cost of replacement vehicle provision to non-fault claimants without compromising claimants' tortious entitlements by:

(a) limiting through the imposition of a rate cap the cost of non-fault replacement vehicle claims subrogated to at-fault insurers; and

(b) reducing the administrative and frictional costs arising in relation to the provision of replacement vehicles both directly (eg through making the administration of claims more efficient) and indirectly (through lower replacement vehicle claims costs leading to fewer disputes).

2.51 We would expect that Remedy 1C, by reducing the gross cost of replacement vehicles, would also reduce the differential effects between higher-risk and lower-risk drivers (see paragraph 2.6).

2.52 While a rate cap lowers the hire rate and so reduces friction from disputes over hire rates (paragraphs 2.48(b) and 2.50(b)), it would not directly address frictional costs incurred in disputes of liability, hire duration and/or need (paragraph 2.48(a), (c) and (d)). However, we expect that disputes over these matters might also reduce because the lower hire rate payable is expected to reduce overall disputes. In designing Remedy 1C we have sought to complement the rate cap with measures *(a)* to speed up liability resolution; *(b)* to cap hire duration; and *(c)* to assess need more effectively (see Remedy 1F). In our view, these measures are an important part of the effective functioning of Remedy 1C.

3.5.1.1 TO WHOM AND TO WHAT SHOULD REMEDY 1C APPLY?

2.56 There was widespread agreement among respondents to the Remedies Notice that there would be a risk of circumvention in a rate cap, which would result in rates returning to levels above the cap, thus making the remedy ineffective. For the remedy to be effective it would therefore need to cover all replacement vehicle provision to non-fault PMI claimants.

2.57 We propose to require that the remedy is mandatory for all those involved in the provision of replacement vehicles to claimants (insurers, brokers, CHCs/ CMCs, repairers and vehicle recovery providers). This means it would be significantly wider in scope than the GTA because currently around 23% of credit hire claims are handled either outside of the GTA or initially within the GTA but then 'fall out' of it.

2.58 The remedy would apply at the point a claim is submitted by the replacement vehicle provider to the at-fault insurer (ie the daily hire rate could not exceed the relevant cap at any point in the hire duration for any claim that is sub-mitted to an at-fault insurer). This avoids complications relating to claims where liability is undetermined or disputed immediately following an accident.

2.59 We do not propose that the remedy be extended to cover replacement vehicle claims charged to at-fault insurers directly by non-fault claimants who have organised the hire of a replacement vehicle directly themselves, without the assistance of an insurer, broker, CMC or CHC (ie the self-provision of replacement vehicles by non-fault claimants). To do so would require a change in law in order to prohibit the recovery of costs incurred in the provision of replacement vehicles at basic or retail hire rates. Any need to change the law to implement this remedy (so as to reduce individuals' rights

2.60 We considered whether this approach might allow circumvention of the remedy. For example, a replacement vehicle provider could offer a claimant a vehicle on credit at a higher rate than the cap imposed by the remedy, with the claimant then pursuing the claim themselves, reimbursing the provider following settlement of the claim. The claimant could receive, for example, some cash back in return for using the replacement vehicle provider. However, in our view the risk of this type of circumvention is likely to be low, because:

(a) On the demand side, self-provision of replacement vehicles by non-fault claimants does not currently occur on a significant scale, as non-fault claimants typically report an accident to their insurer (or repairer or dealer) and are then referred to a CHC/CMC for the provision of a replacement vehicle. There is significant risk for individuals in assuming responsibility for the management of their claim rather than having their claim managed by a professional party.

(b) On the supply side, replacement vehicle providers could pursue a business model whereby they provide non-fault claimants with the funding to arrange the self-provision of replacement vehicles but there would appear to be significant risks involved. The vehicle provider would have to rely on the consumer submitting and defending the claim in order to recover its costs, and would have no control over the claims management process. In our view, this is likely to make such a business model unattractive.

2.61 Although this risk is relatively low, we intend to ensure that Remedy 1C is as effective as possible by limiting such opportunities for circumvention. There-fore, we propose to prohibit replacement vehicle providers from using financial inducements to encourage claimants to take a replacement vehicle at rates above the cap. The intention of this is not to prohibit the ability of hire vehicle providers in general modifying the way in which they offer services to consumers, or to prevent consumers from taking a hire vehicle themselves, but specifically to limit the potential use of inducements following an accident in return for claiming from the at-fault insurer at a higher replacement vehicle hire rate.

2.62 One insurer ([]) submitted an alternative way in which Remedy 1C could be designed. [] said that Remedy 1C could work if the CMA were to make an order limiting the amount a replacement vehicle provider could charge a customer, thus limiting the amount for which the customer would be liable under their contract with the replacement vehicle provider. It said that this would mean that any claim made on behalf of the non-fault party against the at-fault insurer for a sum greater than this amount would not succeed because the claim was a consequential loss (loss of use) which might be mitigated by the hiring of a replacement vehicle. Where such a loss was mitigated, or action was taken which resulted in a substituted expense, the claimant was only entitled to recover the actual expense or liability which they had incurred.

2.63 We considered whether this alternative method could work with our dual rate cap proposal (see paragraphs 2.76 to 2.96 below). The idea would be that the remedy would cap the amount a replacement vehicle provider could charge a non-fault claimant (where this amount would depend on the speed with which liability is accepted), such that the insurer/CHC/CMC standing in the shoes of the non-fault claimant could not seek to recover a higher amount as the loss suffered would have been mitigated to the capped amount. We are content that our approach to implementing Remedy 1C (see paragraphs 2.57 to 2.61) is effective but we invite views on whether this alternative approach would be more effective and capable of working with the proposed remedy.

3.5.2 QUINDELL'S RESPONSE

We have considered Remedy 1C in the following areas;

- Our interpretation of the proposed remedy;
- Our understanding of the proposed rate cap process;
- The calculation of setting the rates;
- Frictional costs and how the CMA understand them;
- The process that consumers, credit hire companies and insurers may face in applying this remedy;
- The legal implications of this remedy;
- The risk of circumvention;
- The risk of disruption and adding further frictional cost;
- Our conclusions

3.5.2.1 OUR INTERPRETATION OF REMEDY 1C

The CMA has defined remedy 1C as;

> (2.50) The intention of this remedy is to reduce the cost of replacement vehicle provision to non-fault claimants without compromising claimants' tortious entitlements by:
>
> (a) limiting through the imposition of a rate cap the cost of non-fault replacement vehicle claims subrogated to at-fault insurers; and
>
> (b) reducing the administrative and frictional costs arising in relation to the provision of replacement vehicles both directly (eg through making the administration of claims more efficient) and indirectly (through lower replacement vehicle claims costs leading to fewer disputes).

We interpret 2.50 above as follows;

That the CMA will place a price cap on the amount CHC's can charge at fault insurers when they submit their customer hire claim following a non-fault accident and that by making vehicle replacement costs lower it will, in turn, reduce the number of disputed claims which, in turn, will reduce "administrative costs (frictional costs)".

We also understand the CMA's aim is to reduce the scope for paying referral fees, but without proper consideration of the effect of this imposed change for both consumers and providers of CHC services.

We are concerned at the use of the word "subrogation". We do not *'charge'*, *'bill'* or engage directly with the insurer. We do *'present a claim'* (for loss of use) from the consumer who has been wronged. We are concerned at the CMA's understanding that CHC's "subrogate" hire claims – when we do not.

Specifically, the consumer has a contractual liability for the hire charges incurred to the CHC. This has absolutely no connection to any claim they may have against the tortfeasor, or the insurer indemnifying the tortfeasor. If the consumer was found not to be liable for the contracted hire charges, a claim on their behalf for those hire charges would fail.

The CMA emphasize that in practice the costs are never pursued against the consumer in the unlikely event the hire charges are not recovered from the at-fault insurer. Whether they are or not, may be a commercial decision for the CHC, but the fact that those charges ARE contractually enforceable is important in law. If there was never any intention to enforce those charges, the agreements would be found to be a sham. These points have previously been tested in the courts.

The CMA narrative does not help Quindell understand the remedy and its impact, nor how it will be enforced, nor how circumvention would be inhibited.

The CMA needs to think very carefully through the sequence of events that lead up to the consumer incurring hire charges, the contractual arrangements and the rights of the consumer in tort law.

Q: Could the CMA explain how it has arrived at the conclusion that credit hire companies (CHC's) "subrogate" or assign rights under hire claims?

3.5.2.2 OUR UNDERSTANDING OF THE PROPOSED RATE CAP

The CMA explains that the rate cap will take the following form in paragraph 2.78 of the PDR;

Therefore, we have considered ways in which we can link the cost of replacement vehicles to the speed of liability determination. We propose the following:

> (a) If the at-fault insurer accepts liability within a short period (we propose a period of **three days** from being informed that a replacement vehicle is being provided to the non-fault claimant) a low rate cap will apply (see paragraphs 2.84 to 2.93 below for discussion of the appropriate rate). In this

> scenario, the at-fault insurer is committed to paying for the replacement vehicle regardless of any subsequent change to liability (eg with relevance to a repairs claim or a personal injury claim).
>
> (b) If the at-fault insurer does not accept liability within the short period, a high rate cap will apply (even if the at-fault insurer accepts liability on day 4). This cut-off point is required to provide incentives for insurers to accept liability swiftly and to give replacement vehicle providers sufficient incentive to provide a replacement vehicle when liability is not admitted within the time period. In this scenario, the at-fault insurer will only pay the costs if the claimant being provided with a temporary replacement vehicle is found to be non-fault, but the costs will be higher than if the at-fault insurer had accepted liability early (see (a) above).
>
> (c) The at-fault insurer can **withdraw an acceptance** of liability, eg as a result of receiving new information, but this would only affect future hire charges, not any hire charges already incurred. So if the at-fault insurer withdraws its acceptance of liability, the low rate cap and the commitment to pay (regardless of the final liability assessment) would apply up to the end of the next working day after the changed view, and the high rate cap, with a risk of non-payment, would apply thereafter.

We have interpreted this wording as follows;

- The at-fault insurer has three days, from being notified by the CHC that they intend to provide hire, in which to admit liability. If they admit liability within the three days then they receive the benefit of a lower capped rate which the CHC will legally be bound to charge them;
- If the at-fault insurer does not admit liability in three days, regardless of what date after the three days they do (if they do), they will not receive the benefit of the lower rate cap;
- The insurer can admit liability within three days and then dispute liability afterwards but from the point they dispute liability the higher rate cap would apply;
- The insurer is "committed" to pay the hire under the low rate cap but it is not specific, save for the rate agreed per day, what the insurer has to pay;
- The insurer may or may not be able to dispute other frictional areas such as need, type and duration of hire etc;

Quindell accepts that a three-day period in which to make an admission of liability is more than sufficient time. CHC's have the capacity to undertake such investigations and make a decision usually within 24 hours. It is important that the CMA does not provide insurers additional time in which to make such decisions.

We understand that insurers will seek to persuade the CMA to extend this to 14 days. The CMA needs to understand that many hirers have an immediate need for a replacement vehicle – what would a third party insured motorist do when their vehicle was undrivable, but the CHC had to wait for 14 days before deciding whether to hire or not?

A significant proportion of consumers are in urgent need for a vehicle – especially in instances where their vehicle is un-drivable.

Quindell does not see how the at-fault insurer can be given the opportunity to change their liability decision stance from acceptance to dispute. We believe that this could provide the risk of tactical admissions on a

temporary basis to reduce hire temporarily – or to potentially dissuade a CHC in providing hire (if economically the CHC cannot operate a business model on the lower cap rate).

In this model the CMA are seeking to provide insurers with the opportunity to become directly liable for those charges – but with the ability to swap and change that liability. How does this affect the contractual (if any) liability on who is paying the charges? Is it the customer (the hirer) who would be liable or the insurer?

Q: How does the CMA believe that CHC's would provide service?

Q: How can the CMA ensure that insurers do not tactically abuse the admission of liability window?

Q: How can CHC's determine what rate to start charging their customer if the rate cannot be determined for a number of days?

Quindell may take an economical decision not to provide hire to customers where there is an admission of liability, as the rate cap may not make it viable to do so. In those circumstances if the at fault insurer knows that the CHC will not provide hire on admission, what compels the at fault insurer to provide hire?

At the CMA's proposed rate cap of circa 50% of current GTA for the low rate cap, Quindell does not believe that such a model is economically viable for Quindell to operate.

Q: Would an admission of liability on hire affect or prejudice the insurers' position on any other heads of claim that the claimant has such as repair, personal injury, lost earnings etc?

Q: Would the insurer be able to admit liability for hire only? Would the courts or a claimants solicitors allow / accept this?

Q: What would happen on a split liability case?

Q: What would happen if the same insurer insured both drivers involved in an accident?

Q: What would happen in a multi vehicle accident?

We note that the CMA discussed this issue with insurers at the multilateral hearing and insurers simply said that they would provide service. We remind the CMA that the reason credit hire was born was a result of insurer failure to service third parties post accident.

We refer to pages 26 and 27 of the multi-lateral hearing transcript from the 26th February 2014;

> PROF SMITH: But the credit hire industry say to us that it's only because the credit hire industry exists that insurers, when they are dealing directly with your own customers, provide them with a good service and that before credit hire came on to the scene the picture was one where insurers simply didn't provide a good mobility deal to their own customers.
>
> MR SCOTT: It is certainly true that the genesis of the credit hire industry was that insurers, in the main, tended to provide a non-like-for-like mobility provision, if any at all, but whilst that's an interesting note from history it doesn't reflect the likely commercial position for individual insurers

> from this point forward. We know what our customers require now and we would have mechanisms to provide that service to them.
>
> PROF SMITH: Good. Thank you. Yes.
>
> MR HANNAH: I think the world has moved on and if you look at the incentives for insurers with their at-fault customers to provide a good service it's there in terms of their requirement to keep their retention levels up, and in terms of there's an incentive for insurers to provide as good, if not better, service than credit hire if they are capturing third-party vehicles – essentially to keep their own costs down, but also to provide a good service so the third party doesn't go back into credit hire.

This is the only questioning the CMA undertakes of insurers regarding whether they would seek to provide service if there was no alternative. We note and comment the following;

- There was an acceptance that service was not provided before credit hire started;
- The confirmation of providing service and desire to provide service is purely an economic driver.
- There is significant risk that without credit hire insurers would revert to a defacto failure to provide as they had no economic reason to provide service and incur the cost.
- It is highly unlikely that insurers would provide service to a third party simply to "do the right thing" – insurers are after all financial businesses with shareholders to please.

Mr Hannah added "There is also the impetus of providing a good service, as an insurer, to a third-party driver for the recruitment of that customer at renewal."

We comment;

1. Will insurers seek to provide service in return for obtaining renewal information / data / direct marketing information?

Q: What assurances can the CMA provide consumers that in admissions of liability, if the CHC does not elect to provide hire, the at fault insurer has to provide like-for- like mobility?

We are concerned that the customer journey in 1C would be poor. Has the CMA considered that many CHC's may avoid hiring to customers upon an admission? How would we explain this to customers?

Would there be an increase in customers having to be switched between vehicle providers? How would consumers understand why an insurer had admitted liability and then disputed it?

Has the CMA considered the severe financial challenge that it will impose on CHC's in being unable to accurately financially plan for their business?

What percentage of cases does the CMA expect insurers to admit liability on? Should this figure be lower than the current acceptance rates within the MOJ personal injury portal (as insurers have 14 days)?

We strongly object to the fact that the CMA has undertaken no modeling on what percentage of cases would pass through the low rate cap – the CMA needs to model this figure and provide factual basis and evidence in their final report.

Q: What percentage of cases does the CMA expect will be processed through the lower rate cap?

Q: If an insurer admits liability, where is the compulsion on insurers to pay in full without question? When an insurer disputes, what is the penalty when they are proved wrong? What about increased frictional costs from CMA ideas – how is this forecast for remedy 1c to work?
Q: What would happen if an insurer or self insured fleet admitted liability but then it identified an issue under Sanctions checking and was unable to pay?

Q: What would happen if the at-fault insurer changed their indemnity stance after an admission of liability?

We are concerned that insurers will still raise **frictional challenges** such as period, fraud, etc, which the CMA does not expect to occur in its idealised world under the low rate cap of zero friction – a wholly false assumption in our view.

We are also concerned that applying further pressure economically to admit liability early may increase the risk of fraud cases, or fraud cases receiving an admission of liability – this negates the aims of the remedy with unintended consequences.

How would the CMA propose to force self insured companies or fleets to comply with 1C – i.e. if they admit liability or dispute liability?

Our view is consideration of the above questions show the remedy harms consumers and is disproportionate to the aims.

3.5.2.3 THE CALCULATION SETTING THE RATES

Quindell has the following comments to make;

- Quindell notes again that Table 10 in WP23 is a complete rewrite of Table 6 in App 6.1 of the Provisional Findings - however this was done without consultation or discussion. We object to this unfair process.

- Table 10 rates are not GTA rates (they are defined as credit hire rates and are too high). The credit hire rates may include penalty revenue, which should be excluded as they are insurer's fault. How are non-GTA claims handled in this data?

- Why in table 10 are the direct car provider's rates that have been aggregated redacted? Given that Credit Hire rates are shown, how can the CMA justify hiding its direct hire benchmark rates. This shows its work is based on secret and untested data and should not be used in this way. We protest at this unfair presentation, preventing us from challenging this flawed work.

- Why have Enterprise car groupings been given precedence over the GTA groupings, which were established with insurers over 15 years, and ensure claimants get a like-for-like car? The CMA must follow GTA groupings and not Enterprise inferior classifications, as was done in table 6 of the PF app 6.

- Table 10 does not say their numbers include VAT, which is a distortion to inflate the alleged

detriment.

- Does the credit hire rate include late payment penalties recovered? "Revenue" would naturally include late payment penalties. That must be excluded.

- Quindell notes that all the Enterprise numbers are hidden. How can the CMA adopt a benchmark where no numbers are shown - this shows the numbers are not a suitable transparent comparator, but something from a private agreement.

- Why does Enterprise have the biggest share of this service to insurers (to the exclusion of Avis, Hertz, Europcar?). Could this mean the direct hire numbers in table 10 are too low – i.e. Avis, Hertz, Europcar need to charge more to stay competitive?

- The weightings for car groups have no analysis – how does the CMA know they are correct?

- If the CMA's calculation to determine credit hire rates includes late payment penalties, these need to be removed. This is because the defacto counter on the 1C proposed lower rate cap assumes an ideological world where late payment penalties will hardly be paid. This is because the CMA assumes there will be very frictional costs – and lower frictional costs = lower penalties.

- Why in Table 10 is the example of an S1 vehicle stated at £39.87 when the GTA rate is £30.89? (29% higher)?

- Where has our point raised at the PF stage regarding Enterprise receiivng **upselling** income, been taken into account? There is nothing in the Table 10 narrative about this, and it will increase the direct hire rates shown - hence the multiple of 2.1 shown is far too high.

- How has the CMA checked that the credit hire data shown in Table 10 excludes penalty income, which will distort the multiple upwards?

- Table 10 also needs to show that the data includes VAT. We believe an alternative table should also be shown without the VAT, so that this distortion is removed.

To summarise, we think our questions need immediate answers and Table 10 needs to follow the GTA classifications as before in Table 6. We believe that the resulting multiple is too high and will fall well below 2 when proper adjustments are done.

The CMA comments at 2.69 say:

"In our view, the structure of the rate cap should therefore comprise a fixed replacement vehicle arrangement element and a variable daily cost element."

Turning to the fixed replacement vehicle arrangement element the CMA splits this into two areas under paragraph 2.68 as follows:

Replacement vehicle arrangement costs – costs incurred in providing each replacement vehicle, irrespective of its type or the length of the hire, as follows:

(i) Upfront costs in the provision of a replacement vehicle (eg the preparation of the vehicle for hire and the delivery of the vehicle to the customer). We invite views on the extent of these costs and who typically incurs them (eg whether those CHCs which do not own their own fleets incur different costs). In our view these costs should be recoverable.

(ii) Administration costs relating to the claim. The GTA includes an administration fee of £37 + VAT. It appears to us that this may be a reasonable estimate of the fixed administration cost under credit hire. In the case where an insurer purchases direct hire the relevant costs would be the fixed costs of direct hire, plus any additional costs incurred by the insurer.

Quindell has calculated that the delivery and collection costs of a rental are £50 (£25 each way) and the vehicle preparation costs are c.£20 per rental. This would include safety check, cleaning, and vehicle damage check in and out.

We do not accept that the current administration fee of £37 under the GTA provides a reasonable estimate of the fixed administration costs incurred under credit hire.

The costs incurred would include the following;

- Case input, fraud and sanctions checking, hire monitoring, billing and payment recovery. We calculate the costs of this activity are circa £70 per hire.

- The most critical component is hire monitoring – in a direct hire, the rental company providing the hire will not incur any fraud or sanctions checking or hire monitoring costs. This is because they have a direct supplier contract with the insurer who instructs them.

- It is incorrect for the CMA to assume that a case under 1C, where liability is admitted, will incur the same process or costs as a direct hire case. They are completely different.

- A direct hire will follow a process where once the at-fault insurer decides they are liable, and have contacted the not at-fault party and agreed to provide them with a vehicle, they (the at fault insurer) simply send an instruction to their direct hire provider.

- The direct hire provider will contact the not at-fault party and arrange to on-hire the vehicle. They will then wait until they receive an instruction from the at fault insurer to off-hire the vehicle.

- The direct hire rates do not include any time taken to determine liability, assess and monitor period, check for fraud, or sanctions etc.

All of the above shows the consumer loses in terms of time and expense under direct hire, compared with the immediate and free credit hire service. How does the CMS recognise this?

For example under direct hire, the claimant may wait several days before they take delivery of their car because liability is not admitted. But the CHC would provide the car from day one on completion of a risk assessment. This benefit is ignored in the CMA's narrative but it explains why Credit Hire claims are higher than direct hire, to the benefit of consumers.

Where is any of this reflected in Table 10 or explained in the WP23 narrative? In addition where are the extra costs incurred by insurers to subsidise the Enterprise direct hire charges reflected in Table 10, or the resulting detriment calculation?

All of these factors, in our view, reduce the alleged separation deficit to negligible amounts. We do not think the CMA has done this work correctly, and it includes unfair bias against CHCs. We object to these failures.

Liability investigations

Quindell notes at paragraph 2.68 (iii) the CMA does not believe that the costs of determining liability should form part of the rate cap.

> Costs in determining liability. The replacement vehicle provider and the at-fault insurer have to determine liability irrespective of whether a replacement vehicle is provided. Hence, the cost of determining liability is not an additional cost of replacement vehicle provision and does not need to be recoverable under the rate cap.

We do not accept this. We cannot understand how the CMA would reach a conclusion that the costs associated of assisting a claimant determine liability.

- It's through only the involvement in non personal injury cases of CHC's that place pressure on insurers to investigate liability properly;
- The replacement vehicle provider will usually only undertake liability investigations on claims where they believe the claimant is not at fault;
- Why would a CHC undertake investigations on a claim where the claimant appears to be at fault? They can simply dispute or reject the claim.
- The defacto direct hire rates do not include any liability investigation costs and these are the comparison that the CMA uses to compare to GTA or credit hire rates (Table 10).

We calculate that the costs of undertaking full liability investigations are on average £40 per claim. How does the CMA intend to deal with this?

3.5.2.4 FRICTIONAL COSTS AND HOW THE CMA UNDERSTANDS THEM

Quindell agrees that any ways to reduce the administrative and frictional costs arising from the provision of replacement vehicles is a good thing subject to consumer rights and competition being protected i.e. the CMA does not worsen the successful current status quo where some 300,000 consumers receive free assistance each year without the worry of being treated unfairly by at-fault insurers

The CMA further explains how 1C will reduce friction in paragraph 2.52 as follows:

> While a rate cap lowers the hire rate and so reduces friction from disputes over hire rates (paragraphs 2.48(b) and 2.50(b)), it would not directly address frictional costs **incurred in disputes of liability**, hire duration and/or need (paragraph 2.48(a), (c) and (d)). However, we expect that disputes over these matters might also reduce because the lower hire rate payable is expected to reduce overall disputes.

We believe the CMA thinks that by simply allowing a lower rate cap for cases where the insurer admits liability, two things will happen;

1. A significant proportion of hires will flow through the low rate cap.
2. Those cases will simply be paid in full by the at fault insurer.

The CMA's logic is that at a lower cost of hire, it will not be economically viable for an insurer to dispute a case. That appears naïve – what happens when the case also includes personal injury. Also by holding out for 3 days as the CMA suggests, the consumer does not get a replacement car if CHCs are not available to provide immediate mobility.

We are concerned that the CMA's logic may not result in actual practice. There are many software based outsource systems which can be sold to insurers at low cost and which can repudiate or dispute cases over period.

If the CMA builds the low rate cap and admin fee on an assumption that there will be no friction – what happens if friction remains? How would CHC's be able to progress claims that are disputed within the low rate cap? The low rate cap at half GTA rates leaves nothing to cover CHC's costs. How is this going to work?

How would they recoup their costs in resulting period disputes? One solution could be that any case that wasn't paid in full (within 30 days) would automatically trip into the higher rate cap.
Q: Can the CMA expand on how they "expect" overall disputes to reduce? What evidence or data can the CMA point to in providing assurances that insurers will not seek to maintain high frictional costs?

The CMA explains who will be affected by remedy 1C in paragraph 2.57 and 2.58 as follows:

> We propose to require that the remedy is mandatory for all those involved in the provision of replacement vehicles to claimants (insurers, brokers, CHCs/ CMCs, repairers and vehicle recovery providers). This means it would be significantly wider in scope than the GTA because currently around 23% of credit hire claims are handled either outside of the GTA but then 'fall out' of it.
>
> The remedy would apply at the point a claim is submitted by the replacement vehicle provider to the at-fault insurer (ie the daily hire rate could not exceed the relevant cap at any point in the hire duration for any claim that is sub- mitted to an at-fault insurer). This avoids complications relating to claims where liability is undetermined or disputed immediately following an accident.

Quindell is concerned that CHC's do not necessarily need to submit the hire cost directly to the at-fault insurer. Quindell does not accept the CMA's logic that frictional costs would disappear under low rate cap cases. We therefore disagree with paragraph 2.80 as follows:

> We would not expect undue frictional costs (eg beyond those already reflected in direct hire rates) under the low rate cap, where liability is agreed.

We further noted, for example in paragraph 2.80:

> (a) Enterprise provides **credit hire** under its subscriber model (ie when the at-fault insurer accepts liability) effectively at direct hire rates;

(b) bilateral agreements between insurers provide for subrogation at the cost of direct hire without any addition to allow for frictional costs;

We note the CMA makes reference to the Enterprise "subscriber" scheme and indicated that the scheme is still credit hire, but is actually contracted direct hire.

The subscriber scheme is a restricted confidential scheme between Enterprise and insurers and Quindell is unable to comment on the scheme technically as the CMA has not disclosed it within its working papers. As such the CMA is referring to a competitor's confidential scheme.

However, we understand that the subscriber scheme does include additional fixed charges such as a fee for making liability decisions, and restricted payments that have to be made.

Can the CMA provide further details to avoid classifying this subscriber scheme as a comparator to direct hire when it is not?

Can the CMA also explain how Enterprise provides credit hire under the subscriber scheme? We understood the subscriber scheme to be a contractually agreed supplier scheme between Enterprise and the paying insurer.

As a result, contractually the insurer has a liability to pay Enterprise in full on every case and the contractual liability rests directly between those two parties.

In credit hire the liability rests between the hirer and the hire company and indemnity is sought from the at-fault insurer. Again, no frictional costs exist in a contract between a hire company and an insurer as they form part of their supply chain and agree to hire upon contractual agreement to receive payment.

Credit hire agreements have no certainty of paying in full from the at fault insurer. How can Quindell or other parties comment or raise concerns about the subscriber scheme when there has been no disclosure?

Q: Can the CMA confirm it understands that there are additional charges payable as well as a daily rate under the subscriber scheme?

Q: Can the CMA state what they are?

We believe that the CMA is misguided to assume that the low rate cap 1C is counter facto the same as direct hire rates. Direct hire rates contain no frictional cost. Remedy 1C low and high rate caps still contain large amounts of frictional cost.

Frictional costs can be split into six key areas; liability disputes, durational disputes, rate disputes, need or type of vehicle provided disputes, fraud disputes, indemnity disputes and finally technical disputes. Below we provide a glossary of each term.

Liability	Friction arising from disputes or negotiations / investigations surrounding who was to blame for the accident.
Rate	The rate that is recoverable (the BHR)

Duration	The period of hire that is recoverable
Need	Whether the claimant needed to hire a vehicle
Type	Whether the type of vehicle hired was appropriate for the claimants needs
Fraud	Whether the claim involved one or more fraudulent parties
Indemnity	Whether the at fault insurer will indemnity their policyholder
Technical	Other arguments such as enforceability of the agreement, Distance Selling Regulations, who signed the agreement, length of hire of over 90 days, VAT registration checking etc

The following table illustrates how each of the above frictional cost elements link to both the lower rate cap and the higher rate cap proposed under 1C or compare against the current GTA and non GTA hire claims process.

✔ Frictional cost is taken away for this element (the element is not challenged)

✖ Frictional costs remains (the element of friction is still open to challenge)

Area of friction	1 C (Low)	1 C (High)	GTA	Non-GTA
Liability	✔	✖	✖	✖
Rate	✔	✔	✔	✖
Period	✖	✖	✖	✖
Need	? – 1F	? – 1F	✔ Mitigation Statement	✖
Type	? – 1F	? – 1F	✔ Mitigation Statement	✖
Fraud	✖	✖	✖	✖
Indemnity	✖	✖	✖	✖
Technical	✖	✖	✖	✖

We have the following observations to make;

- The proposed 1C either low or high still leaves large areas of friction remaining;
- 1C low rate cap only removes friction on liability;
- Many GTA claims (around 30%) are paid immediately by the at fault insurer within the first 30 days without any friction at all;
- 1C either low or high rate cap does not address the majority of frictional areas;
- 1C is no different than the current GTA yet adds a huge amount of increased complexity in having dual rates;
- There is no consideration for fraud checks. Due to the systems that many insurers use (such as Netfoil), they have an increased risk of "false positives". These false positives are where their screening system flags that the case could potentially involve a fraudulent person as the data wash has hit something that has previously been tagged to a fraud case. This could be an address, a name or even a mobile phone number;
- As a result of false positives, insurers tend to flag significantly more cases as potentially fraudulent than actually are. Those cases need investigating fully to protect the claimant's rights. Most claims insurers end up settling;
- Technical – 1C does not remove frictional cost associated with other technical arguments insurers raise – usually around the construction of the contract, its enforceability or application when considering other laws and regulations (such as Distance Selling Regulations).

Accordingly, we have the following questions for the CMA:

Q: Why would insurers not still investigate some or all of the lower rate cases and investigate / challenge period?

Q: Would insurers tactically offer one or two days off every invoice? What remedy would the CHC have if dispute over period remained?

NOTE 1: We do not think that frictional costs will be removed and a pure idealised world will be formed just because rate (as it is already in the GTA) and liability is removed.

NOTE 2: The above table clearly illustrates that most of the frictional cost areas will still be there under Remedy 1C – and especially under the remedy 1C low rate cap.

Q: If we have to litigate what rate do we charge – small claims court who covers our costs? What percentage of cases will be litigated?

Q: Is the CMA proposing that CHC's would litigate low and high rate cap cases if unpaid directly against the at fault insurer?

3.5.2.5 LIABILITY DISPUTES

The CMA says when raising the issue of frictional costs, for example, in paragraphs 2.81 and 2.90 as follows:

> 2.81 It appears to us that frictional costs are currently high under the GTA because prices are high and liability is often not agreed. Frictional costs are even higher outside of the GTA because prices are usually even higher and liability takes even longer to agree.

However in the following paragraph, the CMA disputes that liability is actually a major frictional cost;

> 2.90 In the light of this, and the evidence from insurers that there was not a large amount of disagreement about liability, we would expect the high rate cap to occur **rarely**. Moreover, this rate cap structure would discourage some of the disagreement which currently exists.

Q; Which is correct?

Quindell does not accept that in the majority of cases that frictional costs exist surrounding liability. CHC's are well adept (and financially have to be with their slim margins) at hiring out cars on correct non-fault cases and avoiding fault or split liability cases.

Quindell maintains that the majority of frictional cost exists due to disputes surrounding period and insurers failure to properly interpret/explain to their employees a linear adherence to GTA wording surrounding control of hire duration.

There are many delays or discussions surrounding liability but not many disputes. It is the vigour and challenge from an independent third party organisation (the CHC) that supports the claimant in investigating liability properly.

Q: Is liability a major frictional issue or not?

On the basis that the CMA have lifted what the GTA says under duration management (The GTA actually has far more and also where it is challengeable in the FAQ section) we don't see how the proposed remedy 1C remove frictional cost from the market. The CMA needs to remember that the GTA is a voluntary code.

We have provided two very common examples below;

1. A drivable car. The at-fault insurer admits liability immediately. The client's insurer processes the repair, but there is a parts delay and it takes an extra week to repair the car. The CHC submits an invoice for 20 days hire at the low rate cap rate, but the at fault insurer disputes period saying that the clients insurer should not have commenced repairs until all parts were available. What is payable? What rights do the CHC have?

2. A total loss case where the at fault insurer admits liability and hire commences. The claimant has a dispute with his own insurer over the valuation they place on his vehicle and it takes another week to resolve. The at fault insurer refuses to pay for the delay in agreement the valuation.

The CMA can point to the current MOJ portal on injury and assess the likelihood of insurers admitting liability on a significant number of cases within three days.

The process that consumers, credit hire companies and insurers may face in applying this remedy.

Quindell has considered the possible process for consumers, CHC's and insurers and has the following comments to make;

- CHC's may economically decide not to provide hire on lower rate cap cases. Who will provide mobility then? If the at fault insurer knows that the CHC will not provide mobility what reason would they have to fulfil the claimants mobility need?
- If the majority of CHC's are unable to economically offer hire at a low rate cap, does the CMA's proposal increase the chance of creating an Enterprise monopoly at the detriment to the consumer and creating an unintended consequence that the CMA **cannot** allow to happen?
- The opportunity to admit and then dispute liability will be difficult for consumers to understand.
- It will cause a challenge for CHC's to model how their business will financially operate.
- CHC's under the contract term regulations have to define under their hire contract what rate the customer is liable for. 1C has two rates – what rate would the CHC use? If insurers refuse to pay the right amount, will remedy 1C force CHC's to recover loss from claimants – or will the no-win no fee model need to change for consumers?
- Assuming the high rate, then the hirer has that liability to repay at this rate for the car hire, which is then recoverable in law against the at-fault insurer.
- Quindell does not currently have the capability to charge variable rates on hire – this would require system change at significant cost – we forecast around £150,000;
- We believe most CHC's will not be able to change rate on their system easily;
- What risk do insurers have in tactically admitting liability if a business case economically stacks up for them to do so to provide further time to investigate liability?
- What recourse would the CHC have if an insurer did not pay an invoice or only paid xx days from an xx day invoice? What rate would the CHC litigate at?
- Would the law of tort need to change before remedy 1C can arise?

3.5.2.6 THE LEGAL IMPLICATIONS OF REMEDY 1C

Quindell notes that at 2.157 the CMA state:

> Application of the rate cap to all replacement vehicle providers at the point of subrogation of the claim to the at-fault insurer

At 2.60 the CMA also comments:

> For example, a replacement vehicle provider could offer a claimant a vehicle on credit at a higher rate than the cap imposed by the remedy, with the claimant then pursuing the claim themselves, reimbursing the provider following settlement of the claim.

And again at 2.60 the CMA adds:

> On the supply side, replacement vehicle providers could pursue a business model whereby they provide non-fault claimants with the funding to arrange the self-provision of replacement vehicles

> but there would appear to be significant risks involved. The vehicle provider would have to rely on the consumer submitting and defending the claim in order to recover its costs, and would have no control over the claims management process. In our view, this is likely to make such a business model unattractive.

Quindell offers the following key comments;

- It is deeply concerning that after such a detailed investigation that the CMA still does not understand how CHC's operate.
- We remind the CMA that credit hire claims are not subrogated, nor is there an assignment of rights.
- CHC's business model is exactly as defined at 2.60 by the CMA.
- CHC's provide supply of services under credit and it is the claimants claim that is pursued against the at fault party, by the claimant but supported by the CHC.

We have attached below the our current terms and conditions of hire and have highlighted the relevant sections;

Following an accident involving two cars, both drivers have a right of recourse under tort law against each other. The success of those claims will rest with who was determined to be liable for causing the accident and as a result loss to the other party.

To avoid individuals facing having to pay personally for such loss, which could be significant financially – especially in personal injury cases, we are forced by law to have insurance that **protects and indemnifies us against damage** that we cause to another person.

After determining liability the innocent party is legally entitled to recover any loss that has been **reasonably** incurred as a result.

The courts look at a chain of causation to determine whether a cost incurred is reasonable. If someone was injured and as a result was not allowed to board a flight to go on a holiday that they had paid for, and could not recover the cost then this would be linked to the accident and the negligent act of the other motorist and should be recoverable.

If the person booked another holiday to replace it, at much greater cost, this would not be recoverable.
For a TRV the reasonable cost of hiring a vehicle, so long as the person needed the vehicle is recoverable in law. To avoid customers having to pay for the charges upfront and then recovering them from the at fault motorist, credit hire allows those charges incurred to be placed under a period of credit.
The innocent party still has to sign to commit contractual liability to repay the charges. It is the ultimate liability to repay even though repayment may not have occurred that the courts look at. If the innocent party has hired a car, has a liability to pay those charges and those charges are reasonable then it is for the at fault motorist to be liable to repay those costs. And it appears to us that remedy 1C is interfering with this right to recovery, without changing the law of tort – we think this is outside the CMA's powers, and only parliament or the EU can address this public Policy issue.

In practice under the GTA, the at fault motorists' insurer engages and says that they will indemnify their policyholder, and the credit hire company communicates directly with the insurer.

However legally the claim and liability rests between the claimant and the defendant – ie NOT the hire company and the at fault insurer. Accordingly the following questions arise:

Q: How can the CMA make such a fundamental mistake in their understanding of how CHC's operate?
CHC's simply provide TRV's to a customer. The recovery of that claim rests in the hands (and name) of the claimant. The liability to repay those charges rests with the claimant.

Q: How can a rate cap on what CHC's charge insurers apply when the rate is charged directly to the consumer?

What is the effect of this reality on the legal position of remedy 1C?
Q: Is the CMA proposing that they [basic car hire suppliers] impose a rate cap on what CHC's can charge consumers?

Q: How will the CMA define who is caught by the act? Many companies provide replacement vehicles after accident – some unknowingly.

Q: Has the CMA considered leasing companies of leisure rental that could be affected?

CHC's have to ensure that the rate that they charge the consumer is legally recoverable under their contract (sale of goods). With a dual rate system what rate would the CHC place on its agreement?

A CHC cannot change it's rate after the contract has commenced (hire started). This is why the GTA evolved into a single rate system from originally a dual rate system.

If the CHC charges the higher rate, but the lower rate is paid – how does the CMA propose that the residual liability for the balance be resolved? The CHC could legally under contract enforce recoverability of the balance, which in turn would form part of the claimants tort claim against the at fault motorist.
The variation of rates would cause enforceability issues under both the Consumer Credit Act and also Distance Selling regulations. Both these areas are a cause for CHC's to ensure compliance as insurers have attacked for financial benefit in the past both these areas to identify loopholes in avoiding paying for claims.

Q: How will the CMA ensure that CHC's do not fall foul of both the Sale of Good Act and Distance Selling Regulations?

What would happen if the hirer was found to have committed fraud? What will the CHC charge the customer?

It's contractually and legally important to define one rate at the point we deliver the vehicle – this is why CHC have to change the full commercial rate on every case.

What would happen if the hirer refused to return the car for a week? This excess hire duration would not be recoverable – what rate and how would the CHC charge their customer?

What would happen if there was a very short term immediate and high price movement either in car prices or rental? How would this be reflected given that the CHC price caps will stand for 2 to 3 years before review?

We have illustrated some variations on circumstances and ask that the CMA define what rate would be chargeable on each instance:-

1. Consumer doesn't need a car immediately and there is no admission from the at fault insurer;
2. Consumer doesn't need car immediately but there is an admission from the at fault insurer;
3. Consumer does need a car immediately and there is no admission from the at fault insurer;
4. Consumer does need a car immediately and there is an admission of liability from the at fault insurer.

Rate capping what the CHC charges the consumer (variant within 1C)

We note the following in paragraph 2.59:

> We do not propose that the remedy be extended to cover replacement vehicle claims charged to at-fault insurers directly by non-fault claimants who have organised the hire of a replacement vehicle directly themselves, without the assistance of an insurer, broker, CMC or CHC (ie the self-provision of replacement vehicles by non-fault claimants). To do so would require a change in law in order to prohibit the recovery of costs incurred in the provision of replacement vehicles at basic or retail hire rates. Any need to change the law to implement this remedy (so as to reduce individuals' rights to recover retail rates) would significantly reduce its advantages compared with a remedy such as Remedy 1A (see paragraphs 2.161 to 2.169).

Q: Can the CMA explain given our explanation of the current legal process in the claimant taking a contractual liability for hire, why the CMA believes that 1C can work <u>without</u> a change in the law?
We also note the following from paragraphs 2.62 and 2.63:

> One insurer ([✂]) submitted an alternative way in which Remedy 1C could be designed. [✂] said that Remedy 1C could work if the CMA were to make an order limiting the amount a replacement vehicle provider could charge a customer, thus limiting the amount for which the customer would be liable under their contract with the replacement vehicle provider. It said that this would mean that any claim made on behalf of the non-fault party against the at-fault insurer for a sum greater than this amount would not succeed because the claim was a consequential loss (loss of use) which might be mitigated by the hiring of a replacement vehicle. Where such a loss was mitigated, or action was taken which resulted in a substituted expense, the claimant was only entitled to recover the actual expense or liability which they had incurred.
>
> We considered whether this alternative method could work with our dual rate cap proposal (see paragraphs 2.76 to 2.96 below). The idea would be that the remedy would cap the amount a replacement vehicle provider could charge a non-fault claimant (where this amount would depend on the speed with which liability is accepted), such that the insurer/CHC/CMC standing in the shoes of the non-fault claimant could not seek to recover a higher amount as the loss suffered would have been mitigated to the capped amount. We are content that our approach to implementing Remedy 1C (see paragraphs 2.57 to 2.61) is effective but we ***invite views on whether*** this alternative approach would be more effective and capable of working with the proposed remedy.

We have interpreted this to mean that the CMA considered whether they should place a price cap on the rate that TRV providers charge their customers. In turn this would limit the liability the customer has to repay.

If the CMA proposes to cap the rate that TRV providers charge their customers, which providers of TRV would be caught by this proposal?

Would the CMA limit it to credit hire providers, or any car hire provided to a party involved in a non fault accident? In effect does this mean capping basic hire rates, (which we note are the correct benchmark for assessing the costs of separation)? In other words given that GTA rates are at a discount to basic hire rates, is the CMA extending its mandate under this investigation to all car hire situations?

Alternatively, if the CMA is saying GTA rates are too high for insurers to pay, taking account of the work that CHC's do, why then does it accept that higher basic hire rates can be recovered by non fault claimants personally? We do not see that these questions have been addressed in the PAR – they now need examination if remedy 1c is not dropped.

Accordingly, the following questions need answers:

Q: How will the CMA define who a TRV provider is?

Q: Is there a risk that other provides of TRV such as Avis, Hertz, Europcar, Enterprise and local regional car hire companies get caught in a price cap*?*

In other words, remedy 1C is a back door to capping basic hire rates? Would consumers knowing about imposed caps under remedy 1C accuse basic hire providers of overcharging, if their rates exceeded the CMA lower cap? We believe all these anomalies of remedy 1C need consideration and consultation before the report is published.

Q: Would leisure rental companies have to ask every hirer before confirming the rate for the vehicle whether they were hiring the vehicle as a result of a non fault accident?

Q: What rate would a leisure rental have to be charged at [for a large variety of cars], in the event that the customer is cash hiring after an accident? Is the CMA proposing that the car rental company would have to make enquiries to determine what rate they could legally charge the customer?

If the CMA proposes they are the remedy impacts on a completely different and non -connected rental market. Has the CMA reason to investigate the retail car hire market?

Has the CMA entered into consultation with car rental providers about the potential impact on their leisure business with consumers from the low rate cap 1C?

Q: What would be the rights and impact of remedy 1C on impecunious non-fault claimants, if they require mobility immediately after an accident where their car is not drivable? Will remedy 1C make their position worse than under the current status quo?

3.5.2.7 THE RISK OF CIRCUMVENTION OR DETRIMENTAL EFFECTS ON CONSUMERS

We are concerned that the currently proposed remedy 1C has significant risk of circumvention. We believe that 1C as proposed will provide a revised after-accident mobility market that has the following characteristics;

- Enterprise monopoly with poor service/cars to captured claimants, compared with current status quo under the GTA framework;
- Low rate cap used tactically and with poor insurer behaviour towards non-fault claimants;
- Unattractive margins for CHC's who avoid providing mobility – or forced to exit with losses of business, goodwill, capital, etc. Restructuring may not be successful putting some in a death-spiral over a few years when systematically of revenue and regular flow of claimants.
- Reduced competition to find non-fault claimants, putting greater power into the hands of insurers to do as they please with claimants;
- Reduced customer choice for TRV solution, and lower incentive on insurers to accept legitimate claims quickly
- Exit of current CHC from this service, or changes to a model where free service becomes selective with charging the non-fault claimants. Is this a good outcome?
- More losses moving to consumers
- More fraud claims falling directly on insurers accepting liability
- Remedy 1C could contradict the objectives of Remedy A to provide better information to consumers at FNOL – ie without a viable independent CHC sector, how does the information in the statements to consumers as shown in Appendix 2.2.

We also do not think that the RCB section of the PDR from paragraphs 2.240 to 2.246 properly looks at loss of relevant customer benefits from the existence of CHCs. If CHC's disappear because of remedy 1C, the consumers will be left to pick up their losses personally - or to make claims under their policies (at the cost of paying higher premiums in future years, or suffering loss of NCB), and loss of all the benefits that CHCs currently provide for free. For example, millions of car drivers, without buying MLEI can benefit from our ULR free service when they go to a CHC – that saving alone outweighs the alleged detriment, and is worth £millions a year to consumers from savings in needing to buy this add-on. Where is this considered?

Whilst making these points, we note that the CMA noted in paragraph 2.241(d) that captured claimants are not sufficiently protected by FCA rules concerning the fair treatment of customers, which do apply to most CHCs/CMCs – but in paragraph 2.242 looking at assessment of relevant customer benefits, we see this point is not answered – why?

Similarly, we see the benefit of CHCs obtaining excess costs, on behalf of claimants is not noted as a benefit of separation, where independent CHCs exist. Why is this missed out? On this issue, the CMA needs to note insurers treat their own customers badly, so why should they treat non-fault claimants better – we remind the CMA of the following it wrote in paragraph 72 of WP23:

> We noted that the most important ULR service provided by CHCs tended to be helping clients recover their excess. We noted too that the need for this service **often arose because some non-fault insurers were failing to provide customers with their entitlements under tort law**, for example by deducting the excess when subrogating repair bills to the at-fault insurer.[24] **We found it difficult to understand why** insurers adopted this practice which appeared to **disadvantage their own customers.**

This is evidence that insurers can be expected to treat non-fault claimants badly under a remedy 1C regime – why is it ignored?

Also, the better quality cars under the GTA compared with Enterprise's general inferior car categories, does not get proper recognition as a valuable benefit to non-fault claimants.

Or the fact that CHC's can provide a car from the FNOL on day 1 in a few hours, whereas if the claim is not captured by the insurer, and the consumer makes the approach themselves, they may take days before the insurer agrees the claim and permits the direct hire contractor to provide a car. All these mobility penalties from the direct hire model, are missed out in both the PDR and WP23. It all needs proper evaluation.

In effect, a low cap, below the current GTA level could resemble the worst aspects of remedy 1A which the CMA has already rejected, heavily on the grounds that it is disproportionate – see paragraph 2.266.

NOTE – we think the text in paragraph 2.293 to 2.294 are inadequate regarding balance of benefits and costs from the remedy package – without any modelling before the report is finalised, to deal with the above risks, we do not think the CMA has done enough to implement remedy 1C.

If a change of tort law is required as a condition for the remedy, the CMA will have no powers to bring in remedy 1C under its timetable in paragraph 2.259, post the report. And we think any order for this could be illegal, unless the law of tort is first changed. We hope these issues will be fully explained before the report is finalised, or in the report narrative to support what decisions are made on relevant remedies.

Our comments above, should indicate that we think paragraph 2.295 is wrong regarding the CMA's view on the proportionality of its proposals.

We also believe that as per paragraph 2.60, **simple circumvention** could occur as the CMA does not propose to legally change the consumer's rights under tort.

The following are areas for circumvention;

- The CMA does not understand how CHC's legally recover costs – how can the CMA make any recommendations into a market they do not fully understand?
- As a result 1C is developed on poor legal understanding;
- Credit hire companies can operate identically to rental companies;
- Distinguishing between the two will be a challenge for the CMA to avoid bringing unconnected industries/sectors/businesses into any price cap;
- The CMA only needs to force one CHC to circumvent for whatever reason and commercially force other CHC's to follow suit;
- The CMA is not proposing that the GTA is mandatory – and would the GTA survive if CHCS change the nature of their business?;
- The CMA is not changing (as per paragraph 2.60) the claimant's tortuous rights.

3.5.2.8 THE RISK OF DISRUPTION AND ADDING FURTHER FRICTIONAL COST

We are deeply concerned that the proposed 1C remedy will ultimately result in the following;

- Reduced competition for non-fault claimants (as discussed above)
- Increased cost on insurers operationally in explaining process to customers and third parties;
- Reduced access to legal support as CHC's are removed from the market; indeed if CHCs suffer financial loss from remedy 1C, who will be responsible for the damages – is this something where the CMA could be liable for misguided decisions; or the liability could fall on insurers as a class, for encouraging decisions which harmed consumers and CHCs? At the moment, we raise these as concerns, but clearly legal advice will be needed under these circumstances to exercise the claims.
- Harm to existing CHC businesses - would the CMA need to create a special fund, of perhaps £100m a year funded by large insurers, in case there are unintended consequences of remedy 1C, which can not be undone?
- No reduction in frictional costs, and they may increase between insurers, or increase from disputes with consumers going to the Ombudsman;
- Collapse of the GTA as greater margin is available through circumvention as per exercise of legal rights under tort.
- Potential for Enterprise monopoly [via a predatory pricing strategy endorsed by the CMA] and the CMSA supporting the strategy of Enterprise which has been to destroy the credit hire market for some years.
- Increased behavioural abuse by insurers and CHC's
- Increased risk of litigation.

We note at 2.139 the CMA accepts that an enforcement order cannot impact the non fault claimants tortious rights following an accident;

> Although the proposed design of Remedy 1C would not impact upon the non- fault claimant's tortious entitlement, it is important that the courts are aware of our findings and the role of this remedy in addressing the AEC. There are several ways in which this could be achieved:
>
> > (a) make an enforcement order and leave parties to refer to the order in the courts in the event of a dispute;
> > (b) produce an explanatory memorandum to accompany the enforcement order, which explains the role of the remedy so as to assist parties disputing claims before the courts; and/or
> >
> > (c) make a recommendation to the MoJ or The Law Society to produce some judicial guidance to accompany the enforcement order.

We are concerned that the CMA believes that by simply asking the courts to use the rate cap, or asking the MOJ or the Law Society to provide "guidance" that the courts will adhere to this. For example:

Q: Does the CMA believe that the courts will use "recommendations" from the CMA to supersede 100+ years of good law in determining what is a reasonable BHR rate to recover?

Q: What if the courts think the CMA needs to first change the law of tort, before the recommendations can take effect? And could this question go to Supreme Court, or the European Courts for clarity on who has power to make these changes? How many years might this take?

Q: How does the CMA propose to persuade the court that its own extensive time used in multiple high profile cases [setting case law precedents] was wrong and in fact lower rates can now be used? What if the Judges think the CMA thinking is unfair on consumers exercising their rights of recovery under tort law – only 1 test case may paralyse the CMA's remedies package?

Q: How does the CMA propose to persuade the courts to change the bar of mitigation for a claimant?

We think that had the CMA generated a legal paper as requested multiple times by various parties to this investigation, the CMA would not find themselves in such challenging waters simply hoping that the courts would do what the CMA ask them to do. As we noted in this response, we put on record our concern that the CMA does not even understand the work we do, we evidenced by the comments in paragraph [2.60] and its apparent inability to understand what subrogation entails in our sector of the insurance market. Until we see text that answers these concerns, we must stand by our view.

How can consumers gain any confidence that the CMA is doing the right thing when after such a long investigation a fundamental simply understanding of how CHC's operate is wholly misunderstood? As taxpayers how can the CMA spend so much time and resource (with noted huge resource powers at the CMA's disposal) and get such a fundamental wrong?

We urge the CMA to revisit the GTA as the right starting point for remedy 1C – ie support the rates agreed between the insurers and the CHC sector, working towards a fair and common goal each year, on the classes of cars to ensure like-for-like provision to non-fault claimants. And if the insurers, via direct hire can provide a better service, nothing stops them from trying to get more than the current 30% of non-fault claims as now.

However our concern is that remedy 1C gives insurers power to take most of the non-fault claims from CHCs, or at a price that we cannot provide TRVs and our existing free service to consumers. This is all unfair. The effect of destroying our independent viability means there will be no constraint on insurers to offer a terrible or non-existent service to non-fault claimants in the future.

The CMA can only "hope" that insurers step up and provide service – because they have "learnt to do so. We quote again from the multilateral hearing the CMA had with insurers earlier this year;
MR FINBOW: I mean, one point that's been put to us is that before the arrival of CHCs, customers were significantly worse looked after in terms of their legal rights than they are now, which may not be a justification for maintaining the role of CHCs in their current form, but may, nonetheless, add to the argument that they fulfil a role. Is there a point there or is that a non-point?

MR O'ROARKE: I would say that that is true but I think it's rationalising the situation with hindsight. I think the whole industry has moved on in terms of the level of service delivery that it provides. I don't see that that represents an ongoing justification for the credit hire firms to argue against first-party provision.

MR FINBOW: So there wouldn't be any return to the old days.

MR O'ROARKE: No, I think that was then and this is now.

The CMA can only trust insurers when they say "that was then and this is now".

Or the insurers may provide the service, but the service may be awful, with the option that the non-fault claimant can pay for better TRVs, and making practices to get customers to come and collect cars from its depots.

So over time, with the demise of CHCs, the existing level of say 500,000 non fault claims a year, of which say 300,000 claims are handled by CHCs might move to a situation where total claims accepted by insurer's is no more than 250,000 out of 500,000 a year. In effect massive numbers of people and their extended families are prejudiced by remedy 1C changing the landscape in a way that harms CHCs and consumers, and causes loss of choice, innovation, and service. How does the CMA rebut this scenario, which we think is foreseeable from what we read in the PDR and WP23.

3.5.2.9 CONCLUSIONS

We do not believe that remedy 1C works for the following summarised reasons;

1. **It's not fully enforceable;**
2. **It does not reduce frictional costs to any degree;**
3. **Its hypothetical economic position can never be reached;**
4. **Direct Hire is not a defacto to a low rate cap case, as one has no frictional costs and the other does;**
5. **Administration costs have not been properly thought through;**
6. **Insurers will abuse the three-day liability window as noted in paragraph 2.78;**
7. **Insurers will still raise frictional arguments regardless of the low or high rate cap;**
8. **Consumers will be confused, and potentially left with uninsured losses unrecovered, excess payments unrecovered, and losses from legitimate claims being refused – impecunious victims could suffer disproportionately and the Ombudsman may not be able to help;**
9. **Investigations into defending allegations of fraud raised by insures (on behalf of the claimant) will not be completed – as a result many innocent claimants claims will not progress (as the claimant will not be able to pay for legal advice);**
10. **The low rate could prevent CHCs from paying referral fees to drive sufficient volumes of business – forcing exit not because of inefficiency but only because of remedy 1C being misguided and wrong;**
11. **Competition will be reduced and a CMA sponsored monopoly created – is this within the aims of the CMA and its mandate to promote competition and benefit consumers! Will a compensation fund be needed, funded by insurers, in case Remedy 1C harms the independent CHC sector?**
12. **The logistical process does not work from having two rates – it is much better to retain the industry agree GTA rates, and why does the CMA need to be involved in the rate setting process?**

13. **Legally a CHC cannot have variable rates – it will impact risks on claimants, and confusion.**
14. **There could be knock-on consequences for suppliers of basic hire cars, where rates are higher than the capped rates?**
15. **Any predatory pricing model by the main direct hire supplier to insurers (Enterprise) should be stopped without delay.**

This would enable companies like Avis, Hertz etc to get a percentage of the direct hire market to insurers. We think this point is important to note, because it could be strong evidence that the absence of Avis, Hertz, Europcar etc, as direct hire suppliers with significant market shares, is because they can not compete on price with Enterprise – see para1 74/75 of WP23.

This lack of competition against Enterprise from similar large car hire firms shows the CMA benchmark using Enterprise hidden prices in Table 10 of WP23 are clearly artificially low, and not a proper benchmark – so the alleged detriment is overstated and inflated (without taking account of our other objections). Accordingly remedy 1C is not remedying the true detriment but a false target.

3.6 REMEDY 1F – IMPROVED MITIGATION IN RELATION TO THE PROVISION OF REPLACEMENT VEHICLES TO NON FAULT CLAIMANTS

3.6.1 SUMMARY OF REMEDY

2.46 We also proposed a remedy which would require replacement vehicle providers to ask non-fault claimants standard questions about their need for a replacement car (Remedy 1F). Replacement vehicle providers would be required to provide the at-fault insurer with adequate documentation showing that the appropriate vehicle had been provided by completing a 'mitigation declaration'. This declaration would set out details of the claimant's responses, and so confirm that the cost of the replacement car had been appropriately mitigated. The at-fault insurer would be entitled to be sent the mitigation declaration. We asked in our Remedies Notice whether the at-fault insurer should also be entitled to review the replacement vehicle provider's call record in the event of a dispute.

2.53 Remedy 1F is expected to:

(a) Reduce frictional costs incurred by insurers and CMCs/CHCs which arise when there is a dispute over the replacement vehicle provided to a non-fault claimant where the at-fault insurer alleges that the replacement vehicle exceeds the non-fault claimant's needs. The completion and signing of a mitigation declaration by the replacement vehicle provider prior to the provision of a replacement vehicle to the non-fault claimant, in addition to the review and countersigning of the mitigation declaration by the non-fault claimant upon delivery of the replacement vehicle, would provide greater transparency over the assessment of need and the claimant's mitigation of their loss, thereby reducing the likelihood of dispute.

(b) Support Remedy 1C by ensuring that the hire rate cap proposed under Remedy 1C cannot be circumvented by providing the non-fault claimant with a replacement vehicle that exceeds their needs.

3.6.2 QUINDELL'S RESPONSE

Quindell acknowledges the work of the CMA seeking to reduce transactional and frictional cost. Due to some of the failures to understand the relationship between the parties and the role the law of subrogation and/or tort plays in the process, Quindlel suggests the CMA has materially erred in arriving at the remedies.
It should be noted that it is the individual consumer, the one who has suffered loss or damage, which pursues a claims against the individual who has committed the wrong (caused the accident). Without changing the law, the rights of the consumer will not be altered. As providers of service to the consumer, who retains those rights, we must continue to observe them. As such, some of the remedies proposed, which do not apply directly to the consumer liability for the (TRV) charges, cannot be adhered to due to conflicts between common law and what the CMA is seeking to impose. How can Quindell overcome this very real conflict?

3.7 1C RECOMMENDATIONS (OTHER THAN CAPPING)

Whilst it is admirable that the CMA is seeking to introduce changes which promote a reduction in transactional and frictional cost, the reality is likely to be very different.

The GTA as drafted today has ALL, and many more, requirements on the service provider to comply with. Whether to address the duration of hire via monitoring and on/off hiring guidance, or mitigation, these all serve to reduce friction. They are however requirement of a protocol. A protocol signed up to voluntarily by the serviced provider and the at-fault insurer. They are not required in common law, which only considers the ***'facts of the case'*** and whether the ***'behaviours'*** of the claimant were ***'reasonable'***.

The claimant does not have to make personal sacrifice. The claimant in the case of incurring a TRV is not required to shop around for the cheapest option, is not required to monitor the repairs to their vehicle (so long as the vehicle was placed in the hands of a competent repairer), nor is the claimant required to off hire after 24 hours of repair completion or 7 days after receipt of a cheque. Whilst these timings may appear reasonable in one case, in another case they may not – The common law principle of finding on the facts of a particular case are important in law and protect consumers from detriment.

Quindell supports such measures, but wonders, at whose expense should these be incurred? Whilst they do form part of the GTA (a voluntary protocol), the costs of providing the service (to the at-fault insurer) are able to be carried through contribution of the administration fee AND margin generated from providing the TRV. For the CMA to seek for these services to be provided by the CHC, especially with the low capped rate is remarkable and unworkable.

What happens if the consumer does not accept the conditions placed on the CHC by the CMA in providing the service?

What happens if the consumer refuses to comply highlighting that in common law there is no such requirement? Would the CHC simply refuse to provide service?

The CMA is seeking to promote elements of the GTA whilst ignoring others – In doing so, the CMA is taking elements of a very finely balanced voluntary protocol, where revenue and costs are considered carefully before arriving at a compromise. The CMA has not gone through the same exercise.

Quindell will write to the CMA separately to explain the evolution of the GTA, from its creation in 1999 (only offered to ERAC and National Car Rental with a dual rate structure and to directly challenge the principles of

credit hire), to being offered as a set of rates to CHCs which insurers would support in Jun 2000, to its thorough and detailed rewrite, including introduction of Frequently asked Questions in 2005. This paper will look at all developments in the GTA, why they were introduced and how the compromise was reached between insurers and CHCs to arrive at where we are today – A workable, efficient solution, for the provision of TRVs and, wherever possible, frictionless environment.

In particular this paper will set out how the current rates were arrived at which take account of insurer direct hire rates, basic hire rates (retail rates used as the counter factual to credit hire rates by the courts) and credit hire rates.

3.8 1F Remedy – Mitigation

Quindell is disappointed that the CMA is seeking to introduce formal arrangements for assessing a consumer's need for a vehicle. Whilst Quindell is pro anything which can reduce transactional and frictional cost in the settlement of claims, and early resolution of the issues of 'need' and 'mitigation' may serve this purpose, it by no means is a silver bullet.
In mandating the use of a prescribed mitigation statement, the CMA are stepping over the line in to an area of common law, and as such, needs to tread very carefully.

The question of 'need' is subjective. Quindell discussed this with the panel at the bilateral hearing when asked whether the current GTA mitigation statement was sufficient.

Mitigation is ***'the action of reducing the severity, seriousness, or painfulness of something'***. When a consumer loses the use of their vehicle in an accident, if he is not at fault, prima facie, he can have a vehicle, just like his own, fir the duration of the loss of use. So long as the costs incurred are reasonable, damages are recoverable in full. Whilst not self-proving, the ownership and running costs associated with having a motor vehicle at ones disposal is expensive. The use of prestige of the vehicle may have a bearing on the particular motor vehicle one has available to him. Many do not choose the cheapest option. The point is, the choice of a particular vehicle is personal to ones circumstances and to in some way be asked to explain why you make the personal choice of having a particular vehicle for your only domestic or leisure use is intrusive.

For these reasons, Quindell is unable to support the package of remedies associated with limiting the duration of hire, nor the mitigation statements as presented.

