COMPETITION AND MARKETS AUTHORITY MARKET INVESTIGATION

PRIVATE MOTOR INSURANCE

ACCIDENT EXCHANGE'S RESPONSE TO THE COMPETITION AND MARKETS AUTHORITY'S PROVISIONAL DECISION ON REMEDIES (PUBLISHED ON 12 JUNE 2014)

8 JULY 2014

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1. EXECUTIVE SUMMARY

1.1 The CMA's Provisional Decision on Remedies ("**PDR**") sets out its provisional decision on the package of remedies required to remedy the alleged adverse effects on competition ("**AEC**") and the resulting customer detriment that it has provisionally found in the CC's Provisional Findings ("**PFs**") and Working Paper 23 ("**WP**") on Theory of Harm 1 ("**ToH1**").

1.2 AX's submission in response to the PDR focuses on Remedy 1C, which is the most far reaching of the remedies proposed by the CMA. AX's comments on Remedy A and 1F are also set out below. Attached at Annex 1, 2 and 3 (confidential information redacted) are three further papers by Compass Lexecon in relation to the PDR, the WP and the data room. These also form part of AX's response to the PDR and the WP. Additionally, AX has raised a number of queries and made a number of submissions directly to the CMA since publication of the PDR. These are attached at Annex 4 (confidential information redacted) and to the extent that additional points are made that are not set out in this submission (and accompanying Compass Lexecon papers) then these should also be taken into account by the CMA.

1.3 AX has considered the PDR in detail and is deeply concerned that the post remedy world will be one that has gone back in time to a world in which credit hire does not exist and consumers are faced with dealing with insurers that have insufficient incentive to provide them with their full legal entitlement and car rental companies who have no interest or incentive to ensure that consumers are provided with their full legal entitlement.

1.4 CHCs such as AX would be forced out of the market - a consequence that the CMA seems to be aware of but the implications of which it has entirely failed to grapple with. Thirty years of work done by CHCs and the Courts to enable consumers to realise their entitlements will be eroded.

1.5 Non-fault drivers will not receive their full legal entitlement in the post remedy world, meaning that the remedy cannot be an admissible one since a stated premise of the CMA's investigation has been not to challenge consumers' legal entitlement. If the CMA wanted to change the law it should have made recommendations to Government to that effect.

1.6 However, as the CMA itself recognises (in the context of rejecting the previously proposed Remedy 1A[1]), if consumers are no longer able to receive what they are legally entitled to under tort law, as a consequence of the remedies, this would be "*too fundamental a change...given the size and nature of the detriment we have found*"[2].

1.7 In seeking to remedy the alleged AEC under ToH1 the CMA has created a package of remedies that is biased towards at-fault insurers with all obligations and restrictions being placed on CHCs and the innocent victims of road accidents. In a world in which CHCs do remain (which AX disputes), at fault insurers retain the ability to perpetuate friction in relation to need and period and continue to have the incentive to do so in order to avoid hire charges, or reduce them even further. Alternatively, they have the incentive to reduce consumers' legal entitlements by utilising direct hire providers who consistently provide a deficient service.

1.8 Compass Lexecon's Report on the PDR sets out its economic concerns with the remedies package:

1.8.1 Insofar as the remedy is aimed to tackle frictional costs, this is an extremely unusual price control because the connection between the level and the harm, even on the CMA's own assessment, is "*indirect*". The nature of that indirect linkage is unclear and not properly evidenced by the CMA.

1.8.2 In any event, a large reduction in prices (which CMA considers necessary for the remedy to have any effect on the AEC) is likely to lead to unintended consequences causing non-fault drivers not to realise their legal entitlement. In particular, it appears clear that Remedy 1C will eliminate credit hire and that the CMA is aware of this consequence.

1.8.3 However, the CMA has not analysed the incentives of insurers to provide the consumers' legal entitlement absent credit hire. In the post-remedy world insurers would face weak unilateral incentives to provide consumers' legal entitlement (given the limited profit incentive the CMA intends to allow for when setting the price cap) and strong incentives to explicitly or tacitly agree not to provide consumers' legal entitlement (given that this would allow them to avoid collectively the cost of TRV provision).

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1 Notice of Possible Remedies dated 17 December 2013.

2 Paragraph 2.168(a) PDR.

1.8.4 The CMA has not considered this risk in its assessment despite that the presence of such a risk means that the remedy could undermine consumers' legal entitlement and as such be incompatible with the premise of the investigation which is not to challenge consumers' legal entitlement.

1.9 AX's fundamental concerns with the CMA's proposed remedies package are summarised as follows by reference to the Sections in this submission:

Section 2 "The CMA's Misunderstanding of Consumers' legal entitlements"

1.9.1 As a consequence of the CMA's misunderstanding of the legal position not at fault drivers[3] tortious entitlement will either be affected by the remedies or the remedies package will not be proportionate. It is apparent that, unfortunately, the CMA does not understand the status quo including (i) the legal framework; (ii) the current business models under which consumers achieve their legal entitlement; and (iii) the deficiencies in the direct hire model which the CMA infers is an equivalent but lower cost alternative to credit hire.

1.9.2 If Remedy 1C is imposed in the way the CMA appears to intend (by catching any claims made that involve a CHC), not at fault drivers will either be limited in what they can claim (contrary to their legal entitlement) or will end up with a residual liability to a CHC that they will have to pursue against at fault insurers in the Courts (creating more friction which has not been considered by the CMA).

Section 3 "Flaws in identifying the AEC"

1.9.3 There are still a number of material flaws in the CMA's quantification of the AEC which are addressed further below and in the accompanying Compass Lexecon Report on the AEC at Annex 2 (confidential information redacted) .

Section 4 "The Remedies Package Does Not Address the AEC"

1.9.4 The CMA does not know to what extent the remedies package will address the AEC as it does not know how the AEC is made up or what the drivers are of the frictional costs that it says are excessive. Therefore, it cannot know that the remedies will address the AEC, or how much of it. In any event, even without doing this analysis it is plain that the AEC will not be addressed as either (i) CHCs will have exited the market and consumers will be left in a position

3 We refer variously throughout this submission to "not at fault driver" / "claimant" and various other iterations. It is not intended that there is any difference in meaning from using differing terminology unless explicitly stated.

whereby they cannot realise their legal entitlements; or (ii) CHCs will remain but frictional costs will still exist (and will likely be exacerbated and greater in the post remedies world);

1.9.5 The dual rate cap approach is not sufficient to incentivise insurers to admit liability early and remove disputes (and, therefore, frictional costs) over liability. It still remains in the insurer's interests to dispute liability at a later date. Furthermore, the commitment to pay under the low rate cap when liability is admitted does not actually impose a commitment on the insurer to pay for the TRV as the insurer is still able to dispute need and duration;

1.9.6 Insurers will retain an incentive to dispute need and hire duration[4] and neither Remedy 1F, nor the proposed measures to deal with duration, will (on the CMA's own analysis) remove or mitigate this incentive. The CMA's conclusion that duration disputes are currently high (presumably under the GTA) means that any remedy that simply imposes the current GTA requirements cannot (on the CMA's own reasoning) be effective.[5] Consequently, frictional costs in relation to disputes over need and hire duration will remain. In these circumstances the remedy will not be effective or proportionate;

1.9.7 The CMA lacks the evidential basis to conclude that Remedy 1C would address the AEC as even on the CMA's own assessment of the proposed remedy there is only an "*indirect*" link between the remedy and the AEC, and the nature of this indirect relationship is unclear. Firstly, and also on the CMA's own assessment, an insufficient reduction in the price level may have no effect on frictional costs and therefore no effect on the AEC. Secondly, the CMA has not shown that a significant reduction in the price level would reduce frictional costs (and thus address the AEC) so long as entities other than insurers provided TRVs. In any event, a large reduction in prices (which the CMA considers necessary for the remedy to have any effect on the AEC) is likely to lead to unintended consequences causing non-fault drivers not to realise their legal entitlement.

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4 The CMA finds at Paragraph 2.105(b) of the PDR that disputes over duration are significant in the status quo.

5 Note, however, that AX considers the GTA to working well (as does the CMA in its PFS) and so does not agree that the GTA is not capable of being an effective tool for minimising friction.

Section 5 "Unintended Consequences of the Remedy"

1.9.8 AX's concerns about the impact on consumers' realising their legal entitlements of the CMA's proposals is not remedied by instead imposing a cap on the price that CHCs can charge their customers. The way in which the rate cap is to be calculated will make it economically unviable for AX (and for CHCs generally) to provide TRVs in the post remedy world if they cannot charge more than the cap. Credit hire will likely disappear from the market leaving consumers without the necessary assistance that credit hire gives in order for consumers to be in a position to realise their full legal entitlement. The CMA has not properly recognised this (and in fact appears agnostic about this being the outcome) and so has not undertaken the necessary proportionality analysis and considered the costs (for consumers in losing credit hire) associated with its remedy. This would give rise to a loss of significant relevant customer benefits arising from credit hire and consequently consumer detriment. Any cap on what CHCs can charge also brings with it significant practical difficulties. In particular, the consumers' financial liability under the hire contract will not be capable of being fixed with any certainty as it is dependent (amongst other things) on the insurers' assessment of liability which can change at any time;

1.9.9 The way in which the rate cap is to be calculated appears to rely on the CMA's misguided perception that the economics of direct hire are a true and proper reflection of the cost of provision of hire to not-at fault drivers;

1.9.10 Moreover, the basis for the rate cap being direct hire rates also makes no allowance for the fact that this a frictionless price and so is not sufficient to allow TRV providers to recover the continuing frictional costs they will incur post remedy;

1.9.11 The CMA appears to take direct hire as the likely post remedy outcome but it has not done any proper analysis of direct hire and its implications for consumers. It has given no express consideration at all to the question as to who will provide TRVs after the remedy takes effect. Instead, the CMA simply assumes that consumers realise their full legal entitlement without assessing this. In fact, it is not the case and there are significant risks and costs for consumers in a direct hire world that have not been considered;

1.9.12 The proposed remedies package is (i) not effective; (ii) not the least onerous option available, (iii) not necessary; and (iv) likely to produce harm far in excess of any alleged benefit;

1.9.13 In particular, the CMA's proportionality analysis is flawed in its assessment of relevant consumer benefits and its cost/benefit analysis. The CMA proceeds on the basis that the only cost to be weighed against the potential benefits of the remedy are its administrative costs. This leaves out of account a wide range of consumer detriment and associated costs that arise out of the remedy and so the CMA cannot conclude the proposed package is proportionate.

2. THE CMA'S MISUNDERSTANDING OF CONSUMERS' LEGAL ENTITLEMENTS

2.1 Before responding in detail to the PDR, AX considers it critical to set out a description of a consumer's legal entitlement in the event of an accident and how they can exercise their legal rights. This context is critical for assessing the proportionality and effectiveness of the remedies package, as the CMA has made it clear that this remedy **should not** compromise the tortious[6] entitlements of not at fault drivers (indeed, Remedy A is focused solely on making consumers more aware of their tortious rights[7]).

2.2 However, it has become abundantly clear during correspondence between AX and the CMA, post-publication of the PDR, that the CMA[8] has failed to understand the manner in which credit hire actually works, and as result the impact of its proposed remedies on the rights of consumers. This is despite AX setting out the legal background in its response to the PFs[9] and repeatedly suggesting that the CMA should produce a working paper on the legal framework.

2.3 AX understands that the CMA intends that Remedy 1C should apply where a TRV is obtained through a CHC and a claim is made against an at-fault insurer using the claims management services of a CHC. However, the inescapable effect of the remedy will be to either diminish the not at fault driver's ability to realise its legal entitlement, or leave them with a residual

6 See, for example, at paragraph 2.50, 2.67, 2.77, 2.93, 2.100 and 2.113 PDR.

7 Paragraph 2.66, PDR.

8 See, for example, copies of the email correspondence between AX and the CMA attached at Annex 4 (confidential information redacted).

9 See paragraphs 3.2 to 3.25 of AX's Response to the PFs dated 7 February 2014.

liability for hire charges which they will still be able to pursue against the at fault insurer. This is a fundamental flaw in the remedies package that renders it incapable of addressing the AEC.

Consumers' legal entitlements to a TRV post-accident

2.4 The basic legal position under tort law is that the not at fault victim of a road accident is entitled to be put back in the position he would have been in but for the accident. He is entitled to choose how to pursue the recovery of that position and who, if anyone, he wants to assist him in that recovery.

2.5 This means that the not at fault driver is entitled to (as a basic minimum):

2.5.1 receive independent legal advice to assist him in formulating and pursuing any claim;

2.5.2 claim under the terms of his own insurance policy if he is comprehensively insured;

2.5.3 repair of his damaged vehicle to pre-accident condition or, if it is a write off, the value of the damaged vehicle (less the salvage value of the damaged vehicle if the non-fault driver retains it);

2.5.4 diminution arising from the loss of value incurred as a consequence of the accident if the damaged vehicle is repaired;

2.5.5 compensation for the loss of use of the damaged vehicle while it is being repaired which is ordinarily measured by reference to the provision of a temporary replacement vehicle and by reference to the cost of hiring a reasonable replacement vehicle for the duration of the repairs (subject to need);

2.5.6 the right to pursue a claim for loss of earnings;

2.5.7 damages for any personal injury;

2.5.8 recovery of policy excess;

2.5.9 travel expenses (to the extent they are not provided by the provision of a temporary replacement vehicle); and

2.5.10 not be required to incur any contractual liability for any part of the provision of a replacement hire vehicle without having the right to recover the cost of any indemnity protecting against that liability as an item of recoverable damage[10].

2.6 The not at fault claimant is under a duty to act in reasonable mitigation of these losses. The burden is on the at-fault insurer to prove that the Claimant has failed to mitigate his losses by not acting reasonably in the particular circumstances of the case. The not at fault claimant is not prevented from incurring any cost he chooses. He is simply limited in what can be claimed from the at fault insurer[11].

2.7 If a not at fault claimant wishes to use the services of a credit hire company then he is entitled to do so.

2.8 In principle, a not at fault claimant seeking to recover credit hire charges is entitled to recover those charges in full. In practice, this means that they can recover the credit hire rate charged unless the at fault insurer can prove that the relevant credit hire rate exceeds the basic hire rate (the "**BHR**") in which case they cannot recover the excess over the BHR. If the credit hire rate is less or equivalent to the BHR, then the rate is recoverable in full. This position is set out in the Court of Appeal case *Bent v Allianz*:

"*If the claimant could afford to hire a replacement car in the normal way ie. without credit terms and paying in advance, then the damages recoverable for loss of use of the damaged car will be that sum which is attributable to the basic hire rate of the replacement car*"[12].

2.9 There is an exception to this general principle in cases where the non-fault claimant is '*impecunious*' (i.e. he did not have the financial means to hire a vehicle at BHR or that to do so would have required him to make unreasonable sacrifices). In such cases, an impecunious

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10 See *Marcic v Davis* [1985] Court of Appeal (unreported) and *Bee v Jenson* [2007] 4 ALL ER 791 paragraph 6.

11 See *Darbishire v Warren* [1963] 1 WLR 1067 at 1075 where the Court of Appeal held that "*In my view it is impossible to find from the evidence that the plaintiff took all reasonable steps to mitigate the loss, or did all that he reasonably could to keep down the cost. He was fully entitled to have his damaged vehicle repaired at whatever cost because he preferred it. But he was not justified in charging against the defendant the cost of repairing the damaged vehicle when that cost was more than twice the replacement vehicle and he had made no attempt to find a replacement vehicle*".

12 Paragraph 33, *Bent v Highways and Utilities Construction Ltd, Allianz Insurance plc.* [2011] EWCA Civ 1384.

non fault claimant is entitled to recover the *full* credit hire charges even if they exceed the BHR.[13]

Consumers' exercise of their legal entitlements to a TRV post-accident

2.10 A not at fault accident victim can exercise his legal entitlements in a number of different ways. However, as set out above, a fundamental legal principle (which is recognised by the CMA[14]) is that he is entitled to choose his service provider.

2.11 In practice, this means that he can choose to deal with: his own insurer; the at fault driver's insurer; a car rental company; a solicitor; or a credit hire / claims management company. Each of these service providers offers a different avenue by which the not at fault victim can exercise his legal entitlement and achieve his right to mobility. The use of such professional services enables the motorist to secure his legal entitlements whilst reducing his own frictional costs.

2.12 These different parties (currently) have different incentives to meet the TRV needs of not at fault drivers. In practice the incentives to provide a TRV differ as follows:

Not at fault insurers

2.12.1 No incentive or obligation to provide a TRV unless the insured has purchased this as part of his insurance policy and the insured has made a claim under his policy to this effect. Even then the not at fault insurer will only provide for the period provided in the policy which may be less than the policyholder's tortious legal entitlement as a consequence of the accident;

2.12.2 No incentive or obligation to provide an equivalent TRV unless the terms of the policy add-on provide for this;

2.12.3 Incentivised to minimise the cost of its insured making a claim under their policy;

2.12.4 Incentivised to instead refer its insured to a CHC for a TRV for the insured to pursue the fault insurer; and

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13 *"if it was reasonable for the claimant to hire a replacement car but he could not afford to hire a replacement car by paying in advance, (in the word used in the cases, that he is "impecunious")then, prima facie, he is entitled to recover the whole of the credit hire rate he has paid, If the claimant is "impecunious" then, on the assumption it is reasonable for him to hire a replacement car and it was a reasonable type of car that he hired, he is said to has had "no choice" but to hire on credit terms"*, paragraph 36, *ibid.*

14 Paragraph 2.191 PDR.

2.12.5 Incentivised to refer its insured to a CHC for a TRV to earn a referral fee.

At-fault insurers

2.12.6 No incentive to provide a TRV to not at fault drivers as it incurs a cost[15];

2.12.7 Incentive to delay determining liability in order to avoid the provision of a TRV itself in circumstances where the not at fault driver has asked his own insurer (or another third party) to deal with repairs to his damaged vehicle;

2.12.8 Incentive to dispute any aspect of a claim for a TRV (i.e. need, hire duration, liability, hire rate)[16]; and

2.12.9 In the event that liability is clearly with their insured and the at fault insurer considers there to be a risk that, if it fails to act, the not at fault driver may seek credit hire services, there is an incentive to provide (or offer to provide[17]) a direct hire TRV at the lowest possible cost, often involving a lower category TRV than the non-fault driver is legally entitled to receive (i.e. not a like-for-like replacement)[18] (see further paragraphs 5.10 to 5.15 below for AX's submissions on the provision of direct hire and how it does not address a consumers' needs).

Credit Hire Company / Claims Management Company

2.12.10 Incentive to provide a TRV if liability is clearly with a negligent party;

2.12.11 Incentive to assist the not at fault driver to recover its losses as the position under tort law means that CHCs can recover amounts which exceed their costs;

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15 The CMA recognises the incentives on at-fault insurers to provide a reduced level of service provision in paragraph 2.192 of the PDR where the CMA finds (in rejecting the previously proposed Remedy 1B) that "*While we recognised the benefit from at-fault insurers having a strong incentive to control the costs of non-fault claims, we were concerned that this also created a risk of reduced service provision because at-fault insurers would have less incentive to meet claimants' legal entitlements. This risk would be particularly high for the variant of the remedy which removed the claimant's right to choose the service provider. In that variant, at-fault insurers would not be constrained by the threat of claimants choosing another provider*".

16 The greater portion of disputes will happen during the pre-litigation period, this is where the at fault insurer disputes any part of the claim (i.e. need, liability, hire duration, hire rate) and these elements are disputed between the at-fault insurer and the not at fault claimant (who will be represented by their own solicitor or referred to a solicitor by the CHC/CMC). During this period, the at fault insurer can simply not pay the not at fault claimant, and seek a reduction through negotiation . If a settlement is not reached, then litigation will follow in the name of the claimant and the at fault insurer (see paragraph 2.18 below).

17 By just offering to provide a TRV, at-fault insurers may seek to rely on the decisions in *Copley v Lawn* [2009] EWCA Civ 580 and *Sayce v TNT* [2011] EWCA Civ 1583 to reduce its liability for credit hire charges.

18 The CMA recognised in its PFs (see paragraph 6.90 PFs) that the incentive to provide direct hire arises out of the existence of credit hire. Before the emergence of credit hire and, indeed, without credit hire, direct hire would not exist (or at least not in its current form).

2.12.12 Incentive to use the excess recovered to pay referral fees to insurers / body-shops / garages etc. in return for referring not at fault drivers[19]; and

2.12.13 Incentive not to provide services in excess of those for which the not at fault driver is able to recover in law given that, in practice, the CHC/CMC typically bears the cost of any irrecoverable "*overprovision*".

2.13 In light of the clear incentives on the part of a CHC / CMC to assist the not at fault driver to obtain their legal entitlement (and the CMA's recognition that they provide a service that consumers benefit from and that it does not intend for its proposed remedies to interfere with a consumers' exercise of its legal entitlement) it is fundamental that the CMA should understand how the not at fault driver uses the services of a CHC / CMC to obtain their legal entitlement. If the innocent driver chooses to use a CHC / CMC, then they enter into a contract for hire with that CHC / CMC. The claim against the insurer is made by the not at fault driver. There is no subrogation of their claim against the at fault insurer to the CHC/CMC.[20]

2.14 Under the terms of a typical credit hire contract the innocent driver contracts with the CHC for the provision of a TRV and the assistance of the CHC in organising the repair of their vehicle and with the administration of their claim against the at fault insurer. Under the usual principles of contract law, the CHC provides a service that the customer is obliged to pay for under the terms of the agreement. The not at fault driver is liable at all times to the CHC / CMC for the charges incurred with credit for the hire charges being provided by the CHC. The consumer is protected by consumer legislation. This ensures that consumers are provided clear and comprehensive information in writing, including details of all costs and liabilities, before they contract and benefit from a fourteen day cancellation period. The consumer is invoiced for the charges at the end of the credit hire period and typically agrees that the CHC can recover those charges out of the proceeds of any damages obtained by the innocent driver from the at fault driver's insurer.

2.15 At all times it is the responsibility of the not at fault claimant to either (i) seek recovery of its losses from the at-fault driver (who will ordinarily be indemnified by an insurer); or (ii) pay for the credit hire (if such a claim is unsuccessful).

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19 The CMA recognises that CHCs do not earn more than normal profits, see paragraph 6.17 of the CC's PFs.

20 AX notes that the CMA considers its use of "*subrogation*" to be a shorthand for all types of claim against at fault insurers that AX has used this term. However, it is now clear that the CMA does not appreciate the correct legal position in relation to Credit hire. Therefore, to the extent AX has also previously used this term it was adopting the CMA's "*shorthand*" without appreciating the CMA's misunderstanding.

2.16 In practice, the CHC / CMC or the non-fault victim's independently instructed solicitor handles the claim for the not at fault claimant and will (in the majority of cases) seek to deal with the at fault insurer under the terms of the GTA. The GTA was introduced at the behest of Tuckey LJ following a period of friction where claims were litigated because of insurers' determination to avoid them and delay incurring these costs. However, it is important to remember at all times that the claim is the not at fault victim's claim and it is always made in the name of and by the not at fault claimant. The claimant does not assign its rights to the CHC / CMC and it does not subrogate its claim to a CHC / CMC[21]. No indemnity is granted to the hirer by the CHC, which would be a pre-requisite of any subrogated claim. The CMA has not acknowledged, and indeed appears to have misinterpreted or misunderstood, the legal position in this regard.

2.17 In the event that the at fault insurer disputes any part of the claim (i.e. either the need, liability, hire duration and/or hire rate), then there will be a period of time where these elements are disputed between the at-fault insurer and the not at fault claimant (who will be represented by their own solicitor or referred to a solicitor by the CHC/CMC). During this period, the at fault insurer can simply not pay the not at fault claimant, and seek a reduction of its liability through negotiation. The greater proportion of disputes will happen during this pre-litigation period and will clearly involve costs for both parties.

2.18 If a settlement is not reached, then litigation will follow in the name of the claimant and the at fault driver and/or the at fault insurer. The CHC / CMC will most likely refer the not at fault claimant to a solicitor, or allow the Claimant to use his own solicitor, in order to conduct the litigation and will retain an interest in the outcome given the contractual liability of the claimant for the credit hire charges. The CHC cannot litigate on behalf of the not at fault claimant.

2.19 The not at fault claimant is contractually bound to pay the CHC's charges and in seeking to recover these costs via a claim against the at fault driver or his insurer is subject to the law of tort which governs the recovery of these charges and allows the not at fault claimant to recover BHR (and other costs) according to the principles set out in *Bent v Allianz*[22] (referred to at paragraph 2.8 above).

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21 Paragraph 3.8 of the PFs refers to contracts between CHCs and not at fault drivers including a clause assigning the rights of recovery against the third party insurer. This not correct.

22 *Darren Bent v Highways and Utilities Construction Ltd, Allianz Insurance plc* [2010] EWCA Civ 292.

2.20 This has always been the position and is set out in one of the original credit hire cases, *Giles v Thomson (House of Lords May 1993*[23]*)*, and reinforced subsequently in other cases including *Dimmond v Lovell*[24], which held that:

"the position in law is that the negligent driver, backed by his insurers, is liable to pay reasonable charges incurred in hiring a replacement car if this is reasonably necessary. For many motorists the existence of this liability of the other motorist can be more theoretical than real. In practice this source of recompense frequently does not yield money, or even an acceptance of liability, in time to be of use.

In Giles v Thompson [1994] 1.A.C. 142, 155A Lord Mustill observed that: ...'there exists in practical terms a gap in the remedies available to the motorist, from which the errant driver, and hence his insurers, frequently profit'.

The additional services provided by accident car hire companies bridge this gap. They redress the imbalance between the individual car owner and the insurance companies. They enable car owners to shift from themselves to the insurance companies a loss which properly belongs to the insurers but which, in practice, owners of cars often have to bear themselves. ***So long as the charge for the additional services is reasonable, this charge should be part of the recoverable damages****....accident car hire arrangements provide a reasonable basis by which no-fault victims can in fact obtain the benefit of the right which the common law and compulsory third party insurance seek to give them against careless drivers. A measure of damages which does not achieve this result would be sadly deficient. The law on the measure of damages should reflect the practicalities of the situation in which a wronged person finds himself. Otherwise it would mean that the law's response to a wrong is a right to damages which will often be illusory in practice"*[25].

2.21 If the not at fault claimant loses any aspect of the claim against the at fault insurer, or does not recover in full, then this does not alter their liability to the CHC / CMC for any residual balance due. However, in practice, CHCs/CMCs do not pursue not at fault drivers for these costs if their legal claim fails, unless they have misled the CHC/CMC as to the circumstances surrounding the accident or if they have declined to cooperate in the recovery of their damages. In circumstances where there is a judicial determination against the not at fault

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23 [1994] 1 AC 142.
24 [2002] 1 AC 384.

25 Ibid, page 391, paragraphs A to E.

driver restricting or eliminating his ability to recover the hire charges, those circumstances influence the attitude of the CHC/CMC in recovering any shortfall.

2.22 It is accordingly critical to the business model of CHCs that they make a careful liability, and reasonable need, assessment first. Otherwise, in practice, they can incur significant unrecovered costs arising from credit hire agreements. Yet as further noted below, the CMA has made no allowance at all for the recovery of such costs[26].

2.23 In light of the legal position that it is the claimant that brings a claim against the at fault insurer, and not the CHC, the CMA is wrong to assert (as it has done in an email between AX and the CMA dated 27 June and attached at Annex 4 (confidential information redacted)) that CHC's recover costs from at fault insurers. It, therefore, cannot assess the effects of a remedy which is based on a fundamental misunderstanding of the way in which credit hire works:

"*The intention of our remedy is to cap the amount which the at-fault insurer pays for the replacement vehicle provided to the non-fault claimant. The way we have proposed doing this, though we are open to responses on all issues, is to* ***cap the amount which any professional party, including a solicitor, can bill to the at-fault insurer on behalf of their client, the non-fault claimant, for a replacement car.*** *We do not believe that this should in any way restrict a non-fault claimant's access to their legal entitlement.*"[27]

2.24 If the claimant is, in effect, limited in what it can recover from the at fault insurer (because the CMA intends the remedy to apply to claims submitted by the claimant but that have involved the TRV being provided by a CHC) then the CMA is fundamentally limiting the consumers' legal entitlement to obtain a TRV by way of credit hire and to recover this cost of a TRV at BHR. As stated by the House of Lords in *Dimond*, this result would be "*sadly deficient*".

2.25 The consequence is that CHCs will either have to lower their charges to consumers to the level of the cap or continue to charge at the credit hire rate but leave consumers with a proportion of their charges that will have to be recovered by a separate action against the at fault insurer. AX does not consider that it can provide TRVs at a price based on the proposed methodology for calculating the rate cap.[28] This is confirmed by the Compass Lexecon Report on the PDR (Annex 1),which concludes that CHCs will not be able to provide TRVs at the level of the proposed rate cap. As to the former option, because of the way in which the

26 Paragraph 2.68(iii) of the PDR.

27 See Annex 4 (confidential information redacted).

28 See, for example, the transcript of the multilateral hearing with CHCs and Steve Evans' response to the CMA's question about whether CHCs could operate at direct hire rates at page 78 lines 6 to 16.

CMA proposes to set the cap, credit hire will be uneconomic and the practical outcome is that consumers will be left without recourse to credit hire and will, therefore, be losing a service of real benefit to them and which has proven effective in bridging the "*practical gap*" which the Courts identified. The CMA has provided no analysis at all of what it envisages will replace this or how this business model will operate and provide consumers with TRVs.

2.26 As to the latter option, if the motorist has to pursue a separate claim for additional charges, this will generate significant additional personal costs in paying the CHCs charges and/or significant personal (frictional) costs in pursuing the at fault insurer for recovery of the credit hire charges which it is lawfully entitled to recover provided they do not exceed BHR. On either scenario, very significant detriments arise out of the CMA's analysis which it has wholly failed to take into account when assessing the suitability and proportionality of its remedies package.

2.27 In light of the above, it is clear that the CMA does not understand the status quo including (i) the legal framework; (ii) the current business models which provide routes for consumers to achieve their legal entitlement and (as set out further below); and (iii) the deficiencies in the direct hire model which the CMA infers is a low cost equivalent to Credit Hire. Accordingly, without a proper understanding of these crucial features of the market, the CMA is not in a position to impose remedies and to conclude that its proposed remedies package will not affect a consumers' legal entitlement (as it seeks to do)[29].

2.28 It is a core premise of the CMA's proposal that consumers' rights under tort law should not be compromised. It has chosen not to propose any change to the law[30]. Yet its chosen remedies very substantially threaten those rights.

3. FLAWS IN IDENTIFYING THE AEC

3.1 A summary of the CC's AEC in relation to ToH 1 is contained at paragraph 6.91 of the PFs:

"*We have provisionally found that **separation** results in an **inefficient supply chain**, with **excessive frictional and transactional costs**, for meeting non-fault claims. Insurers and brokers are **competing to find ways of earning a rent** from their control of non-fault claims, rather than simply competing 'on the merits' (ie offering the lowest price and best quality of claims handling and other service to customers). Furthermore, since the greatest effect is on drivers with the most adverse risk factors, prices to individual drivers are not fully reflective*

29 Paragraph 2.50, PDR.

of expected costs. These are not aspects that would be observed in a well-functioning motor insurance market. We consider that these effects represent a distortion of competition in the supply of motor insurance."[31] (emphasis added)

3.2 The CC summarises the *features* giving rise to the AEC in relation to ToH 1 at paragraph 6.93 of the PFs as follows:

"We have identified the following ***two features*** *of the supply of motor insurance and related services which have, in combination, an adverse effect on competition:*

(a) ***separation*** *- that is, that the insurer liable for the non-fault driver's claim, ie the insurer to the at-fault driver, is often not the party controlling the costs;* ***and***

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

We provisionally conclude that these features distorted competition in the motor insurance market." (emphasis added)

3.3 These 'various practices and conduct' or 'ways in which claims are made at a level higher than the cost actually incurred' include the following:

"(a) ***claims handling and car hire intermediaries charge at-fault insurers more than the costs incurred in the provision of replacement cars.*** *They in turn compete, via referral fees, to obtain work from the insurer and in so doing provide non-fault insurers, brokers and others with an opportunity to earn additional income from these fees,* ***leading to disputes with at-fault insurers and a high level of frictional costs and transactional costs.***

(b) Some non-fault insurers charge at-fault insurers more than the cost of repairs incurred (though the practice of one insurer is currently subject to litigation in the Court of Appeal); and

(c) When cars are written off, some at-fault insurers do not receive the full salvage value of the car".[32]

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30 Paragraph 2.177, PDR.

3.4 Accordingly, the CMA's provisional AEC is a combination of (i) separation; **and** (ii) various practices and conduct, leading to excessive frictional and transactional costs (which allegedly arise because of CHC/CMCs charging at-fault insurers more than the costs incurred, thus leading to disputes[33]). There is no "*supply chain*" that is being operated inefficiently as a consequence of separation. The purpose of separation is to allow consumers to realise their full legal entitlement. The costs of doing so are costs that at fault insurers are obliged to bear. Therefore, in assessing the AEC, the CMA must quantify what aspects of it relate to separation per se.

3.5 AX has made extensive submissions at earlier stages of the Investigation as to the flaws in the CMA's analysis and it maintains, but does not repeat, those submissions.

3.6 In its WP, the CMA revises its analysis and estimation of the detriment and concludes that the size of the net detriment arising out of ToH1 is about £113m per year and the detriment in relation to the supply of replacement vehicles is approximately £87m per year (£3.48 per policy per year[34]).

3.7 However, as set out in the accompanying Compass Lexecon Report on the AEC (at Annex 2 (confidential information redacted)), the CMA's analysis of the AEC remains fundamentally flawed in a number of respects. The CMA's analysis has both fundamental errors of approach and also contains numerous substantial errors and omissions in the quantification of the net consumer detriment and the AEC; or relies upon irrelevant material or fails to take into account relevant material. There are important issues in relation to quantification of the AEC which the CMA has failed to investigate. As a result, the CMA's conclusion as to the net detriment arising from the AEC is fatally flawed and cannot be relied upon.

4. THE REMEDIES PACKAGE DOES NOT ADDRESS THE AEC

4.1 There are a number of serious errors in the CMA's assessment of whether the remedies packages addresses the AEC. In particular, Compass Lexecon's Report on the PDR identifies three critical issues.[35]

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31 Paragraphs 6.91 and 9.92 of the PFs.

32 Paragraph 43, PFs.

33 Paragraph 2.2, PDR.

34 On the basis of 25.7m million policies as used in the CC's PFs, see paragraph 6.84.

35 See paragraphs 17 to 30.

4.1.1 The "*indirect*" nature of the price control in relation to the AEC means that it can only work if frictional costs fall as a consequence of regulating price. The CMA cannot know this without assessing the elasticity of frictional costs with respect to the price level. It has not done so;

4.1.2 The CMA recognises that only substantial price reductions will cause a reduction in frictional costs. However, there is no evidence that this will be the case; and in fact the rate cap will lead to detrimental unintended consequences; and

4.1.3 Friction will remain in any event as insurers will still have an incentive to challenge hire duration, need and liability even with the remedies in place.

4.2 Furthermore (and critically for its analysis of its proposed remedies), nowhere in its PFs or WP does the CMA quantify what portion of the net detriment relating to the supply of replacement vehicles is attributable to (i) separation; (ii) the various other practices and conduct which allegedly lead to excessive transactional and frictional costs; and (iii) what the alleged excessive frictional costs are caused by and how these costs can be allocated to the different causes.

4.3 The CMA's PDR is premised on the fact that the net detriment is due to frictional costs and these consist of two parts: (i) frictional costs unavoidable under separation[36] and (ii) '*excessive*' frictional costs, i.e. those that could be avoided under separation[37]. The CMA does not intend to remove separation and it is therefore conscious that some proportion of frictional costs will not be removed.[38]

4.4 However, there is a gaping hole in the CMA's analysis. The CMA has not identified which proportion of the net detriment is due to these unavoidable frictional costs. Therefore it is not in a position to know what part of its net detriment estimate it is intending to remedy and whether the remedy can be effective and proportionate. As set out further below in relation to the costs of the remedy (see paragraphs 7.5 to 7.7 and 7.20 to 7.22) , the CMA is in no position to conclude that the costs of its proposed remedies package are so insignificant that addressing any aspect of the AEC renders the remedy effective and proportionate; and, therefore, it does not need to have identified what proportion of the net detriment is due to unavoidable frictional costs (or what drives those costs).

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36 Paragraph 2.281, PDR.

37 Paragraph 2.1, PDR.

38 Paragraph 2.83, PDR.

4.5 Moreover, the CMA has not identified in the PDR what drives these '*excessive*' frictional costs. It is necessary to know what the disputes relate to in order to know what the frictional costs relate to. Without understanding these critical issues the CMA cannot know how the different components of its remedies packages will work and whether they will be effective and proportionate. The WP also does not address the different drivers of these excessive frictional costs, despite AX pointing out to the CMA that it was critical that it carry out this exercise[39]. The PDR simply makes the following, plainly insufficient, finding:

"*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 provisions:*

(a) liability;

(b) hire rate;

(c) hire duration; and

(d) need.

We have therefore considered ways in which each of these aspects could be addressed through our remedies."[40]

4.6 In order for the CMA to assess the proportionality of its remedies package it must be in a position to know which aspects of these different sources of dispute (and causes of frictional costs) will be addressed. The CMA expressly acknowledges that hire rate is the only element of frictional costs directly addressed by the remedy[41]. Moreover, it cannot know whether these different sources of dispute will be remedied by its package of proposed remedies without being clear on what the disputes relate to. For example, the PDR contains contradictory and confusing statements on whether liability is a major source of disputes or not. For example, the CMA states on the one hand 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*

39 See paragraphs 49 to 53 of the "*Further submission on Remedies 1A and 1C*" which was sent to the CMA on 13 May 2014, and paragraph 5.72 of the Compass Lexecon report, which was Annex 1 of AX's response to the PFs, submitted on 7 February 2014 ("**Annex 1 of AX's response to the PFs**") requesting the CC to calculate what portion of the AEC would be attributable to the different types of frictional costs. See also paragraph 1.19, bullet point 8 and paragraph 5.65 of Annex 1 of AX's response to the PFs, in which AX asked the CC to attribute what portion of the residual is attributable to frictional costs (this remaining residual would have to be due to separation). The CMA has not undertaken any of this critical work.

40 Para 2.48, PDR

41 Paragraph 2.52, PDR.

even longer to agree"[42]. However, later the CMA refers to evidence from insurers that there is not "*a large amount of disagreement about liability*"[43]. In practice, liability is an important source of dispute and friction between insurers and CHCs.

4.7 As the CMA does not know what drives frictional costs, it does not know whether the remedy will be effective in dealing with the adverse effect on competition (the harm to consumers) it alleges exist in excessive frictional costs. As a result, the CMA is not in a position to know what drives frictional costs, and therefore it does not know whether the remedy will be effective in dealing with the harm. Accordingly, the CMA's current proportionality assessment is flawed. For example, if only a few disputes relate to the price level (and there is no evidence that there would be fewer disputes at a lower price level), the price cap remedy is unlikely to be effective or proportionate. See paragraphs 17 to 23 of the attached Compass Lexecon Report on the PDR for further submissions on this point.

4.8 Even if the CMA considers that contrary to this submission it does not need to assess these issues then, in any event, the proposed remedies package will not address the AEC.

4.9 The package of remedies has failed to address the four key causes of friction as follows:

4.9.1 **Liability**: if insurers can change their assessment at any time (with very little "*punishment*" for doing so since if liability is disputed) as currently proposed[44], liability is not actually being resolved and can and still will be disputed;

4.9.2 **Rate**: whilst rates may reduce in the CHC administered claim consumers are still entitled to recover BHR and will continue to do so if they have a residual liability to a CHC. In any event, this is not an area of friction under the GTA (within which the vast majority of claims are settled) because rates are agreed in the GTA at a significant discount to BHR;

4.9.3 **Hire Duration**: the measures on hire duration simply adopt the current GTA framework so there will be no improvement in friction over duration: in fact it could become worse if lower rates encourage longer rental periods or simply because at-fault insurers focus their efforts to reduce claim costs on remaining issues they are able dispute; and

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42 Paragraph 281, PDR. Note that it is unclear what "price" the CMA is referring to here, if this is a reference to the prices charged by CHCs/CMCs the CMA has not carried out any analysis to reach this conclusion

43 Paragraph 2.90, PDR.

44 Paragraph 2.78(c), PDR.

4.9.4 **Need**: the GTA mitigation statement is not that dissimilar from what has been proposed but need is often disputed under the GTA and there is no reason to conclude that will change[45].

5. UNINTENDED CONSEQUENCES OF THE REMEDY

5.1 Whilst the CMA has purported to consider[46] whether consumers would continue to be able to obtain their rights under tort law, it has limited that question to considering whether claimants would still be able to obtain a like for like TRV (subject to need) and not considered whether claimants would be able to obtain all the other services to which they are legally entitled (subject to mitigation) and which are currently provided by credit hire such as:

5.1.1 the assistance of dedicated claims management expertise and assistance to allow claimants to pursue their claim against at fault insurers in the most efficient way;

5.1.2 the high quality of TRV provided by credit hire which includes providing the consumer with a car that meets all their needs on matters such as automatic transmission, estate size, tow bars, baby/child seats, dual control vehicles;

5.1.3 the provision of a replacement vehicle without requiring the Claimant having to seek continuous approval to extend the period of hire and not based on any restriction imposed by an insurer on their direct hire supplier to limit their costs;

5.1.4 the provision of cars to young or inexperienced drivers or those with a driving record or occupation which may not be acceptable to conventional rental companies;

5.1.5 the provision of collision damage waiver or other waiver cover for tyre and windscreen, for example, at the cost of the at fault insurer rather than the not-at fault driver;

5.1.6 uninsured loss recovery services including the recovery of the client's policy excess leading to the re-instatement of his no claims bonus;

5.1.7 the provision of a replacement vehicle when liability is uncertain; and

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45 It is noted that the CMA has not proposed, for example, that at fault insurers be prevented from raising issues over need where a mitigation declaration has been properly completed. This is an example of where the CMA's remedies are biased towards the interests of the at fault insurer, conferring upon them significant rights with little, if any, obligation.

46 Paragraph 2.100 PDR.

5.1.8 delivery and collection of the TRV at a time convenient to the not at fault driver.

5.2 Without considering how all these different elements will be provided and by whom the CMA cannot know that in the post remedies world consumers will still receive their full legal entitlement. To the extent that credit hire is eliminated then the loss of these relevant customer benefits is a key issue for the CMA's proportionality assessment. .

5.3 The CMA has also purported to consider whether a rate cap would distort incentives for the efficient provision of TRV services[47]. As set out in this submission (and reflected in the accompanying Compass Lexecon Report on the PDR) AX will not be able to profitably provide credit hire on the basis of the rate cap. Therefore, it will not have an incentive to provide TRVs in the post remedy world.

5.4 However, in its consideration of these two fundamental issues the CMA has incorrectly (i) ignored all the benefits of credit hire set out above that a consumer is legally entitled to; and (ii) proceeded on the basis that CHCs would continue to have an incentive to provide TRVs[48]. For the reasons set out in Compass Lexecon's report on the PDR (Annex 1), this is not a sustainable conclusion.

5.5 Remedy 1C has fundamental implications on the functioning of the market. In particular, it is very likely to eliminate credit hire as an industry for a number of reasons, including that (i) CHCs will no longer be able to pay significant referral fees to insurers and thus insurers may decide not to refer non-fault claimants to CHCs (as acknowledged by the CMA), (ii) the CMA's intention is to set the regulated price level "*slightly*" above the cost of providing TRVs and not to allow the TRV provider to recover the cost of determining whether the driver is at fault or not, which will lead to CHCs being loss-making in expected terms, and (iii) the CMA intends to define the variable element of the rate cap based on current direct hire rates which do not reflect certain risks CHCs face. Despite apparently being aware of the likely elimination of credit hire, the CMA has not assessed the potential impacts of this on non-fault drivers' realisation of their legal entitlement Viewed in historical context, this is striking given that consumers only began to receive their legal entitlement with the emergence of CHCs.

5.6 In the post-remedy world insurers would face weak unilateral incentives to provide consumers' legal entitlement (given the limited profit incentive the CMA intends to allow for

47 Paragraph 2.100 PDR.

48 Paragraph 2.101 PDR.

when setting the price cap) and strong incentives to explicitly or tacitly agree not to provide consumers' legal entitlement, despite AX's previous submission on the issue and its own acknowledgement regarding insurers' bilateral incentives in the AEC Working Paper. The presence of such a risk means that the remedy could undermine consumers' legal entitlement and as such would be incompatible with the premise of the investigation which is not to challenge consumers' legal entitlement.[49]

5.7 The exit of credit hire (in its current form) from the market will lead to a significant consumer detriment as consumers will no longer have access to the service that the Courts considered to be of fundamental importance to the not at fault driver and so will lose all the benefits of credit hire that are listed in paragraph 5.1 above. As set out above (and in the Compass Lexecon Report on the AEC as Annexed at 2 (confidential information redacted)), consumers realise significant benefits from credit hire that will either be lost in the post remedies world or will incur a (potentially irrecoverable) cost to continue realising.

5.8 Therefore, before imposing its remedies package the CMA must undertake an analysis of the consequences for consumers of TRVs being provided only by some other party under direct hire.[50] Nowhere in the PFs or the PDRs has the CMA considered this, or even explicitly consider who would make such provision.

5.9 Instead, the CMA appears to proceed on the basis that direct hire will remain and will give consumers all they are entitled to. However, it has undertaken no proper analysis of direct hire and in fact direct hire does not today and will not in the future provide consumers with all that they are legally entitled to. Indeed, in the absence of credit hire to incentivise the provision of reasonable direct hire services[51] , it is inevitable that the quality of direct hire services (to the extent they remain at all) will reduce from the status quo.

CMA's misunderstanding of direct hire

5.10 The CC's PFs and the CMA's PDR fail to consider the true nature of the current provision of direct hire to consumers. The CC's PFs simply state:

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49 Paragraphs 31-36 in Compass Lexecon's Report on PDR (Annex 1).

50 See also paragraphs 45 to 47 of Compass Lexecon's Report on the PDR (Annex 1).

51 As the CMA recognised in the PFs at paragraph 6.90.

"Direct hire is where a replacement car is supplied either by the at-fault insurer or by the non-fault insurer, in the latter case often pursuant to a bilateral agreement between the non-fault insurer and the at-fault insurer, with the costs recovered from the at-fault insurer"[52].

5.11 The shorthand employed by the CMA misrepresents the nature of direct hire in that at no point does the at fault insurer itself provide the not at fault driver with a hire car. As set out further below, the most that they do is refer the not at fault driver to deal with their supplier hire company who will dictate the level of service provision and require the consumer to enter into a hire contract which imposes significant financial obligations on him without the at fault insurer being a party to that agreement or specifying exactly what indemnity is provided to the hirer. The CMA is wrong to infer that direct hire is the means by which consumers can avail themselves of their legal entitlement. It is the means by which insurers use their supply to reduce costs by requiring not at fault drivers to accept obligations, responsibilities and costs that they are not obliged to do in accessing their legal entitlement post -accident.

5.12 The CMA's description of the basic nature of direct hire takes no account of what actually happens in practice and whether consumers realise their full legal entitlement. AX sets out below its understanding of the process of direct hire; which it told the CMA should be properly investigated[53].

5.13 When an insurer seeks to intervene and provide a TRV through direct hire, the insurer *refers* the not at fault driver to a third party hire company and the consumer is then at their mercy. The at fault insurer does not arrange delivery or collection of the vehicle to accord with the not at fault driver's needs but instead leaves it to their supplier who may not provide delivery and collection at all. The at fault insurer does not specify the vehicle that they will supply to the not at fault driver or, if they do, they do not guarantee that it will be the vehicle eventually supplied. The at fault insurer, typically, does not confirm in writing to the consumer exactly how and by what means they will provide mobility and what additional charges or liabilities the not at fault driver may have imposed upon them by their supplier. Instead, the claimant will enter into a hire agreement with the supplier of the at fault insurer, without necessarily knowing whether all of the charges will be paid by the insurer, whether the insurer will indemnify the hirer in respect of any contingent liabilities, or if the charges and /or liabilities will be paid in full. The at fault insurer is never a party to or signatory of that hire agreement leaving the consumer exposed to a dispute with the rental company, who has no interest at all

52 Paragraph 3.88(b), PFs.

53 Page 20 line 25 to Page 21 line 11 of the Multilateral Hearing with CHCs on 17 July 2013.

in the hirer's status as the not at fault party to an accident. The rental company's overriding interest is in protecting the at-fault insurer's interests which, in turn, is in minimising its own costs.

5.14 In practice, this means that non fault drivers (who, through lack of information and experience, may be under the assumption that the insurer will be covering the costs) will typically be faced with the following:

5.14.1 signing a rental agreement (this will be between the consumer and the third party hire company, the insurers are not a party to the agreement) making them liable for all charges. These may be paid directly by the insurer but as the insurer is not a party to the credit hire agreement there is no obligation for it to pay all charges. In the case where there is a dispute between the claimant and the hire company, the hirer will then have to either arrange for the at fault insurer to pay them or pursue the at fault insurer for recovery. In most instances the hire company will insist on taking credit card details from the not at fault driver and will use that mechanism to take any charges for which the insurer provides no indemnity direct from the hirer;

5.14.2 being asked if they want to pay for a damage waiver policy which may not be sufficient to completely remove their obligation for any contingent liability associated with their use of the hire car and the cost for which they will have to recover from the insurer;

5.14.3 not receiving a like for like replacement car or being told they are entitled to a replacement up to a certain value per day (which will not entitle them to a like for like replacement);

5.14.4 the third party hire companies often not delivering the TRV to the customer (making it difficult for them to obtain since they have no mobility) and not collecting it after the hire often making the hirer responsible for the costs until the car is returned to the rental station;

5.14.5 being asked to provide their debit card or credit card details as security for the TRV;

5.14.6 being asked to pay for additional drivers (even if they were covered in their insurance policy);

5.14.7 being obliged to pay for vehicle defects – attendance at a breakdown by the AA, the cost of replacing tyres following a puncture, the cost of replacing a damaged windscreen – all of which may have arisen because of mistreatment of the hire vehicle by a previous hirer or cumulative wear and tear; and/or

5.14.8 being obliged to pay compensation for loss of use of the hire vehicle if, whilst it is on hire to the not at fault claimant, the hire vehicle is damaged in an accident or the hire company considers the accident was a result of the behaviour of the hirer.

5.15 All of the risks detailed above (which are by no means exhaustive) are borne by the consumer, usually without the consumer having properly understood the nature of the transaction that they are being encouraged to consummate. The at fault insurers, who refer the consumer, do not have any incentive to provide them with adequate information or an explanation of how the direct hire service is being provided to enable them to access their full legal entitlement. The CMA has not properly considered the realities of direct hire (and how it significantly differs from credit hire) in delivering consumers' legal entitlements and so is not in a position to know that a post remedies world involving direct hire (even if it remains the same as currently which AX disputes) will be providing consumers with their legal entitlement and will not lead to unintended consequences.

5.16 Instead, the CMA has concluded that the quality difference between direct hire and credit hire is small (see paragraph 110 of WP). The analysis behind this is flawed and (for the reasons set out in Compass Lexecon's Report on the AEC (see Section 5) the CMA cannot rely on this in the context of assessing the impact of its proposed remedy package and concluding that it will be effective and proportionate.

5.17 Moreover, as a result of the elimination of CHC/CMCs, insurers will have increased incentives to collude. These concerns are set out in full at paragraphs 48 to 64 of Compass Lexecon's Report on the PDR paper (Annex 1). Whilst the CMA recognises that collusion may arise post implementation of the remedies package[54], its explanation for why it will not arise is incoherent and ignores the possibility (and in fact likelihood) of insurers colluding. Therefore, it has failed to properly take this into account in assessing its remedies package.

5.18 The CMA is therefore not in a position to conclude (as it does in paragraphs 2.97 to 2.103 of the PDR) that it does not matter how TRVs are provided to claimants as the rate cap will not lead to distortion risks or a to a loss of consumers' ability to realise their legal entitlements.

54 Paragraph 2.104 PDR.

6. FURTHER DETAILED OBSERVATIONS ON THE CMA'S PDR

6.1 In paragraphs 2.10 to 2.157 of the PDR, the CMA sets out its summary of the remedies it is proposing to take forward to address its ToH1. In this section of the PDR the CMA addresses a number of detailed issues and AX has set out its further detailed comments and responses to the CMA's conclusions on Remedies A, 1C and 1F by reference to the relevant headings / paragraph numbers.

6.2 Section 7 below then addresses AX's response to the CMA's proportionality analysis which necessarily relies on the details and conclusions in the summary section of the PDR and the submissions set out below.

Remedy A

6.3 Whilst AX fully supports any measure designed to make consumers better informed about their rights and entitlements, it has a number of concerns about the way in which the CMA has formulated Remedy A, which it considers does not provide the consumer with clear and impartial information.

How will the remedy address the AEC and/or resulting consumer detriment? (Paragraph 2.13 to 2.16 PDR)

6.4 In paragraphs 2.13 to 2.15 of the PDR, the CMA states it found in its PFs that consumers have a poor understanding of their legal entitlements following an accident, which affects how they are able to enforce their legal entitlements under tort law and their own insurance policy.

6.5 The CMA notes that the aim of Remedy A is to give claimants a better understanding of these entitlements and that it will support the measures proposed in Remedy 1C and 1F in addressing ToH1. In particular, the CMA finds that "*it would ensure that claimants take into account what entitlements they have when making claims under tort law*"[55].

6.6 The CMA claims that it has been careful to ensure that the information given to consumers is not partial or misleading.

6.7 However, for the reasons set out below in relation to design issues, this remedy does not give consumers all the information that they need and in fact inaccurately represents consumers' current legal entitlements.

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55 Paragraph 2.14 PDR.

6.8 Therefore, it is not clear that Remedy A will actually be effective in enhancing consumers' understanding in the new post remedies world and so it will not be an adequate support mechanism for Remedies 1C and 1F.

Design issues (Paragraph 2.17 to 2.35 PDR)

6.9 In paragraphs 2.17 to 2.34 of the PDR, the CMA addresses (i) when the information should be provided; (ii) what should be provided; and (iii) by whom.

6.10 In relation to the first issue, the CMA has concluded that it should be included in policy documentation and that "*targeted, short-form information*" should be provided orally at FNOL "*to any claimant that is not found to be immediately at fault following an accident (i.e. where the claimant is found to be not-at fault or where liability is undecided)*".

6.11 It is important that this information should be provided orally at FNOL to **all** claimants irrespective of the insurers' initial determination of liability and in accordance with the obligation imposed by the Financial Conduct Authority on those engaged in the management or settlement of insurance claims to Treat Customers Fairly. For instance, it could be that the claimant is considered to be at fault or partially at fault at the outset but this may change in the future to a finding of not at fault. The claimant should be made aware of their rights and how liability determinations affect those rights.

6.12 Additionally, in relation to the information that is to be provided, the draft statement at Appendix 2.2 of the PDR is incorrect in its statement of consumers' legal entitlements and misses out important statements such as that consumers should be advised that they have the right to seek legal advice in order to protect and/or obtain their legal entitlement.

6.13 It also fails to set out any obligations which may befall a customer who opts to let the at fault insurer manage his claim and as a result is provided a direct hire vehicle by entering into a contractual obligation with a non-party to the accident.

6.14 Fundamentally, the statement incorrectly claims that the respective insurers can determine who is responsible for the accident in a binding way without recourse to the drivers involved. This is wrong in law as it is a matter for the individual drivers involved to decide / accept a determination of liability. There are important consequences for drivers in accepting a determination of liability (or not) and consumers should not be misled into thinking it is a matter for the insurers only.

6.15 Moreover, this would be in breach of Article 6 ECHR which guarantees a consumer is entitled to access to an independent and impartial tribunal to determine its rights and obligations.

6.16 The information statement should make it clear that the question of liability is a matter for the individual drivers (albeit with the possible involvement of the insurers).

6.17 In addition, the following elements of the Information Statement are wrong or incomplete:

6.17.1 Paragraph 6 refers to what compensation rights a claimant has. However, the list ignores diminution;

6.17.2 Paragraph 6 (a) (iii) refers to the cost of purchasing an equivalent vehicle being based on "*published price guides*". In fact, the cost is based on publically available information including (but not limited to) local newspapers, car website and dealer stock lists, which indicate the availability of similar vehicles, of a similar age, in similar condition having similar specifications, options and mileage and based on the price at which a consumer can procure that vehicle. Published price guides do not factor availability, or reflect specification and are based on prices vehicles obtain at auction with an indicative mark-up applied as a suggestion to car dealers as to how they might mark up their vehicle. Including this statement would mislead consumers who would be led to believe that published price guides set out the value of cars once they are written off; when in reality supply and demand dynamics in the market may mean they could achieve a higher value;

6.17.3 Paragraph 9 incorrectly states that where liability is split a claimant is "*required to claim under [your] motor insurance policy for the remaining proportion of the claim*". A claimant is not "*required*" to claim and may choose not to in order to avoid an impact of their future premiums and no claims bonus.

Remedies 1C and 1F

How the remedies address the AEC and/or resulting consumer detriment (Paragraphs 2.48 to 2.53 PDR

6.18 In paragraph 2.48 of the PDR, the CMA refers back to its findings in the PFs that disputes between at fault insurers and CHC's give rise to frictional costs and that the disputes typically

relate to disputes over liability, hire rate, hire duration and need. The CMA considers that it is these disputes that need to be addressed through its proposed remedies[56].

6.19 Paragraph 2.50 of the PDR goes on to explain the intention behind Remedy 1C which is "to reduce the cost of replacement vehicle provision to non-fault claimants without compromising claimant's 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 (e.g. through making the administration of claims more efficient) and indirectly (through lower replacement vehicle claims costs leading to fewer disputes)".

6.20 Taking each of these intentions in turn (for the reasons set out below):

6.20.1 firstly, there are no AEC findings in the PFs and/or the WP that amount to a finding that the cost of replacement vehicle provision to non-fault claimants (by any provider) is currently too high;

6.20.2 secondly, as set out further above, the CMA is not in a position to know whether it is compromising claimant's tortious entitlements or not as it clearly does not properly understand what those entitlements are and how they are realised (especially insofar as they involve credit hire); and

6.20.3 thirdly, the CMA is not in a position to know that a rate cap will reduce administrative and frictional costs directly and/or indirectly (see paragraphs 17 - 30 of the Compass Lexecon Report on the PDR attached at Annex 1).

6.21 As set out above and in the Compass Lexecon Report on the PDR (Annex 1), the CMA has not assessed how much of its AEC relates to separation and how much of it relates to frictional costs. Moreover, it does not know which of these areas of dispute gives rise to what proportion of the frictional costs that it considers make up the net consumer detriment of £87m. Therefore, it does not know whether imposing a rate cap or Remedy 1F is necessary or will be effective in addressing the AEC and/or reducing the consumer detriment, or whether its proposed remedy is proportionate.

6.22 Moreover, given that the CMA does not know how much of the consumer detriment relates to disputes in relation to rates (or even whether there are a material number of disputes over rate at all) or disputes over need, it cannot know that the imposition of Remedy 1C and 1F will

56 Paragraph 2.49 PDR.

reduce administrative and frictional costs as the CMA intends in paragraph 2.50(b) and 2.52 of the PDR[57].

6.23 In any event, even if the CMA considers that there is friction over the level of rates i.e. where the fault insurer and the CHC disagree on the appropriate level of charge for the hire (which is un-evidenced), it does not need to set the rate cap at a level lower than current credit hire rates in order to remove friction. It just needs to set a regulated rate in order to remove the possibility for disputes over rate.

6.24 There is no evidence to support the CMA's claim that the imposition of a rate cap will make the administration of claims more efficient per se or that it will lead to fewer disputes. As the CMA itself recognises, the GTA still involves disputes, even though it effectively caps rates at agreed levels. A remedy that reduces the rate (and removes the element of consensus that exists in the GTA) will not necessarily reduce disputes or make the administration of claims more efficient than under the GTA (which was designed to deliver efficiencies in process amongst other things).

6.25 Even with a rate cap in place, at fault insurers will still have an incentive to dispute issues such as liability, need, and hire duration. Not at fault insurers have as their primary motive the interests of their shareholders. It is, therefore, in the at fault insurer's interests to limit the total amount payable to a not at fault claimant and so there is no reason to believe that pre-litigation disputes (such as withholding payment in order to negotiate a settlement) and litigation over need and hire duration will be fewer or disappear. As the CMA recognises at paragraph 2.105 (b) of the PDR, hire duration is a significant source of dispute[58].

6.26 Indeed, many insurers in their responses to the Notice of Possible Remedies (including Acromas, Ageas, Allianz [59]) stated that a rate cap would not reduce friction and disputes in relation to need, liability and hire duration. The CMA has ignored this evidence and instead

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57 See also paragraphs 17 to 30 of Compass Lexecon's Report on the PDR on this point.

58 As set out in above, AX does not consider that disputes over hire duration will be altered by the CMA's introduction of the current GTA requirements over hire duration. If hire duration is currently a significant source of dispute then this will remain the case if all the CMA does is include within its enforcement order the current provisions of the GTA in relation to hire duration. Therefore, there is no alteration to the status quo and consequently there can be no expectation that disputes over hire duration will reduce.

59 *"This remedy may **increase the risk of litigation (and increase frictional costs)** if there is a delay between a new vehicle being released and the independent body settling a rate.", page 13 of Acromas' response to the Remedies Notice; "The administration of this remedy would appear likely to **involve high frictional costs**. Creating and administering an online portal, and engaging an independent body to set prices, would come at a cost.", paragraph 3.14.4 of AGEAS' response to the Remedies Notice; "In the event that Remedy 1C is adopted as part of the solution we suggest it would best be implemented by way of an enforcement order applicable to all providers of TRVs. It would need to enforce a process (provision of information to the at-fault insurer, rates, hire periods, prevent insurers and others differentiating between at-fault and non-fault hires, and ensure that claimants are provided with all the necessary information to make an informed choice including cost). **The frictional cost will be significant** and is avoided by Remedy 1A. [page 20] We believe that adopting Remedy 1C would result in **significant costs in relation to set up cost and ongoing frictional cost.** [Page 22]"* of Allianz's response to the Remedies Notice.

made a bold and unwarranted assumption (in paragraph 2.52 of the PDR) that disputes over these issues might also reduce because a lower hire rate will reduce overall disputes. For the reasons set out in paragraphs 21 to 23 and 24 to 29 of Compass Lexecon's Report on the PDR there will (in principle) be no impact on frictional costs without a significant reduction in rate; and there is no evidence that in fact a large reduction will reduce the frictional costs.

6.27 Disputes over liability and hire duration will not reduce as a consequence of the CMA's other proposed measures to reduce those disputes. For the reasons set out further below, the other elements of Remedy 1C that the CMA intends to put in place (see paragraphs 2.76 to 2.93 and 2.107 of the PDR) to deal with disputes over liability and hire duration will not be effective and the overall consequence of the remedies package will be to seriously risk distorting consumers' rights, a detriment which the CMA has not taken into account in its proportionality analysis. Therefore, the CMA can have no confidence that any element of Remedy 1C as proposed will address the AEC and/or related consumer detriment.

6.28 The mitigation statement proposed under Remedy 1F will also not reduce disputes over need. Most fundamentally, the proposed statement (set out in Appendix 2.3) contains statements that misrepresent the law. For example, Section A, paragraph 1C and paragraph 3(1) are wrong in law. A claimant is only obliged to act reasonably when exercising their rights[60]. There is no obligation to keep their losses to a "*minimum*", and they should not be pressured into doing so or accepting that they have done so. This could prejudice any future claim. Furthermore, the questions in paragraph 3 will not elicit whether a driver is non-standard (this is a highly technical question). The CMA has done no work to assess the implications of being standard or non-standard and answering such questions incorrectly may prejudice a claimant's position (incorrectly). As set out above, insurers have an incentive to dispute need and this incentive will remain even in a world with the CMA's proposed mitigation statement. Moreover, leaving aside the legal errors in the proposed statement it also does not differ greatly from the mitigation statements used by CHCs in the status quo. Therefore, it is highly unlikely to have any effect.

6.29 Moreover, greater transparency over the CHC's process for assessing need will not per se reduce the likelihood of dispute over need. Insurers gain significantly from disputing need and nothing will change as a consequence of Remedy 1F unless, for example, the remedy imposed a prohibition on insurers disputing need where a signed mitigation statement was

60 See paragraph 2.6 above.

delivered to them. As currently proposed, disputes over need may become more common in a post-remedies environment.

6.30 In conclusion, the CMA has no basis for concluding that Remedy 1C and Remedy 1F will, in combination, address the AEC and/or consumer detriment.

Design issues

To whom / what should the remedy apply (Paragraphs 2.56 to 2.63 PDR)?

6.31 In paragraph 2.56 of the PDR, the CMA finds that (in order to avoid the risk of circumvention and for the remedy to be effective) the rate cap "*would therefore need to cover all replacement vehicle provision to non-fault PMI claimants*". The CMA goes on to find, in paragraph 2.57, 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)*".

6.32 The CMA has further clarified, in correspondence with AX (Annex 4 (confidential information redacted)) that the rate cap would also apply to solicitors involved in assisting their clients with claiming damages from an at fault insurer.

6.33 However, it is unclear whether it applies to direct hire providers when supplying hire as a consequence of an intervention by the at fault insurer. For the avoidance of doubt, AX considers it must apply to any form of direct hire.

6.34 In light of the diverse way in which not at fault drivers can exercise their legal entitlements and obtain access to a TRV, it is clearly critical to the effectiveness of this proposed remedy that it is clear how it applies; and how it applies without affecting a consumers' legal entitlement.

6.35 However, it is entirely unclear from paragraphs 2.58 to 2.62 of the PDR how the remedy would apply and not affect consumers' legal entitlement. The CMA states in paragraph 2.58 that "*the remedy would apply at the point a claim is submitted by the replacement vehicle provider to the at-fault insurer (ie the daily rate could not exceed the relevant cap at any point in the hire duration for any claim that is submitted to an at-fault insurer)*". However, it goes on in paragraph 2.59 to find that it would not apply to claims charged to at-fault insurers directly by non-fault claimants who have organised a TRV directly themselves. The CMA

recognises that this would require a change in the law as it would be limiting an individual's legal entitlements[61].

6.36 However, as set out above, any claim on an at fault insurer by a claimant that has obtained a TRV via credit hire is a claim submitted by the claimant directly and relates to a TRV that has been obtained by themselves (albeit provided by a credit hire company rather than a traditional car rental company). Therefore, it is not clear that in these circumstances the remedy would or could apply; and certainly it is not clear that it could apply without limiting the consumers' legal entitlement to make a claim for recovery of its losses (at the basic hire rate or, in the case of impecunious customers, the full credit hire rate even if it is higher) if it involves credit hire. If the CMA intends the remedy to apply to claims by credit hire customers then it will have to change its design; but in doing so will diminish consumers' ability to exercise their legal entitlements.

6.37 The lack of clarity on this issue of how the remedy works in relation to credit hire has also been the subject of extensive correspondence between AX and the CMA (Annex 4 (confidential information redacted)) but, to date, there is still confusion on the part of the CMA about how the remedy will apply and how it will apply without affecting a consumers' legal entitlement.

6.38 Moreover, the CMA's explanation as to how the remedy might be circumvented (in paragraph 2.60(b) of the PDR) is in all material respects a description of how credit hire currently operates (as explained further above); and how it will continue to have to operate in a world post remedies (as set out further below).

6.39 Furthermore, it is not clear how the remedy can operate when it is not clear what constitutes a PMI claimant, how CHC's might demonstrate that without creating further friction and why commercial at-fault insurers should benefit from the rate cap if the claimant is a private motorist.

6.40 AX considers that PMI not at fault accidents with commercially insured drivers account for approximately 20% - 25% of road traffic accidents ("**RTAs**"). The CMA's remedy should apply to commercial at fault entities if the not at fault driver is to be restricted to the price cap. However, commercial entities are usually either fully self-insuring or insured with a very high excess such that an insurer often acts only as an insurer of last resort or claim handling agent

61 It should be noted that Professor Smith has confirmed in correspondence with AX that the CMA recognises that the amount TRV providers are paid by at fault insurers is set by the operation of tort law (see email from Professor Smith to Steve Evans of 1 July 2014 sent at 16:15) (at Annex 4 (confidential information redacted)).

without delegated authority for the commercial entity. It means the at-fault insurer may well have no financial interest in the loss and. therefore, unless the commercial at fault driver is caught (and even if they are) there will be no early liability concession because commercial fleet managers are notoriously slow in getting an accident report from the fleet driver. The rate cap will only serve as a benefit to the commercial insurer who will be shielded from the not at fault drivers' true claim to the BHR.

6.41 Any uncertainty over the way in which a remedy will apply renders it impossible to assess from a proportionality perspective because the CMA cannot know the true costs and benefits of its proposals. This renders the CMA unable to answer the fundamental statutory questions it must address when proposing remedies to remove or mitigate an AEC.

6.42 More fundamentally, the fact that this Remedy 1C could (and, in fact, will) alter consumers' legal entitlements means that it would require a change in the law and so cannot be implemented by the CMA. It also cannot remedy the AEC if it alters consumers' legal entitlements as the AEC is assessed by reference to a benchmark in which consumers legal entitlements are met.

6.43 Leaving aside the points made in paragraphs 6.36 to 6.38 above, on the basis that the CMA appears to intend that the cap applies to a claim made by the claimant directly (but involving a credit hire) this will leave the not at fault driver with a residual hire liability to the credit hire operator under its contract of hire. Any effective prohibition on the not at fault driver from making their own (later) claim against the at fault insurer for recovery of outstanding contractual charges that do not exceed the BHR would be altering the consumers' legal entitlement.

6.44 It is no solution to this issue for the CMA to revert to the suggestion made by an insurer (set out in paragraph 2.62 of the PDR) that the TRV provider be capped in terms of what it can charge its customer. For the reasons set out in Compass Lexecon's Report on the PDR (at Annex 1 paragraphs 32 to 44), CHCs will not be able to operate profitably at the level of the rate cap. Any elimination of credit hire as a consequence will negatively impact on consumers ability to recover their legal entitlement and has not been considered by the CMA.

6.45 Moreover, a cap on hire charges would be entirely unworkable as when a CHC contracts with a customer it must be able to charge what it considers necessary to cover its costs and that reflects the appropriate market rate that can be recovered by the not at fault claimant in litigation.

6.46 Otherwise, capping the charges it can impose will not allow it to take into account the risks of the following arising in the claimant's pursuit of its losses and the consequential (material) risk that the CHC will not be paid by its customer[62]:

6.46.1 the at fault insurer may not accept liability (or may change its position on liability;

6.46.2 the at fault insurer may argue that the claim is fraudulent and decline to make any settlement;

6.46.3 the at fault insurer may dispute need or duration at a later date in circumstances where the claimant may have misled the CHC on these issues and the CHC wishes to effect a recovery; and/or

6.46.4 the claimant has not mitigated its loss properly and so its claim is unsuccessful or partially unsuccessful.

6.46.5 In addition, it would be impossible to document (in a way that was compliant with the FCA's TCF regime and the consumer protection/unfair contract regimes) in the rental agreement a charge that was capped by reference to a dual rate cap under which a different rate, with penalties, may or may not apply depending on the acts of a third party.

Views of the parties (Paragraph 2.54 PDR)

6.47 In paragraph 2.54 of the PDR, the CMA notes that it has considered the views of the parties in designing and addressing the remedies.

6.48 However, the CMA does not appear to have taken into account a number of important views of the parties as expressed in either their responses to the Notice of Possible Remedies or in bilateral and multilateral hearings. It is also not clear that Appendix 2.1 records all the important views of the parties.

6.49 Critically, the CMA has ignored the following views:

6.49.1 the views of CHCs that a reduction in credit hire rates might result in CHCs exiting the market thus removing the incentive of at fault insurers to provide

62 As set out in Compass Lexecon's Report on the PDR (Annex 1), it is understood from AX that CHCs face a higher risk profile than direct hire companies and so to the extent that the operation of (and calculation of) the cap does not have an allowance for those risks then CHCs will be loss making in expected terms.

direct hire with the consequential harm to consumers of no longer having easy access to their legal entitlements;

6.49.2 the views of CHCs that any exit from the market of a number of CHCs would result in a reduction of competition between them;

6.49.3 the view of DLG that there was a risk of collusion or market manipulation when submitting information on rates in order to calculate a direct hire rate; and

6.49.4 the views of CHCs that direct hire is not a proxy for credit hire and that the CMA has not identified the true cost of direct hire.

6.50 Moreover, AX's concerns in respect of the risk of tacit collusion appear to have been completely ignored[63]. The elimination of credit hire would transform the provision of TRVs to a "*closed system*" in which only insurers provide TRVs to non-fault drivers. This will lead to an environment where insurers will operate closely, and frequently interact with each other (or in some instances where a single insurer is the insurer to both drivers, themselves), but having alternating roles (i.e. in some cases find themselves on the non-fault side providing the TRV and incurring the cost of provision and in other cases find themselves on the fault side paying the regulated rate as compensation for the TRV provision). These concerns are set out in full at paragraphs 50 to 64 of Compass Lexecon's Report on the PDR (included at Annex 1) and must be addressed by the CMA.

How to set a dual rate cap (Paragraphs 2.64 to 2.93 PDR)

6.51 As the CMA recognises at paragraph 2.64 of the PDR, the way and level in which the cap is set will affect the incentives for the provision of TRVs. The CMA intends, therefore, to set a cap which "*limits the subrogation of non-fault claims to those costs efficiently incurred in the provision of a TRV to a non-fault claimant*" whilst at the same time continuing to "*incentivise replacement vehicle providers to provide non-fault claimants with their tortious right to mobility following an accident*" (paragraph 2.64 PDR).

6.52 Firstly, as set out above, the CMA has wrongly proceeded on the basis that all claims submitted to at fault insurers are subrogated claims. This is not correct in relation to claims involving credit hire as the claims are submitted to the at fault insurer by, and in the name of, the claimant.

63 These concerns were made in the context of Remedy 1A, but equally apply in the context of Remedy 1C. See AX's response to the Remedies Notice dated 17 January 2014.

6.53 Therefore, if the CMA intends the remedy to apply in these circumstances it is designing a cap that will limit what a claimant can recover (and thus alter their legal entitlements) or effectively limit the amount a CHC can charge for the provision of a TRV. This will fundamentally alter the incentives of a CHC to provide a TRV to a non-fault claimant; either at all or one that gives them their full legal entitlement to a like for like replacement vehicle.

6.54 Moreover, the actual way in which the cap has been designed means that (for the reasons set out in Compass Lexecon's Report on the PDR (Annex 1)) AX (and credit hire providers more generally) will no longer have an incentive to provide TRVs in the post remedy world.

6.55 In particular, in relation to the replacement vehicle arrangement costs ("**RVA costs**") the CMA's failure to allow CHCs to recover the costs of establishing liability will mean that CHCs will either be loss making if they make their own assessment of liability or it will mean that they will not take the risk of providing a TRV if they have to rely on a third party insurer's assessment of liability.

6.56 Furthermore, the CMA considers that the administration costs element of the RVA costs can be determined by reference to the GTA administration fee of £37 + VAT. However, this is a cost that is set under the GTA by reference to the GTA being a system that is based on agreed processes, rates and certain areas of compromise between CHCs and insurers. It has never been empirically tested nor does it represent the true cost of administering a claim. Aside from this, in the post remedies world the GTA will no longer exist in its current form and the CMA has not investigated what administration will be involved in the post remedies world. Given the highly complex nature of the price control it is not obvious that the level of administration needed will be equal to or less than under the GTA and so there can be no certainty that this will be sufficient to cover the administration costs of CHCs.

6.57 In relation to paragraphs 2.68(a)(iv) and paragraphs 2.83 of the PDR, it is unclear whether the CMA intends to include an allowance for certain frictional costs in the fixed element of the regulated rate and if so, how this allowance would be quantified. Such an allowance should be included in light of the CMA's acceptance that separation will remain. With separation remaining there will inevitably still be frictional costs that should be allowed for. Moreover, as set out above, the remedies package will not alter the incentives of at fault insurers to dispute need and hire duration and so there will be additional frictional costs incurred in dealing with these disputes that need to be accounted for in the RVA costs.

6.58 Additionally, the RVA costs should include, as a minimum, the upfront costs of providing a vehicle which would include valeting costs, delivery and collection costs (including driver costs and fuel costs).

6.59 In relation to paragraphs 2.70 and 2.85 of the PDR, the CMA proposes to separate out arrangement costs from the direct hire rates when setting the variable element as there would be an allowance for these costs in the fixed cost element. The CMA's intention is to set "*higher*" daily rates and "*lower*" fixed element not to encourage undue short hires. However, it is unclear how this can be done in practice without assessing direct hire costs (i.e. costs of direct hire providers) which the CMA has not done. Therefore, the CMA does not know that it has covered arrangement costs at all, or adequately.

6.60 In relation to paragraph 2.84 of the PDR, the variable element of the regulated rate will vary by car category, but there is no allowance for extras (tow bar, additional driver, etc.). If TRV providers cannot recover the costs of extras, they will have no incentive to provide them. Alternatively, the CMA must build this into the variable costs.

6.61 In relation to the fixed daily costs element, AX does not consider that using average direct hire daily rates is appropriate. In particular, direct hire rates are rates that necessarily relate to a frictionless world and so are not appropriate for use as the basis for a price control in a world that will still involve friction[64].

6.62 Furthermore, direct hire rates are only representative of fleet costs for direct hire providers. These providers' business models are fundamentally different in nature from that of credit hire providers and so the CMA cannot, without investigation of the different business models and costs, conclude that direct hire rates are suitable because "*these rates are likely to be closer to the relevant costs*". This may only be true for one part of the industry and given that the CMA does not know it cannot conclude with certainty that it has set the rate in such a way that still incentivises TRV providers, including CHCs to remain[65].

6.63 In relation to paragraph 2.84 of the PDR, the CMA states that the fixed element of the regulated rate will not vary by car category. However, some of these costs do vary by category. For example, delivery costs will be higher for larger engine vehicles. The distance of the delivery is also a relevant factor, for example, the fuel costs of delivering a 1.0L Corsa 3 miles compared to delivering a 6.0L Bentley 200 miles will be significant (possibly a

64 See also paragraph 42 of Compass Lexecon's Report on the PDR (Annex 1).

65 Paragraph 2.101 PDR.

difference of up to £50 - 100). In addition, valeting costs will be higher for larger/more prestigious vehicles. This will mean that the CMA's price cap will incentivise TRV providers to provide lower quality cars. Alternatively, the CMA must build in a variable costs element to cover this issue.

6.64 Without prejudice to AX's submission that it is not proportionate for the CMA to impose a price cap remedy, in the event that it does intend to do so the CMA should, in fact, set the daily cost element of the cap by reference to retail rates and set it at a level that allows CHCs to recover their necessary costs. These retail rates are representative of the rate that consumers are entitled to recover under tort law and will vary by location and by date and so using these rates (without any discount to them) will reflect the current legal position.

6.65 In conclusion, to the extent that the design of the remedy eliminates credit hire and/or does not allow consumer their full legal entitlement the CMA must take into account the detrimental impact on consumers of this in its proportionality assessment.

Ways to reduce frictional costs by speeding up liability determination (Paragraphs 2.76 to 2.83 PDR)

6.66 The CMA considers one way of reducing frictional costs is to speed up liability determination (which is just one of a number of frictional costs the CMA has not properly analysed).

6.67 In cases where liability is certain and common knowledge (and where the at-fault insurer has completed its checks to eliminate fraud on the part of the at fault driver), there will be an incentive to provide TRV services. But in cases where liability is uncertain, the risk of providing a CHC TRV service (the risk of not being able to recover the costs of providing the TRV) means that there will be less incentive to provide TRV services. There would also, in turn, then be a limited incentive for the insurer to provide a TRV. This is recognised by the CMA[66] in its PDR and the CMA considers that linking the cost of TRVs to the speed of liability determination will reduce liability disputes and, therefore, the frictional costs associated with them[67].

6.68 The CMA proposes that a dual rate cap will apply which involves (i) applying a low rate cap in circumstances where the at-fault insurer accepts liability within a short period of time (for example, three days) and the at-fault insurer is committed to paying for the TRV regardless of any subsequent changes to liability (subject to the caveat to this in paragraph 2.78(c) PDR);

66 Paragraph 2.77 PDR.

67 Paragraph 2.78, PDR.

and (ii) applying a high rate cap where the at-fault insurer does not accept liability within that short period (or alters its acceptance at a later date).

6.69 The high rate cap is intended to be a "*cut-off point*" 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*"[68]. The CMA also propose a carve out, where the at-fault insurer withdraws an acceptance of liability (i.e. as a result of receiving new information), and at this point the future hire charges will be set at the high rate cap (and any previous charges will be incurred under the low rate cap) and there is no commitment to pay the future hire charges.

6.70 AX has a number of serious concerns with this aspect of the price cap mechanism and its implications for liability determination and the intention to remove or mitigate friction over liability. These are as follows:

6.70.1 The way in which the dual rate cap applies does not deal with the risk to a TRV provider that the insurers' position on liability is altered at a future point during the hire. The CMA has explicitly recognised these risks in relation to the incentives for the provision of a TRV but the risk remains in light of the carve out in paragraph 2.78(c) of the PDR. In the circumstances where an insurer alters the liability determination at a future date then it is only committed to pay (at the lower rate) up to that point. Therefore, there remains a residual risk of non-payment to the TRV provider and an incentive for the insurer to alter the liability determination after day 3 and remove its obligation to pay. Whilst it remains at risk of paying the higher rate this is likely to be a risk worth taking if the insurer can use the threat of non-payment to negotiate a settlement or if it simply disputes liability (even without cause) in order to minimise its chances of paying at all. The CMA has not considered this risk at all and so cannot be in a position to know that its dual rate cap approach will reduce or remove friction in relation to disputes over liability.

6.70.2 Without prejudice to AX's submission in paragraph 6.70.1 above, the design of the remedy involves the CMA introducing financial incentives on insurers to determine liability quickly without considering the complexity of determining liability following an accident. The determination of liability requires agreement between both the at fault driver and the not at fault driver, potentially after them

68 Paragraph 2.78 (b), PDR.

being advised as to the consequences of conceding liability. It is not a decision that one insurer can make arbitrarily in order to limit its costs liability. There are consequences associated with deciding liability in relation to matters such as the policyholder's no claims discount, the cost of future insurance, and the recoverability of other potential losses (i.e. such as personal injuries). Any attempt to determine, agree or concede liability absent confirmation of the authority to do so from the driver and/or it's legal advisers (and confirmation of it being in their clients best interests) may entirely prejudice the recoverability of damages for other losses.

6.70.3 If, in order to deal with these risks, the liability aspect of the price cap mechanism results in a situation where insurers try to persuade their clients to make quick decisions on liability (in order to lower their costs), such situations would be inconsistent with the obligations imposed on insurers by the FCA's TCF Regime[69]. The CMA has failed to consider this.

6.70.4 Where a claim for hire is intimated, the consumer may be receiving independent advice in respect of his claim (i.e. from a solicitor). In such a scenario, the claim for damages could go beyond a claim for the cost of a TRV, and the ultimate determination of liability will not be made between two insurers, rather it could be made by one insurer on behalf of one party, and an independent adviser on behalf of the other party; or even between independent advisers if both parties are not managing their claims via their insurers. In this scenario, under the CMA's proposal the high rate cap will apply; but this does not result in any speeding up of liability determination, which may be delayed until there is judicial determination of liability.

6.70.5 Even with the dual rate cap approach the number of claims of this nature may increase as a consequence of Remedy 1C, because if CHC's are eliminated or marginalised claimants will either not seek a TRV themselves because the private frictional costs of doing so are prohibitive or if they do they will incur significant costs in doing so and will also seek damages at the commercial rate of the BHR

69 The Financial Conduct Authority ("**FCA**") imposes an obligation on all businesses to Treat Customers Fairly ("**TCF**"). The purpose of the TCF policy is to protect consumers in an increasingly difficult economic environment, and is focused on consumer outcomes and ensuring consumers get a fair deal. Key outcomes of the TCF standards which insurers must follow include: consumers should be confident that they are dealing with firms where the fair treatment of customers if central; consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale; where consumers receive advice, the advice should be suitable and take account of their circumstances. See: http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers/general-insurance

increasing friction over liability (and other issues) and a return to the position before Tuckey LJ intervened promoting the creation of the GTA 14 years ago. Again, this has not been considered by the CMA.

6.70.6 In the event that the hire proceeds on the basis of early admission of liability and the claimant subsequently authorises repairs to his damaged vehicle to mitigate his position, and then the liability stance is changed by the at fault insurer such that he no longer accepts liability, the consumer will not be protected in respect of his financial obligation to pay for the repairs that he has authorised (when liability was agreed). The consumer will also not be able to reduce the length of hire until liability is properly resolved. This aspect of price cap does not prevent an insurer from changing its mind on liability at a later date and leaving a consumer with residual liability to a repairer or for other losses.

6.70.7 The CMA's proposed price cap appears to be premised on accidents only involving two cars and liability being determined on a 100% basis by insurers only. This is not correct. In relation to multi-vehicle and multi-party accidents, liability is often determined by the Police or a Court (and never quickly in either case). It is entirely unclear how the rate cap will apply in these situations and the CMA has failed to consider this in its design of the remedy.

6.70.8 The CMA's purported incentive to insurers to settle claims early on the basis that to do so will earn a reduced cost is inconsistent with the concerns of the Transport Select Committee who are critical of insurers for settling personal injury claims early in order to reduce the cost of claims.

6.71 Moreover, the CMA's suggestion that the at-fault insurer, if they accept liability is "*committed to pay*"[70] the low rate cap is undermined by the continued ability to dispute need and duration and leaves a number of practical questions unanswered:

6.71.1 What constitutes an acceptance of liability? Is it required in writing? Presumably this must clearly refer to the at fault driver's acceptance who is the party which is ultimately liable.

6.71.2 In relation to footnote 37 at paragraph 2.91 of the PDR, the CMA states that if the insurer admits liability within three days, it would be committed to pay the low

70 Paragraph 2.78(a), PDR.

daily rate for the "*necessary hire period*". However, it is unclear who will determine what the necessary hire period is. Moreover, the CMA appears to assume that there would be no dispute over this which is an unrealistic and un-evidenced assumption.

6.71.3 What is the effect of such an acceptance insofar as other claims are concerned (such as personal injury claims)? Does the acceptance apply only to the direct hire element of the overall claim, and if so, would this have any impact on potential liability of other claims?

6.72 Even if frictional costs were to be reduced by the dual rate aspect of the rate cap and the commitment to pay under the lower rate (which AX does not accept), the cap will lead to a number of distortions and unintended consequences for consumers and for insurers that the CMA has simply not grappled with or considered in relation to its remedy proposal.

6.73 Furthermore, in relation to paragraph 2.92 of the PDR, the CMA's intention is to set the high rate cap to be twice the low rate cap in order to incentivise provision at the low rate cap. However, it is not clear whether each of the fixed and the variable elements in the high rate cap will be double the fixed and variable elements in the low rate cap and so it is not clear how this the dual rate cap actually works.

6.74 AX also notes the CMA's comment at paragraph 2.80 of the PDR that it "... *would not expect undue frictional costs (eg beyond those already reflected in direct hire rates) under the low rate cap, where liability is agreed.*" As set out in detail above, the CMA does not have any basis to make this sweeping assertion that there will be less frictional costs (per se) if liability is agreed and the low rate cap applies. The CMA has not considered the portion of frictional costs which relate to liability, compared with the portion which relate to separation, need, enforceability or period. Simply putting in place a low rate cap (and alleged incentives to determine liability early) will not remove or limit frictional costs per se. The CMA's reliance on the unpublished evidence of Enterprise and bilateral agreements between insurers does not assist in this respect.

6.75 Firstly, the fact that Enterprise provides credit hire effectively at direct hire rates (when the at-fault insurer accepts liability) tells the CMA nothing about whether there are other disputes over matters such as need, period, rate etc. The CMA has not pointed to any evidence to show that Enterprise is involved in fewer disputes over any issue and so the fact that it supplies at direct hire rates provides the CMA with no support for the proposition in paragraph 2.80 of the PDR.

6.76 Furthermore, at footnote 31 the CMA specifies that Enterprise provides credit hire "*at direct hire rate plus referral fee and FNOL fee*". Given that the CMA estimates that the average direct hire bill to be about £540 and referral fees to be about £330 per claim, "*direct hire rate plus referral fee*" is not effectively the same as the direct hire rate (and the CMA has not disclosed what an FNOL fee is other than it being a device to increase the revenue earned by Enterprise outside of its disclosed hire revenues). Therefore, the example does not support the CMA's view that there is no friction at direct hire rates.

6.77 Secondly, whilst bilateral agreements between insurers may reduce / remove friction they only do so in circumstances in which consumers legal entitlements are at risk and do not do so because the rate is low[71]. Moreover, bilateral agreements arose as a response to credit hire and if the CMA's remedies package removes credit hire as an industry (which AX considers it will) there is no guarantee that bilateral agreements will remain. The CMA has not considered this and as set out in Compass Lexecon's Report on the AEC (Annex 1) the CMA should undertake a proper quantitative and qualitative assessment of bilateral agreements and should have allowed AX's advisers access to the agreements it has reviewed in the confidentiality ring in order to allow AX properly to understand the CMA's views on bilateral agreements.

6.78 The CMA has also apparently misunderstood the role of the GTA and has made an unsupported assertion at paragraph 2.81 of the PDR that *"frictional costs are currently high under the GTA because prices are high and liability is often not agreed"*. There is no evidence to support this statement in relation to rates and there remain disputes over liability under the GTA because it is always in the insurers interests to seek to delay payment or reduce payment and because it is the prerogative of any motorist involved in an accident to argue his position effectively and ultimately to have the matter determined by the Courts.

6.79 The CMA has undertaken no analysis of why these disputes arise and has ignored relevant evidence provided by CHCs in relation to disputes under the GTA. The CMA has also not engaged with the Technical Committee of the ABI GTA in order to explore these issues.

6.80 As set out in the attached Independent Audit of Insurer Delays under the GTA (Annex 5 (confidential information redacted)), which was submitted to the OFT in 2012 (and which the CMA has ignored) there was a review in 2011 of the reasons why there were deviations from the GTA. The audit found that there was "*overall strong compliance with the GTA*"; "*hire*

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71 See paragraph 28 of Compass Lexecon's Report on the PDR.

periods and costs usually correct" and that insurer disputes over liability was "*the biggest barrier to settling claims quickly*" (see summary slide).

6.81 Furthermore, the Audit shows that insurer behaviour differs greatly. The CMA has undertaken no proper analysis of insurer behaviour and so cannot place undue weight on what some insurers may have said about the GTA.

6.82 The CMA concludes[72] that the aim of the high rate cap will be to facilitate early determination of liability as it will be "*significantly more costly for an at-fault insurer to pay for a temporary replacement vehicle for a non-fault claimant under this higher rate" and that "the high rate cap will mean that there is still an incentive to provide a temporary replacement vehicle to potential non-fault claimants even recognising that, in these cases, frictional costs will be high and the costs of some provision may not be recovered*".

6.83 However, these conclusions are flawed. Firstly, the high rate cap is intended to be approximately double the low rate cap and effectively equivalent to the GTA rates[73]. The GTA rate is an agreed rate and does not typically give rise to significant dispute over rates in the status quo. Therefore, there is little change from the status quo under the high rate cap and so does not necessarily follow that there is a material incentive for the insurer to seek to avoid paying the high rate.

6.84 Furthermore, in light of this, and the lack of a commitment to pay under the higher rate, there will (on the CMA's own case) continue to be high frictional costs and the real chance that some of the costs of provision will not be recovered by TRV providers. Consequently, there will be little incentive for CHCs to provide a TRV with the associated consumer detriment if TRV provision reduces or their choices of TRV providers are limited to direct hire only.

6.85 As set out at paragraphs in Compass Lexecon's Report on the PDR (included at Annex 1), the CMA's intention not to allow TRV providers to recover the cost of establishing liability means that CHCs are likely to be loss-making (unless the margin over the daily rate is set high enough which is unlikely in light of the CMA's intention to set the rates slightly above cost) and so it will be inevitable that CHCs will exit the market.

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72 Paragraph 2.82 PDR.

73 Paragraph 2.87 PDR.

Initial and subsequent determinations of a rate cap (Paragraphs 2.94 to 2.96 PDR)

6.86 In relation to paragraph 2.96 of the PDR, the CMA states that subsequent determinations of rates should be done by reference to indexation as insurers have said that the cost of direct hire has been fairly constant over the last 5-10 years. However, the CMA has not provided any evidence of this, and has simply relied on what "*insurers said*" (see paragraph 6.93 below). This is insufficient. Moreover, the CMA should have gathered evidence regarding credit hire rates.

6.87 The movement of rates in the UK rental industry has relevance since the primary drivers of cost of any hire business (vehicles, premises, fuel, staff and insurance) are common to direct hire and to daily rental. AX has written to the CMA (2nd July 17:49) and pointed out that the movement in BHR rates (2013 versus 2012) according to data relied upon by insurers in the GTA review revealed showed that rates rose by 14.4% in 2013.

6.88 In relation to paragraph 2.96(b) of the PDR, the CMA intends to gather data on "*the extent of referral fees being paid, as an indicator of the difference remaining between the costs incurred by a provider of replacement vehicles to non-fault claimants and the costs charged to at-fault insurers*" during its period reviews. This appears to suggest that to the extent CHCs could obtain business through referral fees post-remedy, the CMA may further reduce the rates with the consequence of eliminating credit hire in a few years.

6.89 The CMA also proposes to appoint itself as the body to set the initial rates of the price cap "*based on the evidence we have received to date and other further consultation now.*"[74] There is no reason to suppose the CMA will be best able to set the rate at exactly the correct level necessary in order not to give rise to consumer harm (even if this would be possible theoretically). Moreover, many parties told the CMA that an independent body should be constituted to set the rates.

6.90 If, as the CMA states, the first iteration of the price cap is to be based on information the CMA currently already holds, then the CMA's provisional calculation should have been included in the PDR (or in a separate working paper) to allow for consultation now. This is crucial information which is missing from the CMA's PDR. As a matter of procedural fairness, it is essential that the parties are given an opportunity to address this before any remedy is adopted. This is particularly the case in respect of CHCs such as AX at risk of being driven out of business by the CMA's proposals.

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74 Paragraph 294, PDR.

6.91 Furthermore, AX is concerned that the CMA does not hold all the necessary and relevant information in order to even be able to set the initial price cap. During a teleconference between AX and the CC on 17 April 2014, AX offered the CC data on hire rates and costs. At the time, Andrew Wright stated that the inquiry was not minded to look at rate and cost data. The CC/CMA has not subsequently requested this information. Accordingly, AX has offered directly relevant and material data which would be necessary for the CMA to set the price cap, and it appears that this will not be taken into account by the CMA when setting the price cap. Moreover, AX is concerned that the data the CMA does currently hold will, based on the rate movement in BHR recorded between 2012 and 2013, by the time the CMA provides its provisional calculation and sets the cap, be historic and out of date.

6.92 In relation to the CMA's proposals for subsequent determination of the price cap, the CMA considers two options: (i) an annual reappraisal of the two rate caps; or (ii) annual indexation of the rate caps with reviews held on a periodic basis to check the rate is appropriately set (the first periodic review to occur two years after the implementation of the remedy, with reviews occurring every three years thereafter).

6.93 The CMA rejects the first option on the basis as it considers an annual reappraisal to be "*unnecessary as costs do not change significantly from year to year*"[75] and that the basis for this assertion is "*a number of insurers told us that the cost of direct hire has remained fairly constant over the last five to ten years*"[76]. This is, in fact, not correct. Aside from the evidence on rate adduced by insurers in the 2014 GTA rate review, the CHO adduced information that showed the rate increase to be nearer 7% and, either way, the movement by rental companies (including Enterprise) was not static. The costs of direct hire cannot have been static although the rate charged may have been in order to secure volume business and may be unsustainable.

6.94 Furthermore, in light of AX's view that the effect of the proposed remedies will be to drive CHCs out of the market the overall impact on consumer welfare is hard to predict. In these circumstances the CMA should reconsider the necessity of the remedy, the level of the rate and the impact on consumers at the latest after one year.

6.95 The CMA's preferred option, however, involves a review every three years (after an initial review after two years). This could be appropriate for a simple and straight forward price cap; however this is not such a case. There are a number of variables involved, for example

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75 Paragraph 2.96, PDR

76 Footnote 40, PDR.

(i) the costs of direct hire (which are not static), (ii) the extent of friction (which will not decrease as the CMA expects; and (iii) the extent of utilisation of the high rate cap. There are also other variables linked to car rental rates including (i) petrol costs (which will directly impact the delivery costs which the CMA is proposing to incorporate in its cap); (ii) the wider vehicle market – new and used car prices for example and fleet insurance costs which will impact the cost of acquiring, running and disposing of a rental fleet; and (iii) the cost of vehicle financing – all of which significantly impact car rental rates. Additionally, these factors fluctuate more than every three years and are not directly reflected (if at all) in RPI or CPI.

Distortion risks (Paragraphs 2.97 to 2.100 PDR)

6.96 For the reasons set out in this Submission, and in Compass Lexecon's Report on the PDR (Annex 1), AX considers that there are significant risks of distortion associated with the CMA's remedies package. AX does not agree with the CMA's conclusion that consumers will continue to be able to obtain their lawful entitlements. It considers that the rate cap will distort incentives for the provision of TRVs and lead to the exit of credit hire.

6.97 In relation to paragraph 2.98 of the PDR, the CMA concludes that in the post-remedy world, TRV providers will not be able to pay significant referral fees and consequently insurers (and brokers, dealers, repairers etc) will have less incentive to refer non-fault claimants to a CHC/CMC. As a result, the CMA considers that *"reductions in the level of referral fees paid by replacement vehicle providers to insurers and brokers could require some other marketing costs to be incurred by replacement vehicle providers".*[77] However, if CHCs will not be able to afford to pay referral fees (as the CMA concludes), then it is unlikely that they will be able to afford marketing expenses either.

6.98 The CMA considers that alternative marketing costs should not be particularly significant *"because there are business-to-business transactions which involve tendering processes and it is unlikely that there would be much direct marketing".*[78] There is no evidence behind the CMA's assertion whatsoever and the CMA has undertaken no analysis of the types of marketing that would be involved post remedies and what costs they would incur[79]. In reality the post remedies world is likely to be one in which insurers do not refer hires to CHCs because they are no longer paid a referral fee. Therefore, the *"business to business"*

77 Paragraph 2.98, PDR.

78 Paragraph 2.98, PDR.

79 The CMA has not sought any of the relevant evidence it would need from CHCs.

transactions envisaged by the CMA will not exist and CHCs will need to direct market. However, without any investigation into the marketing that would be required, and the costs involved the CMA cannot conclude that increased costs would not be required.

6.99 In relation to paragraph 2.99, of the PDR the CMA states that it is "*not concerned with the specific type of contractual arrangements which might arise*". However, it intends to gather data on direct hire rates during its periodic reviews[80]. This appears to suggest that direct hire will survive post-remedy and credit hire will not survive. As set out in Compass Lexecon's Report on the PDR (Annex 1), the impact of the loss of credit hire has not been properly quantified in the CMA's proportionality analysis.

6.100 Moreover, direct hire rates are set on the basis that the TRV provider incurs no cost in acquiring business (no referral fees and no marketing) and, from evidence obtained by AX, direct hire income is supplemented by charges made to consumers themselves. This will simply not be the case for CHCs in the post remedy world . Indeed, in the (remote) event that CHCs/CMCs remain (in whatsoever form) they will have to compete harder than ever for business . More likely, however, as recognised by the CMA is that ultimately the outcome of the price cap will be CHCs/CMCs exit the market:

"*Another consequence of lower referral fees could be that insurers (and others) seek a different way in which to provide replacement vehicles to potential non-fault claimants One option is that they would make the provision themselves subrogating the claim to the fault insurers, and not referring the claimant to a CHC/CMC. Other options could also emerge*"[81].

6.101 Despite finding that, "*nevertheless, we do need to consider whether the remedy might have unintended consequences*", the CMA does not consider the possibility or probability of CHCs/CMCs exiting the market. It should not be agnostic on this given the significant risks of consumer harm if CHC's exit. These consequences, and also the impact on consumer's being able to obtain their legal entitlement are set out in full in Sections 2, 5 and 6 and in Compass Lexecon's Reports on the PDR (Annex 1). The CMA has failed to take into account these consequences in its assessment of the remedies.

6.102 A further distortion that will arise is that in the post remedies world CHCs will not (if they continue to exist) be able contract with their customers in a way which complies with consumer protection legislation as we explain below.

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80 Paragraph 2.96, PDR.

81 Paragraph 2.99, PDR

6.103 The intention is that the rate cap will apply to all TRV providers "*at the point of subrogation of the claim to the at-fault insurer*"[82]. Whether the low rate cap or the high rate cap applies depends on whether the at-fault insurer accepts liability within a short period (three days from being informed that a TRV is being provided to the non-fault claimant); or does not accept liability within the short period, in which case the high rate will apply.

6.104 As detailed at paragraph 2.13 above, when non-fault claimants engage the services of a CHC/CMC, there is no subrogation, rather the claim is brought directly by the non-fault claimant against the at-fault claimant. Accordingly, it is unclear as to whether the rate cap will apply to CHCs/CMCs at all or, if so, when at what point it will apply.

6.105 In any event, the CMA has also not considered how a CHC will contract with its customer when the claimant will be limited in terms of the rate it can recover with this also being dependent on the actions of the at fault insurer in deciding on liability. This may not become clear until three days after the accident and so a credit hire agreement entered into on day one will necessarily need to make it clear to the claimant that the charge made may or may not be recoverable depending on what decision the at fault insurer takes on liability.

6.106 Credit hire agreements must comply with the Consumer Protection from Unfair Trading Regulations 2008 (the "**CPR**") and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This legislation is designed to ensure the consumer has sufficient certainty in their contractual relationships with businesses and traders. AX has serious concerns that the adoption of a dual rate cap would make it impossible to put in place a clear price in the agreement and/or make clear to the claimant their potential risks and obligations. This would risk these agreements being unenforceable and in breach of the relevant regulations, without a change in the law. The CMA has simply not considered this issue at all.

6.107 The CPRs prohibit unfair commercial practices, such as misleading acts and omissions. This includes giving insufficient information about the product or services in question which prevents the consumer from making an informed choice about the product or service being provided. The CMA's own guidance considers that in most circumstances the price of a product or service will be considered to be material information, and therefore failure to provide this in a timely fashion before the consumer makes his decision is made is likely to

82 Para 7(b), PDR.

amount to a misleading omission[83]. The uncertainty caused by the dual nature of the price cap, will make it very difficult to include a clear price in the contract and will render CHC/CMC and insurer compliance with the CPRs almost impossible.

6.108 Similarly the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 set out a list of pre-contract information business must make available to a consumer, this includes "*the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated*"[84] is considered to be material and should be provided to the consumer prior to them entering into contracts. It will not be possible to include the total price or explain with any clarity how the price is to be calculated.

Delivery of entitlements (Paragraphs 2.101 to 2.103 PDR)

6.109 For the reasons set out in, *inter alia*, Section 5 above, AX does not agree that CHCs or insurers will continue to have an incentive to provide non-fault claimants with a like for like replacement vehicle (subject to need). The CMA's reasoning in this regard is flawed.

6.110 In light of this, it is even more critical that the CMA's concerns set out in paragraph 2.101 of the PDR (i.e. that some insurers' practices in relation to non-fault claimants restrict consumers access to their legal entitlement) are effectively dealt with.

6.111 However, the measures proposed in paragraph 2.102 (a) and (b) will not do anything to prevent insurers from initially taking an undecided determination on liability in order to force claimants to claim on their own policy instead of obtaining a like for like TRV, and then altering their determination at a later date.

6.112 Firstly, a requirement that an insurer tells a claimant their view of liability before a repair is started will not incentivise the insurer to tell the claimant anything other than that their view is undecided at that point. Liability determinations are complex and the insurer may not have taken a view at that point.

6.113 Alternatively, this will incentivise insurers to seek to delay the start of the repairs and so leave the consumer either without a TRV or a material risk associated with a liability for a TRV or repairs that it will have to procure themselves in the interim.

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83 See, paragraph 7.7 and 7.17 of the CMA's Consumer Protection from Unfair Trading Guidance available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310044/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf.

84 Schedule 1C and Schedule 1(f).

6.114 Furthermore, there are no sanctions built in to the proposal and simply monitoring what insurers do on liability determinations is insufficient to bring about a material change in current practices and is insufficient to prevent the consumer harm that will arise from the remedies package.

6.115 Therefore, the CMA has no basis to conclude that these measure will address the material risk that consumers will not be able to realise their full legal entitlements.

Efficient delivery of services (Paragraph 2.104 PDR)

6.116 For the reasons set out in Compass Lexecon's Report on the PDR (Annex 1), the CMA's conclusions in relation to the risks for competition associated with the price cap remedy are flawed.

6.117 Firstly, CHCs will not be able to compete in the post remedy world and their exit will plainly alter the efficient delivery of services to consumers. The CMA has not analysed the incentives of insurers to provider consumers' legal entitlements absent credit hire.

6.118 Secondly, the remedy will lead to the risk of explicit or tacit collusion between insurers. The CMA's conclusions in paragraph 2.104 of the PDR do not recognise this or take it into account as it only considers the risks in relation to direct hire providers.

Should measures be put in place to cap hire duration? (Paragraphs 2.105 to 2.107 PDR)

6.119 The CMA recognises in paragraph 2.105(b) of the PDR that hire duration is a significant source of dispute between insurers and CHCs and that some incentives to unduly lengthen hire periods would be likely to remain in the post remedies world (see paragraph 2.85 PDR).

6.120 However, its proposal to deal with the risks of excessive hire duration (and associated frictional costs) is plainly not capable of being effective as it simply mirrors the current position under the GTA[85].

6.121 If there are currently significant disputes about hire duration (even with the existing GTA measures in place) then a remedy which does not alter the status quo will not reduce the disputes or the frictional costs associated with these disputes.

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85 Paragraph 2.107 PDR confirms that the CMA's proposal *"is in line with existing GTA requirements"*.

6.122 Consequently, the CMA is not remedying one of the causes of frictional costs that gives rise to the AEC and which it is seeking to eliminate or reduce by implementation of its remedies package.

How should measures to address need be designed (Remedy 1F) (Paragraphs 2.108 to 2.113 PDR)

6.123 In paragraph 2.108 of the PDR, the CMA states that "*requiring the replacement vehicle provider to assess need fully, and to state that it has done so, and asking a claimant to confirm the answers they provided when the car is provided to them, will result in a more effective fulfilment of the legal duty of mitigation*".

6.124 However, it is not legally possible for the TRV provider to mitigate the claimants loss (in relation to need) on their behalf. This is a matter solely for the claimant and so requiring the TRV provider to sign a mitigation declaration will not provide any additional protection in relation to disputes over need.

6.125 Consequently, there is no basis for the CMA to conclude that the mitigation statement will reduce disputes (and, therefore, frictional costs) over need.

Risk of circumvention and/or distortion (Paragraphs 2.130 to 2.134 PDR)

6.126 One distortion, which the CMA has not considered in the PDR, is the difference in application of the price cap between PMI customers and commercial insurers. It is intended that Remedy 1C will apply only to private motor insurance claims[86]. However, in order for the CMA to be confident that it is only applying its remedies package to PMI and not creating a distortion in relation to commercial motor insurance it needs to define the concept of private motor insurance claims more precisely.

6.127 At present it is not clear what the consequence is of the remedying not applying to claims made by a not at fault privately insured motorist against a commercial vehicle (i.e. a taxi driver/private hire driver; commercial vehicles; company car drivers or cars used for business purposes or cars used for part business and part personal use).

6.128 The CMA conclude that its remedies will reduce the cost of providing TRVs to private motorists but that given that such accidents could involve a private or commercial motorist (or, if there were more than two motorists in the accident any combination of private or commercial motorists) then the remedies will reduce both private and commercial

86 Paragraph 7(a), PDR.

premiums[87]. Furthermore, the CMA notes (in footnote 47) that commercial premiums could reduce further as commercial motor insurers will continue to benefit from referral fee income.

6.129 However, it has done no analysis of the commercial insurance market and so has no basis upon which to conclude that commercial insurance premiums will reduce.

6.130 For instance, there will still be disputes and frictional costs involved when the at fault driver is a commercial driver and the CMA has not undertaken any analysis of how these frictional costs may impact on insurance premiums.

RCB's (Paragraphs 2.242 to 2.245 PDR)

6.131 The CMA states that it has considered the benefits of separation in its WP on the AEC and sets out its conclusions on these issues in paragraph 2.242 (a) to (c). For the reasons set out in Compass Lexecon's Report on the AEC (Annex 2 (confidential information redacted)), AX considers that the CMA's conclusions on the benefits of credit hire are flawed.

6.132 As set out in paragraph 5.1 above and in the Compass Lexecon Report on the AEC, there are significant benefits of separation and credit hire which allow consumers to realise their legal entitlements in full. As the CMA recognises in paragraph 2.244 of the PDR, any reduction in a consumers' ability to gain their full entitlement caused by the remedies package would be a loss of a relevant consumer benefit. The CMA recognises the concern that if it sets the rate too low there is a risk that the level of replacement vehicle provision would reduce.

6.133 In light of the way in which the rate is set (i.e. based on direct hire rates), the CMA recognises that if the rate is set too low then CHCs will no longer have the incentive to provide TRVs[88]. Consequently consumers would not receive their full entitlements and the CMA acknowledges this in paragraphs 2.192 of the PDR.

6.134 However, the CMA concludes that it will set the rate at a level that continues to provide incentives for replacement vehicle providers to supply and that it will take this into account when setting the exact rate[89].

6.135 For the reasons set out above, the CMA's methodology and approach to setting the rate is flawed and will not incentivise CHCs to remain. Therefore, the CMA can have no confidence that in the exact rate setting exercise it is yet to carry out it will not set the rate too low.

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87 Paragraph 2.131 PDR

88 Paragraph 2.101 PDR.

6.136 Furthermore, as set out in paragraph 2.94 of the PDR, the CMA intends to set the rate by reference to evidence it has received to date. As set out above, the CMA should, therefore, have, been in a position to carry out this rate setting exercise and properly to conclude that the rate it intends to set will not give rise to a loss of relevant customer benefits.

6.137 Until the CMA sets the rate it cannot know that "*there was no evidence to suggest that the introduction of our proposed remedies package would result in a material loss of RCBs*"[90].

7. PROPORTIONALITY ASSESSMENT

7.1 Firstly, there are serious concerns with the CMA's AEC and consumer detriment analysis. As set out in Compass Lexecon's Report on the AEC (Annex 2 (confidential information redacted)), the CMA has made errors in its analysis and/or omitted a large number of factors from its calculations and therefore the AEC estimate is not reliable and cannot form the basis of a proportionality assessment.

7.2 Furthermore, as set out in Section 4 above, the CMA has failed to calculate what portion of the net impact of separation is accounted for by frictional and transaction costs, therefore there is no benchmark against which AX can judge the proportionality or effectiveness of the proposed price cap.

7.3 The CMA has found that the implementation and monitoring costs of its remedies in relation to ToH 1 would be limited and therefore, even if it is unclear what proportion of the net detriment the remedy would address, "*the expected benefits are likely significantly to outweigh the expected costs*".[91]

7.4 However, for the reasons set out in this submission and the accompanying Compass Lexecon Reports on the PDR and the AEC the CMA is not in a position to draw any positive conclusions on a proportionality assessment in this context. In particular:

7.4.1 it has failed properly to assess the relevant customer benefits of credit hire;

7.4.2 it has ignored, entirely, the proportion of frictional costs which are unavoidably associated with separation (which the CMA does not intend to remedy); and therefore it cannot exclude the possibility that a large part of the identified net detriment consists of unavoidable frictional that will not be remedied costs;

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89 Paragraph 2.244 PDR.

90 Paragraph 2.246 PDR.

7.4.3 the remedies package will alter consumers' ability to realise their legal entitlement with consequential detriment to consumers;

7.4.4 the remedies package will not in fact reduce frictional costs;

7.4.5 the likely consequences of the imposition Remedy 1C, is the elimination of credit hire and the risk of (tacit) collusion; these consequences are severe and unaccounted for (see also the Compass Lexecon Report on the PDR (Annex 1); and

7.4.6 the remedies package is not the least onerous option available.

7.5 Moreover, the CMA has proceeded wrongly on the basis that the only cost to be weighed against the benefit of the remedies is the administrative cost of implementing the remedies. As set out above, and in the accompanying Compass Lexecon submission on the PDR, the proposed remedies package will give rise to the exit of credit hire providers from the market. Consequently, consumers will lose the only way in which they are currently able to realise their full legal entitlement without incurring their own frictional costs in dealing with insurers.

7.6 As set out above, the solution is not to impose a cap on the amount that CHCs can charge their customers. For the reasons set out above and in the Compass Lexecon Report on the PDR, the CMA's approach to setting the rate will not allow CHCs to recover their costs and so will also cause CHCs to exit the market; with the consequence that consumers will still lose the only way in which they are currently able to realise their full legal entitlement without incurring their own frictional costs in dealing with insurers.

7.7 Without prejudice to Compass Lexecon's submission[92] that the CMA cannot view a consumers' loss of their legal entitlement as a "*cost*" of the remedies package to be weighed against benefits, we note that, the CMA has entirely ignored a whole range of costs which are likely to flow from their remedies package such as:

7.7.1 the cost to consumers of obtaining their full legal entitlement. As set out in paragraph 2.5 above consumers are entitled to a minimum set of legal entitlements that it can recover in the event it is not at fault. Any loss of the

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91 Paragraph 2.294, PDR.

92 See paragraph 66 of Compass Lexecon's Report on the PDR.

provision of these caused by the loss of credit hire will give rise to a cost to consumers in seeking to obtain these from elsewhere;

7.7.2 the frictional costs and risk of under provision that arises as a result of consumers having to seek their legal entitlement from elsewhere; and

7.7.3 the costs to consumers of the risks of tacit collusion arising as a consequence of the elimination of credit hire.

CMA's proportionality assessment in the PDR

7.8 In paragraphs 2.267 to 2.295 of the PDR, the CMA purports to address the legal questions that it must consider when assessing whether its remedies package is a proportionate response to the AEC.

7.9 For the reasons set out above, and in the Compass Lexecon Reports on the PDR and AEC, AX does not consider that the proposed package is a proportionate response:

7.9.1 There can be no certainty that it will be effective in its aim; and in fact is not likely to be effective;

7.9.2 The measures in the remedies package are significantly more onerous than they need to be and the CMA has failed properly to consider an alternative strengthened GTA / requirement for an online claims portal; and

7.9.3 The package will produce costs / detriment for consumers that do not outweigh any apparent benefits.

Effective in achieving its aim (Paragraph 2.268 PDR)

7.10 The CMA concludes that the proposed package of remedies will be effective for the reasons set out in paragraphs 2.249 to 2.265 of the PDR.

7.11 As set out in Section 4 above, and in the accompanying Compass Lexecon Report on the PDR, the remedies package cannot be expected to be effective in reducing or removing the excessive frictional costs that the CMA considers arise above the inevitable frictional costs of separation.

7.12 In summary:

7.12.1 the CMA has undertaken no analysis of the amount of the consumer detriment that relates to the frictional costs that arise over and above the costs of separation. Therefore, it cannot know whether its package of remedies will remedy these costs;

7.12.2 the price cap aspect of the remedies package is highly unusual as it only indirectly attempts to remedy frictional costs. However, the CMA has undertaken no analysis of the relationship between rates and frictional costs and so cannot know that the price cap will remedy the frictional costs;

7.12.3 there is no evidence that even with a substantial reduction in price a price cap will reduce frictional costs;

7.12.4 there is an inadequate incentive on insurers to accept liability under the dual rate approach;

7.12.5 remedy A and 1F will not reduce disputes over need as insurers will continue to have an incentive to dispute need (which the CMA has not analysed);

7.12.6 the controls on hire duration contained in Remedy 1C are no different from the current controls under the GTA and so cannot be expected to be effective;

7.12.7 there is no analysis done by the CMA to support its conclusion that any TRV provider (whatever their business model) will be incentivised to provide under the remedies package. In order to conclude this the CMA would need to have analysed the different business models it expects to remain / enter in the post remedies world. It has not done so. In fact, it appears to assume (without explicitly stating this) that it will be direct hire providers that will remain. However, it has not properly understood the way in which direct hire works and so not understood the impact of direct hire provision on whether consumers will realise their legal entitlement; and

7.12.8 a new class of frictional costs will be created by the remedy as a consequence of consumers having to deal with insurers and/or direct hire providers only (following the exit of CHCs) and seeking to force them to provide their full legal entitlements in a world in which the insurers and/or direct hire providers do not have the incentive to do so.

No more onerous than necessary / Least onerous if there is a choice (Paragraphs 2.269 to 2.274 PDR)

7.13 As set out in Section 8 below, the CMA has not properly considered the benefits of a more efficient GTA and an obligation on the parties to put in place the online portal that has been under development.

7.14 In paragraphs 2.114 to 2.129 of the PDR, the CMA considers which (other) aspects of the GTA it should adopt. Whilst it recognises that the "*GTA has many positive elements which encourage the efficient resolution of claims and help to reduce frictional and transactional costs between CHCs/CMCs and at-fault insurers*"[93] the CMA has not undertaken any analysis as to what impact the GTA has had on frictional costs and might continue to have if there was a mandatory imposition of the GTA as it currently operates (or in a strengthened way).

7.15 Given the negotiated / consensus basis for the GTA mandating compliance with it (on a strengthened basis) would be a less onerous remedy proposal.

7.16 Furthermore, the CMA has not given any adequate consideration to the possibility of mandating the use of the online portal. As the CMA finds in the PDR,[94] there is wide support for the online portal and the view of the GTA Technical Committee was that it would reduce frictional costs.

7.17 However, the CMA appears to reject this as a less onerous remedy on the basis that it expects the industry to continue to work together to implement the portal. The CMA has no basis for reaching this conclusion as it has not asked the parties for its views on what will happen to the portal after conclusion of the inquiry. In fact, there can be no confidence that it will be implemented anyway as the effect of the CMA's remedies will be drastic in terms of credit hire and the work on the portal has all but ceased as a consequence of the uncertainty surrounding the outcome of the CMA's inquiry.

7.18 Finally, the CMA has not considered whether the way in which it proposes to construct the rate cap could be altered to use retail hire rates as the base for the calculation and so produce a less onerous remedy that way.

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93 Paragraph 2.114 PDR.

94 Paragraph 2.129 PDR.

7.19 For all these reasons the CMA is not in a position to conclude that the remedies package is the least onerous package.

Benefits of the remedies / costs of the remedies (Paragraph 2.281 to 2.294 PDR)

7.20 For all the reasons set out in this submission, and in the accompanying Compass Lexecon Reports on the PDR and AEC, the CMA can have no confidence that the proposed package of remedies will bring about benefits for consumers in excess of the costs that it will create.

7.21 The CMA attempts to avoid the consequence issue that it recognises in paragraph 2.281 of the PDR (that there will continue to be frictional costs in the post remedies world as a consequence of separation) by finding that the costs of the remedy are so small that it is inevitably producing benefits that outweigh the costs.

7.22 However, this ignores the material costs that the remedies package will cause to consumers as a consequence of the distortions it will create. AX has set these distortions out in full in Section 5 above and so does not repeat them here. The CMA's analysis of the distortive effects of its remedies package is flawed and so it cannot conclude that there are no material distortions such that the remedies package is plainly beneficial.

8. ALTERNATIVE REMEDY PROPOSAL

8.1 The GTA provides flexibility in the settlement of claims and provide a framework for setting hire rates according to the circumstances of individual claims. The CMA has failed to analyse the likely reduction in frictional costs that the GTA's online portal could generate (and whether these would be sufficient to address the AEC) as requested by AX[95].

8.2 The benefits of the GTA (and the online portal) far outweigh the restrictive and over complicated nature of the dual price cap. The PDR omits any analysis of such benefits. On this basis, the proposed remedy is not the least onerous that could be imposed. The extent of the CMA's analysis of the GTA as a viable option for remedying the AEC is as follows:

8.2.1 the CMA states that the current remedy would be significantly wider in scope than the GTA because currently around 23% of credit hire claims are handled outside the GTA or initially within the GTA but then fall out of it.[96] This is

95 Paragraph 10.26, AX response to the PFs.

96 Paragraph 2.57, PDR.

simple to overcome by making it mandatory for all credit hire claims to be handled within the GTA; and

8.2.2 the CMA also states that, "*it appears to use that frictional costs are currently high under the GTA because prices are high and liability is often not agreed.*"[97] Again, there is no evidence presented to support this broad assertion. AX has explained the enhanced efficiencies created by the GTA, and the likely future efficiencies that are to be created by future GTA-led initiatives.

8.3 Moreover, the CMA has clearly not taken into account the improved rate of settlements under the GTA (even though these effects are readily quantifiable).

8.4 The CMA must be guided on the principles that it has set out in its own guidance including the principle that a proportionate remedy is "*no more onerous than needed to achieve its aim*"[98]and is "*the lead onerous if there is a choice between several effective measures*". Moreover, the Guidance states:

"*to avoid imposing unnecessary burdens on business, the CC will seek...to ensure that its remedies are no more onerous than is necessary to remedy the AEC identified. In selecting and designing remedies, the CC will also have regard to the potential for more competitive markets to create profitable opportunities for new and innovative competitors as well as the cost of remedial measures on established businesses.*"

8.5 AX submits that strengthening the GTA, together with opening up a dialogue with insurers will be a far less onerous, and much more effective, simpler and transparent remedy. Most importantly, such a remedy would ensure the preservation of consumers' full entitlement. AX submits that the GTA rates struck the right balance of eliminating avoidable frictional costs while maintaining consumers' legal rights, and that this is not a balance relation would likely be able to achieve. In the absence of quantification of the benefit of a remedy, strengthening the GTA, imposition of the complex price cap would not be proportionate or effective.

DLA Piper UK LLP

For and on behalf of Accident Exchange

8 July 2014

97 Paragraph 2.81, PDR.

98 *Guidelines for market investigations: Their role, procedures, assessment and remedies*", April 2013, CC3 (Revised) and adopted by the CMA on 1 April 2014 (the "CC Market Investigation Guidance").paragraph 344.