

CMA PMI MARKET INVESTIGATION

AXA UK PLC

RESPONSE TO FURTHER CONSULTATION ON REMEDY 1C

4 August 2014

1. INTRODUCTION

- 1.1 This submission is in response to the CMA's additional consultation paper on Remedy 1C, published on 28 July 2014 ("**New Consultation Paper**").
- 1.2 The original Remedy 1C proposed (among other things) imposing a cap on the amount that a CHC/CMC can claim on behalf of a non-fault claimant, or a non-fault insurer can claim against the at-fault insurer for the cost of a temporary replacement vehicle ("**TRV**"). However, in the New Consultation Paper, the CMA has accepted arguments made by certain insurers in their responses to the Provisional Decision on Remedies ("**PDR**") that its powers under Schedule 8 to the Enterprises Act 2002 does not allow it to apply such a remedy.
- 1.3 The CMA has therefore sought feedback on an alternative remedy to Remedy 1C which would cap the amount a TRV provider could charge for a TRV, rather than cap the level of the claim ("**Alternative Remedy**").¹
- 1.4 As previously submitted in its response to the PDR ("**PDR Response**"), AXA strongly supports this Alternative Remedy² and believes that the CMA has the powers to adopt this remedy.³ In fact, AXA believes that the CMA has an obligation to remedy the AEC it has identified, unless in exceptional circumstances. The CMA has put forward no arguments to support a decision to take no remedial action, and AXA believes that no legitimate arguments exist in this case. Accordingly, AXA believes that the CMA must adopt the Alternative Remedy to ensure the costs of TRV hire can be controlled and so the AEC identified by the CMA can be (at least, partially) remedied.
- 1.5 It will be an extremely unsatisfactory outcome for the CMA, the industry and consumers if the status quo is retained, particularly as the alternative mitigating proposals suggested by the CMA (such as encouraging aspects of Remedy 1C to be integrated into the General Terms of Agreement ("**GTA**")), would be completely ineffective. AXA therefore urges the CMA to pursue the Alternative Remedy in the interests of making important improvements to the private motor insurance ("**PMI**") sector.
- 1.6 AXA provides general comments on the Alternative Remedy, as well as responses to the CMA's specific questions at paragraph 21 of the New Consultation Paper, below.

¹ Paragraph 14 of the New Consultation Paper; see also paragraphs 2.62-2.63 of the PDR.

² See paragraphs 1.8, and 4.3-4.7 of AXA's PDR Response.

³ See footnote 7 of AXA's PDR Response.

2. GENERAL COMMENTS

AXA strongly supports the Alternative Remedy

- 2.1 As previously submitted, AXA maintains that Remedy 1A is the only remedy that would directly resolve the AEC in relation to separation of cost control and cost liability in relation to cost of TRVs. However, while it is not a complete solution, AXA believes that the Alternative Remedy will be effective in at least controlling the costs of TRV hire where a CHC or CMC acting on behalf of the non-fault party is responsible for arranging the TRV. As the CMA has concluded, it is the excessive cost of TRV in these circumstances which contributes to higher than necessary premiums for consumers and therefore the adverse effect on competition ("AEC") in the PMI sector.
- 2.2 It is important for AXA to qualify that its support for the Alternative Remedy is subject to it knowing the level of any rate cap to be imposed on the amount charged by TRV providers for TRVs in the context of a non-fault party's claim. As noted in its PDR Response, AXA cannot reasonably comment on the effectiveness of a remedy without knowing how the rate will be calculated and what the actual initial rates will be.⁴ AXA notes that the CMA is currently considering the appropriateness of "direct rates as the low rate benchmark."⁵ AXA maintains that if a rate cap was to be imposed, such a cap must be based on direct hire rates; any other rate would undermine the CMA's decision not to provide the at-fault insurer with the ability to exercise control itself over the cost of the TRV (through the removal of the separation), but rather to provide cost control solely through capped rates. If the rates are not close to direct rates, the CMA remedy will neither address the separation issue nor deliver comparable cost control and hence fail to address the AEC.
- 2.3 Although not expressly addressed in the New Consultation Paper, AXA proceeds on the basis that the other elements of the original Remedy 1C (i.e. dual-rate caps, a liability decision period, and an "acceptance of customer" principle) must also fall away if the Alternative Remedy is to be adopted as these are further manifestations of the approach which the CMA has said it does not have the powers to adopt. In other words, AXA understands that the Alternative Remedy, if accepted, would be a complete replacement of Remedy 1C. However, we note from paragraph 19 of the New Consultation Paper that the intent is to allow individual claimants to be able to obtain a TRV on their own terms. It therefore goes without saying that the safeguards against using this for circumvention, described at paragraph 2.61 of the PDR, need to be carried over in the event the Alternative Remedy is adopted.

Doing nothing is not an option

- 2.4 AXA is extremely concerned at the CMA's comment at paragraph 23 of the New Consultation Paper that the CMA may decide not to pursue Remedy 1C. While not its preferred remedy (because the removal of the separation of liability and cost control has not been achieved), AXA views Remedy 1C as an opportunity, at the very least, to control the cost of TRV hire.

⁴ See paragraph 4.2.2 of AXA's PDR Response.

⁵ Paragraph 22 of the New Consultation Paper.

- 2.5 The CMA cannot ignore that it has reached a provisional finding that there is an adverse effect on competition due to the cost of TRV hire. Section 138(2) of the Enterprise Act 2002 requires that the CMA remedy AECs by taking such action as it appears to be reasonable and practicable. As noted in the Guidelines for Market Investigations ("**Guidelines**"), in considering whether to take any action the CMA is required to have regard to "the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC and any detrimental effects on customers so far as resulting from the AEC".⁶ It is expected that cases where the CMA chooses not to take any remedial action following a finding of an AEC will be rare.⁷ Examples of such cases cited in the Guidelines include:⁸
- 2.5.1 Where there is no practicable remedy;
 - 2.5.2 Where the cost of each practicable remedy is disproportionate in relation to the extent that remedy resolves the AEC; or
 - 2.5.3 Where the relevant consumer benefits accruing from the market feature are large in relation to the AEC and would be lost as a consequence of any practicable remedy.
- 2.6 AXA submits that the CMA could not justifiably decide not to take remedial action in this case based on the above grounds because:
- 2.6.1 There is clearly a practicable remedy in the form of the Alternative Remedy;
 - 2.6.2 While there may be some additional costs incurred to implement the Alternative Remedy (such as devising the applicable rate cap), AXA would not expect such costs to be significant or prohibitive, and therefore it cannot be said that these costs would be disproportionate to the effectiveness of the remedy; and
 - 2.6.3 There are no relevant consumers benefits accruing from excessive costs of TRVs and therefore no relevant consumers benefits can be lost as a consequence of adopting the Alternative Remedy.
- 2.7 AXA is therefore of the view that the CMA is obliged to adopt the Alternative Remedy as it is a remedy that will reasonably and practicably address the AEC which it has identified as a result of its investigation.
- 2.8 If the CMA did decide not to proceed with Remedy 1C, the CMA has suggested that instead of seeking undertakings or making an order, it may:

⁶ Paragraph 329, "Guidelines for market investigations: their role, procedures, assessment and remedies", April 2013.

⁷ Paragraph 354 of the Guidelines.

⁸ Paragraph 354 of the Guidelines.

- 2.8.1 encourage the GTA to adopt aspects of Remedy 1C (and 1F) not already part of the GTA (such as a dual-rate system, the Mitigation Declaration Statement, an online portal to deliver quicker and cheaper administration of claims, and rates which are more in line with those which some insurers and CHCs have agreed through bilateral agreements); and/or
 - 2.8.2 encourage insurers to take action themselves to reduce frictional costs by, for example, the more common use of bilateral agreements between CHCs and insurers, and between insurers in situations where insurance policies are extended so as to provide a like-for-like TRV to a non-fault claimant under the terms of the insurance policy; and extending a non-fault claimant's insurance cover to their TRV so removing the need for the CHC to incur costs in providing this insurance.
- 2.9 AXA repeats its previous submissions that the GTA is a purely voluntary scheme which has been unsuccessful at delivering cost control of TRV costs. "Encouragement" will simply not address the AEC concerned. If the Alternative Remedy is not implemented, CHCs/CMCs will still be able to extract excessive prices for TRV hire, and accordingly, the AEC identified by the CMA will be allowed to continue. It must also be noted that any decision to abandon Remedy 1C must be accompanied by a review of the CMA's previous decision not to proceed with Remedy 1A as AXA would find it difficult to identify any measures still under consideration which would address the AEC.
- 2.10 Above all, given the significant time and financial resources AXA and the whole industry has dedicated to this market investigation and its commitment to finding a way to reduce the cost of this behaviour to consumers, AXA would be very disappointed, if the CMA dismisses the Alternative Remedy in favour of measures that only reinforce the unacceptable status quo. As already mentioned in paragraph 2.6 above, AXA also seriously doubts whether a decision not to remedy the AEC is even a legitimate course of action for the CMA to take.

3. **RESPONSES TO THE CMA'S SPECIFIC QUESTIONS ON REMEDY 1C**

- 3.1 The CMA seeks views on whether:

(a) This alternative approach would be an effective way in which to implement Remedy 1C?

- 3.2 Assuming direct rates are used to establish the rate cap, AXA believes that the Alternative Remedy should deliver effective control over the cost of TRV hire, even if the separation of cost liability and cost control issue has not been addressed in its entirety.
- 3.3 Importantly, the Alternative Remedy should not only achieve cost control, but should also remove circumvention risks and the incentives of parties to litigate over the cost of TRV hire, without seeking to (unlawfully) limit the tortious rights of the claimant. The rate cap will determine the liability of the claimant to the provider under contract, and hence the sum to be paid by the at-fault insurer.

(b) The remedy would create distortions between the provision of temporary replacement vehicles to non-fault claimants and the provision of hire vehicles to retail customers?

- 3.4 As AXA understands the Alternative Remedy, the rate cap on the amount chargeable for TRV hire would only apply in cases where TRV hire costs are incurred or payable as part of a claim for compensation in the claimant's name. Accordingly, when a person seeks a TRV in other circumstances (i.e. other than being deprived of the use of a vehicle through the negligence of another party) the rate cap would not apply. AXA notes that differential rates already exist between commercial credit hire rates and basic hire rates. Moreover, differences in rates may reflect other factors. For example, the aim of the rate cap proposed by the CMA is to reduce excessive profits, which indirectly also delivers a constraint on the ability to make referral fee payments and the size of those payments. On the other hand, retail rates do not necessarily share this objective; retail rates cover overheads and a reasonable profit for the TRV provider. Accordingly, as the difference between TRV hire rate for non-claimants in an accident scenario and TRV hire rates for retail customers already exists, AXA does not believe that the Alternative Remedy would create any additional distortions.

(c) The definition in paragraph 18 would capture effectively the provision of credit hire vehicles to non-fault claimants or whether there are any further circumvention risks from this proposed wording?

- 3.5 The definitions at paragraphs 18(a) and 18(b) of the New Consultation Paper are acceptable subject to inserting the addition of the words "or otherwise" after the words "pursuant to a credit agreement" in paragraph 18(a), as follows:

"Any entity providing temporary replacement vehicles to non-fault claimants pursuant to a credit agreement, or otherwise, with that entity, directly or indirectly."

- 3.6 While the aim of the Remedy 1C is to curb the costs differential observed when TRVs are provided under credit hire terms, it is equally possible that the provision of TRVs under non-credit hire terms could be used to produce the same differential and therefore this needs to be acknowledged within the remedy. Accordingly, AXA believes that the definition should capture any provision of a TRV in circumstances where the costs of the TRV are intended to be included in a damages claim as a claim for loss of use as a result of an accident, whether provided under a credit agreement or otherwise.

(d) The remedy would create distortions between CHC/CMC provision and non-fault insurer provision of temporary replacement vehicles?

- 3.7 If a non-fault insurer chooses to refer non-fault customers to CHOs, then the TRV will be provided under contractual terms between the CHO and the claimant. Under the Alternative Remedy, this contract would include the rate cap on the amount that the TRV provider can charge the customer. Whether the referral takes place as an additional service, or to meet an obligation under the policy, in these circumstances, there will be a contract to which the rate cap will apply.

- 3.8 If there is no separate TRV provider (and therefore, no contract to which the rate cap can apply) AXA recognises that it may be possible for the non-fault insurer, having provided a TRV to its customer under its insurance policy, to seek recovery at commercial or “open market” rates.
- 3.9 However, AXA does not perceive this to be a concern in terms of the Alternative Remedy's ability to address the adverse effect on competition for the following reasons:⁹
- 3.9.1 The CMA has not identified insurer cost recovery as a significant factor which contributes to the AEC. The AEC primarily derives from recovery claims made by CHOs/CMCs.
- 3.9.2 All insurers will be, at various points in time, acting for at-fault parties as well as non-fault claimants. There is therefore little incentive for insurers to apply open market rates in non-fault circumstances if this means that they would be then vulnerable to paying open market rates when acting for the at-fault party.
- 3.9.3 Practically speaking, it is rare for TRVs to be provided directly by a non-fault insurer. In AXA's experience, a separate TRV provider is invariably used.
- 3.10 Notwithstanding this, AXA believes that the CMA could require insurers to provide an undertaking to not, in any subrogated claim, recover any costs of TRV hire which would exceed the rate cap that applies to CHCs/CMCs where providing a TRV in response to a claim without involving a separate organisation contracting with the claimant. In practice, this would achieve application of the same rate caps regardless of whether recovery was pursued by a CHC/CMC or the insurer.
- 3.11 AXA believes that compliance with this type of undertaking could also be relatively easily monitored. For example, if a non-fault insurer tried to recover more than the rate cap in litigation proceedings, it would be immediately clear to the at-fault insurer, who could then report the breach to the CMA (or the FCA). AXA also believes that the undertaking would not impact on the tortious rights of the claimant, as the undertaking would simply require the insurer to recognise the rate cap as a fair reflection of open market rates, and this would then be recognised by the Courts (see below). To the extent that TRV hire arranged by non-fault insurers is shown by the CMA to be a genuine contributor to the AEC, an insurer undertaking to follow the TRV rate caps applicable to CHCs and CMCs would mitigate the risk of distortion between CHC/CMC provision and non-fault insurer provision of TRVs.

⁹ See also paragraph 3.10 of DLG's response to the PDR for additional reasons why non-fault insurer arranged TRV would not undermine the effectiveness of the Alternative Remedy.

(e) The courts would be likely to limit the sums recoverable in subrogated claims to the rate cap set by the CMA on the basis that this indicates the reasonable cost, or, if not, whether the cap for CHC/CMC provision would have to be set at a level which aligned with that currently allowed by the courts for subrogated claims for temporary replacement vehicles; and whether a dual-rate cap would create greater ambiguity for the courts in these circumstances?

3.12 As mentioned in its PDR Response, AXA maintains that the Courts will not see themselves as constrained by any rate cap that might be imposed under a CMA remedy. The Courts, unless compelled to do so by legislation, will continue to consider the rights of the individual claimant and assess damages on usual principles under tort law. It is for this reason that AXA supports the Alternative Remedy, and not the original Remedy 1C. While a rate cap imposed by an enforcement order would have no legal weight with the Courts, the rates agreed upon under the contract for the provision of the TRV will be followed by the Court when considering the claimant's liability to the TRV provider, and hence the basis for the at-fault motorist's liability to the claimant. The rate cap will effectively fix the hire rate used to calculate the recoverable damages.

3.13 Where subrogated claims are made by non-fault insurers, the Court will also apply usual tort law principles when assessing damages. However, due to the undertaking mentioned above, the non-fault insurer would not seek to recover more than the rate cap as this would breach its undertaking. In practice, the Court would not override the claimant's pleaded case as to what the appropriate recoverable rate should be. Accordingly, AXA believes that the Alternative Remedy, in conjunction with the insurer undertaking, would be effective in keeping the costs of TRV down in and out of litigation proceedings.

(f) Whether the remedy might be expected to lead to greater provision of temporary replacement vehicles by non-fault insurers under the terms of individuals' insurance policies, and the benefits and costs of this greater provision if it occurred?

3.14 AXA does not believe this is a likely outcome of the Alternative Remedy. The current arrangements for providing vehicles will remain. The only change would be the removal of excessive claims by CHCs and CMCs on behalf of non-fault motorists. AXA has strongly argued for a referral fee ban but it is possible that referral fees will be impacted by the rate cap rates and that the reduced revenue stream may lead insurers to look at their business models around the provision of TRVs. However, short of insurers deciding to own their own fleets of vehicles (which appears unlikely) there will still be a role for TRV providers if the Alternative Remedy is adopted (just under terms which no longer cause the AEC which the CMA has identified).

(g) Whether this alternative approach creates any other unintended consequences, costs or benefits from those already expressed?

3.15 AXA has made it clear in its previous submissions that the only remedy which comprehensively addresses the AEC that the CMA has identified is Remedy 1A. However, if Remedy 1C (and the package of other remedies) is ultimately adopted, AXA believes that the inclusion of a rate cap in the TRV hire contract will effectively limit recovery of excessive TRV costs both in and out of litigation proceedings.

**CMA MARKET INVESTIGATION
INTO PRIVATE MOTOR INSURANCE**

**RESPONSE OF AXA INSURANCE LIMITED (“AXA NI”)
TO THE NOTICE OF FURTHER CONSULTATION
ON REMEDY 1C**

5th August 2014

This is AXA NI’s response to the Competition and Markets Authority's (“CMA”) Notice of Further Consultation on Remedy 1C (“New Notice”), published on 28th July 2014.

AXA NI acknowledges and agrees with the comments in the submission of AXA UK plc in relation to the CMA’s New Notice. However we would like to re-emphasise some of the comments in our response of 4th July 2014 to the CMA’s Provisional Decision on Remedies published on 12th June 2014. AXA NI operates in a jurisdiction which is slightly different to that of England and Wales which we feel the CMA should take into consideration when formulating their remedy.

We would also like to add to the response of AXA UK plc to paragraph 21 (e) of the New Notice by the inclusion of the following:

- (e) **The courts would be likely to limit the sums recoverable in subrogated claims to the rate cap set by the CMA on the basis that this indicates the reasonable cost, or, if not, whether the cap for CHC/CMC provision would have to be set at a level which aligned with that currently allowed by the courts for subrogated claims for temporary replacement vehicles; and whether a dual-rate cap would create greater ambiguity for the courts in these circumstances?**

Much will depend on the level of the cap set by the CMA under the Alternative Remedy suggested. [CONFIDENTIAL TO AXA NI]

If the Court accepts that the correct measure of damages is the contracted rate then we will be in a better place. However if, for whatever reason, the Court concludes that it is not obliged to measure damages in this way then presumably we will be back to the measure of Basic Hire Rate (“BHR”). Provision of adequate evidence to the courts within the NI jurisdiction to establish a BHR has proved difficult and costly and, thus far, we have not been able to establish such a rate.