Response to CMA's Consultation Paper on Remedy 1C

1. Introduction and summary

1.1 It is essential that the CMA implements a remedy to address the adverse effect on competition ("**AEC**") it identified as resulting from the overcosting of temporary replacement vehicle ("**TRV**") services by credit hire companies ("**CHCs**") and claims management companies ("**CMCs**").

1.2 esure supports the CMA's proposal for a cap on the contractual liability of a claimant for a TRV supplied by a CHC/CMC (the "**Adjusted Remedy**") and considers it to be an effective and appropriate method by which to address this AEC. The CMA has a clear legal basis under Schedule 8 of the Enterprise Act 2002 to implement the Adjusted Remedy.

1.3 The CMA should incorporate judicial guidance in any final remedies package to ensure that the Adjusted Remedy is as effective as possible. The CMA is particularly well placed to provide guidance for the courts on the reasonable costs of TRVs (reflecting the cap imposed through the Adjusted Remedy) as a result of the CMA's in depth understanding of the industry. It can, therefore, ensure that the cap applies more broadly to encourage settlement of claims at truly reasonable rates.

1.4 esure endorses the comments made in the ABI's final response to the consultation, which it has had the opportunity to review, particularly its comments on the necessity of the CMA resolving the AEC arising from overcosting in credit hire and the possibility for the Adjusted Remedy to apply to insurer sourced TRVs if the CMA's legal powers extend to such a remedy.

1.5 Ultimately, the CMA must focus its attention on the AEC identified – TRVs provided through CHCs/CMCs, which has caused a total net detriment of £95 million[1] – and apply the Adjusted Remedy to 'credit hire' contracts, since the CMA has not found detriment in respect of insurer provided TRVs.

2. Judicial guidance would bolster the effectiveness of the Adjusted Remedy

2.1 esure considers that the Adjusted Remedy would be strengthened by guidance for the judiciary for the determination of 'reasonable' costs incurred in the provision of TRVs for non-fault drivers.

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[1] CMA Provisional Findings at footnote 50.

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2.2 Specifically, esure proposes that the CMA judicial guidance ought to reflect:

(i) the rates at which the CHC/CMCs are to be capped for each vehicle category (as established by the CMA Panel) as an indication of reasonable daily rates;

(ii) the CMA's assessment of the reasonable administrative costs incurred in the provision of a replacement hire vehicle; and

(iii) the reasonable duration for a replacement vehicle (i.e. 24 hours after completion of the repair or seven days after the submission of the total loss payment).

2.3 Having spent two years investigating the PMI market (in particular, the provision of TRVs), the CMA is well placed to produce such a guidance paper for the courts. Furthermore, as under Remedy 1C, a CMA panel will continue to monitor and adjust the level of the rate caps for CHC/CMC provided TRVs, the CMA panel is equally well placed to update the judicial guidance as and when necessary.

2.4 The introduction of CMA guidance would mitigate the risk of any unjustified distinction between the costs charged by non-fault insurers and CHCs/CMCs. While not binding, in practice, the CMA's unparalled understanding of the costs associated with TRV provision will add substantial weight to its recommendations. Guidance would provide insurers with greater certainty as to the outcome of any litigation concerning the provision of TRVs, ensuring that the TRV costs subrogated by a non-fault insurer are no higher than the cap under the Adjusted Remedy (since costs higher than the cap under the Adjusted Remedy would not be expected to be recoverable in court as reasonable costs).

2.5 Moreover, judicial guidance would significantly reduce the number of disputes being challenged before the courts, reducing the level of frictional costs incurred by insurers in such disputes.

2.6 Similar (albeit significantly more complicated) guidance was published by the Judicial Studies Board (now the Judicial College) in the context of personal injury and this has been successful in establishing a consistent methodology for the assessment of levels of compensation in this area. There is no reason to believe that guidance in the context of TRVs provided by CHCs/CMCs would not be at least as effective.

2.7 Even if the CMA does not implement the Adjusted Remedy (which esure would strongly oppose for the reasons set out in Section 4), esure considers that judicial guidance should be implemented as a <u>minimum</u> in order to address the AEC identified by the CMA.

3. The Adjusted Remedy is both workable and effective in addressing the AEC

3.1 While judicial guidance would, in esure's view, strengthen the Adjusted Remedy, even in the form proposed by the CMA in its Consultation Paper, the Adjusted Remedy would remain a targeted and effective remedy aimed at addressing the key cause of the overcosting of TRVs provided by CHCs and CMCs.

Implementation of the Adjusted Remedy

3.2 As suggested by the CMA in relation to the previous version of Remedy 1C, esure considers that the rate cap can be split between: (i) the administrative costs of arranging a TRV; and (ii) the daily hire rate for the specific vehicle category.

3.3 The GTA currently provides for an admin fee of £37 + VAT, which esure considers to be the most appropriate level at which to fix the arrangement costs element of the rate cap, for the reasons identified by the CMA in the PDR (at paragraph 2.68(ii)).

3.4 In relation to the daily hire rate, esure agrees with the ABI that the Adjusted Remedy cap would be most effective if benchmarked against average direct hire daily rates linked to the relevant vehicle category, since the CMA has not identified overcosting in respect of the provision of direct hire.

3.5 The rate cap should be indexed to a publicly available index and should be subject to periodic review by a CMA panel. esure proposes that such reviews occur one year after implementation, then every two years subsequently.

3.6 In addition to a cap on the rate charged for the TRV hire, it is important that the CHCs/CMCs are not able to circumvent such a cap by increasing the costs of the provision of additional services and products (e.g. sat-navs or child booster seats). The Adjusted Remedy must, therefore, also provide for a capped menu price for the main TRV add-ons. These rate caps should also be subject to the CMA panel's periodic reviews.

3.7 Finally, esure reiterates the submission made in its response to the PDR (at paragraphs 2.4 and 2.5), and by the ABI in its most recent response, that a rate cap would greatly benefit from a mandated portal to ensure the efficient settlement of claims.

Clear legal basis for the Adjusted Remedy

3.8 esure notes that the CMA's powers, as set out in Schedule 8 of the Enterprise Act 2002 (in particular paragraphs 7 and 8), allow it to impose an order regulating the amounts charged by a CHC or CMC to a claimant, as proposed in the Consultation Paper.

3.9 Furthermore, the Adjusted Remedy is proportionate to the detriment identified by the CMA within the terms of section 134(6) of the Enterprise Act 2002 and the CMA's Guidelines on Market Investigations, since it:

(i) is effective in achieving its legitimate aim (being the prevention of overcosting of credit hire vehicles);

(ii) is no more onerous than needed, since it targets the precise cause of the AEC and does not impose structural changes on the market or to the legal system;

(iii) there are no other, less onerous, measures available to the CMA to remedy the AEC, as evidenced by the significant analysis of potential remedies conducted by both the CMA and market participants; and

(iv) esure cannot identify any unintended consequences resulting from the Adjusted Remedy that are disproportionate to its aim of preventing overcosting. In particular, a rate linked to the costs of direct hire (see paragraph 3.4 above) should not unfairly disadvantage CHCs/CMCs.

Scope of implementation

3.10 esure considers that, in order to prevent circumvention of the Adjusted Remedy, it is necessary that the cap extend to partially at-fault drivers. It is also necessary for the CMA to consider carefully the ability for CHCs and CMCs to circumvent the rate cap. In particular, esure considers that there is some risk that the phrase 'pursuant to a credit agreement' may be too narrow to encompass all potential methods of TRV provision by CHCs/CMCs and other TRV providers.

No potential for distortions in the market

3.11 The CMA identifies two potential areas of distortion arising from the Adjusted Remedy (at paragraphs 21(b) and (d)); however, esure does not consider that there is any real risk of distortion in either case.

3.12 While it would be possible for a non-fault driver to seek a TRV from a retail outlet, esure agrees with the CMA's conclusion (at paragraph 19) that this situation is unlikely to arise often in practice. Moreover, this would require the non-fault driver to incur the initial expense and, therefore, the risk of failing to recover the full value from the at-fault insurer. Therefore, esure would expect most drivers to prefer to conduct the post-accident process through a single contact (e.g. their insurer or a CMC/CHC).

3.13 To the extent that the Adjusted Remedy was to extend to insurer provided TRVs, plainly this would not result in any distortion between CHC/CMC provided TRVs and insurer provided TRVs. However, even if the CMA were to implement the Adjusted Remedy as proposed (i.e. only to CHCs/CMCs), esure does not consider that this would result in a distortion as the remedy would address the AEC identified by the CMA, which relates only to overcosting arising from CHC/CMC provided TRVs. Further, esure's proposal that the CMA provide guidance to the courts would mitigate the risk of any significant differences emerging between the costs of CHC/CMC provided TRVs and those provided by insurers (as identified at paragraph 21(e) of the Consultation Paper).

4. A decision not to impose a remedy would represent a failure by the CMA

4.1 esure does not consider that either of the CMA's proposals at paragraph 23 of the Consultation Paper is likely to have a significant effect on the AEC, since CHCs and CMCs do not have an incentive to reduce, voluntarily, the rates that they charge for TRVs, either on an industry-wide basis or with specific insurers.

4.2 Furthermore, the adoption of a large number of bilateral agreements, each of which are likely to be on slightly different terms, is likely to increase frictional costs as insurers (and, where relevant, CMCs/CHCs) attempt to adjust their claims handling processes to meet the terms of each agreement.

4.3 Therefore, if the CMA was to decide not to implement a remedy in relation to Theory of Harm 1, esure endorses the ABI's assessment that this would lead to significant additional detriment on the market. Furthermore, if the CMA does not implement an enforceable remedy for Theory of Harm 1, the costs of implementing the CMA's other remedies are likely to far exceed any level of detriment identified resolved the CMA.

4.4 Ultimately, it is vital that, after two years of detailed consideration (at great expense to insurers and other industry participants) the CMA addresses the AEC in order to ensure competition functions effectively in the private motor insurance market, benefiting consumers in the form of lower premia.

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