MCCAA
MALTA COMPETITION AND
CONSUMER AFFAIRS AUTHORITY

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DECISION OF THE OFFICE FOR COMPETITION

18.09.17

relating to a proceeding under article 15(1) of the Competition Act

(Case COMP-MCCAA 4/2017)

Redacted information in this Decision is denoted by [.....].

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LEGAL BASIS OF THIS DOCUMENT

The Director General of the Office for Competition is issuing this Decision on the basis of Article 15(1) of the Competition Act.

SUMMARY

On the basis of the preliminary results of the investigation, the Director General of the Office for Competition considers that the behaviour of Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd amounts to a *prima facie* infringement of articles 5(1) and 5(1)(d) of the Competition Act. The Director General in view of the urgency due to the risk of serious and irreparable damage to competition is hereby imposing interim measures on Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd in the framework of an ongoing investigation into a possible infringement of the competition rules. The measures aim at protecting the chances of non-QVR garages to remain in the market.

These interim measures do not prejudice the outcome of the proceedings on the merits in the main case.

THE OFFICE FOR COMPETITION,

Having regard to the Competition Act, Chapter 379 of the Laws of Malta (hereinafter "the Competition Act");

Having considered the replies of Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd (hereinafter "the four insurance companies" or "the insurers") dated 27 March 2017 to the Request for Information sent by the Office for Competition on the 10 March 2017;

Having considered the Statement of Objections (hereinafter "the SO") dated 13 June 2017 issued by the Office for Competition against the four insurance companies;

Having given the insurers the opportunity to make their views known on the objections raised by the Office for Competition pursuant to article 12A(6) of the Competition Act;

Having given access to the file to the insurers, pursuant to article 12A(5) of the Competition Act;

Having given the Malta Chamber of SMEs (hereinafter "the GRTU"), as complainant, the opportunity to make its views known on the objections raised by the Office for Competition pursuant to article 12A(2)(a) of the Competition Act;

Having considered the written submissions to the SO dated 27 June 2017 presented by the four insurance companies;

Having considered the written submissions to the SO dated 7 July 2017 presented by the GRTU;

Having considered the oral submissions of the four insurance companies presented during the oral hearing of 4th July 2017;

Having considered the oral submissions of the GRTU presented during the oral hearing of the 10th July 2017;

Having considered the response of the insurers dated 20 July 2017 to the observations of the GRTU on the SO;

Having considered the response of the GRTU dated 20 July 2017 to the observations of the insurers on the SO;

Whereas:

1. Introduction

1. On the basis of the preliminary results of the investigation, the Director General of the Office for Competition (hereinafter "the Office") considers that the behaviour of Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd amounts to a *prima facie* infringement of articles 5(1) and 5(1)(d) of the Competition Act. In view of the urgency due to the risk of serious and irreparable damage to competition, the Director General is hereby

imposing interim measures on Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd in the framework of an ongoing investigation into a possible infringement of the competition rules. The measures aim at protecting the chances of non-QVR garages to remain in the market.

2. These interim measures do not prejudice the outcome of the proceedings on the merits in the main case.

3. The Decision is addressed to the following undertakings:

Atlas Insurance PCC Limited (C5601) with registered Office at: 48-50 Ta Xbiex Seafront Ta' Xbiex

GasanMamo Insurance Limited (C3143) with registered Office at: Head Office Msida Road Gzira

MAPFRE Middlesea plc (C5553) with registered Office at: Middle Sea House, Floriana

Elmo Insurance Ltd (C3500) with registered Office at: 'Elmo', Abate Rigord Street, Ta Xbiex

4. The four insurance companies provide for insurance services relating in particular to travel, home, motor and health.

2. Background to the Investigation

5. In mid-February 2017, the Office started to be contacted by motor vehicle repairers, who claimed that they were losing work because of an initiative known as the Quality Vehicle Repair Scheme (hereinafter "QVR"). The Office started researching on this initiative and found articles wherein it was stated that around 70 vehicle repairers obtained the quality vehicle repair certification[1]. Moreover, some other articles stated that as "*[F]rom January 2017 the said insurers will only use QVR certified repairers to undertake Insurance-funded accident repairs*"[2] and that "*As of January 2017, the above-mentioned four insurers will only authorise repairs through QVR-approved repairers and will guide you as a claimant on the appropriate repairer to opt for, based on the severity/nature of the damage*"[3]. Another article published on the 8th February 2017 held in particular that: "*GasanMamo is proud to be one of the insurers behind the QVR initiative which was formally launched today. QVR is aimed at raising the standards of vehicle repairs in order to ensure that repairs are carried out efficiently, according to the standards and methods laid down by the vehicle's manufacturer and without compromising the vehicle's safety features*".[4]

[1] Available at: https://www.gasanmamo.com/news/qvr/.
[2] Ibid.
[3] Available at: http://www.islandins.com/IIB/index.asp?WebMenu=IIB&WebPageID=85&MenuLanguage=ENG.
[4] Available at: https://www.gasanmamo.com/news/qvr-quality-vehicle-repair/.

6. The Office sent a letter to the four insurance companies on the 21st February 2017 requesting them to individually attend a meeting so that the Office would be able to discuss the matter and establish whether there were grounds for investigation.

7. On the 22nd February 2017 the Malta Competition and Consumer Affairs Authority (hereinafter "MCCAA") received information[5] from a panel beater arguing against those insurance companies promoting the QVR scheme. This repairer explained that over the years, he had established a strong clientele who trusted his work and regularly resorted to his garage for vehicle repairs. On one particular day, a client informed him via a phone call that he could no longer resort to the repairer because his insurance company, Atlas, informed the client that if he chose that garage, he should first pay the repair costs himself. The client was not in a position to fork out the money himself. The repairer asked for reasons why his regular clients were required to refrain from resorting to his services just because they are insured with a certain insurance company. He also explains about another phone call received from another client who informed him that upon requesting MAPFRE to open a claim on her behalf, the insurance company informed her that the garage of the repairer could no longer work for the insurance company because he is not listed in their book.

8. The Office received an email[6] from a representative of the Malta Insurance Association (hereinafter "MIA") asking in particular whether the Office could convene one joint meeting with all the insurance companies. The Office received the following identical letters and, or emails from the four insurance companies[7] where it was held in particular that, "*We wish to inform you that we are promoting the QVR arrangement together with the Malta Insurance Association and three other insurers in order to improve the knowledge, skills and equipment of repairs and establish appropriate standards for motor repairs. Since, as mentioned this is a joint initiative, we would suggest that one meeting for all interested parties should be held. We are aware that the other insurers, as well the Association would agree to such approach*".

9. The Office did not accede to such request and meetings were held with the four insurance companies individually where representatives of the MIA were always present and the meetings were convened on the 27th February 2017 and on the 28th February 2017.

10. The Office also convened a meeting with the Collision Repairers Association and with an insurance company not forming part of the QVR scheme.

11. Around 90 garages had commenced court proceedings[8] against the insurers promoting the QVR, arguing against the introduction of the scheme by filing a request for a warrant of prohibitory injunction. The warrant of prohibitory injunction was temporarily upheld by the First Hall of the Civil Court. However, the

[5] Email dated 22 February 2017 received from panel beater.
[6] Email dated 22 February 2017.
[7] Letters and emails from Elmo, Gasan, Atlas and MAPFRE dated 22 February 2017.
[8] *Mandat ta' Inibizzjoni numru*: 430/17MH.

Court[9] later revoked the precautionary warrant, in particular because according to the Court there was no *prima facie* right to be safeguarded.

12. On 28 February 2017, an online article[10] was published titled "Panel beaters frustrated at QVR scheme which is causing them loss of work." It stated in particular:

An issue between four major insurance companies and panel-beaters who are not included in the companies' scheme for car repairs has led to frustration among panel-beaters who have put their case to the Consumer and Competition Authority. Four major insurance companies have come up with a scheme between them for clients making claims for repairs to vehicles to have the vehicles repaired by panel-beaters and sprayers who are certified by them as part of the Quality Vehicles Repairs scheme, known as QVR.

Panel-beaters Jonathan Attard and Manuel Zammit have complained with TVM that because of what they call an imposition which limits the choice of clients, many panel-beaters like them are losing out on work.

Jonathan Attard said that "clients are being told that this garage is not approved by QVR and you have to go to another garage, and if a client not insured with them is involved in an accident and they accept the blame although he is not their client, they have to comply. I had to turn away seven cars needing repairs this week, and I don't know what happened to them. The client who turns up and is not served has to go elsewhere.

Manwel Zammit added: "We have problems. We have been badly hit. I lost ten clients in a week.

They explained that out of some 400 garages whose standards are approved by the Consumer and Competition Authority, the MCCAA, only 92 form part of the QVR scheme set up between insurance companies Atlas, Elmo, Gasan Mamo and Mapfre Middle Sea. Francis Valletta for the insurance companies came out in defence of the QVR scheme. Valletta said that "the difference is that the insurance companies in the case of a QVR repairer are paying the panel-beater directly, as when a vehicle is repaired he sends the bill to us for settlement. When the panel-beater is not part of the QVR, the client has to make his own arrangements with the panel-beater and then brings the bill to us for settlement."

13. On the 10th March 2017, the Office sent a letter informing the four insurance companies that the Office has in fact opened an investigation and in this regard they were requested to duly complete a Request for Information (hereinafter "the RFI") as well as to state why should the Office desist from issuing interim measures against the four insurance companies.

[9] Judgement in the names *Simon Camilleri et vs Mapfre Middlesea et*, delivered by the First Hall of the Civil Court on the 18th April 2017.

[10] Available at: http://www.tvm.com.mt/en/news/panel-beaters-frustrated-at-qvr-scheme-which-is-causing-them-loss-of-work/.

14. On the 12th March 2017, an article was published on the Sunday Times of Malta written by Mr Francis Valletta, General Manager at the Motor Insurance Division of Gasan titled, "Safe and Efficient Car Repairs".

15. On the 15th March 2017, the Office received a letter from the four insurance companies whereby they objected to the letter of the Office since they alleged that the Office had breached their rights of defence and the principles of natural justice. In particular, they claimed that the Office should have issued an SO in terms of the law and the Office did not sufficiently indicate and explain clearly how the scheme falls under article 15 of the Act.

16. The Office replied to this letter on the 17th March 2017 whereby it stated that it is normal procedure for it to start off a case by gathering the necessary information to determine whether there are sufficient reasons which justify the opening of an investigation. The Office also explained that in this underlying case, it had enough reasons to form the belief that there could exist a *prima facie* finding of an infringement of competition rules as the QVR scheme could pose a risk of serious and irreparable damage to competition. The Office emphasised that it intentionally used the word "could" because at that stage it only had an indication. Amongst other arguments, the Office clarified that should it provisionally conclude that there is a *prima facie* finding of an infringement and a risk of serious and irreparable damage to competition, it will issue the necessary SO. In that case, the parties would have a clear picture of what are the objections raised against them and they will also be allowed reasonable time to prepare their defence and to rebut the said objections found in the SO. This is the regular procedure which the Office follows in its cases.

17. On the 22nd March 2017 the Office convened a meeting with another panel beater.

18. The Office received also a letter dated 23rd March 2017 from the four insurance companies. In their letter, the four insurance companies expressed their concern that the legal basis and purpose of the RFI were not clearly indicated by the Office in its letter dated 17th March 2017.

19. In their letter they also claimed that even though the Office had informed them that a formal investigation was launched, the Office in its letter dated 10th March 2017 had requested the insurance companies to give reasons why interim measures should not be issued against them, without giving reasons why it was considering interim measures. In view of this, the parties argued that they cannot be expected to reply to the Office with any coherency and give reasons as to why interim measures should not be issued, without some basic information as to how their conduct can be said to infringe any of the competition rules.

20. The parties clearly state that the rights of defence must be ensured not just during the administrative procedure which leads to a decision but also during the preliminary inquiry procedures. Therefore the insurance companies stated that the Office must state the subject matter and purpose of the investigation even during the preliminary procedure. They therefore expected the Office to give at least a generic indication on how does the QVR Scheme allegedly infringe articles 5 and/or 9 of the Competition Act and/or Articles 101 and/or 102 of the Treaty on the Functioning of the European Union (hereinafter "the TFEU").

21. On the 24th March 2017, the Office replied to the letter stating that as was explained in its letter dated 17th March, at that stage of the investigation the Office had fulfilled its obligations in accordance with the Competition Act and in line with the judgments of the General Court and the Court of Justice of the European Union (hereinafter "CJEU") when it clearly indicated the legal basis and the purpose of the RFI. The Office concluded by stating that in its opinion the contents of the letter and the RFI dated 10th March 2017 provided the undertakings concerned with sufficient information which preserves the effectiveness of their defence at this stage of the investigation.

22. On the 27th March 2017 the legal representatives of the four insurance companies replied to the letter once again, this time claiming that there was no *prima facie* case and no urgency in this underlying case. The following was stated in their letter:

I. A prima facie case

Although there need only be a prima facie infringement of the competition rules in order for the issue of interim measures to be possible, in this case, there is no prima facie infringement. In fact, the Office, in the letters of 10th March, 17th and 24th March, has failed to specify how the Quality Vehicle Repair ("QVR") scheme operated by our clients could constitute an anti-competitive practice, notwithstanding that it was asked to do so in our letters of 15th March and 22nd March.

Indeed, similar schemes are operated in different European Union Member States, such as in the United Kingdom (see DOC A to DOC D), where they are considered to be highly beneficial to the consumer.

II. Urgency

No indication has been given as to why there is a case for urgency in this case. Our clients fail to see how this case calls for immediate action on the part of the Office is required in order to avoid 'serious and irreparable damage to competition'.

III. Serious and irreparable damage to competition

Neither has any indication been given as to what serious and irreparable damage to competition could arise from the operation of the QVR scheme. In fact, there cannot be said to be any damage to competition because of the operation of the QVR scheme.

First of all, none of our clients are prohibiting repairs at repairers who are not QVR certified.

Secondly, many repairers have applied to join the scheme and currently 92 garages are certified under the QVR scheme. Another 36 garages are due an inspection in order to obtain certification, and another 121 garages have indicated their interest to join the QVR scheme.

Moreover, the QVR scheme does not discriminate between repairers, and any repairer wishing to join the scheme may apply. The criteria for certification are also non-discriminatory, objective and transparent. Furthermore, the basic criteria for certification under the scheme are essential criteria which may be easily achieved

by any serious repairer. The QVR scheme in fact envisages a star rating system which would serve to indicate whether a repairer meets only basic criteria, or whether he meets additional requirements.

Finally, the fee for inspection, which is payable upon application, is heavily subsidized by our clients according to the size of the repairer, in order to ensure that repairers are not discouraged from applying to join the QVR scheme due to prohibitive costs. This also ensures that the largest possible number of repairers are certified.

As a result, the QVR scheme is not creating a closed-shop of repairers. Indeed any repairer can join the QVR scheme as long as they meet objective standards which certify that they are competent and beneficial for the market. The aim of the scheme is to ensure that customers are aware and informed which repairers are duly qualified in order to do the required work on their vehicles.

In view of the above, there cannot be said to be serious and irreparable damage to competition through the operation of the QVR scheme.

23. On the 27th March 2017, the Office received also the replies of the insurers to the RFI issued by the Office. In their replies, the insurers gave an extensive background to the QVR scheme by highlighting its history and launch. It was held that:

The Quality Vehicle Repairs ("QVR") certification was introduced in the Maltese Islands in 2016. Its establishment is one of the stated objectives of an initiative undertaken by the Addressees through their collaboration known as 'Motor Insurance Repair Efficiency' or "MIRE 2", which is in itself a continuation of the same MIRE initiative introduced two decades earlier. Amongst other things, the MIRE 1 initiative led to the development of the MCCAA standard SM 1400:2012 entitled "Motor Vehicle Repairs – Repairers management system – Requirements".

MIRE 2 operates within the remit of the Malta Insurance Association ("MIA). Although the MIA represents the interests of indigenous companies and agents to foreign principals, certain projects and/or initiatives which are not backed by the entire sector are hived off and the financing of such projects is ring-fenced to keep these expenses separate from those of other initiatives undertaken by the MIA for the entire market. The MIRE 2 group of four insurance companies (which was originally a group of six insurers out of which two insurers discontinued their participation along the years) finance the administrative expenditure that the MIRE 2 project incurs, which includes the recruitment of a Project Manager and also a share of the expenditure incurred by the MIA. A copy of the MIRE 2 Objectives is included as a separate document marked as Appendix 1[11]*.*

24. With regard to the establishment of the QVR, the insurers held that: "*One of the primary initiatives that MIRE 2 decided to tackle was the raising of repair standards. In April 2014 the participating insurers decided that they would no longer allow repairs to be carried out by repairers that had not obtained MCCAA certification. Consultations were held with both the Collision Repairers Association on with the Standards and Metrology Institute of the MCCAA and a press release*

[11] Replies of the four insurance companies to the RFI, dated 27th March 2017.

involving these three stakeholders was issued notifying the public of this initiative (see Appendix 11)".

25. The four insurance companies stated *interalia* that: *"However the participating insurers were becoming increasingly concerned that the MCCAA certification process was not reaching its objective in ensuring that all repairers were meeting National Standard SM 1400:2012..."* A meeting between the MIA and the MCCAA was held on the 7th July 2014 on the matter but according to the insurers: "*Both parties agreed to look into how this problem could be tackled and resolved but unfortunately no progress was registered following this meeting. The insurers participating in the MIRE 2 project then decided to take their own initiatives to address the issue of maintaining and improving repair standards".*

The MIRE 2 project therefore embarked on the QVR certification initiative by launching a call for tenders from companies (Stage 1 of the Bidding Process) interested in submitting their application by means of a 'Bid Document' - please refer to Appendix 2. The covering note clearly highlights the aims and objectives of the initiative launched – which is one of

> *'…ensuring that damaged vehicle repairs are carried out in a cost-efficient and safe manner in accordance with the manufacturers' specifications'. The objective is to be attained through the regular Inspection of Vehicle Accident Repair Garages and their Grading in strict accordance with Maltese Standard SM 1400:2012 – a copy of this standard can be downloaded from this same site'.*

A non-refundable bid bond of €100 was also requested with every bid submitted. A total of 5 bids were received, 1 company eventually withdrew its bid and the remaining 4 bidding companies were considered for shortlisting purposes. The four bidding companies, listed in alphabetical order here below, were the following:

- *Auto Industry Consultants Ltd (U.K.)*
- *CESVIMAP (Spain)*
- *Fusion Management Support Limited (U.K.)*
- *STEP Enterprises Ltd (Malta)*

Stage 2 of the bidding process was characterized by an evaluation of each of the bidding documents submitted and any supporting documentation provided. A report was compiled for consideration of the MIRE 2 Management Committee. Each of the bidding companies was also asked to deliver a presentation to the said Management Committee and meeting dates were scheduled with each of the bidding companies. Two companies were eventually short-listed:

- *Auto Industry Consultants Ltd (U.K.)*
- *CESVIMAP*

The two shortlisted companies were once again asked to deliver a presentation to the MIRE 2 Management Committee, focusing on the task at hand which is the

eventual inspection of garages and grading. CESVIMAP was eventually chosen as the preferred bidder.

CESVIMAP was chosen for the extensive experience, knowledge and presence that it has in several countries, including a presence in Latin American countries. A copy of CESVIMAP's presentation is included in Appendix 3. CESVIMAP's credentials are solid to the extent that vehicle manufacturers request their help in crash testing new vehicles and provide the necessary feedback and data as to improvements that may be required in the vehicle design. In addition, CESVIMAP use this research when running training workshops, in preparing their own publications or multimedia content (most of which is readily available through You Tube) and also their very own CESVI TV. Furthermore, the studies conducted are of interest to entities specialized in accident reconstruction and fire research, insurance companies and as stated, vehicle manufacturers. CESVIMAP has, since 1985, provided its assistance and expertise to a wide array of brands in Spain which include the following:

- *BMW*
- *HONDA*
- *JAGUAR*
- *LAND ROVER*
- *MAZDA*
- *NISSAN*
- *PORSCHE*
- *SEAT*
- *VOLVO*[12]

26. The four insurance companies explained the launch of the QVR as follows:

A series of seminars were conducted with all the relevant stakeholders before garage inspections were carried out. The MIRE Management Team embarked on a rigorous campaign which is ongoing at the time of writing this report. It has also engaged the services of a well-known personality who is well acquainted with motorists and practitioners of the repair industry alike. The seminars which were in the main conducted throughout the month of February 2016 were targeted at the following audiences (list produced in alphabetical order):

- *Brokers, Agents and Intermediaries*

[12] Replies of the four insurance companies to the RFI, dated 27th March 2017.

- *Car Importers*
- *Repairers*
- *Staff working with Insurance Companies*

Further detail about the stated 'Aims' of the QVR scheme were also explained in a series of seminars which were conducted throughout 2016. These are:

- *To promote awareness of the need for the safe and efficient repair of vehicles;*
- *To help ensure that vehicles are only repaired by those who are competent and equipped to repair them safely and efficiently;*
- *To improve the level service provided to vehicle owners who need quality repairs and service following an accident to their vehicles;*
- *To put into place a fair and transparent grading system of repairers enabling vehicle owners to make better choices;*
- *To help, advise and develop repairers to reach higher standards for a suitable business;*
- *MIRE/QVR insurers are positioning themselves for the future.*

Although the MIRE Group sent specific invitations to those repairers who contribute to around 80% of the volume of work handled by Insurance Companies, yet a full page advert was also featured on the second page of the most prominent paper of the Maltese Islands. (A copy of this advert, as featured, is included with this document in Appendix 5. The interest generated by spreading the word around has meant that many other repairers expressed an interest to attend the sessions which were conducted on a daily basis and over the period of one week"[13].

27. The four insurers explained that a representative of the MCCAA, Standards and Metrology Institute, attended one of these sessions and "*was able to sample for himself the manner how such seminars were conducted, the content delivered throughout the presentation and the discussions that took place. Each one of these seminars was filmed and copies of any one of the sessions, which are in the MIA's possession, may be viewed upon request. Although the session which took place on the 22nd February 2016 was attended by Car Importers, a representative from the Association of Car Importers (ACIM), the MCAST and the MCCAA (Standards and Metrology Institute) were invited to attend too. Those car importers who run a body repair shop are by now part of the Scheme.*

Throughout these seminars, attendees had the opportunity of gaining as much knowledge and information about the Quality Vehicle Repair Scheme itself, participation in this scheme, the structure of fees that apply and any other relevant details. Although a fee is charged for each garage inspection it is to be noted that these fees are heavily subsidized by the four insurance companies backing the

[13] Replies to the RFI of the four insurance companies, dated 27 March 2017.

MIRE/QVR initiative. A total of 163 repairers registered an interest in attending and / or were invited to these sessions, of which 113 repairers or their representatives attended these sessions and eventually 93 repairers were inspected throughout 2016 as follows:

- *21 repairers in April 2016*
- *23 repairers in May 2016*
- *24 repairers in June 2016*
- *25 repairers in November 2016*

Most of the repairers who did not apply to join the QVR scheme throughout 2016, eventually submitted their application or else intimated their willingness to join the Scheme in the first months of 2017. A few of them have had their garages inspected at the first round of inspections, which were carried out throughout the week of the 20th March 2017.

Apart from the informative seminars, a QVR website with Frequently Asked Questions (FAQs) in both English and Maltese was also set up. This website is maintained to this day with the list of QVR certified repairers and their star ratings.[14]"

28. In their replies to the RFI, the insurers stated that: *This document contains replies to questions made in the Request for Information issued by the Director General (Competition) on 10 March 2017 to four undertakings ("the RFI"), namely Mapfre Middlesea plc, GasanMamo Insurance Ltd, Atlas Insurance PCC Ltd and Elmo Insurance Ltd (hereinafter referred to as "the Addressees" and "Addressee" shall be interpreted accordingly). In view of the fact that questions A, B, G, H, I and J have common answers for all four undertakings, namely because they all relate to the 'Quality Vehicle Repairs' ("QVR") scheme, which is run in the same manner by all the undertakings involved, a single answer is being given on behalf of all four undertakings. The answer to the other questions, the answers to which include highly sensitive commercial information, which is not public, is being given by each undertaking separately*[15].

29. On the 11th April 2017, the Office convened a meeting with the representatives of the GRTU.

30. On the 19th May 2017, GRTU informed the MCCAA that there were: "*multiple reports coming in on a daily basis saying that they are not allowing consumers to fix their car at the repairer of choice unless they are in the QVR scheme and that those not QVR are not being given work by them*. It was also stated that *this issue will probably require an interim measure"*.

31. On the 22nd May 2017, GRTU sent an email to MCCAA stating that they received yet another complaint. GRTU claimed that: "*[I]nsurances have again resorted to not covering repairs of garages that are not QVR, even though they are MCAAA*

[14] Replies to the RFI of the four insurance companies, dated 27 March 2017.

[15] Reference to the replies of the four insurance companies to questions C, D, E, F, G and J has been made throughout this Decision, since they were pertinent to the objections raised by the Office.

approved, and they will only refund following an assessment of the works carried out. This of course exposes the consumer because they are not sure they will have their costs covered even if they are insured because the insurance surveyor might not have agreed with the extent of the repairs carried out as they usually go for the very bare minimum that is necessary, which in the opinion of the repairer might not be sufficient to restore the vehicle to pre-accident condition. This also exposes them to cash flow issues because repairs are mostly expensive and delay in payments."

32. On the 24th May 2017, GRTU sent another email to the MCCAA and stated as follows: "[*W]e received another complaint. This time it is from... He complained that his client Ms..... owning a ..... with claim number ..... was told that she cannot conduct her repairs at the said garage of her choice because it is not QVR approved and that she has to make expenses herself and wait for a reimbursement if she wants to carry on. Ms..... is of course finding this difficult and has complained with the garage*."

33. On the 2nd June 2017, the GRTU sent another email where it stated as follows:

"Customers of non-QVR repairers are all being told to pay upfront and then wait for a reimbursement. We are no longer finding clients that are ready to stay opening a case with the MCCAA as they are very easily being directed to the insurances' preferred QVR garages and just get on with their repairs as usual. The problem is that other MCCAA approved garages are unjustly losing work. The problem was originally only with Gasan and lack of action has led to the problem expanding."

34. In its email, the GRTU also listed those panel beaters who had complained with GRTU regarding the problems they were encountering with the insurance companies concerned.

3. Legal Assessment

35. In terms of article 12A(6) of the Competition Act, the Director General shall base his decision only on objections referred to in the SO. In view of the due observance of the rights of defence, the Office did not address any submissions which the Office considered to be outside the scope of the objections raised in the SO.

3.1 Conditions for ordering interim measures

36. Article 15(1) of the Competition Act, provides that in cases of urgency due to the risk of serious and irreparable damage to competition, the Director General, acting on his own initiative, may by decision, on the basis of a *prima facie* finding of an infringement of articles 5 and, or 9 of the Competition Act and, or Articles 101 and, or 102 of the TFEU order interim measures.

37. It is not necessary for the Office to make a definitive finding that an infringement has occurred. The decisions of the Office imposing interim measures are adopted in the course of its administrative proceedings and are based on provisional findings. Accordingly, the Office cannot be expected to establish the existence of the

infringement of competition law with the same degree of certainty as applicable in a final decision.

38. As held in **Automobiles Peugeot SA and Peugeot SA v Commission**, "*[I]t must be pointed out that in proceedings relating to the legality of a Commission decision imposing provisional measures, the requirement of a finding of a prima facie infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy*[16]."

39. However, before it will grant interim measures in a case such as the present, the Office still requires being satisfied that:

- There is a reasonably *prima facie* case establishing an infringement;
- There is an urgent need for protective measures; and
- There is a likelihood of serious and irreparable damage to competition, unless measures are ordered

40. Any measures which the Office may take must be of a temporary and conservative nature and restricted to what is required in the given situation. The Office must also have regard to the legitimate interests of the undertakings subject to the interim measures. The interim measures may not go beyond the framework of the powers of the Office to order the termination of an infringement in the final decision.

3.2 General Principles

3.2.1 Prima facie case of infringement

41. The main points at issue in this respect are:

(1) Whether an agreement as contemplated under article 5(1) of the Competition Act has been concluded by the undertakings under investigation and;

(2) Whether such an agreement infringes the Competition Act.

42. As stated earlier, European case law has held that the competition authority does not need to make a final determination on these points[17]. The question here is whether legal and factual elements exist which demonstrate a reasonably strong *prima facie* case.

3.2.2 Summary of the relevant law

43. Article 5(1) of the Competition Act applies when undertakings are engaged in agreements or concerted practices which have as their object or effect the

[16] Case T-23/90, *Automobiles Peugeot SA and Peugeot SA v Commission*, para 61.
[17] Ibid.

prevention, restriction or distortion of competition in trade in any goods or services in Malta.

44. Article 5(1) of the Competition Act reads as follows:

Subject to the provisions of this Act, the following is prohibited, that is to say any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta and in particular, but without prejudice to the generality of this subarticle, any agreement, decision or practice which:

(a) directly or indirectly fixes the purchase or selling price or other trading conditions; or

(b) limits or controls production, markets, technical development or investment; or

(c) shares markets or sources of supply; or

(d) imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage; or

(e) makes the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

45. Some brief general comments on the structure of article 5(1) of the Competition Act are required in this case as well as a general explanation on the concept of an agreement which has as its *object or effect the prevention, restriction or distortion of competition within Malta or any part of Malta*. This commentary will then be mirrored in the decision of the Office.

46. In analysing an agreement under article 5(1) of the Competition Act, the first step is normally to determine the 'object' of the agreement[18]. In general, cases which found a restriction of competition by object involved price fixing or market sharing of one form or another. Such agreements 'by their nature' restrict competition and in these cases, the European Commission is not required to examine whether the agreement in fact had also the 'effect' of restricting competition.

47. However if it is not clear that the object of the agreement is to restrict competition, it is necessary to consider the effects of the agreement, taking into account the economic context in which the undertakings operate, the products or services covered by the agreements, the structure of the market concerned and the actual conditions in which it functions. In analysing the effect of the agreement on competition, it is also necessary to consider the competition that would occur in the absence of the agreement in dispute.

48. In order for Article 101 (1) of the TFEU to apply, the equivalent of the Maltese article 5(1) of the Competition Act, it has to be shown that the effect on competition is appreciable. The CJEU held that:

[18] Case 56/65 *Société Technique Minière* [1966] ECR 235, para 249.

... an agreement falls outside the prohibition of Article 81(1) when it has only an insignificant effect on the markets, taking into account the weak position which the parties concerned have on the market of the product in question[19].

49. In determining whether there is an appreciable effect on competition, the primary criterion normally considered is the position and importance of the parties on the market concerned, taking into account the structure of the market in question.

3.3 Application of the above principles to the present case

3.3.1 Undertakings

50. The Competition Act is only concerned with the conduct of undertakings. Article 2 of the Competition Act, defines an undertaking as follows: "*any person whether an individual, body corporate or unincorporated or any other entity, pursuing an economic activity and includes a group of undertakings.*"

51. Therefore any natural or legal person can be considered as an undertaking, provided it is engaged in an economic or commercial activity. There is no doubt that the four insurance companies satisfy this definition, since they are all conducting an economic activity by providing *inter alia* insurance cover to policyholders, including car insurance.

3.3.2 Agreement

52. An agreement within the meaning of article 5(1) of the Competition Act exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action[20]. For there to be an agreement it is sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way[21]. In this case as submitted by the four insurance companies, "...*none of the four insurers is disputing the existence of an agreement. The QVR is of its nature an agreement between undertakings*"[22]. The insurers themselves acknowledge the existence of the QVR and the fact that the four insurers had agreed to set it up and operate it[23]. Therefore there is no doubt regarding the establishment of an agreement among the four insurance companies.

3.3.3 Nature and scope of the conduct

53. The facts described in this Decision demonstrate that the addressees of this decision are involved in a *prima facie* infringement of competition law, through the adoption of a wide anticompetitive horizontal agreement. The principal aspect of

[19] Case 5/69 *Völk v Vervaeke* [1969] ECR 295, para 7.
[20] See the General Court Judgment (subsequently upheld by the CJEU) in Case T–41/96 *Bayer v European Commission* [2000] ECR II–3383, para 69.
[21] Ibid para 67.
[22] Submissions of the four insurance companies dated 27 June 2017, page 3.
[23] Submissions of the four insurance companies dated 27 June 2017, page 2.

the agreement which can be characterised as restriction of competition by object or effect consists in the four insurers deliberately coordinating their conduct to collude in a number of ways by (i) disparaging other undertakings (ii) jointly promoting a star rating mechanism, (iii) applying a different payment system between claimants who choose to repair their vehicle at a QVR garage and those claimants who choose to repair their vehicle at a non-QVR garage, (iv) adopting discriminatory conduct and (v) exchanging completely sensitive and strategic information on their future market conduct. Moreover the Office found that even if there was no other form of collusion, the exchange of information among the four insurers resulted in an anticompetitive conduct, constituting an independent infringement of competition law in itself.

3.4 Disparaging behaviour and star rating mechanism

3.4.1 Arguments of the four insurance companies

54. It has been argued by the four insurance companies that "...any allegedly disparaging remarks made in advertising are not within the remit of the Office. *Should any car repairer feel aggrieved about such remarks, they are free to open a lawsuit based on the provisions on unfair competition (konkorrenza slejali) found in the Maltese Commercial Code. Such conduct is certainly not within the scope of competition law (dritt dwar il-kompetizzjoni).*

Secondly, the exception the Office takes to the QVR list of approved repairers and the star rating is baffling. The MCCAA itself issues a list of repairers that it approves. It also grades repairers. The only way for consumers to know which repairers have passed inspection, and to what extent they can carry out certain repairs is precisely through a list, and a star rating or some other type of grading. If the QVR is unlawful for this reasons, the MCCAA certification scheme is similarly unlawful[24]*."*

55. In their submissions dated 20 July 2017, the four insurance companies argue that:

The Other Matters' have nothing to do with competition law. The distribution of a leaflet marketing the QVR with alleged disparaging comments and the list of QVR certified repairers and star rating are if anything, matters of unfair competition law under either Article 34(1) of the Commercial Code and/or Article 32A and 32B of the Commercial Code. Indeed this is admitted by the GRTU itself (in paragraph 44 of its observations).

THE INSPECTION AND CLASSIFICATION CARRIED OUT UNDER THE QVR

It is baffling how the GRTU believes that customers of repair services (whether policyholders, non-policyholder or the insurers themselves) are confused by a star rating system and an icon. Indeed an icon is the simplest method of indicating the services offered by a trader, and has been used since time immemorial. The icon clearly represents the repairs that a particular repairer can undertake.

[24] Submissions of the four insurance companies dated 27 June 2017, page 6.

The claims, which GRTU states as facts, regarding the star rating are also untrue. Kindly refer to Appendix 4 to the replies to the RFI, in particular pages 9 to 10 of the document, where the star rating is explained in detail. The star rating indicates the services offered by the particular repairer. This is a common practice in a lot of industries, the most ubiquitous of which is in the hotel industry, where hotels cannot acquire a particular star unless they have certain facilities.

Equally untrue is the claim that the QVR is 'more cosmetic' rather than emphasising on quality of repairs and the sense of safety and durability. In any case, quality of repairs go hand in hand with the amount and level of services, and are not separate matter as the GRTU asserts[25]*.*

3.4.2 Arguments of the GRTU

56. In its submissions to the SO, the GRTU argued as follows:

GRTU considers that the Other Measures identified by the Office in section 2.3.3.2.4 are intended to ensure the success of the QVR scheme and therefore the success of the collusive conduct of the Insurers. For the purposes of Article 5(1), these Other Measures are part of the agreement identified above among the Insurers to collectively establish and implement the scheme. Like the Office, GRTU considers that these Other Measures have the effect of indirectly imposing the scheme on the Garages.

The marketing of the QVR scheme is inundated by disparaging comments as the Office notes. Moreover, the marketing is intended to instil fear in the claimants' minds. Indeed, they are intended to target the vulnerability of consumers who in matters relating to safety are more likely to take a cautionary approach without testing the veracity of what is being alleged. This even more so where consumers are not in a position to assess a Garage's skill or tools. The marketing is appealing to claimants to 'trust' the Insurers in choosing the right repairer. As will be explained further on, the information provided to claimants on QVR through the icons and star rating does not enable claimants to make an informed choice on the quality of the repairs. The QVR site merely instigates serious doubt and fear in the consumer's mind, without empowering him to determine independently how to decide on the quality of repairs. This marketing material is in a few words an insult to one's intelligence, a fake pretext to create trust, based on a fundamentally incorrect and unsubstantiated premise, i.e. that one cannot obtain an excellent, highly professional and perfect service outside the QVR scheme. This conduct is also a clear breach of some of the oldest rules in the fair competition rule book, specifically the provisions on the Limits of Competition in the Commercial Code, which prohibits spreading of false news on traders and misleading advertising.

Once the insurer 'wins the trust' of the claimant who has been informed that the Garage of his choice is not recommended, the claimant will be led automatically to believe that the Garage he chose is not good, thus deserting that Garage not only for those particular repairs that he may need at the time but for any repairs that he may ever need thereafter. It should be observed at this point that very often the

[25] Submissions of the four insurance companies dated 20 July 2017, page 16.

first point of contact a claimant makes is with the Insurers and not with the Garages, making it easier for the Insurers to influence claimants. The claimant may never go back to the Garage to verify what the Insurer said. So evidently the Garages, just like claimants, are also in a vulnerable position as they may never be able to defend their reputation and indeed may not even know that they have just lost a customer forever. Indeed, the Insurers are in a superior position to steer the downstream market in the direction of the QVR scheme, i.e. to bolster the scheme they themselves have introduced in the Maltese market, thereby affecting supply and demand in the insured vehicles repair market.

Furthermore, the information being submitted may well mislead consumers. There are two types of classifications in the QVR scheme, the first one is an icon indicating the repair services offered by the repairer and the second a star rating. The icons denote the type and level of damage a Garage is able to handle. The star rating refers to the 'level of services' and not the 'quality of the repairs'. Thus, both the icons and stars do not give details or indications on the quality of repairs and do not provide any mechanical or technical information. Hence, it is submitted that whilst the QVR marketing puts the emphasis on quality of repairs and whilst the Insurers have informed the Office that one of the aims of the QVR scheme is "to put into place a fair and transparent grading system of repairers enabling vehicle owners to make better choices", in reality, the information that is available to consumers to make an independent assessment of which Garage has the best skills and qualifications to repair their cars is glaringly missing. This is because the QVR scheme is in itself more cosmetic in nature, aimed to provide a service that is appealing to the eye (for instance, availability of a waiting room, parking spaces or reception area). QVR's emphasis, unlike SM 1400:2013, is less focused on quality of repairs in the sense of safety and durability. It is submitted, however, that what matters most from the consumer's point of view is that he gets a good and safe job done from someone who is a master in his skill. Hence, from a consumer's perspective it is the quality of repairs that probably matters most, rather than the amount or level of services. Yet, the star rating could well deceive a claimant into believing that a Garage is not up to scratch in so far as repairs are involved.

Furthermore, as the Office points out, the conduct of the Insurers creates confusion in the mind of policyholders in that the requisite standard that the industry has agreed to is reflected in the National Standard SM 1400:2013 that was approved by the national regulator, MCCAA, under Maltese law four years ago (Document A). In line with the general rule that standardisation agreements should cover no more than what is necessary to achieve their aims, SM 1400:2013 ensures a minimum level of requirements to guarantee consumer satisfaction and appropriate repair work. Even so, this standard still imposes onerous obligations on Garages relating inter alia to quality of vehicle repairs, necessary tooling and equipment, competence of the repairers and proper records. Ever since this standard was introduced, the Standards and Metrology Institute (SMI) carries out regular inspections to ensure conformity with SM 1400:2013 and provides certification to this end. GRTU is also of the view that SM1400:2013, in contrast with QVR, does not restrict participation and it is applied in a transparent manner on fair, reasonable and non-discriminatory terms.[26]*"*

[26] Submissions of the GRTU dated 7 July 2017, paras 43 to 47.

57. In their further submissions dated 20 July 2017, the GRTU argues that:

"GRTU agrees with the Insurers' submissions that any disparaging remarks made in adverts would fall squarely within the provisions of unfair competition in the Commercial Code (Chapter 9 of the Laws of Malta) as was already pointed out in the GRTU's earlier submissions. However, the Office's arguments on the SO were not based on 'unfair competition', rather that the Insurers agreed to deploy a specific marketing strategy 'designed to discourage policy holders by casting doubts on the efficacy and safety of non-QVR repairs [....] and [which] deterred consumers from having their cars repaired at a non-QVR repairer, causing immense damage to non-QVR repairers'. The inherent object of this marketing strategy was correctly identified by the Office, that is, the manipulation of competition on the market as expressly prohibited by Article 5(1) CA. The Insurers deliberately attempted to instil fear in the minds of its policyholders by sowing doubt about the safety or otherwise of repairs carried out by non-QVR repairers so as to push them to opt for QVR repairers.

Despite the fact that the conduct in question is sanctioned both by the Competition Act and also by the Commercial Code does not mean that the conduct is 'not within the remit of the Office'. Indeed, the Garages reserve the right to file judicial proceedings on the basis of the Commercial Code and this is something which is not only recognised, but also promoted by the general competition law enforcement framework which allows victims of anti-competitive conduct to file private actions to cater for a very specific enforcement gap (i.e. claims for damages and other related private law based claims).

GRTU also strongly submits that it is completely untrue that the running of the QVR and the SMI certification is equivalent. It is true that SMI issues a list of repairers that it approves, but it is not true that the SMI 'also grades repairers'. SMI does not grade repairers in a subjective manner on the basis of a rating system by allocating stars, but rather it is an open, transparent and objective certification based on a pass or a fail test. This is a fundamental difference between the two. The QVR grading is said to be transparent and objective, but it is neither, as already submitted in GRTU's earlier submissions. GRTU submits that this is completely intentional so as it allows the Insurers, via the QVR, to allocate more stars to specific repairers in which the Insurers might have vested interests and to squeeze out specific repairers as it pleases"[27].

3.4.3 The Findings of the Office

58. The list of infringements provided in Article 5(1) of the Competition Act is not exhaustive. As held by the CJEU: *the types of agreements covered by Article 81(1)(a) to (e) EC* [today Article 101 (1) (a) to (e) of the TFEU] *do not constitute an exhaustive list of prohibited collusion*[28]. Similarly, article 5(1) of the Competition Act which is modelled on article 101 (1) TFEU, provides that:

[27] Submissions of the GRTU dated 20 July 2017, paras 31 to 33.
[28] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.* ECR I – 8637, Para 23.

Subject to the provisions of this Act, the following is prohibited, that is to say any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta and ***in particular***, ***but without prejudice to the generality of this subarticle,*** *any agreement, decision or practice which* (emphasis added).

59. This means that although some infringements are expressly set out in the relevant provisions of the TFEU or the Competition Act such as price fixing, these are merely examples and a number of judgments of the European Courts have already established further infringements which go beyond the classical categories of infringements mentioned in the Competition Act or in the TFEU. It follows that the fact that disparaging behaviour by an undertaking does not fit into one of the classifications of infringements mentioned does not mean that the Competition Act cannot be applied. Competition authorities can still apply competition law principles if the cases so require and find an infringement in novel factual circumstances. Therefore, apart from the examples of classical anticompetitive behaviour mentioned in both Articles 101 and 102 TFEU, there can be other types of abuses and prohibited collusion.

60. Albeit in the context of a dominant position, other competition authorities have already classified disparaging behaviour by undertakings as being another type of an infringement of competition law, thereby a conduct which clearly falls within the remit of a competition authority. Indeed the French and Belgian competition authorities have already classified disparaging behaviour as falling within the ambit of competition law.

61. On the 14th May 2013, the French competition authority fined *Sanofi Aventis* for implementing a practice of driving out competitors by disparaging generic versions of its *Plavix* product to healthcare professionals in order to favour sales of the original product and the own generic version of *Sanofi Aventis.* On the 18th October 2016, the French *Cour de Cassation* upheld the decision of the French Competition Authority which was delivered in May 2013 on *Sanofi-Aventis* and affirmed the judgment of the Paris Court of Appeal.[29]

62. On the 19th December 2013, Schering Plough was fined by the French competition authority *inter alia* for disparaging Arrows' generic product. As held on the website of the French competition authority, Schering Plough carried out a global and structured disparagement campaign:

"From mid-February to May 2006, Schering-Plough organised seminars and telephone meetings and prepared sales pitch templates for its medical and pharmaceutical representatives so that ***they could disseminate an alarmist message*** *to doctors and pharmacists on the risks of prescribing or dispensing the Arrow generic, even though it did not have access to any specific medical study to justify such a position.*

For example, during a training seminar for medical representatives, ***they were asked to "instil certain "doubts"*** *in the minds of pharmacists regarding change" ("2006 pharmacy strategy - Communicate information on the specificities of drug*

[29] Available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2091.

addicts, and the specific nature of care: instil certain "doubts" regarding change....."[30] (Emphasis added).

63. In the Belgian case, *" Algist Bruggeman engaged in denigrating practices to the detriment of Enzyme yeast, the type of yeast distributed by the new entrant Basic Bakery. These practices included the distribution of internal reports which were incomplete and not supported by findings of official institutions. <u>According to the BCA, the purpose of these reports was to create uncertainty among distributors and bakers regarding the quality of Enzyme yeast. This is the first time the BCA considers denigrating practices by a dominant company to be an abuse under Article 102 TFEU</u>*[31]" (emphasis added).

64. Although the above decisions have been issued in the context of an abuse of dominance, it is clear that disparaging practices adopted by undertakings fall within the remit of a competition authority.

65. Disparagement consists of publicly discrediting a competitor or other undertakings or its identified products or services. The Office considers that through disparagement, an undertaking seeks to benefit from an unjustified competitive advantage, by discrediting competitors or discrediting products or services of other undertakings. Disparagement may constitute an abuse of dominance (when disparagement originates from a dominant player) or may constitute a collusion between undertakings (when disparagement originates through an agreement between undertakings).

66. The Office considers that the four insurance companies should have been more careful in their promotional campaign, since the disparagement of non-QVR garages with no proof created doubts over the quality and safety of services provided by non-QVR garages and is clearly contrary to the competition rules. Indeed as highlighted by the French Competition Authority[32] "*Sanofi-Aventis' **<u>discourse created uncertainty about the quality and safety</u>** of generic medicines, **<u>without any evidence for basis</u>** **<u>since nothing shows that Plavix's competing generics are less safe that the originator</u>***" (emphasis added). The same reasoning applies in the present case.

67. The Office delineates the following comments which were written on the leaflets marketing the QVR scheme and which were distributed to claimants. These same comments are also found on the website of the QVR[33]:

"Would you go to a dentist to cure your back pain?"

"Would you send your children to an unlicensed school?"

"Would you allow an unqualified person to install the electrical system in your house?"

[30] Available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2325.
[31] Available at: http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/090517-belgian-competition-authority-anti-competitive-vertical-restraints.
[32] Available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2091.
[33] Available at: https://www.qvr.com.mt/about-qvr-malta/.

"A repairer that is not QVR certified has not been through QVR's rigorous inspection process, so one cannot be sure that they possess the necessary skills, equipment and standards. It is like going to a doctor who cannot prove any qualifications".

"If a vehicle has not been repaired in the correct manner, its safety features may be compromised and its resale value might be negatively affected".

68. The Office considers that the insurers casted doubts on the services offered by non-QVR garages without any supporting evidence and the Office considers such conduct as a clear infringement of the competition rules. The above comments are undoubtedly written in a way to steer policyholders away from the non-QVR garages and to draw them towards the QVR repairers. When one reads these comments, it becomes apparent to him that the non-QVR repairers are not qualified for the job – independently from the fact of whether or not in reality they have the expertise to perform their job. The disparaging comments of the four insurance companies focused on a marketing campaign designed to discourage policy holders by casting doubts on the efficacy and safety of non-QVR repairers with no concrete proof on the statements written. By engaging in such practices, the four insurance companies deterred consumers from having their cars repaired at a non-QVR repairer, causing immense damage to non-QVR repairers.

69. The Office assessed the star rating mechanism promoted and agreed jointly by the insurers. It is to be made clear that the Office is not criticising the star rating mechanism *per se*. The Office is criticising the agreement among the insurers to jointly introduce a star rating mechanism with clear repercussions on non-QVR garages.

70. According to the submissions of the insurance companies, *"[A] star rating, ranging from 1 to 3 stars for panel work and 1 to 3 stars for paintwork will be assigned for each garage inspected by CESVIMAP. The star rating that each facility obtains is also declared in the inspection report provided to the repairer and these star ratings are quoted on the www.qvr.com.mt website too."*

71. According to the QVR website[34] *"[T]he star rating refers to the level of services that a repairer can offer and not the quality of repairs. The maximum rating is 3 stars for panel beating and 3 stars for spray painting. The maximum star rating for a repairer that offers both services is therefore 6 stars."*

72. The Office believes that the star rating publicised by the insurers collectively causes additional damage to those garages which are not QVR approved. The Office considers that the star rating mechanism agreed by the insurers which represent more than 80% of the motor vehicle insurance market gives consumers the impression that any motor vehicle repairers which do not have any star rating may be equivalent to a repairer which is not to be trusted, when in reality this may clearly not be the case.

73. The star rating mechanism promoted jointly by the insurers is an additional measure which facilitated the anticompetitive agreement among the four insurers, by convincing the policyholders to choose a repairer with, for instance, a 5 stars grading rather than a non-QVR repairer who is not rated at all. It might happen that

[34] Available at: https://www.qvr.com.mt/about-qvr-malta/.

a certain non-QVR repairer has much more expertise in repair skills than a newly designated 5 star repairer.

74. As stated by the insurers themselves in the abovementioned submissions, the star rating denotes the services offered by that repairer. Therefore it has nothing to do with the quality of repairs or the skills required for those repairs. A well equipped non-QVR repairer could very well compete with the star rated repairer, but is severely obstructed *a priori* from doing so, just because he did not apply for the QVR scheme.

75. When a policyholder reads such leaflets or looks through the website promoting the QVR, the policyholder would read these disparaging remarks which are not based on any objective criteria and these create doubts on the efficacy and safety of the non QVR garages. The policyholder would also be faced with the star ratings which continue to put the impression on the policyholders that the only efficient repairers on the market are those which are QVR approved and those awarded with stars. The disparaging remarks jointly promoted by the insurers and the star rating mechanism implemented collectively by the four insurance companies gives the false impression that only those QVR approved repairers can provide services of good quality (which is not the case).

76. Indeed as referred to in the Guidance Note issued by the Irish competition authority regarding Preferred Repairer Arrangements in the Irish Insurance Sector, "*The term 'approved repairer' is widely used in the insurance market. It merely denotes that the repairer to whom it refers has an agreement with a particular insurer. It should be noted that the Authority does not consider it to be a term that denotes superiority in quality of service. Many service providers who do not have agreements with insurers (and are therefore not 'approved'), are capable of providing a high standard of service to insurance policyholders*"[35] (emphasis added).

77. As part of its analysis, the Office shall also explain hereunder the status of those repairers who are not QVR approved but are still MCCAA certified repairers.

78. In Malta there is in force a National Standard SM 1400:2013 – the Motor Vehicle Repairs - Repairers Management System - Requirements - which was approved and endorsed by the MCCAA and published on the Government Gazette on the 17th May 2013.

79. As highlighted by the parties themselves in their replies to the RFI, and also in the Maltese Standard SM 1400:2013, such certification was agreed with the Malta Insurance Association. It can also be found on the MCCAA website[36]:

Maltese Standard SM 1400:2013 on "Motor Vehicle Repairs - Repairers Management System- Requirements" outlines the minimum requirements for a repairer wishing to demonstrate a best-practice approach to vehicle repairs and to continuously strive to obtain a high level of repair consistency and customer satisfaction. The scope of such standard is the following: This Maltese standard specifies requirements for a vehicle repair facility to (a) demonstrate its ability to

[35] Irish Competition Authority Guidance Note: Preferred repairer arrangements in the insurance sector - Footnote 3 - Available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/2012-12-19-Preferred-Repairer-Agreements.pdf.

[36] Available at: http://mccaa.org.mt/en/certification-of-motor-vehicle-repair.

consistently provide a service that meets customer and applicable regulatory requirements, and (b) aim to enhance customer satisfaction. MCCAA is implementing an Approved Motor Vehicle Repair Garage Certification Scheme as agreed with Malta Insurance Association. Approved Garages under this Scheme are inspected on a regular basis against the requirements of SM 1400:2013. The SMI Certification Unit offers certification against the Maltese standard SM 1400:2013 with the aim of ensuring the adoption of best practice and a consistent level of repairs to motor vehicles especially following accidental damage.

80. Reference is also made to the MIA Handbook of Best Practice for Third Party Motor Liability Claims[37], where rule 3.1 provides that:

The purpose of this handbook is to ensure that:

claims are handled fairly;

claims are settled promptly; and

third parties and customers are aware of their rights and obligations in respect of claims.

Rule 18. 1 of the MIA Handbook provides also that:

An insurer who accepts liability and elects to pay for the repair of an accidented vehicle, should recommend that the repair is carried out by National Standards Authority certified repairers in accordance with the national standard, as evidenced in the Motor Vehicle Repairs – Repairers' Management System – Requirements (DMS 1400).

81. While the MIA Handbook gives the impression that all policyholders are entitled to repair their vehicles at garages which conform to the standard, (which standard was agreed with the MIA) at the same time the insurance companies together with the MIA are portraying the repairs of non-QVR approved repairers as being of inferior quality even though these repairers are still MCCAA certified, and which scheme was approved together with the MIA.

82. Indeed the Office considers that the four insurance companies through dissemination of such information undermined the reputation of non-QVR garages in its communication to the public, which, according to the Office, negatively affected the structure of the market since policyholders are dissuaded to use the services of the non-QVR panel beaters and spray painters. The Office moreover considers that in view of the fact that the four insurance companies are well known and trusted among policyholders, undeniably amplifies the impact of their statements.

83. Clearly, the communication strategy of the four insurance companies was to the effect of discouraging customers from having their cars repaired at non-QVR workshops. As explained above, it might happen that a certain non-QVR repairer is well equipped and has much more expertise in repair skills than a newly qualified 5 star repairer. The policyholder would resort to the QVR repairer merely due to the imprecise and altered picture presented by the insurer. In other words, the QVR

[37] Available at: http://maltainsurance.org/best-practice-version-5/.

star rating is another tool agreed among the insurers which drives policyholders (the end consumers) towards seeking only the services of QVR repairers. Competition law is not there to protect the weaker party or to protect those undertakings which cannot compete because they are incapable of keeping up with their rivals. However the Office believes that it is equally important that consumers are objectively informed on the best quality of products and services available. The consumer should make an informed decision after considering all the available products and services on that particular market. However, in this case, consumers are not getting the true picture.

84. It is not the task of the four insurance companies to take steps on their own initiative to exclude products or services which they regard, rightly or wrongly, as dangerous or inferior to the services which they are promoting. While an undertaking may legitimately defend the quality of its products or services, it may not however deliver incorrect or unverified information on competing products or services by casting doubts on their quality and safety. Such information has the aim of instilling doubts in the minds of the policy holders causing damage to the reputation of non-QVR garages.

85. The Office considers that policyholders do not have enough information thus making it more difficult to make an informed judgment on the equivalence or substitution of QVR garages with non QVR garages. Therefore within the whole promotional campaign, the disparaging comments together with the star rating mechanism implemented jointly by the four insurers have a clear damaging effect. The Office deems that the four insurance companies presented a number of inaccurate statements regarding the non-QVR garages.

86. In view of the above considerations, the above mentioned comments, together with star rating publicised by the insurers created doubts in the minds of policyholders regarding the quality of repairs of non-QVR approved garages to the detriment of the same non-QVR garages. Such comments discourage customers from having their cars repaired at the non-QVR garage even though this non-QVR garage might have more experience to conduct that particular work, than the QVR approved repairer.

87. Therefore the Office believes that the strategic communication among the four insurance companies by joining forces to disparage non-QVR undertakings and by implementing a star rating mechanism are used to cumulatively misguide and dissuade policyholders from choosing non-QVR repairers. In light of all of the above considerations, the promotional campaign of the four insurance companies confuses consumers, preventing them from making rational choices when deciding whether to choose a QVR or non-QVR repairer.

3.5 Reimbursement of repair costs when opting for a non-QVR repairer

3.5.1 Arguments of the four insurance companies

88. The insurance companies argue that, "...*with regards to the fact that the four insurers chose to directly settle only repairs made by QVR approved repairers, it will be remembered that freedom to contract is one of the basic tenets of law. The*

insurer's relationship is with its policyholder, and no insurer can be forced to contract with a third party qua car repairer. As noted by the First Hall, Civil Court, in the proceedings for the issue of the warrant of prohibitory injunction sought out by some repairers, at the end of the day since by directly settling the bill issued by the repairers the insurers are effectively paying for the repairs, they are entitled to choose the repairers who repair the vehicles insured by them. It has to be pointed out that similar scenarios exist in other Member States; see for instance Policy Terms issued by Hellas Direct, in particular clause 4.3"[38].

3.5.2 Arguments of the GRTU

89. The GRTU argued that: *"[T]he last measure identified in section 2.3,3.2.4.3 of the SO, that is the distinction made by the insurers between claimants who have opted to use the services of non- QVR Garages on the one hand and QVR Garages on the other hand with respect to the reimbursement of costs clearly has a strong compelling effect on garages to join the QVR scheme unless they want to lose their clientele. Moreover, it also clearly has a compelling effect on claimants to opt for a QVR Garage rather than a non-QVR Garage, not because of a voluntary reasoned choice but to avoid having to fork money out of their own pocket in the first place and then having to chase reimbursement at a later stage from the Insurer, with the risk and cumbersomeness that this involves, apart from the reality that claimants may not have ready funds available to finance the costs involved. Hence, whilst the Insurers claim that the QVR scheme is 'a voluntary scheme' open to all MCCAA certified Garages and that they only 'recommend' QVR certified repairers to claimants, in reality, they are, through this measure, indirectly imposing the QVR scheme both on Garages and claimants.*

"The significance of these Other Measures is greater when analysed within the context that the market for motor vehicle repair service is largely dependent on the car insurance cover market, so that any harmful conduct on the part of the insurers immediately produces its negative effect on the Garages. Clearly, the conduct of the insurers has created anti-competitive foreclosure effects of non-QVR repairers in the vehicle repair market in breach of article 5(1)."[39]

90. In their written arguments dated 20 July 2017, GRTU also submitted that:

"GRTU feels that, at this stage, the point on freedom to contract has already been exhausted, in that, competition law imposes restrictions on this general principle of law, and therefore, it cannot be used by the Insurers as a defence, let alone to justify their conduct.

"GRTU also invites the Office to discard and ignore the example cited by the Insurers of Hellas Direct. No evidence has been brought forward to show that Hellas Direct's conduct has survived the scrutiny of the respective national competition authority, but more importantly it is unilateral conduct (as against the collusion of the Insurers in this case) which is used as an example outside the context of the

[38] Submissions of the four insurance companies dated 27 June 2017, page 7.
[39] Submissions of the GRTU dated 7 July 2017, paras 51 and 52.

specific market in which Hellas Direct operates which are not known to us or to the Office."[40]

3.5.3 Findings of the Office

91. The insurance companies distinguish payment procedures between claimants who have chosen to use a QVR certified repairer and those claimants who choose non-QVR repairers.

92. Firstly the Office considers that one cannot compare the example of Hellas Direct (mentioned by the insurers) to the present situation for a number of reasons. The policy terms of Hellas Direct states that if a policyholder chooses a garage partnered with Hellas Direct, the insurance company will either compensate the policyholder or asks the policyholder to authorise direct payment to the garage. [41] On the other hand, in the Maltese scenario, if a policyholder chooses a non-QVR garage for his repairs, the only option available is the compensation to the policyholder. More importantly, the situation of Hellas Direct deals with a vertical agreement which represents the efforts of a single individual insurance company to enter an agreement with a number of garages, whereas in this case we have a situation where a number of insurance companies competing against each other have entered into a horizontal agreement.

93. In the case at issue, the Office did not object to a situation where one insurance company decides to make a distinction in payment regarding those policyholders who use its garages and those who do not (even though in that particular instance, the Office would still have to assess the case to verify whether such conduct constitutes an abuse of dominance or whether it forms part of an anticompetitive vertical agreement). However the present case does not deal with a unilateral conduct. The present case clearly deals with the conduct of four competitors who have agreed together to implement a number of measures and practices, in other words, it is a horizontal agreement among four competitors.

94. Moreover the Office cannot compare the example of Hellas Direct to this case because it does not know the market conditions in which Hellas Direct operates and as explained in this decision, the structure and market conditions are both important to assess whether a particular behaviour can be considered to fall foul of the competition rules.

95. Secondly the Office does not agree with the arguments of the four insurers concerning freedom to contract. There is no doubt that freedom to contract is one of the basic tenets of law and a fundamental principle of law. Indeed competition law does not interfere with the freedom of market participants to enter into business dealings as long as the business transactions do not affect the market. In such respect, competition law imposes limits on the freedom to contract. In this case the Office found that as a result of an anticompetitive agreement among the four insurers, the market structure for the motor vehicle repair services has been clearly affected with a risk of serious and irreparable damage to competition and therefore intervention by the Office is warranted. Although the freedom to

[40] Submissions of the GRTU, paras 45 and 46.
[41] Document submitted by the four insurers – 'Hellas Direct Terms and Conditions' - Point 4.3.

contract is a general principle of law, however it does not stand alone independently of the market. In this case, the distinction in payment being applied by the insurance companies is the result of a collusive agreement affecting free competition and depriving non-QVR garages from competing with other QVR garages and thereby intervention of the Office is warranted. The insurance companies, as competitors operating on the same level of the market, should have never agreed on the commercial conditions to be offered to their policyholders when choosing between non-QVR and QVR repairers. As will be explained later on in the Decision, each economic operator must determine independently the policy which it intends to adopt on the market.

96. The replies of the four insurance companies, the replies of the GRTU, as well as the personal experiences of the motor vehicle repairers, demonstrate that claimants are discouraged from choosing non-QVR approved repairers.

97. On many occasions these insurance companies state that it is the "prerogative" of the client to choose the repairer himself, but at the same time, they are leaving no other option to the client but to choose a QVR approved repairer. As can be seen from the replies to the RFI, the insurance companies inform the policyholders from the outset regarding the difference in the method of reimbursement. It is obvious that the majority of claimants would choose the easy way out and immediately resort to a QVR approved repairer.

98. Moreover, repairers who obtained the trust of their longstanding clients are also losing these same clients just because the latter have no other option, but to "choose" a QVR approved repairer. Therefore instead of the client resorting to his own trusted repairer, the client would need to resort to the QVR approved repairer even though he would have chosen otherwise. This limits the choice of services available for end consumers and indirectly limits their free choice on the market. It is highly unlikely and improbable that a policyholder would opt to pay the repairs from his own pockets (which in most cases repairs were necessitated through no fault on his part), only to then having to start a process to obtain reimbursement from the insurance company, but only after demonstrating sufficient proof that the repairs were made! It is obvious that the policyholder would choose a QVR approved repairer so that the repairs would be paid directly without the policyholder having to fork out his own money for damage which after all was caused by somebody else.

99. Additionally, the replies of the four insurance companies demonstrate that for a claimant to be reimbursed when choosing a non-QVR repairer is by no means a straightforward procedure.

100. In turn, this payment method would ultimately cause the non-QVR approved repairer to lose all of his clients. All those clients whom he would have gained throughout the years and who trust his work completely would now have to resort to other repairers because otherwise the reimbursement process of the insurance company would prove to be a far more tedious process. So the policyholders would rather choose a repairer who is QVR approved and avoid the long and difficult reimbursement procedure as well as the consequential financial burden, instead of resorting to the repairer of their choice.

3.6 Discriminatory behaviour

3.6.1 Arguments of the four insurance companies

101. With regard to the objection raised by the Office relating to discriminatory treatment, the four insurance companies submitted the following:

"*The Office claims that the four insurers are acting in breach of Article 5 (1) (d) of the Competition Act because repairers who have applied to join the QVR are being treated like QVR approved repairers, whilst repairers who have not applied to join the QVR are not. However, it will be noted that in this case there is no equivalence.*

Repairers who have applied to join the QVR are, of their very nature, not in the same position as those who have not applied. Therefore it is difficult to see how the Office believes that these repairers are in the same position. Whilst those who have applied to join the QVR are willing to undergo vigorous testing, in the knowledge that the inspection and the rating system will aid them improve their service, the others are not interested in self-improvement. As already noted, freedom to contract is a general principle of law, and once the insurer's relationship is with its policyholder, it cannot, not even in terms of competition law, be forced to contract with another third party qua a car repairer.

Moreover, it should also be noted that repairers who have applied to join the QVR are not placed on the list of approved repairers. It is only upon passing inspection that they are placed on the aforementioned list."[42]

102. In their submissions dated 20 July 2017, the four insurance companies argue that:

"It has already been noted in the replies to the SO that in this case there can be no equivalence between those repairers who have applied for QVR and those who have not. Whilst those who have applied to join the QVR are willing to undergo vigorous testing, in the knowledge that the inspection and the rating system will aid them improve their service, the others are not interested in self-improvement.

The insurer's relationship is with the policyholder not the repairer. Freedom to contract is a general principle of law, and an insurer cannot, not even in terms of competition law, be forced to contract with another third party qua a car repairer. The contract of insurance is a contract of indemnity and therefore the obligations of the insurer is to indemnify the insured for his loss in terms of the policy, not to directly settle repair bills".

"The GRTU's complaint in this regard (Section B.5) is baffling since, in order to avoid what it views as discrimination against those who have not applied for the QVR, the undertakings concerned would have to stop making direct settlements of repairs made at repairers who have applied for the QVR, thereby exacerbating the situation they are complaining about, that is, the fact that the undertakings concerned have stopped making direct payments to non-QVR certified repairers." [43]

[42] Submissions of the four insurance companies dated 27 June 2017, page 7.
[43] Submissions of the four insurance companies dated 20 July 2017, page 18.

3.6.2 Arguments of the GRTU

103. In this regard, the following were the comments of the GRTU:

> *"GRTU agrees with the Office that the Insurers also acted in breach of Article 5(1)(d) CA in that when it comes to the payment of repair works, they distinguish, on the one hand, between non-QVR Garages and, on the other hand, Garages that have applied for the scheme but are waiting for inspections and have not yet been certified. Claimants resorting to the latter Garages are treated like claimants resorting to QVR certified Garages, so that in their case the Insurers pay directly the Garages and the claimants do not need to pay themselves for the service and later await reimbursement from the Insurers, should the latter consider the work satisfactory, as in the case where claimants resort to non-QVR Garages. Without prejudice to GRTU's position that the QVR scheme does not improve repair quality levels, in this case, the Insurers can certainly not argue that the Garages awaiting inspections and approval are offering a better service than the non-QVR Garages on the basis of the QVR scheme since the they do not have in reality any QVR certification in place just like the non-QVR Garages. Rather they are treated preferentially merely because they have applied for QVR and have therefore been 'captured' by the Insurers in the QVR scheme. Hence, in these circumstances, the claims coming from non-QVR Garages and Garages who are awaiting QVR certification are equivalent transactions from the point of view of the Insurers. As found by the Office, this discriminatory treatment has continued to prejudice seriously the competitive position of non-QVR Garages and indeed cannot fail to affect them as consumers are naturally unwilling to pay themselves at their own risk when they can avoid doing so by going to another garage be it a QVR Garage or a Garage awaiting QVR certification.*
>
> *The above discriminatory conduct was also agreed upon by the Insurers collectively, so that for the purposes of Article 5(1), this conduct is also the result of an unlawful agreement among the Insurers.*
>
> *Evidently, for the reasons outlined in the previous paragraph, the behaviour of the Insurers has effectively imposed "the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage" in violation of Article 5(1)(d)."*[44]

104. In their further submissions dated 20 July 2017 the GRTU argued that,

> *"GRTU must emphasise that it was completely lost for words when it read the Insurers' submissions under this heading. Who are the Insurers to decide who might be interested in vigorous testing or in self-improvement and their reasons why not to do so? The Insurers' submissions paint a true picture of their relationship with the Garages, but also with their own policyholders—there is a complete imbalance in the allocation of bargaining power of the respective parties which is all tipped in the Insurers' favour. The sheer arrogance in the Insurers' submissions exposes the manner in which the Insurers' deal with Garages and it goes to show that the Insurers' feel that they are entitled to impose collectively their self-implemented QVR on third parties, that is, the Garages and the policyholders, by whatever means."*

[44] Submissions of the GRTU dated 7 July 2017, paras 53 to 55.

"GRTU submits that the Insurers have not been forthcoming with the Office and that their submissions are inconsistent. The Insurers cannot, on the one hand, submit that the QVR is focused on quality of repairs and self-improvement which is based on inspections and eventual certification (something which is strongly contested by GRTU), but then all it takes for the Garages to be paid directly by the Insurers is to merely apply for the QVR—without the process of inspection and certification. GRTU again refers to its earlier submissions and again strongly submits that this is simply an exercise to capture a market to the exclusion of potential competitors".[45]

3.6.3 The Findings of the Office

105. In its RFI dated 10 March 2017, the Office received a common reply from the four insurance companies to the following question:

Question G – What is the situation surrounding those repairers whose application for the QVR scheme is still pending? If a person requires repairs from a panel beater whose application is still pending, will he need to pay from his own pocket and then be reimbursed later according to the survey report?

Repairers may form part any one of the following categories:

i. Repairers whose facilities have already been subject to an inspection process and such facilities have been rated and an inspection report issued – these repairers are considered to be QVR-certified repair centers of which there are currently 92. Names of these QVR-certified repairers are also available on the www.qvr.com.mt website;

ii. Repairers who submitted an application form for their facilities to be inspected. The MIRE Management Committee which is formed by representatives of the Addressees (the four mentioned insurers), has agreed that these repairers are to be considered and treated as QVR-certified repairers, with the exception that until their inspection process is complete and the facilities are graded, their names would not form part of the list of the repairers shown on the www.qvr.com.mt website. The MIRE / QVR project Manager will keep the participating insurers updated with the list of repairers scheduled for an inspection visit.

iii. Repairers who may have expressed an interest, through some form of communication which may include e-mail, letter, phone call or even an incomplete application form, who will be placed on a waiting list in date order until such time when the Project Manager contacts them to ascertain whether :

a. The repairer concerned wishes to pursue the application to join the QVR scheme in which case, a complete application form would be required; or

b. The repairer concerned does not wish to pursue the application to join the QVR scheme, in which case, the repairer concerned is informed that the name is

[45] Submissions of the GRTU dated 20 July 2017, paras 47 and 48.

removed from the waiting list and the repairer would have to start the process from scratch if the name is to be inserted in the waiting list once again.

In the case of categories (i) and (ii) above, the process explained in reply to Questions C, D and F applies for QVR-certified repair centers. In the case of category (iii) above, the process outlined in reply to Questions C, D and F for a non-QVR certified repair center applies. It should be pointed out that there is no legal obligation on insurers to pay third parties, such as repairers, directly. As already noted, the contract of insurance is a contract of indemnity, with the corresponding obligation of the insurer to indemnify the insured or third party vehicle owner for his loss in terms of the relevant policy and legal liability respectively.

106. Firstly, one must first examine the wording of article 5 (1) (d) of the Competition Act. It states that:

Subject to the provisions of this Act, the following is prohibited, that is to say any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta and in particular, but without prejudice to the generality of this subarticle, any agreement, decision or practice which:

*(d**) imposes the application of dissimilar conditions to equivalent transactions with other parties outside such agreement**, thereby placing them at a competitive disadvantage**;* (Emphasis added)

3.6.3.1 Equivalent transactions

107. It should be pointed out that the insurers are disputing the "*equivalence*" of the transaction and not whether there are dissimilar conditions imposed. In fact, upon an analysis of the written submissions of the insurers, it becomes clear that the four insurers clearly admitted a difference in treatment between those repairers who have applied for the QVR scheme and have not been inspected under the QVR scheme and those repairers who have not applied for the QVR scheme and therefore have not been inspected under the QVR scheme.

108. What should be examined is therefore whether the two comparisons made by the Office are in fact "*equivalent transactions*". In this case, the Office is comparing two types of repairers:

- The first, **A,** is a repairer who has applied for the QVR scheme, but is not yet inspected by the QVR personnel, not yet approved by the QVR personnel and certainly not yet rated or awarded any stars by the QVR scheme.

- The second repairer, **B,** did not apply for the QVR scheme and is therefore not inspected by the QVR personnel, not approved by the QVR and not rated or awarded any stars by the QVR scheme.

109. The only difference which one can find in these two instances highlighted above is that A has applied for the QVR scheme and B has not applied for the QVR scheme. Even though A has applied for the QVR scheme, there is no guarantee that A will be

awarded any stars or that he will be approved because he is not yet inspected (the same as B). It naturally follows that A has to be treated in the same way as B. A is being treated differently *a priori* solely because he has applied for the QVR scheme.

110. In view of the above, the Office considers without any doubt that both types of repairers are to be considered as equivalent transactions.

111. This means that if a policyholder resorts to A for repairs, he is assured direct payment for the repairs conducted by A (even though A is not yet inspected and of course, not yet QVR approved). However, if the same repairer chooses B (which like A is not inspected and of course, not QVR approved) as his repairer, the policyholder will have to pay out of his own pockets for the repairs and then he has to demonstrate to the insurer the necessary proof that the repairs were done according to the survey, in a sufficient manner and only upon the required vigorous verifications will he finally be reimbursed. In other words, direct payment is attributed only to those repairers who are QVR approved and those repairers who have applied for the QVR but are not yet QVR approved.

3.6.3.2 Dissimilar conditions

112. Moreover, there is no justification for the reasons given by the four insurers on this discriminatory treatment. The Office fails to see how one can determine whether a repairer is interested in self-improvement solely on the grounds of whether or not the repairer has applied for the QVR scheme. A repairer can continue to learn about newer technologies and improve his techniques and skills even if he does not apply for the QVR. A repairer has various means with which he can further his knowledge and expertise, independently of the QVR scheme.

113. The Office considers that the insurance companies forming part of the agreement are applying dissimilar conditions to equivalent transactions since these insurance companies are not applying the same method of repair payments. The insurance companies in fact are distinguishing between those policyholders who decide to repair their vehicle at an MCCAA certified garage which has applied for the QVR but is still waiting for the QVR inspection and those policyholders who have chosen to repair their vehicle at an MCCAA certified garage which did not apply to be QVR certified.

114. In view of these circumstances, the Office is of the view that the four insurance companies are applying dissimilar conditions to equivalent transactions with trading parties who are in competition with one another.

3.6.3.3 Competitive disadvantage

115. The Office therefore considers that the discriminatory treatment inflicted the "*competitive disadvantage"* contemplated in article 5 (1) (d) of the Act. The Office considers that all repairers, including the panel beaters and spray painters, compete intensely with each other in order for them to win customers. There is

nothing anticompetitive with regard to fierce competition. To the contrary, the Office encourages healthy competition as much as it is possible.

116. However, the non-QVR repairer is competing with other repairers who applied for the scheme but are not yet approved and due to this disparity in treatment he is being unjustly affected by the discriminatory conditions implemented by the four insurance companies. It is for this reason that the non-QVR repairer is put at a competitive disadvantage – losing a number of clients in the meantime and all of these consequences ensue not because of his inferiority or inefficacy but because of a discriminatory and preferential treatment.

117. In view of the above considerations, the Office confirms the provisional finding in its SO and due to the above reasoning, the Office cannot accept the arguments put forward by the four insurers and therefore considers the above discussed disparity in treatment which has been agreed among the insurers as discriminatory and such which infringes Article 5 (1) (d) of the Competition Act.

3.7 Information exchange

3.7.1 Arguments of the insurers

Information exchange as being anti-competitive 'by object'

118. In their submissions dated 27 June 2017 the four insures argue that:

The exchange of information can never be said to be anti-competitive by object in itself. The Office's conclusion in this regard is based on an incorrect reading of the judgement in Case C 8/08 T-Mobile Netherlands BV and Others v Raad van bestuur can de Nederlandse Mededingingsautoriet.

Considering exchange of information to be anti-competitive by object in itself would go against the very idea of perfect competition, which is the ideal scenario for a competitive market. The theory of perfect competition is based upon the assumption that there is perfect freedom of information. In fact, the exchange of information can be highly beneficial to market players, be they competitors or consumers, as well as to the competitive process.

It is true that exchanges of very sensitive information, for instance on price or capacity, may be used to implement or monitor compliance with a cartel. Generally the EU authorities deem the exchange of information unlawful where it is part of a mechanism for monitoring or enforcing compliance with another agreement which is itself unlawful. However in this case there is no exchange of sensitive information, nor is there any exchange of information in support of another unlawful agreement. In fact, the Office does not actually specify what type of information which is being exchanged is problematic. It is obvious that once the four insurers have set up the QVR collectively, they have to exchange information about the set up and management of the QVR. This does not mean that they are engaging in any sort of anti-competitive conduct. If this were the case, all undertakings would be precluded from taking any sort of initiative with other undertakings. The Office relies on the set of replies of the RFI to conclude that

there was exchange of information; however, as noted, answers to questions on the operation of the QVR necessarily had to be the same, because they all related to the same scheme, which is jointly run!

In the T-Mobile case cited by the Office the undertakings concerned were exchanging information on postpaid subscriptions. Those undertakings were therefore fixing the remuneration paid to dealers, and consequently indirectly fixing prices to be paid by end users, contrary to Article 101(1)(a) of the Treaty on the Functioning of the European Union ("TFEU"). It is for this reason, and for this reason alone, that the Court of Justice of the European Union ("CJEU") held that '[a]n exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings'. Indeed this statement is preceded by another statement that '[i]t is not necessary for there to be (...) a direct link between the concerted practice and consumer prices.' The only conclusion that can be drawn from the T-Mobile case is that 'a concerted practice organized by means of an exchange of information designed, directly or indirectly, to fix purchase or selling prices would have an anti-competitive object where it had the potential to have a negative impact on competition. Extending the conclusion in the T-Mobile case to all cases of information exchange would be a gross misapplication of the law[46]*.*

119. In their written submissions dated 20 July 2017, the four insurers argue that: *...[T]he text cited in paragraph 16 of the GRTU's observations on information exchange was lifted from a discussion on concerted practices contained in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. The undertakings concerned invite the Office to read paragraph 61 of the said Guidelines as a whole, and within the context of the section it is placed in which is entitled 'Concerted practice'. The GRTU's citation is therefore misleading. The said Guidelines actually note that exchange of information is restrictive by object only where it relates to prices and quantities. The Commission states that:*

Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome (...) Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities.

In the case at hand, there is most definitely no exchange of information on prices or quantities, and indeed no allegation to that that effect was made, either by the GRTU or by the Office. Therefore, the GRTU's assertion that the undertakings concerned are party to a cartel is completely unfounded.

The discussion in both the SO and even more so in the GRTU's observations focusing on concerted practices and exchange of information is totally spurious: it gives the impression that the undertakings concerned acted surreptitiously or clandestinely,

[46] Submissions of the four insurance companies dated 27 June 2017, pages 4 and 5.

trying to hide some anti-competitive conduct. There can be no question of the QVR being anti-competitive by object[47].

Information exchange as being anti-competitive by effect[48]

It is now well established in European Union ("EU") competition law that in order to determine that the exchange of information has an anti-competitive effect, a full market analysis has to be carried out. The CJEU has noted that "[t]he compatibility of an information exchange system (...) depends on the economic conditions on the relevant markets and the specific characteristics of the system concerned (....) as well as the type of information exchanged (....).

Although conscious of the fact that the Office only has to find a prima facie infringement, this analysis is missing from the SO, with only a superficial assessment of the market being made and the other two elements requirements being ignored.

In particular, it will be noted that in this case, information is shared with the public. Exchange of information would be problematic when it is kept confidential between the participating undertakings. This was highlighted in the UK Agricultural Tractor Registration Exchange case cited by the Office, and then sustained by the CJEU upon appeal.

Moreover the Office has failed to consider the type of information being exchanged. Indeed the Office fails to identify what information allegedly being exchanged it is objecting to. The four insurers only exchange information, if indeed it can be called an 'exchange of information', which relate to the operation of the QVR. In its SO, the Office is not objecting to the QVR itself. The four insurers are not disclosing to each other any sort of price information, capacity, investment plans or output, which is the type of data which is normally objected to. Neither are they disclosing individual data.[49]

3.7.2 Findings of the Office

120. In competition law, information exchange falls into two different categories. Firstly, the information exchange may occur in the context of another agreement, where the exchange is ancillary to the collusive agreement. Secondly, the information exchange may constitute an independent form of horizontal cooperation between competitors which manifests itself in one of the three forms of prohibited conduct pursuant to article 5 and/or Article 101 (1) of TFEU: an agreement between undertakings, a decision by an association of undertakings or a concerted practice. Indeed, this is clearly explained in paragraph 56 of the Horizontal Guidelines[50] which states that:

[47] Submissions of the four insurance companies dated 20 July 2017, pages 9 and 10.
[48] Submissions of the four insurance companies dated 27th June 2017, page 5.
[49] Ibid.
[50] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance, C 11/2.

"Information exchange takes place in different contexts. There are agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself. Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself."

121. The Office does not agree with the submissions of the insurers where they state that: "*in this case there is no exchange of sensitive information, nor is there any exchange of information in support of another unlawful agreement*[51]". As argued in the SO, "*the Office has considered that the four insurers have exchanged information as part of a horizontal agreement and introduced a number of measures to give effect or supplement that agreement".*[52] The Office also concluded "*that the information exchange as part of the horizontal agreement as well as the measures adopted to give effect to the agreement adopted by the four insurance companies is to be regarded as an agreement between undertakings having as its object or effect a restriction or distortion of competition within the meaning of Article 5(1) and 5(1)(d) of the Act"*[53]. (Emphasis added).

122. In this case, the Office found that there is an exchange of sensitive strategic information in support of another unlawful agreement, with the members of the anticompetitive agreement adopting a common and mutually agreed strategy for their exclusive benefit.

123. The Office considers that the four insurance companies: *"communicated and disclosed to each other their future intentions on the market and the conduct which they were about to carry out. They communicated the conditions which they intend to offer to their customers by agreeing that claimants seeking repairs from non QVR panel beaters and spray painters will have to first settle the bill with the repairer and only after the necessary checks by the insurance companies, will they eventually receive reimbursement. Therefore the four insurance companies have agreed to distinguish between non QVR and QVR repairers regarding the payment of repair bills*[54]*.*

124. In this case, the information exchange as clearly evidenced in the SO was considered by the Office to be part of a wider anticompetitive scheme and hence the Office assessed the restrictive object or restrictive effect of the information exchange in the broader context of the overall anticompetitive horizontal agreement.

125. Therefore such information exchange was found to be ancillary to a wider anticompetitive agreement involving also collusion amongst the four insurance companies agreeing amongst them to adopt a discriminatory behaviour vis-a-vis a number of undertakings and to introduce a number of measures which foreclosed competition.

[51] Submissions of the four insurance companies dated 27 June 2017, page 4.
[52] Page 26 of the SO.
[53] Page 41 of the SO.
[54] Page 27 of the SO.

3.7.2.1 The nature of the information exchanged

126. According to the Horizontal Guidelines, "*the exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete*"[55]. Information is strategic if it is related not only to prices (for example: actual prices, discounts, increases, reductions or rebates) but also customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, but also to risks, investments, technologies, R&D programs and their results. It follows naturally that information related to prices and quantities is however the most strategic, followed by information about costs and demand[56].

127. According to the four insurers, the Office did not specify clearly which type of information exchanged is being considered to be problematic. This is clearly not the case. In its SO, the Office evidently objected to the following information exchange: i.e. information on the insurers' future intentions regarding their commercial strategies adopted on the market;

> *"The Office considers* ***that the four insurance companies communicated and disclosed to each other their future intentions on the market and the conduct which they were about to carry out. They communicated the conditions which they intend to offer to their customers by agreeing that claimants seeking repairs from non QVR panel beaters and spray painters will have to first settle the bill with the repairer and only after the necessary checks by the insurance companies, will they eventually receive reimbursement.*** *Therefore the four insurance companies have agreed to distinguish between non QVR and QVR repairers regarding the payment of repair bills. In this way the four insurance companies have reduced and removed the degree of uncertainty between themselves on the market in question, with the result that competition between them has been restricted."*[57]
>
> *"The Office considers that insurance companies have exchanged information which in turn helped them* ***predict their future commercial strategies of each other****. The Office considers that the information relating to the* ***future intentions of a company*** *which affects customers is* ***particularly sensitive*** *and should be exclusively discussed as part of internal matters of each company."*[58]

128. The Office also made it clear in its SO, that: ***"through information exchange, the insurance companies have obtained knowledge on the strategies of each other adopted on the market,*** *also in view of the market structure discussed above and in this way they created a highly distortive effect on competition.* ***The Office considers that the information exchange allowed the undertakings concerned to coordinate their commercial strategies by delineating a unanimously agreed plan and***

[55] Paragraph 86 of the Horizontal Guidelines.
[56] Ibid.
[57] Page 27 of the SO.
[58] Page 28 of the SO.

therefore making it easier to agree on a common line of conduct. *In this way, the four insurance companies have designed a mechanism to facilitate coordination of their commercial strategies with the claimants, which ultimately had the scope of affecting panel beaters and spray painters"*[59]. (Emphasis added).

129. Therefore in view of the above, the Office considers that the four insurance companies exchanged sensitive strategic information in a deliberate coordination of conduct and revealed to each other their future commercial strategies and they used that information to determine their conduct on the market. Each insurance company submitted information regarding its own future intention on its commercial strategy with respect to policyholders and non-QVR repairers with the expectation and understanding that the other insurance companies involved will do the same.

130. The common replies to the RFIs were a further corroboration towards the fact that there is a clear anticompetitive agreement amongst the four insurance companies since the information submitted on their future intentions accurately reflected the way each insurance company will deal with each policyholder and non-QVR repairer. This is reflected in their replies to the RFI where the four insurers argued that the QVR scheme: *"is run in the same manner by all the undertakings involved"* (emphasis added).

131. The Office considers that the information exchanged is so strategic that it is specifically aimed to ensure that none of the insurers outperform each other and to minimise the risks of competition between them. The information which was communicated among the insurers regarding the conditions which they intended to offer to their customers, i.e. the distinction in payment imposed on those claimants who choose a non-QVR garage over a QVR garage, forms part of the common marketing plan adopted by the four insurers and which was communicated to claimants as an incentive for policyholders to use QVR garages and steer them away from using non-QVR garages.

3.7.2.2 Public information exchange vs. private information exchange

132. The insurers argue that: *"... in this case information is shared with the public. Exchange of information would be problematic when it is kept confidential between the participating undertakings*[60]".

133. It is the opinion of the Office that the information exchange to which the Office objected was not made public. In more precise terms, the information was only made public at a much later stage after it was firstly discussed among the insurers to the exclusion of garages and policyholders.

134. Both the evidence[61] as well as the arguments provided by the four insurers did not demonstrate in any way that the repairers were somehow informed regarding the future difference in treatment between those repairers who would opt for the QVR

[59] Page 32 of the SO.
[60] Submissions of the four insurance companies dated 27 June 2017, page 5.
[61] See paras 23 to 27 of this Decision, where reference was made to replies of the insurers to the RFI explaining the launch of the QVR and the contents of the seminars.

and those who would opt not to apply for the QVR. The evidence brought before the Office demonstrates that prior the month of February 2017, the information given to repairers related to the way in which the QVR scheme should have improved the quality of repairs and that repairs are carried out safely and efficiently but did not include the essential information relating to the difference in the payment method between those policyholders who choose a QVR repairer and those who do not.

135. The Office considers that the information relating to the differentiation in the payment system between those policyholders who chose the QVR garages and those who did not remained completely secret. Therefore, repairers as well as policyholders were left in the dark regarding this issue. The information was only made public in February 2017 (during which time the Office started to receive the first protests from repairers) – therefore only from the moment where the insurers started to distinguish between those policyholders resorting to the QVR repairers and those resorting to non-QVR repairers.

136. This information was undeniably strategically useful for the insurers and was neither public nor, shared with the garages and the policy holders before February 2017. The fact that the information is not public is also corroborated from the replies of the same insurers. In fact, the four insurers stated that questions C, D and F have not been made public[62]. Indeed in the replies C, D and F, there is information about this distinction in payment. Therefore, the Office considers that this particular disclosure of information occurred only between competitors, i.e. the insurers, to the exclusion of consumers or customers. Therefore the insurers exchanged strategic information secretly on their future conduct without disclosing this information to all policyholders and repairers in the relevant market leading to serious anticompetitive effects on the relevant market. Therefore, the evidence does not demonstrate that the full extent of the anticompetitive agreement was known to the public or garages[63].

137. This notwithstanding, even in case the third parties (garages or policyholders) knew about this differentiation in treatment, that does not mean that the information exchange would be considered lawful. The findings of the Office would not have been altered even in the instance where the insurers would have discussed the same or similar issues with customers or revealed some of the information to the garages.

138. On the same lines, the General Court in one case held that:

> ***In any event, even if the parties also exchanged information that could have been obtained from other sources, it must be noted that, as the Commission points out (recital 155 of the contested decision), contacts between competitors do not become legitimate because banana prices were widely known in the business***.
>
> ***The exchange of information between competitors does not become legitimate because that information or certain parts of it is publicly known, since each***

[62]See para 28 of this Decision.

[63]See Joined Cases T-259/02 etc. *Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2006] ECR II-5169, para 506 and Commission decision Case COMP/39188 – Bananas (C/2008) 5955 para 307.

***economic operator must determine independently the policy which he intends to adopt on the internal market**. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*[64]*".* (Emphasis added)

139. In view of the above, the Office considers that the fact that the information exchanged might have been publicly known is irrelevant when it comes to assessing the legality of the conduct in question. Even if the communications were not kept secret, the findings of the Office would not have been altered.

140. By exchanging such information, the four insurances agreed to proceed in an identical manner and consequently the four insurers ceased to act independently of each other. Such arrangement attempted to remove the degree of uncertainty on the operation of the market and their incentives to compete against each other were subsequently eliminated.

3.8 Restriction of competition

3.8.1 Arguments of the insurers

141. The four insurance companies argue that: "*...[T]here is no doubt that the QVR has neither the object nor effect of restricting, distorting or preventing competition - not even on a prima facie basis. Proof of this is the fact that the object and effect of the QVR is similar, or indeed identical, to the MCCAA certification scheme operated under Standard 4000:2012. They both have the same object - that of inspecting and classifying motor vehicle repair shops to ensure road safety and quality of repairs. They also have the same effect - that of distinguishing, on an objective non discriminatory basis, vehicle repair shops according to their capabilities. Both schemes set objective industry standards which are open to all, and uniform consumers of repair services (which includes insurers) who is up to standard and who is not.*

Thus, if the QVR is unlawful, the MCCAA certification scheme is equally unlawful. The MCCAA certification scheme like the QVR is not required by law. Indeed there are some repairers which are not MCCAA certified. The Office itself notes that all motor vehicle insurers in Malta require that a repairer be MCCAA certified before vehicles can be repaired at said repairers. If the Office has no objection to this practice of all motor vehicle insurers, it should have less of an objection to the QVR, which is less restrictive. The QVR therefore does not lead to market distortion.

The benefits of the QVR, and how consumer benefits, have already been highlighted in the replies to the RFI. The replies to the RFI also reported how part of the costs

[64] Case T-655/11 *FSL Holdings and others v Commission,* paras 319 and 320.

for carrying out the inspections are absorbed by the four insurers, who indeed make no profit for the scheme, and have set up purely to ensure the quality of repairs"[65].

142. In their submissions dated 20 July 2017, the insurers argue that:

NO RESTRICTION BY EFFECT

(I) THE RELEVANT MARKET

The GRTU raised a number of issues regarding the relevant market which will be addressed in this section.

REPAIR WORK COVERED BY AN INSURANCE POLICY

First of all, the percentage of repair work which the GRTU is alleging constitutes repair work covered by motor vehicle insurance (paragraph 26) is grossly overstated. In fact, the 90% figure is not supported by any data.

Repairers do not just carry out repairs which are covered by an insurance policy. Firstly, not all motor collisions would be covered by an insurance policy. It is only policyholders who are insured on a fully comprehensive basis who can claim irrespective of fault. In the event of third party only policies and third party, fire and theft policies (which collectively represent 60% of the policies issued by all motor vehicle insurance companies in Malta), when the accident occurs through the policyholder's own fault, it is the policyholder who pays out of his own pocket for repairs. The insurance company will not make good for such damages.

Secondly, any policyholders do not make a claim, even when they are entitled to, and even when they are insured on a fully-comprehensive basis. This happens for a number of reasons. Policyholders will consider the excess, loss of no-claims bonus and increase in premium before making a claim. If the sums do not add up, they will not make a claim. Moreover, motor vehicles require routine maintenance which will not be covered by insurance policies, and are therefore paid for by the vehicle owner.

THE MARKET FOR MOTOR VEHICLE REPAIRS – WHETHER COVERED BY AN INSURANCE POLICY OR NOT

For this reason, the QVR cannot affect the market referred to by the GRTU as the market for non-insured motor vehicle repair service. The point raised in paragraph 28 of the GRTU's observations is further elaborated in paragraph 45, where the GRTU argues that claimants would desert their repairers of choice. If indeed a policyholder, after trying a QVR certified repairer, decides to discontinue using the previously utilised non QVR certified repairer, it is precisely because after experiencing the level of service provided by a QVR certified repairer he recognises that the QVR certified repairer is better equipped to repair his vehicle. In other words, it proves that the policyholder did not in fact 'trust' his repairer 'of choice' qua the non-QVR certified repairer.

In fact, it is interesting to note that none of the complaints in the copy of the file given to the undertakings concerned are from policyholders/claimants. The only

[65] Submissions of the four insurance companies dated 27 June 2017, page 2.

complaints are from GRTU, and one complaint from a panel beater. It is also interesting to note that the Office spoke to only one panel beater who has applied for the QVR, and had not yet been certified, whereas there are now 200 QVR certified garages.

Incidentally, the MCCAA certification scheme, back in October 2007, had only 82 certified garages. It has now certified around 400.

Contrary to what is stated in paragraph 31 of the GRTU observations, the undertakings concerned are not players on the market for insured motor vehicle repair services, and therefore have no sort of economic strength on such market, let alone, as the GRTU's comment seems to imply, a dominant position thereon[66]*.*

...

It has already been noted above that repairers do not only obtain work which is covered by an insurance policy therefore there cannot be foreclosure of non QVR certified repairers from the market. Moreover, there are other motor vehicle insurance companies which are not participating in the QVR. Therefore, there is competition between QVR and non-QVR approved garages[67]*.*

3.8.2 Findings of the Office

143. As stated previously, article 5(1) of the Competition Act proscribes agreements, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition. Even if the "object" and "effect" tests are distinct, the substantive criterion of restriction of competition is the same whether an agreement restricts competition by object or effect. Both "object" and "effect" tests seek to identify the same consequence of collusion, in other words, the restriction of competition.

144. In its conclusions in the SO the Office argues that the information exchange as part of the horizontal agreement as well as the measures adopted to give effect to the agreement adopted by the four insurance companies are to be regarded as an agreement between undertakings having as its object or effect, the restriction or distortion of competition within the meaning of article 5(1) and 5(1)(d) of the Competition Act.

3.8.2.1 By object restriction of competition

145. According to settled case law, an infringement by object can be found in more than one way. It is established case law that it can be found when the content or aim of the agreement implies obvious or explicit restrictions to competition. The CJEU[68] has also stated that in order to determine whether an agreement between undertakings reveals a sufficient degree of harm to competition showing an

[66] Submissions of the four insurance companies dated 20 July 2017, pages 11 and 12.
[67] Submissions of the four insurance companies dated 20 July 2017, page 13.
[68] Case C-32/11 Allianz Hungária Biztosító Zrt, v Gazdasági Versenyhivatal , para 36.

anticompetitive objective, one must carefully consider , the "*content of its provisions, its objectives and the economic and legal context of which it forms part"*, as well as the "*nature of the goods or services affected*".

146. Importantly, at no point in the SO has the Office contested or analysed the QVR scheme *per se.* Although the SO relates to the QVR scheme, "*in its SO, the Office is not objecting to the QVR itself*[69]" as it has been clearly evidenced by the four insurance companies. At no point has the Office objected to the certification in itself. In its SO, the Office has objected to the collusion among the four insurance companies, i.e. the fact that the insurance companies aligned their competitive behaviour which resulted in the restriction of competition, by adopting a common and mutually agreed strategy on a number of aspects.

147. With regard to the terms of the agreement, the Office considers that the addressees of this Decision colluded with each other by deliberately coordinating their conduct and entering into a horizontal agreement by (i) disparaging other undertakings (ii) jointly promoting a star rating mechanism, (iii) applying a different payment system between claimants who chose to repair their vehicle at a QVR garage and those claimants who chose to repair their vehicle at non-QVR garages, (iv) applying discriminatory treatment and (v) exchanging completely sensitive and strategic information on their future market conduct.

148. In its SO[70], the Office considered that all the measures put into effect by the insurance companies have to be seen also in the light of the particular facts which surround the case, namely the market structure, in particular, the fact that the parties to the agreement have a high combined market share, they are close competitors and the market has high concentration and is oligopolistic. This is in line with the judgments of the European Courts where in determining the economic and legal context of an agreement in accordance with the case-law cited above[71] , it is necessary to take account of the nature of the services affected, as well as the actual conditions of the functioning and the structure of the market concerned. In fact, the Office undertook an extensive analysis of the competitive structure of the market and assessed the market power of the insurance companies in contrast to that of other insurance companies outside the agreement and to that of the non-QVR garages[72].

149. As highlighted in the foregoing paragraph of this Decision the Office took into account that the agreement in question was entered by four close competitors[73]. In fact, this type of agreement also conflicts patently with the concept inherent in the TFEU competition provisions, according to which each economic operator must determine independently the policy which it intends to adopt on the market and compete freely for any client on the market. By entering into this agreement, the insurers colluded with each other in order to minimise the risks of competition[74], reducing their strategic uncertainty and eliminating the competition process.

[69] Submissions of the four insurance companies dated 27 June 2017, page 5.
[70] Page 38 of the SO.
[71] Case C-32/11 Allianz Hungária Biztosító Zrt, v Gazdasági Versenyhivatal , para 36.
[72] See to this effect para 154 of the Decision.
[73] Page 38 of the SO.
[74] See to that effect, judgment in C-209/07 *Beef Industry Development Society and Barry Brothers*, para 34. See also opinion of advocate general in Case C-172/14, para 76, and C-7/95P, *John Deere v Commission of the European Communities* para 86.

Under article 5(1) of the Competition Act, which mirrors article 101(1) of the TFEU, competitors cannot remove uncertainty and independent decision making from the market.

150. The four competitors drafted a common plan to eliminate competition between them. They did not choose to act independently to arrive at their individual market policy for their clients, but instead they chose to collude and decide on a common market policy to implement and maintain on the market. The insurance companies adopted a common and mutually agreed strategy to their benefit. In general, such an agreement is designed to ensure that none of the insurance companies outperform each other.

151. The objective pursued by the four insurance companies in this agreement was that of steering policyholders away from the non-QVR repairers, preventing competition on the downstream market for motor vehicle repair services by foreclosing and excluding competition between QVR and non-QVR repairers, to the detriment of non-QVR repairers operating in the economic sector concerned.

152. In view of the above, the unlawful agreement involving the above mentioned five practices pursued an objective that was clearly at odds with the proper functioning of normal competition.

153. To support a finding of a restriction by object, the CJEU has only to demonstrate that the agreement under examination has the "***potential to have a negative impact on competition***"[75]. In fact it is settled case-law that, "*in order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages*". In line with such case law as argued by the Office in its SO[76], the purpose of such collusion on the part of the insurers concerned was capable of negatively affecting the market structure in particular, by foreclosing and excluding competition between QVR and non-QVR repairers.

3.8.2.2 By effect restriction of competition

154. An effect analysis entails a factual investigation of both the specific characteristics of the market and the economic consequences of the agreement in question. In its SO, the Office clearly explained the structure and characteristics of the vehicle insurance market and explained how the conduct of the insurers affected the downstream market for motor vehicle repairs. In its SO, the Office defined the relevant market as follows:

The relevant market[77]

[75] See Case C-32/11 Allianz Hungária Biztosító Zrt, v Gazdasági Versenyhivatal, para 38, Case C-8/08, T-Mobile Netherlands B.V. and others v NMa [2009] ECR I-4529, para 31.
[76] Page 38 of the SO.
[77] Pages 29 – 31 of the SO.

In the Commission's practice, a relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the customer by reason of the product's characteristics, their prices and their intended use[78].

The Office identified two markets that could have been affected by the activities of the four insurance companies:

(i) The market for private motor vehicle insurance and;

(ii) The market for motor vehicle repair services (panel beaters and spray painters)

(i) The market for private motor vehicle insurance

The Office is of the view that the market for private motor vehicle insurance within Malta constitutes a relevant market for the purposes of competition analysis. Motor Insurance is one of the insurance coverage, which is compulsory in Malta. There is a legal requirement for the driver of a motor vehicle in Malta to have as a minimum the third-party motor vehicle insurance. Separate markets in the private motor vehicle insurance exist such as third party only and fully comprehensive insurance.

From a demand side perspective a person can decide to purchase third party insurance from other insurance companies not participating in the QVR scheme. Even though other insurance companies might be feasible alternatives for the consumer, the policy holder will still encounter a barrier.

The following example sheds light on the above reasoning: If policyholder "A" is involved in a collision where policyholder "B" was clearly at fault and "A" has a third party insurance only, he has a right to seek compensation from the insurer of "B", which in this example, is one of the four insurance companies behind the QVR scheme. "A" would like his vehicle to be repaired at a non-QVR repairer. According to the replies of the four insurance companies, the insurer of "B" will refuse to pay directly the repairs unless the vehicle is repaired at a QVR garage and "A" has to settle all bills directly with the non-QVR repairer.

(ii) The market for motor vehicle repair services

Motor vehicle repairers, being either panel beaters or spray painters provide services to final consumers. There are around four hundred motor vehicle repairers in Malta being either panel beaters and, or spray painters.

From a demand side perspective the purchase of another vehicle (as opposed to the repair of the original vehicle) does not represent a viable alternative to the services of motor vehicle repairers located in Malta for the vast majority of consumers (i.e. policy holders).

Moreover, there is an issue of whether there is a separate market for motor vehicle repair services provided to policy holders. It could be argued that the

[78] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition law. OJ C 372, 9.12.1997.

market is divided into motor vehicle repairers that the four insurance companies actively recommended to their own policyholders, and those repairers that are not actively recommended to policyholders (QVR approved repairers and non-QVR approved repairers who are only MCCAA certified).

The insurance companies state that they undertook to give the policyholder his freedom of choice of repairer and therefore there is no obligation on an insured driver to take his vehicle to a QVR approved motor vehicle repairer. If this is true, the insured driver could – potentially at least – resort to any repairer in Malta and in this case it could be argued that there is no separate market for motor vehicle repair services provided to policyholders. At the same time however, there are a number of incentives and barriers which steer the policyholders to choose a QVR repairer and make it highly difficult for a policyholder to opt for the non- QVR repairer. The incentives refer in particular to the difference in treatment vis a vis the payment method for car repairs if a policyholder decides to take his vehicle to a QVR repairer when compared to a non QVR repairer. Therefore it can be argued that there is a separate market for the motor vehicle repair services provided to policyholders.

The relevant geographic market

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of the products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the particular conditions of competition are appreciably different in those areas.

The Office does not consider that access to the services of repairers outside Malta represent viable alternatives to the services of motor vehicle repairers located in Malta for the vast majority of consumers (i.e., policy holders).

The Office takes the view that the present case concerns the provision of motor vehicle insurance and the provision of motor vehicle repair services to claimants by QVR approved motor vehicle repairers on the one hand and only MCCAA certified repairers on the other in the Maltese islands.

The position of the parties to the agreement in the relevant market

The four insurance companies quoted statistics issued by the MIA which refer to data in 2016, and accordingly they concluded that the declared Gross Premium Income for motor vehicle insurance in Malta reached €[.....].

According to information submitted by the four insurance companies, the parties calculated their market share for the year ending 2016 as follows: MAPFRE has a market share equivalent to [....]%, Atlas [.....]%, Elmo [.....]% and Gasan [.....]%.

In view of this, the agreement was entered into between four of the largest motor vehicle insurers in Malta, which account for around [.....] % of the market for motor vehicle insurance.

The Office has also considered that the Maltese motor vehicle insurance market is dominated by four insurance companies which together hold around [80-100]% of the market. These four major insurance companies each hold market shares between [.....]% and [....]%. In other words, these four insurance companies have an extremely large combined market share. This means that the market is to be considered as a highly concentrated, oligopolistic market.

The Office takes into account the market structure in its analysis. In particular:

- *High concentration: four firms with approximately [80-100]% of the market and therefore there is as a result, a huge gap from other insurance companies not forming part of the agreement;*

- *High barriers to entry: the advantage of the brand loyalty. Indeed the four members are all insurance companies enjoying a high brand reputation which can highly influence policy holders.*

- *The nature of the information exchanged: i.e future commercial strategy between competitors in a highly concentrated market, on how to deal with consumers in the market for motor vehicle repair services.*

- *The Office considers that the four insurance companies are not exposed to any external competitive pressure, neither from the repairers nor from end consumers or other insurance companies not forming part of the agreement and thereby face limited competition from the latter.*

- *The market is relatively transparent involving homogenous services".*[79]

155. The Office has already clearly underlined the fact that it objected to the conduct of the addressees of this decision, where the four undertakings colluded with each other and deliberately coordinated their conduct and entered into an agreement by (i) disparaging other undertakings (ii) jointly promoting a star rating mechanism, (iii) applying a different payment system between claimants who choose to repair their vehicle at a QVR garage and those claimants who choose to repair their vehicle at non QVR repairers, (iv) applying discriminatory treatment and (v) exchanging completely sensitive and strategic information on their future market conduct.

156. The horizontal agreement of the insurers created anticompetitive foreclosure effects in the motor vehicle repair market. The arrangement severely restricts the freedom of choice of the policyholders, as the insured is effectively being prevented from resorting to non-QVR repairers. The effect of the agreement limited competition because it reduced uncertainty among the four insurers and minimised the risks of competition between them. The net result of the horizontal agreement among the four insurers is that policyholders do not get their choice of vehicle repairers.

[79] Pages 29 – 31 of the SO.

157. The Office considers that by such unlawful agreement, the insurance companies (which have considerable market power in the motor vehicle insurance market) are attempting to force non-QVR repairers to join the scheme, by disparaging their services and facilities and giving these repairers no ulterior choice but to join QVR.

158. Moreover, the agreement among the insurers caused unnecessary monetary burdens on the policyholders, since insurance companies require customers not to deal with repairers who are not QVR approved. In this case, the insurance companies are not merely informing or encouraging policyholders to choose those repairers who have agreed to join the QVR initiative, but they have collectively agreed to deny policyholders in practice, the possibility to use the same method of payment which other policyholders using QVR approved repairers can avail themselves of. All this comes at the expense of those MCCAA certified repairers who are not QVR approved. The four insurance companies have also used disparaging comments in their marketing campaign to shed a bad light on non-QVR repairers besides adopting a discriminatory treatment in their regard. In this way, the insurance companies are directing policyholders to only "choose" QVR repairers. On the other hand, if the repairer chooses not to join the QVR scheme, he would lose all of his existing and potential clients.

159. The four insurance companies have disrupted the businesses of non-QVR repairers and damaged customer relations and consumer choice. Consequently, this agreement among the four insurance companies has the effect of restricting competition between QVR approved repairers and non-QVR approved repairers which are still MCCAA certified.

160. The Office considers that non-QVR repairers have no other choice but to join QVR so that they would be at par with other QVR repairers. Even though policyholders are not prevented from utilising the non-QVR repairers, the Office considers that there are a number of measures put in place by the four insurance companies which by direct or indirect means severely restrict the freedom of choice of the policyholders, reducing their chances of ever resorting to a non-QVR repairer.

161. Moreover, the considerable number of garages which filed judicial proceedings for the warrant of prohibitory injunction, the information received from repairers as well as complaints from the GRTU demonstrates the negative effects of the agreement.

162. Importantly, the fact that a number of repairers who had filed proceedings in court may have joined the QVR is irrelevant for the considerations of the Office on whether the agreement in question has the effects of distorting and preventing competition. This is because it is the logic which dictates that it is more beneficial for a garage to join the QVR because otherwise there is a great chance of being foreclosed from the market. The repairers were ultimately obliged to join the QVR scheme in the hope that they would not lose their clients.

163. The agreement at issue constitutes an infringement of competition law, capable of negatively affecting the structure of the market and has the effect of preventing, restricting or distorting competition.

164. In view of the above, the repairers are severely impeded from competing in the market for motor vehicle repair services. The analysis demonstrates that the

access to repairs conducted by non-QVR repairers is severely hampered or eliminated.

3.9 Exchange of information as independent form of prohibited conduct

3.9.1 Arguments of the insurers

165. The four insurance companies argue that "*in view of the fact that in this case there is clearly an agreement between four undertakings, it is unclear why the Office felt the need to examine whether there was any sort of 'exchange of information'. Exchange of information is not viewed as anticompetitive itself but to determine whether there is a concerted practice between parties, or as evidence that parties have agreed to a particular practice, for instance price fixing."* The insurers argued that exchange of information "*...is considered by competition authorities when there is no clear agreement and the authorities are trying to establish a concerted practice*".[80]

166. In their further submissions dated 20 July 2017 the insurers submitted that:

In their replies to the SO, the undertakings concerned have already explained how there can be no restriction by object in this case. In their observations on restrictions of competition by object, the GRTU make a number of inaccurate observations, and cite judgements and doctrine which have no place in this case.

CONFLATION WITH RESPECT TO 'CONCERTED PRACTICE', 'ANTI-COMPETITIVE OBJECT' AND 'EXCHANGE OF INFORMATION'

In the first place, the idea that economic operators must determine independently the policy their intent to adopt in the market is not used in EU or Maltese competition law to establish a restriction by object. This principle and the cases cited by the GRTU (Dyestuffs and Suiker Unie) are used in support of the idea of a 'concerted practice' which as we know occurs when, 'there is a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'. In this case, the existence of an agreement has never been in any doubt. The definition of a concerted practice, as established in Dyestuffs and Suiker Unie, cannot in any way be used to establish that an agreement is anti-competitive by object. This is a separate part of the analysis which must be satisfied to fulfil the elements of Article 5(1) of the Competition Act.

Similarly, the text cited in paragraph 16 of the GRTU's observations on information exchange was lifted from a discussion on concerted practices contained in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. The undertakings concerned invite the Office to read paragraph 61 of the said Guidelines as a whole, and within the context of the section is it placed in, which is entitled 'Concerted practice'. The GRTU's citation is therefore misleading. The said Guidelines actually

[80] Submissions of the four insurance companies dated 27th June 2017, page 2.

note that exchange of information is restrictive by object only where it relates to prices and quantities. The Commission states that:

'Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. (...) Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. (...)

In the case at hand, there is most definitely no exchange of information on prices or quantities, and indeed no allegation to that effect was made, either by the GRTU or by the Office. Therefore, the GRTU's assertion that the undertakings concerned are party to a cartel is completely unfounded.

The discussion in both the SO and even more so in the GRTU's observations focusing on concerted practices and exchange of information is totally spurious: it gives the impression that the undertakings concerned acted surreptitiously or clandestinely, trying to hide some anti-competitive conduct. There can be no question of the QVR being anti-competitive by object"[81].

3.9.2 Findings of the Office

3.9.2.1 Restriction by object and by effect

167. Even though the Office assessed the information exchanged as part of a wider agreement, the Office was clear in its SO that in itself the information exchanged constituted an independent infringement. In other words, even if there was no other form of collusion, the exchange of information among the four insurers resulted in an anticompetitive conduct, constituting an independent infringement of competition law in itself.

168. In the present case, the Office considers that the undertakings concerned entered into an agreement to exchange market information, by expressing their common intention to adopt a common coordinated conduct on the market.

169. The Office completely disagrees with the submissions of the insurers whereby they state that information exchange can only occur in the context of a concerted practice. As evidenced by the Office in this Decision, the Commission also confirms in paragraph 56 of its Horizontal Guidelines that the exchange of information may constitute an agreement in itself or may be part of a wider agreement. Therefore, the information exchange can well be an independent form of prohibited conduct where it has an anticompetitive object or anticompetitive effect.

170. The situation where an exchange of information would be considered anticompetitive is when the particular information reduces or eliminates the uncertainty of the market participants with regard to the development of their

[81] Submissions of the four insurance companies, pages 8 to 10.

competitive relations, and results in restricting the competition between the companies concerned.

171. The European Courts have confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct exclusively as an agreement or as a concerted practice. The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. On the contrary, they are intended "*to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves*[82]".

172. The CJEU explained this in **Anic** as follows:

> *"[t]he list in Article [101(1)] of the [TFEU] is intended to apply to all collusion between undertakings, whatever the form it takes. …* ***The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion"***[83]*.* (Emphasis added).

173. Therefore to find an infringement of article 5(1) in the present case with regard to information exchange as an independent infringement, it is certainly not necessary for the Office to categorise whether the behaviour of the four insurers is specifically in the form of an agreement or in the form of a concerted practice. It is enough for the Office to find a restriction of competition as exercised between competitors and as contemplated in article 5(1) of the Competition Act, in one of the forms examined be it a concerted practice and, or an agreement. This is clear because the decision, concerted practice and agreement are not mutually exclusive.

174. This can be applied to the facts in **Asnef-Equifax**. In that case, the CJEU did not consider it necessary to qualify the exchange of information as one of the three categories of Article 101 TFEU and immediately delved into the analysis of the existence of a restriction of competition.

175. In that case, the Court held that:

> *"In effect, while that provision distinguishes between 'concerted practices', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibitions of that article catch different forms of coordination and collusion between undertakings (see Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 112).* ***Accordingly, in the present case, a precise characterisation of the nature of the cooperation at issue in the main proceedings is not liable to alter the legal analysis to be carried out under Article 81 EC[84]".*** (Emphasis added).

176. Moreover as it was also held by Advocate General Kokott, which reasoning was upheld by the Court, *"[T]he question of an anti-competitive object must be assessed*

[82] Case C-49/92 P *Commission v Anic partecipazioni* ECR I- 4125, para 131.
[83] Ibid para 108.
[84] Case C-238/05 *Asnef –Equifax, servicios de informacion sobre solvencia y credito SL Administracion del Estado v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)* ECR I – 11125 para 32.

having regard to the circumstances of the individual case. In making that assessment the same criteria are decisive as those applicable in relation to agreements between undertakings and decisions by associations of undertakings governed by Article 81(1) EC. Therefore, the case-law on agreements and decisions applies also to concerted practices by undertakings[85]. This was reiterated by the CJEU where it argued that, "*It follows, as the Advocate General stated in essence at point 38 of her Opinion, that the criteria laid down in the Court's case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice*". (Emphasis added)[86].

177. In the present case, the Office also considered information exchange as a standalone infringement in the form of an agreement, where the insurers exchanged information regarding their future commercial strategies because they, *"communicated and disclosed to each other their future intentions on the market and the conduct which they were about to carry out. They communicated the conditions which they intend to offer to their customers by agreeing that claimants seeking repairs from non QVR panel beaters and spray painters will have to first settle the bill with the repairer and only after the necessary checks by the insurance companies, will they eventually receive reimbursement. Therefore the four insurance companies have agreed to distinguish between non QVR and QVR repairers regarding the payment of repair bills*[87]*.* (Emphasis added).

178. The agreement is clearly evidenced from the fact that the four insurance companies exchanged strategic information about their future commercial strategies by adopting a common and mutually agreed strategy. In this way, the undertakings expressed their common intention to adopt a coordinated conduct in the market. That information was exchanged among competitors is also corroborated by the fact that the four insurance companies replied in the same manner to questions C, D and F, - which three questions related specifically on the distinction applied by the insurers with respect to policyholders who use the services of non-QVR garages. Although it was highlighted by the insurers that the information was given separately, all the insurers replied in the same manner when asked the questions mentioned below. The Office has already pointed out in its Decision that the information exchanged among the insurers was not public. Moreover the secretive nature of the information exchanged is also evidenced from the fact that the insurers themselves claimed that replies to questions C, D and F were not made public[88].

179. In its RFI, the Office asked the following questions:

Question C – If a repairer does not wish to apply for the QVR scheme, can he still repair the car of your client (i.e. the person who was involved in an accident and insured by your company)? If in the affirmative, will such client be treated

[85] Opinion of Advocate General in C-8/08 *T Mobile Netherlands BV and Others* ECR I – 4529, point 38.
[86] Case C-8/08, T-Mobile Netherlands B.V. and others v NMa [2009] ECR I-4529, para 24.
[87] Page 27 of the SO.
[88] As can be found in paragraph 28 of the Decision: - "*In view of the fact that questions A, B, G, H, and I, and J have common answers for all four undertakings, namely because they all related to the 'Quality Vehicle Repairs' ("QVR") scheme, which is run in the same manner by all the undertakings involved, a single answer is being given on behalf of all four undertakings.* ***The answer to the other questions, the answers to which include highly sensitive commercial information, which is not public, is being given by each undertaking separately*****".** (Emphasis added).

differently than another who would opt for a QVR certified repairer? Please elaborate.

Question D – Are your clients obliged to take their car for repairs at a QVR certified garage? If this is not the case, how does your insurance company treat a customer who does not opt to have repairs done at a QVR certified garage?

Question F – In the case a person insured by another company which does not form part of the QVR initiative, happens to have an accident with a client insured with your insurance company, will the person be allowed to repair at a garage of his own choice or does he have to opt for a QVR approved garage? Does he have to repair damages at a QVR certified garage notwithstanding the fact that he did not cause the accident himself? What is the procedure adopted by your company in these specific circumstances (where the accident caused by a driver insured by your company and the person insured by another company, not forming part of QVR, requires repairs)?

180. As pointed out by the four insurers, it is true that the exchange of information concerning future conduct regarding prices or quantities is restrictive by object. However this is without prejudice to the settled *"case-law of the Court of Justice of the European Union, which states that in order to conclude that a given information exchange constitutes a restriction of competition by object, regard must be had to the content of the agreement's provisions, the objectives it seeks to attain, and the economic and legal context of which it forms part*[89]*. To this end, it needs to be assessed whether the information exchange concerned, by its very nature, may possibly lead to a restriction of competition"*[90].

181. In this regard, paragraph 72 of the Horizontal Guidelines reflects the above stance when it states that:

"Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the ***legal and economic context in which the information exchange takes place.*** *To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition."* (Emphasis added).

182. Reference is also made to paragraphs 58 and 61 of the Horizontal Guidelines which provide respectively that:

"58. However, the exchange of market information ***may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity***

[89] Contribution from the European Union in document Roundtable on Information Exchanges between Competitors under Competition Law page 312. Available at: http://www.oecd.org/competition/cartels/48379006.pdf, See also C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* ECR I-8637, paras 16 and 21, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, para 25 .

[90] Commission Guidelines on the Application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97. para 22 .

etc.) *as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.* (Emphasis added).

61 This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market . ***This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market . Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete****.* (Emphasis added).

183. The vital test to assess whether the exchange of information has a collusive object or effect for the purposes of finding an infringement of the competition rules is to determine whether or not the flow of information reduces the strategic uncertainty of competitors, consequently diminishing their incentives to compete one against the other. The important rule is that the exchange of information must not enable a company to anticipate precisely the strategy of its competitors or reduce the degree of uncertainty on the market further than it would have existed in the absence of such an exchange of information. In other words, competitors must act independently of each other. This was also confirmed by the CJEU which held that, *"[it is] inherent in the Treaty provisions on competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers"*[91]. Indeed in line with settled case law, *it follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted*[92]. (Emphasis added).

184. The Office considers that the insurers have exchanged information which in turn helped them predict the future commercial strategies of each other. The Office considers that the information relating to the future intentions of a company which affects customers is particularly sensitive and should be exclusively part of the internal matters of each company.

185. The information exchanged among the four insurers pursued a collusive and anticompetitive objective by removing any strategic uncertainty which prevailed among these four competitors, thereby removing any possibility of competition among the four insurers. The objective of the information exchange was to pursue a common goal – to clearly steer policyholders away from the non-QVR garages. This common conduct had the object of

[91] Case C-7/95P, *John Deere Limited v Commission of the European Communities*, para 86.
[92] Case C-8/08, *T-Mobile Netherlands B.V. and others v NMa* ECR I-4529, para 35.

preventing competition on the downstream market for motor vehicle repair services by foreclosing and excluding competition between QVR and non-QVR repairers.

186. As already evidenced above[93], the Office considers that the information exchanged is so strategic that it was specifically aimed to ensure that none of the insurers outperform each other and in this way, they minimised the risks of competition between them. The information which was communicated amongst the insurers regarding the conditions which they intended to offer their customers, i.e. the distinction in payment between those policyholders who choose QVR repairers from those who do not choose QVR repairers, formed part of the common marketing plan adopted by the insurers.

187. In France, the French Competition Authority found an infringement by a number of hotels for exchanging *inter alia* information on their marketing strategies in a highly concentrated oligopolistic market.[94] With regard to the public nature or otherwise of the information exchanged, the Office makes reference to the arguments previously raised by the Office in this Decision[95].

188. In view of the above considerations, the exchange of information among the four insurers is also considered by the Office as sufficiently constituting a restriction of competition by object.

189. Even though the Office considered that the exchange of information in question constituted a restriction by object, it still went a step further and conducted an effects analysis as well. In doing so, the Office took into consideration both the jurisprudence of the European Courts as well as the Horizontal Guidelines to consider the market characteristics involved in the present case. Paragraphs 77 to 79 of the Horizontal Guidelines state that:

Market characteristics

77 Companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations. However, information exchange can also enable companies to achieve a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. In this context, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics.

78 Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion by enabling companies to reach a common understanding on the terms of coordination, or/and by increasing internal and external stability of collusion. Information exchange can increase transparency and hence limit

[93] Para 131 of the Decision.
[94] Decision of the French Competition Council No. 05-D-64, 25 November 2005.
[95] See paras 132 to 140 of the Decision.

uncertainties about the strategic variables of competition (for example, prices, output, demand, costs etc.). The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome. An information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. The pre-existing degree of transparency, inter alia, depends on the number of market participants and the nature of transactions, which can range from public transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors.

79 Tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because, when there are more companies, the share of the rents from the collusive outcome declines. Exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than in less tight oligopolies, and are not likely to cause such restrictive effects on competition in very fragmented markets. However, by increasing transparency, or modifying the market environment in another way towards one more liable to coordination, information exchanges may facilitate coordination and monitoring among more companies than would be possible in its absence.

190. Therefore, the structure of the market and the levels of concentration are important factors to determine how anticompetitive the information exchange may be, given that achieving and sustaining collusion is easier in more concentrated markets with a small number of players. In its competitive assessment, the Office considered the fact that the information was exchanged amongst competitors (insurers) representing more than 80% of the market players, thus facilitating the reduction of uncertainty among insurers in practically the whole sector and consequently enabling the attainment of a collusive equilibrium.

191. The Office confirmed and proved the existence of an oligopoly, which in this case represents a highly concentrated market with few undertakings offering homogeneous products. As held by the European Courts, "*It is apparent from case-law that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between the operators.*[96]"

[96] Case T-370/09 *GDF Suez SA v European Commission* para 213. See also Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, para 34.

192. The Office pursued a careful analysis of the restrictive effects that the information exchange may produce on competition, in the light of the specific market characteristics and, in particular, the market power of the involved companies. This market power was then contrasted with the weak position of both repairers and policyholders. The information exchanged affected the downstream market, since such information exchange affected the structure and actual conditions of the functioning of the market and was capable of negatively affecting the market structure in such a way that it foreclosed and excluded competition on the market between QVR and non-QVR repairers. The result was that of anticompetitive foreclosure in the downstream market.

193. After an overall assessment of the practice, the findings of the Office in themselves are not incompatible with the conclusion that the information exchange at issue is in itself an infringement of competition rules either by object or effect. In view of this, the Office confirms the provisional finding in its SO and it is due to the above findings of the Office that the arguments of the four insurers cannot be accepted.

194. The Office therefore considers that the information exchange has the object or effect of preventing, distorting or restricting competition in Malta. The exchange is considered harmful for consumers and undertakings alike, in the latter case the non- QVR repairers.

3.10 Appreciable restriction of competition

195. An agreement will infringe article 5(1) of the Competition Act, if it has as its object or effect 'an appreciable' prevention, restriction or distortion of competition in Malta. The high combined market share of the four insurance companies as well as the horizontal agreement among the four competitors cause restrictive effects on competition.

196. Such negative effects are particularly relevant in the present context, as the four motor vehicle insurers involved in the agreement account for nearly [.....]%[97] of the market for private motor vehicle insurance.

197. The agreement among the four insurance companies with a combined market share of nearly [.....]% on the private motor vehicle insurance market, which affects around 400 motor vehicle repairers is enough for it to amount to an appreciable restriction or distortion of competition within article 5(1) of the Act.

198. On the basis of the above, the case in question can in no way be regarded as insignificant, but to the contrary, it is undoubtedly appreciable.

[97] Market shares provided by the four insurance companies in reply to question E of the RFI.

3.11 Comparison of the QVR with the certification of the Standards and Metrology Institute and the Independence of the Office

3.11.1 Submissions of the insurance companies

199. In their submissions the insurers argued that even though they had no doubt regarding the integrity of the Office, since the Office is an entity within the MCCAA, same as the Standards and Metrology Institute (hereinafter "SMI") the Office can be perceived to form part of one and the same entity – the MCCAA - without any independence from the SMI.

200. Moreover, in their submissions the four insurances compare the QVR scheme with the certification of the SMI. *Interalia* it has been argued that, "*...there is no doubt that the QVR has neither the object nor effect of restricting, distorting or preventing competition, not even on a prima facie basis. Proof of this is the fact that the object and effect of the QVR is similar, or indeed identical, to the MCCAA certification scheme operated under Standard 4000:2012. They both have the same object – that of inspecting and classifying motor vehicle repair shops to ensure road safety and quality of repairs. They also have the same effect – that of distinguishing, on an objective non-discriminatory basis, vehicle repair shops according to their capabilities. Both schemes set objective industry standards which are open to all, and inform consumers of repair services (which includes insurers) who is up to standard and who is not.*

Thus if the QVR is unlawful, the MCCAA certification scheme is equally unlawful. The MCCAA certification scheme like the QVR is not required by law. Indeed there are some repairers which are not MCCAA certified. The Office itself notes that all motor vehicle insurers in Malta require that a repairer be MCCAA certified before vehicles can be repaired at said repairers. If the Office has no objection to this practice of all motor vehicle insurers, it should have less of an objection to the QVR, which is less restrictive. The QVR therefore does not lead to market distortion"[98].

201. In their submissions of the 20 July 2017:

...the undertakings concerned however maintain that the QVR does not have an anticompetitive object or effect. The undertakings concerned fail to see how the Office can find a prima facie infringement with respect to the QVR and its operation, when the MCCAA clearly approves, indeed operates, a similar competing scheme.

There is no doubt that with respect to its activity concerning the certification and classification of motor vehicle repairers, the MCCAA is an undertaking. As highlighted in Hofner and Elser v Macroton a public agency may still be classified as an undertaking. In this case certification and classification is an economic activity, the MCCAA is offering a service for a fee.

In fact, in most markets, an authority issues a national standard and certification is carried out by various undertakings, and not by the self-same authority which has issued the standard. There are various instances of this in Malta such as the certification of gas, cylinders, lifts, boilers, pressure vessels, and ships.

[98] Submissions of the four insurance companies dated 27 June 2017, page 2.

Before the QVR, the state of the market was such that the MCCAA was the only entity that certified and classified motor vehicle repairers, and all motor vehicle insurers, in agreement with the MCCAA would not pay for repairs carried out at a repairer who is not MCCAA certified.

The MCCAA certification scheme is therefore even more onerous because, although like the QVR it distinguishes between certified and non-certified repairers, unlike the QVR it is applied by all motor vehicle insurers and whilst the insurers making use of the QVR do not refuse outright to pay for car repairs carried out at non-certified repairers, the MCCAA scheme stipulates an outright refusal to pay"[99].

3.11.2 Submissions of the GRTU

"*The Insurers also argue that there is no prima facie infringement of competition law on the grounds that "the QVR has neither the object nor the effect of restricting, distorting or preventing competition" and that QVR is lawful. In reply to this, GRTU points out that as it already highlighted in an ample fashion in its earlier submissions, the Office condemned under Article 5 of the Competition Act ('CA"), the agreement amongst the Insurers to set up and implement the QVR scheme in concert and did not condemn QVR per se or consider that QVR per se is unlawful. This is, in fact, the correct approach. The anticompetitive object or effect must be sought not in QVR itself, but in the agreement between the Insurers which gave rise to the collusion amongst them — in synthesis, it is the collusive agreement among the Insurers that is prohibited by competition law and which must be kept in perspective for the purposes of the Office's decision in this case. Nowhere have the Insurers in their submissions disclaimed that this collusion did not have an anticompetitive object or effect — they have merely argued that QVR brings about consumer benefits. Indeed, they seem to be using QVR as a veil to conceal their collusive agreement. This however is far from an adequate defence under Article 5 CA.*

In the light of the above, given that it is not certification per se which has been considered in breach of Article 5, it is futile for the Insurers to argue that QVR and the SMI certification have the same object, so that "if the QVR is unlawful, the MCCAA certification scheme is equally unlawful". This is being submitted apart from the fact that no court or authority has ever found comfort in relieving someone of responsibility at law for unlawful conduct on the basis of an argument that others have equally engaged in that same conduct. Indeed, GRTU finds this argument puerile, for as the saying goes two wrongs do not make a right (although in this case it must be emphasized that there was only one wrong, i.e. the collusive conduct of the Insurers)..."[100].

3.11.3 Findings of the Office

202. As pointed out initially in this Decision, the Office will only address the objections raised in its SO. The Office considers that at no point in the SO has the Office

[99] Submissions of the four insurance companies dated 20 July 2017, pages 7 and 8.
[100] Submissions of the GRTU dated 20 July 2017, paras 4 - 5.

objected to the QVR scheme. Even though the SO relates to the QVR scheme, it is also correctly confirmed by the four insurers when they claim that, "***[I]n its SO, the Office is not objecting to the QVR itself***[101]". (Emphasis added).

203. As part of its investigation, the Office asked specific questions relating to the QVR scheme. In particular, the Office asked in what way the QVR scheme differs from the certificate currently being issued to panel beaters and spray-painters by the SMI of the MCCAA.[102] However, since in its SO, the Office did not object to the QVR scheme *per se*, any comparisons made by the insurers of the QVR with the SMI certification scheme will not be considered in the Decision.

204. At no point has the Office objected to the certification scheme *per se*. To the contrary, the Office is objecting to the collusion among the four insurance companies, i.e. the fact that the insurance companies aligned their competitive behaviour which restricted competition by adopting a common and mutually agreed commercial strategy. The Office clearly explained in this Decision that it objected to the fact that the four competitors deliberately coordinated their conduct, colluding together by : (i) disparaging other undertakings (ii) jointly introducing a star rating mechanism, (iii) applying a different payment system between claimants who choose to repair their vehicle at a QVR garage and those claimants who choose to repair their vehicle at a non-QVR garage, (iv) applying discriminatory conduct and (v) exchanging completely sensitive and strategic information on their future market conduct.

205. Since the Office objected to the above outlined anticompetitive behaviour and not to the QVR certification scheme itself, the Office does not consider that any comparisons with the SMI certification scheme are to be considered as valid and to this end; they shall not be taken into consideration in the analysis of the Office.

206. This notwithstanding, the Office has to point out certain key principles regarding the independence of the Office, which are crucial when considering the aspect of the decision making of the Office.

207. The MCCAA is a public authority which consists of a Board of Governors and four different and functionally independent entities – amongst which are the SMI and the Office (the other two being the Technical Regulations Division and the Office for Consumer Affairs). The four different entities are internally divided and each entity has separate and independent functions. Similarly the complainant stated that: *"[T]he legislator included very explicit and strict provisions to ensure* ***strict firewalls amongst the four entities and the Board."***[103] (Emphasis added).

208. The clear and strict division of functions are written in the law. The Board of Governors carries out the policymaking and administrative matters whereas the responsibility to enforce the applicable laws vests solely in the Directors General of the four separate entities. It follows naturally therefore that the Director General of the Office is responsible for applying the rules of competition whereas the Director General of the SMI is responsible for the determination and publication of standards and to provide certification and testing services.

[101] Submissions of the four insurance companies dated 27 June 2017, page 5.
[102] Question A of the RFI dated 10 March 2017.
[103] Submissions of the GRTU dated 20th July 2017, para 8a.

209. The law is direct and self-evident in this regard. Article 3(3) of the Malta Competition and Consumer Affairs Authority Act, Chapter 510 of the Laws of Malta states that:

(3) (a) *The legal and judicial representation of the Authority shall be vested in the Chairman: Provided that the Board may appoint any one or more of the Authority's officers or employees to appear in the name and on behalf of the Authority in any proceedings and in any act, contract, instrument or other document whatsoever, or in the case of a vacancy in the post of Chairman*:

Provided further that in ***matters relating exclusively to the responsibilities of an entity forming part of the Authority as established in Parts IV to VII of this Act, the legal and judicial representation of the Authority in those matters shall vest in the Director General heading the entity.*** (Emphasis added).

210. Moreover article 7 of the same Act provides that:

7. (1) The four entities established in Parts IV to VII, shall have the responsibilities provided for under this Act, the Competition Act, the Consumer Affairs Act, the Product Safety Act, the Metrology Act respectively and any other law or regulations.

(2) The Authority shall achieve the functions set out in article 4 through the responsibilities vested in the respective entities, as provided under subarticle (1).

(3) The responsibilities vested in each entity shall be exercised by the Director General heading the respective entity and in doing so ***each Director General shall act independently and autonomously, free from the direction or control of any person or authority without prejudice to article 12*** (Emphasis added)

Provided that in the exercise of the responsibilities vested in the entities, the Directors General shall ensure that they implement the policies set by the Board and give effect to government policy and for this purpose, they shall be subject to the overall supervision and control of the Board.

211. The proviso abovementioned refers to the policy of the Government to have a well-functioning competitive market. The Office is obliged to implement this policy and therefore to investigate anticompetitive practices according to the law, however the Board can never intervene in the decisions or investigations of the Office. The Board is there to ensure that the Office is carrying out its duties under the law. Most importantly, the entities at the MCCAA are independent and separate from one another. The Office has the power to investigate any public authority, including the SMI, if the latter acts as an undertaking.

212. The Act continues to safeguard the independence of the Office. Whereas Article 11(d) of the MCCAA Act states that one of the functions of the Board is to guarantee the functional independence of the entities, Article 12 states that the control and direction of the Permanent secretary and Minister do not apply to the Office for Competition with respect to the prioritisation, investigation and determination of cases and enforcement.

213. Thus the independence of the Office in its decisions is enshrined in the law. Therefore the insurers were wrong in stating that the MCCAA carries out the certification and testing whereas it is the SMI which carries out that function.

214. In view of the fact that the Office objected to a specific anticompetitive behaviour and not to the QVR certification scheme itself, the Office does not consider that any comparisons with the SMI certification scheme are to be considered as valid. It is important to additionally highlight that article 3 of the Competition Act provides that the Director General shall have the exclusive competence to apply the provisions of the Competition Act thus highlighting another provision safeguarding the independence of the Office. The Office is an independent and autonomous entity, impartial in its decisions and free from any control and direction with respect to the investigation and determination of cases.

3.12 Preferred repairer schemes within the EU

3.12.1 Arguments of the insurers

215. In their replies[104] to the RFI, the insurers argued that**,** "*Schemes such as the Quality Vehicle Repair initiative are not considered as a novelty and have been around for several years. Atlas Insurance PCC Ltd has, together with the other insurance companies supporting the QVR initiative, conducted research into the topic which may be designated in a different manner, but 'Approved Garage Scheme' seems to be the most popular one. We quote hereunder a few examples in the UK and elsewhere:*

- *The RAC Approved Garage Network*
- www.approvedgarages.co.uk
- www.approvedworkshops.co.uk *(targeted at Caravans or mobile homes)*
- *The Good Garage Scheme*

It is equally interesting to note that the then (UK) Trade Secretary Rt. Hon Stephen Byers (a British Labour Party politician and Member of Parliament) had originally raised the idea of 'good garage' schemes for repairers along the same lines as Michelin Star ratings for restaurants. Matters continued to progress further until eventually, in May 2003, motor industry representatives and representatives from the Office of Fair Trading signed an agreement which gave birth an industry-run Good Garage Scheme that would set standards for Repairers. The OFT would later opt to withdraw from the scheme as Forte (manufacturer of petrol and diesel engines additives) continued to develop the scheme further to the extent that several hundreds of repairers became members.

A guidance note issued in 2012 which focuses on the competition implications of preferred repairer arrangements with specific reference to the motor and home insurance sectors, categorically states that 'Insurers in Ireland have been entering into agreements with specialized motor vehicle repairers for many years. For example, motor vehicle windscreen and other glass repairs are often undertaken under such arrangements by specialized glass repair companies and networks'. As

[104] Reply of the four insurance companies to question J to the RFI, dated 27 March 2017.

the examples quoted above clearly demonstrate, these schemes are not restricted to panel and/or paintwork but have nowadays become a regular occurrence in a wider scope of vehicle repairs and also household repairs.

Although such schemes would normally see insurers introducing certain incentives to policyholders or clients if they use the services of their list of preferred service providers, or alternatively introduce disincentives (such as higher excesses) if repairers not on the list are used, it is pertinent to add that none of such incentives or disincentives apply in the local context.

Furthermore, the conclusions reached by this report are also worthy of note. It was generally ascertained that the three main stakeholders – insurers, customers (policyholders) and repairers stand to benefit from such schemes.

Policyholders 'benefit as they do not have to spend time and effort searching for someone to repair the damage including gathering the quotes' thereby gaining easier access to the repair network. The fact that the processing of claims by insurers becomes more efficient is also another factor to the policyholders' benefit.

Those repairers who join such schemes are likely to benefit of increased business as such schemes would normally provide a higher degree of visibility with the public in general. The report concludes that 'Although repairers <u>without</u> preferred repairer agreements may find it more difficult to obtain insurance-related work the purpose of competition law and policy is to protect competition, not firms who are having difficulty competing. As the Commission notes:

<u>The ultimate aim of Article 101 is to protect the competitive process</u>.

The Authority is therefore of the opinion that the essential concept and structure of preferred repairer agreements described in this Note <u>do not</u> infringe Section 4 of the Act and/or Article 101 TFEU (Treaty on the Functioning of the European Union)".

216. The insurers submitted that: "*Within other EU Member States, there are similar or even more restrictive arrangements which are allowed by their respective competition rules. For instance, in Ireland, preferred repairer arrangements are common. These are arrangements where insurance companies enter into agreements with service providers to provide repair, restoration and replacement services to policyholders, and policyholders have an incentive to use the insurers' preference repairer. Some insurance companies use financial incentives, others incorporate disincentives for the use of such other repairers. The Irish competition authority, when assessing these arrangements concluded that 'essential concept and structure of preferred repairer agreements (....) do not infringe Section 4 of the Act [which prohibits anti-competitive agreements] and/or Article 101 TFEU. A copy of the Guidance Note is attached hereto and marked as DOC B. In Greece, Hellas Direct has a similar scheme to the QVR in place (see clause 4.3 of document attached as 'Doc A' to the replies to the SO). In many instances, the list of 'preferred' or 'approved' repairers is a closed list, unlike the QVR which is open and allows for certification at any time*[105]*"*.

[105] Submissions of the four insurance companies dated 20 July 2017, Page 8.

3.12.2 The findings of the Office

217. The four insurance companies brought examples of preferred repairer schemes within the EU. With regard to Hellas Direct, the Office makes reference to its arguments in paragraphs 92 to 94 of this Decision.

218. Reference is also made to the Guidance Note issued by the Irish competition authority on preferred repairer arrangement schemes in the insurance sector. The Office considers that the Guidance Note cannot be used by the four insurance companies as a justification for the behaviour assessed by the Office. The Irish competition authority has looked at the type of preferred repair arrangements schemes that are currently in place in the specific insurance market in Ireland.

219. The Guidance Note does not address the issues and the circumstances which have arisen in the specific Maltese market as a result of the agreement entered into by the four insurance companies. As highlighted in the Guidance Note itself, there may be circumstances when a particular agreement could be considered to involve a breach of competition law.

220. Most importantly, the Guidance Note relates to agreements entered into by individual insurance companies (upstream) with garages (downstream), as opposed to the agreement in the present case among undertakings operating at the same level of the market. This Decision deals with the competition implications arising out of the horizontal agreement and does not deal with those arising out of a vertical agreement between an insurer and garages.

221. In addition, reference is made to the examples brought by the insurers, i.e. Approved Garage network, the Good Garage Scheme and the Approved Workshop Scheme. These examples cannot justify the agreement in question which the Office considers that *prima facie* infringes competition law for the following reasons. Firstly, the Office considers that these are schemes which are not operated by insurance companies as in the Maltese scenario. Secondly, none of the examples mentioned seem to refer to an agreement entered into between several undertakings operating on the same level of the market (a horizontal agreement between competitors) and its effect on undertakings operating on the downstream market.

3.13 Urgency due to the risk of serious and irreparable damage to competition

3.13.1 Arguments of the insurers

222. The four insurers raised certain important issues regarding the interests at stake of the insurers on the one hand contrasted with those of the panel beaters and spray painters on the other hand. They argue that the interests of the non-QVR repairers are not prejudiced for a number of reasons. In their words, they state that:

... [I]t is also submitted that there is no urgency in this case. In order to qualify as 'urgent', the European Commission has said that the case 'must call for immediate action on the part of the Commission.' Moreover, in order to assess whether 'serious' damage could be caused, one has to carry out a case by case analysis. Damage is only 'irreparable' if it cannot be remedied by a subsequent decision of the Office[106].

The four insurers fail to see how these three requisites can be satisfied in this case. The Office in making its assessment relies on the fact that whilst the investigation is on-going, the non-QVR approved repairers might suffer loss of business because their clients could possibly be put off from repairing at their shop if the insurers stop making direct settlements. This however is only a hypothesis and not based on any sort of statistics. Such hypothesis is grounded solely on what the GRTU has reported to the Office and it grossly overstates reality. Moreover, such hypothesis envisages harm to competitors not to competition as is required by law. In fact, in this case, there is and can be no harm to competition, since there are in any case a large number of QVR approved repairers, which in turn have been carrying out the largest number of repairs even before the establishment of the QVR. Any possible effect that the QVR has on the market is minimal and is likely a result of the consumers qua policyholders being better informed as regards the capabilities of car repairers. Consumer have always preferred to repair their cars at those repairers who are now QVR certified, and this even before the QVR was set up. This in itself shows that the repairers who are QVR certified are those which give a better service to consumers. Therefore, any operation of the QVR does not entail harm to competition[107].

Furthermore, the number of QVR approved repairers has increased from the original 92 repairers cited in the RFI. To date, 210 inspections have taken place (including inspections of a good number of repairers who had filed the warrant of prohibitory injunction).

Aside from competition within the QVR, there is no competition between the QVR, the MCCAA certification and any potential third party scheme on the market for certification of repair shops[108].

223. In their submissions dated 20 July 2017, the insurers argued that, *there is in this case no need for interim measures. The GRTU is only concerned with protecting individual, and inefficient, service providers, hence its comments in Section A of its observations. The SO is devoid of any assessment of the alleged negative effects of the QVR on competition, and the GRTU has not given a valid reason as to why they should be imposed, save for noting that interim measures are needed to avoid damage to the mechanics, spray painters and panel beaters. These three types of undertakings however are market operators, and damage to market operators does not amount to damage to competition.*

The SO and the measures contemplated therein are aimed at protecting competitors not competition, contrary to the basic principles of competition law. In a Guidance Note on preferred repairer arrangements in the insurance sector, the Irish competition authority concluded

[106] Submissions of the four insurers dated 27 June 2017, page 8.
[107] Submissions of the four insurers dated 27 June 2017, page 8.
[108] Ibid.

Although repairers without preferred repairer agreements may find it more difficult to obtain insurance related work, the purpose of competition law and policy is to protect competition, not firms who are having difficulty competing. As the Commission notes:

The ultimate aim of Article 101 is to protect the competitive process.

Contrary to the GRTU's statement, the proposed interim measures are of a final nature and go beyond what is necessary to conserve competition in the relevant market. As detailed in the four insurer's replies to the SO, they are final and essentially dismantle the QVR at this early stage of proceedings...[109]

224. The insurance companies argue as well that, *"The aim of interim measures is to prevent harm to competition and not competitors. Interim measures issued in this case would be protecting operators on a downstream market to the detriment of competition both in the market for motor vehicle repairs and, more importantly, in the market for certification and classifying motor vehicle repairers"*[110].

3.13.2 Arguments of the GRTU

225. In their submissions dated 7 July 2017, the GRTU argue that:

The GC has considered that there is urgency due to serious and irreparable harm where "a situation is liable to endanger the very existence of that undertaking, which has had a substantial proportion of its sources of income taken away from it and which, if the situation persists, is liable to have to cease trading".

The Garages have been and are still currently losing clientele and reputation, both of which will be impossible for the Garages to recoup. A good reputation, which is key for a Garage to succeed and thrive in this sector, is only earned following considerable effort, which effort must be continuous in order to maintain business. The Insurers' conduct has severely inhibited the commercial activities of the Garages, thereby restricting their ability to compete effectively and impairing significantly and permanently their position on the market. Indeed, the situation is becoming increasingly more and more difficult for the Garages to remain on the market as they continue to rapidly lose market share whilst failing to cover costs. The anticompetitive foreclosure of non-QVR Garages will inevitably affect the structure of the motor vehicle repairs market as the Garages are compelled to cease their economic activities. It should be highlighted that in this case we are experiencing a scenario where equally efficient competitors are being driven out of the market, not because they are inefficient but because they rightly refuse to be part of an unlawfully established and implemented Scheme which is the fruit of a cartel in breach of the competition rules. This harm is serious and irreparable and ought to be immediately addressed by the Office through interim measures. Furthermore, this harm is irreparable as the damage to the Garages' reputation and economic activities cannot be satisfactorily remedied by paying compensation. As the Commission has observed, the loss of revenue resulting from loss of reputation and business cannot be calculated with confidence or accuracy.

[109] Submissions of the four insurance companies dated 20 July 2017, pages 6 and 7.
[110] Submissions of the four insurance companies dated 20 July 2017, page 3.

In particular, urgency in this case arises out of the fact that unless restrained, the Insurers will continue to implement the QVR scheme. Hence, failure to take these interim measures imminently will render any prohibition decision against the Insurers ineffectual and illusory as the status quo ante (i.e. the harm to the structure of the market, the exit of the non-QVR Garages from the market, the loss of reputation and loss of clients) would be impossible to restore.

Moreover, the harm to consumer welfare is also serious and irreparable. Thus, for instance, customers who involuntarily and against their will had to resort to a QVR Garage due to the implementation of the QVR Scheme by the Insurers, cannot reverse their choice once repairs have been affected by QVR Garages Several instances like this have already happened as the evidence before the Office shows, are still happening and will continue to happen unless the prevalent situation is immediately rectified by the Office through interim measures. Again, this loss to consumer welfare, consumer welfare being at the core of the competition rules, is serious and irreparable and cannot be restored.

Thus GRTU submits that the serious and irreparable harm outlined above should immediately be checked as a matter of urgency by means of interim measures to prevent further harm being done[111]*.*

226. In their submissions of the 20th July, the GRTU made reference to: *"...their earlier submissions on the need for urgent interim measures as a result of the risk of serious and irreparable damage to competition. In the SO, the Office, and in their earlier submissions, GRTU, in line with the CJEU's case law and the Commission's decisional practice, explain why immediate action by the Office is required on the basis of the facts of this case and why the damage is irreparable. The Office considered that the damage is irreparable because the Insurers' conduct (i) leads to foreclosure of non-QVR Garages as the conduct of the Insurers could drive the Garages out of the market; (ii) causes harm to the reputation of the non-QVR Garages; (iii) steers customers away from the non-QVR Garages; and (iv) raises the cost of services for consumers. The Office was able to reach these conclusions on the basis of the e-mails from GRTU which were based not only on complaints of the Garages but also on complaints of policyholders who were even copied in the emails as well as complaints from the Garages. It is also evident that the approach of the Insurers vis-a-vis reimbursements had the logical effect of shifting consumers away from non-QVR Garages and that this, along with the disparaging publicity, had serious reputational effects on the non-QVR Garages. It is equally evident that harm resulting from foreclosure and harm to reputation is irreparable and cannot be remedied by any subsequent action as confirmed by the Commission in its decisions.*

GRTU fails to understand how the Insurers could have the cheek to say that the impact on competition or on the market is minimal. Clearly, the Insurers either need to get their calculations right or are trying to mislead the Office. More than half of the Garages on the market are not QVR — if 50% of the market is minimal as the Insurers claim, then the word 'minimal' needs a redefinition. Definitely, affecting 50% of the market means affecting the structure of the market, i.e. it means damaging permanently the fabric of the market with all the harm that this brings to economic and consumer welfare as it directly impacts on the parameters of competition (i.e. prices, output, quality, choice and innovation).

[111] Submissions of the GRTU dated 7th July 2017, paras 100 – 104.

The Insurers also say that the Office's conclusion 'envisages harm to competitors not to competition'. Competition law protects the competitive process on the market. In so doing, it protects 'efficient competitors' against foreclosure — it does not help 'inefficient competitors'. Without efficient competitors on the market there can be no competitive process. In this case, the non-QVR Garages are efficient competitors. Indeed, no proof has been brought by the Insurers to show that they are not. The Garages are simply being ousted from the market not because they are not efficient (meaning a good service) but because the Insurers' unlawful conduct is shifting custom away from them and without custom no economic activity can survive on the market. This is precisely why competition law prohibits anticompetitive conduct that brings about foreclosure — competition law wants to ensure that efficient undertakings that contribute to consumer welfare stay on the market and are not foreclosed by cartels or any other anti-competitive conduct. In the case at hand, we have the classical scenario that competition law precisely guards against — a few mighty ones holding 90% of the market get together and scheme on some unlawful conduct to clear away the little (but nevertheless efficient) ones, in order that they can control the market and exercise more power. This is what the Insurers are up to.

GRTU also wants to emphasize that it is not QVR which is making the Garages provide a better service. The Garages are already being certified for the quality of repairs by SMI. If the insurers deny this, then clearly this shows that the Insurers are not open to other certification schemes as the Commission required in the Dutch Mobile Crones case, but that QVR was introduced for ulterior motives. But apart from this, we are talking of Garages that have been on the market for several years. It is the good service that they have been able to offer throughout that has in fact enabled them to survive on a highly competitive market. Any Garage that does not offer a good service has no hope of survival and no amount of QVR certifications and publicity can save it. In other words, it is the competitive process as protected by competition law that guarantees good quality repairs on the market and not the QVR scheme as operated in concert by the Insurers. This is why interim measures are necessary, because if the situation is not addressed immediately, the Insurers conduct would have defeated the competitive process, which is exactly why competitors collude and engage in cartels and other anti - competitive conduct.

The Insurers also refer to consumer behaviour in this part. GRTU has already explained in its earlier submissions that consumers have been placed in a situation where they have no choice but to resort to QVR Garages. GRTU also refers to its earlier submissions where it explained that the QVR star rating and the icons actually mislead the consumer and that the consumer is not really empowered to choose a Garage with the best quality repair service.

Ironically, the Insurers boast that some of the Garages that applied for QVR include some of the Garages that applied for a warrant of prohibitory injunction. GRTU considers that this confirms the Office's conclusion that if the Garages stay out of QVR they will be foreclosed from the market. These Garages did not want to be part of the QVR, so much so that they went into the trouble of instituting judicial proceedings. These Garages only joined because they had no option if they wanted to continue working given that they are dependent on the vehicle insurance cover market— this in itself is proof of the fact that the Insurers' collusive conduct is

reaching the anti-competitive effect desired by the Insurers. This is why it must be immediately checked by the Office through interim measures"[112].

3.13.3 The findings of the Office

227. The Office finds it surprising that the insurers are able to conclude that consumers in general have always preferred "*those repairers who are now QVR certified*." The Office cannot understand on what basis was this opinion formed. The insurers themselves admitted later on in their written submissions that there is an increasing number of repairers who are being approved as QVR. How can one say that these repairers were the same ones preferred by consumers before they were approved QVR? On what basis can this be stated?

228. The fact that a repairer is QVR certified does not imply that he provides a better service than another non-QVR repairer, contrary to what the insurance companies emphasised. More so when one considers, that the payment system is also direct in those cases where the policyholder chooses a repairer who has applied for the QVR, but has not yet been inspected or approved.

229. The four insurers believe and state in their submissions that if the consumer does not go back to the non-QVR repairer after having his vehicle repaired at a QVR repairer, it means that the QVR repairer provides better equipped service. The Office completely disagrees with this statement. In practice, the policyholder does not have any choice when it comes to determining who the repairer will be – the policyholder will more often than not choose the repairer who is QVR certified (or at least, the one who has applied for the QVR!) to avoid a situation where the policyholder himself would have to pay for the costs himself. The choice of the QVR repairer is independent of whether or not that QVR repairer can perform a better service – the policyholder would much prefer not to fork out his own money to pay for repairs for damage which after all in some instances, was not caused through his own fault. The policyholder would have to resort to the same QVR repairer because that is the easiest solution and that is how the present payment system is. Contrary to what the four insurers imply, it is not a question of trust but a question of feasibility and practicality. Unfortunately, this payment system which was agreed unanimously by the four insurers is also limiting the choice of services available to the end consumer (the policyholder).

230. The Office believes that there is urgency because non-QVR garages are losing their clients on a daily basis and it is not due to their inefficiency in competing, but as a result of the collusion of the four insurers involved. No decision of the Office would remedy this situation. As it was stated in the SO, an eventual finding in the main decision that the four insurance companies have infringed the Act would be illusory, if in the meantime the remaining repairers would have been put out of business. The reputation of non-QVR repairers is at jeopardy because clients are being misled into believing that the QVR is the only good and efficient repair system. Clients will never choose non-QVR repairers even if the latter are the best on the market, because they would much prefer having their repairs being paid immediately rather than forking out the money themselves and then being paid

[112] Submissions of the GRTU dated 20 July 2017, paras 49 to 54.

much later on after a vigorous amount of verifications[113]. Therefore the damage is serious and irreparable and it calls for an urgent intervention from the part of the Office.

231. The four insurers are limiting the choice for consumers since the latter have to fork out money and therefore pay any unnecessary monetary burdens themselves and they are not able to choose their preferred repairer. This results in a reduction in consumer welfare. Indeed competition not only refers to rivalry between undertakings but also freedom of choice on the part of the consumers. When there is no room left for choice or where consumer choice is severely limited, competition is absent.

232. Moreover the insurers argue that the Office, by adopting such decision, "**...***envisages harm to competitors not competition as is required by law*[114]". This is clearly not the case. Articles 101 and 102 of the TFEU like articles 5 and 9 of the Competition Act pursue the same aim of maintaining effective competition on the market. As held by the four insurance companies, the aim of interim measures is to prevent harm to competition and not competitors - to which the Office agrees *in toto*. In a situation where competition is restricted because the market structure is highly affected and because the freedom of efficient garages to compete on the downstream market is obstructed, intervention in the form of interim measures is warranted to protect all efficient competitors who can compete.

233. The Office considers that by imposing the necessary interim measures, it can protect those firms which are able to compete effectively on the market and whose freedom to compete is severely restricted. Under competitive conditions, a market will be served only by the most efficient firms. Therefore, it is not considered harmful for less efficient firms to be driven out. Indeed, the Office is not protecting less efficient competitors. Even though the Office is issuing interim measures, less efficient competitors will still leave the market ultimately if they cannot compete in terms for instance of choice, quality and innovation. Therefore, what the Office seeks to protect is the healthy competition between efficient competitors who are being restricted from competing fairly and justly due to the restrictive agreement at issue. Even though the repairer does not only obtain work from insurances, it is a well known fact that the bulk of their work relies on insurance companies. It follows that the downstream market is largely dependent on the car insurance market. In other words, access to the repairs covered by an insurance policy is a prerequisite for competition on the downstream market.

234. The Office considers that there is a disproportionate prejudice placed on the non-QVR repairers. As previously stated, no final decision issued by the Office in the favour of the repairers would remedy the number of clients already lost. Moreover, their reputation is also being harmed in the process by the disparaging comments used in their regard.

235. The interim measures which the Office is hereby imposing, strive to ensure that the repairers, which include both spray painters and panel beaters, would be able to continue to operate without any disruption. This would safeguard their rights and avoid any further irreparable harm.

[113] The replies of the four insurance companies to the RFI explain in detail the process of reimbursement in case a policyholder opts for the non-QVR repairer.
[114] Submissions of the four insurance companies dated 27 June 2017, page 8.

236. Furthermore, the Office does not consider that there is a disproportionate potential inconvenience caused on the insurance companies as a result of the interim measures. More so, when this is compared to the damage already caused and which will be caused on the repairers if interim measures are not imposed.

237. The anticompetitive behaviour of the four insurance companies is liable to foreclose competition between several repairers.

238. The Office therefore finds that there is enough evidence and the conditions of the interim measures are all fulfilled and these factors together warrant interim measures against the four insurance companies. The interim measures envisaged would have the necessary effect of ensuring that those repairers negatively affected will not be put out of business pending the final outcome of the administrative procedure of the Office.

239. The behaviour of the four insurance companies is considered as a serious and immediate impediment to effective competition on the market. The Office hereby considers that there is the urgency due to the risk of serious and irreparable damage to competition in view of a *prima facie* finding of an infringement of competition law.

3.14 Conclusion of the Office

240. In light of all of the above considerations, the Office considers that there is a sufficiently *prima facie* finding of an infringement of article 5(1) and 5(1)(d) of the Competition Act.

4. Remedies

4.1 Arguments of the insurers

241. The four insurance companies consider the remedies envisaged in the SO as disproportionate. The four insurance companies argue that "*the Office cannot force an insurer to contract with a third party, as it would be doing by virtue of the first remedy envisaged. It has already been noted that freedom to contract is a general principle of law. By forcing the insurers to stop make a distinction in payment methods, the Office is essentially forcing the insurers to have a relationship with all repairers. This is beyond the remit of the Office.*

Moreover by virtue of the third remedy the insurers would be required to send a letter to all policyholders informing them that there would be no distinction in payment methods. This remedy would be grossly disproportionate to any allegedly anti-competitive conduct undertaken by the insurers. First of all, none of the insurers have written to all policy holders informing them that they are applying a distinction in payment methods between QVR and non QVR repairers in the first place. The approach to be taken was only advertised in certain marketing material. Policyholders made aware of the said approach upon making a claim, and not when taking out an insurance policy. Therefore, this remedy would be completely

unnecessary and would go beyond the actions initially taken by the four insurers. It is also unnecessary and would go beyond the actions initially taken by the four insurers. It is also unnecessary, when one considers the other two remedies that the Office envisages.

Secondly such a remedy is unduly burdensome both financially and from a reputational point of view. In particular, it would be unfair for the Office to require the insurers to inform all policy holders of the fact that there will be no distinction in payment when there would be, as yet, no final decision from the Office finding a breach of article 5(1) of the Competition Act, but only a decision on an interim measure which expires. Such a measure would give the impression that there is a final decision against the insurers. Moreover, should the final decision be in the insurers favour, or should the interim measure expire, they would be placed in the unenviable position of having to re-inform the policyholders of another change regarding the 'treatment' of QVR and non-QVR repairers. The interim measure is, of its nature temporarily; however this remedy would indicate the decision of the office is final. The third remedy would therefore be at best premature[115]*."*

242. In their submissions dated 20 July, the four insurance companies stated that, "*[A]s noted during the oral hearing of 9 July, the remedies envisaged by the Office are neither conservatory not temporary in nature. On the contrary, they are final and sound a death knell not just for any alleged collusion between the undertakings concerned, but also for the QVR at a preliminary stage of proceedings, before there is a final decision by the Office on the matter of infringement. The remedies envisaged lack proportionality and harm the QVR and the undertakings concerned, notwithstanding that the remedies are being envisaged within the context of an interim measure, not a final decision, to benefit the repairers/GRTU members".*

The remedies envisaged by the Office, and the remedies proposed by the GRTU in fact are redacted as if the interim measure would be a <u>final</u> decision; one need only refer to the comment made in para 106 of the GRTU's observations that the costs incurred by the undertakings concerned 'are the result of their own unlawful conduct'. The GRTU therefore have already decided that there is a breach of Article 5(1), and wish the undertakings concerned to be 'punished' as the GRTU sees fit, and as it requested in paragraphs 107 and 108 of its observations. The remedies proposed by the Office, and even more so, by the GRTU, are disproportionate and would harm the market for the certification and classification of motor vehicle repairers for the benefit of some inefficient operators on the market for motor vehicle repairs"[116]*.*

4.2 Arguments of the GRTU

243. In their submissions dated 7 July 2017, the complainant argues that, *"[F]urthermore, in line with the European Commission's (henceforth the Commission") decisions, the proposed interim measures are of a provisional and conservatory nature and limited to what is required in the given situation. The proposed interim measures take into account the legitimate interests of the*

[115] Submissions of the four insurance companies dated 27th June 2017, pages 8 and 9.
[116] Submissions of the four insurance companies dated 20th July 2017, pages 19 and 20.

undertakings subject to the interim measures, that is Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Limited (hereinafter collectively referred to as "the Insurers"). Thus, the Office has taken regard to the balance between the likely harm to the Garages and consumer welfare if it does not act and the effect upon the Insurers should it adopt interim measures. Finally, the proposed interim measures come within the framework of the final decision which may be adopted by the Office in that they do not go beyond the scope of the Office's powers to order the termination of the infringement in the final decision.

Saving the suggestions made below, GRTU agrees with the remedies proposed by the Office in section 3,2 of the SO GRTU considers that the measures proposed by the Office satisfy the requirements laid down in the case law. Thus, they are of a temporary (limited in time) and conservatory nature and limited to what is necessary to safeguard competition on the relevant market in the interim period until final decision. GRTU also considers that the measures do not go beyond those measures that the Office is able to order upon a finding of an infringement of the competition rules under the CA. The establishment and implementation of the QVR scheme by the Insurers collectively in this case constitutes the subject-matter of the main proceedings. The final decision which the Office will have to take on conclusion of the proceedings concerns the question whether or not the establishment and implementation of the QVR scheme by the Insurers altogether constitutes an infringement of Article 5(1) CA. It follows that the conservatory measures proposed by the Office come within the framework of the final decision to be adopted by it.

Furthermore, GRTU considers that the proposed measures take into account a proper balance of the interests involved. The interim measures envisaged would allow all the Garages on the market to continue to operate uninterruptedly on the market and claimants can resort to the Garage of their choice without suffering any differential treatment from the Insurers. The granting of the interim measures would result in the Insurers suffering some additional costs and inconvenience in that they would have to inform policyholders, agents and TIIs that there will be no distinction in payment between those policyholders who opt for the QVR approved garages and those policyholders who do not opt for QVR approved garages. These costs and inconvenience to the Insurers would however be much less than the damage suffered by the Garages in terms of loss of business and reputation, Furthermore, the costs incurred by the Insurers are the result of their own unlawful conduct. Thus, the potential inconvenience that could be suffered by the Insurers is not disproportionate in comparison with the damage that would be caused to the non-QVR Garages and consumer welfare, For these reasons, a balance of interest requires interim measures against the Insurers"[117].

244. In their submissions dated 20 July 2017 the GRTU argues that:

First of all, the Office, through the first remedy, is not forcing the Insurers to contract with the Garages. It is simply ordering them to stop discriminating amongst policyholders, since in the case of non-QVR Garages the policyholders have to effect payment themselves, whilst in the case of QVR Garages the Insurers pay the Garages for the repairs. This discriminatory approach applied uniformly by the

[117] Submissions of the GRTU dated 7th July 2017, paras 100 to 106.

Insurers is part of the collusive agreement discovered by the Office and is in fact one of the most important elements of the anticompetitive agreement which is ensuring its success, that of partitioning the market between QVR and non-QVR repairers and steering away policyholders from non-QVR Garages. Hence, the Office is in duty bound in terms of the Competition Act to order this remedy immediately. In failing to order this remedy, the Office will be failing in its duty to protect the competitive process and consumer welfare.

The third remedy is also important. The Insurers' QVR scheme has been running for some months now. During this time, the Insurers ensured that all claimants resorted to QVR Garages. Over just a few months several claims accumulate. Furthermore, the claimants themselves may have inadvertently spread the practice of the Insurers when speaking to family members and friends. The wide publicity engaged by the Insurers on their individual websites, MIA's website and QVR website and in the main newspapers ensured the widest circulation possible to all policyholders. The only way how the effects of this can be mitigated is by the Insurers informing all policyholders by direct communication as indicated by the Office in the third remedy that there will be no difference in treatment. This is the only way how the Garages can hope to recoup some (they will never be able to recover them all) of their former customers and to reverse some of the harm caused to their reputation. Without this remedy therefore the foreclosure effect that the anticompetitive conduct has had on the Garages will not be effectively addressed and again the Office will be failing in its duty to protect the competitive process as urgently as possible.

Furthermore, the resistance of the Insurers to implement the third remedy goes to show, notwithstanding the prima facie finding of a breach of Article 5 by the Office, how adamant the Insurers are to continue to pursue their collusive conduct on the market by allowing the anticompetitive effects created by them to continue to survive until the Office comes up with a final decision. This goes to show a complete lack of good will on the part of the Insurers.

GRTU do not understand who the Insurers are trying to fool when they argue that the third remedy would give the impression to policyholders that the Office had reached a final decision of a breach. The Insurers would simply need to write in the letter to the policyholders that in view of the decision of the Office ordering interim measures the Insurers would be making no distinction in payment between policyholders who opt for QVR approved Garages and those who do not in the light of the Office ordering interim measures to this effect for a period of six months pending a final decision. It is up to the Insurers to make it sufficiently clear to the policy holders that this is an interim measure limited in time. GRTU has no doubt that the Insurers are able to do this. Even so, the Office cannot desist from ordering the third measure merely because the Insurers fear that they are unable to portray the message clearly to the policyholders. As to any ensuing financial or reputational effect on the Insurers, this is exclusively due to the collusive conduct of the Insurers. Hence, if they shall at all suffer any effect, they will be suffering as a result of their own unlawful conduct, even if the latter has only been established on a prima facie basis at this stage. Rest assured that the damage suffered by the Garages (who are the victims in this story along with consumers) so far and stand to continue suffering in case the Office fails to order the interim measure is much greater than

any possible harm the Insurers can suffer from sending out a letter to all policyholders as ordered by the Office[118].

4.3 The Findings of the Office

245. Regarding the first remedy, the Office does not agree with the arguments of the four insurers concerning freedom to contract. There is no doubt that freedom to contract is one of the basic tenets of law and a fundamental principle of law. Competition law does not interfere with the freedom of market participants to enter into business dealings as long as the business transactions do not affect the structure of the market. In such respect, competition law imposes limits on the freedom to contract. In this case, the Office found that as a result of a *prima facie* finding of an infringement of competition law, the market structure for the motor vehicle repair services has been clearly affected with a risk of serious and irreparable damage to competition and therefore intervention by the Office is warranted.

246. Competition law and interim measures are there to protect the competition process by protecting the freedom of competition for all market participants, be they final consumers, producers or suppliers. The Office considers that as long as the freedom of competition of efficient undertakings is affected, competition law will apply and some form of intervention is warranted, in this case in the form of interim measures.

247. With the first remedy envisaged, the Office is protecting those undertakings that are efficient enough to stay on the market and compete but which are being foreclosed and excluded in repairing insured vehicles and are facing enormous difficulties to compete with approved QVR garages as a result of the collusion among the four insurers. Competition law is there to protect and to safeguard the market in the interest of all efficient market players.

248. Although the freedom to contract applies and is a general principle of law, it cannot stand alone and must be regarded in the light of other principles and rules on the market which ensure healthy competition on the market. The distinction in payment methods being applied by the insurance companies is the result of a collusive agreement affecting free competition and is depriving non-QVR repairers from competing fairly.

249. Since free competition is affected, competition law has to intervene by requiring the four insurers to cease and desist for the time being from making a distinction on the method of payment of repair bills, between claimants who have chosen to use a QVR certified repairer and those who have chosen a non-QVR repairer.

250. Regarding the second remedy, reference is made to a decision taken by the French competition authority in December 2007 (previously mentioned in this Decision), where the authority by way of an interim measure ordered Schering Plough to stop making disparaging comments to physicians and pharmacists. Similarly to this stance adopted by the French competition authority, the Office is hereby

[118] Submissions of the GRTU dated 20 July 2017, paras 56 to 59.

requesting the four insurance companies to stop the disparaging comments used against the non-QVR garages**.**

251. With regard to the third remedy proposed by the Office, reference should be made to the above mentioned interim measure decision adopted by the French Competition Authority. In its decision, the French competition authority imposed interim measures on the dominant undertaking to the effect that the undertaking should publish at its own costs, a text in two specialised magazines, reminding the bioequivalence of generic drugs which were permitted on the market, and their possible substitution by pharmacists as soon as they are listed as generic drugs.

252. Recently the Belgian competition authority in 2014 adopted interim measures ordering BMW to take the necessary steps to allow a former BMW and MINI concessionaire to continue its business as an independent repairer. Two of the interim measures imposed were the following:

a) BMW had to send a letter to the customers of the concessionaire stating that they are free to choose where they want their car to be maintained and that they would not lose the warranty on the car if the concessionaire was chosen for car maintenance; and

b) BMW also had to send a letter to all recognised Belgian distributors and repairers confirming that they can sell spare parts and cars to independent car repairers and sellers[119].

253. These two decisions prove that informing clients and reaching out to the widest possible audience is pivotal. In view of this, the Office confirms its position and states that it is essential for policyholders to be informed on the fact that there will be no distinction in payment between those policyholders who opt for the QVR approved repairers and those policyholders who do not opt for QVR approved repairers.

254. However the Office took note of all the arguments submitted by all parties and to this end; the Office is hereby modifying the third proposed remedy in consideration of the arguments of the parties concerned. The Office shall change the means but not the substance of the remedy proposed in order to tackle the proportionality of such a remedy, since the Office considers that it is essential for policyholders to be informed that no distinction in payment will apply.

255. In light of the above, the proposed interim measure whereby the Office provisionally imposed an interim measure to the effect that all policyholders should be informed regarding the payment system, no longer applies. Instead, the four insurance companies are to send a letter to all those policyholders who submitted a claim, since February 2017 onwards.

256. Moreover, the four insurance companies must also publish a clearly visible notice on the websites of Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd that no distinction in payment shall be made between those claimants who choose a QVR repairer and those who do not choose a QVR repairer.

[119] BCA-2014-V/M-14, decision of 11 July 2014. See also the European Antitrust Review 2016 - GCR- Belgium Overview page 68.

5. Decision

257. **The Director General of the Office for Competition is issuing the following decision;**

i) In terms of Article 15(1) of the Competition Act there is a *prima facie* finding of an infringement by Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd of article 5(1) and 5(1)(d) of the Competition Act;

ii)Imposing interim measures in view of urgency due to the risk of serious and irreparable damage to competition in terms of Article 15(1) of the Competition Act on Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd which shall consist of the following:

a)Requiring the said undertakings to cease and desist from making a distinction on the method of payment of repair bills, between claimants who choose a QVR repairer and claimants who choose a non-QVR repairer; and

b) To stop circulating any leaflets or adverts of any type which disparage the non-QVR approved garages; and

c) To send a letter to those policyholders who submitted a claim, since February 2017 onwards, informing them that no distinction in payment shall be made between those claimants who choose a QVR repairer and those who do not choose a QVR repairer;

And;

To publish a clearly visible notice on the websites of Atlas Insurance PCC Limited, MAPFRE Middlesea plc, GasanMamo Insurance Limited and Elmo Insurance Ltd stating that no distinction in payment shall be made by the four insurance companies between those claimants who choose a QVR repairer and those who choose a non-QVR repairer.

258. **The measures are limited to six months and in terms of Article 15(2) of the Competition Act, the decision may be renewed in so far as is necessary and appropriate.**

Godwin Mangion

Director General (Competition)