Competition Commission Consultation:

Private Motor Insurance Market

Response from Keoghs LLP

17 January 2014

Introduction

Keoghs welcomes the investigation into the external influences on the private motor industry (PMI), and the identification of the issues compensators face with such claims.

Keoghs is the only "top 50" law firm to focus exclusively on the handling and defence of both mainstream and specialist insurance claims. We offer an "end to end" claims service to insurers, public sector bodies and self-insured corporates which include pre-litigation, litigation and costs negotiation activities. With almost 1,200 dedicated staff Keoghs is a recognised leader in the field.

Keoghs have been a trusted advisor to the insurance market on credit hire matters for a number of years. In the last 12 months alone we have been instructed to handle in excess of 20,000 separate matters in total across all classes of credit hire claims. Our experience spans both pre litigated and litigated matters, so we have visibility of the whole of the claims lifecycle.

In the same period Keoghs has represented insurers in two Court of Appeal cases on credit hire (Singh v Yaqubi and Opoku v Tintas). These cases relate to issues that are the essence of the Competition Commission's (CC) Investigation into Private Motor Insurance (PMI).

Keoghs has been closely engaged in the broader Government reforms to the civil litigation system as enacted in Part 2 of the LASPO Act 2012 and other ancillary CPR changes as recommended by Lord Justice Jackson.

Executive Summary

Whilst we embrace the aims set out in the interim report, we believe the implementation of the proposed remedies could have undesirable consequences if pursued in isolation. Which ones are progressed and how they interact will need careful consideration.

Consequently, we were disappointed at the restrictive timescales that have been set to provide qualitative responses to gain the best result for consumers.

For the purposes of our response we have concentrated on the areas that best relate to our particular expertise, those being Remedy A, and Remedies 1A – 1G.

At numerous points within our response we have referred to the concept of 'GTA2'. We believe that for reforms to be effective, and indeed for enforcement orders to be feasible, there needs to be some form of mandatory and regulated agreement across the market.

The current optional framework goes to the heart of why this investigation (with regard to credit hire) became necessary.

Definition of PMI

Within the CC findings published on the 17th December, a suggestion was made that the investigation would not encapsulate "commercial vehicles and motorcycles".

Many, if not all, of the remedies are impacted to their detriment by this point, and are actually made almost impossible to implement. The changes need to encompass all areas of the market as all areas are directly affected by it.

As examples:

- What is the definition of a commercial vehicle? Is it a vehicle being used for business purposes? Does that change if the policy covers the driver for social and domestic use? What would happen if the vehicle was owned by an individual but was insured on a fleet policy as a benefit of their employment?
- This exclusion would doubtlessly cause confusion to policyholders about their entitlements.
- How would a third party model be implemented if the at fault insurer was indemnifying in respect of a motorcycle or commercial vehicle?
- How would the CC propose to remove the legal right in tort to recover damages of one section of the population and not another?

The above, though not an exhaustive list shows how ambiguities could arise which would have the unintended consequence of increased dispute and frictional cost.

Responses to Remedies

Remedy A: Measures to improve claimants' understanding of their legal entitlements

This remedy in itself provides the real opportunity to make the consumer generally more informed about the process.

A crucial element that leads to a significant amount of dysfunction within the market is not that the consumer is unaware of their entitlement, rather it is the fact they have entered into a formal contract for credit facilities, and the liability arising therefrom without perhaps completely understanding the ramifications of that contract.

Where they are aware of the liability, we often find they have no visibility as to the level of credit they are accruing by remaining in the vehicle. We believe there is an opportunity to remedy this to keep the consumer at the heart of the service provided.

(a) What information should be provided to consumers?

In our opinion, to improve the understanding of claimants, the information should be provided on two levels.

Firstly, this information should cover their entitlement. Secondly it should also include details of the legal liability that comes as a consequence. This will enable them to make an informed decision assisting with TOH 1 because the cost liability is actually that of the claimant. The contract is what allows the consumer (in reality the CHO) to recover the cost from the at-fault insurer.

What should be advised to the claimant in terms of the policy of insurance wording?

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We propose that the following should be made clear to all new / existing policy holders (PH):

- Clear sub-headings under the policy wording "In the Event of Accident" for 'replacement vehicle', 'repair to your vehicle', 'recovery of your losses' and 'alternative options'.
- Under 'replacement vehicle'(dependent on implementation of 1A) it should state that the PH has cover in place that provides them with a replacement vehicle. It should state that this is subject to the excess, and outline any impact on NCB (if it was affected) following any recovery from the at-fault insurer.
- Under 'repair' the PH should be advised that their vehicle will be repaired via an approved network in their locality. The PH should also be advised of the benefits to them of that network e.g. guaranteed manufacturer parts, warranty on work carried out, PAS 125 etc.
- Under 'recovery of losses' the PH should be advised that the insurer will attempt to recover all losses for them, including the insurance excess, and these will be subject to liability for the accident.
- In the 'alternative options' section the insurer should make reference to the fact that the PH is free to choose, if they wish to rely on ,the assistance of a CMC who will provide this service for them. This may differ from what is covered on the PH own policy, subject to the level of cover acquired. It should then be made clear to the PH that these services are provided on credit. In the event the PH has any liability for the accident, or that some losses are under-recovered, the PH holds a personal liability to repay these losses to the CMC.

In addition to the proposed change to insurance policy wording, we would advocate that a CMC / CHO is also required to inform a consumer at the point of service provision regarding the services provided by the CMC.

This should be read as a telephone script covering the following points:

- The services the CMC can provide e.g. hire, repair, claims management, recovery of losses.
- Explaining that the claimant has a legal entitlement to recover reasonable costs incurred as a result of the accident (subject to liability). These include a vehicle that is suitable to their needs (perhaps providing examples), repairs to their vehicle (again outline the benefits of their service), and their ability to recover these charges from the at fault insurer.
- An agreed wording clearly communicating that:

  i) The claimant can only recover charges/costs that have been reasonably incurred.

  ii) They do have a liability to repay any unrecovered charges to the CMC.

  iii) The services are provided pursuant to a legally binding contract.

  iv) Whether this credit is covered by the Consumer Credit Act.

  v) That they will be required to sign credit agreements to this end before, or at the point services are provided.

This should be followed up with an agreed 'Key Facts' document. We would then suggest that the consumer should be updated periodically of the charges incurred to allow them to assess their potential liabilities and make an informed decision as to whether they should continue to use the services of the CHO.

(b) When is this information best provided to consumers—with annual insurance policies, at the first notification of loss, or at some other point? Should this information be available on insurers' websites?

In short we would suggest all of the above. We would advocate that PH are reminded of these verbally at the point of FNOL so that they can ask/answer questions that may arise.

In addition as set out at (a) we believe the CMC should also be obliged to advise these points at service provision stage.

(c) Would it be more effective for consumers to be provided with a general statement of consumers' rights prepared and periodically updated by a body such as the Association of British Insurers or are there any examples of existing best practice in relation to information given to consumers by insurers?

In principle we see no issue with such statements being provided as suggested, as this will ensure uniformity across the market. However, we would suggest such documentation is still provided at the same key points set out above, including as part of CHO service provision.

(d) Would this remedy give rise to distortions or have any other unintended consequences?

As we have seen with the "whiplash culture", if the wording provided is not robust one scenario could be an increase in the number of replacement vehicles being provided. This could result in an increase in the overall cost to the industry, which in turn could have the unintended consequence of an increase in motor insurance premiums.

We doubt the insurance industry is able to, or has a desire to, provide legal advice. Moreover, we would suggest that legal advice should never be provided by those who do not hold the required regulation.

(e) What circumvention risks would this remedy pose and how could these be addressed?

Some insurers would be likely to outsource the provision of vehicles on credit and direct rates to the same supplier. There may be instances where the message to PH (their legal entitlement) is distorted as a result. This means the desired decrease in services provided on credit may be less marked than it could potentially be.

(f) How would this remedy best be monitored, particularly in relation to a statement of rights at the first notification of loss?

There could be an audit by an independent firm if the remedy formed part of 'GTA2'. When GTA audits were being piloted in 2011, a sample of open and closed cases were reviewed to monitor compliance. There is no reason why this methodology could not be replicated to form part of a wider scale audit to confirm adherence. The question would be who would bear the cost of the audit?

(g) How much would it cost to implement this remedy?

As a legal services provider we are not in the best position to comment on this point. However we do not believe the cost would be prohibitive.

(h) Is there any reason why this remedy should not be implemented through an enforcement order?

To optimise the impact of enforcement orders we believe the credit hire market requires regulation through a compulsory GTA2. This would ensure that all parties are informed and accountable. We are not currently aware of the existence of a list of all hire providers to allow the OFT (or their representatives) to serve the required notice.

i) Is this remedy more likely to be effective in combination with other remedies than alone and, if so, which combinations of remedy options would be likely to be effective in addressing the AECs that we have provisionally found?

Our view is this is a remedy to work alongside other remedies in section 1, excluding 1B.

(j) Would the additional measure set out in paragraph 20 be likely to be effective in enhancing consumers' understanding of their legal entitlements?

We refer to point (d) and would query whether, in addition to one's legal entitlement, reference is made to legal liability. It is problematic to see one without the other, except to the detriment of the consumer.

In this section, we consider the seven remedies:

- ***1A: first party insurance for replacement cars;***
- ***1B: at-fault insurers to be given the first option to handle non-fault claims;***
- ***1C: measures to control the cost of providing replacement cars to non-fault claimants;***
- ***1D: measures to control non-fault repair costs;***
- ***1E: measures to control non-fault write-off costs;***
- ***1F: improved mitigation in relation to the provision of replacement cars to non-fault claimants; and***
- ***1G: prohibition of referral fees.***

1A first party insurance for replacement cars

Whilst the remedy appears fairly straightforward, we feel its actual implementation would not be.

Our rationale for such a view is twofold:

i) On balance, we very much doubt this remedy can be effectively implemented without primary legislation (i.e. changes to The Road Traffic Act 1988 (RTA)), to require an individual to hold first party insurance in addition to third party, and

ii) The individual's right in tort law to recover damages for the loss of their mobility has been established through numerous High Court rulings and this would have to be removed.

It appears to us, particularly in relation to the second point above, that whilst the CC is suggesting a policy offering from insurers to consumers based on their 'legal entitlement' the CC would need to change the legal rights around how that entitlement can be implemented.

The remedy is suggesting that the insurance industry includes a base level of cover for a vehicle (or not), and that a consumer can purchase a higher level of cover should they 'need' it through what would appear to be a 'policy add-on'.

In this scenario one can see unintended consequences of consumers being 'sold' a product they did not 'need'. Additionally, through the passage of time a customer's needs may alter meaning that the policy cover taken is no longer appropriate at the time the requirement for a mobility solution arises.

A final observation is that there could be issues in deciding whether this remedy would allow the non-fault insurer to subrogate the cost of providing a vehicle to the at-fault insurer. If an insurer is not able

to do this the NCB of the consumer could be effected. This could also mean that higher risk drivers' premiums are being subsidised by safe drivers.

If subrogation is afforded to insurers then much of the frictional cost that this remedy seeks to remove could persist as there may be arguments and disputes between insurers around what represents an appropriate vehicle.

(a) What aspects of the law would need to be changed?

As we have stated in our summary it is very difficult to see this remedy being implemented effectively without changes to the RTA and to the rights of an individual in tort.

Tort law allows a party to recover damages for "legal injury" (whether that be personal or economic injury) against a negligent party. Any change in legislation would have to remove the right to recover where the negligence results from a road traffic incident. Consideration would need to be given as to how a finding of contributory negligence, as well as additional heads of loss, would affect this.

(b) How should policyholders be given a choice as to the extent of replacement car cover?

As we have said in our summary of this remedy, a framework is required setting out how the policy add-on is offered and how a consumer's need is established. Careful consideration needs to be given as to whether this assessment is at the point of policy inception or at the point of an accident.

Experience demonstrates that an individual's need for an alternate vehicle and the type of that vehicle can change over time.

Keoghs would suggest there should be a minimum cover of mobility provision.

(c) To what extent would the need for consumers to pay a premium for replacement car cover be offset by the effect on premiums of the overall reduction in replacement car costs that would occur as a result of this remedy?

We would speculate as to whether there could actually be a short term increase on premiums through implementation of this remedy. This is due to the fact that the cost of provision will need to be covered where it is not currently. This cost will be dependent on whether insurers apply a blended increase averaging the cost linearly across the book; or an incremental increase depending on the value / type of vehicle.

This impact will be dependent on the uptake of an equivalent replacement vehicle under the cover of the insurance policy, and on the insurers' mix of potential replacement vehicles across their book.

We would therefore argue that this is politically a difficult remedy to balance. We would again refer back to our summary of this remedy and urge careful consideration about the right of subrogation and the part this has to play.

(d) How might this remedy affect NCBs and the premiums of non-fault claimants? Would non-fault claimants have to pay an excess when provided with a replacement car under their own policy? If so, would this be treated as an uninsured loss which should be recoverable from the at-fault insurer?

Keoghs don't believe we are in a position to answer the point on NCB.

Other losses covered by the policy are not subject to NCB reduction (for example windscreens), but the sums of money involved in vehicle replacement are significantly greater.

(e) How would this remedy affect the credit hire and direct hire activities of vehicle hire companies? How might the quality of service in the provision of replacement cars be affected if replacement car provision is contractually specified in motor insurance policies?

Aggregator statistics suggest that consumers will often elect to purchase at the lowest price. This approach could carry through to the election and purchase of cover for the provision of a mobility solution. If so, without an unequivocal change in legislation to remove an individual's right to recover against a negligent party we will still be left with a significant demand for credit hire services.

This point also has to be considered in relation to that raised regarding subrogation. If an insurer is unable to recover the replacement vehicle costs from the at-fault insurer this may have unintended consequences. For example, we foresee a potential scenario that would dis-incentivise an insurer to insure particular (specifically higher value) vehicles which would be very expensive in terms of equivalent replacement.

(f) Would it be likely that the non-fault insurer providing the replacement car would also handle the repair of the non-fault claimant's vehicle? What would be the consequences of this? Would complexities and costs arise if the replacement car is provided by the non-fault insurer and the repair is carried out by a different service provider?

It is difficult to see this remedy working well without the insurer responsible for the replacement vehicle also being responsible for repairs. We see two key reasons for this.

Firstly, in the case of a subrogated claim it would add frictional cost if a particular party caused lengthy delays in the repair / total loss period, and this was compounded by the involvement of a third party (for example, for storage) in the negotiation process.

Secondly, if an insurer was responsible for both elements, it would give them enhanced ability to control cost, and manage the customer journey.

(g) Would this remedy give rise to distortions or have any other unintended consequences?

As we have mentioned above, high risk drivers may see no increase to premium, whilst the premiums of non-fault consumers increase. This is undesirable.

If indemnity is withdrawn at any point, for whatever reason, a consumer could also be wrongfully left with no mobility.

In addition, there may be insufficient vehicle availability if consumers elected for this policy cover and this should be investigated prior to any implementation.

- Currently only 60 – 65% of non-fault consumers contacted by CHOs are provided with a credit hire vehicle. In our experience, a significant number of those vehicles are provided from a CHO's fleet, with any shortfall met by the vehicle rental market.
- Under the remedy, if it is written into policies that the PH has cover for an equivalent vehicle in the event of an accident there will be a demand for replacements for both non-fault and fault drivers. This will increase demand overall, but particularly from non-fault consumers who may take a vehicle from their insurer where they might not have taken one from a CHO. It is likely that the proportion of non-fault consumers taking a replacement vehicle will be well in excess of the 60% to 65% who currently take a CHO provided vehicle.
- Manufacturers may very well be unprepared to allow higher number of cars on to the second hand car market via rental or CHO organisations.

Aside from this potential impact it is also incredibly difficult to say what the impact of CHO's not using rental fleets as widely will do to retail rates. Certain CHOs utilise rental fleets to the extent that they can comprise 30% of the vehicles they supply. If you remove that revenue from the rental organisations (which is likely to be higher than an insurer would pay) they may be forced to increase retail rates as a consequence. This will erode the benefit of the remedy significantly.

(h) How long would it take to implement this remedy? What administrative changes would need to be made?

We envisage this remedy will require primary legislative change to the Road Traffic Act 1988, and the necessity to remove a claimant's legal right in tort to recover damages. The process may be prolonged if concerns around restricting access to justice are raised.

To make this change without legislative change would therefore be problematic.

In terms of moving to this model for insurers we must recognise that, in reality, there are few rental fleets with the capability to deliver this service and that there would be industry wide requests to tender for vehicle provision.

The rental organisations will understandably focus on those customers with the potential to provide the greatest revenue, and it will therefore take time to secure full coverage across the market. This is also compounded by the issue we have outlined in (g) above regarding providing 'equivalent vehicle coverage'.

(i) Would this remedy need any supporting measures? If so, what are those measures?

In the main we see this to be clarity around the subrogation point as this is critical to implementation.

We would also recommend a code of practice around vehicle provision. Whether costs are subrogated or not, there could be differing market opinions on what 'equivalent' means, depending on the age and value of the policy holder's vehicle for example.

1B at-fault insurers to be given the first option to handle non-fault claims

We strongly suspect that there will be a widespread view that this remedy is problematic. It is our view that this remedy is not workable.

There would be real confusion for the consumer regarding the claims process. We suggest it would be perverse for a consumer to choose to purchase cover from an insurer who they ultimately have little interaction with except to pay a premium. Moreover that insurer would have no ability to resolve a complaint if the service was unsatisfactory.

(a) Which of the variants in paragraphs 38 and 39 are likely to be most effective:

(i) If the non-fault claimant retains the right to choose who handles the claim, what incentive would they have to choose to have claims handled by the at-fault insurer? Would this remedy favour larger insurers with stronger brands?

As per our summary above we see paragraph 39 of the remedy as being very much to the detriment of the consumer, and the customer journey with the insurance market. For example, for reasons relating to poor claims service a consumer could choose not to renew their policy with a particular insurer, but then be forced to use this insurer as they represent the at-fault party.

Although paragraph 38 sets this remedy out in a manner that considers this point more ably, we can see the explanation of this process being very confusing for consumers. Consumers would need to ask a lot of questions to ascertain who should be dealing with their claim and why.

The administration cost of this process may be disproportionate.

(ii) If the at-fault insurer is able to capture the claim should it wish to do so, what incentive would the at-fault insurer have to provide the standard of service to which the non-fault

claimant is entitled? What measures need to be put in place to safeguard against this risk (see, for example, Remedy 2A)?

We can see that this could be a risk for consumers. One could argue that there is potential for the at-fault insurer to increase their customer base by providing an excellent service and hence attracting new policyholders. Conversely that could actually mean that the insurer eventually deals with fewer claims as an at-fault insurer would deal with the non-fault claims of their policyholders.

The whole process could be damaging to the market and to consumers.

(b) What are the implications of the non-fault claimant having the right to choose an alternative service provider?

In reality this choice exists today and works to a reasonable standard. Insurers who make quick liability decisions and have strong processes to offer services to non-fault consumers, have a good level of success in doing so.

The remedy could penalise those insurers who have already developed systems and processes in this area.

(c) To what extent might this remedy inconvenience non-fault claimants, for example if they have to wait for the at-fault insurer to make contact? How long should the fault insurer be given to contact the non-fault claimant?

In our opinion this process has a number of potential pitfalls for the consumer, namely;

- Being forced to use an insurer they have not chosen, nor may not want to use.
- Having to wait for the at-fault insurer to make a decision on liability. If their vehicle is un-driveable it could give rise to other heads of claim e.g. loss of earnings.
- We see this as unworkable if the at-fault insurer took more than 24 hours to make contact. Even then in some circumstances as mentioned above this will be too long.
- Real confusion about how the insurance claims process works.
- Numerous parties being involved in the provision of services (vehicle replacement, repair, PI, ULR) which further adds to confusion.

(d) Should non-fault claimants who make the first notification of loss to their own insurer, broker or CMC have to wait for an offer from the at-fault insurer before deciding who to appoint to handle the claim even if they want their own insurer or CMC to do so?

We would suggest that in reality there will be no CMC involvement in the notification process to the at-fault insurer if this remedy was implemented. Why would this part of the market incur those costs (taking FNOL calls, setting up on a system, explaining process to consumer, calling insurer etc.) if ultimately they will not control the claim and hence receive no payment?

It is likely to be brokers and insurers who will be required to bear this administrative cost.

One can see some scenarios where consumers are faced with very challenging situations where they were the non-fault party.

(e) Are there any advantages or disadvantages to the variant applying this only to replacement cars (see paragraphs 40 and 41) compared with applying this to both replacement cars and repairs? What might be the consequences of a replacement car being provided by the at-fault insurer but the repair being managed by the non-fault insurer?

We believe these to be answered in the points above. We see little advantage in this remedy.

(f) Would this remedy give rise to distortions or have any other unintended consequences?

We believe this remedy could inhibit an at-fault insurer's ability to screen and check for fraud. As the timescales to offer services will doubtlessly have to be stringent, fraudulent claimants could receive a whole range of services before the insurer becomes aware of the issue.

An increase in fraudulent claims will ultimately cause premiums to rise.

Understandably this may well make insurers hesitant and that would further increase the time that reputable consumers have to wait for services.

(g) How might this remedy be circumvented? How could this circumvention be avoided?

We don't propose to comment further as we have addressed this above.

(h) How should insurers, brokers and CMCs be monitored to ensure that claimants are properly informed of their rights when making the first notification of loss? How should non-fault insurers and CMCs be monitored to ensure that the at-fault insurer is informed of the claim? Who should undertake this monitoring? What additional costs would arise as a result of monitoring?

We feel this question in itself highlights the challenges faced by this remedy and its implementation. In short, it is difficult to envisage how this remedy, if it were implemented, could be monitored proportionately and effectively.

It would require telephone recording technology, significant auditing and reporting to a body who can take action were any non-compliance to be identified.

The administrative cost all parties would have to bear in answering a myriad of policy holder questions would further add to this.

(i) How long would it take to implement this remedy? What administrative or legal changes would need to be made?

We would refer to our answer to question 1A and again suggest the CC should consider whether vehicles would be available if this service was offered.

We envisage this remedy to require primary legislative change to the Road Traffic Act 1988, and the necessity to remove a claimant's legal right in tort to recover damages.

In terms of moving to this model for insurers we must recognise that, in reality, there are few rental fleets with the capability to deliver this service and that there would be industry wide requests to tender for vehicle provision.

The rental organisations will understandably focus on those customers with the potential to provide the greatest revenue, and it will therefore take time to secure full coverage across the market. This is also compounded by the issue we have outlined in (g) above regarding providing 'equivalent vehicle coverage'.

1C measures to control the cost of providing replacement cars to non-fault claimants

We agree that this remedy has the potential to deliver the desired effect, though we suggest in order for this to happen, 1G would have to compliment it.

We foresee it as workable only to cap the daily rate of certain vehicles and not the duration. There are many genuine reasons why duration can extend for an amount of time and capping this would be to the detriment of the consumer, particularly if they are liable for any unrecovered charges under their terms of credit.

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(a) What would be the most effective way of implementing this type of remedy? Possible ways could be an enforcement order made by the CC, an under-taking to replace the GTA, or (in relation to the hire costs of TRVs subject to dispute) a recommendation for judicial guidance on the level of hire costs recoverable from at-fault insurers by non-fault insurers and other providers of replacement cars.

It is difficult to see a rate cap being implemented without GTA2.

We could see a situation where this regulation also enables the market to challenge practices that are undesirable; i.e. CHOs or CMCs being required to reach a base standard of service / quality to meet the regulation requirements.

An enforcement order if implemented in conjunction with regulation, would enable real financial penalties to be levied for non-compliance.

(b) Which parties should be covered by this remedy?

Any party who seeks to supply or refer vehicle services, and any compensator who has to meet that cost. This should include commercial entities, self-insured fleets and vehicles currently exempt from the RTA.

(c) What is the appropriate time period in which repairs should commence once a replacement car has been provided? How should the hire period be monitored and by whom?

Guidelines as to repair timescales should form part of the GTA2 provisions.

The genuine issue for subscribing parties to the current GTA framework is that there is no punitive measure for non-compliance.

The CC should consider these risks before setting timescales, and equally importantly, that the industry is geared to monitor compliance and the accuracy of information provided.

Ultimately CHOs will monitor claims, however, insurers who want to ensure the process is adhered to should also monitor the repair. Within our unit that handles 15,000 GTA claims per annum we mirror this process. This has resulted in a significant decrease in our client's indemnity spend.

(d) What is the most appropriate mechanism for setting hire rates for replacement cars? Who should determine the hire rates?

There is a clear dispute between the claimant and defendant markets on the above question, in both the GTA and litigated scenarios.

The GTA framework and method is not ideal and often protracted. It is, nevertheless, based on submissions from both sides of the market as to what rates should be.

The rate takes into account the retail rate, or what is referred to in litigation as the basic hire rate (BHR), and also numerous other factors such as the cost of purchase of the fleet, fleet maintenance, the cost of providing credit and so forth.

In our view, a similar process, overseen by a committee from both sides of the market (but crucially with some independent body able to make a casting judgement) would be sensible.

All parts of the market have experience of such negotiations through the GTA annual rate review. This must reduce the risk of error and the remedy having detrimental or unintended consequences.

What should not be forgotten (and as we have stated in 1A(g)), is that we cannot be certain in future what altering this market will do to retail rates longer term. We would argue strongly for engagement with the rental market on this point.

(e) What administrative costs should be allowed? At what level should administrative costs be capped?

We do not feel, as a legal services provider, that it is in our remit to comment on this as we have no visibility on the costs involved for insurers.

(f) Is it practicable for the relevant documentation to be exchanged through a web portal rather than in paper form?

We know that there are portal exchanges in the market at present, with two of these being at the forefront. It is arguable that this has produced administrative savings, but the 'selling' point of these portals is that:

i) they facilitate a reduction in hire spend to the insurer and

ii) they therefore enable swifter payment to the CHO.

The two leading portal systems charge a transaction fee to both sides.

There is a caveat, however, that the outcomes from a portal are only good for all parties if the information entered is accurate. If this information is not accurate, the process doesn't improve.

The final issue around a portal would be the cost and who would pay for the development.

(g) What costs would the measures in this remedy entail?

There is no reason to assume that setting rates would be significantly more expensive than the current GTA rate review. As it is to be expected that the reduction in CHO revenue will be marked, it would have to be done at the point remedy 1G is implemented.

(h) Would this remedy give rise to distortions or have any other unintended consequences?

If, as we assume, replacement vehicles in this remedy are still provided on credit and yet the ability to recover losses is capped, are claimants still liable for unrecovered charges? If so, that will mean legislative change in order to prevent the hirer from recovering those losses could not be implemented.

Worryingly, consumers will be left with a residual liability that will not fall to be paid by the at-fault party. Even if a CHO were to waive that liability, should they then go into liquidation who is to say the liquidators would take a similar view? We have already seen instances where administrators have attempted to recover under-recovered hire charges from customers many years later.

It is therefore unclear how the cap would be best implemented.

We would also ask whether it is the intention to cap rates at one rate regardless of other factors. Currently through the GTA, rates are discounted from the 'commercial rate' that forms part of the rental agreement (terms of credit). Is the intention to cap the commercial rate or the GTA rate?

If it is the former, we envisage this is far more difficult to cap as we would have to consider the types of vehicle at each cap, and the geographical disadvantage some providers would have.

(i) To what extent is there a risk that this remedy could be circumvented by the evolution of new business models that are not subject to it? How could this risk be avoided?

Circumvention would be possible in the absence of a regulated GTA2. Otherwise CHOs / CMCs could opt out of the rate cap as they essentially do today. These companies in our experience do not only

charge a higher daily rate, but also possess business models around profiting from frictional cost, i.e. litigation.

The rate cap is more easily circumvented from a referral fee ban (see 1G) perspective, and the two remedies are likely to be required to work in tandem.

This point comes back to the question of which rate the CC suggest is capped? If it is the GTA rate then one could envisage CHOs using a more aggressive litigation strategy to recover losses at a greater value via the courts.

1D: measures to control non-fault repair costs

As Keoghs have limited experience of administering repairs we do not propose to work through the points in detail. Instead we have reviewed the benefits and potential unintended risks of implementing this remedy.

From our knowledge of the area it appears at face value that this remedy does as much to harm competition as it does benefit.

This remedy does not provide detail on whether it applies to credit repair or is limited to insurer v insurer repair, and this would need to be clarified. It does appear that 1D (in both sections) is very much contradictory and to the detriment of TOH2.

If credit repair is excluded from this remedy, it is very much open to circumvention by promoting a move to a credit repair model. Hence there is a need for a baseline standard of quality in the whole market as we would suggest in relation to TOH2.

There is no clarity within 1Da as to what is meant by 'wholesale'. Insurers could very well argue, depending on the definition, that it could cause them to lose a competitive advantage they have developed through their supply chain. This could certainly have negative consequences.

Benefits

- Potential reduction in TP costs being brought against them for repair.

Risks through implementation

- If credit repair is not included, insurers would argue this is the sector with the biggest issue on price / cost in the market, and the CC findings support this. It should therefore be included.
- It is open to circumvention as detailed in our summary of the remedy.
- Due to the recent decision in Coles v Hetherton, legislative change may be required in order for this remedy to be achievable as that judgment now sets out that a market rate is recoverable in law.
- We would question how standardised costs would be calculated so as not to prejudice certain market sections e.g. direct book vs. commercial book?
- Who would meet the cost of developing a system, or is it assumed they would self-fund what will undoubtedly be a costly exercise? If this cost was borne by insurers it may well be that any benefit is eroded.
- Is it possible to cap costs in geographically isolated areas or for those repairers specialising in certain vehicles e.g. coachworks? Again this could have negative unintended consequence.

1E: measures to control non-fault write-off costs

We are not engaged in this sector of the market and therefore do not feel our response will add significant value in this area.

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1F: improved mitigation in relation to the provision of replacement cars to non-fault claimants

It is vital to improve consumers understanding of the service. As we have outlined at the outset of our response, we believe this encompasses making consumers far more aware of their legal liability and not simply their legal entitlement.

This remedy should very much support this through understanding of the consumers' needs, and assisting them with mitigation of loss.

We are not convinced that this remedy will be bring huge benefit in isolation, and as a consequence has to be implemented as part of broader measures. The primary reason for this scepticism, is that this remedy could be circumvented by asking the consumer questions that undermine the remedy's intention.

As above, the key to minimising circumvention is making the consumer aware of their liability to pay unrecovered credit hire charges.

We also think it is worth noting that the idea of telephony exchange seems practicably unworkable and far too costly. We understand that not all insurers (or CMCs) have the technology available to deal with the requirement to provide telephone call recording. It may require software to enable all parties to listen to other parties calls which again is a cost consideration.

If this is a requirement, who bears that cost? Would there be a minimum standard to achieve? If this is the case then it may very well be disproportionate.

There is also a risk that some would call for this information too readily, resulting in an increase in administration and frictional costs far in excess of what they are today.

There will doubtlessly be issues with DPA when transferring call data particularly as it is dealing with claimant needs and requirements for personal reasons.

(a) Could this remedy operate on a stand-alone basis?

As above we believe this remedy is best implemented with others, particularly Remedy A. One would expect a reduction in frequency and claim cost if this were the case.

(b) Which other remedies would benefit from this remedy as a supporting measure?

We believe that Remedy A, 1C, 1F and 1G all share synergies.

(c) What questions should the non-fault insurer or CMC ask non-fault claimants in order to assess the need for a replacement car, the appropriate type of replacement car and to demonstrate that the provision of a replacement car had been appropriately mitigated? Should the cover provided by the claimant's own insurance policy be considered in assessing the claimant's need: for example, if the claimant's own policy included provision of a replacement car in the event of an at-fault claim, would that be sufficient evidence of need for a replacement car in the event of a non-fault accident?

We would refer to our response to remedy A when reviewing this section. In our experience, in addition questions need to centre around;

- What is the consumer vehicle used for?
- Availability of any other vehicle in the household
- Age of the consumer vehicle (meaning a more modern hire car in a lower category is equivalent

- Type of profession the consumer is in, i.e. do they have an image to maintain?
- Is the vehicle used for social and domestic or other purposes/
- What mileage do they cover and is it local or further afield?
- Are they injured and do those injuries prevent driving or require different features to the vehicle?
- Does anyone else have authority/need to use the vehicle?

In relation to establishing need, the legal threshold (as it currently stands), is considered fairly low. The test is the reasonableness of the replacement.

Referring back to remedy 1A, this would again support subrogation if this was the favoured long term option (as it can't be implemented quickly due to the required primary legislative change).

(d) Would the right of the at-fault insurer to challenge the non-fault insurer or CMC and to see the 'mitigation declaration' and call record be sufficient for this remedy to be self-enforcing without additional monitoring? Would giving the at-fault insurer access to the non-fault insurers or CMC's call records give rise to any data protection issues?

In our experience this would not.

It would be very easy to circumvent the remedy by leading the consumer with additional questions or phraseology to persuade them of a particular view.

We consider the best remedy is to implement 1F in conjunction with steps to outline legal liability as suggested in A to enable the consumer to be more informed.

The at-fault insurer could then maintain the ability to negotiate with the CHO after the event.

(e) How much would it cost to implement this remedy?

The cost to implement a standard wording should be fairly low. It merely requires the administration of dealing with an increased number of questions from policy holders, although one would expect many of these will be directed at the CHO.

The other cost would be for the market to monitor behaviour. However, these could form part of compulsory audits under GTA2 to maintain regulated status.

(f) Would this remedy give rise to distortions or have any other unintended consequences?

Other than the points detailed above we do not see other unintended consequences.

1G: prohibition of referral fees

We see this remedy as one that enables other remedies to work more effectively.

We have seen from the ban on referral fees in the personal injury market, that the banning of the fee itself does not reduce claim cost. It does however facilitate the reduction of claimants' fixed costs.

We certainly feel it would be beneficial to differentiate between what is seen as a referral fee, and how this compares to wholesale price, and a shared profit and loss account or volume rebate.

This definition is key to help avoid circumvention.

If this remedy is implemented (and we advocate that it should), the lessons from the circumvention of the ban in referral fees in the personal injury market should be heeded. There would therefore need to be a far better solution with tighter control and governance.

Furthermore, it would need to be clear when it is applied, otherwise certain revenues that should not be included (and are not in any other industry) but are, could be to the detriment of premiums.

(a) Could this remedy operate on a stand-alone basis?

As we have stated above we would envisage this remedy working in conjunction with others, particularly 1C.

(b) Would remedies 1A to 1F benefit from a prohibition of referral fees as a supportive measure? Or would remedies 1A to 1F have the effect of reducing referral fees in any event?

As we have stated above we see 1G as an enabler, however we do see this remedy as having potential for circumvention.

(c) What would be the impact on premiums if referral fees were prohibited?

We see this as dependent upon whether the revenue stream from referral fees to insurers is greater than the cost saving of a cap and the other measures that are being proposed. We know referral fees, subject to volume of hires, are in the region of £300 - £350 per claim. It is unclear whether that amount of saving can be generated from the other measures.

It may well be the case, certainly in the short term, that premiums rise; however we wouldn't anticipate this being a long term impact, as savings would start to off-set this revenue loss.

Submissions from insurers will break this point down in more detail.

(d) Would this remedy give rise to distortions or have any other unintended consequences? In particular, would a prohibition on referral fees create a greater incentive for insurers to vertically integrate?

There is evidence that vertical integration in this part of the market has happened with some insurers, and there has to be a risk therefore it could occur on a broader scale.

It is difficult to see Remedy 1A being implemented without the need for the non-fault insurer to subrogate the loss, and this would inevitably contribute to vertical integration.

As well as allowing insurers to more effectively recover cost, vertical integration would replace lost revenues. As we have said, the loss of revenues to insurers could well be greater than the reduction in cost, which could mean premiums will rise in the short term.

(e) What circumvention risks would this remedy pose and how could these be mitigated? In particular, how could other monetary transfers (e.g. discounts) having the same effect as referral fees be prevented?

The ban can be circumvented in several ways, for example discounting third party claims.

If the ban does not encompass credit repair, this would be a loophole that could be exploited to circumvent the ban. We have considered alternatives that could be employed by CHOs and are happy to discuss these in further detail.

(f) How could this remedy best be monitored and what costs would be incurred in doing so?

Such is the complexity of many of the methods that could be employed to circumvent a ban (as we have seen in personal injury) this will be a significant challenge.

If the GTA becomes a regulated market there would have to be an entry level audit and this may include a review of status to ensure the owners are 'fit and proper'. That is not guaranteed to stop activity such as that outlined above, but it would be a deterrent.

The costs for audit on this scale appear significant at face value.

From a common sense perspective, if 1G is implemented in conjunction with 1C, the CHOs simply won't have the revenues to pay a commission / referral fees. At present, margins in the CHO market per file are fairly slender. The successful CHOs are those who have an efficient return on capital employed model therefore the two go hand in hand.

Conclusions

None of the options are straightforward and all carry the inherent risks of unintended consequences. We are also concerned as to the true cost / benefit outcome with some of the proposals. We consider it unlikely that either Government or the OFT will have a budget to fund implementation and subsequent policing. It is highly likely that this would have to be borne by compensators generally. Careful thought needs to be given as to how this may work and the likely cost involved if premiums for consumers are to be contained/reduced.

We would therefore urge the CC to provide for a greater amount of time for consideration of these risks than it has done to date.

We also consider it unlikely that legislation could be effected promptly, given where we are in the lifecycle of the current administration. This raises real questions as to how practical both 1A and 1B are as short to mid-term solutions.

Remedies by way of enforcement orders seem more likely outcomes. However we see this as being complimented by legislation in the future if the CC made firm recommendations to Parliament.

It may therefore be preferable to consider this paper in the following way:

- What is achievable / deliverable in the short to medium term, and will that make a positive difference to outcomes in terms of both cost and consumer protection; and
- What are longer term ambitions to reform the credit hire process including the possibility of legislative intervention.

A two-stage strategy may form a more productive outcome, giving the CC the opportunity to take stock of 'quick wins' implemented at the outset, thus mitigating unintended consequences.

As in much of the recent personal injury reform, the aim should be to try and seek positive outcomes which avoid unintended consequences. We believe that the CC will receive common themes from responses outlining some of the pitfalls of proposals, and reflect the reality of the Parliamentary timetable.

Keoghs would welcome the opportunity to engage further with the CC in the development of the remedies in the short to medium term to remove frictional cost and improve the process for the end consumer. Our unique position in the market place gives us the perspective to do this.

Further information

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