Response of Liverpool Law Society to the Competition Commission Private Motor Insurance Market Investigation Notice of Provisional Findings dated 17th December 2013.

Liverpool Law Society

Liverpool Law Society (LLS) represents over 2500 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This response has been produced by canvassing the opinions and experiences of solicitors who are predominantly engaged in the work of personal injury and credit hire litigation. Contributors include solicitors acting for both Insurers and Claimants. At all times LLS has sought to express an impartial view without preference. The views expressed are not necessarily those of the author.

Response

As a neutral body LLS does not suggest that it has within its direct knowledge detail of the motor insurance market and in particular it does not have access to the statistical data of which an independent analysis would be necessary to verify the assumptions made by the Competition Commission (CC) in determination of the Theories of Harm. LLS would however wish to raise a concern that contrary to Section 136 (2) (c) of the Enterprise Act 2002 the Provisional Findings would not appear to have provided all information relevant to facilitating a proper understanding of questions and reasons for any decisions. It is particularly noted that to date the only "data room" access has been in respect of the vehicle repair analysis which would seem wholly inappropriate given the significant and wide ranging impact that the Possible Remedies would have upon the consumer and their access to justice. LLS would seek a detailed explanation from the CC as to why data has been redacted and thereafter withheld it being the widely held belief of members that such failure in disclosure does prevent a full understanding by all relevant bodies and impinge upon the ability of those bodies including LLS to make a complete and detailed response whilst also calling into question the lawfulness of any decision that might be made.

LLS would additionally request that the CC explain the rationale behind seeking a response to the Possible Remedies (PR) prior to any response to the Provisional Findings (PF) and also provide confirmation that the parties likely to be affected by the market investigation have been properly directed to the fact that a single response to the remedies will not necessarily suffice in terms of there being any consideration as to whether the PF should become final or be varied in any way. Should it be the case that ultimately a body is denied the opportunity to make a valid representation to the Commission that impacts upon the final remedies LLS would consider that the methodology adopted in terms of securing responses would have the potential to negatively impact not only upon that body but other interested parties including the general public in terms of their access to justice and right to restitution following a non fault accident.

Pursuant to section 131 of the Enterprise Act 2002 the OFT made a reference to the CC in respect of the supply or acquisition of private motor insurance and related goods or services in the UK. The CC are required under the terms of section 134 (1) and (2) to determine by way of market investigation whether there is an adverse effect on competition (AEC) due to "any feature, or combination of features of a relevant market (that) prevents, restricts, or distorts competition..."

Following investigation of the Private Motor Insurance market the CC identified that AEC exist with regard to:

- the separation of liability for costs and control of costs in the handling of non-fault drivers' claims
- various practices and conduct of the parties managing such claims which result in higher costs to at-fault insurers and therefore higher motor insurance premiums
- lack of effective monitoring of car repairs and limitations in the ability of the customer to assess the quality of repairs to the extent that repairs are substandard
- insufficient information provision in respect of the sale of add on insurance products and point of sale advantage resulting in there being inflated add on prices

The different ways in which these AEC impact upon competition are particularised within five separate Theories of Harm. Theory One refers to the separation of control and Theory Two relates to the beneficiary of post accident services being different from the procurer of those services and these Theories are most relevant to this response. LLS in review of the PF have concentrated upon the impact to access to justice and the public interest generally against the backdrop of whether there might be considered a genuine adverse effect on competition. For this reason LLS would not intend responding to those Theories of Harm that relate to market concentration (Price Comparison Websites), Competition softening (Add-On Products) or vertical relationships (MFN clauses). These fall beyond the remit of LLS and necessitate considerations of an economic nature that are not within the knowledge of the society. LLS further note that the FCA is engaged in a review of PCW in any event.

LLS have previously discussed the importance of the Law of Tort in the context of this market investigation and do not therefore intend to rehearse the points made with regard to Remedy 1A in the response to the PR a copy of which is annexed hereto. It must suffice to say that the CC themselves identify that it is a foundation stone of the British judicial system that in the event of negligence giving rise to a claim in damages the non-fault party has a right to damages that will be awarded on the basis of restitution namely that they will be put back into the position that they would have been had the accident not occurred.

In their investigation the CC have reviewed the provision of post accident services to non-fault parties and in particular concentrate upon the existence of CMC and credit hire companies (CHC) and their perceived impact upon the identified AEC. They assess by reference to a "well functioning market" the ways in which separation may impact upon the at fault insurer's costs and revenue streams and in corollary how that affects premium price and quality of service to the non-fault party. The conclusion ultimately is that the average cost of vehicle provision to the non-fault party is £1085 some 2.5 times more expensive than provision by way of direct hire secured by the at fault insurer. They deem the referral fee element of that figure to be £340 and calculate that frictional costs exist through provision of credit hire in the region of £300 albeit that they also conclude that the overall cost to the consumer is only £6- £8 per premium.

Notwithstanding the concerns of LLS as to the analysis of data generally and which will be discussed below it is clear that these figures do not necessarily demonstrate the AEC described by the CC. Section 134(4) Enterprise Act 2002 refers to considerations as to the type of action or recommended action that should be taken by the CC for "the purpose of remedying, mitigating, or preventing the adverse effect on competition or any detrimental effect on customers so far as it has resulted from or may be expected to result from the AEC." Section 134(5) determines that a detrimental effect on customers or future customers will exist in the form of:

(a) higher prices, lower quality or less choice of goods or services in any market;

(b) less innovation in relation to such goods or services.

Section 134 (8) describes the converse of these principles to be relevant to considerations in respect of a customer benefit.

It is the view of LLS members that the separation of control identified does not give rise to an AEC and importantly in the context of access to justice and full legal entitlement the provision of post accident services does not cause a detrimental effect to the customer within the definitions of the Enterprise Act 2002.

An assumption would seem necessary in terms of what is deemed to be a well functioning market and that would appear to be one without the AEC. However the CC clearly refer to the fact that the "existence of credit hire was likely to act as a deterrent to at fault insurers providing a poor quality of replacement car services." They additionally state that the "motor insurers in our sample told us that third party capture was in direct response to the increased no-fault mobility costs incurred by them (as the at-fault) insurer following the introduction of credit hire". It is therefore the case that if the ability of a non-fault party to access post accident services was removed as a result of the implementation of the possible remedies this would involve the effective abolition of credit hire companies. LLS do not wish to adopt a position that serves only to champion the existence of CHC but do not

consider that the CC in reaching their conclusions have undertaken adequate analysis of the direct hire market and how legal entitlement may suffer.

Direct hire and credit hire alongside CMC and legal services generally have recognised quality differentials in terms of the service they are able to offer. Whilst it might be argued that all the bodies involved have an aim of improving margin and profitability the incentives that ensure the non-fault party accesses their full right of restitution are entirely different. Indeed LLS would argue that as far as the at fault insurer is concerned there is no incentive other than to minimise cost. In the alternative the other bodies are in direct competition with one another to make payment of a referral fee attractive to the insurer or other party who might refer work to them and also provide additional services that give rise to customer satisfaction. These would include delivery and collection of vehicles, automatic vehicles, estate vehicles, satellite navigation equipment, non standard driver services (eg drivers of younger or older ages and drivers with penalty points) and excess waiver which services are often excluded entirely from direct hire or must be purchased by the non fault driver at direct cost or risk to themselves despite the necessity of them to the driver. LLS would point out that nowhere within the data analysis offered is there evidence that these additional services have been included within comparison of the direct hire and credit hire charges such that there is a genuine concern on the part of members that an understatement prevails in respect of direct hire cost. LLS also note that whilst credit hire attracts VAT this is not always the case within direct hire contracts but that element has not been referenced within the figures included within the PF.

In terms of provision of service to the non-fault party the above mentioned additional services are clearly vital to their being put back into the position that they would have been but for the accident. The model adopted by CC would seem to have as its premise that any like for like, need or period considerations would be mirrored between the direct hire and credit hire. In this regard the CC is referred back to the response made to the PR attached hereto and the concerns expressed by LLS that there is no evidence that the at fault insurer would be willing to provide an adequate replacement vehicle in the absence of credit hire or that they wouldn't employ their more considerable strength in reducing hire periods and creating confusion about the issue of need - in short issues as to legal entitlement and general misinformation would arise.

LLS note that the CC used data provided by only three direct hire companies and that these were larger providers able to access bulk buying wholesale tariffs possibly due to the fact that they would also refer more highly remunerated credit hire work to the CHC as well. It should be noted that a more comprehensive survey would be required to adequately assess the true costs of direct hire in the context of additional services and whether in the absence of credit hire suppliers of vehicles would be as willing to enter into the same commercial arrangements as today.

It is a long established fact within the Court system that the use of a CHC is not a failure to mitigate. In the case of Dimond -v- Lovell Lord Hoffman stated at page 401 para F:

" By virtue of the contract, she obtained not only the use of the car but additional benefits as well. She was relieved of the necessity of laying out the money to pay for the car. She was relieved of the trouble and anxiety of pursuing a claim against Mr Lovell or the CIS. She was relieved of the risk of having to bear the irrecoverable cost of successful litigation and the risk, small though it may be, of having to bear the expense of unsuccessful litigation. Depending upon the view one takes of the terms of the agreement, she may have been relieved of the possibility of having to pay for the car at all. My Lords, English law does not regard the need of any of these additional services as compensatable loss...

Consequently whilst the additional services listed above and which include excess waiver, estate and automatic vehicles and satellite navigation equipment are recoverable and an essential element to be taken into consideration when making a comparison with direct hire the costs of additional benefits are not necessarily recoverable but nevertheless do form part of the service offered and a cost covered in entirety by the CHC in order to secure business and retain customers. It is the view of LLS that this single issue is fundamental to the decision making process that must be adopted by the CC when it considers the existence of any AEC and whether a remedy is required. LLS are concerned that in the absence of a CHC or CMC willing to provide these services the individual non fault party would be placed at risk of making no recovery in respect of their own uninsured loss which would include not only the excess but heads of damage relating to property damage and financial loss such as loss of earnings and diminution in vehicle value. LLS have not seen any evidence that third party intervention would ensure recovery of uninsured losses and indeed the CC have already identified that some 28% of non-fault parties fail to recover their excess presumably in cases of third party intervention.

If it is assumed that the removal of CHC will remove the frictional costs identified (but not yet proven), LLS would seek clarification as to how the CC intend to ensure that the non fault Claimant remains able to recover their full legal entitlement? LLS members have significant concerns that the Claimant would be left to bear the frictional cost themselves in order to put themselves back into the position they would have been. At a simple level this may mean that in cases involving direct hire they are required to make payment for some additional service such as an automatic vehicle or excess waiver product but on a much more serious level they may be left in the position that they are unable to secure recovery of their uninsured loss. The small claims track includes any non personal injury claim up to a value of £10000 namely the larger part of the uninsured loss claims to which LLS refer. The PF do not confirm how they envisage the individual would be able to recover their loss. LLS do not see that law firms would be in a position to act for the Claimant for costs limited to the small claims track particularly should the case involve significant dispute in respect of liability or a requirement for expert engineering

evidence. If those hypothetical scenarios are approached as an expense of time calculation the Claimant may be in the position that they would lose a significant part of, if not all of their uninsured loss claim in pursuing a recovery. Whilst excess recovery may involve a low level fee earner and be suitable for fixed fee or DBA funding the more complex the argument became the higher the graded fee earner and the greater the amount of time required. It is the conclusion of LLS that in terms of access to justice and the loss of an additional benefit to the non-fault party the AEC and PR are misguided - reform would result in either inability to recover uninsured loss or the Claimant having to seek out and pay for legal representation at a level that would far exceed the balance frictional cost identified of £300. LLS also refer to the fact that direct hire would be unlikely to be provided in the case of a dispute and that the CC have stated that " motor insurers are incentivised to settle liability more promptly to minimise credit hire or avoid GTA late payment penalties." A non fault party or indeed even a partially responsible party would suffer serious prejudice in the even of dispute since they would be unlikely to secure any for of restitution in respect of their vehicle or personal loss.

In promulgation of this view LLS do not simply rely upon expense of time review but look to the closest geographical model of a situation without credit hire and uninsured loss recovery namely Ireland. It is the experience of the non-fault party in Ireland that they are left considerably out of pocket in the face of a lack of legal representation caused directly by market forces that have reduced the profitability of being able to provide a post accident service. These are serious points and LLS would urge the CC to undertake a detailed analysis of the real costs to the consumer of creating an idealised frictionless market and what it would actually cost the consumer to restore their legal entitlement. In this regard LLS would also point out that the CC in undertaking a survey as to the satisfaction of some limited 100 parties who received a credit hire or direct hire vehicle have presupposed that those involved understood their actual legal entitlement.

It must be considered fundamentally wrong to seek to reduce frictional costs that have not been fully proven by removal of the individual's legal entitlement. LLS members further point out that whilst the evidence at this stage may be entirely anecdotal there is a view that frictional costs are contributed to by the conduct of the parties involved and in particular the Insurer who fails to settle within the GTA periods for example or who raises arguments or procedural points within litigation that ultimately serve to increase cost.

Whilst LLS recognise that the CC have chosen not to give consideration to PI claims as part of their market investigation they believe this to be naive. The original reason behind the OFT referral related to an alleged 40% increase in private motor insurance premiums. In their report the Transport Select Committee identified that this was an unfounded claim in terms of personal injury claims and that there had been insufficient time to allow the reform achieved by LASPO to bed in and be reviewed. However if the non-fault party is left unable to recover their uninsured loss it must be accepted that there is a real risk that whilst they would not previously have pursued an injury compensation claim they will do so to bring it within the £1000 track limit and

secure the representation that require to recover their financial loss. This is contrary to the aims of LASPO and may give rise to an increased level of fraudulent claims. In terms of an unintended consequence this is one that would increase premiums to the consumer and therefore should be considered a possible detrimental effect.

The point was made within LLS response to the Possible Remedies and we reiterate it here that the CC would appear to have overlooked the existing mechanisms in place that control the provision of TRV to the non fault Claimant it being a long established principle per Giles v- Thompson that " need is not self proving". Point 4.3 of the GTA specifically imposes upon signatories an obligation to advise their customers of the need to mitigate loss at the start of and during the hire period and at Appendix C includes a draft Mitigation Questionnaire for completion as part of the Payment Pack. Mitigation is further a legal principle within the law of tort that has been part of any consideration as to reasonableness since the case of Liesbosch Dredger -v- SS Edison (1933). The concept has been regularly tested and key decisions handed down in the specific area of credit hire most recently in Opoku -v- Tintas (2013) and the Northern Ireland case of Clarke -v- McCullough (2013) when in both instances the amount that the Clamant could recover by way of credit hire charges was significantly curtailed due to a failure on their part to mitigate their loss. It is our view therefore that a remedy is not required given the existence of existing controls. Indeed it does not in any way overcome the AEC of separation of control and is unlikely to reduce frictional and transactional costs any more than mitigation as a concept already keeps them in check.

LLS are concerned that the absence of transparency within the data analysis undertaken by the CC means that an AEC has been developed without sufficient basis in evidence. The general erosion of legal entitlement to mobility and recovery of loss after an accident would potentially reduce competition in favour of the insurers who may look to recover the losses caused by the necessity of controlling the claim and providing replacement vehicles by increasing premiums or persuading non -fault parties that they don't require a vehicle at all. It is a view expressed by members that separation of control rather than being an AEC is positive in that it protects the market (from a monopoly situation), ensures a quality of service and enables access to remedies in line with the principles of restitution in tort and legal entitlement. Separation of control should therefore be considered a function of tort that serves to protect the choice of the consumer rather than detract from it. Direct hire has not been accurately assessed as an alternative and indeed neither has it been shown that in its current form it is a true comparator and the CC are referred to the points raised by LLS in their response to the PR and possible remedy of third party intervention attached hereto. LLS do not therefore find on the information contained within the PF that an AEC is proven in respect of the separation of control point and associated Theory of Harms. The CC are invited to undertake more detailed analysis of the market and provide access to the data held to prove that a saving would be made to the consumer that would be able to overcome the loss of additional benefits

identified within this response and prevent a reduction in access to justice and loss of legal entitlement.

LLS do not intend to reiterate the points that have been made within their earlier response to the Possible Remedies but do annex that response and confirm that it should be reviewed alongside this response in terms of the conclusions it draws in respect of access to justice and legal entitlement.

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