



Inquiry Manager  
Competition Commission  
Victoria House  
Southampton Row  
London  
WC1B 4AD

4 February 2014

Dear Sirs

### **PRIVATE MOTOR INSURANCE MARKET INVESTIGATION**

This is the response from the trade body ("The CHO") representing the interests of credit hire companies ("CHCs") in relation to the Notice of Possible Remedies ("PRs") issued by the Competition Commission ("CC") on 17 December 2013.

#### **1. Timetable**

- 1.1. You will be aware from previous correspondence and conversations that The CHO was arranging its annual conference around the timetable for the publication of the CC's Provisional Findings ("PFs") and PRs. This was an essential part of The CHO's work so as to provide smaller members with guidance on your work and findings to date and for giving those smaller members a forum for contributing to the trade body response.
- 1.2. The CHO notes that the CHCs that are privy to the round table meetings and from whom you have elicited investigation data and responses are all larger CHCs, each of which has more complex and differing business models than the sole provision of credit hire.
- 1.3. Your timetable has changed several times and remained unspecific as to actual dates making the administrative issue of arranging the annual conference so as to link in with your PR responses timetable (which was unknown until 17 December) more than problematic.



- 1.4. The CHO notes that its request for a timetable extension was rejected. The CHO is also aware of communications that you have had with the Chairman of The CHO regarding the CC's inability to confirm that it will consider responses to the PRs submitted after 17 January. The CHO would respectfully remind the CC that on 23 December it informed the Chairman of The CHO that "we will of course consider further comments on points of details relating to the remedies that you might include in your response to provisional findings".
- 1.5. It will be apparent to the CC that certain of your remedies as proposed would effectively end the business models (and therefore the business) of those CHCs that provide credit hire exclusively and it would therefore be grossly unjust if the CC were not, given the context above, to take into account this submission on PRs.
- 1.6. The CHO also notes that it has requested access to the data room and that it will only be in a position to provide complete comments on PRs having obtained such access. The CC's findings are highly sensitive to calculation errors, inconsistencies, biases and omissions and the CHO is only in a position to comment on these once given access to the data room. The CHO also notes that it has requested access to the data room and that it will only be in a position to provide complete comments on PRs having obtained such access. Such access is vital for the CHO to be able to check the reliability of the CC's calculations. The CHO notes in this regard the very significant and basic error that the CC has made in regard to the treatment of VAT.

## 2. Overview comments on PFs

- 2.1. Although the main focus of this submission is on PRs, for context The CHO sets out below some high level points on the CC's finding of an adverse effect on competition ("AEC") in PFs. The CHO will provide a more detailed response to PFs in due course.
- 2.2. The CHO disagrees with the CC's finding of an AEC in relation to the provision of temporary replacement vehicles ("TRVs"). The CHO considers that the CC has reached a mistaken conclusion due to serious mistakes and gaps in its analysis, including those set out below.



- 2.3. First, the CC has repeatedly acknowledged that the existence of CHCs provides an incentive to fault insurers to provide TRVs under direct hire. This is correct. However, the CC has not taken this incentive effect into account in reaching its conclusion that the separation between cost liability and cost control (in combination with frictional costs) leads to an AEC.
- 2.4. This omission is highlighted in the cost benefit analysis presented in PFs which purports to show the net cost associated with the AEC. As The CHO has submitted to the CC, any cost benefit analysis should attribute benefits of direct hire to the existence of credit hire (since the latter incentivises the former) but no such benefit is included in the CC's cost benefit analysis.
- 2.5. As explained further below in the context of PRs, the CC's failure to internalise the role of CHCs in incentivising direct hire in the AEC analysis leads the CC to propose perverse remedies. In particular, the CC proposes PRs that are in direct contradiction to the ongoing viability of credit hire and *therefore also in contradiction with the ongoing incentives of fault insurers to provide direct hire and therefore to the provision of mobility overall*.
- 2.6. Although the CC has acknowledged that that the existence of CHCs provides an incentive to fault insurers to provide TRVs under direct hire, the CC has failed to conduct any analysis of the lengths that insurers will go to avoid recognising the rights of the victims of accidents. For example, the CC has failed to analyse bilateral agreements in depth. Had it done so, it would have understood that they are used by insurance companies deliberately to deny consumers' legal entitlements. This is a huge gap in the CC's analysis given the AEC gives rise to remedies that shift control towards insurers.
- 2.7. Second, whilst the CC acknowledges that the costs of credit hire are policed by the courts' assessments of what is reasonable, the CC mistakenly appears to consider that the oversight of the courts is inadequate despite having not conducted any investigation.
- 2.8. The CC mistakenly concludes that "insurers of at fault drivers appear to find it difficult to assess the extent to which the costs claimed are reasonable and appear to exercise only limited control over the cost of these services" (PF para 1.5).



- 2.9. This is wholly incorrect. Fault insurers find it easy to demonstrate unreasonableness where it occurs; they struggle to show unreasonableness in general however because CHCs take care to (and have incentives to) only make reasonable claims.<sup>1</sup> Litigation typically arises not because of the unreasonableness of CHCs' claims but because of insurance companies' incentives not to settle claims thereby undermining the CHC model.
- 2.10. The CHO previously submitted to the CC that it had failed to undertake sufficient study to understand the magnitude of the commercial and legal protection given to at fault insurers as a result of significant case law that governs the cost dynamics involved. In particular, the CC should have analysed challenged claims (post-Autofocus) as this would have demonstrated the reasonableness of CHCs' claims.
- 2.11. It remains of concern to The CHO that the CC has still not studied this adequately and has made mistakes in relation to stating the actual position established in law, and that the CC is making PRs that involve proposed changes to the law whilst having failed to perform work on the protections already provided by current law.
- 2.12. In this context, the CC has also failed, despite the request of The CHO, to investigate the Autofocus episode. This involved fraudulent expert evidence being submitted to courts in a very large number of cases to suggest that credit hire rates were not reasonable. It created what proved to be an entirely false impression that CHCs were submitting unreasonable claims. As stated above, the CC should have undertaken the work required to establish the factual position in relation to the reasonableness of CHCs' claims.
- 2.13. Third, the CC's cost benefit analysis claims to identify net costs of credit hire associated with increased frictional costs compared to a world where credit hire is converted to direct hire, but this is an illusion that arises from an incomplete analysis.

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<sup>1</sup> The CC has also made a number of errors in stating the basic legal position. For example in para 3.18 the CC states that "the non-fault driver need only show that the rate is reasonable". This is incorrect. The onus is on the fault insurer to demonstrate unreasonableness.



- 2.14. The essence of the CC's cost benefit analysis is that the separation of cost liability and cost control combined with the frictional costs of CHCs imposes an additional cost in the supply chain. However, the CC has failed to integrate frictional costs borne by consumers in its cost benefit analysis.
- 2.15. Without CHCs acting on their behalf, consumers (victims of accidents) would need to exercise considerable effort themselves (despite a lack of knowledge and expertise) in attempting to secure TRVs under direct hire from fault insurers, who have no incentive to provide such a service (as noted above, the CC appears to acknowledge that fault insurers do not have a direct incentive to provide TRVs to the victims of accidents). The CHO set out the work the CC should do to address this issue in its response to the Annotated Issues Statement (see in particular paragraph 1.22). The CC has still not conducted that work.
- 2.16. Frictional costs therefore do not disappear under a notional world of all direct hire but are rather displaced from CHCs and are privately borne by consumers instead. In practice, consumers are likely to find the frictional costs prohibitive – especially when an absence of credit hire removes insurers' incentives to provide direct hire - and be forced to do without mobility instead.
- 2.17. The above is all the more important since credit hire cases involve a higher proportion of cases in which liability is not clear, compared to direct hire cases. This inevitably means the costs of establishing liability are higher on average in credit hire cases.
- 2.18. Fourth, the CC has done no analysis of what the direct hire rates submitted to it actually represent or what might happen to direct hire rates in a market where credit hire was either less prevalent or indeed prohibited.
- 2.19. The CC's figures for direct hire rates are based on samples and the CC has not shown that they are representative. Furthermore, direct hire rates reflect complex commercial relationships between car hire companies and insurers and reflect a variety of strategic considerations including low direct hire rates in exchange for credit hire referrals (meaning that the direct hire rates identified by the CC would be higher absent credit hire) or as a means of charging consumers for other protections or add ons that are afforded by and included within the provision of credit hire. The gaps in the CC's work and consequent understanding of what is represented by headline (low) direct hire rates undermines the CCs quantification of ToH1 in the extreme and have led it to suggest disproportionate PRs.



- 2.20. Finally, The CHO notes that the CC has reached its AEC finding while treating consumers in aggregate and not considering costs and benefits separately for victims of accidents and tortfeasors.
  - 2.21. In particular, the CC has considered the benefits of credit hire only in aggregate (concluding, wrongly, such benefits are small) but has failed to consider the benefits for victims. Considering the position of victims separately would have led the CC to recognise that its AEC finding operates against the interests of victims of accidents (since they are better off under the status quo). As such the AEC finding has a distributional aspect and cannot simply be regarded as a finding confined to the issue of economic efficiency. The CHO queries the basis on which the CC can reach an AEC finding that includes value judgments between classes of consumers.
  - 2.22. In the remainder of this submission, we set out our comments on Remedy A and the remedies intended by the CC to address Theory of Harm (“ToH”) 1 (Remedies 1A to 1G).
3. Remedy A – Measures to improve claimants’ understanding of their legal entitlements.
    - 3.1. The CHO would support measures that set out to improve claimants’ understanding of their legal entitlements, subject to observing that at fault insurers (including via bilaterals) have an obvious incentive not to perform this role – misleading the consumer along the way. The CHO therefore considers that it should not be the ABI that is vested with creating the solution (they are not independent).
    - 3.2. The CHO will submit further comments on this proposed remedy in due course. At this stage we note that there will be difficulties in making any general advisory material fit for purpose given each consumer will be applying it to their specific claim circumstances (which may of course be for more than just TRV). The advisory material would also need to be kept current and would hence give rise to ongoing costs of stewardship, assuming an independent body can be found that feels it is able to issue such generic material in the first place.



#### 4. Remedy 1A

- 4.1. This is a radical remedy that would create winners and losers among consumers. It would be to the detriment of the victims of accidents (who would pay more to obtain mobility) and to the advantage of fault drivers who would not bear the costs of the damage they inflict on non fault drivers. Given the remedy creates winners and losers it is not merely a matter of economic efficiency; rather it involves a value judgment between different classes of consumers and The CHO queries the basis on which the CC can propose a remedy that involves a value judgment among consumers.
- 4.2. This remedy would end the provision of credit hire. This seems therefore to be a disproportionate remedy given the extent of the supposed harm of the £3.70 to the consumer per policy and the CC's recognition of the benefits of credit hire.
- 4.3. The CC has done no work to establish what the costs of a TRV policy may be, but current rates are substantially in excess of the £3.70 and therefore this remedy imposes even further costs on consumers and represents effectively a cost of buying protection already afforded under law.
- 4.4. The role of these types of TRV policies is complex and the CC has done no work on either the current dynamic of how claim costs are absorbed by insurers when a claim is made under a TRV policy or on how those dynamics and costs would change after the proposed law change. Before advancing such a remedy the CC would need to consider inter alia (i) the likely weak competition for such add on policies (ii) the inefficiency caused by the retail mark up applicable to such policies (iii) the fact that the price of such policies is currently depressed by the existence of credit hire and would therefore rise absent credit hire (this is because the providers of such policies fulfil the TRV through credit hire where possible).
- 4.5. This remedy would impose frictional costs on consumers – which, as noted above, the CC has so far ignored entirely. Rather than dealing with credit hire companies, who have aligned interests, consumers would instead have to deal with their insurer, who has non aligned interests (i.e. who would prefer not to provide a TRV under the policy if it can be avoided).



5. Remedy 1B – At fault insurers to be given the first option to handle non-fault claims
  - 5.1. This remedy involves artificially suppressing the ability of CHCs to compete to provide TRV services in favour of at fault insurers (which would be a perverse outcome of a competition inquiry). Given that at fault insurers do not have incentives to provide direct hire other than due to the threat of credit hire, this would be to the detriment of mobility provision.
  - 5.2. In particular, if fault insurers are offered a time window in which to consider the position and decide whether to intervene, they will have incentives to use that entire time window, to shorten the duration of mobility provision. This would be to the detriment of victims, especially given that mobility provision is most valuable in the immediate aftermath of an accident (since the victim has had no time to make contingency plans for the absence of a vehicle).
  - 5.3. By using the entire time window, this would also reduce the probability of credit hire provision at all at the end of the time window since by then the victim may have lost faith in the process due to the delays, and correspondingly reduce the fault insurer's incentive to provide the consumer's full entitlement, if indeed they provided mobility at all.
  - 5.4. Allowing fault insurers to offer a price and giving credit hire companies the opportunity to beat it would impede the ability of credit hire companies to compete. In particular, it is unclear how the rates quoted by insurers would be determined or what would stop insurers from quoting artificially low rates to seize control of claims and then underprovide and at the same time drive CHCs out of the market.
  - 5.5. This remedy could seriously undermine the consumers' ability to make a claim, especially if that claim involved a claim for costs other than just TRV. For example, a victim also claiming for whiplash could be compromised if the fault insurer asked questions relevant to the claim for the whiplash injury.





## 6. Remedy 1C – Measures to control the costs of replacement cars

- 6.1. The CHO is supportive of measures to make the GTA more efficient. In particular, it notes that in the context of the GTA an electronic claims portal is being developed, albeit it has been delayed by the CC's investigation. This has the potential significantly to reduce the frictional costs identified by the CC.
- 6.2. The CHO reiterates that control over reasonable costs is already existent given the many years of legal case law and the competitive rental market in the UK (from which the courts assess the notion of reasonableness). As noted above and despite The CHO pointing this out on numerous occasions, the CC has still performed no work to understand this dynamic.
- 6.3. The CHO would remind the CC that the GTA is explicitly a voluntary set of rates that are used by CHC's and insurers to avoid the further costs of litigation. As such they are not the rates in any market.
- 6.4. The CHO would not support any change to the principle that the relevant rates are those established in law (which allow for the existence of credit hire, with the consumer benefit that entails). Nor does The CHO consider that an independent party could effectively contribute to the setting of discounts of these rates to reflect the avoided costs of litigation, since that is necessarily a bargain to be struck by the opposing interests of CHCs and insurance companies.

## 7. Remedies 1D and 1E

- 7.1. The CHO is not directly concerned with repair or write off costs other than to say that the CC has identified significant consumer harm being performed as regards the quality of vehicle repairs, even to the point of seemingly promoting measures to see that the provider of repair services is adequately remunerated so as to be able to perform a quality repair.
- 7.2. The CHO agrees that the consequences of insurer buying power leads to substandard quality of repair provision and is mindful that your proposed PR's (1A and 1B) seek to give insurers even greater control over the provision of TRV's. This will not be in the interests of consumers.
- 7.3. The CHO may expand on its thoughts on these remedies in its future submission.



8. Remedy 1F – Improved mitigation in relation to the provision of TRVs

- 8.1. The CHO supports measures to ensure CHC's obtain information as to need and believes that CHC's already perform this role. Given that the CHC assumes the financial risk of determining this incorrectly it is well positioned to perform this role.
- 8.2. The CHO does not believe that insurers or CMC's are best positioned to perform the role as they have an incentive to mislead consumers about their entitlement.
- 8.3. The law already provides insurer protection on the issue of mitigation and any changes would need to ensure that consumer rights are not reduced.

9. Remedy 1G – Prohibition of referral fees

- 9.1. The OFT acknowledged that the role of referral fees was complex and required further analysis. This has not been performed.
- 9.2. A ban on referral fees would reduce consumers' awareness of their legal rights and has to be a material consideration for the CC. Banning the fees would reduce insurer income and lead to higher premiums.
- 9.3. The CHO considers that a ban on referral fees would reduce claim volumes to insurers but this should not be the objective of the CC.
- 9.4. The CHO reiterates that referral fees do not influence the quantum of a claim made by a CHC for a TRV.

Kind regards

Yours faithfully

**M J Andrews**  
**Director General**  
**The CHO Limited**