

CIS GENERAL INSURANCE LIMITED

Market Investigation into Private Motor Insurance

**Response to the
Provisional Decision on Remedies**

4 July 2014

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1 INTRODUCTION

- 1.1 This Response is made by CIS General Insurance Limited ("CISGIL"). It contains CISGIL's observations on the Provisional Decision on Remedies and accompanying appendices (the "Provisional Decision") published by the Competition and Markets Authority CMA (the "CMA") on 12 June 2014.
- 1.2 CISGIL welcomes this opportunity to comment on the Provisional Decision.
- 1.3 CISGIL has already provided extensive comments on the market features that the CMA is investigating under various theories of harm, as well as its observations on the specific adverse effects on competition ("AEC") that the CMA has provisionally identified. It has also commented on the provisional findings that certain market features do not lead to an AEC and has responded to the notice of possible remedies¹ (CISGIL's Response to the Notice of Possible Remedies (the "Response on Remedies")).
- 1.4 In this response CISGIL provides its observations on the CMA's Provisional Decision. CISGIL looks forward to continuing to assist the CMA throughout the final stages of its market investigation.

¹ See: CISGIL Response to the Issues Statement (14 January 2013); Transcript and Summary of Bilateral Hearing with CISGIL held on 19 July 2013; CISGIL Response to the Annotated Issues Statement and Working Papers (9 September 2013); CISGIL's Observations on the MSX International Vehicle Inspection Programme Report (18 November 2013); CISGIL Response to the Notice of Possible Remedies (17 January 2014); CISGIL Response to the Provisional Findings Report (7 February 2014); and Transcript and Summary of Multilateral Hearing with insurers held on 26 February 2014.

2 EXECUTIVE SUMMARY

- 2.1 CISGIL is committed to ensuring that the interests of Co-operative members and its customers generally are protected, that consumers receive their legal entitlements and a high level of service, and that the market for private motor insurance operates efficiently, effectively and fairly.
- 2.2 CISGIL broadly supports and welcomes the CMA's Provisional Decision which will help to reduce some unnecessary costs faced by insurers in relation to the provision of replacement vehicles and provide consumers with an enhanced level of information regarding both their legal rights under tort law and entitlements under the terms of their own PMI policy. However, CISGIL is disappointed that the CMA's proposals, despite the fundamental issues identified with the findings of AEC, do not go far enough in addressing those AECs and customer detriment arising out of the separation of cost liability and cost control (Theory of Harm 1).
- 2.3 CISGIL has given careful consideration to the CMA's Provisional Decision. In responding CISGIL has limited its comments to only those remedies the CMA is proposing to take forward. CISGIL is particularly concerned about the possible unintended consequences of parts of the CMA's remedies package.
- 2.4 For example, in relation to Remedy 1C, a three day limit will mean:
- (a) that insurers are less likely to be able to investigate liability properly and that as a consequence the insurer could accept liability to obtain the low rate cap but learn subsequently that its customer wishes to pursue a personal injury claim which may be prejudiced by the prior admission of liability (paragraphs 3.9 to 3.11);
 - (b) there could be an increase in the frequency of credit hire (paragraphs 3.12 to 3.14); and
 - (c) there could be an increase in the frequency of credit hire fraud (paragraph 3.15);
- 2.5 Furthermore, the CMA does not propose to extend Remedy 1C to cover replacement vehicle claims charged to at-fault insurers directly by non-fault claimants who have organised the hire of a replacement vehicle directly. CISGIL believes this presents CHCs with an opportunity to circumvent the low rate cap by funding a customer's self-provision of a replacement vehicle rather than providing them with a credit hire vehicle (paragraphs 3.28 to 3.32);

- 2.6 CISGIL urges the CMA to give very careful consideration to these potential problems and to work closely with the industry to ensure that the remedies package addresses fully the AECs identified but without the possible unintended consequences that CISGIL explains in this Response.

3 THEORY OF HARM 1: SEPARATION OF COST LIABILITY AND COST CONTROL

Remedy A: measures to improve customers' understanding of their legal entitlements in the event of a claim

- 3.1 In view of CISGIL's commitment to protecting the interests of Co-operative members, its customers and consumers generally, CISGIL fully supports the CMA's proposal that consumers be provided with clearer information on their legal entitlements both under tort law and under the terms of their own PMI policy following an accident or other claim event.
- 3.2 CISGIL therefore supports the CMA's proposed Remedy A which will ensure that consumers are more aware of their rights and the options available to them in the event of an accident.
- 3.3 However CISGIL remains concerned that consumers will be over burdened with information and would encourage the CMA to consider this issue throughout the development of the detailed design of the remedy. Although stated before, CISGIL considers the emphasis should be on *clearer* information not merely *more* information.
- 3.4 Turning to the implementation of the remedy, CISGIL has considered what changes will be necessary to its business systems and believes that the CMA's proposed timeframe (currently within three months of its order / at first renewal after that three months) will be [§<].
- 3.5 Finally, whilst such changes are capable of being initiated in advance of the CMA's enforcement order, CISGIL has concluded that it will require up to [§<] months within which to complete the changes necessary to implement the remedy fully and effectively from the date of the final report (assuming that is late September 2014).

Remedy 1C: measures to reduce the cost of replacement vehicle provision to non-fault claimants

- 3.6 CISGIL is broadly supportive of the introduction of a dual rate cap and General Terms of Agreement ("GTA") based controls and guidance around first to the customer, the capping of hire period duration and payment terms. However, CISGIL has some concerns regarding the design of the remedy and the potential for circumvention which are set out below.

Design

Reducing frictional costs by speeding up liability determination

- 3.7 The CMA has considered ways in which it can link the cost of replacement vehicles to the speed of liability determination and has proposed that the low rate cap will apply

when the at-fault insurer accepts liability within a 'short period'. That period is proposed to be three days from first being informed that a replacement vehicle is being provided to the non-fault claimant.

- 3.8 While CISGIL accepts that the determination or otherwise of liability has an impact upon frictional costs, it considers that the proposed three days in which the at-fault insurer has to investigate and to accept liability is too short a timeframe.
- 3.9 It is CISGIL's view that the CMA's proposed three day limit will result in significant pressure upon them to admit liability in order to take advantage of the low rate cap. CISGIL considers that as that period is too short a time in which to properly investigate liability [redacted].
- 3.10 This could have adverse effects on customers. For example, the insurer could accept liability within the three days in order to take advantage of the low rate cap but subsequently learn that its own customer wishes to pursue a claim for personal injury. Such **acceptance of liability** in relation to the replacement car claim, which would have been based upon the best available information at the time, may prejudice their own customer's personal injury claim (emphasis added). In light of the foregoing, CISGIL believes that in order to take advantage of the low rate cap, acceptance of 'liability' should not be required.
- 3.11 CISGIL believes it is sufficient for the proposed remedy to work that the CMA should merely require insurers to accept that they will **pay for a replacement vehicle at the low rate** (without any admission of liability) until such time as they have had the opportunity to investigate and to reach an informed decision on liability (emphasis added).
- 3.12 In addition, CISGIL considers that the three day limit to investigate and accept liability could encourage both an increased frequency of credit hire provision and, possibly, fraud.
- 3.13 In relation to the increased frequency of credit hire provision, CISGIL is concerned that the CMA's proposal incentivises CHCs and CMCs to provide replacement vehicles regardless of fault, i.e. the remedy removes an element of the commercial risk inherent in the provision of credit hire vehicles. Currently CHCs and CMCs assess the likelihood of not being able to recover based on the circumstances of the incident and provide a replacement vehicle in line with their assessment. If an insurer only has three days to secure the lower rate [redacted].
- 3.14 In CISGIL's view there is a real possibility, particularly in relation to organisations with their own fleet, [redacted].
- 3.15 In relation to possible fraud, which is clearly different to the above circumstances, [redacted].

- 3.16 CISGIL notes that the proposed three day limit contrasts with the pre-action protocol for low value personal injury claims in road traffic accidents (which applies to claims up to a value of £25,000), in which the at-fault insurer has up to 15 days from receipt of notification of the claim to respond on liability. Given that replacement vehicle and personal injury claims are often interlinked, CISGIL considers that the period within which to determine and to confirm liability on replacement vehicle claims should be the same as that which applies under the pre-action protocol, i.e. 15 days from first notification.²
- 3.17 The GTA addresses confirmation of receipt of the claim: under the GTA³ insurers must respond to the CMC's notification of a new claim within five working days confirming receipt and advising the CMC of the relevant handling centre and claim reference number.
- 3.18 The GTA⁴ acknowledges that where liability is at issue insurers are not always able to settle quickly. Issuing a formal acceptance of liability fundamentally prejudices an insurer's position in relation to a claim. The CMA should be clear that what is required here is acceptance of the rate payable for a replacement vehicle under its dual rate cap not acceptance of liability.
- 3.19 CISGIL considers that if the CMA persists with the three day time limit it must be satisfied that the acceptance of liability provided to the replacement vehicle provider in order for the lower rate cap to apply would, at law, simply confirm that the insurer accepts and will pay for the replacement car at the low cap rate for the period while acceptance is in place. It should not be taken as an admission or acceptance of liability for the accident itself. If that is achievable, then in CISGIL's view this would remove the risk of an insurer being reluctant to accept liability in relation to the replacement car claim for fear it would prejudice their position or arguments in relation to liability with regards to any later claim for other heads of damage, such as personal injury and/or any potential later uninsured loss claim its own customer may wish to pursue.
- 3.20 CISGIL believes that such an approach, if achievable, would fulfil the CMA's aim of reducing frictional costs by allowing insurers to take a more commercial view regarding acceptance of the replacement car claim without fear of prejudice to its own customer's uninsured loss claim or any other later heads of damage pursued by the third party, yet would still provide the replacement vehicle provider with an undertaking that the claim will be accepted and paid at the low rate cap for the period while acceptance is in place.

² Whatever time period is applied to the acceptance of liability, it will need to be clear whether it is actual days or business days and whether a day is 24 hours calculated from the time of notification.

³ Paragraph 4.2 of the GTA.

⁴ Paragraphs 6.9 and 6.10 of the GTA.

Upfront costs in the provision of a replacement vehicle

- 3.21 The CMA has set out the type of costs incurred in current business models adopted by CHCs, including upfront costs relating to the provision of the vehicle to the non-fault claimant. CISGIL recognises that an element of upfront costs (e.g. preparation of the vehicle for hire and its delivery and collection) are recoverable but is concerned that this could be [redacted].
- 3.22 Under the terms of the GTA, upfront costs such as collection and delivery are not recoverable as stand-alone charges as they are accounted for in the maximum settlement rates for car hire. CISGIL's view is that the low and high rate cap proposed under Remedy 1C should factor in appropriate upfront costs as this would be the optimum approach to remove areas of dispute and friction.
- 3.23 The CMA has invited views on an alternative method for setting the daily hire cap based on average retail spot rates for each category of vehicle in a particular geographic area. CISGIL believes this would be both unwieldy and impractical; requiring not least the collation of numerous vehicle rates varied by both vehicle group and location.

Aspects of the GTA

- 3.24 The CMA has provisionally decided that it does not intend to implement a portal for credit hire handling as part of its package of remedies. While CISGIL understands the rationale behind this decision, in its view it is extremely important that an appropriate medium and robust process is used to harness the proposed remedies. CISGIL believes that without this there is a risk that handling friction will simply move from issues over rate to issues with when liability was accepted or withdrawn. For example, an insurer could accept liability (or retract liability) by post or by telephone within three days however the CHC/CMC could have no record of the call, or claim not to have received the written response within three days. CISGIL believes that the CMA will need to be specific as to what will constitute 'receipt' and 'acceptance'. For example, it may be that a dedicated email address is required to be set up so that both sender and recipient are clear on when precisely notification has occurred.
- 3.25 [redacted].
- 3.26 The CMA has provisionally decided to adopt GTA based arrangements in relation to late payment penalties. CISGIL considers that there needs to be absolute clarity as to how such late payment penalties will apply. For example, if the at-fault insurer does not pay the low rate cap within a certain time period, will the amount payable increase to the high rate cap or do the penalties only ever apply to the low rate cap?
- 3.27 CISGIL welcomes the 'GTA' type guidance in relation to durations, but suggests to the CMA that careful wording needs to be used to prevent situations arising such as the

seven days of hire post receipt of a total loss settlement being claimed as standard even when the claimant may have replaced their vehicle beforehand.

Circumvention

- 3.28 The CMA does not propose that Remedy 1C is extended to cover replacement vehicle claims charged to at-fault insurers directly by non-fault claimants who have organised the hire of a replacement vehicle directly. In this regard, the CMA has recognised that this might present an opportunity for circumvention of the remedy but has said that it believes the risk to be low on the basis that replacement vehicle providers would be unlikely to adopt a business model where they provide non-fault claimants with funding, as such a model would be unattractive as they would have to rely upon the claimant submitting and defending the claim in order to recover its costs.
- 3.29 CISGIL does not share the CMA's view that the risk is low. The CMA draws such a conclusion on the basis that the vehicle provider would have to rely on the consumer submitting and defending the claim in order to recover its costs and that such a business model would be unattractive as the vehicle provider would have no control over the claims management process.
- 3.30 However, in circumstances where a customer can already approach a third party (such as a solicitor) to handle their claim, there appears, in CISGIL's view, to be no reason why, if a customer arranges their own hire rates themselves, they could not be provided with a loan for a vehicle by the CHC (rather than a credit-hire vehicle) and repay that loan once the cost of hiring the vehicle has been recovered.
- 3.31 [redacted].
- 3.32 CISGIL believes that CHCs could seek to circumvent the proposed remedy and that the CMA's enforcement order will need to be drafted in such a way as to remove, or significantly limit the opportunities to do so.
- 3.33 CISGIL notes that the CMA refers to a dual rate price cap for "**subrogated**" hire claims. CHOs/CMCs may be likely to contend that credit hire claims are not "**subrogated**" claims but rather are claims made by the non-fault claimant. Therefore the majority of credit hire claims are not **subrogated** claims because CHOs/CMCs are not providing any indemnity or payment but are providing a hire vehicle on credit terms. This use of the term 'subrogation', illustrates a significant circumvention opportunity. CISGIL believes the language used by the CMA should be carefully reconsidered and that the CMA should work closely with the industry, so as to avoid any such unintended consequences. (Emphasis added).

Remedy 1F: measures to provide greater transparency over the assessment of need and the non-fault claimant's mitigation of loss

- 3.34 Whilst CISGIL supports in principle the CMA's proposed Remedy 1F, concerns remain, as expressed in CISGIL's Response on Remedies, that this remedy may well increase disputes and frictional costs, despite the intention to achieve the opposite. CISGIL expands on this point briefly below.
- 3.35 CISGIL accepts however that the introduction of the proposed mandatory mitigation declaration is more robust than the mitigation statement that currently exists under the GTA. It will help to establish a claimant's true requirements and needs, as well as to emphasise their common law duty to mitigate their losses. In so doing it will contribute to a reduction in the level of over-provision of replacement vehicles to non-fault claimants.

Design

- 3.36 CISGIL agrees with the CMA's proposal that the mitigation declaration should be required to be completed prior to the provision of the replacement vehicle. However, CISGIL believes that it is important that there is absolute clarity around the point at which the mitigation declaration is required to be completed.
- 3.37 The CMA wording is currently unclear on this point particularly as it also refers to FNOL. By way of example, if an insurer or other party at FNOL is referring the non-fault claimant to a CHC, does the mitigation declaration have to be completed by the insurer or other party before they refer to the CHC, or should it be completed by the CHC after the referral but prior to the replacement vehicle being provided? In CISGIL's view it makes sense for this to be completed by and provided to the customer by the replacement vehicle provider – that is the physical provider.
- 3.38 CISGIL further notes that the CMA proposes that all replacement vehicle providers be required to make the relevant declaration. In CISGIL's view the scope of this requirement is unclear. For instance, would the provision of a courtesy car (by, for example, the repairing garage) fall within scope? CISGIL would welcome the CMA's clarification on this point.

Unintended consequences

- 3.39 There is a risk that the mitigation declaration itself will lead to increased disputes around need and therefore will not, as intended, reduce frictional costs. For example, CISGIL [redacted].

4 THEORY OF HARM 4: THE SALE OF ADD-ON PRODUCTS

Remedy 4B: measures to improve the transparency of information concerning no-claims bonuses

- 4.1 CISGIL, as previously stated⁵, is committed to providing a clear explanation of NCB and NCB protection. Therefore, CISGIL broadly supports the CMA's proposed package of remedies with respect to Theory of Harm 4. However, CISGIL has a number of observations on the design of the remedy and is concerned that the CMA has not factored in sufficient time for its proper implementation.

Design

Disclosure of average NCB discounts

- 4.2 CISGIL considers that the remedy proposed, i.e. the disclosure of average NCB discounts, is the best of the alternatives available but can only ever be illustrative in nature and has some material drawbacks. CISGIL explains below how the proposed remedy, which is predicated on the discounts to be quoted being based upon the average for each insurer for each NCB year **reflecting the policies written in the previous calendar year**, may mislead customers and lead to issues in implementation (emphasis added).
- 4.3 CISGIL is moving away from its [X].
- 4.4 As a result of this change, providing customers of the future with a table of average discounts based on CISGIL's old rigid rating approach will not be "comparing like with like" and may give customers a false impression of the level of discount they may expect to get. This discrepancy would not necessarily mean that customers could make informed purchasing decisions. The result, i.e. potentially misleading average historic discounts, would arise each time any insurer makes a fundamental change to the way in which it sets its scale of discounts.
- 4.5 Regarding the accompanying requirement that insurers submit an annual compliance statement setting out the information on their average NCB discounts which they propose to provide to consumers in the forthcoming year, and the basis for these figures from the prior year, CISGIL interprets this to mean it is not required to reveal its future plans for NCB but would welcome confirmation on that from the CMA.

Step-back procedures and the CMA's recommendations to the FCA

- 4.6 CISGIL has had the opportunity to review the ABI's draft response to the Provisional Decision and would endorse its views on these points.

⁵ Paragraph 6.15, Response on Remedies.

Implementation

- 4.7 The CMA noted that the main factor which would affect the timeliness of the remedy is the period of time required by insurers and brokers to amend their systems for direct online sales so as to generate the necessary information. The CMA noted that there would be a period between the publication of its final report and the making of an enforcement order (a statutory maximum of six months, extendable by four months) during which any administrative and IT changes could be initiated in advance of the enforcement order being made. The CMA are of the view that since all of the information the CMA are requiring to be disclosed should already be available to insurers and brokers the CMA did not consider that longer than six months from the date of the order should be required for the implementation of these remedy measures.
- 4.8 CISGIL agrees that the main factor which would affect the timeliness of the implementation of Remedy 4B is the period within which insurers and brokers will be required to update their systems and other customer facing collateral, for example pre-printed materials, web brochure etc., in order to support the envisaged changes.
- 4.9 Whilst such changes are capable of being initiated in advance of the CMA's enforcement order, the current proposal, which allows six months from the date of the order, leaves some uncertainty as to the precise period of time within which such changes must be completed.
- 4.10 CISGIL has given consideration to the changes that will be required to its systems. Taking into account [3<] months within which to complete the changes necessary to implement the remedy fully and effectively from the date of the final report (assuming that is late September 2014).

5 THEORY OF HARM 5: PRICE COMPARISON WEBSITES AND MFN CLAUSES

Remedy 5A: prohibition on wide MFNs and 'equivalent behaviours'

- 5.1 CISGIL supports the CMA's provisional decision to prohibit 'wide' MFN clauses. However, as previously stated,⁶ and although the prohibition of 'equivalent behaviours' is to be welcomed, CISGIL remains firmly of the view that 'narrow' MFN clauses also lead to an AEC and should also be prohibited for the reasons set out more fully in its Response on Remedies and briefly summarised below. Allowing narrow MFNs will also permit the circumvention by PCWs of a prohibition on wide MFNs.
- 5.2 A further concern to CISGIL, as a member-owned and driven organisation, its members should be entitled to assume that they will receive the best price by coming to CISGIL directly. As explained below, the continuation of 'narrow' MFNs would prevent CISGIL from offering this price to its own members, unless it charges its members the same premium as offered on the highest price PCW, which could lead to uniform pricing across all PCWs.
- 5.3 CISGIL has had the opportunity to review the ABI's draft response to the Provisional Decision and would endorse its views on this remedy.

Unintended consequences

- 5.4 CISGIL is concerned that a prohibition of only 'wide' MFNs will lead to unintended consequences for the sale of insurance by both PCWs and direct sales channels (such as insurers' own websites).
- 5.5 With the abolition of 'wide' MFNs, an insurer can in theory agree different premiums with different PCWs. However, accepting that PCWs are most likely to impose 'narrow' MFNs the insurer will still be prohibited from advertising on its own direct website a premium lower than the highest price agreed with a PCW, in order to comply with that MFN clause. That is, CISGIL will be obliged to offer a premium that is more expensive even in circumstances where its costs of direct acquisition are lower than those of the highest priced PCWs.
- 5.6 This, for the reasons explained more fully in the Response on Remedies, is likely to lead to customer confusion and dissatisfaction. Indeed, CISGIL has received and continues to receive feedback from its customers [§<]. In CISGIL's experience customers do not differentiate the product based purely on which channel to market it is sold through. In order to avoid customer confusion and dissatisfaction insurers are likely to adopt a single premium across all platforms, PCWs and their own website.

⁶ Paragraph 7.4, Response on Remedies.

- 5.7 The alternative is that more insurers adopt a strategy of maintaining different brands or products for their direct channels from those listed on PCWs to obtain some pricing 'freedom' from MFN clauses. CISGIL already maintains a separate PMI product solely for PCWs (ecoinsurance), which enables it [~~S~~] of its principal PMI product, 'Car Insurance', which is not sold via PCWs.
- 5.8 However, maintaining separate brands increases the costs to insurers, either in terms of marketing costs to promote the different brands or in terms of internal management cost to maintain, monitor and analyse the performance of the separate products. These costs are ultimately borne by the consumer in the form of higher premiums.

Circumvention risk

- 5.9 It is to be expected that PCWs will retain existing narrow MFNs and seek to impose them on insurers with whom they do not presently have narrow MFNs. The continued existence of narrow MFNs would, CISGIL considers, permit the circumvention of a prohibition on wide MFNs and prevent insurers from being able to set independently their own direct prices and also from innovating in their direct sales proposition.