Inquiry Manager
Competition & Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD

8 July 2014

Dear Sirs

PRIVATE MOTOR INSURANCE MARKET
THE CHO LIMITED ("The CHO") RESPONSE TO THE PROVISIONAL DECISION ON REMEDIES ISSUED 12 JUNE 2014

1. Introduction

1.1 The CHO is the trade body that represents the interests of credit hire companies (CHCs) in helping consumers pursue their legal entitlement following an accident where they were the not at-fault party.

1.2 The majority of our members are smaller corporate entities and, for reasons set out in this document, we consider that the CMA's proposed Remedy 1C will have severe and detrimental consequences to the ability of all but the very largest CHCs to continue trading. They will also introduce a raft of other unintended and negative consequences, and therefore will result in severe consumer harm.

1.3 The CHO believes that there are material deficiencies in the process, content and quality of the inquiry undertaken by the CMA, with the CMA's objective seemingly to come up with "remedies" to a highly questionable AEC finding that results in a reduction of costs to insurers outweighing any regard to consumer welfare and consumer rights. Consumers' rights have been enshrined through centuries of tort law precedent but the CMA seems to think it can ride roughshod over those rights. It is duplicitous for the CMA to state that Remedy 1C does not involve a change of consumers' legal entitlements when it so clearly and fundamentally impacts (potentially fatally) consumers' only ability to realise those rights through CHCs given the lack of incentives on insurers to ensure they are met. This is not acceptable.

1.4 Gaps in the work undertaken by the CMA, despite the CHO and others urging the CMA to perform certain workstreams as long ago as 15 October 2012, has resulted in the CMA making provisional remedy decisions that are biased in their objective, that place insurer profitability above consumer rights and which have not been thought through in sufficient detail in terms of the detrimental (and hopefully unintended) consequences to consumers.

2. Inquiry procedure – a flawed and bias process

2.1 In previous CHO submissions since 15 October 2012 and repeatedly thereafter, we have expressed concerns over gaps in the workstreams undertaken by the CMA.

We have advised the CMA to:

- Investigate, understand and publish a paper on their understanding of the legal position of claimants as regards TRV provision
- Investigate and understand the GTA to see how it is already the workable solution that balances effectively both costs and consumer rights
- Investigate the ***competitive*** retail rental market to understand the range of rates (Basic Hire Rates or BHRs) available to consumers
- Fully investigate what direct hire rates actually are, how the direct hire model , are not comparable to credit hire given the practices that unwitting consumers are targeted with (charges for CDWs etc)
- Investigate the actions of Autofocus to understand the reasons behind the false perception that credit hire costs were "inflated"
- Investigate the behaviour of insurers as regards bilateral arrangements put in place by insurers to prevent consumers from realising their full legal entitlements in the interests of saving costs
- Investigate the behaviour of insurers as regards the time taken to pay claims. Such behaviour results in unnecessary friction and claim costs becoming greater than they need to be
- Take great care when collecting, understanding and making conclusions from data; there has been averaging of averages and VAT errors all of which have resulted in the overstatement of credit hire costs and hence the overstatement of the quantification of the supposed AEC
- To produce a paper that shows that any cost savings obtained as a result of any remedy will flow through to reduced premiums, or how the CMA will ensure they do

2.2 From the inception of the OFT's investigation, the inquiry teams have brought preconceived ideas to the table and failed to independently question those perceptions. The OFT eventually ceased using the words "dysfunctional" and "inflated" to describe aspects of credit hire. The CMA eventually ceased using some pejorative phrases such as "overcosted" to describe credit hire costs. These are phrases that should not have been used in the first place. Had the CMA performed the necessary workstreams set out above, the use of such inaccurate and pejorative terminology would not have occurred and, The CHO believes, the remedies proposed by the CMA would not have been adopted.

2.3 The preconceptions continue to this day. It is entirely unacceptable for the Inquiry Chairman, on a business news TV channel, to describe credit hire costs as "artificially high". None of the working papers or documents use this terminology because it is wholly unsupported. What it demonstrates, however, is the underlying antipathy to credit hire within the inquiry team exemplified by use of this phrase by the Chairman to support its flawed remedies. The CMA has had two years to understand the dynamics of these issues and to fairly represent them. It has failed to do this. This is wholly unacceptable and an injustice to those organisations who have committed significant financial and human resources to assist the CMA in their investigation in the difficult commercial times of the recession.

3. The Legal Position

3.1 As already mentioned, the CMA has failed to publish a paper on the current legal position as it relates to claimants. Given that the issues on which the inquiry focused in ToH1 are fundamentally legal as much as economic (indeed more so) the CMA should have retained the services of Leading Counsel to develop and publish a detailed paper covering the legal environment in which the current market operates. The CMA has failed in this fundamental regard.

3.2 The failure to perform this workstream means that misguided unsubstantiated negative perceptions remain and, more importantly, that the CMA finds itself in the invidious position in which the proposed Remedy 1C, which is trailed as not changing consumers' legal entitlements, will do exactly that.

3.3 It is not for the CHO to provide the CMA with this legal paper. The CHO anticipates that other parties will point out the impact that Remedy 1C will have on consumers' ability to exercise their legal entitlements. The CHO anticipates those parties will highlight the fact Remedy 1C would allow informed and wealthy consumers to claim for their existent legal rights but uninformed less wealthy consumers to be deprived of existing rights and exposed to residual liabilities. Remedy 1C as proposed only

makes sense if its overriding objective is to reduce insurer costs. That is not, should not and cannot be the sole objective of this inquiry. Creating separate classes of consumer cannot be an intended consequence of any proposed remedy.

3.4 The fact that the CMA is now at the latter stages of its inquiry is no reason for it not to undertake this crucial workstream and issue a full and robust paper on the legal position and request feedback before a final decision is made.

3.5 The CHO proposes an alternate remedy based upon the existing GTA later in this paper. That proposal will not be a surprise given the CHO has repeatedly pointed the CMA to it since October 2012. Remedy 1C as proposed has moved closer to this but is still deficient because of it proposes to crudely cap costs in the mistaken assumption that frictional costs will also be removed as a result.

3.6 The Remedies Document also states that CHCs subrogate claims and bring them on their own behalf. They do not. Indeed para 2.6(b) states that the CMA consider *"a business model where TRV providers provide non-fault claimants with the funding to arrange the self provision of replacement vehicles…would appear to [have] significant risks involved. The vehicle provider would have to rely on the consumer submitting and defending [sic] the claim in order to recover its costs and would have no control over the claims management process. In our view this is likely to make such a business model unattractive"*. What the CMA says would be unattractive is exactly what CHCs currently do. It is just amazing, and also deeply concerning, that at this stage in such an expensive inquiry that the CMA has not understood the legal basis by which TRV providers exist, provide a solution to consumers and offer reductions in legally justifiable costs to insurers. If the CMA does not understand the current dynamic it cannot know whether its proposed remedies require a change in the law nor what their intended or unintended consequences would actually be.

3.7 The CHO believes there are numerous aspects of law that the CMA has failed to consider in proposing Remedy 1C as drafted. In particular, the CMA has failed to acknowledge the impact of the FCA's Treating Customers Fairly regime, consumer protection legislation (including the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013) or even potential conflict between the proposed remedies and Articles 1 and 6 of the European Convention on Human Rights. Again, this is unacceptable.

4. Quantification of the supposed AEC

4.1 The CHO maintains that the CMAs quantification of the AEC is flawed. These flaws include, most fundamentally, the assumption that credit hire is comparable to direct hire and so the costs of credit hire should be comparable to direct hire costs. The CMA has not investigated what these direct hire costs are, how consumers are exposed to additional costs not recognised by the CMA (e.g. charges for CDWs, upselling techniques, cost and inconvenience of collecting / returning the vehicle, non standard and additional driver charges etc) let alone the fact that The CHO suspects these direct hire costs are strategically engineered loss making rates that are currently provided by only a select few vehicle rental companies.

4.2 The CHO does not have the power to investigate these and the many other issues it and other parties have raised. The CMA does. It has not used those powers; it has merely accepted the word of insurers and direct hire suppliers that these practices do not take place.

4.3 In addition, The CHO is aware that the CMA has been presented with economic arguments of multiple other costs and / or flaws in its quantification of the supposed AEC and it is unclear why those arguments have been either consciously ignored or inadequately addressed by the CMA.

4.4 As such, The CHO does not accept the CMA's AEC findings: they are flawed both conceptually and in their detail. As such they provide no firm basis on which the CMA is able to propose what are in effect draconian and intrusive remedies severely risking market failure and/or unintended consequences the effect of which is likely to be that the consumers' position reverts to that which existed before credit hire; one in which they are unable to realise their legal entitlements and from which insurers profit.

5. The GTA – Remedy 1C, the role of BHR and friction

5.1 The CHO has repeatedly pointed the CMA to the GTA as being the existing solution that balances the realisation of consumers of their legal entitlements with the opportunity for insurers to benefit from compromised and reduced charges. CHC and insurer membership levels of the GTA surely already show that it is a pragmatic solution accepted by both sides as balancing reduced costs with the provision of TRVs to consumers in accordance with their legal entitlements.

5.2 It is clear that insurers are hoping for the CMA to implement remedies that either reduce costs (clearly they want that) both on a per claim basis but also on a reduced claim volume basis. The CHO will point out later its view that proposed Remedy 1C will reduce claim volumes or, putting that another way, will reduce consumers' access to justice and realisation of their rights.

5.3 Nevertheless, the CHO supports the notion of the existing GTA providing the basis for a "remedy", in so far as, for example, late payment penalties continue to incentivise the speedy settlement of claims and rental lengths are actively monitored and reported.

5.4 However, the CMA is wrong to suggest a low rate cap will reduce friction. Insurers will merely move the "friction bar" lower. Experience of claim settlement within the RTA Portal has demonstrated that cost is not a panacea for removing liability disputes and promoting early settlement.

5.5 The CMA seems to have missed the rather crucial point that the ultimate reason insurers pay claims at all is not only that they are liable for the costs of the claim, but because they realise the courts will impose that liability on them if the consumer behaves reasonably and brings his claim appropriately. Most consumers of course do not know how to commence and manage a claim. That is the role that CHC's and solicitors, acting for the claimant, adopt. Insurers know that consumers can currently find this advice. The issue then comes to quantum. The GTA already pragmatically deals with the fact that insurers would rather have no claim or settle it for less than might otherwise be the case. Hence the GTA rates are rates designed to save insurers money compared to what would otherwise be the case, namely BHR (or credit hire rate if impecunious). Insurers only pay claims to avoid costs rising if they don't. The role of BHR, as reinforced over decades of case law, is essential as to why insurers settle claims at GTA rates. It does not matter what those GTA rates are so long as the discount from BHR is sufficient to prompt the insurer, commercially, to pay. This is why CHCs accept the rates within the GTA; at a 26% discount to the BHR they balance the claim quantum with the improved timing for settlement.

5.6 The CHC and insurer representatives of the GTA Technical Committee submit rate evidence to the Independent Chairman of the GTA on an annual basis, to end up with a schedule of rates accepted by insurers as representing that sufficient discount from BHRs to settle the claim so as to avoid litigation.

5.7 It is essential in any proposed remedy that the ability of the claimant to claim BHR (or credit hire rate if impecunious) is retained, regardless of whether the consumer is advised (by a CHC or solicitor) or not. Without this, insurers will not pay claims. They will cause friction to increase and force claimants to litigate more and more claims in the courts. If as stated the CMA is not proposing any change of the law, it cannot change a consumer's entitlement to claim BHR.

5.8 The CHO also points out that the GTA only costs the insurance industry £50,000 per annum to administer. Remedy 1C would inevitably result in per annum costs much larger than this.

5.9 The fact that, via the GTA Technical Committee, insurers and CHCs agree "pricing" does at first glance look "odd". However given the rates are agreed for the early settlement of consumers' claims (ie they are more than simple day rates) so as to avoid further frictional costs, it is logical that it is indeed CHCs and insurers that agree these rates (it is after all the insurer and the CHC compromising the claim). The CHO urges the CMA to consider an alternative to the proposed Remedy 1C and recommend the industry explore the potential for a more resilient and effective GTA.

5.10 The CMA also need to provide a tight definition of which consumers are or are not caught by Remedy 1C, if enforced. For example, is a private motorist with a business use extension on his policy caught by 1C or not? Does it depend on the type of use of the vehicle at the specific time of the accident? Numerous unintended consequences and considerable friction will arise if this is not dealt with in considerable detail and could lead to many unintended consequences.

6. Price Capping – direct hire rates are flawed and unintended consequences

6.1 It is not clear from Remedy 1C as proposed what the CMA envisage as far as a consumers' right to claim BHR (credit hire rate if impecunious) in court. As mentioned, the maintenance of this right essential in any remedy if the law is not to be changed, consumers' rights are to be protected and an incentive for insurers to pay all retained.

6.2 The CHO does not agree that any "price cap" should be based in anyway on direct hire rates. The CHO is concerned and has voiced this concern on many occasions that the direct hire rates supposedly identified by the CMA are in fact strategically and unsustainably low rates provided by only a very small number of direct hire providers; they are not driven by normal market forces. Furthermore if the CMA had allowed parties to investigate adequately where these direct hire rates have come from, The CHO believes that on a weighted average basis the rates are from effectively only one supplier. "Pricing" (which itself is a strange term given it is not pricing, it is compromising) must start from BHRs and work backwards to a level at which insurers AND CHCs are willing to compromise. It cannot start from this opaque direct hire rate. The CMA is simply not able to say (para 2.7) that "it has *"no reason to believe that this market is not reasonably competitive"*. That is simply not good enough. It must investigate the direct hire market in more depth, be sure that the upselling tactics parties have described are not present in this market, and consider the likely counter factual as described below, before recommending that direct hire rates are in any way appropriate to introduce into the claim settlement processes. In any event, the CMA must recognise a claimant's right to claim for BHR for the reasons already specified.

6.3 The CHO believes that a low rate cap based on direct hire rates would result in the non payment of claims (especially if litigating for BHR is effectively prohibited) AND the termination of direct hire supply by insurers. As the CMA acknowledge in its working papers, the only real reason why at fault insurers procure direct hire services is to avoid credit hire claims. As such, it is perfectly foreseeable that in a post-remedy world, insurers will withdraw from direct hire arrangements and refer the non fault claimant to the outside world; a world in which credit hire may well not exist as an alternative and as such, consumers' ability to realise their legal entitlements may well have been eradicated. Remedy 1C as proposed has drastic, draconian and materially damaging consequences for the consumer.

6.4 Further, any price capping that uses BHRs as its basis for determining pre claim compromise values would have to ensure the BHRs obtained are real rates (and not internet headline rates where the underlying vehicle isn't actually available) and that the rates provide the appropriate level of service (ie additional drivers, CDW at nil, non standard driver rates etc). It is complex if the CMA determine to go down this route.

7. Remedy A

7.1 The CHO supports a remedy that provides consumers with more information about their legal rights (assuming they remain capable of being effectively realised) and duty to mitigate but not as currently proposed. The CHO hopes that other legally qualified entities provide specific feedback on the exact content of that advice. It must be informative, legally accurate and appropriate to the claimant's circumstances.

8. Summary

8.1 The CHO does not agree with the identification of ToH1 nor with the quantification of the AEC that supposedly accompanies it. Even as the quantification currently stands it is de-minimus (on a per policy basis) compared to the detrimental impact and costs that would be incurred by consumers following your enforcement of Remedy 1C or indeed any other supposed remedy.

8.2 The GTA already balances cost management with consumers' access to their legal rights. Remedy 1C will interfere with those rights and materially worsen the position of consumers post an accident. It is not for the CMA to "price cap" what is in effect an existing and effective process of compromise between the fault and non-fault party so as to avoid both sides incurring the further rising costs of litigation.

8.3 The CHO looks forward to working with the CMA over the coming months and urges it to complete the missing workstreams, particularly the paper summarising and acknowledging consumers' existing rights so that those rights can be shown to be unchanged following the enforcement of any supposed remedy.

8.4 The GTA is staring you in the face as being the existing solution. Your role here should not be to contrive conclusions that support the supposed need for remedies that would increase insurer profits at the expense of consumer rights.

Yours faithfully

M J Andrews
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The CHO Limited