PRIVATE MOTOR INSURANCE MARKET INVESTIGATION

Notice of further consultation on Remedy 1C

1. On 12 June 2014, we published our provisional decision on remedies (PDR) for the private motor insurance market investigation.[1]

2. In the PDR, we proposed a package of remedies to address the AECs and detrimental effects which we had provisionally identified under theories of harm 1, 4 and 5. This package of remedies included a rate cap on temporary replacement vehicles as part of Remedy 1C.

3. The deadline for consultation responses to our PDR closed on 4 July 2014.

4. We received a number of responses to our PDR which raised many different concerns about Remedy 1C. Some responses raised concerns about the way in which we had proposed to apply the rate cap to replacement vehicle providers.

5. In this Notice we provide a reminder of the relevant parts of the PDR, summarise the concerns expressed to us by parties in relation to the implementation of Remedy 1C, set out our view on these concerns and invite further views on an alternative proposal which was included in the PDR but on which few parties have so far commented. Given the nature of the concerns which have been expressed about how Remedy 1C might be implemented, and the concerns we have outlined in this Notice about the alternative proposal, we have also set out in this Notice some alternative possibilities were we to decide that Remedy 1C would not represent an effective and proportionate remedy.

6. We are continuing to consider many other comments raised in response to the PDR on Remedy 1C, and on all other remedies, which we do not discuss in this Notice.

Our provisional decision on how to apply Remedy 1C

7. In paragraphs 2.56 to 2.59 of the PDR, we set out ‘to whom and to what should Remedy 1C apply?’ We stated that the remedy would ‘need to cover

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[1] *Private motor insurance market investigation: Provisional decision on remedies*.

all replacement vehicle provision to non-fault PMI claimants';[2] and we went on to say that 'we propose to require that the remedy is mandatory for all those involved in the provision of replacement vehicles to claimants (insurers, brokers, credit hire companies (CHCs)/claims management companies (CMCs), repairers and vehicle recovery providers)'.[3] We also said that 'the remedy would apply at the point a claim is submitted by the replacement vehicle provider to the at-fault insurer'.[4]

8. Elsewhere in our PDR,[5] when summarising the proposed remedy, we used 'subrogation' as a shorthand for both claims pursued by CMCs and CHCs on behalf of non-fault claimants and claims made by the non-fault insurer against the at-fault insurer after an indemnity payment has been made to the non-fault policyholder.

Concerns expressed by respondents

9. The shorthand of 'subrogation' led to some respondents raising questions about the applicability of our proposed Remedy 1C. We were told that:

   (a) CHCs/CMCs are not subrogated to claims; rather they issue a statement of charges and a demand to pay to a non-fault claimant and then usually seek to recover the claim on behalf of the non-fault claimant (although some CMCs/CHCs leave the claimant to recover the claim themselves).

   (b) CHCs/CMCs do not 'charge' at-fault insurers. Although CHCs/CMCs operate different types of business models, in general, the arrangement when a vehicle is provided on credit hire is as follows:

      (i) the claimant remains liable to pay the hire charges but the claimant's liability to pay the replacement vehicle provider is deferred;

      (ii) the claimant authorises the replacement vehicle provider (or an appointed representative) to pursue his/her claim in his/her name;

      (iii) the claimant authorises the replacement vehicle provider to retain any settlement money offered in full or part settlement of the claim and/or pay to the replacement vehicle provider any payment received by the claimant in respect of the claim; and

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[2] PDR, paragraph 2.56.
[3] PDR, paragraph 2.57.
[4] PDR, paragraph 2.58.
[5] See for example, paragraph 7(b) and paragraph 2.296(b), where we referred to 'the point of subrogation of the claim to the at-fault insurer'.

(iv) an insurance policy is sometimes provided for the benefit of the claimant which covers the hire charges (and any repair charges) which cannot be recovered from the at-fault driver/insurer, and legal costs incurred in pursuing the claim against the at-fault driver/insurer.

(c) It was not clear whether our proposed approach would capture solicitors acting on behalf of claimants.

10. In particular we were told that the CMA does not have the power directly to limit the damages for loss of use of a vehicle that non-fault parties could seek to recover in court as:

(a) claims brought by CHCs/CMCs on claimants' behalf cannot be capped directly as this would be attempting to regulate a claim in tort against an at-fault party; and

(b) claims brought by the non-fault insurer once the claimant has been indemnified under their contract of insurance are subrogated claims and any arrangements by insurers to reduce the costs incurred are not relevant to a court in assessing the 'reasonable costs' to which the claimant is entitled (in this case, the cost of the temporary replacement vehicle), so this would also be attempting to regulate a claim in tort against an at-fault party.

Our consideration of these points

11. Our intention in paragraphs 2.56 to 2.59 of the PDR was to impose a cap on temporary replacement vehicle costs from *(a)* CMC/CHC claims recovered from at-fault insurers on behalf of non-fault claimants; and *(b)* subrogated claims submitted by non-fault insurers to at-fault insurers.

12. However, having considered the detailed responses to the PDR, we have reached the view that our powers under Schedule 8 to the Enterprise Act 2002 cannot be applied in this way. We accept the arguments made by parties that we would be unable to cap the level of claims.

13. We do not intend to pursue further the possibility of applying the remedy in this way.

Alternative implementation proposal

14. Prior to the publication of our PDR, one party raised some concern about whether we would have powers to implement the remedy as we intended and made an alternative proposal, which we summarised in the PDR (see paragraphs 2.62 and 2.63). Under this proposal, instead of capping the claims

made by CMCs/CHCs on behalf of claimants and the subrogated claims made by non-fault insurers, the amount which would be capped would be that which a replacement vehicle provider charges its customers for the vehicle hire. By capping the contractual liability of the claimant for the vehicle, the amount which the replacement vehicle provider (or a solicitor) would be able to claim in tort on behalf of the claimant would also be capped.

15. This alternative implementation approach would not apply to non-fault insurers as, in such cases, there is no charge for the temporary replacement vehicle provided.

16. We are considering this alternative proposal further and invite comments on it.

17. In particular, we are concerned about two potential problems to which this remedy might give rise:

    (a) The need for a clear definition of the circumstances in which the remedy should and should not apply to vehicle hire transactions; and

    (b) A possible distortion in the provision of temporary replacement vehicle provision between CHCs and non-fault insurers, if non-fault insurers would still be able to make subrogated claims at average retail rates which are above the actual cost of vehicle provision.

18. With regard to paragraph 17*(a)*, we could seek the remedy to apply to:

    (a) any entity providing temporary replacement vehicles to non-fault claimants pursuant to a credit agreement with that entity, directly or indirectly;[6] and/or

    (b) any entity providing temporary replacement vehicles and providing, directly or indirectly,[7] assistance to the claimant to recover the costs of provision of a temporary replacement vehicle from an at-fault driver/ insurer on the basis of the claimant's tortious rights.

19. Under this definition, an individual non-fault claimant would still be able to go to a vehicle hire retail outlet, rent a vehicle on a credit or debit card and seek to recover the cost themselves. However, we would not expect this to happen in many cases.

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[6] Indirectly means either through ownership of another entity or through contractual arrangements with another entity. For example, where a replacement vehicle provider provides the vehicle and has a contractual arrangement with a credit provider to provide the credit.

[7] As above, indirectly means either through ownership of another entity or through contractual arrangements with another entity. For example, where a CHC has an agreement with a firm of solicitors and makes referrals to that firm.

20. With regard to paragraph 17*(b)*, were a non-fault insurer to bring a subrogated claim for a temporary replacement vehicle the courts might regard the cap which would apply to CHCs as defining the reasonable cost of a temporary replacement vehicle so that the cap would be applied to subrogated claims also.

21. We would like to understand from parties whether:

(a) This alternative approach would be an effective way in which to implement Remedy 1C?

(b) The remedy would create distortions between the provision of temporary replacement vehicles to non-fault claimants and the provision of hire vehicles to retail customers?

(c) The definition in paragraph 18 would capture effectively the provision of credit hire vehicles to non-fault claimants or whether there are any further circumvention risks from this proposed wording?

(d) The remedy would create distortions between CHC/CMC provision and non-fault insurer provision of temporary replacement vehicles?

(e) The courts would be likely to limit the sums recoverable in subrogated claims to the rate cap set by the CMA on the basis that this indicates the reasonable cost, or, if not, whether the cap for CHC/CMC provision would have to be set at a level which aligned with that currently allowed by the courts for subrogated claims for temporary replacement vehicles; and whether a dual-rate cap would create greater ambiguity for the courts in these circumstances?

(f) Whether the remedy might be expected to lead to greater provision of temporary replacement vehicles by non-fault insurers under the terms of individuals' insurance policies, and the benefits and costs of this greater provision if it occurred?

(g) Whether this alternative approach creates any other unintended consequences, costs or benefits from those already expressed?

Other aspects of Remedy 1C

22. We received many other comments on Remedy 1C, which we are continuing to consider. In particular, we received many submissions which raised concerns about the effectiveness and proportionality of the remedy. Some parties have told us that this remedy would lead to many non-fault claimants being left without access to the provision of a temporary replacement vehicle.

As part of our ongoing consideration of these issues, we are continuing to investigate the differences between direct hire and credit hire, and the appropriateness of direct hire rates as the low rate benchmark.

23. Given the significance of the views we have received in response to our PDR on Remedy 1C, and the issues raised in paragraphs 14 to 21, we are mindful that following this consultation, one possible outcome is that we decide not to pursue Remedy 1C. In this scenario, we would still be keen to do what we could to encourage market practices which reduce friction between at-fault insurers and parties representing non-fault claimants, in order to reduce the detriment which flows from the provisional adverse effect on competition we have identified. Instead of seeking undertakings or making an order, we might, for example:

    (a) encourage the General Terms of Agreement (GTA) to adopt aspects of Remedy 1C (and 1F) not already part of the GTA (such as a dual-rate system, the Mitigation Declaration Statement, an online portal to deliver quicker and cheaper administration of claims, and rates which are more in line with those which some insurers and CHCs have agreed through bilateral agreements);[8] and/or

    (b) encourage insurers to take action themselves to reduce frictional costs by, for example, the more common use of bilateral agreements between CHCs and insurers, and between insurers in situations where insurance policies are extended so as to provide a like-for-like temporary replacement vehicle to a non-fault claimant under the terms of the insurance policy; and extending a non-fault claimant's insurance cover to their temporary replacement vehicle so removing the need for the CHC to incur costs in providing this insurance.

Responding to this consultation

24. The parties to this investigation and any other interested persons are requested to provide any views in writing on these issues to the CMA by 5pm on Monday 4 August 2014, either by email to PMI@cma.gsi.gov.uk or in writing to:

    Project Manager
    Competition and Markets Authority
    Victoria House

[8] We have considered the possibility of making the GTA mandatory, as put forward by some respondents to the PDR, but do not consider this to be a practicable option because we cannot require another body to set rates and to require an industry body to do so would be in breach of the Competition Act 1998.

Southampton Row
LONDON
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(signed) ALASDAIR SMITH
Group Chairman
28 July 2014