



COMPETITION & MARKETS AUTHORITY'S PRIVATE MOTOR INSURANCE MARKET INVESTIGATION

Notice of further consultation on Remedy 1C

Response of the Association of British Insurers

The ABI

The ABI is the voice of insurance, representing the general insurance, protection, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has almost 300 members, accounting for some 90% of premiums in the UK.

The ABI's role is to:

- Be the voice of the UK insurance industry, leading debate and speaking up for insurers.
- Represent the UK insurance industry to government, regulators and policy makers in the UK, EU and internationally, driving effective public policy and regulation.
- Advocate high standards of customer service within the industry and provide useful information to the public about insurance.
- Promote the benefits of insurance to the government, regulators, policy makers and the public.

1. EXECUTIVE SUMMARY

- 1.1 The ABI believes that the Competition and Markets Authority (CMA), in its original Provisional Decision on Remedies (PDR) has, in general terms, developed a proportionate and workable package of proposed remedies to address the adverse effects on competition (AEC) the CMA's private motor insurance (PMI) investigation has identified, especially in relation to the provision of temporary replacement vehicles.
- 1.2 The ABI believes the alternative approach outlined in paragraphs 14 to 21 of the CMA's Notice of further consultation on Remedy 1C, would be an effective way to implement Remedy 1C as set out in the CMA's original PDR. Provided that the final rates implemented by the CMA are as close as possible to direct hire rates (which insurers can achieve with replacement vehicle providers) and are fully inclusive to avoid circumvention, then the alternative approach should deliver cost control even if the separation of cost control and cost liability identified in the CMA's theory of harm remains.
- 1.3 The new proposals to implement Remedy 1C would not lead to the creation of a new distortion beyond the current distortion that already exists between the provision of credit hire vehicles to non-fault claimants and retail customers due to the inflated rates charged by Credit Hire Company (CHC) under a credit hire agreement.
- 1.4 When the non-fault insurer pursues a claim for the costs associated with the temporary replacement vehicle (TRV) they have provided, there is the potential for the CMA's enforcement order to endorse an undertaking between insurers (which, for competition reasons, could not be arrived at independently) which would require that insurers to not seek to recover against another insurer for more than the capped rate. In effect, the same capped rates would then apply whether the claim is made by a non-fault insurer or via another provider, including a CHC or a Claims Management Company

(CMC), through a combination of both measures set out above. This undertaking between insurers would not affect the consumer's tortious rights. Enforcement and monitoring of such a remedy would be self-policing in that the at fault insurer could identify and reject any claim which seeks to recover more than the capped rate.

- 1.5 There is no doubt that if the CMA does not address the AEC that has been identified by implementing as far as possible Remedy 1C, then the AEC will worsen as CHCs/CMCs look to inflate credit hire claims further. The current gap between the cost of direct hire and the cost of credit hire will only grow and potentially spawn increased litigation and further additional cost, all to the detriment to the premium paying consumer.
- 1.6 If the CMA decides not to implement the proposed Remedy 1C and merely encourage the General Terms of Agreement (GTA) to adopt aspects of Remedy 1C and 1F, and insurers to take action themselves to reduce frictional cost, this would represent a failure by the CMA to address the AEC that has been identified. This would be an unfortunate missed opportunity to deliver long overdue reforms to the PMI market and improve consumer outcomes. Without some positive basis upon which the value of a credit hire is assessed, there is no reason why CHCs/CMCs would agree to the GTA claim cost being reduced as they could recover a higher value by withdrawing from the voluntary protocol.

2. ANSWER TO SPECIFIC QUESTIONS

We would like to understand from parties whether:

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

- 2.1 The ABI believes the alternative approach proposed by the CMA, whereby the price that a TRV provider charges its customer for vehicle hire would be capped, would be an effective way to implement Remedy 1C. Provided that the final rates implemented by the CMA are as close to those of direct hire rates as possible and are fully inclusive to avoid circumvention, then the alternative approach should deliver cost control, and therefore deliver benefit for consumers, even if the separation of cost liability and cost control remains.

(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?

- 2.2 The new proposals to implement Remedy 1C would not lead to the creation of a new distortion beyond the current distortion that already exists between the provision of credit hire vehicles to non-fault claimants and retail customers due to the excessive rates charged by TRV providers under a credit hire agreement.
- 2.3 Most credit hire providers do not provide retail offers. Therefore, a rate cap on credit hires will not impact on any retail business and will also not affect the retail market. In fact, it may increase competition in the market as a result of setting the rate and reducing the frictional costs so that others enter the rental market and compete.
- 2.4 Non-fault claimants are treated by TRV providers as a separate and distinct category of customer from retail customers. CHCs/CMCs consider non-fault claimants as a commodity that they can purchase through the use of referral fees and then provide these customers with a TRV at inflated credit hire rates. Effective implementation of

Remedy 1C will help reduce the distortion which presently exists between the two categories of 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?

- 2.5 The definitions at 18 (a) and 18 (b) are largely appropriate but the CMA should expand the term “pursuant to a credit agreement” to ensure that this definition is not too narrow. The definition should not be limited to **non-fault** claimants to avoid the risk of different standards applying to **part fault** claimants.
- 2.6 The remedy should capture all parties involved in the TRV supply chain, not just the hire provider themselves. It needs to apply to any party that contractually arranges hire with a claimant customer, whether upon credit or via some other commercial means. This should also include Motor as well as Legal Expenses and ATE insurers who may provide a TVR as a policy benefit.
- 2.7 The wording in the definition should be carefully considered by the CMA's legal experts to ensure that the definition is achieving the aims the CMA is setting out to achieve and would be legally robust given that it will inevitably be considered and scrutinised by the courts.

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

- 2.8 The ABI does not believe that the remedy would create a distortion between CHC and the not-fault insurer provision of TRVs. The current remedy only applies to TRVs provided on a credit basis and insurers do not provide TRVs funded in this way.
- 2.9 If there is no involvement by CHCs/CMCs, the ABI recognises that it may be possible for the non-fault insurer (having provided a vehicle under a policy provision) to seek recovery at retail rates. As such, the ABI believes it is important for the Remedy to be extended to cover insurers (see paragraphs 2.12-2.14 below).

(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?

- 2.10 It is far from clear whether the courts would be likely to limit the sums recoverable in subrogated claims to the rate cap set by the CMA. Whether arising in contract or tort, the court would not be obliged to consider the rate caps at all when assessing the claimant's entitlement to damages.
- 2.11 Furthermore, there is a question as to whether the courts will be prepared to investigate the commercial terms of hire arrangements. As the Courts currently look no further than saying that the claim remains the property of the individual claimant and ignores how it has been funded, there needs to be robust standards applied to identify the true retail hirer and to recognise that claimants are not in the position of retail customers.

- 2.12 In order to address the AEC that the CMA has identified, it is essential that the rate cap is set at a level that reflects direct hire rates i.e. those rates which insurers can negotiate as a bulk purchaser of TRVs. Under the alternative proposal the rate cap would be incorporated into the contract between the TRV provider and the customer. This would limit the sums recoverable because the rates would be set out in the contract and it is this rate which would be the rate which determines what the claimant can recover.
- 2.13 When the non-fault insurer pursues a claim for the costs associated with the TRV they have provided, there is the potential for the CMA's enforcement order to additionally endorse an undertaking between insurers that they will not seek to recover against another insurer more than the capped rate in any claim. In effect the same capped rates would apply whether the claim is made by a non-fault insurer or via another provider, including a CHC/CMC, through a combination of both measures set out above.
- 2.14 This would not affect the consumer's tortious rights. Enforcement and monitoring of such a remedy would be self-policing in that the fault insurer could identify and reject any claim which seeks to recover more than the capped rate.
- 2.15 If the CMA does not believe that it has the scope to make an enforcement order of this nature then the industry would be prepared to make undertakings to the CMA to this effect, although this would clearly only be effective as a remedy if all PMI providers did so. Such a model would also alleviate any circumvention risks because if the capped rate is set at a level that reflects direct hire rates, the margin between the cost incurred in providing the TRV and the rate cap will be marginal meaning that insurers or any other TRV providers will have significantly reduced incentives to seek to circumvent the new framework for financial advantage. Moreover, any attempted circumvention of an undertaking would be instantly identifiable, through the claim presented or pleaded.

(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?

- 2.16 When their vehicle is being repaired, many non-fault claimants do not take up their full legal entitlement to a like for like TRV. Many will be content with a courtesy car and some do not require a TRV at all due to ownership of other vehicles or other means of transportation.
- 2.17 Many insurers provide a free courtesy car (Class A vehicle) to their customers in the event of an accident (whether at fault or non-fault). Therefore insurers do commonly provide TRVs and this practice is likely to continue.
- 2.18 A number of motor insurers offer cover for a hire car as an add-on. Such cover may provide for a TRV either above the Class A level or on a like for like basis. The motor insurance market is highly competitive and products are becoming more and more flexible and innovative which is likely to continue. Therefore, the availability of TRV cover could increase.

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

- 2.19 The ABI believes that this alternative proposal is the right way forward to implement Remedy 1C if the CMA considers that its original proposal is unworkable. The

alternative approach does not create any additional unintended consequences than the CMA's original proposal.

3. POSSIBLE DECISION NOT TO PURSUE REMEDY 1C

- 3.1 The CMA's PMI investigation is a unique opportunity to address issues in the market that both the Office of Fair Trading (OFT) and the CMA have identified, particularly the separation of cost control and cost liability in relation to credit hire claims. The CMA found that credit hire claims cost £186 million per year more than direct hire claims – a cost borne by PMI customers through car insurance premiums that are higher than they need to be.
- 3.2 There is little doubt that if the CMA does not address the AEC that has been identified, then the AEC will only grow and worsen as CHCs/CMCs look to inflate credit hire claims further and the current gap between the cost of direct hire and the cost of credit hire will only widen.
- 3.3 If the CMA decides not to implement the proposed Remedy 1C and merely encourages the GTA to adopt aspects of Remedy 1C and 1F, and insurers to take action themselves to reduce frictional cost, this would represent a failure by the CMA to address the AEC that has been identified and would be a missed opportunity to improve consumer outcomes in the PMI market. It would, in reality, result in no remedy being implemented in relation to the principal theory of harm the CMA has identified. This would amount to a failure to address the key AEC affecting consumers.
- 3.4 The GTA is a voluntary agreement which, although it has delivered some improvement to the market, has not to date proved to be an effective solution to controlling credit hire costs. Indeed, if the GTA had done so, the CMA would not have found an AEC in relation to the credit hire market to start with. If the CMA does not use its powers to implement a workable solution, there is little likelihood of CHCs agreeing to reform the GTA given that meaningful reform is likely to impact on their profits. In fact, if the CMA fails to address the AEC, CHCs will likely view this as regulatory endorsement for their current business practices and cease to support the GTA if they can recover greater value outside this voluntary agreement which will drive up costs for the fault insurer to the detriment of PMI customers.
- 3.5 The ABI reiterates its position in our response to the CMA's PDR that the CMA should carefully consider making a credit hire Portal mandatory as part of an enforcement order to help facilitate the settlement of credit hire claims and help reduce frictional and administration costs.

Association of British Insurers
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