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

4 August 2014

Dear Sirs

PRIVATE MOTOR INSURANCE MARKET
THE CHO LIMITED ("The CHO") RESPONSE TO THE NOTICE OF FURTHER CONSULTATION ON REMEDY 1C DATED 28 July 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. The CHO submitted a detailed response to the Provisional Decision on Remedies (PDR), including Remedy 1C, and all of the comments contained in that response continue to apply to the variant of Remedy 1C set out in the consultation paper issued on 28 July 2014 (the "1C Variant"). Certain comments are repeated again in this document but this is not intended to dilute in any way the comments made in the previous response that are not repeated here.

2. Differences between Direct Hire and Credit Hire

2.1 The CHO is pleased that the CMA is now investigating the differences between the costs and liabilities imposed on a consumer provided with a vehicle under direct hire and the comparative costs for a vehicle under credit hire and the appropriateness of direct hire rates as the low rate benchmark (paragraph 22) or indeed any proper counterfactual to credit hire.

2.2 From the inception of this investigation, the CHO and many other entities have urged the CMA to investigate and understand what "Direct Hire" actually is, in so far as it exposes consumers to charges that under tort law and Credit Hire provision respectively they should not and do not have to pay for. Furthermore

the rates provided by a select few Direct Hire providers (and to all material purposes there is only one such provider) are in themselves loss making rates, or at least are rates that are supported by that entity charging consumers for additional items that are included in the credit hire rate.

2.3 Furthermore, if recent allegations are correct even in this regard, the description "Direct Hire" is misplaced when the fault insurer is not even a party to the rental agreement; it is in fact the consumer who signs and becomes exposed to all of the terms of the rental agreement. The term "Direct Hire" is seemingly misplaced and cannot be taken, as it has been as shorthand for those cases 'where a replacement car is supplied by the at-fault insurer' (PFs 3.88(b)).

2.4 The CHO awaits with interest the publication of the findings of the CMA's ongoing investigation in this regard.

3. AEC Quantification

3.1 If the hidden costs that non-fault consumers become liable for do exist in relation to Direct Hire and are not reimbursed fully by the at-fault insurer, then the quantification of the alleged AEC as currently determined is erroneous. The CMA must conclude, as the CHO and others have argued, that Direct Hire and Credit Hire are not comparable services and therefore any cost differences between them which might be eliminated in a post remedy idealised world is not an appropriate benchmark from which to make an AEC finding.

3.2 Furthermore, the CHO contends that on the evidence available to the CMA currently, having failed to properly evaluate the real cost of Direct Hire, the CMA cannot rely on its currently determined quantification of the alleged AEC.

3.3 The CHO believes that even if the CMA do not agree that the idealised benchmark by which they have calculated their AEC is wrong that they will still have no choice but to conclude, based on the incremental costs identified with "Direct Hire", that the quantification of any AEC is either nil or at worse case now de minimis and hence any proposed remedy is disproportionate to the scale of the alleged AEC.

3.4 That said, the CHO supports the concept of Remedy A, subject to agreement on content which does deal with the asymmetry of information, given the fact it is the only consumer-centric remedy the CMA has proposed.

4. Biased Proposed Remedies Favouring Insurer Profits Above Consumer Rights

4.1 Despite the CHO and others requesting that the CMA publish a paper on the legal position of consumers following an accident, with particular regard to TRV provision, the CMA has not done so. If this work has not been undertaken, it perhaps explains why errors continue to be made when attempting to summarise the legal position.

By way of example, in paragraph 17(b) of the 1C Variant consultation paper, reference is made to "*average* retail rates" which is not a correct summary of the recoverability of hire rates at law.

4.2 The CHO repeats its concerns that the CMA having said that it does not propose to make recommendations to Government to make changes in the law when it does not understand how the law operates and yet suggests in paragraph 20 that its proposed Remedy 1C Variant may do so 'via the back door' by suggesting that it may influence the Courts in their view of BHR. This is not acceptable and nor is it a proposal that holds any jurisprudential basis of support. If the CMA wishes to change the law to deal with any purported AEC it must do so by making recommendations to government and not by hoping for some form of existential osmosis.

4.3 The PDRs and the 1C Variant seem to continue to ignore consumer rights in favour of insurer profits.

4.4 The CHO has urged the CMA to investigate bilateral agreements between insurers as we claim they have been used for insurers to act in concert to deliberately mislead consumers as to their legal rights. The CHO is alarmed that in paragraph 23(b) the CMA is considering encouraging insurers to use bilateral agreements more widely. At worse, the existence of bilateral arrangements may be anti-competitive and it strikes us as odd that, having failed to respond to a request that they be investigated, that the CMA should consider encouraging industry participants to engage in a practice which may be unlawful.

4.5 Most materially though, the proposal to allow insurers to continue to make subrogated claims at the proper BHR rates but propose a price cap on credit hire providers is perverse. This is explored further later.

5. There is no AEC

5.1 If the CMA is not making recommendations to change the law and by seeking to allow insurer subrogated claims to be recovered as they currently are and at the BHR, then the CMA is, surely, declaring that there is in fact no AEC.

5.2 The CMA has already conceded that credit hire fills a gap in the market and that Credit Hire provides an incentive for insurers to offer Direct Hire. Price capping of TRVs as proposed, for reasons submitted previously, would weaken consumers' access to Credit Hire, leaving consumers at the mercy of insurers – and as we have previously argued ultimately to the elimination of Direct Hire too. Importantly though, if remedies allow insurers to continue to bring claims at BHRs (which is the basis of a Credit Hire claim) then the CMA is either preferring insurers over CHCs or deliberately seeking to disable the ability of CHCs to compete to offer their lawful and valuable service contrary to Article 16 of the EU Charter of Fundamental Rights. The law defines consumers' rights and Credit Hire does no more than provide consumers with access to the ability to exercise those rights.

5.3 It appears to the CHO that continuing to propose a price cap but only on CHC's in fact creates a market distortion, favouring insurer profitability over consumer rights by making the provision of a Credit Hire TRV less likely for the reasons outlined in previous submissions.

6. Market Distortion

6.1 The CMA appears to be informally consulting on a variation to the definition of private motor insurance as set out in the terms of reference under which the current investigation has proceeded. The CHO is alarmed that if, as has been suggested by LV in their response to the PDRs that data provided by LV and other insurers as part of its data gathering exercise included data from policyholders who had business use as part of their motor insurance cover, then the volume of claims and the costs of those claims relied upon by the CMA need to be recalibrated and the AE recalculated .

6.2 Applying a price cap to CHCs but not insurers creates a market distortion. The level of service a consumer receives will become dependent on (i) whether their insurer has decided to operate its business to take advantage of its ability to charge full BHR for TRV provision via subrogation and (ii) to whom the consumer first notifies his loss to, rather than a consistent level of service being provided within his legal rights: Remedy A will not prevent this. More significantly, insurers will generate greater profitability and will be incentivised to earn a rent from

managing subrogated claims where the recoverability rate of hire charges is absolutely guaranteed to be higher then any cap which might be imposed on a consumer seeking to assert his legal entitlement from a CHC. That is the real basis upon which the CMA will distort a market and it is one that the CMA have not chosen to examine or cost in accordance with their obligation to demonstrate that any Remedy will deal with the AEC alleged.

6.3 The remedies would create increased friction (i) for CHC's who would have to enquire more assertively of their customers as to the nature of their insurance cover (which they might not fully appreciate), (ii) for insurers who would face the same challenge which they may seek to use to their advantage to delay the settlement of claims eliminating the hard fought collaborative process made through the GTA in the last 14 years and (iii) between CHCs and insurers as insurers would cease paying claims whilst it is ascertained whether the Courts, as the CMA seems to advocate, reflect the CMA's price cap in judicial determinations. As the CHO understands it, the Courts would have no basis on which to apply the CMA's price capped rates; the law provides that rates within BHR can be claimed and will be awarded as the valid measure for quantifying damages attributable to the loss of use a vehicle following an accident. If the CMA press ahead with any variant of 1C, the CHO anticipates litigation will follow and it will take time for the principle to be reinforced creating considerable further friction whilst it is.

7. The GTA

7.1 As the law is seemingly now established as being the basis for the analysis of the market, there cannot be an AEC. The GTA already provides a "price cap" mechanism whereby insurers benefit from a reduced price for "settling claims promptly", leaving CHCs to pursue BHR for those claims that remain unpaid. The CHO supports the CMA encouraging insurers to remain in or adopt the GTA. However the GTA Technical Committee is already best placed to determine the GTA rates given they are rates agreed as being acceptable for the early compromise of large volumes of claims without recourse to litigation. That was the guidance given by Tuckey LJ at the end of the last stage of test litigation in the appellate courts and it is as relevant now, as it was then.

7.2 The CHO supports the adoption of an electronic portal, and indeed has funded the work necessary to design and create such a portal. That initiative was not driven by the current investigation and it is likely that this portal would already be up and running save for the uncertainty created by the CMA's own investigation.

7.3 The CHO will leave others to comment on the appropriateness of the Mitigation Statement Declaration but the CHO suspects insurers will not place any greater emphasis on a revised statement as compared to the existing GTA processes. The CHO will highlight, however, that the CMA is not empowered to compel a consumer to complete such a mitigation statement as part of any action that may require the intervention of a legal tribunal. To do so would breach a consumers Article 1 and Article 6 rights under the ECHR.

8. Bilateral Agreements

8.1 There are already numerous bilateral arrangements between CHCs and insurers and if the CMA's remedies leave consumer rights unchanged the CHO suspects these bilateral arrangements, and the GTA, would become more widely used and adhered to, all potentially reducing costs as GTA rates via prompt payment are taken advantage of. It is also probable that insurers would seek to use the GTA rates as the basis for the bilateral rates – this of course being open to competitive negotiation between the bilateral parties.

8.2 Insurers are already free to provide Direct Hire and it is for insurers to undertake a cost benefit exercise on this, but the answer already exists given the existence of the GTA. The CHO is concerned, however, that one of the outcomes of the current investigations that the potential for consumer rights to be ridden over and for Consumer Regulation not to be properly adhered to either by insurers or those providing Direct Hire must be a concern to the authority tasked with enforcing those regulations.

8.3 Finally, in respect of the suggestion that insurers should extend their customers' own insurance policies to cover their use of a TRV provided by a CHC, the CHO would note that this would put consumers in a worse position that the law allows (see *Marcic v Davies*) and should not be encouraged. Not-at-fault drivers are entitled at law to hire a TRV with a zero excess and their own insurance cover should not be impacted by their enforced use of a TRV. Moreover, the idea that CHC's could avoid insuring their fleet on a comprehensive basis to reduce their cost base is misplaced. All CHCs will be required under the terms of their operating leases to insure the fleet on a comprehensive basis.

9. Summary

9.1 The CHO believes that the CMA's own inquiry status, proposed remedies and acceptance of the current legal environment, coupled with their ongoing investigations into the Direct Hire model, must result in the CMA concluding that there is in fact no AEC in respect of ToH1. In any event, it is clear that any meaningful quantification of any such supposed AEC is de minimis.

9.2 Remedy A, subject to final drafting, is supported in principal.

9.3 Insurer-to-insurer bilateral agreements should not be encouraged as they have not been investigated by the CMA and the CHO believes they are used to supress consumers' realisation of their legal entitlements and may be anti-competitive in any event.

9.4 Price capping CHC TRV provision whilst allowing insurers to recover at subrogated rates will create market distortion and reduce consumers' ability to exercise their legal entitlements.

9.5 The GTA already provides an appropriate mechanism for insurers and CHCs to minimise friction and for insurers to reduce their costs. The CHO would anticipate that the further development of the GTA will gain greater momentum once the CMA conclude their investigation.

Yours faithfully

M J Andrews
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The CHO Limited