Private Motor Insurance Investigation

Response to CMA's further consultation on Remedy 1C

Kindertons Accident Management

6 August 2014

Note – This document must be read in conjunction with:

(a) our response to Section 6 and Appendix A6(1) of the Provisional findings dealing with the cost of replacement cars,

(b) our response to the CC's Remedies Notice, and

(c) our hand-out and representations at the private hearing on 4 March 2014, and

(d) [✂]

(e) our response to the PDR and WP23 on 8 July 2014

We are assuming all this information has been understood.

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Introduction and Overview of our position

1. We thank the Competition & Markets Authority (CMA) for giving us the opportunity to comment on its latest thinking regarding remedy 1C.

2. In the following, we cross-refer to the CMA's text in its notice, and reproduce such text where we believe showing that information will enable the Panel and staff to better understand our comments and representations. However, we think it is important that the readers cross-refer to the CMA's text as needed, to ensure our points are understood. We respond in the order of presentation of information in the consultation document. We also answer the questions in the document, based on our knowledge and experience of this sector, and how we work with insurers and non-fault claimants.

3. This document is confidential for the CMA's attention, but we will produce a version for the public domain, to be placed on the CMA's website.

The CMA's recognition that its original remedy 1C was legally flawed

4. We note that the CMA decided this variation on remedy 1C was necessary because it recognised a fundamental legal argument which we and other parties made, namely that remedy 1C (as originally formulated), would change the rights of non-fault claimants in exercising their claims for compensation under the law of tort (via the service of CHCs). As the CMA accepted that changing the law of tort was **disproportionate**, it further understood that trying to implement its original remedy 1C caps on non-fault claimants who use the services of CHCs (without this change of law) would exceed its powers.

5. As we understand this consultation document, the CMA is still considering whether to proceed with a dual rate price cap but this time by: (a) moving from capping the non-fault party's claim against at-fault insurers (via the services of CHCs); and instead (b) regulating the hire rates that CHCs are permitted to charge non-fault claimants (based on artificially low and arbitrary prices decided by the CMA). In this way, the claim against the insurer that is ultimately made will be at the CMA's controlled rates. It is our submission that this approach will have the effect that the claimant's rights to reasonable compensation under the law of tort will be circumvented. Clearly these new rules will effect the availability and scale of TRVs to non-fault claimants.

- Our view, as previously expressed, is that the imposition of an artificially low cap will render the provision of claims management and credit hire utterly uneconomic, with the result that non-fault drivers will be left solely in the hands of insurers (and primarily at-fault insurers, whose only incentive is to minimise cost). As well as systematic under-provision of vehicles, numerous non-fault drivers (and in particular the most vulnerable, impecunious drivers) will simply be left without mobility. Therefore, while the CMA may believe the modified Remedy 1C contemplated in its consultation would be capable of implemenatation without a change to the law of tort, our view is that, as currently proposed, the modified remedy would fundamentally **deprive non-fault drivers of their entitlements**. As well as exposing the CMA to legal challenge, it would be a perverse outcome (*given that the CMA has a consumer-centric mission*) for it to implement a remedy which is so obviously bad for consumers.

6. We object to this approach and thinking. In our view:

- As modified, remedy 1C permits individual claimants to recover TRV costs at basic hire rates (because this is what the law of tort requires), then logically the CMA should be allowing claimants to recover similar amounts at basic hire, when done via the service of CHCs. If however, CHCs are prepared to reduce their claims below basic hire rates to discounted GTA levels (because this was agreed with insurers under the GTA framework), then surely this is the **floor** that the CMA should recognise in any caps under modified remedy 1C.

- We believe the CMA tactics to modify remedy 1C to a form that effectively makes the law of tort redundant when non-fault claimants use CHCs is using competition law provisions for improper purposes (ie abuse of power).

- We believe the law of tort needs to be respected and overrides the powers of the CMA's decisions on remedies under EA 2002. If the CMA recognised this fundamental legal hurdle to reject its original remedy 1C proposal, it can not side-step this hurdle by arbitrary process, and without a very detailed further round of consultation. In the available time of 2 months, we do not believe this is possible, given that more intense engagement with interested parties would be needed.

7. We submit that any remedy applying to CHCs and non-fault claimants (personally) must be the same for both, and not based on discrimination against CHCs when making

claims on behalf of claimants. The revised remedy 1C fails this test of fairness, and appears arbitrary, to salvage the failed original remedy 1C proposals. The CMA still shows a defective understanding of what CHCs do for consumers/insurers, and still seeks to destroy the CHC sector, to the detriment of non-fault claimants who are impecunious and will have no-one to fight for them against at-fault insurers.

- Modified remedy 1C does not guarantee that consumers making non-fault claims (without the assistance of CHCs) will be treated better than under the current status quo where CHCs operate on their behalf. Nor does it recognise that we do our job efficiently because we don't make excess profits from our charges to at-fault insurers. And remedy 1C does not mean frictional costs will end – insurers will continue to have frictional costs with each other, and any CHCs which might survive, as well as individuals seeking recovery of TRV compensation themselves.

8. Moreover, we believe the thinking behind remedy 1C is wrong. Courts operating under the law of tort are not interested in whether costs might be lower, if at-fault insurers did the remedial work themselves – the test is **reasonable costs of the claimant**. So any claim that insurers can procure TRVs at prices lower than GTA rates are wholly irrelevant under the law. The CMA has not answered this legal challenge, as a condition for remedy 1C lower caps.

9. The CMA should clearly not be interested in alleged costs of TRVs below GTA rates. Accordingly, we submit that any charges imposed under modified remedy 1C should be at GTA rates, as currently approved between CHCs and insurers. Doing so, effectively retains the status quo without need for this remedy.

10. As the CMA will appreciate, insurers have participated in setting GTA rates through extensive negotiations. Accordingly, these rates are **the correct reasonable rate for recovery of non-fault claims**, especially because this is at a significant discount to basic hire rates. And basic hire rates are the publicly visible benchmark for consumers to make non-fault claims personally against insurers (and which the CMA recognised as recoverable under its draft of remedy 1C already).

- It follows that if the CMA has recognised that a non-fault claimant can make a claim themselves against insurers at basic hire rates (when *not* using the services of CHCs), then by similar logic, the GTA rates at a ***discount*** to these basic hire rates,

must be the next best alternative when the non-fault claimants use the services of CHCs to effect the claim recovery for TRVs.

- This means that any price cap below the GTA rates (as approved by insurers) must be ***more onerous*** than needed under the proportionality rules for imposing remedies.

11. In addition, imposed price caps below GTA levels may mean non-fault claimants using CHCs will not get suitable like-for-like cars (which is a requirement under the law of tort), but cheaper or inferior alternatives. This does not happen under the GTA rates which are structured to meet this legal hurdle (and no more). So here again, the remedy is seeking to harm consumer rights under the law of tort, which the CMA accepts claimants in person could preserve **if they make claims directly against insurers** (without use of CHCs).

- All this gets worse, when the CMA recognises that impecunious drivers (*ie those who do not have financial means to hire a vehicle at basic hire rate or could only do so by making unreasonable sacrifices*) would lose this service, if CHCs withdraw from this sector, or restrict their service to particular drivers, or move to a fee paying service. Why should CHCs take on the risk of providing TRV services to non-fault claimants if the CMA prices lead to losses?

12. It is reassuring to note that the CMA confirm that they are investigating the differences between direct hire and credit hire and the appropriateness of direct hire rates being used as the low rate benchmark. The CMA will be aware that within our numerous previous submissions we have expressed our significant objections to this asumption which also directly impacts on any alleged AEC.

- It is hoped that the CMA will finally acknowledge that if it makes a proper comparison on this separation issue, as for example shown in our **Annex B** to WP23, it will conclude that there is no AEC, and even if a small AEC might arise (which we dispute), the set-off of relevant customer benefits and gains to consumers from the role of CHCs would justify no remedies such as 1C.

- We also restate that any reliance by the CC/CMA on direct hire data to date has been a grave error in judgement. We along with others argued (with supporting

evidence) that the direct hire rate data that the CMA relied upon is not the true cost of hire and is indeed subsidised and supported through various practices, inter alia, (a) through upselling, or (b) providing inferior cars (to what some claimants are entitled under tort law), or (c) removal of risk in respect of daily insurance costs when transferred to the hirer's own insurer. None of these problems for consumers occur when credit hire is chosen, and we note again that our service is provided at our risk to potential claimants, at no cost as a one-stop solution at point of need.

- Our TRVs are also provided from day 1 (at FNOL) whereas the direct hire alternative may be provided (if the claim is accepted) after a gap of perhaps several days (whilst the non-fault claim is considered), or with extra impediments on claimants, and costs in terms of time and resources, once accepted. Our Annexes [✂] with WP23 dealt with our evidence on these problems for consumers.

13. Remedy 1C as modified would possibly lead to changes in the structure of CHCs, as an *alternative* to exit, with different pricing structures or circumvention. How this plays out, is currently speculative, but the CMA should expect this after its final report, or later when any order is drafted. This alone should make this remedy idea unsound, on grounds that it is too vague, its effects too widespread and unfocussed, and it would be open to significant circumvention once enacted.

14. As said, this remedy does <u>not</u> remove frictional costs, and disputes will still arise, but in ways that are not predictable and random, depending on whether consumers have the ability to challenge at-fault insurers, or insurers don't make bi-lateral agreements between themselves.

- What is clear is that the scale of claims handled by CHCs at present of around 300,000 a year, could fall to an insignificant percentage. And the 25% of claims captured by insurers, at present will be a meaningless percentage, because in the new world under remedy 1C, most claimants will find their claims rejected, with no CHCs to step in. It would be a consumer disaster.

15. So we think, by pressing on with a modified version of remedy 1C, the CMA is acting in a discriminatory way against CHCs (and consumers who depend on their services), and abusing its powers. We now refer the CMA to our earlier high-level objections on this remedy proposal.

Reference to our earlier submission objecting to remedy 1C

16. As we noted in our response to the original remedy 1C proposals ('original remedy 1C'), we believe the proposals would severely harm consumers, and cause significant loss of relevant customer benefits. It would also lead to withdrawal, exit or demise of CHCs over time, with severe harm to their businesses. It would impose prices at the [artificially] low cap which CHCs could not find sufficient to operate profitably or find a sufficient regular volume of claimants (based on the CMA saying this would be around half the level of GTA rates). We are not repeating these detrimental effects from remedy 1C (as already noted) and expect the CMA to take the same arguments forward as if they are our response to this variation in remedy 1C ('modified remedy 1C').

17. In this connection, we refer the CMA to text in ***our response to the PDR*** as follows, which remain relevant to consideration of this modified remedy 1C:

    Remedy 1C – Dual price cap – see pages 8 to 25 where we noted, inter alia, the following:

    - The remedy will reduce/distort competition – paras 39 to 47
    - The remedy causes additional distortions – paras 48 and bullet points.
    - The remedy is disproportionate – paras 49 to 54
    - The remedy will remove relevant customer benefits – paras 55 to 68
    - There would be many problems with implementation eg
        - To whom and to what would remedy 1C apply – para 69
        - How should the rate cap be set – paras 70 to 79
        - Monitoring and enforcement – see paras 82 to 85

18. In addition to our objections noted above (about implementing remedy 1C and its mechanics), we refer the CMA to our detailed work **rebutting the CMA's analysis of the alleged detriment** – as for example noted in our **response to WP 23, and summarised in Annex B** to that document. That too is enough, in our view, to reach a conclusion that there is no TOH1 to remedy, at least with the remedy 1C proposals (original or modified).

- And when the loss of relevant customer benefits are taken into account, especially in a counter-factual situation where (i) the viability of CHCs is not assumed, and (ii) power moves totally to at-fault insurers (over non-fault claimants), the CMA decision-makers should be even more clear that implementation of modified remedy 1C is irrational.

19. Accordingly, we submit that modified Remedy 1C is not effective, and disproportionate to its aims, and more onerous *when compared with the alternative of GTA prices (as agreed between CHCs and insurers*).

20. **We believe that preserving the GTA pricing regime in any remedy package**, or supporting this (if the CMA fears concerns over the Competition Act 1998 on anti-competitive agreements), will ensure (a) at-fault insurers get a discount, when claims are made via CHCs compared with (b) the claimants making a higher claim at basic hire rates, if forced to make the same claims themselves (when not using CHCs).

    - Insurers will still have the opportunity and incentive to capture claims in this situation, and take their success rate above the current 25%, but this will be on merit, and only if they improve the direct hire service to a level where consumers are:

        (i) not charged for extras which CHCs provide for free (ie no upselling), and

        (ii) consumers get a proper like-for-like car, using GTA classifications, for replacement vehicles from direct hire providers.

        We believe the CMA needs to note this in any remedy package to ensure an equal playing field between at-fault insurers and CHCs, and that the insurers don't allow their direct hire contractors to **short-change consumers** of the rights to compensation, under the law of tort.

21. To date, we think the classifications used by direct hire operators for cars (with approval of insurers), which are at variance with GTA classifications (as demonstrated by Table 10 in WP23) has caused a significant detriment against consumers who have used direct hire services to date. And worse, many/most non-fault claimants may not know they were short-changed, or were unnecessarily charged for services they could have obtained for free. This is something which may need to go into the information disclosures under remedy A to prevent it happening in the future. But how will the CMA resolve this, now that we have identified this issue so close to the end of this investigation. We need an answer.

22. To conclude, we believe that the CMA should dismiss its ideas under remedy 1C, and rather, it should enshrine the GTA protocols in its remedy package, or support them for all interested parties to note. This will mean the GTA industry solution to date will gain more momentum to increase efficiencies, stimulate innovation, and work in the interests of both insurers and non-fault claimants. It would be a virtuous circle remedy proposal, which we would support. Moreover, the creation of the GTA portal for claims, and the greater adoption of bi-lateral agreements between insurers and CHCs will further suppress any residual friction in the system to the minimum possible.

23. We do not believe any more monitoring is needed to a GTA remedy package, eg by the OFT, FCA or any other agency because their involvement could make evolution of industry solutions more onerous, or delay them, as has happened by this investigation freezing developments for several years. As insurers are present in the GTA with equal representation, and they represent a £10 billion industry, we believe the CMA should appreciate that **insurers' representatives** are more than capable of ensuring the GTA develops in a pro-competition and pro-consumer manner, but also taking account of changing business circumstances. No more action from the CMA is needed.

Response to the paragraphs in Consultation document –

Paras 1 to 6 – background behind this consultation

We note these paragraphs explaining the background behind this consultation paper. We are glad that the CMA [in para 5] mentions for the purpose of this discussion that its *'original remedy 1C'* proposal might not represent an effective and proportionate remedy. We believe this is the correct conclusion from the responses submitted already; and once recognised, It led the CMA to urgently produce its modified remedy 1C proposals that we comment upon below.

We note that para 6 notes that the CMA is continuing to consider many other comments raised in response to the PDR on Remedy 1C and on all other remedies which it does not discuss in its consultation document. However, we can only comment on matters brought to our attention, and if there are any additional matters that the CMA wishes to consult on, we will be happy to add our further reviews. We must reserve our position in case there are other objections which the CMA ought to have raised in this consultation, but have been

excluded.

Paras 7 to 9 - Our provisional decision on how to apply Remedy 1c

We note the CMA's paras 7 and 8.

Regarding para 9, the CMA says *'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'.*

Please can the CMA note where it has made errors in its use of this language, so we can comment further. We believe these errors in understanding what CHCs do, and their relationship with at-fault insurers, on behalf of claimants, has led to the errors identified in 'original remedy 1C', for example para 2.60. Here, the CMA's ideas to stop circumvention were precisely how CHC's currently operate – so it demonstrated that the CMA did not understand (at the PDR stage in June 2014) the nature of our service and value to non-fault claimants. It is a matter of great concern on the lack of care with design of relevant remedies.

Moreover, as now recognised by the CMA, the law of tort is very important in limiting any remedies that the CMA has powers to implement. It is again being ignored in modified remedy 1C, and we object. We submit that the CMA has no authority or power to implement remedies like modified 1C, unless it properly recognises how the law of tort will still apply. Such explanation is omitted in the consultation document, and is needed, supported by publication of Counsel's opinions, which we assume was sought by the CMA before publishing this consultation document.

Paragraph 9 - Concerns expressed by respondents

We note the objections in para 9 – we agree with these objections, but note this may not be the full list of objections to remedy 1C.

Para 10 is important, and we note its language, as follows:

> *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.*

The above are fundamental objections to original remedy 1C, especially as in para 12, the CMA noted **it accepted it was unable to cap the level of claims** [via CHCs on behalf of non-fault claimants] because its powers under section 8 of the Enterprise Act cannot be applied in the way it proposed.

Paras 11 to 13 - Our consideration of these points

We note para 12 and agree with the following:

> *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.*

Paras 14 to 21 - Alternative implementation proposal

> *This says: … 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***

As we noted in our introduction/overview, we see this proposal as a way of circumventing the law of tort, to try to make it redundant when claimants use the services of CHCs.

- As we noted previously, remedy 1C under its original provisions or the modified version now, would effectively end consumers ability to exercise TRV claims under the law of tort, when using these services from our sector. This modified remedy would cause them harm, equivalent to hundreds of £m a year, ie the value of claims currently handled by CHCs which are likely to fall to zero over time.

- Already, the CMA noted in WP23 that our turnover (see Appendix E Table 1) amounts to some £373m in 2013 from credit hire services, and some £123m from credit repair services. All this revenue would be jeopardised once modified Remedy 1C comes into existence. Legal challenges will be inevitable, or CHCs will explore how to circumvent the rules to remain viable, perhaps by encouraging claimants to make claims themselves at basic hire rates. The CMA decision-makers should not treat these options lightly.

Given the above serious concerns, we answer the CMA's detailed questions in para 17, etc, if not covered already:

> *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.*

In our view, para (a) will lead to circumvention, sooner or later. CHCs may need to change their business structure or organisation, depending on what emerges as this remedy; and at its worst, CHCs may cease to provide a free service to non-fault claimants, or withdraw providing the full range of cars under the GTA classifications. The GTA may become redundant and also fail, with the demise of CHCs. How would the CMA react to the loss of the GTA, as a medium-term effect of remedy 1C.

CHCs (who may be described as something else in the future as a reaction to this remedy) may only accept non-fault claims where additional recoveries, eg with a personal injury element are possible, to subsidise this service. Or CHCs may have to cease what they do directly, and encourage claimants to obtain TRVs at basic hire rates. We don't think this is

a better outcome than the current status quo.

- What should be clear is that the existing volume of non-fault claims handled by CHCs at around 300,000 a year may fall dramatically once modified remedy 1C is implemented.

- Complicated claims, where multiple vehicles are involved, may result in refusals of non-fault claims, and no-one to assist the claimants.

- The CMA's remedy would be helping insurers resist their tort responsibilities by forcing non-fault claimants to (a) resort to law more often than now, or (b) claim for losses under other insurance (with the penalty of higher premiums in the future), or (c) accept their losses (which will be considerable and on a large scale). None of this is consumer friendly, or reasons to recommend modified remedy 1C. We therefore can not see how this remedy can be made to work, however defined; and it has no merit in being taken forward.

Under para 17(b) the CMA is clearly aware of unjustified [price] discrimination in favour of insurers, and intention to harm CHCs. The CMA realises insurers will/could be claiming under their bi-lateral arrangements at higher rates than the CMA imposed rates below GTA. None of this appears fair, or within the powers of the CMA. It is not justified.

- As an example, if insurers can recover TRV costs at average retail rates, then surely the rates imposed on CHCs can not be below this level. The CMA does not answer this dilemma.

- In our view, CHCs will withdraw TRV service and any provision of replacement cars under the GTA classifications will diminish. The consumer will not get a like-for-like replacement TRV, in breach of their rights under tort.

As we noted above, parties have complained that the CMA's PDR showed it did not even understand how CHCs handle claims on behalf of claimants, or the nature of our contracts with consumers ie the non-fault claimant is responsible to CHCs for the car hire costs at basic hire rates. To the extent that such charges are *not* recovered from insurers, or there is fraud, the claimant is directly liable to the CHC. By the CMA trying to impose prices that we charge claimants below GTA levels, and substantially more lower than basic hire rates (which the CMA allows insurers to recover between themselves), the CMA is guaranteeing our sector can not survive in its present form, and will be unable to finance our activities.

We note this consultation has not rebutted this argument, specifically the CMA has not shown how it has done any modelling to demonstrate its modified remedy 1C will guarantee CHCs can survive and be able to maintain current levels of turnover and claimant activity on equal footing with at-fault insurers

> *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.*
>
> > *Footnote 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.*
> >
> > *Footnote 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.*

Regarding para 18(a) we see this remedy causing huge distortions in terms of what entities may provide TRVs, and as noted we expect the availability of this service to fall dramatically over time. Credit agreements may disappear (as they are clearly targeted in the above language), and be replaced by other forms of service and rental structures closer to basic hire rates. Or more cases may go to Court – in other words, the consumer will be legally assisted to acquire cars at basic hire rates and then sue the insurer for recovery under tort law, or the driver of the at-fault vehicle. **There is no way the CMA can stop this**, however remedy 1C is framed. And we say the language in para 18 is designed to negate the claimants rights to recovery of reasonable compensation.

Regarding 18(b) for reasons noted above, we don't think this objective will be possible. Over time, consumers will be assisted to seek their TRV recoveries directly via the Court (when possible) at considerable additional frictional costs, and without any concern over any agreement with the at-fault insurer. Or, in a worst case scenario:

- a large proportion of consumers (non-fault claimants) will be left to carry their losses if claims are refused or restricted by at-fault insurers.

- In addition, without CHCs' all the other benefits will disappear, which the CMA noted are available to claimants at no costs, via CHCs (*eg no excess or premium inflation, or free ULR, and opportunity costs benefits from CHCs doing necessary claim's recovery work as experts immediately at day 1 when the FNOL is made*).

- The indirect harm to claimants suffering upselling costs, or being short-changed in a poor like-for-like TRV will also increase with the demise of CHCs in their current form.

It should therefore be plain to a reader of this submission that the CMA's thinking is perverse, and anti the interests of consumers. That is something remarkable to observe from a competition authority in a major world economy, like the UK.

We doubt the footnotes will work in practice. Circumvention will happen, or withdrawal of CHC service and credit agreements as targeted by this remedy. The CMA needs to model the effects of what it plans here, in terms of volumes of expected business, based on (a) the prices it intends to impose by its modified remedy 1C, and (b) taking account of the mix of cars expected under GTA classifications. The CMA also needs to model the expected time for settlements under its modified remedy 1C ideas (including parties resorting to Court and abandoning the GTA). All this is not answered in the consultation document, and is not satisfactory. The consultation is still too vague, and we request an updated paper, as soon as this consultation is complete.

We have already noted that direct hire operators do <u>not</u> provide a GTA compliant, equivalent service, but an <u>inferior</u> car replacement service with scope to charge consumers for extras. All this is anti-consumer, and we believe was recognised in Table 10 of WP23, but without understanding the adverse implications of this on consumers. These anti-competitive and abusive practices need to stop, and we note they are not mentioned in the above text in para 18. The CMA is therefore misleading itself on its remedy options.

> *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.*

This clause, which recognises the absolute rights of consumers under the law of tort to recover their losses, will mean this is the avenue for CHCs to consider, should modified remedy 1C be implemented (with its low price caps).

Impecunious individuals will need financial assistance to help them acquire a vehicle at basic hire rates from rental businesses. Surely they will be entitled to someone financing them, when their claim has merits, or insurance is provided to give them this protection at FNOL stage. How will the CMA deal with this?

The cost of settlement and frictional costs with insurers may/must increase under this proposal, compared with the current status quo. The CMA seems to say this is acceptable, which contradicts its objectives for imposed low TRV prices on CHCs in order to allegedly reduce friction with insurers. The CMA's thinking here is either biased to harm CHCs pro-consumer business, or irrational.

Given our comments, why does the CMA think its remedy will not result in many claimants making claims themselves? Its reasoning here needs expansion.

> *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.*

Here, the CMA is speculating on what its remedy 1C might achieve. We believe the CMA should be clear on what it is doing, and in practice, we doubt any Court will care about the CMA's thinking on this very important subject, where consultation with relevant and informed parties since our hearings in March 2014 **were wholly inadequate**. We suspect test cases will move to the High Court, given the size of the £10 billion insurance market, at least to test what any remedy 1C will mean in practice. All this uncertainty will freeze developments in our sector, to the extent that the remedy 1C order is vague, and poorly understood to go further.

- We think the CMA needs to provide a range of **hypothetical examples** of how its remedy 1C will apply, and we request this is done in the next 4 weeks, to enable

consultation. For example, how will this remedy deal with multi-car crash situations, or cases where some drivers have 3rd party cover only, or where injuries are also involved? What happens when there are allegations of contributory negligence and split liability? Who is going to assist the victims in these situations, when the at-fault insurers refuse to get involved, or refuse to allocate a direct hire car to the claimant? How will potential claimants be able to find CHCs if referral fees don't operate under the remedy 1C lower caps?

We doubt any cap will apply to subrogated claims between insurers. In any event, the CMA has permitted insurers to agree anything they want via bilateral agreements, and yet CHCs have not been given the same privilege under remedy 1C. So when these matters come before a Court, there will be clear trouble and confusion. The CMA's recognition that the Courts will still be involved in this tort process, implies that the problems of dispute resolution in Courts will be more complicated – how are judges expected to assess whether the CMA's ideas make any sense?

- In our view, insurers, and legal representatives for claimants, will simply ask the Courts to respect the Court precedents, and the historic law of tort. Reasonable costs for recovery, will be either (a) basic hire rates, or (b) lower rates per car, if agreed via a bilateral agreement, or (c) the GTA if it still exists. So the CMA's views on caps could be viewed as irrelevant and without legal foundation.

- And if Judges are asked to read the CMA's PDR, we think they will be mystified at the lack of clarity in the CMA's reasoning on departing from basic hire rates as the benchmark for recovery of losses, or imposing a low cap at half the GTA rate. Judges will reasonably ask for example, that if the low cap for a car is say £25 a day (when the claim is made by CHCs), then why should basic hire rates be say **2.8 times this for the same car** (when the work done by car rental companies is less than that by CHCs)?[1] Our only answer will be that the CMA imposed rates that had no basis with reality.

- Presumably, claimants will also be able to recover any VAT charged by basic hire rental companies. Yet, in our situation, the CMA has included VAT in the alleged

[1] Our thinking here is as follows: If we assume the GTA rate is 70% of basic hire rate, then as an example, let's assume basic hire rate for a car is £70 a day (excluding VAT). So the GTA rate at 70% would be £49. Then, if the low cap imposed by the CMA is **half the GTA rate**, this will be £25 excluding VAT per day. The ratio of basic rate to low cap is therefore 70/25 or 280 per cent. **Surely, Judges will want the CMA to explain its thinking on this odd situation.**

detriment from what we do – another massive error of principle undermining its low rate cap under remedy 1C.

- And the CMA will appreciate that additional work would be needed in handling the claim, such as credit repair, or write-off services. All this needs to be priced, and will be outside the remedy 1C regime.

- Moreover, private motor drivers involved in accidents with drivers of non-reference vehicles (eg HGV's, motorcycles, commercial vehicles, or foreign EU drivers, etc), will find they have unknown challenges to overcome because these claims will not be covered by remedy 1C. Again here, what does the CMA propose?

To summarise, we noted this subject is complicated, and arises only because of the law of tort, and not competition. This reason is enough for the Courts (and the learned Judges) to dismiss the views of the CMA and its decision-makers, and question any guidance included with an order surrounding remedy 1C. Please can the CMA give further thought on this, with an updated working paper?

21. We would like to understand from parties whether:

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

For reasons given above, it should be clear the alternative approach is not effective; and as we noted already, remedy 1c is not accepted as reasonable, proportionate or needed.

*21(b) The remedy would create **distortions** between the provision of temporary replacement vehicles to non-fault claimants [**via the CMA imposed caps**] and the provision of **hire vehicles** to retail customers [**at basic hire rates**]?*

For reasons given above, it should be clear the CMA's remedy would create distortions between the provision of TRVs to non-fault claimants and the provision of hire vehicles to retail customers. CHCs may not provide TRVs in all the circumstances, as currently is the case with non-fault claimants.

- Businesses described as CHCs may cease to exist in this form, and might move to a car rental format, or some hybrid. The independent provision of TRVs via CHCs may fall substantially from current levels, to the extent that a large proportion of the 300,000 claimants handled today, will not get this service for free in the future.

They will have unpleasant choices of eg

(a) relying on at-fault insurers (whose good intentions should not be expected given that they only have non-contractual obligations towards non-fault claimants), or

(b) finding other ways to recover their losses (at considerable cost of their own time, money and personal resources), or

(c) simply have to bear their losses silently until enough people realise Government action is needed to give non-fault claimants more rights against insurers.

As we noted earlier in our responses to the PF, we doubt the Ombudsman would be useful to these situations, and a new Adjudicator may be needed, at additional costs. Or would the CMA like to create a compensation fund to deal with "hard-luck cases", which reach the press?

21(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?

As noted above, we believe circumvention will be inevitable, or exit. The critical factor is what is the imposed lower cap, under the modified remedy 1C. As noted previously, if it is at half the GTA level, it will achieve nothing but removal of this independent service over time. Our comments in our response **to WP23 (Annex A)** dealt with the harm from this loss of choice, because the CMA has been using an incorrect and inappropriate benchmark, called direct hire. Our response to WP23 shows the benchmark chosen by the CMA is opaque and arbitrary, with no transparent means of corroboration. These are fundamental problems that arise because the CMA has calculated its alleged detriment in a selective, concealed and misleading manner. We remind the CMA that its direct hire evidence was not even disclosed to expert advisers who sought to inspect the evidence under the confidentiality ring procedure.

Our Annex B with our WP23 response shows how we believe the CMA methodology needs to be amended/corrected. When corrected, the CMA should realise there is no TOH1 detriment, nor any AEC to remedy in the way foreseen by remedy 1C.

- We also believe the cost allocations as shown in Table 1 of the PDR are wrong and need correction.

We hope all this work is underway, and we will be able to see the updated results before the report is finalised.

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

This may seem a small matter, but is a significant *problem* which will doubtless arise. But the effects are unclear to forecast. However, it is clear that this remedy idea is fatally flawed, and needs to be abandoned as unworkable, with unforeseen side-effects which can not be controlled once this remedy is implemented.

Our response to the PDR and WP23 suggested that the CMA needs to resolve these problems before its report is concluded in September 2014, and not 10 months after the report (as planned). That later date would be too late to undo the harm from publicizing this remedy in the final report. And we think that decision may trigger appeals on the issues covered in this response.

*21(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?*

As stated above, we believe the Courts will take no notice of the CMA's views on dual-rate caps. The CMA's views have nothing to do with the law of tort, and indeed we expect the learned Judges to query why a replacement car has 2 prices, as discussed in footnote 1 above? The logic may be understandable to the CMA panel, but in a case before a Court to recover reasonable compensation, the CMA's thinking could be viewed as absurd and beyond comprehension.

- For example, if basic hire rates are the benchmark for recovering compensation by individuals (based on publicly available prices), and industry agreed GTA rates are equally acceptable to Courts (because they are at an agreed discount to basic hire rates), the Courts would ask why individuals using the services of CHCs should pay a rate for cars at half the GTA rate (because the CMA arrived at this by some secret formula)?

- Judges would logically ask that **if** the CMA rate is the right price for a car hire, then

why are basic hire rates nearly 3 times this level – what are they doing which makes the cars so much more expensive to consumers? As the CMA knows, basic hire rental operators are doing less than CHCs, who have to both provide a car and provide claim recovery services for clients. We hope this example shows how the CMA's ideas may be viewed in a court forum as irrational. We hope the CMA provides the needed clarification.

In any court proceedings, we would argue that the CMA imposed lower rates are not reasonable, and we objected to them. The Judges would probably criticise the CMA's prices, rather than endorse them, given that the law of tort is unchanged. We are convinced that if the CMA proceeds with its modified remedy 1C, **there will be appeals probably to the Supreme Court on whether the CMA exceeded its powers in this investigation**.

We also think that the legal decisions in case like **Coles v Hetherton**, reinforces our views that any lower costs [potentially] available to at-fault insurers are an irrelevant consideration, when the claimant recovers reasonable compensation under claims for tort. For example, we understand the Court of Appeal held the following:

- Damage to a policyholder's car is ascertained by the diminution in its value, which is usually the **reasonable** cost of repair.
- The reasonableness of the repair cost is assessed by reference to the **notional cost to the policyholder**, i.e. without the benefit of group procurement.
- Where the insurer's actual repair cost is comparable with the notional cost, it is recoverable. However, an insurer is not permitted to claim a repair cost **which exceeds the notional cost**.
- Equally the at-fault insurer cannot argue that they could have secured the repairs at a much lower cost

In our view, this can be an additional obstacle to modified remedy 1C. The above case shows the non-fault insurers costs can be recovered, and not those that the at-fault insurer might like to substitute if lower. As remedy 1C tries to impose the alleged low costs of direct hire TRVs available to at-fault insurers (as the basis for settlement), it too must be in conflict with the logic in Coles.

- Also, as the CMA accepts that claimants can recover their TRV costs at basic hire rates (and this is also accepted by the Courts), it follows that GTA rates (at a discount to basic hire rates) are an **equally acceptable basis** for settlement between

insurers and CHCs because both sides have agreed these rates via the GTA framework. GTA is therefore consistent with the Coles judgement.

- Anything lower than this is wholly artificial and would be unreasonable unless agreed between CHCs and insurers eg in bilateral agreements. The CMA is aware that we dispute its thinking on substituting prices lower than GTA, and the CMA needs to explain how remedy 1C lower caps are consistent with Coles.

We hope our comments suggest that the CMA's thoughts in this question can be viewed as irrational to outsiders who are not trained to understand issues in the way assumed by the CMA. We would like to see answers to these arguments in the final report, to the extent that Remedy 1C is not set aside.

*21(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?*

We don't understand why this should happen, unless claimants find they need to make these claims under their comprehensive policies – but they will then need to pay increased premiums in the future, which is hardly a favourable outcome for a non-fault claimant. Please can the CMA explain better its thinking on this.

We think the remedy will do the opposite of the question ie it might be expected to lead to lesser provision of TRVs. Why should non-fault insurers provide this service to non-fault claimants? There is no logical link of causality in the CMA's question. We would be interested to know why it thinks insurers would increase TRVs under this remedy and whether this is suggested by any party?

- As we noted in our response to the PDR, we believe this remedy could lead to more fraud cases being accepted, or more innocent non-fault claimants being rejected. Either extreme is not an improvement on the current status quo which has worked well (between insurers and CHCs), and without CHCs making excess profits. The GTA framework has shown what CHCs do, is in the interest of consumers.

- Moreover, the current status quo recycles referral fees paid to non-fault insurers, back to consumers in lower premiums. But a viable referral fee system ensures CHCs get sufficient regular business, in order to innovate to improve their service and build better relationships with insurers, and find better ways to compete against

each other. All this will end with remedy 1C.

The current status quo does not prevent insurers from developing bilateral agreements between themselves or CHCs, to reduce friction. Similarly, if at-fault insurers are able to do a good job, then they can try to get to the claimant first, and offer a better claim's settlement service under direct hire. The open competition to the claimants should continue without the distortions from modified remedy 1C.

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

If our view as noted above, are accepted, the CMA has many good reasons to remedy 1C (original or modified) is unworkable and a failed approach to non-fault claims settlement. Circumvention and changes in CHC services to consumers will be inevitable. What may emerge in 3 years is speculation for now, but worse than the status quo.

- Moreover, we believe a large proportion of the existing 300,000 claimants handled for free by CHCs will not get their TRV service for free, or at the same standard as now. Or worse, the CMA should expect they will find their claims rejected in whole or part by at-fault insurers. What happens then?

We also ask the CMA to recognise that its remedy does not remove frictional costs, which could increase. We look forward to seeing answers to this in the CMA's final report.

Paras 22 to 23 - Other aspects of Remedy 1C

We note the CMA is considering many other comments, received regarding Remedy 1C, but as it has not disclosed them, we are unable to comment further.

We note the CMA recognised objections about the effectiveness and proportionality of the remedy 1C. Some parties told the CMA that this remedy would lead to many non-fault claimants being left without access to the provision of a temporary replacement vehicle. We agree with this and we provided significant evidence as to why within our PDR and WP23 response.

The CMA noted it was continuing to investigate the **differences** between direct hire and credit hire, and the appropriateness of direct hire rates as the low rate benchmark. As noted in our response to WP23, we agree the CMA needs to do much more work on direct hire and its estimate of the alleged detriment, as well as the cost allocations shown in Table 1 of the

PDR. In our view, all the work done by the CMA on these subjects to date, were done below an acceptable standard, and therefore the CMA has misled itself in getting to its remedy 1C proposals, especially on the lower cap.

- Our views are covered in great detail in our response to WP23, and we ask the CMA to look carefully at our reworked version of its alleged detriment, as shown in **Annex B** to our WP23 response. That shows there should be no AEC under TOH1, assuming this exercise is done correctly. The CMA will note the numerous adjustments we have noted as necessary and were omitted from its calculations. We expect the CMA to provide its alternative estimates and reasoning, if it does not accept our thinking and conclusions.

- It follows that if there is no AEC under TOH1 (based on our thinking) then remedy 1C has no basis for implementation.

- Moreover, we believe the CMA needs to demonstrate that modified remedy 1C removes **only the alleged detriment**, and no more. In our view, remedy 1C produces the destruction of CHC sector, which is a perverse outcome for this investigation. Destroying the CHC sector is not what anyone might have expected when this investigation was referred in 2012 to deal with insurers providing insurance to private motor drivers. We think this investigation has gone considerably off-course over the last year.

Para 23 is important because we agree with many of the thoughts in this text, which we reproduce below:

> *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*

*Footnote 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.*

*(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.*

We of course believe the GTA is the solution, which we noted long ago, in our response to the Remedies Notice and Provisional Findings from December 2013. We believe the rates agreed under the GTA framework, between representatives of insurers and CHCs (via the technical committee) is the correct, and expert forum for this decision. Paragraphs 82 to 84 in our response to the PDR expand our views on why this is the correct forum to see rates.

Regarding sub-para 23(a), we are confused on what the GTA would be expected to do on the dual rate cap. As the situation currently exists, the GTA prices are the [cap] for claims (which are at a pre-determined discount to basic hire rates). However, if insurers are slow to settle claims, or create unnecessary friction leading to delays, then GTA penalty charges come into play at 30 days and 90 days.

- So, we believe the GTA price structure is aligned into a dual rate structure, where the GTA prices are the floor, and penalties arise where cases are badly handled by insurers. We also note that as CHCs bear the risk of accepting a case, then if we are wrong, we bear the loss and not the insurers.

- Moreover, we have to ensure our systems and procedures are efficient and effective to handle large volumes of on-going claims at any point in time. This too is an important reason why the CMA needs to be very careful, before implementing risky remedies that can destroy our viability or infrastructure. Insurers may be delighted to be able to reject more non-fault claimants (with ease) under modified remedy 1C, but the consumers suffering these losses will not be so happy with the CMA.

- And we need to emphasise that a £1000 loss for individuals is vastly more painful than a £1000 charge to an insurer with GWPs above £1 billion.

We think the CMA has failed to understand these **BEHAVIOURAL factors**, or the relative opportunity costs from remedy 1C between insurers and non-fault claimants especially if the remedy drives CHCs from the sector. Consumers will have no-one to help them, other than what they can put together with their own resources and contacts.

We are fully in agreement with the CMA's encouragement of the claims portal. We also have bi-lateral agreements with insurers and have seen the benefit of such agreements, so an increase would seem entirely logical,

Conclusion

As should be noted from our representations in this response, the modified remedy 1C proposals (as well as the original proposals) should be dropped because it is ineffective, disproportionate, too onerous compared with the more effective GTA alternative, and causes massive harm to consumers, and destruction of the GTA (with exit of CHCs from this sector).

The modified remedy 1C could still be open to challenge because it appears to circumvent the law of tort. As a credible competition authority, with the interests of consumers to consider, the CMA should not be trying to exercise powers which might be challenged as an abuse of process, or which harms consumers and the businesses that provide their TRV services at point of need, and at no costs (ie CHCs).

The CMA has strong evidence that insurers can not be trusted to treat even their own customers fairly, let alone non-fault claimants. This thinking undermines any considerations that remedy 1C is a good idea. Moreover, in exercising rights under the law of tort, the cost of at-fault insurers (or attempts to reduce this), is an irrelevant consideration when setting the reasonable costs for compensation (to claimants). This is a compelling reason why the CMA has misled itself in seeing this TOH1 issue as a competition case, rather than a reflection of the law of tort, which takes precedence over competition law, and the powers of the CMA.

The CMA will doubtless now realise that its low cap (which claimants can recover when using CHCs) could be roughly 2.8 times less than the basic hire rate whch individual claimants are permitted to recover (when making claims under the same car themselves). This gap shows its thinking under remedy 1C must be materially wrong and unfair to CHCs.

Given that we believe this modified remedy 1C should be abandoned, we agree that alternative outcomes, in accordance with the CMA's comments in para 23 of the consultation document could be a good idea. Depending upon what emerges, we would endorse any CMA decision to support and encourage the GTA and its recognised framework as a viable effective competition and pro-consumer outcome from this investigation.

- But we caution that there should be no price caps imposed on what is already in the GTA price structure. Prices should never be below the GTA limits, and the penalty structure in the GTA framework will encourage reduction in disputes or friction. No other parties should be involved in interfering with this industry solution of the GTA framework, eg the FCA or the OFT, or the CMA. We doubt they have the necessary skill, and expertise to make timely and valued input in GTA decisions.

Preserving the GTA will ensure consumers continue to achieve **relevant customer benefits**, and enjoy opportunity costs benefits from CHCs continuing to act on their behalf for free.

- There will also be no distortions with consumers having to make claims (without CHCs) at basic hire rates, or CHCs/claimants finding ways to circumvent the remedy, or limit the provision of like-for-like TRVs (in order to meet imposed arbitrary prices at half GTA levels).

- We believe that if insurers can capture a greater proportion of claims than their current level of around 25%, via better service to non-fault claimants, then this will be due to better competition with CHCs, rather than the CMA changing the rules in favour of insurers. Our value to consumers should be obvious by the fact that currently we handle around 300,000 claims a year, and maintain our high share of these claims because of the good work we do.

All that we have noted still enables insurers to build bi-lateral agreements between themselves and CHCs to extract even more benefits from efficiencies and innovations. All this will be eradicated with Remedy 1C, as well as the long-term survival of the GTA. If the GTA dies, we believe there is nothing better to replace it, and the consumer will suffer.

We finally remind the CMA that we do not believe there is any AEC under TOH1 as demonstrated in our submissions noted above. Any friction that the CMA might object about, is necessarily a result of the law of tort or mostly due to at-fault insurers (who can control friction and disputes). There is no need for any remedy like 1C as modified in the

consultation paper. The GTA portal and advent of more bi-lateral arrangements between insurers and CHCs will address any residual friction which should be minimised by these arrangements. No monitoring of the GTA is needed by any outside agency. As the insurers are represented in the GTA they are fully capable of looking after their interests.

We also note the alleged direct hire rates and car classifications as used by the CMA for benchmark purposes (in eg WP23 and to support remedy 1C low caps), are wrong and misleading for reasons given in our earlier submissions. Indeed, we believe the CMA should implement a remedy that insurers must ensure that their direct hire operators stop upselling as a technique against non-fault claimants, and ensure they group their cars in accordance with the GTA classifications which have arisen to ensure consumers realise their legal entltlement under the law of tort.

When the CMA contemplates our submission, we hope it will realise its thinking has gone wrong to a high degree, and led to what we think are irrational anti-consumer remedies such as 1C. We hope there is time to correct these errors before the report is finalised.

We will be happy to discuss the above with the CMA is needed.

Kindertons 6 August 2014

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