Liverpool Law Society

Response of Liverpool Law Society to the Competition and Markets Authority Private Motor Insurance Market Investigation Notice of Further Consultation on Remedy 1C

1. Liverpool Law Society

Liverpool Law Society (LLS) represents over 2500 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This response has been produced by canvassing the views of the members. Most of the information provided is based upon the opinions and experiences of solicitors predominantly engaged in the work of personal injury and credit hire litigation. Contributors include solicitors acting for both Insurers and Claimants. At all times LLS has sought to express an impartial view without preference. The views expressed are not necessarily those of the author.

2. Response

LLS has previously made the point that it is a neutral body and reiterate that as a Society it does not have within its knowledge detail relating to the mechanics of the private motor insurance industry and in particular the information or empirical data that has formed for the basis of the proposed remedy. LLS seeks to represent the interests of its' members and clients (actual or potential) at all times and will therefore consider the effect of the remedies in terms of any potential impact upon access to justice and the legal framework in which they must operate should they be deemed to be an appropriate method by which to address the perceived adverse effect on competition.

In the Provisional Decision on Remedies dated 12th June 2014 the CMA concluded that TOH1 remained namely that there was a separation of control caused by the fact that the insurer liable for paying the non-fault driver's claim was not the party in control of costs. Pursuant to section 134(1) of the Enterprise Act 2002 it was perceived that this separation gives rise to excessive frictional and transactional costs that have an adverse impact on competition and it was proposed that Remedy 1C being a dual rate cap imposed upon the provision of temporary replacement vehicles would address that AEC.

The Notice of Further Consultation on Remedy 1C recognises the responses that have been made with regard to its operation. LLS are pleased to note that having given consideration to the points

made, the CMA concludes at paragraph 12 that it would be unable to apply the powers afforded under Schedule 8 to the Enterprise Act 2002 to cap the rate payable in respect of the provision of a temporary replacement vehicle.

It is therefore of some concern that the CMA proposes an alternative Remedy 1C that would comprise a cap to the total contractual liability that the non-fault driver would be able to claim in tort.

LLS do not intend to reiterate the full content of their original submission to Remedy 1C but are of the view that the larger part of the issues raised within that response remain relevant and this response must be read in conjunction with the earlier response. The alternate Remedy 1C does not in any way address the problems that arose in respect of that Remedy and in fact LLS are of the view that additional and more serious unintended consequences would arise.

The CMA is particularly referred to the following points:

The Enterprise Act 2002

The issue of proportionality is fundamental to a consideration of the effectiveness of any Remedy. Indeed the CMA confirms that it has used the detriment analysis comprised within WP23 in its assessment of whether the remedies achieve their aim, are no more onerous than is necessary or produce any adverse and disproportionate effect (para 1.12).

Section 134(5) determines that a detrimental effect on customers or future customers will exist if it is in the form of:

"(a) Higher prices, lower quality or less choices of goods or services in any market and;

(b) Less innovation in relation to such goods or services."

In the consideration of how to overcome such a detriment in accordance with section 134(6) the CMA should:

"…have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as result from the adverse effect on competition."

Section 138 confirms that position and states that there shall be:

"…no action taken to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if-

(a) no detrimental effect on customers has resulted from the adverse effect on competition; and

(b) the adverse effect is not being remedied, mitigated or prevented."

LLS have previously expressed the view that the perceived AEC does not exist or at least does not exist at a level that causes a relevant customer detriment.

Paragraph 8 (2) of Schedule 8 to the Enterprise Act 2002 states:

" No order shall be made by virtue of sub paragraph (1) unless the relevant report in relation to the matter concerned identifies the prices charged for the goods or services as requiring remedial action."

There has been no actual finding that the current rates in operation are too high or that any remedy proposed thus far would in fact cause less detriment to the non-fault driver. LLS would suggest that it remains the case that the CMA is without sufficient power to enact Remedy 1C in either its original or revised form. LLS are particularly mindful of the recent submissions made to the CMA with regard to direct hire and the data that has been provided and note that the CMA have confirmed an intention to investigate the comparison between direct hire and credit hire in more detail particularly in terms of any price inflation.

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

LLS would reiterate to the CMA that credit hire is subject to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Compliance with these regulations is mandatory and subject to criminal prosecution. Rental agreements must be drafted to ensure the provision of information to the client in accordance with the relevant Schedule to the Regulations to include "the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot be reasonably calculated in advance the manner in which the price is to be calculated". Members are particularly concerned as to how an agreement may be drafted in a compliant way to include the two rates of the dual capped rate.

The Regulations additionally require the provision of a 14 day cancellation period during which the non-fault driver must accept a responsibility to make payments should the service have been provided before the expiry of the period. In those circumstances it is difficult to see which rate would be payable by the non-fault driver.

In their current and compliant format, rental agreements make reference to a daily charge at commercial rates such that the non-fault driver retains a responsibility to pay the full amount. Under the proposed enforcement order the rate within the agreement would have to be the higher rate in order to comply with the 2013 Regulations. It would not possible under these regulations to provide a clear statement at the time of entering into an agreement of the customer's liability to pay based around the possibility of a low rate applying in certain circumstances but with the possibility of it reverting back to a higher rate. In the view of LLS the contract would need to create a liability for the higher rate only for the sake of clarity and this would in turn create a significant consumer detriment in that the customer will have a residual legal liability to pay the outstanding balance.

At the time of contract there may be a lack of knowledge relating to liability, the identity of the at-fault driver or even fraud such that a need to insert the correct rate would mean that at the least the CHC may be forced to delay the hire commencement until the three day liability acceptance period had passed were that provision to remain. This would cause an immediate and clear prejudice to the non-fault driver.

It should also be pointed out that the CMA has itself provided guidance relating to the provision of material information and stated that this should include the price. Given the obligations imposed by the Unfair Trading Regulations 2008 and prohibition in respect of misleading acts or omissions LLS considers that there would be difficulties in drafting a compliant rental agreement, that did not cause a significant consumer detriment as between the high and low rates.

Liability and the definition of Private Motor Insurance

It will not serve any useful purpose to repeat the issues raised within the earlier submission in respect of liability or direct hire. However LLS do refer the CMA to the earlier submission should it be the intention that the cap be set in a similar way to the original Remedy 1C.

It is noted that considerations have commenced as to the definition of private motor insurance and the extent to which any remedy will apply. Whilst LLS will make separate submissions in respect of that point, so far as the issue of liability in particular is concerned, we do refer to the original remit of the investigation and reference to non-business use only. It is the strongly held position of LLS that any individual who holds insurance that enables business use should not fall within the definition of private motor insurance if they are the owner of the vehicle or use it for SDP purposes as well. It is noted that this blurring of distinctions between drivers potentially gives rise to increased frictional costs as both insurers and CHC are placed in the position that before they can provide a vehicle and at the time they discuss liability they must also consider whether it is private or not for the purposes of applying the correct rate. The alternate Remedy 1C does not address this point.

Potential Abuse by the Retail Consumer

Within paragraphs 17 (a) and 18 of the Further Consultation it is suggested that an individual no fault driver would still be able to hire directly from a retail outlet without being subject to the

Remedy. LLS would query whether the CMA has given adequate consideration to the potential for abuse of process by the driver who attends upon the hire company, alleging that he has been involved in a non-fault accident and seeks only to pay a lower capped rate. Does the hire company simply accept that individual's word or do they investigate the assertion made? Should they choose the former they may find themselves subject to fraud whilst the latter will layer in a frictional cost that may cause them to ultimately remove themselves from the market altogether. This will result in an inability of the market to provide restitution in the form of mobility to non-fault drivers in general.

A Closed Market

Paragraph 17 (b) of the Further Consultation recognises that a potential distortion may arise in that non fault insurers would not be subject to the cap in that they would continue to subrogate claims at average retail rates.

Paragraph 20 refers to a hope that " ...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 apply to subrogated claims also."

LLS would remind the CMA that the Courts do not have that judicial power. The Courts are bound by case precedent and in particular the rules provided within Dimond -v- Lovell (2002) 1 AC 384 and more recently expounded in the decision of Bent -v- Highways and Utilities Construction and Allianz (2011) EWCA Civ 1384. At paragraph 73 Lord Justice Aikens refers to the test applicable to the calculation of basic hire rate:

"(i) did the Claimant need to hire a replacement vehicle at all; if so

(ii) was it reasonable in all the circumstances to hire the particular type of car actually hired at the rate agreed; if it was

(iii) was the Claimant impecunious; if not

(iv) has the Defendant proved a difference between the credit hire rate actually paid for the car hired and what in the same broad geographical area would have been the BHR for the model of car actually hired and if so what is it: if so

(v) what is the difference between the credit hire and the BHR?"

The way in which impecuniosity applies is dealt with at para 36 when it is confirmed that in the event that the Claimant could not afford to hire a replacement vehicle by paying in advance they will be entitled to recover the credit hire rate in full provided it was otherwise a reasonable rate.

Importantly Lord Justice Aikens also refers to the case of Burdis -v- Livesey (2003) QB 36 and para 139 which states that the test is to look at "...actual locally available figures" and at a para 146 adds "...a person who needs to hire a car because of the negligence of another must subject to mitigating his loss be entitled to recover the actual cost of the hire not the average cost..."

The test in respect of BHR is well established but the report would appear to suggest that the Court should disregard precedent in favour of an Order that doesn't actually apply to subrogated claims. If so the CMA must explain why and upon what basis since it is the view of LLS that a more significant measure than an enforcement order would be required to implement such a Remedy including a change to the law.

The imposition of a Remedy that seeks to limit only one provider of TRV will immediately distort competition. A closed market will exist in that CHC would be no longer be able to provide the same quality of service that they currently do at a combined low/high rate. Such reduced ability to operate within the market is likely to lead to the exit from it of CHC. It has been openly recognised throughout the course of the investigation that the provision of TRV by Insurers is only in competition to CHC and that as such the quality of the provision is higher. LLS are concerned that the removal from the market of CHC will drive down and limit service levels and provide an opportunity for collusion between Insurers that would impact the ability of the non-fault driver to receive restitution in terms of mobility in accordance with their rights in tort. It is certain that there will be no incentive to the Insurer to provide a service level equivalent to that currently in operation and the non-fault driver would therefore be restricted in pursuing their full legal entitlement.

Paragraph 21

(a) Is the alternative approach an effective way to implement Remedy 1C?

For the reasons set out above and within earlier submissions LLS do not believe that the alternate Remedy is effective. Its application to only one part of the market will create distortions that give rise to unintended consequences.

(b) Would the remedy create distortions between the provision of TRV to non-fault claimants and the provision of hire vehicles to retail customers?

As indicated LLS have serious concerns about the potential abuse that may arise and the impact that would have upon the high street retail outlet. In any event any circumstance in which an artificial limit is placed upon one type of company that brings price down would immediately give rise to a market distortion.

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

In the time made available since the further consultation was released there has been insufficient opportunity to give this definition adequate consideration however discussion with our members does lead us to believe that there is a possibility of circumvention.

(d) Will the remedy create distortions between CHC/CMC provision and non-fault driver insurer provision of TRV?

As set out above LLS anticipate that a closed market will develop that will drive down and restrict quality of service.

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

Without knowledge of the basis upon which any rate dual or otherwise would be calculated it is not possible to provide anything more than a speculative response to this query. If it is intended that the cap will be calculated in the manner suggested within the PDR dated 14th June 2014 then LLS must refer the CMA to the response that was made to that report and reasons why it would be inappropriate to proceed on that basis.

For reasons detailed above the Court would not in any event be bound by the capped rate and neither would they be bound by any Order made by the CMA. They will at all times be bound not only by precedent but by the legal right of the Claimant to receive restitution in tort.

(f) Whether the remedy might be expected to lead to greater provision of TRV by non-fault insurers under the terms of the individual's insurance policies and the benefits and costs of this greater provision if occurred?

If that provision were to be by way of direct hire then LLS have already identified the risks that may arise with regard to quality of service and collusion between insurers. If the question directly refers to courtesy car policies the CMA should examine current provision available from those types of policies which often requires the payment of a much higher premium to secure the like for like vehicle or high beyond 7 days both of which are a legal entitlement. The remedy would therefore either give rise to a scenario where the provision by way of contract would supercede the provision that should be available in law at greater cost to the individual who would pay a higher premium.

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

LLS refer to the above points made in respect of this further consultation generally and the replies to the specific questions. There are not perceived to be any benefits that would arise to the non-fault driver.

Kirsty McKno

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