BGL Group Limited

Private Motor Insurance Market Investigation – Response to Notice of Further Consultation on Remedy 1C (Notice)

1 Introduction

1.1 This response sets out BGL Group Limited's (**BGL**'s) views on the CMA's adjusted remedy (1C) set out in the Notice published on 28 July 2014.

2 Summary

2.1 BGL agrees with the CMA's decision to discontinue Remedy 1C in its original form, which would have operated as a direct cap on the level of claims brought in tort.

2.2 In its place, BGL notes that the CMA is considering a revised proposal for Remedy 1C, which would involve capping a claimant's contractual liability to their TRV provider and thus, indirectly, constrain the amount of any claim in tort.

2.3 In BGL's view, regardless of whether the CMA's revised proposal for Remedy 1C would overcome any legal difficulty resulting from the regulation of claims in tort, the revised proposal fails to address the underlying adverse effects associated with a dual price cap remedy as cast by the CMA.

2.4 The CMA has repeatedly acknowledged the consumer benefits of claims management and credit hire and the fact that consumers, if left to the mercy of insurers as a result of the removal of these safeguards, would suffer harm. Consumer welfare must, as highlighted by BGL's previous written submissions, be at the heart of any remedy adopted by the CMA. It follows that while ensuring appropriate cost control, any remedy adopted by the CMA must not create financial conditions that require or risk the sabotage or elimination of these safeguards.

2.5 For this reason, BGL would urge the CMA to abandon Remedy 1C in its revised form and, instead, as sensibly contemplated in the Notice (paragraph 23(a)), focus on more effective and proportionate measures, such as an enhanced GTA, which have the potential to deliver greater efficiencies and lower costs without placing consumer welfare at risk.

2.6 Finally, BGL would also urge the CMA to revisit that aspect of its PDR that relates to ToH 5, as parallels can be drawn between this proposed remedy, its lawfulness and its likely adverse impact on consumers, to that associated with Remedy 1C.

3 CMA questions

3.1 BGL has reproduced, in the table below, the questions asked by the CMA in paragraph 21 of the Notice, together with BGL's preliminary responses.

The CMA would like to understand from the parties whether:
(a) This alternative approach would be an effective way in which to implement Remedy 1C?
In BGL's view, the remedy would not be effective regardless of its form of implementation (at least until clear assurance can be provided by the CMA that any applicable cap would, rather than using direct hire as a baseline, recognise properly the value and services delivered to claimants by non-insurer parties in the supply chain. In order to provide these services effectively and efficiently providers of TRVs utilise

appropriate and proportionate methods of advertising including the payment of referral fees and the importance of referral fees as an efficient means of advertising).

Irrespective of whether Remedy 1C in its revised form addresses the relevant legal hurdle, the remedy could feasibly help to create a 'market' in which claimants would, in practice, often receive a service falling short of their entitlement in tort. This would also fail to meet meaningful consumer outcome focused on restoring the innocent consumer to his/her pre accident position.

As regards whether the revised Remedy 1C addresses the relevant legal hurdle, it is arguable, at least superficially, that setting the cap against the contractual TRV charges that a TRV provider can agree with a claimant does not compromise the claimant's tortious rights. This is because, on its face, it simply regulates some of the costs incurred by the claimant, as opposed to technically limiting the value of the claim (although it is intended to deliver a similar effect).

We do not consider that remedy 1C meets existing legal requirements. There is a conflict between the effect of a cap and existing case law, which has been developed over many years. For example, cases such as Dimmond v Lovell [2002] 1 AC 384 reiterate the established position:

> *"…the negligent driver, backed by his insurers, is liable to pay **reasonable charges** incurred in hiring a replacement car if this is reasonably necessary."* [emphasis added]

In this case, Lord Nicholls goes on to quote from an earlier case - Giles v Thompson [1994] 1.A.C. 142 - in which Lord Mustill states:

> *"…'there exists in practical terms a gap in the remedies available to the motorist, from which the errant driver, and hence his insurers, frequently profit'…"*

Lord Nicholls concludes:

> *"The additional services provided by accident car hire companies bridge this gap. They redress the imbalance between the individual car owner and the insurance companies. They enable car owners to shift from themselves to the insurance companies a loss which properly belongs to the insurers but which, in practice, owners of cars often have to bear themselves. So long as the charge for the additional services is **reasonable**, this charge should be part of the recoverable damages….accident car hire arrangements provide a reasonable basis by which no-fault victims can in fact obtain the benefit of the right which the common law and compulsory third party insurance seek to give them against careless drivers. **A measure of damages which does not achieve this result would be sadly deficient. The law on the measure of damages should reflect the practicalities of the situation in which a wronged person finds himself. Otherwise it would mean that the law's response to a wrong is a right to damages which will often be illusory in practice**. I do not believe this can be the present state of the law in a situation which affects thousands of people every year".*[emphasis added]

According to the principles set out in Darren Bent v Highways and Utilities Construction Ltd, Allianz Insurance plc [2010] EWCA Civ 292, 'reasonable' charges are set by reference to the basic hire rate (or BHR).

It follows that a remedy which disregards the BHR and sets a cap by reference to (lower) direct hire rates has the potential to cause confusion in the Courts and, more importantly, compromise the critical additional services that, in reality, form part of any claimant's tortious rights. To have to claim for these costs separately would cause further friction and inefficiency, which the CMA is no doubt keen to avoid.

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

It is feasible that if TRV prices are, as a result of a rate cap, set at artificially low levels, those operators also engaged in the provision of hire vehicles to retail customers would seek to subsidise the former, which in turn could encourage other rental companies to increase prices. It is certainly not the case, in BGL's view, that the dual rate cap envisaged by Remedy 1C would result in any positive effects in respect of the supply of hire vehicles to retail customers.

However, this question obscures a more fundamental issue, which is whether a rate cap as envisaged by Remedy 1C would distort incentives for the effective provision of TRV services generally.

If the rate cap is set at a level that: i) inhibits referral fees (and, obviously, all other forms of marketing, which are also less efficient than referral fees); and ii) undermines the ability of service providers (CMCs/CHCs etc) to deliver the value added services (that a stripped down direct hire model denies), it is reasonable to conclude that these businesses, or many of them, will not be able to function profitably. This then places the entire model – which the CMA has acknowledged as providing important protections for consumers – at risk.

Market power would over time possibly concentrate in the hands of a few large fleet providers who would have greater scope to exercise that market power and ultimately derive enhanced profits through raising direct hire rates and/or offering an entirely basic and inadequate TRV service.

In BGL's view, the CMA has, without proper consideration, undervalued the benefits of claims management and credit hire and assumed that such service providers would continue to have an incentive to provide full and proper solutions under Remedy 1C, which is not necessarily the case.

(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?

The definition appears adequate; however, BGL does not endorse the remedy to which it relates.

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

Please see the more general comments set out above in relation to question (b).

Over time, BGL believes that to the extent that the credit hire model survived, claimants would be worse off owing to the inability of such operators to market their services as they have done previously (and effectively) and their need to dilute the quality of service provided in order to achieve pricing within the cap.

(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?

Please also see the comments set out above in relation to question (a). It is difficult to predict how the Courts would interpret the rate cap in light of the cases referred to in that answer, as well as the principles established in Coles v Hetherton.

As regards the second part of the question, in order to avoid undermining the current level of protection afforded to consumers, the cap would, in BGL's view, need to be set at a level which is more closely aligned with that allowed by the Courts currently or reflected in GTA rates. The CMA's suggestion that it might promote an enhanced (and possibly more inclusive) GTA , as an alternative to remedy 1C, is therefore sensible.

The dual rate cap is ambiguous, not least because it is incomplete. As currently proposed by the CMA, it is unlikely to be particularly effective as it focuses only on liability, which an insurer could dispute at a later date in any event. It does not seem to incentivise prompt payment or disincentivise disputes as to claimant need or the duration of the hire. It follows that the circumstances in which the higher rate would actually apply are very limited and open to manipulation by insurers, which the Courts might find difficult to address.

(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?

In BGL's view, this trend is difficult to predict. If the remedies undermine the sustainability of non-insurer providers (CHCs etc), then it is unlikely that insurers would opt to fill the gap unless it was profitable for them to do so, which as evidence provided to the CMA to date suggests, would actually result in significantly higher (add-on) costs for policyholders than the current AEC detriment (per policy) identified by the CMA.

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

It is worth highlighting that the impairment, through an underfunding, of the credit hire model and the potential transition to direct hire (or even no solution) could have the following consequences:

- Innocent and vulnerable claimants would be left to the vagaries of an insurer or its rental company, which has little interest in their claimant's experience or outcome. The CHC Business model exists because of the historic failings of insurers in these situations. Any such changes would require wholesale change in the legal and regulatory responsibilities of at-fault insurers.

- There would be limited assurance that the same (or any) level of value added (vehicle delivery or collection services etc) would be provided to the claimant in their time of need, or whether the vehicle provided would reflect the claimant's entitlement or needs.

- Claimants might also be expected to sign up to rental agreements making them liable to the rental company for all charges. It is important to remember that the insurer may not be a party to that agreement, in which case, if the insurer refuses to cover the charges, the claimant would still have to pay them (or, more probably, have funds debited from credit cards given as security) and seek recovery from the insurer. This would operate as a barrier to those customers not wishing to incur further debt at what is often a vulnerable point. Of course, this barrier is most difficult to overcome for the most financially disadvantaged consumers.

- Claimants might also incur a range of additional costs, for example:

    - damage waiver policies, which might not, in any event, afford total protection associated with their use of the hire car;

    - insurance for additional drivers (even if they were covered in their insurance policy);

- recovery services in the event of breakdowns;
- tyre and windscreen protection/costs etc etc.

4 Conclusions

4.1 BGL continues to be of the view that, irrespective of its legal foundation, the proposed dual cap remedy will disadvantage claimants. The identified benefits associated with this remedy are based on a flawed comparison between credit hire and direct hire costs. Further, the assumption that all or any such savings will be delivered to consumers in the form of reduced premiums, takes as its starting point a linear correlation between costs and premiums that is unsupported by any evidence made available to BGL.

4.2 The subordination of the rights of the claimant in relation to PMI RTA claims (the rights will continue to exist for all other claims) is, without any appropriate legislative intervention, unreasonable and disproportionate.

At the same time, BGL acknowledges the willingness shown by the CMA to contemplate alternative remedies and would urge the CMA to recommend enhancements to and greater participation in the GTA. With regard to bilateral agreements, BGL would caution that it is important to distinguish between insurer to insurer 'bilaterals' and insurer to CHC bilaterals or protocols in respect of which discounted rates are offered in return for prompt payment. The former are, by their nature exclusionary and designed to favour specific insurer propositions. These often involve the creation of a distinction between the larger, more established insurers and the smaller, newer entrants. As such they are not designed to work in the best interests of consumers as their focus is primarily on cost reduction. The latter are likely to deliver a better outcome for consumers provided they continue to contain measures to assure quality of service and TRV provision.