

The Competition Commission
Private Motor Insurance Investigation Team
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BY EMAIL ONLY

11 January 2013

Dear Sirs

Private Motor Insurance (PMI) Industry Investigation Response to Statement of Issues

We set out below our response to the Statement of Issues issued by the Competition Commission (the "Commission") on 12 December 2012. Our response is set out in two parts:

- (A) Our general comments and observations with regard to some of the key issues to be investigated by the Competition Commission in so far as they relate to credit hire and repair services provided by businesses such as Accident Exchange. This includes:
- (i) legal framework;
 - (ii) commentary on the evolution of credit hire;
 - (iii) the insurance industry's response to credit hire;
 - (iv) the Association of British Insurers General Terms of Agreement ("**GTA**");
 - (v) how Accident Exchange operates its business; and
 - (vi) other matters which we believe the Competition Commission should take into account in the course of its investigation.
- (B) Specific comments on Statement of Issues, in particular, Theories of Harm 1 and 2.

In this document we have used the same defined terms and expressions as are used in the Statement of Issues.

The fact that we have not commented on all of the points in the Statement of Issues should not be interpreted as meaning we agree with the comments that have not been directly discussed in this response.

PART A – GENERAL COMMENTS

1. LEGAL FRAMEWORK

- 1.1 It is necessary to recognise that at the centre of the matters raised in the Statement of Issues in so far as they relate to the provision of temporary replacement vehicles to non-fault motorists, are consumers who (if necessary) have the right to hire a replacement vehicle whilst their own vehicle cannot be used and recover the reasonable costs of so doing from the third party responsible for causing the damage.

- 1.2 In this regard, we believe it is incorrect to categorise the settlement of tortious claims for damages brought against negligent parties as a 'market'. As a matter of law, the innocent victim of a road accident who suffers a loss is entitled to compensation for damages in tort. Those losses might include:
- 1.2.1 damages by way of compensation for personal injury, loss of earnings or diminution in the value of the damaged car;
 - 1.2.2 the provision of funding for the repairs to a motorist's own car if their own policy cover is third party or if they do not wish to pursue a claim through their own comprehensive insurer because of the risk to their no claims bonus and its impact on future insurance premiums or because of the need to pay out and then recover from the at-fault motorist (or the insurer who is obliged to indemnify that party) a large policy excess; and
 - 1.2.3 damages by way of compensation for loss of use of their own vehicle, the quantification of which is usually arrived at by reference to the cost of hiring a comparable vehicle. The charges for the replacement hire vehicle are recoverable as part of an uninsured loss claim from the tortfeasor for the period that the damaged car is being repaired or, if it is not being repaired, for the time it takes to secure a settlement from the negligent party or their own insurer.
- 1.3 The amount that can be recovered must be reasonable and in relation to car hire, non-fault drivers are only entitled to recover the costs of hiring a vehicle of similar specification to their own; this does not mean that they must take the cheapest option or the option most convenient to the insurer of the at-fault driver.
- 1.4 General legal principles of tort, including the heads of loss that may be recovered and the duty to mitigate losses to a reasonable amount, set the framework in which companies which provide credit hire services ("CHOs") operate.

2. THE EMERGENCE AND EVOLUTION OF CREDIT HIRE

- 2.1 Credit hire is a service provided which enables motorists who have been involved in an accident which was not their fault to be provided with a suitable temporary replacement vehicle whilst their own vehicle is being repaired.
- 2.2 In essence, it is a service whereby a customer's liability to pay the hire charges for a temporary replacement vehicle is deferred, during which time the CHO seeks recovery of the hire charges on behalf of the customer from the insurer of the driver responsible for causing the accident.
- 2.3 Credit hire dates back to the early 1980s, prior to which time motorists whose own vehicle had been damaged by a third party and who were reliant on their vehicle to go about their daily lives, were potentially left without mobility for what could be a considerable period of time.
- 2.4 Then, as is still the case, insurance policies, whilst providing protection for damage to the vehicle and for bodily injury in accordance with the provisions of the Road Traffic Act and related European legislation, did not provide for mobility for policyholders, thereby leaving innocent accident victims to pursue a remedy at common law.
- 2.5 As Lord Nicholls stated in the case of *Dimond v Lovell* in 2000:

"...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."

- 2.6 The consumer benefits of credit hire and the gap in the market that it fulfils were also summed up, again by Lord Nicholls in *Dimond v Lovell* as follows:

“Momentary inattention by a driver results in his car running into and damaging another vehicle. The damaged car needs repair and is off the road for some days while being repaired. The owner of the damaged car requires a replacement vehicle. Many car insurance policies make no provision for a replacement if the car is damaged in an accident. So the victim of a no fault accident has to make his own arrangements to tide himself over the days he is without a car”

“Under an ordinary car hiring agreement, the hirer has to produce the hire charge up front. Usually the amount of money involved is not large but for many people it is still a considerable sum to have to find. Further, there is no certainty the money will ever be recovered from the insurers of the car whose driver was at fault. The innocent motorist has no clout when it comes to seeking payment from someone else’s insurers. And no one would wish to be involved in court proceedings to recover the money from insurers. So there are many cases where innocent motorists make do as best they can. They manage somehow without a car, or borrow one from a relation, or get lifts from friends. Either that or they hire a car and write off the hire charges as just one of those things.”

“So it comes about that accident car hire companies are fulfilling a real need. They provide replacement and additional services as well. The hirer does not have to produce any money, either at the time of hiring or at all. The hire company pursues the allegedly negligent driver’s insurers. The hire company is not deterred by having to bring court proceedings should this become necessary.”

*“These are valuable additional services...The position in law is that the negligent driver, backed by his insurers, is liable to pay reasonable charges incurred in hiring a replacement car if this is reasonable necessary... In *Giles v Thompson* [1994] 1 A.C. 142, 155A, Lord Mustill observed that*

‘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’.

“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, in practice, owners of cars have to bear themselves.”

- 2.7 The credit hire services offered by CHOs provide immediate, practical assistance to motorists to keep them mobile following an accident. Without this service being available, motorists whose vehicles have been damaged in an accident caused by a third party would, in practical terms, be left without access to a vehicle; something which for most people who own a car is considered a necessity.
- 2.8 In addition to providing credit hire services, CHOs may offer ‘credit repair’ services to motorists. In these cases, CHOs fund the cost of repairs on behalf of their customer and then seek to recover the amount paid from the insurer of the driver responsible for causing the accident.
- 2.9 Credit hire and credit repair provide funding for motorists who are not comprehensively insured, or choose not to claim on their comprehensive insurance policy in accordance with their legal entitlement to do so, to repair their damaged vehicle and reclaim the cost as part of an uninsured loss claim. Both services are aimed at providing an innocent motorist with access to a service that ensures their damaged vehicle is repaired as rapidly as possible and that they have the use of a temporary replacement vehicle for the period that they are deprived of the use of their own.

3. INSURERS' RESPONSE TO CREDIT HIRE

Insurers' response to the emergence of credit hire as a means by which the victims of motor accidents were able to access mobility services through credit hire arrangements has, notwithstanding the development of the GTA (see **paragraph 4** below), been largely one of resistance. Insurers have sought to eschew their legal obligations in an effort to reduce their own costs at the expense of the innocent motorist. They have adopted a number of strategies over the past 20 years to challenge the credit hire industry:

3.1 *Legal Challenges*

Over the years, insurers have mounted a series of high-profile and costly legal challenges seeking to avoid their responsibility to meet third party mobility costs:

3.1.1 In the case of *Giles v Thompson* (1993), insurers sought to argue that credit hire represented a danger to the administration of justice by encouraging motorists to hire cars which they do not really require at inflated rates which have to be paid for by insurers and ultimately impact premiums. In that case, Lord Mustill rejected that proposition, stating that *"the perils to the proper administration of justice much exaggerated"* on the basis that *"as to rates of hire, shrewd insurers will be well equipped with information about local tariffs for the hire of cars as the same type as the motorists"*. He also noted, in terms of public policy of credit hire arrangements that *"the balance of advantage is overwhelmingly in favour of those who receive professional and financial assistance to recover a valid claim which would otherwise go unsatisfied"*.

3.1.2 Insurers subsequently sought to challenge credit hire arrangements by raising technical legal arguments. They challenged the enforceability of CHOs' hire agreements with their customers, seeking to take advantage of issues which were not in dispute between the CHO and their customer but which, if successful, enabled the insurer to avoid a liability they would otherwise have been obliged to meet. They did so first in the case of *Dimond v Lovell* referred to above and have subsequently sought to take similar, opportunistic advantage of legal arguments with the sole aim of avoiding their liabilities.

In 2006/2007, solicitors acting on behalf of defendant insurers sought to challenge Accident Exchange's agreements on the basis of alleged deficiencies in the wording of those agreements which, insurers argued, rendered them unenforceable. This challenge was ultimately defeated but only after a protracted legal process and substantial legal costs for all parties.

More recently, solicitors acting for defendant insurers have sought to challenge the enforceability of the hire agreements of many CHOs on the basis that they did not comply with the requirements of the Cancellation of Contracts made in a Consumers Home or Place of Work Regulations 2008 (the "Regulations"). Again, this challenge was effectively defeated but the legal process to validate our customers' claims took over two years to conclude and again, resulted in substantial costs being incurred by both CHOs and insurers.

In respect of this particular challenge, we would note that in the case of *W v Veolia Environmental Services (UK) Plc* heard in the High Court in 2011 Mackie J noted that:

"the defendant's reliance upon the Regulations arises not from a new and unexpected concern for the rights of consumers but from a search for weapons in a continuing battle with those behind the claimant".

The tension between CHOs and insurers was described by Lord Justice Aikens in the case of *Bent v Highways and Utilities Construction and Allianz Insurance* in 2011 as a “saecular war that has now been conducted for over 20 years between the motor insurance market and credit car hire companies who provide an innocent victim of a motor accident with a replacement vehicle whilst his is being repaired.”

3.2 Strategies used by insurers to limit the use of credit hire services by motorists

Insurers have also initiated a number of strategies aimed at preventing or discouraging non-fault drivers from entering into credit hire arrangements:

3.2.1 Intervention

At-fault insurers may seek to offer to provide a replacement vehicle directly to the non-fault driver. The manner in which these ‘intervention’ strategies have been employed and the way that they seek to influence the non-fault driver’s decision-making was criticised in the case of *Copley v Lawn & Ors* in 2009. In that case, the at-fault insurer’s attempts to steer the non-fault driver away from using credit hire services were described as having been made “in an unpleasant and threatening tone” which did not “even suggest that the recipient should pass it to his insurer or solicitor for advice as to its contents.”

Notwithstanding the criticisms made in that case, insurers continue to adopt intervention strategies with non-fault drivers which we believe misstate the true legal position with regard to their rights and seek to impose on the innocent motorist a position which suits the insurer’s commercial interests rather than their own.

We believe the Competition Commission should review the intervention strategies of insurers as part of its investigation.

3.2.2 Bilateral Arrangements

Insurers have also sought to prevent non-fault drivers entering into arrangements with CHOs in cases where they or counter-party insurers are the at-fault insurer by entering into bilateral arrangements with other insurers.

These bilateral arrangements rely on a group of insurers agreeing to ensure that their own policyholders are not referred to a CHO in circumstances where a counter-party insurer is the insurer of the at-fault driver. In contrast, where the insurer of the at-fault driver is not a counter-party to a bilateral arrangement, the not-at fault driver's insurer is free to (and does) refer the policyholder to a CHO to provide mobility in return for a referral fee.

One obvious concern arising from these arrangements is the treatment of non-fault policyholders who happen to be involved in an accident with an at-fault driver who is either insured by the same insurance company or by an insurer with whom his or her own insurance company has such a bilateral arrangement. In these cases, customers will be dissuaded from seeking the like-for-like mobility to which they are entitled and instead will be persuaded to accept the mobility service offered by their own or the at-fault driver’s insurer, which may be in a lower specification vehicle/for a reduced hire period.

Accident Exchange has been invited to participate in tenders relating to such arrangements but, in the case of one tender with a leading UK insurer, declined to do so because of concerns as to how we would be able to satisfy our obligations to under the FSA’s Treating Customers Fairly regime: we would be required to advise

certain customers of their legal rights to like-for-like mobility but actively discourage other customers from these options simply based on the identity of the insurer of the at-fault driver.

Whilst they may have some effect in terms of reducing costs, bilateral arrangements do this at the expense of consumers by suppressing their ability to exercise their legal rights.

Bilateral agreements between insurers may also have an anti-competitive effect if these agreements are only concluded between larger insurer companies, excluding these smaller competitors (e.g. because reaching an agreement is costly).

In this respect, we agree that the Competition Commission should be looking at the operation of bilateral agreements in its investigation of potential theories of harm.

3.3 *The impact of Autofocus*

Finally, but importantly, insurers have sought to challenge CHOs' commercial rate of hire (i.e. the market rate which is charged if the insurer determines not to settle the hire claim at discounted rates within the GTA). This has been an area of substantial dispute over recent years, in large part, we believe, because insurers were led to believe that they could successfully argue that the commercial rates of hire charged by CHOs were excessive. They were of this opinion because for a number of years, and following the collation of evidence by the insurers represented on the Technical Committee in 2006, many of them commissioned a company called Autofocus Limited (now in liquidation) to produce evidence of hire rates which almost invariably appeared to show that the CHO rates were higher than rates generally available in the market.

It has subsequently transpired, however, that the rates evidence supplied by Autofocus was wholly unreliable and again, this has been an area of dispute for the past three years or so. A committal order was made against one former employee of Autofocus for contempt of court and a criminal investigation into allegations of perjury and conduct intended to pervert the course of justice was ordered by the Attorney General following permission being given by the Divisional Court for proceedings to apply to commit seven former employees of Autofocus to prison.

The routine deployment of the evidence of Autofocus, which has now been shown to be systemically dishonest, has been part of a process that has polluted the reputation of the credit hire industry entirely without justification. For our business it has involved in excess of 5,000 claims being disposed of at an undervalue and far wider damage being done to the business with losses estimated at £135 million.

The use of Autofocus evidence was part of a strategy intended to allow insurers avoid having to deal with claims in the GTA and it was aimed at starving Accident Exchange and other CHOs of cash flow.

The impact of Autofocus must therefore be taken into account by the Commission when considering any issues relating to recoverable rates of hire at law because this unreliable and now discredited evidence has impacted Court decisions and subsequently, settlement rates over a number of years.

4. **THE GTA**

- 4.1 The GTA is a voluntary protocol between subscribing CHOs and motor insurers covering the terms, conditions, rates of hire and administrative issues in connection with the supply of credit hire and credit repair services.

- 4.2 The GTA is different from the bilateral agreements between insurers, inter alia because (i) it is not exclusive (i.e. any insurer and CHO can join), (ii) it is agreed between different market participants (insurers and CHOs) and not only between two competitors (insurers) and (iii) it does not restrict what service is offered to the not-fault driver.
- 4.3 The development of the GTA followed judicial comment Lord Justice Tuckey that insurers needed to take action to reduce the volume of cases being litigated following a series of legal challenges relating to credit hire claims in the superior courts in the late 1990's. The aim was to find a better and less fractious means of resolving claims and to do so without the need for litigation.
- 4.4 The GTA requires CHOs to undertake a significant administrative burden in proactively controlling documentation and the management of claims to ensure that the overall cost of the claim is kept as low as possible. It provides for standardised arrangements in respect of monitoring and processing hire claims and a payment pack that saves insurers time and money in checking claims. These processes were recently independently audited in a sample of 12 CHO's and found them to be effective at delivering the aims of the GTA. Most significantly, the GTA sets the discounted rates applicable to various categories of vehicle which subscribing insurers are able to benefit from if they settle claims promptly.
- 4.5 The GTA has developed and evolved over its eleven year history and is still widely supported by most CHOs and insurers. It serves as a compromise between both parties' respective positions and seeks to reduce the frictional costs that would otherwise elevate the costs associated with the provision of these services to motorists. It is estimated that nearly 80% of credit hire and credit repair claims are settled in accordance with the GTA, a significant proportion of the balance being accounted for by claims where AXA (the only large insurer that does not subscribe to the GTA) insures the at fault party.
- 4.6 In recent years some smaller insurers have joined the GTA, Brit Insurance being the most recent new subscriber. However, some insurers, notably AXA, have withdrawn from the GTA which is disappointing. The fact that AXA determined to leave the protocol was, we believe, in part at least based on an erroneous view that they may be able to reduce the cost of credit hire claims by seeking to challenge more and more claims utilising rates evidence supplied by Autofocus Limited (see **paragraph 3.3** above).
- 4.7 Nevertheless, we remain of the view that the GTA is beneficial and provided all parties adhere to it, significantly reduces costs relating to the supply of temporary replacement vehicles whilst ensuring that consumers receive the mobility benefits to which they are entitled. We believe that the majority of insurers share this opinion on the basis that if the GTA did not satisfy their own annual cost/benefit analyses, they would not continue to subscribe as they have for the past eleven years.
- 4.8 Whilst there are some occasions in which a negotiated settlement cannot be concluded under the GTA (for example, in the case of a genuine dispute over liability) it can and is used in the majority of cases to resolve claims in a timely and cost effective manner. It is only in a minority of cases where claims are protracted or are dealt with outside of the GTA that additional costs (in particular, legal costs) arise and insurers do not benefit from the discounted hire rates available under the GTA.

5. **HOW ACCIDENT EXCHANGE OPERATES**

Whilst all CHOs provide broadly similar services, we believe it is helpful to explain how Accident Exchange provides its services to customers:

- 5.1 Accident Exchange does not market its services directly to the public but has arrangements with franchised motor dealerships, manufacturer approved body repairers and leasing companies, to provide accident management services to those of their customers who have been involved in road traffic accidents. Having contacted their local car dealership, body

repairer or leasing company to seek assistance in connection with the repair of their vehicle, customers (both those involved in fault accidents and those involved in non-fault accidents) may be referred to Accident Exchange to establish whether we are able to assist them.

- 5.2 We discuss with the customers referred to us the circumstances surrounding the accident, the damage to their vehicle and services we might be able to provide. In the case of customers whom we assess have been involved in a non-fault accident, we explain the credit hire service we are able to offer. We assess whether the customer has a need of a replacement vehicle (we would not offer to provide a credit hire vehicle if the customer has access to another suitable alternative vehicle) and establish the type of vehicle they need. We usually seek to provide a vehicle which is equivalent to their own damaged vehicle.
- 5.3 As well as discussing the provision of a temporary replacement vehicle, we discuss the options for the repair to the customer's vehicle. This includes the customer arranging the repairs through their own insurer where they are comprehensively insured, agreeing with the at-fault driver's insurer that they will arrange and pay for the repairs directly or by Accident Exchange offering credit repair services to the customer. In circumstances where we offer credit repair services, an independent engineer is appointed to assess the damage caused to the customer's vehicle and the cost of the necessary repairs. Accident Exchange does not itself manage the repair.
- 5.4 Under the terms of the GTA, we are required to explain how credit hire works and the customer's liability for credit hire charges. Accident Exchange is authorised and regulated by the Financial Services Authority and the Ministry of Justice and we follow a strictly controlled protocol when we advise customers of the services we offer. At the forefront of those protocols are our regulatory obligations under the Financial Services Authority's Treating Customers Fairly regime.
- 5.5 All our customers are issued an underwritten policy of insurance which covers them against any non-recovery of hire and repair charges and legal costs in the event that proceedings are issued. This insurance policy is provided free of charge to the customer; we pay the premium on their behalf. Therefore, whilst customers are liable for the hire charges, they have the benefit of an underwritten insurance policy which protects them against these charges in the event that they are not successfully recovered from the at-fault driver's insurer.
- 5.6 Where a customer's vehicle has been rendered legally undrivable as a result of the accident, we will arrange for their vehicle to be recovered and taken to the customer's chosen body repairer. We will also deliver a replacement vehicle to the customer (usually to the customer's home or place of work) as soon as possible, usually within a matter of hours of them contacting us.
- 5.7 We liaise with the body repairer, the customer's own insurer and/or the at-fault driver's insurer (as appropriate) to arrange for the customer's vehicle to be inspected, the damage assessed and the repairs undertaken. If the customer's vehicle suffers only minor damage and is legally drivable following the accident, we deliver the temporary replacement to their home or place of work immediately before the repairs can be commenced and our delivery driver will take the customer's vehicle on to the nominated body repairer.
- 5.8 During the repair period, we monitor progress of the repair and notify the at-fault driver's insurer of any delays to the repair period and the reason for those delays. We are obliged under the GTA to minimise the length of hire of the temporary replacement vehicle. We also keep the customer informed on the progress of the repairs to their own vehicle.
- 5.9 When the repairs to our customer's vehicle are completed, we notify the customer and arrange for them to return the temporary replacement vehicle we have supplied to the body repairer and collect their own vehicle. We then collect our own vehicle from the repairer's premises.

- 5.10 At the end of hire, we consolidate the paperwork to include any other losses our customer may have suffered, for example a policy excess, taxi fares if they have been unable to drive their car immediately following the accident and loss of earnings if they have lost time from work. We then submit those elements of the claim with the hire charges to the at-fault driver's insurer. Where we have provided credit repair services we will also submit for payment any repair charges we have paid on behalf of the customer.
- 5.11 Where the at-fault driver's insurer is a subscriber to the GTA, these charges are submitted in an approved form and the GTA process is followed to settle the charges at GTA discounted rates. These rates are negotiated annually and allow the paying insurer to settle the claim for hire charges at a discount to commercially available hire rates. Where the at-fault driver's insurer is not a subscriber to the GTA and we have not otherwise agreed a similar protocol for the submission of claims, there is no agreed procedure to be followed and in these cases it may be necessary to issue legal proceedings for recovery if the charges cannot be settled by agreement.
- 5.12 In the majority of cases (we estimate currently c80%), claims are settled by agreement with the at-fault driver's insurer without the need for legal proceedings. Therefore, other than being advised of the fact that the matter has been settled, customers will have no further involvement in the process after they have collected their vehicle.
- 5.13 In the remainder of cases, settlement may take longer and it may be necessary for legal proceedings to be issued to resolve any disputes about the claim. These might include:
- 5.13.1 a dispute over the **period of hire** recoverable, for example, if the customer was on holiday abroad for a period of time or there were delays in the repair process or a failure by an insurer managing a repair to act expeditiously;
 - 5.13.2 a dispute on **liability** for the accident;
 - 5.13.3 a dispute over the **type of vehicle** provided to the customer and whether it was a reasonable substitute for their own vehicle;
 - 5.13.4 a refusal of the at fault insurer to provide **indemnity** for their insured;
 - 5.13.5 occasionally, there may be a dispute as to whether, in law, the customer had **need** to hire a temporary replacement vehicle (for example, if the customer had access to another vehicle for a period of time).
- 5.14 In these cases, a customer will be advised of the need for legal proceedings and the matter will be referred to one of our panel firms of solicitors to advise the customer in respect of the claim. At this stage, customers may make a claim on the insurance policy referred to above to protect themselves from liability to pay the hire charges and any ensuing legal costs.
- 5.15 As with any other dispute involving legal proceedings, cases are often settled prior to a hearing. Where they are not, a hearing usually at a local county court, will ultimately determine the issues in dispute. The CHO recently submitted figures to the OFT which indicated that of almost 600,000 incidents handled annually by their members, fewer than 20,000 result in litigation and fewer than 2,000 actually proceeded to trial.
6. **OTHER GENERAL MATTERS**
- 6.1 The impact of the recession has been felt throughout the UK economy. The credit hire sector has seen a material deterioration in the speed of payment of claims such that the average debtor days across the industry now ranges from a low of c100 days to a high of over 300 days. The use by insurers of solicitors to manage claims on their behalf has led to increased cost, created delay and brought friction back into the system as solicitors engaged by insurers

seek to maximise their earning opportunity by routinely prolonging the settlement of claims which has the effect of delaying resolution for the innocent motorist.

- 6.2 Since the emergence of credit hire in the 1980s, it appears that very little has changed in the level of cover provided in a comprehensive motor insurance policy. Access to a small courtesy vehicle may now be an insured policy benefit which the motorist pays for as part of their annual insurance premium. Alternatively, insurers may insist that their approved body repair network provides and funds the cost of a small courtesy vehicle to satisfy the mobility needs of their insured policyholders. Or they may recognise, as the appellate courts have recognised over the last 20 years or so, that credit hire companies offer a valuable service to consumers which is perhaps even more valuable in the current economic climate.
- 6.3 Quantifying the size of that benefit or the costs to the insurance industry is difficult. The CHO has estimated the annual cost of credit hire charged by members to be less than £500 million from a total insurer claims outgo which is estimated to be in excess of £10 billion. However, it is wrong to seek to apportion that cost across policyholders as if it were an avoidable cost in a market place where insurers collect in excess of £10 billion in motor premium and achieve breakeven at best.
- 6.4 Car hire and the management of a claim has a cost. Whether it is car hire paid for by an insurer on behalf of a client, paid for by a motorist directly and recovered as part of an uninsured loss claim or provided on credit by a CHO, the best that insurers could hope to achieve if they volunteered to provide mobility for their policyholders irrespective of fault, is a small reduction in the overall hire bill they face assuming that they can keep all of the other operational efficiencies in place and avoid adding administrative costs elsewhere.
- 6.5 Absent the current protection afforded to a motorist at common law, the concern we have is that if insurers continued to do little or nothing for their policyholders then motorists who found themselves in need of a replacement vehicle following an accident and who were unable to fund hire charges themselves, then the number of claims involving hire might fall and the overall cost may also decline but the consequence would be that innocent motorists would likely be deprived of access to mobility in the same way as they were thirty years ago before the law was clarified to protect them.
- 6.6 Repeating the extract from the speech of Lord Mustill in *Giles v Thompson* in 1994, *'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'*.
- 6.7 In assessing that gap, we believe that it is not the cost of credit hire at c£500 million, it is the cost of hire following an accident and that is a cost which the negligent tortfeasor is obliged to recognise. Insurers and credit hire companies have worked together over more than ten years to ensure that it is an efficient means of resolving non-fault drivers' rights in a way which passes the cost benefit analysis run by each subscribing insurer and each credit hire company so that they remain members of the GTA.

PART B – SPECIFIC COMMENTS ON THE STATEMENT OF ISSUES

We note that the Commission has stated in the Statement of Issues that it intends to focus the investigation on several issues, including the following:

- *"Whether the separation of cost liability and cost control in the supply of services (excluding PI) to non-fault parties involved in motor accidents increases the costs of the services supplied (due to a lack of price competition or an unwarranted increase in quality) (ToH 1).*

- *Whether consumers may be put at a disadvantage due to information asymmetries and a lack of alignment between their interests and those of the parties which procure post-accident services on their behalf (ToH 2)."*¹

Rather than provide a detailed critique of the Statement of Issues and its conclusions or to comment specifically on the Questionnaire, we have set out below:

- an analysis of the legal issues in the Statement of Issues;
- comments on the lack of clarity as to which consumers might be served by the Commission's investigation;
- comments on Theory of Harm 1 set out above; and
- comments on Theory of Harm 2 set out above.

8. ANALYSIS OF THE LEGAL ISSUES

8.1 Reducing and mitigating loss

Insofar as CHOs, such as Accident Exchange, are able to recover credit hire charges from the fault driver insurance company, Accident Exchange notes that it can only recover "reasonable" charges because:

- insurance companies have an *incentive* to reduce their loss; and
- the non-fault driver has a *duty* to mitigate his loss.

Indeed, we agree with the CC's observation in paragraph 34 that certain measures used to mitigate loss might give rise to other problems, including *"the services provided to non-fault parties being of lower quality than that to which they are entitled and would otherwise choose."* (Paragraph 34 of the Issues Statement).

8.2 Legal rights of non-fault driver outside the terms of reference

That *"the fault party is required to put the non-fault party 'back into the position he would have been but for the accident'"* is a matter of well-established general law and it would be surprising if the Commission considered that this should be adjusted. In any event, an attempt to alter the legal rights and liabilities of individuals would appear to be outside the Commission's terms of reference since these are legal rights and have nothing to do with private motor insurance.

9. LACK OF CLARITY AS TO WHICH CONSUMERS MIGHT BE SERVED BY THE COMMISSION INVESTIGATION

The PMI market investigation could potentially impact several consumer groups, including: all PMI consumers, non-fault drivers, non-fault drivers who use replacement vehicles during the repair of their vehicle, non-fault drivers who use the services of CHOs etc. The definition of the relevant market/consumer group is crucial to determining whether there are features that appear to be harming competition.

It is apparent that the interests of these different groups of consumers are not aligned, since, for example, all PMI customers would be interested in lower premiums but non-fault drivers would be interested in receiving the services to which they are entitled.

¹ Page 24 of Statement of Issues

It appears doubtful whether the Commission can properly decide to favour one group of customers over another, even if one group is always a subset of the other.

10. COMMENTS ON THEORY OF HARM 1

"Whether the separation of cost liability and cost control in the supply of services (excluding PI) to non-fault parties involved in motor accidents increases the costs of the services supplied (due to a lack of price competition or an unwarranted increase in quality) (ToH 1).

10.1 Unwarranted Increase in Quality

It must be questioned whether an "unwarranted" increase in quality of service (particularly where any such situation is capable of resolution through the courts) could ever, in itself, amount to an adverse effect on competition.

In any event, Accident Exchange considers that an unwarranted increase in quality of service is not a viable proposition for CHOs in particular because insurers are "*liable to pay reasonable charges*" for the hiring of a replacement vehicle "*if this is reasonably necessary*". However, insurers are not liable for reasonable charges for *any* service provided i.e. if the non-fault driver's vehicle was a Ford Focus, the insurer would not be liable for the hiring of a BMW 5 series.

As such, in relation to CHOs, an unwarranted increase in quality would never be profitable because if a CHO hires out a vehicle of a higher quality,² the insurance company can either refuse to pay or only pay the rates applicable to the lower quality vehicle.³

We therefore do not agree with the proposition that 'moral hazard' exists in respect of credit hire and repair services. In credit hire cases, the non-fault driver is not a policyholder with policy rights he is able to enforce; he is a claimant with a duty to mitigate his loss and act reasonably. There is, therefore, incentive for non-fault motorists and those who supply them services (including CHOs) to control the costs incurred because third party insurers will not settle claims to the extent they are not reasonable and there are well established principles enabling them to do so.

10.2 Lack of price competition

Accident Exchange contests that there might not be price competition for CHO services provided to non-fault parties.

In the case of CHOs, there are a large number of suppliers of services, the nature of services provided and their price are readily capable of being determined in each case in the judicial system. As such, it appears that the price might be regarded as a regulated price and not one set, at least directly, by any market. In addition, the party paying for the services (the insurer) always has recourse to a determination by the Court. Accordingly, it is difficult to see how there could be either a lack of competition or any consumer detriment except insofar as non-fault drivers are forced to accept less than that to which they are legally entitled. It is Accident Exchange's view that the level of settlements cannot be the subject of an AEC.

Whilst non-fault drivers might be minded to either go with the CHO nominated by their insurance company or of their local garage, price competition (for referrals) does take place on an ongoing basis.

In the case of CHO's competing to be the preferred supplier to businesses whose customers have a need for post-accident mobility such as the franchised motor dealers and body repairers

² Vehicles of "higher quality" are considerably more costly to acquire from manufacturers.

³ A claimant is entitled to recover the cost which the defendant can show he would reasonably have incurred (Strutt v Whitnell)

Accident Exchange works with, in addition to prices, there is also significant competition between CHOs on the basis of the quality of service. These businesses differentiate themselves on the basis of services provided and the quality of service is also a factor in their choice of which CHO it will recommend.

10.3 Cost control and the GTA

As noted above, the GTA was effectively born out of a considerable volume of cases appearing before the courts. It was intended that the GTA would reduce confrontation, avoid costly litigation and stimulate collaboration in the management and settlement of the hundreds of thousands of accident claims annually. However, the balance of power in the GTA remains firmly in favour of insurers. Insurers exercise the choice of dealing with CHOs inside or outside of the GTA. Insurers have an incentive to:

- a. reduce their administrative costs in settling claims (which the GTA achieves);
- b. delay the payment of higher value claims for as long as possible by taking the case outside of the GTA; and
- c. refuse to settle under the GTA pending any potentially relevant court decisions.

However, Accident Exchange considers the GTA itself to be a reasonably balanced mechanism which, if operated properly and not opportunistically, reduces the friction costs (confrontation, costly litigation and delayed payment dates) and delivers cost savings for both sides.

11. COMMENTS ON THEORY OF HARM 2

Whether consumers may be put at a disadvantage due to information asymmetries and a lack of alignment between their interests and those of the parties which procure post-accident services on their behalf (ToH 2)."

11.1 Information Asymmetries

Accident Exchange notes the passages quote above from Dimond v Lovell where the Court of Appeal held that CHOs:

"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."⁴

In relation to ToH 2, Accident Exchange observes that it has no practical ability to influence any information asymmetry between non-fault drivers and insurers nor is it able to influence consumers' awareness of their legal rights. Accident Exchange considers that some of the information provided by insurers to non-fault drivers is potentially misleading.

As referred to above, an example of potentially questionable behaviour carried out by or on behalf of insurers arose in Copley v Lawn & Ors where Longmore LJ noted in reference to a letter from the insurers that:

"It is very difficult to know what an average driver would make of all of this. It comes (within a day or two of the accident) from the insurers of a defendant who has negligently caused damage to the claimant's car and perhaps his person too. It has an unpleasant threatening tone to it and does not even suggest that the recipient should pass it to his insurer or solicitor for advice as to its contents. It is tempting to say that any recipient should be

⁴ Per Lord Nicholls in Dimond v Lovell [2000] 2 All ER 897

entitled to ignore it completely. But that is not a course which any of the judges below adopted. What is completely clear to me is that the cold telephone call to Mrs Copley was inappropriate. If that is KGM's practice it should be discontinued forthwith."⁵

There are many other examples of questionable behaviour / information asymmetry that have come to light in the High Court or Courts of Appeal.

We therefore agree that the Commission should be looking at this aspect of insurer behaviour.

11.2 Referral fees

Accident Exchange agrees with the Commission's observation that "*the net financial effect (of referral fees) on consumers is unclear*" (paragraph 32 of the Statement of Issues). Indeed, from the insurers' perspective, it might be argued that referral fees have little or no impact on premiums because each insurer is likely to be in the fault position for some claims and in the non-fault position for other claims and therefore the referral fees derived by the insurance companies off-set (whether wholly or partially) any higher credit hire cost that it might face.

Notwithstanding the above, Accident Exchange considers the commissions it pays to companies who refer their customer to it to be one of the few marketing options available to it. Accident Exchange does not, for example, engage in media advertising (neither TV nor radio) because of the increased risk of fraudulent claims and vehicle thefts.

Finally, it is important to note that referral fees themselves do not affect the amount recoverable in law in respect of the hire of a replacement vehicle. The amount of recoverable hire charges are, in law, reflective of the wider vehicle rental market. Therefore, any change in referrals fees would not impact rates of hire as CHOs would need to replace those costs by other costs (for example, advertising) in order to generate business.

We hope that this response is helpful to the Commission. If we can be of any further assistance, please contact Stephen Jones (Group Counsel and Company Secretary) in the first instance.

Yours faithfully

Accident Exchange

⁵ [2009] EWCA Civ 580