



Policy Briefing

The CHO Ltd (the “CHO”) Summary Position Paper: Competition and Markets Authority (“CMA”) investigation into the UK private motor insurance market

Executive Summary

- **The current credit hire market functions in the interests of consumers, and the CHO maintains that there is no compelling CMA evidence of an adverse effect on competition.**
- **Pressure to refer the industry to the competition authorities was partly driven by the actions of Autofocus, a company that systematically created a false impression in the courts that credit hire companies (“CHCs”) were deliberately inflating hire rates. Autofocus has folded, and insurers who used Autofocus have been forced to pay millions of pounds in compensation to CHCs. There is a strong likelihood of further legal action against those parties who knew the information provided by Autofocus was deliberately flawed.**
- **The CMA still has a profound misunderstanding of the dynamics of the credit hire market and the consumer benefit it provides. The CMA’s calculation of the cost of credit hire @£2.69 per policy is incorrect, and even if it were true, this still represents fair value for consumers to ensure they have mobility in the event of an accident. Without credit hire, the cost to a consumer for provision of mobility in the event of an accident would be at least £30.**
- **The General Terms of Agreement (GTA) is acknowledged by CHCs and insurers as being an effective protocol for the settlement of credit hire claims as it offers material cost savings to insurers and removes additional frictional costs associated with litigated claims.**
- **Any CMA-recommended remedy needs to be proportional. It cannot prejudice the market place for credit hire and the costs of temporary replacement vehicles (TRVs) in the post remedy world needs to deliver the same service at appropriate cost without unintended consequences that would harm the consumer or CHCs.**

About the CHO and their members.

The CHO is a trade body with c. 65 members that represents the interests of CHC’s. CHC’s provide temporary replacement vehicles (“TRV’s”) to non-fault parties following road traffic accidents. Non-fault parties are legally entitled to be put back in to the position they were in before the accident and under tort law the fault party is liable to pay reasonable costs of so doing should the non-fault party need a TRV (and to pay the repair costs of the non-fault party’s vehicle). A non-fault party does not have to make a claim on their insurance policy to obtain this right.

CHCs depend on being referred details of non-fault parties, having access to a fleet of vehicles, having experience to form an opinion as to fault given the accident circumstances, having knowledge of tort and case law to contract (rental agreement) with the non-fault party and then to pursue the tort law claim against the fault insurer. CHCs also need significant working capital as insurers can resist the payment of TRV claims, and they can take 18 months to get to court if not settled sooner. CHCs pay referral fees to receive details of the non-fault party.

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Background on the credit hire sector

1. The UK motor vehicle accident rate is c 17% (averaging one accident per consumer every seven years). Consumers are not generally aware of their legal rights and often seek advice from their insurer immediately after the accident.
2. Insurers are normally quite happy to guide consumers that fault cannot be determined, and ill informed consumers take that guidance as gospel. A consequence of this is that they lose the ability to bring that tort law claim and have to resort to making a claim on their policy, losing their no claims discount and having to pay their insurance excess. Insurers also benefit by not paying for the TRV. CHC's provide a consumer service in taking the liability risk themselves, and a failed claim means they recover nothing.
3. The amount claimed by a CHC depends on the vehicle provided and the length of hire. The vehicle provided can be similar to the non-fault party's damaged vehicle (but no better). The length of hire broadly equates to the repair time for the damaged vehicle. The referral fee is paid by the CHC and is effectively a marketing cost. It is not added to the claim.
4. The day rate for the TRV has to be reasonable. Case law states that a reasonable rate (known as the Basic Hire Rate) must be within the range of commercial rates available to the consumer.
5. Most CHC's and most insurers (AXA excepted) are members of the ABI General Terms of Agreement (the "GTA"). The GTA (12 years old) is a non-legally binding pragmatic agreement benefitting insurers and CHC's. For insurers, CHC's have to give them 90 days to pay at pre agreed (adjusted annually) GTA day rates that broadly reflect a 30% discount to the Basic Hire Rates in the market place. CHC's benefit from the prompter payment of claims having offered the GTA discount, significantly improving CHC cash flows.
6. The maximum discount available to insurers is for payment by 30 days, with a reduced discount if payment is within 60 days and again within 90 days. After this period the CHC will litigate for the full Basic Hire Rate.
7. The GTA is acknowledged by CHC's and insurers as being an effective protocol that removes frictional costs associated with disputed claims and eventual litigation. The GTA day rates are more than just day rates for vehicles, they are rates agreed to also avoid the further costs of litigation.

The genesis of the Competition Commission Inquiry

8. After the credit crunch insurers' cash reserves fell significantly. Almost overnight the proportion of claims settled within the GTA reduced as insurers sought to retain cash, which forced CHC's to send an increased proportion of claims to the courts for jurisdiction.
9. 12 months later courts became clogged up with credit hire claims. Insurers (and their lawyers acting for them) then used various techniques to prevent or reduce the claim being made. For example, lawyers introduced various tangential legal arguments to show that credit hire rental agreements were legally unenforceable. These complex legal arguments were eventually defeated by CHC's but insurers benefitted from the resulting uncertainty (reduced appetite for CHC's to enter the market) and also from improved cash flow given it took years to defeat the legal arguments.
10. Most materially though insurers engaged the services of Autofocus Limited, a company that purported to be an independent rate expert. For a fee Autofocus 'researched' the Basic Hire Rates available for the specific vehicle used in each TRV claim. Autofocus employees would then attend court and, under oath, testify as to the range of rate available for that TRV at that time.
11. The rate reports were accepted by Judges as a quick method of quantifying the value of the claim being made, but it has since emerged and is accepted that Autofocus were making up their reports, omitting rates that showed the TRV claim was reasonable and lying in court. Their actions created the false perception among judges, insurers, the ABI and eventually MPs that CHCs were deliberately increasing the costs incurred by insurers and thereby premiums paid by consumers.

12. At this same time the Transport Select Committee held an inquiry into motor premium increases. MPs were concerned that rising premiums were making insurance unaffordable. People would be forced to drive illegally or were harming their job prospects by not being able to drive. The Committee attributed whiplash claims as being a key driver of premium increases, and recommended banning referral fees for personal injury claims. The Committee did not attribute any harm from TRV credit hire provision, but Jack Straw MP began a high profile campaign against CHCs immediately after the report was published.
13. After legal action from Accident Exchange, among others, Autofocus collapsed, and following several years of investigation and litigation Accident Exchange has now settled over £20 million in additional amounts from insurers against the amounts that Judges awarded in court. Further litigation against those parties who were aware of and sponsored Autofocus' actions is pending.
14. Political and media scrutiny, encouraged by insurers and the ABI, led to the referral of the UK motor insurance market to the Office of Fair Trading (the "OFT"), and given the complexities of the insurance market it was inevitable that the OFT handed responsibility to the Competition and Markets Authority (CMA) to enable a two year investigation.

Credit Hire vs Direct Hire and Referral Fees

15. Where insurers acknowledge that they are the insurer of the fault party (eg a clear cut rear end crash) the fault insurer will know that there is a chance of the non-fault party being referred to a CHC. In these circumstances they may decide to proactively contact the non-fault party (who is not their insured customer remember) and take steps to offer that non-fault party a TRV themselves.
16. If the at-fault insurer provides the TRV the CHO believes there is customer detriment, as insurers will almost certainly offer a lower-spec car for shorter periods than the full repair period, to keep insurer costs down. Informed consumers can demand that their vehicle is repaired at a repairer of their choice (as opposed to the approved repairer of the fault insurer where the CMA has shown that cost control is a priority). An informed consumer can also demand an equivalent spec TRV.
17. Regardless of the actual vehicle provided or of the length of hire, the fault insurer will have previously entered into a supply arrangement with a car rental company for the supply of the TRV. The car rental company (usually Enterprise Rent a Car) contracts with the fault insurer to supply the vehicle (credit hire companies contract with the non-fault consumer). The fault insurer will have tendered the supply opportunity and the winning car rental company (as well as agreeing to service level agreements) will have agreed very low day rates for the TRV. These low "direct hire" rates reflects the volume commitment the insurer will provide the rental company, and also payment certainty, and are rates that are not available to ordinary consumers.
18. Insurers offer direct hire where they can see they are the insurer of the fault party (ie liability is accepted) and to avoid the greater charges associated with credit hire TRV provision.
19. The CRUCIAL point, accepted by the CMA, is that direct hire only exists because of credit hire. Without credit hire insurers would have no incentive to provide mobility to a non-fault party who is not their customer. In its submission to the CMA Direct Line states: "insurers have no incentive to provide a service to someone who is not their customer".
20. The fact that Direct Hire is cheaper than Credit Hire is not disputed. What is disputed is the comparison of the two costs in order to ascertain the cost of the alleged adverse effect on competition (AEC) of credit hire. Moreover, any changes recommended by the CMA cannot disadvantage the consumer, and the CMA acknowledges that credit hire is a benefit for consumers.

The Competition Commission (CC) – now the Competition and Markets Authority (CMA)

21. The CC investigation covered UK Private Motor Insurance Market, but credit hire has formed a material part of the CC's work, as has vehicle repair. The CMA must conclude their work by the end of September 2014 and are scheduled to publish their Provisional Decision on Remedies ("PDRs") by

mid June. They published their “Possible Remedies” notice in December 2013, following an earlier determination by them that there was an AEC caused, they say, by the separation of cost control and cost liability. The CMA says that because the fault insurer does not control the cost (of the TRV) even though they are liable to pay for it, that there is an AEC, even though the CMA has done no work to prove the linkage between costs and premiums.

The CHO submission to the CMA

22. The CHO has argued in its submissions to the CMA that:

- The CMA has not proven any links between insurer costs and motor premiums.
- The CHO has told the CMA that work done to date is inaccurate and lacking crucial analysis.
- TRV provision is in the interests of consumers and credit hire fills a gap in the market.
- Any remedy to the supposed AEC must be proportionate.
- The CMA’s quantified the supposed AEC by comparing credit hire costs with direct hire costs. This is a flawed approach, because if credit hire did not exist, direct hire volumes will eventually fall to zero. Insurers would refuse to concede liability, leaving consumers to fight back on their own. If insurers refuse to cooperate for three weeks (the average repair period) the consumer will have to use public transport as their only means of mobility.
- Three insurers complied when the CMA asked the sector to provide them with average direct hire costs, but those three rates were actually provided by the same direct hire provider (Enterprise). The CMA’s initial headline quantification of the harm of the AEC as announced in December 2013 was incorrect as they had compared VAT exclusive direct hire rates with VAT inclusive credit hire rates. The CMA has subsequently re-quantified the AEC at only £2.69 (for the TRV) per policy.
- Direct hire and credit hire are not comparable service offerings. Direct hire also imposes excess charges on customers whereas excess is included in the credit hire TRV free of charge.
- Under direct hire consumers are exposed to various upselling strategies when they collect the direct hire TRV, such as insurance, CDW and the quality of the vehicle, leaving the consumer to pay for things that tort law (credit hire) says they do not have to.

23. In summary the CHO is extremely critical of the lack of intellectual rigour applied by the CMA and is concerned that a premature publication of the PDR before further working papers are published will further undermine the proper outcome of the investigation.

Potential remedies

24. The CMA listed several possible remedies in December 2013. One includes the obligation to provide the consumer with information as to their legal rights. Despite the difficulty of providing “pro forma” legal advice the CHO supports the consumer having access to proper and full legal advice – something they currently get from CHC’s.

25. The other remedies, 1A through 1G, seem to have narrowed down now to some form of remedy 1A (first party insurance) and 1C (the GTA with price capping), with 1G (referral fees) not having been the subject of any specific working paper.

Possible Remedy 1A – first party insurance

26. The CMA’s drafting of remedy 1A requires a lot of interpretation, but the thrust of it is that consumers will have to purchase a TRV insurance policy when they buy their motor policy (TRV

provision may be embedded, it may be an add on or it may be a separate policy). If the consumer does not purchase this product they forego their right to a TRV, fault or no-fault.

27. The CHO opposes this possible remedy as:

- (i) Where the yet to happen accident was non-fault they needn't have had to pay for cover as tort law provides it free of charge currently
- (ii) Consumers would have to consider insuring themselves against an accident that someone else causes, and insurers would have to price it on that basis ie the premium is not set against the driving quality of the person buying the product;
- (iii) Poorer consumers may choose not to purchase it and as a result forego legal rights they currently have – and CMA remedies should not differentiate between classes of consumer
- (iv) Such policies currently cost c £30 – considerably more than present;
- (v) The average cost of these policies will increase further in a market without credit hire; and
- (vi) Insurers generally do not support remedy 1A either.

28. It is not clear from the description of possible remedy 1A whether insurers could claim against the fault insurer where their non-fault customer makes a TRV claim on his policy. If this is possible then the frictional costs of litigation (as with credit hire) would remain, yet removing frictional costs seems to be a key aim of the CMA regarding the supposed AEC.

29. The CMA has failed to publish a working paper on the legal position of consumers, and we are none the wiser as to whether the CMA agree that consumers' current legal rights should be protected. At this late stage of the investigation this is unacceptable.

Possible Remedy 1C – GTA

30. Remedy 1C focuses on the GTA as the start point. It is unclear whether membership of the GTA would be binding for CHC's and/or insurers, but the CMA also include in this remedy the notion of price capping.

31. Whether or not a regulated GTA is appropriate, the CHO is concerned about price capping, especially where the CMA's pricing suggestion is to average artificially low direct hire rates and credit hire rates.

32. Price capping is in principle at odds with an organisation focused on competition.

33. Whilst the GTA has 'agreed' vehicle rates, they are agreed rates to avoid the further costs of litigation not simply day rates.

34. It is unclear who may determine these rates, enforce its operation or what the costs of it would be.

35. If claims were not settled under "GTA2", litigation, and the costs of it, would still be incurred – so it does not address some of the CMA's frictional cost concerns.

Remedy 1G – banning referral fees

36. Possible remedy 1G still leaves open as to whether the CMA will recommend that credit hire referral fees should be banned. The CMA has done no working paper on this, despite the OFT noting that referral fees are complex, requiring further deliberation.

37. Referral fees are complicated because most are paid to insurers as the source of most credit hire referrals. Some insurers benefit from these referral fees more than others, but referral fees offset the cost of credit hire.

38. Banning credit hire referral fees would not benefit the consumer, because insurers would be less likely to invest in recruitment and training to identify that a customer was a potential non-fault party. Hence the consumer would be less likely to be referred to a CHC or advised of their legal rights.

39. Crucially referral fees form no proportion of the TRV cost payable by a fault insurer – that depends only on the type of vehicle and length of hire, plus the insurer's willingness to concede liability and



pay promptly under the GTA. Insurer behaviour also dictates the cost they suffer – prompt payment equals lower cost via the GTA discounts.

Investigation Summary – the CHO view

40. The CHO has urged the CMA to focus attention on areas where it should perform additional work before publishing its PDR's. It does not look like the CMA has listened.
41. The CMA have not published an economic model of the proposed counterfactual to the current legal position of the consumer and we are concerned we will have inadequate time between the PDR's and the September deadline to comment further on the CMA's possible PDR's.
42. If the TRV market was different to what it already is today, and were the CMA to recommend an improvement to that market, the CHO contends that it is the current GTA model that would be the proposed solution.
43. The role of the CMA is to protect consumers' interests not to increase the profitability of insurers.
44. Two years of motor insurance premium reductions and recent reserve releases by insurers demonstrate that credit hire costs do not impact premiums.
45. Whilst any TRV provision has cost attached, the CHO argues that the cost of credit hire represents excellent value for the consumer, affording legal protection and mobility in their hour of need should they suffer the misfortune of a motor accident.
46. Any CMA remedy needs to be proportional. It cannot prejudice the market place for credit hire (and remedy 1A does that) and the costs of TRV's in the post remedy world need to deliver the same service and in a proportional manner. The GTA is already the mechanism for this, however price capping could prejudice CHC's to the ultimate detriment of consumers.