Competition Act 1998

Decision of the Office of Fair Trading
No. CA98/04/2004

Notification by the Association of British Insurers of the General Terms of Agreement

22 April 2004
(Case CE/2204-02)

SUMMARY

The Office of Fair Trading (OFT) has considered a request from the Association of British Insurers (ABI) for a decision on the application of the Chapter I prohibition of the Competition Act 1998.

The OFT has concluded that the ABI’s General Terms of Agreement infringes the Chapter I prohibition by operating a centralised, subscriber-controlled system of setting credit hire fees, which may have the effect of appreciably preventing, restricting or distorting competition between ABI members and between credit hire operators. However, it is the view of the OFT that if changes to the agreement as notified are made, then the agreement would qualify for individual exemption.

Rule 14(2) and rule 12 notices setting out the OFT’s proposal to grant a conditional exemption were issued on 7 January 2004 and 26 January 2004 respectively. Responses were received from insurers and their representatives, credit hire operators and their representatives and other trade associations or pressure groups. The OFT has taken account of these representations in reaching this decision.
I  THE FACTS

Background

1  On 13 November 2002, the Office of Fair Trading (OFT) received a request (notification) from the Association of British Insurers (ABI) for a decision on the application of the Chapter I prohibition imposed by section 2(1) of the Competition Act 1998 (the Act). The ABI requested a decision that the agreement notified does not infringe the Chapter I prohibition or, in the alternative, that the OFT grants an individual exemption under section 4 of the Act.

2  A summary of the notification was placed on the OFT’s public register on 16 December 2002. This summary was also published in the OFT Weekly Gazette.

3  A notice was issued under the Act in accordance with rule 14(2) of the Director’s procedural rules (the Director’s rules) on 7 January 2004. The Director’s rules provide that on an application under section 14 of the Act for an agreement to be examined under the Act, if the OFT proposes to grant an individual exemption subject to conditions or obligations, it shall provide written notice to the applicant and those persons whom the applicant identifies in the application as being the other parties to the notified agreement to which the application relates.

4  A notice was also issued in accordance with rule 12 of the Director’s rules on 26 January 2004. The Director’s rules provide that if, on an application under section 14 of the Act for an agreement to be examined, the OFT proposes to grant an individual exemption, whether or not subject to conditions or obligations, it must consult the public.

5  The OFT received a number of responses from these notices, from insurers and their representatives, credit hire operators and their representatives and other trade associations or pressure groups. Oral representations were made by a number of parties.

---

1  The Competition Act 1998 (Director’s rules) Order 2000 (SI 2000/293). This is available on the OFT’s website at www.oft.gov.uk/Business/Legal+Powers/ca98+publications.htm. As from 1 April 2003, the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT. The OFT now applies the Director’s rules.

2  Rule 14(2) of the Director’s Rules.

3  Rule 12(1)(a) of the Director’s rules.
This decision is issued under the Act in accordance with rule 15 of the Director’s rules. It states the facts on which the OFT relies and the reasons for its decision.\(^4\)

**The parties**

The ABI is an unincorporated trade association of UK insurance companies. One of its activities is to facilitate the operation of the ‘General Terms of Agreement’ (GTA), which is described in more detail below. A summary of the nature and objectives of the GTA as notified, including a list of parties to the GTA at the time of notification, was entered in the OFT’s Competition Act 1998 Public Register on 16 December 2002.\(^5\)

**Credit hire**

Credit hire is a business activity whereby replacement vehicles are loaned to innocent drivers involved in road accidents while their damaged vehicle is being repaired. The undertaking providing the vehicle (often referred to as a credit hire organisation (CHO)) then seeks to recover the cost of the vehicle hire from the at-fault driver’s insurer. However, the innocent driver remains residually liable for the full cost of the vehicle hire and/or the cost of any additional services provided by the CHO – the credit terms involve deferment of a demand for payment from the innocent driver for the replacement vehicle until the conclusion of any claim against the at-fault driver.

The practice of credit hire arises where the innocent driver may be entitled to a replacement vehicle as an element of an insurance claim resulting from an accident, and other possible sources of a vehicle – such as the vehicle repairer or the insurer – are unavailable or slower to react than the CHO.

**The relationship between CHO\(s\) and insurers**

There is no direct relationship between CHO\(s\) and insurers, although the insurer has a direct relationship with the at-fault driver and the CHO has a direct relationship with the innocent driver. Whilst credit hire agreements provide that CHO\(s\) can seek recovery from the at-fault driver’s insurer directly, should an insurer refuse to pay, the CHO would have to arrange for the innocent driver to initiate legal proceedings against the at-fault driver.

---

\(^4\) Rule 15(1) of the Director’s rules.

\(^5\) Available on the OFT’s website at: www.oft.gov.uk/Business/Competition+Act/Notifications/Association+of+British+Insurers.htm
The process whereby the insurer of an at-fault driver pays a CHO for the costs of providing a replacement vehicle under a credit hire arrangement to an innocent driver can therefore be characterised as a settlement. The CHO is making a claim against the at-fault driver’s insurer on behalf of the innocent driver for a major component of the costs associated with restoring the innocent party to their pre-accident position.

The amount of the claim submitted to an at-fault driver’s insurer by a CHO is influenced by:

- the daily rate charged by the CHO for the provision of a replacement vehicle (daily rate); and
- the duration of the loan of the replacement vehicle to the innocent driver.

The GTA is an agreement launched in September 1999 which governs the basis upon which subscribing insurers (of at-fault drivers) will meet claims made by subscribing CHOs for the cost of credit hire provided to innocent drivers. Parties to the GTA include various CHOs and vehicle insurers in the UK who are members of the ABI. The full text of the GTA is available on the GTA website, which forms part of the ABI’s website (www.abi.org.uk/tphire) (the GTA website).

The introduction to the GTA states that it: ‘sets out the arrangements between subscribers for the provision of replacement vehicles to innocent third party motorists …, and, where appropriate, the undertaking of repairs.’ The GTA includes terms and conditions for credit hire which for example require that the losses of the innocent drivers must be mitigated by not prolonging the period of hire or providing a vehicle above the necessary specification.

The ABI has described the GTA as a ‘non-binding protocol between insurers and credit hire organisations for settling claims in tort which might otherwise need to be litigated through the courts.’ The ABI also argues that the GTA is a necessary means of remedying the problems associated with credit hire, and in particular is aimed at avoiding the high levels of dispute and litigation that have occurred in the past.

---

6 Letter of 13 November 2002 from Eversheds notifying the GTA.
16 Prior to September 1999, insurers had very little control over the amounts claimed by CHOs, the terms of credit hire arrangements or even which CHO they dealt with. This often resulted in litigation between the insurers and the CHOs, as insurers refused to pay what they perceived to be inflated claims. The cost to CHOs of non-payment and bringing actions resulted in many CHOs going out of business or exiting the market.

17 According to the ABI, before the introduction of the GTA insurers had attempted to deal with these problems by trying to introduce additional competition into the provision of replacement vehicles through increased insurer participation, for example by offering replacement vehicles to innocent drivers themselves and by attempting to take control of the accident management process at an early stage. However, the ABI has argued that these attempts failed to tackle the problems identified, as price competition was very muted in relation to the hire charges CHOs made to their customers (and subsequently claimed from insurers) and, in the absence of any contractual relationship, insurers’ only option in the event of dispute was to resort to litigation.

18 Several judgments, including the House of Lords judgment Dimond v Lovell in 2000, resulted from the problems identified above. In Dimond v Lovell it was determined, on the facts of the case, that the daily rate recoverable from insurers in damages is limited to the equivalent ‘spot rate’ – the rate charged when a vehicle is hired conventionally by a customer on his or her own account (i.e. without credit). This case is not however binding on CHOs in general, which remain able to charge innocent drivers for additional services and to submit claims based on daily rates which exceed the spot rate.

How the GTA operates

19 Both insurers and CHOs may subscribe to the GTA. With a few exceptions, most major UK insurers are subscribers, as are the main CHOs. In subscribing to the GTA, CHOs and insurers may settle claims in accordance with its terms and conditions. The GTA requires that subscribing CHOs follow specific procedures when making a claim and also places obligations on subscribing insurers, for

---

7 Dimond v Lovell [2000] 2 WLR 1121.
8 For example, section 4.4(a) of the GTA sets out the services for which extra charges may be levied on the innocent driver, which include, for example, ‘extra facilities requested by the customer, beyond what can be justified by need …’. Also, section 4.7 of the GTA states: ‘Customers may opt for a higher class vehicle than is needed or an extension of the hire period at their own cost.’
example, by requiring the prompt payment of bills.  

20 The GTA operates in the following way:

(a) Before daily rates are posted on the GTA website, the range of daily rates which is collectively acceptable to subscribing CHOs and insurers as a basis for settlement of claims made by CHOs (acceptable rates) is agreed by a sub-committee of the ABI composed of representatives of these CHOs and insurers. The role of this committee includes the setting and revision of acceptable rates, and updating terms of the GTA where this is considered necessary or desirable. Since mid-2003 this sub-committee has been called the Technical Committee.

(b) A credit hire focus group of insurers (the focus group) provides the negotiating mandate for representatives of insurers on the Technical Committee. Importantly, the focus group determines the mandate of insurer representatives to negotiate a revision of acceptable rates.

(c) The Technical Committee uses information from a number of sources, including, for example, recent settlements, a survey of spot rates commissioned by insurers and conducted by a company of forensic accountants, and rates already posted on the website, in order to determine acceptable rates.

(d) The outcome of the Technical Committee’s discussions is recommended for ratification: (i) by CHOs (usually via their trade associations); and (b) by insurers (via the focus group).

(e) Once ratified, the conclusions of the Technical Committee are subsequently communicated to subscribing CHOs, who are invited by the Technical Committee to propose daily rates which are consistent with acceptable rates.

(f) The GTA provides for acceptable rates to be revised annually in a process known as 'uprating'. This annual revision of rates is carried out through the Technical Committee.

---

9 The description of the operation of the GTA contained in the Rule 14 and Rule 12 Notices was based upon information provided to the OFT during the course of its investigation. Following further submissions made in response to the Rule 14 and Rule 12 Notices, the OFT is now able to give a fuller and more accurate description of the operation of the GTA in practice.
(g) Approved daily credit hire rates are posted on the GTA website. When providing replacement vehicles, subscribing CHOs will claim their posted rate from subscribing insurers, unless a separate bilateral agreement is reached between the CHO and the insurer in question.

21 CHOs may subscribe to the GTA either as 'Tier 1' CHOs or 'Tier 2' CHOs. Tier 1 CHOs post their daily vehicle hire rates on the GTA website. The GTA website states that '...[Tier 1]... rates are endorsed by the ABI.' Tier 2 CHOs simply sign up to the GTA to indicate that they agree to the general terms and conditions of the GTA, but do not post rates. Tier 2 CHOs (CHOs which generally do not provide national coverage) may then determine rates bilaterally with individual insurers. However, the GTA website states that Tier 2 CHO rates '...should not exceed those of Tier 1 CHOs.'

10 www.abi.org.uk/tphire/firsttier/default.asp
11 www.abi.org.uk/tphire/secondtier/default.asp
II LEGAL AND ECONOMIC ASSESSMENT

A THE RELEVANT MARKET

The relevant product market

22 As described above, credit hire is a commercial activity whereby CHOs provide hire vehicles to innocent parties in road accidents, while the damaged vehicle is being repaired. The CHO then makes a claim from the at-fault driver’s insurer for the cost of credit hire.

23 The main issue here is whether credit hire should be considered as a separate product market, or whether it should be included in a wider market for vehicle hire, which would include ordinary vehicle hire, fleet hire and vehicle leasing.\(^{12}\)

24 Credit hire may be differentiated from 'conventional' vehicle hire in a number of aspects, which include:

- it is termed *credit* hire because it involves a deferment of payment for the replacement vehicle until the conclusion of any claim against the at-fault driver involved in the accident;
- the user of a replacement vehicle (the innocent driver) does not pay for the vehicle hire and/or services received, whereas the party from whom a CHO expects to recover the cost of providing the vehicle (the at-fault driver’s insurer) does not receive them;
- with a few exceptions, different companies are involved in the provision of credit hire from those providing 'conventional' vehicle hire services;
- credit hire is often associated with other ancillary 'accident management' services which make the handling of an accident or insurance claim less burdensome for innocent drivers. More generally, CHOs may require some knowledge of the law, insurance etc. These factors may present barriers from switching from providing general vehicle hire to credit hire;

\(^{12}\) There are some other complexities, which the OFT does not consider relevant here. For example, in some cases an insurer’s recommended repairer can provide a replacement vehicle. This however can only apply if the recommended repairer is in a position to do so, the third party has chosen to use the recommended repairer, and the CHO has not provided a vehicle first. The OFT has not found any evidence to suggest that the fact that, in some cases, an insurer’s recommended repairer can provide a replacement vehicle would materially affect its analysis in this case.
• one key difference is that, whereas conventional vehicle hire rates are determined by the free market, credit hire rates are not. Insurers are not able to negotiate the rate at which the replacement vehicles are provided or purchase this service from CHOs on the free market – they are effectively ‘captive’ customers. When faced with a bill, insurers must either settle on the basis of the amount claimed by a CHO or face litigation, in which case the amount recoverable by a CHO will be determined ultimately by the courts.

25 The OFT has considered whether these – and other – differences are sufficient to justify a separate market for credit hire, distinct from ordinary vehicle rental. A small survey of CHOs and vehicle rental businesses undertaken by the OFT on this issue was indeterminate. However, it would appear from the divergence in credit hire rates before the introduction of the GTA that these rates were not constrained by conventional vehicle rental rates. This suggests that a separate market definition may be appropriate.

26 The OFT therefore takes the view that there is a separate product market for credit hire. However, the OFT considers that as the GTA has the essential feature of a price-fixing agreement it can be regarded as having an appreciable effect on competition irrespective of how the relevant market is defined.13

The relevant geographic market

27 Although replacement vehicles are delivered locally by CHOs, for the convenience of the innocent driver, Tier 1 CHOs (at least) tend to provide national coverage, and daily rates posted by Tier 1 CHOs apply on a national basis. Although Tier 2 CHOs often operate at a local level, they are directly influenced by Tier 1 rates and should not exceed these rates (see paragraph 21 above). More generally, it would appear that the GTA provides a framework for settling claims made by CHOs on a national basis which reflects the national characteristics of the market. In addition, on the buyer side, insurers’ practices may be standardised across the country, since subscribing insurers are typically active throughout the UK.

28 The OFT’s view is that the relevant geographic market is national, covering the whole of the UK, or, at least, that the provision of credit hire has sufficient national characteristics to suggest that the conditions of competition would not

13 OFT 401: The Competition Act 1998 (March 1999): The Chapter I Prohibition: paragraph 2.20: ‘The [OFT] will, in addition, generally regard any agreement between undertakings which ... directly or indirectly fixes prices or shares markets ... as being capable of having an appreciable effect even where the combined market share falls below the 25 per cent threshold.’
vary significantly between markets if the market is defined on either a national, regional or local level.

Conclusion

29 On the basis of available information, the OFT considers that the relevant market is the market for the supply of credit hire vehicles in the UK.

B AGREEMENTS BETWEEN UNDERTAKINGS, DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS AND CONCERTED PRACTICES

30 The Chapter I prohibition applies to agreements between undertakings. The GTA is an agreement between the subscribing insurers and CHOs, and therefore the GTA constitutes an agreement between undertakings.

C EFFECT ON TRADE WITHIN THE UK

31 The GTA covers the operation of credit hire in the UK. The agreement therefore affects trade within the UK within the meaning of section 2 of the Act.

D THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION IN THE UK

32 The OFT has identified the provisions and associated features of the GTA which it considers would give rise to an appreciable effect on competition within the meaning of the Chapter I prohibition as follows:

- section 2.1 of the GTA, which provides for the centralised setting of daily hire rates for credit hire;

- section 2.2 of the GTA, which sets the administration fee;

- the process of annually revising rates, which also involves agreement on the level of increase.

E CENTRALISED SETTING OF DAILY CREDIT HIRE RATES

33 Section 2.1 of the GTA states:

'The liable insurer will pay the CHO’s daily rates for [credit hire] vehicles as set out in the [GTA] website …'
34 Under section 2.1 of the GTA, subscribing insurers that wish to benefit from the GTA as a framework for settlement must pay a subscribing Tier 1 CHO the daily rates posted by that CHO on the GTA website (unless a bilateral agreement has been reached). The daily rates of subscribing Tier 1 CHOs are posted on the GTA website after:

- the Technical Committee has approved the acceptable rates; and
- Tier 1 CHOs have submitted their daily rates for credit hire to be posted on the GTA website, and they have been judged to be in line with the acceptable rates.

35 In practice, since the Technical Committee collectively approves acceptable rates and Tier 1 CHOs are invited to submit daily rates in accordance with acceptable rates, Tier 1 CHOs tend to submit very similar daily rates.

36 The daily rates submitted by Tier 1 CHOs are influenced by the rates posted on the GTA website which accord with acceptable rates. Acceptable rates indicate to Tier 1 CHOs the levels which their daily rates must not exceed in order to remain acceptable to insurers. (Whilst the acceptable rates are non-binding, and either party may attempt to settle at a different rate, Tier 1 CHOs will not benefit from the GTA as a framework for settlement if they seek to settle at other than their posted daily rate). In practice, the acceptable rates determine the rates charged by CHOs as they represent the lowest price acceptable to CHOs and the highest price acceptable to insurers. (CHOs are unlikely to be willing to accept settlement on the basis of daily rates which are lower than the acceptable rates. Equally, insurers will be unwilling to settle claims on the basis of daily rates which are higher than the acceptable rates.) In combination, these factors mean that the daily rates submitted by Tier 1 CHOs accord with the acceptable rates.\(^{14}\)

37 It is clear that the process followed by the Technical Committee means that acceptable rates are determined as a result of co-ordination between subscribing CHOs and insurers. Given that acceptable rates have a direct effect on the daily rates posted by subscribing Tier 1 CHOs (for the reasons outlined above), this means that acceptable rates qualify at least as 'recommended prices'. Therefore, the process followed by the Technical Committee, in practice, results in the determination and alignment of the daily rates published by subscribing Tier 1 CHOs. Acceptable rates also have an effect on the daily rates of Tier 2 CHOs which should not exceed the daily rates of Tier 1 CHOs (see paragraph 21 above).

\(^{14}\) Even allowing for standard factors on which calculation of daily rates is based (e.g. recent
In summary, the operation of Section 2.1 of the GTA prevents and/or restricts competition in two ways:

- it prevents or restricts competition to the extent that subscribing Tier 1 CHOs and insurers act collectively through the Technical Committee to agree acceptable rates for the settlement of claims. This has an effect on the setting of daily rates (and the amount for which innocent drivers may be residually liable in the event that an at-fault driver’s insurer refutes liability for the cost of credit hire); and

- it prevents or restricts competition (on the basis of daily rates) between CHOs, which are set with reference to acceptable rates.

The current operation of the GTA therefore gives both CHOs and insurers a mechanism by which they collectively co-ordinate the setting of daily rates in such a way that prevents or restricts competition.

The ABI argues that the posted rates are not prices and therefore the practice in question cannot amount to price-fixing:

‘In the circumstances covered by the GTA, the insurer is not a customer of the CHO for vehicle credit hire services, which are supplied by the CHO to the innocent third party driver. The relationship between the CHO and insurer arises solely out of the tortious claim by the CHO’s customer (the innocent driver) against the insurer’s customer (the at-fault driver). There is no scope for competition between insurers for the business of CHOs nor between CHOs for the business of insurers. The agreement between CHOs and insurers on baseline rates for settling claims is not an agreement on the prices to be charged either by CHOs or by insurers for their respective customers, and it has no effect on competition.’

In summary, the ABI’s view is that the posted rates are settlement rates (rather than prices), and therefore there is little or no scope for ‘shopping around’. This view was further put forward by the ABI in the course of representations made in response to the rule 14(2) notice.

The OFT notes the ABI’s argument, and accepts that the process of settlement has some distinct characteristics. However, acceptable rates constitute that component of the cost of credit hire which is payable by innocent drivers, and credit hire settlements, surveys of spot rates etc).
which is ultimately paid by the at-fault driver's insurer. While insurers do not necessarily have an immediate choice as to which CHO they must deal with, this does not mean that daily rates do not constitute prices in this context. Equally, although CHOs may not compete in specific instances on the basis of daily rates, this does not mean that daily rates do not constitute prices, or that CHOs are not subject to other indirect competitive constraints.

Section 2.1 of the GTA - and the associated operation of the Technical Committee - effectively regulates the price at which CHOs can recover the cost of providing credit hire vehicles, and as such has the essential feature of a price-fixing agreement.

**F THE SETTING OF THE ADMINISTRATION FEE**

Section 2.2 of the GTA states:

>'In addition to the daily rate charges, insurers will pay the credit organisation a flat rate administration fee of £30 plus VAT per hire.'

This charge applies to both Tier 1 CHOs and Tier 2 CHOs.

The setting of the administration fee by the GTA clearly amounts to a price-fixing agreement between insurers and CHOs. As with daily rates, the setting of the administration fee represents an agreement among insurers and CHOs (again made via the Technical Committee) to attach a collectively agreed fee for the administrative costs associated with settling claims made by CHOs in respect of each credit hire arrangement. Effectively, the administration fee is set by collective agreement between insurers, on the one hand, and CHOs on the other. The provision reduces the incentive for insurers and CHOs to negotiate administration fees bilaterally.

**G PROCESS OF RATE REVISION**

The revision of acceptable rates by the Technical Committee also has an effect on competition. Acceptable rates are subject to revision every year, which is aimed at reflecting changes in spot hire rates (and any other information on CHO charges, such as cost settlements). The revision is made following consideration by the Technical Committee as regards the appropriate rates. Just as the system under Section 2.1 of the GTA effectively regulates prices, the OFT considers that any revision of acceptable rates which is negotiated collectively between the ABI

---

15 Letter of 13 November 2002 from Eversheds notifying the GTA.
and the CHOs prevents or restricts competition to the extent that insurers and CHOs act collectively through a Technical Committee to agree the payments they will make to CHOs, and prevents or restricts competition (on the basis that acceptable rates affect the daily rates charged by CHOs).

H CONCLUSION ON EFFECT ON COMPETITION

45 In the light of the above considerations, the OFT believes that certain elements of the GTA (and its associated operation) have the effect of appreciably preventing or restricting price competition between ABI members and between CHOs, and therefore infringe the Chapter I prohibition. It is the OFT’s view that those elements of the GTA that directly set the £30 administration fee and provide for the submission of daily rates which accord with acceptable rates constitute price-fixing.
III INDIVIDUAL EXEMPTION

A GROUNDS FOR EXEMPTION

46 Under section 4 of the Act the OFT may grant an individual exemption from the Chapter I prohibition with regard to an agreement where a request for exemption has been made under section 14 of the Act by a party to the agreement, if the agreement notified meets the criteria contained in section 9 of the Act.

47 Briefly, section 9 of the Act provides that, in order to be exempted, an agreement must:

(a) contribute to an improvement in production or distribution, or promote technical or economic progress;

(b) allow consumers a fair share of the resulting benefit;

(c) not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

(d) not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

48 The GTA regulates the basis upon which subscribing insurers (of at-fault drivers) will meet claims made by subscribing CHOs for the cost of credit hire provided to innocent drivers. Given the problems that resulted from the unregulated provision of credit hire services which preceded the introduction of the GTA (described above in paragraph 16), the OFT accepts that a system such as the GTA is needed in order to regulate this activity. It also notes that other attempted solutions have not appeared to work. The OFT also accepts that for a non-binding system such as the GTA to be an effective framework for settlement, its terms and conditions must be broadly acceptable to all subscribing parties.

49 Further the OFT recognises that benefits arise from the GTA to both insurers and CHOs, and ultimately to consumers. By increasing the certainty of payment, and reducing the risks of dispute and litigation, the GTA makes it less likely that the innocent driver will in fact have to pay for the provision of credit hire services.

16 For example, the insurers had previously tried to deal with the problem through offering courtesy vehicles and by trying to intervene in sorting out the accident at an early stage.
Also, to the extent that the GTA exerts a discipline on credit hire costs, insurance policyholders will not face higher premiums in order to cover these costs.

50 The OFT is nevertheless of the view that the GTA as notified does not qualify for exemption. However, there are certain changes which could be made to the wording and operation of the GTA and which, in the view of the OFT, if implemented would qualify the GTA for exemption. Section 4(3)(a) of the Act provides that the OFT may grant an exemption subject to such conditions or obligations as the OFT considers appropriate. Therefore, the OFT grants an individual exemption to the GTA on the condition that the ABI implements the proposed changes to the wording and operation of the GTA. The reasons for the OFT’s view, and the proposed changes to the GTA upon which exemption is conditional, are outlined below.

B EXEMPTION CRITERIA

Improving production or distribution or promoting technical or economic progress

51 As described above, the credit hire market has in the past faced a number of problems, principally the high incidence of disputes and non-payment of bills, which have resulted in litigation, and a lack of certainty among insurers and CHOs. The main purpose of the GTA is to reduce the number of disputes and therefore the costs associated with such disputes, and provide some certainty as regards the conduct of transactions between insurers and CHOs.

52 In essence, the significant features which parties that wish to benefit from the GTA as a framework for settlement must observe are: (a) a pre-commitment by the CHOs to submit claims to insurers in accordance with their posted daily rates and to abide by other reasonable terms and conditions (including not extending the period of hire beyond that which is necessary and providing a vehicle to an innocent driver which is similar to the damaged one); and (b) a pre-commitment by insurers to pay bills issued by CHOs within a reasonable length of time.

53 The full effect of the GTA on the number of disputes between CHOs and insurers cannot be easily quantified. However, the ABI did consult a sample of subscribing insurers\(^\text{17}\), and the responses received showed a significant drop in the number of claims disputed. The responses also demonstrated a significant reduction in the costs of handling claims.

\(^{17}\) ABI provided details of this consultation to the OFT in its notification of 13 November 2002.
The OFT considers that the GTA is likely to contribute to improving production and distribution for the following reasons. First, the GTA is likely to reduce significantly the transactions costs which would arise from bilateral negotiation of terms in every case where credit hire services are provided. Second, the GTA is likely to lead to a reduction in the direct costs of litigation which would otherwise accrue to insurers and CHOs. In both cases, it is likely that any escalation of these costs would be passed on to policyholders via increased premiums. Third, the OFT considers that the GTA is likely to provide insurers and CHOs with a framework within which individual transactions are settled without recourse to litigation, thereby allowing both groups to transact with greater certainty.

It is the view of the OFT that the GTA as notified leads to an improvement in the provision of credit hire services and in that context has promoted economic progress and contributed to improving production and distribution.

Consumers allowed a fair share of the resulting benefit

It appears that consumers benefit from the GTA as notified, both as innocent drivers who are the primary users of credit hire vehicles and as insurance policyholders.

Innocent drivers - while many innocent drivers view credit hire as a 'free' service, this is not in fact the case. Innocent drivers are under a duty to mitigate losses, and are residually liable for any charges that cannot be recovered from the at-fault driver’s insurer. This means that an innocent driver may have to pay part of the cost of credit hire, either because of a failure to mitigate loss, or because not all of the costs of credit hire can be recovered from the insurer.

The GTA, by increasing the likelihood of full payment by the insurer, and reducing the chances of dispute, means that the innocent driver is less likely to have to pay for those costs of credit hire which cannot be recovered from the insurer, and is less likely to be involved in a dispute between the CHO and insurer. Similarly, by requiring that CHOs must advise innocent drivers of their duty to mitigate losses and ensure that the terms of hire are appropriate in the circumstances, innocent drivers are more likely to be able to recover all losses from insurers.

The GTA therefore gives rise to benefits to the users of credit hire vehicles.

Policyholders - the ABI also argues that the GTA will have an indirect impact on the market for motor insurance:
'The motor insurance industry is highly competitive and therefore this market can be considered as price sensitive from a consumer’s point of view. Claims costs and associated expenses on an annual industry basis are estimated to have exceeded premium income over seven of the last ten years … and premiums have been rising to reflect this. To the extent that the GTA delivers cost savings to subscribing insurers it can be considered as having a beneficial effect for policyholders by lowering the price that they would otherwise have to pay for cover and improving claims services.'

The OFT accepts that the GTA exerts a constraint on the credit hire costs that subscribing insurers are liable for. If the costs of credit hire had remained high and continued to escalate, then such costs would inevitably be reflected in even higher vehicle insurance premiums being paid by policyholders. As a result of the GTA halting (and even reversing) the escalation of the costs of credit hire, policyholders will not face further increases in premiums to cover these higher costs.

It is the view of the OFT that the GTA results in benefits to both innocent drivers and all policyholders in general.

Indispensability

The OFT’s Competition Act guideline on the Chapter I prohibition states that:

‘To qualify for exemption, agreements may not include restrictions beyond those necessary for the attainment of the benefits which the parties demonstrate are likely to flow from the agreement. The agreement should contain the least restrictive means of achieving its aims. The [OFT] will look carefully for any restrictions beyond those necessary to securing those benefits.’

The relevant issue is therefore whether the terms and operation of the GTA are necessary to achieve the benefits of the GTA outlined above. The fact that various other attempts were made unsuccessfully to solve problems associated with the unregulated provision of credit hire services (such as early intervention by insurers) does not of itself make the current system indispensable. Further, in order to show that the GTA is indispensable to the achievement of the benefits outlined, it is also necessary to show that any amendment to the agreement would result in those benefits being lost.

18 ABI’s notification of 13 November 2002.
The OFT notes the problems that were experienced in the credit hire market (as described in paragraph 16). Further, it notes that other attempted solutions to the problems have not worked and, more generally, notes the lack of control there would otherwise be over the charges, hire arrangements or even which CHO insurers dealt with. One possible alternative, a system of arbitration in the event of a dispute, is unlikely to produce a similar level of benefits. It does not provide the same level of certainty, and while it may be effective in resolving some disputes, without the pre-commitment of the GTA, more are likely to end in arbitration or litigation. There will also be more resources involved in negotiating claims than with the GTA system. Some form of agreement which provides an effective framework for settling claims and which contains terms and conditions which are acceptable to both subscribing CHOs and insurers does seem necessary to achieve the benefits identified. The GTA clearly provides such a framework.

The OFT considered whether it would be possible to provide an effective settlement framework in which each insurer entered into separate agreements concerning rates and the administration fee with each CHO to form a series of bilateral agreements between individual CHOs and insurers. Tier 2 CHOs already operate in this manner (except for the £30 administration fee which is set under the GTA), by agreeing to the terms and conditions of GTA without posting daily rates, and also pre-committing to set daily rates with individual insurers. Further the existence of Tier 2 CHOs, who do not post daily rates on the GTA website, would appear to show that an alternative system within the GTA is possible, without the need for the insurers to approve daily rates. The 'Tier 2 model' allows individual insurers and CHOs to agree daily rates on a pre-committed bilateral basis, and retains the advantages of pre-commitment on both sides.

The ABI however argued that a network of bilateral agreements would be impractical as every insurer would need to enter into a large number of individual agreements, and even then this would not guarantee the insurer that it had an agreement with the next CHO it dealt with. Negotiating all these agreements would also be inefficient and wasteful. The ABI also argued that the Tier 2 model would not work effectively in the absence of posted Tier 1 rates, because Tier 2 CHOs rely on the Tier 1 posted rates to establish what level of charge will be accepted by insurers without dispute. It would also be a less certain system, since it is unlikely that most insurers would have agreements with most CHOs. In assessing this argument, the OFT accepts that in circumstances such as this, where the GTA arrangements obviate the need for a vast and possibly indeterminate number of bilateral agreements, they may be viewed as the least

---

restrictive means of achieving the benefits in question.

68 Even though the OFT accepts that a GTA-type system is desirable, it is still necessary to consider whether the terms of the GTA as notified (in particular those provisions which result in the fixing of credit hire rates and the administration fee) are the least restrictive way of achieving the benefits outlined above.

Section 2.1 – Fixing credit hire rates

69 The system determining acceptable rates via the Technical Committee means that daily rates are more or less fixed by co-ordination between insurers and CHOs, this co-ordination being effected through the GTA. The current operation of the GTA therefore gives both CHOs and insurers a mechanism by which they collectively co-ordinate the setting of vehicle hire rates in a way that prevents or restricts competition. It is clear that the setting of acceptable rates by the Technical Committee is not indispensable to the achievement of the benefits outlined above. The same benefits could be achieved if an independent body approved the credit hire rates to be posted instead of the Technical Committee.

70 It is therefore proposed that a wholly independent assessor appointed by the Technical Committee, rather than the Technical Committee itself, should conduct the review of acceptable rates. The independent assessor would be responsible for making an objective assessment based on a number of factors and information from a range of sources (for example, recent credit hire settlements, surveys of spot rates, and any other factors which the assessor considered appropriate). In determining acceptable rates on the basis of such an objective assessment, the independent assessor would have to ensure consistency (except where necessary to reflect differences in the nature of services provided by individual CHOs) between posted daily rates and the spot daily rates charged by conventional vehicle hire companies and recent settlements of claims by CHOs, whilst having regard to the interests of insurers, CHOs and policyholders (and in particular the common interest in avoiding litigation). The obligations of the independent assessor should be reflected in the GTA. If amended as discussed, the GTA would still retain those elements of the GTA (as discussed above) which promote economic progress and contribute to improving production and distribution, whilst ensuring that the GTA does not provide both CHOs and insurers with a mechanism by which they collectively co-ordinate the setting of vehicle hire rates.
For the reasons outlined above, the OFT considers that a system for determining pre-agreed acceptable rates is a necessary element of providing an effective framework for settling claims. Unless pre-agreed rates which are acceptable to CHO's and insurers can be determined via the GTA it is unlikely to provide a real remedy to the problems identified above, and to ensure that the benefits described above are achieved. Without any form of pre-commitment, CHO's would not be constrained in setting their rates, and therefore the problems the GTA is intended to address would recur. The replacement of the Technical Committee with an independent assessor will mean that CHO's and insurers will no longer be involved in price-fixing through the collective approval of daily rates. The introduction of an independent assessor therefore appears to be the least restrictive way to achieve a system of agreed pre-committed, published rates whilst still achieving the stated benefits of the GTA.

Section 2.2 – The administration fee

As described above, the £30 administration fee for the administrative costs associated with settling claims made by CHO's in respect of each credit hire arrangement is set by the GTA as a result of agreement between insurers and CHO's (which amounts to price-fixing). There does not appear to be any reason why the administration fee should be fixed in this way as opposed to simply forming part of the credit hire rate posted by CHO's – the achievement of the benefits described above does not appear to be dependent on the fixing of the administration fee, and therefore section 2.2 of the GTA cannot be described as indispensable in this context.

The exemption is therefore granted also on the condition that the administration fee is to be subsumed within the posted CHO rates, rather than being treated as a separate payment. As a result, this element of the GTA will be brought under the scope of the independent assessor. The independent assessor will be able to decide that acceptable rates should include a fixed element similar to the existing administrative fee if that is considered appropriate in the light of the objective assessment described in paragraph 70 above. By subsuming the administration fee within daily rates for credit hire services, as the OFT proposes, the administration fee falls to be considered as an element of the credit hire rate, and therefore the analysis contained at paragraph 71 applies here also.

Rate revision

As with the fixing of acceptable rates, the benefits of the GTA could be achieved if an independent assessor, rather than a Technical Committee of insurers, conducted the annual rate revision. Therefore, as regards the annual revision of
acceptable rates, it is proposed that the current system of collective negotiation between representatives of insurers and representatives of the CHOs be replaced with one where an independent assessor has responsibility for revising rates. As with the consideration of the initial determination of acceptable rates, this appears to be the least restrictive means of providing for rate revision whilst achieving the benefits of the GTA.

Conclusion

75 It is the OFT’s view that those provisions of the GTA as notified which directly set the administrative fee and provide for the determination of acceptable rates by a Technical Committee are not indispensable to the achievement of the benefits of the GTA as outlined above. However, if the proposed changes to the GTA are implemented, the OFT’s view is that the restrictions remaining in the amended GTA would be indispensable to the achievement of the stated benefits.

No elimination of competition

76 For the GTA to be an effective framework for settling claims, subscribing CHOs and insurers must accept its terms and conditions. The GTA is non-binding and allows parties to settle disputes outside of the GTA, or to come to bilateral arrangements which might offer better terms for each side. CHOs are also still free to compete in order to obtain business both in terms of the service they provide to innocent drivers, and their dealings with insurers. The GTA does not (either as notified or amended as proposed) eliminate competition in the national market for the provision of credit hire services.

77 In order to encourage competition, however, the OFT considers that it is important that the ABI further emphasises to all parties that the GTA is non-binding and that the GTA merely provides an optional framework for settlement of claims, and recommends that it does so.

C CONCLUSION

78 It is the OFT’s view that, although the GTA satisfies the other criteria for exemption contained in section 9 of the Act, it contains restrictions which are not indispensable to the achievement of the benefits it gives rise to, and therefore does not, as notified, qualify for individual exemption. However, the OFT considers that if certain changes are made to the GTA it would qualify for individual exemption. The OFT therefore grants an individual exemption to the GTA in accordance with section 4 of the Act subject to the conditions and obligations set out below:
(a) The following changes must be made to the wording and operation of the GTA:

(i) A wholly independent assessor appointed by the Technical Committee, as opposed to the Technical Committee itself, should conduct the review of the range of acceptable rates to be submitted by CHOs. The independent assessor would be responsible for making an objective assessment of acceptable rates, determining the level of rates to be submitted by CHOs. In conducting such an objective assessment, the OFT anticipates that the assessor will consider similar information to that currently used by the Technical Committee (for example, recent credit hire settlements, surveys of spot rates, and any other factors which the assessor considered appropriate). In setting acceptable rates the independent assessor would have to ensure consistency, except to the extent necessary to reflect differences in the services provided, between posted daily rates and the current rates charged by conventional vehicle hire companies and recent credit hire settlements, whilst having regard to the interests of insurers, CHOs and policyholders (and in particular the common interest in avoiding litigation). The obligations of the independent assessor should be included in the GTA.

(ii) The administration fee should be subsumed within the posted daily rates, rather than being treated as a separate payment in order to bring this element of the GTA under the scope of the independent assessor.

(iii) The system of annually revising or up-rating acceptable rates should be managed by an independent assessor. When revising acceptable rates, the independent assessor should follow the principles set out in (a) above. Again, the obligations of the independent assessor in this regard should be included in the GTA.

(b) Any amendments to the GTA or its operation which are proposed in order to comply with conditions (1)(a) to (c) must be agreed with the OFT.

(c) The proposed changes must be implemented within three months from the date of this decision.
D DECISION

79 The OFT may grant an individual exemption from the Chapter I prohibition to have effect for such period as it considers appropriate,\(^{20}\) and may grant an exemption subject to such conditions or obligations as it considers appropriate.\(^ {21}\)

80 The OFT has decided that the GTA as notified is not capable of meeting the exemption criteria set out in section 9 of the Act.

81 However, on the basis of the facts and for the reasons set out above, the OFT has in accordance with section 4 of the Act decided pursuant to section 14 of the Act to grant an individual exemption from the Chapter I prohibition to the ABI for a period of five years subject to the conditions set out above.

\(^{20}\) Section 4(3)(b) of the Act.
\(^{21}\) Section 4(3)(a) of the Act.