Market Investigation Reference to the Competition Commission

Helphire Group PLC would like to make its position in relation to the Market Reference clear. We welcome the investigation as it will bring to a close a period of uncertainty since the OFT's aborted investigation some years ago. The views of Helphire are given below and we hope they are of some assistance. If the Inquiry Group would like to meet with us to explore our views in more depth we are at your disposal.

1. The gap in the market, why credit hire came about

It is important that the committee has a clear vision of why credit hire and repair exists, the forces and culture that brought it into being and how the legal landscape was formed. Simply looking at the state of affairs as it exists is simplistic. Anyone coming new to this industry might find it strange that,:-
a) an industry has grown up purely to service the mobility needs of non-fault accident victims
b) insurers refer non-fault victims to companies like Helphire, receive hire commissions but then pay more for hire than they could achieve by purchasing direct in bulk
c) the lower courts are flooded with satellite litigation and issues surrounding credit hire have been referred to the Court of Appeal and the Supreme court on numerous occasions

An historical perspective will inform both the understanding, and the impact of certain proposed solutions.

In the 1970's there was no provision for innocent victims of non-fault accidents to have a replacement vehicle. This is perhaps a little surprising as a basic tenet of common law, and insurance, is that the victim should be put back in the position he was before the event that gave rise to the loss. Third Party insurers made much of the 'duty to mitigate the loss', not to incur expense that wasn't strictly necessary. Victims of accidents had no assistance available to them and third party claims were reduced as a result. It was, in fact, almost impossible to get even your excess back as litigation was expensive and legal expense insurance not common.

Some solicitors recognised that this was wrong in law and that owners of vehicles should be entitled to mobility following the disturbance of their "quiet enjoyment of their goods and chattels". Later to be enshrined in the Human Rights Act as the "Principle of Restitution". They worked with enterprising local hire companies who were prepared to hire a car to a client of the solicitor and wait until the hire charges were recovered from the other side. As the customer was not shopping around and the third party was paying, rates were higher than standard hire rates but the defendant always had the option of proving the rates to be 'unreasonably high', the argument that over time lead to the definition of a 'Basic Hire rate'.

Through the 1980's this market grew rapidly. The insurers were none too pleased and sought to dispute the hire charges on the common law arguments of "Need" (did the client need a car at all) and mitigation (was there a cheaper readily available source of

car hire the customer could have used). In general these arguments got little traction because:
a) though not self-proving, generally you buy and maintain a car because you need it
b) he claimant has to behave reasonably, though the “test of reasonableness is not high”. The thrust of legal precedent being that the fact that a wrongdoer can point to cheaper solutions does not preclude recovery as long as the claimant has acted ‘reasonably’ and that “criticism of measures taken comes ill from the party that occasioned the emergency in the first place”.

The reaction of the insurance industry was not to embrace this loss and to make adequate provision for customer mobility. Far from it. The culture was (and is) to keep claims costs down and to dispute where advantage can be gained. The innocent third party is not a policyholder and the insurer saw (sees) them purely as a cost. The next action of insurers was to look for a legal challenge to the contract between the hire company and the claimant. An effort that continues today. The hires were recovered under the principle of ‘gratuitous services’ (Donnelly-v-Joyce) applied to nursing provision given by relatives to accident victims. Just because a service is provided to a victim free, does not relieve the third party of the duty to pay for them. In Giles-v-Thompson the insurers sought to show that the hire company was maintaining an action in which it had no interest involving the medieval principle of ‘champerty’. The challenge was dismissed but the judge in that case alluded to the newly minted “Consumer Credit Act” as having some part to play.

May 1999 at the Court of Appeal heard the now infamous case of “Dimond-v-Lovell” the insurers used section 127(3) of the CCA (since repealed) that said that an incorrectly framed credit agreement was unenforceable “even by an order of court”. The victim had thus suffered no loss and the third party had no loss to meet, because parliament had intended it to be unenforceable in the legislation this overrode the “gratuitous services” argument. The insurers got a windfall in that many millions of £’s of credit hire debt became uncollectible.

It was to some extent a Pyrrhic victory since the case pointed the way to all credit hire organisations to make their agreements exempt from the consumer credit act. As long as the agreements subsisted for less than 12 months, were repayable in no more than 4 instalments and in the case of car hire the duration was no more than 90 days the Act did not apply. Unfortunately the tone of the relationship between insurer claims handlers and credit hire had been set. Instead of recognising the customer's legitimate claim for loss of use and the need to get the innocent victim back on the road, insurers focused on increasingly technical arguments on enforceability and the common law arguments of need and mitigation.

Shortly after Dimond-v-Lovell the General Terms of Agreement (GTA) came into being its aim to create a protocol by which CHO's and insurers could, for the first time, have a common view of rates and an agreed process for settling claims. It is, as you are aware, entirely voluntary and has no sanctions. This is both a strength and a weakness of the initiative. The majority of credit hire and repair claims are settled under the GTA but there is a significant minority of insurers, and organisations who do not insure conventionally (Royal Mail, large fleets, public authorities) and only around 75% of all

claims submitted under the GTA settle. Much of the remainder heads towards the courts and the lower courts are heartily sick of the whole matter, with CHO's bearing the brunt of their displeasure. The High Court has been trying its best to create clarity in the law through a series of cases (Clark-v-Ardington, Copley-v-Lawn, Bent-v-Highways Utilities [twice], Walker-Veolia, Sayce-v-TNT) but the subject matter is so variable, and so case specific that there is plenty of room for defendant lawyers to exploit and seek to deny the victim's right to mobility following a non-fault accident .

2. Helphire's history and position in the market

Helphire was founded in 1992 gaining business mainly from repairing garages then insurance brokers. In the years from 1999 it developed closes links with major insurers and large brokers and that is now the main source of custom. Helphire developed credit repair and the 'insured' model of credit hire (where the customer's liability for the hire charges is covered by a low, or no cost insurance policy). At its peak Helphire was the largest player in the market with over 140,000 hires per annum. It is still probably the largest credit repairer. Helphire was fundamental in the evolution of the ABI GTA and the CHO trade Body the AMA (now The CHO). It has been at the forefront of the development of the law surrounding the industry with many of the precedent cases either involving Helphire or run by the Helphire legal team.

3. The complex legal position of credit hire and why that creates frictional costs

The innocent victim of a non-fault accident faces some real hurdles when it comes to getting mobility following a non-fault accident. If he goes to his own insurer's approved repairer he may be offered a courtesy car. This is usually a basic class A vehicle and not a direct replacement for the asset he was deprived of. In addition his insurer will log this as a claim, affecting the no claims discount and on collecting his vehicle the applicable excess will have to be paid with no guarantee it will be repaid. In the old days of 'knock for knock' the client's insurer had no incentive to dispute liability and the victim was left out of pocket. Even now the comprehensive insurer will often have little appetite to pursuer liability and the third party can get away with it simply by not acknowledging the claim at all.

If the innocent victim is referred to a CHO then he does, at least, have someone whose interests and his are aligned. The CHO will assess the accident circumstances, check that there is an identifiable third party and then make a decision whether to hire a replacement vehicle to the customer. The customer has to hire the car, and be liable for the hire charges. The risk is usually then offset by a credit protection policy that was either purchased when the motor policy was incepted (uninsured loss recovery ULR) or arranged by the referrer. The hirer has obligations under the agreement to co-operate in the recovery process and not to mislead the CHO as to the accident circumstances. The customer (in practice the CHO) then has to demonstrate that:

a) the third party is liable in whole or in part
b) car was needed
c) the model hired was appropriate
d) the rate of hire reasonable
e) the duration of the hire was no longer than it needed to be

f) any delays to the repairs (authorisation, parts, re-estimate) are fully documented and justified

It is no wonder that very few individuals choose to hire from a 'mainstream' hire company hoping that the other side will pay the bill. The law as currently framed coming as it does from 20 years of fairly intensive litigation presents a baffling picture to the layman, and indeed to many County Court judges.

At the conclusion of the hire the CHO presents the client's claim and has to demonstrate all of the above and also that the claimant has entered into a valid contract and does have a real liability to pay for the hire and repair charges incurred. It is this complex factual matrix that applies to every case that creates grey areas for defendants to exploit and seek to avoid the consequence of their insured's negligence. As a consequence the CHO has to jump through all sorts of regulatory, legal and process hoops to present a claim that is to be paid. This is the essence of frictional costs and does nothing whatsoever for the customer whilst costing the industry millions.

A simplified system that allows a CHO to provide a service that is essentially 'cost free' to the customer, allowing the CHO to take the commercial risk of recovery would focus attention on the real issues. Liability, need and rate of hire.

4. Credit Repair

In credit repair the CHO commissions and authorises the repair and pays for it. The customer being ultimately liable for the bill as in credit hire. Credit repair came about because the client does not want to make a claim on their policy and bodyshops wanted guaranteed payment not dependent on the outcome of a claim. The labour and parts rates that apply are not those negotiated by insurers in bulk supply arrangements (approved repairers) but they are agreed by independent engineers as reasonable and so cannot be inflated.

The CHO again usually purchases the debt owed by the customer to the repairer and charges a commercial 'factoring fee'. The customer has a seamless service covering the hire and repair and does not make a claim or have to pay an excess; the bodyshop gets the repair at agreed labour rates and no parts discounts but has to pay a factoring fee; the CHO has to pay out for the repair often before it is paid and assumes the risk on recovery.

The third party faces higher labour and parts bills than if repaired in their approved network (still a fair retail rate) but because there are no delays in authorisation the period of repair is shorter (see submissions to the OFT) so the overall hire plus repair cost is comparable, if not lower in the majority of cases.

5. Repair organisations

In recent times two types of repair organisation have emerged. These establish a network of approved repairers and act as a 'middle man' between the insurer and the repairer. The repair is sub-contracted to the repairer and the organisation sends a bill to the insurer that has within it a margin. Some simply act as middle men making a turn,

some act for insurers and focus on non-fault accidents extracting margin from their competitors. Industry debate has been about the morality of the latter form. In fact the insurer organisation assumes the risk of the repair itself and has to recover the charges from the third party insurer. Both of these are cost-bearing activities and the margin is covering those costs which otherwise are unfairly borne by the client's insurer.

6. The MIB

The MIB and its constitution will be familiar to the Inquiry Group we are sure. It has been even more hostile to credit hire and credit repair than the insurance industry and is not a signatory to the ABI GTA. As well as marshalling all of the arguments outlined above the MIB has used its anecdotal status as "The insurer of last resort" to try to avoid paying out on credit hire and credit repair cases. In McCall-v-Poulton it argued that as there was a credit protection policy in place, there was an insurer available to pay the claim and this should meet the loss. This was heading for the European Court until a compromise was reached. Helphire now has uninsured and untraced drivers as a significant exclusion on its credit protection policy. Leaving customers exposed to Helphire's commercial best interests should the MIB not pay up.

The argument still continues on credit repair where the MIB insists that the comprehensive insurer should pay, but the client's insurer generally declines to do so. Test cases are running in the courts to determine the point and more frictional costs accumulating that are passed on to the insurer, and thence to the consumers.

7. The OFT investigation

The investigation was necessarily brief and did not get fully to grips with the complexity of the market. We also have some issues with the philosophy of the approach in certain areas. You will have access to our detailed submissions, we summarise our position as:-

A) The lack of control the third party has over the costs of repair. The third party has committed an act of negligence and should have the ability to control the costs of repairing the damages caused? This concept is an anathema to our legal system and overturns centuries of law. There is no contractual relationship between the third party and the innocent victim through which the process of reparation could be controlled. It should be clear from the historical perspective above that insurers must, through commercial pressures, seek to reduce the cost of third party claims and to put a victim into their control is against the interests of the consumer. The insurers will simply attempt to limit the consumer's entitlement.

B) Insurers have difficulty in assessing whether the costs of the hire and repair are reasonable. The reality of the market simply does not bear this out. With independent engineers, rates surveys and full repair documentation the insurers have everything they need to assess the bills presented to them. They spend far too much time and money trying to avoid the head of claim in its entirety through complex legal arguments instead of recognising the loss and treating is as any other claim. A big reduction in frictional costs is achievable without any increase in the claims paid out.

C) CHO's extend hires beyond that which is justified this is simply wrong. The OFT saw that the insurers provided cars in some circumstances for defined periods, 14 or 21 days and took this to be a way of controlling hire periods. In fact these cars are provided on 'replacement vehicle' policies, add-ons to the main motor policy with an additional premium. They provide for a class A or B vehicles to be provided in the event of a fault accident. The periods simply cannot be compared with that of non-fault accidents. In addition the OFT compared non-fault accidents with the periods of all accidents. This is a false comparison as the two populations are different. The closest comparison is of non-fault accidents where the CHO repairs and where the comprehensive insurer repairs, as these are drawn from the same population of incidents. Here the CHO controlled repairs are of shorter duration.

This assertion came from 'one or two' insurers. The OFT ignored an independent audit of 12 CHO's carried out by Fusion (this report is available to the CC) that showed no such attempt to elongate repair periods.

D) rates of hire paid by third party insurers are higher than if they sourced the vehicles themselves this is of course literally correct, but entirely irrelevant. Where a third party insurer has accepted liability, agreed which level of car to provide and underwrites and controls the period of hire it can source a vehicle at bulk rates and get the best deal. All of the arguable points (liability, enforceability, need, rate) are taken away and the hire company has certainty. To compare this to a credit hire situation where none of these can be taken for granted is not tenable. If a comprehensive insurer provided a car in every case and sought to recover from the third party it would face all of the same costs the credit hirer does in recovering the charges.

E) Benefit to insurers of using outsourced non-fault accident management the OFT report takes into account the levels of hire commission earned by insurers that contribute to the overall profitability and, therefore, subsidise premiums. This is in principle no different to the profit made from investment income in better times that propped up indemnity spends. Some commentators concede that It is the reduction in investment income that is largely to blame for premium rises over the last few years. What the OFT has not taken into account is the cash flow benefits of credit repair and the administration savings in having another organisation deal with around 25% of notified claims. As a result the net cost of the industry to insurers is exaggerated.

8. Rates of hire

There are a number of rates of hire mentioned in the market, an understanding of what they are, and how they interrelate is important.

a. **Basic Hire Rates** a term coined by L J Aiken in the Darren Bent case. This refers to the rate at which the client could have hired the appropriate vehicle in the open market. It does not have to be the lowest rate, it could be the highest. It replaces the term 'spot rate' that was previously employed.
b. **ABI GTA Rates** these are the rates of hire associated with the ABI GTA. It is easy to see them simply as hire rates but they are an agreed compromise of the client's claim. The courts recognise that which is why they are not mentioned in

litigation. Both sides have advantages built into the protocol. The CHO has the protection against intervention (the insurer offering an alternative) the insurer gets a discount from Full Commercial Rates plus certainty of rates and the CHO monitors and is responsible for the period of hire and the vehicle group chosen, delivery and collection and insurance.

c. **Full Commercial Rates most** CHO's have these. Generally above the rates charged by Daily Rental but not always as the pricing matrix breaks down with highly specialised and expensive vehicles. these are equivalent to the 'rack rates' in hotels, publicised but rarely charged. These rates appear on the customer's hire agreements and so represent their liability to the hire company. They will only be awarded in court if the defendant tenders no sufficient evidence or if the client is adjudged to have in no position to have hired from a conventional daily rental company 'impecunious' is the term commonly used.
d. **Direct Hire and intervention rates** rates offered to an insurance company when they hire a car on behalf of a third party. There is minimal risk of non-payment, no monitoring and the hire company gets paid for however long the car is out.

9. Hire commissions and referral fees

CHO's pay hire commissions to their sources of business, much as daily rental companies pay commissions to hotels, airlines and rental brokers. CHO's have a limited role in placing personal injury cases and fees earned in this way are often passed on to the source of business. The vast majority of the fees and commissions paid go straight to insurance companies and brokers who use them to bolster profitability and maintain competitive premiums.

The genesis of this enquiry was the rapid rise in premiums experienced over the last few years. The insurers argued this was owing to personal injury claims and other uninsured losses like credit hire and repair. It is instructive that the OFT gave up trying to establish any link between credit hire/repair and premium rises. The CHO's argued strongly that the rises were a market correction largely driven by reductions in investment income. Credit hire revenues dropped over the period in question.

We would argue that those efficient insurers that can capture non-fault accidents and offer an excellent service maximise their competitive advantage and can provide the best premiums. This drives down the premiums paid by the consumer rather than inflating them.

10. Can we learn from other countries?

It is widely recognised that the UK has the most competitive insurance market in the world and, in relation to other costs, the lowest premiums. Unlike many other European countries that have one or two dominant players either nationally or regionally(France, Spain, Italy), or are heavily regulated with a very powerful trade body (Germany) we have a vibrant and effective market with a multitude of channels of distribution offering real choice.

In Germany the replacement vehicle market is ruled by statute and the victim is forced to accept a lesser vehicle as a replacement. In other countries the head of claim is largely

unrecognised and the customer has to 'make do', much as UK citizens had to do before the advent of credit hire. It is an open question whether we, as a society, wish to adopt either of these approaches which would seem to run counter to our values of freedom and justice.

The concept of credit hire has been tried in France and Spain with limited success for two main reasons. The dominance of certain insurers allowed them to freeze out the fledgling players and the legal systems are so much less efficient and access to justice so much inferior to our own that it was uneconomic to pursue. Not, we would suggest, compelling reasons for following their line.

11. Is the consumer disadvantaged?

Victims of non-fault accidents receive an excellent service when referred to a CHO (in the CC's terms a Relevant Customer Benefit), Helphire's own satisfaction statistics are a testament despite the complex nature of the service we provide. Does the use of these services constitute an Adverse Effect on Competition by raising costs of all insurers so premiums are inflated?

In our view the credit hire/repair component does not drive premiums up overall. It is a source of competitive advantage and so allows efficient insurers to gain market share by offering lower premiums forcing competitors to either compete, become more efficient, make losses or exit the market. The behaviours are clearly in the "become more efficient' category driving down costs through intervention, driving value from the supply chain. All of which increase levels of service and drive out costs reducing premiums.

To take one example, cycle times of repairs. In 2003 the average time of a repair was 23 days. Insurers did not really care how long it took to repair the car and customers were inconvenienced. The competitive pressure generated by car hire has contributed to a 25% reduction to around 16 days so the client has far less time without his asset.

The market would be disadvantaged if CHO's extracted super-profits that took value out of the supply chain. Even the most cursory examination of the results of most of the major CHO's will reveal that this is not the case. In fact most have absorbed substantial losses.

12. Reducing frictional costs

There is no doubt the market could be more efficient, the legal and regulatory complexities are such that the relationships between hire companies and insurers are, in many cases, fraught. A simplification of the legal standing of hire and repair to give certainty to hirers, repairers and insurers would strip out layers of cost.

CHO's face a barrage of regulators and regulatory regimes. The FSA, the MoJ, Distance selling and Distance Marketing Regulations, Consumer Credit act, Contracts made at the consumers home regulations and soon the strictures of The Legal Aid, Sentencing and Punishment of Offenders Bill 2013 (LASPO). Some simplification would reduce the areas for dispute.

The market is itself considering methods of cost reduction and the creation of a 'Portal' analagous to the RTA portal is under consideration but without legislative impetus, we doubt it will come to fruition

13. Is intervention in this market

a. **Desirable** with the non-fault victim getting a great service and no established detriment to premiums we would suggest that measures to reduce friction would be the most effective way to maximise the benefits to the consumer.
b. **Possible** the solutions proposed by insurers would seem to run so counter to natural justice as to be untenable. History has shown that the third party insurer is not a good custodian of the rights of the individual. Anything that prescribes the right to a fair replacement following a non-fault accident while a car is under repair would seem to be an infringement of human rights.
c. **Practical** primary legislation in this complex area would be problematic and likely to produce unwanted side effects, as we fully expect LASPO to do. The market has evolved over time to its current state. It isn't perfect, but in many ways it is efficient and delivers value, and protection, with enough checks and balances to make sure no-one is greatly disadvantaged. Tinkering with legislation or regulation will likely just cause the components to move around and find a new steady state while engendering another wave of law.

14. Summary

The OFT's examination of the market was necessarily superficial and failed to examine some aspects dispassionately. It is noticeable that the language of the MIR is considerably less inflammatory than the report. The Motor Insurance market is highly developed and competitive. It delivers value, low premiums, good service and continual innovation (direct insurers, Electronic Data Interchange, now telematics) putting the UK at the forefront of the world motor insurance market. Germany has a tiny direct sector and distribution is through 17,000 tied agents and a few large insurers. Spain is dominated by regional insurers catering to Castillian, Basque and Catalan clients. France and Italy have a few dominant players. Holland mainly through insurance brokers. The UK has a thriving direct sector; small medium and large insurers; Lloyd's syndicates; affinity schemes and banks all distributing motor insurance through direct marketing, aggregators and local presence.

We believe strongly that consumer's have benefited from the services offered by CHO's in the face of strong opposition from elements of the insurance industry that have sought to prevent access to mobility for innocent victims on non-fault accidents. The competitive nature of the industry drives efficiency and rewards effective players. Super profits are not being extracted by CHO's, in fact most are absorbing losses which underlines the complexity of delivering mobility solutions in this market place.

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