



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998 CASE NO 1036/1/1/04

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar gives notice of the receipt of an appeal, lodged on 22 June 2004, under section 46 of the Competition Act 1998 (“the Act”) by the Association of British Insurers (“the appellant”) in respect of a decision (CA98/04/2004)¹ taken by the Office of Fair Trading (“the OFT”) and notified to the appellant on 22 April 2004 (“the decision”).

On 13 November 2002 the appellant, pursuant to section 14(1) of the Act, notified to the OFT its General Terms of Agreement (“GTA”), requesting a decision that the GTA did not infringe the Chapter I prohibition contained in section 2 of the Act or, alternatively, the grant of an individual exemption under section 4 of the Act.

The following matters are mentioned in the notice of appeal.

The GTA is a non-binding agreement made between insurers and credit hire organisations (“CHOs”). CHOs are firms that provide replacement vehicles on a credit hire basis to innocent drivers when their own vehicles have been damaged as a result of road traffic accidents. The GTA provides a basis for settling tortious claims which might otherwise need to be litigated between insurers of at-fault drivers and CHOs of innocent drivers.

The GTA was launched in September 1999 as a means of addressing in particular the high volume of litigation between insurers and CHOs, which was a result of the particular features of the market for credit hire services. The party to whom the services are provided – the innocent driver – is not normally called upon to pay for them, whereas the party who is called upon to pay – the at-fault driver, through his insurer – has no contractual relationship with the supplier and can resist an escalation of cost only by resorting to litigation.

There is extremely muted price competition between CHOs. This is due, first, to lack of price sensitivity on the part of innocent drivers, who are unlikely to query the price of attractive and convenient packages, given that the cost will be met by somebody else, and, secondly, to the absence of any contractual relationship between the CHO and the at-fault driver’s insurer.

In the absence of effective competitive restraints CHO hire charges escalated. The combination of escalating charges and cost of subsequent litigation was reflected in the insurance premiums paid by policyholders. In light of this, the appellant was urged by the courts and by MPs to take measures to avoid the need for litigation between insurers and CHOs.

By subscribing to the GTA insurers and CHOs have a mutually acceptable framework within which to settle claims. Settlement is made on the basis of daily settlement rates posted by CHOs on the GTA website on an annual basis. The posted daily settlement rates are based upon acceptable rates arrived at as a result of negotiation between representatives of both sides, taking account of various considerations, including the likely level of court awards, the savings gained by avoiding litigation, the benefit to insurers of agreed protocols for monitoring and control of hire periods and the benefit to CHOs of protocols (i) offering an incentive to insurers to settle cases and make payment quickly and (ii) preventing insurers

¹ The text of the decision can be found at <http://www.offt.gov.uk/NR/rdonlyres/96FB80EF-BDB2-4E81-AAFB-114BBDDE48C2/0/ABI.pdf>

from intervening to offer a courtesy car once the innocent driver has become a customer of the CHO, thereby curtailing the period of hire.

The operation of the GTA has led to a significant drop in the number of litigated disputes between insurers and CHOs. The decision recognises that the costs of handling claims has dropped, which may be expected to help in containing the premiums that motor vehicle policyholders have to pay.

In the decision the OFT concluded that the GTA infringed the Chapter I prohibition by appreciably preventing or restricting competition between the appellant's members and between CHOs, and had the essential feature of a price-fixing agreement. However, the GTA would qualify for individual exemption if changes were made to it to introduce an independent assessor to determine the rates for settlement in lieu of them being determined by the parties.

The appellant's grounds of appeal are threefold:

- (a) the classification of the GTA as a price-fixing agreement is based on errors of fact and law. The decision errs in conflating GTA rates with prices. The GTA is neither directly nor indirectly an agreement on prices. The GTA rates represent an agreed basis for settling claims that would otherwise be made against the insurers in tort. They are distinct from the prices offered to drivers for the services supplied by CHOs;
- (b) the OFT's conclusion that elements of the GTA have the effect of appreciably preventing or restricting price competition between the appellant's members and between CHOs is wrong in law and in fact. The GTA does not prevent or restrict price competition either between insurers or between CHOs. The decision fails to take proper account of the absence, irrespective of the GTA, of any scope for price competition between insurers and between CHOs when settling claims for damages made on behalf of innocent drivers against at-fault drivers.
- (c) the OFT's decision that the GTA as notified is not capable of meeting the exemption criteria set out in section 9 of the Act, and its requirement of amendments to the wording and operation of the GTA as a pre-condition to the grant of an exemption, are based on errors of fact and law. The restrictions contained in the GTA are indispensable to the achievement of the benefits it gives rise to. The decision errs in its reasoning that the conditions and obligations it imposes would render the GTA less restrictive than is currently the case while still giving rise to the same benefits.

The appellant requests the Tribunal to:

- (i) set aside the decision that the GTA infringes the Chapter I prohibition;
- (ii) make a decision that the GTA does not infringe the Chapter I prohibition;
- (iii) alternatively to (i) and (ii), set aside the conclusion in the decision that the grant of individual exemption should be subject to conditions and obligations; and
- (iv) make a decision that the GTA is exempt from the Chapter I prohibition;
- (v) award costs to the appellant.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar
7 July 2004