

UK Competition

Competition and regulatory developments in the UK

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ARTICLE

Referral of Zipcar/Streetcar merger to CC

The Office of Fair Trading (“OFT”) has referred the completed acquisition of Streetcar Limited (“Streetcar”) by Zipcar Inc. (“Zipcar”) to the Competition Commission (“CC”) under s 22(1) of the Enterprise Act 2002 (“the Act”). The OFT found that the merger of Streetcar and Zipcar (“the Parties”) represented a realistic prospect of a substantial lessening of competition in the car clubs sector in London and that the potential benefits to consumers resulting from the merger were not enough to justify this. Undertakings in lieu were offered by the Parties but the OFT concluded that these were not enough to prevent a reference to the CC.

THE PARTIES

Zipcar

Zipcar has operated through Zipcar UK Limited in the UK since entering the market in 2009. They run a car sharing service, which by 2009 had 300-400 cars and 10,000-15,000 members in London. While having a relatively low market share (10-20% in London), this has been achieved in only two years of operation. Zipcar has been loss-making since starting trading but launched an Initial Public Offering (in the US) on 1st June 2010.

Streetcar

Streetcar operates the largest car and van club in the UK in 11 towns and cities with approximately 1,300 cars and vans and 60,000-70,000 members. It generated £16.4 million in 2009/10 and made a small profit but had been loss making until that point. In London Streetcar has the largest market share of both vehicles and revenue of any car club, with 60-70% of fleet and 80-90% of revenue.

THE TRANSACTION

The acquisition by Zipcar was of the entire share capital of Streetcar whereby it becomes a wholly owned subsidiary of Zipcar. Streetcar’s turnover of £16.4 million was not enough to trigger the annual turnover threshold under the Act but the Parties’ combined market share of UK car club revenue would be 80-90% with an increment of 0-10%. In London, this would increase to an 85-95% market share of

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revenue with an increase of 10-20%. As such, at least one quarter of the supply of relevant services in the UK or a substantial part of it would be met under the Act.

The Parties stated that the acquisition was designed to increase the growth rate of Zipcar and to provide Zipcar with better access to UK financing to further increase its growth rate. They stated that the acquisition would provide customers with access to both the Streetcar call centres and customer services with Zipcar technology. As such the acquisition would represent the 'best of both worlds' for consumers as well as providing them with access to a much larger vehicle fleet.

MARKET DEFINITION

Product market

The Parties submitted that the relevant product market should be drawn widely enough to include off-airport car rental. The Parties argued for a wide definition, claiming that they were competitively constrained by other transport options (specifically car ownership, car rental and public transport, including taxis) either on an individual or combined basis. The OFT, however, concluded that the appropriate product market was the provision of 'car club services'. These are distinct from other types of car sharing in that they are commercial services offering members some of the benefits of owning a car for a fraction of the cost of actual ownership. The member pays a membership fee and an additional fee for each use of a car but does not have to insure or maintain an individual car and has access to the entire fleet of the car club.

In relation to car ownership, the OFT accepted the survey evidence presented by the parties that customers switched between car ownership and club membership. However, due to the large cost differential (£1,000-1,500 p/a for club membership compared to £4,000-£5,000 p/a for ownership), the OFT felt that a small but significant price rise of 5% from a car club would not be enough for customers to switch. It was excluded from the product market definition.

While the OFT accepted that there was some constraint it felt that the market was fundamentally different. Survey evidence indicated that 70-80% of club vehicle utilisation was for less than 8 hours with shopping being the single biggest reason for utilisation. This placed the majority of club utilisation outside of the market for car rental, something further indicated by the fact that when clubs increased their prices they did not lose customers to rental companies.

The OFT concluded that as most car club members used public transport as well as the cars, it should be regarded as a complementary rather than an alternative mode of transport.

Geographic market

The Parties submitted that the relevant geographic market was national. The OFT however concluded that the relevant geographic market for car club services was in metropolitan areas and that the Parties only overlapped in the London area.

Accordingly the relevant market definition was the provision of car club services in the London area.

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COMPETITIVE CONSTRAINTS

The Parties argued that there was no real prospect of a substantial lessening of competition on the basis that: they were not each other's closest competitors; barriers to entry were low; and that entry and (or) expansion was likely from a range of new players and potential entrants.

The Parties argued that they were not close competitors, as demonstrated by the fact that they did not lower prices in response to each other and that there was very little switching between companies. The OFT concluded, however, that all occasions of price-lowering by Streetcar had occurred after the entrance of Zipcar into the market and, crucially, that Zipcar had been attempting, if unsuccessfully, to cause customers of Streetcar to switch to them. The OFT felt that the high levels of growth in the market were disguising the closeness of competition between the Parties.

The OFT rejected the idea that there were low barriers to entry to the car club market and that existing players could easily expand. The OFT highlighted the cost and importance of setting up a network as demonstrating the high barriers to entry into the market. A club's success relies on having a reasonably high density of available cars. This not only has a cost implication for potential entrants and existing players looking to expand but a parking implication too as the car clubs rely on local authority parking for a substantial amount of their total parking requirements. Amongst the criteria used by local authorities when assessing whether to grant parking space to the clubs is the number of members, causing the OFT to conclude that established large players enjoyed a distinctive advantage over new or smaller players.

CONSUMER BENEFITS AND UNDERTAKINGS IN LIEU

Consumer benefits

The Parties claimed that consumers would benefit from the extended network and the customer care and technology synergies between the firms. These claims were supported to some extent by evidence from third parties. However the OFT found that there was not enough evidence to justify an exception to their duty to refer the acquisition.

Undertakings in lieu

The Parties offered to give up some parking spots in London claiming that this was similar to the solution of giving up airport slots in airline mergers. However the OFT found that the number and location of the parking spots was not enough to replicate the existing constraints. Further, they found that as there was no guarantee that the parking spots would be given to the same competitor, along with the relevant vehicles and members, parking spots were not sufficiently like airline slot sales for relinquishment of them to be an acceptable undertaking in lieu.

Accordingly the acquisition has been referred to the CC under the Act.

SOURCE

www.oft.gov.uk, 27.08.2010.

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Mergers

OFFICE OF FAIR TRADING (OFT)

1. *OFT clears the anticipated acquisition by DS Smith plc of Otor S.A.* – The OFT has cleared the anticipated acquisition by DS Smith plc of Otor S.A. The OFT found that the proposed acquisition is unlikely to give rise to horizontal competition concerns in the supply of corrugated cases, or vertical competition concerns in relation to the supply of packaging machines (www.oft.gov.uk, 25.08.2010).

COMPETITION COMMISSION (CC) REFERENCES

2. *OFT publishes full text of its decision to refer the completed acquisition by Zipcar, Inc of Streetcar Limited to the Competition Commission* – See main article (www.oft.gov.uk, 27.08.2010).

OTHER DEVELOPMENTS OF INTEREST

3. *Court of Appeal sets aside summary judgment order in parallel imports case and makes strong case for reference to the ECJ to gain guidance on the complex relationship between competition law and IP enforcement* – The Court of Appeal has set aside the summary judgment order in the parallel imports case, *Oracle America (formerly Sun Microsystems, Inc) v M-Tech Data Ltd and another* ([2010] EWCA Civ 997, 24 August 2010). The Court of Appeal stated that the ECJ had not held that Article 81 (new article 101) could not be used in trade mark cases relating to imports from outside the EU, and gave a strong indication that this case is appropriate for a reference to the ECJ in order to obtain guidance on the complex and controversial relationship between competition law and IP enforcement (www.bailii.org, 26.08.2010).

Antitrust

OFFICE OF FAIR TRADING (OFT) AND OTHER CONCURRENT REGULATORS

4. *OFT publishes draft proposals in advertising of prices market study* – The OFT has published its draft proposals, which are set to be the basis of negotiations with industry stakeholders, in its market study of the advertising of prices. The proposals will be considered to assess whether an advertised price promotion breaches the Consumer Protection from Unfair Trading Regulations (www.oft.gov.uk, 27.08.2010).

COMPETITION COMMISSION (CC)

5. *CC publishes an issues statement in movies on pay TV market investigation* – As part of its ongoing market investigation into the movies on the pay TV market, the Competition Commission has published an issues statement outlining the areas it intends to look into during the remainder of the inquiry. Provisional findings of the investigation will be published in April 2011 (www.competition-commission.org.uk, 03.09.2010).

COMPETITION APPEAL TRIBUNAL (CAT)

6. *The CAT establishes confidentiality ring in the tobacco retail pricing appeals* – The CAT has established a confidentiality ring in the six tobacco retail pricing appeals by which the parties involved are to release confidential case documents to named external counsel (www.catribunal.org.uk, 01.09.2010).

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Regulatory

ENERGY

7. ***Ofgem approves modifications to the Statements of the Basis for Transmission Owner Charges of Scottish Hydro-Electric Transmission Ltd (SHTL) and Scottish Power Transmission Ltd (SPTL)*** – SHTL and SPTL are required to revise the annual statements setting out the basis upon which they charge National Grid Electricity Transmission (NGET) for transmission owner services. The changes are largely of a 'house-keeping' nature with some specific modifications to achieve better consistency with developments in NGET's current Statement of Use of System Charges (www.ofgem.gov.uk, 20.08.2010 and www.ofgem.gov.uk, 20.08.2010).
8. ***Ofgem approves variations to the Distribution Connection and Use of System Agreement (DCUSA) to reflect distribution price control licence changes*** – Ofgem has approved the modification of the DCUSA to reflect the licence changes that implemented the last electricity distribution price control review (www.ofgem.gov.uk, 20.08.2010).
9. ***Ofgem publishes decision on unbundling compensation payments and use of system charges for pre-2005 distributed generators*** – Ofgem has published its decision on unbundling compensation payments and use of system charges for pre-2005 distributed generators, deciding that such payments and charges should be unbundled (www.ofgem.gov.uk, 23.08.2010).
10. ***Ofgem decides to delay submission of charging methodology for customers at the highest (EHV) voltage distribution level following earlier consultation (see 'Consultation' 23.08.2010 below)*** – Ofgem has decided to delay submission of the EHV distribution charging methodology until 1 February 2010 in order to allow full consultation between distribution network

operators and customers. It is also considering whether to change the implementation date of the common EHV charging methodology to October 2011 and will publish this decision in September (www.ofgem.gov.uk, 27.08.2010).

11. ***Ofgem launches investigation into possible breach of misselling licence conditions by four suppliers*** – Ofgem has launched an investigation into possible breach of licence conditions by suppliers npower, Scottish Power, Scottish and Southern Energy and EDF Energy which prohibit misselling. It has also set up a hotline to receive reports of misleading energy sales (www.ofgem.gov.uk, 02.09.2010).
12. ***Ofgem changes its licence application procedure*** – Ofgem has published its decision to amend the licence application procedure by introducing a new risk based, three-tier application process. The new process, effective from 22 September 2010, is designed to resolve concerns about potential VAT fraud in European energy markets. Ofgem has also published a revised version of its Guidance Document on licence applications (www.ofgem.gov.uk, 03.09.2010 and www.ofgem.gov.uk, 03.09.2010).

TELECOMMUNICATIONS

13. ***The CAT sets timetable in BT's partial private circuits (PPCs) dispute*** – The CAT has published an order setting out a timetable for BT's appeal against Ofcom's decision under the Communications Act 2003 in its PPC charges dispute. The main hearing is listed to take place on 20 October 2010, running for an estimated nine and a half days (www.catribunal.org.uk, 01.09.2010).

POSTAL SERVICES

14. ***Postcomm decides Royal Mail breached licence obligation to monitor performance but will not impose penalty*** – Postcomm has concluded

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that Royal Mail had breached certain conditions of its licence in relation to its quality of service performance monitoring. As Royal Mail has given assurances that it will put in place a programme to rectify the issues identified by Postcomm, the regulator has decided to not make a final order or impose a financial penalty (www.psc.gov.uk, 01.09.2010).

THE RAILWAYS

15. *ORR publishes report outlining the lessons learnt in the track access application and allocation process* – The Office of Rail Regulation has published a report explaining the lessons learnt in respect of the track access application and allocation process for the East Coast Main Line, and makes recommendations as to how the process may be improved in the future (www.rail-reg.gov.uk, 23.08.2010).

Consultations

16. *Ofcom consults on reserving the 2.6GHz band for use during the London 2012 Olympics* (<http://stakeholders.ofcom.org.uk>, 23.08.2010).

17. *Ofgem consults on revised timeline for customers on the highest voltage levels (EHV) distribution charging methodology* (www.ofgem.gov.uk, 23.08.2010).

18. *Competition Commission to review telecom appeals process* (www.competition-commission.org.uk, 24.08.2010).

19. *Ofgem consults on guaranteed performance standards for distributed electricity generation* (www.ofgem.gov.uk, 24.08.2010).

20. *Law Commission consults on criminal liability in regulatory contexts* (www.lawcom.gov.uk, 25.08.2010).

21. *Ofcom consults on proposed revisions to the Code of Practice on Changes to Existing Transmission and Reception Arrangements in order to provide guidance to broadcasters on minimising disruptions to viewers during the digital switchover and the 800MHz clearance programmes* (<http://stakeholders.ofcom.org.uk>, 25.08.2010).

22. *The Department for Environment Food Rural Affairs (Defra) announces review of the Water Services Regulation Authority (Ofwat) to ensure that it is fit for future challenges facing the water industry* (<http://ww2.defra.gov.uk>, 26.08.2010).

23. *The Department of Energy and Climate Change (DECC) and Ofgem consult further on the enduring regulatory regime for offshore transmission* (www.ofgem.gov.uk, 26.08.2010).

24. *Ofcom consults on modifications to the National Telephone Numbering Plan* (<http://stakeholders.ofcom.org.uk>, 31.08.2010).

25. *Postcomm consults on regulatory management arrangements for Postcode Address File* (<http://postcomm.bang-on.net>, 02.09.2010).

26. *Ofgem consults on revised version of generic Offshore Transmission Owner Licence (OFTO) licence* (www.ofgem.gov.uk, 03.09.2010).

Publications

27. *Electricity (Connection Standards of Performance) Regulations (SI 2010/2088) published (in force from 1 October 2010)* (www.legislation.gov.uk, 23.08.2010).

28. *Ofgem publishes collective licence modification to implement decision on electricity distribution charging boundary between higher and lower voltages* (www.ofgem.gov.uk, 26.08.2010).

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29. *Ofcom publishes statement on future spectrum access for programme-making and special events (PMSE)* (<http://stakeholders.ofcom.org.uk>, 31.08.2010).
30. *PLC Public Sector publishes a blog discussing recent criticism of the way in which the Legal Services Commission (LSC) conducts its public procurement activities* (<http://publicsector.practicallaw.com>, 01.09.2010).
31. *Ofgem publishes letter explaining its consent to a request by National Grid Gas to omit auditors' statement in 2010 IECR methodology statement* (www.ofgem.gov.uk, 01.09.2010).
32. *The Electricity (Standards of Performance) (Amendment) Regulations 2010 (SI 2010/2131) published (in force from 1 October 2010)* (www.legislation.gov.uk, 03.09.2010).
33. *Ofgem publishes letter explaining impact of the Amendment Regulations* (www.ofgem.gov.uk, 03.09.2010).
34. *Ofgem publishes revised version of tender rules for first offshore tender process* (www.ofgem.gov.uk, 03.09.2010).

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