

**COMP/M.5996 –
THOMAS COOK/TRAVEL BUSINESS OF CO-OPERATIVE GROUP
LIMITED/TRAVEL BUSINESS OF MIDLANDS CO-OPERATIVE SOCIETY
LIMITED ('NOTIFIED CONCENTRATION' OR 'JV')**

**REQUEST PURSUANT TO ARTICLE 9(2)
OF COUNCIL REGULATION (EU) 139/2004**

INTRODUCTION

1. This submission is provided by the United Kingdom's ('UK's') Office of Fair Trading ('OFT') to the European Commission (the Commission) in support of the OFT's request made under Article 9(2) of Council Regulation 139/2004 ('EUMR') by letter of 2 December 2010, that the Commission refer the whole of the Notified Concentration to the UK so that the OFT can examine the above transaction under the UK merger control provisions in the Enterprise Act 2002.¹

TIMING

2. The OFT received a copy of the parties' Form CO on 11 November 2010. The 15 working day deadline in which to make a request under Article 9 EUMR is 2 December 2010.

THE UNDERTAKINGS CONCERNED

Thomas Cook Group

3. Thomas Cook Group plc (Thomas Cook) is a vertically integrated leisure tour operator in the UK. Thomas Cook operates across Europe, North America, India and Egypt and offers a range of package holidays, flights, holiday accommodation and associated services through travel agencies and direct to consumers. In the UK, Thomas Cook's leisure travel activities are carried out under a

¹ The OFT would have jurisdiction under the Enterprise Act 2002 to examine the Notified Concentration were it to be referred back under Article 9 EUMR as the Notified Concentration would constitute a relevant merger situation and the sum of the turnover of each of the contributed enterprises exceeds £70 million. See paragraph 3.49 of the OFT's Mergers – Jurisdictional and Procedural Guidance (June 2009).

large number of brands. Thomas Cook also operates Thomas Cook Airlines, a charter airline used primarily for its package holidays.

Co-operative Group Limited

4. Co-operative Group Limited (CGL) is the UK's largest co-operative society, comprising approximately 3.9 million individual members and over 80 corporate members. CGL's trading interests include banking, insurance, travel, funeral services, farming, food retail, legal services and pharmacies. CGL's travel business operates a network of retail travel agency outlets, a business travel operation and call centres.

Midlands Co-operative Society Limited

5. Midlands Co-operative Society Limited (Midlands) is a cooperative society and has trading interests in a number of sectors including food retail, department stores, travel, funeral services and transport. Midlands is a corporate member of CGL but is owned by its members and is operated independently from CGL. Midlands' travel business includes a network of retail travel agency outlets, a business travel operation and call centres.

APPLICATION OF ARTICLE 9 EUMR

6. The OFT is making this application pursuant to Article 9(2) of the EUMR. Specifically, the OFT believes that the Notified Concentration satisfies both the criteria of Article 9(2)(a) of the EUMR ('Article 9(2)(a)') as threatening to affect significantly competition within the UK and of Article 9(2)(b) of the EUMR ('Article 9(2)(b)') as affecting competition in a market within the UK, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.
7. According to the Commission's Notice on case referral (the 'Notice'),² in making a request Member States should take account of the principle of subsidiarity, and, in particular, consider which is

² 2005/C 56/02.

the more appropriate authority for carrying out the investigation, the benefits inherent in a 'one-stop shop' system and the importance of legal certainty with regard to jurisdiction.³

8. The OFT has taken due regard of these factors and, for the reasons described below, considers that it is appropriate for the case to be referred to the UK's OFT for investigation.

More appropriate authority

9. According to paragraph 9 of the Notice, in deciding the more appropriate authority to deal with a case, regard should be had to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should also be had to the likely locus of any impact on competition resulting from the merger.
10. Importantly, the OFT points to the fact that the effects of the proposed concentration are UK-centric. Two of the three undertakings contributed to the JV are active exclusively in the UK and all of the overlaps are limited to the UK (or parts of the UK). As a result, any adverse effects resulting from a loss of competition and rivalry will be felt exclusively by consumers in the UK and therefore the OFT considers that the principle of subsidiarity supports a referral to the UK.
11. In addition, the UK authorities have built up a significant body of experience and expertise in relation to several aspects relevant to this case over a long period of time.
12. In relation to Article 9(2)(a), first, the UK authorities have examined this sector through several market investigation reports, which have resulted in remedial action in the sector,⁴ and merger cases.⁵ Second, the OFT has also examined a significant number of merger

³ Paragraph 8.

⁴ See the Restriction on Agreements and Conduct (Tour Operators) Order 1987, a statutory instrument made following the MMC report on foreign package holidays.

⁵ See, for example, *Anticipated merger between Co-operative Group (CWS) Ltd and United Co-operatives Ltd*. (OFT, July 2007)

cases involving national chains of retail outlets in the UK.⁶ Finally, the OFT has a comprehensive understanding of regional aspects of competition in the UK, where that region may still represent a substantial part of the common market, and competition around, or affected by, UK airports.⁷

13. In relation to Article 9(2)(b), the OFT considers that, on a preliminary assessment, there may be local competition concerns arising from the transaction due to the concentration of retail outlets within certain local areas of the UK, where the extent of local areas is discussed below. The OFT notes that it has significant experience in assessing the extent to which the parameters of competition are set at the national, regional, or local level and would be well placed to assess aspects of competition at a geographic level which does not constitute a substantial part of the common market.
14. The OFT is of the view that, were competition concerns to arise at a geographic level which does not constitute a substantial part of the common market and needed to be addressed by, for example, divestment remedies, the UK competition authorities would be better placed to obtain such remedies; in particular, in circumstances where such remedies might not be open to the Commission.

One-stop shop

15. The OFT does not consider that there are material 'one-stop shop' benefits in this case since the effects of the relevant transaction will be felt exclusively by consumers in the UK and the referral of the case to the OFT could be made in full. The OFT therefore considers there to be no impact on administrative efficiency, and no risk of duplication, fragmentation of enforcement effort, incoherent treatment of the case, or conflicting outcomes resulting from the referral of the case to the UK authorities, nor would there

⁶ See, for example, *Anticipated acquisition by Co-operative Group Ltd of Somerfield Ltd* (OFT, October 2008) and *Completed acquisition by Home Retail Group of 27 Stores from Focus (DIY) Ltd* (OFT, April 2008).

⁷ See, for example, *BAA Airports Market Investigation: A report on the supply of airport services by BAA in the UK* (Competition Commission, March 2009).

be any benefit to the parties in terms of reducing the number of filing obligations they would need to satisfy.

Legal certainty

16. Finally, as regards legal certainty, the OFT considers that a referral to the UK would not have been beyond the parties' contemplation in this case. The OFT notes that in the Form CO the parties acknowledge the UK-centric characteristics of this case.
17. The parties engaged with the OFT and provided material information on the case at the latter stages of the pre-notification process with the Commission. The OFT indicated an interest in the case and requested sight of the draft Form CO notification, following receipt of which it immediately made clear to the parties the possibility of an Article 9 request. The OFT believes that earlier engagement with it, as would normally be expected,⁸ would have highlighted the possibility of an Article 9 request even earlier and, possibly, the scope for a more expeditious referral under Article 4(4) EUMR. Given these factors, the OFT does not consider that legal certainty would be affected by a referral in this instance.

Article 9(2)(a) and Article 9(2)(b) requirements

18. With respect to a request being made pursuant to Article 9(2)(a), the OFT is required to show that the Notified Concentration 'threatens to affect significantly competition in a market within the UK, which presents all the characteristics of a distinct market'.
19. By way of clarification, the Notice states that in order for the Commission to refer the case to the OFT pursuant to Article 9(2)(a), the OFT must demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition and thus deserves close scrutiny. In addition, the OFT must show that the geographic markets affected by the transaction are at most national in scope.

⁸ See paragraphs 4.42-4.48 of the OFT's Mergers – Jurisdictional and Procedural Guidance (June 2009).

20. Similarly, in relation to a referral request pursuant to Article 9(2)(b), the OFT is required to show, based on a preliminary analysis, that the concentration is liable to have an impact on competition in a market. Such preliminary indications require only *prima facie* evidence of a possible adverse impact and are without prejudice to the outcome of a full investigation. The OFT must also show that the market in which competition is affected constitutes a distinct market within a Member State and that the market in question does not constitute a substantial part of the common market.
21. The following sections set out the following:
- (a) the views of the parties on jurisdiction and on which is the more appropriate authority to deal with the case
 - (b) the views of third parties and
 - (c) the reasons why the OFT believes that the requirements of both Article 9(2)(a) and Article 9(2)(b) are indeed met.

VIEWS OF THE PARTIES

22. The parties submit that the conditions to request a referral pursuant to Article 9(2) are not met. In respect of Article 9(2)(a), the parties submit that the proposed transaction is not likely to significantly affect competition in any of the markets concerned in the UK on any basis and decisions in previous merger cases support this proposition. The parties also submit that this is not an appropriate case for the Commission to exercise its discretion to refer the case to the UK authorities pursuant to Article 9(2)(a) or Article 9(2)(b) for the following reasons:
- the Commission has particular experience in this sector
 - due to the extensive pre-notification phase the Commission has gained substantial knowledge of the particular markets affected by the Notified Concentration and

- a referral will involve additional delay that will overlap the crucial January to March peak period of business activity in the sector.
23. The OFT refers the Commission to paragraphs 7 to 17 of this request which set out why the OFT considers that the Commission should exercise its discretion to refer the Notified Concentration to the UK authorities.

VIEWS OF THIRD PARTIES

24. The OFT issued an invitation to comment ('ITC') notice on the possibility of submitting a request to the Commission under Article 9 EUMR on 11 November 2010 and invited third parties to comment by 19 November 2010.

25. It received a number of responses from both package holiday companies (tour operators) and high street travel retail providers (travel agencies). The OFT acknowledges that the number of direct responses it received was relatively small, nevertheless it has no reason to believe that these may not be representative of wider concerns. In relation to the comments received:

- a number of third parties commented that they were in the process of responding to the Commission's questionnaire and so could not respond to the OFT's invitation
- some third parties submitted that the case should be referred to the OFT for review due to the UK-centric nature of the transaction
- a number of responses indicated the sector had national, regional and/or local aspects of competition and
- some third parties raised competition concerns. These concerns were mixed but articulated the possibility of national unilateral effects, both horizontal and vertical, arising from the transaction, as well as similar concerns at a regional and local level.

ARTICLE 9(2)(a)

NOTIFIED CONCENTRATION THREATENS TO AFFECT SIGNIFICANTLY COMPETITION

HORIZONTAL ISSUES

Retail market for travel agency services

26. The parties submit in the Form CO that their combined market share of travel agency retail outlets, which distribute holidays, that is, package holidays and individual holiday components, such as flights, accommodation and car rental, as well as ancillary services, such as foreign currency, in the UK would be around [25-35] per cent with an increment of approximately [five-15] per cent. Thus, the parties submit that more than [REDACTED] per cent of retail outlets would be operated independently and continue to represent an effective competitive constraint to the new entity.
27. The parties acknowledge that their combined retail market share in some UK regions in respect of all travel agency services would be significantly higher. For example, combined shares based on number of outlets would range from [30-40] to [45-55] per cent in Northern Ireland, the East Midlands, the North West, and Yorkshire.
28. The OFT notes that the parties submit that the appropriate market against which the transaction should be assessed is significantly wider than just retail outlets. In particular, they argue that it should include direct sales distribution channels such as the internet and telephone sales. In support of this submission, the parties point to previous decisions of the Commission and the OFT in this area.⁹
29. The OFT has considered the parties' submission. However, based on the evidence available to it, the OFT believes the Notified Concentration raises significant prima facie competition concerns for the following reasons.

⁹ The parties, for example, highlight Case No. COMP/M.4601 *KarstadtQuelle/MyTravel* and *Anticipated merger between Co-operative Group (CWS) Ltd and United Co-operatives Ltd*. (OFT, July 2007).

30. First, on a national basis the transaction would bring together the first and third largest network of high street travel agency outlets in the UK and result in the largest UK travel agency chain by a significant margin over the nearest competitor by size, TUI, with 22 per cent. Moreover, the merger would remove the largest remaining independent group of retail travel agents (that does not belong to one of the two large vertically integrated UK holiday companies) in the UK. This represents a significant structural change to the UK travel agency market and, in that context, should be considered very carefully.
31. In this respect, the transaction is also likely to raise different concerns, and therefore require a somewhat different assessment, to that undertaken in the previous cases highlighted by the parties in their submissions. Furthermore, the OFT considers that for the significant proportion of consumers that continue to use retail travel agency outlets, service levels and quality, as well as price, may be a crucial factor in the competitive offering.
32. Second, the OFT also notes that the remaining competitors are significantly dispersed. According to the parties' own evidence, no other competitor would have a market share greater than four per cent and the vast majority of remaining competitors would be independent travel agencies, with varying degrees of scale and scope. In particular, the OFT is minded at this stage to query whether the market share estimates provided by the parties underestimate the pre-merger competitive constraint that CGL and Midlands impose on Thomas Cook. In addition, the OFT is sceptical whether the distribution of holidays, in particular package holidays, through fragmented independent travel agents is strong enough, irrespective of the presence of buyer groups, to replace the constraint that CGL with nationwide networks of outlets and Midlands which is strong in certain regions are imposing on Thomas Cook pre-merger.
33. Third, the high regional shares of supply in certain areas of the UK are by themselves sufficient to raise *prima facie* competition concerns. The OFT considers it possible that the degree of

competitive constraint from retail competitors and from different distribution channels may vary by region.

34. Fourth, while direct sales have become very important for certain holiday components, such as flights and accommodation, the high street appears to remain an important sales route for 'all in one' package holidays. While high street sales now account for only around one fifth of all holiday bookings, they continue to account for around [REDACTED] per cent of Thomas Cook's package holiday sales,¹⁰ and as noted above, in the area of distribution of package holidays via retail outlets, the parties' combined shares of supply in certain regions exceed [35-45] per cent. The OFT does not believe that sufficient evidence has yet been provided that supports a wider product market, especially for package holidays.
35. The parties' argument for a wider market (for example including other distribution channels) is based primarily on past cases and certain long-term trends. The OFT accepts that previous decisions can be informative in assessing current cases, however, it remains important in any merger control assessment to review the merger under contemplation and assess each case on the basis of the evidence available. In respect of this matter, there are some aspects, as noted above, which appear based on the information available to the OFT, to indicate cause for prima facie concern. Moreover, the OFT notes that there is a substantial overlap in certain regions in the supply of package holidays through retail outlets only, for example, [45-55] per cent in the North West, [60-70] per cent in Northern Ireland and [40-50] per cent in Yorkshire, although the parties submit that there are limitations with the source data.¹¹ In addition, the OFT notes that the parties' UK-wide combined market share in the supply of package holidays through retail outlets is [35-45] per cent by turnover.

¹⁰ The proportion of all (not just Thomas Cook) package holidays booked 'offline' (including telephone sales and retail outlets) is estimated to be around [REDACTED] per cent. The internet accounts for [REDACTED] per cent of Thomas Cook's package holidays sales.

¹¹ The parties consider that the data on which these figures are based have certain limitations; however, they have not put forward any alternative figures or given any reasons to indicate why the market shares in the retail market for the distribution of package holidays would be lower.

Closeness of competition

36. The OFT believes that, given the combined market shares above, a fuller consideration needs to be made of the closeness of competition between the parties and the competitive constraint that they exert on each other. The OFT has concerns that the merger may impact service, quality and range which are key aspects of the competitive offering of 'bricks and mortar' travel agencies.

Conclusion on horizontal issues

37. On the basis of the evidence viewed by the OFT thus far, it considers that there are prima facie concerns to be addressed due to the loss of CGL and Midlands who may pose a significant (and close) competitive constraint to Thomas Cook across the UK as a whole or in particular regions.
38. Therefore, the OFT is concerned that the Notified Concentration threatens to affect significantly competition in the distribution of holidays via retail travel agency outlets in the UK and a number of affected UK regions.

VERTICAL ISSUES

Customer Foreclosure

39. The OFT considers that there is evidence showing that the transaction may significantly increase the ability and incentive to foreclose access to key customers and impair the ability of upstream tour operators to compete.

Ability to Foreclose

40. As noted above, the Notified Concentration would bring together the largest and third largest competing travel agency retail outlets in the UK. While a significant number of retail outlets will remain, these are smaller multiples or independent retail groups. These independents may not provide so effective and significant a

network of retail outlets, with as good coverage across the country as CGL and Midlands. It may also be more difficult for third party tour operators to deal with this network of smaller independents than with CGL and Midlands. CGL and Midlands may therefore be expected to represent an especially important route to market for third party tour operators.

41. Further, the OFT notes, and third parties highlighted, that shares of supply at a regional level may be higher than they are at a national level. In addition, the OFT also notes that there may be a strong consumer preference in package holidays to fly from a nearby airport. As such, the absence of a strong independent distribution network at a regional level could potentially lead to foreclosure of tour operators at a regional level.
42. While information was provided by the parties showing the catchment area around East Midlands airport,¹² the OFT has significant past case experience showing that the catchment area surrounding an airport can vary significantly, on both the demand-side and supply-side, dependent on the airport and region in question. As such, the OFT did not find this to be convincing evidence that upstream markets do not have a strong regional element.
43. The OFT considers that the Notified Concentration may therefore increase the ability of the parties to impair the ability of upstream competing tour operators to compete.

Incentive to Foreclose

44. A number of third party tour operators highlighted access to market as a concern arising from the merger. It is noteworthy that CGL and Midlands have only very limited upstream tour operations, and therefore they primarily retail third party products. By contrast, Thomas Cook's existing stores sell only around [REDACTED] per cent of third party product. The OFT considers that there may be some prospect that the incentives of the parties may be altered sufficiently as Thomas Cook may wish to pursue the same stocking

¹² Annex 3 of parties' submission to OFT dated 23 November 2010.

policy in its purchased stores (or to close these stores down) following the merger, impairing access to market for third party operators.¹³

45. Assessing the change to the incentive to foreclose as a result of the Notified Concentration requires a detailed examination of the profitability of such a strategy. For example, an increase in the input price may result in a loss of profit through lost upstream sales but there may be a gain in profits in the downstream market if rival suppliers are forced to raise prices. These two offsetting effects must be assessed.
46. The OFT does not have sufficient information, at this stage, to conduct a detailed examination of the likely effects on profitability and thus the incentives to foreclose. However, the OFT considers that, on the basis of the evidence available, there are sufficient reasons as to why the Notified Concentration may have materially affected the incentives to foreclose. If this is the case, the OFT considers the transaction may have a significant adverse impact on competition through customer foreclosure and believes these issues deserve close scrutiny.

Conclusion on vertical issues

47. The OFT is not in a position, without a fuller consideration, to assess the merits of the vertical effects of the Notified Concentration, nor the extent to which any vertical effects may have an actual anti-competitive effect.
48. However, the OFT believes that there is sufficient evidence to raise, at the least, *prima facie* competition concerns that warrant closer consideration in order to reach a definitive view.

¹³ In this respect, the OFT notes that the parties have provided a letter to third party tour operators offering to continue to carry and sell their products in their retail outlets. However, the OFT is not in a position at this stage, and without a fuller consideration, to conclude that such an offering will resolve its *prima facie* concerns in relation to upstream tour operators being foreclosed.

49. **The first requirement of the Article 9(2)(a) test is therefore met, since the Notified Concentration threatens to significantly affect competition in the distribution of holidays in the UK.**

NATIONAL SCOPE OF GEOGRAPHIC MARKETS AFFECTED BY THE TRANSACTION

50. According to the parties' Form CO, a horizontal overlap arises in the distribution of holidays in the UK. The parties provided additional information in relation to a number of sub-segments. In each of these the affected markets are national in scope and the overlaps apply exclusively to the UK. It is the OFT's view that the affected markets are no wider than the UK, and may well be narrower, in scope and sufficiently distinct to be considered separately by the OFT.
51. **The OFT believes that the second requirement of the Article 9(2)(a) test is therefore met, since the Notified Concentration affects geographical markets that are national in scope.**

ARTICLE 9(2)(b)

NOTIFIED CONCENTRATION AFFECTS COMPETITION

52. The OFT has limited evidence submitted by the parties or included in the Form CO in relation to the impact that the Notified Transaction may have in the local areas where the parties' retail outlets overlap.
53. However, the OFT believes that the Notified Concentration may result in a reduction in fascia in a significant number of local areas (the extent of which are outlined below) in which the parties overlap. The reduction in fascia may be significant in and of itself in some local areas to raise competition concerns. Even if this is not the case, the degree of competitive constraint exerted by the parties on one another may be particularly strong in these local areas, due to them being two of a small number of multiple retailers

with a national presence and/or being particularly close competitors.

54. Furthermore, the comparative constraint from local independent retail outlets may differ significantly between areas and remains to be examined in detail.
55. The OFT believes there is sufficient evidence to raise, at the least, prima facie competition concerns on a local basis, that warrant closer consideration in order to reach a definitive view.
56. **The first requirement of the Article 9(2)(b) test is therefore met, since the Notified Concentration affects competition in the distribution of holidays in local areas within the UK.**

LOCAL SCOPE OF GEOGRAPHIC MARKETS AFFECTED BY THE TRANSACTION

57. In the Form CO the parties argue that the geographic scope for the distribution of holidays is national in scope. In particular, the parties argue that this is consistent with the approach adopted by the European Commission and the OFT in previous decisions.¹⁴ In addition, the parties submit that it is not appropriate to consider the distribution of holidays (or package holidays) via retail travel agency outlets in isolation from other distribution channels, since a high proportion of holidaymakers use multiple channels to research and book their holidays.
58. The parties also contest that the pricing and service quality in retail outlets is driven by local dynamics. In particular, the parties note that the upstream selling price of a particular travel product is set by the tour operator, airline or accommodation provider on a national basis regardless of distribution channel.
59. In addition, the parties argue that the minimal discounting that can be implemented by the distributor at the high street retail outlets is unrelated to local concentration.

¹⁴ See, for example, Case No. Comp/M.4601 KarstadtQuelle/MyTravel, paragraph 37.

60. The OFT believes that there are aspects of competition that vary locally. Consumers shopping in retail outlets will likely do so locally within a given travel time from their place of residence or work, with the precise geographic size of these catchment areas varying according to the nature and frequency of the shopping trip, and accounting for wider constraints on this local competition.
61. Evidence submitted by the parties shows that a significant proportion of price matching by retail outlets (where the customer has received a 'price-matching' discount) has been in response to local retail competition.¹⁵
62. The OFT considers that national or regional competition, as discussed above, need not preclude material or greater competition at a local level. A binary approach to defining the geographic market as entirely local or entirely national may not capture the extent of competition between the parties that may be lost as a result of the merger, that is, it may unduly simplify the way in which rival retail chains compete.
63. Therefore, the OFT believes that the Notified Concentration could have an impact in the distribution of holidays, and/or, in particular of package holidays through retail outlets in local areas, where at least two of the parties' retail outlets overlap. In this respect, the OFT believes that these local areas individually or potentially in combination do not constitute a substantial part of the common market.
64. **The second requirement of the Article 9(2)(b) test is therefore met, since the Notified Concentration affects geographical markets, which present all the characteristics of a distinct market and which do not constitute a substantial part of the common market.**

¹⁵ Evidence from the parties showed that approximately 71 per cent of discounts provided by Thomas Cook's retail shops are to match internet discounts, and approximately 18 per cent to match prices of other high street travel agents. In relation to CGL and Midlands, the OFT understands that for the sales via retail outlets which are subject to a level of discount the proportion of discounts matching local retail competition may be higher.

CONCLUSION

For the reasons described above, the OFT therefore requests the Commission to refer in full the Notified Concentration to the OFT for review.