

OFT for the First Time Uses Its 'Fast Track' Merger Referral Procedure

By Frances Murphy, Matt Evans and Tom Bainbridge (Jones Day)

On March 2, 2011, the UK's Office of Fair Trading (OFT) made a 'fast-track' reference to the Competition Commission (CC) of the travel agency joint venture proposed by Thomas Cook, Co-operative Group, and Midlands Co-operative Society. This is the first time the OFT has used this procedure since it first was introduced in the OFT's revised Jurisdictional and Procedural Guidance in 2009. In the right circumstances, this procedure can save merging parties time and money when seeking UK merger clearance for deals that raise prima facie competition concerns. Nevertheless, the right circumstances are likely to be few and far between.

UK Merger Control

In the UK, the OFT is the antitrust regulatory body responsible for first reviewing mergers for competition concerns. It clears most deals, but will refer a deal for in-depth review by the CC where it "may be expected to result in a substantial lessening of competition." Referrals to the CC usually take place after a full review by the OFT, which typically takes 40 working days. However, since 2009, the OFT may accelerate a decision to refer a merger to the CC where the merging parties agree and there is sufficient evidence, available at an early stage, to indicate that the "substantial lessening of competition" test would be

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met. Parties can ask the OFT for their merger notification to be fast tracked immediately after they notify it to the OFT or at any time during its investigation by the OFT.

Absent any material pre-notification discussions, it would be a bold decision for merging parties to dismiss their chances of obtaining OFT merger clearance, and to opt instead for a CC investigation.

Background to This Transaction

The OFT's decision is the latest procedural twist in a merger clearance process that has already been heavy on procedure. In November 2010, the JV was notified to the European Commission, on the basis that the EU jurisdictional test was met. While the European Commission generally has sole competence within the EU to review such transactions, all or part of a transaction may be referred back to a Member State competition authority where there are clear local market competition concerns. In the OFT's view, this JV "threatens to significantly affect competition in the distribution of holidays via retail travel agency outlets in the UK." On this basis, the OFT formally requested the European Commission to refer the entire transaction to it for investigation, and in January 2011 the European Commission did so.

In February 2011, the parties re-notified the JV, this time to the OFT, and a deadline of April 4, 2011 was set for the OFT to decide whether the JV met the test for reference to the CC. Shortly after notification, however, the parties requested that the OFT make a fast-track reference of the JV to the CC.

Why Request a Fast-Track Reference?

The parties' decision to request a fast-track reference will doubtless have been influenced by the competition concerns identified by the OFT and the European Commission when the OFT sought jurisdiction over the transaction. In the views of both regulators, the JV will result in the merger of the first and third largest UK High Street travel agencies, giving rise to high market shares on

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a national and regional basis. In addition, both regulators identified potential vertical concerns, since the JV may increase the incentive and ability of Thomas Cook, as one of two major UK package tour operators, to restrict the access of rival package tour operators to its High Street travel agencies.

The OFT's Jurisdictional and Procedural Guidance states that "fast-track reference cases will by definition be those where the parties accept that the test for reference is met." However, it is clear from the parties' submissions that they did not agree with the OFT's analysis. As such, it would appear that the parties' fast-track reference request is driven more by pragmatism than a shared view that the reference test is met. The OFT has 40 working days to investigate a notified merger and clear it or refer it to the CC for an in-depth investigation. The parties may have believed that, within that time period, they would not have been able to dissuade the OFT of its apparent view that the JV would substantially lessen competition. Accordingly, rather than 'waste' time and money fighting an inevitable reference to the CC, the parties' interest would be better served by asking for the matter to be fast-tracked to the CC.

More Fast-Track References?

In many ways, the fast-track reference procedure is ideally suited to mergers that are referred back to the OFT by the European Commission. The OFT will have set out in some detail the reasons for its referral request, in particular why the merger threatens to significantly affect competition in the UK. As a result, the merging parties may very well have a good sense of the inevitability of a reference

to the CC. In addition, by the time a merger is referred back to the OFT, a significant amount of time already will have elapsed since the merging parties first notified the deal to the European Commission. All things considered, the fast-track procedure may well provide a useful and more time efficient means of obtaining a merger clearance decision. It may also save the parties the uncertainty and negative publicity that can surround a decision by the OFT itself to refer a merger decision to the CC.

The fast-track procedure is only likely to be attractive to merging parties in exceptional circumstances, where there has been a reference back, where the potential competition concerns are particularly complex, and where the merging parties see little or no prospect of dissuading the OFT of the necessity of a reference to the CC.

It is not clear how often parties will use the procedure in connection with merger notifications that have not been referred back to the OFT by the European Commission. In such cases, it is unlikely that the strength of the OFT's views on a transaction will be known to the parties, unless they have tried to address the prima facie competition concerns upfront in pre-notification discussions with the

OFT. In reality, many firms are reluctant to engage in such discussions, in case it is seen as damaging their case before the formal review has even begun. As such, absent any material pre-notification discussions, it would be a bold decision for merging parties to dismiss their chances of obtaining OFT merger clearance, and to opt instead for a CC investigation. The up-side is avoiding a 2-month OFT investigation; the down-side is a 6-8-month CC investigation, which may or may not have been inevitable.

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