



**‘AN IMMOVABLE FEAST’?: TACIT COLLUSION AND COLLECTIVE  
DOMINANCE IN MERGER CONTROL AFTER *AIRTOURS***

**by**

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**Abstract**

In the case of *Airtours v Commission*, the Court of First Instance (CFI) delivered the first in a number of recent judgments that call into question the future direction of the EC merger control regime. The case concerned an appeal by Airtours plc from a decision of the Commission to prohibit the company’s proposed hostile take-over of First Choice plc. The Commission was concerned that the merger would foster tacit collusion on the part of the new company and two other undertakings, and thereby create a collective dominant position. It feared that this would result in effective competition on the market being significantly impeded. The CFI disagreed. This note offers, first, an outline characterisation of the UK market for short-haul foreign package holidays; secondly, a review of the concepts of tacit collusion and collective dominance as reflected in the jurisprudence of the Community courts prior to this litigation; thirdly, brief synopses of the decisions taken by the Commission and CFI respectively, and finally, a short commentary on some questionable aspects in, and the possible ramifications of, the court’s judgment.

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In the case of *Airtours v Commission*, the Court of First Instance (CFI) delivered the first in a number of recent judgments that call into question the future direction of the EC merger control regime.<sup>1</sup> The case concerned an appeal by Airtours plc from a decision of the Commission to prohibit the company's proposed hostile take-over of First Choice plc.<sup>2</sup> The two companies are leading players in the UK market for short-haul foreign package holidays. The Commission was concerned that the merger would foster tacit collusion on the part of the new company and two other undertakings, and thereby create a collective dominant position.<sup>3</sup> It feared that this would result in effective competition on the market being significantly impeded. This was the first occasion on which the Commission had foreseen and proscribed the creation of collective dominance on the part of three entities; the case also became the first in which the CFI overturned a prohibition decision taken under the EC Merger Regulation (ECMR).<sup>4</sup>

Given that the ECMR envisages an assessment of the future outcome of a concentration, the very high standard of proof that the CFI now appears to require must raise doubt as to whether it will ever be possible to sustain a finding of collective dominance in this context. The question of how competition authorities are to evidence findings of tacit collusion to the requisite legal standard, and thereby justify intervention, has become key to future developments. Much of the comment on the litigation to date has been offered by persons associated with either the Commission decision or the Airtours appeal;<sup>5</sup> it is important that the judgment receives a wider review.<sup>6</sup> This is so not least because, due to the concentration on the related concepts of

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<sup>1</sup> Case T-342/99 *Airtours v Commission* (CFI, unreported, 6 June 2002). Other important recent judgments include Case T-5/02 *Tetra Laval BV v Commission* (CFI, unreported, 25 October 2002), and Case T-77/02 *Schneider Electric SA v Commission* (CFI, unreported, 22 October 2002).

<sup>2</sup> Case No. IV/M.1524 OJ [2000] L 093/1. Subsequent to the investigation, Airtours rebranded as MyTravel group plc.

<sup>3</sup> The concept of tacit collusion, sometimes also referred to as tacit co-ordination, entails that separate companies can achieve a common approach to the market by reaching the same conclusions independently through their readings of a shared business environment and expectations of the actions of other players on the market. Thus, this common policy is shared without being actively deliberated upon in any collective manner.

<sup>4</sup> Regulation 4064/89, [1989] OJ L 395/1, as amended by Regulation 1310/97, OJ [1997] L 180/1

<sup>5</sup> Chappatte, Philippe and Claire Jewell. (2000) Collective Dominance: The Commission's Decision in Airtours/First Choice. IBA (ed). *EC Merger Control: Ten Years On*. London: IBA, pp. 101-108; Drauz, Götz. (2000) Recent Developments in the Assessment of Dominance. IBA (ed), pp. 109-120; Christensen, Peder and Valerie Rabassa. (2001) The Airtours Decision: Is There a New Commission Approach to Collective Dominance. *European Competition Law Review*, 22(6), pp. 227-237; Nicholson, Malcolm and Sarah Cardell. (2002) Airtours: A Wake-Up Call for the Commission. *Global Competition Review*, Aug, pp. 13-15; Overd, Alan. (2002) After the Airtours Appeal. *European Competition Law Review*, 23(8), pp. 375-377.

<sup>6</sup> The Commission determined that it would not appeal the judgment to the Court of Justice (ECJ) – Guerrara, Francesco. (2002) Brussels Will Not Appeal Over Ruling on Airtours Merger. *Financial Times*, August 7.

collective dominance and tacit collusion, the judgment may have implications for wider aspects of EC competition law. This note offers, first, an outline characterisation of the UK market for short-haul foreign package holidays; secondly, a review of the concepts of tacit collusion and collective dominance as reflected in the jurisprudence of the Community courts prior to this litigation; thirdly, brief synopses of the decisions taken by the Commission and CFI respectively, and finally, a short commentary on some questionable aspects in, and the possible ramifications of, the court's judgment.

### **A Sketch of the Foreign Package Holiday Market**

The market for foreign package holidays is a somewhat particular one. It is broadly oligopolistic: four tour operators cumulatively enjoyed around 80% of sales in 1998.<sup>7</sup> The next nearest competitor commanded less than 3%, and several hundred smaller operators accounted for the remainder of the market.<sup>8</sup> Moreover, the market proceeds through two discrete, although manifestly entwined stages: capacity setting and holiday selling.

The first stage is played out twelve to eighteen months in advance of the second. Tour operators must confirm their intended level of use of both airline seats and accommodation this far in advance. Thus, the level of supply is fixed on the basis of best conjectures as to the likely level of demand for foreign package holidays some time hence. After these initial determinations on capacity, there is very little scope for the companies concerned to increase supply to mitigate any significant underestimate of demand in the original calculations. The major tour operators are generally vertically integrated, upstream into the charter airline business and downstream into travel agency. This allows them a relative flexibility to shape their supply plans to the expected level and nuance of demand. Smaller operators tend to make their supply decisions somewhat later, and these are often dependent on the under-utilisation of capacity by major operators.

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<sup>7</sup> Precise figures vary depending on the source of the estimate – see *supra* note 1, para. 66; *supra* note 2, para. 72. The other two main undertakings are Thomson Holidays and Thomas Cook. The latter has recently been purchased by C&N Touristic AG.

<sup>8</sup> *ibid.*

For obvious reasons a package holiday is a perishable commodity of no value beyond a given date. Moreover, tour operators must secure very high levels of capacity utilisation to attain profitability.<sup>9</sup> These imperatives elicit a typical response: the progressive discounting of holiday prices during the selling season as their departure date approaches. This is made more possible by the fact that the fixed costs of tour operation – airline seat and accommodation costs – comprise a high proportion of total costs.<sup>10</sup>

As noted above, this particular market cannot achieve the flexible provision of supply that perishable goods markets normally require. This results in a highly sensitive and precarious position under competitive constraints. In the case of a general oversupply in the market, firms encounter a failure to sell or sales at discounted prices allowing negligible contribution even to variable costs. Such an outcome was last seen in the foreign package holiday market in the summer of 1995.<sup>11</sup> Conversely, under-supply in the market allows companies to sustain prices more close to the brochure level. This allows a much greater degree of profitability. The Commission's suspicion was that, were the proposed take-over to go ahead, it would become more possible for the remaining large players to restrict their own supply on the market in the knowledge that their competitors would be doing likewise. Given this restriction of capacity, such apparent competition that ensued during the selling period would be only for the most juicy of juicy pickings; a feast at which no one was left unsatisfied.

### **Collective Dominance and Tacit Collusion in Mergers Jurisprudence**

Regulatory intervention in proposed mergers is warranted only on the satisfaction of the two part test stipulated in Article 2(3)ECMR. This queries whether “a concentration... creates or strengthens a dominant position” with the prospective result that “effective competition would be significantly impeded”. For some time, it was uncertain whether the prospective creation of collective dominance between the merged entity and one or more other undertakings would suffice to pass the first arm of this test. The ECMR does not explicitly refer to collective dominance, neither is it framed in the same pluralising language as the prohibition of abuse of

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<sup>9</sup> See *supra* note 2, para. 60.

<sup>10</sup> *ibid.*, para. 65.

<sup>11</sup> *ibid.*, para 135.

dominance under Article 82EC.<sup>12</sup> Moreover, it was not certain whether the prospect that tacit collusion in an oligopolistic market would likely transpire post-merger could base a finding of collective dominance.

Although the Commission had previously required commitments from merging parties to divest aspects of their businesses in avoidance of the creation of collective dominance,<sup>13</sup> the ECJ only confirmed that such intervention was a legitimate regulatory practice in its *Kali und Salz* judgment.<sup>14</sup> Recognising that the ECMR would otherwise be “deprived of a not insignificant aspect of its effectiveness”,<sup>15</sup> the ECJ accepted the extended application of the measure. While the *Kali und Salz* case related specifically to the requiring of commitments, the *Gencor* decision saw the CFI confirm that the outright prohibition of a merger could also be justified on this basis.<sup>16</sup>

This latter case also rebutted the proposition that a finding of collective dominance would require some form of explicit collusion of the sort that might be covered by Article 81(1)EC. In its judgment, the CFI indicated that “there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly”.<sup>17</sup> This question had been left uncertain by earlier jurisprudence.<sup>18</sup> Such interdependence may allow undertakings “to anticipate one another’s behaviour... to align their conduct in the market... [and to appreciate] that highly competitive action on [one] part designed to increase... market share would provoke identical action by the others”.<sup>19</sup> The result would be that the undertakings would know in advance that any benefit that might, under other circumstances, have been expected to accrue from the initiative would not be forthcoming. This indication was confirmed – albeit in the context of Article 82EC – by the

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<sup>12</sup> Article 82EC refers to “abuse by *one or more undertakings* of a dominant position” (italics added).

<sup>13</sup> The first occasion on which the Commission issued such a decision was in the *Nestle/Perrier* case – Case No. IV/M.190 OJ [1992] L 356/1.

<sup>14</sup> Cases C-68/94 and 30/95 *France v Commission* [1998] ECR I-1375.

<sup>15</sup> *ibid.*, para. 171.

<sup>16</sup> Case T-102/96 *Gencor v Commission* [1999] ECR II-753.

<sup>17</sup> *ibid.*, para. 276.

<sup>18</sup> Albors-Llorens, Albertina. (2000) Collective Dominance: A Mechanism for the Control of Oligopolistic Markets? *Cambridge Law Journal*, 59(2), pp. 253-257.

<sup>19</sup> *ibid.*

decision of the ECJ in the *Maritime Belge Transports* case.<sup>20</sup> The court held that “the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position”, and that such may equally be based upon “other connecting factors”.<sup>21</sup>

The ongoing difficulty facing the competition authorities is that this is not simply a question of basic market structure. Markets in which there are very few competitors can still be highly competitive; tacit collusion entails more than oligopolistic interdependence alone.<sup>22</sup> This complicating factor has been emphasised in the judgments of both the CFI and the ECJ. The Community courts insist that the Commission’s findings must be contextualised; they “depend on an economic assessment... of the structure of the market in question”.<sup>23</sup> For its part, the Commission has considered a number of factors important in its assessment of whether particular markets are conducive to tacit collusion and thereby collective dominance. These include product homogeneity, symmetrical cost structures, broadly similar market shares, and significant concentration on the supply side of the market.<sup>24</sup> The Commission accepts that its assessments must not merely involve an abstract review of these disparate points; rather they must comprise a substantive analysis of the particular market in which the concentration is proposed. Evidently, the determination of whether a particular market is likely to foster tacit collusion is a complex task that cannot easily be answered in advance of such thorough examination. This does not promise much in the way of legal certainty for business.

## **Perspectives of the Commission and the Court of First Instance**

In its judgment in the *Airtours* case, the CFI offered a restatement of the legal meaning of collective dominance as relevant to merger control,<sup>25</sup> and more specifically, highlighted three

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<sup>20</sup> Cases C-395&396/96 *Compagnie Maritime Belge Transports v Commission* [2000] ECR-I 1365

<sup>21</sup> *ibid.*, para. 45.

<sup>22</sup> Niels, Gunnar. (2001) Collective Dominance: More Than Just Oligopolistic Interdependence. *European Competition Law Review*, **22**(5), pp. 168-172.

<sup>23</sup> See *supra* note 20, para. 45.

<sup>24</sup> Richardson and Gordon note that assumptions relating to the degree of concentration on supply side that pertain in respect of single dominance are not immediately apposite as regards collective dominance – see: (2001) Collective Dominance: The Third Way. *European Competition Law Review*, **22**(10), pp. 416-423. p. 417.

<sup>25</sup> See *supra* note 1, para. 61. The Court explained that “a collective dominant position... [may arise] where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the

aspects of the phenomenon of which the regulatory authorities must take especial account.<sup>26</sup> First, the market must be sufficiently conducive and transparent to allow the members of the oligopolistic group to know that aligned, sub-competitive conduct would be both rational in general, and actually continuing in practice. Secondly, the tacit collusion between the dominant parties that would have the effect of restricting internal competition must be sustainable over time: “there must be an incentive not to depart from the common policy on the market”. Finally, external competition must be equally weak: “the foreseeable reaction of current and future competitors, as well as of consumers, [must not be such as to] jeopardise the results expected from the common policy”. This explanation has been received as “a welcome clarification of the legal test to be applied... in order to establish collective dominance”.<sup>27</sup> It also offers a clear rubric under which the respective views of the Commission and the CFI on the market for foreign package holidays can be considered.

### *The Decision of the Commission*

On the first question, the Commission had perceived the market as one that was already conducive to tacit collusion, and expected that the ‘reinforcement’ of most of the relevant characteristics by the merger would result in a situation of collective dominance.<sup>28</sup> It noted that, despite manifest variations, short-haul foreign package holidays were “fundamentally similar”, and that this general homogeneity had been accepted by all parties.<sup>29</sup> It asserted that demand growth was “not likely to provide a stimulus to competition within the foreseeable future”.<sup>30</sup> Moreover, the Commission suggested that because all tour operators would be taking their respective decisions on capacity on the basis of similar expectations of demand fluctuation, any volatility in the market would not impinge upon tacit collusion.<sup>31</sup> Indeed, it posited that demand volatility might in fact reinforce the tendency for firms to be overcautious in setting capacity, thereby exacerbating undersupply in the market. The Commission further noted, by reference to

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market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively”.

<sup>26</sup> *ibid.*, para. 62.

<sup>27</sup> Nicholson and Cardell, *supra* note 5, p. 13.

<sup>28</sup> See *supra* note 2, para. 87.

<sup>29</sup> *ibid.*, para. 88.

<sup>30</sup> *ibid.*, para. 93.

the Herfindahl-Hirschmann index, that the merger would lead to a substantial increase in an already high level of concentration on the market.<sup>32</sup> Finally, the Commission explained that the major operators had basically the same cost structures, and that their market shares were broadly stable.<sup>33</sup> Thus, they would be likely to ‘think’ in a similar manner.

As regards the forward-looking, dynamic aspect of the transparency question, the Commission noted the distinction between the two market stages: capacity determination and holiday selling. As regards the former, it maintained that a number of factors would allow each major operator to monitor the capacity decisions of the others: the development of each operator’s programme of holidays was ‘evolutionary’; each dealt with the same accommodation providers; it would not be possible to keep secret any substantial capacity additions, and each could know how many airline seats competitors were taking from other suppliers.<sup>34</sup> This surveillance would become easier following the merger as the number of interrelationships would halve.<sup>35</sup> While the Commission did not believe that a high degree of transparency on prices during the selling period was necessary to a finding of collective dominance, it noted that such transparency “exists” and in some respects was “almost complete”.<sup>36</sup>

On the question of the sustainability of the alignment, the Commission insisted that “it is not necessary to show that there would be a strict punishment mechanism”.<sup>37</sup> Rather, it maintained that what was important was whether “the degree of interdependence... is such that it is rational for the oligopolists to restrict output”.<sup>38</sup> Given the circumstances of this particular market, the Commission argued that “the financial impact of an oversupply... would be such that simply the threat of reverting to such a market outcome would be a sufficient deterrent”.<sup>39</sup> It also identified some further, albeit relatively minor, means of retaliation.

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<sup>31</sup> *ibid.*, paras. 95-97.

<sup>32</sup> *ibid.*, para. 139.

<sup>33</sup> *ibid.*, para. 101.

<sup>34</sup> *ibid.*, paras. 103-105.

<sup>35</sup> *ibid.*, para. 142 *et seq.*

<sup>36</sup> *ibid.*, paras. 106 *et seq.*

<sup>37</sup> *ibid.*, para. 150.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*, para. 151.

As regards the potential influence of parties external to the dominant group, the Commission perceived an existing “marginalisation of the ‘fringe’ suppliers as a competitive force on the market”.<sup>40</sup> It expected that the proposed merger would exacerbate this position, not least because of the loss of First Choice as a supplier of airline seats and (potentially) travel agency services.<sup>41</sup> Moreover, barriers to the potential market entry of new firms were said to be “already significant” and would increase as a result of the merger.<sup>42</sup> The Commission refuted the contention that this finding was contrary to the conclusion of a Monopolies and Mergers Commission (MMC) report published in 1997.<sup>43</sup> First, it noted that the MMC had recognised that vertical integration could be anti-competitive, and that were further concentration to take place this might give rise to barriers to entry. Secondly, the Commission referred to the “increased concentration and vertical integration” of the market that had in fact since taken place.<sup>44</sup> The result, it asserted, was that the barriers were now “high enough to remove any realistic possibility of entry or expansion... sufficient to constrain the market power of the three large suppliers”.<sup>45</sup>

### *The Judgment of the Court of First Instance*

There were four components to the appeal pursued by Airtours: that the Commission had incorrectly identified the relevant product market; that the Commission had breached the principle of legal certainty in its use of an altogether new and incorrect test for collective dominance in its assessment; that the Commission erred in its finding of collective dominance, and that the failure to accept the ameliorative undertakings proposed by Airtours was disproportionate.<sup>46</sup> As regards the first plea submitted by Airtours, the court noted that, “a proper definition of the relevant market is a necessary precondition for the assessment of the effects on competition of the concentration”.<sup>47</sup> It was happy, however, that the Commission had

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<sup>40</sup> *ibid.*, para. 73.

<sup>41</sup> *ibid.*, paras. 140-141.

<sup>42</sup> *ibid.*, para. 122.

<sup>43</sup> Monopolies and Mergers Commission. (1997) *Foreign Package Holidays: A Report on the Supply in the UK of Tour Operators’ Services and Travel Agents’ Services in Relation to Foreign Package Holidays*. Cm 3813. London: The Stationery Office.

<sup>44</sup> *ibid.*, para. 123. Many of these acquisitions are detailed in para. 134.

<sup>45</sup> *ibid.*, para. 122.

<sup>46</sup> See *supra* note 1, para. 16.

<sup>47</sup> *ibid.*, para. 19.

identified the relevant market correctly in this case.<sup>48</sup> Following this section of the judgment, the court centred firmly on the third issue; the second and fourth points were largely ignored, and given the result of the discussion were deemed irrelevant.<sup>49</sup>

Having outlined its three part test for collective dominance, the CFI proceeded to note that whenever the Commission believes it necessary to intervene in a proposed merger “it is incumbent upon it to produce convincing evidence” justifying this decision.<sup>50</sup> It then set about a “forensic demolition” of the Commission’s findings,<sup>51</sup> and pronounced that far from being based on “cogent evidence” they had been “vitiating by a series of errors of assessment as to factors fundamental to... whether a collective dominant position might be created”.<sup>52</sup> These errors were said to permeate the three parts of the assessment of collective dominance.

The CFI found that the market for short haul foreign package holidays was neither conducive nor sufficiently transparent to foster tacit collusion. It contested the Commission’s finding that the market shares of the main operators were broadly stable, asserting that “there is no justification... for excluding growth by acquisition when assessing the volatility of market shares”.<sup>53</sup> When such growth was included in the relevant calculations, market shares were certainly volatile, such being indicative of a competitive market. The Court was highly critical of the Commission’s findings on the prospects for future demand stagnation, concluding that these were “based on an incomplete and incorrect assessment of the data”.<sup>54</sup> This weakness included the Commission’s misinterpretation and reliance on a single page extract of an undated report, and reference to an internal econometric study. The first report the Commission had never seen in its full form, the second it never produced before the court.<sup>55</sup> Moreover, the CFI was able to point to inconsistencies in this regard in the text of Commission’s decision.<sup>56</sup> The CFI also criticised the Commission’s assertion that all tour operators would adopt similar views on the level of future demand, with the result that demand volatility was not an important factor,

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<sup>48</sup> *ibid.*, paras. 19-48.

<sup>49</sup> *ibid.*, para. 295.

<sup>50</sup> *ibid.*, para. 63.

<sup>51</sup> Overd, *supra* note 5, p. 375.

<sup>52</sup> See *supra* note 1, para. 294.

<sup>53</sup> *ibid.*, para. 113.

<sup>54</sup> *ibid.*, para. 127.

<sup>55</sup> *ibid.*, paras. 128 and 132.

“without producing any evidence in support of that statement”.<sup>57</sup> Each of these factors led the CFI to conclude that, contrary to the Commission’s view, the market was not easily readable and therefore not conducive to tacit collusion.

A perceived lack of transparency in the market was found to further undermine the Commission’s decision. The CFI accepted the applicant’s submission that capacity determination is a “very complex task”,<sup>58</sup> and concluded that the Commission’s “global approach” that considered the detail of this process irrelevant could not be sustained.<sup>59</sup> Furthermore, it noted that the Commission had failed to prove its contention that, by various means, the major operators were sufficiently able to monitor competitors’ decisions.<sup>60</sup> It indicated that this lack of transparency in the market would make it difficult for four operators to appreciate when apparent changes in demand were due to demand volatility or competitors increasing capacity.<sup>61</sup> This situation was not thought likely to foster tacit collusion, and the Commission had not proven otherwise.

The CFI focused its examination of whether tacit collusion would be sustainable on the issue of whether ‘retaliation mechanisms’ adequate to deter ‘cheating’ by members of the dominant group existed. It noted that the Commission “had adopted a somewhat ambiguous approach” in this regard, asserting both that retaliatory mechanisms were not necessary and that they were sufficient in this market.<sup>62</sup> It proceeded that “the Commission must not necessarily prove that there is a specific retaliation mechanism involving a degree of severity, but it must nonetheless establish that deterrents exists”; these deterrents must be such as to negate any advantage that would be gained from departing from the common policy.<sup>63</sup> In conclusion, it found that the Commission had been wrong in its identification of supposed deterrents.<sup>64</sup>

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<sup>56</sup> *ibid.*, para. 132.

<sup>57</sup> *ibid.*, para. 144.

<sup>58</sup> *ibid.*, para. 160.

<sup>59</sup> *ibid.*, para. 168.

<sup>60</sup> *ibid.*, paras. 172-179.

<sup>61</sup> *ibid.*, para. 146.

<sup>62</sup> *ibid.*, para. 191.

<sup>63</sup> *ibid.*, para. 195.

<sup>64</sup> *ibid.*, para. 207.

The Court’s rulings on the potential of consumers and competitors to offer a counterbalance to the market power of the allegedly dominant group also deferred from those of the Commission. The CFI began by noting that “the issue here is not whether a small tour operator can reach the size necessary for it to compete effectively... by challenging [the integrated operators] for their places as market leaders”.<sup>65</sup> Rather, what was important was whether the competitive fringe of myriad small operators could step in to mitigate or absorb completely any unmet demand left by the major operators. Given this, it considered that much of the Commission’s argument was “immaterial”.<sup>66</sup> In its review of the capabilities of the smaller operators and tour operators from abroad, the CFI found substantial evidence that, by a wide range of available means, such firms would be quick to take advantage of the opportunities afforded by any undersupply on the market.<sup>67</sup> In conjunction with the other aspects of the judgment, this appreciation prompted the CFI to accede to the Airtours appeal; this result was reached more than three years after the merger had originally been notified to the Commission.

### **Commentary: Tacit Collusion and the *Airtours* Case**

It is widely accepted that the outcome of the CFI’s judgment, the annulment of the original decision of the Commission, was appropriate in the circumstances. The Commission has been accused of pursuing a “forced fit” with the requirements of tacit collusion in its reading of the market for foreign package holidays.<sup>68</sup> It seems clear that, to some extent at least, officials had preconceived a desired result and then shaped their interpretation of evidential data to achieve this end. This positive reception of the court’s ruling, however, must not mask a number of problematic aspects contained within it. It is not a perfect judgment.

Three possible specific reservations can be identified. First, that the high standard of proof required by the CFI places an almost impossible burden upon the Commission, and that this will effectively preclude merger prohibition in collective dominance cases. The court may have delved too far into the substantive merits of the Commission’s economic assessment. Secondly,

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<sup>65</sup> *ibid.*, para. 213.

<sup>66</sup> *ibid.*, para. 214.

<sup>67</sup> *ibid.*, paras. 217-269.

<sup>68</sup> Overd, *supra* note 5, p. 376.

that the CFI conflated separate aspects of the test for merger prohibition leaving the judgment untidy and less helpful as a source of guidance for future cases. Thirdly, that the CFI may have followed Airtours' advisers too far in drawing so close an analogy between tacit collusion and explicit anti-competitive agreements. This last point is evidenced by two considerations: the CFI arguably emphasised too strongly the need for explicit retaliation mechanisms to sustain tacit collusion, and it may have been misguided in its approach to 'caution in capacity setting'.

### *The Standard of Proof and Intensity of Review*

Few commentators would dispute that "the *Airtours* judgment is of particular importance for the strict standard of substantiation and evidence laid down by the CFI regarding the finding of [collective dominance]".<sup>69</sup> The CFI appeared to consider, sometimes explicitly and certainly impliedly, that the onus on the Commission was to "prove conclusively" its findings.<sup>70</sup> On one hand, this is nothing new. Even prior to the judgment, the Commission was well aware that it faces a high burden of proof when considering whether it should adopt a finding of collective dominance. Moreover, in its *Kali und Salz* judgment, the ECJ had been emphatic that "evidence of the lack of effective competition between a group of suppliers held to be collectively dominant must be very strong, as must evidence of the weakness of competitive pressure from other suppliers".<sup>71</sup> Interestingly, the Commission considered that its economic analysis in the *Airtours* case "was probably more refined than in earlier cases".<sup>72</sup>

On the other hand, this stringency would appear to diverge from the common view that "by providing for a system of *ex ante* control of industrial concentration, merger laws should have the primary role of seeking to prevent the creation of market structures that *would be likely* to impede the incentives for enterprises to compete in those markets".<sup>73</sup> It must be remembered that, in contrast with the *ex post* review conducted under Articles 81(1) and 82EC, merger

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<sup>69</sup> Haupt, Heiko. (2002) Collective Dominance Under Article 82EC and EC Merger Control in the Light of the *Airtours* Judgment. *European Competition Law Review*, 23(9), pp. 434-444, p. 443.

<sup>70</sup> See, for example, *supra* note 1, para. 210.

<sup>71</sup> As interpreted by the Commission in Case No. COMP/M.1016 *Price Waterhouse/Coopers & Lybrand* OJ [1999] L50/27, para. 105.

<sup>72</sup> Christensen and Rabassa, *supra* note 5, p. 227.

<sup>73</sup> *per* Professor Mario Monti, speech delivered to International Competition Network Inaugural Conference, Naples, 28 September 2002. Italics added.

decisions can be based only on an assessment of future possibilities. There will always be scope for the positing of alternative prognoses.

This issue can be recast as a question as to whether the intensity of the court's review was too strong given the time-constrained and expert nature of the Commission's task; of whether the CFI went too far into the merits of the Commission's evaluation when exercising its reviewing function. This is certainly a moot point.<sup>74</sup> Article 230EC allows the court jurisdiction over acts of Community institutions on grounds, *inter alia*, of the "infringement of this Treaty or of any rule of law relating to its application". There is no straightforward means, however, to determine the appropriate level of this juridical intervention.

One possible illustration of the court's overreaching itself can be seen in its perspective on the vertical and horizontal concentration of the market. The Commission had sought to show that the market conditions had been adversely affected by a string of horizontal mergers and vertical integration since the MMC had reported the market to be pro-competitive in 1997. In contrast, the court held that this did "not entail the kind of major alterations in the market which would invalidate in 1999 the conclusions on competition in the market reached by the MMC towards the end of 1997".<sup>75</sup> This is a curious analysis. In respect of horizontal concentration, the court justified its comments by excluding the case of Thomas Cook – whose market share had grown from 6 to 20% - and then focusing on the relatively unaltered market share of the other main operators.<sup>76</sup> The growth of Thomas Cook was arguably significant in itself, and the Court should not have elided the elimination of numerous middle-ranking players.

The CFI also contended that the Commission's decision was "inconsistent" in its interpretation of the vertical integration that had taken place on the market, at one point treating it as 'pro-competitive' while at another lamenting its contribution to the emergence of collective dominance.<sup>77</sup> This is inaccurate and unfair. It is clear that First Choice had previously found it

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<sup>74</sup> Nicholson and Cardell, *supra* note 5, p. 14. For a general comment, see Craig P. and G. de Burca. (2002) *EU Law: Texts, Cases and Materials*. 3<sup>rd</sup> ed. Oxford: OUP, pp. 537-540.

<sup>75</sup> See *supra* note 1, para. 96. It continued that the concentrations of the market "are less significant than the Commission alleges" (para. 101).

<sup>76</sup> *ibid.*, paras. 93-107.

<sup>77</sup> *ibid.*, para. 105.

necessary to integrate upstream, and that this had been important for it to insulate itself from the market power of the other major operators. In these circumstances, the creation of a fourth large operator had arguably been pro-competitive. The vertical integration of some middle players and elimination of others, however, now left it very much less likely that a further integrated competitor could emerge. In these circumstances, and assuming that the remaining competitive fringe would be unable to offer an adequate counterbalance, the reduction to three vertically integrated players was likely to be anti-competitive.<sup>78</sup> For so long as there were four major players rather than just three, the chances of a misjudgement resulting in a match between supply and demand, or perhaps even a surfeit of supply, would be greater. This is the scenario considered by the Commission in reaching its conclusion that the structure of the market had changed notably since the MMC report.

The CFI appears to have taken as its task, first, to show by reference to the MMC report that in 1997 the market was competitive. Secondly, to evidence that nothing much has changed in respect of competition on the market since that time. Finally, to contend that therefore the proposed merger would likewise not make any substantial difference. The second point was evidently crucial. However, this is an economic question to be answered by expert analysis. The court's reassessment was arguably both unconvincing and constitutionally inappropriate.<sup>79</sup> In these circumstances, it is almost ironic that the CFI sought to deride the Commission for being "particularly elliptical in its description of the competitive situation at the time of the notification".<sup>80</sup>

A possible touchstone of acceptability is that the court did announce itself cognisant of the 'discretionary margin' to be afforded the primary decision-taker,<sup>81</sup> and the Commission has raised no objection in this regard. By no means all of the failings identified by the Court in the Commission's decision, however, formed part of the substantive economic assessment. Many averred to the quality of evidence cited in support. Concern as to the court's assumed remit may have been elided in the wider decision to forego any appeal. It remains an open question

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<sup>78</sup> Obviously, the Commission acted in ignorance of the CFI's ruling on the potential impact of the competitive fringe.

<sup>79</sup> It may also have been a misapplication of the tests under Article 2(3)ECMR – see below.

<sup>80</sup> See *supra* note 1, para. 75.

whether the Community courts will habitually reopen economic assessments in future cases. If this is to happen, then the various constraints under which the Commission operates must leave it unlikely that it will ever be able to judge-proof a merger decision involving collective dominance. An important balance may have shifted to favour parties proposing mergers over the general interest of consumers.

### *Conflation of the Tests for Merger Prohibition*

It is arguable that the CFI went too far in its desire to undermine the Commission decision to the point where it conflated the two distinct aspects of the test in Article 2ECMR. Having clarified the three-part test for collective dominance,<sup>82</sup> the court proceeded to re-confuse the matter in its application of the tests to the circumstances of the specific case in hand. It contended that “the level of competition obtaining in the relevant market at the time when the transaction is notified is a decisive factor in establishing whether a collective dominant position has been created”.<sup>83</sup> This is not correct. The CFI appeared to treat the question of whether the concentration would result in a significant impediment to competition – the second arm of the overall test under Article 2(3)ECMR – as part of the test for collective dominance. This led it into placing an over-weighted emphasis on the Commission’s passing note that “there is already a tendency towards collective dominance in the market at present”.<sup>84</sup>

This is not to argue that an analysis of past competition is unimportant in determining the second question under Article 2ECMR. It is true that if the merger would not worsen the level of competition (or under-competition) on the market then it should not be prohibited. The necessary causal influence would be lacking. Moreover, past competition remains relevant also to the first question, the assessment of collective dominance. Under the first strand of the clarified tripartite test the Commission is required to explain why features of a once competitive market now lend themselves to tacit collusion. In this case, the Commission cited the high degree of recent horizontal and vertical integration on the market. It concluded that given the

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<sup>81</sup> See *supra* note 1, paras. 64-65.

<sup>82</sup> *ibid.*, paras. 61-62.

<sup>83</sup> *ibid.*, para. 82.

<sup>84</sup> See *supra* note 2, para. 138.

weight of recent change the proposed merger would leave the market conducive to tacit collusion.<sup>85</sup> For its part, having posited a clarification of the test for collective dominance, the CFI then failed properly to follow its own prescription. None of this, however, suggests that it was not correct s to annul the Commission’s decision on the other stated grounds.

### *Analogy with Explicit Anti-Competitive Agreements*

In the judgment of the CFI - and subsequently, in much of its attendant commentary - there is an overplayed analogy with the explicit collusion evident in anti-competitive agreements. Perhaps this derives from a confusion the sort identified by Professor Whish.<sup>86</sup> Alternatively, it may be borne of the belief that because economic theory is indifferent as to how collusion is achieved so long as it is sustainable, tacit collusion is effectively the same as an anti-competitive agreement. It is not. For example, the emphasis on the need for sufficient transparency in a market is correct. This is appropriate, however, not simply in order to allow members of a dominant group to assess whether other members are adhering to some ‘tacitly agreed common policy’. Rather, sufficient transparency is fundamental in allowing each party independently to assess whether it remains rational (to continue) to under-compete by restricting capacity. To an extent this may appear to be a distinction without a difference, but the shift in emphasis is important to maintain the integrity of the concept of tacit collusion. The concept is not focused on contemptible conduct. On the contrary, it assumes rational decision taking, and therefore, there is no pejorative connotation attendant.

In the *Airtours* judgment, an overbearing association between tacit collusion and explicit anti-competitive agreements can be seen most clearly in discussion of two themes: ‘retaliation mechanisms’ and ‘caution in capacity setting’. Both of these areas confound the Commission’s

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<sup>85</sup> For example, this would allow the Commission to consider that the ‘caution in capacity setting’ that was a natural feature of this market even when competitive, could under these circumstances be seen as a feature conducive to tacit collusion.

<sup>86</sup> Whish has noted a certain discomfiture with the term ‘tacit collusion’ among those “who associate the notion of collusion with actively conspiratorial behaviour of the kind captured by the expressions ‘agreement’ and ‘concerted practice’” – see: Whish, Richard. (2001) *Competition Law*. 4<sup>th</sup> ed. London: Butterworths, p. 459.

contention that “it is [un]necessary to show that the market participants... would behave as it there were a cartel, with a tacit rather than explicit cartel agreement”.<sup>87</sup>

Debate on the question of the necessity or otherwise of retaliation mechanisms had been fuelled by the Commission’s decision. The “apparent rejection” of such a requirement was said to “contradict directly standard economic theory”.<sup>88</sup> Commentary on the *Airtours* judgment has suggested that it “lays to rest once and for all the debate over the need for a punishment mechanism in the assessment of collective dominance”, so that “a credible punishment mechanism... [should now be considered] an essential part of a sustainable policy of tacit coordination”.<sup>89</sup> More generally, the ruling has been hailed as a welcome return to economic theory.<sup>90</sup> These perspectives are premised on the court’s implication that “the notion of retaliation” was “inherent” in the concept of sustainability.<sup>91</sup>

Read more fully, however, the court’s judgment does not appear to justify the stridency of the commentary. The CFI was explicit in confirming that “the Commission must not necessarily prove that there is a specific ‘retaliation mechanism’ involving a degree of severity”.<sup>92</sup> It did insist, however, that it must be possible to show that ‘sufficient deterrents’ existed to ensure that tacit collusion would be sustainable. Interestingly, the court then considered the deterrents posited by the Commission as if they consisted solely of reactive retaliation mechanisms. It concluded that none was sufficient to prevent ‘cheating’ on the common policy. The court entirely missed the point of the Commission’s explication of the peculiar features of this market. It interpreted the ‘threat of a return to oversupply’ as a means of retaliation to be effected by non-cheating parties in future selling periods. The real thrust of this point, however, was that any significant cheating would itself be likely to result in oversupply with its negative repercussions for profitability in the current selling season. The point about oversupply is not that it would be used in retaliation, but that it would be likely to arise as a direct result of the cheating itself, independently of intervention by disgruntled competitors.

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<sup>87</sup> See *supra* note 2, para. 53.

<sup>88</sup> Nicholson and Cardell, *supra* note 5, p. 15.

<sup>89</sup> Overd, *supra* note 5, p. 375.

<sup>90</sup> Haupt, *supra* note 69, p. 444.

<sup>91</sup> See *supra* note 1, para. 62.

<sup>92</sup> *ibid.*, para. 195.

Tacit collusion emphatically is not the same thing as an anti-competitive agreement secured by the threat of sanction. It is a market circumstance in which companies consider it rational not to compete. The repercussions of beginning to compete more vigorously are factors for consideration in the earlier decision to restrict capacity. It is important to identify retaliation mechanisms not because they are themselves essential to tacit collusion, but rather because their availability will be one factor among others that leave it more rational for each party to continue to under-compete.

The court's discussion of caution in capacity setting in the foreign package holiday market shows a similarly unwarranted analogy with anti-competitive agreements. Indeed, the reference to the parties "right to adapt themselves intelligently to the existing and anticipated conduct of their competitors" is drawn directly from the jurisprudence under Article 81EC.<sup>93</sup> There is a natural tendency not to compete vigorously in a market of this type, but rather to 'play it safe'. It is precisely this tendency, however, that fosters tacit collusion. This is not to imply any questionable practice, but rather to note that the outcome is potentially highly damaging to consumer welfare nonetheless. The aggregation of the wholly rational, independent decisions of the oligopolistic firms produces the adverse result, not active collusion on their part. Thus, it is this natural outcome of a market structured in this way that regulation seeks to avoid, and not active scheming by companies against the consumer. As Professor Whish has noted, "merger control is not, or not only, about pre-emptively preventing a merged entity from abusing its dominant position in the future... it is an instrument for the maintenance of a competitive market structure".<sup>94</sup>

## **Conclusion**

It is a fair summary that "the *Airtours* judgment of the CFI is a milestone in the development of the concept of collective dominance in Community competition law".<sup>95</sup> This is most particularly

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<sup>93</sup> *ibid.*, para. 86. See Case 40/73 *Coöperatieve Vereniging Suiker Unie UA v Commission* [1975] ECR 1663 (paras. 173 *et seq.*)

<sup>94</sup> Whish, *supra* note 87, p. 728.

<sup>95</sup> Haupt, *supra* note 69, p.443.

the case on account of its confirmation of a clear tripartite test for collective dominance. The emphasis on the transparency and conduciveness of the market, the sustainability of alignment of conduct, and the potential influence of consumers and the competitive fringe should guide practice for the future. Arguably, however, this clarity was less than evident in some of aspects of application of this test to the circumstances faced in the *Airtours* case. The court must be careful to maintain the integrity of its own function.

The CFI and Commission both accepted that merger decisions must be based on prospective economic analyses of the particular markets in question. The complexity of the economic assessment as to whether tacit collusion is likely to ensue following a given concentration entails a significant challenge to legal certainty for the firms involved. Given this, it might be argued from a functional perspective that the establishment of a high evidential threshold is necessary in order to reassure business that intervention is in any case very unlikely. This leaves the Commission facing a significant task. Its analyses begin to resemble mere predictions that might be easily overturned. Moreover, such substantive investigation may seem to be beyond the power of the court. The Commissioner for competition policy, however, would appear to defer. He has accepted that as a “specialised competition court”, it is appropriate for the CFI to “provide a meticulous and stringent review of the substance of the Commission’s analysis”.<sup>96</sup>

Finally, it is a moot point whether an alternative approach to the question of dominance will be the longer-term outcome. Richardson and Gordon offer a substitute – that of ‘multi-firm dominance’ – which is premised on the contention that where a firm can maintain its price above a competitive level it is dominant as a matter of fact. This approach, if viable, would leave it irrelevant whether the same could be said of other firms on the same market.<sup>97</sup> Similarly, a move towards a ‘significant lessening of competition’ model would preclude the need first to show that dominance, whether individual or collective, pertained.<sup>98</sup> For the mean time, however, it seems unlikely that the fundamentals of the ECMR doctrine will be revised. Instead, the Commission is to proffer guidance in a Notice on the assessment of collective dominance in horizontal

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<sup>96</sup> *per* Professor Mario Monti, speech delivered to European Commission / IBA Conference on EU Merger Control, Brussels, 7 November 2002.

<sup>97</sup> Richardson and Gordon, *supra* note 24.

mergers. It remains to be seen whether anything of this nature will be able to justify the Commission in tackling the prospective creation of markets conducive to tacit collusion.

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<sup>98</sup> Motta, Massimo. (2000) EC Merger Policy and the Airtours Case. *European Competition Law Review*, **21**(4), pp. 199-207, p. 207.