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Reform of the Merger Regulation

Since the adoption of the Commission's Green Paper on the reform of the Merger Regulation, the Commission has received a wide range of views from interested parties, and in particular from the business community, the legal profession, consumers and trade unions. That is in addition to the continuing dialogue with governments and competition authorities of Member States and of some non-member states, as well as with other European Community institutions.

The official period for public comment expired at the end of March 2002, by which time the Commission had received 114 written comments. Nearly half the submissions were from industry and more than a quarter from law firms. A large proportion of these contributions come from the English-speaking world, in particular from the United Kingdom and, to a lesser extent, from United States firms and associations.

Four broad subjects were raised in the submissions:

- the question of jurisdiction,
- the extent to which infringements "substantially" affected competition,
- how far "efficiency" arguments should be acceptable and
- matters of procedure and enforcement.

As to the question of jurisdiction, the evidence shows that a significant number of transactions scrutinised at national level are the subject of notification in several Member States. The Green Paper proposed methods of tackling the problem of multi-jurisdictional filings and of making the mechanism for case allocation between the Commission and Member States more effective: it suggested automatic Community jurisdiction over transactions notifiable in three or more Member States (the "3+ model"). This suggestion seems to have been welcomed.

Among other things, the Green Paper invited comments on the dominance test enshrined in Article 2 of the Merger Regulation, and in particular on how the effectiveness of this test compared with that used in many other jurisdictions (and notably in the United States), that mergers should not be allowed to proceed if they engendered a "substantial lessening of competition". Arguments for and against the different approaches appear to be fairly evenly balanced.

"Efficiency" arguments were discussed in our December 2001 issue: they continue to figure in the submissions. But procedure and enforcement are attracting more attention. There are criticisms of the "time squeeze" which gives companies insufficient time to have their remedy proposals properly considered; and there is support for the extension of accelerated appeal in the Courts. The Commission is sympathetic to reform in both these areas. ■

PRICE FIXING (BANKING): THE AUSTRIAN BANKS CASE

Subject: Price fixing
Fines

Industry: Banking
(Some implications for other industries)

Parties: (See list in text)

Source: Commission Statement IP/02/844, dated 11 June 2002

(Note. This is a classic cartel case, with interesting documentation on the methods used by the participating banks to conduct the price fixing operations. The Commissioner's comments are perhaps slightly exaggerated, particularly in view of the cooperation which the banks in question afforded to the Commission's investigation and which earned them a reduction in their fines. He was, however, fully justified in pointing out that banks were as much a part of the competition system as any other industry.)

Fines imposed for cartel infringement

On 11th June, 2002, the Commission imposed fines totalling €124.26 million on eight Austrian banks for their participation in a wide-ranging price cartel. In a highly institutionalised price-fixing scheme, the CEOs of the banks met every month, except August, as the "Lombard Club", a cartel which covered the entire Austrian territory "down to the smallest village", as one bank put it, with a view to fixing deposit, lending and other rates to the detriment of businesses and consumers in Austria. The cartel started well before the accession of Austria to the European Economic Area in 1994. But in this case, the Commission can levy fines only for the period starting with membership of the European Union (1995) until June 1998, when it carried out surprise inspections at the banks' premises, putting an end to the infringement.

Competition Commissioner Mario Monti said that the institutionalised set-up of this cartel and its comprehensiveness, both in terms of the banking services covered and geographical scope, made it one of the most shocking cartels ever discovered by the Commission. "Banks should be in no doubt that they are subject to the competition rules of the European Communities just like any other sector. In fact, maintaining competition in the banking sector is particularly crucial, considering the importance of the banking sector for consumers, businesses and the efficient allocation of resources in the economy as a whole".

The breakdown of the fines by bank is as follows (€ million):

Erste Bank der österreichischen Sparkassen AG (Erste)	37.69
Bank Austria Aktiengesellschaft: (BA)	30.38
Raiffeisen Zentralbank Österreich AG: (RZB)	30.38

Bank für Arbeit und Wirtschaft Aktiengesellschaft (BAWAG)	7.59
Österreichische Postsparkasse Aktiengesellschaft (PSK)	7.59
Österreichische Volksbanken AG (ÖVAG)	7.59
NÖ Landesbank-Hypothekenbank AG (NÖ Hypo)	1.52
Raiffeisenlandesbank Niederösterreich-Wien reg Gen mbH (RLB)	1.52

Overwhelming evidence

Following reports in the Austrian press, the Commission, accompanied by officials from the Austrian Ministry for Economic Affairs, conducted simultaneous surprise inspections at a number of Austrian banks in June 1998. The hundreds of documents found - minutes of meetings, memoranda, records of telephone conversations, correspondence, and so on, - unearthed a network of cartel committees which covered the whole of Austria and all banking products and services as well as advertising or, rather, the lack of it. The cartel members fixed interest rates for loans and savings for private/household and for commercial customers as well as the fees consumers had to pay for certain services. The cartel also extended to money transfers and export financing.

The object of the Lombard cartel is expressed succinctly by the "host" of one of the illicit meetings in February 1995 when he welcomed the other participants with the following words: "The exchange of experience between banks in relation to interest rates has repeatedly proved to be a useful means of avoiding uncontrolled price competition. In this vein, today's meeting [...] should likewise ensure a focused and reasonable approach of all banks with regard to pricing. The way in which interest rates are currently being set shows very clearly that it is again necessary for us to sit down together and counteract problematic price developments [...] [I] hope, in the interests of your institutions, that constructive solutions will be found". (All quotes are taken from documents seized at the banks' premises.) The documents seized showed that the banks were aware of the anti-trust implications of their behaviour. For example, one participant at a cartel meeting suggested that, as a precaution, in future "no more minutes should be kept of such meetings". The legal department of one bank was also consulted on the matter and recommended: "Destruction of all existing records".

The Commission considers that the Austrian banks' behaviour amounts to a "very serious infringement" of the competition rules laid down in Article 81 of the EC Treaty.

"Down to the smallest village"

The cartel network was comprehensive as regards its contents, highly institutionalised and closely interconnected, and covered the entire country – "down to the smallest village", as one bank put it. For every banking product there was a separate committee on which the competent employee at the second or third level of management sat. Each month, except August, the Chief Executive Officers of the largest Austrian banks came together as the top-level body dubbed "Lombard Club". One level down were the product-based specialist committees. The most important ones were the Lending Rates Committees, the

Deposit Rates Committees and a pan-Austrian committee called Federal Lending and Deposit Rates Committee in which bank representatives from Vienna met their opposite numbers from the provinces. A constant flow of information took place between the various committees as well as between them and the top-level Lombard Club. In controversial cases, the Lombard Club's guidance was awaited, while in the case of less important decisions, confirmation "by the CEOs at the next Lombard" was "considered unnecessary". Between January 1994 and the end of June 1998, in Vienna alone at least 300 meetings took place.

What often triggered the convening of a committee meeting was a change in the key lending rates by the Austrian Central Bank, whereupon the banks promptly met "for the joint reflection of measures to be taken ". On these occasions, each participant would start by re-stating the rates applied at that particular moment and what reaction (that is, interest rate reduction or increase by a certain amount) each bank would consider appropriate. Most Austrian banks participated in the cartel, but a careful analysis of the cartel meetings showed that the eight banks fined played a key role.

Background

To calculate fines in cartel behaviour, the Commission takes account of the gravity of the infringement, its duration and the existence of any aggravating or mitigating circumstances. It also takes account of a company's ability to harm competition on a given market. Where there is considerable disparity in the size of the parties, the Commission places them in different groups so that parties with roughly similar market shares pay similar fines.The calculation of the fines is, therefore, not made solely with reference to a company's turnover although, under Regulation 17/62, the fine can never exceed 10% of a company's total annual turnover. The Commission reduced the fines calculated to take into account the co-operation afforded by the companies to the Commission while it was conducting its investigation (under the so-called "Leniency Notice" of 1996). As the banks did not contest the facts set out in the statement of objections, a reduction of 10% was granted. The companies have three months to pay the fines, which will go into the general budget of the European Union. Since the EU budget is financed by Member States' contributions the fines will ultimately benefit the European taxpayer. ■

The BBC Case

The Commission has decided that the funding of the BBC's nine new digital television and radio channels through the UK television licence fee does not involve state aid. This is because the new channels will be subject to public service obligations and the state financing is not disproportionate to the net costs of running the services.

Source: Commission Statement IP/02/737, dated 22 May 2002

PRICING POLICY (TELECOMMUNICATIONS): THE DT CASE

Subject: Pricing policy
Abuse of dominant position
Market entry

Industry: Telecommunications

Parties: Deutsche Telekom

Source: Commission Statement IP/02/686, dated 8 May 2002

(Note. Briefly, the Commission's argument is that DT has abused its dominant position by charging excessive prices to potential line-sharers, thereby restricting market entry by newcomers. DT has two months in which to respond.)

After investigation, the Commission has sent Deutsche Telekom AG (DT) a statement of objections setting out the preliminary conclusion that the German incumbent telecommunications operator has abused its dominant position through unfair pricing regarding the provision of local access to its fixed telecommunications network (local loop). The Commission is concerned about DT's practice of charging new entrants higher fees for wholesale access to the local loop than the amounts paid by DT's subscribers for retail access. This discourages new companies from entering the market and, therefore, creating new jobs, and reduces the choice of suppliers of telecoms services as well as price competition for consumers. The Commission's action, which stems from complaints by Mannesmann Arcor and local and regional carriers in Germany, follows the sending of statements of objections to France Télécoms's subsidiary Wanadoo, over predatory pricing for high speed Internet access services, and to Dutch KPN over the price charged to terminate calls on its mobile network.

According to Commissioner Monti, "After four years of complete liberalisation of the telecommunications markets in Europe, competition has come to a critical stage. This is particularly acute in the local loop where many promising new entrants have already been forced to give up their business. Much can still be done to foster competition in this field and that is clearly one of our priorities now. We have already acted in Italy and Spain to ensure a balance between the monthly telephone subscription fees and the call charges, allowing the new entrants in both countries to compete better with the incumbent operators."

Access to the local loop

The "local loop" is the physical circuit between the customer's premises and the telecommunications operator's local switch. Traditionally it takes the form of pairs of copper wires. New entrants on the telecommunications markets need access on fair and non-discriminatory terms to the local loop (so-called "local loop unbundling") in order to be able to offer retail services to end-customers, as

it would be technically, environmentally and economically impossible to replicate such a network which was built over a century.

Effective local loop unbundling is key for the spread of electronic communications services and thus for the success of the New Economy. It was imposed on the incumbent operators by way of legislation at EC level and, in some Member States, such as Germany, also at national level. However, the current assessment leaves no doubt that local loop unbundling is not developing fast enough. The regulatory framework is not the only tool available. The conditions of local loop unbundling, such as pricing, are also subject to scrutiny under the EC competition rules.

Situation in Germany

In Germany, DT offers local loop access at two different levels. Besides the retail subscriptions to end customers, DT also offers unbundled access to the local loop to competitors, which allows them direct access to end-users. DT is thus active on the upstream market for wholesale local loop access to competitors and on the downstream market for retail access services to end-customers. Both markets are closely linked to each other.

DT's local access network is not the only technical infrastructure allowing for the provision of wholesale access services to competitors and of retail access services to end-users. But the otheroptions, which include fibre-optic networks, wireless local loops, satellites, power lines, and upgraded cable TV networks, are not yet sufficiently developed and cannot be considered as equivalent to DT's local loop network. Therefore, in the Commission's preliminary view, DT holds a dominant position on the markets for both wholesale and retail local loop access. Regarding wholesale access, DT is the only German network operator having a network with nation-wide coverage to which it grants competitors access on a wholesale basis. Regarding retail access, even after four years of competition, DT still has more than 98 % market share and the remaining 2% is divided up between numerous competitors.

Margin squeeze

As set out in the statement of objections, the Commission believes that DT abuses its dominant position through unfair pricing practices amounting to a margin squeeze between its wholesale and retail tariffs. A margin squeeze is deemed to exist because of an insufficient spread between DT's tariffs for retail subscriptions and wholesale local loop access. The Commission has received several complaints against DT by new entrants on the German telecommunications market, such as Mannesmann Arcor and a large number of local and regional carriers, alleging such a margin squeeze for access to the local network.

It is the Commission's view that DT could have avoided the margin squeeze since 1998, either by reducing the wholesale access fees, or by increasing the retail subscription fees, or by combining the two. DT's most recent tariff changes at both retail and wholesale level are to be seen as a step in the right direction, but

are far from being sufficient in order to rebalance the local loop access tariffs. In general, it is the Commission's position that vertically integrated operators like DT must indeed fix their retail prices at a level sufficiently above the wholesale prices so as to allow new entrants to compete.

The Commission can use Article 82 of the EC Treaty to prohibit abuses of dominance. DT now has two months to present arguments contesting the Commission's preliminary analysis and may also expand on those arguments at an oral hearing. It is only after this has happened that the Commission will adopt a final position.

Background information

More than a year after the EC Regulation on local loop unbundling came into force (on 1 January 2001), fewer than 800,000 subscriber lines have been unbundled across Europe. The large majority of them (nearly 700,000) are in Germany, where unbundling was already mandated by national law in 1998; but, even there, unbundled lines account for less than 2% of the total. This very slow progress has been analysed in-depth in the Commission's 7th Implementation Report of November 2001 (COM(2001) 706) and in a consultant report published on the DG Competition website in March 2002. The relative failure of local loop unbundling so far can be attributed to the behaviour of incumbent telecommunications operators, which accumulate the obstacles to effective third party, access as well as to the economic conditions of access to the copper pair and to collocation facilities. Under Community law, there are two possible solutions to tackle these problems: the one relies on sectorial regulation and the other on the EC competition rules, notably Article 82 of the EC Treaty.

Using its powers under the telecommunications legislation, namely the EC Regulation on Local Loop Unbundling, the Commission launched infringement proceedings in December 2001 against the three Member States (Germany, Greece and Portugal) that had failed to implement the provisions of the Regulation on so-called shared access. Shared access is essential for operators seeking to offer broadband services. As a result of this action, immediate remedies were taken in the Member states concerned, and the cases regarding Greece and Portugal have been closed. On 20 March 2002, the Commission opened proceedings against five Member States (Germany, France, Ireland, Netherlands and Portugal) in relation to the lack of a complete and sufficiently detailed unbundling offer, particularly in regard to sub-loop unbundling (so that an operator can install equipment closer to customers' premises than the local exchange).

Under the competition rules of the EC Treaty, the Commission launched a sector inquiry on local loop unbundling in 2000, which is still ongoing. Such sector inquiries are not only a useful monitoring instrument, but also a tool to gather evidence of possible abuses of a dominant position. Besides the present Deutsche Telekom case, the Commission also recently opened proceedings in France against Wanadoo's ADSL tariffs and in the Netherlands against KPN's mobile termination rates. ■

EXCLUSIVITY (BROADCASTING): THE UEFA CASE

Subject: Exclusivity

Industry: Broadcasting; sport

Parties: Union des Associations Européennes de Football (UEFA)

Source: Commission Statement IP/02/806, dated 3 June 2002

(Note. This appears to be a satisfactory resolution, subject to third party views, of the problem of exclusive joint sales of broadcasting rights for football matches.)

The Commission intends to take a favourable view of the draft new rules of UEFA, Europe's soccer governing body, regarding the sale of the broadcasting and other media rights to the Champions League. The Commission had objected to the current rules, which had been notified for regulatory clearance, on the grounds that if a group of people joined forces to sell a given product then that restricted competition. The rules distorted competition between broadcasters, encouraged media concentration and stifled the development of Internet sport services and the new generation of mobile phones by barring access to key content, which is not in the broad interest of fans and consumers generally. UEFA's draft new rules will bring the Champions League media rights within the reach of Internet content providers and UMTS operators as well as of a greater number of television and radio companies. Instead of selling the rights as a bundle to only one broadcaster per country, UEFA will sell the rights in several packages for shorter periods of time, and individual football clubs will also be able to exploit some of the rights with their fan base.

In the Commission's view, the existing rules, under which a single broadcaster has exclusive rights for a long period of time could not be exempted because they distorted competition between broadcasters, who regard sports as an essential content. The Competition Commissioner Mario Monti said: "This solution fosters a broader and a more varied offer of football in the European Union. It will allow clubs to develop some of the rights with their fan base and will give an impulse to the emerging new media markets such as the Internet and UMTS services. At the same time, the continuation of some central selling will permit UEFA to continue promoting the successful Champions League brand, which it created, while safeguarding financial solidarity in the sport.

"In short, the UEFA settlement proposal represents good news for clubs, broadcasters and fans. It is a clear example of the Commission's ability to achieve a balanced solution in sports related cases with the existing legal instruments and allows both sport and competition to flourish, to the benefit of the European consumer."

UEFA (Union des Associations Européennes de Football) notified its Regulations concerning the joint selling of the commercial rights to the UEFA Champions League to the Commission in 1999, requesting clearance under the competition rules. ("Commercial rights" include the television broadcasting rights – radio broadcasting rights, as well as stadium tickets, are sold by the individual home clubs – sponsorship, suppliership, licensing and intellectual property rights.)

Until now UEFA has sold all the TV rights to the final stages of the UEFA Champions League on behalf of the clubs participating in the league. The rights were sold as a bundle on an exclusive basis for up to four years to a single broadcaster in each Member State, in general a free-to-air television company, which would normally sub-license some rights to a pay-TV player. One of the drawbacks of the system is that some of the rights, including live footage, were unexploited: the clubs and possibly other players, such as regional television channels or small pay-per-view companies, would be happy to use these rights.

Joint selling on an exclusive basis, in the sports or in any other sector, restricts competition because it has the effect of reducing output and limiting price competition. This view is shared by a number of national competition authorities. Therefore, joint selling of football TV rights can be allowed only if it is beneficial to the consumer and if certain safeguards are taken, as foreseen in Article 81(3) of the EC treaty, which allows the Commission to exempt restrictive agreements if they contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". One effect of joint selling is that only bigger media groups are able to afford the acquisition and exploitation of the bundle of rights. Those groups are typically dominant incumbent broadcasters. It also leads to unsatisfied demand from those broadcasters who are unable to obtain the rights and slows down the use of new technologies, because of a reluctance of the parties to embrace new ways of presenting sound and images of football.

Following a careful examination of UEFA Champions League broadcasting rules, the Commission sent a statement of objections to UEFA on 19 July 2001 formally warning that UEFA's joint selling arrangement could not benefit of an exemption in its initial form.

UEFA's new joint selling arrangement (the full details of which will be published on UEFA's Internet web site at a later stage) will start with the 2003/2004 football season, and may be summarised as follows. First, UEFA will continue to sell the rights to live transmission of the main matches on Tuesday and Wednesdays. For example, at the beginning of the Champions League season, that is, the last stage which starts after the qualifying phases with 32 teams UEFA will be able to sell the "gold match", such as the Roma-Real Madrid match, to a TV company in Spain and Italy.

Second, if UEFA has not managed to sell some of the other matches played on that Tuesday (normally a total of eight at the beginning of the season) to another broadcaster, the clubs in question will have an opportunity to sell their match individually. This means that Arsenal and Liverpool, also playing the same day,

could sell the rights themselves in Spain and Italy if UEFA has not managed to sell the rights.

Third, as a departure from the present situation, all media rights will be offered to the market, including those rights that were unexploited so far such as Internet and UMTS rights. This is a welcome move for telecommunications operators currently rolling out the third generation of mobile phones. Fourth, the individual football clubs now have the right to exploit deferred TV rights to provide their fans with better services. The settlement means that UEFA has split all the media rights into 14 smaller packages some of which are exploited only by UEFA and some of which are exploited by both UEFA and the individual clubs. Fifth, UEFA will award the media rights contracts for a period not exceeding three years using a public tender procedure giving all broadcasters an opportunity to bid for the rights.

In the light of UEFA's settlement proposal, the Commission is in a position to give its preliminary approval of the modified arrangements. However, before giving its final approval, the Commission wishes to give third parties the opportunity to comment. To this end a Notice describing the new arrangements will be published in the EU's Official Journal in the coming weeks, and third parties will be invited to submit their comments on the new arrangements to the Commission. Depending on the outcome of this market testing, the Commission services will propose the adoption of a formal exemption decision pursuant to Article 81(3) of the Treaty.

This case is the latest in a line of cases that show that the Commission seeks to take into account the specific character of sport while intervening to ensure fair competition. The Commission last year cleared the UEFA broadcasting regulations, allowing national football associations to block the broadcasting on television of football during 2½ hours either on Saturday or Sunday to protect stadium attendance and amateur participation in the sport. This was possible after the conflicting interests of the broadcasters, to maximise the rights they paid for, were better balanced with those of the clubs to protect gate revenues.

In another well-publicised case, the Commission last year successfully concluded discussions with FIFA and UEFA with regard to the rules governing the transfer of players within the EU which had been the subject of a bitter feud between the players' unions and the world football governing body. The Commission last year also closed its long-standing investigation into the rules governing the FIA and the commercial agreements relating to the Formula One car racing championship. The settlement did not contest FIA's role to regulate the sport, but aimed to prevent certain conflicts of interest and remove unfair restrictions put on broadcasters and circuit owners among others. In these and other cases, the Commission has limited its intervention, which was always triggered by complaints or by the sports organisations' desire to seek legal certainty, to the commercial aspects of sport and other aspects that were in violation of the EC treaty rules. ■

COMPETITION RULES (SPORT): COMMISSION MEMORANDUM

Subject: Exclusivity
Complaints

Industry: Sports; broadcasting; other commercial aspects

Source: Commission Memorandum MEMO/02/127 dated 5 June 2002

(Note. This Memorandum puts into context the UEFA case, reported on page 133 of this issue, as well as the other cases referred to by the Commission. Whatever the activity concerned, it is likely, if it has economic aspects, as defined in the case law, to fall within the purview of the competition authorities; as the summary points out, this has been true in principle ever since the Walrave case in the 1970s. Since then sport has had an increasing economic importance and has run an increasing risk of falling foul of the competition rules.)

The declaration adopted by the European Council in Nice on the specific character of sport stresses the need to take account, in all action by the Community, of "the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured". It is the task of sports organisations to organise and promote their particular sports, having due regard to the sporting rules applicable and, in particular, to national and Community legislation. The Court of Justice has ruled on several occasions that sport, in its economic aspect, is subject to Community law, but has recognised at the same time certain special characteristics of the sector.

Series of sports cases

Commissioners Monti and Reding in particular have engaged in constructive discussions with sporting organisations over the last two years, to put these principles into practice. As a result, the sporting organisations have put into effect important changes to bring their rules into line with their legal obligations, bringing about better legal security to sport as a basis for future economic and sporting development, and a better deal for fans and consumers. UEFA's agreement to change its rules regarding the sale of broadcasting and other media rights to the Champion's League *[see the previous report in this issue]* is the latest positive resolution of a series of sports cases that have been under examination.

Other concrete examples include the following cases. First, there was the case involving football players' agents *[also referred to in the previous report]*. Second, there was the earlier (2001) UEFA Broadcasting case, in which the Commission cleared revised UEFA broadcasting regulations, allowing national football associations to block the broadcasting on television of football during two and a half hours either on Saturday or Sunday to protect stadium attendance and amateur participation in the sport. The regulations originally submitted to the

Commission were highly complex and very broad in scope. The broadcasting of football matches was prohibited throughout the weekend. A balance was found between the interests of the broadcasters to maximise the rights they paid for and those of clubs throughout the game.

Third, there was the Formula One case, in which, after long negotiations, the Fédération Internationale d'Automobile (FIA) agreed to change its rules to bring them into line with EC law. The modifications ensure that the role of the FIA is limited to that of a sports regulator, with no commercial conflicts of interest. FIA rules will not be used to prevent or impede new competitions unless justified on grounds related to the safe, fair or orderly conduct of motor sport. Appeal procedures against FIA have also been strengthened.

Fourth, there was the case involving football player transfer rules. After lengthy negotiations between the Commission and the Presidents of FIFA and UEFA, ending on 5 March 2001, FIFA and UEFA undertook to adopt new transfer rules on the basis of a number of principles, including three main ones which seek to promote the training of young players and to ensure the stability of teams as well as the integrity, regularity and proper functioning of competitions, in the context of the specific features of football, so as to safeguard the interests of fans and spectators of the sport. New regulations were adopted in July, and in August 2001, FIFA and FIFPro (the players union) reached an agreement about FIFPro's participation in the implementation of the new rules.

Fifth, in a case dealt with under the state aid rules in 2001, the Commission authorised the award of state grants by France for the financing of training centres for young players in view of their educational and integrative objective and the little impact they had on competition between the leading clubs.

Sixth, in The Mouscron case in 1999, the Commission had already rejected a complaint against the UEFA "home and away rule", on the basis that this was a sporting rule and a necessary part of the organisation of sporting competitions; as such it fell outside the scope of competition law.

Judgments of the Court

The judgment of the Court of Justice in the *Walrave* case (Case C-36/74, *Walrave and Koch*) established that European Community law applied to sports, insofar as the practice constituted an economic activity within the Community. However, it was only in the mid-1990s, after the judgment in the *Bosman* case (C-415/93, *Bosman*) and the increase in the money being paid for broadcasting rights to major sporting events, that the economic aspects of sporting activities became an issue of major importance. It is only relatively recently that sporting organisations have embarked on the complex task of adjusting their sporting regulations to bring them into line with today's sporting, economic and legal requirements. The Commission's involvement in this exercise of modernising the rules has come about largely as a result of complaints. ■

ACQUISITIONS (TOUR OPERATORS): THE AIRTOURS CASE

Subject: Acquisitions
Relevant market
Collective dominance
Market shares
Market growth
Market transparency
Consumers
Annulment (of Commission Decision)

Industry: Tour operators
(Implications for all industries)

Parties: Airtours plc
First Choice plc
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 6 June 2002, in Case T-342/99 (*Airtours plc v Commission of the European Communities*)

(Note. This is an interesting, important and extremely long judgment, severely shortened and summarized in the report below. It is interesting on several counts, partly because most readers, as consumers, will probably be fascinated by the description of the industry and its workings; partly because of the interplay of economic and legal issues; and partly because of the comprehensive trouncing of the Commission's Decision, on almost every one of the many issues dealt with in the Court's judgment. It is also important of several counts, not least the fact that litigation on merger cases is rare and successful litigation by the party aggrieved by a Commission Decision rarer still; also for the manner in which the party concerned, using a number of resourceful economic and official arguments, attacked the Commission's case.

Litigation arose out of a Commission Decision in 1999, refusing approval for a proposed acquisition. As it has taken just under three years from the date of the Commission Decision to the date of the Court judgment, the urgency with which cases under the merger regulation are handled at the administrative level has vanished. However, from the bystander's point of view, the judgment is valuable and throws light on the care which the Commission is under a duty to take in assessing the legal and economic circumstances of merger regulation cases, as well as the care needed in setting out its reasons for making a Decision, particularly one in which approval is denied.

As the judgment runs to 296 paragraphs, the report is limited to an introductory section, given in full, and later summaries of and extracts from the later sections of the judgment.)

Judgment

Facts and procedure

1. On 29 April 1999, Airtours plc, a United Kingdom company whose main activity is as a tour operator and supplier of package holidays, announced its intention to acquire all the shares in the United Kingdom tour operator, First Choice plc, one of its competitors.

2. On the same day, Airtours notified the proposed merger to the Commission pursuant to Article 4 of Council Regulation EEC/4064/89/ on the control of concentrations between undertakings, as most recently amended by Council Regulation EC/1310/97, (hereinafter Regulation 4064/89).

3. In its decision of 3 June 1999, the Commission found that the merger gave rise to serious doubts as to its compatibility with the common market and decided to initiate the investigation procedure in accordance with Article 6(1)(c) of Regulation 4064/89.

4. On 9 July 1999, the Commission sent the applicant a statement of objections under Article 18 of Regulation 4064/89, in which it set out the reasons why it took the view, prima facie, that the proposed merger would give rise to a collective dominant position in the United Kingdom short-haul foreign package holiday market. The applicant replied to the statement of objections on 25 July 1999.

5. A hearing was held before the Commission Hearing Officer on 28 and 29 July 1999, pursuant to Articles 14, 15 and 16 of Commission Regulation EC/447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Regulation No 4064/89.

6. On 7 September 1999 the applicant submitted a set of undertakings in accordance with Article 8(2) of Regulation 4064/89 in order to allay the competition concerns which had been identified.

7. On 9 September 1999 the Advisory Committee on concentrations met and delivered its opinion on the merger and on the undertakings put forward by the applicant.

8. A meeting was held on 15 September 1999, which was attended by representatives of the applicant and of the Commission, following which the applicant submitted a revised set of undertakings.

9. By decision of 22 September 1999 (Case IV/M.1524 - Airtours/First Choice) (hereinafter the Decision), the Commission declared that the concentration was incompatible with the common market and the operation of the European Economic Area under Article 8(3) of Regulation 4064/89 on the ground that it would create a collective dominant position in the United Kingdom market for short-haul foreign package holidays, as a result of which competition would be

significantly impeded in the common market. The Commission stated in the Decision that the undertakings proposed by Airtours on 7 September 1999 would not prevent the creation of a collective dominant position and that the undertakings put forward on 15 September 1999 were submitted too late to be considered at that stage in the procedure.

[Paragraphs 10 to 15 refer to the procedure and the forms of order sought by the parties]

Substance

16. The applicant relies on four pleas in law in support of its application. The first plea alleges that there were manifest errors of assessment in the definition of the relevant product market and infringement of Article 253 of the EC Treaty. The second plea alleges infringement of Article 2 of Regulation No 4064/89, breach of the principle of legal certainty in so far as the Commission applied a new and incorrect definition of collective dominance in its assessment of the present case, and infringement of Article 253. The third plea alleges infringement of Article 2 of Regulation No 4064/89 - in that the Commission found that the transaction created a collective dominant position - together with infringement of Article 253. The fourth plea alleges infringement of Article 8(2) of Regulation No 4064/89 and breach of the principle of proportionality inasmuch as the Commission did not accept the undertakings proposed by the applicant.

The first plea alleging errors in the definition of the relevant product market and infringement of Article 253 EC

A - The Decision

17. The definition of the relevant product market in the United Kingdom foreign package holiday industry is the only definition challenged by the applicant. The Decision identifies two separate markets, the market for package holidays to long-haul destinations (long-haul package holidays) and that for package holidays to short-haul destinations (short-haul package holidays). In that connection, it is specified in the Decision that the travel industry considers the long-haul sector to comprise all destinations involving a flight time from the United Kingdom substantially in excess of three hours, other than flights to the islands in the Eastern Mediterranean or the Canary Islands, which may take up to around four hours. As a result, all European (mainland and islands) and North African holiday destinations fall into the short-haul category, in contrast to those destinations in, for example, the Caribbean, the Americas or South-East Asia, in respect of which the flight times are substantially longer (typically twice as long or more) (paragraphs 10 to 13 of the Decision).

18. At paragraphs 16 to 28, the Decision sets out the reasons which led the Commission to conclude that the differences between long and short-haul package holidays are, from the point of view of competition, more significant than the similarities and are such as to justify defining separate markets for the purposes of an appraisal of the concentration notified ...

B - *Definition of the relevant product market*

19. The Court notes, to begin with, that, as regards the application of Regulation 4064/89 as envisaged in this case, a proper definition of the relevant market is a necessary precondition for the assessment of the effects on competition of the concentration (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (*Kali & Salz*), paragraph 143).

20. The definition of the market in the products affected by the merger must take account of the overall economic context so as to make it possible to assess the actual economic power of the undertaking or undertakings in question and, for that purpose, it is necessary first to define the products which, although incapable of being substituted for other products, are sufficiently interchangeable with the undertaking's own products, both as regards their objective characteristics and the competitive conditions and the structure of supply and demand on the market (see, to that effect, Case C-333/94 P, *Tetra Pak* v *Commission*, paragraphs 10 and 13, and Case T-83/91, *Tetra Pak* v *Commission*, paragraph 63).

[Paragraphs 21 to 24 and 43 to 45 set out the applicant's arguments.]

25. The Court notes that it is apparent from the documents before it that the Commission took account of consumer preferences, average flight time, the level of average prices and the limited interchangeability of the aircraft used for each type of destination in reaching its conclusion that short-haul package holidays belong to a separate market from that to which long-haul packages belong. The Commission came to that conclusion, while not, however, disputing that long-haul package holidays are becoming increasingly popular with consumers or that the market studies cited by the applicant in its reply to the statement of objections (see British National Travel Survey 1998, volume 4, *The 1998 Holiday Market*, and Mintel, *Holidays: The booking procedure, 1997*) illustrate the tendency of United Kingdom consumers to go further afield for their holidays and particularly to the other side of the Atlantic. Nor did it question the fact that a substantial number of short-haul holidaymakers have also taken a long-haul holiday in the last five years (36%) and that a much greater number (62%) are very or fairly likely to do so over the next five years, as the applicant has indicated in Table 2.4 in its reply to the statement of objections.

26. The Court must therefore consider whether the Commission made a manifest error of assessment when it concluded that those factors were reasons for defining the relevant product market narrowly and excluding long-haul package holidays, which it did not regard as sufficiently interchangeable with short-haul package holidays.

[Paragraphs 27 to 39 set out the Commission's arguments.]

40. Further, the applicant acknowledged at the hearing that it publishes separate brochures for short and long-haul package holidays.

41. In those circumstances, the Commission's proposition that only a small proportion of the customers of the main United Kingdom tour operators regard long-haul package holidays as substitutes in terms of value for money for short-haul package holidays cannot be regarded as manifestly incorrect.

42. The other arguments advanced by the applicant do not invalidate that finding ...

46. Finally, the applicant cannot rely on a failure to state reasons in relation to the definition of the relevant market.

47. The Commission devoted a significant part of the Decision (paragraphs 5 to 28) to explaining why it considered the relevant market to be limited to the market for short-haul package holidays. The Decision thus discloses, in a clear and unequivocal fashion, the Commission's reasoning relating to the definition of the relevant market, in such a way as to enable the Community Courts to exercise their power of review and the persons concerned to be aware of the reasons for the measure in order to defend their rights (see Case C-350/88 *Delacre and Others* v *Commission*, paragraph 15).

48. It follows that the first plea must be rejected as unfounded.

The second plea alleging infringement of Article 2 of Regulation No 4064/89, breach of the principle of legal certainty and infringement of Article 253 EC inasmuch as the Commission applied an incorrect definition of collective dominance in its appraisal of the present case

49. The applicant complains that the Commission, for the purposes of the Decision, applied a new and incorrect definition of collective dominance, which is set out generally at paragraphs 51 to 56 of the Decision, departing from its previous decisions, from Community case-law and from sound economic principles, and also infringing Article 2 of Regulation 4064/89. The Commission thereby also acted in breach of the principle of legal certainty and Article 253 of the EC Treaty, inasmuch as the Decision is vitiated by a defective statement of reasons.

50. The Commission denies that it adopted a new approach and maintains that it applied the test for collective dominance already used by it in previous cases and approved by the Court of First Instance in its judgment in Case T-102/96, *Gencor* v *Commission*.

51. It is appropriate to point out that the abovementioned paragraphs of the Decision (51 to 56) are in Part VA of the Decision, in which the Commission sets out, purely by way of introduction and summary, the reasons which led it to conclude that the concentration would give rise to the creation of a dominant position and in which it replies generally to observations made by the applicant during the administrative procedure concerning certain of the characteristics of a collective dominant position.

52. In the introduction to its legal analysis of the concentration, the Commission merely sketches the broad outlines of its findings on the effects of the merger, which are subsequently explained and developed in detail at paragraphs 57 to 180 of the Decision.

53. Since the Decision is a measure applying Article 2 of Regulation No 4064/89 to a specific concentration, the Court must, in its review of the legality of the Decision, confine itself to the position adopted by the Commission in relation to the transaction as notified, that is to say, it must examine the way in which the law has been applied to the facts and adjudicate on the merits of the Commission's findings concerning the effects of the concentration on competition. In this case, the specific findings relating to the impact of the transaction on competition, which led the Commission to conclude that the concentration should be prohibited, are stated and developed in paragraphs 57 to 180 of the Decision and are challenged by the applicant in its third plea.

54. It is therefore necessary to consider, first, the merits of the arguments raised by the applicant in its third plea and, at the same time, to take into account its arguments concerning the Commission's general findings at paragraphs 51 to 56 of the Decision.

The third plea alleging (i) infringement of Article 2 of Regulation 4064/89 in that the Commission found that the concentration would create a collective dominant position, and (ii) infringement of Article 253 of the EC Treaty

55. By this plea, the applicant seeks to show that the Commission made an error of assessment in deciding that the proposed merger should be prohibited. It claims that the Decision does not prove to the requisite legal standard that the outcome of the transaction would be the creation of a collective dominant position of such a kind as significantly to impede competition in the relevant market. In prohibiting the merger, the Commission thus infringed Article 2 of Regulation 4064/89.

A - General considerations

56. Under Article 2(2) of Regulation 4064/89, a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared compatible with the common market.

57. Under Article 2(3) of the Regulation, a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared incompatible with the common market.

58. Where, for the purposes of applying Regulation 4064/89, the Commission examines a possible collective dominant position, it must ascertain whether the

concentration would have the direct and immediate effect of creating or strengthening a position of that kind, which is such as significantly and lastingly to impede competition in the relevant market (see, to that effect, *Gencor* v *Commission*, paragraph 94). If there is no substantial alteration to competition as it stands, the merger must be approved (see, to that effect, Case T-2/93, *Air France* v *Commission*, paragraphs 78 and 79, and *Gencor* v *Commission*, paragraph 170, 180 and 193).

59. It is apparent from the case law that in the case of an alleged collective dominant position, the Commission is ... obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers (*Kali & Salz*, cited above, paragraph 221, and *Gencor* v *Commission*, paragraph 163).

60. The Court of First Instance has held 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 within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels. (*Gencor* v *Commission*, paragraph 276).

61. A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration 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 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 of the EC Treaty (see, to that effect, *Gencor* v *Commission*, paragraph 277) and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

62. As the applicant has argued and as the Commission has accepted in its pleadings, three conditions are necessary for a finding of collective dominance as defined:
- first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. As the Commission specifically acknowledges, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;
- second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. As the Commission observes, it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In this instance, the parties concur that, for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, to that effect, *Gencor* v *Commission*, paragraph 276);
- third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

63. The prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market (*Kali & Salz*, paragraph 222). As the Commission itself has emphasised, at paragraph 104 of its decision of 20 May 1998 *Price Waterhouse/Coopers & Lybrand* (Case IV/M.1016), it is also apparent from the judgment in *Kali and Salz* that, where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.

64. Furthermore, the basic provisions of Regulation 4064/89, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of

that discretion, which is essential for defining the rules on concentrations, is under review, the Community judicature must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (*Kali & Salz*, paragraphs 223 and 224, and *Gencor* v *Commission*, paragraphs 164 and 165).

65. Therefore, it is in the light of the foregoing considerations that it is necessary to examine the merits of the grounds relied on by the applicant to show that the Commission made an error of assessment in finding that the conditions for, or characteristics of, collective dominance would exist were the transaction to be approved.

B - The Decision

66. The Decision identifies two types of players on the relevant market (see paragraphs 72 and 75), the large tour operators on the one hand, and the secondary or small tour operators on the other:
- the major tour operators are characterised by their relatively large size - each of them having a market share exceeding 10% (according to the Commission's data, Thomson accounts for 27% of sales, Airtours for 21%, Thomas Cook for 20% and First Choice for 11%, that is, overall for 79% of sales. On Airtours' figures, Thomson accounts for 30.7% of sales, Thomas Cook for 20.4%, Airtours for 19.4% and First Choice for 15%, that is, overall for 85.5% of sales). A further characteristic is that they are all integrated both upstream (operation of charter airlines) and downstream (travel agencies);
- the secondary operators are smaller, none of them having a market share in excess of 5%, and in general they do not own either their own charter airlines or their own travel agencies. Apart from Cosmos (which, since it is linked to Monarch, one of the major charter airlines in the United Kingdom, is exceptional among secondary operators where there is no vertical integration), Manos and Kosmar, which are the fifth, sixth and seventh tour operators accounting respectively for 2.9%, 1.7% and 1.7% of sales, there are several hundred competing small tour operators, none of them accounting for more than 1% of sales.

67. It is apparent from the Decision (see the summary of the Commission's appraisal at paragraphs 168 to 172 of the Decision) that the Commission formed the view that the proposed merger would create a dominant position in the United Kingdom market for short-haul foreign package holidays, the effect of which would be to impede competition significantly in the common market for the purposes of Article 2(3) of Regulation 4064/89, and that it would do so for the following reasons:
- the proposed merger would remove competition between the three large players remaining after the concentration (combined Airtours/First Choice, Thomson and Thomas Cook). Because of the structural features of the market and the way that it operates, which is dependent on capacity decisions, and because of the high degree of market concentration (the three remaining large tour operators would have about 80% of the market if the operation took place) (Decision,

paragraph 169), they would no longer have an incentive to compete with each other;
- the operation would increase the degree of transparency and interdependence which already exists, with the result that the three remaining large tour operators would have every interest in adopting parallel conduct so far as the decision as to how many package holidays to put onto the market is concerned, reducing capacity below what is required as a result of market trends (Decision, paragraph 170);
- an examination of past competition bears out this conclusion, since it demonstrates that the relevant market already had a tendency towards collective dominance (Decision, paragraphs 128 to 138);
- deterrents or scope for retaliation exist, which are connected with the fact that if one of the three remaining large tour operators decided not to restrict capacity, there would be a risk that the two others would do the same, which would result in oversupply and serious financial consequences for each of the operators (Decision, paragraph 170);
- the smaller operators or new entrants, that is to say current and future competitors, would be further marginalised as a result of the operation, since they would lose First Choice both as a supplier of airline seats and as a potential distribution channel. In any event, those operators would not have the ability to offset any reductions in capacity brought about by the three remaining large tour operators (Decision, paragraph 171).

68. So far as the effects of the merger on effective competition are concerned, the Commission found that the effect of restricting overall capacity put onto the market would be to tighten the market and bring about an increase in the prices and profits of the members of the dominant oligopoly (see, in particular, paragraph 56 and the final part of paragraph 168 of the Decision).

C - The Commission's alleged errors of assessment

69. The applicant argues that, contrary to the Commission's contention, the factors put forward by the Commission in the Decision to characterise the situation as one of collective dominance were not present at the time of the notification and would not occur were the merger to proceed.

70. More specifically, the applicant claims, first, that, given the characteristics of the relevant market, the Commission has not proved conclusively that, were the merger to proceed, the three remaining large tour operators would have an incentive to cease competing with each other.

71. Second, it argues that, even supposing that such an incentive did exist, the absence of any deterrents or adequate means of retaliation would prevent the emergence of the alleged dominant oligopoly.

72. Third, and in any event, smaller operators and new entrants, namely current and future competitors, would challenge any capacity restrictions brought into effect and consumers would react as a result, so that the three remaining major

operators would not be able, as a result of the concentration, to act together to any appreciable extent independently of other competitors and consumers.

73. Fourth, the applicant claims that the Commission incorrectly assessed the impact of the merger on competition in the relevant market.

[Paragraphs 74 to 78 set out some preliminary considerations; paragraph 79 opens the discussion of the proposition that, if the merger were to proceed, the three remaining large tour operators would have an incentive to cease competing with each other. The remaining paragraphs analyse this proposition in detail.

[In paragraphs 80 to 83, the Court assesses competition between the leading tour operators. It begins by looking at the tendency towards collective dominance alleged to exist before the proposed merger and concludes, in paragraph 84, that "the (Commission's) Decision makes no mention of any reduced level of competition in the market before the notification". The Court goes on to consider, in paragraphs 85 to 92, the fact that the large tour operators take a cautious approach to capacity planning and take particular note of the estimates of the main competitors and concludes, in paragraph 92, "that, since it did not deny that the market was competitive, the Commission was not entitled to treat the cautious capacity planning characteristic of the market in normal circumstances as evidence substantiating its proposition that there was already a tendency to collective dominance in the industry". Then the Court looks, in paragraphs 93 to 108, at the assessment of horizontal and vertical integration characteristic of the market since publication of the (United Kingdom) Monopolies and Mergers Commission Report and concludes, in paragraphs 107 and 108, "that the Commission was wrong in taking the view that the horizontal concentration and vertical integration that has taken place since the MMC Report was published in 1997 made it necessary to disregard the latter's findings on the level of competition obtaining in the relevant market and ... that the Commission erred in concluding at paragraph 138 of the Decision that the factors set out at paragraphs 128 to 137 thereof are evidence that there is already a tendency towards collective dominance in the market at present (most especially as regards the setting of capacity)". In paragraphs 109 to 119, the Court makes an assessment of the volatility of historic market shares and concludes, in paragraph 119, that "the market is competitive and consequently militates against any finding of collective dominance". It reinforced this in its general conclusion, in paragraph 120, "that the Commission made errors of assessment in its analysis of competition obtaining in the relevant market before the notification".

[The Court follows with an assessment, in paragraphs 123 to 180, of past and anticipated development of demand, demand volatility and the degree of market transparency. It looks in particular at low demand growth, in paragraphs 123 to 133, concluding "that the Commission's interpretation of the data available to it concerning growth demand was inaccurate"; demand volatility, in paragraphs 134 to 147, disagreeing with the Commission's view "that volatility of demand was conducive to the creation of a dominant oligopoly by the three remaining major tour operators"; an assessment, in paragraphs 148 to 180, of the degree of market transparency, concluding "that the Commission wrongly formed the view

that market transparency was high for the four major integrated operators during the planning period and that it wrongly concluded that the degree of market transparency was a characteristic which made the market conducive to collective dominance".]

181. It follows from the foregoing that the Commission's examination of competition obtaining between the main tour operators at the time of the notification was inadequate, and that the Commission made errors of assessment concerning the development and predictability of demand, demand volatility and the degree of market transparency, and that it wrongly concluded that those factors were, in this instance, conducive to the creation of a collective dominant position.

182. It follows from all of the foregoing that the Commission made errors of assessment when it concluded that if the transaction were to proceed, the three major tour operators remaining after the merger would have an incentive to cease competing with one another.

[In paragraphs 183 to 207, the Court looks at the inadequate nature of the deterrents which the Commission alleges will secure unity within the alleged dominant oligopoly and concludes "that the Commission erred in finding that the factors mentioned in ... the Decision would, in the circumstances of the present case, be a sufficient incentive for a member of the dominant oligopoly not to depart from the common policy". In paragraphs 208 to 261, it refers to the underestimation of the likely reaction of smaller tour operators, potential competitors and consumers as a counterbalance capable of destabilising the alleged dominant oligopoly: it refers in particular to the possible response of current competitors and small tour operators, concluding, in paragraph 228, that "a more specific examination of whether adequate access to the markets for airline seats and travel agencies is available to them". As to the smaller operators' access to airline seats, the Court's comments are as follows.]

251. It is clear from the foregoing that the Commission was wrong to conclude that smaller tour operators would not have access to airline seats on favourable enough terms to attempt to increase capacity and take advantage of the opportunities afforded by the under-supply that would occur in the anti-competitive environment anticipated by the Commission in the event of the operation being approved.

[This section of the Court's judgment ends by examining the access of smaller tour operators to distribution and concludes, in paragraph 261, "that the Commission underestimated the ability of the small operators to increase capacity in order to take advantage of opportunities afforded by a situation of general under-supply brought about by the large tour operators and thus to counteract the creation of a collective dominant position following the concentration". The next section looks, in paragraphs 262 to 269, at the possible reactions of potential competitors - other tour operators – and concludes that the Commission "did not take account, as it should have done, of the fact that the lack of barriers to market entry was likely to allow potential competitors to gain access to, and offer their

products on, the relevant market. The final section of the judgment, in paragraphs 270 to 276, considers the possible reaction of consumers and concludes that "the Commission has underestimated the role that might be played by United Kingdom consumers", particularly in resisting high prices.]

277. In view of the foregoing observations, the Court concludes that the Commission's assessment of the foreseeable reaction of smaller tour operators, potential competitors, consumers and hotel-owners was incorrect and that it underestimated their reaction as a countervailing force capable of counteracting the creation of a collective dominant position.

[Paragraphs 278 to 293 of the Court's judgment deal with the assessment of the impact of the transaction on competition, concluding that "the Commission has failed to prove that the result of the transaction would be to alter the structure of the relevant market in such a way that the leading operators would no longer act as they have in the past and that a collective dominant position would be created".]

D - General conclusion

294. In the light of all of the foregoing, the Court concludes that the Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market.

295. In those circumstances, the third plea must be declared to be well founded and, therefore, the Decision must be annulled, without it being necessary to examine the other complaints and pleas put forward by the applicant.

[Paragraph 296 deals with costs.]

Court's ruling

The Court hereby: 1. Annuls Commission Decision C(1999)3022 final of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement ... ; 2. Orders the Commission to pay its own costs and those incurred by the applicant. ■

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