



CASE STUDY 14

NOVEMBER 2013

Airtours v European Commission*
(Tacit Collusion and Collective Dominance in EU Merger Control)

FORUM:

European Commission
&
European Court of First Instance ("CFI")

LEGISLATIVE PROVISIONS REFERRED:

Article 2(3): 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 shall be declared incompatible with the common market.

Article 6(1)(c) of Regulation No 4064/89: If commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

Article 82: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

PARTIES TO THE CASE:

Appellants: Airtours & First Choice

Respondent: European Commission

BRIEF FACTS OF THE CASE:

Airtours was a tour operator company actively engaged in travel agencies, charter airlines, hotels and cruise ships with operations in 17 countries across Europe and North America. On the other side, First Choice was engaged in tour operating, travel agencies, charter airlines, seat broking and car rental broking, mainly in the UK and Ireland. Initially, Airtours announced its intention to acquire First Choice on 29th April 1999 and notified the European Commission of the proposed transaction

pursuant to Regulation No 4064/89. Suddenly after the merger notification, on 3rd June 1999, the Commission decided to initiate proceedings under Article 6(1)(c) of Regulation No 4064/89.

The merger was between two of the big four UK tour operators. The market shares of the four operators were: Thomson 27%, Airtours 21%, Thomas Cook 20% and First Choice 11%; and all other operators had under 5%. Commission delivered its final decision on 22nd September and prohibited the merger of Airtours and First Choice, two UK companies active principally in the package holiday business. The Commission found that in "the UK market for short haul foreign package holidays," the acquisition would create a 'collective dominant position' held jointly by Airtours/First Choice and two other large vertically integrated operators, Thomson and Thomas Cook. Airtours appealed to CFI against the Commission's decision. CFI through its decision* reversed the Commission's findings.

ISSUES INVOLVED AND FINDINGS OF COMMISSION AND CFI:**ISSUE 1: Definition of the relevant product market**

Commission in this case viewed that the relevant product market was the market for short-haul package holidays, thus eliminating potential competition from domestic holidays, non-package foreign holidays, and long haul package holidays. On the basis of the

* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=C ELEX:61999A0342:EN:HTML>

Commission's finding, there was insufficient substitutability between short and long haul package holidays for them to be considered part of the same market.

Airtours argued before the CFI that the Commission's definition of the market on short and long-haul package holidays are part of the same product market of 'foreign package holidays.' Airtours further argued, in respect of demand-side substitutability, that the Commission erred in relying on its finding that short-haul destinations are 'more exotic' than long-haul. Airtours challenged the commission's points on the average prices for long-haul destinations exceed those for short-haul, the two products being clearly differentiated.

Finally, the Court rejected Airtours claim on Commission's assessment of market definition and supply-side substitutability between long and short-haul based on the lack of interchangeability of aircraft on those routes.

ISSUE 2: Collective Dominance

On this issue, Commission argued that the merger of Airtours and First choice would create a position of collective dominance in the market, by reducing the number of significant competitors. Commission blocked Airtours proposed acquisition of First Choice with possibility of collective dominance under the principle used in *Gencor v Commission*[†]. CFI noted that there are three requirements to find that a merger would create a position of collective dominance. Firstly, there must be sufficient market transparency so that each member of the dominant oligopoly has the ability to know that other members are adopting and maintaining the same strategy. Secondly, there must be adequate deterrents to ensure that there is a long-term incentive not to depart from the common policy; each

[†] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=C ELEX:61996A0102:EN:NOT>

member of the dominant oligopoly must know that competitive actions on its part would induce responses that would render the competitive actions unprofitable. Lastly, proof that reactions of current and future competitors, and of consumers, will not "jeopardise the results expected" from following a policy of collective dominance. CFI noted that the Commission's decision was that the merger would create a position of collective dominance where no such position existed before, not that the merger would have strengthened an existing position of collective dominance.

Therefore, the CFI noted, it was necessary for the Commission to evaluate the level of competition in relevant markets before the merger, in order to assess the extent to which the merger would lead to reduction in the level of competition. CFI strongly, criticised the Commission's findings on dominant position. Further, CFI accepted Airtours submission that an analysis of competition prior to the notification is particularly important. The level of competition obtaining in the relevant market at the time of the notification is a decisive factor in establishing whether a situation of collective dominance has been created. CFI further found that the Commission had wrongly concluded that the high degree of transparency made the market conducive to collective dominance.

DECISION OF THE COMMISSION:

The Commission concluded the merger between Airtours and First Choice would lead to the creation of a collective dominant position in the UK market for short-haul foreign package holidays, as a result of which competition would be significantly impeded in the common market within the meaning of §2(3) of the Merger Regulation and, accordingly, blocked it.

DECISION OF THE CFI:

In this case, Airtours appealed against the Commission's decision on different grounds such as the market definition, the inference of collective dominance, and the alleged evidence about the likelihood of post-merger coordination. The CFI in its preliminary observations pointed out that Commission concluded that the merger would create, rather than strengthen, a dominant position. The CFI held that the Commission has failed to produce convincing evidence on the issue of collective dominance on this merger case. Further, the CFI found that Commission wrongly concluded that the degree of market transparency was sufficient to allow the major tour operators to be aware of the conduct of the others, to detect any deviations from the common policy, and to see retaliatory measures of what they are. According to the CFI, the Commission has failed to establish that the situation (*i.e.*, the level of competition) would be any different if there was a move from four major tour operators to three. The CFI also found that the Commission erred in identifying adequate deterrents and underestimated the likely reaction of smaller

tour operators, potential competitors and consumers as a countervailing force. The CFI on 6th June 2002 annulled the Commission's decision on both legal and factual grounds. Finally, CFI expressly criticised Commission's judgment being vitiated by a series of errors of assessment and being far from prospective analysis on cogent evidence.

Analysis Of The Order:

The CFI judgment on Airtours case is a milestone in the development of the concept of collective dominance in European competition law. In this case, the Commission's decision to block a major merger was overturned by court which shows the Commission's investigation was not correct. This case further increases the importance of judicial review in competition law cases. The most significant aspect of this judgment is the clear guidance it gives for the assessment of mergers in oligopolistic markets in EU.

Prepared By: Biranchi Narayan Panda, CIRC