

Collective Dominance Under the European Merger Control Regulation: The Implications of the *Airtours* Case

ABA Section of Antitrust Law “Brown Bag” Program

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Editor’s Note: On June 6, 2002 the European Court of First Instance (“CFI”) handed down its long-awaited decision in *Airtours PLC v. Commission of the European Communities* (Case T-342/99, [2002] 5 C.M.L.R. 7). It was the first of three merger cases to be overturned by the CFI in the last six months. In its *Airtours* decision, the CFI overturned the Commission’s decision of September 22, 1999, O.J. 2000 (L 93) 1, that the acquisition of First Choice PLC by Airtours PLC would create a position of collective dominance in contravention of the European Merger Control Regulation. In its *Airtours* decision, the Commission took the position that the proposed merger would create a dominant position in the U.K. market for short-haul foreign package holidays. According to the Commission, the aggregate market share of the three largest competitors post-merger (*Airtours/First Choice, Thomson, and Thomas Cook*) would have been 80 percent.

On appeal before the CFI, the issues focussed on whether the Commission had met its evidentiary burden. The parties agreed on the three conditions that are necessary for a finding of collective dominance: (1) the market must be transparent (i.e., each member of the oligopoly must have the ability to know how the other members are behaving); (2) the situation of tacit coordination must be sustainable over time (i.e., there must be an incentive not to depart from the common policy); and (3) the foreseeable reaction of current and future competitors, as well as of consumers, cannot jeopardize the results expected from the common policy.

In *Airtours*, the CFI held that the Commission failed to show that these three conditions were present. To the relief of many practitioners, the uncharacteristically critical disposition of the CFI to the Commission’s decision stimulated an internal review by the Commission of the procedures it employs to assess mergers—in particular, where oligopolistic dominance is alleged. The CFI’s disposition in Case T-5/02, *Tetra Laval v. Commission* (October 28, 2002), and Case T-310/01, *Schneider Electric v. Commission* (October 22, 2002), will most likely instill a sense of greater urgency to the internal review. On a substantive level, the decision of

the CFI in Airtours is significant because it clarifies the evidentiary burdens the Commission needs to meet in order to substantiate a finding of collective dominance. The subsequent holdings in Tetra Laval v. Commission and Schneider Electric v. Commission serve a similar purpose, albeit regarding different theories.

In view of the significance of the Airtours case, the International Antitrust and Foreign Competition Law Committee of the ABA Section on Antitrust Law sponsored a seminar addressing the issues raised by the Airtours case on June 26, 2002. As one of the Vice-Chairs of the Committee, I was fortunate to have the opportunity to moderate the seminar. The speakers were Götz Drauz, Director of the Merger Task Force of the European Commission's Competition Directorate; Paul Malric-Smith, Head of Unit IV, Merger Task Force; F. Enrique Gonzalez-Diaz, Head of Unit, Merger Task Force; Malcolm Nicholson of Slaughter and May, London; and Alan Overd of Lexecon Ltd., London.

Although the seminar preceded the publication of the Tetra Laval v. Commission and Schneider Electric v. Commission decisions, we thought that it would be beneficial to the antitrust community to print an edited version of the seminar because of the insights shared by the speakers. Although each speaker has had the opportunity to review and revise his comments, we have attempted to retain the original language to the extent possible.

ANDRE FIEBIG

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Andre Fiebig

ANDRE FIEBIG: Mr. Nicholson, who represented Airtours in the legal proceedings leading up to the decision of the CFI, has kindly agreed to be our first speaker.

MALCOLM NICHOLSON: The facts of the *Airtours* case are very easily and rapidly stated. The proper and real concern for regulators is how to approach mergers in industries characterized by only a few competitors. You have to devise a set of rules for distinguishing between those oligopolies that are benign, i.e., that operate in a competitive fashion, and those where the concern is that they will operate in an anticompetitive fashion in a way that, in the parlance, is characterized as "collective dominance." Now, the *Airtours* case involved an acquisition in the U.K. tour operator market. It would have reduced the number of competitors from four to three. We thought it was a fairly competitive market at the time. It had been examined by the U.K. Competition Commission just a couple of years earlier and had been given a clean bill of health. Anyone reading the newspapers knows that you can get a week holiday in Southern Spain for US \$150. Although it looked pretty competitive to us, the Commission disagreed. In essence, the Commission said that following the merger, it would be rational for the parties to constrain capacity and thereby maintain supracompetitive prices. The Commission prohibited the merger on that basis. We disagreed. Now Alan Overd can now take you over some of the key issues.

ALAN OVERD: The key issue in the *Airtours* case relates to perhaps one of the most difficult questions in competition policy: When is an oligopoly competitive? Put another way, given that oligopolies are characterized by the interdependence of large firms, how do we differentiate between unacceptable oligopolistic behavior and acceptable oligopolistic behavior? From an economist's perspective, the key criticism of the Commission's decision is that a detailed reading



Alan Overd

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shows that if the Commission's approach was allowed to stand, it would give the Commission the discretion to block any merger it wanted in an oligopolistic market.

What specifically is the objection to the application of collective dominance in this case? A good place to start is the distinction between unilateral effects and coordinated effects. Prior to the *Airtours* case, it was thought that collective dominance related to the possibility of coordinated effects. What was the basis for this view? Well, the first point to note is that the court's judgment in *Gencor v. Commission*, Case T-102/96, (March 25, 1999), was consistent with this view. Further, various Commission officials had confirmed this interpretation before the *Airtours* case actually started. Finally, the checklist of market characteristics that the Commission tends to use in collective dominance cases, such as product homogeneity, similar cost structures, absence of demand volatility, and so on, are textbook factors which are thought to facilitate coordination. The conditions necessary to establish and maintain tacit coordination are widely accepted. To be able to reach a mutual understanding to restrict competition, the market needs to be sufficiently transparent. Further, transparency helps to ensure that this behavior can be monitored effectively. There must also be a scope for credible punishment mechanism to undermine the well-recognized incentive to cheat. Further, as an aside, such an exercise has little point if entry barriers are low and other firms could come into the market rapidly if prices were to rise. The CFI in its judgment confirms the basis of this interpretation of collective dominance in paragraph 62 of its judgment.

The key economic criticism in our case was that in the *Airtours* decision, the Commission applied a different test. This test seemed to involve an objection to oligopolistic interaction per se. A good example is in paragraph 150 of the decision, which states the following:

What matters for collective dominance in the present case is whether the degree of interdependence between the oligopolists is such that it is rational for the oligopolists to restrict output, and in this sense, reduce competition in such a way that a collective dominant position is created.

Oligopolists are by definition interdependent. Restricting competition is rational if it leads to higher sustainable profit. This paragraph, along with many others in the decision, does not appear to describe tacit coordination, or to assess its feasibility. It might be argued that these sentences are somewhat ambiguous or maybe somewhat clumsily phrased. However, any claim that the [*Airtours*] decision was reasonable but merely badly drafted is unsustainable in the light of the court's demolition of the decision. In the specific context of the incorrect test for collective dominance applied in this case, I think a number of examples undermine such a claim but I would say, because time is short, I will pick only two.

The first relates to my assertion that the Commission merely described interdependent market conduct per se rather than a more sinister tacitly coordinated outcome. This is well captured in the court's discussion of the Commission's assessment of capacity setting in the foreign package-holiday market. The Commission asserted in paragraph 138 of the decision that there was already a tendency towards collective dominance in the market at present, particularly in the setting of capacity, although, as a footnote, it is worth noting that it later conceded in its pleadings that the market was not characterized by collective dominance premerger. But let's look at capacity setting.

The key plank of the Commission's case in this regard was that the cautious planning of capacity was symptomatic of a tendency towards collective dominance. But we argued that taking account of what your rivals are doing is an inherent feature of an oligopolistic market. It is, to quote the court in a previous judgment, consistent with the right of firms to "adapt themselves intelligently to the existing and anticipated conduct of their competitors." In the *Airtours* judgment, the

court noted that remarks made by executives stressing the importance of matching capacity to demand do not give the slightest indication that there is no competition between the main operators.

The second example of how the collective dominance test was misapplied relates to the need for a punishment mechanism. The need for a punishment mechanism, or its interchangeable variation, retaliation, is well recognized in the economic literature and indeed is explicitly stated in the U.S. Merger Guidelines. In the *Airtours* decision, the Commission states at paragraph 55 that it does not regard a strict punishment mechanism as a necessary condition for collective dominance, adding that where there are strong incentives to reduce competition, coercion may be unnecessary. Similar sentiments were expressed elsewhere in the decision, such as in paragraph 150. The court noted these comments by the Commission and describes the Commission's approach as "somewhat ambiguous," given that the Commission denied the need for a punishment mechanism but then went on to argue that punishment was perfectly feasible in this market anyway. The court went on to dismiss the hypothetical punishment identified by the Commission, such as the de-racking of brochures, as entirely inadequate.

Hence the court is particularly robust in its insistence on the need for a punishment mechanism, showing a good understanding, particularly in paragraphs 193 and 194, that tacit coordination is essentially a dynamic analysis. In economist's terms, it's essentially a repeated game—and that sustainable tacit coordination really does require the need for a deterrent mechanism to align the incentives of the oligopolists. So, in sum, the main economic criticism of the methodology of collective dominance in this case was that it really captured oligopolistic interdependence per se rather than capturing the more narrowly based tacit coordination.

What the court did not say in this case—and no one should run away with it—it did not say collective dominance does not exist. It says it does exist, it defines it, and it said it's not established on the facts of this case.

MALCOLM NICHOLSON: I want to draw a few conclusions from the methodology adopted by the CFI in its decision. The first one is that there is a natural complexity in the relationship between the Commission and the CFI. The Commission has a role in assessing mergers—it evaluates economic evidence—and the CFI is the review body. Traditionally, the European courts have said that where the Commission is engaged in an exercise of complex economic assessment, it will allow the Commission a degree of discretion, it will cut it some slack, and it will only look to see if the facts are a problem and if they substantiate the economic theory that the Commission is relying on. In this case, the CFI paid lip service to that point but concluded that, in a sense, where law and economics inter-react and cannot be distinguished, the court is prepared to articulate as a matter of law a test for collective dominance.

The second observation I want to make goes to burden of proof. When we were at the hearing in Luxembourg, the opening comment from the reporting judge was that this is not a state aid case. The presumption is that state aids are bad unless they are approved. This is a merger case. Mergers are good unless they are established to be bad. That rigorous approach to burden of proof permeates everything in the CFI's judgment in this case.

The third point is the way the CFI conducted its substantive assessment of the Commission's decision. The CFI concentrated on four areas. It looked at the relevance of existing competition; it looked at a number of the so-called competitive dominance checklist items; it looked at the evidence of retaliatory mechanisms as they were alleged to exist; it then looked at the competitive impact of the fringe.

Now, if we look at existing competitive pressures, the departure point of the CFI was really a question at the hearing where they said to the Commission, "You have said (as they did in their pleadings), that this market is competitive with the four players in it. What are the fundamental

—MALCOLM NICHOLSON

changes that mean it is not going to be competitive when there are only three players in it?” And again that issue permeates the way the court analyzed the case. As you look at paragraph 58 of the judgment, the court says that if there is no substantial alteration to competition as it stands, the merger must be approved. And on the facts, the court then found that incorrect inferences had been drawn from data related to the existing competitive situation involving the parties, how they went about the capacity planning process and the significance of market share changes, and so on and so forth.

The next broad area was the checking of a number of items from the collective dominance checklist. The court concentrates on three well-known questions for people looking to try to distinguish benign and anticompetitive oligopolies—namely, is the market static, or does it exhibit demand growth? Is there demand volatility? And is the market transparent (in which connection product homogeneity is relevant)? The point I want to make here is that on the facts the CFI found that the Commission did not establish (i.e., prove) the conclusions that it sought to draw in its decision, but the court also gave quite helpful guidelines or notes throughout the judgment. I’ll just take one example in relation to demand volatility. Paragraph 139 of the judgment states: “the Court observes in limine that, as the Commission recognizes, economic theory regards the volatility of demand as something which renders the creation of a collective dominant position more difficult. Conversely, stable demand, thus displaying a low volatility, is a relevant factor indicative of the existence of a collective dominant position insofar as it makes ‘deviations’ from the common policy (that is, cheating) more easily detectable.” Now, here you’ve got a little note from the CFI as to why a particular item on the collective dominance checklist is relevant. The court sets that out and then goes on to reflect the evidence in front of it. And as I say, on all those elements it concluded on our side of the fence rather than the Commission’s.

It did so similarly with the methodological approach in looking at the evidence of the retaliatory mechanisms that would be available.

Finally, and I freely admit by this time I think the Court was on a roll; I do not think it was the strongest part of our case. It found that the little fringe of smaller players would also exercise a competitive constraint.

So, at the end of that sort of analysis—and it’s a pretty detailed, full review, rigorous analysis by the CFI—whether or not you agree with the outcome, the methodological approach is, I think, extremely helpful. The court concluded in paragraph 294 of the judgment that the decision, far from basing its prospective analysis of post-merger competition on 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. And that seems to me to be a fairly firm statement by the CFI regarding this particular case. What the court did not say in this case—and no one should run away with it—it did not say collective dominance does not exist. It says it does exist, it defines it, and it said it’s not established on the facts of this case.

ANDRE FIEBIG: Over the years, the European courts have consistently given deference to the European Commission in the application of Article 81(3) of the EC Treaty, stating repeatedly that the application of Article 81(3) involves matters of complex, economic appraisals which are better left to the Commission. Why all of a sudden is the CFI now willing to engage in a complex economic assessment in the context of the Merger Control Regulation?

MALCOLM NICHOLSON: I think the true reason lies in the fact the court has grown up and grown in confidence over twenty or thirty years. It feels better equipped to second-guess some of these

things. I think it is also a feature of the fact that this is before the CFI, which is a full review court, rather than the European Court of Justice which is more of an appellate supreme court.

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GÖTZ DRAUZ: First of all, I can understand that Malcolm takes a certain degree of pride in the judgment; and I think he really deserves it. We are still assessing the judgment in its full importance and, of course, at the same time, we are assessing whether the judgment needs to be appealed. Therefore, what we can say today may be limited to some extent.

Our first impression is that the judgment should not be read as intending to limit the scope of the dominance concept in the context of the Merger Control Regulation. What the CFI has done, and I think this is very much welcomed despite the sometimes very critical language used by the CFI, is to clearly establish the criteria which must be fulfilled in order to reach a finding that a particular transaction is likely to result in the creation or strengthening of dominance in the form of tacit collusion. In doing so, the CFI has made it clear that a high standard of proof must be met before we can reach such a conclusion. What I think it has not done, however, is to say that this is as far as Article 2 of the Merger Control Regulation can be stretched in terms of dominance scenarios involving multiple firms. The case before the CFI as we understood it and as the parties understood it was a case of tacit collusion. It was not a unilateral effects case. So my first point is that we do not interpret that judgment as limiting the scope of the unilateral effects theory because that was not the question before the CFI. It was a case of tacit collusion.

Let me address one point Malcolm has made when he talked about methodology. He suggested that the CFI has departed from the traditional way that it reviews these kinds of economic issues. Malcolm suggests that the traditional way is to check whether there are manifest errors of assessment. As far as I see the case, it was one where we could not convince the CFI. One of the main building blocks had been a study of the UK Monopoly and Mergers Commission that was published only two years earlier. The major finding of this study was that a market with four players was sufficiently competitive. In the *Airtours* case, the CFI basically said that if the market has been competitive, then we simplify by saying that the market was “white.” Now, let us look at what the market is with three players—has the market which has been previously white, now becomes black? We have tried, and I recognize we may not be fully clear and convincing here, and I have no problem of taking blame for certain inconsistencies, but our main argument was that the market with four players was already reduced in competition, and the change from four integrated players to three integrated players had an effect of making collusive behavior a real possibility. Actually, this is a problem in any oligopolistic dominance case—it is a decision to make when the market has sufficiently changed—whether to intervene. If you look at an oligopolistic market with five players, is it when you go from five to four, is it if you go from four to three, or three to two, or two to one? Of course, this is a very difficult exercise and, again, I would like to say we have failed to sufficiently clarify these issues.

The question concerned the type of punishment mechanism, rather than the necessity of one.

PAUL MALRIC-SMITH: I just wanted to pick up on a few points which I think are important in looking at the *Airtours* case. The first concerns the question whether the Commission tried to introduce some novel theory of collective dominance in the case. When one reads the judgment of the CFI, I think it reflects orthodox theory about the elements that would lead to a finding of tacit coordination amongst a small group of players. The Commission’s theory in this case was not different from the CFI’s position. For example, the Commission’s position was not that punishment mechanisms were unnecessary. There was a question as to what sort of punishment mechanism would be a sufficient one. I think we felt that, for example, the reversion to a more competitive equi-

—GÖTZ DRAUZ

—PAUL MALRIC-SMITH

librium as a result of cheating could be a punishment mechanism. I think we were well in line with U.S. jurisprudence and thinking on that point. The question concerned the type of punishment mechanism, rather than the necessity of one.

The observation that the Commission could block any collective dominance case that came along on the basis of the theories which we were supposedly developing in this case goes too far. As has been said, there are certainly opportunities to make a draft better and clearer. No doubt those things could be done. As regards fringe competition, we didn't think that this could effectively constrain the parties to the oligopoly if there were a collective dominant position operating and reducing capacity. On the question of growth in the market, the conclusion overall was, and everybody seemed to agree, that the market was growing somewhere in the region of 3 to 4 percent a year. That is not incompatible with a finding of tacit coordination.



F. Enrique Gonzalez-Diaz

My understanding is that the CFI specifically decided not to rule on the unilateral effects issue.

—F. ENRIQUE GONZALEZ-DIAZ

F. ENRIQUE GONZALEZ-DIAZ: I would like to come back to the issue of whether the Commission actually tried to advance a theory of unilateral effects or a theory of tacit collusion, and to what extent the CFI has ruled out the possibility of analyzing a case under a theory of unilateral effects in an oligopolistic market. My understanding is that the CFI specifically decided not to rule on the unilateral effects issue. Airtours developed the argument that the Commission was applying a different test in this case and that this test was not acceptable for a number of reasons. In deciding the case, the CFI has specifically taken care not to rule on this issue and has concentrated on whether or not the conditions for tacit collusion were supported by the facts in this case. The CFI did not thus mean to limit the scope of the Merger Control Regulation to cases of tacit collusion. In that regard, I fully concur with Götz Drauz in reaching the conclusion that this judgment does not close any doors as to how the notion of dominance can be applied in future cases.

MALCOLM NICHOLSON: I have a degree of sympathy with Götz when he says it is a problem when it goes from five to four, or four to three, or three to two. I see that. The fact of the matter is, the way the pleadings in this case developed, the Commission conceded that the market was sufficiently competitive premerger. That it was going from four to three brought about the definitive change and therefore the line of questions of the court—well, what's the difference with four and with three; the factors you've identified, the structural features exist already; and if you're going to constrain capacity, you can do it when there are four players instead of when there are three—that seems to me to be the particular bed the Commission chose to lie on and the court was not happy with it. In relation to collective dominance and the unilateral effects, I am quite clear that, in effect the CFI told the Commission they applied an incorrect test. At the beginning of the section on dealing with this particular case—the particular facts in issue—it sets out the framework that had to be applied in collective dominance cases. That's in paragraphs 61 and 62 of the judgment. I do not want to go over it now, but it's there and that is what it says has to be established for collective dominance. Remember that when we're talking about collective dominance, it is a theory that says the players in the market are so interdependent that they operate as if they were one single monopoly. Now, that's a slight over-simplification, but that is the whole thrust of the analysis. If my Commission colleagues are saying that you are one player of four and you've got a 15–20 percent market share, and the Commission can look and be seeking to identify unilateral effects, then what we said was unilateral effects really corresponds to single-firm dominance—not collective dominance—that's where you look at unilateral effects. As it appeared to us in its original decision, the Commission was intending to depart from the tight and fairly firm test for col-

lective dominance, tacit collusion, coordinated effects as understood in U.S. antitrust law, and rely on incentives and rational behavior. What we were trying to argue in our pleadings was to say incentives and rational behavior are not enough to conclude that the players are acting as if they were a single monopoly. It is intelligent adaptation of behavior in the light of your understanding of what other people could do, and that's not a problem under the competition rules and does not become a problem under the competition rules until such time as you have single-firm dominance.

GÖTZ DRAUZ: I fundamentally disagree with the description of the scenarios that could be the subject of scrutiny in the context of oligopolistic markets. I think that Malcolm is depicting a situation where you either have a single dominant firm charging potentially supracompetitive prices, or you have a group of companies colluding tacitly in the marketplace, with nothing in between these two extremes. And we all know, and there are theories available to support this position, you could still have situations in oligopolistic markets where a concentration could lead to a price increase even if there is no tacit collusion. Current economic theory shows that in the context of oligopoly, a merger could lead to a price increase even in the absence of collusion. In this particular case, the Commission did not advance a theory of one-shot moves based on any of these models. We defended the case on the basis of tacit collusion. It is on this basis that the court has judged the merits of the case. I still believe that we can read this judgment as not closing the door to any future cases advanced on a different basis. It seems to me that we have to agree to disagree because Malcolm feels very strongly about the fact that the court has closed the debate and opened a huge gap in the potential application of Merger Control Regulation to anticompetitive mergers.

I think if anything, this case shows a very strong need for a much more rapid appeals process, and one that certainly goes far beyond the proposal that's been implemented for the fast track procedure.

ALAN OVERD: I think there is no denying that unilateral effects have a key role to play in merger analysis, but I would merely point to the U.S. Merger Guidelines where there is a clear distinction between coordinated effects and unilateral effects. If you reach a position where collective dominance is in one case coordinated effects and in another case coordinated effects plus unilateral effects, or whatever, things get very confused. I think we're mixing up a debate here between what is an appropriate merger control test and how best to apply the test of dominance that we have at the moment. I also think we're missing one of the main points of the judgment, and that is, when Commission decisions are subject to forensic scrutiny by a third party, a number of things can come out of the woodwork. And it's worth stressing that this case took three years for the court to reach a judgment. I think in the discussion of what is the ongoing debate relating to which is preferable—a significant lessening of competition test or dominance test—we should also bear in mind that the institutional arrangements are very important. I think if anything, this case shows a very strong need for a much more rapid appeals process, and one that certainly goes far beyond the proposal that's been implemented for the fast track procedure.

ANDRE FIEBIG: The evidentiary problems that the Commission encountered in the *Airtours* case may stem from the necessity to fit the coordinated effects theory into the dominance test set forth in the Merger Control Regulation. Would the introduction of a substantial lessening of competition test in the Merger Control Regulation solve that problem?

—ALAN OVERD

GÖTZ DRAUZ: I do not necessarily think that changing the substantive test would have an impact on the degree of scrutiny that the court is going to devote to the arguments on the factual evidence. I think that the debate on substantial lessening of competition versus dominance is more

linked to whether or not there is a gap in the Merger Control Regulation or whether or not there is a potential anticompetitive effect arising out of a merger which can be caught by the dominance test. The court is going to be less flexible with the Commission when the Commission assessment is based on a set of facts and findings of economics that it does not share.

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MALCOLM NICHOLSON: I think it is fundamentally important to distinguish the two elements to which substantial lessening of competition may or may not give rise. There may be a major gap in the existing dominance test, which means that you need a new test. What it cannot be used for, and I'm delighted to hear Enrique say that he agrees, is to enable the Commission to substitute lower burdens of proof, lower degrees of substantiation of the theory they are advancing in a given case. You've got to distinguish the theory and the evidencing of the case, and the evidencing of the case must be as rigorous as the court suggests in this case. Otherwise, I think we're all lost.

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QUESTION FROM AUDIENCE: Do you think that *Airtours* has significance in terms of the margin of deference that the CFI will give to the Commission's findings, for example, that competitors would be unable to compete and eventually leave the market segment, and conclusions such as eventual price increases?

in this case.

MALCOLM NICHOLSON: I think the *Airtours* decision shows that in an appropriate case, the CFI is prepared to look very closely at the substance of the case. I think it probably is going to depend on whether it smells a rat. The court needs to read the dossier, read the pleadings, see that this is a real issue, and if they think there is, then they get into it. If they think there is on the facts of *GE/Honeywell* (and we are not involved in it) so I do not know, then, yes, clearly the *Airtours* case shows that they are prepared to do so if they think they need to. There will no doubt be cases where the court decides that there is not that need; there is not enough in the appeal to make it worthwhile to devote that effort. In that case it will not.

Otherwise, I think we're all lost.

—MALCOLM NICHOLSON

GÖTZ DRAUZ: I fully agree this time with Malcolm. I do not think this case represents a fundamental change in the way the CFI is looking at its role. As I said earlier, I think the court was not convinced about the Commission's case. The court was disturbed in a certain way by some inconsistencies and some shortcomings which, again, I fully accept. I think the court under these circumstances decided to have a very close look at the case. And I think in that way it is one of the very helpful outcomes of the court because it reminds everybody that you can only win such a complicated case in a court of law if you can show that you have made a good case and that you have basically adhered to do all the necessary principles. I also believe that the court found it important to emphasize that there is a court of law in the system, and this cannot be and must not be overlooked. I think this is the clear message from *Airtours*.

ANDRE FIEBIG: What is the significance of the *Airtours* case for the application of Article 82 of the EC Treaty? For example, would the punishment activities necessary to support a collective dominance theory constitute abuse under Article 82?

MALCOLM NICHOLSON: I do not necessarily believe that you have to have absolute identity of the definitions of dominance, including collective dominance, in relation to Article 82 of the EC Treaty and the Merger Control Regulation. You can't allow the definitions to depart significantly

because otherwise you get into a terrible confusion. I do not think the punishment mechanism is particularly relevant as an indicator of abuse although it is relevant as a defining feature on whether or not these independent players are acting as if they were a single dominant player. And punishment mechanisms of a sort constitutive of abuse are those directed at third parties outside the collectively dominant players and not, as it were, within the collectively dominant players as a feature constitutive of their position.

PAUL MALRIC-SMITH: I would very much go along with what Malcolm has said. The analysis also has to consider the harm that you are trying to address. In cases of abuse of dominant position, there may be various forms of harm to competition which you might be concerned with.

QUESTION FROM AUDIENCE: In the future, if the Commission is faced with an oligopoly situation and the facts do not support a tacit coordination claim, will the Commission still bring the case or will it still argue that the merger will create a collective dominance position or a single-firm dominance position?

GÖTZ DRAUZ: We have no concrete plans to challenge a transaction on a specific theory. We have to see what kind of cases we get. But I can give you a hypothetical example. Take an oligopoly of four players where the fourth player is the most active company in that market and tries to gain market share by adopting a policy of undercutting the other three. Now, in my example, the largest competitor proposes to acquire the fourth largest, and therefore basically eliminates the player that has a different policy from the other ones. This is a transaction we certainly would carefully consider challenging. By eliminating, if you like, the “active” competitor, it will benefit the three other ones who have, for instance, a similar policy and, therefore, allow them to raise prices by having eliminated that obstacle. That is one scenario. In the first place you will look at the effect unilaterally by buying out this active competitor, and second, you would look at the effect on the remaining oligopoly players.

QUESTION FROM AUDIENCE: In your hypothetical case, what will the last paragraph of your decision read like? Would the decision conclude that the merger is not compatible with the Merger Control Regulation because it creates a dominant position or a joint dominant position?

GÖTZ DRAUZ: In my opinion it probably would call it a joint dominant position. I should also, of course, remind you that the test in the Merger Regulation does not talk about single-dominance or collective dominance. It talks about a creation or strengthening of a dominant position as an effect of which effective competition would be significantly impeded. In other words, I am not sure that the only avenues for the test we have at the moment are to identify single or collective dominance. But I have to say this is a very hypothetical answer on a hypothetical question. I’m quite sincere that we will certainly see that our test here in Europe even without changing it—and a position on that has not been taken; you probably know that Commissioner Monti has made it very clear that for the moment we have an open mind on it—we would try to build as convincing a case as possible and would see whether our courts will follow us in on this approach to bring European law in line with, if you like, basically U.S. law.

QUESTION FROM AUDIENCE: The CFI was careful in its judgment to talk about manifest error and margin of appreciation, at least in relation to market definition. However, the CFI never really

came back to that formulation when looking at the evidence and consequently ended up with an unfamiliar formulation of the Commission not having met the requisite standard of proof. And the question coming out of that is, what in the past has the Commission regarded as the burden of proof, and what do you think the CFI means by that formulation?

PAUL MALRIC-SMITH: The standard, of course, is manifest error. At the end of the day, the CFI came up with a series of errors which added up to a picture they then characterized as not having met the legal standard. I do not think there is a fundamental change in the court's attitude to the burden of proof. I think in this case they obviously have looked very carefully. I think the CFI has made tough judgments for the Commission in the past; in other cases it has certainly made tough decisions against the Commission.

GÖTZ DRAUZ: I do not believe it is a fundamental change by the court.

QUESTION FROM AUDIENCE: Can a single undertaking alone abuse a collectively dominant position under Article 82 of the EC Treaty?

MALCOLM NICHOLSON: It seems to me that if all the conditions for collective dominance are met for the purposes of Article 82 of the EC Treaty, then if one person undertakes action which inures to its benefit and to the benefit of other members of the oligopoly and that action is in some way abusive, then that can involve a breach of Article 82 by that one member of the collectively dominant group. Now, whether or not that's right, I do not know, but that seems to me to be a logical and sensible way of approaching the issue.

QUESTION FROM AUDIENCE: In the United States, it can also be a violation to have a market structure that increases the possibility of interdependence without tacit collusion. I do not think I heard the Commission respond to that. Does the Commission have a position as to whether something less than tacit collusion could be caught by the Merger Regulation?

PAUL MALRIC-SMITH: There could be a case that involves a structure which leads to higher prices without the existence of tacit coordination. In principle that is a possibility.

QUESTION FROM AUDIENCE: I gather from your answers that if the Commission finds the right case it may employ a unilateral effects theory.

PAUL MALRIC-SMITH: That is possible. ●