have been inapplicable. Nonetheless the correct result was reached on the facts.

DUNCAN SHEEHAN

COLLECTIVE DOMINANCE CLARIFIED?

ARTICLE 82 EC prohibits the abuse of a dominant position by "one or more undertakings". The EC Treaty does not define the circumstances in which more than one undertaking can be said to occupy a dominant position; the meaning of what has become known as joint/collective dominance has been developed by the Courts of Justice and First Instance in cases decided under both Article 82 EC and the EC Merger Regulation (ECMR). Hitherto the case law has failed to make clear when and why undertakings can be said to be in a collective dominant position. *Airtours* (Case T-342/99 [2002] E.C.R. II-2585), a decision on the application of the ECMR, provides welcome clarification of what a collective dominant position is and of the legal test applied in order to establish its existence.

Under Article 82 EC the development of collective dominance can be said to start with the CFI judgment in *Italian Flat Glass*, (Joined Cases T-68/89, T-77/89, T-78/89 *Società Italiana Vetro* v. *Commission* [1992] E.C.R. II-1403, at para. [358]). Here collective dominance is said to require independent undertakings to be "united by such economic links that, by virtue of that fact, together they hold a dominant position *vis-à-vis* the other operators on the same market". In *Almelo* (Case C-393/92 [1994] E.C.R. I-1477, at para. [42]) the Court of Justice made it clear that "economic links" enable otherwise independent undertakings to adopt common conduct, and as such to operate as a single entity. What remained to be clarified was what constitutes an economic link and how these links enable undertakings to adopt common conduct.

Under the current ECMR, which controls the creation or strengthening of dominant positions, collective dominance has been accepted as a relevant concern and defined as a situation in which one or more undertakings, *inter alia* because of "correlative factors" which exist between them, "are able to adopt a common policy on the market and to act to a considerable extent independently of their competitors, their customers, and also of consumers" (Joined Cases C-68/94 and C-30/95 *Kali und Salz* [1998] E.C.R. I-1375, at para. [221]). In *Gencor* (Case T-102/96 [1999] E.C.R. II-753, at paras. [273–274]) the CFI focused on the factors

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enabling independent undertakings to adopt common conduct; these factors could be structural or contractual. Further, in relation to structural factors, a "relationship of interdependence" caused by "tight oligopoly" was deemed to be a legally relevant cause. What remained unclear was whether all situations of tight oligopoly are situations of collective dominance.

On 29 April 1999, Airtours (now MyTravel) sought to take over First Choice and notified the European Commission of the proposed merger. The Commission found that, whilst the pre-merger situation was not one of collective dominance, the post-merger situation would put the three remaining large undertakings in a collective dominant position, and once in this position they would reduce the number of holidays provided, leading to an increase in price (Decision 2000/276/EC *Airtours/First Choice* O.J. [2000] L 93/1). Airtours felt that, in finding that a collective dominant position would be created, the Commission had applied a test that did not correctly identify situations of collective dominance. Airtours thus brought an action challenging the Commission's finding, and this provided an opportunity for the CFI to clarify both the meaning of collective dominance and how it is to be identified.

Economists accept that in certain markets some firms may be independently aware that coordinated conducted is more profitable than independent action and independently act in the expectation that others in the market place will act in the same way. The firms act *as if* they had colluded, but without the need for explicit collusion; this situation is referred to as tacit coordination. At paragraph [61] of its *Airtours* decision, the CFI held that a collective dominant position exists when a number of firms can become aware that it is more profitable to adopt a common policy and can adopt that common policy without having to enter into an agreement or resort to a concerted practice. The judgment thus makes it unambiguously clear that since tacit coordination enables independent firms to act as a single entity, it is included in the meaning of collective dominance.

The CFI held that undertakings can act as a single entity without the need for explicit coordination when two conditions are met. The first is that the market is *transparent*. Transparency is required for two reasons. First, it allows a mutually beneficial market strategy to be identified; each party can independently assess whether it is rational to act *as if* they have colluded to follow an anti-competitive strategy. Transparency's second function is to enable firms to monitor adherence to the common policy.

Whilst transparency allows adherence to be monitored, it does nothing to prevent deviation. Preventing deviation is considered by

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a second condition—*sustainability*. There must be a disincentive for deviating from the common policy that sustains adherence to the common policy. The CFI ruled that the disincentive sustaining the common policy must be the threat of retaliation/punishment (see paras. [183–207]; Rivas, (2003) 40 C.M.L.Rev. 1187 at [1235]). All firms know that, if they deviate, adhering firms will punish them. It is this relationship between adherence and deviation that enables adherence to be seen as collusive/cooperative, although the collusion is tacit.

Transparency and sustainability enable a group of firms to act as a single entity. This is not enough; the de facto single entity must be dominant. The CFI thus add that as a third condition there must be an *absence of competitive constraints*. It must be likely that neither current nor future competitors, nor consumers, can react in a manner that makes the common policy unprofitable. This is the familiar test of dominance. The three-stage test introduces a degree of predictability as to when a position of collective dominance will be identified. The test is satisfied when a number of undertakings are able to act as a single entity and, treated as a single entity, the body would be dominant. Collective dominance allows Article 82 EC to capture coordination by non-dominant firms that enables them to act *as if* dominant (para. [76]).

Since the Court has regularly used ECMR and Article 82 EC case law on collective dominance interchangeably, it might have been expected that *Airtours* would be part of the closing chapter on the meaning of collective dominance. However, in November 2003, the Council agreed that a new Merger Regulation should come into force on 1 May 2004 (see Press Release of 27 November 2003, IP/03/1621 available from http://europa.eu.int/rapid/start/cgi/guesten.ksh, and Council Regulation 139/2004 O.J. [2004] L 24/1). One aim is to de-couple explicitly the meaning of collective dominance under the new ECMR from the meaning of collective dominance under Article 82 EC (Explanatory Memorandum O.J. [2003] C 20/4, para. 57). What is urgently required is a ruling on collective dominance and the propriety of cross-fertilisation between the concept under the Article 82 EC and both the current and new Merger Regulation.

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