

## Case T-212/03

**MyTravel Group plc**

**v**

**Commission of the European Communities**

(Non-contractual liability of the Community — Competition — Decision declaring a concentration incompatible with the common market — Annulment of the decision by a judgment of the Court of First Instance — Sufficiently serious breach of a rule of law intended to confer rights on individuals)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 9 September 2008 . . . . . II - 1973

### Summary of the Judgment

1. *Non-contractual liability — Conditions — Sufficiently serious breach of Community law — Concept*  
(Art. 288, second para., EC)
2. *Non-contractual liability — Conditions — Sufficiently serious breach of a rule of law intended to confer rights on individuals — Concentration transactions*  
(Art. 288, second para., EC; Council Regulation No 4064/89, Arts 2(1), (2) and (3), and 8(2) and (3))

3. *Non-contractual liability — Conditions — Sufficiently serious breach of Community law (Art. 288, second para., EC)*
4. *Competition — Concentrations — Examination by the Commission — Commitments by the undertakings concerned to render the notified transaction compatible with the common market — Taking into account of commitments given after the deadline — Conditions (Council Regulation No 4064/89, Arts 2(2), 6(2), 8(2) and 18(3); Commission Notice on remedies acceptable under Regulations Nos 4064/89 and 447/98, para. 43)*
5. *Procedure — Costs — Order that the successful party bear its own costs (Rules of Procedure of the Court of First Instance, Art. 87(2) and (3))*

1. The concept of a breach of Community law sufficiently serious to give rise to the non-contractual liability of the Community does not comprise all errors or mistakes which, even if of some gravity, are not incompatible with the normal conduct of an institution responsible for overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion.

action for annulment cannot of themselves be sufficient to give rise to a manifest and grave infringement of the limits imposed on the Commission's discretion in the control of concentrations, particularly in the presence of a complex oligopoly situation.

The fact that the Court of First Instance annulled a decision of the Commission which declares a concentration incompatible with the common market cannot be equated, without further analysis, to the finding of a sufficiently serious breach and was not of itself sufficient to give rise to non-contractual liability on the Community's part. In particular, mere errors of assessment and the lack of relevant evidence in the context of an

To accept that the position was otherwise would risk compromising the capacity of the Commission fully to function as regulator of competition, a task entrusted to it by the EC Treaty, as a result of the inhibiting effect that the risk of having to bear the losses alleged by the undertakings concerned in such circumstances might have on the control of concentrations.

Because of the need to have regard to such an effect, which is contrary to the general Community interest, a failure to fulfil a legal obligation, which, regrettable though it may be, can be explained by the objective constraints to which the institution and its officials are subject in the control of concentrations, cannot be held to constitute a breach of Community law which is sufficiently serious to give rise to the non-contractual liability of the Community. Conversely, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, are objectively subject.

(see paras 40-43, 85)

2. Article 2(2) of Regulation No 4064/89 on the control of concentrations between undertakings, which applies to an approval decision, and Article 2(3) of the regulation, which covers a prohibition decision, fall to be interpreted in the light of Article 2(1) of the regulation, which sets out the specific factors to be taken into account by the Commission in assessing the compatibility or incompatibility of a concentration

having a Community dimension with the common market.

The purpose of those provisions, taken together, is to confer rights on individuals in that, when it has been notified of a concentration under Regulation No 4064/89, the Commission is, in principle, required to adopt a position, either by approving the concentration or by prohibiting it, in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue. Thus, if the conditions laid down in Article 2(2) of that regulation are satisfied, an undertaking which has notified a concentration having a Community dimension is entitled to have that concentration declared compatible with the common market. That undertaking cannot, however, put the concentration into effect without the Commission's approval, and a prohibition decision has serious consequences. Such an intervention by the Community in the business world, which requires an undertaking to obtain approval before putting the proposed concentration into effect and obliges the Commission to prohibit the implementation of the concentration if it should be found to be incompatible with the common market, necessarily implies that undertakings which are refused authorisation may seek compensation for the harmful consequences of such a decision if it is established that the decision was founded on a sufficiently serious breach of the substantive rules applied by the Commission in order to assess the compatibility of the concentration concerned with the common market.

Furthermore, the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to involve the liability of the Community under Article 288 EC.

Article 2(3) of Regulation No 4064/89, read in conjunction with Article 2(1) and (2) and with Article 8(2) and (3) of the regulation, taken together with the duty of diligence, therefore lay down rules the purpose of which is to confer rights on undertakings concerned by a decision which prohibits a concentration being put into effect.

(see paras 47-50)

(3) of the regulation could constitute breaches that are sufficiently serious to give rise to the non-contractual liability of the Community.

However, for such a finding to be made, it is necessary to bear in mind that the economic analyses necessary for the characterisation in competition law, of a given situation or transaction involve generally, as regards both the facts and the reasoning based on the recital of the facts, complex and difficult intellectual exercises, which may inadvertently contain some inadequacies, such as approximations, inconsistencies, or indeed certain omissions. That applies all the more in the control of concentrations, in view in particular of the time constraints to which the institution is subject.

3. In the field of non-contractual liability, the possibility cannot be ruled out in principle that manifest and grave defects affecting the economic analysis which underlies a decision adopted on the basis of Article 8(3) of Regulation No 4064/89 on the control of concentrations between undertakings and which declares a concentration incompatible with the common market under Article 2(1) and

Such inadequacies in the economic analysis are all the more likely to occur where, as in the case of the control of concentrations, the analysis has a prospective element. The gravity of a documentary or logical inadequacy may, in such circumstances, not always constitute a sufficient circumstance to cause the Community to incur liability.

The Commission enjoys a discretion in maintaining control over Community competition policy, which means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it, and, as a corollary, that it enjoys a degree of latitude regarding the choice of the economic instruments available to it and the choice of the appropriate approach to the study of a matter, provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied consistently.

The margin of discretion which the Commission must be accorded in the context of issues of non-contractual liability concerning the control of concentrations applies both in the individual examination of errors which may have been committed at the stage at which the effects of the concentration on competition were analysed and at the stage when those errors fall to be considered overall.

(see paras 80-83, 95)

4. As part of the arrangements for control of concentrations, the undertakings concerned may submit commitments to the Commission in order to obtain a

decision finding their concentration to be compatible with the common market. Depending on the stage which the administrative procedure has reached, the commitments proposed must allow the Commission either to form the view that the notified concentration does not raise serious doubts as to its compatibility with the common market at the stage of the preliminary examination or to respond to the objections sustained during the detailed investigation. Those commitments therefore enable, at the initial stage, the initiation of a detailed investigation phase to be avoided, or, thereafter, a decision declaring that the concentration is incompatible with the common market to be avoided. Article 8(2) of Regulation No 4064/89 on the control of concentrations between undertakings allows the Commission to attach to a decision declaring a concentration compatible with the common market in accordance with the criterion laid down in Article 2(2) of the regulation conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

Having regard both to the significance of the financial interests and the industrial or commercial stakes inherent in that type of transaction, and to the powers available to the Commission in the field, the undertakings concerned can be expected to do everything to facilitate the work of the administration. For the same reasons, the Commission must display the utmost diligence in performing its supervisory duties in the field of concentrations.

With regard to commitments which are submitted out of time, it follows from the Commission Notice on remedies acceptable under Regulation Nos 4064/89 and 447/98 that the parties to a notified concentration may have such commitments taken into account subject to two cumulative conditions, namely, firstly, that those commitments clearly and without the need for further investigation resolve the competition concerns previously identified and, secondly, that there is sufficient time to consult the Member States on those commitments.

(see paras 116-119, 127)

be ordered to bear its own costs where it produces, only at the hearing and following an order of the Court adopted on the basis of Article 65(b) and of the third subparagraph of Article 67(3) of its Rules of Procedure documents requested by the applicant, which were important in allowing the applicant to substantiate its case in the present proceedings and in allowing the Court to adjudge the action and which ought to have been furnished at the time at which the Commission lodged its pleadings, even though it may be considered that, a priori, the documents in question were not of a type to which a party to a concentration can have access under Regulation No 4064/89 or under Regulation No 1049/2001, and although the point had no impact on the case in question in so far as those documents were finally submitted in the course of these proceedings.

5. Under Article 87(2) and (3) of the Rules of Procedure of the Court of First Instance, the Court may decide that a party which does not fail on any head can

(see paras 135-139)