JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

9 September 2008 *

In Case T-212/03,

MyTravel Group plc, established in Rochdale, Lancashire (United Kingdom), represented by D. Pannick, QC, M. Nicholson and S. Cardell, Solicitors, A. Lewis, Barrister, and R. Gillis, QC,

applicant,

v

Commission of the European Communities, represented initially by R. Lyal, A. Whelan and P. Hellström, and subsequently by R. Lyal and F. Arbault, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by W.-D. Plessing and M. Lumma, acting as Agents,

intervener,

* Language of the case: English.

APPLICATION for damages for the loss allegedly suffered by the applicant by reason of the unlawfulness of the proceedings for determining whether the concentration between the applicant and First Choice plc was compatible with the common market,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of J. Azizi, President, J.D. Cooke, E. Cremona, I. Labucka and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 29 April and 20 May 2008,

gives the following

Judgment

Facts

1 On 29 April 1999, the applicant, the United Kingdom travel company Airtours plc, which has since been renamed MyTravel Group plc, announced its intention to

acquire the whole of the issued share capital of First Choice plc, one of its competitors in the United Kingdom, on the stock market. On the same date, the applicant notified the proposed concentration to the Commission with a view to obtaining an approval decision on the basis of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

2 By decision of 3 June 1999, the Commission found that the concentration gave rise to serious doubts as to its compatibility with the common market and decided to initiate detailed investigation proceedings in accordance with Article 6(1)(c) of Regulation No 4064/89.

3 On 9 July 1999, the Commission sent the applicant a statement of objections under Article 18 of Regulation No 4064/89, in which it set out the reasons for which it took the preliminary view that the proposed concentration would create a collective dominant position on the United Kingdom short-haul foreign package holiday market. The applicant replied to the statement of objections on 25 July 1999.

4 On 6 September 1999, the Commission sought the opinion of interested third parties on a set of proposed commitments submitted by the applicant, which were formalised by the latter on 7 September 1999. The third parties concerned had until 8 September 1999 to reply and their replies did not allay the Commission's concerns.

5 On 9 September 1999, the majority of the members of the Advisory Committee on concentrations decided that the commitments proposed by the applicant would not allay the competition concerns identified at that stage by the Commission.

6 The commitments referred to above were submitted within the period of three months from the date on which the detailed investigation proceedings were initiated, laid down by Article 18(2) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1) in order to allow the undertakings concerned to submit the commitments to the Commission that they would wish to have taken into account in a decision based on Article 8(2) of Regulation No 4064/89. That three-month period ended on 7 September 1999.

7 On 14 September 1999, the applicant sent a new set of commitments, based on the previous version. A meeting was held at the Commission on 15 September 1999 to discuss those proposals, following which the applicant submitted a firm set of revised commitments to the Commission.

8 On 16 September 1999, the applicant requested an extension to the three-month period laid down by Article 18(2) of Regulation No 447/98, which may, in exceptional circumstances, be granted by the Commission. In the present case, the applicant put forward three exceptional circumstances to justify such an extension: (i) the difficulties in finding an appropriate alternative; (ii) the fact that it had entered into constructive dialogue during the administrative procedure; and (iii) the change of Commission at that time.

9 On 22 September 1999, that is to say, 15 days before the end of the period of four months from the date of the initiation of the detailed investigation proceedings laid down by Article 10(3) of Regulation No 4064/89 as being the maximum period for adopting a decision under Article 8(3) of Regulation No 4064/89 — which ended on 5 October 1999 — the Commission declared the concentration incompatible with the common market and with the EEA Agreement by Decision 2000/276/EC (Case IV/M.1524 — Airtours/First Choice) (OJ 2000 L 93, p. 1) ('the Airtours decision').

10 The Commission stated in recital 193 of the Airtours decision that the applicant had submitted commitments at a very late stage in the proceedings (15 September 1999). It also stated that there was nothing in those commitments which the applicant could not have included in a commitment submitted within the three-month period laid down by Article 18(2) of Regulation No 447/98, that the applicant had not put forward any reasons which could be regarded as constituting 'exceptional circumstances' that might reopen the three-month period for the purposes of that provision and that the Commission did not have sufficient time available in which to examine those commitments effectively.

11 The applicant brought an action for the annulment of the Airtours decision. By judgment of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, the Court of First Instance annulled that decision, declaring the third plea, which related to the lawfulness of the Commission's assessment of the effects of the Airtours/First Choice concentration on competition in the common market, to be well founded, without it being necessary to examine the fourth plea, which concerned the lawfulness of the Commission's assessment of the commitments submitted during the administrative procedure.

Procedure and forms of order sought

12 By application lodged on 18 June 2003, the applicant brought the present action.

13 By decision of 22 July 2003, the case was assigned to a chamber sitting in extended composition.

14 By order of 13 November 2003, the Federal Republic of Germany was granted leave to intervene in the proceedings in support of the form of order sought by the Commission.

15 By letter of 22 March 2004, the Commission requested the Court to order the applicant to guarantee its potential liability to pay the costs incurred by the Commission to the extent of EUR 1.5 million. The Court informed the Commission that there was no legal basis for such a guarantee.

16 By letter of 14 July 2004, the applicant requested the Court to adopt measures of organisation of procedure directing that the applicant be furnished with the report of the working group established by the Commission to assess the implications of *Airtours* v *Commission*, together with the documents referred to in that report. By letter of 9 December 2004, the Commission submitted its observations on that request, indicating that those documents could be the subject of a request made under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

17 Following that request for access to documents, the applicant once again requested the Court, by letter of 9 January 2006, to adopt measures of organisation of procedure in the present action so as to order, in particular, disclosure by the Commission of the report of the working group and of documents relating to that report. In that letter, the applicant also proposed to limit the damages which it sought to the period of three years between the Airtours decision and *Airtours* v *Commission*. By letter of 17 February 2006, the Commission submitted its observations on that request.

18 At the same time, by decisions of 5 September and 12 October 2005, the Commission refused to grant the applicant access under Regulation No 1049/2001 to certain preparatory documents to the Airtours decision and to documents prepared by its services following the annulment of that decision by *Airtours* v *Commission*. The applicant brought an action for the annulment of those decisions (Case T-403/05 *MyTravel Group* v *Commission*).

19 On hearing the report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure, and, by way of measures of organisation of procedure, the parties were invited to reply to a number of questions.

20 By letter from the Federal Republic of Germany of 25 February 2008 and by letters from the applicant and the Commission of 14 March 2008, the parties submitted their replies to the questions put by the Court.

21 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 29 April and 20 May 2008.

22 At the hearing on 29 April 2008, the Court ordered the Commission, in accordance with Article 65(b) and the third subparagraph of Article 67(3) of the Rules of Procedure of the Court of First Instance, to produce all the documents in its possession relating to the evaluation of the commitments submitted on 15 September 1999 drawn up between that date and the date on which the Airtours decision was adopted, namely 22 September 1999.

23 The Commission complied with that request by producing two documents at the hearing on 29 April 2008 and a number of other documents subsequent to that hearing.

24 Within the period laid down for that purpose by the Court, the applicant submitted its comments on the various documents produced by the Commission at the Court's request.

25 The applicant originally claimed that the Court should, inter alia, order the Community to pay to it GBP 517 900 000 as compensation for the following damage: loss of profits of First Choice, loss of synergy savings and abortive bid costs, less successful bid execution costs.

26 That head of claim was amended during the proceedings before the Court, on the basis in particular of information provided in the reply, in the letter to the Court of 9 January 2006 (see paragraph 17 above) and at the hearing on 20 May 2008 in the presence of experts nominated by the applicant and the Commission.

27 The applicant now claims that the Court should:

— order the Community to pay it an amount to be determined by the Court, exercising its power to assess the evidence presented by the parties, as regards the period between the adoption of the Airtours decision (22 September 1999) and the date on which it could, in principle, have acquired First Choice following *Airtours* v *Commission* (considered to be 31 October 2002);

— order interest to be paid on the above compensation from the date of the judgment establishing the obligation to pay damages in this case at the rate of 8% per year, or at such other rate as the Court might fix in the exercise of its discretion;

— order the Commission to pay the costs.

28 The Commission, supported by the Federal Republic of Germany, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

A — *Preliminary considerations regarding the conditions governing the circumstances in which the non-contractual liability of the Community will arise*

29 As a preliminary point, the Court considers it appropriate to examine the arguments of the parties relating to (i) the circumstances in which the non-contractual liability of the Community will arise and, more specifically, the condition that there be unlawful conduct on the part of the Community institutions, which requires that there be a sufficiently serious breach of a rule of law intended to confer rights on individuals, and (ii) the alleged symmetry between the action for annulment and the action in respect of non-contractual liability.

1. *General arguments of the parties*

30 The parties are in agreement as to the circumstances in which the non-contractual liability of the Community will arise, having regard to the judgment in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291 ('*Bergaderm*'), but disagree as regards the significance to be attributed to the condition requiring that 'unlawful conduct' be established where a judgment of annulment has been delivered and the significance to be attributed to the shortcomings identified by the Court in *Airtours* v *Commission* in the context of the present action.

(a) The concept of a sufficiently serious breach

31 The applicant claims as its main argument that a manifest error of assessment established in a judgment for annulment may be equated to the sufficiently serious breach of a rule of law intended to confer rights on individuals required in the field of non-contractual liability. That being the case, the Court made due allowance for the discretion given to the Commission when it decided to annul the Airtours decision by reason of the errors committed by that institution, and that argument is sufficient of itself to establish the existence of unlawful conduct under Article 288 EC.

32 The Commission, supported by the Federal Republic of Germany, rejects the line of argument based on symmetry between the action for annulment and the action in respect of non-contractual liability, on the ground that a judgment of annulment is not sufficient to establish a sufficiently serious breach for the purposes of *Bergaderm*.

(b) The concept of a rule intended to confer rights on individuals

33 In pleading the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals for the purposes of *Bergaderm*, the applicant essentially relies on Article 2 of Regulation No 4064/89, which sets out the criteria in accordance with which the Commission must declare a concentration compatible or incompatible with the common market. That provision confers rights on individuals within the meaning of the *Bergaderm* judgment, in so far as decisions adopted on that basis under Article 8 of Regulation No 4064/89 concern the concentration which has been notified. In the absence of a decision of compatibility on the Commission's part, the undertaking which has notified the concentration in question cannot put it into effect and its commercial freedom is thereby infringed. Regulation No 4064/89 should be seen in the context of the EC Treaty, which is founded on economic liberalism and is intended to promote the integration of the common market. The applicant also claims that the Commission must act in accordance with the principle of sound administration and the duty of diligence, which confer rights on individuals.

34 The Commission contends that Article 2 of Regulation No 4064/89 is not of itself a rule of law which is intended to protect individuals but a rule of law which sets out the criteria on the basis of which a concentration must be declared compatible or incompatible with the common market in the interest of consumers. The rules which exist for the protection of individuals are those — such as the duty of diligence — which govern the conduct of the Commission in its application of rules similar to Article 2 of Regulation No 4064/89.

2. *Findings of the Court*

35 It is settled case-law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its

institutions a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-383/00 *Beamglow* v *Parliament and Others* [2005] ECR II-5459, paragraph 95).

36 If any one of those conditions is not satisfied, the claims for damages must be dismissed in their entirety and it is unnecessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

(a) The concept of a sufficiently serious breach

37 Where, as in the present case, the unlawfulness of a legal measure is relied on as a basis for an action for damages, that measure, in order to be capable of causing the Community to incur non-contractual liability, must constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive criterion in that regard is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (*Bergaderm*, cited in paragraph 30 above, at paragraphs 42 and 43, and Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 47).

38 The system of rules which the Court of Justice has worked out with regard to the non-contractual liability of the Community takes into account, inter alia, the complexity

of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (*Bergaderm*, cited in paragraph 30 above, at paragraph 40, and *Holcim (Deutschland)* v *Commission*, cited in paragraph 37 above, at paragraph 50).

39 Where the institution in question has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach of Community law (*Bergaderm and Goupil* v *Commission*, cited in paragraph 30 above, at paragraph 44, and *Holcim (Deutschland)* v *Commission*, cited in paragraph 37 above, at paragraph 47). The same applies where the defendant institution improperly applies the relevant substantive or procedural rules (see, to that effect, Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, 262).

40 In response to a measure of organisation of procedure adopted by the Court, inviting the parties to consider the impact of the judgment in Case T-351/03 *Schneider Electric* v *Commission* [2007] ECR II-2237 (currently under appeal, Case C-440/07 P *Commission* v *Schneider Electric*) on the present case with regard in particular to the principles laid down in *Bergaderm*, the parties recognised that it is clear from the case-law that the concept of a sufficiently serious breach 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.

41 When questioned on that point at the hearing on 29 April 2008, the applicant also stated that the fact that the Court had annulled the Airtours decision — considering that the prospective analysis of the competitive situation set out in it, far from being based on cogent evidence, was vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created — was not of itself sufficient to give rise to non-contractual liability on the Community's part, in so far as additional criteria were required by the case-law relating to actions for damages.

42 To accept that the position was otherwise, by equating, without further analysis, the annulment established in *Airtours* v *Commission* with a sufficiently serious breach within the meaning of *Bergaderm*, 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 might have on the control of concentrations.

43 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.

(b) The concept of rules intended to confer rights on individuals

44 First of all, the applicant relies on the breach of the substantive rules applied by the Commission in the Airtours decision as a basis for its right to compensation.

45 The first of those rules is Article 2(3) of Regulation No 4064/89, which provides that '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'. If that criterion is satisfied, the Commission must adopt a decision based on Article 8(3) of Regulation No 4064/89 and declare such a concentration incompatible with the common market.

46 The second of those rules is Article 2(2) of Regulation No 4064/89, which provides that '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 shall be declared compatible with the common market'. If that criterion is satisfied, the Commission must adopt a decision based on Article 8(2) of Regulation No 4064/89 and declare such a concentration compatible with the common market. That decision may be made subject to conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission in order to render the concentration compatible with the common market.

47 As with Article 2(2) of Regulation No 4064/89, which applies to an approval decision, Article 2(3) of the regulation, which covers a prohibition decision, falls 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.

48 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 Regulation No 4064/89 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 (see Article 7(1) of Regulation No 4064/89), and a prohibition decision adopted under Article 2(3) of Regulation No 4064/89 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.

49 In the second place, the applicant relies on the duty of diligence as a basis for establishing unlawful conduct on the Commission's part. The short answer to that point is that 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 (Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134, and Case T-285/03 *Agraz and Others* v *Commission* [2005] ECR II-1063, paragraph 40, not affected by the judgment on appeal in Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833). That protective nature of the duty of diligence in relation to individuals which imposes on the competent institution the obligation to examine carefully and impartially all the relevant elements of the individual case has been recognised in the case-law, including the case-law on actions for damages (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraphs 73 to 76; order of the Court of First Instance in Case T-369/03 *Arizona Chemical and Others* v *Commission* [2005] ECR II-5839, paragraph 88; and Case T-285/03 *Agraz and Others* v *Commission*, paragraph 49; see also Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403, paragraphs 37 to 45), relating to the principle of sound administration.

50 It follows that 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, 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.

51 It is in the light of those principles that the Court must determine whether the unlawfulness which vitiated the Airtours decision, as annulled by the *Airtours* judgment, is capable of giving rise to the non-contractual liability of the Community by reason of a sufficiently serious breach of the substantive and procedural rules which may be relied on by an undertaking which seeks approval of its concentration. It is necessary in that regard to distinguish between the claims relating to the existence of a sufficiently serious breach at the stage of the Commission's assessment of the effects of the concentration on competition on the one hand and the claims relating to the existence of a sufficiently serious breach at the stage of the analysis of the commitments proposed during the administrative procedure on the other.

B — *The existence of a 'sufficiently serious breach' at the stage of the Commission's assessment of the effects of the Airtours/First Choice concentration on competition in the common market*

1. *Arguments of the parties*

52 The applicant submits that the unlawful conduct required by the case-law set out in *Bergaderm* is clear from *Airtours* v *Commission*, which shows the extent to which the Commission's conduct amounts to a sufficiently serious breach. In adopting the Airtours decision, the Commission committed a sufficiently serious breach for the Community to incur liability under the second paragraph of Article 288 EC by virtue of its manifest and grave disregard for the limits of its discretion under Article 2 of Regulation No 4064/89 and for the general duty of diligence. Each of those discrete

bases of liability is inextricably linked and finds its expression in the single question as to whether the Commission, in assessing the compatibility of the Airtours/First Choice concentration with the common market, performed its functions and duties as a competition authority to the requisite legal standard.

53 In support of that line of argument, the applicant distinguishes between two types of errors in the reasoning used in order to assess the effects of the concentration. First, the applicant claims that the Commission did not satisfy the level of skill required in the control of concentrations, which requires, as a minimum, awareness of the relevant law and the identification of elements sufficient to allow the competitive situation to be understood and to give rise to a collective dominant position. The applicant categorises the errors committed by the Commission at this stage as 'tier one' failures (see paragraphs 54 to 71 below). Secondly, the applicant submits that those errors were reinforced and supported by a large number of 'tier two' failures, connected with the fact that the Commission did not take into account the evidence submitted and failed to provide an adequate statement of reasons in the Airtours decision. Those 'tier two' failures, either on their own or in conjunction with the 'tier one' failures, establish that the Commission was manifestly incompetent in examining the relevant evidence and ignored that evidence because it was incompatible with the theory it had developed (see paragraphs 72 and 73 below).

(a) The duty to recognise the limited scope of application of Article 2 of Regulation No 4064/89

54 As regards the applicable law, the applicant states that in its action for annulment it argued that the Airtours decision relied at least in part on unilateral effects, which, in the applicant's view, amounted to an incorrect interpretation of Article 2 of Regulation No 4064/89 and a manifest disregard for the discretion enjoyed by the Commission in the application of that provision.

55 The Commission states that the Airtours decision was based on the assessment of collective dominance and not on the theory of unilateral effects. The question whether the theory of unilateral effects could be applied in the context of Article 2 of Regulation No 4064/89 is irrelevant to the present action for damages.

(b) The obligation to define the market situation in the absence of the concentration

56 As regards the factual analysis of the effects of the concentration on competition, the applicant claims that the Commission gravely infringed its discretion in failing to state what the competitive situation was prior to the proposed concentration. That situation, however, constitutes the starting point for the analysis of the effects of the concentration on competition (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 84). The Commission's failure to comply with its obligation to adopt a position on that point vitiated the whole of the Airtours decision (*Airtours* v *Commission*, paragraph 75). The Commission thus sought to argue that market developments in the 18 months following the publication of the report of the Monopolies and Mergers Commission, one of the competition authorities in the United Kingdom, were such as wholly to invalidate the conclusions of that report, according to which the market was broadly competitive at the end of 1997 (*Airtours* v *Commission*, paragraphs 96 to 108).

57 The Commission states that it investigated the changes in the United Kingdom tour operator market between 1997, when the report of the Monopolies and Mergers Commission was published, and 1999, when the concentration was notified. It concluded that there had been a significant increase in the level of concentration and based that conclusion on evidence from interested third parties, which influenced its assessment of the effects of the concentration. Nevertheless, the Commission contends that it took the view in the Airtours decision that there was no dominant position prior to the concentration (as the Court found — see paragraph 88 of *Airtours* v *Commission*, cited in paragraph 11 above, although it criticised the

'elliptical' nature of the description of that position in paragraph 75 of the judgment). According to the Commission, it was accordingly necessary to establish that such a position had been created and not that it had been strengthened. No one questioned the need to indicate what the market situation would be in the absence of the concentration. The question was only whether there was already a tendency towards collective dominance, in which case the concentration might upset a delicate balance and thereby significantly diminish the scope for effective competition. The Commission's error was, therefore, not in failing to understand the market situation but only in considering that aspects of the existing market situation considered as a whole (that is to say, the market characteristics described in recitals 87 to 126 to the Airtours decision) could be regarded as favouring the emergence of a collective dominant position following the concentration.

(c) The obligation to establish the conditions for tacit collusion

58 The applicant claims that in order to establish the creation of a collective dominant position, the Commission had to ascertain whether the three conditions laid down in paragraph 62 of *Airtours* v *Commission*, cited in paragraph 11 above, were satisfied, namely: first, the ability of each member of the dominant oligopoly to monitor whether the other members are adopting the common policy, which is dependent on there being sufficient market transparency; secondly, the sustainability of tacit coordination over time, which implies that there must be an incentive not to depart from the common policy on the market; thirdly, that the foreseeable reaction of current and future competitors and consumers would not jeopardise the common policy. A number of items of evidence relied on in the Airtours decision in order to establish the existence of those conditions are based on an incorrect assessment of the facts.

59 The Commission states that it addressed the various conditions mentioned by the applicant, as can be seen from recital 87 to the Airtours decision, in which the issues in question are listed. Its awareness of the conditions necessary for a finding of a collective dominant position is not in question in this case.

Market share volatility

60 The applicant stresses the importance of fluctuations in market share to any analysis by the Commission (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 111). In the present case, the difficulty lay in the fact that the market shares of the various operators on the market in question had shown significant volatility in the past, which might imply that the market concerned was not the subject of collective dominance. That fact was not taken into account in the Airtours decision, presumably because it did not fit the Commission's case.

61 The Commission argues that the considerable volatility of market shares is due to acquisitions by certain operators being taken into account. By contrast, market shares would demonstrate considerable stability if such acquisitions were to be excluded. In the Airtours decision, the Commission considered that the extent of organic growth was the most relevant criterion in seeking to assess the incentive for oligopolistic parallel behaviour, since where there is little prospect of increasing market share by adding capacity there is more likelihood of parallel behaviour. The Court disagreed, taking the view that it had not been shown that the scope for competition through acquisition was not irrelevant. That does not mean, however, that the Commission's analysis was based on a blatant disregard for the evidence obtained in the course of the administrative procedure, given that some of that evidence showed that the scope for further acquisitions was limited after 1998.

Demand volatility

62 The applicant states that stability of demand is a factor conducive to collective dominance (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 139). That point was ignored in recital 97 to the Airtours decision, in which the Commission

stated that volatility of demand made the market more favourable to the creation of a collective dominant position. It was only in the course of the hearing in the action for annulment that the Commission conceded that the weight of economic theory was as indicated in *Airtours* v *Commission* and sought unsuccessfully to defend its position on the basis of the particular facts of the case. That is not a proper position to have taken. If the weight of economic theory was incompatible with the approach adopted by the Commission in the Airtours decision, the Commission was under a duty to advance a coherent case, supported by reputable economic theory, in support of its position.

63 The Commission states that during the administrative procedure it considered the Binmore report, which the applicant had provided, as regards the significance to be attributed to demand volatility. It even asked the applicant to submit further observations on that report. That report was accordingly not ignored by the Commission, which states, however, that the report did not refer to data on the market in question and focused essentially on the possibility of coordination on price rather than capacity. The Commission also states that the report even acknowledged that coordination on capacity was possible, though it doubted whether there were credible deterrents to prevent tour operators cheating.

Low demand growth

64 The applicant claims that low demand growth is a factor conducive to tacit collusion. It states that during the administrative procedure it had noted that demand had grown historically at a rate faster than the United Kingdom's gross domestic product; that, despite dipping briefly in 1995 and 1996, demand had grown again, according to the leading industry report, and that growth was expected over the next two years. However, the Commission disregarded those elements. As became clear in the proceedings before the Court, the Commission preferred to rely on an undated single-page extract from a report drawn up by Ogilvy & Mather, the full contents of which it never saw nor reviewed. That document was supplied to it by the target company, First Choice, which was opposed to the concentration. The

document, which was quoted from selectively and inaccurately by the Commission, was never put to the applicant for comment during the administrative procedure and was contradicted by other evidence supplied to the Commission. That represents a blatant example of manifest disregard for the general duty of diligence.

65 The Commission states that the question is whether demand growth was sufficiently high to exclude parallel behaviour following the concentration. It emphasises that, in assessing that issue in the Airtours case, it asked the main tour operators for their assessments of past and future demand growth and it is in that context that it is criticised for not having quoted accurately from the Ogilvy & Mather report. In that regard, the Commission contends that the market growth rate cited in that report was 3.7%, whereas the growth rate cited by the applicant on the basis of statistics from the British National Travel Survey (BNTS) was 3.4%. The debate is all the more incomprehensible since the Ogilvy & Mather figures are said to be based on BNTS statistics. There is accordingly no real conflict in the evidence. In any event, the Commission argues that the applicant does not address the issue of forecasts of future demand growth. On that point, the Commission states that it was entitled to rely on the observations the applicant had submitted during the administrative procedure, according to which demand growth in the period from 2000 to 2002 was estimated at approximately 3.3% a year.

Market transparency

66 The applicant claims that market transparency is fundamental to the assessment of collective dominance, since in the absence of transparency economic operators have more difficulty in reaching a tacit agreement or in identifying and punishing those who do not comply with such agreements (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraphs 156 and 159). In the present case, the problem for

the Commission was the almost infinite variety of holidays on offer. Such product heterogeneity made tacit collusion much more difficult. Faced with that difficulty in substantiating its case on tacit coordination, the Commission simply decided not to take account of it. Instead, it preferred to argue that the members of the oligopoly would coordinate on capacity and not price and that 'there [was] only a need to be able to monitor the overall level of capacity (number of holidays) offered by the individual tour operators' (recital 91 to the Airtours decision). It also argued that, since planning for a future season was based on sales for the previous season, the market was transparent. In doing so, the Commission disregarded the evidence put forward in the administrative procedure. Moreover, the Commission fundamentally misreads the analysis of the Court in *Airtours* v *Commission* by submitting that it had to analyse a large volume of information in examining those issues. None the less, according to the applicant, that was not the real difficulty: the Commission simply refused to address the detail of the issue of product heterogeneity and the complex nature of the capacity planning process or to do for itself the work that the Court undertook, despite the central importance of it to any case on collective dominance.

67 The Commission contends that the fact that the Court found that a conclusion had not been substantiated to the requisite legal standard does not of itself amount to a manifest and grave disregard of the Commission's duty to consider the evidence carefully. In the present case, the Commission submits that, if tour operators are to engage in parallel behaviour throughout the market in question, they must be able to detect any deviation from such behaviour on that market at a sufficiently early stage to punish the deviant behaviour. It follows that the transparency in question must relate to the parameter to which collusion may relate, that is to say, total capacity on the market and not the allocation of that capacity to individual destinations likely to be of interest to consumers. The central question is therefore whether there was sufficient transparency for anomalous increases in capacity to be able to be detected at an early enough stage for the other operators to retaliate. On that point, the Commission states that it concluded that there was a considerable element of continuity from one season to another. It adds that, while it is true that total capacity encompasses a multiplicity of decisions, those decisions are made within an envelope dictated by forecast demand. According to the Commission, knowledge of the past offerings of

the others allowed operators to observe changes to current offerings rapidly. Since brochures are published 12 to 15 months prior to the holidays themselves, decisions relating to air transport and, to some extent, to hotel capacity were visible to all.

The obligation to examine whether a deterrent mechanism existed

68 The applicant states that, although the need for a deterrent mechanism is recognised as a basis for the identification of collective dominance (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraphs 192 and 193), the Commission's position in the Airtours decision is ambiguous as to whether such a mechanism was needed (*Airtours* v *Commission*, paragraph 191). The Court also rejected the arguments relied on by the Commission in order to substantiate the existence of such a mechanism and the Commission then attempts to explain those errors by claiming that they are due to the fact that the Court's view of transparency and demand volatility is different from the view the Commission had taken in the Airtours decision. That explanation is not satisfactory, since it is not possible to rely on a previous error in order to correct a later one.

69 The Commission states that the observations set out in recitals 55 and 150 to the Airtours decision regarding the need for a 'strict retaliation mechanism' concerned the type of mechanism which the applicant had argued was necessary (essentially, a mechanism of the type typically found in a cartel rather than in a situation of oligopoly). The fact that the Court dismissed the Commission's findings on the various means of retaliation (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraphs 200 to 207) does not mean that the Commission failed to take into account the relevant evidence. It is clear from recital 148 et seq. to the Airtours decision that it was precisely the issues raised by the applicant that the Commission addressed.

The obligation to give due weight to the reaction of current and potential competitors and consumers

70 The applicant states that the Court criticised the Commission for failing to examine to the requisite legal standard the possible reaction of smaller tour operators and of other competitors and potential consumers to the implementation of the concentration (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraphs 213, 266, 273 and 274). The Commission disregarded, with respect to those points, the evidence relied on by the applicant in the administrative procedure.

71 The Commission states that, according to the Airtours decision, the principal constraint on the ability of small operators to react to capacity limitation by the main operators was access to airline seats. The Court found, however, that there were a number of sources able to offer seats to small operators on satisfactory terms. That represents a difference in the assessment of the evidence and not a failure by the Commission to have regard to the evidence. The same is true of access to distribution channels. The fact that the Commission's analysis was not accepted by the Court is not sufficient to establish that the Commission was guilty of culpable misconduct or that it disregarded the evidence. As regards potential competitors, the Commission states that its conclusions were based on the considerations relating to access to airline seats and to the distribution channels referred to as regards small operators. The same is true of the argument based on the failure to take into account the possible reaction of consumers, in so far as the ability of consumers to buy holidays from small operators is dependent on the ability of those operators to offer them. The Commission considers that, while those findings were held to be wrong, they were, however, not unreasonable.

(d) The cumulative effect of the instances of failure to have regard to evidence, and the failure to state adequate reasons

72 The applicant claims that the Airtours decision contains a series of 'tier 2' errors, which reinforce and support the failures mentioned above. A series of errors, taken together, may give rise to liability on the part of the Community under the second paragraph of Article 288 EC (Case T-40/01 *Scan Office Design* v *Commission* [2002] ECR II-5043, paragraph 107). Thus, as regards every aspect of the case relating to collective dominance, the applicant submitted evidence which was disregarded by the Commission. There are, on that point, some 40 instances where such evidence was disregarded by the Commission. It cannot be claimed by the Commission that its position in relation to those points was not unreasonable. In addition, the Commission submits that the Airtours decision was adequately reasoned, which is incorrect since the third plea in law in the action for annulment related not only to infringement of Article 2 of Regulation No 4064/89 but also to infringement of Article 253 EC. Furthermore, Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 at Nice (OJ 2000 C 364, p. 1), provides that the right to good administration includes the obligation of the administration to give reasons for its decisions. In the present case, the Commission failed to comply with its obligation to adduce cogent evidence to bring the Airtours decision within the range of decisions open to it taking into account the latitude afforded to it. There are 22 examples of such inadequate reasoning.

73 The Commission contends that to reject some evidence and accept other evidence does not constitute a manifest disregard for the evidence as a whole or even a manifest disregard for each of the items of evidence. Such a conclusion is acceptable only when the result reached on the basis of the evidence is clearly and wholly perverse. The Commission sets out in one of the annexes to its rejoinder all the evidence which was in its possession and which was examined with care and dedication in the course of the administrative procedure. The Commission also argues that a breach of Article 253 EC does not give rise to liability on the part of the institution, because the obligation to state reasons is not a rule of law intended for the protection of individuals. Moreover, *Airtours* v *Commission* does not contain any finding that points to the existence of an infringement of the obligation to state reasons. In addition, the

reference to Article 41 of the Charter of Fundamental Rights of the European Union is irrelevant, since that article does not provide that a failure to state reasons gives rise to a claim for damages.

2. *Findings of the Court*

(a) The argument relating to the duty to recognise the limited scope of application of Article 2 of Regulation No 4064/89

74 The first point to be made is that, in reply to the applicant's argument that the Commission manifestly and gravely disregarded the limits on its discretion by basing its reasoning at least in part on the economic theory known as the theory of unilateral effects as a basis for declaring the Airtours/First Choice concentration incompatible with the common market under Article 2 of Regulation No 4064/89, it must be pointed out — as the Court did in paragraphs 49 to 54 of *Airtours* v *Commission*, cited in paragraph 11 above — that 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 Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753.

75 In the light of that statement by the Commission and in the absence of sufficiently detailed submissions from the applicant as to whether and to what extent that alleged new approach might have had any effect on the Commission's assessment of the Airtours/First Choice concentration on competition, it is unnecessary to adjudicate on the alleged failure to comply with the obligation to recognise the limited scope of application of Article 2 of Regulation No 4064/89.

(b) The arguments relating to the obligation to define the market situation in the absence of the concentration and the obligation to establish the conditions for tacit collusion

76 As regards the applicant's claims relating to the manifest and grave disregard for the limits imposed on the Commission's discretion in its analysis of the Airtours/First Choice concentration in the light of the criteria relating to the creation of a collective dominant position, it is necessary to point out what such an analysis must involve.

77 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may 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 entailed by the transaction, 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 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 61).

78 The creation of a collective dominant position as so defined requires three conditions. 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. Secondly, 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. Thirdly, in order 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 (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 62).

79 In the action for annulment, the Court held that, having regard to all its findings, it was clear that in the Airtours decision the Commission, far from basing its prospective analysis on cogent evidence, had committed a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. The Commission had thus prohibited the concentration 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, such as significantly to impede effective competition in the relevant market (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 294).

80 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 and which declares a concentration incompatible with the common market under Article 2(1) and (3) of the regulation could constitute breaches that are sufficiently serious to give rise to the non-contractual liability of the Community for the purposes of the case-law (see paragraphs 37 to 43 above).

81 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. It is important to point out that, for reasons of legal certainty connected with the need to enable economic operators to obtain a decision from the Commission as swiftly as possible in order to put their concentration into effect, the latter must operate within a short time and subject to strict time-limits. In cases where serious doubts arise as to the effects of the notified concentration on competition, the Commission has a period of only four months available to it in order to examine the concentration and to obtain the views of all concerned or interested parties.

82 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. In the present case, the Court considers that the difficulty which is inherent in the prospective aspect of the analysis of the effects of the concentration on competition, after it has been put into effect, is added to by the fact that the economic situation in question was especially complex, inasmuch as the Commission was required to assess the possible creation of a collective dominant position of an oligopolistic rather than a merely duopolistic nature on a market for a product which combines a sale through a travel agency, with air transport and a stay in a hotel and on which competition is practised more in relation to capacity than prices.

83 It must also be borne in mind that 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 econometric instruments available to it and the choice of the appropriate approach to the study of any matter (see, to that effect, as regards the definition of the relevant market Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 89 et seq., and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 482), provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied consistently.

84 The complexity of the situations to be regulated in the control of concentrations, difficulties of application connected with the time constraints imposed on the administration in that regard and the margin of discretion available to the Commission must be taken into account in assessing whether the Commission committed a sufficiently serious breach in analysing the effect of the Airtours/First Choice concentration on competition.

85 Consequently, the analysis of the Court in the action for damages must of necessity take into account the contingencies and the difficulties inherent in the control of concentrations in general and complex oligopolistic structures in particular. It is in that context that the administration's discretion, within the meaning of the case-law resulting from *Bergaderm*, must be interpreted. Such an exercise is by its nature more demanding than that which is required in an action for annulment, where the Court need only, within the limits of the pleas in law put forward by the applicant, examine the lawfulness of the contested decision in order to satisfy itself that the Commission has correctly appraised the different elements which enable it to declare the notified concentration incompatible with the common market for the purposes of Article 2(1) and (3) of Regulation No 4064/89. Accordingly, contrary to what the applicant claims, mere errors of assessment and the failure to put forward relevant evidence in the context of *Airtours* v *Commission* 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 and in the presence of a complex oligopoly situation.

86 In that context, the line of argument relating to low demand growth requires particular consideration, in so far as the Commission's assessments are based in that regard on an incomplete and incorrect appraisal of the data submitted to it in the administrative procedure and which were relied on in the Airtours decision (see paragraph 64 above and *Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 127). None the less, the constraints imposed on the control of concentrations are such that the mere fact that the Commission construed a document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding that the rate of market growth was moderate in the 1990s and would continue to be so (*Airtours* v *Commission*, paragraph 130), is not sufficient to give rise to the non-contractual liability of the Community (see paragraph 82 above). The same applies to the fact that the Commission failed to take account of certain data included in the file to which the document at issue here referred (*Airtours* v *Commission*, paragraph 132).

87 In the present case, the Commission was in possession of evidence in the administrative file which allowed it reasonably to consider that growth would increase

slowly in the years to come. The fact that the findings made in the Airtours decision were put in question by the Court falls within the dispute as to the lawfulness of that measure, in which the Court examined the legal and factual conclusions reached by the Commission in the light of the arguments put forward by the applicant in its action and the evidence relied on in that decision. That does not mean, however, that the Commission committed a manifest and grave infringement of its discretion in the control of concentrations, provided that — as in the present case — it is capable of explaining the reasons for which it could reasonably form the view that its assessments were well founded. It is clear, in that regard, from the administrative file, that the applicant itself had provided the Commission with data which envisaged a small yearly increase in demand for the period from 2000 to 2002.

88 As regards the line of argument relating to market transparency, it cannot be denied that the Commission failed in that context to take into account a key factor for determining whether there is a collective dominant position which restricts competition (see paragraph 66 above and *Airtours* v *Commission*, cited in paragraph 11 above, at paragraphs 156 to 180). None the less, as with demand growth, the reasoning set out in that regard in the Airtours decision shows that, while the conclusions reached by the Commission were not accepted by the Court, inasmuch as that reasoning was not sufficiently supported by evidence or was badly explained, the fact remains that that reasoning was adopted following a careful examination of the information provided in the administrative procedure. Even though it was established in the action for annulment that the decision was unlawful, that error of assessment can be explained by the objective constraints imposed on the institution and its agents by the effect of the provisions governing the control of concentrations (see paragraph 43 above).

89 Even though the approach adopted by the Commission in the Airtours decision, which was limited to taking into account, at a general level, the total number of package holidays proposed by each operator, was not accepted by the Court, which preferred the approach supported by the applicant, according to which that complex process does not consist merely in predicting a renewal of capacity estimated or sold in the past, but in adopting a multiplicity of individual decisions at a microeconomic level having regard to estimates of market volatility and demand growth, it none the less remains the case that — in the light of the material contained in the administrative file — the line of reasoning adopted by the Commission, however incorrect it may be in the light of the review of the lawfulness of the decision, does not

represent a sufficiently serious error to be considered to be incompatible with the normal conduct of an institution responsible for ensuring that the competition rules are applied.

90 Furthermore, it is clear that the other errors established in *Airtours* v *Commission* are also not sufficiently serious to give rise to the non-contractual liability of the Community.

91 That applies to the alleged failure to comply with the obligation to define the market situation in the absence of the concentration (see paragraph 56 above), since it is clear to the requisite legal standard from the arguments put forward by the Commission that that situation was examined by its services on the basis of the available evidence in order to identify what changes would occur to the competition structure should the concentration be put into effect.

92 The same is also true of the arguments based on market share volatility (see paragraph 60 above), the alleged failure to comply with the obligation to examine whether a deterrent mechanism existed (see paragraph 68 above) and the alleged failure to comply with the obligation to give due weight to the reaction of current and potential competitors and consumers (see paragraph 70 above), since the line of reasoning adopted by the Commission in relation to those points — which was not accepted by the Court — does not amount to a manifest and grave disregard for the material contained in the administrative file.

93 The same reasoning applies to the argument based on demand volatility (see paragraph 62 above), in so far as the inadequacy relied on by the applicant was not so material that it can be considered to be sufficiently serious to give rise to the

non-contractual liability of the Community. It must be added in that regard that the Commission states that the evidence put forward on that point by the applicant was not of itself sufficient to establish demand volatility.

(c) The arguments relating to the cumulative effect of the instances of failure to have regard to the evidence and the failure to state adequate reasons

94 Seen individually, the errors of assessment established by the Court in *Airtours* v *Commission* can be explained by the objective constraints inherent in the control of concentrations and the particular complexity of the competition situation examined in the present case. That analysis is not put in question by the cumulative effect relied on by the applicant, which submits that a number of errors, considered as a whole, can suffice to give rise to the non-contractual liability of the Community.

95 In that regard, it must be held that paragraph 107 of *Scan Office Design* v *Commission*, cited in paragraph 72 above, cannot be relied on in support of that line of argument, in so far as the Court there held that the Commission had committed in that case 'a number of serious faults which, individually or at the very least when taken together, must be regarded as fulfilling the first of the three conditions necessary for the non-contractual liability of the Community to be incurred'. Those errors were of a very different kind from the errors of assessment established by the Court in *Airtours* v *Commission*. The facts which gave rise to *Scan Office Design* v *Commission* involved serious faults committed in the course of a public procurement tender assessment procedure, namely the refusal of the Commission to furnish documents on the mistaken ground that they did not exist, the acceptance in a tender award procedure of a tender submitted out of time, the taking into account of an assessment which was unsigned and which was not elucidated by any supporting remarks and of irregular assessments, and the selection of a tender which did not comply with the tender specifications. In the present case, the errors of assessment were

committed within the Commission services when they were called upon to examine numerous items of evidence in order to analyse a competition situation that was particularly difficult to classify. 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. Consequently, the view cannot be taken in the present case that the mere fact that a number of errors of assessment were established in *Airtours* v *Commission* necessarily gives rise to the non-contractual liability of the Community.

96 Lastly, as regards the argument based on the failure to state adequate reasons in the Airtours decision, the Court finds that such failure cannot give rise to the non-contractual liability of the Community in the present case. It is clear from *Airtours* v *Commission* that the Court's analysis of the third plea in law, alleging both infringement of Article 2 of Regulation No 4064/89 and infringement of Article 253 EC, focuses only on the arguments relating to the infringement of Article 2 of Regulation No 4064/89. The annulment of the Airtours decision was thus based on the fact that the Commission failed to establish to the requisite legal standard — having regard to the evidence on which it relied in that decision — that the concentration would give rise to a collective dominant position of such a kind as significantly to impede effective competition in the relevant market (*Airtours* v *Commission*, cited in paragraph 11 above, at paragraph 294). The Airtours decision thus set out reasons which were adequate and which allowed the Court to review its legality even though, in terms of its substance, those reasons were shown to be incorrect once that review had been carried out.

97 It follows from the above that the Commission did not commit a sufficiently serious infringement of a rule of law intended to confer rights on individuals within the meaning of the case-law in analysing the Airtours/First Choice concentration in the light of the criteria relating to the creation of a collective dominant position.

C — *Potentially unlawful conduct occurring at the stage of the analysis of the commitments*

1. *Admissibility of the line of argument relating to potentially unlawful conduct occurring at the stage of the analysis of the commitments*

(a) Arguments of the parties

98 The Commission contends that the line of argument relating to potentially unlawful conduct occurring at the stage of the analysis of the commitments is inadmissible, because that plea is not stated, even in summary form, in the application and the applicant cannot simply refer in that regard to annexes which restate the arguments put forward in the action for annulment.

99 The applicant claims that the only test in this case is whether the Commission is able to adopt a position on the plea relied on and whether the Court is able to exercise its powers of review. The material put forward in that regard in the application satisfies that criterion and is expanded upon in Annexes 15 and 16 to that document, which contain the necessary evidence.

(b) Findings of the Court

100 Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of review. In order to guarantee legal certainty and the sound administration of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (orders in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 50, and Case T-294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719, paragraph 23).

101 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against it can be identified (order in *Internationaler Hilfsfonds* v *Commission*, cited in paragraph 100 above, at paragraph 24).

102 In the present case, the applicant states in its application that the refusal of the Commission to accept, or even to examine, the commitments submitted by it in the administrative procedure constitutes a sufficiently serious breach of a number of rules of law intended to confer rights on individuals. In that regard, the references in the application to the arguments put forward in support of the fourth plea in law in the application for annulment in Case T-342/99 (relating to the lawfulness of the Airtours decision in the light of the rules relating to commitments), put forward in detail in Annexes 15 and 16 to the application, must be considered to be no more than an amplification of the reasoning set out in the application as to the unlawfulness allegedly underlying the Commission's conduct complained of as regards the analysis of the proposed commitments.

103 Having regard to the above, the Commission was able to prepare its defence on the basis of that plea.

104 The Commission's submissions as to the admissibility of the plea relating to potentially unlawful conduct occurring at the stage of the analysis of the commitments will accordingly be rejected.

2. *Substance*

(a) Arguments of the parties

The arguments put forward in the parties' written pleadings

105 In its written pleadings, the applicant claims that in refusing to accept, or even to examine, the commitments submitted by it during the administrative procedure, the Commission infringed Article 2 and Article 8(2) of Regulation No 4064/89, the principle of proportionality, the principle of sound administration, the duty of diligence and the obligation to apply its own procedures for examining commitments. Those infringements constitute a sufficiently serious breach within the meaning of the case-law. The applicant argues in particular that, had the Commission accepted and not wrongfully rejected the commitments the applicant had submitted, the concentration would have been approved in accordance with Article 2(2) of Regulation No 4064/88 and that that would have been the case even though such commitments were unnecessary, since the concentration did not give rise to any competition concerns. The applicant also submits that the Commission should have considered the second set of commitments notwithstanding the fact that they were submitted outside the period laid down by Regulation No 4064/89.

106 The Commission contends that it is clear from the Airtours decision that the first set of commitments were not sufficient to render the notified concentration compatible with the common market, since the creation of a single mid-sized operator dependent on the travel agencies controlled by the main operators would not have brought about sufficient competition on the market in question (recitals 186 to 192 to the Airtours decision). As regards the second set of commitments, submitted after the expiry of the period laid down by Article 18(2) of Regulation No 447/98, the Commission states that even though that period may be extended in exceptional circumstances, the applicant neither asked for an extension, nor explained the exceptional circumstances which might have justified such a measure prior to the expiry of the period. Moreover, the second set of commitments did not contain any material which could not have been included in the first set of commitments. In addition, there was insufficient time to examine the new commitments effectively (recital 193 to the Airtours decision). The rejection of the proposed commitments was accordingly justified and does not constitute a sufficiently serious breach to give rise to liability on the Community's part.

The opportunity to examine the commitments of 15 September 1999 in the time remaining

107 In reply to the measures of organisation of procedure decided upon by the Court, which sought to establish the reasons for which the Commission was unable to evaluate effectively the commitments submitted on 15 September 1999 'in the short time that remained' and the further investigations that would have been required in order to evaluate those commitments, the applicant claims that there was nothing to prevent the Commission from examining those commitments and that the particular constraints which are imposed objectively on the service in its normal operation provide neither justification nor explanation for its refusal.

108 The Commission sets out the reasons for which, although the period for adjudicating on the Airtours concentration expired on 5 October 1999, the draft decision required

to be ready before noon on Tuesday 21 September 1999. The practice of the Commission is to prepare the draft decision for the meeting of the College of its Members which takes place during the week preceding the week in which the period expires in order to allow for the possibility that a majority of the Members might require the decision to be amended. In the present case, the Commission services thus had only three and a half working days in which to consider the commitments submitted on Wednesday 15 September 1999 (that is to say, Thursday 16, Friday 17, Monday 20 and the morning of Tuesday 21 September 1999). Having regard to the fact that material uncertainties remained, that it would have been necessary to conduct a new market test and to consult further with the Advisory Committee within three and a half days, that the comments received in relation to the first market test were very negative, that everything that was in the second set of engagements could have been included in the original proposal and that the applicant neither sought a derogation nor put forward any convincing arguments as to exceptional circumstances to justify such a derogation, the Commission considers that the commitments submitted on 15 September 1999 did not require to be examined.

Whether the commitments submitted on 15 September 1999 were sufficient and the response to the request by the Court for the production of documents relating to that assessment

109 In response to the measure of organisation of procedure decided upon by the Court, which wished to know to what extent the commitments submitted on 15 September 1999 allowed the problems identified by the Commission at that stage of the proceedings to be addressed, the applicant claims that the Commission had raised two concerns, namely the need to constitute a fourth force with at least 10% of the relevant market and access of that entity to a distribution network. Both of those issues were addressed by the proposed commitments: the fourth force (Cosmos, with 800 000 package holidays sold in 1998) would receive a business comprising 700 000 packages sold — which would allow it, with 1.5 million packages, to represent over 10% of the relevant market, estimated in 1998 at 13.9 million passengers — and the First Choice distribution network would be transferred to it, together with access to part of the applicant's network for a period of five years.

110 The Commission contends that its concerns were, first, to allow for the recreation of a fourth force with access to a distribution network and, secondly, to ensure that the competition provided by the small operators was maintained. It states that those concerns arose principally from the observations made by the undertakings and associations which had responded to the market test undertaken in relation to the first set of commitments.

111 In that context, the Commission submits that the commitments submitted on 15 September 1999 (following a meeting with the Commission of the same date) were new and substantially modified by comparison with the previous version and that they did not enable a clear and definitive response to be given to the problems identified at that stage. Thus, although, in formal terms, it rejected those commitments on procedural grounds, the Commission states that it nevertheless carried out a preliminary assessment of those commitments in order to assess whether the possibility of putting questions to the interested parties and the Advisory Committee might yield a positive outcome. According to the Commission, several areas of uncertainty remained and it could not conclude with confidence that its concerns relating to the creation of a collective dominant position would disappear.

112 At the hearing on 29 April 2008, the Court ordered the Commission, pursuant to Article 65(b) and the third subparagraph of Article 67(3) of the Rules of Procedure, to produce all the documents in its possession relating to the assessment of the commitments submitted on 15 September 1999 which were drawn up between that date and the date on which the Airtours decision was adopted, namely 22 September 1999.

113 In response to that request, the Commission produced two documents at the hearing on 29 April 2008. The first document is an undated note to file, which summarises the discussions which took place before and at the meeting held at the Commission on 15 September 1999 as regards the commitments and, in particular, the proposed commitments submitted informally on 14 September 1999. The second document is a note of 16 September 1999, prepared by the director of the Merger Task Force ('the MTF') for the Member of the Commission responsible for competition matters, which sets out conclusions in relation to the undertakings submitted on

15 September 1999 from a procedural and substantive point of view. Points 11 to 13 of the latter document set out, in substance, the content of the submissions made by the Commission in reply to the question put by the Court in relation to the assessment of the commitments.

114 Within the period laid down for that purpose by the Court, the Commission also produced other documents:

— a note to file, dated 16 September 1999, prepared by a head of unit of the MTF and relating to the principles applicable to the submission of commitments out of time;

— a note dated 17 September 1999, prepared by the same head of unit for an official in the Secretariat-General, together with a revised version of that note, which contain the text of the communication to be issued by the Member of the Commission responsible for competition matters and which refer to doubts and uncertainties regarding the assessment of the substance of the commitments submitted on 15 September 1999;

— speaking notes of the Member of the Commission responsible for competition matters, intended for use at the meeting of the Commission on the draft Airtours decision, which refer to doubts and uncertainties regarding the assessment of the substance of the commitments submitted on 15 September 1999;

— a draft of the Airtours decision, which does not refer to the assessment of the substance of the commitments submitted on 15 September 1999, but states only that those commitments were submitted out of time;

— a note setting out lines to take headed 'Defensive Points — Offer of Undertakings' prepared by the MTF for the attention of the Member of the Commission responsible for competition matters intended to enable him to put forward arguments relating in particular to the assessment of the substance of the commitments submitted on 15 September 1999.

115 Within the period laid down for that purpose by the Court, the applicant submitted its comments on the various documents produced by the Commission in response to the Court's request.

(b) Findings of the Court

116 The purpose of the control of concentrations is to provide to the undertakings concerned the authorisation which is necessary and preliminary to the implementation of every concentration having a Community dimension. As part of the arrangements for control, those undertakings may submit commitments to the Commission in order to obtain a decision finding their concentration to be compatible with the common market.

117 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 (Article 6(2) of Regulation No 4064/89) or to respond to the objections sustained during the detailed investigation (Article 18(3), read together with Article 8(2) of Regulation No 4064/89). 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.

118 Article 8(2) of Regulation No 4064/89 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.

119 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.

120 In the present case, it is clear from the Airtours decision and from the replies of the parties to the questions put by the Court, that the Commission decided to initiate detailed investigation proceedings on 3 June 1999. It also gave the applicant the opportunity of communicating its observations on the objections raised by its services, by sending it a statement of objections on 9 July 1999, and those issues were addressed at the hearing which took place on 28 and 29 July 1999. In order to respond to those objections, the applicant submitted a number of commitments to the Commission on 19 August 1999. Originally, the commitments proposed were intended only to ensure that competition from the small operators was maintained. However, the Commission indicated to the applicant that the recreation of a fourth force would constitute an effective remedy for addressing the competition problems identified at that stage. That point was addressed by the applicant at a meeting which was held with the Commission on 24 August 1999 apropos the commitments submitted on 19 August 1999. Subsequently, it was the subject of the first set of commitments, formally submitted on 7 September 1999 following discussions with the Commission's services, and of the second set of commitments, which amended the first set and which were formally submitted on 15 September 1999 following a meeting which was held with the Commission on the same date.

121 Moreover, it must be pointed out that in recital 193 to the Airtours decision, the Commission took the view that the commitments submitted on 15 September 1999 did not require to be taken into account by its services, because they had not been submitted within the period of three months laid down by Article 18(2) of Regulation No 447/98 — which ended on 7 September 1999 — in the absence of relevant exceptional circumstances and that it was not possible to evaluate them effectively 'in the short time that remained before the expiry of the deadline under Article 10(3) of [Regulation No 4064/89]', that is to say, 5 October 1999. That point is not contested by the parties.

122 It is also not contested by the parties that, on its own initiative, the applicant submitted new commitments on 15 September 1999 in order to replace those which had been submitted on 7 September 1999. That revised offer of commitments was made, having regard to the objections identified in the statement of objections and of the result of the first market test undertaken in relation to the original commitments, with a view to responding to the competition problems identified at that stage by the Commission. It is the latter set of proposed commitments which must be taken into consideration in the present case.

123 The fact that the Court declared the assessment of the effects of the concentration on competition carried out by the Commission in the Airtours decision to be unlawful does not mean that the refusal to accept the commitments submitted on 15 September 1999 is unlawful by reason of that fact alone. At the time at which the Court's analysis was undertaken, the Airtours decision had not yet been adopted and it was therefore freely and in full knowledge of the facts that the applicant decided to offer the Commission solutions capable of responding to the objections identified, in order to obtain a decision of compatibility. It is on that basis that it is necessary to assess whether there was a sufficiently serious breach at the stage of the analysis of the proposed commitments and not on the basis of information of which the parties were not yet aware at the time of the discussion regarding the commitments.

124 At the hearing on 29 April 2008, the Commission stated that, at the material time, in September 1999, its practice in relation to the examination of commitments submitted out of time was to accept such commitments only if they clearly responded

to the objections raised at that stage as regards the compatibility of the concentration with competition in the common market. That approach satisfies the duty of diligence which is imposed on the administration when implementing the decision-making powers which are conferred on it by virtue of Article 8(2) and (3) of Regulation No 4064/89 (see paragraph 49 above).

125 According to the information provided in reply to a question from the Court on that point, the Commission found that its initial, relatively indulgent and conciliatory, approach had rapidly revealed its limitations. The undertakings concerned had a tendency to wait until the last minute before submitting their commitments and that threatened to undermine the proper conduct of the decision-making process in the control of concentrations by preventing the Commission from examining those commitments and consulting third parties and the representatives of the Member States in the proper conditions. With effect from 27 May 1998, the Commission decided to apply the period of three months laid down by Article 18(2) of Regulation No 447/98 more rigorously, so as to limit cases where commitments required to be examined out of time to those in respect of which it remains in a position to carry out a proper evaluation.

126 That practice has, moreover, subsequently been restated in its notice on remedies acceptable under Regulation No 4064/89 and Regulation No 447/98 (OJ 2001 C 68, p. 3) in order to set out the lessons learned from the experience acquired in relation to commitments submitted following the entry into force of Regulation No 4064/89. Point 43 of that notice states that the Commission will examine modified commitments submitted after the deadline laid down by Regulation No 447/98 'where it can clearly determine — on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test — that such commitments, once implemented, resolve the competition problems identified and allow sufficient time for proper consultation of Member States'.

127 In a case involving a concentration notified in 2004, the Court took the view that it followed from that notice, by which the Commission had voluntarily undertaken to be bound, that the parties to a notified concentration may have their commitments

which are submitted out of time taken into account subject to two cumulative conditions, namely, first, 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 (Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraphs 162 and 163).

128 While it is true that the Airtours decision indicates otherwise, it is clear that the Commission did not reject the commitments of 15 September 1999 without considering whether they were capable of responding clearly to the objections raised at that stage of the proceedings.

129 In that regard, the documents submitted in response to the request made by the Court set out the reasons for which the Commission was entitled to consider that those commitments did not represent a satisfactory response to those objections. The note from the director of the MTF of 16 September 1999 and the note on the defensive points prepared by the MTF for the Member of the Commission responsible for competition matters thus refer to the Commission's doubts concerning the claim that the market share of the new grouping proposed by the applicant, namely the fourth force, amounted to 10%. Not only was the market share of First Choice higher than that of the fourth force proposed by the applicant by way of replacement (11%, at the lowest), but also, and above all, that figure of 10% was achieved on the assumption that Cosmos, which was one of the members of the fourth force, would have significant internal growth from one year to another (going from 550 000 packages sold in 1998/99 to 800 000 packages sold in 1999/2000, that is to say, 45% in one year). Such internal growth was highly difficult to envisage, having regard to the characteristics of the market. Those documents also refer to doubts and uncertainties concerning a number of points, such as the exact composition of the packages to be transferred to the new business, the interest Cosmos, which did not attach great significance to the use of a network of agencies, might have in retaining the First Choice network of agencies and Cosmos' independence from the three main operators remaining on the market after the concentration and which purchased the majority of the airline seats sold by Cosmos. The commitments submitted on 15 September 1999 were indeed, therefore, examined by the Commission's services, which raised a number of issues liable to put in question the ability of those commitments to respond clearly to the objections identified at that stage of the proceedings.

130 The fact that the Commission did not refer in the Airtours decision to the analysis undertaken by its services of the commitments submitted on 15 September 1999 does not prevent the Court from taking account of those documents that have been produced in the present action and which are relevant, which carry sufficient evidential weight and establish that such an analysis was carried out to the requisite legal standard.

131 Without it being necessary to state a view on whether it was possible in the time available for the Commission to examine the amended commitments submitted on 15 September 1999, it follows from the above that it is apparent that those commitments did not respond clearly to the objections raised at that stage as regards the compatibility of the concentration with competition on the common market. The Commission's conduct did not therefore result in the applicant being deprived of all possibility of having the concentration declared compatible with the common market. The Commission accordingly did not infringe its duty of diligence in that regard.

132 Consequently, the Commission did not commit a breach of a rule of law intended to confer rights on individuals that was sufficiently serious to give rise to liability on the Community's part as regards the analysis of the commitments submitted by the applicant at the end of the administrative procedure.

133 It follows that the action will be dismissed.

134 It is also necessary to reject the various applications presented by the applicant for measures of organisation of procedure in order to obtain certain documents or for clarification of certain factual or procedural points. In the light of the replies to the questions put to the parties and after examination of the documents communicated by the Commission regarding the analysis of the commitments of 15 September 1999 (see paragraphs 113 and 114 above), it must be held that the measures requested are

not necessary in order to give a ruling in the present case and, accordingly, that they should not be allowed.

Costs

135 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to Article 87(3) of the Rules of Procedure, the Court of First Instance may, however, order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

136 In the present case, the Court notes that the Commission stated in the Airtours decision that it had not examined the commitments submitted by the applicant on 15 September 1999, because they had been submitted out of time and since there was no time available in which to do so. The applicant and the Court could thus reasonably have formed the view that those revised commitments, submitted after a meeting held with the Commission's services in order to alter the original set of commitments so as better to respond to the concerns identified at that stage of the proceedings, had not been examined by the Commission for purely procedural reasons. It is clear from the measures of organisation of procedure and measures of inquiry decided upon by the Court, first, with a view to preparing for the hearing on 29 April 2008 and, secondly, at that hearing, that the Commission's services did not simply reject the commitments offered on 15 September 1999 as being out of time, but that they had also carried out a preliminary examination of those commitments and had, as a result, concluded that they were not sufficient at that stage.

137 The fact that the Commission had indeed carried out an appropriate examination of the commitments submitted on 15 September 1999 in accordance with its practice

at the time, which is a decisive point in the resolution of the dispute, was thus not known to the applicant and the Court until a very advanced stage in the procedure before the Court.

138 It is all the more regrettable that this information was provided at such a late stage, since, on several occasions in this case and in Case T-403/05 (see paragraph 18 above), the applicant requested the Commission to provide to it all documents capable, in substance, of being used by it to substantiate its case before the Court. Even though it may be considered that, in principle, the documents in question are not of a type to which a party to a concentration can have access in an administrative procedure under Regulation No 4064/89 or to which a member of the public can have access following the making of a request under Regulation No 1049/2001, the fact remains that those documents were important in allowing the applicant to substantiate its case in the present proceedings and in allowing the Court to assess the non-contractual liability of the Community.

139 Thus, and although the point has no impact on the present case in so far as those documents were submitted in the course of these proceedings, the documents produced at the hearing on 29 April 2008 and thereafter ought to have been furnished at the time at which the Commission lodged its defence, in which it challenged both the admissibility and the substance of the plea alleging potentially unlawful conduct at the stage of the analysis of the commitments. Consequently, the Court considers that it would be equitable in those circumstances to hold that the Commission bear its own costs.

140 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. The Federal Republic of Germany must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders MyTravel Group plc to bear its own costs;

3. Orders the Commission to bear its own costs;

4. Orders the Federal Republic of Germany to bear its own costs.

Azizi Cooke Cremona

Labucka Frimodt Nielsen

Delivered in open court in Luxembourg on 9 September 2008.

Registrar President

E. Coulon J. Azizi

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