





**La aplicación del análisis económico en el Derecho de defensa la competencia: riesgos y peligros. AIRTOURS/FIRST CHOICE**


**CURSO "LA REFORMA DEL DERECHO DE LA COMPETENCIA: CLAVES Y RETOS DE FUTURO"**

Prof. Dr. Francisco Marcos  
 (francisco.marcos.fernandez@madrid.org)  
 Director del Servicio de Defensa de la Competencia


  TRIBUNAL DE DEFENSA DE LA COMPETENCIA DE LA COMUNIDAD DE MADRID 

Donosti, 3 de julio de 2007, 17-19 horas






Where leisure travels further




The Holiday Makers


**The Airtours/First Choice Case**  
 CFI pending T 212/03 (518Mill. pound damage claim)  
 CFI Order 28 June 2004 (T-342/99DEP)  
 CFI judgment 6 June 2002 (T-342/99)  
 EU Commission decision 22 September 1999 (IV/M.1529)




Página 2



- Background
- The Commission's arguments
- Airtours' appeal to the CFI
- CFI's judgment
- Relevant market definition
- Collective dominance test




Página 3

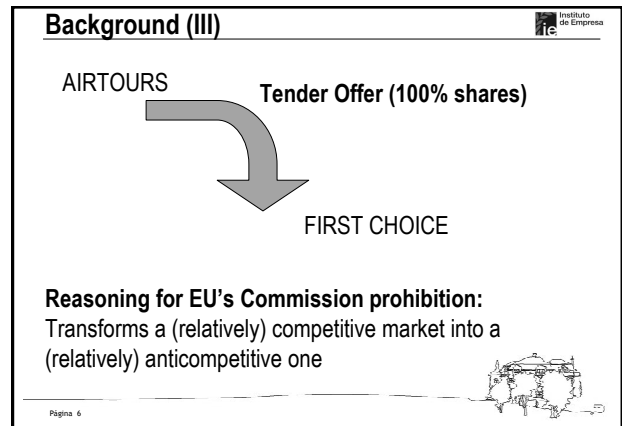
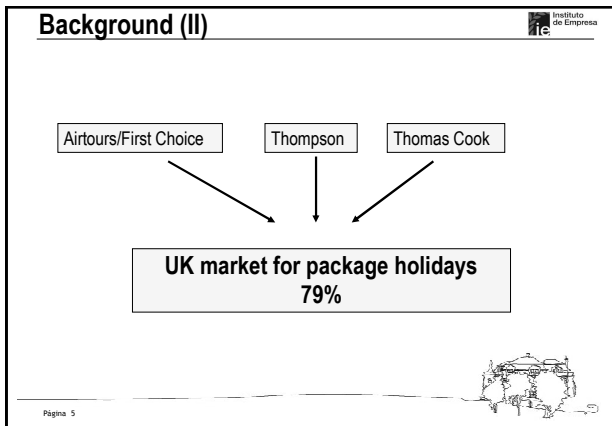


**Background (I)**

- UK market for package holidays
- 4 main tour operators: Together a 79% market share
  - Airtours 21 %
  - Thomson Travel Group 25 %
  - Thomas Cook 20 %
  - First Choice 13 %
- 1999 Airtours announced intention to acquire First Choice – notified the Commission, ECMR compliant
- The Commission prohibited merger proposal



Página 4



- ### The Commission arguments
- Relevant product market:
    - long-haul package holidays (Caribbean, Southeast Asia, 8 hours)
    - short-haul package holidays (European, North African destinations, 3 or 4 hours)
  - Collective dominance trend prior, as well as, at the time of notification
  - Scope for retaliation in the market
  - Marginalization of small operators
  - Effects – restriction of overall capacity
    - increase in prices
    - tightening of the market
    - only one profiting – dominant oligopoly
- 
- Página 7

- ### Airtours' appeal to the CFI
- FOUR PLEAS IN LAW
    1. Definition of relevant market (should had been: foreign package holiday market).
    2. Incorrect definition of collective dominance.
    3. Commission had not proved that the result of the transaction would be the creation of a collective dominant position.
    4. Commission had infringed the principle of proportionality (Commission did not accept undertakings proposed by the applicant).
- Página 8

## CFI's judgment

- Annulment of the Commission's decision
- inconsistent reasoning
- mishandling of factual evidence
- disregard for the economic facts
- Rejects First Choice plea on market definition.
- Collective dominance test



## Relevant product market definition

- **Analysis of demand/offer substitutability**
- **Offer:** limited scope for short-haul and long-haul flights little scope for use of same aircraft for both kind of destinations, and difficulties to overcome in case of reconfiguring fleet.
- **Demand:** Significant differences from consumers' perspective (image, time when they're taken, transfer time, lack of price substitutability-limited overlap). Partial recognition of applicant's plea (marginal consumer substitutability).
- **Different Brochures for long/short-haul packages.**
- **Considerations related upstream (airlines) and downstream market (travel agencies): Vertical integration...**
- **Within EU's Commission bounds of discretion.**



## Collective dominance test (I)

Three-step procedure

- (A) Assessment of Market transparency
- (B) Sustainable tacit coordination: Retaliation possibilities.
- (C) Underestimation of external constraints: possible reaction of competitors and consumers



## Collective dominance test (II)

- (A) **Assessment of Market transparency (mistakes in facts considered).**

### *Oligopolistic dominance market*

low demand growth?, low price sensitivity to demand, similar cost structures, interdependence and commercial links between suppliers, substantial entry barriers and insignificant buyer power of consumers)

Instead, high demand volatility in market and capacity! (adds noise, impeding assessment of departures from common policy): caution is characteristic of competitive market of the kind not evidence of collective dominant position.



### Collective dominance test (III)



- (A) Assessment of Market transparency (mistakes in facts considered).

Product homogeneity? Package holidays are heterogeneous good (varying with destination, hotel category and other services) less likely collusion

High degree of transparency (both in **planning period** and **selling season**)?

Instead, planning procedure is complex: major obstacle to any attempt at tacit coordination (difficult to interpret capacity decisions taken by other operators concerning holidays to be taken 18 months later).



Página 13

### Collective dominance test (IV)



- (B) Sustainable tacit collusion: Retaliation possibilities.

Adequate retaliation mechanisms or deterrents to secure unity within the alleged dominant oligopoly?

Oversupply: adding capacity: downward pressure on prices against the deviant member

CFI, no significant deterrent effect:

difficult for retaliatory measures to be implemented quickly and effectively enough (I),

difficult to be detected as such (II)

bad effect of retaliatory measures (late-added for those punishing) (III)



Página 14

### Collective dominance test (V)



- (C) Underestimation of external constraints: possible reaction of potential competitors and consumers.

Possible response by smaller tour operators? (market polarisation)

Ability to compete constrained by lack of vertical integration and small size (no similar economies of scale and scope)? Not true (reality shows otherwise), no control of *inputs* by applicants (hotels, air seats), access to distribution possible..... despite some difficulties found by the Commission, Cosmos & Virgin Sun

Possible reaction of other tour operators? (foreign and long-haul)

Insignificant barriers to entry (tour operation, charter airlines and travel agency business). MMC 1997 Report.

Nekerman & TUI potential competitors



Página 15

### Collective dominance test (V)



- (C) Underestimation of external constraints: possible reaction of potential competitors and consumers.

Possible reaction of consumers?

Commission considered limited ability and power of consumers to look for other options in case of increase in prices.

consumer highly sensitive to prices in this market (buyer countervailing power)

related to the possible switch to long-haul holiday packages (if price overlap)



Página 16

## Conclusions



- Development of standards for the evaluation of joint dominance
- Change the dominance test to a broader substantial lessening of competition (US Law)
- Rigorous approach in proving allegations

