

***Case No COMP/M.4601 -  
KARSTADTQUELLE /  
MYTRAVEL***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 04/05/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04/05/2007

SG-Greffe(2007) D/202716

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.4601 - KarstadtQuelle/ MyTravel  
Notification of 26 March 2007 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 26 March 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking KarstadtQuelle AG ("KarstadtQuelle", Germany) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of MyTravel Group PLC ("MyTravel", United Kingdom) via the acquisition vehicle NewCo (to be renamed Thomas Cook Group plc, United Kingdom) by way of purchase of shares.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 139/2004 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

**I. THE PARTIES**

3. KarstadtQuelle is a major European department store and mail order company. The core business of KarstadtQuelle further includes service outlets, a real estate portfolio and the Thomas Cook Group. The Thomas Cook group is a tourism company which offers services in air-flights, hotels, tour operation, sales and service agencies. It is

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

represented in Germany, the UK, Ireland, France, Belgium, Luxembourg, the Netherlands, Austria, Hungary, Poland, Slovakia, Slovenia, Egypt, India and Canada.

4. MyTravel is a multi-national travel group whose principal business activities include charter airline, tour operating and travel agency operations serving customers in the UK and Ireland, Northern Europe (Sweden, Norway, Finland and Denmark) and Northern America.

## **II. THE OPERATION**

5. Pursuant to a merger agreement signed on 12 February 2007, KarstadtQuelle and MyTravel agreed to establish a new company ("NewCo") which will acquire each of MyTravel and Thomas Cook (MyTravel by means of scheme of arrangement). According to the merger agreement, NewCo will be renamed Thomas Cook Group plc and listed and headquartered in London. KarstadtQuelle will obtain 52% of the shares in NewCo, whereas MyTravel shareholders will obtain the remaining 48%. In addition, KarstadtQuelle and MyTravel have agreed the terms of a Relationship Agreement which will regulate the relationship between the NewCo and KarstadtQuelle as a shareholder in NewCo.

## **III. CONCENTRATION**

6. KarstadtQuelle will be the largest shareholder in NewCo, with a shareholding of 52%. The remaining shares will be dispersed among a large number of MyTravel shareholders<sup>2</sup>.
7. According to the Relationship Agreement, KarstadtQuelle will have the majority of votes exercisable at shareholders meetings, except for issues concerning the appointment of members of the board of NewCo, where KarstadtQuelle's voting rights will be limited to 40% of the total number of votes that could be cast. Considering that KarstadtQuelle is by far the largest shareholder in NewCo it will be difficult to be outvoted. Therefore, it would enjoy *de facto* control right on these issues. The control by KarstadtQuelle is further strengthened by the need for its approval of the appointment of the CEO of NewCo. [...]
8. In view of the above, it is considered that KarstadtQuelle will acquire sole control over NewCo (and consequently over MyTravel). The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## **IV. COMMUNITY DIMENSION**

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>3</sup>. Each of them have a Community-wide turnover in excess of EUR 250 million (KarstadtQuelle EUR [...] billion and MyTravel EUR [...] billion), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. Whereas KarstadtQuelle generates more than two-

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<sup>2</sup> At the end of February 2007, MyTravel had approximately [...]

<sup>3</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p. 25).

thirds of its aggregate Community-wide turnover in Germany, MyTravel does not generate more than two thirds of its aggregate Community-wide turnover in any Member State. The notified operation therefore has a Community dimension in the sense of Article 1(2) of the Merger Regulation.

## V. RELEVANT MARKETS

10. KarstadtQuelle and MyTravel operate throughout the EEA. The only product sector in which the parties overlap is the leisure travel sector. From a geographic point of view, the parties' activities are largely complementary. Whereas MyTravel has a tour operating business in Norway, Sweden, Denmark and Finland, KarstadtQuelle has activities in France, Austria, Belgium, Germany, Hungary, Poland and the Netherlands.
11. The activities of the parties overlap, however, in the supply of leisure travel services to customers in the UK and Ireland. As well as supplying package tours and certain other holiday products, they are both also vertically integrated into upstream (airline operation) and downstream (travel agency) businesses.

### 1. Supply of package holidays

#### *Package holidays vs. independent holidays*

12. Both KarstadtQuelle (Thomas Cook) and MyTravel are tour operators. Tour operators mainly supply "package holidays" combining accommodation and possibly other services in a given destination with return travel to and from it. Package holidays have previously been found by the Commission to constitute a separate market from holidays where the consumer purchases the various elements individually<sup>4</sup>.
13. In case M.1524 Airtours/First Choice (the "Airtours decision")<sup>5</sup> the Commission considered that it could be difficult for consumers to make a direct comparison of prices between a package holiday and an independently composed holiday. It also referred to additional search and "transaction costs" (telephone calls, faxes, letters to the hotel and airline, arranging car hire etc) and risks in contracting separately by comparison with the "one stop" nature of the purchase of a package. As a result, the Commission considered, at the time, that a relatively small price rise in package holidays would not cause sufficient customers to shift to independent holidays to justify including independent holidays in the relevant product market.
14. The parties submit that the distinction made by the Commission in its Airtours Decision in 1999 between the two types of leisure travel in relation to the UK and Irish markets has become less marked, if not disappeared all together. They refer in particular to the growth of independent holidaymaking, with a significant increase in the ability and willingness of consumers independently to source flights, accommodation and the various other components of their holiday either as "self-package", by booking flights, accommodation and other holiday components independently through separate transactions, or as "dynamic package", by using a

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<sup>4</sup> Case M.1524 Airtours/First Choice, paragraph 28.

<sup>5</sup> Case M.1524 Airtours/First Choice, of 22 September 1999.

single website to book flights, accommodation, and possibly other components in a single booking.

15. The Mintel report *Independent Travel, Leisure Intelligence* (September 2006) (the "Mintel report"<sup>6</sup>) observes that the UK holiday market has grown by 6% over the past five years<sup>7</sup>. The source of this growth has been the overseas market, which has risen by 14% in volume terms since 2001. This rise has been at the expense of the domestic market, which has contracted by 3% over the same period. This strong growth in the overseas market is closely connected to the transition within the sector from a predominantly package-based industry to one based primarily on independently booked travel.
16. Since 1996, the independent foreign holiday market has grown by 118% and by an annual average of almost 10% over the past five years. The package holiday industry grew by 25% since 1996<sup>8</sup>, but is showing a decline since 2002<sup>9</sup>. According to IPS data independent holidays have accounted in absolute terms for the majority of British trips abroad since 2003. By 2006, the independent holidaymaking sector was over 35% larger than the package tour sector.
17. The transformation from package holidays towards independent holidaymaking has been driven, according to the parties, by the expansion of the so-called "low cost" airlines. Whereas in 1996 there were a total of four low cost carriers operating from the UK, flying from 10 UK airports to 12 destinations in seven EU countries, by 2005 there were already 22 low cost carriers operating from about 35 UK airports and serving more than 150 international destinations. These destinations include many traditional sun and sea destinations in the Mediterranean where the charter airlines are most prominently present.
18. The British Civil Aviation Authority (CAA) concluded in its report *No-Frills Carriers: Revolution or Evolution* (November 2006) that overall the growth of low-cost airlines was primarily at the expense of charter airlines. While low cost traffic expanded at an average rate of 32% a year over the period 2000-2005, UK to the EU charter traffic declined at an average annual rate of 4%, whereas full service scheduled traffic contracted at a rate of over 2% a year. Further, the CAA report indicates that 80% of the customers of low cost carriers are leisure travellers and that a significant part thereof travels on the basis of an independent package holiday.<sup>10</sup>
19. The success of the low cost carriers in the UK and Ireland, in turn, is according to the parties linked to the significant growth in internet usage and in particular to the rapid pick up of broadband internet access at home. Whereas in 1999 the market situation was still such that the Commission concluded in its Airtours decision that e-commerce

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<sup>6</sup> The Mintel International Group Ltd is a supplier of consumer, media and market research. Mintel has published in 2005 and 2006 a number of independent reports related to the leisure industry.

<sup>7</sup> The Mintel report p. 21.

<sup>8</sup> The Mintel report, p. 27.

<sup>9</sup> IPS data on UK residents' short-haul holidays abroad (all modes of travel) 1996-2006.

<sup>10</sup> Chapter 4, p.4 , 6 and 7 of the CAA report

is undeveloped in the UK and that consumers perceive purchases via the web as risky, this situation has radically changed since.

20. The Mintel report finds that the Internet has provided the consumer with access to a spectrum of travel sites which encompass tour operators, third party intermediaries, direct suppliers of travel components, travel search engines and auction sites. It has created a global route for a large number of small to mid-scale suppliers of holiday products, which enables them to compete with larger branded players and empowered customers - who have become far more confident in the security of online booking – to become "their own travel agents". The Mintel report estimates that the internet accounted in 2005 for over 45% of foreign holiday bookings.
21. The studies referred to above (see paragraphs 15 and 18) indicate that independent holidays exercise a certain competitive constraint on package holidays. In the market investigation, this view was shared by tour operators which focus on the sale of package holidays and by those who concentrate on independent holidays.
22. However, while the above mentioned statistics<sup>11</sup> show that independent travel has managed to capture a growing part of the travel budget of UK consumers, they do not demonstrate conclusively that package holidays could not constitute a separate product market. On the one hand, the increase in individual travel could be linked to a demand that is unrelated to any changes in the prices for package holidays.<sup>12</sup> On the other hand, there still remain a number of differences between package holidays and independent holidays which may affect the substitutability of both types of holiday products, as it will be set out below. For certain customer groups it may be more convenient to book a traditional "sun and sea" package holiday than to use the newly created freedom to create an independent package holiday by collecting the individual elements from different suppliers. As a result, it can not be excluded that a hypothetical monopolist in the provision of package tours could profitably increase its price even though overall demand for this service is stagnant or decreasing.
23. The Mintel report confirms that especially in the age groups 35-44 (families with children) and 55 and over (senior citizens) the package holiday remains popular<sup>13</sup>. The same applies to certain socio-economic groups. Customers which prefer a package holiday often also have a preference to book such a holiday via a traditional high street travel agent, which is perceived by many as more reassuring than a booking via the Internet. In addition, booking via the travel agent often offers the additional advantage to pay for the holiday in instalments, a possibility which often does not exist in relation to independent packages<sup>14</sup>. A final difference between package holidays and independent holidays concerns the fact that the latter often do not provide the traveller with any protection against insolvency, as would be the case with package holidays which are covered by the ATOL (Air Travel Organisers Licensing Scheme) regime.

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<sup>11</sup> See in particular paragraphs 15, 16 and 18, read together.

<sup>12</sup> Consumers could for instance consider substituting a short city break for a non-travel expense while at the same time they would only spend their summer vacations on a package holiday.

<sup>13</sup> The Mintel report p.48.

<sup>14</sup> The Mintel report p. 69

### *Short-haul vs. long-haul foreign package holidays*

24. In its *Airtours* decision the Commission considered that prices of domestic holidays in the UK and Ireland do not constrain prices for foreign package holidays and should therefore be considered as a separate product market. The market investigation has confirmed that this distinction reflects the current market situation.<sup>15</sup>
25. Within the foreign package holiday market a number of distinctions would be possible. These would include distinguishing by holiday type, e.g. "sun and sea" holidays<sup>16</sup>, "city breaks", or by destination. However, in previous decisions the Commission did not consider it necessary to make such a further distinction<sup>17</sup>.
26. The only further distinction made by the Commission in relation to foreign package holidays concerned the split between short-haul package holidays and long-haul package holidays. The long-haul sector is generally recognised as comprising all destinations that involve a flight time (from the UK) substantially in excess of three hours<sup>18</sup>. Thus effectively all European (mainland and islands) and North African holiday destinations fall into the "short-haul" category, in contrast to those in, for example, the Caribbean, the Americas or South/East Asia. This distinction was upheld by the Court of First Instance<sup>19</sup> and is confirmed by the market investigation in the present case.

### *Conclusion*

27. For the purpose of this case, the definition of the relevant holidays market on which the parties are active can be left open, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area.

### *Geographic market definition*

28. The parties submit that the geographic market for the supply of foreign package holidays is national in scope. The Commission has also found in previous decisions that the markets for the supply of foreign package holidays are still essentially national in character<sup>20</sup>. Tour operators, even those which sell holidays in several countries generally produce and market their packages on a national basis. This is largely confirmed by the market investigation.

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<sup>15</sup> Neither Thomas Cook nor MyTravel's tour operator business operates domestic UK package holidays.

<sup>16</sup> According to the MQ6 Transport Travel and Tourism report of IPS for q3 of 2006 around 60% of the visits abroad of the UK in 2005 to the EU concerned Spain, Portugal, Italy, Greece and France.

<sup>17</sup> See M. 1524 *Airtours/ First Choice*, paragraphs 10 and 28.

<sup>18</sup> Although flights to the Eastern Mediterranean and the Canary Islands may take up to four hours they are included in the concept of "short-haul" destinations.

<sup>19</sup> See Case T-342/99 *Airtours vs. Commission*.

<sup>20</sup> See Case M. 1524 *Airtours/First Choice*, paragraph 43.

29. For the purpose of this case, the market for the supply of foreign package holidays (short-haul and long-haul) can be considered national in scope.

## 2. Travel agency services

### *Product market*

30. A further market that can be distinguished concerns the down-stream market for the supply of travel agency services. Both parties are active down-stream on the market for the supply of travel agency services in the UK. There is no overlap in Ireland, where only Thomas Cook is active to a very small extent.
31. The Commission has found in previous decisions that travel agents supply various services to consumers and business travellers such as flights bookings, hotel and other accommodation bookings and other related services. All travel agents in the UK and Ireland offer the products of a range of tour operators and other suppliers. The major tour operators also distribute their products via their own outlets, telephone call centres and online activities. Tour operators were previously considered to operate mainly through high street travel agent outlets and call centres, although they are increasingly active in online distribution. In past decisions, the Commission has left open whether the online and phone distribution activities of tour operators and travel agents are part of the same market for travel agency services<sup>21</sup>.
32. The parties submit that the distribution of package holidays online or by phone, directly from the tour operator, through own or third party intermediaries, traditional agents or online-specialists, should be considered as part of the same product market as the booking of package holidays through retail outlets. They argue that the ability to undertake internet research serves as a competitive constraint on high street prices, even for those customers who might prefer ultimately to book through a travel agent. High street and online prices are broadly comparable, driven by the ease with which prices can be compared and the desire of high street agents to win business through competitive discounting. The parties consider direct sales, integrated travel agents, third party agents (both vertically integrated and independent) and specialist online third party distributors/search engines/comparison websites<sup>22</sup> as the four principal distribution channels. Moreover, as mentioned above, the parties argue that the development in online distribution has blurred the distinction between tour operator and travel agents as tour operators engage increasingly in direct sales and travel agents are offering more and more dynamic packaging.

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<sup>21</sup> In Case M. 1524 Airtours/First Choice online sales were considered as a significant potential alternative distribution method for the future, but undeveloped in the UK at the time (1999). However, more recent cases (Case M. 1812 Telefónica/Terra/Amadeus and Case M. 2794 Amadeus/GGL/JV) the market investigations suggested that internet travel agent activities should be included in the product market definition.

<sup>22</sup> Examples of specialist online agents include [www.lastminute.com](http://www.lastminute.com); [www.expedia.co.uk](http://www.expedia.co.uk); [www.ebookers.com](http://www.ebookers.com); [www.travelocity.co.uk](http://www.travelocity.co.uk); [www.opodo.co.uk](http://www.opodo.co.uk); [www.packyourbags.com](http://www.packyourbags.com); [www.lowcostbeds.co.uk](http://www.lowcostbeds.co.uk); [www.holiday.co.uk](http://www.holiday.co.uk); [www.bargainholidays.com](http://www.bargainholidays.com); [www.holidaywarehouse.co.uk](http://www.holidaywarehouse.co.uk); [www.holidayholidayholiday.co.uk](http://www.holidayholidayholiday.co.uk); [www.traveleze.co.uk](http://www.traveleze.co.uk); [www.freedomdirect.co.uk](http://www.freedomdirect.co.uk); [www.travelrepublic.co.uk](http://www.travelrepublic.co.uk). Examples of search and comparison websites which typically allow the holidaymaker to 'click through' to the website of the relevant tour operator to complete the booking include: [www.travelsupermarket.com](http://www.travelsupermarket.com); [www.uksidestep.com](http://www.uksidestep.com); [www.traveljungle.co.uk](http://www.traveljungle.co.uk); [www.tripadvisor.co.uk](http://www.tripadvisor.co.uk); [www.henoo.com](http://www.henoo.com); [www.directline-holidays.co.uk](http://www.directline-holidays.co.uk).



33. The Mintel report *Holiday Booking process Leisure Intelligence* (August 2006) observes that since 2001 there has been a general trend on the one hand to reduce the number of travel agency outlets, in particular by three of the four vertically integrated chains, and on the other hand to invest into the expansion of direct sales.<sup>23</sup> The report also shows that at the same time the proportion of package holidays sold via travel agents declined while the share of direct bookings of package holidays with the tour operator increased.
34. The market investigation confirms a general increase in phone and internet bookings, directly from tour operators or through agents. Distribution through retail outlets and distribution online and by phone are regarded as part of the same market since they offer the same products and act as price constraints upon each other because consumers are very price sensitive and use internet possibilities to collect information on the "best offer". While it was pointed out that there may be indeed groups of customers who would be reluctant to book online or by phone and need a travel agency's advice, it was also agreed that in view of the research facilities offered by internet, price discrimination of these consumers would hardly be feasible.
35. For the purpose of this case, the definition of the relevant product market can be left open, since in all alternative definitions considered, effective competition is not significantly impeded in the EEA or any substantial part of that area.

#### *Geographic market definition*

36. The Commission has found in previous decisions that in general travel agents market nationally.<sup>24</sup> The parties submit that a national market definition would be appropriate in view of the growing significance of the internet as a distribution channel which reduces the dependency of consumers on local high street agents.
37. The market investigation has confirmed that the market should be considered as national, although with some regional aspects taking into account that consumers are only prepared to travel a certain distance to reach a retail outlet and that retail agents compete by giving individual discounts. It was considered by the respondents to the market investigation that a majority of consumers would be in a position to compare prices of local agents with offers in the internet and that a sufficient number would be willing to book online. These options are considered by most respondents as an important competitive constraint on prices. Such a constraint would make market conditions sufficiently homogenous to consider the distribution market as national.
38. For the purpose of this case, the market for the supply of travel agency services can be considered national in scope.

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<sup>23</sup> Whereas Thomas Cook reduced its high street outlets by 19%, MyTravel/Going Places reduced it by 30% and TUI/Thomson by 6%. The only integrated chain to open up new outlets was First Choice who according to Mintel expanded its previously limited presence by 51%.

<sup>24</sup> See Case M. 1524 Airtours/First Choice paragraph 43 to 50 and Case M. 1812 Telefónica/Terra/Amadeus paragraph 13.

### 3. Wholesale supply of airline seats

39. Charter airlines sell block seats or entire flights to tour operators, who then integrate the flight into a package holiday. In previous decisions, the Commission has identified a separate product market for the supply of seats on charter flights to tour operators, indicating the possibility to distinguish between short haul foreign destinations and long haul foreign destinations<sup>25</sup> ("wholesale"). In its Airtours decision, the Commission excluded from the market definition the wholesale supply of seats to tour operators by scheduled airlines. According to the Commission, scheduled flights at that time were not a viable substitute for charter flights for package tours to most package holiday destinations<sup>26</sup>.
40. The parties submit that this market definition has been overtaken by developments on the market and in particular by the rise of low cost carriers which currently serve a wide range of short haul holiday destinations<sup>27</sup>. According to the parties, low cost carriers provide an important additional source of flying capacity for package holiday tour operators making block allocations and individual seats available to package tour operators. Moreover, the parties argue that, following airline liberalisation, non-UK based airlines such as Spanair, Futura, Iberworld, Nouvelle Air Tunisie or Air Europa can offer seats on flights from airports located outside their home market. Finally, a number of UK full scheduled airlines such as British Airways also supply short haul seats to package tour operators. Consequently, the product market should be broadened and include the services of all these providers of scheduled air travel.
41. As regards long-haul holiday destinations, the parties put forward that the relevance of scheduled airlines as providers of flight capacity is even greater.
42. The market investigation has largely confirmed the parties' views that scheduled airlines and non-UK carriers (especially charters) provide airline capacity for short-haul and long-haul destinations. In particular, the market investigation shows that, to a certain extent, some non-UK based charters, low cost and full service scheduled airlines also represent a source of supply of seats to tour operators.
43. For the purpose of the present case, it is not necessary to conclude on the precise scope of the relevant product markets as, under any alternative market definition, the proposed operation does not give rise to competition concerns.

#### *Geographic market definition*

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<sup>25</sup> See Case M. 1524 Airtours/First Choice, paragraph 42; Case M.157 AirFrance/Sabena, paragraph 25; see also Case M.1494 -Sair Group/AOM, paragraph 11, Case No COMP/M. 2186 Preussag/Nouvelles Frontières, paragraph 7 and Case No COMP/M.3770 Lufthansa/Swiss, paragraph 20.

<sup>26</sup> See Case M. 1524 Airtours/First Choice, paragraphs 34 to 50. Airtours did not challenge this market definition in the framework of the case T-342/99 Airtours v Commission.

<sup>27</sup> A recent report from the UK Civil Aviation Authority ("*No-Frills carriers: revolution or evolution?*", 2006) shows the significant increase in the number of European destinations served by low cost carriers from the UK in the past six years. Low cost carriers now fly from the UK to over 150 destinations, including most popular package holiday destinations such as Portugal (e.g. Faro) and Spain (e.g. Malaga, Palma de Mallorca, Tenerife).

44. The Commission has accepted in previous decisions that the market for charter airline services can be regarded as national in character as they fly out and return to their country of origin and licensing and the demand for these services mainly arises from customers resident in the country of origin<sup>28</sup>. The parties do not oppose this delineation of the geographic market.
45. For the purpose of this case, the market for the charter airline services can be considered national in scope.

#### 4. Purchase of hotel accommodation

46. The Commission has also investigated the impact of the proposed transaction as regards the combined buying power of Thomas Cook and MyTravel on the procurement markets for hotel accommodation in destination holiday resorts.
47. It is not necessary to define these markets product or geographic wise in the present case, as the transaction does not raise competition concerns on any possible market definition.

## **VI. COMPETITIVE ASSESSMENT**

48. Following the notification of the present concentration, the Commission received on 4 April 2007 a notification of a subsequent transaction<sup>29</sup> by TUI AG ("TUI," Germany) and First Choice Holidays Plc ("First Choice", UK) (Case M 4600 TUI/First Choice). This second transaction partly covers the same markets (i.e. tour operating business in UK and Ireland) as the markets on which Thomas Cook and MyTravel are active.
49. The Commission will assess the impact of these two transactions in light of the competitive situation that prevailed at the time of the respective notification. In view of the dates of notification, this implies that the present transaction will be assessed independently from the second transaction. Any further consolidation in the tour operating business brought about by the TUI/First Choice merger will be analysed taking into account the competitive circumstances prevailing at the time of the second notification.
50. In this respect, the Commission observes that it is inherent in the system of the Merger Regulation that a party that is the first to notify a concentration that, assessed on its own merits, would not significantly impede effective competition in the common market or in a substantial part thereof, is entitled to have its operation declared compatible with the common market within the applicable time limits. It is settled case-law that the relevant counter-factual for assessing a merger is, in principle, the

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<sup>28</sup> See Case M. 1524 Airtours/First Choice, paragraph 43 and Case No COMP/M.2691 TUI/Nouvelles Frontières, paragraph 8.

<sup>29</sup> The merger agreement KarstadtQuelle/MyTravel was concluded and announced on 12 February 2007 whereas the merger agreement between TUI and First Choice was concluded and announced on 19 March 2007. The KarstadtQuelle/MyTravel concentration was notified on 26 March 2007 whereas the TUI/First Choice concentration was notified on 4 April 2007.

competitive situation that prevails at the time of its notification<sup>30</sup>. While it is true that the Commission is required to carry out a prospective analysis that takes account of future events and market developments, the administrative authorisation of future mergers in the same market with a Community dimension is under the control of the Commission.

***Non-coordinated effects***

***1. Short- and long-haul foreign package holidays in the UK and Ireland***

51. The UK and Irish market are characterised by the presence of four major vertically integrated tour operators, Thomas Cook, MyTravel, TUI and First Choice and a large number of smaller independent tour operators for short-haul and medium-sized operators like Virgin travel and Kuoni for long-haul.
52. Thomas Cook and MyTravel would have the below combined market shares on the markets for the supply of short- and long-haul foreign package holidays in the UK and on the market for short-haul foreign package holidays in Ireland.

**Table 1**

<b>UK - Foreign package holidays</b>	<b>Short-haul</b>	<b>Long-haul</b>
Thomas Cook	[10%-20% ]	[10%-20%]
MyTravel	[10%-20%]	[10%-20%]
<i>Combined</i>	<i>[30%-40%]</i>	<i>[30%-40%]</i>

\* Source: AC Nielsen data for W05/S06.

**Table 2**

<b>Ireland - Foreign package holidays</b>	<b>Short-haul<sup>31</sup></b>
Thomas Cook (Sunworld)	[10%-20%]
MyTravel (Panorama)	[10%-20%]
<i>Combined</i>	<i>[30%-40%]</i>

\*Source: market investigation.

53. After the transaction, the parties will continue to experience significant competition from the two other major vertically integrated tour operators, TUI and First Choice, which are both active on the markets on which the activities of the parties overlap, as well as from numerous small tour operators which are active on the package holiday markets. These smaller tour operators for short-haul include Olympic/Odyssey, Kosmar, Libra, Goldtrail, Cosmos, Balkan and Inghams. For long-haul, the merged

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<sup>30</sup> Cf. Case T-2/93 Air France v Commission [1994] ECR II-323, paragraphs 70-72; Case T-374/00 Verband der freien Rohrwerke and Others v Commission [2003] ECR II-2275, paragraph 170; Case T-342/99 Airtours v Commission [2002] ECR II-2585, paragraph 82.

<sup>31</sup> Based on number of passengers, excluding city breaks. In Ireland, Thomas Cook does not sell long-haul packages and 95% of MyTravel packages are short-haul.

entity will face competition not only from TUI and First Choice, but also from other medium-sized competitors with a relative important market share (Virgin and Kuoni).<sup>32</sup>

**Table 3**

UK - Foreign package holidays	Short-haul	Long-haul
TUI	[20%-30%]	[10%-20%]
First Choice	[10%-20%]	[10%-20%]
Virgin		[0%-10%]
Kuoni		[0%-10%]
Others	[20%-30%]	[10%-20%]

\* Source: AC Nielsen data for W05/S06.

**Table 4**

Ireland - Foreign package holidays	Short-haul
TUI (Budget)	[30% to 40%]
First Choice (Falcon)	[10% to 20%]
Others	[10% to 20%]

\*Source: market investigation.

54. There is no evidence that Thomas Cook and MyTravel are each others' closest competitors. All four large tour operators are in fact relatively similar in relation to their competitive positioning, in particular in the short-haul package holiday market. They all offer an extensive range of destinations and a wide choice of accommodation. In exercising this choice, consumers can and do shop around to find the best deal for a package holiday. This is facilitated by the presence of a large number of web based search engines which allow consumers to compare prices and availability within seconds. In addition, consumers show little brand loyalty<sup>33</sup> and engage in high levels of switching in a market place where the competitive offering changes almost daily.
55. Even if one limits the assessment to a narrowly defined product market (i.e. only including foreign package holidays), the market developments which have taken place since 1999 should be taken into account, as they exert a degree of competitive constraint on the tour operators which are active on the markets for package holidays. These developments include the significant growth in the number of independent holidays and the blurring of the distinction between tour operators and on- and off-line travel agents, who offer more and more dynamic packages, similar to tour operators. These developments, together with the presence of the actual competitors, would allow the final consumers to defeat any attempt by the merging parties to unilaterally increase prices.
56. If these market developments led to a widening of the product market, the parties' combined market share would significantly be reduced and result in market shares which are generally not indicative for the existence of significant non-coordinated effects.

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<sup>32</sup> The parties have argued that Virgin and Kuoni sell a higher amount of long-haul package holidays than the one reported by ACN Nielsen. The market investigation has confirmed this point. Taking into account the figures provided by Kuoni and Virgin, the parties combined market share would be [20%-30%] whereas Kuoni and Virgin would have a combined market share of [20%-30%].

<sup>33</sup> [...]

**Table 5**

<b>UK - Foreign package holidays + independent packaging<sup>34</sup></b>	Short-haul	Long-haul
Thomas Cook	[0%-10%]	[0%-10%]
MyTravel	[0%-10%]	[0%-10%]
<i>Combined</i>	<i>[10%-20%]</i>	<i>[10%-20%]</i>

\* Source: IPS, AC Nielsen and parties' internal data for flight-only for W05/S06.

**Table 6**

<b>Ireland - Foreign package holidays + independent packaging<sup>35</sup></b>	Short-haul and long-haul
Thomas Cook	[0%-10%]
MyTravel	[0%-10%]
<i>Combined</i>	<i>[0%-10%]</i>

\*Source: parties' estimates, CSO and ITAA data for 2005.

57. In view of the above it is considered that the concentration does not create a risk of relevant price increases as a result of non-coordinated effects on the UK and Irish foreign package holidays markets. This would also be the case if one did not take into account the mitigating effects of the market developments described above. The market investigation has confirmed that consumers, in particular for short-haul package tours, are very price-sensitive. Attempts by the parties to increase prices would most likely be unsuccessful as they would allow TUI, First Choice and the smaller tour operators to increase their sales at the expense of the parties.

## 2. Travel agency services

58. Both parties sell package tours and other holiday components directly (via the internet and call centres) as well as through their own travel agencies ([...] for My Travel and [...] for Thomas Cook in 2006) and third party intermediaries (travel agencies and online specialists). On the basis of the information submitted by the parties, they would have the following market shares on the market for travel agency services with regards to high street outlets (high street retail distribution) in the UK<sup>36</sup>:

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<sup>34</sup> The parties have calculated their market shares on the basis of the package holidays and flight-only sales that they supplied.

<sup>35</sup> The parties have calculated their market share on the basis of the package holidays sold and the total number of independent holidays reported by CSO.

<sup>36</sup> There is no overlap in Ireland, where only Thomas Cook is active to a very small extent.

Table 7

UK W2005/S2006	Market shares based on number of outlets <sup>37</sup>	Market shares based on number of short-haul packages sold <sup>38</sup>
Thomas Cook	[0%-10%]	[10%-20%]
MyTravel	[0%-10%]	[10%-20%]
<i>Combined</i>	<i>[10%-20%]</i>	<i>[30%-40%]</i>
TUI	[10%-20%]	[20%-30%]
First Choice	[0%-10%]	[0%-10%]
Co-op	[0%-10%]	[10%-20%]
Others	[50%-60%]	[10%-20%]

59. In view of the parties' rather small combined share of outlets in the UK ([10%-20%]) and the fact that around [60%-70%] of all outlets (with a combined market share of [30%-40%] in the sales of short-haul packages via agents) are independent from the four major vertically integrated tour operators, it is unlikely that the transaction would lead to horizontal concerns on a narrowly defined national market for high street retail distribution.<sup>39</sup>
60. The market investigation has confirmed that in general pricing strategies are decided and applied on a national level and that the need to match online prices would prevent price increases on a national as well as on a local level. While some respondents raised the point that the parties' agents might become more reluctant to give competitive discounts to consumers in areas where they have a strong market presence, it was also confirmed that consumers are in general well informed about prices and the majority search for alternatives and are prepared to book by phone or online. It therefore seems likely that the availability of online price comparisons would act as sufficient constraint to prevent possible price increases.
61. On a wider market where all online (and phone) distribution of all types of intermediaries as well as direct distribution are included in the same product market, the parties would have a combined market share of [20%-30%] ([20%-30%] for short-haul, [10%-20%] for long-haul package holidays). In view of the competitive constraints by online distribution described above, on this basis there would be even less reasons for horizontal concerns.

*Access of independent tour operators to high street distribution*

62. In the course of the market investigation some concerns were raised in relation to the access of independent tour operators to high street distribution by the parties (customer foreclosure). Independent tour operators consider the access to high street distribution as

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<sup>37</sup> Parties' estimates are based on parties' actual figures, ABTA (Association of British Travel Agents) figures and BP Travel Trade Services for outlets from non-ABTA members. The total number of outlets is 7,182 in October 2006, compared to 8,851 in October 2002.

<sup>38</sup> Based on AC Nielsen. The total number of packages sold is [7,000,000-7,500,000] in W05/S06, compared to [8,000,000-8,500,000] in W03/S04. It has to be noted that these figures include self-distribution.

<sup>39</sup> Similarly in the Airtours decision of 1999 the Commission had concluded that a market share of 15 % of travel agency outlets would not raise concerns of a dominant position, irrespective of whether online and phone bookings were included or not (Case M. 1524 Airtours/First Choice, paragraph 32). This has been confirmed by the CFI (T-342/99 Airtours v Commission paragraph 256).

particularly important for their ability to compete on the market, given that many customers take home catalogues before they make their final choice<sup>40</sup>. Some respondents voiced concerns that they could be discriminated against by their vertically integrated competitors with higher commission fees and 'directional' (i.e. preferential) selling of the parties' own products.<sup>41</sup>

63. While respondents to the market investigation argued that access to retail outlets continues to be important in particular to create sufficient awareness of their products, they also acknowledged that the developments in online distribution have facilitated access to the market for independent tour operators by offering more opportunities for direct distribution and distribution through new specialized online-intermediaries<sup>42</sup>. It can thereby be concluded that the dependency of independent tour operators on high street sales has decreased in view of these increased possibilities of direct sales and online-intermediaries.
64. However, as regards high street distribution, it has to be noted that the parties account for only [10%-20%] of travel agency outlets while more than [80%-90%] of outlets would remain independent from the parties.<sup>43</sup> Even if the parties chose to reduce access to their own travel agents outlets or to provide access on less favourable conditions, their share of travel agency outlets is rather small. Market access for independent tour operators would remain via TUI ([10%-20%]) and First Choice ([0%-10%]) as well as via a large number of independent travel agents (around [60%-70%] of all outlets, i.e. around [40%-50%] ABTA and [20%-30%] non-ABTA outlets)<sup>44</sup>. Moreover, given consumers' expectations to find products from different tour operators even in integrated agencies and in view of the need to maximise income, the parties would not be able nor have the incentive to refrain from offering the smaller tour operators' products on reasonable terms. A significant proportion of their package holiday sales are indeed third party package holidays ([30%-40%] for MyTravel and [30%-40%] for Thomas Cook), in particular where third party products complement the in-house product offering. In view of this it can be concluded that the transaction does not lead to concerns of customer foreclosure by reducing access of independent tour operators to the parties' high street retail distribution.

#### *Access of third party agencies to the parties' products*

65. Another concern which has been raised by some respondents to the market investigation is that the merged entity might reduce access by travel agents to the products of the parties and/or offer lower commission rates for independent travel agencies and worsen trading conditions (input foreclosure).
66. In this regard, it has to be noted that the market investigation has confirmed a general trend by integrated tour operators to reduce commissions to third parties. However,

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<sup>40</sup> [...]

<sup>41</sup> See also Case M. 1524 Airtours/First Choice, paragraphs 81 and 82.

<sup>42</sup> [...]

<sup>43</sup> Although the higher share in sales seems to better reflect the perceived importance of the parties in the market, it has to be noted that these sales include an important percentage of self-distribution.

<sup>44</sup> See also T-342/99 Airtours v Commission paragraphs 256 to 260.



according to the parties this trend is due mainly to an increase in their own direct sales (and therefore not merger-specific) and decreased dependency on independent travel agents. This may be illustrated by the fact that the parties shares of direct internet sales increased within two years (W03/S04 to W05/S06) from [...] to [...] for MyTravel (short-haul packages and long-haul), and from [...] to [...] for Thomas Cook's short-haul, [...] to [...] for Thomas Cook's long-haul packages<sup>45</sup>. In the same period the share of own phone sales decreased (by up to [...] for MyTravel's short-haul packages), the share of own retail shares increased slightly (up to [...] for MyTravel's long-haul), and the share of third party agents (high street and online, including the other party) decreased.<sup>46</sup>

67. The parties acknowledge that naturally they would seek to generate the higher margins associated with an integrated sale where possible but that this was often not possible in view of consumers expectations as well as their interest to maximise sales and the perishable nature of their products. They submit that they will not restrict sales of their package holidays to their own outlets but will have an interest to make them available to third party outlets on commercial terms (i.e. based inter alia on volume of sales which typically could add [...] to the basic rate). They claim that third party agents are and will not be disadvantaged regarding access to information on holiday products compared to their own integrated network. In particular, they argue that all travel agents use the same booking system, information on availability is accessible to all simultaneously and access to stock not preferential, training on their product offering was available to third party agents.
68. Although the figures mentioned above illustrate the development that for the parties as well as for other competitors the direct route to market has improved and that they tend to increase direct and integrated sales, both parties still rely for at least [30%-40%] of the short-haul package high street sales on third party outlets, not including current sales through the other party<sup>47</sup>. For long-haul package both parties realise more than [20%-30%] of high street sales through third parties<sup>48</sup>. Taking into account the parties interest to maximise sales it seems unlikely that the parties would refrain from selling through third parties or lower their conditions to the extent as to make such sales unattractive for third party agents.
69. Even if the transaction may enhance the trend to lower commissions by enlarging the leverage of the merged entity, the parties still represent only [30%-40%] of the short-haul and [30%-40%] of the long-haul package market. In addition to the remaining [...] of the package holiday market, third party travel agents would still have access to other travel products and could offer "dynamic packaging" of accommodation and air travel.

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<sup>45</sup> W03/S04 to W05/S06.

<sup>46</sup> [...] for MyTravel's short-haul, [...] for MyTravel's long-haul packages, from [...] for Thomas Cook's short-haul, [...] for Thomas Cook's long-haul packages.

<sup>47</sup> In relation to high-street-distribution in W05/S06 Thomas Cook sold [...] of short-haul packages through own high street outlets, [...] through MyTravel and [...] through other third party outlets. For MyTravel these figures would be [...].

<sup>48</sup> Thomas Cook [...], not including [...] through MyTravel, MyTravel [...], not including [...] through Thomas Cook.

### 3. Wholesale supply of airline seats

70. Both parties operate their own charter airlines (MyTravel Airways UK and Thomas Cook) in the UK, which are primarily intended for use with their own packages<sup>49</sup>, though some of their seats are also supplied to third party tour operators. Both parties also buy seats from other airlines mainly for incorporation into their own packages. Additionally, the parties supply a limited amount of seats-only to end consumers.
71. In Ireland, the proposed merger will not lead to any horizontal overlaps. Thomas Cook is not a wholesale supplier of airline seats (either for own supply or for third party supply) and relies entirely on third party flying (e.g. First Choice, Air Europa, Monarch). MyTravel uses its own airline and third party airlines (e.g. Monarch, Spanair, Nouvelair Tunisie). It supplies to a limited extent airline seats to a vertically integrated third party tour operator.<sup>50</sup>
72. The parties' combined market shares in a narrowly or broadly defined market (including carriers other than UK charters) for the wholesale supply of airline seats to tour operators in the UK are modest. Moreover, post-merger the parties will continue to face strong competitors such as Monarch, First Choice, TUI and XL Airways.
73. In the narrowly defined market for the wholesale supply of airline seats in *charter flights* to tour operators and on the basis of the figures provided by the parties, the parties would have a combined market share of [20%-30%] for short-haul destinations (Thomas Cook [10%-20%] and MyTravel [0%-10%]) and [10%-20%] for long-haul destinations (Thomas Cook [10%-20%] and MyTravel [0%-10%])<sup>51</sup>. Competitors in short-haul destinations include First Choice [10%-20%], Monarch [20%-30%], Astraeus [10%-20%], XL Airways [10%-20%] and TUI [0%-10%]. Competitors in long-haul destinations include Monarch ([50%-60%]), TUI ([0%-10%]) and XL Airways ([10%-20%]).<sup>52</sup>
74. In a broader market for the wholesale supply of airline seats to tour operators (*low cost and non-UK based carriers included*<sup>53</sup>) the parties provide conservative estimates and

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<sup>49</sup> For example, in W05/S06, [...] of MyTravel capacity and [...] of Thomas Cook capacity was used for self-supply for short-haul destinations.

<sup>50</sup> In Ireland, MyTravel supplied approx. [...] seats to a single tour operator ([...]) in W05/S06.

<sup>51</sup> These market shares include the seats sold by the parties on their own airlines as well as on other airlines to third party tour operators (vertically and non-vertically integrated). In line with the Commission past decisions, self-supply is not regard as forming part of the relevant market (see case M.1524 Airtours/First Choice, paragraph 41).

<sup>52</sup> According to the Commission's internal calculations based on the parties' estimates and on the figures provided by charter carriers responding to the market investigation, the parties' combined market shares would be lower.

<sup>53</sup> For short-haul destinations, the parties have included estimates of the seat allocations supplied to tour operators by certain UK-based low cost companies (e.g. Jet2 and bmi) and non-UK based carriers (e.g. Spanair, Futura, Iberworld, Nouvelle Air Tunisie).

indicate to have a combined market share of [10%-20%] in short-haul destinations and of [0%-10%] in long-haul destinations in 2006<sup>54</sup>.

75. According to the parties, competitors in this broad market and short-haul destinations include the charter carriers mentioned above, low cost such as Jet2 ([0%-10%]) and bmi ([0%-10%]) and non-UK based carriers (e.g. Spanair, Futura, Iberworld, Nouvelle Air Tunisie, SATA) which would represent [10%-20%] of the supplies. For long-haul destinations, apart the competitors mentioned above, the parties estimate that scheduled carriers would represent most of the supplies ([60%-70%]).
76. The market investigation has voiced some concerns regarding the vertical effects of the proposed operation and in particular, the impact that the merger could have on the non-vertically integrated tour operators' ability to source flight capacity for short-haul destinations. It has been stated that the four vertically integrated tour operators own most of the charter capacity and the merger could lead to a reduction of capacity available to independent tour operators. A long haul tour operator has also raised concerns regarding the wholesale supply of airline seats to tour operators for long-haul destinations. In particular, it has indicated that low cost carriers do currently not fly to long haul destinations and full scheduled airlines do not serve certain destinations (e.g., Cancun, Dominican Republic).
77. First, it should be noted that a significant proportion of the parties' capacity is used for self-supply and does not therefore constitute part of the market<sup>55</sup>. The parties' position in the market for the wholesale supply of airlines seats, as stated in the paragraphs above, is not significant and cannot be considered to grant the parties any considerable market power. MyTravel in particular is not a major wholesale supplier of seats to tour operators. In W05/S06, it only supplied [...] seats to non-vertically integrated tour operators (i.e. excluding the 4 major UK tour operators). Other important competitors such as First Choice Airways, Monarch, XL Airways and Astraeus represent a more important source of wholesale supply.
78. Moreover, as discussed in the section on relevant markets, tour operators source or could potentially source their flight requirements not only from charter airlines but also from scheduled airlines (including low costs). Consequently, to the extent that the merged entity would try to foreclose independent tour operators from accessing airlines seats, these tour operators could start purchasing airlines seats from both the remaining charter competitors and scheduled airlines.
79. Furthermore, two UK charters and three non-UK based charters have replied affirmatively when asked whether they intended to expand their activities with respect to the wholesale supply of airline seats to tour operators in the near future.

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<sup>54</sup> These market shares include the seats sold by the parties on their own airlines as well as on other airlines to third party tour operators (vertically and non-vertically integrated). In line with the Commission past decisions, self-supply is not regarded as forming part of the relevant market (see case M.1524 Airtours/First Choice, paragraph 41). See also in this respect the CFI judgment in case T-342/99 Airtours vs. Commission, paragraph 231.

<sup>55</sup> In line with the Commission past decisions, self-supply is not regarded as forming part of the relevant market (see case M.1524 Airtours/First Choice, paragraph 41). See also in this respect the CFI judgment in case T-342/99 Airtours vs. Commission, paragraph 231.

80. Finally, regarding the route-specific concerns raised by a long-haul operator, it should be noted that there are no long-haul destinations (or short-haul destinations) which are only served by both Thomas Cook and MyTravel.

#### 4. Hotel accommodation

81. Both MyTravel and Thomas Cook purchase hotel accommodation in destination holiday resorts. Moreover, MyTravel is vertically integrated into accommodation, primarily in Spain, Greece and Cyprus, whereas Thomas Cook accommodation interests are marginal.<sup>56</sup> It has been the Commission's general practice to exclude self-supply from the relevant market, and to assess the impact of a concentration on the third-party procurement market.<sup>57</sup>
82. The parties enter into three types of contracts with hoteliers: (i) "no guarantee" or "allotment" contracts where unsold rooms are generally returned to the hotelier an agreed number of days before the date of departure and the hotelier is free to sell those rooms; (ii) "full guarantee" contract where the tour operators pays for all the rooms allocated to it irrespective whether it manages to sell a holiday at the hotel to a customer; and (iii) "volume guarantee" or "partial guarantee" which are hybrid contracts<sup>58</sup> where generally unsold rooms are also returned to the hotelier. The parties enter in guaranteed or partially guaranteed contracts in respect of less than [20%-30%] of their contracted hotel beds, with the vast majority of hotels entering into rolling year-on-year no guarantee contracts.
83. Concerns have been voiced by some hotels regarding the (potential) increase of the negotiating power of the new group post-merger and by some competing tour operators regarding the increase of the parties' ability to foreclose them from access to accommodation.
84. However, the parties' combined market shares tend to be relatively low in the destinations where they overlap, with the highest market shares in accommodation procurement appearing in Mallorca (up to [20%-30%]), Lanzarote (up to [20%-30%]) and Fuerteventura (up to [20%-30%])<sup>59</sup>. In these destinations less than [20%-30%] of MyTravel hotel rooms contracted were subject to guarantee contract. For Thomas Cook, the proportion was at most [30%-40%]. Their combined market share is below 15% in the remaining holiday destinations.

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<sup>56</sup> Thomas Cook has a [...] % shareholding in a company owning 5 hotels in Spain (3 in Mallorca and 2 in Andalucia) and it is a minority shareholder in other hotel holding or management companies. MyTravel owns, leases or manages hotels mainly in Spain, Cyprus and Greece.

<sup>57</sup> Case No COMP/M.2002 Preussag/Thomson, paragraph 12.

<sup>58</sup> For instance, the tour operator may contract for an allocation of X rooms of which half are subject to a guarantee; contract for an allocation of X rooms with a guarantee in respect of a fixed income/revenue; or contract for an allocation of X rooms but pay a deposit in respect of a smaller number.

<sup>59</sup> The parties' combined market share could be lower depending on the source used for calculating the total rooms available at a given destination.

85. Moreover, over [70%-80%] of hotel rooms purchased by the parties are contracted on a "no guarantee" or "allotment" basis and the parties have decreased the number of hotel rooms that they have contracted on a full guarantee basis during the last 3 years.
86. Finally, the market investigation shows that most of the hotels diversify their supply of rooms to more than one tour operator and not only from the UK and contracts are generally concluded for no more than a year of duration.

### *Co-ordinated effects*

87. The present case leads to a reduction from four to three of the major vertically integrated tour operators active on the UK and Irish markets with joint market shares of respectively [30%-40%] and [30%-40%] on the UK short- and long- haul market and of [30%-40%] on the Irish short-haul package holiday market. The other two major vertically integrated tour operators (TUI and First Choice) control [40%-50%] and [30%-40%] of the UK short-haul and long-haul package market<sup>60</sup> and more than 50% of the Irish short-haul package market<sup>61</sup>. A large number of smaller independent tour operators, especially for short-haul, control the remaining market share.
88. The above market situation justifies an assessment as to whether the concentration may give rise to concerns of coordinated effects in these narrowly defined markets. In case of wider product markets, which would include independent packaging, such an assessment would not be necessary, given the resulting lower market shares and the enlarged number of competitors which reduce the risk of coordinated effects.
89. In relation to the narrow product market for short haul foreign package holidays, the CFI set out in its Airtours judgement why in the market situation of 1999, the Commission was incorrect in finding coordinated effects on the UK market. At the same time, the CFI provided guidance on how to assess a potential situation of coordinated effects.
90. The guidance provided by the CFI has been incorporated in the Commission Guidelines on the assessment of horizontal mergers<sup>62</sup> that presents the analytical approach used by the Commission in its appraisal of horizontal mergers.
91. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. Three conditions need to be fulfilled for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Finally, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.

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<sup>60</sup> See tables 3 and 4.

<sup>61</sup> On the UK short-haul package holiday market the post merger HHI would be [2000-2500], with a delta of [600-700]. On the Irish short-haul package holiday market the post merger HHI would be [2000-2500] with a delta of [400-500].

<sup>62</sup> OJ C 31 of 5 February 2004, p. 5.

92. In its Airtours decision the Commission considered that on the UK market for foreign short-haul package holidays there was a risk of coordinated effects. On appeal the Court of First Instance annulled the Commission's decision on this point. In the present case it has to be determined whether, taking into account the changes which the UK and Irish market have experienced since 1999, there would currently be a risk of coordinated effects.

Reaching terms of coordination

93. Generally, the less complex and the more stable the economic environment, the easier it is for companies to reach a common understanding on the terms of coordination. It is easier to coordinate when demand and supply conditions are relatively stable. In this context volatile demand, substantial internal growth by some firms in the market or frequent entry by new firms may indicate that the situation is not sufficiently stable to make coordination likely.
94. Certain characteristics of the package holiday market in the UK and Ireland indicate that this market is rather stable and could make coordination likely. In particular (i) the market shares of the four major vertically integrated tour operators on the UK and Irish markets for foreign short- and long-haul package holidays have remained stable in the last three years (i.e. only changed by less than 3%); (ii) no major market entry has happened in recent years in package holidays; and (iii) demand growth for package holidays is low<sup>63</sup>. The reduction of the main tour operators in the UK and Irish markets from four to three would therefore increase the possibilities of reaching terms of coordination in the package holidays market.
95. However, as described in the following paragraphs, a number of characteristics of the package holidays market in the UK and Ireland and recent developments in the leisure industry seem to complicate reaching terms of coordination.
96. The tour operating market is characterised by its wide array of products on offer, which differ in terms of destination, hotel, and departures. Over time, the increased availability of independent packages and the supply of flights and accommodation have further increased the pallet of products on offer. The sheer number and variety of the available options on the UK and Irish markets significantly reduce market transparency and complicate price coordination.
97. As regards possible coordination of capacity setting, it should be noted that the complex and detailed "bottom up" approach<sup>64</sup> to capacity planning which is characteristic for the tour operating market is likely to constitute a major obstacle to coordination between the three large vertically-integrated tour operators after the merger. In this respect no significant differences exist between short- and long-haul holidays and between the UK and Irish markets.

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<sup>63</sup> According to the figures provided by the parties and based on IPS data, demand for traditional package holidays has stagnated since 2000. Over that period, passengers on inclusive tours have declined by 1.1% (compound annual rate).

<sup>64</sup> The "bottom up" approach refers to a process whereby existing product offerings will be analysed and changes that have taken place or are forecast to take place will be considered in the capacity planning process for the next season.

98. The capacity planning processes of the major vertically integrated tour operators begins approximately 18 months in advance of the season. The crux of the planning process is to attempt to predict how demand will develop on both a macro-economic and micro-economic level. This process takes place in different stages. In case of Thomas Cook it commences with an initial planning stage, followed by an initial hotel contracting stage, which leads to the first brochure stage. The first brochure stage is followed by a second brochure stage which includes the process of slot allocation. Finally, there is a third brochure stage which coincides with the start of the key selling season. This last stage includes the printing in November of the brochures for the next summer. At that point in time, it is the aim to have 100% of the hotel beds contracted so that the prices quoted to customers in the third brochure can be based on real prices negotiated with hoteliers. At the start of the selling season there is only limited room left for changes to the planned capacity.
99. The market investigation has revealed that MyTravel, TUI and First Choice planning process is equally complex. The market investigation also indicates that the capacity planning process for smaller tour operators and more specialist businesses is also a relatively complex process which starts on average 12 months before the season.
100. Moreover, demand for short- and long-haul foreign holidays seems to be not only volatile in absolute terms, but also in relation to specific holiday destinations. Natural disasters, political instability and rapid and unpredictable changes in consumer preferences may result in significant changes in demand from year to year. As example, the parties refer to January 2006, when demand for holidays to Turkey was severely affected by the bird flu outbreak and Thomas Cook had to replace the flights to Turkey by flights to another destination.
101. Finally, recent developments in the market and, in particular, the independent holidays phenomenon (see section on relevant markets) should be taken into account as a destabilisation factor in reaching terms of coordination in the package holidays market.
102. In light of the foregoing, it can be concluded that the markets for the supply of package holidays in the UK (short-haul and long-haul) and Ireland (short-haul) present certain characteristics conducive to coordination. However, factors such as the complexity of the capacity planning process, the demand volatility and the independent holidays phenomenon, even if they do not totally exclude the possibility of reaching terms of coordination between the three large vertically-integrated tour operators that would remain after the merger, render such coordination more difficult and thus unlikely.
103. In the following paragraphs, the Commission will analyse if the three cumulative conditions necessary for coordination are met.

#### Monitoring of deviations

104. Only the credible threat of timely and sufficient retaliation keeps companies away from deviating from terms of coordination. This requires that markets are sufficiently transparent to allow coordinating companies to monitor to a sufficient degree whether companies are deviating. The present concentration will reduce the number of the major vertically integrated tour operators in the UK and Irish markets from four to three, and might therefore increase the possibility of these undertakings to monitor compliance with the terms of coordination.

105. However, as explained in the previous section, the internal capacity planning processes applied by tour operators on the UK and Irish markets prior to the selling season are not public and they are the result of a complex exercise. During these internal planning processes most decisions on capacity and pricing are made. It is therefore only at a relatively late stage, at the selling season, that competitors become aware of the decisions taken by their competitors. At such a stage, the scope for retaliation is however limited, as only limited changes to planned capacity can be introduced. The market investigation has confirmed that the capacity planning procedures of tour operators lack transparency, at least until the brochures and programmes are published.
106. Moreover, the growth in independent holidays and accommodation-only products coupled with the willingness of customers to switch between the independent and package alternatives, would add considerable "noise" to the package holidays market which would make it even more difficult to detect deviations from the common policy and hence sustain a coordinated outcome.
107. Considering the characteristics of the relevant markets, and in particular, the limited degree of transparency further reduced by the independent holidays phenomenon, it would be difficult for the three large vertically-integrated tour operators to monitor any potential deviation from planned coordinated action on the UK and Irish package holidays markets.

#### *Deterrent mechanisms*

108. Coordination is not sustainable unless the consequences of deviation are sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of the coordination.
109. There would be several deterrent mechanisms in the present case which the parties could consider applying (e.g. lowering prices, increasing capacity). The threat of increasing capacity would be the most likely one. Such an increase of capacity could either take place during the selling season, or, in case there would be insufficient free capacity in the short term, in next years selling season.
110. According to the parties, detection of deviation from agreed coordinated behaviour is only likely during the selling season, due to the non public character of the internal planning process.
111. Immediate retaliation through simply cutting prices in the same selling season would, according to the parties, be ineffective unless capacity is also expanded. Lowering prices would simply bring forward the punishing firm's bookings within the selling season and push back those of the company being punished, unless it increases the total number of holidays it offers. The parties argue that capacity changes within the same selling season are relatively difficult to make as the range of flight dates, times, destinations and hotel accommodation still available will become increasingly limited as the departure date approaches. This was confirmed by the market investigation.
112. As the Guidelines point out, retaliation that manifests itself after some significant time lag, or is not certain to be activated is less likely to be sufficient to offset the benefits from deviating.
113. It appears from the above, that although retaliation by means of capacity increase cannot be excluded by itself, the likelihood thereof is relatively limited, considering the



reduced possibilities to significantly increase capacity during the selling season, while capacity increases in next years selling season may come too late to obtain the desired result.

### Reactions of outsiders

114. For coordination to be successful, the actions of non-coordinating companies and potential competitors, as well as customers, should not be able to jeopardise the outcome expected from coordination. If coordination would aim at reducing overall capacity in the market, this will only hurt consumers if non-coordinating companies are unable or have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable.
115. In the present case there would seem to be significant competitive constraints present on the market which would destabilise any attempt at coordination. These constraints would in particular stem from effective competition from smaller independent short haul tour operators, medium independent long haul tour operators, and the competition from the independent holiday alternative. The market investigation has confirmed that consumers of package holidays are very price sensitive. Therefore, any attempt by the major tour operators to increase prices would lead consumers to switch either to smaller tour operators or, in view of the developments in the industry, to independently source the components of their holidays. Consumers tend to make extensive comparisons before purchasing a holiday, searching for better prices from smaller tour operators, travel agencies doing dynamic packing or simply self-packaging.
116. Considering the above and the fact that the criteria that have to be fulfilled in order to show coordinated effects are of a cumulative nature, the merger is unlikely to have coordinated effects on the UK markets for the supply of short-haul and long-haul foreign package holidays and on the Irish market for the supply of short-haul foreign package holidays.

## **VI. CONCLUSION**

117. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission,  
(Signed)  
Andris PIEBALGS  
Member of the Commission