

Jurisdictional turbulence ahead: Ryanair/Aer Lingus

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This blog post examines the complex interaction of European Commission and national authority jurisdiction to examine different transactions involving the same parties, as well as the OFT's reasons for referring Ryanair's minority shareholding in Aer Lingus to the Competition Commission.

Background: prohibition of Ryanair/Aer Lingus merger and subsequent General Court appeals

In October 2006, Europe's leading low cost airline, Ryanair, launched a hostile takeover bid for its rival, the Irish 'flag carrier' Aer Lingus. On 27 June 2007, the European Commission ("Commission") prohibited the proposed transaction, because it would have seriously affected competition on numerous routes to and from Ireland (in particular Dublin) on which the parties were the most important or in many cases only competitors.

By this time, Ryanair had built up a minority, non-controlling shareholding of 29.8% in Aer Lingus. The Commission rejected Aer Lingus' request that it order Ryanair to divest its minority shareholding, on the basis that the acquisition of a minority, non-controlling shareholding did not fall within the scope of the EU Merger Regulation ("EUMR"), such that it had no power to require its divestment.

On 6 July 2010, the General Court rejected both Ryanair's and Aer Lingus' appeals against the respective Commission decisions. Neither judgment was appealed.

The OFT investigates Ryanair's minority shareholding

On 30 September 2010 (after the expiry of the deadlines for any appeals to be made against the General Court's judgments), the Office of Fair Trading commenced an investigation into Ryanair's minority shareholding.

The CAT and Court of Appeal dismiss Ryanair's jurisdictional challenge

Ryanair challenged the OFT's jurisdiction to investigate the minority shareholding: in its view, the OFT's jurisdiction to do so expired on 28 October 2007, four months after the Commission adopted its prohibition decision. (Before the Court of Appeal, it argued that this period expired on 11 February 2008, four months after the Commission adopted a decision refusing Aer Lingus' request that Ryanair be required to divest its shareholding.)

On 28 July 2010, the Competition Appeal Tribunal ("CAT") rejected Ryanair's challenge. It appealed to the Court of Appeal, which handed down its judgment on 22 May, confirming the CAT's judgment. The Court of Appeal held, as had the CAT before it, that the UK competition authorities were required to avoid potential conflicts with the Commission's jurisdiction under the EUMR. This was both because of their duty of sincere cooperation with the Commission (by virtue of Article 10 EC, now Article 4.3 TEU) and the EUMR's prohibition on the application of national competition law to a concentration with a Union dimension (Article 21(3) EUMR).

In the view of the Chancellor (who gave judgment for the whole Court), the duty of sincere cooperation went beyond avoiding inconsistent judgments, but extended to avoiding overlapping investigations. Therefore, the OFT (or the Competition Commission ("CC")) could not start an investigation and then suspend it pending the outcome of the appeals to the General Court: given the wide powers to investigate mergers under both the EUMR and the Enterprise Act and the various steps involved (including information gathering from the parties and third parties, working papers and statements of objections, submissions, oral hearings and consideration of remedies), it would be "oppressive and mutually destructive" to have concurrent investigations under the EUMR and national law.

The Court of Appeal therefore held that the OFT could not investigate until it was certain that there was no longer a concentration with a Union dimension, which was not until the time for appeals by Ryanair and/or Aer Lingus against the General Court's judgments of 6 July 2010 had expired. This was on 17 September 2010. On 1 June 2012, the Supreme Court refused Ryanair leave to appeal.

The OFT refers the transaction to the Competition Commission

The result of the Court of Appeal's judgment was that the OFT had jurisdiction to review the minority shareholding only as of 17 September 2010, with any reference to the CC to be made within a further four months. The OFT's investigation was therefore not "out of time". This period was further extended by Ryanair's challenge to the OFT's jurisdiction. On 15 June, the transaction was referred to the CC. The OFT's decision was published on 5 July.

The OFT found that Ryanair's minority shareholding gave it the ability to "materially influence" the policy of Aer Lingus, even though it did not have board representation. It found that Ryanair could block various types of shareholder resolution relevant to its commercial strategy. As the parties together accounted for more than 25% of air passengers between the UK and Ireland, the "share of supply" test was met. Accordingly, the OFT had jurisdiction to review the merger.

The OFT found that Ryanair's minority shareholding could have substantially lessened competition for several reasons. In particular, it considered that by acquiring its shareholding, Ryanair would be able to directly and/or indirectly weaken Aer Lingus' ability to compete. Ryanair could block important shareholder resolutions, which would limit Aer Lingus' ability to raise new finance and to divest of slots at London Heathrow (so limiting its operational flexibility and ability to trade important assets). Ryanair also used its shareholding to interfere with Aer Lingus's commercial policy, for example the routes and frequencies operated by it and the acquisition of new aircraft. In addition, Ryanair's presence as the largest shareholder could restrict competition indirectly, by deterring other airlines from investing in or acquiring Ryanair.

The OFT was also concerned that, as a result of the shareholding, Ryanair and Aer Lingus might have had reduced incentives to compete with each other. However, it did not reach a firm conclusion. It considered that the airlines may have been able to profitably increase prices or change service levels, given the strong diversion ratios between them on key overlap routes. This would particularly be the case on 'duopoly routes' operated only by Ryanair and Aer Lingus. In addition, there was evidence that Aer Lingus had already exited from direct competition with Ryanair on several routes. The OFT also left open whether the shareholding would have had anti-competitive coordinated effects, including by facilitating the sharing of information and creating a more stable environment for tacit coordination.

Ryanair announces its intention to make a further bid for Aer Lingus

On 20 June, Ryanair announced its [intention to make a cash offer](#) for that part of Aer Lingus that it did not already own. Ryanair's offer is subject to merger approval by the Commission and it has stated (without further elucidation) that it is willing to offer "appropriate remedies" to allay any competition concerns and that the "significant synergies and cost efficiencies" that would be achieved by the merger are also relevant to it obtaining merger approval. On 17 July, Ryanair posted its offer document to Aer Lingus's shareholders, who were, on 18 July, recommended by their Board to reject the offer.

Where next?

The minority shareholding is presently [before the CC](#). The CC has not suspended its investigation and indeed has issued an information request to Ryanair. On 18 July, the CC extended its deadline until Ryanair responds to the request. On 13 July, [Ryanair challenged before the CAT](#) both the CC's jurisdiction and the information request. Aer Lingus has now intervened. The CAT will hold a full hearing on 27 July to hear Ryanair's challenge.

Ryanair had not yet notified its offer to the Commission, although it would appear that pre-notification discussions are underway and a draft Form CO has been provided to the Commission: under the Irish Takeover Code, the Form CO must be filed by 25 July. As a matter of law, the Commission has had jurisdiction to review the offer since Ryanair's announcement, even without a notification having been made, such that the CC's duty of sincere cooperation could potentially already have been engaged.

The Court of Appeal judgment is clear that the OFT and CC must avoid concurrent merger investigations that overlap with those of the Commission, as this would be "both oppressive and mutually destructive". However, there is no basis under the Enterprise Act 2002 to suspend a CC merger investigation once it has started: this was one reason why the CAT and Court of Appeal rejected Ryanair's argument that that OFT could have started its investigation earlier and made a reference to the CC, which could then have been suspended.

It is therefore difficult to see how under English law the CC could stop its investigation, notwithstanding its duty of sincere cooperation to avoid conflict with a Commission investigation, unless the principles in *Factortame (No. 2)* were to be applied to disapply the mergers provisions of the Enterprise Act; however, as the CAT observed in its first judgment (concerning the OFT's jurisdiction), this could mean that the CC would not be able to comply with its statutory timetable and thus render it functus officio if it were to seek to restart its investigation at some later stage, for example if either Ryanair does not proceed with its proposed offer or it is prohibited by the Commission.

It is equally unclear that Article 21(3) EUMR would provide the answer. Whilst it prohibits a Member State from applying national laws to a "concentration with a Union dimension", the CC is clearly not investigating such a concentration: in rejecting Aer Lingus's appeal, the General Court explicitly held that Ryanair minority shareholding does not fall within the EUMR. However, that said, it would clearly not be possible for the CC to require Ryanair to sell some or even all of its shareholding in Aer Lingus (which falls short of sole control) if the Commission were to approve Ryanair's acquisition of sole control of Aer Lingus, subject to remedies: this would truly be a case of conflicting outcomes.

It will therefore be interesting to see how the CAT, the CC and the Commission proceed in untangling what is clearly a complicated jurisdictional situation.