

# Kluwer Competition Law Blog

## The Aer Lingus Judgment – When non-implementation is implementation, or not

Frederic Depoortere (Skadden, Belgium) · Thursday, July 22nd, 2010

On 6 July 2010, the General Court rejected Ryanair's appeal against the Commission's 2007 prohibition of its hostile take-over of rival Irish airline Aer Lingus. On the same day, the Court also issued a much shorter judgment in Case T-411/07, and rejected an Aer Lingus appeal against a Commission decision, which refused to order Ryanair to sell down its minority interest in Aer Lingus.

The legal basis for Aer Lingus' request was Article 8(4)/(5) of the EU Merger Regulation, which allow the Commission to take measures (including interim measures) in cases where a concentration has been declared incompatible with the common market but has already been implemented.

The Commission decided to reject the request, on the basis of the argument that no concentration had been implemented by Ryanair, given that Ryanair's shareholding (which today is still at 29.82%) does not constitute control. Given that Ryanair did not acquire control, there was no concentration within the meaning of the Merger Regulation. Given that no concentration was implemented, the Commission could not take measures on the basis of Article 8.

One key argument made by Aer Lingus was that the Commission's prohibition decision stated that Ryanair's acquisition of the minority shareholding was part of a single concentration, together with Ryanair's hostile bid to acquire the remaining Aer Lingus shares. Therefore, the acquisition of a minority shareholding had to be seen as partial implementation of the single concentration, thereby fulfilling the conditions of Article 8.

The Court rejected Aer Lingus' claim and confirmed that only if the minority shareholding had enabled Ryanair to control Aer Lingus, a concentration would have been implemented and the Commission would have had the power to act on the basis of Article 8. No control means that no concentration was implemented.

The Court however goes further and analyzes whether the same reasoning should be applied to the notion of implementation of a concentration under Article 7 of the EU Merger Regulation. Article 7 prohibits the implementation of concentrations with a Community dimension before they have been declared compatible with the common market.

It would not be illogical to assume that "implementation of a concentration" means the same both

in Article 7 and Article 8. Taking the Court's interpretation of the concept under Article 8, this would mean that Article 7 prevents an acquirer from acquiring control over a target before the Commission approves the transaction. As long as no control is acquired, there is no implementation and Article 7 does not come into play.

The Court disagrees.

The Court adopts a kind of teleological approach to Article 7 to come to the conclusion that the acquisition of a non-controlling minority shareholding can in some cases be seen as implementation and therefore prohibited under Article 7. The goal of Article 7 is "to prevent situations in which a concentration is implemented even though it might still be declared incompatible with the common market." Based on this interpretation, the Court concludes that:

"the acquisition of a shareholding which does not, as such, confer control for the purposes of Article 3 of the merger regulation may fall within the scope of Article 7. The Commission's approach must be understood as using the concept of 'single concentration' to limit the risk of finding itself in a situation in which a decision finding incompatibility would need to be supplemented by a decision to dissolve in order to put an end to control acquired even before the Commission has taken a decision on its effects on competition."

In other words, the acquisition of a non-controlling interest can be stopped in order to avoid the Commission having to take measures against the acquisition of control in case the concentration is prohibited.

This reasoning is difficult to understand. If an acquirer buys a minority stake which does not confer control, there is no implementation and the Commission will not be able to apply Article 8, even if the concentration is prohibited – that is the conclusion of the *Aer Lingus* judgment itself. What is then the risk that Article 7 seeks to prevent? A lack of control before the prohibition of a concentration will still be a lack of control after the prohibition.

Beyond the somewhat obscure reasoning, the Court's conclusion is troubling in that it gives a very broad interpretation of Article 7, based on the concept of a "single concentration." As soon as the Commission concludes that the acquisition of a non-controlling minority shareholding is part of a broader "single concentration," the Commission could prevent the acquisition and/or the exercise of the voting rights attached to a non-controlling minority shareholding.

Without going into the technical details of what is a single concentration, suffice it to say that the concept is broad and not always clear. In addition, what levels of minority acquisitions can and will the Commission prevent on the basis of Article 7: 25%, 10% or even 5%?

The Court's conclusion on Article 7 raises questions. It gives a different meaning to the same concept of "implementation of a concentration" for Articles 7 and 8. The reasoning at the basis of the Court's conclusion leads to confusion. More importantly, the interpretation of Article 7 leads to significant uncertainty as to what can and cannot be done in terms of acquisitions of minority stakes. Given the (financial, strategic and other) stakes involved in acquisitions, the Court missed an opportunity to provide some necessary clarity on the interpretation of Article 7.

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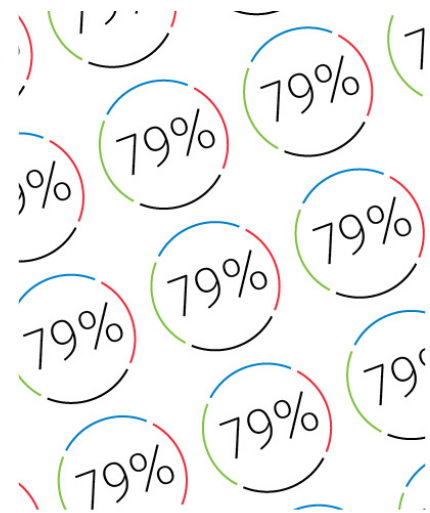
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