

# COMPETITION LAW

## RYANAIR HOLDINGS PLC v OFFICE OF FAIR TRADING (AER LINGUS GROUP PLC INTERVENING)

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***On 28 July 2011, the Competition Appeal Tribunal (“CAT”) gave judgment on the application by Ryanair Holdings plc (“Ryanair”) for judicial review of the decision by the Office of Fair Trading (“OFT”) that it would be in time (should it decide to take such a decision) to refer to the Competition Commission (“CC”) Ryanair’s acquisition of a minority shareholding in Aer Lingus Group plc (“Aer Lingus”). Ryanair’s application required the CAT to address the relationship between the domestic and European Union (“EU”) systems of merger control and, in particular, the effects on that relationship of the “one stop shop” principle reflected in Article 21 of Council Regulation (EC) 139/2004 (“the Merger Regulation”).***

### BACKGROUND

#### **The minority shareholding and attempted acquisition**

In September 2006, Ryanair began to acquire shares in Aer Lingus, a rival business in a number of air transport markets. On 23 October 2006, Ryanair launched a bid for the entire share capital of Aer Lingus; it notified the concentration to the Commission later that month. The Commission instigated “Phase II” proceedings under the Merger Regulation around a month later. In the event, Ryanair’s bid for total ownership lapsed, but it retained a substantial minority shareholding.

In the first half of 2007, Aer Lingus attempted unsuccessfully to persuade the Commission to require as an interim measure that Ryanair divest its minority shareholding. The Deputy Director General of the Directorate-General for Competition (“DG Comp”) wrote to Aer Lingus stating that the Commission could not require divestment of the minority shareholding under Article 8(4) of the Merger Regulation but that, in the non-binding opinion of DG Comp officials, this

was without prejudice to the “powers that Member States may have after the adoption” of the Commission’s decision on the reference.

### **The Commission Decision and the Appeals**

The Commission’s decision, which came on 27 June 2007, was that the acquisition by Ryanair of sole control of Aer Lingus was incompatible with the common market and was prohibited – Case COMP/M.4439 *Ryanair/Aer Lingus* (“the Commission Decision”).

Aer Lingus then pursued its argument as to the minority shareholding with the Irish Competition Authority, the OFT and the German Federal Competition Regulator. For its part, the OFT wrote to Aer Lingus on 3 August 2007 stating that it was prevented from taking action in respect of the minority shareholding by Article 21(3) of the Merger Regulation, and that this conclusion was underlined by the likelihood of appeals by Ryanair and Aer Lingus.

By 27 August 2007, Ryanair had acquired further shares, and Aer Lingus applied again to the Commission requesting that it either (a) require divestment of the minority shareholding under Article 8(4) and 8(5) of the Merger Regulation, or (b) state formally that it did not have the power to do so. The Commission duly decided on 11 October 2007 that it did not have the power to the order divestment of the minority shareholding (“the Article 8(4) Decision”). As regards Article 21(3), on which Aer Lingus had also requested a decision, the Commission stated that the interpretation of this provision was a matter for the national competition authorities; these authorities could seek, if necessary, a reference to the European Court of Justice (“ECJ”).

On 6 July 2010, the General Court dismissed appeals by Ryanair and by Aer Lingus against the Commission Decision and the Article 8(4) Decision, respectively – “the Ryanair Appeal” and “the Aer Lingus Appeal” (Cases T-342/07 and T-411/07)).

### **The General Court Judgments**

The General Court dismissed in its entirety Ryanair’s appeal against the Commission Decision, upholding the Commission’s competition analysis and reasoning.

As to the Article 8(4) Decision and the Aer Lingus Appeal, the General Court upheld the decision that the acquisition of the minority shareholding did not give Ryanair control of Aer Lingus and that there was accordingly no concentration for the purposes of the Merger

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Regulation. It followed that the Commission had been right to decide that it had no power to order divestment of the minority shareholding. The General Court held at paragraph 91 that:

*"Where there is no concentration with a Community dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect."*

The time-limit for appeal to the General Court expired in both cases on 17 September 2010.

## The Reference Decision

On 30 September 2010, the OFT sent to Ryanair a notice under section 31 of the Enterprise Act 2002 ("the Act") requiring it to produce specified information in relation to a preliminary merger investigation ("the Section 31 Notice"). In that notice, the OFT stated that the time-limit for making a reference to the CC *"has been effectively suspended since [the start of the Commission's investigation]...because a reference to the [CC]...could not have been made and has become possible only now that the appeals to the General Court...have ended."* Ryanair challenged the OFT's power to open an investigation and to refer, and the OFT took on 4 January 2011 a formal decision that it was able (should it choose to do so) to refer to the CC the acquisition of the minority shareholding – "the OFT Decision".

## THE CAT APPEAL

Ryanair sought by a Notice of Appeal dated 7 January 2011 a declaration that the OFT investigation was time-barred (and consequential relief). Aer Lingus was permitted to intervene.

## The relevant legislation

Section 22 of the Act provides that the OFT shall make a reference to the CC if the OFT believes that it is or may be the case (i) that a relevant merger situation has been created and (ii) that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition ("SLC") within any market or markets within the United Kingdom for goods or services.

The four-month time-limit for making such a reference is given effect to by the definition of "relevant merger situation" ("RMS") in sections 23 and 24. Section 23 provides that an RMS has been created if two or more enterprises have ceased to be distinct enterprises at a time

or in circumstances falling within section 24. The relevant time and circumstances in section 24 are as follows:

*“(a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is made and did so not more than four months before that day”*

Section 122, headed “Primacy of Community law”, provides, amongst other things, that the duty to make a reference and the power to give an intervention notice shall apply “*at a time or in circumstances not falling within section 24*” if the condition in subsection (4) is satisfied, which is that:

*“because of the [Merger Regulation] or anything done under or in accordance with them, the reference...to which the intervention notice relates, could not have been made earlier than 4 months before the date on which it is to be made.”*

The scope of the exception to the ordinary four-month time-limit created by this provision was central to the argument in the CAT.

### ***The Primacy of Community law***

Article 21(3) of the Merger Regulation provides, in material part, that “*No Member State shall apply its national legislation on competition to any concentration that has a Community dimension*”. The 8th recital to the preamble states, to similar effect, that concentrations with a Community dimension “*should, as a general rule, be reviewed exclusively at the Community level, in application of a “one stop system” and in compliance with the principle of subsidiarity*”.

The parties to the CAT Appeal relied upon conflicting interpretations of Article 21(3) and of the Treaty duty of sincere cooperation. This duty, contained previously in Article 10 of the EC Treaty but now in Article 4 of the Treaty on the European Union (“TEU”), provides that “*Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives*”.

### **The Time-Bar Issue**

Ryanair contended that the Article 21(3) of the Merger Regulation prevented the OFT from applying UK law (and thus extended time under section 122 of the Act) *only* during the period

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for which the Commission was considering the compatibility with the common market of the proposed concentration, ceasing with the Prohibition Decision on 27 June 2010; as a result, the OFT was out of time when it sought to commence the investigation of the acquisition of the minority shareholding.

By contrast, the OFT and Aer Lingus argued that the OFT was unable to apply the domestic merger control rules until expiry of the time for appealing the General Court's judgments – 17 September 2010; as a result, the OFT was within time to commence the investigation. The OFT's summary arguments are reported at paragraph 71: in short, it argued that section 122 ought to be construed so as to prevent there being such a risk of inconsistent EU and national outcomes, and that this risk ended only upon the expiry of the time limit for appeal.

The CAT concluded as follows on the risk of conflicting decisions:

- i. if the CC had applied domestic competition law to the minority shareholding prior to the resolution of the appeals to the General Court, a jurisdictional conflict would have arisen if the General Court's judgment had been in line with Aer Lingus' contention that the Commission was wrong to conclude that it did not have jurisdiction to consider the minority shareholding under the Merger Regulation [88];
- ii. accordingly, the application of the national merger rules before the resolution of Aer Lingus' appeal would have given rise to a risk that the OFT and/or the CC would infringe Article 21 (3) of the Merger Regulation [90];
- iii. there was a risk of inconsistent and conflicting decisions at the EU and national levels, notwithstanding the differences between (certain of) the issues arising under the two regimes [97]-[98];
- iv. the duty of sincere cooperation was triggered by the existence of this risk, requiring the OFT and/or the CC to take steps to prevent a conflict materializing [90].

As to the third point above, the CAT considered at some length Ryanair's submissions to the effect that the differences between the two regimes prevented there arising a risk of conflicting reasoning and outcomes, but concluded at paragraph 100 that:

*"...although the competition assessment required by each of the two merger regimes is formulated in slightly different language, it is clear that the Competition Commission would be considering precisely the same issues as those which the European Commission had considered and Ryanair had raised for determination by the General Court, namely the existence and nature of competitive constraints on the merging parties, an assessment of barriers to entry, a route-by-route analysis, and an assessment of alleged efficiency gains."*

The CAT noted that the relevant case-law referred to the national authority being able to proceed only where there was "scarcely any risk" of a conflict arising, noting that this would require that the risks identified by the national authority be "real and not fanciful" but that there was no suggestion that the issues raised by Ryanair and Aer Lingus on their appeals to the General Court were not properly arguable [103].

#### **Avoiding the risk of conflict**

Ryanair contended, in the alternative, that the means used by the OFT to avoid the risk of inconsistency (namely, not investigating and not making a reference) were not permitted under the Act.

The CAT reasoned on this issue that the Act set out clear statutory processes and time-limits and that, were there no express provision permitting the OFT and/or the CC to "stop the clock", the sole means of avoiding the risk of conflict would be to disapply the relevant national provisions in accordance with the principles expressed in cases including *R v Secretary of State ex parte Factortame* (No. 2) [1991] 1 AC 603. The CAT agreed with the OFT and Aer Lingus that disapplication was "a last resort" and that section 122(4) provided the mechanism to ensure compliance with EU law, stating "[o]ne clearly does not disapply national legislation unless there are no other means of ensuring that the primacy of EU law is respected." [117].

#### **The "lateness" of the Aer Lingus Appeal**

The CAT proceeded to consider (*obiter*) whether or not the fact of the Aer Lingus Appeal coming more than four months after the relevant date meant that the four-month time-limit had already expired prior to any engagement of section 122(4). It was not necessary for the CAT to decide this issue because it had held that the Ryanair Appeal (which was brought within the four-month period) had caused the suspension of time under section 122(4).

The CAT reasoned that the OFT had in July/August 2007 “very good reason to believe, and did believe, that a relevant appeal to the General Court was highly likely to be commenced”, and that section 122(4) was accordingly engaged at this time and not upon Aer Lingus bringing its appeal on 19 November 2009. Its power to refer still existed, therefore, upon the expiry of time to appeal the Ryanair Appeal and the Aer Lingus Appeal, having been in abeyance in the interim.

### **Outcome**

The CAT refused to grant the relief sought and declined to make a reference to the ECJ, stating that its judgment was concerned with the application of “reasonably well established principles of EU law rather than with the nature of those principles”.

Ryanair has sought permission to appeal but, at the time of writing, its application had yet to be determined.

### **COMMENT**

It is plain from the CAT’s reasoning that it was eager to make the interface between the EU and national merger control regimes workable and to avoid cases “slipping between the cracks” in the face of some arguably unfortunate legislative drafting. The case, in all its stages, affirms the ability of the national law merger control system to sit outside of (and go beyond) the scope of its EU counterpart.

***John Swift QC, Alistair Lindsay and Josh Holmes appeared for Ryanair  
Daniel Beard QC and Julian Gregory appeared for the OFT***