

THE MINORITY SHAREHOLDING SAGA CONTINUES – RYANAIR V COMPETITION AND MARKETS AUTHORITY

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In the most recent episode of Ryanair's epic campaign to guard its territorial interests in Aer Lingus, the Competition Appeal Tribunal has ruled that there has been no "material change of circumstances" since the Competition Commission's final report of 28 August 2013. The judgment provides insight into the meaning of "material change of circumstances" and makes it clear that, absent such a change, the competition authority does not need to carry out a fresh proportionality review of its remedy decision when taking a decision implementing the remedy under Section 41 of the Enterprise Act 2002.

The essential facts

On 28 August 2013, the Competition Commission (the "CC") took a decision that Ryanair's 29.85% minority stake in Aer Lingus resulted in a substantial lessening of competition (the "Final Report"). One of the CC's main theories of harm was that Ryanair's minority shareholding gave it a "foot in the door" which would be an impediment to other airlines combining with Aer Lingus. Ryanair's ability to obstruct, combined with its incentives as a competitor, would create a significant risk for airlines considering Aer Lingus as a potential partner. To remedy the substantial lessening of competition ("SLC"), the CC decided that Ryanair should be ordered to reduce its stake to no more than 5% of Aer Lingus' shares.

Ryanair's challenge to the Final Report was dismissed by the Competition Appeal Tribunal (the "CAT") on 7 March 2014. A subsequent appeal to the Court of Appeal was dismissed on 12 February 2015 (the Supreme Court refused permission to appeal on 13 July 2015).

Showing impressive agility, Ryanair made a new application to the CMA, on the day of the Court of Appeal's judgment, arguing that there had been a "material change of circumstances" within the meaning of Section 41(3) of the Enterprise Act 2002 (the "EA02") and that the proposed divestment no longer remained appropriate. Ryanair's main argument was that Aer Lingus was subject to a takeover offer from IAG which had been recommended by the Irish Government and by Aer Lingus' board. This was "the very thing" that the CC found would not happen for so long as Ryanair continued to own its 29% minority stake in Aer Lingus. This IAG bid represented a material change of circumstance and should lead to the CMA re-assessing the remedy.

On 11 June 2015, the CMA decided that there had been no material change of

circumstances since the Final Report (the “**MCC Decision**”) and made a remedies order requiring the appointment of a Divestiture Trustee to manage the partial disposal of Ryanair’s stake in Aer Lingus.

True to form, Ryanair exercised its right to appeal to the CAT. Ryanair advanced two grounds: one alleging a breach of the principle of proportionality and the other arguing that the CMA had behaved irrationally.¹

The proportionality ground

Ryanair’s (ambitious) first ground was that Section 41 of the EA02 required the CMA to conduct a fresh assessment of the proportionality of the remedy proposed in the Final Report, in light of the circumstances that exist at the point in time when the remedies are imposed. Ryanair put its argument ingeniously: where a remedy would be disproportionate in light of the developments, it is that disproportionality which establishes the material change of circumstances. The CMA erred in its MCC Decision by failing to carry out that proportionality assessment.

The CAT rejected this argument based on the statutory scheme and, in particular, the wording of Section 41 of the EA02. Where the competition authority had already carried out an assessment that the remedies in its final report were proportionate, there was no need to carry out a fresh proportionality assessment when considering the implementation of those remedies, “**unless**” there had been a material change of circumstance within the meaning of Section 41(3) of the EA02 (§107). The CAT considered that the material change of circumstance condition in Section 41(3) provided sufficient protection against a situation where the remedy may have been proportionate at the time of the final report but was no longer at the time of the imposition of the remedy (§108).

The CAT envisaged a two-step process where a material change of circumstance is alleged:

- a. First, the competition authority will need to consider whether the change is “*material*”. The CAT envisaged that a change may be material if it may result in a different decision on remedy or if it would affect a significant aspect of the reasoning in the final report. If there is no such effect, the change would not “*in the ordinary course of events be likely to be considered material*” (§110). This carefully couched language leaves room for manoeuvre in future cases but the essential message is clear – there will be a “*material change in circumstance*” if a significant new development impacts on an important

¹ Prior to the hearing, Ryanair withdrew a third ground arguing that the making of a final order prior to the conclusion of Ryanair’s appeal to the Supreme Court was unreasonable, disproportionate and contrary to Ryanair’s legitimate expectations. Ryanair withdrew that ground “*at this stage*” in view of the CMA’s agreement not to require Ryanair to appoint a Divestiture Trustee while the proceedings challenging the MCC Decision were pending.

element of the reasoning or the appropriateness of the remedy.

b. Second, if there is a material change of circumstance, the CAT considers that it will be *"incumbent upon the CMA to assess the impact of such a change"* (§§108 and 110). If there is still a SLC, despite the material change of circumstance, and if the CMA is minded to impose a remedy, it would *"ordinarily"* be appropriate to assess the proportionality of the remedy in light of the material change of circumstance. A material change would not necessarily lead to a change in the remedy.

This two-step process makes sense. However, if there is a material change of circumstance and the CMA still intends to impose a remedy, then it would seem to follow from *BAA Ltd v Competition Commission* ([2012] CAT 3, at §20(2) ("**BAA**")) that the CMA should always carry out a proportionality assessment of that remedy. The CAT's finding that this would *"ordinarily"* be required begs the question of when and why it would be permissible not to have a proportionality assessment of a remedy in light of a material change of circumstance.

Separately, the CAT noted that requiring the CMA to undertake a fresh proportionality assessment in the absence of a material change of circumstance would have the potential for *"repeated challenges to the CMA when it comes to the stage when it takes action in accordance with the final report"* (§107).

The rationality ground

Ryanair's second ground of challenge was that the CMA acted irrationally in concluding that there was no material change of circumstance. Its main argument in that regard was that the Final Report's conclusion that potential merger partners for Aer Lingus were being deterred by Ryanair's minority shareholding was undermined by the fact that IAG made a takeover bid for Aer Lingus.

The CAT noted that it previously ruled in *BAA* that whether a material change of circumstance applies and whether it affects the decisions arrived at in a previous report, is an evaluative assessment to which a wide margin of appreciation or evaluative discretion applies (§31).

The CAT found that the CMA was *"entitled"*, within its discretion, to reach the conclusion that the IAG bid was not a material change of circumstances (§135). It was important that the IAG bid came against the background that Ryanair had been required to divest itself of all but 5% of its shareholding in Aer Lingus (§136). The CMA could rely on the fact that IAG had confirmed to it that this divestiture (along with the resolution of the Aer Lingus pension dispute) had led it to seriously contemplate the acquisition. The CAT repeatedly emphasised the key point that IAG's bid was conditional upon Ryanair divesting itself of the shares (at §§136, 137

and 138).

The CAT seems to add a subsidiary element to its reasoning. The Final Report did not state that no other airline would consider a combination or discuss one while Ryanair still had its 29% shareholding. The mere fact that IAG had not been deterred from entering discussions and making a bid, does not mean that other airlines would not continue to be deterred (at §§137-138). However, the CAT seems to be careful not to go so far as to find that, even if IAG had made an unconditional offer for Aer Lingus, without requiring divestiture of Ryanair's shares, then there would still be no material change of circumstance because other airlines might bid. Instead, the Judgment carefully interweaves the point that IAG's offer was conditional upon Ryanair agreeing to sell its shareholding in each of the relevant paragraphs of the Judgment.

Ryanair had argued that the CMA had failed to recognise other new facts as material changes in circumstances. First, Ryanair claimed that the CMA ignored the fact that the Irish government had changed position since the Final Report and that it (not Ryanair) was the impediment to IAG's bid. The CAT rejected this by stating that the CMA concluded that the Irish government had not changed position. The "*connectivity commitments*" that the Irish government sought from IAG were amongst the concessions that it was insisting upon at the time of the Final Report (§§143-144).

Second, Ryanair had claimed during the earlier procedure before the CC that the Aer Lingus pension dispute (relating to a deficit of approximately €700 million) was more of a deterrent for potential bidders than Ryanair's minority shareholding. Ryanair argued that the resolution of this dispute was a material change of circumstance which coincided with IAG's first serious interest in bidding for Aer Lingus in August 2014. Again, the CAT rejected this, finding that the CMA was entitled to conclude, in the exercise of its discretion, that the resolution of the pension dispute did not undermine the CC's finding that Ryanair's shareholding was likely to impede or prevent Aer Lingus from combining with other airlines (§145). Ryanair's shareholding was an impediment even after taking the pension issue into consideration.

Comment

The judgment provides some helpful guidance on the meaning of a "*material change of circumstance*" but, overall, it seems to have been quite clear that IAG's bid was not any kind of new independent change on the market, but rather that it was a consequence of the CMA's Final Report. It would be circular to conclude that a market development resulting from the CMA's remedy was a "*material change of circumstance*" requiring the CMA to reconsider the remedy. However, at the time of writing, Ryanair appears to be gearing up for a potential appeal – certainly it would

be imprudent to assume that it would accept any ruling without a fight.

As for Ryanair's ground on proportionality, it seems to have been highly ambitious given the clear language of Section 41(3) of the EA02. Moreover, given the scheme of the legislation, it would be rather absurd if Ryanair was entitled, after its unsuccessful appeals to the CAT and Court of Appeal, to then force the CMA into a fresh proportionality assessment (absent a material change of circumstances). The CAT addressed this in a rather lenient manner as causing potential for "repeated challenges to the CMA". It might have pointed out that there would be a risk of a vicious circle of fresh proportionality assessments, challenges before the CMA, court appeals and fresh assessments again. If Ryanair prevailed on this there would be a risk of an almost Dickensian process of endless challenges which would clearly fly in the face of the requirements of legal and commercial certainty that should underlie merger law.

Finally, it is impressive how quickly the CAT managed to deal with this case. The Notice of Application was lodged on 18 June 2015. The hearing took place on 3 July 2015. The judgment was handed down on 15 July 2015. Clearly the CAT appreciates the need for speed.

The CMA was represented by Daniel Beard QC, Rob Williams and Alison Berridge.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.