



This publication provides an overview of the key legal and policy developments in UK & EU competition law in July 2010. For further information, please contact your usual Burges Salmon contact or a member of our competition team.

Merger control implications of the General Court's ruling in Ryanair/Aer Lingus

Key points

- It is appropriate to assess mergers in the transport sector on a route-by-route basis.
- If a proposed merger would lead to the creation or strengthening of a dominant position, this is likely to be sufficient to justify prohibiting the merger.
- Unless there has been 'a change of control on a lasting basis' the Merger Regulation does not seek to protect companies from commercial arguments with their own shareholders.

On 6 July 2010, the General Court ruled that the prohibition of Ryanair's takeover of Aer Lingus should be upheld, and also that the European Commission was right in refusing to order Ryanair to divest its minority shareholding in Aer Lingus.

Background

In 2006, Ryanair launched a public bid for the entire share capital of Aer Lingus and notified the Commission in accordance with the Merger Regulation. Prior to this public bid, Ryanair held a 19.16% shareholding in Aer Lingus, which increased to 29.3% during the Commission's investigation of the merger.

In June 2007, the Commission prohibited the acquisition stating that the proposed concentration would gain a monopoly or very strong market-position on at least 35 routes, in particular flights from Dublin and Cork. In reaching this conclusion, the Commission rejected Ryanair's proposed commitments and its arguments that the deal would lead to efficiency gains.

The Commission also dismissed Air Lingus' argument under Article 8(4) of the Merger Regulation that Ryanair should be forced to divest its increased stake, stating that it had no power to require an entity to sell a non-controlling stake, especially where the proposed transaction was not completed.

Both parties appealed to the General Court seeking annulment of the Commission's decisions.

Judgment in relation to Commission's prohibition decision

Ryanair appealed under three main heads but failed on each.

■ *Appraisal of competitive relationship*

The Court accepted the Commission's use of the combined high market share as an 'indicator' of competitive importance. The Court also endorsed the view that Ryanair's 'no frills' business model did not amount to a 'fundamental difference' between the airlines when assessing competitiveness. Further, the Court held that the proposed merger may cause harm to consumer choice and to the quality of services offered.

■ *Assessment of barriers to entry*

The Court stated generally that when considering the effect of a merger on market entry, there needed to be more than a "mere threat" of a new entrant in order for any competitive disadvantage to be offset. The Commission's reasoning was upheld with the Court particularly noting the high entry barriers to the airline industry, the significant influence the concentration could exercise over Dublin airport and Ryanair's aggressive reactions to previous entrants.

■ *Route-by-route analysis*

The Court endorsed the Commission's application of the route-by-route analysis and emphasised that a finding of dominance on just one route would have been sufficient to prohibit the concentration.

Judgment in relation to divestment of minority rights

The General Court rejected Aer Lingus' appeal stating that a 29.3% shareholding was not a controlling stake and was therefore insufficient to show the concentration had been implemented as required by Article 8(4). The fact the shareholding might give Ryanair the potential to interfere with the operation of Aer Lingus was a matter for national courts or competition authorities as appropriate.

The General Court concluded that UK merger control rules are, in this sense, different from the Merger Regulation which only applies where there has been 'a change of control on a lasting basis.' Accordingly, the size of shareholding required to trigger merger control jurisdiction is higher under the Merger Regulation.

Under the Enterprise Act 2002, a relevant merger situation in the UK may be created when one enterprise acquires a 'material influence' in another, as argued by Aer Lingus. For example, the Competition Commission recently found that the acquisition by BSkyB of 17.9% of ITV's shares was likely to lessen competition substantially owing to the loss of rivalry between those two companies and to BSkyB's ability to have a material influence on ITV's management.

Sources

Case T-324/07, *Ryanair Holdings plc v Commission*.

Case T-411/07, *Aer Lingus Group plc v Commission*.

Commission Press Release: Commission welcomes General Court rulings in Ryanair case (MEMO/10/300).

Other news in July 2010

Land agreements to be subject to competition law

With effect from 6 April 2011, land agreements will no longer be exempt from the competition law regime. The Office of Fair Trading is due to issue guidance towards the end of September and we will report further on this matter then. For further information, please see our briefing note '[Are your land agreements anti-competitive?](#)'.

Commission accepts binding commitments from British Airways, American Airlines and Iberia

On 14 July 2010, the Commission accepted legally binding commitments offered by BA, AA and Iberia, three members of the Oneworld alliance. The commitments were offered to address antitrust concerns relating to the planned joint venture between the airlines. Under the commitments, the airlines offered to make landing and take off slots available at London Heathrow to facilitate the entry of competitors on routes between London and New York, Boston, Dallas and Miami.

Damages payable by Commission following procedural errors

Following a ruling by the Court of Justice in July 2009, holding that the Commission must compensate Schneider Electric in respect of the additional costs that it incurred as a result of a second investigation by the Commission into the acquisition of Legrand, the Court of Justice published an order setting the amount of damages to be paid to Schneider Electric at €50,000. This is an unusual example of the Court of Justice awarding damages under Article 288 of the EC Treaty (now Article 340 of the Treaty on the Functioning of the EU) for a procedural failing.

This relatively low award represents a disappointing result for Schneider Electric considering the significant length of proceedings and inevitable associated costs. Indeed, this case highlights the need for companies to carefully consider the prospects of success before pursuing damages claims against an EU institution.

CEER publishes conclusions of wind farm consultation

The Council of European Energy Regulators (CEER) has

revealed the conclusions of its consultation on the regulatory issues of integration of wind generation into the mainstream European electricity markets. Electricity storage, better forecasting and wind generation pooling were proposed as methods of encouraging flexible capacity and overcoming the difficulties posed by the intermittent nature of wind power.

Ofcom publishes 2010 Annual Report

On 1 July, Ofcom published its 2009/2010 Annual Report. The regulatory body noted successes in addressing the mis-selling of mobile phones and the introduction of a voluntary code requiring internet providers to provide clearer advice on internet speeds. Aims for 2011 include the creation of a code of practice regarding file sharing, a report on the UK's communications infrastructure and continuing work on managing internet traffic.

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