Yes, we can (prohibit) – The *Ryanair/Aer Lingus* merger before the Court

by Oliver Koch [1]

1. Introduction

In two judgments handed down on 6 July 2010, the General Court upheld the Commission's June 2007 decision to prohibit the planned merger between Ryanair and Aer Lingus (Case T-342/07) and dismissed Aer Lingus's appeal against the Commission's decision not to order Ryanair to sell its minority share in Aer Lingus subsequent to the prohibition (Case T-411/07). Both judgments are of general interest for European merger control practice [2].

2. The Court's *Ryanair* decision (T-342/07)

The Court's ruling upholding the Commission's prohibition decision [3] had been awaited with interest, not only because it was only the second such decision since 2003 and the only prohibition since 2007 [4], but also because the Court had to deal for the first time with some important issues of substantive merger assessment, such as how to treat efficiencies in merger control and how to use econometric data.

2.1 The Commission's prohibition decision and *Ryanair's* appeal

The Commission's prohibition decision concerned the proposed acquisition of Aer Lingus by Ryanair, both based in Ireland. The Commission found that the acquisition would have led to overlaps on more than 30 routes from/to Ireland with very high market shares. The effect would, the Commission felt, have been to reduce choice for consumers, leaving them exposed to a high risk of price increases. During the investigation, Ryanair submitted a number of commitment proposals. These were rejected by the Commission because they did not do enough to allay the identified competition concerns. The acquisition of Aer Lingus by Ryanair would in several respects have been different from previous airline merger cases. The main thing was that it would have combined the two overwhelmingly largest airlines at a single airport (Dublin, where they would together have accounted for some 80 % of European short-haul traffic), with both of them following a 'point-to-point' and 'no-frills' business model [5].

The decision is remarkable in several respects, not only for pure length (514 pages for the non-confidential version [6]), but also for the investigative methods used by the Commission to underpin its arguments (e.g. large-scale customer surveys carried out by external consultants for the Commission and, for the first time in a prohibition decision, extensive use of quantitative data analysis).

In November 2007, Ryanair filed an application for annulment of the decision with the General Court of the European Union. The firm claimed that there were manifest errors throughout the decision, including the Commission's assessment of the competitive relationship between Ryanair and Aer Lingus (first plea), of entry barriers (second plea), an allegedly mistaken 'route-by-route' analysis (third plea), errors in the assessment of efficiencies (fourth plea) and, finally, errors in the way the submitted commitments had been analysed (fifth plea).

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author. The author wants to thank the other members of the Ryanair case team (Hubert Beuve-Mery, Richard Gadas, Miguel de la Mano, Kay Parplies, Enrico Pesaresi and Oliver Stehmann) for their useful comments on an earlier draft of this article.

(2) It may also provide guidance for any further attempts to take over Aer Lingus; see in this context Ryanair's second notification of an intended acquisition of Aer Lingus of 8 January 2009 (subsequently withdrawn).

(3) COMP/M.4439 — *Ryanair/Aer Lingus (available under*: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4439).

(4) See also the prohibition decision in case COMP/M.3440-ENI/EDP/GDP, upheld by the General Court in 2005. It should, however, be noted that several mergers were abandoned in Phase II of the investigation over recent years before the Commission reached the point of issuing a prohibition decision.

(5) For a more detailed description of the decision see the article in the Ryanair Competition Policy Newsletter 3/2007, page 65.

(6) Compared to prohibition decisions of around 20 pages in length in the early 90s, e.g. Case No IV/M.490 — Nordic Satellite Distribution. The length of the decision in a seemingly 'simple' horizontal overlap case is, on the one hand, the result of the extremely high standard the Courts have imposed on merger control decisions (e.g. CFI, case T-310/01, '*Schneider*', (2002) ECR, II-4071 — obligation to analyse markets individually in multi-market cases — and cases T-342/99, '*Airtours*' (2002) ECR, II-2585 and T-5 & 80/02, '*Tetra Laval*' (2002) ECR, II-753; — obligation to address all arguments by parties, 'convincing' evidence). It is also the result of the Commission having to react to the increased use by the merging parties of quantitative data analysis and econometric studies.

2.2 The findings of the General Court

Close scrutiny — no 'hands off' approach in analysing merger decisions

In its very detailed 122-page ruling, the General Court took a careful look at Ryanair's arguments, ultimately rejecting *all five pleas* and following the Commission in every one of the 40 sub-pleas.

What is striking is the *great level of detail* of the General Court's analysis, addressing almost every single argument put forward by Ryanair, even where it would not have been strictly necessary for the outcome of the decision [7], and not shying away from discussing such technical and complex subjects as efficiencies and quantitative data. In that respect it follows the approach of all main judgments since '*Schneider*', '*Airtours*' and '*Tetra*', which paved the way for a more careful re-examination of merger decisions by the General Court [8]. The Court had occasionally been criticised for going too far in its examination of merger decisions, but in this case it clearly restricted its assessment to verifying whether the Commission had established the facts it needed to argue its case, whether it had disregarded any important argument by the applicant, whether its arguments were valid and logical, and whether the procedural rights of the applicant had been honoured.

Court backs the Commission's assessment: a sound and solid prohibition

The Court fully endorsed the Commission's conclusion that the merger would significantly impede competition. In a somewhat 'classic' approach, which may have raised a few eyebrows among proponents of a purely effects-based approach [9], the Court reiterates at the very beginning of its judgment that

'although the importance of market shares may vary from one market to another, (...) very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. (...). That may be the situation where there is a market share of 50 % or more (...) [10]*.'*

The Court then rejects Ryanair's claim that the Commission had 'automatically' argued from high market shares to a significant impediment of competition. It expressly acknowledges the Commission's careful analysis of the effects of the merger, stating that

'the Commission took care to carry out an in-depth analysis of the conditions of competition by taking account of factors other than just market shares, such as the effects of the concentration on competition between Ryanair and Aer Lingus, the reactions which could be expected from customers and competitors and the actual situation on each route affected by the concentration [11]*'.*

As in earlier judgments [12] on merger decisions, the *Horizontal Merger Guidelines* again played an important role in the ruling, with the Court measuring the decision carefully against the assessment structure set out in these guidelines.

As regards the Commission's assessment of *closeness of competition*, the Court agreed that closeness of competition by no means requires competitors to share all major elements [13].

Another important finding — one that is regularly discussed in merger decisions — concerns the *likelihood of entry* as a mitigating factor in the assessment. The Court made it clear that

'the mere threat of an entry (...) is not sufficient. (...). What counts is the prospect of an entrant which offsets the anti-competitive effects specifically established in the contested decision (...). [14]*'*

For the first time, the General Court also had to *verify detailed efficiency claims,* which were ultimately rejected by the Commission. The Court dedicated no fewer than 80 paragraphs of its judgment to assessing efficiencies. Its role as a Court was,

(7) See e.g. the detailed analysis of the Commission's assessment of Ryanair's efficiency claims (paragraphs 386-446), where the Court still examined Ryanair's arguments on the merger-specific nature and the consumer benefit of the efficiencies, despite the fact that it had already confirmed that the claimed efficiencies were not verifiable and had to be rejected for this reason. See also the Court's assessment of the substance of the remedies *('for the sake of completeness'*, see paragraph 506) despite the finding that the remedies had never been formally submitted und could be rejected simply on these grounds.

(8) See e.g. rulings in case T-282/06 'Sun chemicals' (2007) ECR, II-2149 and case T-151/05 'NVV', (2009) ECR, II-1219.

(9) See in this context also the new US Horizontal Merger Guidelines, which expressly state that merger analysis should start with the effects of a merger and not with defining markets and establishing market shares. The Guidelines are available under: http://www.ftc.gov/os/2010/08/100819hmg.pdf.

(10) See paragraph 41 of the judgement; this formula has already been used in previous merger judgements, e.g. case T-282/06 'Sun chemicals', (2007) ECR, II-2149, at paragraph 135 and case T-210/01 'General Electric' (2005) ECR, II-5575, at paragraph 115. The Court also commented on a possible 'de minimis' argument (very small competition effect), stating that: *'The creation of a dominant position which would have the effect of significantly distorting genuine competition on one of those routes is itself sufficient to make the transaction incompatible with the common market (...)'* — see paragraph 326 of the ruling.

(11) See paragraph 42 of the ruling.

(12) See e.g. case T-282/06 '*Sun chemicals*' (2007) ECR, II-2149 and case T-151/05 '*NVV*' (2009) ECR, II-1219.

(13) See paragraph 77-94 of the ruling.

(14) See paragraph 239 of the ruling.

of course, limited to deciding whether all the arguments put forward by Ryanair on efficiencies had been addressed properly by the Commission and whether the Commission's reasoning was logical and consistent, without going into the question of whether there actually were efficiencies ([15]).

Finally, the Court confirmed that the Commission was right to reject the *remedies* proposed by Ryanair at different stages of the procedure. It is noteworthy that, while the Court had in other judgments accepted certain deviations from strict formal and procedural rules under certain circumstances (e.g. concerning deadlines in the case of 'late remedies' ([16])), it set clear limits to the parties' freedom to disregard procedural rules in this judgment. It confirmed that the Commission was right to reject the remedies proposed on the last day of the deadline for Phase II remedies because of their *formal shortcomings*. These shortcomings included an unclear and contradictory formulation of some key parts of the remedies offer. It also confirmed the Commission's view that the unsigned 'Draft Commitments' Ryanair had sent to the Commission more than four weeks after the remedies deadline had expired could be disregarded by the Commission since these 'late' remedies had never been formally submitted. These findings are particularly important for future remedies negotiations with the Commission since they emphasise the importance of the formal recommendations in the Remedies Notice and clarify the limits to any deviations from the standard format of commitment texts and other formal shortcomings of remedies proposals ([17]).

Confirmation of the Commission's approach to airline mergers

The ruling also confirmed the Commission's analytical framework for airline mergers. The '*easyjet*' judgment of 2006 had endorsed the Commission's practice of analysing the effects of airline mergers on the basis of *individual routes* on which the two companies' activities overlap and not on bundles of routes or by countries ([18]). The *Ryanair* ruling also agreed with the *analytical framework for deciding the substitutability of different airports* formulated by the Commission, and fully endorsed the Commission's approach in this regard on all 35 routes under consideration ([19]).

Furthermore, it confirmed the Commission's approach with regard to *remedies in airline cases*, one of the most contentious issues in airline mergers. It followed the Commission in distinguishing between mergers involving players from different airports and mergers of companies operating from the same airport. The Court found in particular that *slot remedies* were not the appropriate remedy in the latter case, stating that

'(...) it must be pointed out that, unlike previous mergers in the passenger air transport sector (such as those which were at issue in Air France/KLM and Lufthansa/Swiss), the Commission could not be satisfied in the present case that mere slots would ensure access to a route. This is not a transaction involving active operators which have a home airport in different countries. Ryanair and Aer Lingus operate from the same airport, Dublin Airport, where they have significant advantages which could not easily be countered by competitors ([20]).'

On the use of qualitative and quantitative evidence in merger decisions

Finally, the ruling clarified important aspects of the Commission's investigative powers, notably concerning the use and presentation of information gathered in the market investigation, and of quantitative data compiled by the Commission as evidence in merger decisions.

Faced with the problem of a multitude of 'anonymous' customers, the Commission had, for the first time, commissioned a *passenger survey* from an independent consultancy. The Court dismissed Ryanair's claim that the survey was not designed accurately and only addressed 2500 customers at a single airport (Dublin). The Court accepted the use of survey data in the decision and acknowledged that there was insufficient time to carry out a larger survey on a broader scale ([21]).

The Court also rejected Ryanair's claim that the Commission had *used information from the market investigation 'selectively'*, giving more weight to some questions while neglecting other information. The ruling accepted that in complex investigations it is normal if not all the evidence points into the same direction. Accordingly, it acknowledged the Commission's right to weigh the importance and relevance of the information it had gathered:

'It seems perfectly conceivable that the responses of passengers or competitors to some questions will be more relevant

([15]) See paragraphs 386-446 of the ruling.
([16]) CFI, case T-87/05 '*EDP v Commission*' (2005) ECR II-3745 *EDP v Commission*; paragraphs 28/163, and Case T-212/03 '*MyTravel*' (2008) ECR II-1967, paragraph 448.
([17]) While the Commission had, in its decision, still analysed the substance of the remedies proposal, the Court found that such analysis was not necessary anymore since the remedies could be rejected purely on formal grounds.
([18]) See case T-177/04 '*Easyjet*' (2006) ECR, II-1931.
([19]) See paragraphs 95-115 and 319 et seq of the ruling.
([20]) See paragraph 522 of the ruling.
([21]) See paragraphs 207-213 of the ruling.

or more convincing than the responses given to other questions. The Commission can thus not be accused of having acted incoherently or unreasonably on the sole ground that it attached less importance to the responses which it considered to be less relevant [22]*.'*

Last but not least, the ruling examined and accepted the Commission's extensive use of *quantitative evidence and econometric studies* in the decision. The decision, indeed, refers frequently to quantitative evidence, notably to different regression analyses, and to a price correlation analysis and other forms of quantitative data analysis [23]. While it rejected Ryanair's claim that there should be 'priority' for 'technical evidence' resulting from the various econometric studies [24], it principally acknowledged that econometric studies can, together with other factors, be relevant factors in analysing the anti-competitive effects of the merger [25]. While not going so far as to 're-calculate' the results of the various studies, the Court took a very close look at all the arguments put forward by Ryanair against the validity of the econometric data. It ultimately found that none of Ryanair's arguments concerning the use of economic evidence in the various parts of the decision were well-founded, stressing in particular that the Commission had made very *careful and transparent* use of econometric studies and quantitative data. Ryanair had also claimed that different aspects of the quantitative analyses pointed in a different direction to the findings of the 'qualitative' market investigation, which should have led to the conclusion that the qualitative evidence was wrong. The Court dismissed this claim, stressing that however limited the specific evidence value of certain studies may be, and even if their results were only partly conclusive, they could still be used as *supportive arguments* pointing in the same direction as the remaining body of the evidence [26]. The Court noted in this respect that economic studies were *only used by the Commission to complement* and not to substitute for the findings gathered in the Commission's market investigation.

(22) See paragraph 215 of the ruling; see also paragraph 266. The Commission had itself explained its approach to the market investigation in the prohibition decision (paragraph 38): *'The fact that single pieces of evidence (answers to questions, result of econometric studies) may not support a certain conclusion, cannot as such put into question the Commission's assessment, since the Commission cannot base its decision on one single piece of evidence, but must collect as many pieces of evidence as possible, analyse all available facts and opinions and weigh all the available evidence when deciding on the compatibility of a transaction with the common market.'*.

(23) See in detail the article on the use of economic evidence in the Ryanair decision, CPN 3/2007, page 65 ff.

(24) See paragraph 132 and 133 of the ruling.

(25) See, in particular, paragraphs 115/116 and 139-195 of the ruling.

(26) See paragraphs 156, 162 et seq of the ruling.

3. The Aer Lingus appeal: no obligation to divest a minority shareholding post-merger

The second ruling (Case T-411/07) concerned an appeal by Aer Lingus against a separate Commission decision concerning Ryanair's right to keep its minority shareholding in Aer Lingus.

In 2006, following the privatisation of Aer Lingus by the Irish government, Ryanair had acquired a 19.16 % stake in the company. Ryanair subsequently acquired further shares and by 26 November 2006 held 25.17 % of the share capital. Following the Commission's prohibition decision, Ryanair further increased its stake to 29.4 %.

Aer Lingus had asked the Commission directly after the prohibition decision to order Ryanair to *fully divest its remaining minority shareholding* in Aer Lingus pursuant to Article 8(4) of the Merger Regulation. It also requested the Commission to take a position as to the applicability of national competition law with respect to the remaining minority shareholding [27]. The Commission rejected the requests by way of its decision of 11 October 2007. This decision was appealed by Aer Lingus [28].

The appeal touched upon the issue of the treatment of *non-controlling minority shareholdings* under European merger law. While other national jurisdictions make the acquisition of minority shareholdings subject to merger control rules, minority acquisitions are only notifiable under the European Merger Regulation if they confer de facto or de jure *control* of the acquired company to the minority shareholder (i.e. the possibility of exercising *decisive influence* over the activity of the undertaking). In the absence of a *controlling* minority share, minority shareholdings do normally not fall under merger control rules and can only be analysed under Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU).

(27) Aer Lingus submitted that it is unclear whether national competition authorities (e.g. the OFT in the UK or the Bundeskartellamt in Germany) were free to apply their national competition and merger rules to the minority shareholding or whether they might be prevented from doing so because of Article 21(3) of the Merger Regulation (exclusive right to control concentrations with a Community dimension for the Commission). It argued that the Commission had already in its 6(1)(c) decision confirmed the existence of a concentration with Community dimension and that the Community dimension cannot 'fall away' after the merger.

(28) Aer Lingus had also asked the Commission to adopt *interim measures* pursuant to Article 8(5) of the Merger Regulation, which was rejected by the Commission. The subsequent request for interim measures to the Court was dismissed by order of the President of the Court of 18 March 2008.

In its appeal, Aer Lingus argued that not ordering Ryanair to divest its entire minority shareholding would have significant negative effects on competition and that the Commission's interpretation of merger rules would lead to a 'serious lacuna' in merger control. It also pointed to previous cases in which the Commission had asked for the remaining shareholding to be fully divested after a prohibition decision [29].

The General Court dismissed Aer Lingus's appeal. It confirmed that the Commission *was right to reject Aer Lingus's claim* and that the Commission could not order Ryanair to divest its non-controlling shareholding in Aer Lingus under current EU merger rules. It stated that

'the concept of concentration cannot be extended to cases in which control has not been obtained (...). The Commission is not granted such a power under the merger regulation.'

The Court found that Ryanair's acquisition of a minority share can neither be regarded as 'full' nor as 'partial' implementation of a concentration [30] and hence the Commission has no power under Article 8(4) of the Merger Regulation to order Ryanair to divest its minority share. The Court endorsed the Commission's position that the situation in this case was different from previous cases such as the 'Tetra' or 'Schneider' mergers, since in those cases the transaction had been implemented by the parties, while this was not the case for Ryanair.

The General Court also analysed Aer Lingus' claims that Ryanair's minority shareholdings might have come close to a form of *de facto control* over Ryanair. The Court found that Aer Lingus had established no controlling or anti-competitive effect of the minority shareholding: Ryanair could not gain access to confidential strategies through its rights to ask for meetings with Aer Lingus' management, nor could Ryanair block important decisions just because of its right to ask for extraordinary general meetings. Also Ryanair's limited voting rights did, according to the Court, *'not have a significant impact on the company* [31]*'*.

The Court finally found that the Commission's refusal to take a position on the applicability of national merger rules under Article 21(3) of the Merger Regulation did not constitute a failure to act under Article 265 TFEU (ex-232 EC). It is interesting to note that the Court not only confirmed that the Commission was not obliged to take such a position, but expressly took the view that the Member States remain free to apply their national competition law to Ryanair's minority shareholding since there was no concentration with a Community dimension [32].

The decision not only provides *important clarifications* as to the interpretation of Article 3 (concentration) and 8(4) (dissolution order) of the Merger Regulation; it also makes it clear that any form of control of minority shareholdings is excluded under the Merger Regulation unless the shareholding confers de facto control to the acquirer(s). It is perhaps a pity that the Court did not elaborate more on the potentially harmful competition effects of minority shareholdings, and that the judgment is not fully in line with the intention of the Merger Regulation to treat proposed concentrations carried out in different steps 'as a whole' [33]. However, it should be noted that ordering Ryanair to entirely divest its existing shareholding would, in practice, have had a very limited effect, since Ryanair could have immediately re-acquired the minority share without any notification obligations. The discussion on whether this difference vis-à-vis the control regime in many other countries should or should not be changed *de lege lata* remains, in any event, open [34].

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[29] See COMP/M.2416 — *Tetra Laval/Sidel* and COMP/M.2283 — *Schneider/Legrand*.

[30] Aer Lingus had argued that Article 8(4) should also cover the dissolution of *'partial implementations'*. While the wording of Article 8(4) does, indeed, not exclude such an interpretation, the Court endorsed the Commission's view that transactions should not be split into different parts, but considered as a whole. Accordingly, Ryanair's minority shareholding cannot constitute a 'partial implementation' (paragraph 84 of the ruling in case T-411/07).

[31] See paragraph 71 of the ruling in case T-411/07.

[32] Aer Lingus had argued that Article 21(3) *might* still remain applicable once the Commission had found that a merger was a notifiable concentration with a Community dimension. The Court is, however, right to point to the fact that the concentration was only 'proposed' and not implemented in the present case (paragraph 91).

[33] See e.g. paragraph 48 of the Jurisdictional Notice: 'The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.' See also recital (20) of the Merger Regulation.

[34] See also the announcement of Vice-President Almunia in a speech of 10 March 2011 to look for solutions to close the 'enforcement gap' in the area of minority shareholdings (SPEECH/11/166).