

EN

Case No COMP/M.4439
– Ryanair /Aer Lingus

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 232
Date: 11/10/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11/X/2007
SG-Greffe(2007) 4600 final

PUBLIC VERSION

To the notifying party

Dear Sir,

Subject: Case No COMP/M.4439 – Ryanair/Aer Lingus

Call upon the Commission to act pursuant to Article 232 of the EC Treaty of 17.08.2007

1. On 17 August 2007, the Commission received a letter from Aer Lingus Group Plc (“Aer Lingus”) relating to the proceedings in Case No COMP/M.4439 – Ryanair / Aer Lingus. By this letter, Aer Lingus formally requested the Commission to open proceedings against Ryanair Holdings Plc (“Ryanair”) under Article 8(4) of Council Regulation (EC) No 139/2004 (“the EC Merger Regulation”)¹ in relation to the existing minority shareholding held by Ryanair in Aer Lingus and to adopt interim measures under Article 8(5) of the EC Merger Regulation to prevent Ryanair from further exercising its voting rights in Aer Lingus. Alternatively, Aer Lingus asked for a decision stating that the Commission has no such power under Article 8(4) of the EC Merger Regulation. In addition, Aer Lingus invited the Commission to take a position on the interpretation of Article 21 of the EC Merger Regulation in the context of the above mentioned case.

I. FACTS AND PROCEDURE

2. On 30 October 2006, the Commission received a notification of a proposed concentration pursuant to Article 4 of the EC Merger Regulation by which Ryanair would acquire control, within the meaning of Article 3(1)(b) of that regulation, of the whole of Aer Lingus. After examination of the notification, the Commission initiated, by decision of 20 December 2006 pursuant to Article 6(1)(c) of the EC Merger Regulation, proceedings in this case.
3. In its decision under Article 6(1)(c) of the EC Merger Regulation, the Commission assessed its jurisdiction. It noted that in addition to the public bid for all outstanding shares not already acquired, announced on 5 October 2006, Ryanair had also acquired 19.16% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and a further 6% shortly thereafter. The Commission considered that these

¹ OJ L 24, 29.1.2004, p. 1.

operations together constituted a single concentration within the meaning of Article 3 of the EC Merger Regulation.²

4. On 27 June 2007, the Commission adopted a decision pursuant to Article 8(3) of the EC Merger Regulation ("the prohibition decision") declaring incompatible with the common market the concentration by which Ryanair would acquire sole control of the whole of Aer Lingus. Paragraphs 10-12 of that decision confirm the analysis carried out in the Commission's decision under Article 6(1)(c) of the EC Merger Regulation that the entire operation comprising the acquisition of shares before and during the public bid as well as the public bid itself constitute a single concentration within the meaning of Article 3 of the EC Merger Regulation.
5. During the Commission proceedings, Aer Lingus made several submissions in which it argued that the Commission should require Ryanair to divest its already acquired 25.17% minority stake in Aer Lingus pursuant to Article 8(4) of the EC Merger Regulation in case the concentration was prohibited³. Responding to these submissions, the Deputy Director General for Mergers informed Aer Lingus on 27 June 2007, the day of the adoption of the prohibition decision, that in the opinion of the services in charge of Merger Control in the Directorate-General for Competition the Commission does not have the power to order Ryanair to divest its minority shareholding in Aer Lingus or to abstain from exercising its voting rights.
6. Aer Lingus made a further submission on this issue on 3 August 2007 and, finally, by its letter of 17 August 2007 formally called upon the Commission to act in this matter pursuant to Article 232 of the EC Treaty.

II. REQUEST TO ACT UNDER ARTICLE 8(4)

7. In its submissions, Aer Lingus in particular argues that the acquisition of the minority stake in Aer Lingus by Ryanair represents a partial implementation of the concentration declared incompatible with the common market by the Commission. It argues that the wording of Article 8(4) of the EC Merger Regulation should be interpreted as referring to a concentration that has already been implemented "*in whole or part*". It further argues that a divestiture of Ryanair's minority stakes is necessary in order to restore effective competition.
8. Under Article 3(1)(b) of the EC Merger Regulation, a concentration shall be deemed to arise where a change of control on a lasting basis results from the acquisition of direct or indirect control of an undertaking by another undertaking, whether by purchase of securities or assets, by contract or by any other means. Article 3(2) of the EC Merger Regulation provides that control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact and law involved, confer the possibility of exercising decisive influence on an undertaking. It is clear from these provisions that a concentration only arises where an undertaking acquires control, that is, the possibility of exercising decisive influence on another undertaking.
9. Article 8(4) of the EC Merger Regulation provides that where the Commission finds that a concentration has already been implemented and that the concentration has been declared incompatible with the common market, the Commission may require the undertakings

² Cf. paragraphs 5-7 of the Article 6(1)(c) decision.

³ See in particular submissions by Aer Lingus of 14.12.2006, 25.01.2007, 7.06.2007 or 25.06.2007. The last two submissions of Aer Lingus and some other documents refer to a shareholding of 25.22%, but Aer Lingus has subsequently confirmed to the Commission that 25.17% is the correct figure.

concerned to dissolve the concentration, in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration. The Commission may also take any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

10. The Commission considers that the concentration assessed in the present case has not been implemented. Ryanair has not acquired control of Aer Lingus and the prohibition decision also excludes that Ryanair acquires control of Aer Lingus in the future by way of the notified operation. The transactions that have been carried out during the Commission's proceedings can therefore not be considered as part of an implemented concentration.
11. In this respect it is necessary to point out that the 25.17% minority stake does not grant Ryanair *de jure* or *de facto* control of Aer Lingus within the meaning of Article 3(2) of the EC Merger Regulation. Even though minority shareholdings may in certain circumstances lead to a finding of control⁴, the Commission has no indications that such circumstances are present in this case. In fact, according to the information available to the Commission, Ryanair's rights as a minority shareholder (in particular the right to block so-called "special resolutions" pursuant to Irish Company Acts) are associated exclusively to rights related to the protection of minority shareholders. Such rights do not confer control in the sense of Article 3(2) of the EC Merger Regulation⁵. In addition, Aer Lingus itself does not seem to suggest that this minority stake would lead to control by Ryanair over Aer Lingus and has not provided the Commission with any evidence which would suggest existence of such control.
12. The suggested interpretation of the acquisition of the minority shareholding as a "partial implementation" covered by Article 8(4) of the EC Merger Regulation is difficult to reconcile with the wording of that provision, which clearly refers to a concentration that "has already been implemented". As the decisive element of a concentration under the EC Merger Regulation – the acquisition of control – is missing, there is no concentration which "*has already been implemented*" and the parties thus cannot be required to "*dissolve the concentration*". The Commission's competence is limited to situations in which the acquirer has control over the target. The purpose of decisions under Article 8(4) of the EC Merger Regulation is to address the negative effects on competition that are likely to result from the implementation of a concentration as defined in Article 3 of the EC Merger Regulation. In the present case, such negative effects cannot occur, since Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration.
13. In this respect, the current case clearly differs from the situation in past cases where Article 8(4) of the EC Merger Regulation was applied, such as Tetra Laval/Sidel or Schneider/Legrand⁶, where the public bid had already been successfully completed and the acquirer had acquired control of the target.

⁴ See Commission Consolidated Jurisdictional Notice of 10.07.2007, paragraphs 57-60.

⁵ See paragraph 66 of the Commission's Consolidated Jurisdictional Notice.

⁶ Commission Decision of 30 January 2002 setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M.2416 Tetra Laval/Sidel), OJ L 38 of 10.2.2004, p. 1, and Commission Decision of 30 January 2002 requiring undertakings to be separated pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M.2283 – Schneider/Legrand), OJ L 101 of 6.4.2004, p. 134.

14. For these reasons, the Commission rejects Aer Lingus' request to open proceedings against Ryanair under Article 8(4) of the EC Merger Regulation.

III. REQUEST TO TAKE INTERIM MEASURES UNDER ARTICLE 8(5)(c)

15. Aer Lingus submits that the Commission should adopt interim measures to prevent Ryanair from further exercising its voting rights in Aer Lingus. Further, Aer Lingus claims that the Commission should, by way of interim measures under Article 8(5)(c) of the EC Merger Regulation, order Ryanair to hold the shares separate and not to sell them without previous Commission approval, in order to prevent Ryanair from selling its stake in an unapproved manner⁷.
16. The Commission notes that according to Article 8(5)(c) of the EC Merger Regulation, it may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration "*has already been implemented and that the concentration has been declared incompatible with the common market*".
17. Therefore, Article 8(5)(c) uses the same wording as Article 8(4) for identifying the situations in which it can be used by the Commission. For the reasons set out above, there is no implemented concentration in the case at hand. Therefore, the Commission considers that it does not have the power to take interim measures in the present case. The Commission therefore rejects Aer Lingus' request to adopt interim measures pursuant to Article 8(5)(c) of the EC Merger Regulation.

IV. REQUEST FOR AN INTERPRETATION OF ARTICLE 21

18. Aer Lingus further invites the Commission to take a position on the interpretation of Article 21 of the EC Merger Regulation with respect to the applicability of national competition laws to the acquisition by Ryanair of the 25.17% minority share in Aer Lingus after the adoption of the prohibition decision, with a view to challenging that position before the Court. It argues that Aer Lingus' legal position is directly affected by the lack of clarity as to whether national competition authorities would be competent to deal with this matter. It also submits that it is ultimately the responsibility of the Commission to ensure that the EC Merger Regulation is interpreted and applied in a consistent manner within the European Competition Network (ECN).
19. In light of the various submissions by Aer Lingus, this request seems to relate in particular to the interpretation of Article 21(3) of the EC Merger Regulation, which states: "*No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.*"
20. The Commission observes that Article 21(3) of the EC Merger Regulation is a provision of Community law that imposes an obligation on the Member States. It does not confer any specific duties or powers on the Commission.
21. Clearly, if a Member State failed to comply with Article 21(3) of the EC Merger Regulation, the Commission would have the power to start an infringement procedure under Article 226 of the EC Treaty against that Member State. In the present case, however, there are no indications that a Member State has violated Article 21(3) of the EC Merger Regulation by applying its national legislation on competition to the concentration that the Commission has assessed in this case. Nor has Aer Lingus claimed that the Commission failed to act against such a violation. In any event, an alleged breach of Article 21(3) of the EC Merger Regulation by a Member State could not be the subject matter of

⁷ See in particular Aer Lingus' submission of 7 June 2007.

an action for failure to act under Article 232 of the EC Treaty, since the Commission has no duty but discretion to institute infringement proceedings against a Member State that violates Community law.

22. Given that only binding acts can be challenged in court by way of an action for annulment, Aer Lingus in fact requests the Commission to adopt a legally binding interpretation of a provision of Community law addressed to Member States. The Commission manifestly lacks the power to adopt such an act. Any interpretation of Article 21(3) of the EC Merger Regulation that the Commission would give in response to Aer Lingus' request would not be binding upon the authorities of the Member States. Moreover, in the Community legal order it is not the task of the Commission but that of the Court of Justice to give an authoritative interpretation of Community law. Therefore, the Commission finds that it does not have the power to give the binding interpretation of Article 21 of the EC Merger Regulation requested by Aer Lingus.
23. Should Aer Lingus be of the opinion that a national competition authority is obliged to act with respect to Ryanair's minority shareholding pursuant to its national legislation on competition, Aer Lingus has the opportunity to pursue this matter before that authority and/or the competent national court. If a national court considers that an interpretation of Article 21(3) of the EC Merger Regulation is necessary to enable it to give judgment, it may request the Court of Justice to give a preliminary ruling pursuant to Article 234 of the EC Treaty in order to clarify the interpretation of that provision and to ensure a consistent interpretation of the EC Merger Regulation. Where such a question is raised in a case pending before a national court against whose decisions there is no appeal, that court is obliged to refer the matter to the Court of Justice.
24. As far as Aer Lingus refers to the role of the Commission within the framework of the ECN, it may be noted that the ECN is not involved in the area of merger control but was created in view of the system of parallel competences of the Commission and national competition authorities to apply Articles 81 and 82 applicable under Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in the Articles 81 and 82.⁸
25. For the above reasons, the Commission concludes that it is not in a position to act in response to the request to give an interpretation of Article 21 of the EC Merger Regulation.

VI. CONCLUSION

26. For the above reasons, the Commission rejects the request of Aer Lingus to open proceedings under Article 8(4) and to adopt interim measures under Article 8(5) of the EC Merger Regulation in relation to the minority shareholding in Aer Lingus that Ryanair acquired shortly before and during the period of the public bid. Furthermore, the Commission concludes that it does not have the power to adopt an interpretation of Article 21 of the EC Merger Regulation as requested by Aer Lingus.
27. An action for the annulment of the decision to reject the request to open proceedings under Article 8(4) and to adopt to adopt interim measures under Article 8(5) of the EC Merger Regulation may be brought before the Court of First Instance of the European Communities in accordance with Article 230 of the EC Treaty. The Commission will send a copy of this decision to Ryanair, which is directly concerned by this matter.

⁸ OJ L 1 of 4.1.2003, p. 1. See Joint statement by the Council and the Commission on the functioning of the network of competition authorities, Council minutes relating to the adoption of Regulation 1/2003, Doc 15918/02, page 11.

For the Commission

[signed]

Neelie KROES
Member of the Commission