

*Case No IV/M.786 -  
BIRMINGHAM  
INTERNATIONAL  
AIRPORT*

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 25/03/1997

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.03.1997

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No. IV/M.786 - Birmingham International Airport**  
Notification of 24.03.1997 pursuant to Article 4 of Council Regulation (EEC) No.4064/89

1. On 24 February 1997 Birmingham International Airport Ltd ("BIA"), Aer Rianta cpt ("AR"), NatWest Ventures Ltd ("NWV") and the seven District Councils of the British West Midlands ("the Districts"), notified to the Commission the agreement by AR, NWV and the Districts to establish a joint venture holding company, Birmingham Airport Holdings Ltd. ("BAH") to act as a vehicle for the acquisition of control over Birmingham International Airport Limited ("BIA") and Eurohub (Birmingham) Limited ("Euro-Hub"), both of which will be wholly-owned subsidiaries of BAH. Furthermore, AR, which will carry out the operation through its wholly-owned subsidiary, Aer Rianta International, cpt (ARI), has established with NWV a new nominee company (in which it holds the share capital in the proportion 50:50 with NWV), called ARI/NWV (Nominees) Limited, for the sole purpose of acting as their nominee in relation to their respective investments in BAH.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation 4064/89 and does not raise serious doubts as to its compatibility with the common market.

## I. THE PARTIES

3. AR is a public limited liability company, wholly-owned by the Irish State, with activities in airport management, retail management of duty free and tax free shops, hotel operation and catering.
4. NWV is a provider of venture capital and an ultimate subsidiary of National Westminster Bank, plc which is an international banking and financial services group.
5. The Districts comprise Birmingham City Council, the Council of the City of Coventry, the Borough Council of Dudley, the Borough Council of Sandwell, Walsall Metropolitan Council, the Council of the Borough of Wolverhampton and the Council of the Metropolitan Borough of Solihull. They are public authorities which, apart from providing various civic and public services in their respective areas, have interests in various commercial activities, among which interests in BIA and Euro-Hub.
6. BIA, one of the two companies to be acquired by BAH and which is currently wholly-owned by the Districts, is responsible for the operation and management of Birmingham Airport, of which it owns the site and two terminals (for passengers and cargo), and the provision of associated facilities and services.
7. Euro-Hub, the other company being acquired by BAH, is a joint venture between BIA, British Airways plc and other private investors which owns and operates the third and most recent terminal (for passengers) at Birmingham Airport.

## **II. THE CONCENTRATION**

### Joint Control

8. ARI and NWV will hold jointly 40% of the shares of the new joint venture holding company, BAH, while the Districts will hold an aggregate 49% of the shares. The remaining 11% will be held by private investors.
9. Under the provisions of the Shareholders' Agreement, all decisions on matters of strategic importance, taken by the Main Board of Directors of BAH, will require the approval of both the Directors representing the Districts (who will in all circumstances vote in block), on the one hand, and ARI and NWV (who will in all circumstances vote in block), on the other hand. In the case of the Districts, their block vote will be exercised on the basis of majority decision-making, in accordance with their individual shareholdings in BAH. In the case of ARI and NWV, their block vote will be cast in such a manner as may be agreed by both these companies.
10. The said provisions require a 75% majority of votes for passing any strategic decision (including those concerning the Business Plan, which itself incorporates the Budget). The Directors representing ARI and NWV (who jointly hold 40% of the shares), will have jointly 40 of the total number of 100 votes which can be cast and the Directors representing the Districts (who hold an aggregate 49% of the shares) will have jointly 49 of the votes. Moreover, a quorum at Main Board meetings will require at least a minimum representation of each shareholder or

group of shareholders holding 25% or more of the votes capable of being cast. This means that both ARI and NWV, on the one hand, and the Districts, on the other hand, must be represented for a quorum to be reached. Likewise, the approval of both these groups of shareholders will be necessary if the 75% required majority is to be reached for passing any strategic decision. Consequently the new joint venture holding company, BAH, and its wholly-owned subsidiaries, BIA and Euro-Hub, will be jointly controlled by ARI, NWV and the Districts.

#### Concentrative Joint Venture

11. BAH fulfils all the criteria of a concentrative joint venture. AR as well as one of the Districts, Coventry City Council, are airport operators. However, AR's airport activities are not carried out in the geographic area in which BIA and Euro-Hub operate (AR has no activities in any UK airport). In addition Coventry City Council, which owns and operates Coventry Airport, principally handling cargo, is currently negotiating a joint venture arrangement with a third party, through which the latter would take over a substantial share of the Council's interest in Coventry Airport as well the day-to-day operation and management of the airport.

#### Full Function Nature

12. Both BIA and Euro-Hub already perform the functions normally carried out in airport activities. They currently have and will continue to have sufficient finance, personnel and assets to carry out their respective businesses on a lasting basis. Although the expansion of the airport will benefit from new operational assistance and investment from AR and NWV through the present operation, it will not be dependent on these parent companies for its day to day operations. Consequently, the full function aspects of the companies controlled by the new joint venture (BIA and Euro-Hub) are not called into question by this operation.

### **III. COMMUNITY DIMENSION**

13. The AR group, the National Westminster Bank group and BIA have a combined aggregate world-wide turnover in excess of ECU 5,000 million ( AR group, ECU 265.6 million; National Westminster Bank group, 20,303.4 million ; BIA, 71.8 million). The AR group and the National Westminster Bank group have each a Community-wide turnover in excess of ECU 250 million, and they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension, but does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

### **IV. COMPATIBILITY WITH THE COMMON MARKET**

#### **A. Relevant product market**

14. The principal activities concerned by the operation are airport operation and management for passengers and cargo and the provision of associated

commercial services. These activities consist of the provision of infrastructure services (e.g. runway facilities, taxiways), ground handling services (e.g. passenger and baggage handling, fuel and oil provision, aircraft maintenance), both types of services being provided to airlines and aircraft, and the associated commercial services (e.g. catering facilities, car parking, car hire, duty free shops and other retail outlets) offered to any users of the airport, in particular passengers. The management also includes the co-ordination and supervision of the activities of third parties who supply such services through contracts or concessions.

15. Airport operation and management consists of several broad categories of services within which infrastructure, ground handling and commercial services could be distinguished as separate markets. Finally, the question could be raised whether each of these categories of airport services could be divided into several distinct markets depending on the nature of services supplied. However, for the purpose of the present case, the exact definition of the relevant product market for airport management and operation can be left open, since the concentration will not lead to the creation or strengthening of a dominant position on any of the alternative markets considered.

#### **B. Relevant geographic market**

16. With regard to the relevant geographic market, the question could be raised whether the geographic market is limited to the confines of an airport, or to its catchment area, or whether the market encompasses different airports within a given larger area comprising airports offering similar services. However, from a competitive point of view in terms of dominance, the question of the exact geographic market can be left open as, in any of the alternative geographic markets, the concentration will not lead to the creation or strengthening of a dominant position which would significantly impede effective competition in the Community or in the EEA or any substantial part of that area.

#### **C. Assessment**

17. The current activities of Birmingham Airport are mainly concerned with passenger traffic, the cargo traffic representing only a minor part of the overall air transport movements, and the present operation is the consequence of the significant growth expected in passenger numbers over the next 15 years. This prospect requires additional terminal capacity and also an enhancement in the number, range and quality of the services offered to passengers. The principal purpose of the transaction is the funding and development of this expansion project. The result is the entry of new shareholders, with expertise in financial investment, NWV, and with experience in airport development, ARI. This latter company, as an airport operator and supplier of commercial services (e.g. catering services, duty and tax-free shops) will hold a specific leadership role at Birmingham Airport. It will not only participate in the joint control, but it will also offer support, advice and expertise to the Airport for management and development prospects, pursuant to a Support Services Agreement signed with Birmingham International Airport.
18. With the exception of its new interest in Birmingham International Airport and Euro-Hub, ARI is not engaged directly or indirectly in any other airport activities

in the United Kingdom. At a European level, ARI's airport activities are confined to Dublin, Shannon and Cork airports in Ireland. The other parent companies, as well as Birmingham International Airport and Euro-Hub, are only engaged directly or indirectly in airport management and operation relating to Birmingham Airport. The only exception is one of the Districts, Coventry City Council, which currently owns and operates Coventry Airport. However, as said above (§ 11), Coventry City Council is negotiating an arrangement with a third party which should assume a substantial share of the Council's interests in Coventry Airport and take over its management and operation. Furthermore, as Coventry City Council was present both in BIA and Coventry Airport prior to the present operation, its continued presence in both companies would not change the appreciation of the present case in terms of dominance.

19. Consequently, the proposed operation does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the Community or in EEA or in any substantial part of that area.

## **V. ANCILLARY RESTRICTIONS**

20. The parties submitted several provisions as ancillary restrictions directly related to and necessary for the implementation of the concentration.
21. (i) Sub clauses 10.1(2), 10.1(4) and 10.1(5) of clause 10.1 of the Shareholders Agreement provide that the Districts and the AR group will not carry out any activities, nor exercise or acquire any management influence or significant economic interest, nor be engaged in any other commercial arrangement, which relate to the operation of [...] Airport or [...] Airport or to any other activity which is connected with these airports. In addition, sub clause 10.1(3) provides that NWV shall not acquire or hold more than 20% of participating interest in any undertaking which owns any significant part of [...] Airport or [...] Airport, and shall not appoint a director of such undertaking.
22. This prohibition on competition concerns activities relating to the operation of the [...] airports which are considered by the parties as current or potential competitors of Birmingham International Airport. The parties argue that these sub-clauses are designed to prevent the parent companies from competing with Birmingham Airport in its prime [...] catchment area, and to protect the Airport's confidential information from used for the benefit of its [...] competitors.
23. Currently, [...] Airport has a marginal activity for passenger transport. Although [...] Airport has three times less passengers than Birmingham Airport, it offers domestic and international routes. Given the proximity, the easy access by motorway, the vast population living in the region in which the [...] airports are located, and given the numerous air routes from or to Birmingham Airport, it is clear that its catchment area encompasses a whole or significant part of the other [...] airports' catchment areas. In this context, a certain degree of competition

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<sup>1</sup> deleted for publication

exists and/or could develop if a particular airport extended activities and attracted more airlines and passengers as, given the existence of several airports in the same region, airlines can or could make a selection in accordance with fees, services supplied and facility capacities.

24. In such conditions, any operation and management activity by Birmingham International Airport's parent companies in [...] Airport or [...] Airport could have consequences in terms of competition. Therefore, as a result of these considerations, it appears as reasonably necessary that Birmingham International Airport's parent companies intend, in the best interests of their common undertaking, to abstain from activities relating to the operation and management of other airports whose catchment areas coincide or overlap with that of Birmingham Airport.
25. In this same context of restricting the activities of the parent companies in the airports which are in [...] proximity to Birmingham Airport, Clause 7.2 of the Support Services agreement between ARI and BIA mentioned above (§ 17) provides that, whilst ARI is a shareholder in BAH and is bound under the Agreement to provide expertise, support, assistance and consulting services to Birmingham International Airport, such services being directed towards the progressive development of Birmingham Airport, ARI could not offer the same services to [...] Airport. Given the role of ARI as a strategic partner in the development operation, it can be considered that this clause is necessary so that, in the best interests of the new joint venture company, it does not offer the same services to [...] Airport.
26. Given the above factors, the Commission concludes that sub-clauses 10.1(2), 10.1(3), 10.1(4) and 10.1(5), as well as Clause 7.2 of the above-mentioned Support Services Agreement, constitute ancillary restrictions which are directly related and necessary to the implementation of the present operation.
27. (ii) Sub-clause 10.1(1) of the Shareholders Agreement provides that the Districts, as long as any airport undertaking holds any shares in BAH, may not be involved in any business which consists to any significant extent in the operation of any airport located in the area encircled on the map of England and Wales attached to the Shareholders Agreement ("the Map"). The area concerned comprises in particular the airports of Manchester, Heathrow, Gatwick, Stansted and Luton, the major airports of England in terms of turnover, as well as Cardiff Airport [...] Bristol Airport [...] Coventry Airport as well as Midlands Airport [...]. The only exception to the prohibition concerns activities or interests which are carried out or held at the date of the Agreement.
28. In the case of this sub-clause, the conditions of competition which prevail for the sub clauses, discussed above (i), are not present: With the exception of [...] and [...], the airports concerned are not in [...] proximity to Birmingham Airport, where the J.V. is being implemented. Moreover, there is little or no overlap between their respective catchment areas and that of Birmingham Airport. Furthermore, the clause concerns only one of the controlling parents, the Districts. Were the airports affected by this clause to be considered, from a competitive point of view, as belonging to one geographic area (which included Birmingham), the restrictions contained in the sub clause should be extended to the other controlling parent companies, in particular ARI, which is currently

involved in airport activities, if such restrictions were considered necessary for the implementation of the activities of the joint venture. Rather the sub-clause would seem to be intended to protect for the future ARI's business against any possible competitive activity from the Districts, at any of the other airports concerned.

29. Consequently, the restrictions contained in this sub-clause 10.1(1) are not deemed to meet with the conditions required to consider them as necessary to the implementation of the present joint venture, BAH, and thus are not considered to be ancillary restraints.
30. (iii) Sub-clause 10.1(6) provides that each of the parent shareholders shall not do any of the things mentioned in sub clauses 10.1(1) to 10.1(5) discussed above in relation to any airport located within the Map, competing directly or indirectly with Birmingham Airport in terms of having similar passenger flows to or from the West Midlands without (a) implementing in good faith such procedures or practices as may be reasonably necessary for avoiding and minimising any prospective conflict of interest and protecting the legitimate commercial interest of the Group, and(b) advising the Chairman as to the procedures or practices which have been implemented.
31. This sub-clause contemplates a third geographic area which is different both to that of the catchment area of sub clauses 10.1(1) to 10.1(5) and the Map area of sub clause 10.1 (1) as it concerns potentially only certain airports within the Map (only those with similar passenger flows). In addition, given the criteria for determining airports concerned within the Map, the geographic area appears to be undefined and subject to modifications. Finally, these airports may not be in [...] proximity to Birmingham Airport.
32. Consequently, it is considered that the restrictions contained in this sub-clause 10.1(6) are not necessary for the implementation of the present joint venture, BAH, and thus are not considered to be ancillary restraints.

## **VI. CONCLUSION**

33. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission,