



EUROPEAN COMMISSION

DG Competition

Case M.8869 - RYANAIR / LAUDAMOTION

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 7(3)

Date: 8.5.2018



EUROPEAN COMMISSION

Brussels, 8.5.2018
C(2018) 2984 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

To the notifying party:

**Subject: Case M.8869 – Ryanair/LaudaMotion
Commission decision pursuant to Article 7(3) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European
Economic Area²
Second request for derogation**

Dear Sir or Madam,

- (1) We refer to your second application for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation with regard to the proposed acquisition by Ryanair Holdings Plc ("Ryanair", Ireland) of sole control over LaudaMotion GmbH ("LaudaMotion", Austria) (the "Transaction"), submitted pursuant to Article 7(3) of the Merger Regulation on 3 May 2018.
- (2) Ryanair and LaudaMotion are together referred to as the "Parties".

1. THE PARTIES AND THE TRANSACTION

- (3) Ryanair operates air transportation services in Europe.
- (4) LaudaMotion, which is owned by Mr. Niki Lauda, operates business charter flights (general aviation services through private jets) in Europe and has secured an Austrian Air Operator Certificate to operate scheduled and charter passenger services.³ In February 2018, LaudaMotion acquired certain assets of NIKI

¹ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

³ Nevertheless, LaudaMotion is not active in the charter market for the Summer 2018 IATA Season.

Luftfahrt GmbH ("NIKI"), the leisure subsidiary of bankrupt airline Air Berlin, after NIKI had filed for insolvency.

- (5) On 16 March 2018, the Parties reached agreement on binding Heads of Terms,⁴ pursuant to which Ryanair would acquire a 75% shareholding in LaudaMotion in two inter-related stages ("Step One" and "Step Two"). On 20 April 2018, the Parties executed the corresponding Share Purchase Agreement (the "SPA").⁵
- (6) On 23 March 2018, the Commission granted Ryanair a derogation from the obligations imposed by Article 7(1) of the Merger Regulation for the implementation of Step One, consisting in the following measures (the "First Derogation Decision"):
 - (a) The acquisition by Ryanair of a 24.9% shareholding in LaudaMotion;⁶
 - (b) The provision by Ryanair to LaudaMotion of six aircraft under a wet-lease agreement to LaudaMotion for the Summer 2018 IATA Season;
 - (c) The addition by Ryanair of scheduled aircraft capacity of LaudaMotion to its website and the offering of these LaudaMotion seats for sale;
 - (d) The provision by Ryanair of the working capital for LaudaMotion's daily operations and the funding of any losses incurred.⁷
- (7) Ryanair has implemented the measures referred to in points (a), (c) and (d) above.
- (8) Step Two involves the following:
 - (a) Ryanair will acquire a further 50.1% shareholding in LaudaMotion, subject to LaudaMotion efficiently operating no less than 75% of the former NIKI slots at Palma de Mallorca airport;⁸
 - (b) Ryanair will acquire the right to appoint three of the five members of the Board of LaudaMotion;⁹
 - (c) Ryanair will be responsible for growing the fleet of LaudaMotion to at least 30 aircraft over the [...] years [...];
 - (d) Ryanair will assist LaudaMotion in growing its presence in the scheduled air travel sector in Europe. Ryanair will promote LaudaMotion's services and sales by referring to LaudaMotion as a "partner" airline.

⁴ Annex 1 to Ryanair's first application for a derogation dated 19 March 2018.

⁵ Annex 2 to Ryanair's draft Form CO dated 26 April 2018.

⁶ See also Clause 2.1 of the SPA.

⁷ See also Clause 3.3 of the SPA.

⁸ See also Clauses 2.2 and 4.2.2 of the SPA.

⁹ See also Clause 7.2.9 of the SPA.

- (9) As indicated in paragraph (8) of the First Derogation Decision, neither Mr. Niki Lauda nor any undertaking other than Ryanair will have any rights that might confer joint control over LaudaMotion. Therefore, by acquiring 75% of LaudaMotion's shareholding and the right to appoint the majority of its Board, Ryanair will acquire sole control over LaudaMotion within the meaning of Article 3(1)(b) of the Merger Regulation.
- (10) In addition, as explained in paragraphs (9) to (13) of the First Derogation Decision, in view of the unitary nature of Step One and Step Two as well as the short period of time in which the two steps are to be implemented, and pursuant to paragraphs 38 and 48 of the Commission's Consolidated Jurisdictional Notice,¹⁰ the Commission considers that Step One and Step Two constitute a single concentration within the meaning of Article 3 of the Merger Regulation.

2. THE EU DIMENSION

- (11) As described in paragraph (14) of the First Derogation Decision, Ryanair and LaudaMotion have a combined aggregate world-wide turnover of more than EUR 5 000 million. Each of them has an EU-wide turnover in excess of EUR 250 million, and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
- (12) The Transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

3. THE SECOND APPLICATION FOR A DEROGATION

- (13) At the time of the First Derogation Decision, LaudaMotion was negotiating agreements with Condor Flugdienst GmbH and its affiliates ("Condor") (i) to wet-lease three aircraft from Condor, (ii) to procure certain ancillary services from Condor (access to Condor's sales platform, operations control services and crew control services), and (iii) to block-sell seats to Condor.
- (14) On 9 April 2018, LaudaMotion agreed to a separation agreement with Condor, pursuant to which Condor will (i) [...], (ii) act as sales agent for seats on LaudaMotion flights and provide operations and crew control services only until [...] and [...] 2018 respectively, and (iii) terminate its block-booking agreement with LaudaMotion.
- (15) At the time of the First Derogation Decision, LaudaMotion had also entered into Heads of Terms to block-sell to the Lufthansa Group 90% of seats on certain of LaudaMotion's aircraft. LaudaMotion and the Lufthansa Group have subsequently renegotiated a new block-space agreement for significantly lower volumes.¹¹

¹⁰ OJ C 95, 16.4.2008, p. 1.

¹¹ According to information provided by Ryanair on 4 May 2018.

- (16) In this context, Ryanair requests certain amendments to the derogation granted by the Commission in the First Derogation Decision so as to include the following additional measures (the "Additional Measures"):
- (a) Ryanair would provide between three and eight aircraft under a wet-lease agreement to LaudaMotion for the Summer 2018 IATA Season in addition to the six aircraft referred to in point (b) of paragraph (6) of the First Derogation Decision and in point (b) of paragraph (6) above;
 - (b) Ryanair would provide operational support to LaudaMotion, including operations control and crew control.
- (17) In particular, pursuant to its second application for a derogation, Ryanair requests that Step One of the Transaction, as described in paragraph (6) of the First Derogation Decision and in paragraph (6) above, is amended so as to include the Additional Measures ("Amended Step One").
- (18) Similarly to the measures approved under the First Derogation Decision, the Additional Measures would become void if Step Two of the Transaction would not be implemented.

4. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE MERGER REGULATION

- (19) Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that regulation shall not be implemented either before its notification or until it has been declared compatible with the internal market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on the basis of a reasoned request, grant a derogation from the obligation imposed by Article 7(1) of the Merger Regulation.
- (20) Article 7(3) of the Merger Regulation provides that, in deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.
- (21) A derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.
- A. The Transaction falls under the suspension obligation pursuant to Article 7(1) of the Merger Regulation**
- (22) As described in paragraph (20) of the First Derogation Decision, the Transaction is subject to the suspension obligation laid down in Article 7(1) of the Merger Regulation.
- (23) In paragraph (21) of the First Derogation Decision, the Commission expressed the view that carrying out Step One before completion of the Commission's merger control procedure would amount to a partial implementation of a concentration.

The extension of the scope of Step One does not question this view. Therefore, carrying out Amended Step One of the Transaction before the notification of the Transaction or before it has been declared compatible with the internal market by the Commission pursuant to the Merger Regulation would amount to a partial implementation of a concentration.

B. The effects of the suspension on the undertakings concerned and third parties

Ryanair's arguments

- (24) Ryanair submits that the wet-lease of additional aircraft and, if required, the operational support referred to in paragraph (16) above are necessary to fill the void left by Condor's termination of its agreements and to ensure LaudaMotion's continued survival.

The Commission's assessment

- (25) As explained in paragraphs (25) to (31) of the First Derogation Decision,¹² LaudaMotion needs to deploy a sufficiently large fleet to use its portfolio of slots and to offer a sufficient volume of seats for sale to end customers to operate independently on the retail market.
- (26) Without the Additional Measures included in Amended Step One, LaudaMotion would not have access to the aircraft and, possibly, to operational support necessary to operate its Summer 2018 IATA Season flight schedule in a manner allowing the use of its slots in accordance with the so-called "use it or lose it" rule.
- (27) Therefore, without the Additional Measures, LaudaMotion would not be able to protect critical slots, the loss of which would permanently damage LaudaMotion's competitive sustainability. Similarly, the Additional Measures are necessary to prevent the cancellation of scheduled air passenger transport services and consequent harm to customers.

Conclusion

- (28) Against this background and based on the available evidence, the Commission concludes that the suspension obligation imposed by Article 7(1) EUMR could lead to serious harm to LaudaMotion. Furthermore, on the basis of the information submitted by Ryanair, a derogation from the suspension obligation would not have adverse effects on any third party.

¹² Pursuant to the termination of the block-booking agreement with Condor and of the renegotiation of the block-space agreement with Lufthansa for significantly lower volumes, the argument referred to in paragraph (32) of the First Derogation Decision is not valid anymore. Nevertheless, considering that [...], the Commission deems it unlikely that the derogation authorising the implementation of the Additional Measures has an adverse effects on these two undertakings.

C. The threat to competition posed by the Transaction

Ryanair's arguments

- (29) In line with its first application for a derogation dated 19 March 2018 (see paragraphs (34) to (36) of the First Derogation Decision) and with the draft Form CO submitted on 26 April 2018, Ryanair states that the Transaction raises no competition concerns on the markets for scheduled passenger air transport services.

The Commission's assessment

- (30) As indicated in paragraph (37) of the First Derogation Decision, the Transaction relates to passenger air transport services, considering that Ryanair provides and LaudaMotion has started providing passenger air transport services to end customers for the Summer 2018 IATA Season.
- (31) In its prior decision practice related to passenger air transport services, the Commission has usually defined the relevant market on the basis of the "point of origin/point of destination" ("O&D") city-pair approach, whereby the effects of a transaction on competition are assessed for each O&D separately.¹³
- (32) At this stage and taking into account the information provided by Ryanair in the draft Form CO dated 26 April 2018, the Commission considers that the Transaction is unlikely to give rise to competition concerns on any routes, for the following reasons.
- (33) First, NIKI as an air carrier has definitively exited the routes that it used to operate until December 2017. Consequently, an O&D assessment of the effects of the Transaction based on NIKI's former operations would not properly reflect the specific change brought about by the Transaction on the passenger air transport markets. The effects of the Transaction should rather be measured on the routes that LaudaMotion plans to progressively operate using notably assets (in particular slots) transferred from NIKI.¹⁴
- (34) In the Summer 2018 IATA Season, LaudaMotion will operate 60 routes, out of which 25 will also be operated by Ryanair. Out of these 25 overlap routes, the

¹³ See for instance Case M.7541 – *IAG/Aer Lingus*, paragraph 14. Under the O&D approach, the Commission has distinguished the retail market for the supply of scheduled passenger air transport services from the wholesale market for the supply of seats to tour operators (see for instance Case M.8046 – *TUI/Transat France*, paragraph 66). The Commission has further left open the question of whether the supply of dry seats to passenger by a charter airline on a given route could be considered as part of the same market as scheduled services provided on that same route for non-premium passengers (see for instance Case M.6828 – *Delta Air Lines/Virgin Group/Virgin Atlantic Limited*, paragraph 68). Given that Ryanair and LaudaMotion are not active in the wholesale supply of airline seats or in the supply of charter services, these two possible markets will not be considered further at this stage.

¹⁴ LaudaMotion intends to operate a fleet of 20-21 aircraft, compared to NIKI's former fleet of 34-35 aircraft.

Parties' combined share of capacity exceeds [...] % on [...] routes.¹⁵ However, LaudaMotion has only recently entered the (retail) market for the provision of scheduled passenger air transport services and, for the time being, it does not exert a significant constraining influence.¹⁶

- (35) Second, absent the Transaction, LaudaMotion would have had limited access to aircraft, forcing it to scale back its operations significantly, reducing the number of routes served and flights operated. In particular, no LaudaMotion aircraft would have been based at or operated from Berlin in the Summer 2018 IATA Season. Furthermore, LaudaMotion would not have operated flights between Duesseldorf and Faro, and would have operated fewer frequencies on routes between Duesseldorf and Ibiza and Duesseldorf and Malaga. Finally, LaudaMotion would have based only two aircraft at Vienna airport, instead of the four aircraft that it plans to operate post-Transaction, reducing the offering on routes from and to Vienna. Considering that, absent the Transaction, LaudaMotion would have been marginally active on most of the routes where the Parties' combined capacity exceeds [...] %, the Transaction is unlikely to bring about any specific anti-competitive effects on these routes.
- (36) Third, LaudaMotion and Ryanair do not operate many of these routes from the same airports (e.g. LaudaMotion flies from Duesseldorf airport and Vienna airport, while Ryanair flies respectively from Weeze airport and Bratislava airport). Other carriers departing from the same airports as LaudaMotion are thus likely to compete with LaudaMotion more closely than Ryanair.
- (37) Therefore, the competitive pressure exerted by LaudaMotion seems insufficient for the Transaction to cause *prima facie* competitive concerns under the O&D approach.
- (38) In addition, in a number of prior decisions related to air carriers, where the transaction entailed the transfer of a position at certain airports, the Commission has considered the effects of the transaction on the operation of passenger air transport services at a given airport in terms of the slot portfolio held by a carrier at the airport, without distinguishing between the specific routes served from or to that airport.¹⁷ Considering that the Transaction relates primarily to the acquisition of LaudaMotion's position at certain airports,¹⁸ it is necessary to assess whether the Transaction is likely to lead to the creation or strengthening of a dominant position in slot holding, which might in turn have anti-competitive effects on the markets for passenger air transport at these airports.

¹⁵ [...] [...].

¹⁶ LaudaMotion has launched its website on 16 March 2018 and Ryanair has sold all LaudaMotion's tickets through the Ryanair website since 1 May 2018 only.

¹⁷ See for instance Cases M.8672 – *easyJet/Certain Air Berlin Assets*, paragraph 41; M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraph 58; M.6447 – *IAG/bmi*, paragraph 483.

¹⁸ In that regard, in paragraph 7 of the Heads of Terms (Annex 1 to Ryanair's first application for a derogation dated 19 March 2018), the Parties have acknowledged that "*slots are scarce and valuable*".

- (39) On the basis of the information submitted by Ryanair in the draft Form CO dated 26 April 2018, the Parties' combined slot holding post-Transaction would be significantly below [...] % at all overlap airports.¹⁹ Therefore, post-Transaction, the Parties' combined slot holding seems unlikely to give rise to competition concerns on the markets for passenger air transport at an airport.

Conclusion

- (40) In view of the above and on the basis of the information available, it appears *prima facie* that the Transaction is not likely to pose a threat to competition within the EEA.

D. Balance of interests

- (41) Based on the above, it appears that the suspension obligation could seriously affect LaudaMotion's ability to preserve its key assets and thus to become an effective competitor on the markets for the provision of passenger air transport. The Commission further considers that *prima facie* the Transaction is not likely to pose a threat to competition, and a derogation does not appear to have adverse effects on one or more of the Parties, on any air carrier or tour operator, or on passengers. Therefore, the Commission decides to grant a derogation in accordance with the application and to the extent specified in section 5 below.

5. CONDITION

- (42) According to Article 7(3), fourth sentence, of the Merger Regulation, a derogation from the suspension obligation laid down in Article 7(1) of the Merger Regulation may be made subject to conditions and obligations in order to ensure conditions of effective competition.
- (43) In its second application for a derogation, Ryanair committed itself to notify the Transaction to the Commission without any delay and, in any case, no later than one month from the adoption of this decision.
- (44) The Commission has thus decided to grant a derogation from the standstill obligation with regard to the Transaction, subject to the following condition: Ryanair shall notify the Transaction to the Commission pursuant to Article 4 of the Merger Regulation no later than one month from the adoption of this decision.

¹⁹ In its first application for a derogation dated 19 March 2018, Ryanair used as a proxy for the Parties' combined slot holding at a given airport the ratio between the number of scheduled frequencies operated by Ryanair and NIKI at the airport and the total number of scheduled frequencies at the same airport during the Summer 2017 IATA Season. This method overestimated the Parties' combined slot holding since (i) NIKI held more slots than LaudaMotion holds, and (ii) the total number of scheduled frequencies is lower than the total number of slots available at an airport. By contrast, in the draft Form CO dated 26 April 2018, Ryanair has calculated the Parties' slot holding as the ratio between the number of slots held by the Parties at an airport and the total number of available slots at the same airport, in line with the Commission's past decision practice (see Cases M.8633 – *Lufthansa/Certain Air Berlin assets*, paragraph 187 and M.8672 – *easyJet/Certain Air Berlin assets*, paragraph 107). Applying this calculation methodology, the Parties' combined slot holding at the two airports referred to in paragraph (44) and footnote 28 of the First Derogation Decision ([...] and [...] airports) would be below [...] %.

6. CONCLUSION

- (45) The Commission considers that Ryanair's second request for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation in relation to the Amended Step One, as described above in paragraph (17), meets the requirements set out in Article 7(3) of the Merger Regulation.
- (46) On the basis of the above considerations, and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, and subject to the condition set out in paragraph (44) above, Ryanair is granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation for the Additional Measures identified in paragraph (16) of this decision and until the Commission takes a final decision under the relevant provisions of the Merger Regulation.

For the Commission

(Signed)

Karmenu VELLA

Member of the Commission