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Testing the limits: *Ryanair/Aer Lingus* and the boundaries of merger control

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Abstract: Between the summer of 2007 and the autumn of 2015 Ryanair made repeated and determined attempts to either acquire the entirety of Aer Lingus or to defend the acquisition of a minority shareholding in the company. Aer Lingus in turn made repeated and determined efforts to defend itself against an unwanted acquisition. The litigation ceased only at the point where an alternative bid for Aer Lingus was accepted. During this process the difference in the ability of the EU and Member States to exercise control over minority shareholding acquisitions was thrown into sharp relief, and the UK courts discussed the relationship between the exercise of UK merger control and EU merger control. This article explores various aspects of this chain of decisions and litigation.

Introduction

It is very unusual for merger control administrative proceedings to become litigated cases under the European Union merger regulation¹ ('the EUMR'). The same is true of merger control operating in administrative systems generally – litigation in the United Kingdom ('the UK') is similarly rare. Merging parties typically seek quick outcomes offering timeous certainty, are often likely to abandon transactions in the face of challenge, and find little attraction in appealing administrative decisions to courts where both timing and outcome are anything but certain. It is indeed rare even to move to a full prohibition decision under the EUMR.² The result is that, notwithstanding the introduction of the fast-track procedure in the General Court ('GC'), the law of merger control tends to be advanced, in the European Union ('the EU') and in the UK, through administrative practice rather than through case law. Typically, within the EU, each potential merger is reviewed either by the EU Commission, or by the relevant authority of a Member State (although where the EUMR does not apply more than one Member State may exercise jurisdiction). The chain of cases surrounding the attempt by Ryanair Holdings plc ('Ryanair') to acquire the whole of, and defend the acquisition of a minority shareholding in, Aer Lingus Group plc ('Aer Lingus'), is therefore remarkable in the extent of administrative decisions and litigation that it generated. Notwithstanding that there has been some discussion of aspects of these decisions and cases in relevant literature, the chain is so complex, and so interesting, that it merits further exploration. Unfortunately even here it is not possible fully to develop all points of interest.

Two features of the chain stand out above all else. First, the very fact that both the EU Commission *and* the relevant UK competition authorities reviewed aspects of the attempted acquisition, and a completed partial acquisition, required the authorities in both the EU and the UK, and the UK courts, to consider questions of the relationship between the jurisdictions, and the meaning of the duty of sincere cooperation in this context. Second, notwithstanding that the difficulties encountered under the EU regime in applying it to the acquisition of minority shareholdings were well understood before *Ryanair/Aer Lingus* the fact that the UK was able to act in this respect, when the EU Commission was not, demonstrated the deficit in the EU system with remarkable clarity. That this has played a significant role in driving change in EU law is suggested in the relevant literature (see further below). Intermingled

1 Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004) OJ L 24/1.

2 Of the 6,425 concentrations notified under the EUMR up to the end of 2016, only 25 had been prohibited.

with both of these issues is that of how, in this instance, both parties sought to navigate between the two regimes to their advantage, with Aer Lingus arguing first that the EU Commission should have acted against the acquisition of the minority shareholding, and when this failed, supporting the UK authorities in their attempt to do so, while Ryanair sought to rely on the Commission's approach to the minority shareholding as a bar to independent UK action. Untangling this complex web is a challenge to any analyst seeking to explain these cases.

Table 1 sets out the key relevant decisions and judgments flowing from the – ultimately frustrated efforts – of Ryanair to acquire ownership of Aer Lingus; references throughout this article are given by the identifier in the first column.

Table 1 – Decisions, reports and judgments³

| | <i>Date</i> | <i>Decision/Report /Judgment (subject matter)</i> |
|-----------|-------------------|--|
| EU | | |
| EU1 | June 27, 2007 | Commission Decision in case M.4439 <i>Ryanair/Aer Lingus</i> (concentration incompatible with internal market) |
| EU2 | October 11, 2007 | Commission Decision <i>Ryanair/Aer Lingus</i> – art 232 EC (now art 265 TFEU) (rejecting initiation of proceedings under art 8(4) of Regulation 139/2004; case M.4439) |
| EU3 | March 18, 2008 | <i>Aer Lingus Group plc v Commission</i> case T-411/07R, [2008] ECR II-00411 (dismissal of application for interim measures in respect of minority shareholding) |
| EU4 | January 8, 2009 | Case M.5434 <i>Ryanair/Aer Lingus II</i> (prior notice of concentration) (2009) OJ C14/10 (withdrawn January 21, 2009) |
| EU5 | July 6, 2010 | <i>Aer Lingus Group plc v Commission</i> case T-411/07, [2010] ECR II-03691 (dismissal of action for annulment in respect of Commission decision of October 11, 2007) |
| EU6 | July 6, 2010 | <i>Ryanair Holdings plc v Commission</i> case T-342/07, [2010] ECR II-03457 (dismissal of appeal against Commission decision of June 27, 2007) |
| EU7 | July 24, 2012 | Case M.6663 <i>Ryanair/Aer Lingus</i> (prior notice of concentration) (2012) OJ C231/4 |
| EU8 | February 27, 2013 | Commission Decision in case M.6663 <i>Ryanair/Aer Lingus III</i> (concentration compatible with internal market) |
| UK | | |
| UK1 | July 28, 2011 | <i>Ryanair Holdings plc v Office of Fair Trading</i> [2011] CAT 23 (rejection of argument that OFT proceeding was time-barred) |
| UK2 | May 22, 2012 | <i>Ryanair Holdings plc v Office of Fair Trading</i> [2012] EWCA Civ 643 (dismissal of appeal against [2011] CAT 23) |
| UK3 | August 8, 2012 | <i>Ryanair Holdings plc v Competition Commission</i> [2012] CAT 21 (rejection of application to quash or stay merger investigation) |
| UK4 | December 13, 2012 | <i>Ryanair Holdings plc v Competition Commission</i> [2012] EWCA Civ 1632 (rejection of appeal from [2012] CAT 21) |
| UK5 | May 30, 2013 | Competition Commission, Draft Report – <i>Acquisition of shares in Aer Lingus by Ryanair</i> (partial divestiture required) |
| UK6 | October 10, 2013 | <i>Ryanair Holdings plc v Competition Commission and Aer Lingus Group</i> [2013] CAT 25 (redaction of material in draft report presented to Ryanair) |
| UK7 | March 7, 2014 | <i>Ryanair Holdings plc v Competition Commission and Aer Lingus Group plc</i> [2014] CAT 3 (dismissal of application for judicial review of CC report) |
| UK8 | February 12, 2015 | <i>Ryanair Holdings plc v Competition and Markets Authority and Aer Lingus Group plc</i> [2015] EWCA Civ 83 (appeal from [2014] CAT 3 dismissed) |
| UK9 | April 17, 2015 | CMA, <i>Ryanair/Aer Lingus Merger Inquiry – Final Decision on possible material change of circumstances</i> (finding of no material change in circumstances) |
| UK10 | April 17, 2015 | Competition and Markets Authority, <i>The Ryanair Holdings plc and Aer Lingus Group plc Inquiry Order 2015</i> (Order by CMA requiring partial share divestiture) |

³ This table does not include references to claims for costs or other minor procedural matters.

| | | |
|------|---------------|---|
| UK11 | July 15, 2015 | <i>Ryanair Holdings plc v Competition and Markets Authority and Aer Lingus Group plc</i> [2015] CAT 14 (appeal against final divestment order – rejected) |
| UK12 | July 15, 2015 | <i>Ryanair Holdings plc v Competition and Markets Authority and Aer Lingus Group plc</i> [2015] CAT 15 (rejection of leave to appeal – abridgment of time to appeal this rejection) |

Background and case progress

Aer Lingus was, like many of the older airlines, formerly owned by the State, having been founded by the Irish Government in 1936.⁴ It was privatised in 2006, with the Government continuing to hold 25.35% of the shares.⁵ Aer Lingus shares began trading on October 2, 2006. Despite its history as a state-owned airline, Aer Lingus had, since 2001, operated as a low cost airline providing scheduled services to and from three Irish airports, primarily, but not exclusively, flying to the UK and the United States. In 2012 it carried nearly 10m passengers, on a fleet of 44 aircraft. In the year ending December 31, 2011, Aer Lingus's turnover was €1,393m.

Ryanair was founded in 1985, and first listed shares on the Dublin stock exchange in 1997. In 2013 it operated approximately 1,500 flights per day across 1,500 routes, carrying nearly 80m passengers. It is perhaps noteworthy that at the time of EU1 it was suggested that Ryanair carried more passengers each year than British Airways did on its entire global network.⁶ In March 2013 Ryanair's fleet comprised 305 aircraft. In the year ending March 31, 2013, Ryanair's turnover was €4,884m.

Through a wholly-owned subsidiary, Coinside Limited, Ryanair acquired a 19.21% stake in Aer Lingus between September 27 and October 5, 2006. A full public bid was launched on October 23, 2006, and a merger notification was made to the EU Commission on October 30, 2006.⁷ Ryanair continued to acquire shares in Aer Lingus through the bid period, such that by the end of the first EU review, which led to a decision that the merger would be incompatible with the internal market within the meaning of art 8(3) of the EUMR, Ryanair held 25.17% of the shares in Aer Lingus. Ryanair continued to build its stake following the Decision, taking it first up to 29.4%,⁸ and then to an eventual maximum shareholding of 29.82%. Aer Lingus made an application to the Commission in which it argued that Ryanair's shareholding amounted to an unlawful partial implementation of the merger. The Commission rejected this application, and its position was upheld on appeal by the GC. Meanwhile Ryanair appealed against EU1. Judgment in that case (EU6) was not given until July 6, 2010, and when it came the action was dismissed, with Ryanair losing in 'spectacular fashion'.⁹ Before that judgment, on December 15, 2008, Ryanair launched a further public bid for Aer Lingus, making a second notification to the EU

4 The profiles of Aer Lingus and Ryanair are set out in the EU Commission decisions (EU1 and EU8), and in UK5.

5 See EU3, at para [3]. In UK5, at para [2.10] it is stated that the Irish Government retained a 25.1% shareholding.

6 EU1, para 744.

7 (2006) OJ C274/10.

8 See para 10 of EU3; in EU5 the figure of 29.3% is used.

9 AC Witt, 'From *Airtours* to *Ryanair*: is the more economic approach to EU merger law really about more economics?', (2012) *Common Market Law Review* 217 at 219. As the Commission stated at the time, this was only the second opportunity that the GC had had in which to appraise the approach of the Commission to mergers in the airline sector, the first being that in Case T-177/04 *easyJet Airline Co. Ltd v Commission of the European Communities* [2006] ECR II-01931 (see MEMO/10/300, July 6, 2010 'Mergers: Commission welcomes General Court rulings in *Ryanair* case').

Commission on January 8, 2009 (*Ryanair/Aer Lingus II*).¹⁰ This notification was withdrawn on January 23, 2009.

Following the end of the EU Commission procedures relating to *Ryanair/Aer Lingus I*, the UK authorities had taken steps under the Enterprise Act 2002 ('the EA02'), in respect of the acquisition of the minority shareholding. The procedure had been stayed until the completion of the EU proceedings; Ryanair challenged the legality of this extended time limit and argued further that the UK authorities were in breach of the duty of sincere co-operation owed under EU law. While Ryanair was partially successful in relation to some relatively minor procedural matters it was substantially unsuccessful, and notwithstanding the launch of yet a third bid for the entirety of Aer Lingus's share capital, and a resulting third notification to the Commission on July 24, 2012,¹¹ the Competition and Markets Authority ('the CMA') eventually published an Order requiring that Ryanair divest itself of the majority of its shareholding. The EU Commission subsequently made an art 8(3) decision in respect of *Ryanair/Aer Lingus III* (EU8), from which there was no appeal to the GC. Commercial events then rendered further legal battles superfluous; a competing offer for Aer Lingus was recommended by its Board to its shareholders, and was subsequently accepted. Aer Lingus officially delisted from the London and Dublin stock exchanges on September 17, 2015, signalling the near-completion of a takeover by the International Consolidated Airlines Group SA ('IAG'). This latter transaction was cleared subject to conditions and obligations under art 6(1)(b) of the EUMR on July 14, 2015.¹²

Control over the acquisition of minority shareholdings

In EU1 the Commission dealt with a notification made on October 30, 2006 under which Ryanair would acquire, 'within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Aer Lingus Group Plc ('Aer Lingus', Ireland), by way of public bid announced on 23 October 2006'. At the time of the notification Ryanair had already acquired 19.16 % of the shares in Aer Lingus.¹³ A further 6% was acquired shortly thereafter. Given the timeframe of these acquisitions, the first of which took place within 10 days of the announcement of the public bid, 'and in view of Ryanair's explanations of the economic purpose it pursued at the time it concluded the transactions,'¹⁴ the Commission took the view that the entire series of transactions, including the public bid, amounted to a single concentration. As such, the Commission considered only whether, *as a whole*, the proposed transaction would fall within art 8(3) EUMR, and concluded that it did.

The effect of EU1 was that neither Ryanair nor Aer Lingus were wholly successful. While Ryanair was thwarted in its attempts to acquire the whole of Aer Lingus, Aer Lingus in turn did not secure the divestiture of the minority shareholding acquired by Ryanair. It is not remarkable that the Decision in EU1 is almost silent on the issue of the minority shareholding: it has for a long time been clear that 'the creation of a structural link by itself without including a change of control does not constitute a notifiable transaction under the [EUMR]'.¹⁵ As set out in the EUMR the EU Commission has jurisdiction only in the case of there being a concentration with a Community dimension and for a concentration to arise, *inter alia*, the terms of art 3(1) must be satisfied. Article 3(1) is in part in the following terms:

10 EU4.

11 The Commission opened its in-depth investigation on August 29, 2013 (see IP/12/921).

12 Case M.7451 *LAG/Aer Lingus*, notified on May 27, 2015 (2015) OJ C182/06; see European Commission Press Release July 14, 2015 (IP/15/5371).

13 EU1, para 10.

14 EU1, para 12.

15 P Fotis, and N Zevgolis, *The Competitive Effects of Minority Shareholdings: Legal and Economic Issues* (2016) Hart Publishing, at 149. *Ryanair/Aer Lingus* is extensively discussed in this work, hinting at the case's importance.

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- (a) the merger of two or more previously independent undertakings or parts of undertakings, or
- (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

While it may be possible to acquire ‘direct or indirect *control*’ (emphasis added) through the acquisition of minority shareholdings any finding that control has changed hands is exquisitely fact-sensitive. *Inter alia* art 3(2)(b) states that control may arise in the event of the acquisition of ‘rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking’.

On August 17, 2007, Aer Lingus brought an application under art 265 TFEU, relying on art 8(4) of the EUMR, arguing that the acquisition amounted to a partial implementation of a prohibited concentration, and requesting that the Commission take interim measures to prevent Ryanair exercising its voting rights. The Commission’s conclusions are set out at para 10 of EU2:

‘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’.

The Commission distinguished the present case from *Tetra Laval/Sidel*¹⁶ and *Schneider/Légrand*,¹⁷ in which the public bid had been implemented, and control had been acquired of the target. For the Commission a 25.17% minority stake, in the circumstances, did not confer control (it was not disputed that there could be cases in which such a stake *might* confer control). The Commission noted that the provisions of Irish company law made clear that the rights held by Ryanair were those accorded to minority shareholders, and it noted that Aer Lingus itself did ‘not seem to suggest that this minority stake would lead to control by Ryanair over Aer Lingus and [had] not provided the Commission with any evidence which would suggest existence of such control’.¹⁸

The outcome was appealed by Aer Lingus in EU5, and at the same time it applied for the adoption of interim measures and the suspension of the contested Decision in case T-411/07 R (EU3). Ryanair was granted leave to intervene. The approach taken by the President in EU3 was such that there was, in part because Aer Lingus did not make the argument, no discussion at this stage of the proceedings as to whether Ryanair had in fact acquired ‘control’ of Aer Lingus within the meaning of the EUMR.¹⁹ When

16 M.2416 (2004) OJ L38/1.

17 M.2283 (2004) OJ L101/134.

18 EU3, at para 11.

19 See EU3 at para 121: ‘... it should be emphasised that it is not being claimed by the applicant that Ryanair is in a position to exercise control over Aer Lingus. On the basis of the definition of control under art 3(2), it follows that Ryanair cannot be understood to be in a position to “exercise decisive influence” over Aer Lingus.’ The President of the Court held that ‘the rationale behind the [Decision was] clearly that, according to the Commission, no concentration [had] been implemented in the circumstances at hand and that therefore the Commission [had] no powers to adopt measures under art 8(4) and (5) in relation to the minority shareholding’ (EU3, at para 83). The question to be dealt with in the interim proceedings was that of whether the Commission had been wrong in its interpretation of art 8, EUMR, such that “partial implementation” or implementation of any of the elements which together constitute the single concentration notified can constitute “implementation” of that concentration and trigger the

the GC dealt with the issue in EU5 it was able to do so cursorily: at para 67 of the judgment it is stated that it was ‘not disputed that in the present case Ryanair’s shareholding in Aer Lingus [did] not confer on Ryanair the power to “control” Aer Lingus’. Aer Lingus’s argument rested on the fact that the shareholding merely gave Ryanair ‘substantial opportunities to seek to interfere with the management and commercial strategy of Aer Lingus’,²⁰ notwithstanding a number of examples of such ‘interference’, the totality was insufficient to constitute control, and thus insufficient to meet the most essential element of the EUMR: ‘where before the operation there were two distinct undertakings for a given economic activity, there will only be one after it’.²¹

The response of the President of the General Court in EU3 to Aer Lingus’s argument that the EUMR was, if interpreted narrowly, defective, was to push the matter back into the realm of arts 101 and 102 TFEU, suggesting an unwelcome return to a position which the EUMR was in large part enacted to avoid. At paras 103 and 104 of EU3 the President suggested that:

‘... as far as the existence of a regulatory lacuna is concerned, it should be pointed out that, whilst a minority shareholding of the type in question cannot, *prima facie*, be regulated under the [EUMR], it might be envisaged that ... art [101] and [102 TFEU] can be applied by the Commission to the conduct of the undertakings involved following the acquisition of the minority shareholding. ... Whilst [art 101 TFEU] might, *prima facie*, be difficult to apply in cases, such as the present, in which the infringement in question arises from the acquisition of shares on the market and, therefore the necessary meeting of minds might be difficult to establish, the applicant may ask the Commission to initiate a procedure under [art 102] if it believes that Ryanair enjoys a dominant position ... and is abusing that dominant position’.

That the Commission has not taken such an approach since *Continental Can*²² in the case of art 102, and that not since, in a case brought on the basis of art 265, the CJEU ruled²³ that art 101 might apply in such cases has either article been used in this way suggests that the approach put forward by the President of the GC was, while technically correct, somewhat fanciful.

The conclusion of this chain of Decisions and litigation can be readily summed up: the notified concentration was prohibited, but the minority shareholding did not constitute a concentration for the purposes of the EUMR, such that EU law was silent on its legality.

EU Member States may operate distinctive merger control systems: unlike the position with respect to arts 101 and 102 TFEU there is no obligation to ensure alignment of national merger control with the EU system; the only obligation is to adhere to the duty of sincere co-operation, discussed further below. The current UK law of merger control is found in the EA02 (as amended), under which, at the time of the *Ryanair/Aer Lingus* proceedings, the Office of Fair Trading (‘the OFT’), as it then was, was required, subject to some exceptions, to make a merger reference to the Competition Commission (‘the CC’)

Commission’s powers under art 8(4) and (5)’ (EU3, at para 85). An analysis of the meaning of the term ‘implementation’, and of other language versions of the EUMR suggested that ‘the definition of “implementation” envisaged under arts 8(4) and (5) encompasses full consummation of the concentration’ (at para 90).

20 EU5, at para 67.

21 EU5, at para 63. A separate chain of analysis related to the effect of art 7 of the EUMR (‘Suspension of Concentrations’), the Court taking the view that the Commission’s use of this article was merely ‘to limit the risk of finding itself in a situation in which a decision finding incompatibility would need to be supplemented by a decision to dissolve in order to put an end to control acquired even before the Commission has taken a decision on its effects on competition’ (EU5, at para 83).

22 *Re Continental Can Co. Inc.* 72/71, (1972) OJ L7/25 (on appeal *Europemballage Corp. and Continental Can Co. v Commission* case 6/72, [1973] CMLR 199).

23 *BAT Ltd and RJ Reynolds Industries Inc v Commission* cases 142 and 156/84, [1988] 4 CMLR 24.

where: (a) a relevant merger situation has been created; and (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market ... [in the UK].²⁴ For a relevant merger situation to exist it is a requirement, *inter alia*, that at least two enterprises that were previously separate 'cease to be distinct'.²⁵ Section 26 is, in part, in the following terms:

(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control ...

(2) A person or group of persons able, directly or indirectly, to control or *materially to influence the policy* of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise may, for the purposes of subsections (1) and (2), be treated as having control of it'.²⁶

It is clear that there is a gap between the acquisition by A of 'control' of B, and the acquisition of the ability 'materially to influence the policy' of B. While this ability may be acquired through contracts or other arrangements, it is most likely to arise through the acquisition of a minority shareholding.²⁷ As is made clear in the approach of the UK's CC to *Ryanair/Aer Lingus* an analysis based on this rubric does not have to proceed on a unilateral or coordinated effects theory; it is necessary to show only that, *by whatever means*, a relevant merger situation has the ability to give rise, or potentially give rise, to a substantial lessening of competition.²⁸ On a number of occasions shareholdings of less than 30% have been found to confer the ability materially to influence policy. In *Stora Kopparbergs Bergslags AB/Swedish Match NV/The Gillette Company*,²⁹ for example, Gillette had taken a 22% holding of the equity of Swedish Match NV in the form of non-voting convertible loan stock and also held certain pre-emption rights. The Monopolies and Mergers Commission ('the MMC') concluded in part that:

'in our view a prudent Wilkinson Sword management would be bound constantly to take into account the fact that Gillette was a major shareholder in its parent company, Swedish Match NV, was its parent company's largest creditor and had important rights in relation to significant decisions affecting the future of the company, notwithstanding the limits to Gillette's rights.'³⁰

24 EA02, s 22(1).

25 EA02, s 26(1).

26 Emphasis added.

27 See also CC and OFT, *Merger Assessment Guidelines* (CC2/OFT1254; September 2011), which have been adopted by the CMA. The 'material influence' test is discussed at paras 3.2.8 – 3.2.12. Paras 3.2.8 – 3.2.9 are in the following terms:

'3.2.8 The ability to exercise 'material influence' is the lowest level of control that may give rise to a relevant merger situation. In assessing material influence in the context of the Act, the Authorities will conduct a case-by-case analysis, focusing on the overall relationship between the acquirer and the target and on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target includes its strategic direction and its ability to define and achieve its commercial objectives.

3.2.9 The acquirer's ability to influence the target's policy can arise through the exercise of votes at shareholders' meetings, together with any additional supporting factors that might suggest that the acquiring party exercises an influence disproportionate to its shareholding. Material influence may also arise as a result of the ability to influence the board of the target and/or through other arrangements.'

Section 26 in essence reproduces s 65 of the Fair Trading Act 1973, and it is reasonable to reference case law and decisions made under that Act in the interpretation of s 26.

28 See the discussion of this point in P Fotis, and N Zevgolis (n 15, above) at 199.

29 Cm 1473 (1991).

30 Para 1.6.

Similar arguments were subsequently made in *Ryanair/Aer Lingus*. In *The Peninsular and Oriental Steam Navigation Company and European Ferries Group plc*³¹ the MMC found that a shareholding of 20.8%, which carried 16.1% of the voting rights, conferred on the holder of the shares a material influence over the policy of the target. Most notably, in *Acquisition by BSkyB plc of 17.9% of the shareholding of ITV plc*³² the CC found that a shareholding of 17.9% would confer, in the distinctive facts of the case, material influence.

In *Ryanair/Aer Lingus* the CC found that the, by then, 29.82% shareholding conferred the ability materially to influence policy through a number of factors: Irish company law required that certain matters put to the shareholders could be passed only by a special resolution, requiring the support of at least 75% of votes cast, such that Ryanair would have the ability to block these;³³ Aer Lingus's Articles of Association contained provisions requiring an Extraordinary General Meeting if the company proposed to dispose of its slots at Heathrow Airport, which Ryanair could then also block; Ryanair could prevent Aer Lingus from issuing new shares to a strategic partner via a private placement; and the possibility could not be dismissed that Ryanair would be able to achieve a majority at shareholder meetings, were the Irish Government to sell its remaining shares.³⁴ The ability of Ryanair to limit Aer Lingus's ability to be acquired by, to acquire, or to merge with another airline was significant in shaping the final finding of the CC that the relevant merger situation could be expected to give rise to a substantial lessening of competition,³⁵ and that a remedy was required.

The CC subsequently ordered that the appropriate remedy was for Ryanair to divest itself of all but 5% of its shareholding.³⁶ Ryanair appealed on a number of grounds (going so far as to assert, unsuccessfully, that the CC was in breach of territoriality requirements), but it did *not* challenge the finding that it had acquired the ability materially to influence the policy of Aer Lingus.³⁷ In a coda to these cases the CMA made a Decision on April 17, 2015 finding that, notwithstanding commercial developments³⁸ and the passage of time, there had been no material change in circumstances, and that the divestiture remedy should stand; *The Ryanair Holdings plc and Aer Lingus Group plc Inquiry Order 2015* was issued to this effect on June 11, 2015.³⁹ The combined effect of the operation of EU *and* UK merger control by this point was

31 Cm 31 (1986).

32 December 20, 2007.

33 In UK5 the CC stated that of the 33 special resolutions considered between 2007 to 2013, Ryanair had blocked 13 (para 4.18).

34 The CC acknowledged that such a situation was 'relatively unlikely to occur' (UK5, para 4.28).

35 UK5, para 7.159.

36 This Order was, and remains controversial. Precisely what shareholding percentage would have been required to demonstrate 'material influence' under the EA02 is open to question, but the 'magic number' in this case was probably a holding of at least the 25% required to block special resolutions. This was by far the most important factor cited by the CC as determining the existence of a relevant merger situation. The position reached therefore may appear anomalous: if this analysis is correct, a shareholding of, say, 20% would not have triggered prescriptive intervention, but once intervention was triggered by a higher shareholding the CC could order a reduction in that shareholding to a level as low as 5%. Note that a similar approach was taken in *BskyB/ITV (British Sky Broadcasting Group plc v The Competition Commission and the Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25, [2008] CompAR 223) in which the CAT upheld a requirement of partial divestiture down to 7.5%. The confirmation by the CAT (UK7, at paras [196] – [198]) and the affirmation given by the Court of Appeal (UK8, at paras [57] – [58]) to the approach taken in *Ryanair/Aer Lingus*, is an important outcome from this chain of cases, even though in practice it is unlikely often to be invoked.

37 Before the main appeal *Ryanair*, in UK6, challenged the extent to which redactions had been made in the version of the CC report sent to it, seeking an unredacted version. This application was upheld in part by the CAT.

38 IAG announced that it had submitted a revised proposal to make an offer for Aer Lingus on January 26, 2015. Aer Lingus recommended acceptance of the offer the following day.

39 An application brought under s 120 of the EA02 that the material change in circumstances decision, and the Final Order be quashed was rejected by the CAT in UK11; leave to appeal against this judgment was denied in UK12.

therefore both to prevent the acquisition of Aer Lingus by Ryanair (a position confirmed in EU8, in response to the third notification of the proposed concentration), and to prevent the maintenance of a minority shareholding in excess of 5%. By combining protections available under both jurisdictions Aer Lingus had very largely succeeded, and Ryanair had been very largely thwarted.

That the UK authorities were able to, and did, act in relation to the acquisition of the minority shareholding in *Ryanair/Aer Lingus*, when the EU Commission was clearly unable to do so, demonstrated clearly – whatever the rights and wrongs of decisions on the question of whether in fact the appropriate legal tests were met, and whether the acquisition was anti-competitive – that the EU Commission lacked powers available to at least some of the Member States. On July 9, 2014, the EU Commission published a proposal which, if adopted, would give it the ability to review, in some cases, acquisitions of minority shareholdings under the EUMR.⁴⁰ In its White Paper the EU Commission pointed to the UK approach in *Ryanair/Aer Lingus* as being able to address one of the central theories of competitive harm arising from the acquisition of minority shareholdings: that this may ‘raise competition concerns when the acquirer uses its position to limit the competitive strategies available to the target, thereby weakening it as a competitive force’.⁴¹

UK and EU jurisdiction and the extent of the duty of sincere co-operation

The discussion in the preceding section has focussed on the law relating to the acquisition of minority shareholdings. An ostensibly more complicated, but in fact, as I will argue, simpler set of principles arose in relation to that of whether Ryanair could rely on the general principles of EU law to prevent the application of UK merger control to the minority shareholding. Notwithstanding the arguments advanced by Ryanair, nothing in the UK approach to this case challenged the exclusive jurisdiction of the EUMR which, (subject to limited clearly specified exceptions⁴²) is, and remains, absolute. Ryanair’s argument that in acting as they did against the acquisition of a minority shareholding the UK authorities were frustrating the application of a consistent system of EU merger control was ingenious, but was based on an entirely mistaken construction of the effect of the Commission decisions in EU1 and EU2. Nevertheless, it gave the UK courts their first opportunity to consider the boundaries and relationships between the EU and UK merger control regimes, and may be the only case in the EU to have raised these arguments.

The primary justification for the enactment of the EUMR, which was not expressly provided for in the Treaty, was that it was necessary for the EU Commission to have the ability, subject to defined exceptions, to act in respect of concentrations with an impact at the EU level.⁴³ This principle is given articulation in art 21(1) of the EUMR, which provides that ‘[t]his Regulation alone shall apply to

40 COM(2014) 449 final White Paper *Towards more effective EU merger control*. See P Elliott, and JV Acker, ‘A critical review of the European Commission’s proposal to subject acquisitions of non-controlling minority stakes to EU merger control’, (2015) *European Competition Law Review* 97.

41 At para 30. See further para 33: ‘This theory of harm was at the core of the UK authorities’ inquiry into the *Ryanair/Aer Lingus* case. In *Ryanair/Aer Lingus* I, Ryanair had already acquired a significant minority shareholding in its competitor, Aer Lingus, when it notified the Commission of its proposal to acquire control in 2006. The Commission prohibited the acquisition due to serious concerns that it would hurt competition by creating or strengthening Ryanair’s dominant position on a number of routes. However, it had no jurisdiction to review Ryanair’s minority shareholding in Aer Lingus, which the UK [CC] proceeded to do.’

42 See art 4(4) and 4(5) EUMR, art 9 EUMR (‘the German clause’), art 21(4) EUMR (legitimate interests other than competition), art 22 EUMR (‘the Dutch clause’), and art 346 TFEU (defence industries).

43 See, eg, recital (8) of the EUMR: ‘Such concentrations should, as a general rule, be reviewed exclusively at the Community level, in application of a “one-stop shop” system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States’.

concentrations as defined in Article 3'; art 21(2) provides that 'the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation', and art 21(3) further provides that '[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension'. Whether, following the Commission Decision in EU2 and the upholding of that Decision by the then CFI in EU5, the UK authorities had the power to take action under UK merger control in respect of Ryanair's minority stake in Aer Lingus, was a matter strongly contested by Ryanair. In EU3 the Commission was asked by Aer Lingus to take a view on the application of art 21 in the present case, following the Commission's rejection of Aer Lingus's application for it to act itself against the shareholding. On procedural grounds the Commission largely rejected this request, but it did state that 'there are no indications that a Member State has violated art 21(3) [of the EUMR] by applying its national legislation on competition to the concentration that the Commission has assessed in this case'.⁴⁴ By implication and indirectly, although recognising the possibility of future challenge, the Commission was here suggesting that a Member State would not be acting contrary to art 21(3) were it to apply its merger control provisions to the minority shareholding.⁴⁵ In doing so a Member State would *not be* applying its competition law to 'the concentration that the Commission has assessed', as that concentration, the Commission made clear, was the totality of actual and proposed transactions culminating in a successful full public bid. In EU5 the GC stated that

[t]he Commission can therefore not be criticised for having reiterated ... the legal framework applicable in the present case and the consequences to be drawn from it ... Where there is no concentration with a Community dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect'.⁴⁶

In response to a memorandum which Aer Lingus had sent to the Commission, the Irish Competition Authority, the OFT, and the Bundeskartellamt on July 12, 2007 inviting the recipients to reach a common position as to who would act in relation to the acquisition of the minority shareholding, the OFT had taken the initial view that art 21(3) precluded national action only where: '(1) the Commission expressly defined the relevant shareholding as part of the concentration with a Community dimension in its art 6(1)(c) and 8(3) decisions; and (2) the Commission reviewed the concentration in its entirety including the minority stake'.⁴⁷ The OFT took the view that, on a proper construction of the approach in EU1, it was free to act, and commenced to do so on September 30, 2010, following the GC's rejection of Aer Lingus's appeal in EU5 and Ryanair's appeal in EU6.

After various correspondence between the OFT and Ryanair, Ryanair brought an action for judicial review under s 120 of the EA02 before the Competition Appeal Tribunal ('CAT') (UK1), arguing that the OFT's action was time-barred in that it had exceeded the statutory time limits set out in the EA02. Whether this was in fact the case depended on whether the clock had been stopped, and in answering this question the CAT made extensive reference to the duty of sincere co-operation, referring to the EUMR

44 At para 21.

45 This was the conclusion drawn by Aer Lingus, which argued in its memorandum to competition authorities of July 12, 2007 that this response 'explicitly opens the way for the Member States to apply their national laws on competition to the minority shareholding. In particular the Commission's letter makes it apparent that the minority shareholding is not, at this point, following the blocking of the public offer, to be considered to form part of a concentration over which the Commission has exclusive jurisdiction.' (quoted in UK1 at para [8]).

46 EU5, at paras 90 – 91.

47 See UK3, paras [54] – [55].

framework, and the general duties flowing from the application of art 10 EC.⁴⁸ There was, the OFT argued, a real risk that conflict with the GC might arise were a reference to the CC made while the appeal was still before the GC.⁴⁹ Ryanair argued that no such conflict could arise,⁵⁰ as the issues of law and fact were too different. The CAT took the view that whatever the differences in detail, the fundamental issues before both regimes were, in part, the same and that ‘the risk here was of such a nature as to trigger the duty of sincere co-operation under art 10 EC, with the result that the OFT/[CC] were under an obligation to avoid the risk’.⁵¹ The CAT thus held that no reference could have been made before September 17, 2010, and rejected Ryanair’s application.⁵² In UK2 the Court of Appeal upheld this judgment.

A more fundamental challenge to the power of the OFT/CC to act was made in UK3. On June 19, 2012, Ryanair had announced that it would make a third attempt to bid for the entire share capital in Aer Lingus, following which on July 5, 2012, it submitted a draft form CO to the Commission. Ryanair requested that the CC stay its investigation pending the outcome of the Commission proceeding under the EUMR. This request was rejected on July 10, 2012, and Ryanair applied for an order pursuant to s 120 of the EA02 that the decision to continue with this investigation be quashed, and that the decision of the CC to issue a s 109 Notice requiring the provision of information be similarly treated. Ryanair’s argument was that the UK would be in breach of art 21 EUMR and the duty of sincere co-operation were the CC to review an acquisition (the minority shareholding), which was part of a concentration falling within the EUMR over which the EU Commission had exclusive jurisdiction. The CC argued in its rejection of the initial application by Ryanair that it had been in contact with the Commission, and that the latter informed the CC that it ‘would not ... anticipate that examination of the concentration resulting from any new bid would extend to consideration of the existing minority stake’.⁵³ Before the CAT Ryanair argued that

‘even if the acquisition of the minority stake is, as a formal matter, not treated under art 3(1) [of the EUMR] as being part of the same concentration as that notified, the Commission’s investigation of the notified concentration will necessarily encompass the implications of Ryanair owning the minority stake’.⁵⁴

The key argument made by the CAT is that set out at paras [26] – [28], where the CAT states clearly that ‘art 21(3) means what it says: No Member State shall apply its national legislation on competition *to any concentration that has a Community dimension*’.⁵⁵ For the CAT the jurisdiction of the Commission extended to the potential acquisition of 70.2% of Aer Lingus shares notified to the Commission, not to the pre-existing 29.82% of shares that formed the basis of the UK reference. Turning again to the wording of the EUMR, the CAT highlighted the concluding words of recital (8): ‘[c]oncentrations not covered by this

48 Subsequently art 4 of the Treaty on European Union (‘TEU’). The wording of art 4 TEU is slightly different to that set out in art 10 EC, but, as noted by the CAT, nothing in the present case turned on this change in wording, and the CAT referred only to art 10 in its final reasoning (see UK1, para [77]).

49 See UK1, paras [73] – [80]. The High Court had previously stated in *National Grid Electricity Transmission plc v ABB Ltd and others* [2009] EWHC 1326 (Ch) that the duty of sincere co-operation was such that a trial should not be held before a national court in respect of an issue which remained subject to rights of appeal in the EU.

50 See UK1, para [85].

51 UK1, at para [90].

52 On November 24, 2011 the Court of Appeal made an order that the clock be stopped while Ryanair appealed UK1 (*Ryanair Holdings plc v Office of Fair Trading and Aer Lingus Group plc* [2011] EWCA Civ 1579, [2012] UKCLR 82).

53 UK3, Annex 1.

54 UK3, para [25].

55 Emphasis in original.

Regulation come, in principle, within the jurisdiction of the Member States’,⁵⁶ and stated ‘[t]hat is exactly what the minority holding is: a completed acquisition not covered by that Regulation’.⁵⁷ In doing so the CAT dismissed the argument made by Ryanair as to the meaning of the Court of Appeal in UK2 when the Chancellor had stated, at para [38]:

‘it is, to my mind, self-evident that concurrent investigations in the UK and in Europe would be both oppressive and mutually destructive. I accept, therefore, that the duty of sincere co-operation does go beyond avoiding inconsistent decisions and extends to overlapping jurisdictions’.

The CC and Aer Lingus argued that there would only be ‘overlapping jurisdictions’⁵⁸ when a domestic investigation would risk interfering with the Commission’s exclusive EU jurisdiction. That would not be the case in the circumstances uniquely arising here. In the present case the jurisdictions arising were characterised, rightly, as ‘parallel or concurrent’,⁵⁹ and the CAT unanimously dismissed Ryanair’s application. Twelve days later the CAT rejected an application for leave to appeal, but following an application to the Court of Appeal leave was granted, with judgment in UK4 being handed down in December 2012. Stating that the duty of sincere co-operation was ‘highly fact-sensitive’,⁶⁰ the Court of Appeal emphasised the mutually exclusive nature of merger control jurisdiction in the EU:

‘... as between the [European Commission] on the one hand and Member States on the other hand, the jurisdictions are mutually exclusive. If the jurisdiction of the [Commission] is engaged, it has exclusive jurisdiction. If it is not engaged, then, as between the [Commission] and the Member State, the jurisdiction of the Member State is necessarily exclusive.’⁶¹

For the Court of Appeal the matter in the present case was, ‘at the end of the day, a very short one’, and there could be ‘no doubt’ that it was not necessary to stay the proceedings before the CC.⁶² The judgment of the Court in UK2 was clearly distinguished on its facts, with the Commission at that time treating the minority shareholding as part of the notified concentration as a result of the timing of that acquisition. This, the Court held, was no longer the case, such that in *Ryanair/Aer Lingus III* the Commission would be ignoring the partial acquisition, and focussing on the public bid for the remainder of the share capital.⁶³ Ryanair returned to the argument in UK7, following the CC’s order that it divest itself of the majority of its shareholding. The CAT again held that there was no breach of the duty of sincere co-operation, stating that the CC’s report and order dealt with the minority shareholding the acquisition of which went back to 2006, and that the CC did not preclude the possibility that, in the future, a full bid by Ryanair for Aer Lingus might be authorised by the Commission.⁶⁴ This CAT judgment was again upheld on appeal in UK8.⁶⁵

It is noteworthy that none of the case law cited before the CAT and the Court of Appeal in UK1, UK2, UK3 and UK4 relating to the nature of the duty of sincere co-operation, and its applicability in relation to competition law, flowed from cases relating to the EUMR and/or the operation of national merger

56 UK3, para [30].

57 UK3, para [30].

58 In UK4 the Court of Appeal stated that the term ‘overlapping’ was ‘strictly inaccurate’ (at para [58]).

59 UK3 at para [83].

60 UK4, at para [55].

61 UK4, at para [58].

62 UK4, at para [59].

63 See para [62].

64 UK7, paras [89] – [114].

65 In which Laws LJ made a short addition to his agreement with the judgment of Patten LJ, stating, at para [71] that: ‘The terms of TEU art 4(3) apparently create obligations which are so general and open-ended as to raise real concerns for the protection of legal certainty and therefore of the rule of law’.

control regimes.⁶⁶ Although in UK4 the Court of Appeal discussed the duty of sincere cooperation, noting the ‘important observations on the principle’⁶⁷ made in a chain of cases, it noted that it was ‘sufficient for the purpose of this appeal to refer to ... *National Grid*’.⁶⁸ Crucially, although EU case law expanded on this duty, particularly in the leading case of *Masterfoods*,⁶⁹ ‘the context of those cases was (what are now) Arts 101 and 102 of the [TFEU] where there are truly concurrent jurisdictions in respect of antitrust prohibitions on anti-competitive agreements and abuse of dominant positions.’⁷⁰

The case law setting out the relationship of the duty of sincere cooperation in respect of the application of arts 101 and 102 is highly significant. Prior to the enactment of Regulation 1/2003⁷¹ there was limited legislative guidance as to the precise relationship between arts 101 and 102 and national competition law, and it was perhaps inevitable that questions be asked as to the nature of the relationship. These questions were largely resolved by the CJEU in *Masterfoods* and the nature of the relationship was made more explicit in Regulation 1/2003 than had been the case in Regulation 17/62.⁷² The position however is different in respect of the EUMR, in which the relationship between EU and Member State regimes has, in part as a result of the arguments surrounding its introduction, been much more clearly spelt out on the face of the legislation. Recital (8) and art 3 were intended to avoid ambiguity. Other provisions deal with the exceptional cases in which Member State interests may override those of the EU collective mechanism, such that it is perhaps *only* in the exceptionally rare case mapped out precisely by *Ryanair/Aer Lingus* that there may be even a potential for conflict. In fact, as the CAT and the Court of Appeal made clear, there is *no* conflict as long as this is a clear separation between a concentration subject to the EUMR, and an acquisition which does *not* fall within art 3 (even if both involve the same parties at the same time). The fact that in the present case the Commission and GC had previously held that the minority shareholding did *not* confer control within the meaning of art 3 made the position straightforward.

The more general position is probably that set out by the OFT in its response to the *Aer Lingus* memorandum: if the Commission is reviewing a concentration with a Community dimension for the first time it may be assumed that a shareholding acquired before⁷³ or at the time of review would fall within the scope of the review, requiring a delay in any stand-alone Member State challenge under national law until all relevant EU procedures have been either completed or, in the case of potential appeals, time-barred. If the EU moves ahead to legislate for the power of review of minority shareholdings, then Member States’ authorities would likely find themselves in the same position as they do now with respect to concentrations, although the detail of where the lines would be drawn to trigger potential EU jurisdiction would be important.

Other interesting points

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- 66 Until, that is, the CAT in UK3 cited UK1 and UK2, and the Court of Appeal in UK4 cited the earlier cases in the chain.
- 67 At para [5].
- 68 Ibid. See *National Grid Electricity Transmission plc v ABB Ltd & Others* [2009] EWHC 1326 (Ch).
- 69 Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.
- 70 UK4, at para [57].
- 71 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1.
- 72 See recitals (8) and (9) of Regulation 1/2003.
- 73 This position may need modification depending on the date of the acquisition(s) of the minority shareholding.

As suggested in the introduction to this article, one could focus on other elements of the *Ryanair/Aer Lingus* chain of cases.⁷⁴ For those interested in aviation mergers specifically, it is a matter of note that *Ryanair/Aer Lingus* (EU1) was the first case in which the EU Commission blocked a merger in the airline sector. More generally it was also the first prohibition decision since the EUMR was revised in 2004, and as noted by Witt, was only the second such decision since the Commission had suffered heavy defeats before the EU Courts in a series of challenges to its merger decisions in 2002.⁷⁵ It is in part this which explains the ‘unprecedented’⁷⁶ length of EU1, and the development of a new emphasis on detailed economic analysis driven by data.⁷⁷

That the Commission blocked the merger in EU1 flowed from the fact that, in essence, the proposed concentration involved direct horizontal competitors based at the same Dublin airport. Efficiencies claimed by Ryanair as operating in favour of the concentration were deemed to be insufficiently certain or substantial to offset the competitive harms identified by the Commission.⁷⁸ Independent analyses have supported the position taken by the Commission,⁷⁹ and have pointed to the fact that the proposed concentration was exceptional in the extent of the horizontal overlap between the parties.⁸⁰

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- 74 As of the end of 2016 the EU Commission has examined 19 mergers falling within NACE code H.51.1 (passenger air transport). In addition to *Ryanair/Aer Lingus* and *LAG/Aer Lingus*, these are: M.5141, *KLM/Martinair*; M.5181 *Delta Airlines/Northwest Airlines*; M.5335 *Lufthansa/SN Airholding (Brussels Airlines)*; M.5364 *Iberia/Vueling/Clickair*; M.5403 *Lufthansa/BMI*; M.5440 *Lufthansa/Austrian Airlines*; M.5747 *Iberia/British Airways*; M.5852 *Oak Hill Capital Partners/Private Equity/Avolon*; M.5889 *United Air Lines/Continental Airlines*; M.5933 *Marfrig/Keystone*; M.6201 *HSH/Malev*; M.6447 *LAG/BMI*; M.6607 *US Airways/American Airlines*; M.7397 *CD&R/CHC Group*; M.7713 *Rewe Zj/Kuoni Reisen and Related Group Companies*, and M.8069 *RCL Holdings Cooperatief/Springwater Capital/Royal Caribbean Holdings de Espana* and a further 21 falling within sub-code H51.10, including *Olympic/Aegean Airlines* (Case M.5830, decision of January 26, 2011, (2011) OJ C195/11; and see Commission Press Release IP/11/68) which resulted in an art 8(3) incompatibility decision (M806 *British Airways/Tat* (II); M.857 *British Airways/Air Liberté*; M.968 *Lufthansa Cityline/Bombardier/EBJS*; M.1341 *Westdeutsche Landesbank/Carlson/Thomas Cook*; M.1354 *Sair Group/LTU*; M.1494 *Sair Group/AOM*; M.1855 *Singapore Airlines/Virgin Atlantic*; M.2093 *Airtours/Frosch Touristik (FTI)*; M.2156 *Rewe/Sair Group/LTU*; M.2788 *New Holding For Tourism Br/Preussag Ag/Neos JV*; M.3280 *Air France/KLM*; M.3770 *Lufthansa/Swiss*; M.3940 *Lufthansa/Eurowings*; M.6796 *Aegean/Olympic II*; M.6828 *Delta Air Lines/Virgin Group/Virgin Atlantic Limited*; M.7238 *American Express Company/Qatar Holding/GBT*; M.7270 *Cesky Aeroholding/Travel Service/Ceske Aerolinie*; M.7333 *Alitalia/Etibad*; M.7358 *Dnata/Stella*). Yet more, early, cases not recorded within the currently valid NACE classifications have been considered.
- 75 Cases T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-407, T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, and T-5/02 *Tetra Laval BV v Commission* [2002] ECR II-4381. See AC Witt, n 9 above.
- 76 Witt, n 9, at 219. See also O Koch, ‘Yes, we can (prohibit) – The *Ryanair/Aer Lingus* merger before the Court’, (2010) 3 *Competition Policy Newsletter* 41.
- 77 There is also a nicety in that the Commission took *two* art 8(3) decisions in respect of the same concentration, meaning that *Ryanair/Aer Lingus* accounts for approximately 8% of the total number of such decisions.
- 78 For a discussion of efficiencies in EU1 see paras 1099 – 1152 and in EU8 see paras 1638 – 1665. These discussions did not advance the law.
- 79 K-U Kühn, S Albæk and M dl Mano have noted that there was in the present case an ‘absence of airport substitutability’, and ‘closeness of competition between the merging parties’. Given, further, that ‘extensive qualitative data’ was available, and that ‘the data were complete, accurate and adequate for the methodologies for which they were used’ (‘Economics at DG Competition, 2010-2011’, (2011) 39 *Review of Industrial Organization* 311 at 316) the scope for testing the boundaries of the competition test at the heart of the EUMR was limited in EU1. See also AC Witt, n 9, above, and M dl Mano, A Pesaresi and O Stehman, ‘Econometric and survey evidence in the competitive assessment of the *Ryanair/Aer Lingus* merger’, (2007) 3 *Competition Policy Newsletter* 73, and AA Gaggero, and CA Piga, ‘Airline competition in the British Isles’, (2010) 46 *Transportation Research Part E* 270 (in which a different methodology than that employed by the Commission was used, but where the same result was reached). See also P Massey, ‘Commission’s Economic Analysis Shoots Down *Ryanair*’s Proposed Acquisition of *Aer Lingus*’, Conference Paper, Competition Press Conference, April 30, 2008:

Again, specific to the industry, the approach taken to the geographical allocation of turnover, vital in determining EU jurisdiction under arts 1(2) and 1(3) of the EUMR, was more clearly set out in *Ryanair/Aer Lingus* than had previously been the case. Prior to EU1 the Commission had considered three different ways of allocating turnover in respect of sales of airline tickets to passengers: (1) to allocate revenue from individual routes based on the country of destination; (2) to allocate turnover from each route on a 50/50 basis between the country of origin and the country of destination; and (3) to allocate the turnover based on the country in which the ticket was sold. Prior to EU1 there was no case in which the method of turnover allocation would have affected whether or not a Community dimension existed, but the position was different in EU1. Ryanair took the view that there was a Community dimension on the basis of the 50/50 method; Aer Lingus argued that there was not, on the basis that turnover should be allocated according to a variation on the third method. As the vast majority of sales made by Ryanair were online, it was not possible to determine where the ticket was bought, but it was possible to determine where the place of departure for the journey was located, and Aer Lingus proposed that this be the basis for the allocation of turnover. Aer Lingus drew comfort from the fact that art 5(1) of the EUMR provides that turnover is to be related to the Member State where ‘the service is provided’.⁸¹ The Commission adopted this methodology, but reached a different conclusion from Aer Lingus as to the consequence of taking the approach, holding that the conditions set out in art 1(3) of the EUMR were satisfied.⁸² It is not certain from the terms of EU1 that the Commission will *always* adopt such an approach to the calculation of turnover in airline cases. It was swayed in part in EU1 and EU8 by the fact that the relevant tickets were not ‘traditional return tickets’, in that ‘a return flight “bundle” [would be] more advantageous than two one-way flights’.⁸³ This will not always be the case where more traditional airline business models are concerned, meaning that an alternative approach to the calculation of turnover remains available to the Commission if the facts suggest that this would be appropriate.

Conclusion

It is perhaps anomalous that the area of most intense debate in these decisions and cases – that of the lines to be drawn between domestic and EU merger jurisdiction – is very unlikely to be of significant importance in the development of the law. Certainly the approach to be taken to this point of law in the UK has been clarified, but the set of circumstances in which this clarity may be invoked is so fact specific that it is somewhat unlikely to arise again. On the other hand, while *Ryanair/Aer Lingus* did not advance *the law* in relation to minority shareholdings – as stated above the position was clear well before EU3; the

‘The Commission’s Decision in *Ryanair/Aer Lingus* is based on a detailed economic analysis of the merger. Whereas in the past the Commission was criticised for poor reasoning by the courts and for a failure to adopt modern sophisticated analytical tools, in this case it has undertaken a detailed analysis and its decision would appear to be based largely on quantitative rather than qualitative analysis.’

Support for the Commission approach is not universal: one group of commentators has criticised the approach taken in EU1 as being ‘remarkably strict’ (see G Drauz, T Chellingsworth, and H Hyrkas, ‘Recent Developments in EC Merger Control’ (2010) 1 *Journal of European Competition Law & Practice*, 12 at 12).

80 See eg R Gadas et al, ‘Ryanair/Aer Lingus: Even “low-cost” monopolies can harm consumers’ (2007) 3 *Competition Policy Newsletter* 65 at 65.

81 The Commission had also stated, at para 30 of its *Draft Consolidated Jurisdictional Notice*, published in September 2006, that for air transport cases the ‘turnover generated by air transport is to be attributed to the location of the customer at the moment at which provision of the service commences, i.e., the place of departure’.

82 See EU1, paras 13 – 32. The Commission adopted the same methodology in EU8, reaching the same conclusions as to jurisdiction and as to the incompatibility of the concentration with the Common Market (EU8, para (24)).

83 EU1, para 28: ‘On the contrary, they both sell one-way tickets, together or separately as the case may be, and simply sum up their individual prices in the case of simultaneous booking of tickets comprising a round trip, without any price or other advantages for the customer buying the tickets for such a round trip.’

cumulative effect of the chain appears to have been significant in assisting the Commission to advance its position in favour of control over minority shareholdings. Singh and Mehta, for example, have stated that the issues ‘came to the fore in the case of *Ryanair/Aer Lingus like never before*’.⁸⁴ At the minimum *Ryanair/Aer Lingus* made it more likely that the EU Commission will be endowed with some ability to control minority shareholdings falling short of a concentration. This result is in itself likely to be of profound importance in the future development of EU competition law.

The fact that the total chain of decisions and litigation in *Ryanair/Aer Lingus* is uniquely extensive may be placed at the door of both parties, and arises from an exceptionally distinctive set of facts. Both parties sought succour from the law of merger control. However, it should be noted that given that Ryanair lost virtually every argument it brought at every stage before the EU and UK authorities and courts, it may be some time before we see another chain of merger decisions and cases as expansive as that discussed in this article. While the litigation discussed above is of undoubted value to those seeking clarification in respect of the law of merger control, it is hardly likely to incentivise future litigants.

84 M Singh, and A Mehta, ‘Acquisition of non-controlling minority shares: competitive concerns and implications’, (2016) 37 *European Competition Law Review* 122 at 124 (emphasis added). See also at 125: ‘Ryanair/Aer Lingus’s decade-long saga ... raised certain very interesting fundamental questions about the concept of “concentration” and the direct relationship that it shared with the relevant regulatory provisions. Even when no doubt was left in the minds of most about the harm that Ryanair’s acquisition of nearly 30 per cent non-controlling minority shares in Aer Lingus was causing to competition ... a message also came out simultaneously loud and clear that the legal tools and provisions designed primarily to tackle classical cases of merger in the [EUMR] were frustratingly inadequate ...’.