I want to break free

After a massive battle lasting the best part of a decade, Aer Lingus cuts loose from Ryanair

*by **Alec Burnside** and **Marjolein De Backer****

In August 2013, the UK's Competition Commission (CC) found that Ryanair's presence on the Aer Lingus share register impeded Aer Lingus from participating in industry consolidation, and ordered a sell-down to 5%. Ryanair had acquired most of its 29.82% stake in 2006 as part of a failed bid for Aer Lingus, and resisted all efforts since then to force it to exit its rival's share register. Ryanair's appeal against the CC's report was dismissed by the Competition Appeal Tribunal (CAT) in March 2014.

The indication that Aer Lingus would soon be able to cut loose from Ryanair awoke the interest of International Airlines Group (IAG, the parent company of British Airways, Iberia and Vueling), which approached Aer Lingus with a merger proposal in December 2014. Ryanair responded with a fresh appeal in the CAT seeking to reopen the CC report in the light of IAG's approach, while its appeal against the CAT in the earlier litigation was still ongoing.

In a cascade of judgments and decisions in July this year, Aer Lingus was finally able to unshackle itself from Ryanair. Adding these to the history since 2006 brings to 30 the total number of judgments and decisions in the Aer Lingus/Ryanair saga.

The history

Since Ryanair began building its 29.82% shareholding in 2006, it launched three bids for its Irish rival. Ryanair's appeal against the first prohibition was dismissed (Case T-342/07) but it was able to hold onto its minority stake (Case T-411/07), the General Court forming the view that article 8(4) EUMR did not empower the Commission to order divestiture of a non-controlling stake, even though it had been integral to the concentration which had been prohibited.

The second bid (2008) was abandoned on antitrust grounds, and the third, in 2012, was again vetoed by DG Competition. Ryanair's Luxembourg appeal against the second prohibition decision was still pending at the time of the IAG bid.

The Office of Fair Trading (OFT) had begun investigating the minority shareholding situation in September 2010 after the failure of the appeals arising from DG Competition's first prohibition decision. The three years that elapsed before the CC's August 2013 report reflected Ryanair's determined litigation strategy: it sued to prevent the OFT investigating but failed; and the OFT belatedly referred the case to the CC for an in-depth review. Within days, though, Ryanair launched its third bid and sued to suspend the CC investigation; again it failed but time was lost. So the litigation against the CC's belated August 2013 report was the third Ryanair application in the CAT; and the challenge to reopen the report in view of the IAG bid was the fourth separate time that Ryanair asked the CAT to upend the UK investigation.

For more on this history see our earlier CLI articles "Irish air traffic control", *CLI* 16 April 2013; "Tyranny of the minority", *CLI* 15 October 2013; and "Running out of fuel?", *CLI* 17 March 2015.

CMA's "material change in circumstances" decision and order

Just as the Court of Appeal was ruling on the CC's report, Ryanair asked the Competition and Markets Authority (the CMA, the successor to the CC and OFT) to reconsider the CC's report on the basis of the Enterprise Act's opaque "material change in circumstances" (MCC) provision, section 41 EA. Ryanair argued that IAG's interest in Aer Lingus undermined the report's conclusion that Ryanair deterred potential M&A partners for Aer Lingus.

The CMA, after consulting, decided that there had been no MCC. IAG's approach was consistent with the report's finding that Ryanair's presence as a shareholder was likely to impede or prevent Aer Lingus combining with other airlines: IAG's approach reflected the prospect of Ryanair being forced out and was indeed conditional upon Ryanair's exit. In fact, the episode illustrated precisely that Ryanair was in a position to determine whether a bid would succeed or fail. When issuing its MCC decision, the CMA also adopted a final order to compel the sell-down.

Ryanair appealed the MCC decision and the order (Case [2015] CAT 14). Against the background of the running IAG bid timetable, the CAT brought the case on to a hearing 15 days from the application, and gave judgment dismissing the application 12 days later.

- Ryanair criticised the CMA for imposing the order while the original appeal against the CC's report was not yet resolved. This ground was withdrawn against reassurance as to the timing of the intended next steps in the divestiture process.
- Ryanair claimed that the MCC decision and final order were unlawful because the CMA applied the wrong MCC test. The CMA should not have analysed whether there was an MCC but should directly have re-examined the proportionality of the sell-down remedy in light of the circumstances at the time of Ryanair's MCC request. The CAT found that section 41(3) EA only requires that the CMA executes its report unless there has been an MCC.
- Ryanair argued that the MCC decision was irrational because IAG lodged a bid while the CC's report had predicted that Aer Lingus would not be able to enter into

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any M&A transaction. The CAT considered that the MCC question is one for the CMA to evaluate, which it did effectively. The Tribunal also pointed to IAG's bid being conditional upon Ryanair's exit.

IAG bid

IAG's bid for Aer Lingus itself required antitrust approval from DG Competition and the US Department of Justice (DoJ):

DG Comp

DG Competition's investigation (M.7541 IAG/Aer Lingus) focused on the parties' overlap on the Dublin-London and Belfast-London routes, both of them flying specifically from Heathrow. While recognising the city pair analysis from past cases (Ryanair's problematic London overlap with Aer Lingus had been a Stansted/Heathrow issue), the Commission found a particular closeness of competition between the Heathrow-based operations of British Airways and Aer Lingus. Notably this was remedied by slot divestitures at Gatwick, reflecting the interaction of Heathrow and Gatwick within the London airport system.

IAG also offered so-called special prorate agreements with advantageous terms for long-haul carriers wanting to attract Aer Lingus feed from Irish airports for certain long-haul destinations to/from Heathrow, Gatwick, Manchester and Amsterdam. Finally, the parties addressed a concern on the Dublin/Shannon-Chicago routes by offering a similar advantageous prorate agreement to allow a competitor to build up a sustainable service on those routes. Phase I clearance was given.

The DoJ

The DoJ aligned its investigation with DG Competition in timing terms and closed its investigation without action.

Other issues

Distinct from the EU and US antitrust approvals, the CMA had to bless IAG as a suitable purchaser of the Ryanair stake for purposes of the UK sell-down. The CMA's final order required that the purchaser of the Ryanair share did not raise any fresh competition issues. As a practical matter, this was sufficiently addressed via the EUMR clearance.

29-hours to takeoff

These multiple strands all came together on 14-15 July 2015 when takeoff lights flashed green from all directions, one after the other (see diagram below):

- The Supreme Court refused Ryanair permission to appeal in relation to the CC's original report.
- DG Competition gave Phase I clearance.
- The CAT upheld the MCC decision and final order.
- The CMA granted Ryanair permission to sell its shares to IAG.
- The DoJ closed its investigation.
- The CAT refused Ryanair permission to go to the Court of Appeal.

After legal tussles lasting nine years, all this came together in a 29-hour period. And the following day, Ryanair abandoned its resistance, voting in favour of the IAG takeover at a shareholders meeting of Aer Lingus. IAG formally completed the Aer Lingus transaction in September 2015. Ryanair has since withdrawn its remaining litigation in Luxembourg (against DG Competition's second prohibition decision) and abandoned an application to the Court of Appeal for permission to contest the CAT's July ruling on the CMA's MCC decision and order (after protesting loudly in July that it would continue both cases as a matter of principle).

Conclusion

With the sound of Aer Lingus's delayed takeoff still receding into the distance, a full retrospective is a task for a future article. Many novel points of law have been explored along the way that other litigants have not thought to pursue. But one instant lesson: a tactical and well-funded litigant (low-cost maybe in other areas, but not in fighting losing battles) has scope to postpone the inevitable for a very long time.

Another lesson: the European Commission's contemplated minority shareholding reform should at least address the gap in article 8(4) EUMR, which disabled it from expelling Ryanair as an adjunct to the original 2007 prohibition. That prohibition was not effective to maintain effective competition, which remained impeded for long years, as described in the CC report and confirmed by the UK courts.