



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No: 1174/4/1/11

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (“the Rules”), the Registrar of the Competition Appeal Tribunal gives notice of the receipt of a notice of application on 7 January 2011 under section 120(1) of the Enterprise Act 2002 (“the Act”) by Ryanair Holdings plc (“Ryanair”). Ryanair challenges two decisions by the Office of Fair Trading (“OFT”) notified to Ryanair by letters dated 4 January 2011. Ryanair is represented by Covington & Burling LLP, 265 Strand, London WC2R 1BH.

On 23 October 2006, Ryanair launched a public bid for the entire share capital of Aer Lingus Group plc (“Aer Lingus”). Ryanair already owned 19.21 per cent of Aer Lingus’ share capital by that date. On 27 June 2007 the European Commission made a decision pursuant to the EC Merger Regulation¹ (“ECMR”) prohibiting the concentration (Case COMP/M.4339 *Ryanair / Aer Lingus*) (“the Ryanair Decision”). On 11 October 2007, the European Commission rejected a request by Aer Lingus to consider the application of Article 21 of the ECMR to Ryanair’s minority stake in Aer Lingus. The European Commission also stated that the acquisition by Ryanair of a minority stake did not amount to a concentration for the purposes of the ECMR (“the Aer Lingus Decision”). By an application lodged on 10 September 2007, Ryanair appealed to the General Court against the Ryanair Decision. Aer Lingus lodged an appeal against the Aer Lingus Decision on 19 November 2007. On 2 July 2008, Ryanair made a further acquisition of shares in Aer Lingus, taking its stake to 29.8 per cent. The General Court dismissed the appeals by Ryanair and Aer Lingus by judgments of 6 July 2010.

By a letter of 30 September 2010, the OFT informed Ryanair that it was investigating Ryanair’s acquisition of a minority stake in Aer Lingus under the Act.

The first decision challenged by Ryanair is a decision by the OFT that it was not time barred by sections 22 and 24 of the Act (read together with section 122) and consequently had jurisdiction to investigate the acquisition in 2006 by Ryanair of a minority stake in Aer Lingus for the purposes of determining whether to make a merger reference to the Competition Commission (“the Time Bar Decision”). Secondly, the OFT decided that it will make a decision whether to refer to the Competition Commission the acquisition by Ryanair of a minority stake in Aer Lingus by 17 January 2011 because of uncertainty about the lawfulness of a decision made by the OFT on 22 October 2010 which extended the time for the review of the transaction under section 25(2) of the Act (“the Unstopping the Clock Decision”).

In summary, the grounds of review on which Ryanair relies in respect of its challenge to the Time Bar Decision are that:

1. The OFT is time barred because section 122 of the Act did not serve to extend the four month period within which the OFT must make a reference to the Competition Commission whilst the appeals brought by Aer Lingus and/or Ryanair were before the Community Courts.
2. Accordingly, the OFT’s decision that it is not time barred is vitiated by an error of law.

The grounds of review on which Ryanair relies in respect of its challenge to the Unstopping the Clock Decision are that:

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

1. The OFT has power under section 25(2) of the Act to extend the four month period that is running under section 122 of the Act. The OFT's decision that it would reach a conclusion whether to make a reference to the Competition Commission by 17 January 2011 was therefore vitiated by an error of law.
2. The OFT made a further error of law by failing to determine the proper legal interpretation of the Act and instead treating the legal question as a risk factor.
3. If, notwithstanding the second ground under this heading, the question of law was properly to be assessed as a risk factor, the OFT has acted unfairly and unreasonably in giving that risk factor decisive weight in deciding to make a decision whether to make a reference to the Competition Commission by 17 January 2011 and in failing to take account of other relevant considerations.

Ryanair seeks the following relief from the Tribunal in respect of the Time Bar Decision:

1. a declaration pursuant to section 120(4) of the Act that the grounds of review are well-founded and the OFT's investigation is therefore time barred;
2. an order pursuant to section 120(5)(a) of the Act quashing the Time Bar Decision;
3. an order referring the matter back to the OFT with a direction to reconsider and make a new decision that its investigation is time barred, in accordance with the ruling of the Tribunal pursuant to section 120(5)(b) of the Act; and
4. an order that the OFT pay Ryanair the costs it has reasonably incurred in bringing its application.

Ryanair seeks the following relief from the Tribunal in respect of the Unstopping the Clock Decision:

1. a declaration pursuant to section 120(4) of the Act that:
 - a. the grounds of review are well-founded;
 - b. the OFT is not obliged to make a reference to the Competition Commission by 17 January 2011; and
 - c. the four month period that commenced on 17 September 2010 has been suspended since 22 October 2010 and will recommence only when Ryanair provides a response to the OFT's notice under section 31 of the Act that satisfies the conditions specified in section 25(2) of the Act.
2. an order pursuant to section 120(5)(a) of the Act quashing the Unstopping the Clock Decision;
3. an order referring the matter back to the OFT with a direction to suspend its investigation until the time bar issue has been finally determined (or, if earlier, Ryanair provides a response to the OFT's notice under section 31 of the Act that satisfies the conditions specified in section 25(2) of the Act); and
4. an order that the OFT pay Ryanair the costs it has reasonably incurred in bringing its application.

In its notice of application, Ryanair also seeks interim relief in respect of its appeal against the Unstopping the Clock Decision. However, in light of correspondence between the parties, Ryanair is considering whether it needs to pursue any part of its case challenging the Unstopping the Clock Decision.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received by no later than 2pm on Thursday 13 January 2011.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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