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IN THE COMPETITION

Case No. 1196/4/8/12

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

16 July 2012

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

COMPETITION COMMISSION

Respondent

- supported by -

AER LINGUS GROUP PLC

Intervener

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HEARING

APPEARANCES

Mr. Brian Kennelly (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Applicant.

Ms Alison Berridge appeared on behalf of the Respondent.

Mr. James Flynn QC and Mr. Daniel Piccinin (instructed by Cadwalader Wickersham & Taft LLP) appeared on behalf of the Intervener.

1 MR. FLYNN: I apply formally to intervene on behalf of Aer Lingus, and it is not opposed.

2 THE CHAIRMAN: I am not surprised, and that is granted. Mr. Kennelly, I think it is probably
3 you to go first. Just by way of indication, it occurs to me that we obviously two matters
4 before the Tribunal. One is the substantive application, and the other is the application for
5 interim relief. It seems to me there is a degree of connectivity between those two matters,
6 and that it might be worth talking about a timetable regarding the substantive application
7 first before going on to deal with the question of interim relief.

8 Before I hear any of the parties, I thought I might just float a couple of dates with the parties
9 on the basis that we deal with this as swiftly as possible. The Tribunal is thinking about
10 either this Friday or next Tuesday for a day, but I would rather hear from the parties before I
11 make any order on that point. Perhaps we could deal with that question first before we go
12 on to interim relief.

13 MR. KENNELLY: Sir, I am grateful. I was proposing to deal with timetabling first, because, as
14 you say, it makes a difference to the application for the necessity, apart from anything else,
15 of interim relief.

16 In relation to dates, from the point of view of Ryanair, this Friday is possible – when I talk
17 about “possible”, I mean availability of counsel and our instructing solicitors. While we
18 appreciate the urgency of this, and we are anxious to get it heard as quickly as possible,
19 Friday, yes, but we may be in some difficulties on Tuesday, but I ought to add, and the CC
20 will no doubt say it also, I understand they have difficulties with next week. Since we are in
21 the realm of timetabling, I ought to say that the rest of next week, Wednesday, Thursday
22 and Friday, is fine from our point of view, as is Monday, 30th July.

23 Perhaps I should pause there and let the other parties, because I understand you want this
24 dealt with in the next weeks.

25 THE CHAIRMAN: That is helpful. I should say that Monday, 30th and Tuesday, 31st July are not
26 dates that the Tribunal can manage. As you say, let us see what the other parties have to say
27 on dates. Miss Burridge?

28 MISS BERRIDGE: Yes, of the two dates you have mentioned, Friday is better. We would have
29 some difficulties with Tuesday. In terms of the week commencing 30th July, which has
30 been raised, all of that week would be suitable for us as well.

31 THE CHAIRMAN: I am very conscious, Miss Burridge, that you have, rather like the Tribunal,
32 only just had notice of this application. Friday, you say, is free. Would the Commission be
33 ready on Friday?

1 MISS BERRIDGE: I think it would be quite a stretch, given that this only appeared on our desks
2 on Friday. We obviously are very keen for it to be dealt with as quickly as possible. We
3 would probably, from a practical point of view, have a preference for that week
4 commencing 30th July.

5 THE CHAIRMAN: I am sorry, I will press you a little on this. If we went for Friday, I think that
6 would imply that you would have to serve a response to the Ryanair notice of application by
7 close of play on Wednesday, possibly some time on Thursday morning at the latest, and I
8 am just testing ----

9 MISS BERRIDGE: Yes, I think we would push for as much of that time as possible. Our views
10 are already out there in writing, so I do not think anyone would be compromised by us not
11 producing early during the week.

12 THE CHAIRMAN: No. Thank you very much. Mr. Flynn?

13 MR. FLYNN: Either of the dates you mentioned are fine for us, sir. If the 30th and 31st are no
14 good for the Tribunal, as I understand it, we would urge that a date be found before that. As
15 to that, we can make any date you propose.

16 MR. KENNELLY: Sir, on that basis, and again subject to the Tribunal's views, this Friday
17 appears to be the date which could be listed for a hearing of a substantive application.

18 THE CHAIRMAN: Yes. That, I think, seems to be right. I appreciate that it is putting the
19 Commission under some pressure, and clearly there will be understanding about that. It
20 does seem, rather than having to kick it off by a fortnight, better to deal with it for a day on
21 Friday.

22 MR. KENNELLY: If I may say, we are grateful to the Commission for accommodating us,
23 because it is us that they are accommodating in this application.

24 I should say, in fairness to all of the parties, that this short issue which we have raised has
25 been canvassed in writing. The core legal point has been canvassed in writing before the
26 CC prior to its decision of 10th July.

27 THE CHAIRMAN: Indeed, I saw some of the submissions. I do not think I saw Aer Lingus's
28 submissions.

29 MR. KENNELLY: We apologise for that. We have copies of those. Those need to be before
30 you. In fact, they go to my point, which is that our points and the response to them have
31 been raised before the Competition Commission.

32 THE CHAIRMAN: In that case, shall we proceed to the interim application.

33 MR. KENNELLY: I am grateful. Sir, as you appreciate, even though now it is necessary only to
34 seek interim relief until the decision in this application, which should be taken on or close to

1 the date of the hearing, nevertheless it is necessary to seek interim protection for Ryanair
2 because, as you will have seen in the papers, we are required to comply with a notice under
3 s.109 of the Enterprise Act by Tuesday, by tomorrow, and failure to comply with that may
4 incur penalties. It is within the discretion of the CC, but nevertheless they will have to right
5 to impose penalties on us if, as we have said, we do not, and cannot, comply with the
6 deadline of tomorrow, 17th July.

7 Having said that, I will pray in aid the short period in issue as support for my application for
8 interim relief when we come to assess the balance of convenience.

9 THE CHAIRMAN: Mr. Kennelly, I wonder if you could help me on two things. First of all, I am
10 not going to invite you to address me at this stage on whether there is an arguable question.
11 We will see what the intervener and the respondents have to say about that, and if necessary
12 you can reply on that. Let us for the moment take it that I am persuaded that there is a
13 *prima facie* case.

14 What I am more interested in are the so-called balancing factors. As you rightly say, the
15 s.109 notice is due tomorrow. It occurs to me, therefore, that the bulk of the work for the
16 s.109 notice ought to have been done by now. In a sense, that work will be water under the
17 bridge. The work is done. You are, as you say, due to serve tomorrow. This application
18 has been brought on very quickly but it is, at the end of the day, the day before you are due
19 to serve. Why can you not simply serve the response?

20 MR. KENNELLY: Sir, the short answer to that is, as we have said to the CC, we will not be
21 complying with the s.109 notice by tomorrow, because we are unable to do so properly. As
22 we have said to the CC, and I shall say to you today, because we are subjected to very
23 onerous and overlapping merger investigations, we have had to give priority to the
24 Commission's information requests, and we have been working on that, as well as the offer
25 document which we are required to put in also tomorrow pursuant to the Irish Takeover
26 Panel Rules. So we have been put into this regrettable position where we have been simply
27 unable to comply properly with the two parallel sets of information requests, which require
28 a great deal of work. That is why we need interim relief, otherwise we will certainly be
29 liable to these penalties by tomorrow.

30 It is not water under the bridge because the work has not been done. If, for example, the
31 Tribunal were to say simply ask for an extension of time, we would have to ask for an
32 extension of time for some period after the date for compliance, because we could not be
33 expected to comply the moment that, for example, we fail in our main application before
34 you. We would still need to deal with the separate issues which are raised in the s.109

1 notice. They are separate issues which required detailed investigation under that notice.
2 They do not overlap entirely with the matters which have been put before us by the
3 European Commission. That is the problem which we face and which is why we are before
4 you today.

5 THE CHAIRMAN: Just taking your point just made that you could have asked, but have not, is
6 the solution perhaps not for you to ask the Commission for what will be a realistic
7 timeframe to respond, and for that to be agreed?

8 MR. KENNELLY: The difficulty with that, sir, and that of course has occurred to us also, is that
9 the CC is in difficulty. The CC's ability to grant extensions is also constrained. They are
10 anxious to ensure that the investigation proceeds on a timely basis. They, as far as they are
11 concerned, are subject to very strict statutory time limits. In my respectful submission,
12 interim relief would benefit them as much as Ryanair, because then they would have clarity
13 as to their own timetable. I am sure the CC will disagree in due course, if they do, but
14 clarity is in everyone's interests.

15 If, sir, you think it would be useful for us to make that request we can do so immediately. I
16 have my instructing solicitors in the Tribunal. We can do so. If you rise for five minutes, I
17 am sure we could at least ask the question.

18 It is because the CC has indicated to us their concerns, that they are subject to a very strict
19 timetable, we have sought this interim relief to give us protection and clarity for the
20 Commission.

21 THE CHAIRMAN: Thank you. Can I ask a couple of questions about Form CO. As I
22 understand it, Form CO is at the moment only in draft.

23 MR. KENNELLY: That is correct.

24 THE CHAIRMAN: The European Commission's questions are in relation to that draft?

25 MR. KENNELLY: That is correct.

26 THE CHAIRMAN: You have identified two sets of email queries from the EU Commission. Is
27 there a date by which Ryanair has to provide a response to those?

28 MR. KENNELLY: There are two points to make to that, sir. The first is that there is a date
29 which is redacted in the non-confidential versions, which is the date by which Ryanair must
30 file the Form CO pursuant to the Irish Takeover Panel Rules.

31 THE CHAIRMAN: Can you take me to that. I will not mention the date.

32 MR. KENNELLY: In fact, sir, I was about to say that, having taken instructions, that date is not
33 confidential, because it is possible to work it out, which I am sure Aer Lingus have done.
34 That was an overzealous redaction. The date is 25th July of this year. It is para.94 of he

1 notice of application. As you say there, because of the way the Irish Takeover Panel Rules
2 work we need to Form CO by 25th July. That means that we need to file a further draft
3 notification to the European Commission responding to its questions by tomorrow in order
4 that the Commission will have time to review the material submitted. This is part of the
5 pre-notification process. We need some clarity from the Commission before we file. We
6 need to put our responses in to the Commission's detailed queries by tomorrow in order that
7 they have time to respond to us before 25th July. That is the problem.

8 The queries which the Commission have sent us are detailed. I ought to say right away,
9 although the Tribunal has seen the unredacted versions of those queries, the versions that
10 were sent to Aer Lingus on Friday were heavily redacted because in a number of respects
11 the Commission was responding to the draft Form CO which was highly confidential. Parts
12 of the Commission's responses revealed information in the draft Form CO. However,
13 having reviewed the redactions again we have been able to reduce the number of redactions,
14 and we served on Aer Lingus's lawyers today different versions with fewer redactions, now
15 only genuinely confidential information. The overzealous redactions have been removed,
16 and from that it is possible to see the detailed nature of the Commission's queries.

17 That is the problem, and that is why we will be unable to comply with Competition
18 Commission's information request by tomorrow.

19 I shall explain to you in due course, if I am permitted, why that is the case. This is not
20 Ryanair being difficult, these are extremely onerous obligations, and proper compliance
21 with them is an extremely difficult and time consuming task. It is not simply a question of
22 resources. One cannot just pay more solicitors to do the job, it requires information from
23 the business, and that is what is constraining the process.

24 THE CHAIRMAN: Well, I do not want to take you out of your order. Do carry on with all the
25 points you have and I will intervene with any questions I might have.

26 MR. KENNELLY: Sir, just before I move on to the next point, you did raise with us – I do not
27 want the Tribunal to think we have not explored every option. Interim relief should be a
28 last resort. If you think it is useful to ask the CC what their views are, because of the very
29 rapid timetable we have been observing, it has not been possible to have this discussion
30 with the CC – it may be useful to ask them their views as to whether a s.109 notice
31 extension could be granted for some proper period after the determination of our main
32 application in this Tribunal.

33 THE CHAIRMAN: I can see that as being a very helpful shortcut for all concerned, so I will rise.
34 We have now got a date for the substantive hearing, which may concentrate minds.

1 I am sorry, Miss Burridge?

2 MISS BERRIDGE: Just before we rise, I think I am actually able to answer that request without
3 any kind of intermission, so it may be easiest to do that. The Competition Commission
4 would be reluctant to grant an extension to the s.109, and that is for the reasons that have
5 been articulated, which is that the CC has a defined period in which to carry out its
6 functions. It is not currently able to do that without the information, and it does not want to
7 find itself compromised when this application is over. However, I am able to say that,
8 without prejudice to any of the substantive issues, the Competition Commission is not
9 minded to impose penalties in relation to non-compliance in the period between now, or
10 obviously the end of tomorrow when the information is due and the time when we have the
11 Tribunal's view on the substantive application. So that may be a different useful short-cut,
12 but nevertheless a useful short-cut.

13 THE CHAIRMAN: Just to be clear, Mr. Kennelly's suggestion that he would need time in
14 addition to the date on which the Tribunal handed down its judgment on the substantive
15 matter in order to deal with the s.109 notice, there the Commission would be minded to
16 impose a penalty for lateness?

17 MISS BERRIDGE: We have not got a view on that. We obviously did not expect this to happen
18 quite so quickly, so our view is that we are definitely not minded to impose penalties for
19 that period. I can take instructions on a suitable short further period, if that would be
20 helpful.

21 THE CHAIRMAN: I think it would be helpful, simply to avoid everyone addressing me on a
22 question of relief which may not actually be necessary. I think, now that we have a date for
23 determining the substantive matter, that ought to concentrate minds. I will rise for ten
24 minutes to enable discussions to take place. If, during those ten minutes, Miss Burridge,
25 you could give some thought as to when you would want to serve a response to the
26 application and see if that can be agreed as well, then that would save me having to impose
27 a date.

28 I will rise for ten minutes.

29 (Short break)

30 THE CHAIRMAN: Yes, Miss Burridge?

31 MISS BERRIDGE: Thank you. We have had an opportunity to consider. The Commission is
32 minded to extend its "minded not to fine" window to seven days after receiving the
33 Tribunal's decision in the main application. That is the same period that was initially

1 proposed for the information request which is the “off the shelf” information request at the
2 start of the inquiry. We have discussed this, and I understand this is agreed.

3 MR. KENNELLY: Yes, we agree with that extension. That is acceptable to us. If that is the
4 position we will not proceed with our application for interim relief. That protects us in the
5 manner that I suggested.

6 THE CHAIRMAN: Thank you.

7 MISS BERRIDGE: I should perhaps just add for completeness, that there is an outstanding s.109
8 in place. It is not just a question of penalties. The Commission also has the power to put
9 back its reporting date commensurately with the period that there has not been compliance,
10 and that is something the Commission is minded to do, obviously subject to receiving
11 information during the course of tomorrow.

12 I should also mention that we have been reflecting on the date for the hearing of the main
13 application. We are uncomfortable with Friday. We have not had the same opportunities
14 that the other parties have had to articulate in writing our views on the matter. It will be
15 quite a stretch to do. We also think that, given the position that has been reached, some of
16 the absolute urgency has gone out of the issue. We certainly believe it should be expedited.
17 but we do not feel that going to the end of July/beginning of August would be an
18 unacceptable compromise of the public interest.

19 We also think there is a positive reason for it, in that we may be able to receive further
20 clarity from the European Commission during that period, and that would certainly be
21 something the Tribunal would want to take into account, in our view.

22 So, for those reasons, we would ask you to reconsider that hearing date and look to those
23 dates in the week commencing 30th July that have been mentioned.

24 THE CHAIRMAN: I do not want to place the Commission under undue pressure, particularly
25 now that the reason I raised the timetabling question first has been resolved so helpfully by
26 all concerned.

27 Just looking at the timing, you are not keen, for availability reasons, on the second date I
28 suggested, 24th July?

29 MISS BERRIDGE: No.

30 THE CHAIRMAN: We are therefore looking at dates effectively very early in August?

31 MISS BERRIDGE: Yes.

32 THE CHAIRMAN: That is something that I am going to have to rise to consider myself to see
33 what can be achieved then. Am I right in thinking that all of the parties could do either
34 1st, 2nd or 3rd August?

1 MISS BERRIDGE: Yes.

2 MR. KENNELLY: Sir, I am afraid the 1st, 2nd and 3rd are dates which are very problematic for us,
3 because both myself and Lord Pannick are in court on those dates. The next week in
4 August is available from Monday to Thursday. The dates, I am afraid it is to do with the
5 Olympics, there are potential and indeed fixed Olympic Tribunal commitments on those
6 dates. That is the difficulty.

7 THE CHAIRMAN: The trouble is, I think I can say now, that one is going to have difficulties in
8 finding not simply the dates that I can make, but also we need to compose a full Tribunal of
9 three members for the hearing, and the moment one mentions August and diaries, I think
10 there may be difficulties.

11 Mr. Kennelly, your difficulty was Tuesday, 24th, was it not?

12 MR. KENNELLY: Yes, Tuesday, 24th, whereas 25th, 26th and 27th were possible.

13 THE CHAIRMAN: And the Commission's position was that it could do none of those dates in
14 the week commencing 23rd July?

15 MISS BERRIDGE: No, that is not correct. We think we would probably be fine with the
16 27th July.

17 THE CHAIRMAN: And is that a date that – Mr. Flynn?

18 MR. FLYNN: Yes, sir, it is, and we are keen that it should be earlier rather than later and not slip
19 into August, if that were feasible.

20 THE CHAIRMAN: That is entirely my concern. I think the moment one has an August one loses
21 control of the diary.

22 All right, I will rise to check the 27th July, and do not let anyone put anything in your diary
23 in the next five minutes.

24 (Short break)

25 THE CHAIRMAN: Thank you all very much for that. Provisionally, we will put a hearing in the
26 diary for Friday, 27th July. I have to say provisionally, I am afraid, because in particular the
27 Registrar has got to do some ringing around to see whether we can actually have a
28 constituted Panel for that date, but we will ensure that in the course of tomorrow, or, at the
29 very latest, the day after, that is made a firm booking. We will certainly endeavour to
30 achieve the 27th, because, as Mr. Flynn said, I think the moment we drift into August there
31 will be problems.

32 On that basis it seems to me that the Commission ought perhaps to serve its response to the
33 application by midday on Monday, 23rd July, and I will hear any objections to the dates I
34 propose, if there are any, with the intervener serving a response by 4 pm on Tuesday,

1 24th July, and that staggered date will give an opportunity to make any necessary redactions
2 in the intervener's submissions so as to avoid duplication, but I would expect in any event
3 the Competition Commission and the intervener to liaise with regard to the points that they
4 are taking so that time is not wasted.

5 The final point before I invite submissions is to note, as the Registrar has helpfully
6 reminded me, that the 27th is the first day of the Olympics, and it may be that a 10.30 start is
7 not the best start time for this hearing. We might want to start either later or earlier. I
8 would be open to suggestions as to that. Perhaps it would be worth, Miss Burridge, you
9 addressing me first on these points.

10 MISS BERRIDGE: We can confirm that the 27th is available for us, and we are content with the
11 date you have proposed for our response. I do not at the moment have a view on starting
12 earlier or later. We would be happy with whatever the Panel decides is the most suitable.

13 THE CHAIRMAN: Thank you. We will debate it. Mr. Flynn?

14 MR. FLYNN: We do not have a problem with the timing you suggest, sir. I have no idea what it
15 is going to be like in the Olympics. I live quite near here and there is already a checkpoint
16 on my street, but I imagine that I will be able to walk here at whatever time you suggest.
17 Others may have other constraints.

18 Sir, we do say that if the 27th turns out to be a problem then the Tribunal should consider
19 moving the date earlier. This case cannot be made to depend on specific counsel's
20 availability. It is already extraordinary enough that you have had an application for interim
21 relief, that it is impossible to comply with the demands of simply three Regulators. In the
22 world of international merger control that is a very light process, and one which Ryanair's
23 advisers are well able to cope with, in my submission.

24 MR. KENNELLY: Sir, as I say, we are grateful for the Tribunal accommodating us for the 27th.
25 In terms of the timing, we would be concerned for the start of the hearing to move later. It
26 is a one day case, but it will take the day, I think, so it is probably better to start at 10.30 or
27 earlier. The timing is not a problem for us, we will make whatever the Tribunal fixes.

28 THE CHAIRMAN: We will obviously get back to you regarding the 27th, but Mr. Flynn's point
29 is well taken. If that date, for whatever reason, cannot be achieved by the Tribunal, then we
30 may very well be looking at earlier dates, and at that stage I am afraid counsel's
31 convenience will have to come second to the need to dealing with this matter before August
32 is upon us.

33 We will draw up an order in those terms. Anything else before I rise?

1 | MISS BERRIDGE: I did have just one minor point, which is that the Competition Commission's
2 | process is quite an intensive fact gathering process. There will be more requests for
3 | information, and it may be appropriate during the hearing on the 27th to develop a plan for
4 | how those will be dealt with the ongoing weeks so that this same issue does not arise again.

5 | THE CHAIRMAN: That is helpful as a marker, but I think no more than that.

6 | In that case, thank you all very much.

7 | _____