JUDGMENT OF THE GENERAL COURT (Third Chamber)

6 July 2010 *

In Case T-411/07,

Aer Lingus Group plc, established in Dublin (Ireland), represented initially by A. Burnside, Solicitor, B. van de Walle de Ghelcke and T. Snels, lawyers, and subsequently by A. Burnside and B. van de Walle de Ghelcke,

applicant,

v

European Commission, represented by X. Lewis, É. Gippini Fournier and S. Noë, acting as Agents,

defendant,

* Language of the case: English.

supported by

Ryanair Holdings plc, established in Dublin (Ireland), represented by J. Swift QC, V. Power, A. McCarthy, D. Hull, Solicitors, and G. Berrisch, lawyer,

intervener,

APPLICATION for annulment of Commission Decision C(2007) 4600 of 11 October 2007 rejecting the applicant's request to initiate proceedings under Article 8(4) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), and to adopt interim measures under Article 8(5) of that regulation,

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2009,

gives the following

Judgment

Legal context

1 Under the heading 'Definition of concentration', Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p.1) ('the merger regulation') provides that:

'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.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking …'

2 Under the heading 'Powers of decision of the Commission', Article 8 of the merger regulation provides at paragraph 4 that:

'Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market

…

the Commission may:

— require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not

possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

— order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.'

3 Article 8(5) of the merger regulation provides that:

'The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

…

(c) has already been implemented and is declared incompatible with the common market.'

4 Article 21 of the merger regulation, entitled 'Application of the Regulation and jurisdiction', provides at paragraph 3 that:

'No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

Facts at the origin of the dispute

Parties to the dispute

5 The applicant, Aer Lingus Group plc, is a public limited company incorporated under Irish law. Following its privatisation in 2006 by the Irish Government, the State retained 25.35% of its capital and, on 2 October 2006, Aer Lingus Group's shares were listed on the stock exchange. Aer Lingus Group is the holding company of Aer Lingus Ltd (those two companies being referred to collectively as 'Aer Lingus'), an airline based in Ireland which provides scheduled flights from and to Dublin, Cork and Shannon airports.

6 Ryanair Holdings plc ('Ryanair') is a company listed on the stock exchange which provides scheduled flights in 40 countries, including between Ireland and other European countries.

Ryanair's bid for Aer Lingus and acquisition of the shareholding

7 On 5 October 2006, that is to say three days after Aer Lingus' shares were first listed, Ryanair announced its intention to launch a public bid for the entire share capital of Aer Lingus ('the public bid'). That public bid was launched on 23 October 2006, and the time-limit for accepting the bid was initially set as 13 November 2006, which was later extended by Ryanair until 4 December 2006, then again until 22 December 2006.

8 Just before announcing its intention to launch a public bid, Ryanair had acquired on the market a shareholding of 16.03% in the capital of Aer Lingus. On 5 October 2006 Ryanair increased that shareholding to 19.21%. Shortly thereafter Ryanair acquired further shares, so that it held 25.17% of Aer Lingus by 28 November 2006. That shareholding remained unchanged until August 2007 when, notwithstanding the adoption, on 27 June 2007, of the Commission of the European Communities decision referred to in paragraph 15 below, Ryanair acquired a further 4.3% of the capital of Aer Lingus, increasing its shareholding to 29.3%.

Examination and prohibition of the notified concentration

9 On 30 October 2006, the proposed concentration by which Ryanair was to acquire, for the purposes of Article 3(1)(b) of the merger regulation, control of Aer Lingus by the public bid was notified to the Commission in accordance with Article 4 of that regulation ('the notified concentration' or 'the concentration').

10 By email of 19 December 2006, Ryanair informed the Commission that its share acquisitions formed part of its plans to gain control of Aer Lingus.

11 By decision of 20 December 2006, the Commission found that the notified concentration raised serious doubts as to its compatibility with the common market and decided to initiate the detailed examination procedure, in accordance with Article 6(1)(c) of the merger regulation. The concentration is described in recital 7 in the preamble to that decision as follows:

'As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and the further 6% shortly thereafter, the entire operation comprising the acquisition of shares before and during the public period as well as the announcement of the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the merger regulation.'

12 The opening of the detailed investigation caused Ryanair's public bid to lapse pending a final decision in that case. Irish takeover rules require public bids subject to the Commission's jurisdiction to lapse if the Commission initiates the procedure provided for in Article 6(1)(c) of the merger regulation. However, in a press release dated 20 December 2006, Ryanair's CEO stated:

'Ryanair remains committed to acquiring Aer Lingus and will continue this process to — what we believe will be — the successful conclusion of this Phase II investigation.'

13 On 3 April 2007 the Commission sent Ryanair a statement of objections in accordance with Article 18 of the merger regulation. Point 7 of that statement describes the notified concentration in identical terms to those in the decision to initiate the detailed examination procedure.

14 In its reply of 17 April 2007 to the statement of objections, Ryanair informed the Commission that it was committed to refraining from exercising the voting rights attached to its Aer Lingus shares until the conclusion of the detailed examination procedure. It also stated that those shares did not enable it to exercise control over Aer Lingus in any event.

15 Pursuant to Article 8(3) of the merger regulation, the Commission stated, on 27 June 2007, that the notified concentration was incompatible with the common market (Decision C(2007) 3104, Case COMP/M.4439 — *Ryanair/Aer Lingus*; 'the Ryanair decision'). That decision is the subject of Case T-342/07 *Ryanair* v *Commission*, in which Aer Lingus intervenes in support of the Commission.

16 Recital 12 to the Ryanair decision is worded as follows:

'As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before launching the public bid, and the further 6% shortly thereafter, and in view of Ryanair's explanations of the economic purpose it pursued at the time it concluded the transactions, the entire operation comprising the acquisition of shares before and during the public bid period as well as the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the merger regulation.'

Correspondence between Aer Lingus and the Commission during the procedure for the examination of the concentration

17 During the procedure for the examination of the concentration, Aer Lingus presented a number of submissions to the Commission in relation to Ryanair's shareholding in Aer Lingus.

18 As early as the preliminary examination procedure, Aer Lingus requested the Commission to treat Ryanair's shareholding and its public bid as a single concentration. Following the decision to initiate the detailed examination procedure, in which the Commission considered that those two elements formed part of a single concentration, Aer Lingus requested the Commission, by letter of 25 January 2007, then by letter of 7 June 2007, to require Ryanair to dispose of its shareholding in Aer Lingus and to take the necessary interim measures in accordance with Article 8(4) and (5) of the merger regulation. In the alternative, should the Commission conclude that it had no power to act under those provisions, Aer Lingus asked it to make a clear statement that national competition authorities were not precluded by Article 21(3) of the merger regulation from exercising their powers in connection with that shareholding.

19 On 27 June 2007, that is to say the day on which the Ryanair decision was adopted, the Directorate-General (DG) 'Competition' of the Commission wrote to Aer Lingus informing it that the Commission's services did not have the power to order Ryanair to divest its minority shareholding, or to take other measures to restore the situation prevailing before the concentration was implemented, under Article 8(4) and (5) of the merger regulation. DG Competition added that the Commission's position was without prejudice to the Member States' powers to apply, if necessary, their national legislation on competition to Ryanair's acquisition of a minority shareholding in Aer Lingus.

Correspondence between Aer Lingus and the Commission following the Ryanair decision, invitation to act under Article 232 EC and the contested decision

20 The Ryanair decision prohibiting implementation of the Ryanair/Aer Lingus concentration contains no measure relating to Ryanair's 25.17% shareholding in Aer Lingus.

21 On 12 July 2007, Aer Lingus sent a memorandum to the Commission, the Irish Competition Authority, the United Kingdom's Office for Fair Trading and the German Bundeskartellamt (Federal competition authority), inviting those authorities to reach a common position as to the authority competent to act in relation to that shareholding. According to the applicant, that memorandum was addressed to the Office for Fair Trading and the Bundeskartellamt because those authorities have competence to take action in connection with minority shareholdings under their provisions on the control of concentrations, and to the Irish Competition Authority because both the companies in question are Irish companies and the consumers most affected are those who reside in Ireland.

22 By letter of 3 August 2007, the Commission's services reiterated their view that they did not have the power to order Ryanair to divest its shareholding, but that that did not prevent the Member States from applying their own legislation on competition.

23 On 17 August 2007, Aer Lingus sent a letter to the Commissioner for Competition asking the Commission to act under Article 232 EC by initiating a procedure under

Article 8(4) of the merger regulation and by adopting interim measures under Article 8(5) of that regulation, or by formally stating that it did not have the power to do so. Aer Lingus also asked the Commission to adopt a position on the interpretation of Article 21 of the merger regulation as regards Ryanair's shareholding of 25.17% in Aer Lingus.

24 On 11 October 2007, Aer Lingus received the Commission's response ('the contested decision').

25 First, the Commission rejects the request of Aer Lingus that it initiate proceedings against Ryanair under Article 8(4) of the merger regulation. It notes that it is apparent from Article 3(1) and (2) of the merger regulation that a concentration arises only where an undertaking acquires control, that is the possibility of exercising decisive influence on another undertaking (contested decision, point 8). The Commission also points out that it is apparent from Article 8(4) of that regulation that, if it finds that a concentration has already been implemented and that the concentration has been declared incompatible with the common market, it may require the undertakings concerned to dissolve the concentration, in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration. It notes that it may also take any other appropriate measures to ensure that the undertakings concerned dissolve the concentration or take measures to restore the situation prevailing prior to the implementation of the concentration (point 9).

26 The Commission then applies those provisions to the case at hand and reaches the conclusion, in points 10 and 11 of the contested decision, that the notified concentration has not been implemented and that the contested shareholding does not grant Ryanair control of Aer Lingus. Those points read as follows:

'10. 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 [Ryanair] 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.

11. In this respect it is necessary to point out that the 25.17% minority stake does not grant Ryanair *de jure* or *de facto* control of Aer Lingus within the meaning of Article 3(2) of the … [m]erger [r]egulation. Even though minority shareholdings may in certain circumstances lead to a finding of control …, the Commission has no indications that such circumstances are present in this case. In fact, according to the information available to the Commission, Ryanair's rights as a minority shareholder (in particular the right to block so-called "special resolutions" pursuant to Irish Company Acts) are associated exclusively to rights related to the protection of minority shareholders. Such rights do not confer control in the sense of Article 3(2) of the … [m]erger [r]egulation … In addition, Aer Lingus itself does not seem to suggest that this minority stake would lead to control by Ryanair over Aer Lingus and has not provided the Commission with any evidence which would suggest existence of such control.'

27 In addition, in points 12 and 13 of the contested decision, the Commission refutes the analysis suggested by Aer Lingus that Ryanair's minority shareholding represents a partial implementation of the concentration declared by the Commission to

be incompatible with the common market, which should be dissolved in accordance with Article 8(4) of the merger regulation:

'12. The suggested interpretation of the acquisition of the minority shareholding as a "partial implementation" covered by Article 8(4) of the … [m]erger [r]egulation is difficult to reconcile with the wording of that provision, which clearly refers to a concentration that "has already been implemented". As the decisive element of a concentration under the .. [m]erger [r]egulation — the acquisition of control — is missing, there is no concentration which "has already been implemented" and the parties thus cannot be required to "dissolve the concentration". The Commission's competence is limited to situations in which the acquirer has control over the target. The purpose of decisions under Article 8(4) of the … [m]erger [r]egulation is to address the negative effects on competition that are likely to result from the implementation of a concentration as defined in Article 3 of the … [m]erger [r]egulation. In the present case, such negative effects cannot occur, since Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration.

13. In this respect, the current case clearly differentiates from the situation in past cases where Article 8(4) of the … [m]erger [r]egu1ation was applied, such as Tetra Laval/Sidel … or Schneider/Legrand …, where the public bid had already been successfully completed and the acquirer had acquired control of the target.'

28 In so far as Article 8(5) of the merger regulation uses the same expression as Article 8(4) to identify the situations in which the Commission may act, and given that, in the present case, no concentration has been implemented, the Commission rejects,

for the same reasons, Aer Lingus' request to adopt interim measures pursuant to Article 8(5) of that regulation (see points 15 to 17 of the contested decision).

29 Second, in relation to the request for an interpretation of Article 21 of the merger regulation, regarding Ryanair's shareholding of 25.17% in Aer Lingus, the Commission states that paragraph 3 of that article merely imposes an obligation on the Member States and does not confer any specific duties or powers on the Commission. The Commission therefore considers that it does not have the power to give the binding interpretation of a provision addressed to the Member States and that it is not in a position to act in response to Aer Lingus' request for an interpretation (see points 20 to 25 and the last sentence of point 26 of the contested decision).

30 The Commission also states that, if a Member State fails to comply with Article 21(3) of the merger regulation, the Commission still has the power to start an infringement procedure under Article 226 EC (point 21 of the contested decision). Similarly, if Aer Lingus was of the opinion that a national competition authority was obliged to act with respect to Ryanair's minority shareholding pursuant to its national legislation on competition, it could have brought the matter before that authority and/or the competent national court. If a national court considered that an interpretation of Article 21(3) of the merger regulation was necessary to enable it to give judgment, it could have requested the Court of Justice to give a preliminary ruling pursuant to Article 234 EC in order to clarify the interpretation of that provision and to ensure a consistent interpretation of the Community law at issue (see point 23 of the contested decision).

Procedure and forms of order sought by the parties

31 By application lodged at the Registry of the Court on 19 November 2007, the applicant brought an action for annulment of the contested decision pursuant to the fourth paragraph of Article 230 EC.

32 By separate document lodged on the same day, the applicant also made an application pursuant to Article 242 EC for interim measures and for suspension of the operation of the contested decision.

33 By order of 18 March 2008 in Case T-411/07 R *Aer Lingus* v *Commission* [2008] ECR II-411, the President of the Court dismissed the application for interim measures and for suspension of operation of the decision.

34 By separate document lodged at the Registry on 19 November 2007, the applicant also made an application for an expedited procedure under Article 76a of the Rules of Procedure of the Court. By letter of 5 December 2007, the Commission presented its observations on that application.

35 By decision of 11 December 2007, the Court (Third Chamber) rejected the application for an expedited procedure.

36 By order of 23 May 2008, the President of the Third Chamber of the Court granted Ryanair leave to intervene in the dispute in support of the form of order sought by the Commission.

37 By fax received at the Registry on 4 August 2008, Ryanair stated that it considered that the observations submitted by the Commission in its pleadings were sufficient and that it had therefore decided not to lodge a statement in intervention. That fax contained the form of order sought by it in this dispute.

38 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure.

39 The parties presented oral argument and replied to the questions put by the Court at the hearing on 7 July 2009.

40 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

41 The Commission contends that the Court should:

— dismiss the action as unfounded, in so far as it concerns its refusal to initiate a procedure under Article 8(4) of the merger regulation and to adopt interim measures under Article 8(5) thereof;

— declare the action inadmissible or, in the alternative, dismiss the action as unfounded, in so far as it concerns its refusal to provide an interpretation of Article 21(3) of the merger regulation;

— order the applicant to pay the costs.

42 Ryanair contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs occasioned by the intervention.

Law

43 The applicant raises two pleas in law in support of its action. The first plea alleges an infringement of Article 8(4) and (5) of the merger regulation and the second is based on an infringement of Article 21(3) of that regulation. Given that the applicant presents the second plea in a way which is closely related to the first, a fact which was confirmed at the hearing at which the applicant stated that the second plea could be regarded as part of the first, the Court will examine the two pleas together.

Arguments of the parties

44 In relation to the first plea, alleging an infringement of Article 8(4) and (5) of the merger regulation, the applicant submits that, in the contested decision, the Commission infringed those provisions by finding, following the Ryanair decision prohibiting implementation of the proposed concentration, that it did not have the power to require Ryanair to divest its minority shareholding in Aer Lingus, take appropriate measures to restore the situation prevailing before the concentration or take interim measures.

45 First of all, the applicant challenges the statement made in point 12 of the contested decision that 'In the present case, [the] negative effects [on competition] cannot occur, since Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration'. On the contrary, Ryanair's shareholding has significant negative effects on competition and if, in such circumstances, the Commission did

not have power under Article 8(4) and (5) of the merger regulation to eliminate those effects, there would be a serious lacuna in the merger regulation and in the Community's competence to secure 'undistorted competition'.

46 The applicant claims that the significant negative effects on competition resulting from Ryanair's shareholding in Aer Lingus include the following: Ryanair used its shareholding to seek access to Aer Lingus' confidential strategic plans and business secrets; it blocked a special resolution relating to an increase in Aer Lingus' capital and requisitioned two extraordinary general meetings in order to reverse strategic decisions adopted by Aer Lingus. Ryanair has, moreover, used its position as a shareholder to mount a campaign against Aer Lingus' management and to threaten its directors with litigation for breach of statutory duties towards it. Those facts weaken Aer Lingus as an effective competitor of Ryanair.

47 From an economic point of view, that type of minority shareholding between competitors in a duopoly inherently distorts competition. Ryanair has less incentive to compete with Aer Lingus since, as a shareholder, it wishes to maintain the value of its shareholding and ensure that Aer Lingus is profitable. Such a shareholding changes the interests of the parties by encouraging price increases and tacit collusion, which distorts competition. Aer Lingus' market and financial attractiveness is also reduced as a result of Ryanair's shareholding.

48 The statement challenged by Aer Lingus is also contrary to the Commission's previous practice as set out in Decision 2004/103/EC of 30 January 2002 setting out measures to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case COMP/M.2416 — Tetra Laval/Sidel) (OJ 2004 L 38, p. 1)

('the Tetra Laval decision'), in which the Commission found that Tetra Laval should not be allowed to retain a shareholding in Sidel, and in Decision 2004/276/EC of 30 January 2002 requiring undertakings to be separated adopted pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89 (Case COMP/M.2283 — Schneider/Legrand) (OJ 2004 L 101, p.134) ('the Schneider decision'), in which the Commission found that Schneider's shareholding of less than 5% of Legrand's capital would not lead to negative effects on competition. In that regard, the applicant challenges the Commission's statement made in point 13 of the contested decision that the situation in the present case differs from those in *Tetra Laval* and *Schneider*, in which the public bid had already been fully implemented and the purchaser had acquired control of the target. That distinction is not relevant as regards assessing the statement made in point 12 of that decision that there are no negative effects on competition 'in the absence of control'. In *Tetra Laval* and *Schneider* the Commission took precisely the opposite view, namely that even if the relevant shareholdings were reduced to a level which did not allow the exercise of 'control', a minority shareholding would still result in an unacceptable distortion of competition. Moreover, the concentration at issue here remains a prospective concentration. Whether or not the public bid lapsed is immaterial since Ryanair maintained, and still maintains, its intention to acquire Aer Lingus. Differences in national rules applicable to public bids cannot be advanced as justification for one acquirer's being able to maintain a minority shareholding while another is required to dispose of it. The effect on competition is the same in either case. In the present case, the adoption of the Ryanair decision should not have the effect of depriving the Commission of competence to examine the distortion of competition arising from a part of the concentration which it has just prohibited.

49 The applicant also relies on the practice of the United Kingdom Competition Commission, which in October 2007 provisionally found that the acquisition by BSkyB of 17.9% of ITV's shares was likely to lessen competition substantially owing to the

loss of rivalry between those two companies and to BSkyB's ability to have a material influence on ITV's management.

50 Secondly, the applicant claims that Article 8(4) of the merger regulation must be interpreted as applying in this case to Ryanair's shareholding acquired as part of the prohibited concentration. The same reasoning applies, *mutatis mutandis*, to the Commission's competence to adopt interim measures under Article 8(5)(c) of that regulation.

51 First of all, the merger regulation must be given a teleological interpretation. Faced with a choice between two possible interpretations of the regulation, both the Court of Justice and the General Court have indicated that the narrower interpretation would deprive the merger regulation of its effectiveness, whereas the broader interpretation was consistent with the text of the merger regulation, even if that was not explicitly stated. The Commission's interpretation of Article 8(4) and (5) of the merger regulation is contrary to the regulation's purpose, which is to ensure a system of undistorted competition in accordance with Article 3(g) EC. The Commission's approach leaves the European Union helpless in the face of the distortion of competition created by Ryanair's minority shareholding, even though that shareholding was acquired as part of a prohibited concentration.

52 With regard to the request for application of Article 8(4) of the merger regulation, requiring that a concentration 'has already been implemented' and 'has been declared incompatible with the common market', the applicant points out that the Commission gives a purely literal interpretation of that provision by stating in point 10 of the contested decision that 'the concentration assessed in the present case has not been implemented' and that '[t]he transactions that have been carried out during the

Commission's proceedings can therefore not be considered as part of an implemented concentration'. That interpretation is erroneous because the Commission takes the view that the 'transactions' to be examined in the contested decision are distinct from the concentration examined in recital 12 to the Ryanair decision (see paragraph 16 above). That interpretation is also erroneous because the Commission equates the term 'implemented' used in Article 8(4)(a) of the merger regulation with 'acquire control' in the sense of Article 3(2) of that regulation. In the applicant's view, it is clear that the concentration was implemented in the present case by means of transactions which form part of the prohibited concentration and which allowed Ryanair to acquire (and to continue to hold) more than 25% of Aer Lingus. The fact that the concentration was never fully consummated, because the Commission prevented it, does not mean that the concentration was not implemented, albeit partially, through the transactions referred to in recital 12 to the Ryanair decision. In that regard, the Commission's claim, in point 12 of the contested decision, that the concept of a concentration being 'partially implemented' finds no support in the wording of Article 8(4) is correct but of little assistance, since neither is it possible on the basis of the wording of that provision to require full implementation in the sense of acquiring control. According to the applicant, the guiding principle of Article 8(4) of the merger regulation is not the acquisition of control, but the need to restore the *status quo ante*, by reversing transactions forming part of the prohibited concentration.

53 A coherent approach to the concept of 'implementation' should also examine the meaning of that term in the light of Article 7(1) of the merger regulation, which provides that a concentration with a Community dimension cannot be 'implemented' either before it has been notified or before it has been declared compatible with the common market. It may be concluded from an examination of the Commission's practice in that regard that it considers that that provision makes it possible to prevent partial implementations, including transactions falling short of a transfer of control. In this case, the Commission obtained an undertaking from Ryanair to suspend the exercise of the voting rights attached to its shareholding in Aer Lingus, although

the exercise of those rights is not equivalent to the exercise of control. The concern here was therefore indeed to prevent possible negative effects on competition.

54 The applicant also claims that, without having to assess the different language versions of the merger regulation, the concept of 'implementation of a concentration' used by Article 8(4) and (5) and Article 7 can have three meanings: the full implementation of the concentration, the partial implementation of the entire concentration or the full implementation of part of the concentration. That ambiguity is exposed in this case, in which the Commission prohibited a concentration which was defined as comprising two parts (an acquisition of shares in the market and a public bid) of which only the former had been implemented.

55 As regards the second plea, alleging an infringement of Article 21(3) of the merger regulation, the applicant claims that the Commission's erroneous conclusions concerning the application of Article 8(4) and (5) of the merger regulation have led it into error regarding the interpretation of Article 21(3). If it is the case that the Commission indeed has power to adopt divestment measures in connection with Ryanair's shareholding, the national competition authorities therefore have no such power under Article 21(3). That approach supports the 'one-stop shop' principle. If that is correct, the Commission, in the contested decision, infringed Article 21(3) of the merger regulation by failing to state, unequivocally, that that provision precludes the intervention of national competition authorities and thereby leaving open the possibility of such intervention. That infringement is all the more serious, given that the relevant national authorities have issued conflicting opinions. A coherent interpretation of Article 8(4) and (5) of the regulation would exclude any interpretation of Article 21(3) which would prevent the Member States from applying their national laws to Ryanair's shareholding once the shareholding stands in isolation from the public bid and which would also leave the Commission without power to examine that

shareholding under Article 8(4) of the merger regulation. Otherwise Ryanair's shareholding would enjoy legal immunity from both European Union and national law.

56 The Commission disputes that line of argument. It notes, in particular, that the merger regulation applies only to 'concentrations' which satisfy the definition set out in Article 3 of that regulation. In that context, the acquisition of a minority shareholding, which does not confer 'control' as such, does not constitute a 'concentration' under the merger regulation. The Commission also submits that Article 21(3) of the regulation does not confer any specific duties or powers on it and that it thus does not have the power to give an interpretation of that provision when called upon to act under Article 232 EC.

Findings of the Court

57 In calling on the Commission to act, Aer Lingus submits in essence that the shareholding in Aer Lingus acquired by Ryanair before or during the public bid represents a partial implementation of the concentration declared incompatible by the Commission. In order to restore the conditions for effective competition, it claims that the Commission should thus require, pursuant to Article 8(4) of the merger regulation, the disposal of all the shares acquired by Ryanair (see paragraphs 8, 23, 44 et seq. above).

58 In the contested decision, the Commission rejects that request that it initiate proceedings against Ryanair under Article 8(4) of the merger regulation, considering that the concentration notified by that undertaking has not been implemented and that the disputed shareholding does not grant Ryanair control of Aer Lingus. The Commission also considers that, in the absence of a concentration which has been implemented as defined by the merger regulation, the interpretation suggested by the applicant goes beyond the limits of its powers (see paragraphs 25 to 27 above).

59 In order to assess the lawfulness of the contested decision in the light of the power invested in the Commission to require an undertaking to dissolve a concentration, in particular through the disposal of all the shares acquired in another undertaking, the reference point must be the relevant moment established by Article 8(4) of the merger regulation, which envisages a 'concentration' which 'has already been implemented' and which 'has been declared incompatible with the common market' (see paragraph 2 above).

60 In that regard, the contested decision was indeed adopted at a time when the Commission had declared that the concentration notified by Ryanair was incompatible with the common market. Since the Commission did not address the issue of Ryanair's minority shareholding in Aer Lingus in the Ryanair decision, which found the notified concentration to be incompatible under Article 8(3) of the merger regulation, it could still do so in a separate decision adopted on the basis of the final sentence of Article 8(4) of that regulation.

61 However, as is correctly stated in the contested decision, the other condition laid down in Article 8(4) of the merger regulation is not satisfied, since the notified concentration has not been implemented. In the present case, from the moment when

the decision finding incompatibility with the common market was adopted, it was no longer possible for Ryanair, *de jure* or *de facto*, to exercise control over Aer Lingus or to exercise decisive influence on that undertaking.

62 From a legal point of view, the concept of concentration used in the merger regulation is important since it provides the basis for the Commission's powers under that regulation. The merger regulation applies to all concentrations with a Community dimension (Article 1(1)). The concept of concentration is defined in Article 3 of the regulation. Under Article 3(1), a concentration is deemed to arise where there is a change of control on a lasting basis which results, for example, from the merger of two undertakings or the acquisition by an undertaking of the control of another undertaking. Article 3(2) states that that control is constituted by rights, contracts or any other means which confer the possibility of exercising decisive influence on the undertaking concerned.

63 Thus, any transaction or group of transactions which brings about 'a change of control on a lasting basis' by conferring 'the possibility of exercising decisive influence on the undertaking concerned' is a concentration which is deemed to have arisen for the purposes of the merger regulation. Such concentrations have the following characteristics in common: where before the operation there were two distinct undertakings for a given economic activity, there will only be one after it. Unlike in the case of a merger in which one of the two undertakings concerned ceases to exist, the Commission thus has to determine whether the result of the implementation of the concentration is to confer on one of the undertakings the power to control the other, that is to say a power which it did not previously hold. That power to control is the possibility of exercising decisive influence on an undertaking, in particular where the undertaking with that power is able to impose choices on the other in relation to its strategic decisions.

64 It is apparent from the above that the acquisition of a shareholding which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration which is deemed to have arisen for the purposes of that regulation. On that point, European Union law differs from the law of some of the Member States, in which the national authorities are authorised under provisions of national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense (see paragraphs 21 and 49 above).

65 Contrary to the applicant's claims, the concept of concentration cannot be extended to cases in which control has not been obtained and the shareholding at issue does not, as such, confer the power of exercising decisive influence on the other undertaking, but forms part, in a broader sense, of a notified concentration examined by the Commission and declared incompatible with the common market following that examination, without there having been any change of control within the above meaning.

66 The Commission is not granted such a power under the merger regulation. According to the actual terms used in Article 8(4) of the regulation, the power to require the disposal of all the shares acquired by an undertaking in another undertaking exists only 'to restore the situation prevailing prior to the implementation of the concentration'. If control has not been acquired, the Commission does not have the power to dissolve the concentration. If the legislature had wished to grant the Commission broader powers than those laid down in the merger regulation, it would have enacted a provision to that effect.

67 From a factual point of view, it is not disputed that in the present case Ryanair's shareholding in Aer Lingus does not confer on Ryanair the power to 'control' Aer Lingus. In addition to the information given in points 10 and 11 of the contested decision, Aer Lingus states that '[it] accept[s] the assumption, made in paragraph 11 of the [c]ontested [d]ecision, that Ryanair did not, as at 27 June 2007, have "control"

within the meaning of Article 3(2) [of the merger regulation]'. Equally, Aer Lingus does not claim that Ryanair's shareholding of 29.3% in Aer Lingus from August 2007 confers control of the company on it, but merely states that that shareholding gives it 'substantial opportunities to seek to interfere with the management and commercial strategy of Aer Lingus'.

68 In addition, in response to the applicant's arguments in relation to the alleged negative effects on competition, the Commission was correct in the contested decision to reject the claim that those effects could actually be assimilated to a form of control in the present case (contested decision, point 11). It is worth noting generally in that regard that the merger regulation does not seek to protect companies from commercial disputes between them and their shareholders or to remove all uncertainty in relation to the approval of important decisions by those shareholders. If the management of Aer Lingus considers that Ryanair's conduct as a shareholder is abusive or unlawful, it may bring the matter before the competent national courts or authorities.

69 In any event, although it is true that the facts put forward by the applicant suggest that the relations between its management and Ryanair are tense and that they have opposing views on a number of points, they still do not prove — as is required for the Commission to be able to have recourse to Article 8(4) of the merger regulation — that it is possible to exercise decisive influence on that undertaking.

70 Thus, in so far as concerns the claim that Ryanair used its shareholding to seek access to Aer Lingus' confidential strategic plans and business secrets, the only evidence provided in support of that claim is a letter in which Ryanair requests, in general terms, a meeting to be held with the management of Aer Lingus. The application does not contain any evidence that confidential information was actually exchanged during such a meeting. In any event, such an exchange of information would not be

a direct consequence of the minority shareholding, but would constitute subsequent conduct on the part of the two companies which could potentially be examined under Article 81 EC.

71 Similarly, as regards the claim that Ryanair voted against a special resolution that would have allowed the board of directors to issue shares without having first to offer them to existing shareholders, as is generally required under company law, it is apparent from the comments of Aer Lingus' CEO, reported in *The Irish Times* of 7 July 2007 in an article entitled 'Ryanair blocks Aer Lingus bid to reduce holding' and cited by the Commission without being disputed by the applicant, that the failure of that resolution did not have a significant impact on the company.

72 In so far as concerns the claim that Ryanair requisitioned two extraordinary general meetings in order to reverse strategic decisions adopted by Aer Lingus, the Commission states, without being contradicted by the applicant, that the board of directors of Aer Lingus rejected those two requests and that the planned decisions were implemented in spite of Ryanair's opposition. That example illustrates the fact that, contrary to the applicant's claims, Ryanair is not in a position to be able to impose its will.

73 As regards the claim that Ryanair mounted a campaign against Aer Lingus' management, that claim should be understood as another reference to the two extraordinary general meetings requisitioned by Ryanair and to the correspondence and public statements relating thereto. As the Commission points out in its pleadings, Aer Lingus rejected those two requests and implemented its decision as planned.

Even if it were true that Ryanair had disrupted the management of Aer Lingus for several weeks, that would still not prove that it was able to exercise decisive influence on that undertaking within the meaning of the merger regulation.

74 In response to the argument that a minority shareholding in a competitor undertaking in a duopoly inherently distorts competition because the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested, it must be observed that this claim is disproved by the facts. The Commission states in that regard, without being contradicted by the applicant, that after the acquisition of its shareholding in Aer Lingus, Ryanair entered four routes previously served only by Aer Lingus and has increased its frequencies on six other routes where it competes with Aer Lingus (see Ryanair's press releases entitled 'Ryanair announces 6 new routes from Dublin' of 15 August 2007 and '31st new route from Shannon base and 3 new routes from Dublin,' of 25 October 2007). That theoretical argument is not sufficient, in any event, to show, as such, a form of control by Ryanair of Aer Lingus able to justify the divestment of the minority shareholding at issue in the present case.

75 The same is true of the argument that Ryanair's shareholding has a material impact on Aer Lingus' shares, making them less favourable for the latter. In principle, the attractiveness of Aer Lingus both financially and on the stock market is not based solely on Ryanair's minority shareholding, but must take into account the entire capital of that undertaking, in which other significant shareholders may also have a stake. Furthermore, even supposing that Ryanair's shareholding may affect Aer Lingus' attractiveness, that would not be sufficient to show that there is control within the meaning of the merger regulation.

76 The bounds of the powers invested in the Commission for the purposes of merger control would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding on the sole ground that it represents a theoretical economic risk when there is a duopoly, or a disadvantage for the attractiveness of the shares of one of the undertakings making up that duopoly.

77 An examination of the Commission's previous practice shows, in any event, that all the decisions adopted to date by the Commission under Article 8(4) of the merger regulation concern concentrations which have already been implemented, in which the target company had ceased to be an independent competitor of the purchasing company. Unlike in the present case, those decisions did not concern the applicability of Article 8(4) to the concentration at issue, but merely the measures appropriate to restore the competition which had been eliminated by the implementation of the concentration. Those measures may vary from one case to the next depending on the circumstances of the specific case. The Commission's previous practice in relation to the treatment of minority shareholdings under Article 8(4) of the merger regulation can thus not usefully be invoked to call into question the criteria laid down in that provision.

78 Consequently, the Commission cannot be accused of infringing Article 8(4) of the merger regulation by considering that no concentration had been implemented in the present case and that it did not have the power to require Ryanair to dispose of its shareholding in Aer Lingus. Only if such a shareholding had enabled Ryanair to control Aer Lingus by exercising *de jure* or *de facto* decisive influence on it, which is not the case here, would the Commission have had such a power under the merger regulation.

79 The above assessment is not affected by the fact that the Commission considered, during the examination procedure, that the shareholding acquired by Ryanair on the market just before and during the public bid — which, in its words, constituted a 'single concentration' — should be regarded as falling within the scope of that bid. For at that stage, namely that of the examination procedure, the Commission is not concerned with 'restoring the situation prevailing prior to the implementation of the concentration' in the event that it were to adopt a decision declaring incompatibility, even where the notified concentration has been implemented. Those concerns arise only once a final decision has been adopted and when it is necessary to draw consequences from that decision after it becomes apparent that the situation at hand is not in accordance with it.

80 During the examination procedure, the Commission seeks rather to prevent situations in which a concentration is implemented even though it might still be declared incompatible with the common market. That is the goal of Article 7 of the merger regulation, which seeks to ensure that one of the founding principles of the regulation is respected, namely that concentrations with a Community dimension cannot be implemented without first being notified to, and authorised by, the Commission.

81 Article 4(1) of the regulation, entitled 'Prior notification …', states that concentrations defined in the regulation are to be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. That principle is also set out in Article 7 of the merger regulation, entitled 'Suspension of concentrations'. Under Article 7(1), a concentration with a Community dimension is not to be implemented either before its notification or until it has been declared compatible with the common market. Article 7(2) states that paragraph 1 is not to prevent the implementation of a public bid or of a series of transactions in securities, by which control within the meaning of Article 3 is acquired from various sellers, provided that the concentration is notified to the Commission pursuant to Article 4 without delay and that the

acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission.

82 It should be observed that the obligation to suspend the implementation of the concentration until it has been authorised by the Commission is subject to an automatic derogation in the case of public bids or acquisition of control by means of a series of transactions in securities involving various sellers. To be able to benefit from that derogation, the interested parties must notify the Commission of the concentration without delay and not exercise the voting rights attached to those securities. As the Commission submits in its pleadings, that derogation effectively transfers the risk of having the operation prohibited to the acquirer. If, after the examination procedure, the Commission considers that the notified operation must be prohibited, the securities acquired to implement the concentration have to be disposed of, as is illustrated in *Tetra Laval* and *Schneider*, which are referred to in the contested decision and by the applicant (see paragraphs 27 and 48 above).

83 In that regard, the acquisition of a shareholding which does not, as such, confer control for the purposes of Article 3 of the merger regulation may fall within the scope of Article 7. The Commission's approach must be understood as using the concept of 'single concentration' 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. When the Commission requested Ryanair not to exercise its voting rights, whereby it was also pointed out that those voting rights did not grant Ryanair control of Aer Lingus (see paragraph 14 above), it merely asked Ryanair to avoid putting itself in a situation in which it would be implementing a concentration liable to give rise to a measure adopted on the basis of Article 8(4) and (5) if found to be incompatible with the common market.

84 For those reasons, the Commission was correct to consider, in points 12 and 13 of the contested decision, that Ryanair's minority shareholding in Aer Lingus could not be regarded, in the present case, as the 'partial implementation' of a concentration capable of giving rise to a measure adopted on the basis of Article 8(4) and (5) if found to be incompatible with the common market.

85 Given that Ryanair did not actually take control of Aer Lingus, the disputed shareholding cannot be assimilated to a 'concentration' which 'has already been implemented', even if the operation by which that shareholding was acquired has been declared incompatible with the common market.

86 None of the arguments raised by the applicant in its pleadings or at the hearing, which essentially reproduce the theory which the contested decision already addresses, is capable of calling the above assessment into question.

87 Consequently, in spite of the finding that there was a single concentration and the finding that the concentration was incompatible with the internal market, as set out in the Ryanair decision, the Commission justified to the required legal and factual standard, in the contested decision, its decision not to adopt a measure pursuant to Article 8(4) of the merger regulation.

88 The same reasoning is valid for Article 8(5) of the merger regulation, in relation to which the applicant raises the same challenges to the Commission's analysis on that point in the contested decision, which reproduces, *mutatis mutandis*, the analysis made in relation to Article 8(4) of that regulation.

89 Finally, it should be noted that the Commission stated, in the contested decision, that Article 21(3) of the merger regulation merely imposed an obligation on the Member States and did not confer any specific duties or powers on the Commission. It therefore considered that it did not have the power to give a binding interpretation of that provision and that it was not in a position to act in response to Aer Lingus' request for an interpretation (see paragraph 29 above).

90 Like the Commission, the Court points out that Article 21(3) of the merger regulation states that '[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension' and that it thus does not confer the power on the Commission to adopt a measure producing binding legal effects of such a kind as to affect Aer Lingus' interests. The Commission can therefore not be criticised for having reiterated, in its response, the legal framework applicable to the present case and the consequences to be drawn from it, in particular in so far as concerns the actions provided for in Article 226 EC and Article 234 EC (see paragraph 31 above).

91 In addition, the applicant's arguments in the present case invite the Court to examine a hypothesis which is invalid in so far as the application of Article 8(4) and (5) of the merger regulation is not based on erroneous conclusions as claimed by the applicant (see paragraph 55 above). 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.

92 It follows from the above that the action must be dismissed in its entirety.

Costs

93 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission and Ryanair have applied for costs and the applicant has been unsuccessful, it must be ordered to pay its own costs and those incurred by the Commission and Ryanair, including those relating to the interim proceedings.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Aer Lingus Group plc to bear it own costs and those incurred by the Commission and Ryanair Holdings plc, including those relating to the interim proceedings.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 6 July 2010.

[Signatures]

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