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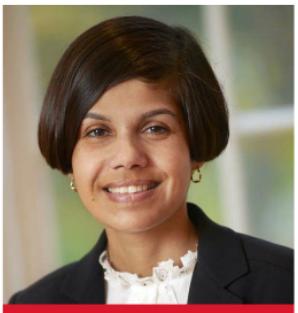
Turbulence in the court

Suzanne Rab wonders if Ryanair should fight on after its latest Court of Appeal defeat



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In February 2015, the Court of Appeal rejected airline Ryanair's challenge to an order that it should reduce its stake in Aer Lingus from 28.5 to 5 per cent (*Ryanair Holdings Plc v The Competition and Markets Authority & Anor* [2015] EWCA Civ 83).

The ruling is the ninth in a succession of legal defeats for Ryanair in what continues to be a hard-fought battle over its ownership of a minority interest in Ireland's flagship airline dating back to 2006.

The European Commission has blocked Ryanair's bid to acquire control of Aer Lingus on three occasions. In contrast with the position under the EU Merger Regulation (EUMR), UK merger control allows for the examination of minority interests that confer on the acquirer the ability to exercise 'material influence' over the target. Ryanair has made repeated attempts to overturn an investigation under UK merger control into its holding of a minority interest.

Lessening competition

In March 2014, the Competition Appeal Tribunal (CAT) rejected all six grounds of appeal by Ryanair against the Competition Commission's (CC) report, which found finding that Ryanair's interest in Aer Lingus has led or may be expected to lead to a substantial lessening of competition in the markets for air passenger services between Great Britain and Ireland. The Court of Appeal has now given judgment rejecting Ryanair's appeal.

The court was unpersuaded by Ryanair's argument that its rights of defence were breached because the CC withheld the names of third parties that were considering a merger with Aer Lingus. The court did not consider that this prejudiced Ryanair in its ability to argue its case.

In addition, the Court of Appeal ruled that the CAT had correctly rejected Ryanair's challenge to the divestment order on the basis of the alleged breach of the duty of sincere co-operation under article 4(3) of the Treaty on European Union (TEU). Ryanair had argued that there was a conflict between the divestment requirement and its appeal against the European Commission's prohibition of the takeover of Aer Lingus.

The Court of Appeal ruled that the CAT was correct in concluding that it was not an objective of the EUMR to facilitate mergers that were compatible with the regulation. The rejection of this argument was not unexpected, although before the court's ruling, there was no clear precedent on the issue. Although there was no reference to the European Court of Justice on this issue, it seems that article 4(3) TEU is concerned with preventing inconsistent decisions between the EU and national authorities on the same subject matter, but this does not extend to preventing any kind of collateral damage arising from parallel proceedings.

> **Ryanair has maintained that the Competition Commission's report was based on secretive evidence**

Ryanair has maintained that the CC's report was based on fanciful hypotheses and secretive evidence. The Court of Appeal refused permission to appeal, but Ryanair can apply directly to the Supreme Court and has announced that it has instructed counsel to file an appeal. After a series of resounding judicial blows to Ryanair at both national and EU level, its prospects of success may be questionable.

'Special reason'

Meanwhile, almost nine years on from Ryanair's original bid, IAG has made a €1.36bn bid for Aer Lingus. In a separate action, Ryanair has also requested the Competition and Market's Authority (CMA) to undertake a review of the original CC report and remedies imposed.

Section 41(3) of the Enterprise Act 2002 requires that remedies imposed must be consistent with the CC/CMA's decisions in its final report 'unless there has been a material change of circumstances since the preparation of the report or the [CMA] otherwise has a special reason for deciding differently'.

It will be recalled that one of the findings of the commission was that Ryanair's interest in Aer Lingus prevented or inhibited other airlines merging with or bidding for Aer Lingus. The factual basis for that proposition will now require reconsideration in light of IAG's recent offers. Whether the changed circumstances will be sufficient to undermine the factual premise for the original decision remains to be seen. **SJ**