



Neutral citation [2013] CAT 25

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Number: 1219/4/8/13

10 October 2013

Before:

HODGE MALEK Q.C.
(Chairman)
PROFESSOR JOHN BEATH
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

-v-

COMPETITION COMMISSION

Respondent

- and -

AER LINGUS GROUP PLC

Intervener

RULING (CONFIDENTIALITY)

APPEARANCES

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

Mr. Daniel Beard QC and Miss Alison Berridge (instructed by the Treasury Solicitor) 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.

THE CHAIRMAN:

1. In its Final Report dated 28th August 2013 (the “Decision”), the Competition Commission (the “Commission”) concluded that Ryanair Holdings Plc’s (“Ryanair”) 29.82 per cent minority stake gave it material influence over Aer Lingus Group Plc (“Aer Lingus”) and resulted in a substantial lessening of competition between two airlines. To remedy this alleged significant lessening of competition, the Commission decided to require Ryanair to divest all but 5 per cent of its minority stake.
2. The current proceedings are, in effect, judicial review proceedings challenging the Decision on various Grounds. The second Ground on which it is challenged was that Ryanair was allegedly not provided with procedural fairness during the investigation which led to the Decision. That is set out in Ryanair’s Notice of Application (the “Notice”) at paragraph 50 and onwards. It is said:

“During the course of its investigation the Commission withheld evidence from Ryanair on grounds of commercial sensitivity. Of particular importance, it withheld (and has continued to withhold) evidence that it relies upon to establish that, absent Ryanair’s minority shareholding, other airlines would have or would in the foreseeable future enter into combinations with Aer Lingus. This is evidence that goes to the core of the CC’s case, its principal theory of harm being the contention that Ryanair’s influence has deterred other parties from entering into combinations with Aer Lingus.”

3. The Decision sets out very detailed reasoning and grounds as to why the Commission formed the view that it did. The central reasoning is at paragraph 12 and onwards of the Decision:

“12. We found that Ryanair would have the incentive to use its influence to weaken Aer Lingus’s effectiveness as a competitor which would not exist for a shareholder which was not in competition with Aer Lingus and we would expect Ryanair to act on this incentive. We assessed the various ways in which Ryanair’s minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy relative to the counterfactual. We recognised that we could not predict with certainty all the ways in which Ryanair’s shareholding might affect Aer Lingus’s commercial policy and strategy and nor were we required to determine which individual scenarios were more likely than not to occur. Instead in making our assessment as to whether there has been, or was likely to be an SLC, we applied the probabilistic test on the basis of all relevant evidence in the round.

13. However, in order to reach an overall view, we looked, in particular, at whether Ryanair's shareholding might ..."

There is a list of five points of which the first is:

"(a) affect Aer Lingus's ability to participate in a combination with another airline."

4. At paragraph 7.24 onwards the Decision analyses Aer Lingus's ability to participate in a combination with another airline. In that section there is a fair amount of redaction as can be seen from the Decision, and particularly the passages which are referred to under Ground 2 of the Notice.
5. It is said that in order to make the point in Ground 2 that procedural fairness was not applied, it is necessary for Ryanair at this stage to see the passages which have been redacted in the Decision in the context of a confidentiality ring. Hence the application made by letter dated 9 October 2013 on behalf of Ryanair for production by the Competition Commission of the Decision without redactions.
6. What procedural fairness does entail is set out in *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, item 6 on p.560:

"Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."
7. What does "gist" of the case really mean? That has been dealt with by the Tribunal in *BMI Healthcare Limited and others v Competition Commission* [2013] CAT 24, at paragraph 39(7):

"Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the 'gist' of the case which he has to answer, what constitutes the "gist" of the case is acutely context-sensitive. Indeed 'gist' is a peculiarly vague term."
8. We agree that you do have to look at the facts of each case. At one end of the spectrum there may be a case where numbers are involved and you need to see the relevant numbers or data in order to understand the gist of what is being put. In other cases, more like the present, you need to know what the general position is. But we are not going to decide on this interlocutory application whether or not the Decision provided Ryanair with the gist of the material.

9. It is said that Ryanair has been provided with the gist and those are the submissions made by Mr. Beard. We do not wish at this stage, particularly without hearing full argument, to decide the issue of whether or not the gist was provided. What we are looking at is whether it would be fair in the circumstances to direct that certain parts of the Decision go into a confidentiality ring in order for Ryanair to effectively make its submission as to whether or not procedural fairness was provided and, in particular, whether the gist of the information was provided.
10. The Commission's position is Ryanair was quite able to make submissions during the course of the investigation and it does not need any more. It is also pointed out by the Commission that the material that has been redacted is highly sensitive information primarily provided by third parties who were given assurances as to confidentiality and that sources of information may dry up if, at the end of the day, it is felt that this information may get into the hands of third parties including rivals. It has also been pointed out that during the course of the investigation a great deal of material was given to Ryanair by the Commission and it is contended that the Commission complied with its duties under Part 9 of the Enterprise Act 2002 in deciding to withhold a very small amount of information from Ryanair. But we do understand the position of Ryanair that it does need to see at least some further information in order to effectively argue the point without deciding the issue of 'gist'.
11. Balancing the interests of the third parties, the confidentiality of those third parties, the points being made by the Commission, as well as those being made by Ryanair, we have decided that there should be an element of unredaction in this case and that applies, in particular, to the passages which are specifically referred to under Ground 2, i.e. certain parts of s.7 of the Decision, and certain parts of Appendix F. Insofar as other passages have been sought to be relied upon or sought in the reply to the submissions today we do not consider it is necessary for those to be unredacted, not least because they are not referred to in the specific ground.
12. We do not consider that it is necessary for Ryanair and its counsel and solicitors to be informed of the identity of those third parties, and what we propose is that in providing the unredacted portions of the Decision the Commission substitute the name of each third party and for each third party allocate an individual letter - of

course, it does not have to be a letter starting with the name of the entity. It must provide, in unredacted form, the remainder of those passages, save to the extent that to provide the unredacted material would tend to identify the name of that party. But if, for example, there is one paragraph which, if the whole paragraph is given without the name, one would identify the name they should try and provide the gist of what is in that paragraph so the position is understood.

13. That is our general ruling but, of course, that is subject to any specific comments that Mr. Beard wants to make in relation to the form of the confidentiality ring because that is something you reserved argument on. Mr. Beard, you have the floor.

MR. BEARD: I am most grateful to the Tribunal, that is extremely helpful. Obviously, there will be a process that has to be gone through to deal with what might be referred to as the 'anonymisation' process.

THE CHAIRMAN: Yes.

MR. BEARD: In relation to the terms of the order, obviously Ryanair has put forward an order. It is worth just highlighting, I think, a number of points in relation to that.

THE CHAIRMAN: Let us have a look at the order first, shall we?

MR. BEARD: Before I do that, the Tribunal did not, in its Ruling, refer to consultation of third parties before that process is undertaken. Can I clarify whether or not it is the intention of the Tribunal that there should not need to be any consultation.

THE CHAIRMAN: There should not be, no. You do not need it now. If we were going to direct disclosure of the identity of the third parties, obviously we would go through that process. I do not think we need to do that.

MR. BEARD: It was just to double check the position.

THE CHAIRMAN: Where do we find the wording of the proposed order?

MR. BEARD: The proposed order is found at the back of Ryanair's letter of 9th October.

THE CHAIRMAN: We have it – six points in Part B, is that it?

MR. BEARD: Yes. There may be a shortcut. Those instructing me have just indicated that, in fact, there was an undertaking given in the *Akzo Nobel N.V. v Competition Commission* litigation (Case: 1204/4/8/13) which those acting for Ryanair did undertake, which I think deals with the following problems that we are just going to highlight.

THE CHAIRMAN: Is that something you might be able to agree with Ryanair?

MR. BEARD: Yes, I am seeing nodding from those behind Mr. Kennelly, so it may be if I just identify the particular points and it may be that we can just deal with these subsequently.

THE CHAIRMAN: Yes.

MR. BEARD: The detailed points that are not covered in the current draft. There is no provision made for destruction or disposal of confidential information in due course. There is no limit made on the production of copies of confidential information which is always a concern.

THE CHAIRMAN: Clearly those two need to be covered.

MR. BEARD: And there is no provision requiring recipients to use the confidential information only for the specified purpose, which I do not think is contentious and therefore it is something which could be built in. The other restriction that would be one that would otherwise be required is to do with the advisory role that would be taken on by counsel in relation to further advice, but in the light of the Tribunal's

indication about anonymisation, I am instructed the Commission will not pursue the requirement for such a restriction on the external legal advisers at the moment. I think Mr. Kennelly may want to take brief instructions, but if we replace this draft with the one from *Akzo* it will cover those points and therefore can probably be agreed.

THE CHAIRMAN: Yes, if there are any points which cannot be agreed then you can come back to me and I can deal with that in writing, and if everyone is happy for the Chairman to deal with those points on his own I will do so.

MR. BEARD: Certainly, I think that maybe the most sensible course. I am sorry, Mr. Kennelly.

MR. KENNELLY: I can probably indicate right away we have no objection to those adjustments which Mr. Beard outlined.

THE CHAIRMAN: Thank you very much.

Hodge Malek Q.C.

John Beath

Margot Daly

Charles Dhanowa O.B.E., Q.C.
(Hon)
Registrar

Date: 10 October 2013