Minority Shareholdings and the Competing Merger Control Jurisdictions of the EU and National Competition Authorities:

The Ryan Air / Aer Lingus Case

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Introduction by column editor Anna Tzanaki

As the European Commission is set to block yet another attempt of Ryanair to takeover Aer Lingus, Pedro Caro de Sousa (Linklaters LLP) analyses this month the treatment of minority shareholdings in the EU. His piece further explores the currently competing jurisdictions of the European Commission and national competition authorities, in terms of merger control of such minority shareholdings, as highlighted by the Ryanair/Aer Lingus case. Given the divergent merger control tests in the EU and its Member States, there appear to be open jurisdictional questions as to the competence and primacy of EU or national competition law. Interestingly enough, it is often the national authorities that are called to interpret the rules and resolve this conflict of laws. As the example of the English courts in this case shows, it may be questionable whether the rulings of national authorities are consistent and in line with EU law. In this regard, the author has well observed that unsettled questions such as "whether an investigation by NCAs into a pre-existing minority shareholding is precluded when the European Commission will have to consider that shareholding as part of its merger control jurisdiction" could be suitable for a preliminary reference to the European Court of Justice.

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The supervision and control of mergers within the European Union and its Member States operate at two levels. At the EU level, there is a jurisdiction exercisable by the European Commission under the EC Merger Regulation ("**ECMR**"). At the Member State level, in the United Kingdom in particular, there is a jurisdiction exercisable by the OFT and the Competition Commission under the 2002 Enterprise Act. The respective jurisdictions are triggered by different merger control tests. The UK test, which refers to "material influence," is more expansive than the EU's jurisdiction, which is triggered by the acquisition of "decisive influence" over the target firm. Other European jurisdictions, such as Germany, also have lower thresholds for merger control than those set out in the ECMR.

The ECMR provides a "one-stop shop" for merger control at EU level. More precisely, in the words of Article 1(1) ECMR, the Regulation "shall apply to all concentrations with a Community dimension." A corollary of this, expressed under Article 21 of the ECMR, is that no Member State shall apply its national

competition law to any concentration that has a Community dimension. This follows naturally from the fact that, when there is a conflict between EU law and national law, EU law should prevail. A similar principle operates in the field of competition law, where the parallel application of the national competition law system has from early on only been allowed inasmuch as it does not impinge upon the uniform application of EU competition law throughout the EU (Case 14/68, *Wilhelm v Bundeskartellamt*).

Accordingly, when both National Competition Authorities ("**NCAs**") and the European Commission have merger control jurisdiction, the merger will be reviewed at the European level. In what concerns the acquisition of non-controlling minority shareholdings where the threshold set in the ECMR is not met, that competence may fall instead to the NCAs, depending on the national rules.

But in some rare occasions – such as pre-existing non-controlling minority shareholdings in a company by a shareholder, who then attempts to merge with that company – it will be doubtful whether the competence of the NCAs overlaps with, and is pre-empted by that of the European Commission. In addition, due to the existing de-centralized system of competition law enforcement, it is often NCAs and national courts that are called to decide on matters concerning the competence of EU competition law.

A good example of such a situation can be found in a recent dispute between Aer Lingus and Ryanair before the English courts. The subject matter of the case was whether the UK's Competition Commission could investigate Ryanair's minority shareholding in Aer Lingus while the European Commission was conducting its (second) merger review of a proposed acquisition of control by Ryanair over Aer Lingus.

Ryanair's First Attempt to Take Control Over Aer Lingus

In 2006 Ryanair started buying stakes in Aer Lingus with a view to acquire control over it. When Ryanair finally attempted a takeover bid over Aer Lingus, the European Commission famously prohibited it (the "**Prohibition Decision**").

As Ryanair kept a minority shareholding in Aer Lingus after the Prohibition Decision, the OFT commenced an independent investigation into this shareholding while Ryanair's appeal against the Prohibition Decision was still on-going. This investigation by the OFT was subject to a first decision by the Court of Appeal, which held that, inasmuch as the minority shareholding was held to be part of a concentration with a Community dimension, and until Ryanair's appeal of the Prohibition Decision had been decided without possibility of further appeal, it was evident that concurrent investigations in the UK and the EU would be both oppressive and mutually destructive; and that the OFT was required to desist from making any reference to the UK's Competition Commission during that period (the "**First Court of Appeal Decision**").

The OFT accordingly abstained from referring the minority shareholding to the Competition Commission. It was only after Ryanair's appeal of the Prohibition Decision was dismissed by the European courts that the OFT eventually made such a reference on 15 June 2012.

Ryanair's Second Attempt to Take Control Over Aer Lingus

On 19 June 2012, Ryanair renewed its bid for control of Aer Lingus, and on 5 July 2012 it notified the European Commission of this (see Case COMP/M.6663). On 10 July 2012, the UK's Competition Commission nonetheless informed Ryanair and Aer Lingus of its decision to continue the investigation, thereby rejecting Ryanair's submissions that the investigation should be halted since it infringed on the European Commission's exclusive jurisdiction for merger control. On 13 July 2012 Ryanair appealed against this decision.

The Competition Appeals Tribunal dismissed Ryanair's application, as did the Court of Appeal. In particular, it was held that while any investigation by the OFT (or the Competition Commission) into a minority shareholding obtained as part of a takeover bid conducted prior to exhaustion of the European process would run the risk (depending on the outcome of the final European decisions) of interfering with a jurisdiction belonging exclusively to the European Commission, this would no longer be the case when Ryanair attempted to acquire control over Aer Lingus again after its first attempt had been prohibited by the EU institutions.

Minority Shareholdings and the European Commission's Exclusive Merger Control Jurisdiction

While the European Commission does not have competence to assess non-controlling minority shareholdings per se under the ECMR, the acquisition of minority shareholdings with a view to acquiring control (i.e. "decisive influence") over an undertaking may lead to those same minority shareholdings being reviewed by the European Commission within the scope of its merger control powers. The tricky question is how to determine whether the acquisition of minority shareholdings is part of a larger process of acquisition of control or not – as it is made clear by the fact that Ryanair's minority stake was deemed to be part of a concentration with a Community dimension in one case, but not in another.

Recital 20 of the ECMR states that it is *"appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time."* What a short period of time is can be better understood from the European Commission's Jurisdictional Notice, which refers at paragraphs 38-40 to Article 3 of the ECMR. According to the Notice, Article 3 of the ECMR implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Referring to the EU General Court's decision in Case T-282/02 *Cementbouw*, the Notice concludes that "*in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other."*

This insight, and the case law of the European courts, would seem to be the obvious starting points for the UK Court of Appeal's analysis. It was not, however, the path the Court of Appeal chose to follow; instead, it focused on the "duty of sincere cooperation" and on whether there were overlapping jurisdictions in this case. In this respect, it held that *"between the EC, on the one hand, and Member States on the other hand, the jurisdictions are mutually exclusive. If the jurisdiction of the EC is engaged, it has exclusive jurisdiction. If it is not engaged, then, as between the EC and the Member State, the jurisdiction of the Member State is necessarily exclusive."*

In light of this, the only outstanding question would therefore seem to be whether the European Commission's jurisdiction had been triggered. But then the Court of Appeal went on to state that it was "*common ground in this court (...) that the EC's jurisdiction does not extend to Ryanair's minority shareholding.*"

This is obviously true as a general statement describing the European Commission's typical merger control jurisdiction over minority shareholdings falling short of control. It should be noted, however, that one of the relevant questions throughout the appeal was precisely whether the European Commission's jurisdiction extended to Ryanair's minority shareholding *while Ryanair's second attempt to take control over Aer Lingus was being reviewed*. By holding that it was "common ground" that this was not the case, the Court of Appeal effectively solved the case without addressing this point.

It is interesting to note that the Court of Appeal had recourse to methods of legal interpretation specific to the English legal system when interpreting the "duty of sincere cooperation" provided for in the European Treaties. It did so by relating this duty to the concept of "overlapping jurisdictions" – a concept not present in EU law at all, but extracted from previous decisions by English courts on this matter and treated with the value of precedent. The upside of doing so was that this concept allowed the Court of Appeal, a UK institution, to conclude that there were no overlapping jurisdictions in this case. By doing so, the Court of Appeal was able to present as obvious the answers to the disputed questions, and ignore the contentious substantive points of European law: whether the European Commission's merger control jurisdiction could be said to extend to Ryanair's minority shareholdings in Aer Lingus in this situation, and whether the UK's Competition Commission was prevented by EU law from exercising its own jurisdiction over minority shareholdings simultaneously and in parallel with the European Commission's merger control procedure.

Conclusion

The relationship between EU and national merger control laws is a sensitive and difficult area that deserves more attention, particularly in what concerns minority shareholdings. In the UK, the law presently seems to be that, while the NCAs are allowed to review minority shareholdings acquired in the course of an attempted concentration, they are not allowed to do so in other cases.

However, it is not clear what the principles underlying this rule are, and accordingly how similar or related situations are to be decided. Perhaps more importantly, it is not clear to this author that this solution as formulated by the UK Court of Appeal is in full agreement with EU law – in particular in what concerns the possibility of NCAs exercising their own jurisdiction over minority shareholdings simultaneously and in parallel with the European Commission's merger control procedure when there is a risk of contradictory decisions –, and one may hope that this matter will be subject to review by the European courts in the future. In effect, this case would have been suitable for a preliminary reference to the CJEU, as the question of whether an investigation by NCAs into a pre-existing minority shareholding is precluded when the European Commission will have to consider that shareholding as part of its merger control jurisdiction does not seem to meet the criteria of the *acte clair* doctrine under EU law.

These, and other questions will undoubtedly be addressed in the future, as minority shareholdings and the interaction between different competition regulators move to the forefront of European competition law.