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II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication')

(Text with EEA relevance)

(2013/C 216/01)

1. INTRODUCTION

1. Since the beginning of the financial crisis, the Commission has adopted six communications ('Crisis Communications') [1]. They have provided detailed guidance on the criteria for the compatibility of State aid with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union for the financial sector during the financial crisis.

2. The Crisis Communications provide a comprehensive framework for coordinated action in support of the financial sector so as to ensure financial stability while minimising distortions of competition between banks and across Member States in the single market. They spell out the conditions for access to State aid and the requirements which need to be ensured to find such aid compatible with the internal market in light of State aid principles set out in the Treaty. Through the Crisis Communications, State aid rules governing public assistance to the financial sector have been regularly updated where necessary to adapt to the evolution of the crisis. Recent developments require a further update of the Crisis Communications.

Legal basis

3. The Crisis Communications, as well as all individual decisions on aid measures and schemes falling within the scope of those Communications, were adopted on the basis of Article 107(3)(b) of the Treaty, which exceptionally allows for aid to remedy a serious disturbance in the economy of a Member State.

4. Significant action has been taken since the start of the crisis to address the financial sector's difficulties. The evolution of the crisis has required the adaptation of some provisions of the State aid framework

[1] Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('2008 Banking Communication') (OJ C 270, 25.10.2008, p. 8); Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('Recapitalisation Communication') (OJ C 10, 15.1.2009, p. 2); Communication from the Commission on the treatment of impaired assets in the Community financial sector ('Impaired Assets Communication') (OJ C 72, 26.3.2009, p. 1); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ('Restructuring Communication') (OJ C 195, 19.8.2009, p. 9); Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2010 Prolongation Communication') (OJ C 329, 7.12.2010, p. 7) and Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2011 Prolongation Communication') (OJ C 356, 6.12.2011, p. 7).

dealing with the rescue and restructuring of firms in difficulty while not ruling out the possibility of accessing, exceptionally, significant public support. Notwithstanding the exceptional deployment of fiscal and monetary instruments which helped avert further worsening of the crisis, the economic recovery remains very fragile and uneven across the European Union. The financial sectors in some Member States face further challenges in accessing term funding and in asset quality, stemming from the economic recession and public or private debt deleveraging. The stress in financial markets and the risk of wider negative spill-over effects persist.

5. The persistence of tensions in sovereign debt markets forcefully illustrates the continued volatility in financial markets. The high level of interconnectedness and interdependence within the financial sector in the Union continues to give rise to market concerns about contagion. The high volatility of financial markets and the uncertainty in the economic outlook and the resulting persistent risk of a serious disturbance in the economy of Member States justifies maintaining, as a safety net, the possibility for Member States to grant crisis-related support measures on the basis of Article 107(3)(b) of the Treaty in respect of the financial sector.

6. In those circumstances of persisting stress in financial markets and given the risk of wider negative spill-over effects, the Commission considers that the requirements for the application of Article 107(3)(b) of the Treaty to State aid in the financial sector continue to be fulfilled. The application of that derogation remains, however, possible only as long as the crisis situation persists, creating genuinely exceptional circumstances where financial stability at large is at risk.

Financial stability as overarching objective

7. In its response to the financial crisis, and under the Crisis Communications, financial stability has been the overarching objective for the Commission, whilst ensuring that State aid and distortions of competition between banks and across Member States are kept to the minimum. Financial stability implies the need to prevent major negative spill-over effects for the rest of the banking system which could flow from the failure of a credit institution as well as the need to ensure that the banking system as a whole continues to provide adequate lending to the real economy. Financial stability remains of central importance in the Commission's assessment of State aid to the financial sector under this Communication. The Commission shall conduct its assessment taking account of the evolution of the crisis from one of acute and system-wide distress towards a situation of more fundamental economic difficulties in parts of the Union, with a correspondingly higher risk of fragmentation of the single market.

8. That overarching objective is reflected not only in the possibility for banks in distress to access State aid when necessary for financial stability, but also in the way restructuring plans are assessed. In that respect it has to be underlined that financial stability cannot be ensured without a healthy financial sector. Capital raising plans must therefore be assessed in close collaboration with the competent supervisory authority with a view to ensuring that viability can be regained within a reasonable time frame and on a solid and lasting basis; otherwise the failing institution should be wound down in an orderly manner.

9. When applying State aid rules to individual cases, the Commission nevertheless takes account of the macroeconomic environment which affects both banks' viability and the need for the real economy of a given Member State to continue to have access to credit from healthy banks. The Commission will, in its assessment of banks' restructuring plans, continue to take account of the specificities of each institution and Member State. It will, in particular, undertake a proportionate assessment of the long-term viability of banks where the need for State aid stems from the sovereign crisis and is not a result of excessive risk-taking ([2]), and will reflect in its assessment the need to maintain a level playing field across the single market, having regard in particular to the evolution of burden-sharing in the Union.

10. Moreover, where large parts of a Member State's financial sector need to be restructured, the Commission endeavours to take a co-ordinated approach in its assessment of individual banks'

([2]) See 2011 Prolongation Communication, point 14.

restructuring plans so as provide for a system-wide response. In particular, the Commission has taken that approach for those Member States under an economic adjustment programme. The Commission should thereby take into account specifically the aggregate effects of restructuring of individual institutions at the level of the sector (for example in terms of market structure) and on the economy as a whole, notably as regards the adequate provision of lending to the real economy on a sound and sustainable basis.

11. Furthermore, in its assessment of burden-sharing and measures to limit distortions of competition the Commission assesses the feasibility of the proposed measures, including divestments, and their impact on the market structure and entry barriers. At the same time, the Commission has to ensure that solutions devised in a particular case or Member State are coherent with the goal of preventing major asymmetries across Member States which could further fragment the single market and cause financial instability, impeding recovery within the Union.

Evolution of the regulatory framework and need for revision of the Crisis Communications

12. Since the start of the crisis, the Union has undertaken a number of institutional and regulatory changes aimed at strengthening the resilience of the financial sector and improving the prevention, the management and the resolution of banking crises. The European Council has agreed to undertake further initiatives to put the Economic and Monetary Union on a more solid footing through the creation of a Banking Union, starting with a single supervisory mechanism (SSM) and a single resolution mechanism for credit institutions established in a Member State participating in the SSM. Member States have also agreed to set up a stability mechanism by which financial resources could be provided to members and their banks in case of need.

13. Those measures inevitably involve a degree of phasing-in, for example in order to allow legislation to enter into force or for resolution funds to build up. Some of them remain confined to the euro area. In the meantime an increasing divergence in economic recovery across the Union, the need to reduce and consolidate public and private debt and the existence of pockets of vulnerability in the financial sector have led to persistent tensions in the financial markets and fragmentation with increasing distortions in the single market. The integrity of the single market needs therefore to be protected including through a strengthened State aid regime. Adapting the Crisis Communications can help to ensure a smooth passage to the future regime under the Commission's proposal for a directive for the recovery and resolution of credit institutions ([3]) ('BRRD') by providing more clarity to markets. The adapted Crisis Communications can also ensure more decisive restructuring and stronger burden-sharing for all banks in receipt of State aid in the entire single market.

14. Exercising State aid control for the financial sector sometimes interacts with responsibilities of supervisory authorities in Member States. For example, in certain cases, supervisory authorities might require adjustments in matters such as corporate governance and remuneration practices which for banks benefitting from State aid are often also set out in restructuring plans. In such cases, whilst fully preserving the Commission's exclusive competence in State aid control, coordination between the Commission and the competent supervisory authorities is of importance. Given the evolving regulatory and supervisory landscape in the Union and, in particular, in the euro area, the Commission will liaise closely — as it does already today — with supervisory authorities to ensure a smooth interplay between the different roles and responsibilities of all the authorities involved.

Burden-sharing

15. The Crisis Communications clearly spell out that even during the crisis the general principles of State aid control remain applicable. In particular, in order to limit distortions of competition between banks and across Member States in the single market and address moral hazard, aid should be limited to the minimum necessary and an appropriate own contribution to restructuring costs should be provided by the aid beneficiary. The bank and its capital holders should contribute to the restructuring as much as possible with their own resources ([4]). State support should be granted on terms which represent an adequate burden-sharing by those who invested in the bank.

([3]) Proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms of 6 June 2012, COM(2012) 0280 final.

([4]) See e.g. Restructuring Communication, point 22.

16. Since the start of the crisis, when examining the compatibility of aid to banks the Commission has required at least a minimum degree of burden-sharing relative to the amount of aid received by those banks, in particular by absorbing losses with available capital and by paying an adequate remuneration for State interventions. Furthermore, in order to prevent the outflow of funds, it has introduced rules on the buyback of hybrid instruments and coupon and dividend bans. However, the Commission did not set *ex ante* thresholds for own contributions or any further requirements [5].

17. In the first phases of the crisis, Member States did not generally go beyond the minimum requirements set by State aid rules with regard to burden-sharing *ex ante*, and creditors were not required to contribute to rescuing credit institutions for reasons of financial stability.

18. The sovereign crisis has, however, made clear that such a policy could not ensure financial stability in the long term, in particular for Member States in which the cost of bank bail-outs significantly weakened their fiscal position. Indeed some Member States had to go beyond minimum requirements under State aid rules and by introducing new legal frameworks enforce stricter *ex ante* burden-sharing requirements. That development led to diverging approaches to burden-sharing across Member States, namely those that have limited themselves to the minimum requirements under State aid rules and those which have gone beyond those requirements, requiring bail-in of investors or creditors. Such differences in the approach to burden-sharing between Member States have led to divergent funding costs between banks depending on the perceived likelihood of a bail-in as a function of a Member State's fiscal strength. They pose a threat to the integrity of the single market and risk undermining the level playing field which State aid control aims to protect.

19. In the light of the above developments, the minimum requirements for burden-sharing should be raised. Before granting any kind of restructuring aid, be it a recapitalisation or impaired asset measure, to a bank all capital generating measures including the conversion of junior debt should be exhausted, provided that fundamental rights are respected and financial stability is not put at risk. As any restructuring aid is needed to prevent the possible disorderly demise of a bank, in order to reduce the aid to the minimum those burden-sharing measures should be respected regardless of the initial solvency of the bank. Therefore, before granting restructuring aid to a bank Member States will need to ensure that the bank's shareholders and junior capital holders arrange for the required contribution or establish the necessary legal framework for obtaining such contributions.

20. In principle, the application of measures to limit distortions of competition depends on the degree of burden-sharing, and also takes into account the evolving level of burden-sharing of aided banks across the Union. All other matters being equal, enhanced burden-sharing therefore implies a reduced need for measures addressing competition distortions. In any event, measures to limit distortions of competition should be calibrated in such a way so as to approximate as much as possible the market situation which would have materialised if the beneficiary of the aid had exited the market without aid.

An effective restructuring procedure and further modernisation of the framework

21. Whilst it is necessary to retain certain support facilities for banks so as to address continued turmoil on the financial markets, certain procedures and conditions should be improved and further developed. It is also necessary to pursue the process of aligning the legal framework to market evolution, which started in June 2010 with the increase of the guarantee fee [6] and continued with the 2010 Prolongation Communication [7].

[5] Ibid., point 24.

[6] See DG Competition Staff working document of 30 April 2010 'The application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010'.

[7] That Communication sets out the requirement to submit a restructuring plan for all banks benefitting from State support in the form of capital or impaired asset measures, independent of the aid amount.

22. The 2008 Banking Communication enabled Member States to put rescue schemes in place whilst at the same time not excluding the availability of ad hoc interventions. Given the scale of the crisis and the general erosion of confidence within the whole EU financial sector with, inter alia, the drying-up of the interbank market, the Commission decided that it would approve all necessary measures taken by Member States to safeguard the stability of the financial system, including rescue measures and recapitalisation schemes. The temporary approval of rescue aid both in the form of guarantees as well as recapitalisation and impaired asset measures succeeded in averting panic and restoring market confidence.

23. However, in the changed market conditions, there is less need for structural rescue measures granted solely on the basis of a preliminary assessment which is based on the premise that practically all banks need to be rescued and which postpones the in-depth assessment of the restructuring plan to a later stage. Whilst such an approach helped prevent the irremediable collapse of the financial sector as a whole, restructuring efforts of individual beneficiaries were often delayed. Late action to address banks' problems has resulted in some cases in a higher final bill to the taxpayers. This Communication establishes the principle that recapitalisation and impaired asset measures will be authorised only once the bank's restructuring plan is approved. This approach ensures that the amount of aid is more accurately calibrated, that the sources of the bank's problems are already identified and addressed at an early stage and that financial stability is assured. Guarantee schemes will continue to be available in order to provide liquidity to banks. Such schemes can, however, only serve as a means to provide liquidity to banks without a capital shortfall as defined by the competent supervisory authority ([8]).

24. This Communication sets out the necessary adaptations to the parameters for the compatibility of crisis-related State aid to banks as from 1 August 2013. In particular, this Communication:

(a) replaces the 2008 Banking Communication, and provides guidance on the compatibility criteria for liquidity support;

(b) adapts and complements the Recapitalisation and Impaired Assets Communications;

(c) supplements the Restructuring Communication by providing more detailed guidance on burden-sharing by shareholders and subordinated creditors;

(d) establishes the principle that no recapitalisation or asset protection measure can be granted without prior authorisation of a restructuring plan, and proposes a procedure for the permanent authorisation of such measures;

(e) provides guidance on the compatibility requirements for liquidation aid.

2. SCOPE

25. The Commission will apply the principles set out in this Communication and all Crisis Communications ([9]) to 'credit institutions' (also referred to as 'banks') ([10]). Credit institutions exhibit a high degree of interconnectedness in that the disorderly failure of one credit institution can have a strong negative effect on the financial system as a whole. Credit institutions are susceptible to sudden collapses of confidence that can have serious consequences for their liquidity and solvency. The distress of a single complex institution may lead to systemic stress in the financial sector, which in turn can also have a strong negative impact on the economy as a whole, for example through the role of credit institutions in lending to the real economy, and might thus endanger financial stability.

([8]) 'Competent supervisory authority' means any national competent authority designated by participating Member States in accordance with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1) or the European Central Bank in its supervisory tasks as conferred in Article 1 of the Commission proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions for credit institutions established in a Member State participating in the single supervisory mechanism.

([9]) See footnote 1.

([10]) As defined in Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast).

26. The Commission will apply the principles set out in this Communication and all Crisis Communications where appropriate *mutatis mutandis* to insurance companies within the meaning of Article 6 of Directive 73/239/EEC [11], Article 4 of Directive 2002/83/EC [12] or Article 1(b) of Directive 98/78/EC [13].

27. All aid to such institutions incorporated in a Member State, including subsidiaries of such institutions, and having significant activities in a Member State will be examined under this Communication.

3. RECAPITALISATION AND IMPAIRED ASSET MEASURES

28. Recapitalisations and impaired asset measures including asset guarantees are typically granted to cover a capital shortfall. A 'capital shortfall' for the purposes of this Communication refers to a capital shortfall established in a capital exercise, stress-test, asset quality review or an equivalent exercise at Union, euro area or national level, where applicable confirmed by the competent supervisory authority. Such public support is normally of a permanent nature and cannot be easily undone.

29. Given the irreversibility of such measures in practice and the fiscal implications for the granting Member States and in the light of the Commission's decisional practice during the crisis, the Commission can in principle only authorise them once the Member State concerned demonstrates that all measures to limit such aid to the minimum necessary have been exploited to the maximum extent. To that end, Member States are invited to submit a capital raising plan, before or as part of the submission of a restructuring plan. A capital raising plan should contain in particular capital raising measures by the bank and potential burden-sharing measures by the shareholders and subordinated creditors of the bank.

30. A capital raising plan, in conjunction with a thorough asset quality review of the bank and a forward looking capital adequacy assessment, should enable the Member State, jointly with the Commission and the competent supervisory authority, to determine precisely the (residual) capital shortfall of a bank that needs to be covered with State aid. Any such residual capital shortfall which needs to be covered by State aid requires the submission of a restructuring plan.

31. The restructuring plan involving restructuring aid will, with the exception of the requirements on capital raising and burden-sharing which must be included in the capital raising plan as set out in points 32 to 34, submitted prior to or as part of the restructuring plan, continue to be assessed on the basis of the Restructuring Communication.

3.1. Addressing a capital shortfall — pre-notification and notification of restructuring aid

32. As soon as a capital shortfall that is likely to result in a request for State aid has been identified, all measures to minimise the cost of remedying that shortfall for the Member State should be implemented. To that end, Member States are invited to enter into pre-notification contacts with the Commission. In the course of those voluntary pre-notification contacts, the Commission will offer its assistance on how to ensure compatibility of the restructuring aid and in particular on how to implement the burden-sharing requirements in accordance with State aid rules. The basis for the pre-notification will be a capital raising plan established by the Member State and the bank and endorsed by the competent supervisory authority. It should:

    (a) list the capital raising measures to be undertaken by the bank and the (potential) burden-sharing measures for shareholders and subordinated creditors;

    (b) contain safeguards preventing the outflows of funds from the bank which could, for example, occur by the bank acquiring stakes in other undertakings or paying dividends or coupons.

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(11) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 228, 16.8.1973, p. 3).

(12) Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ L 345, 19.12.2002, p. 1).

(13) Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group (OJ L 330, 5.12.1998, p. 1).

33. The Member State should provide a detailed methodology and input data used to determine the capital shortfall, validated by the competent supervisory authority. The methodology needs to be presented on a business segment basis.

34. After the submission of the capital raising plan and the incorporation of the results of the asset quality review of the bank and a forward looking capital adequacy assessment, the Member State must determine the residual capital shortfall that has to be covered by State aid. The Commission will offer to the Member State to discuss the restructuring plan before its notification. Once agreement on the restructuring plan has been achieved, the Member State may formally notify the restructuring plan. The Commission will authorise any recapitalisation or impaired asset measure as restructuring aid only after agreement on the restructuring plan has been reached.

3.1.1. *Capital raising measures by the bank*

35. In the capital raising plan endorsed by the competent supervisory authority, the beneficiary should identify and to the extent possible, without endangering viability, carry out all capital raising measures that can be implemented. Such measures should include in particular:

    (a) rights issues;

    (b) voluntary conversion of subordinated debt instruments into equity on the basis of a risk-related incentive;

    (c) liability management exercises which should in principle be 100 % capital generating if the capital shortfall cannot be overcome in full and therefore State aid is required;

    (d) capital-generating sales of assets and portfolios;

    (e) securitisation of portfolios in order to generate capital from non-core activities;

    (f) earnings retention;

    (g) other measures reducing capital needs.

36. If the identified measures are indicated in the capital raising plan as ones that cannot be implemented within six months from the submission of that plan, the Commission will consult the competent supervisory authority to assess whether it should take those proposed measures into account as capital raising measures.

37. There should be incentives for banks' managements to undertake far-reaching restructuring in good times and, thereby, minimise the need to recourse to State support. Accordingly, if recourse to State aid could have reasonably been averted through appropriate and timely management action, any entity relying on State aid for its restructuring or orderly winding down should normally replace the Chief Executive Officer of the bank, as well as other board members if appropriate.

38. For the same reasons, such entities should apply strict executive remuneration policies. This requires a cap on remuneration of executive pay combined with incentives ensuring that the bank is implementing its restructuring plan towards sustainable, long-term company objectives. Thus, any bank in receipt of State aid in the form of recapitalisation or impaired asset measures should restrict the total remuneration to staff, including board members and senior management, to an appropriate level. That cap on total remuneration should include all possible fixed and variable components and pensions, and be in line with Articles 93 and 94 of the EU Capital Requirements Directive (CRD IV) ([14]).

([14]) Directive of the European Parliament and of the Council on the access to the activity of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (OJ L 176, 27.6.2013, p. 338).

The total remuneration of any such individual may therefore not exceed 15 times the national average salary in the Member State where the beneficiary is incorporated ([15]) or 10 times the average salary of employees in the beneficiary bank.

Restrictions on remuneration must apply until the end of the restructuring period or until the bank has repaid the State aid, whichever occurs earlier.

39. Any bank in receipt of State aid in the form of recapitalisation or impaired asset measures should not in principle make severance payments in excess of what is required by law or contract.

3.1.2. *Burden-sharing by the shareholders and the subordinated creditors*

40. State support can create moral hazard and undermine market discipline. To reduce moral hazard, aid should only be granted on terms which involve adequate burden-sharing by existing investors.

41. Adequate burden-sharing will normally entail, after losses are first absorbed by equity, contributions by hybrid capital holders and subordinated debt holders. Hybrid capital and subordinated debt holders must contribute to reducing the capital shortfall to the maximum extent. Such contributions can take the form of either a conversion into Common Equity Tier 1 ([16]) or a write-down of the principal of the instruments. In any case, cash outflows from the beneficiary to the holders of such securities must be prevented to the extent legally possible.

42. The Commission will not require contribution from senior debt holders (in particular from insured deposits, uninsured deposits, bonds and all other senior debt) as a mandatory component of burden-sharing under State aid rules whether by conversion into capital or by write-down of the instruments.

43. Where the capital ratio of the bank that has the identified capital shortfall remains above the EU regulatory minimum, the bank should normally be able to restore the capital position on its own, in particular through capital raising measures as set out in point 35. If there are no other possibilities, including any other supervisory action such as early intervention measures or other remedial actions to overcome the shortfall as confirmed by the competent supervisory or resolution authority, then subordinated debt must be converted into equity, in principle before State aid is granted.

44. In cases where the bank no longer meets the minimum regulatory capital requirements, subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses.

45. An exception to the requirements in points 43 and 44 can be made where implementing such measures would endanger financial stability or lead to disproportionate results. This exception could cover cases where the aid amount to be received is small in comparison to the bank's risk weighted assets and the capital shortfall has been reduced significantly in particular through capital raising measures as set out in point 35. Disproportionate results or a risk to financial stability could also be addressed by reconsidering the sequencing of measures to address the capital shortfall.

46. In the context of implementing points 43 and 44, the 'no creditor worse off principle' ([17]) should be adhered to. Thus, subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted.

([15]) As published by the OECD on its website under Average Annual Wages in constant prices for the last available year, http://stats.oecd.org/Index.aspx

([16]) As defined by Article 26 of the Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, p. 1).

([17]) This can for example be achieved by creating a holding company. The ownership of the bank would be recorded on the asset side of the holding company, whereas the equity, hybrids and subordinated debt existing in the bank prior to the State aid interventions constitute the liability side of the holding company with the same seniority structure as the one existing in the bank prior to the intervention.

3.1.3. *Preventing the outflow of funds prior to a restructuring decision*

47. In order to limit the aid to the minimum necessary, outflows of funds must be prevented at the earliest stage possible. Therefore, from the time capital needs are known or should have been known to the bank, the Commission considers that the bank should take all measures necessary to retain its funds. In particular, from that moment on, institutions which have identified or should have identified capital needs:

(a) must not pay dividends on shares or coupons on hybrid capital instruments (or any other instruments for which the coupon payment is discretionary);

(b) must not repurchase any of their own shares or call hybrid capital instruments for the duration of the restructuring period without prior approval by the Commission; and

(c) must not buy back hybrid capital instruments, unless such a measure, possibly in combination with others, allows the institution to fully absorb its capital shortfall, and occurs sufficiently close to current market levels ([18]) and at not more than 10 % above the market price; any buy back is subject to prior approval by the Commission;

(d) must not perform any capital management transaction without prior approval by the Commission;

(e) must not engage in aggressive commercial practices; and

(f) must not acquire a stake in any undertaking, be it a asset or share transfer. That requirement does not cover: (i) acquisitions that take place in the ordinary course of the banking business in the management of existing claims towards ailing firms; and (ii) the acquisition of stakes in undertakings provided that the purchase price paid is less than 0,01 % of the last available balance sheet size of the institution at that moment and that the cumulative purchase prices paid for all such acquisitions from that moment until the end of the restructuring period is less than 0,025 % of its last available balance sheet size at that moment; (iii) the acquisition of a business, after obtaining the Commission's approval, if it is, in exceptional circumstances, necessary to restore financial stability or to ensure effective competition;

(g) must refrain from advertising referring to State support and from employing any aggressive commercial strategies which would not take place without the support of the Member State.

48. As it needs to be ensured that the aid is limited to the minimum necessary, if a bank undertakes actions which are not in line with the requirements listed in point 47 at a point in time when its need for additional capital should have been evident to a well-run business, the Commission will, for the purpose of establishing the required measures to limit distortions of competition, add an amount equivalent to the outflow of funds to the aid amount.

3.1.4. *Covering the residual capital shortfall with restructuring aid*

49. If after the implementation of the capital raising and burden-sharing measures a capital shortfall remains, it can in principle be covered by public recapitalisation, impaired asset measures or a combination of the two. In order for such aid to be compatible, a restructuring plan has to be submitted to the Commission which needs to comply with the relevant sections of the Crisis Communications.

3.2. **Rescue aid in the form of recapitalisation and impaired asset measures**

50. Once the Commission begins to apply the principles set out in this Communication, a Member State will have to notify a restructuring plan to the Commission and obtain State aid approval before any recapitalisation or impaired asset measures are taken. However, such measures can exceptionally be authorised by the Commission to be granted by the Member State on a temporary basis as rescue aid before a restructuring plan is approved, if such measures are required to preserve financial stability. If

([18]) For example if the buy-back occurs at a double digit discount in percentage points of nominal value from the market price (or, in the absence of a market, a proxy of the market price) to generate profits, or if the buy-back is part of an exchange providing the credit institution with higher quality capital reducing the shortfall.

a Member State invokes this financial stability clause, the Commission will request an *ex ante* analysis from the competent supervisory authority confirming that a current (not prospective) capital shortfall exists, which would force the supervisor to withdraw the institution's banking license immediately if no such measures were taken. Moreover, any such analysis will have to demonstrate that the exceptional risk to financial stability cannot be averted with private capital within a sufficiently short period of time or by any other less distorting temporary measure such as a State guarantee.

51. Any rescue measure falling under point 50 has to be notified to the Commission. In order to be temporarily approved by the Commission, such a measure must comply with the rules governing the remuneration and burden-sharing of such measures set out in the Recapitalisation Communication, the 2011 Prolongation Communication and, where applicable, the Impaired Asset Communication.

52. Moreover, rescue aid in the form of recapitalisation and impaired asset measures must not prevent compliance with the burden-sharing requirements set out in this Communication. Consequently, either the required burden-sharing measures must be implemented as part of the rescue aid, or the recapitalisation or impaired asset measures must be arranged in a manner that allows for the implementation of the burden-sharing measures *ex post*. Such *ex post* implementation may be achieved by, for example, equity recapitalisation in a form that is senior to existing capital and subordinated debt instruments, whilst being compliant with the applicable regulatory and supervisory framework.

53. Following the authorisation of rescue aid, the Member State must submit a restructuring plan in line with the Restructuring Communication within two months of the date of the decision temporarily approving the aid. The restructuring plan will be assessed on the basis of the Restructuring Communication, taking into account the principles of burden-sharing described in this Communication.

3.3. **Schemes for recapitalisation and restructuring of small institutions**

54. Aid to small banks tends to affect competition less than aid granted to larger banks. For that reason and to ensure a proportionate administrative treatment, it is appropriate to allow for a simpler procedure in relation to small banks whilst ensuring that competition distortions are limited to the minimum. Therefore, the Commission is willing to authorise schemes for recapitalisation and restructuring of small institutions where such schemes have a clear remit and are limited to a six-month period, provided they respect the principles set out in the Crisis Communications and in particular the burden-sharing requirements of this Communication. The application of any such scheme must furthermore be restricted to banks with a balance-sheet total of not more than EUR 100 million. The sum of the balance-sheets of the banks that receive aid under the scheme must not exceed 1,5 % of the total assets held by banks in the domestic market of the Member State concerned.

55. The Commission will evaluate any such scheme so as to verify whether it achieves its objective and is implemented correctly. To that end, the Member State must provide a report on the use of the scheme on a six-monthly basis after the scheme's authorisation.

4. **GUARANTEES AND LIQUIDITY SUPPORT OUTSIDE THE PROVISION OF CENTRAL BANK LIQUIDITY**

56. Liquidity support and guarantees on liabilities temporarily stabilise the liability side of a bank's balance sheet. Therefore, unlike recapitalisation or impaired asset measures which in principle must be preceded by the notification of a restructuring plan by the Member State concerned and approval by the Commission before they can be granted, the Commission can accept that Member States notify guarantees and liquidity support to be granted after approval on a temporary basis as rescue aid before a restructuring plan is approved.

57. Guarantees and liquidity support can be notified individually to the Commission; in addition the Commission may also authorise schemes providing for liquidity measures for a maximum period of six months.

58. Such schemes must be restricted to banks which have no capital shortfall. Where a bank with a capital shortfall is in urgent need of liquidity, an individual notification to the Commission is required ([19]). In such circumstances, the Commission will apply the procedure set out in points 32 to 34 *mutatis mutandis*, including the requirement for a restructuring or wind-down plan, unless the aid is reimbursed within two months.

([19]) Banks which have already received approved rescue aid at the date of entry into force of this Communication but have not yet obtained a final approval of the restructuring aid may receive support under a liquidity scheme without individual notification.

59. In order to be approved by the Commission, guarantees and liquidity support must meet the following requirements:

(a) guarantees may only be granted for new issues of credit institutions' senior debt (subordinated debt is excluded);

(b) guarantees may only be granted on debt instruments with maturities from three months to five years (or a maximum of seven years in the case of covered bonds). Guarantees with a maturity of more than three years must, except in duly justified cases, be limited to one-third of the outstanding guarantees granted to the individual bank;

(c) the minimum remuneration level of the State guarantees must be in line with the formula set out in the 2011 Prolongation Communication;

(d) a restructuring plan must be submitted to the Commission within two months for any credit institution granted guarantees on new liabilities or on renewed liabilities for which, at the time of the granting of the new guarantee, the total outstanding guaranteed liabilities (including guarantees accorded before the date of that decision) exceed both a ratio of 5 % of total liabilities and a total amount of EUR 500 million;

(e) for any credit institution which causes the guarantee to be called upon, an individual restructuring or wind-down plan must be submitted within two months after the guarantee has been activated;

(f) the recipients of guarantees and liquidity support must refrain from advertising referring to State support and from employing any aggressive commercial strategies which would not take place without the support of the Member State.

60. For guarantee and liquidity support schemes, the following additional criteria must be met:

(a) the scheme must be restricted to banks without a capital shortfall as certified by the competent supervisory authority in line with point 28;

(b) guarantees with a maturity of more than three years must be limited to one-third of the total guarantees granted to the individual bank;

(c) Member States must report to the Commission on a three-monthly basis on: (i) the operation of the scheme; (ii) the guaranteed debt issues; and (iii) the actual fees charged;

(d) Member States must supplement their reports on the operation of the scheme with available updated information on the cost of comparable non-guaranteed debt issuances (nature, volume, rating, currency).

61. In exceptional cases guarantees may also be approved covering exposures of the European Investment Bank towards banks for the purpose of restoring lending to the real economy in countries with severely distressed borrowing conditions compared to the Union average. In assessing such measures the Commission will examine in particular whether they do not confer an undue benefit that could for example serve to develop other business activities of those banks. Such guarantees may only cover a period of up to seven years. If approved by the Commission, such guarantees do not trigger an obligation for the bank to present a restructuring plan.

5. PROVISION OF LIQUIDITY BY CENTRAL BANKS AND INTERVENTION OF DEPOSIT GUARANTEE SCHEMES AND RESOLUTION FUNDS

62. The ordinary activities of central banks related to monetary policy, such as open market operations and standing facilities, do not fall within the scope of the State aid rules. Dedicated support to a specific credit institution (commonly referred to as 'emergency liquidity assistance') may constitute aid unless the following cumulative conditions are met [20]:

[20] In such cases, the measures will subsequently be assessed as part of the restructuring plan.

(a) the credit institution is temporarily illiquid but solvent at the moment of the liquidity provision which occurs in exceptional circumstances and is not part of a larger aid package;

(b) the facility is fully secured by collateral to which appropriate haircuts are applied, in function of its quality and market value;

(c) the central bank charges a penal interest rate to the beneficiary;

(d) the measure is taken at the central bank's own initiative, and in particular is not backed by any counter-guarantee of the State.

63. Interventions by deposit guarantee funds to reimburse depositors in accordance with Member States' obligations under Directive 94/19/EC on deposit-guarantee schemes ([21]) do not constitute State aid ([22]). However, the use of those or similar funds to assist in the restructuring of credit institutions may constitute State aid. Whilst the funds in question may derive from the private sector, they may constitute aid to the extent that they come within the control of the State and the decision as to the funds' application is imputable to the State ([23]). The Commission will assess the compatibility of State aid in the form of such interventions under this Communication.

64. State aid in the form of interventions by a resolution fund will be assessed under this Communication in order to assess its compatibility with the internal market.

6. SPECIFIC CONSIDERATIONS IN RELATION TO LIQUIDATION AID

6.1. General principles

65. Member States should encourage the exit of non-viable players, while allowing for the exit process to take place in an orderly manner so as to preserve financial stability. The orderly liquidation of a credit institution in difficulty should always be considered where the institution cannot credibly return to long-term viability.

66. The Commission recognises that, due to the specificities of credit institutions and in the absence of mechanisms allowing for the resolution of credit institutions without threatening financial stability, it might not be feasible to liquidate a credit institution under ordinary insolvency proceedings. For that reason, State measures to support the liquidation of failing credit institutions may be considered as compatible aid, subject to compliance with the requirement specified in point 44.

67. The goal of the orderly liquidation must be the cessation of the ailing credit institution's activity over a limited period of time. That goal implies that no new third party business may be undertaken. However, it does not prevent existing business from being executed, if doing so reduces the liquidation costs. Moreover, liquidation must as much as possible aim at selling off parts of the business or assets by means of a competitive process. The orderly liquidation procedure requires that the proceedings of any sale of assets contribute to the liquidation costs.

68. Member States may choose a number of tools for the organisation of the liquidation of ailing credit institutions. Any State aid measures implemented to support such a liquidation must comply with the principles specified in points 69 to 82.

6.2. Conditions for the authorisation of liquidation aid

69. Member States must provide a plan for the orderly liquidation of the credit institution.

70. The Commission will assess the compatibility of aid measures to be implemented with a view to resolving credit institutions on the same lines, *mutatis mutandis*, as set out in Sections 2, 3 and 4 of the Restructuring Communication for restructuring aid.

([21]) Directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee schemes (OJ L 135, 31.5.1994, p. 5).

([22]) See, by analogy, Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, as well as Case C-460/07 *Puffer* [2009] ECR I-3251, paragraph 70.

([23]) See Danish winding-up scheme (OJ C 312, 17.11.2010, p. 5).

71. The particular nature of orderly liquidation gives rise to the considerations set out in points 72 to 78.

6.2.1. *Limitation of liquidation costs*

72. Member States should demonstrate that the aid enables the credit institution to be effectively wound up in an orderly fashion, while limiting the amount of aid to the minimum necessary to keep it afloat during the liquidation in view of the objective pursued and complying with the burden-sharing requirements of this Communication.

6.2.2. *Limitation of competition distortions*

73. To avoid undue distortions of competition, the winding-up phase should be limited to the period strictly necessary for the orderly liquidation.

74. As long as the beneficiary credit institution continues to operate, it must not actively compete on the market or pursue any new activities. Its operations must in principle be limited to continuing and completing activities pending for existing customers. Any new activity with existing customers must be limited to changing the terms of existing contracts and restructuring existing loans, provided that such changes improve the respective asset's net present value.

75. The pricing policy of the credit institution to be wound down must be designed to encourage customers to find more attractive alternatives.

76. Where a banking licence is necessary, for example for a rump bank or a temporary institution created for the sole purpose of orderly liquidation of a credit institution ('bridge bank'), it should be limited to the activities strictly necessary for the winding up. The banking licence should be withdrawn as soon as possible by the competent supervisory authority.

6.2.3. *Burden-sharing*

77. In the context of orderly liquidation, care must be taken to minimise moral hazard, particularly by preventing additional aid from being provided to the benefit of the shareholders and subordinated debt holders. Therefore, the claims of shareholders and subordinated debt holders must not be transferred to any continuing economic activity.

78. Sections 3.1.2 and 3.1.3 must be complied with *mutatis mutandis*.

6.3. **Sale of a credit institution during the orderly liquidation procedure**

79. The sale of a credit institution during an orderly liquidation procedure may entail State aid to the buyer, unless the sale is organised via an open and unconditional competitive tender and the assets are sold to the highest bidder. Such competitive tender should, where appropriate, allow for sale of parts of the institution to different bidders.

80. In particular, when determining if there is aid to the buyer of the credit institution or parts of it, the Commission will examine whether:

(a) the sales process is open, unconditional and non-discriminatory;

(b) the sale takes place on market terms;

(c) the credit institution or the government, depending on the structure chosen, maximises the sales price for the assets and liabilities involved.

81. Where the Commission finds that there is aid to the buyer, the Commission will assess the compatibility of that aid separately.

82. If aid is granted to the economic activity to be sold (as opposed to the purchaser of that activity), the compatibility of such aid will be subject to an individual examination in the light of this Communication. If the liquidation process entails the sale of an economic entity which holds a significant market share, the Commission will assess the need for measures to limit distortions of competition brought about by the aid to that economic entity and will verify the viability of the entity resulting from the sale. In its viability assessment, the Commission will take into due consideration the size and strength of the buyer relative to the size and strength of the business acquired.

6.4. **Conditions for the authorisation of orderly liquidation schemes**

83. The implementation by Member States of regimes to deal with distressed credit institutions may include the possibility of granting aid to ensure the orderly liquidation of distressed credit institutions, while limiting negative spillovers on the sector and on the economy as a whole.

84. The Commission considers that liquidation aid schemes for credit institutions of limited size ([24]) can be approved, provided they are well designed so as to ensure compliance with the requirements on burden-sharing by shareholders and subordinated debt-holders set out in point 44 and to remove moral hazard and other competition concerns.

85. The compatibility of such schemes will be assessed in the light of the conditions set out in Section 3. When notifying a scheme to the Commission, Member States must therefore provide detailed information on the process and on the conditions for the interventions in favour of beneficiary institutions.

86. As the degree to which competition is distorted may vary according to the nature of the beneficiary institution and its positioning in the market, an individual assessment might be necessary to ensure that the process does not lead to undue competition distortions. Therefore, aid measures under an approved scheme in favour of credit institutions with total assets of more than EUR 3 000 million must be individually notified for approval.

6.5. **Monitoring**

87. Member States must provide regular reports, at least on an annual basis, on the operation of any scheme authorised pursuant to Section 6.4. Those reports must also provide the information for each credit institution being liquidated pursuant to Section 6.4.

88. In order to allow the Commission to monitor the progress of the orderly liquidation process and its impact on competition, Member States must submit regular reports (on at least a yearly basis) on the development of the liquidation process of each bank in liquidation and a final report at the end of the winding-up procedure. In certain cases, a monitoring trustee, a divestment trustee or both may be appointed to ensure compliance with any conditions and obligations underpinning the authorisation of the aid.

7. DATE OF APPLICATION AND DURATION

89. The Commission will apply the principles set out in this Communication from 1 August 2013.

90. Notifications registered by the Commission prior to 1 August 2013 will be examined in the light of the criteria in force at the time of notification.

91. The Commission will examine the compatibility with the internal market of any aid granted without its authorisation and therefore in breach of Article 108(3) of the Treaty on the basis of this Communication if some or all of that aid is granted after the publication of the Communication in the *Official Journal of the European Union*.

92. In all other cases it will conduct the examination on the basis of the Crisis Communications in force at the time at which the aid is granted.

93. The Commission will review this Communication as deemed appropriate, in particular so as to cater for changes in market conditions or in the regulatory environment which may affect the rules it sets out.

94. The 2008 Banking Communication is withdrawn with effect from 31 July 2013.

95. Point 47 and Annex 5 of the Impaired Assets Communication are withdrawn.

96. The Restructuring Communication is adapted as follows:

In point 4 the first sentence is replaced by the following: 'Where a financial institution has received State aid, the Member State should submit a restructuring plan in order to confirm or re-establish individual banks' long-term viability without reliance on State support.'

([24]) See e.g. N 407/10, Danish winding-up scheme for banks (OJ C 312, 17.11.2010, p. 7).

Footnote 4 relating to point 4 is withdrawn.

Point 7 third indent is replaced by the following: 'The Commission will apply the basic principle of appropriate burden-sharing between Member States and the beneficiary banks with the overall situation of the financial sector in mind.'

Point 8 is withdrawn.

In footnote 1 relating to point 21 the first sentence is replaced by the following: 'See Section 6 of the 2013 Banking Communication.'

Point 25 is replaced by the following: 'Any derogation from an adequate burden-sharing *ex ante* which may have been exceptionally granted before a restructuring plan is approved for reasons of financial stability must be compensated by a further contribution at a later stage of the restructuring, for example in the form of claw-back clauses and/or by farther-reaching restructuring including additional measures to limit distortions of competition.'

Non-opposition to a notified concentration

(Case COMP/M.6946 — BayWa/Bohnhorst Agrarhandel)

(Text with EEA relevance)

(2013/C 216/02)

On 11 July 2013, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004. The full text of the decision is available only in German and will be made public after it is cleared of any business secrets it may contain. It will be available:

— in the merger section of the Competition website of the Commission (http://ec.europa.eu/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website (http://eur-lex.europa.eu/en/index.htm) under document number 32013M6946. EUR-Lex is the on-line access to the European law.

Non-opposition to a notified concentration

(Case COMP/M.6980 — Cinven/CeramTec)

(Text with EEA relevance)

(2013/C 216/03)

On 24 July 2013, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— in the merger section of the Competition website of the Commission (http://ec.europa.eu/competition/mergers/cases/). This website provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website (http://eur-lex.europa.eu/en/index.htm) under document number 32013M6980. EUR-Lex is the on-line access to the European law.

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Euro exchange rates [1]

29 July 2013

(2013/C 216/04)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,3270	AUD	Australian dollar	1,4364
JPY	Japanese yen	129,91	CAD	Canadian dollar	1,3636
DKK	Danish krone	7,4560	HKD	Hong Kong dollar	10,2938
GBP	Pound sterling	0,86340	NZD	New Zealand dollar	1,6444
SEK	Swedish krona	8,5812	SGD	Singapore dollar	1,6818
CHF	Swiss franc	1,2330	KRW	South Korean won	1 476,78
ISK	Iceland króna		ZAR	South African rand	13,0362
NOK	Norwegian krone	7,8605	CNY	Chinese yuan renminbi	8,1377
BGN	Bulgarian lev	1,9558	HRK	Croatian kuna	7,5055
CZK	Czech koruna	25,914	IDR	Indonesian rupiah	13 627,27
HUF	Hungarian forint	297,88	MYR	Malaysian ringgit	4,2809
LTL	Lithuanian litas	3,4528	PHP	Philippine peso	57,468
LVL	Latvian lats	0,7024	RUB	Russian rouble	43,5560
PLN	Polish zloty	4,2294	THB	Thai baht	41,363
RON	Romanian leu	4,4010	BRL	Brazilian real	2,9945
TRY	Turkish lira	2,5535	MXN	Mexican peso	16,8476
			INR	Indian rupee	78,8500

(1) *Source*: reference exchange rate published by the ECB.

Opinion of the Advisory Committee on mergers given at its meeting of 18 February 2013 regarding a draft decision relating to Case COMP/M.6663 — Ryanair/Aer Lingus III

Rapporteur: Estonia

(2013/C 216/05)

1. The Advisory Committee agrees with the Commission that the notified transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

   A minority abstains.

2. The Advisory Committee agrees with the Commission that the notified transaction has a Union dimension pursuant to Article 1 of the Merger Regulation.

   A minority abstains.

3. The Advisory Committee agrees with the Commission definitions of the relevant markets as stated in the draft decision. In particular,

   (a) the Advisory Committee agrees with the Commission that the effects of the transaction are to be assessed on the basis of an O&D city-pair approach;

   (b) the Advisory Committee agrees with the Commission's assessment on airport substitutability.

   A minority abstains.

4. The Advisory Committee agrees with the Commission's assessment that Aer Arann is a competitor of Ryanair, but not of Aer Lingus.

   A minority abstains.

5. The Advisory Committee agrees with the Commission's assessment that Aer Lingus and Ryanair are very close, if not each other's closest competitor on all overlap routes.

   A minority abstains.

6. The Advisory Committee agrees with the Commission's assessment that the entry barriers in this case are high.

   A minority abstains.

7. The Advisory Committee agrees with the Commission's assessment that the anti-competitive effects of the transaction would not be sufficiently compensated by entry on an isolated route or expanded entry by carriers operating some routes to and from their home bases outside of Ireland.

   A minority abstains.

8. The Advisory Committee agrees with the Commission's assessment that the notified concentration would lead to a significant impediment of effective competition on 46 routes on which the parties' activities overlap, namely:

   — the 28 monopoly routes: Dublin–Alicante/Murcia; Dublin–Berlin; Dublin–Bilbao/Santander; Dublin–Birmingham/East Midlands; Dublin–Brussels/Charleroi; Dublin–Budapest; Dublin–Edinburgh/Glasgow; Dublin–Fuerteventura; Dublin–Glasgow/Prestwick; Dublin–Manchester/Liverpool/Leeds; Dublin–Marseille; Dublin–Milan/Bergamo; Dublin–Nice; Dublin/Rome; Dublin–Tenerife; Dublin–Toulouse/Carcassonne; Dublin–Venice/Treviso; Dublin–Vienna/Bratislava; Dublin–Warsaw/Modlin; Cork–Alicante; Cork–Faro; Cork–London; Cork–Manchester/Liverpool; Cork–Tenerife; Knock–Birmingham/East Midlands; Knock–London; Shannon–Manchester/Liverpool; and Shannon–London,

   — the 7 routes where the merged entity would operate alongside other scheduled carriers: Dublin–Bristol/Cardiff/Exeter (irrespective of the precise market definition); Dublin–Frankfurt; Dublin–London; Dublin–Madrid; Dublin–Munich; Dublin–Paris, and Dublin–Stockholm, and

— the 11 routes where the merged entity would operate alongside charters: Dublin–Barcelona, Dublin–Faro, Dublin–Gran Canaria, Dublin–Ibiza, Dublin–Lanzarote, Dublin–Malaga, Dublin–Palma, Cork–Barcelona, Cork–Lanzarote; Cork–Malaga and Cork Palma.

A minority abstains.

9. The Advisory Committee agrees with the Commission's assessment as regards the elimination of the most credible potential entrant on the following six routes: (i) *Ryanair routes of potential competition:* Dublin–Bologna, Dublin–Bordeaux, Cork–Paris/Beauvais, Cork–Munich/Memmingen, Cork–Birmingham; (ii) *Aer Lingus route of potential competition:* Dublin–Newcastle.

A minority abstains.

10. The Advisory Committee agrees with the Commission that the commitments offered by Ryanair on 17 October 2012, 7 December 2012, 15 January 2013, and 1 February 2013 do not address the competition concerns identified by the Commission and will not eliminate the significant impediment to effective competition resulting from the notified transaction.

A minority abstains.

11. The Advisory Committee agrees with the Commission that the IAG commitments are insufficient to address all the competition concerns identified by the Commission.

A minority abstains.

12. The Advisory Committee agrees with the Commission that the Flybe commitments are insufficient to address all the competition concerns identified by the Commission.

A minority abstains.

13. The Advisory Committee agrees with the Commission that the notified transaction must therefore be declared incompatible with the internal market and the functioning of the EEA Agreement in accordance with Articles 2(3) and 8(3) of the Merger Regulation and Article 57 of the EEA Agreement.

A minority abstains.

Final report of the Hearing Officer [1]

Ryanair/Aer Lingus III

(COMP/M.6663)

(2013/C 216/06)

Background

(1) On 24 July 2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation [2] by which the Ryanair Holdings plc acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Aer Lingus Group plc by way of public bid announced on 19 June 2012.

The statement of objections

(2) The Commission initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation on 29 August 2012 and adopted a statement of objections ('SO') on 13 November 2012. Approximately one month prior to the issuance of the SO, on 17 October 2012, Ryanair submitted a package of formal commitments pursuant to Article 8(2) of the Merger Regulation, which the Commission decided not to market test.

(3) Aer Lingus, the target of the public bid and thus the other involved party within the meaning of Article 11(b) of the Implementing Regulation [3], received on 21 November 2012 a non-confidential version of the SO. It immediately expressed concerns about the redaction of the entirety of the section dealing with Ryanair's commitments and the Commission's assessment thereof. Aer Lingus requested to be provided with a copy of the section after DG Competition had rejected it. After having reviewed the reasoned claim, I asked DG Competition to provide Aer Lingus with a non-confidential version of section of the SO on Ryanair's commitments as stipulated by Article 13(2) of the Implementing Regulation. DG Competition then requested Ryanair to provide a less redacted version of the section dealing with commitments, which was subsequently transmitted to Aer Lingus.

(4) Ryanair submitted its reply to the SO on 28 November 2012 and Aer Lingus its comments on 30 November 2012. Neither the latter nor the former requested a formal oral hearing.

(5) On 14 December 2012, the Commission sent Ryanair a letter of facts, to which Ryanair replied on 20 December 2012.

Access to file

(6) The notifying party was recurrently granted full access to the file upon its request via CD-ROMs from November 2012 until February 2013, while Aer Lingus was given access upon request in so far as this was necessary for the purposes of preparing its comments, also on several occasions along the process.

(7) In addition, two data rooms on quantitative data were organised in this case, from 21 to 23 and on 27 November 2012. The external economic advisers of both Ryanair and Aer Lingus had separate access to the data, i.e. the Commission analysis on the correlation between Ryanair's and Aer Lingus' gross average fares.

Third persons

(8) Three competitors of the merging entities, i.e. International Airlines Group SA, Flybe Group plc and Aer Arran, one airport, i.e. Dublin Airport Authority, and the Irish Department of Transport, Tourism and Sport demonstrated 'sufficient interest' within the meaning of Article 18(4) of the Merger Regulation and were, thus, given the opportunity to be heard in writing as third persons.

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(1) Pursuant to Articles 16 and 17 of Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU').

(2) Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

(3) Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 (OJ L 133, 30.4.2004, p. 1).

Commitments

(9) In order to address the competition concerns identified in the SO, Ryanair submitted revised sets of commitments on 7 December 2012, 15 January and 1 February 2013, which were all market tested. The results of the market tests and the Commission's reasons for rejecting the offered commitments were each time explained during state of play meetings, the last of which took place on 12 February 2013. Moreover, Ryanair was consistently given access to the file allowing it to verify the information underlying the Commission's position.

The procedural rights of the target of the concentration

(10) Aer Lingus, the target company of the hostile take-over, complained about the limited role it has been able to play in an investigation which is central to its independence. The company believes that it has been very far from enjoying an equality of arms. For example, it has not been involved in the pre-notification process, it tended to receive over-redacted documents submitted by the notifying party, it was not offered key documents at the start of phase II, obtained only limited access to file and was excluded from the dialogue with the Commission on remedies.

(11) It is true that target companies do not enjoy the same procedural status as acquiring companies. As Aer Lingus concedes itself, the applicable regulations ascribe only a limited role to other involved parties. I can thus not find that Aer Lingus has not been able to effectively exercise in this proceeding the rights conferred to it by the applicable regulations and best practices. At the only instance it referred an adverse procedural decision to me for review, I was able to decide in favour of Aer Lingus (see above point 3).

The draft Commission decision

(12) In my opinion the draft decision relates only to objections in respect of which the parties have been afforded the opportunity to make known their views. In reason of the highly sensitive nature of certain data originating from the other involved party and a third party, the Commission has requested and obtained a power of attorney from the notifying party which allows its external counsels to (i) receive on its behalf the Commission's Decision, on a counsel-only basis, and to (ii) provide Ryanair with a copy of it that has been redacted to exclude the confidential information. Both providers are aware of this limited disclosure and have both given their written agreement.

Concluding remarks

(13) Overall, I conclude that all participants in the proceedings have been able to effectively exercise their procedural rights in this case.

Brussels, 19 February 2013.

Michael ALBERS

Summary of Commission Decision

of 27 February 2013

declaring a concentration incompatible with the internal market and the EEA Agreement

(Case COMP/M.6663 — Ryanair/Aer Lingus III)

(notified under document C(2013) 1106 final)

(Only the English version is authentic)

(Text with EEA relevance)

(2013/C 216/07)

On 27 February 2013, the Commission adopted a decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1]*, and in particular Article 8(3) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address:*

http://ec.europa.eu/comm/competition/index_en.html

I. THE PARTIES

(1) Ryanair is a low-fares carrier operating point-to-point scheduled air services essentially in Europe. The company has a fleet of 294 aircraft and 51 bases across Europe, with the most important bases being London Stansted, Brussels Charleroi, Milan Bergamo and Dublin. In the IATA summer season 2012, Ryanair operated in particular 62 short-haul routes ex Dublin.

(2) Aer Lingus is an Irish-based carrier. It offers essentially point-to-point scheduled air transport services. Aer Lingus is based principally at Dublin Airport wherefrom it operates a substantial portion of its scheduled flights. In the summer season 2012, Air Lingus (including Aer Arann) operated 66 short-haul routes ex Dublin. Aer Lingus is not a member of any airline alliance and develops a concept of 'open network architecture', whereby its neutrality allows it to partner across alliances and offer connectivity through major hubs to worldwide destinations in addition to carrying point-to-point traffic.

(3) Ryanair's minority shareholding in Aer Lingus represents 29,82 % of Aer Lingus' total issued share capital and makes Ryanair the largest shareholder in Aer Lingus. The Irish Government (Minister for Finance) is the next largest shareholder with a stake of around 25,1 %.

II. THE OPERATION

(4) On 24 July 2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Ryanair Holdings plc ('Ryanair', Ireland) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Aer Lingus Group plc ('Aer Lingus', Ireland) by way of public bid announced on 19 June 2012 ('the transaction').

III. SUMMARY

(5) After the first phase market investigation, the Commission concluded that the Transaction fell within the scope of the Merger Regulation and raised serious doubts as to its compatibility with the internal market and with the EEA Agreement. As a result, on 29 August 2012, the Commission initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation.

(6) The second phase market investigation confirmed the existence of competition concerns on a number of markets leading to the issuance of a statement of objections ('SO') on 13 November 2012. The parties had the opportunity to make their views known through a written response to the SO. On 14 December 2012, the Commission sent a letter of facts, to which Ryanair replied on 20 December 2012.

(7) Pursuant to Article 8(2) of the Merger Regulation, Ryanair submitted a first formal set of commitments on 17 October 2012. The Commission decided that no market test was warranted, as the commitments of 17 October 2012 did not cover all routes on which the SO preliminarily concluded that the transaction would significantly impede effective competition.

[1] OJ L 24, 29.1.2004, p. 1. ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

(8) On 7 December 2012, Ryanair submitted a revised version of the commitments. Further to the submission of these commitments, the Commission launched a market test. Following the result of the market test, Ryanair submitted a modified set of commitments on 15 January 2013. In view of the results of the second market test, Ryanair submitted a revised set of commitments on 1st February 2013 (hereinafter 'final set of commitments'). A third market test was launched.

(9) The market investigation revealed that the final set of commitments offered by Ryanair were not able to remedy the identified significant impediment to effective competition.

(10) Therefore, on 27 February 2013, the Commission adopted pursuant to Article 8(3) of the Merger Regulation a decision declaring the transaction to be incompatible with the internal market and the EEA agreement (the 'Decision').

IV. EXPLANATORY MEMORANDUM

A. The relevant product markets

(11) Ryanair and Aer Lingus both provide scheduled passenger air transport services within the EEA and their activities overlap on 46 routes to/from Ireland. There were no other markets affected by the transaction other than those relating to passenger air transport services.

1. *Traditional point of origin/point of destination (O&D) pair approach*

(12) In line with its decisional practice, the Commission assessed the transaction on the basis of the 'point of origin/point of destination' (O&D) city-pair approach, which reflected demand-side substitutability. As a result, every combination of a point of origin and a point of destination was considered a separate market.

(13) In addition, in the case at hand, the Commission considered that connecting passengers were not part of the same market as O&D passengers and that it was not appropriate to define an overall market for short-haul flights from/to Ireland, given the limited degree of supply-side substitutability between different O&D, nor a market for 'destination insensitive customers', given that for the vast majority of passengers a flight from Ireland to one destination was not simply substitutable with a flight to another destination.

2. *Airport substitutability*

(14) In line with its previous decisional practice, when defining the relevant O&D markets for passenger air transport services, the Commission examined whether flights from or to airports which had sufficiently overlapping catchment areas could be considered as substitutes in the eyes of passengers.

(15) In its assessment of airport substitutability, the Commission relied on the following qualitative and quantitative sources of evidence: (i) the Commission's precedents and in particular the 2007 Decision, where airport substitutability to/from Ireland was assessed in depth, (ii) a 'first proxy' airport catchment area of 100 km/1 hour driving time to the relevant city centre, for determining whether airports appear prima facie as substitutable, (iii) the outcome of the market investigation, (iv) price monitoring behaviour of Aer Lingus and Ryanair, (v) the way in which Ryanair marketed its services and (vi) a price correlation analysis, which provided quantitative support to the conclusions reached by the Commission on market definition. The Commission reached its conclusions by bundling the evidence.

(16) In the present case, substitutability of scheduled air transport services from different airports was relevant for three reasons: (i) for the determination of whether the activities of the Parties overlap, (ii) for the assessment of competition constraints of airlines operating at other airports and (iii) for the assessment of entry prospects at the relevant additional airports.

(17) The activities of Ryanair overlapped with Aer Lingus on 16 routes ([1]) on which Aer Lingus and Ryanair fly between the two same airports and on which there were no issue of airport substitutability because there were no other identified relevant airports.

(18) On additional 10 routes ([2]), although there was more than one airport in the origin or destination city, Ryanair and Aer Lingus fly to the same airport ('airport pair' approach). For some routes, the other airport was equally served by one of the Parties or by another airline. For these routes, airport substitutability was relevant in particular for the assessment of entry projects of the Parties' potential competitors. However, as the Commission did not identify any entry/expansion plans, which would lead to timely, likely and sufficient entry/expansion to dispel the competition concerns identified for the relevant routes, it was not necessary to reach a definitive conclusion as regards the substitutability of these airports for routes from Dublin, Cork and Shannon as relevant.

([1]) Dublin–Berlin, Dublin–Budapest, Dublin–Faro, Dublin–Fuerteventura, Dublin–Gran Canaria, Dublin–Ibiza, Dublin–Lanzarote, Dublin–Madrid, Dublin–Malaga, Dublin–Marseille, Dublin–Nice, Dublin–Palma, Cork–Malaga, Cork–Faro, Cork–Lanzarote, Cork–Palma.

([2]) Dublin–Barcelona El Prat/Girona/Reus, Dublin–Alicante/Murcia, Dublin–Tenerife South/Tenerife North, Dublin–Manchester/Liverpool/Leeds Bradford, Dublin–London Heathrow/Gatwick/Luton/Stansted/City/Southend, Cork–London Heathrow/Gatwick/Stansted, Dublin–Birmingham/East Midlands, Dublin–Edinburgh/Glasgow, Cork–Alicante/Murcia, Cork–Tenerife South/Tenerife North.

(19) On 19 routes ('city pairs') [1], Ryanair and Aer Lingus fly from Ireland to different destination airports. For these routes, airport substitutability was relevant for establishing whether there was an overlap between the Parties. The Decision assesses substitutability for a substantial proportion of Aer Lingus' and Ryanair's passengers who travel from/to 17 airports [2] to/from Dublin, Cork, Shannon or Knock.

(20) For the remaining one additional route, Dublin–Bristol/Cardiff/Exeter, the question of airport substitutability was relevant only for ascertaining whether the Parties would face competition constraints from flights from Exeter to Dublin (as the Parties fly to the same airport (Bristol), the question was not relevant for ascertaining whether there was an overlap).

(21) The Decision concludes that the following airports are substitutable on the routes to/from Dublin, Cork, Shannon or Knock whereas the question whether scheduled point-to-point passenger air transport services between Dublin or Cork as relevant and some [3] airport pairs belong to the same market, was left open as it did not have any consequences on the competitive assessment:

Barcelona El Prat, Girona and Reus	London Airports (Heathrow, Gatwick, Stansted, Luton and City)	Stockholm Arlanda and Skavsta
Bilbao and Santander	Manchester and Liverpool (for Cork and Shannon)	Toulouse and Carcassonne
Birmingham and East Midlands (for Knock)	Milan Linate, Malpensa and Bergamo	Venice and Treviso
Brussels and Charleroi	Munich and Memmingen	Vienna and Bratislava
Glasgow and Prestwick	Paris CDG, Beauvais and Orly	Warsaw and Modlin
Frankfurt and Hahn	Rome Fiumicino and Ciampino	

3. *Market for direct flights and indirect flights*

(22) According to the Commission's previous decisional practice, the level of substitutability of indirect flights to direct flights largely depends on the duration of the flight. As a general rule, the longer the flight, the higher the likelihood that indirect flights exert a competitive constraint on direct flights.

(23) The Commission considered that, because the overlap routes in the case at hand are short-haul (i.e. below six hours flights duration) or medium-haul flights (routes of more than three hours where direct flights normally do not provide the option of one-day return trips), indirect flights are unlikely to exercise a competitive constraint on direct flights. However, the Decision concludes that the question whether indirect flights would belong to the same market can be left open, as it would ultimately not change the outcome of the competitive assessment.

4. *Distinction between groups of passengers*

(24) In the 2007 Decision, the Commission concluded that it was not appropriate to define separate markets for different categories of passengers, in particular on the basis of the finding that both airlines did not discriminate between different types of passengers by opting for one-way restricted tickets only on short-haul routes. Ryanair, Aer Lingus and a large majority of respondents to the market investigation upheld the same conclusion in the case at hand.

(25) The Commission concluded that it was not appropriate to define separate markets for different categories of passengers, whether according to the time sensitive/non-time sensitive distinction, the business/leisure passenger distinction or the 'time between booking and departure' approach.

5. *Substitutability between charter services and scheduled flights*

(26) Ryanair claimed that in particular on leisure routes, charter airlines provided significant competitive constraints to the services of the Parties. Besides, Ryanair pointed out that the decline in the charter business ex-Ireland was a direct consequence of Ryanair's expansion into several charter-type routes.

(1) Dublin–Bilbao/Santander, Dublin–Brussels/Charleroi, Dublin–Milan Malpensa/Milan Linate/Bergamo, Dublin–Frankfurt/Frankfurt Hahn, Dublin–Rome Ciampino/Rome Fiumicino, Dublin–Vienna/Bratislava, Dublin–Paris CDG/Paris Beauvais/Orly, Dublin–Toulouse/Carcassonne, Dublin–Glasgow/Prestwik, Dublin–Venice/Treviso, Dublin–Munich/Memmingen, Dublin–Warsaw/Warsaw–Modlin, Dublin–Stockholm Arlanda/Skavsta, Cork–Barcelona El Prat/Girona/Reus, Cork–Manchester/Liverpool/Leeds Bradford, Knock–Birmingham/East Midlands, Knock–London Heathrow/Gatwick/Luton/Stansted/City/Southend, Shannon–Manchester/Liverpool/Leeds Bradford, Shannon–London Heathrow/Gatwick/Luton/Stansted/City/Southend.

(2) Note that while there are 19 routes on which the question of airport substitutability was relevant, there are only 17 airport pairs. These are: Barcelona El Prat, Girona and Reus; Bilbao and Santander; London Airports (Heathrow, Gatwick, Stansted, Luton and City); Stockholm Arlanda and Skavsta; Manchester, Liverpool and Leeds Bradford (for Cork and Shannon); Toulouse and Carcassone; Birmingham and East Midlands (for Knock); Milan Linate, Malpensa and Bergamo; Venice and Treviso; Brussels and Charleroi; Munich and Memmingen; Vienna and Bratislava; Glasgow and Prestwick; Paris CDG, Beauvais and Orly; Warsaw and Modlin; Frankfurt and Hahn; Rome Fiumicino and Ciampino;

(3) London Southend and the London Airports, Edinburgh and Glasgow, Manchester, Liverpool, Leeds Bradford (for Dublin), Birmingham and East Midlands (for Dublin), Bristol/Cardiff/Exeter, Alicante and Murcia, Tenerife North/South.

(27) In line with its previous decisional practice, the Commission distinguished three types of charters' activities:

(i) *The sales of package holidays*. The sales of seats included in 'package holidays' could not be considered as substitutable for seats on scheduled flights offered by Ryanair and Aer Lingus on the affected routes. This finding was upheld by the majority of the respondents to the market investigation. Most passengers purchase seats only and not package holidays.

(ii) *The sales of seats to tour operators*. From a demand-side perspective, this market is upstream to the market for seat sales to individuals and thus it is characterised by different competitive conditions. Therefore, the Commission upheld the conclusion reached in its previous decisions that 'wholesale' sales of seat packages to tour operators are not in the same market as scheduled air transport services for end customers.

(iii) *The sales of dry seats to end customers*. The Commission considers that on the same O&D route, the 'dry seat' sales of charter airlines are similar to the sale of scheduled air transport passenger transport services. However, some respondents to the market investigation pointed out that charter flights are of inferior quality when compared to scheduled flights not least because of the limited capacity of dry seats and the limited visibility to consumers (in addition to the frequencies and fare price). In any event, the Decision concludes that the question can be left open, as it would ultimately not change the outcome of the competitive assessment.

B. **Competitive assessment**

1. *General framework*

(28) Changes in market circumstances since 2007 were analysed by the Commission. In a broad overview, the main changes appeared to be: (i) the financial and economic crisis that since 2008 has affected many Member States, including Ireland; (ii) the further consolidation in the air transport sector; (iii) the drop in the number of scheduled airlines operating at Dublin airport; (iv) the increased number of routes on which Ryanair and Aer Lingus compete compared to the 2007 Decision, and the concentration levels; (v) the decreased operations of charter companies out of Dublin; (vi) the development of new infrastructure at Dublin airport.

2. *Treatment of Aer Arann*

(29) The Commission considered Aer Arann as a competitor of Ryanair, but not of Aer Lingus. Indeed, Aer Arann is closely linked to and dependent of Aer Lingus through the franchise agreement. Therefore, in the competitive assessment, the market shares of Aer Arann (operating under the Aer Lingus Regional brand) were attributed to Aer Lingus.

3. *Market shares and concentration levels*

(30) The Parties would have very high market shares on all 46 routes on which their activities overlap.

(31) The transaction would create a monopoly on 28 routes: Dublin–Alicante/Murcia; Dublin–Berlin; Dublin–Bilbao/Santander; Dublin–Birmingham/East Midlands; Dublin–Brussels/Charleroi; Dublin–Budapest; Dublin–Edinburgh/Glasgow; Dublin–Fuerteventura; Dublin–Glasgow/Prestwick; Dublin–Manchester/Liverpool/Leeds; Dublin–Marseille; Dublin–Milan/Bergamo; Dublin–Nice; Dublin–Rome; Dublin–Tenerife; Dublin–Toulouse/Carcassonne; Dublin–Venice/Treviso; Dublin–Vienna/Bratislava; Dublin–Warsaw/Modlin; Cork–Alicante; Cork–Faro; Cork–London; Cork–Manchester/Liverpool; Cork–Tenerife; Knock–Birmingham/East Midlands; Knock–London; Shannon–Manchester/Liverpool; and Shannon–London.

(32) On 18 overlap routes, the merged entity would operate alongside other carriers.

(33) On 11 of these 18 routes, the other operating carrier(s) is a charter company. The Parties' combined market shares on each of these routes would exceed 80 %.

(34) On six other routes of the 18 routes, the competitors of the Parties are scheduled carriers, whose business model is different from those of the Parties. On these six routes, the combined market shares of Ryanair and Aer Lingus would be above 50 %.

(35) On the last remaining route, Dublin–Bristol/Cardiff/Exeter, if flights between Dublin and Exeter are included in the relevant market, the Parties' competitor is Flybe, a scheduled regional carrier with a marginal market share between (5-10 %) ([1]).

4. *Closeness of competition between Ryanair and Aer Lingus*

(36) The Commission's investigation indicated that Ryanair and Aer Lingus compete actively on all the overlap routes.

(37) On the majority (28 out of 46) of the overlap routes, Ryanair and Aer Lingus are the only operating carriers. On these routes, Ryanair and Aer Lingus are by nature each other's closest competitor.

(38) Even on those routes on which Ryanair and Aer Lingus face one or more competitors, the Parties are most often by far the largest competitors, as indicated, inter alia, by the significant distance in market share between the competitor(s) and each of the Parties. The Parties are each other's closest competitors considering also the routes where a charter company operates, where each of the Parties are by far the largest competitors.

([1]) However this route would be a monopoly if the market would only comprise air transport services between Dublin and Bristol airport.

(39) Furthermore, Ryanair and Aer Lingus have similar business models which are different from most of their competitors. In particular, both Ryanair and Aer Lingus offer (primarily) point-to-point services, which are different from 'feeder-oriented' services of network carriers. They both apply true one-way pricing models, operate a single class cabin on their short-haul flights and realise most of their bookings on their website rather than via travel agents, unlike network carriers. Besides, unlike other competitors, they enjoy very high brand recognition in Ireland and they both operate significant bases in Ireland, in particular at Dublin Airport.

(40) The Commission's regression analysis confirmed the existence of a significant competitive interaction between Ryanair and Aer Lingus.

(41) The Decision concludes that Aer Lingus and Ryanair are very close, if not each other's closest competitor on all overlap routes. The transaction would therefore result in the elimination of this very close competitive relationship and of the important competitive constraint that both carriers exert upon each other pre-transaction. Customers' choices of travelling options would be substantially reduced and it is unlikely that competitors would be able to sufficiently constrain the merged entity in its market behaviour, especially concerning fare setting.

5. *Entry/Barriers to entry*

(42) The Commission's investigation confirmed that there are high barriers to entry which would make difficult any new entry to the routes where the activities of the Parties overlap.

(43) These barriers to entry related to Ryanair's and Aer Lingus' strong market positions in Ireland and, in particular, to the following factors:

(i) the strong market position of the Parties in Dublin, Cork and Shannon as a result of their established bases;

(ii) the merged entity would have the two strongest brands in Ireland and a new entrant would need considerable time and investment to upgrade its brand. Indeed, due to the announced dual branding strategy, the merged entity would have a strong market position in two different market segments (namely in the no-frills segment with the lowest fares as well as in the segment with higher service level). This entry barrier was equally relevant for routes to and from Dublin, Shannon, Cork and Knock;

(iii) the fear of aggressive retaliation by the merged entity in case of entry. This entry barrier was equally relevant for routes to and from Dublin, Shannon, Cork and Knock;

(iv) the fact that new entrants may face difficulties in obtaining early morning peak hour slots and parking stand at Dublin airport. Besides, capacity constraints at certain destination airports would contribute to the already high barriers to entry;

(v) the level of airport charges and taxes at Dublin airport was likely to deter new entrants from opening routes from or to Dublin;

(vi) the Irish market is not considered by many competitors as an attractive market and the economic downturn in Ireland (but also in other Member States such as Spain) have further deteriorated the attractiveness of the Irish market compared to in 2007;

(vii) finally, the ability of the Parties to influence decision making at the Irish airports for example as regards slot coordination issues (in Dublin), operational issues, the use and development of airport infrastructure at the airports of Dublin, Cork and Shannon.

(44) The conclusion that the entry barriers in this case are high was corroborated by the fact that in recent years only limited entry events took place (by airlines other than Ryanair of Aer Lingus) on the overlap routes.

6. *Forms of entry/expansion*

(45) The results of the market investigation indicated that, in order to be an effective competitor with the merged entity at each of Dublin, Cork and Shannon airports, a new entrant would need to establish a base in each of these respective airports. Without a large number of routes over which to spread these fixed costs, it would be difficult to achieve the same level of cost-efficiency enjoyed by both Ryanair and Aer Lingus. Moreover, a base allows for having an interesting schedule with early morning departures and late evening arrivals and sufficient operations and accordingly market presence and brand awareness.

(46) The Decision concludes that a base in Ireland (at Dublin in particular) would thus appear crucial for carriers in order to be able to provide adequate coverage of the Irish market and exert adequate competitive pressure on the merged entity.

7. *Entry plans by actual and potential competitors*

(47) The Commission analysed whether potential competitors would have entry and expansion plans on an individual basis or an aggregate level, which would be sufficient to offset the anti-competitive effects of the transaction on the routes of concern.

(48) Besides, in the case at hand, competing entry would have to occur on 32 overlap routes where Ryanair have bases at both ends of the routes. Entry in such circumstances appeared even more difficult. In addition, according to the majority of competitors, the mere possibility of entry would not discipline the merged entity post-transaction.

(49) The Decision concludes that the anti-competitive effects of the transaction would not be sufficiently compensated by entry on an isolated route or expanded entry by carriers operating some routes to and from their home bases.

8. *Actual competition* [1]

(50) The Decision concludes that the transaction would likely significantly impede effective competition in particular as a result of the creation of a dominant position on the following 28 routes, where the merged entity would enjoy a monopoly post-transaction: Dublin–Alicante/Murcia; Dublin–Berlin; Dublin–Bilbao/Santander; Dublin–Birmingham/East Midlands; Dublin–Brussels; Dublin–Budapest; Dublin–Edinburgh/Glasgow; Dublin–Fuerteventura; Dublin–Glasgow International/Prestwick; Dublin–Manchester/Liverpool/Leeds; Dublin–Marseille; Dublin–Milan; Dublin–Nice; Dublin–Rome; Dublin–Tenerife; Dublin–Toulouse/Carcassonne; Dublin–Venice/Treviso; Dublin–Vienna/Bratislava; Dublin–Warsaw/Modlin; Cork–Alicante; Cork–Faro; Cork–London; Cork–Manchester/Liverpool; Cork–Tenerife; Knock–Birmingham/East Midlands; Knock–London; Shannon–Manchester/Liverpool and Shannon–London.

(51) The Decision concludes that the transaction is likely to significantly impede effective competition as a result of the creation of a dominant position on the following seven routes where other scheduled carriers operate: Dublin–Bristol/Cardiff/Exeter (irrespective of the precise market definition); Dublin–Frankfurt; Dublin–London; Dublin–Madrid; Dublin–Munich; Dublin–Paris, and Dublin–Stockholm. Moreover, the transaction is also likely to result in the elimination of the very close competitive relationship between Ryanair and Aer Lingus and thus to eliminate the important competitive constraint that both carriers exert upon each other pre-transaction on each of these routes. Customers' travelling options would therefore be substantially reduced and it is unlikely that the other competitor(s) active on each of these routes would be able to constrain the merged entity's market behaviour sufficiently, especially with regard to fare setting on each of these routes.

(52) The Decision concludes that the transaction would likely significantly impede effective competition in particular as a result of the creation of a dominant position on the following 11 routes, where charter companies operate: Dublin–Barcelona, Dublin–Faro, Dublin–Gran Canaria, Dublin–Ibiza, Dublin–Lanzarote, Dublin–Malaga, Dublin–Palma, Cork–Barcelona, Cork–Lanzarote; Cork–Malaga and Cork–Palma. Moreover, the transaction is also likely to result in the elimination of the very close competitive relationship between Ryanair and Aer Lingus and thus to eliminate the important competitive constraint that both carriers exert upon each other pre-transaction on these routes. Customers' travelling options therefore would be substantially reduced and it is unlikely that charter airlines would be able to constrain the merged entity's market behaviour sufficiently, especially with regard to fare setting, on these routes.

9. *Potential competition*

(53) Competition on the routes currently operated by both Ryanair and Aer Lingus ex Dublin, Shannon, and Cork, where both carriers have bases, cannot be regarded in isolation. Such an isolated analysis would imply that the respective product markets are entirely independent from each other. Both carriers have the necessary flexibility to shift and add routes from their existing bases at these airports in reaction to changes in the competitive structure of the different routes operated from their bases. The analysis therefore must also be dynamic looking at what extent the disappearance of one carrier's closest and most important competitor might eliminate potential competition that would have constrained Ryanair and Aer Lingus in the absence of the transaction.

(54) The Commission analysis pointed out that as a consequence of the dynamic pattern of entry in competition with each other and the very limited impact of entry by other carriers on the Parties, Ryanair and Aer Lingus exert a potential competitive constraint on each other.

(55) Following a cautious approach, the Decision concludes that the transaction would likely lead to a significant impediment to effective competition, in particular as a result of the creation or strengthening of a dominant position, by eliminating the most credible potential entrant on the following six routes: (i) Ryanair routes of potential competition: Dublin–Bologna, Dublin–Bordeaux, Cork–Paris/Beauvais, Cork–Munich/Memmingen, Cork–Birmingham; (ii) Aer Lingus route of potential competition: Dublin–Newcastle.

C. **Efficiencies**

(56) Ryanair claimed that the transaction would generate substantial efficiencies, which would benefit all customers. Ryanair would apply its cost-cutting expertise to improve Aer Lingus' efficiency, lower its costs and air fares, and enhance its competitiveness against other airlines at primary airports.

[1] The Commission concluded that all the routes exited by the Parties following the announcement of the transaction are not transaction-specific and are not treated as an overlap between the Parties for the purpose of the competitive assessment. These routes are: Dublin–Krakov, Dublin–Verona and Dublin–Vilnius.

(57) Ryanair did not provide relevant information intended to prove that the efficiencies were verifiable, merger specific and likely to be passed on consumers, nor has the Commission found verifiable evidence that Ryanair could reduce Aer Lingus costs without offsetting reductions in other elements beneficial to consumers, such as quality of service or airport location. Furthermore, a number of efficiencies claimed by Ryanair were likely to be not merger specific (such as staff reduction costs, fuel costs, and distribution costs).

(58) Therefore, the claimed efficiencies did not meet the three cumulative conditions set out in the Horizontal Merger Guidelines. In addition, given the extremely high combined market shares and the absence of timely, sufficient, and likely entry, it appeared that any sufficient pass-on of alleged efficiencies to consumers would not take place.

D. **Commitments**

1. *Description of the final set of commitments*

1.1. Divestiture of Aer Lingus' operations on 43 overlap routes to Flybe

(59) Ryanair offered to transfer to Flybe a new and stand-alone company (hereinafter the Divestment Business, possibly to be called 'Flybe Ireland'), to which it would transfer a number of assets, including inter alia cash of EUR 100 million, a lease for at least nine Airbus A 320, airport slots (at origin and destination), personnel, a royalty-free, non–exclusive, non-sub-licenceable and non-transferable license to the 'Aer Lingus' trademark for three years. This trademark would be used in conjunction with the 'Flybe' brand name.

(60) Ryanair committed to develop, in consultation with Flybe, a business plan for the Divestment Business for the first year, reflecting an agreed amount of projected annual pre-tax profits.

(61) Flybe would operate an agreed schedule on 43 routes during a minimum period of six IATA seasons. Provided that the aggregate weekly frequencies per season scheduled by the Divestment Business on all routes to/from Ireland remained unchanged, Flybe was only required to schedule flights on: (i) 90 % of the Flybe Routes in the third and fourth IATA Season of the first six IATA seasons and (ii) 85 % of the Flybe Routes in the fifth and sixth IATA Season of the first six IATA seasons.

(62) In case of misuse of slots, a penalty mechanism was set on a sliding scale that reflected the importance of the route and whereby the penalties diminishes progressively over the duration of the first six IATA seasons.

(63) During the first six IATA seasons, Flybe would set up base at Dublin Airport, and would operationally base one aircraft at Cork airport.

(64) During the first three IATA seasons, the welcome screen of Aer Lingus's website would be divided into two halves bearing the trade names and logos of Aer Lingus and the Divestment Business respectively, both being hyper-linked to their respective booking websites. After the first three IATA seasons, a banner would be put at the top of the Aer Lingus Website with a web link to the Divestment Business' website.

(65) With respect to six routes operated by Aer Arann, Flybe was intended to satisfy its obligation to operate on these routes by assuming the Aer Arann franchise agreement or by entering into a new franchise agreement with Aer Arann.

1.2. Divestiture to IAG (British Airways) of slots on three overlap routes to London

(66) During six IATA seasons, Ryanair undertook that IAG would operate on the Dublin–London, Cork–London and Shannon–London routes, using Airbus A319 or equivalent aircraft, using its own slots in combination with those divested by Ryanair:

(i) IAG and Ryanair would have entered into a Gatwick Lease Agreement or a Heathrow — Gatwick Transfer Agreement, depending on whether and when the so-called Heathrow Transfer Condition was satisfied, which consisted in the determination by both Ryanair and IAG that giving effect to the Heathrow — Gatwick Transfer Agreement would not have violated Article 10 of the Aer Lingus' Articles of Association (or other successor provision) or any other applicable law or regulation;

(ii) in case the Gatwick Lease Agreement was in effect, IAG would have operated (i) 68 weekly frequencies on the Dublin–London Gatwick route, 13 weekly frequencies on the Cork–London Gatwick route and seven weekly frequencies on the Shannon–London Gatwick route using airport slot pairs owned by Ryanair and (ii) an additional two weekly frequencies on the Dublin–Gatwick Route, one weekly frequency on the Cork–Gatwick Route and seven weekly frequencies on the Shannon–Gatwick Route using slots owned or to be acquired by IAG;

(iii) in addition to operation of Gatwick slots, IAG would have operated seven weekly frequencies on the Dublin–Heathrow route using slots that IAG would have leased from Ryanair. According to a revised IAG Agreement, IAG would also have entered into an additional Heathrow Lease Agreement;

(iv) if the Heathrow Transfer Condition was satisfied, IAG might have exercised its right to terminate the Gatwick Lease Agreement (and the Heathrow Lease Agreement, if it was in force) and give effect to the Heathrow — Gatwick Transfer Agreement (IAG Call Option). In particular, IAG would have transferred its Gatwick slots (as identified above) to operate on Dublin — Gatwick and seven additional Gatwick slots in exchange for slots owned by Aer Lingus at London Heathrow for IAG to operate: (a) 70 weekly frequencies on the Dublin Heathrow route, (b) 14 weekly frequencies on the Cork — Heathrow route and (c) 14 weekly frequencies on the Shannon–Heathrow route. A revised IAG Agreement added a new Heathrow Lease Agreement and modified the number of Gatwick slots which Ryanair would have obtained in exchange for the Heathrow slots.

1.3. Additional slot divestitures on London–Ireland routes

(67) Pursuant to a slot transfer procedure, and during six IATA seasons, Ryanair committed to transfer, or to cause Aer Lingus to transfer to any interested carrier sufficient slots to operate frequencies with its own aircraft on the Dublin–London, Cork–London and/or Shannon–London routes, provided that the number of slots transferred did not exceed the route overlap difference on the relevant route.

1.4. Potential competition

(68) During the first six IATA seasons and at all times thereafter, Ryanair committed to transfer, or to cause Aer Lingus to transfer, slots for the potential competition routes to any interested carrier.

2. *Assessment of the final set of commitments*

2.1. Flybe was not a suitable purchaser

(69) The Commission considered that Flybe was not a suitable purchaser in whose hands the Divestment Business would become an active competitive force in the market.

(70) First, the Commission considered that, in the absence of specifically defined assets to be divested as part of the Flybe Ireland business, there was insufficient evidence to conclude that the Divestment Business would possess the necessary assets in order to be a viable and competitive business.

(71) Second, with respect to Flybe's business model, the Commission considered that while operations of routes connecting Ireland to the United Kingdom would fit in Flybe's current business model, depending on the aircraft used, other routes, especially leisure routes with longer sector lengths, would not fit in Flybe's current business model. The Commission moreover noted that Flybe did not have experience with operating with Airbus A320 aircraft and would thus face a challenge in understanding the market in which it would operate.

(72) Third, the Commission considered that the arrangement whereby Ryanair would prepare a one year business plan for Flybe Ireland, and the arrangement whereby Ryanair would proceed to the (re-)structuring of the cost base of the Divestment Business, even though not leading to a lasting relationship between the merged entity and the Divestment Business, did not seem reconcilable with the concept of independent competitors.

(73) Fourth, given that Flybe's previous experiences in operating in new markets were rather different from the proposed acquisition of Flybe Ireland, given that Flybe only had limited experience in the Irish market, and given that Flybe, unlike Aer Lingus, had only limited experience and track record in competing with Ryanair, the Commission considered that these elements did not provide sufficient evidence to support the conclusion that Flybe had the proven relevant experience to maintain and develop Flybe Ireland as a viable and active competitive force in competition with the merged entity.

(74) Fifth, the Commission concluded that Flybe did not possess the financial resources to maintain and develop Flybe Ireland as a viable and active competitive force in competition with the merged entity in the medium-term.

(75) Sixth, in terms of its ability to compete with the merged entity post-transaction, the Commission considered that, despite the proposed trademark licence, website publicity measures, and capital injection in Flybe Ireland, it was uncertain whether Flybe would be in a position to establish a sufficiently strong brand, in particular as regards passengers originating from Ireland, which would allow it to effectively constrain the merged entity so as to remove the competition concerns identified by the Commission. Furthermore, Flybe Ireland's ability to effectively constrain the merged entity so as to remove the competition concerns identified by the Commission was likely to be affected by the proposed limited base operations and the proposed number of divested frequencies and implied capacities. Lastly, the Commission considered it unlikely that Flybe Ireland's revenues and cost base would enable it to operate profitably on the 43 routes.

(76) Seventh, the Commission concluded that Flybe would not have a sufficient incentive to continue to operate on a lasting basis, at least on a substantial part of the 43 Flybe Routes.

(77) Moreover, the Commission also concluded that the Commitments with respect to Flybe were not likely to be implemented in a timely manner as far as the franchise agreement was concerned. Also, the Commission could not clearly determine that the proposed Commitments, once implemented, would fully and unambiguously resolve the competition concerns identified in this Decision as regards the Aer Arann routes.

(78) Lastly, the Commitments were not clear cut and raised doubts as to whether they would be implemented in a timely manner.

2.2. Uncertainties as regards the three London routes — IAG

(79) The Commission was not able to conclude with the requisite degree of certainty that the new commercial structures resulting from the final set of commitments as regards the three London routes were sufficiently workable and lasting to ensure that the significant impediment to effective competition on the three London routes did not materialise during and after the Minimum Period.

(80) Irrespective of whether the Gatwick Lease Agreement or the Heathrow Gatwick Transfer Agreement would be in effect, the overall capacity on the routes was likely to decrease and the merged entity would remain dominant in terms of frequencies and capacity on the three London routes (Dublin, Cork and Shannon). Furthermore, IAG has a different business model focusing more on business and connecting passengers (relevant if the Heathrow Gatwick Transfer Agreement is in effect). Therefore, the Commission considered that IAG would not sufficiently constrain the merged entity post-transaction during the Minimum Period.

(81) The Commission considered that it was most likely that IAG would exit these three routes from Gatwick and significantly scale back the operations on these three routes from Heathrow at the end of the Minimum Period. The Commission had also not identified any sufficient, likely and timely entry on these routes during its market investigation.

(82) Lastly, the complexity of the Commitments, the inconsistencies between the Commitments, the Form RM and the IAG Agreement and the dispute resolution mechanism, raised doubts as to whether the Commitments would be implemented in a timely manner.

2.3. Conclusion

(83) Based on all available evidence, including the results of the market test, the Commission considered that the final set of commitments would not likely lead to the entry of new competitors able to exert sufficient competitive constraint on the merged entity.

(84) The final set of commitments did not allow the Commission to conclude, with the requisite degree of certainty, that it would be possible to implement them in a timely manner and that they would be sufficiently workable and lasting to ensure that the impairment of effective competition which those commitments were intended to remove would not be likely to materialise in the relatively near future.

(85) The Commission could not clearly determine that the final set of commitments, once implemented, fully and unambiguously resolved the competition concerns identified in the Decision.

(86) It was therefore concluded that the commitments offered by Ryanair were not able to remedy the identified significant impediment to effective competition, and, thus, could not render the transaction compatible with the internal market.

V. **CONCLUSION**

(87) For the reasons mentioned above, the Decision concludes that the proposed concentration would have significantly impeded effective competition in the internal market or in a substantial part of it.

(88) Consequently the concentration was declared incompatible with the internal market and the EEA Agreement.

NOTICES FROM MEMBER STATES

Reorganisation Measures

Decision regarding a reorganisation measure for ‘International Union Insurances SA’

(Publication made in accordance with Article 6 of Directive 2001/17/EC of the European Parliament and of the Council on the reorganisation and winding-up of insurance undertakings)

(2013/C 216/08)

Insurance undertaking	International Union Insurances SA, based at Ilia Iliou 66 11764 Athens, Company Registration No 12836/B/05/1986, Tax No 094058455, and legally represented by Andreas Valiraki, Chairman of the company's Management Board.
Date, entry into force and type of decision	Decision No 80/3/28.6.2013 of the Committee for Credit and Insurance Matters of the Bank of Greece on the prohibition of the free disposal (freezing) of all existing bound and free assets held by International Union Insurances SA at the time the Decision is adopted and all bound and free financial resources held by the company whether in Greece or abroad. Furthermore, all the company's insurance business, covering all its activities in all insurance sectors, are suspended. Entry into force: 28.6.2013 Expiry date: 15.7.2013
Competent authority	Bank of Greece Eleftheriou Venizelou 21 102 50 Αθήνα/Athens ΕΛΛΑΔΑ/GREECE
Supervisory authority	Bank of Greece Eleftheriou Venizelou 21 102 50 Αθήνα/Athens ΕΛΛΑΔΑ/GREECE
Administrator appointed	
Applicable law	Greek law in accordance with Articles 9 and 17c of Legislative Decree No 400/1970

V

(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION POLICY

EUROPEAN COMMISSION

Prior notification of a concentration

(Case COMP/M.7001 — Carlyle/Klenk Holz)

Candidate case for simplified procedure

(Text with EEA relevance)

(2013/C 216/09)

1. On 22 July 2013, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 [1] by which the undertaking CSP III Klenk (Cayman), Ltd, an acquisition vehicle owned and controlled by funds managed by The Carlyle Group (USA), acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Klenk Holz AG (Germany) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— The Carlyle Group is a global alternative asset manager,

— Klenk Holz AG is a manufacturer of wood products for the construction industries and DIY home use. In addition Klenk produces and sells roundwood and fuel wood and provides advisory and planning services. Klenk also has activities in the generation of electricity.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of the EC Merger Regulation. However, the final decision on this point is reserved. Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under the EC Merger Regulation [2] it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (+32 22964301), by email to COMP-MERGER-REGISTRY@ec.europa.eu or by post, under reference number COMP/M.7001 — Carlyle/Klenk Holz, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

(1) OJ L 24, 29.1.2004, p. 1 (the 'EC Merger Regulation').
(2) OJ C 56, 5.3.2005, p. 32 ('Notice on a simplified procedure').

Prior notification of a concentration

(Case COMP/M.6922 — Triton/Logstor)

(Text with EEA relevance)

(2013/C 216/10)

1. On 19 July 2013, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 [1] by which the undertaking Tri-Langley Acquisition ApS, an acquisition vehicle that is ultimately controlled by Triton Managers III Limited and TFF III Limited, ('Triton', Jersey) acquires within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of LRA III ApS, ('Logstor', Denmark) by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— Triton: private equity investment firm which has portfolio companies active in various sectors. One of the portfolio companies of Triton is Battenfeld-Cincinnati, which is active in the manufacture and sale of plastic processing machines and extruders,

— Logstor: manufacture and sale of pre-insulated pipes.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope the EC Merger Regulation. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax (+32 22964301), by e-mail to COMP-MERGER-REGISTRY@ec.europa.eu or by post, under reference number COMP/M.6922 — Triton/Logstor, to the following address:

European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

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[1] OJ L 24, 29.1.2004, p. 1 (the 'EC Merger Regulation').

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