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European Commission Block of Ryanair/Aer Lingus Merger on Competition Law Grounds Upheld on Appeal

On July 6, 2010, the European Commission's 2007 decision which had blocked under the EU Merger Regulation (EUMR) the attempted takeover of Aer Lingus by Ryanair was upheld by the EU General Court after an appeal brought by Ryanair¹.

Although the Commission has dealt with various merger cases involving airlines in recent years, this was the first time that it was required to assess a combination of the two principal airlines in one country, with both operating from the same "home" airport (Dublin) as "low-cost" airlines on a "point-to-point" basis². Further, the number of overlapping routes was unprecedented compared with other airlines cases.

The EU General Court had previously endorsed the Commission's approach to assessing airline mergers in its 2007 confirmation of the conditional clearance under the EUMR of the Air France/KLM merger, which had been the subject of an appeal by easyJet. Although the confirmation by the court of the rejection of the Aer Lingus takeover was therefore not surprising, the case is nevertheless of interest due to

¹ The court also gave its judgment on the same day in a separate, related case brought by Aer Lingus against a Commission decision. This concerned the Commission's decision not to require Ryanair to divest its minority holding in Aer Lingus acquired as part of the attempted takeover (which Ryanair still has). The court also endorsed the Commission's analysis in that case. This article does not consider this case.

² In addition to its short-haul network operating to and from Ireland, in 2006 Aer Lingus operated long-haul services to the U.S.A. and Dubai. These latter activities were not relevant to the analysis.

its detailed consideration and endorsement of the Commission's procedures and analysis, including in relation to the remedies offered by Ryanair during the procedure.



1. The application of the EU Merger Regulation

The EUMR applies to mergers and acquisitions and certain joint ventures in which the parties meet certain worldwide and EU-wide turnover thresholds. The issue of whether the thresholds were met in this case depended on the geographical allocation of the parties' turnover in the EU, which is always a difficult question in airline cases. The Commission analysed this issue on two bases and concluded that under either the transaction would qualify for investigation under the EUMR. The two bases were:

- turnover is allocated based on the place of departure of a flight and a return flight is considered as a separate flight; and
- turnover is allocated 50/50 between country of origin of a flight and country of destination.

This analysis and the Commission's conclusion that the EUMR did apply to the transaction was not the subject of the appeal.

2. The Commission's analysis of the substance

The appeal considered various matters arising out the Commission's analysis of the substance of the transaction. This analysis is summarised below.

Market definition

In any merger control case it is first necessary to define the relevant markets affected by the transaction, or in other words the business activities impacted by the transaction. This was a complex issue in this case. The Commission concluded (after some 80 pages of analysis in its decision) that the relevant markets in the case were the markets for direct scheduled passenger air transport services between a given point (or region) of origin and a given point (or region) of destination. This is its traditional approach in airline cases.

The markets were therefore direct scheduled passenger air transport services between Dublin, Cork and Shannon (the Irish cities from which the parties operated) on the one hand and a range of other European cities/regions (Alicante, Barcelona, Berlin, Bilbao/Vitoria, Birmingham, Bologna, Brussels, Edinburgh, Faro and Frankfurt to name just a few) on the other.

The Commission found that the proposed transaction would lead to overlaps in the activities of the parties in respect of 35 pairs of cities. It also found that the transaction might raise concerns in relation to a large number of pairs of cities where only one of the parties operated.

Competitive assessment

The Commission then ran through a very detailed analysis of the effects of the concentration (following the analytical framework defined in its guidelines on the assessment of horizontal mergers under the EUMR).

First, the Commission analysed the market shares of Ryanair and Aer Lingus in respect of the 35 routes on which their services overlapped. It found that the concentration would create a monopoly (100% market share) on 22 routes and would lead to very significant market shares (all above 60%) on the 13 others. The Commission also considered that the two companies were "closest competitors" on all of these routes and that, contrary to the statements made by Ryanair, the two companies were competing with each other. The merger would eliminate actual competition on the 35 routes on which their services overlapped and it would also remove potential competition on 15 other routes on which there was no overlap (i.e. on which only one of the parties operated).

Secondly, the Commission noted that the “fragmented customers” of Ryanair and Aer Lingus did not have any “countervailing buyer power” and only limited or no possibilities of switching suppliers.

Thirdly, the Commission examined whether the entry of new competitors onto the market or the expansion of existing competitors was likely to eliminate the anti-competitive effects of the concentration, before coming to the conclusion that that would not be the case.

Fourthly, against this general background, the Commission went on to examine on a detailed route-by-route basis the 35 routes on which the parties’ services overlapped (“in order to take due account of the particularities of each route”). It found that the concentration would “significantly impede effective competition as a result of the creation of a dominant position” (the relevant legal test, obliging the Commission to block the merger, unless suitable remedies were proposed) on each of the routes.

Fifthly, the Commission examined whether the gains in efficiency claimed by Ryanair were sufficient to counterbalance the negative effects on competition produced by the concentration. It concluded that that was not the case since those gains were not verifiable, they were not specific to the concentration and they were not likely to benefit consumers (these being the relevant legal tests).

The Commission’s conclusion was therefore that the transaction could not be approved under the EUMR, unless suitable remedies (commitments) were put forward by Ryanair.

3. Commission’s analysis of the proposed remedies

Remedies can be put forward by parties to a problematic transaction so as to remove the problematic issues identified by the Commission, allowing it to clear it, subject to the remedies actually being implemented. The standard remedy in a transaction is the divestment of a business from one or other party, which will commonly remove the problematic overlap between them. In airline cases, by contrast, the normal remedy is a slot divestment, since congestion at airports is commonly a significant barrier to entry to competing providers.

Reflecting this standard approach, Ryanair put forward a slot-based remedy (slots at London Heathrow, Dublin, Shannon and Cork), together with certain remedies concerning the Aer Lingus fares and brand and a “frequency freeze” on certain routes. It also proposed a so-called “up front” solution, under which Ryanair would acquire control over Aer Lingus only after a suitable new entrant was found.

The Commission rejected these proposed remedies on procedural and substantive grounds. The substantive concern was that, unlike a normal airline case, in this case transfer of slots alone was not sufficient to lead to the required likelihood of new entry which would provide significant competitive constraints to Ryanair/Aer Lingus on all the overlap routes. Entry, even with slots, was unlikely for several reasons:

- the strong position of Ryanair and Aer Lingus in Ireland;
- the risks and costs of an efficient entry against these two strong airlines with recognised brands on the affected routes;
- Ryanair’s reputation of aggressive competition against new entrants

The Commission pointed to the fact that in the past there were only a handful of successful new entrants to routes to/from Ireland and that even the second strongest low-cost carrier in Europe – easyJet – had not succeeded in establishing services to Ireland and ceased flying there in 2006.

These problems with the remedy could not, in the Commission’s view, be cured by an “up-front” buyer approach (whatever the buyer, the problems remained).

The Commission therefore rejected the proposed remedies and blocked the proposed transaction.

4. The Court’s analysis of the substance

Ryanair challenged in its appeal the Commission’s assessment of the substance of the transaction and also its rejection of the proposed remedies.

So far as concerns the substance, the General Court’s judgment is a “slam dunk” victory for the Commission. Ryanair put forward a very wide range

of arguments concerning the Commission's analysis of the competitive relationship between Ryanair and Aer Lingus, the Commission's analysis of barriers to entry, the Commission's route-by-route analysis and the Commission's analysis of the efficiencies issue. All of these were roundly rejected by the court, as to the facts and the legal and economic analysis. The court commented as follows:

"[The] dominant positions [which Ryanair/Aer Lingus would have had] are monopolistic or very significant and are sufficient, in themselves, to validate the Commission's finding that the implementation of the merger must be [blocked]."

5. The Court's analysis of the proposed remedies

The Commission also enjoyed a complete victory in relation to its analysis of the remedies proposed by Ryanair, which Ryanair had hoped would be sufficient to allow the Commission to clear the case despite the substantive concerns which arose.

The court found that the Commission had been fully justified in its rejection on procedural grounds, which were largely issues specific to the case. So far as concerns the substantive concerns, the court commented that:

"this is not a transaction involving active operators which have a home airport in different countries. Ryanair and Aer Lingus operate from the same airport, Dublin Airport, where they have significant advantages which could not easily be countered by competitors . . . current and potential competitors were not ready to compete with the merged entity on all of the routes affected by the transaction."

The Commission had therefore been correct to conclude that the remedies could not cure the competition problems which the Commission had (also correctly) identified.

6. Conclusion and Recent Cases

The nature of the deal in question (merging the two main airlines in one country, both operating from the same "home" airport using a similar model) inevitably made the Ryanair/Aer Lingus case an uphill struggle for Ryanair, and the European Commission's and EU General Court's views were not in reality surprising. Nevertheless, the endorsement by the General Court of the Commission's decision was pleasing for the

Commission, as its procedures and analysis (as concerns the substantive analysis and the proposed remedies) were fully endorsed. A route-by-route analysis of the impact of airline mergers has once again been confirmed as the correct way to proceed. More broadly, the case can be seen as judicial approval for the improvements to the Commission's internal procedures introduced in recent years.

Following the General Court's ruling on July 6, 2010, the Commission has looked at several airline mergers:

- On July 30, 2010, the Commission started a phase two (detailed) investigation under the EUMR into the proposed Olympic Air/Aegean Airlines merger. According to the Commission, the transaction "would lead to very high market shares and even monopolies on many domestic routes in Greece and also on a number of international routes". Concerns were also identified in relation to the provision of PSO (public service obligation) routes in Greece (in relation to which the two airlines are seen as the strongest and most credible bidders in Greece) and also concerning ground handling services at certain Greek airports.

It seems inevitable that similar concerns as in Ryanair/Aer Lingus will ultimately be found in this case (at least so far as concerns the overlapping routes) and that remedies will be required. The task for the purchasers (Vassilakis Group (which currently owns Aegean Airlines), Marfin Investment Group and Laskaridis Group) is likely to be to put forward remedies which the Commission finds convincing.

- The merger between British Airways and Iberia was cleared by the Commission on July 14, 2010 under the EUMR. In relation to passenger transport, the Commission examined in particular the impact of the proposed transaction on the London-Madrid and London-Barcelona routes. It found that the merged company would continue to face sufficient competition from other carriers active on these routes, and therefore that passengers would have adequate alternatives to fly on these routes after the merger.

The Commission also examined the effects of the proposed merger on a number of other short- and long-haul routes on which one party offered a non-stop connection while the other party offered a one-stop connection, or on which both parties offered one-stop connections. On these routes, the Commission's investigation also showed that the merged entity would continue to face enough competition after the merger.

Finally, the Commission's investigation confirmed that the merged entity would also continue to be subject to competition from a number of competitors on the markets for air cargo transport and groundhandling services, and that the proposed merger would not have a significant impact on the market for repair and overhaul services. This case shows that it does remain possible to obtain clearance for an airline merger, even if there are fairly significant overlaps, and even without remedies.

- The merger between United Air Lines and Continental Airlines was cleared by the Commission on July 27, 2010 under the EUMR. This appears to have been a simpler clearance than the British Airways/Iberia case. The Commission found that the activities of the parties overlapped in the provision of scheduled air passenger and cargo transport between the EEA and the U.S. but that the proposed

merger only had a limited impact on air cargo transport because of the parties' limited presence in that market. As regards air passenger transport, United and Continental's networks were complementary as they had hubs in different U.S. cities.

The proposed merger therefore only lead to small, incremental increases in the market shares of the parties, where one airline markets seats on flights operated by another carrier or offers an indirect service in competition with a nonstop service operated by the other airline from its U.S. hub. The Commission's investigation therefore confirmed the complementary nature of United's and Continental's respective networks as regards transatlantic EEA-U.S. routes and the fact that their combination would not give rise to concerns on any specific route.

In each of these cases, the Commission can clearly be seen applying the principles of Ryanair/Aer Lingus (now approved by the General Court). A simple market share analysis, although the starting point, is not the end of the story. The Commission also considers the likely impact in practice of the transaction on competition between the parties, the likely reactions of customers and competitors (including particularly as regards new entry) and the specific characteristics of each route. It will be interesting to see how the parties in Olympic Air/Aegean Airlines handle the (likely) requirement for remedies to obtain clearance for that transaction.



General Terms and Conditions of Brussels Airlines and Ryanair under Judicial Review

The Commercial Court of Namur recently ordered Brussels Airlines and Ryanair to stop applying a number of clauses of their General Terms and Conditions of Carriage.

These rulings are the result of cease-and-desist claims (“stakingsvordering” / “action en cessation”) brought by the Belgian consumer association Test-Aankoop / Test-Achats against both airlines for alleged breaches of the Belgian 1991 Fair Trade Practices Act (recently replaced by the 2010 Market Practices Act).³

This Act implements a number of EU Directives into Belgian law, including Directive 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices.

Some of Test-Aankoop’s claims were upheld while others were dismissed.

These rulings reveal how a court assesses, from a Belgian consumer perspective, a number of typical “airline” clauses.

The main comments and critics of the Namur court rulings are summarized below.⁴

1. General structure of the Terms and Conditions

In both rulings it is interesting to note that the court is concerned about the structure of the airline’s website, the fact whether a full list of all applicable terms and conditions can be consulted, and the use of cross references in the Terms and Conditions.

³ Test-Aankoop has initiated similar cease-and-desist proceedings against the UK airline easyJet. EasyJet challenged the jurisdiction of the Belgian courts as well as the applicability of Belgian law. On 10 March 2010, the Namur court made an interim ruling in which it rejected easyJet’s claims, without ruling on the merits of the case.

⁴ The present article discusses the Terms and Conditions of Brussels Airlines and Ryanair which were examined by the Commercial Court of Namur in its judgments dated 10 March 2010. Therefore, reference to Brussels Airlines’ or Ryanair’s “Terms and Conditions” in this newsletter means the Terms and Conditions as discussed in the Namur judgments dated 10 March 2010.

For example, the court criticized Ryanair for the confusion caused by the presence of terms and conditions in the section “Frequently Asked Questions”. Therefore, the court ordered Ryanair to resolve this issue.

Brussels Airlines was criticized for using the undefined term “notices to passengers” (“mededelingen aan passagiers” / “avis aux passagers”) in its definition of Terms and Conditions. According to the court, this wording is misleading since it may lead passengers to believe that contractual conditions other than the Terms and Conditions are applicable.



2. Language of the general terms and conditions

Test-Aankoop criticizes Brussels Airlines and Ryanair for not having a German⁵ version of their Terms and Conditions on their Belgian websites. The Terms and Conditions on these websites are only available in Dutch, French and English.

According to Test-Aankoop, this constitutes a breach of the statutory obligation that all conditions of the agreement must be written in a clear and understandable manner.

However, the court ruled that this practice does not create a market distortion for German speaking Belgians. Therefore, the court dismissed this claim.

⁵ German is one of the three official Belgian languages, in addition to Dutch and French.

3. Accessibility to the general terms and conditions

The court further examined whether a passenger who books a flight via Brussels Airlines' or Ryanair's call center (rather than through their website or sales desks) can be adequately informed about the applicable terms and conditions prior to booking.

The court ruled as follows:

- Brussels Airlines' approach complies with the law. Indeed, passengers contacting Brussels Airlines' call center receive a welcome message including a reference to its Terms and Conditions and the possibility of requesting a copy thereof.
- Ryanair's approach does not comply with the law, since passengers contacting its call center are not offered the possibility of consulting Ryanair's Terms and Conditions.

4. Items unacceptable as baggage

The Terms and Conditions of both Brussels Airlines and Ryanair contain a clause along the following lines:

"You must not include in your baggage: items which are likely to endanger the aircraft or persons or property on board the aircraft, such as those specified in the International Civil Aviation Organisation (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air and the International Air Transport Association (IATA) Dangerous Goods Regulations, and in our regulations (further information is available from us on request). (...)".

The court ruled that a passenger is not adequately informed by the simple references to ICAO and IATA regulations – of which passengers have little or no knowledge – and to *"our regulations"*.

In this respect, the court questioned why the abovementioned clause did not contain a hyperlink to the website section *"Dangerous and liquid items"* (Brussels Airlines) and *"Prohibited Items"* (Ryanair) respectively. According to the court, these website sections comply with the basic information requirements and allow the consumers to know whether a certain item will be refused or not.

Therefore, the court decided that the abovementioned clause violates the Belgian Fair Trade Practices Act *to the extent* that it contains no hyperlink to a list of prohibited items.

5. Check-in and boarding

Brussels Airlines reserves the right to cancel the passenger's reservation if the latter does not observe the check-in deadline.

While Test-Aankoop claims that this clause causes a significant imbalance between the rights and obligations of Brussels Airlines and of the passenger, Brussels Airlines denies this and states that the check-in times are extensively published.

The court decided that the consumer's obligation to inquire about the check-in time of a flight is not manifestly exaggerated for the averagely informed consumer. The claim was therefore dismissed.

6. Code sharing

The court also ruled on the validity of Brussels Airlines' code sharing" clause.

According to this clause, a third party may act as carrier, notwithstanding the fact that (i) the passenger has a reservation with Brussels Airlines; and that (ii) the passenger holds a ticket mentioning Brussels Airlines as the carrier.

The court ruled that this clause violates the Belgian Fair Trade Practices Act which prohibits provisions enabling the "seller" (in this case Brussels Airlines) to transfer an agreement if this could reduce the consumer's guarantees, without the latter's consent.

In reaching its decision, the court gave two examples of "consumer's guarantees" which could be reduced based on the (invalid) code sharing clause:

- "Safety" guarantees

Brussels Airlines could decide to transfer the transport agreement to an air carrier that does not provide the same safety guarantees as Brussels Airlines, i.e. an air carrier which is

subject to an operating ban within the European Union.⁶

– “Quality” guarantees

The court explicitly stated that the service quality offered by Brussels Airlines is widely recognized and undoubtedly constitutes a choice criterion for the consumer. This being said, the court held that it cannot be excluded that the effective air carrier, even if it is not subject to an operating ban, does not provide services of a similar quality.

7. Ticket loss

In case of ticket loss, Brussels Airlines undertakes to replace such ticket.

However, the passenger must reimburse Brussels Airlines for any costs and losses, up to the value of the original ticket, which are necessarily and reasonably incurred by Brussels Airlines or by another air carrier for misuse of the lost ticket. In addition, the issuing carrier may charge a reasonable administration fee for this service.

According to the court, this clause may cause confusion, since it does not explain the calculation of costs and losses.

In addition, if this clause is obsolete because paper tickets are almost extinct – as Brussels Airlines claims – it should no longer be part of the Terms and Conditions.

Therefore, this clause is held to be invalid.

8. Non transferable tickets

The court also investigated whether Brussels Airlines could lawfully stipulate in its Terms and Conditions that its tickets are non transferable.

Instead of ruling on this point, the court requested the Constitutional Court (“Grondwettelijk Hof” / “Cour Constitutionnel”) to clarify whether the Belgian Act of 16 February 1994 governing travel-organisation contracts and travel-agency contracts is

compatible with articles 10 (principle of equality) and 11 (principle of non-discrimination) of the Constitution.⁷ This 1994 Act imposes certain obligations on *travel agents* which offer transport contracts, such as the obligation to guarantee the transferability of these contracts, whereas this same Act would not seem to apply to *airlines* that sell tickets directly to consumers.

This point is currently pending, awaiting a ruling from the Constitutional Court.

If the Constitutional Court decides that the 1994 Act violates articles 10 and 11 of the Constitution, this would not mean that the 1994 Act would automatically apply to airlines. Indeed, in such case legislator will have to decide whether it will modify the 1994 Act and/or make airlines subject to the 1994 Act.

9. Taxes, fees and charges

Ryanair’s and Brussels Airlines’ Terms and Conditions contain a clause along the following lines:

“Taxes, fees and charges imposed on air travel are constantly changing and can be imposed after the date that your reservation has been made. If any such tax, fee or charge is introduced or increased after your reservation has been made you will be obliged to pay it (or any increase) prior to departure. Similarly, if any such tax, fee or charge is abolished or reduced such that it no longer applies to you, or a lesser amount is due, you will be entitled to claim a refund of the difference from us.”

Test-Aankoop claims that these clauses violate the Fair Trade Practices Act since they would cause a significant imbalance in the contracting parties’ rights and obligations. In particular, it follows from these clauses that the airlines will *automatically* receive the payment of an increase while the passenger must undertake an *active* step in order to receive reimbursement.

The court ruled however that the concerned clauses do not specify the procedures to be followed in any of the hypotheses and the court therefore held that they do not cause a significant imbalance in the airlines’ and the passengers’ rights and obligations.

⁶ On the EU list of “banned airlines”, see *European Aviation Law Briefing 2007/Q2*.

⁷ See “*Prejudicial question dated 10 March 2010*” as published in the Belgian State Gazette dated 30 April 2010.

Therefore, in both cases these claims were dismissed.

10. Right to refuse passengers or baggage

The Terms and Conditions of both Brussels Airlines and Ryanair contain a “refusal” clause, listing a number of situations allowing these airlines to refuse, in their reasonable discretion, to carry the passenger or his/her baggage.

Such situations include for example the mental or physical state of the passenger, the carriage of baggage that may endanger or affect the health or safety of other passengers or crew, the fact of having failed to observe the airline’s safety or security instructions, etc.

Test-Aankoop claims that these clauses are invalid because of their vagueness and the purely unilateral nature of the airline’s right of refusal.

However, the court did not follow this reasoning and ruled that these clauses do not violate the Belgian Fair Trade Practices Act.

The court held that as a matter of principle, statutory rules and/or safety rules override consumer rights. According to the court, the situations as described in Brussels Airlines’ and Ryanair’s “refusal” clauses are the mere confirmation of the Belgian Act of 15 May 2006 describing various (safety) measures in the field of transport. In addition, the court explained that these rules justify that the airlines concerned have the authority to make an upfront assessment. Such authority is not discretionary and is subject to legal review.



11. Force majeure

(i)

The court examined the combination of a number of specific clauses of Ryanair’s Terms and Conditions and came to the following conclusions:

- If Ryanair cancels the flight because of force majeure, the passenger is entitled to reimbursement, without any other damages; and
- If the passenger cancels the flight because of force majeure, Ryanair is not required to reimburse the passenger’s ticket.

The court ruled that this clause is invalid since it causes a significant imbalance in the rights of Ryanair and its passengers. Therefore, Ryanair will have to reimburse the passenger’s ticket in case the passenger cancels his/her flight as a result of force majeure.

(ii)

In addition, the court criticized the biased wording of the clause in which Ryanair states that *“you may wish to ensure that you have appropriate insurance to cover instances where you have to cancel your ticket (...) by reason of force majeure”*.

The court ruled that this clause is invalid since it gives the wrong impression that a passenger who cancels a flight because of force majeure assumes a liability, while no liability exists in such case.

(iii)

Finally, it follows from the Brussels Airlines judgment that airlines can claim a “reasonable administration fee” for handling the termination of a contract of carriage as a result of force majeure. However, this fee (i) must be clearly specified; and (ii) must not constitute damages that are disguised as an administration fee.

12. Liability for damage (agents, employees and representatives)

The Terms and Conditions of both Brussels Airlines and Ryanair provide that the contract of carriage (including their Terms and Conditions and

exclusions or limitations of liability) applies to their authorized agents, employees and representatives to the same extent as it applies to Brussels Airlines and Ryanair respectively.

According to Test-Aankoop, this clause is misleading since the air carriers fail to clarify that the exclusions or limitations of liability only apply to their agents, employees and representatives *provided that* the latter prove that they acted within the scope of their employment / mission.

However, the court considered that this point is sufficiently clear for the average consumer and therefore dismissed this claim.

13. Conditions prevail over regulations

Test-Aankoop criticizes the following clause in Brussels Airlines' Terms and Conditions:

"Except as provided in these Conditions of Carriage, in the event of inconsistency between these Conditions of Carriage and any other Regulations dealing with particular subjects, these Conditions of Carriage shall prevail."

According to Test-Aankoop, this clause is invalid since it makes it possible to apply terms and conditions that the consumer is unaware of.

The court decided that this clause is valid since it merely provides for a hierarchy between different norms.

14. People with reduced mobility

The court considered Ryanair's clause with respect to people with reduced mobility ("PRM") as contrary to Belgian and European law.

On the one hand, this clause requires passengers to notify their particular needs for assistance *on the day of booking*. However, according to EC Regulation 1107/2006 of 5 July 2006 concerning the rights of disabled persons and PRM's when travelling by air, it is necessary and sufficient that such notification is made *at least 48 hours before the published time of departure of the flight*.⁸

On the other hand, this clause holds that failure to advise Ryanair of any special needs on the day of

⁸ See art. 7.1 of EC Regulation 1107/2006.

booking will result in the service being unavailable and in a refusal to transport the passenger. However, EC Regulation 1107/2006 explicitly provides that in the event a reservation from a PRM is refused based on safety requirements or the size of the aircraft, the air carrier must make reasonable efforts to propose an acceptable alternative to the person in question.⁹ In addition, a PRM who has been denied embarkation on the grounds of his reduced mobility and any person accompanying this person shall be offered the right to reimbursement or re-routing.¹⁰

Considering the above, the court ruled that this clause illegally limited the statutory rights of the passenger vis-à-vis the air carrier, and hence violates the Belgian Fair Trade Practices Act.

15. Reconfirmation of reservation

It follows from Brussels Airlines' Terms and Conditions that if it requires a passenger to reconfirm the return flight but the passenger fails to do so, Brussels Airlines is entitled to cancel the return reservation without penalty.

The court ruled that this clause is invalid since cancellation constitutes a disproportionate sanction.

* * *

With respect to the clauses which were found to be invalid, the court ordered Brussels Airlines and Ryanair to stop applying them within a period of six months as of notification by bailiff of the court order.

⁹ See art. 4.1.(a) of EC Regulation 1107/2006.

¹⁰ See art. 4.1.(a) in fine of EC Regulation 1107/2006 and art. 8 of EC Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.