



Jersey Competition Regulatory Authority ('JCRA')

Public version of

Decision M152/08 Imposing Financial Penalties

Under Articles 35 and 39 of the Competition (Jersey) Law 2005

Concerning an Infringement of

Article 20(1) of the Competition (Jersey) Law 2005

by

Autogrill S.p.A.

Introduction and Executive Summary

1. On 8 October 2007, the JCRA received a Merger Application Form (the ‘Application’) regarding the acquisition by Autogrill S.p.A. (‘Autogrill’) of the entire issued share capital of Alpha Airports Group plc (‘Alpha’). The Application requested that the JCRA give its approval to this acquisition under Article 22 of the Competition (Jersey) Law 2005 (the ‘Law’).
2. The Application stated that the acquisition of Alpha by Autogrill appeared to satisfy Article 1(4) of the Competition (Mergers and Acquisitions) (Jersey) Order. The Application also stated, however, that Autogrill already had acquired control of Alpha. Because, by operation of Part 4 of the Law, Autogrill was under an obligation to file notification of this acquisition to, and receive approval by, the JCRA, prior to executing it, the information contained in the Application provided the JCRA with a reasonable cause to suspect, under Article 26 of the Law, that Autogrill executed its acquisition of Alpha in breach of Article 20(1) of the Law.
3. The JCRA therefore commenced an investigation of this matter. As a result of this investigation, the JCRA has confirmed that Autogrill has acquired control of Alpha, as the concept of control is defined in Article 2(2) of the Law, without first notifying this acquisition to, and receiving approval by, the JCRA. The JCRA therefore has determined that a breach of Article 20(1) of the Law exists. To remedy this breach, herein the JCRA issues a decision, under Article 35 of the Law, and a financial penalty under Article 39 of the Law. The amount of the financial penalty is £10,000.00.

Background

The Parties

4. According to the Application, Autogrill operates worldwide, directly and indirectly (through controlled undertakings) in the commercial foodservice sector and in the fast-food service sector. Autogrill operates through a commercial network located along motorways, railway stations, airports, shopping malls, and, to a lesser extent, in city centres. According to the Application, Autogrill is present in 32 countries with consolidated sales of about €4 billion in 2006. Autogrill is listed in Milan.¹ Autogrill did not obtain any turnover in Jersey prior to the acquisition subject to the Application.
5. According to the Application, prior to its acquisition by Autogrill, Alpha was an aviation support service company, providing catering and retailing services to airlines and airports globally. Alpha operated through two divisions; Alpha Airlines services and Alpha Airport Services. Alpha Airline Services offered in-flight catering and ancillary services such as catering logistics, bonded stores,

¹ www.autogrill.com/gruppo/profilo.aspx.

management services, in flight retail management services and the onboard sale of food, beverages and gifts for over 100 airlines in 12 countries. Alpha Airport Services offered retailing and catering services at 47 airports in 13 countries, including the operation of specialist, tax and duty free stores, and the provision of restaurant, café and bar services. Alpha had a worldwide turnover of about €800m in the year ending on 31 January 2007. Alpha is a public company listed on the London Stock Exchange. The Jersey turnover is listed as about [£5-10m] in 2006.

The Law's Requirements concerning Mergers and Acquisitions

6. Article 20(1) of the Law states that a person must not execute a merger or acquisition of the type prescribed by Order except with and in accordance with the approval of the JCRA. This approval requirements means that mergers or acquisitions that are subject to Article 20(1) must be notified to the JCRA prior to their execution.
7. The Order referred to in Article 20(1) of the Law is the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the 'Order'). Acquisitions satisfying one or more of the thresholds set out in this Order are therefore subject to the Law's notification and approval requirements. One of these thresholds, and the one relevant to this matter, is set out in Article 1(4) of the Order, which states:

'A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if one or more of the parties to the proposed merger or acquisition has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey.'
8. Article 1(5) of the Order states that, to determine if the threshold set out in Article 1(4) is satisfied: (1) any appropriate description of goods or services may be adopted; (2) a reference to goods or services that are subject to different forms of supply is to be construed as a reference to any of those forms of supply taken separately, together, or in groups; and (3) any appropriate criterion, or any combination of criteria, may be applied.
9. Article 2(1) of the Law states that an acquisition occurs if two or more previously independent undertakings merge, or if a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking. Under Article 2(2) of the Law, control is taken to exist if decisive influence is capable of being exercised with regard to the activities of the undertaking.
10. As stated in the JCRA's Guideline on Mergers and Acquisitions (the 'Guideline'), the combined effect of Article 20(1) and the Order means that, for acquisitions subject to the Law, **'[t]he merging parties must not implement the merger, or**

otherwise engage in joint commercial activities, until the merger has been approved by the JCRA.²

Evidence for an Infringement of Article 20(1)

11. As stated above, on 8 October 2007 the JCRA received the Application. The Application was submitted on behalf of both Autogrill and Alpha, and signed on their behalf under a declaration which states, *inter alia*, that: (1) the information contained in the Application was, to the best of the signatories knowledge and belief, accurate and complete; (2) that the signatories had read and were aware of Articles 20, 21, 22 and 25 of the Law; and (3) the signatories had the authority to sign the declaration on behalf of both Autogrill and Alpha.
12. The response to Specification 1.4 of the Application states that Alpha had an estimated share of supply of (1) over [75-100]% of airport retail sales at Jersey Airport and, (2) [75-100]% of retail catering at Jersey Airport. The Application was submitted on the basis that these activities of Alpha appeared to satisfy the threshold set out in Article 1(4) of the Order.
13. Based on this information, and on other information available to the JCRA, it would appear that the acquisition of Alpha by Autogrill does indeed satisfy the threshold identified in Article 1(4). [REDACTED]. Such activities would appear to constitute shares of supply, under the parameters detailed in Article 1(5) of the Order, and further described in pages 4-5 of the Guideline.
14. The Application states that ‘Autogrill has acquired control of Alpha through a series of transactions in securities which are ongoing and a part of which already have been executed.’ Specifically, through a series of acquisitions starting on 30 May 2007 and lasting through 17 September 2007, the Application states that Autogrill has acquired ownership of approximately 98.25% of Alpha’s share capital.
15. An e-mail by the representative of Autogrill and Alpha states that the first ‘corporate action’ by Autogrill following acquisition of a majority of the shares in Alpha on 8 June 2007, and following approval by the European Commission for the acquisition, was the appointment of two directors to the board of directors of Alpha on 13 August 2007.
16. The Application also states that on 17 September 2007 Alpha’s shares were cancelled and have ceased trading on the London Stock Exchange’s market for listed securities. The JCRA confirmed that on 17 September 2007, the UK’s Financial Services Authority (‘FSA’) cancelled Alpha’s ordinary shares, at the request of Alpha, and stated that as of this date these securities are no longer traded on the London Stock Exchange. Additional information available to the JCRA indicates that the reason for the cancellation of Alpha’s securities was because the company had been acquired by Autogrill.

² JCRA, Guideline on Mergers and Acquisitions at p.6 (emphasis in original).

17. Based on this information, it would appear that the acquisition of Alpha by Autogrill has indeed been executed prior to notifying this acquisition to, and receiving approval by, the JCRA.

The JCRA's Procedure Concerning this Matter

18. After reviewing the Application, on 11 October the JCRA wrote to the legal representative for Alpha and Autogrill in Jersey concerning this matter. This letter reviewed the JCRA's understanding of this matter and the grounds for the responsible cause to suspect an infringement of the Law, and requested that Alpha and Autogrill provide certain additional information. The legal representative of Alpha and Autogrill responded to the JCRA's letter on 23 October 2007. Thereafter, on 25 October 2007, legal representatives of Alpha and Autogrill met with the JCRA to discuss this matter.
19. On 15 November 2007, the JCRA gave written notice to the legal representative of Alpha and Autogrill of its proposed decision concerning this matter, and invited their comments to the proposed decision, to comply with the procedure set out in Article 35(2) of the Law.
20. On 29 November, the JCRA received written confirmation that Autogrill had no comments on the proposed decision. Autogrill marked which information in the proposed decision they consider to be commercially sensitive and requested that this information be kept confidential by the JCRA.

Conclusions Concerning the Suspected Infringement

21. Based on the facts and circumstances detailed in Paragraphs 12-13, above, the JCRA concludes that the acquisition of Alpha by Autogrill satisfied the threshold set out in Article 1(4) of the Order, as that threshold may be determined under the parameters set out in Paragraph 1(5) of the Order.
22. Based on the facts and circumstances detailed in Paragraphs 14-16, above, the JCRA concludes that Alpha has acquired control of Autogrill, as the concept of control is defined in Article 2(2) of the Law. Specifically, the JCRA concludes that Autogrill has acquired control of Alpha through an acquisition of a majority of its share capital, and that Autogrill's control over Alpha has existed at least since 17 September 2007, the day on which the FSA cancelled Alpha's share capital. While Autogrill, through its legal representative, has stated that it did not assume voting rights in relation to Alpha until 1 October 2007 (the date on which Autogrill states it elected Alpha's Board of Directors), the JCRA observes that the assumption of voting rights is not the standard of control set forth in the Law. Specifically, under Article 2(2) of the Law, control is taken to exist if decisive influence is capable of being exercised with regard to the activities of the undertaking, and this can be said

to exist where ‘an undertaking acquired a majority of the voting rights of a company.’³ The Application states that by 17 September 2007, Autogrill had acquired approximately 98.25% of Alpha’s share capital. Furthermore, the JCRA observes that Alpha’s decision to cancel its shares and de-list itself from the London Stock Exchange on 17 September 2007, are in these circumstances evidence that, by that date at least, Alpha was operating under the control of another undertaking (specifically, Autogrill).

23. The JCRA did not receive the Application until 8 October 2007. This date is subsequent even to the date on which Alpha admits that it assumed voting control over Alpha. In its 22 October 2007, Autogrill’s legal representative states that ‘Autogrill very much regrets any failure to comply with the submission timetable required under the Law.’
24. The JCRA therefore concludes that Autogrill has executed its acquisition of Alpha without compliance with the obligations set out in Article 20(1) of the Law, namely, to notify the acquisition to the JCRA and not execute it until after it has received the JCRA’s approval to do so.

Appropriate Remedy concerning the Infringement

25. Having determined that an infringement of Article 20(1) exists, Articles 38 and 39 of the Law set forth potential enforcement mechanisms available to the JCRA. Article 38(1) of the Law states that ‘[i]f the Authority decides that there has been a breach of Article 20(1) it may give the relevant person such directions as it considers appropriate to bring the breach to an end.’ Such directions can include orders that (1) require a person to take possible action to nullify the acquisition, (2) impose on the person a condition as to the manner in which the person conducts business, or (3) require a person to sell or otherwise dispose of any part of the acquired business or assets. In addition to, or in lieu of, such direction, under Article 39 of the Law the JCRA may impose financial penalties for infringements of Article 20(1). To impose a financial penalty, the JCRA must be satisfied that the breach was committed either intentionally, negligently, or recklessly. Under Article 39(2) of the Law, the amount of such penalty shall not exceed 10% of the turnover of the undertaking during the period of the breach, up to a maximum period of 3 years.
26. Autogrill’s legal representative has observed that even if a breach exists, the JCRA retains the discretion to not impose a penalty, or to seek an informal resolution with Autogrill.

³ European Commission Notice on the Concept of Concentration under Council Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings, O.J. 66/5 at ¶ 13 (2 March 1998). Article 60 of the Law requires that, so far as possible, matters arising under competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.

27. The JCRA concludes that it is appropriate and necessary to reach a decision and impose a remedy concerning this matter. This matter concerns what in the JCRA's view is a clear breach of the Article 20(1) filing requirements, and the circumstances requiring the enforcement of these requirements in Jersey appear no less relevant than those relied upon by the European Commission in its own decision to enforce the EC's mandatory merger filing requirements:

*'The Commission considers that the underlying principles in these provisions are in themselves very important and that their violation undermines the effectiveness of the merger control provisions. Indeed, the obligation of prior notification of concentrations which fall within the scope of the Merger Regulation, allows the Commission to prevent companies from carrying out a concentration before it takes a final decision, thereby avoiding irreparable and permanent damage to competition.'*⁴

28. The JCRA also concludes that resolving this matter informally would not be appropriate. Whereas, in its Guideline on Investigation Procedures, the JCRA states it is willing, *in appropriate cases*, to consider voluntary commitments put forward by the parties to take certain pre-emptive or remedial states as an alternative to investigation and/or enforcement;⁵ given the procedural nature of this infringement and the fact that the factors and circumstances leading up to it all have occurred (resulting in Autogrill's acquisition of Alpha), the JCRA does not think that voluntary commitments would be a sufficient or appropriate remedy.
29. The JCRA therefore concludes that this matter is appropriately resolved through a decision under Article 35 of the Law, and the imposition of one or more of the enforcement mechanisms provided in Articles 38 and/or 39.
30. Given that there is no evidence that the acquisition has resulted in a substantial lessening of competition in Jersey or any part of Jersey, the JCRA does not consider it appropriate or proportional to remedy this breach through directions, as provided for under Article 38(1) of the Law. The Application indicates that the acquisition does not result in a change in the concentration of either the demand or the supply side in any relevant product market in Jersey, nor does there appear to be substantial lessening of competition as a result of, for example, vertical integration. The JCRA does not have any indications that the evidence provided in the Application is incorrect or open to an interpretation that would result in the conclusion that the acquisition could substantially lessen competition in Jersey or any part of Jersey

⁴ Commission Decision of 10 February 1999 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89, O.J. L183/29 at ¶ 12.

⁵ JCRA, Guideline on Investigation Procedures at 7.

31. The JCRA does consider, however, that the imposition of a financial penalty under Article 39 of the Law is appropriate.
32. In establishing the level of fines for infringements of merger filing requirements, the European Commission has examined both aggravating and mitigating circumstances.⁶ The JCRA's consideration of such factors with respect to this matter is set out in the following paragraphs.
33. The following facts and circumstances can be seen as aggravating in this matter:
 - As stated in Paragraph 4, above, Autogrill is an international company that should be expected to be aware of its legal obligations.
 - Specifically concerning legal obligations under the Law in Jersey, on 24 July 2007 the JCRA's Senior Competition Law Investigator received a telephone call from a Jersey-based legal representative for Autogrill and Alpha concerning the acquisition. During this conversation, the Senior Competition Investigator, on the basis of the information provided during this conversation, instructed the legal representative that the acquisition required notification to, and approval by, the JCRA under the 40% share of supply threshold set out in Article 1 (4) of the Order. The parties' legal representative indicated that an Application would be submitted forthwith.
 - After not receiving the Application, the JCRA's Senior Competition Investigator contacted the parties' Jersey representatives on 10 September 2007, to remind them of their legal obligations concerning the acquisition.
 - The JCRA's Senior Competition Investigator contacted the local Alpha manager on 5 October 2007 to ask for an update regarding the expected application. The manager expressed surprise that no application had been submitted. Later that day, the JCRA was informed by both the manager and the legal representative of the parties that submission of an Application was imminent.
 - The Application was not received by the JCRA until 8 October 2007.
34. The facts and circumstances listed in the previous paragraph, the JCRA concludes that Autogrill's failure to comply with the Article 20(1) requirements with respect to its acquisition of Alpha was negligent, at least, under Article 39(1).⁷

⁶ Commission Decision of 10 February 1999 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89, O.J. L183/29; *see also* Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89.

⁷ *See* Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89 at ¶ 10 (fining a party for consummating an acquisition without notification to, and approval by, the Commission

35. The following facts and circumstances can be seen as mitigating in this matter:

- Autogrill attempted to comply with the Article 20(1) requirements through its submission of the Application; however, as explained above, the submission of this Application did not satisfy these requirements because it was submitted after Autogrill acquired control of Alpha.
- Autogrill has cooperated with the JCRA in its subsequent investigation and expressed regret concerning any failure on its part to comply with the Article 20(1) requirements.
- As discussed above in Paragraph 30, there is no evidence that Autogrill's acquisition of Alpha resulted in a substantial lessening of competition in Jersey or any part of Jersey.

36. Thus, the facts and circumstances here indicate that Autogrill's acquisition of control of Alpha without notification to, and approval by, the JCRA was not intended to circumvent the Order or the Law, but was merely negligent.

37. In light of these circumstances, the JCRA has determined that a financial penalty of £10,000.00 is appropriate. This amount is well within the limit set by Article 39(2). In setting the amount of this penalty, in the interests of proportionality the JCRA is mindful that this is the first time it has identified a breach of the Article 20(1) requirements, and decided to impose a financial penalty. This amount is specific to this matter, and is not controlling on penalties or other remedies the JCRA may impose on other parties, should other breaches of the Article 20(1) requirements occur in the future.

Decision and Financial Penalty Order

38. Based on the facts and circumstances set out above, the JCRA has decided that Autogrill has acquired Alpha in breach of Article 20(1) of the Law.

39. Based on this breach, the JCRA imposes a fine of £10,000.00 on Autogrill under Article 39 of the Law, which shall pay this amount to the JCRA no later than 15 March 2008.

40. Autogrill may pay this fine from any combination of cheque or wire transfer. Wire transfers may be made to the JCRA's account upon instructions available from the JCRA.

because, while there was no deliberate intention to circumvent the merger regulations, 'the provisions of the Merger Regulation are clear in that they cover not only intentional circumvention, but also negligent circumvention').

41. If payment is not made by 15 March 2008, interest will accrue daily thereafter on any unpaid amount at four percentage points above the published base rate of the Bank of England.

13 December 2007

By Order of the JCRA Board