



Jersey Competition Regulatory Authority ('JCRA')

Public version of

Decision M170/08 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

TUI AG

Introduction & Executive Summary

1. In the *Jersey Evening Post* on 9 October 2007, there was an article entitled: *Thomsonfly scrap three UK routes*. This article states that the airline's announcement '*comes in the wake of a recent merger between parent company TUI and First Choice Travel*'.
2. The JCRA established that, on 4 April 2007, the European Commission received a notification of a proposed concentration by which TUI AG ('TUI') was to acquire sole control over First Choice Holidays PLC ('First Choice') (together the 'Parties'), whereupon the travel activities of both groups would be combined in a new group, TUI Travel PLC. The Parties offered commitments to address the serious doubts raised by the proposed concentration in Ireland, and the European Commission thereupon declared the concentration compatible with the common market on 4 June 2007. In addition, the execution of the concentration involving TUI and First Choice was indicated by information on the TUI website¹ and on the website of the London Stock Exchange.²
3. By operation of Part 4 of the Competition (Jersey) Law 2005 (the 'Law'), it would appear that TUI and First Choice were under obligation to file notification of this concentration to, and receive approval by, the JCRA, prior to executing the merger. The aforementioned information provided the JCRA with a reasonable cause to suspect, under Article 26 of the Law, that TUI executed its acquisition of First Choice in breach of Article 20(1) of the Law.
4. The JCRA commenced an investigation into this matter on the basis of the reasonable cause to suspect an infringement of the Law. As a result of this investigation, the JCRA has determined that TUI has acquired control of First Choice, 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.

¹ Press release of 3 September 2007, stating that the merger of First Choice Holidays PLC and the Tourism Division of TUI AG had been successfully completed, creating TUI Travel PLC.

² www.londonstockexchange.com, posting of 3 September 2007 welcoming TUI Travel PLC to the Main Market.

Background

The Parties

5. According to the application to the European Commission, TUI is the parent company of the TUI group and is headquartered in Hanover, Germany. The TUI group's core businesses are tourism and shipping. In tourism, the group has activities at all stages of the value chain, including tour operating, the supply of cruises, the provision of leisure travel agency services, the provision of airline services, the provision of accommodation in group-owned hotels and the provision of customer care and service by its own travel representatives in the destination. TUI group's tourism portfolio encompasses the airline Thomsonfly. Prior to the acquisition of First Choice, TUI, through Thomsonfly, operated scheduled flights between Jersey and four airports in the UK: Cardiff, Coventry, Doncaster and Luton. TUI's other business activity in Jersey is the operation of a retail outlet under the Thomson brand providing travel agency services. In 2006 TUI had a worldwide turnover of over €20 billion and employed 50,000 staff.
6. According to the application to the European Commission, First Choice was an international leisure travel company headquartered in Crawley, United Kingdom. The First Choice Group employed over 15,000 people across more than 80 brands. Prior to its acquisition by TUI, First Choice had no direct presence in Jersey, apart from internet sales of travel packages.
7. According to their website, TUI Travel PLC, the new company formed by the merger of First Choice and the Tourism Division of TUI, operates in over 180 countries worldwide serving more than 30 million customers in over 20 source markets offering a wide range of leisure travel experiences.

The Law's Requirements concerning Mergers and Acquisitions

8. 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 requirement means that mergers or acquisitions that are subject to Article 20(1) must be notified to the JCRA prior to their execution.
9. 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.

10. 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.
11. 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.
12. 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.'**³

Evidence for an Infringement of Article 20(1)

(i) *An Acquisition Requiring Notification to, and Approval by, the JCRA*

13. Prior to its acquisition of First Choice, TUI's airline, Thomsonfly, provided scheduled air passenger transport services from Jersey to airports in the UK such as Coventry, Doncaster, Sheffield, and London Luton. Specifically concerning the Jersey/Doncaster and Jersey/Coventry city pairs, the JCRA understands that Thomsonfly was the only airline that provided scheduled air passenger transport services during the time of the TUI/First Choice merger.
14. Based on this information, it would appear that the acquisition of First Choice by TUI satisfied the threshold identified in Article 1(4) of the Order, which is quoted above. Specifically, TUI's airline, Thomsonfly, was the sole provider of scheduled air passenger transport services between Jersey and Doncaster and Coventry. We note that in JCRA's Decision concerning the Proposed Acquisition of British Regional Air Lines Group Limited by Flybe Group Limited, the JCRA analysed passenger air transport services using the so-called point of origin/point of destination (or 'O&D') approach, which we understand is consistent with how the European Commission most often has defined relevant product and geographic markets for scheduled passenger air transport services.⁴ Thus, the Jersey/Doncaster

³ JCRA, Guideline on Mergers and Acquisitions at p.6 (emphasis in original).

⁴ See Paragraphs 12-13, JCRA Decision regarding the Proposed Acquisition of British Regional Air Lines Group Limited by Flybe Group Limited (29 Jan. 2007), published on www.jcra.je. Article 60 of the Law

and Jersey/Coventry O&Ds appear to be appropriate shares of supply in which to view the activities of Thomsonfly, under Article 1(5) of the Order.

15. Because Thomsonfly was the sole provider of scheduled air passenger transport services on these O&Ds, its share of supply on these routes well surpasses the 40% threshold set forth in Article 1(4). On this basis, any concentration involving TUI is subject to the requirements of the Order and Article 20(1) of the Law.

(ii) *Execution without prior JCRA Notification and Approval*

16. As stated above, on 4 April 2007 the European Commission received a notification of a proposed concentration by which TUI was to acquire sole control over First Choice. The stated intention was to combine the travel activities of both groups in a new group, TUI Travel PLC. The European Commission declared the concentration compatible with the common market on 4 June 2007.
17. The execution of a merger or acquisition involving TUI and First Choice was indicated by information on TUI Travel PLC's website, www.tuitravelplc.com. On this website, under the heading 'latest news', there is a statement from 3 September 2007 that the merger of First Choice and the Tourism Division of TUI had been successfully completed. Also, the document *Brief portrait of TUI AG* states that:

*In March 2007 TUI announced the formation, together with the British travel group First Choice Holidays PLC, of TUI Travel PLC in the United Kingdom. TUI has put all its tourism activities into the joint company with the exception of its hotel subsidiaries. The shares of TUI Travel PLC were traded on the London Stock Exchange for the first time on 3 September. TUI AG has a 51 percent holding in one of the most profitable travel companies in the world.*⁵

18. On the website of the London Stock Exchange, www.londstockexchange.com, there is a notice that the London Stock Exchange welcomed TUI Travel PLC to the Main Market on 3 September 2007, confirming part of this information.
19. Based on these facts, the JCRA concludes that TUI has acquired sole control over First Choice, as defined under Article 2(1) of the Law, at least since 3 September 2007.⁶ It would appear that the acquisition of First Choice by TUI has indeed been executed prior to notifying this acquisition to, and receiving approval by, the JCRA.

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.

⁵ www.tui-group.com/en/konzern/tui_profile/portrait.

⁶ See 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) ('Sole control is normally acquired on a legal basis where an undertaking acquired a majority of the voting rights of a company.').

The JCRA's Procedure Concerning this Matter

20. On 11 October 2007, the Senior Competition Investigator at the JCRA contacted the General Counsel of TUI. [REDACTED] The General Counsel apologised for the oversight and stated that TUI would cooperate with the JCRA.
21. After reviewing the evidence, on 16 October the JCRA wrote to TUI's General Counsel. This letter reviewed the JCRA's understanding of this matter and requested that TUI provide certain additional information. The legal representative of TUI responded to the JCRA's letter on 6 November 2007, providing the requested information. On 15 November 2007, the JCRA explained in writing its position regarding the share of supply test applied in this matter.
22. On 6 December 2007, the JCRA gave written notice to the legal representative of TUI 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.
23. On 19 December 2007, the JCRA received representations from TUI. The main points raised by these representations were (1) the JCRA has improperly defined the share of supply test, and (2) in the alternative, that if the JCRA determines that an infringement of Article 20(1) exists, and that a decision is appropriate, the decision should state that the JCRA considers that the concentration qualifies for approval under the Law. While the JCRA has considered the points raised by TUI in its 19 December 2007 representations, they have not changed its conclusions with respect to this matter.
24. Concerning the application of the share of supply test, TUI argues that by focussing on individual O&Ds,⁷ the JCRA's decision is both incorrect and *ultra vires* under the Law. Citing the European Commission's recent decision in *Ryanair/Aer Lingus*⁸ and other sources, TUI argues that a strict city-pair approach to market definition is not appropriate for the UK because of the substitutability between regional airports, at least for leisure passengers. Thus, because consumers located near Doncaster or Coventry may be able to fly to Jersey using different departure airports, it is improper to define the share of supply test based solely on the Jersey/Doncaster and Jersey/Coventry city pairs. If other departure airports are included, Thomsonfly's share of supply would not have satisfied the threshold set out in Article 1(4) of the Order, and hence TUI's acquisition of First Choice would not have been subject to the requirements of the Order and Law.
25. While TUI has set out a particular way to look at the share of supply, this does not prevent the application of the Order and the Law if the activities of the parties subject to the merger or acquisition satisfy one or more of the Order's share of supply thresholds defined in an alternative, appropriate way. As stated above,

⁷ See Paragraphs 14-15, above.

⁸ Case No COMP/M.4439 – *Ryanair/Aer Lingus* (27 June 2007).

Article 1(5) of the Order states that to determine whether a merger or acquisition satisfies a share of supply threshold (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. The Guideline goes on to state:

As a general guide the parties should look at the various possible alternative descriptions of products or services and if any of them result in the relevant threshold being exceeded, on the basis of whatever information is available, the parties should apply for approval.⁹

26. As set out in Paragraph 14 above, the JCRA concludes that the O&D approach is an appropriate way to examine share of supply. Using this approach, the activities of TUI's airline, Thomsonfly, resulted in the threshold set out in Article 1(4) of the Order being satisfied – a point which is uncontested by TUI. Thus, the parties should have applied for JCRA approval under the Law.
27. Furthermore, if TUI had any questions concerning the proper application of the share of supply test prior to its acquisition of First Choice, it could have contacted the JCRA with questions, for as stated in the Guideline: **“In any event, if in doubt, the parties may contact the JCRA for an informal discussion prior to deciding whether to apply.”**¹⁰ TUI did not contact the JCRA prior to its acquisition of First Choice.
28. Concerning a statement from the JCRA that even if there was an infringement, the acquisition nevertheless qualifies for approval under the Law; the Law itself provides no grounds for the JCRA to make this statement. However, the JCRA has concluded that based on the nature of the infringement and the facts and circumstances relevant to it, remedying this breach through the issuance of directions would be improper, as detailed below.¹¹

Conclusions Concerning the Suspected Infringement

29. Based on the facts and circumstances detailed in Paragraphs 13-15 above, the JCRA concludes that the acquisition of First Choice by TUI satisfies 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.

⁹Guideline at p. 5. Under Article 7 of the Law, where it has been alleged that a person has failed to comply with a requirement of the Law (including the requirements concerning mergers and acquisitions set out in Article 20(1)), ‘proof of a failure to comply with a guideline published by the Authority in respect of the requirement may be relied upon as tending to establish non-compliance with the requirement.’

¹⁰ Guideline at p. 5 (emphasis in original).

¹¹ See below, Paragraph 38.

30. Based on the facts and circumstances detailed in Paragraphs 16-19 above, the JCRA concludes that TUI has acquired control of First Choice, as the concept of control is defined in Article 2(2) of the Law. Specifically, the JCRA concludes that TUI has had control over First Choice since at least 3 September 2007.
31. The JCRA did not receive any application under Article 20(1) of the Law regarding this acquisition.
32. The JCRA therefore concludes that TUI executed its acquisition of First Choice without complying 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

33. 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.
34. The JCRA concludes that it is appropriate and necessary to reach a decision and impose a remedy concerning this matter. This matter concerns what is, in the JCRA's view, a clear breach of the Article 20(1) filing requirements. 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.*¹²

35. The JCRA also concludes that resolving this matter informally would be inappropriate. 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,¹³ given the procedural nature of this infringement and the fact that the factors and circumstances leading up to it have all occurred (resulting in TUI's acquisition of First Choice), the JCRA does not think that voluntary commitments would be a sufficient or an appropriate remedy.
36. 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.
37. TUI, in its letter of 6 November 2007, stated that:

The decision to scale down its services to Jersey came after the merger but not as a consequence of it, except in so far as the strategic planning process for the merged entity, TUI Travel, naturally involved a detailed review of the profitability of all the sectors in which TUI and First Choice were active. First Choice has no services to Jersey, and the closure of certain of TUI's Jersey flights was not therefore a rationalisation exercise prompted by the merger or the result of duplication between the products/services of TUI and First Choice. Nor would First Choice have been a potential entrant into the air travel market between the UK and Jersey (...). Thus, no actual or potential competition has been lost to Jersey consumers or intermediaries (travel agents) as a consequence of the merger. The merger, therefore, has no impact whatsoever, actual or potential, on competition in any Jersey market.

38. Based on the statements and evidence available to the JCRA, it does not have a reason to believe that the concentration has resulted in a substantial lessening of competition in Jersey or any part of Jersey. The JCRA does not have any indications that the evidence provided by TUI 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. In these circumstances, 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.

¹² 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.

¹³ JCRA, Guideline on Investigation Procedures at 7.

39. The JCRA does consider, however, that imposition of a financial penalty under Article 39 of the Law is appropriate.
40. In establishing the level of fines for infringements of merger filing requirements, the European Commission has examined both aggravating and mitigating circumstances.¹⁴ The JCRA's consideration of such factors with respect to this matter is set out in the following paragraphs.
41. TUI is a major international company and should be aware of the legal obligations that apply to its activities, including those of its subsidiaries like Thomsonfly. [REDACTED] Information on Jersey's merger filing requirements was available to TUI on the JCRA's website, as well as via third-party sources, such as the website of the International Competition Network. The JCRA therefore concludes that TUI's failure to comply with the Article 20(1) requirements with respect to its acquisition of First Choice was negligent under Article 39(1).¹⁵
42. The following facts and circumstances can be seen as mitigating in this matter:
- TUI has cooperated with the JCRA in its investigation and expressed regret concerning any failure on its part to comply with the Article 20(1) requirements.
 - There is no evidence that TUI's acquisition of First Choice resulted in a substantial lessening of competition in Jersey or any part of Jersey, as evidenced in paragraph 38 above.
43. Thus, the facts and circumstances here indicate that TUI's acquisition of control of First Choice without notification to and approval by, the JCRA was not intended to circumvent the Order or the Law, but was merely negligent.
44. 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, at the time of TUI's acquisition of First Choice, the JCRA had not previously published a Decision identifying a breach of the Article 20(1) requirements and imposing a financial penalty. This amount is specific to this

¹⁴ 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.

¹⁵ *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 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').

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

45. Based on the facts and circumstances set out above, the JCRA has decided that TUI has acquired First Choice in breach of Article 20(1) of the Law.
46. Based on this breach, the JCRA imposes a fine of £10,000.00 on TUI under Article 39 of the Law, who shall pay this amount to the JCRA no later than 24 April 2008.
47. TUI may pay this fine by any combination of cheque or wire transfer. Wire transfers may be made to the JCRA's account upon instructions available from the JCRA.
48. If payment is not made by 24 April 2008, interest will accrue daily thereafter on any unpaid amount at four percentage points above the published base rate of the Bank of England.

24 January 2008

By Order of the JCRA Board