



# **Ryanair Holdings plc and Aer Lingus Group plc**

A report on the completed acquisition by Ryanair Holdings plc  
of a minority shareholding in Aer Lingus Group plc



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The Competition Commission has excluded from this published version of the report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets.

## Contents

*Page*

Summary .....	3
Findings .....	9

### *Appendices*

- A: Terms of reference and conduct of the inquiry
- B: Background information on Aer Lingus and Ryanair
- C: Aer Lingus corporate governance issues
- D: Substitutability and competition between the UK operations of Ryanair and Aer Lingus, and their rivals
- E: Trends in fares, overlap, frequency and service offering since 2006
- F: Combinations involving Aer Lingus
- G: Share issuance by Aer Lingus
- H: Economic benefits accruing to Ryanair from its shareholding in Aer Lingus
- I: Variable margins and pricing pressure
- J: Entry and expansion
- K: Remedies implementation
- L: Modelling Ryanair's ability to block a special resolution

### Glossary

## Table of contents

	<i>Page</i>
Summary .....	3
Findings .....	9
1. The reference .....	9
2. The industry and the companies .....	9
Industry background .....	9
Ryanair .....	10
Aer Lingus .....	10
3. The acquisition .....	11
Ryanair's acquisition of its shareholding in Aer Lingus .....	11
Cost to Ryanair of acquiring its shareholding .....	12
Rationale for the transactions .....	12
4. The relevant merger situation .....	13
Enterprises ceasing to be distinct .....	14
Level of shareholding and patterns of attendance and voting at shareholder meetings .....	15
Ryanair's ability to pass or defeat ordinary resolutions .....	17
Board representation .....	19
Distribution and holders of the remaining shares .....	19
The status and expertise of the acquirer and its corresponding influence with other shareholders .....	19
Any other special provisions in the constitution of the company conferring an ability materially to influence policy .....	20
Constraints on Aer Lingus's Management Time .....	21
Conclusion on material influence .....	21
Turnover and share of supply test .....	21
Timing .....	22
Conclusion on relevant merger situation .....	22
5. Substitutability and competition between the UK operations of Ryanair, Aer Lingus and their rivals .....	22
Airlines operating routes between Great Britain and Ireland .....	23
Market definition .....	24
Product market .....	24
Geographic market .....	25
The competitive constraint between Ryanair and Aer Lingus .....	26
Closeness of service offering .....	27
Direct evidence of competition between the airlines .....	27
Potential competition .....	28
Conclusions on the competitive constraint between Ryanair and Aer Lingus .....	28
The competitive constraint from other rivals .....	28
Conclusions on constraint from other rivals .....	29
The trend in competition between Ryanair and Aer Lingus since 2006 .....	29
The European Commission's findings .....	29
Fares .....	30
Overlap .....	30
Frequency .....	30
Service offering .....	31
Other evidence .....	31
Conclusion on competition between Ryanair and Aer Lingus since 2006 .....	31
6. The counterfactual .....	31
The views of parties .....	32
Our assessment .....	32
Aer Lingus would continue to compete with Ryanair on routes between Great Britain and Ireland .....	33

Aer Lingus withdrawal from competition with Ryanair on routes between Great Britain and Ireland.....	33
Aer Lingus withdrawal from the airline industry.....	34
Conclusions on the counterfactual.....	35
7. Assessment of the competitive effects of the acquisition.....	35
Relevance of the European Commission’s findings to our assessment.....	35
Effects of the acquisition on Aer Lingus’s commercial policy and strategy.....	37
Ryanair’s incentives.....	37
Mechanisms by which Ryanair’s shareholding could affect Aer Lingus’s commercial policy and strategy.....	38
(a) Aer Lingus’s ability to participate in a combination with another airline.....	39
(b) Aer Lingus’s ability to issue shares in order to raise capital.....	51
(c) Aer Lingus’s ability to manage effectively its portfolio of Heathrow slots.....	53
(d) Aer Lingus’s ability to pass an ordinary resolution.....	56
(e) Aer Lingus’s management resources.....	58
Conclusions on the effects of the acquisition on Aer Lingus’s commercial policy and strategy.....	60
Other ways in which Ryanair’s minority shareholding might affect competition in the market.....	61
The impact on the incentives of Aer Lingus’s management.....	61
Ryanair’s effectiveness as a competitor.....	62
Coordinated effects.....	64
Market entry/expansion.....	66
Conclusions on the SLC test.....	68
8. Remedies.....	71
Analytical framework for the assessment of remedies.....	71
Duty of sincere cooperation.....	71
Remedy options.....	74
Ryanair’s proposed remedies.....	74
Aer Lingus.....	76
easyJet.....	76
Air France.....	76
Discussion on the effectiveness of Ryanair’s proposed remedies.....	77
Conclusion on the effectiveness of Ryanair’s proposed remedies.....	80
Full divestiture.....	80
Description.....	80
Views of parties.....	81
Effectiveness of a full divestiture.....	82
Partial divestiture.....	82
Description.....	82
Views of parties.....	83
Discussion of the relevant thresholds for a reduction in stake required to remedy the SLC finding.....	84
Ability to block a disposal of Heathrow slots.....	90
Ability to prevent a squeeze-out.....	90
Ability to requisition an EGM.....	91
Ability to place items on the agenda of an AGM.....	91
Behavioural remedies as an adjunct to a partial divestiture.....	91
Views of parties.....	92
Assessment of the effectiveness of a partial divestiture.....	94
The proportionality of effective remedies.....	96
Views of parties.....	96
Our views.....	97
Remedy implementation.....	98
Conclusions on remedies.....	99

## Summary

1. On 15 June 2012, the Office of Fair Trading (OFT) referred the completed acquisition by Ryanair Holdings plc (Ryanair) of a minority shareholding in Aer Lingus Group plc (Aer Lingus) to the Competition Commission (CC) for investigation and report. The reference was made under section 22(1) of the [Enterprise Act 2002](#) (the Act). Following extensions to the statutory reference period, we are required to publish our final report by 5 September 2013.
2. Ryanair was founded in 1985 and has been listed on the Dublin, London and New York stock exchanges since 1998. Ryanair pioneered the low-cost/low-fares business model in Europe. In the year ended 31 March 2013, Ryanair carried 79.3 million passengers, serving approximately 1,500 routes in 28 countries across Europe and reported turnover of €4,884 million and operating profit before exceptional items of €718.2 million. Ryanair operates flights from Ireland to 12 airports in Great Britain.
3. Aer Lingus was founded by the Irish Government in 1936 to provide air services between Ireland and the UK. It was floated on the London and Irish stock exchanges in 2006, with the Irish Government retaining a 25.1 per cent shareholding. Aer Lingus operates as a 'value carrier' and has various agreements with other airlines, including a franchise agreement with Aer Arann under which Aer Arann operates a number of routes to provincial UK airports under the Aer Lingus Regional brand. Aer Lingus's primary markets are the Republic of Ireland, the UK, continental Europe and the USA. In 2012 it carried 9.7 million passengers. In the year ended 31 December 2012 Aer Lingus reported turnover of €1,393 million and operating profit before exceptional items of €69 million. Aer Lingus operates flights from the Republic of Ireland to four airports in Great Britain, as well as having a base at Belfast City.
4. Aer Lingus shares were admitted to the Irish and London stock exchanges on 2 October 2006. By 5 October 2006 Ryanair had acquired a shareholding of 19.1 per cent. Ryanair continued to acquire shares and by 2 July 2008 had increased its shareholding to its current level of 29.82 per cent at a cost of €407.2 million. Based on a share price range of €1.10 to €1.70, the value of Ryanair's shareholding in Aer Lingus is between €175 million and €271 million. Ryanair said that it bought shares in Aer Lingus because it wanted to, and still wants to, acquire Aer Lingus. It said that it did not acquire its shareholding in order to influence Aer Lingus. Aer Lingus said that Ryanair used its shareholding to undermine and weaken its principal competitor.
5. Ryanair's first public offer for Aer Lingus was launched on 23 October 2006 and prohibited by the European Commission on 27 June 2007. On 10 September 2007 Ryanair appealed the European Commission's prohibition decision to the General Court. On 11 October 2007, following an earlier request by Aer Lingus that Ryanair divest itself of the minority shareholding should the concentration be prohibited, the European Commission ruled that the minority shareholding did not constitute a concentration under the EU Merger Regulation (EUMR) and that it therefore did not have the power to require its divestiture. This decision was appealed by Aer Lingus to the General Court. On 6 July 2010 the General Court upheld the European Commission in both cases. Ryanair launched a second bid in December 2008 but abandoned it in January 2009 after the Irish Government indicated that it would not support the bid. On 24 July 2012 Ryanair notified the European Commission of its third bid for Aer Lingus. The European Commission prohibited the third bid on 27 February 2013. On 8 May 2013 Ryanair appealed the European Commission's prohibition decision to the General Court.

6. We concluded that Ryanair's 29.82 per cent shareholding in Aer Lingus gave it the ability to exercise material influence over Aer Lingus. We reached this view having regard to a range of factors and, in particular, Ryanair's ability to block special resolutions and the sale of Heathrow slots under the Articles of Association. We concluded that these mechanisms were relevant to Aer Lingus's ability to pursue its commercial policy and strategy, in particular, its ability to combine with another airline and to optimize its portfolio of Heathrow slots. We concluded that a relevant merger situation had been created.
7. We concluded that the relevant product market was the supply of air passenger services. We identified six corridors connecting airports in Great Britain and the Republic of Ireland where services operated by Ryanair and Aer Lingus overlapped and a further five corridors where Ryanair's services overlapped with routes operated by Aer Arann under the Aer Lingus Regional brand. We also identified some overlap between Ryanair and Aer Lingus on routes between London and Northern Ireland and Northern Ireland and Faro.
8. We concluded that Ryanair and Aer Lingus impose a strong competitive constraint on each other on overlap routes between Great Britain and Ireland, and were also likely to impose a competitive constraint—albeit less significant—on each other through the threat of entry on routes between Great Britain and Ireland on which the two airlines were not currently both active. We concluded that on most overlap corridors, Ryanair and Aer Lingus did not face a competitive constraint from any other airlines although there was some competitive constraint from other airlines on the London to Dublin and Bristol to Dublin corridors and, more substantially, on overlap routes between London and Northern Ireland, and Northern Ireland and Faro.
9. We looked at whether the intensity of competition between Ryanair and Aer Lingus had changed since 2006. We concluded that, in line with the European Commission's findings, competition between Ryanair and Aer Lingus had remained intense since 2006, and that the extent of overlap between the operations of the two airlines had increased, largely as a result of Aer Lingus's Regional franchise agreement with Aer Arann.
10. We concluded that the appropriate counterfactual was that Aer Lingus, absent Ryanair's shareholding, would have continued or would continue to compete with Ryanair on routes between Great Britain and Ireland, either under independent ownership or in combination with another airline.
11. We did not agree with Ryanair's submission that we were bound to conclude, on the basis of the European Commission's assessment of the competition between Ryanair and Aer Lingus, that the acquisition of the minority shareholding had not and would not result in a substantial lessening of competition (SLC). We took into account that, absent Ryanair's shareholding, competition during the period since 2006 or in the future may have developed differently and could have been more intense. We were required to consider not only whether the transaction had, to date, led to a reduction in competition, but also whether competition between the airlines may be affected in the future.
12. We found that Ryanair would have the incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor which would not exist for a shareholder which was not in competition with Aer Lingus and we would expect Ryanair to act on this incentive. We assessed the various ways in which Ryanair's minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy relative to the counterfactual. We recognized that we could not predict with certainty all the ways in which Ryanair's shareholding might affect Aer



Lingus's commercial policy and strategy and nor were we required to determine which individual scenarios were more likely than not to occur. Instead, in making our assessment as to whether there had been, or was likely to be an SLC, we applied the 'probabilistic test' on the basis of all relevant evidence in the round.

13. However, in order to reach an overall view, we looked, in particular, at whether Ryanair's shareholding might:
  - (a) affect Aer Lingus's ability to participate in a combination with another airline;
  - (b) hamper Aer Lingus's ability to issue shares to raise capital;
  - (c) influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow;
  - (d) influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution; and
  - (e) allow Ryanair to raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy.
14. We formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline. We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares (which might be required for a corporate transaction or to optimize its capital structure). We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consolidation observed across the airline industry. By impeding or preventing Aer Lingus from combining with other airlines, Aer Lingus's ability to increase the scale of its operations and reduce its unit costs would be limited. This would be likely to have reduced or to reduce the effectiveness of the competitive constraint Aer Lingus could impose on Ryanair on routes between Great Britain and Ireland relative to the counterfactual.
15. In addition, we found that Ryanair's minority shareholding could limit the commercial policies and strategies available to Aer Lingus by limiting its ability to manage effectively its portfolio of Heathrow slots, restricting it from optimizing its route network and timetable across London airports. We also took account of the possibility, albeit relatively unlikely, that Ryanair would, in certain circumstances, be in a position to pass or defeat an ordinary resolution at an Aer Lingus general meeting (if other shareholders voted in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government's shareholding was dispersed). Given Aer Lingus's existing balance sheet strength and forecast financial performance, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term other than in relation to a corporate transaction or to optimize its corporate structure. However, we note that unforeseen events might arise which would require Aer Lingus to raise equity and noted that Ryanair would be able to impede it doing so by blocking a special resolution. We also took into account that the minority shareholding would increase the likelihood of Ryanair mounting further bids for Aer Lingus relative to the counterfactual. This could serve as a serious distraction for Aer

Lingus's management resources and could have impeded, or could impede Aer Lingus's ability to implement its commercial policy and strategy.

16. We therefore concluded that, by limiting Aer Lingus's ability to pursue its independent commercial policy and strategy, Ryanair's minority shareholding would have led or would be expected to lead to a reduction in Aer Lingus's effectiveness as a competitor.
17. In relation to the materiality of that reduction in effectiveness, the importance of scale to airlines was clear from the evidence presented to us, with Ryanair itself highlighting Aer Lingus's small scale as an impediment to its long-term survival. In addition, given the strategic importance of Aer Lingus's Heathrow slots and the importance of its Heathrow services to its UK operations, there could be a significant impact on Aer Lingus arising from its reduced ability to optimize its slot portfolio. The disruption to Aer Lingus's ability to pursue its own commercial policy and strategy from additional bids by Ryanair for the outstanding shares in Aer Lingus would be (and had been) significant. Further, although relatively unlikely, were Ryanair to achieve a majority at a general meeting, the implications for Aer Lingus's competitive capability could be significant because of the importance of company decisions put to a shareholder vote by ordinary resolution. We therefore found that the impact of Ryanair's minority shareholding on Aer Lingus's effectiveness as a competitor was likely to be material and enduring both across its network generally, and specifically as a rival to Ryanair on routes between Great Britain and Ireland.
18. We also considered whether Ryanair's minority shareholding would affect competition in the market in ways other than by restricting the commercial policies and strategies available to Aer Lingus. We found that the minority shareholding was unlikely to cause Aer Lingus's management to compete less fiercely with Ryanair in order to avoid antagonizing its largest shareholder; to cause Ryanair to compete less fiercely with Aer Lingus in order to protect the value of its investment; or to lead to coordinated effects.
19. We found that entry on routes between Great Britain and Ireland was unlikely to offset the adverse effect of the merger on Aer Lingus's effectiveness as a competitor.
20. We concluded that Ryanair's acquisition of a 29.82 per cent shareholding in Aer Lingus had led or may be expected to lead to an SLC in the markets for air passenger services between Great Britain and Ireland.
21. We were therefore required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect arising from the SLC.
22. Ryanair proposed various remedies to us:
  - (a) an undertaking (or order) preventing it from voting against an acquisition of Aer Lingus by another EU airline, including by means of a scheme of arrangement or a transaction under the Cross Border Mergers Directive;
  - (b) an undertaking (or order) preventing it from voting against an acquisition by Aer Lingus, including by public offer or a scheme of arrangement, involving another EU airline, as proposed by the Aer Lingus board;
  - (c) an undertaking (or order) preventing it from voting against a disapplication of pre-emption rights outside the EU, including in the context of a combination between Aer Lingus and another airline;

- (d) an undertaking (or order) preventing it from voting against Aer Lingus's board on the disposal of Aer Lingus's slots at London Heathrow;
  - (e) an undertaking (or order) to accept an offer for its shares if another EU airline achieved acceptances representing more than 50 per cent of Aer Lingus's shares;
  - (f) an undertaking (or order) to support a scheme of arrangement involving another EU airline if shares representing more than 50 per cent of Aer Lingus's issued share capital were voted in favour at the shareholders' meeting; and
  - (g) an undertaking (or order) to extend its proposals to non-EU airlines, should it at any point in the future become legally permitted for a non-EU airline to hold more than 50 per cent of Aer Lingus's shares.
23. In a dynamic and uncertain sector such as the airline industry, it is inherently difficult to predict the specific forms of combinations or other matters of strategic importance that might come before the Aer Lingus shareholders and therefore to design behavioural remedies that would cater for all eventualities. We found that, in relation to combinations, although Ryanair's proposed remedies sought to address some of our concerns, they did not address other forms of combination available to Aer Lingus and potential partners and would, in effect, restrict Aer Lingus's and its potential partner's choice of combination.
24. We also concluded that Ryanair's continued presence on the share register under certain forms of combinations would be likely to deter potential partners proceeding due to their reluctance to accept Ryanair as a significant minority shareholder, the residual uncertainty and execution risk associated with the measures, and/or their perceived risk of Ryanair using its shareholding to mount a further bid for control of Aer Lingus. We note that Ryanair has said that it still wants to acquire Aer Lingus.
25. We found that these concerns could not be addressed by means of amendments to Ryanair's proposed remedies or imposing a wider prohibition on voting or application of Ryanair's rights as a shareholder. We concluded that the remedies proposed by Ryanair would not be effective in addressing the SLC.
26. We concluded that the following remedy options would be effective in remedying the SLC that we had found:
- (a) full divestiture; and
  - (b) partial divestiture to reduce Ryanair's shareholding in Aer Lingus to 5 per cent of Aer Lingus's issued ordinary shares, accompanied by an obligation on Ryanair not to seek or accept board representation in Aer Lingus.
- Either remedy would need to be accompanied by an obligation on Ryanair not to acquire further shares in Aer Lingus (unless clearance is given under the EUMR for a concentration between Ryanair and Aer Lingus).
27. We concluded that the partial divestiture option would be an effective and proportionate remedy to the SLC that we had found. We also concluded that a Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers in the agreed time period.
28. We considered the application of the CC's duty of sincere cooperation under article 4(3) Treaty of the European Union (TEU) to the implementation of remedial action. In

our view, our proposed remedial action could not be said to jeopardize the attainment of the EU's objectives. We did not find that interim relief (by way of the current—or supplementary—interim measures) would be effective in addressing the SLC that we had found and hence were not persuaded that delaying the implementation of remedial action was justified.

29. We therefore concluded that we should require Ryanair to reduce its shareholding in Aer Lingus to 5 per cent of Aer Lingus's issued ordinary shares. As of the date of this report, this meant that Ryanair must divest 132,529,021 ordinary shares in Aer Lingus. This divestiture should be accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares in Aer Lingus (unless clearance is given under the EUMR for a concentration between Ryanair and Aer Lingus). A Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers in the agreed time period. In our judgement this represented as comprehensive a solution as was reasonable and practicable to the SLC that we found and the adverse effects resulting from it.

# Findings

## 1. The reference

- 1.1 On 15 June 2012, the OFT referred the completed acquisition by Ryanair of a minority shareholding in Aer Lingus to the CC for investigation and report. The reference was made under section 22(1) of the Act.
- 1.2 Our terms of reference, together with information on the conduct of the inquiry, are set out in Appendix A. Following extensions to the statutory reference period, we are required to publish our final report by 5 September 2013.
- 1.3 This document, together with the appendices, constitutes our final report. Further information, including non-commercially sensitive versions of submissions by Ryanair and Aer Lingus, summaries of evidence from third parties, and our provisional findings report, can be found on our website.<sup>1</sup>

## 2. The industry and the companies

- 2.1 In this section, we first provide a brief overview of the European air passenger transport industry (see paragraphs 2.2 to 2.4). We then provide an outline of the two companies involved in this acquisition: Ryanair (see paragraphs 2.5 to 2.9) and Aer Lingus (see paragraphs 2.10 to 2.15). Further details on Aer Lingus are set out in Appendix B.

### *Industry background*

- 2.2 There are a variety of different business models for scheduled air passenger services. Differences between carriers relate mainly to the airline's operating model (hub and spoke or 'network' carriers as opposed to point-to-point models) and to the level of service that is offered to passengers (full service as opposed to low-frills or no-frills model).
- 2.3 Air passenger travel is closely correlated with economic activity. Passenger numbers are also sensitive to unforeseen events such as the volcanic ash incident in 2010. The economic downturn in 2008/09 accentuated the challenges for airlines with high cost structures. There have been a number of exits and withdrawals from the industry, and a number of smaller carriers face an uncertain future as independent airlines. Merger activity has seen the consolidation of European airlines into a small number of major groups, with five large airline groups emerging: Air France, IAG, easyJet, Lufthansa and Ryanair.
- 2.4 Gulf-based airlines, such as Etihad and Emirates continue to expand their footprint in Europe to attract long-haul passengers with European origins or destinations via a range of strategic investments.

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<sup>1</sup> [www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus](http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus).

## **Ryanair**

- 2.5 Ryanair<sup>2</sup> was founded in 1985 and has been listed on the Dublin, London and New York stock exchanges since 1998.<sup>3</sup>
- 2.6 As of March 2013 Ryanair offered over 1,500 flights daily serving approximately 1,500 routes between some 180 airports in 28 countries across Europe. In the year ended 31 March 2013, Ryanair carried 79.3 million passengers (2011/12: 75.8 million). At 31 March 2013 it had a fleet of 305 Boeing 737-800 aircraft with an average age of less than four years.
- 2.7 Ryanair operates flights from Ireland to 12 airports in Great Britain, including Stansted, Gatwick, Luton, Manchester, Birmingham, Edinburgh, Prestwick and Bristol. In the year to 31 March 2012, these Great Britain/Ireland routes represented [0–10] per cent of Ryanair's total scheduled revenue (excluding baggage) and [0–10] per cent of group operating profit.
- 2.8 In the year ended 31 March 2013 Ryanair reported turnover of €4,884 million (2012: €4,325 million) and operating profit before exceptional items of €718.2 million (2012: €617.9 million). At 31 March 2013 Ryanair had cash reserves of €3,559 million (2012: €3,516 million) and debt of €3,498 million (2012: €3,625 million).
- 2.9 Ryanair pioneered the low-cost/low-fares business model in Europe, originally developed in the USA by Southwest Airlines. Ryanair's strategy is based on low fares, secondary airports, point-to-point flights, short-haul routes and low operating costs. Ryanair is not part of any alliances, partnerships or codeshares.<sup>4</sup>

## **Aer Lingus**

- 2.10 Aer Lingus was founded by the Irish Government in 1936 to provide air services between Ireland and the UK. It was floated on the London and Irish stock exchanges in 2006, with the Irish Government retaining a 25.1 per cent shareholding.
- 2.11 Aer Lingus's primary markets are the Republic of Ireland, the UK, continental Europe and the USA. In 2012 it carried 9.7 million passengers (2011: 9.5 million).<sup>5</sup> At 31 December 2012 it had a fleet of 44 Airbus aircraft with an average age of 7.1 years.
- 2.12 Aer Lingus operates flights from the Republic of Ireland to four airports in Great Britain: Heathrow, Gatwick, Manchester and Birmingham, as well as having a base at Belfast City. In the year to 31 December 2011, Great Britain/Ireland routes represented [20–30] per cent of its total revenue and [30–40] per cent of its total passengers.<sup>6</sup>
- 2.13 In the year ended 31 December 2012 Aer Lingus reported turnover of €1,393 million (2011: €1,288 million) and operating profit before exceptional items of €69 million

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<sup>2</sup> In this report, all references to Ryanair are to Ryanair Holdings plc, its subsidiaries and their subsidiaries, which comprise the Ryanair Group (see Appendix B).

<sup>3</sup> The primary market for Ryanair's ordinary shares is the Irish Stock Exchange. Shares were first listed there on 5 June 1997. Ordinary shares have also traded on the London Stock Exchange since 16 July 1998. In addition, American Depositary Shares, each representing five ordinary shares, are traded on the Nasdaq Stock Market in the USA.

<sup>4</sup> A codeshare agreement is an arrangement whereby two airlines can sell seats on the same flight under their respective codes. A seat can be purchased from one airline (a marketing carrier) but the flight is actually operated by a cooperating airline.

<sup>5</sup> Excludes passengers carried on the Aer Lingus Regional franchise operated by Aer Arann and the United Airlines' extended code share services.

<sup>6</sup> Aer Arann, under the Aer Lingus Regional franchise, operates flights to a further ten UK airports—see paragraph 2.15.

(2011: €49 million). At 31 December 2012 Aer Lingus had cash reserves of €909 million (2011: €895 million) and debt (aircraft asset lease financing) of €532 million (2011: €577 million).

- 2.14 Aer Lingus operated as a traditional full service carrier until 2001. Post 9/11 it introduced a low-fares business model to compete with low-cost carriers. Since 2009 it has repositioned itself as a 'value carrier'. Aer Lingus's strategy is based on serving airports at central locations which enhance connectivity for customers at a competitive price and entering into partnerships with other airlines.
- 2.15 Aer Lingus has various codeshare and interline agreements with other airlines.<sup>7</sup> In 2010 it first signed a franchise agreement with Aer Arann under which Aer Arann operates a number of routes to provincial UK airports under the Aer Lingus Regional brand. In February 2013 Aer Lingus signed wet lease agreements<sup>8</sup> with Virgin Atlantic Airways Limited (Virgin) to fly some of the new domestic routes from Heathrow recently announced by Virgin.<sup>9</sup>

### 3. The acquisition

- 3.1 In this section, we set out the key events in Ryanair's acquisition of its shareholding in Aer Lingus (see paragraphs 3.2 to 3.7); the costs of its acquisition (see paragraphs 3.8 and 3.9); and the rationale for its acquisition of the minority shareholding and the full bids (see paragraphs 3.10 to 3.15).

#### ***Ryanair's acquisition of its shareholding in Aer Lingus***

- 3.2 Aer Lingus shares were admitted to the Irish and London stock exchanges on 2 October 2006. By 5 October 2006 Ryanair had acquired a shareholding of 19.1 per cent and on that day announced its intention to launch a public bid for Aer Lingus. Ryanair's first public offer for Aer Lingus was launched on 23 October 2006.
- 3.3 Ryanair continued to acquire shares and by 28 November 2006 had a shareholding of 25.2 per cent. By 20 August 2007 Ryanair had increased its shareholding to 29.4 per cent and by 2 July 2008 Ryanair had further increased its shareholding to its current level of 29.82 per cent (159,231,025 shares).<sup>10</sup>
- 3.4 The first bid was investigated by the European Commission, which prohibited it on 27 June 2007. On 10 September 2007 Ryanair appealed the European Commission's prohibition decision to the General Court. On 11 October 2007, following an earlier request by Aer Lingus that Ryanair divest itself of the minority shareholding should the concentration be prohibited, the European Commission

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<sup>7</sup> Aer Lingus has codeshare agreements with Etihad (for flights between Dublin and Abu Dhabi and on connecting flights to destinations across Etihad's network such as Sydney, Melbourne, Brisbane, Kuala Lumpur, Muscat and Bahrain); United Airlines (under which Aer Lingus can market seats on United Airlines' services from Ireland to North America and from Chicago's O'Hare airport); British Airways (under which British Airways can market seats on Aer Lingus's services from Dublin, Cork, Shannon and Belfast to London Heathrow which connect with British Airways' onward services); JetBlue Airways (under which Aer Lingus can market seats on JetBlue domestic and Caribbean services connecting with Aer Lingus's services from Ireland to North America); and KLM (under which KLM can market seats on Aer Lingus services from Dublin and Cork to Amsterdam which connect with KLM's onwards services). An interline agreement is a more basic form of cooperation which does not involve the marketing carrier placing its code on the operating carrier's flight and simply allows for a through ticket to be purchased and baggage to be checked through on to a connecting flight with another airline without having first to be reclaimed by the passenger at the connecting airport and then checked in again with the second airline. Aer Lingus has interline agreements with numerous airlines.

<sup>8</sup> 'Wet leasing' is where aircraft are provided together with crew, maintenance and insurance.

<sup>9</sup> In addition, from late 2013, Aer Lingus will operate an Airbus A330 aircraft for the next two winter seasons on behalf of a major European tour operator.

<sup>10</sup> These shares are held by Ryanair Limited, a wholly owned subsidiary of Ryanair Holdings plc.

ruled that the minority shareholding did not constitute a concentration under the EUMR<sup>11</sup> and that it therefore did not have the power to require its divestiture. This decision was appealed by Aer Lingus to the General Court. On 6 July 2010 the General Court upheld the European Commission in both cases.

- 3.5 Ryanair launched a second bid in December 2008 but abandoned it in January 2009 after the Irish Government indicated that it would not support the bid.
- 3.6 After the period for appealing against the General Court's findings expired on 17 September 2010, the OFT initiated an investigation of Ryanair's minority shareholding in Aer Lingus. After unsuccessful appeals by Ryanair to the Competition Appeal Tribunal (CAT) and the Court of Appeal (which claimed that the OFT was out of time), the OFT referred the investigation to the CC on 15 June 2012.
- 3.7 On 19 June 2012 Ryanair announced its intention to make a third bid for the remaining share capital of Aer Lingus that it did not already own. It published its offer document on 17 July 2012 and notified it to the European Commission on 24 July 2012. The final date for shareholder acceptances of the offer was 13 September 2012. The European Commission opened a Phase II investigation on 29 August 2012, on which date the public offer lapsed automatically, in accordance with Rule 12 of the Irish Takeover Rules. The European Commission announced on 27 February 2013 that it had decided to prohibit the third bid on competition grounds.<sup>12</sup> On 8 May 2013 Ryanair filed an appeal to the General Court seeking the annulment of the European Commission's prohibition decision.

### ***Cost to Ryanair of acquiring its shareholding***

- 3.8 The cost to Ryanair of acquiring the 29.82 per cent shareholding in Aer Lingus was €407.2 million. In Ryanair's results for the year ended 31 March 2013, the carrying value of its investment in Aer Lingus was €221.2 million (based on €1.389 per share). This represents a gain of €71.5 million over the prior year value of €149.7 million (€0.94 per share).<sup>13</sup>
- 3.9 Based on a share price range of €1.10 to €1.70,<sup>14</sup> the value of Ryanair's shareholding in Aer Lingus is between €175 million and €271 million.

### ***Rationale for the transactions***

- 3.10 In the following paragraphs we set out Ryanair's stated rationale for holding its minority shareholding in Aer Lingus, as well as Ryanair's and Aer Lingus's views on Ryanair's full bids for Aer Lingus.
- 3.11 Ryanair said that it bought shares in Aer Lingus because it wanted to, and still wants to, acquire Aer Lingus. It said that it did not acquire its shareholding in order to influence Aer Lingus. Aer Lingus said that Ryanair used its shareholding to undermine and weaken its principal competitor.
- 3.12 We also considered Ryanair's rationale for launching bids for the remainder of the share capital of Aer Lingus that it did not already own. In 2012, as in 2006 and 2008,

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<sup>11</sup> Council regulation on the control of concentrations between undertakings (139/2004/EC).

<sup>12</sup> See [http://europa.eu/rapid/press-release\\_IP-13-167\\_en.htm](http://europa.eu/rapid/press-release_IP-13-167_en.htm).

<sup>13</sup> The gain was recognized as other comprehensive income. The accounts disclose that the investment had been written down to €0.50 per share in prior periods but, as the asset is classified as available for sale, gains and losses are recorded periodically based on the market price of the asset.

<sup>14</sup> Range of share prices: December 2012 to end July 2013.



Ryanair stated that Aer Lingus shareholders should accept Ryanair's offer.<sup>15</sup> It said that as the air transport market in Europe inexorably consolidated into five large airlines/groups led by Air France, British Airways, easyJet, Lufthansa and Ryanair, the long-term future of Aer Lingus, its brand and its growth prospects could best be secured within one strong Irish airline group, led by Ryanair, under which Aer Lingus's fares and unit costs could be reduced and its traffic decline could be reversed. Ryanair said that, if its offer were successful, it would seek to enable Aer Lingus to provide more competition and consumer choice on short-haul flights to a number of Europe's primary airports where currently Aer Lingus flies but where Ryanair does not and also to grow Aer Lingus's long-haul transatlantic business by additional investment.

- 3.13 Aer Lingus stated in its circular to shareholders in 2012<sup>16</sup> that they should reject Ryanair's offer; its first offer in 2006 was prohibited on competition grounds and the reasons for prohibition were now stronger than before given the increase in route overlap. The number of overlap routes between Aer Lingus and Ryanair had increased from 35 in 2007 to 50 in 2012. In 2007, Aer Lingus and Ryanair were the only operators on 22 of these overlapping routes and this number has doubled to 44 routes in 2012.<sup>17</sup>
- 3.14 Aer Lingus said that the company's strategy was working and that Aer Lingus was a strong and profitable business. Since 2009, Aer Lingus has repositioned itself as a demand-led value carrier and had, to date, delivered €95.8 million in cost savings. In 2011, the company was profitable in a tough economic environment and delivered operating profit (before net exceptional items) of €49.1 million.
- 3.15 Aer Lingus said that Ryanair's offer of €1.30 per share fundamentally undervalued the company.<sup>18</sup>

#### **4. The relevant merger situation**

- 4.1 In this section, we discuss the relevant merger situation. Further details in relation to material influence (Aer Lingus shareholder participation and voting) are set out in Appendix C.
- 4.2 Under the Act and our terms of reference (see Appendix A), we are first required to decide whether a relevant merger situation has been created.<sup>19</sup> A relevant merger situation will have been created where:
- (a) two or more enterprises have ceased to be distinct;<sup>20</sup>
  - (b) the UK turnover test or share of supply test has been met,<sup>21</sup> and
  - (c) the enterprises have ceased to be distinct no more than four months before the OFT made its reference to the CC.<sup>22</sup>

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<sup>15</sup> Ryanair offer document 2012, [www.ryanair.com/doc/news/2012/aerlingus\\_20120619.pdf](http://www.ryanair.com/doc/news/2012/aerlingus_20120619.pdf).

<sup>16</sup> [http://corporate.aerlingus.com/media/corporateaerlinguscom/content/pdfs/Day\\_14\\_Documentx.pdf](http://corporate.aerlingus.com/media/corporateaerlinguscom/content/pdfs/Day_14_Documentx.pdf).

<sup>17</sup> See Appendix D for a description of the overlap routes between Great Britain and Ireland.

<sup>18</sup> Aer Lingus referred to the company's gross cash per share of €1.96, net asset value per share of €1.48 (which did not attribute any value to the slot portfolio or brand), and a 2011 adjusted EV/EBITDAR multiple of 4.2x, representing a 30 per cent discount to the average trading multiple of Aer Lingus's traded peers of 6.0x.

<sup>19</sup> Section 35 of the Act.

<sup>20</sup> Section 23(1)(a) and section 23(2)(a).

<sup>21</sup> Section 23(1)(b) and section 23(2)(b).

<sup>22</sup> Section 24(1)(a).

## ***Enterprises ceasing to be distinct***

- 4.3 The Act defines an ‘enterprise’ as ‘the activities or part of the activities of a business’ with a ‘business’ defined as ‘including a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge’.<sup>23</sup>
- 4.4 Ryanair and Aer Lingus are both publicly listed companies active in the supply of air transport services. We are therefore satisfied that Ryanair and Aer Lingus are ‘enterprises’ for the purposes of the Act.
- 4.5 Section 26(1) of the Act states that two enterprises cease to be distinct if they are brought under common ownership or common control. As explained in the joint [CC/OFT Merger Assessment Guidelines](#) (CC2),<sup>24</sup> there are three levels of interest referred to as ‘control’, set out in ascending order:
- (a) Company A, the acquirer, may acquire the ability materially to influence the policy of Company B, the target (known as ‘material influence’);
  - (b) Company A may acquire the ability to control the policy of Company B (known as ‘de facto’ control); and
  - (c) Company A may acquire a controlling (ie over 50 per cent) interest in Company B (known as ‘de jure’, or ‘legal’ control).
- 4.6 For the purposes of the Act, the CC may treat material influence and de facto control as equivalent to legal control.<sup>25</sup>
- 4.7 As set out in paragraphs 3.2 and 3.3, Ryanair has acquired its current shareholding in Aer Lingus in stages, over a period of two years. The OFT treated all of the transactions within those stages as having occurred simultaneously on the date on which the last of them occurred pursuant to section 29 of the Act. Our terms of reference therefore refer to Ryanair’s acquisition of the entire 29.82 per cent shareholding in Aer Lingus as at 2 July 2008.
- 4.8 As Ryanair holds 29.82 per cent of Aer Lingus it has not acquired legal control. In the current circumstances, we find that Ryanair has not acquired de facto control, which would arise if an entity were to have effective control of a company, notwithstanding that it holds less than the majority of voting rights (for example, where the acquirer has in practice and on a stable basis control of over more than half of the votes actually cast at a shareholder meeting).<sup>26</sup>
- 4.9 Whether a party has acquired material influence is a question of fact and degree to be assessed on a case-by-case basis having regard to all relevant circumstances. As far as the jurisdictional test is concerned, our Guidelines indicate that this analysis will focus on the overall relationship between the acquirer and the target and on the acquirer’s ability materially to influence policy relevant to the behaviour of the target

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<sup>23</sup> Section 129(1) and (3) of the Act.

<sup>24</sup> CC2, paragraph 3.2.5 et seq.

<sup>25</sup> Section 26(3) of the Act.

<sup>26</sup> ‘De facto’ control is similar in nature to the concept of ‘decisive influence’ under the EU Merger Regulation (see paragraph 3.29 OFT Guidelines). It was confirmed by the European Commission in a decision dated 11 October 2007 that Ryanair’s minority shareholding (then standing at 25.17 per cent) was insufficient to confer control over Aer Lingus on Ryanair under the EUMR (see in particular paragraph 11:

[http://ec.europa.eu/competition/mergers/cases/decisions/m4439\\_20071011\\_1500\\_1937375\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20071011_1500_1937375_EN.pdf)).

in the marketplace (including its strategic direction and its ability to define and achieve its commercial objectives).<sup>27</sup>

- 4.10 In making our assessment in the present case, we take into account the extent to which Ryanair has in fact exercised material influence over Aer Lingus in the six and a half years since Ryanair acquired its first shareholding in Aer Lingus. However, the jurisdictional question we must decide is not whether Ryanair has in fact exercised material influence; we have to consider whether, on all the evidence available, Ryanair has the ability to exercise material influence.<sup>28</sup>
- 4.11 In paragraphs 4.12 to 4.41, we discuss a number of factors which may suggest that an acquisition of a minority shareholding confers material influence on the holder, before reaching our conclusion on material influence in paragraphs 4.42 to 4.44:<sup>29</sup>
- (a) level of shareholding and patterns of attendance and voting at shareholder meetings (see paragraphs 4.12 to 4.27);<sup>30</sup>
  - (b) board representation (see paragraph 4.28);
  - (c) the distribution and holders of the remaining shares, in particular whether the acquiring entity's shareholding makes it the largest shareholder (see paragraphs 4.29 and 4.30);
  - (d) the status and expertise of the acquirer and its corresponding influence with other shareholders (see paragraph 4.31);
  - (e) any other special provisions in the constitution of the company conferring an ability materially to influence policy (see paragraphs 4.32 to 4.38); and
  - (f) constraints on management time (see paragraphs 4.39 to 4.41).

#### *Level of shareholding and patterns of attendance and voting at shareholder meetings*

- 4.12 The rights of Aer Lingus's shareholders are set out in Irish company law, Aer Lingus's Articles of Association and Irish and London stock exchange listing rules.
- 4.13 Under Irish company law and the Articles of Association, the board of directors has a fiduciary duty to act in the best interests of the company. The board of directors runs the company on a day-to-day basis, and takes the majority of decisions concerning the company's commercial policy and strategy. Some issues, however, must be put to a shareholders' vote in a general meeting. Many resolutions passed in general meetings are ordinary resolutions and require a simple majority of those present or a majority of the votes cast in a ballot. These cover certain matters relating to the day-

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<sup>27</sup> See CC2, paragraph 3.2.8.

<sup>28</sup> See for example BSKyB/ITV final report, paragraph 3.65. Whether influence has been or may in the future be exercised is also an important consideration in the CC's assessment of whether or not the relevant merger situation has given rise, or may be expected to give rise, to an SLC.

<sup>29</sup> See CC2, paragraphs 3.2.10 & 3.2.11.

<sup>30</sup> The OFT's Jurisdictional and Procedural Guidance states that the OFT will presume a shareholding of more than 25 per cent confers material influence, because it generally enables the holder to block special resolutions. As noted by the CC in its final report on BSKyB/ITV (paragraph 3.40) 'in previous decisions of the CC (and MMC) and OFT, the ability to block special resolutions has been regarded as a very strong indicator of material influence'. In [Southern Water plc/Mid-Sussex Water Company](#) the existence of a 25.1 per cent shareholding, giving the ability to block special resolutions, was held, of itself, to be sufficient to determine the existence of influence. At paragraph 3.55 of its final report into the BSKyB/ITV merger, the CC noted that the ability to block a special resolution creates the ability materially to influence policy when that policy requires a special resolution, indicating that for the jurisdictional test to be satisfied, it is not required that all of the target's policy be subject to material influence.

to-day business of the company, including, for example, the appointment of directors; the appointment of auditors; and approval of a dividend. In addition, under the Irish stock exchange listing rules, certain transactions which are material relative to the size of the company must be passed by ordinary resolution (see Appendix C for a description of what constitutes a material transaction).

- 4.14 Certain matters, however, can only be passed by special resolution. Special resolutions require the support of at least 75 per cent of the members who vote at a general meeting. A shareholder with a shareholding of more than 25 per cent would therefore always have the ability to block such a resolution, provided they exercised their votes. Actions that require a special resolution include: changing the Articles of Association; disapplying pre-emption rights when issuing new shares for cash; approving a scheme of arrangement, for example in relation to a merger with another company; variation of rights attached to special classes of shares; changing the form of a company; and allowing winding up of the company. (See Appendix C for a list of matters requiring a special resolution under Irish company law.)
- 4.15 In addition to the standard use of special resolutions under Irish company law, Aer Lingus's Articles of Association contain provisions requiring an EGM to be held and a resolution with particular majority requirements to be passed in certain circumstances if the company proposes to enter into a Disposal Transaction (as defined in the Articles of Association)<sup>31</sup> in respect of its slots at Heathrow Airport (see paragraphs 4.34 to 4.38).

#### *Ryanair's ability to block special resolutions*

- 4.16 Ryanair's 29.82 per cent shareholding is sufficient to block the passing of special resolutions.
- 4.17 During the period 2007 to 2013, Aer Lingus's shareholders have considered 33 special resolutions. Ryanair opposed 13 of the 33 special resolutions, including in relation to disapplying pre-emption rights in each of the years 2007 to 2013; and special resolutions aimed at changing the Articles of Association, particularly relating to the rights of shareholders in proposing resolutions at an EGM. In all instances, Ryanair has been successful in preventing the adoption of the special resolution. In ten of these the special resolutions were blocked in the ballot (due to Ryanair's vote) while the remaining three resolutions were withdrawn by the board after Ryanair's declaration of its intention to oppose.
- 4.18 Ryanair said that it had blocked all special resolutions concerning the disapplication of pre-emption rights in order to prevent its investment in Aer Lingus being diluted by the issuance of new shares.<sup>32</sup> It noted, however, that it would be willing to subscribe for shares if there was a rights issue. Ryanair noted that Aer Lingus was able to disapply pre-emption rights outside the EU, which would remove any concerns about the cost or timing of a pre-emptive rights issue in non-EU countries. It also said<sup>33</sup> that Aer Lingus, in its view, had no need to raise additional capital, as it had close to €1 billion in cash reserves and claimed to have a business that was 'robust and profitable with...a strong balance sheet'.<sup>34</sup> Ryanair said that, in any event, a rights

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<sup>31</sup> A Disposal Transaction is defined as: 'A transaction pursuant to which any member of the Group proposes to sell, transfer or otherwise dispose of, lease, surrender, mortgage or otherwise alienate or encumber any Existing Slot(s) held by it or any of its subsidiaries.'

<sup>32</sup> Ryanair Submission to the OFT on Material Influence dated 31 August 2011, paragraph 47. See [www.competition-commission.org.uk/our-work-/directory-of-all-inquiries/ryanair-aer-lingus/evidence](http://www.competition-commission.org.uk/our-work-/directory-of-all-inquiries/ryanair-aer-lingus/evidence).

<sup>33</sup> Ibid, paragraph 49 et seq.

<sup>34</sup> Aer Lingus, Reject Ryanair's Offer presentation.

[http://corporate.aerlingus.com/media/corporateaerlinguscom/content/pdfs/Day\\_14\\_Documentx.pdf](http://corporate.aerlingus.com/media/corporateaerlinguscom/content/pdfs/Day_14_Documentx.pdf).

issue could raise a maximum of around €37 million, which was insignificant for any potential commercial plans of Aer Lingus, including financing any combination transaction.<sup>35</sup> In relation to possible combinations with other airlines, Ryanair said that only a limited number of means of entering into a combination would require a special resolution: (a) a scheme of arrangement; (b) a transaction under the Cross-Border Merger Regulations;<sup>36</sup> or (c) issuance of shares to a new partner. It said that a combination would not have to be implemented by one of these methods.

- 4.19 Aer Lingus said that, if normal pre-emption rights were not waived, it would be impossible to offer a rights issue to its shareholders who were resident in certain jurisdictions (eg the USA, Canada, Japan, South Africa and Australia) except at great expense and delay (see Appendix G). Aer Lingus also said that to the best of its knowledge, all listed Irish companies, including Ryanair, regularly passed similar resolutions waiving pre-emption rights on up to 5 per cent of issued shares and in respect of rights issues, up to 33 per cent of issued shares.
- 4.20 We discuss further the ways in which Ryanair might use its ability to block a special resolution in our discussion of competitive effects. But we note here that Ryanair's ability to block a special resolution gives it the ability in particular to influence possible combinations of Aer Lingus with other airlines through, for example, its ability to prevent a merger with another airline via a scheme of arrangement or under the Cross Border Merger Regulations. This may be relevant not only in the case of an acquisition of the entire share capital of Aer Lingus by another airline, but could also prevent Aer Lingus from acquiring or merging with an airline of similar or smaller size.
- 4.21 Given its ability to block a special resolution in relation to disapplying pre-emption rights, Ryanair can also prevent Aer Lingus from issuing new shares to a strategic partner via a private placement (for example, in relation to a minority investment in the region of 3 to 5 per cent of Aer Lingus). This also prevents a transaction structure in which a minority shareholder could acquire an equity stake of up to 33 per cent in Aer Lingus via the issuance of new shares.<sup>37</sup>

### *Ryanair's ability to pass or defeat ordinary resolutions*

- 4.22 This section considers whether Ryanair would be likely to have the ability to achieve a simple majority in Aer Lingus shareholder meetings, taking into account information provided by Aer Lingus on voter turnout and voting patterns for all general meetings since 2007.
- 4.23 Aer Lingus's shareholders are summarized in paragraph 4.29. During the period 2007 to 2013, Aer Lingus's shareholders have considered 76 ordinary resolutions. Ryanair opposed four of these, but was not successful in any of these challenges. However, the ballot came within 4.2 percentage points of a majority in 2012 and 5.5 percentage points in 2013, both of which concerned the appointment of Board member David Begg. Ryanair also opposed two ordinary resolutions at an EGM in 2008 and proposed two ordinary resolutions at the 2009 AGM and attempted to give a proxy to the Minister for Transport, which was not accepted.

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<sup>35</sup> We noted that this was not correct: Aer Lingus's directors have been authorized, at AGM, to raise the equivalent of up to 33 per cent of issued share capital via a rights issue. At €1.70 per share, this could be worth approximately €300 million (though we note that a rights issue would likely be made at a modest discount to the then-prevailing share price).

<sup>36</sup> European Communities (Cross-Border) Merger Regulations 2008 giving effect to Council Directive No 2005/56/EC of 26 October 2005.

<sup>37</sup> Aer Lingus's directors currently have authorization from shareholders to issue new shares for cash equivalent to approximately 33 per cent of its issued share capital. Based on a share price range of €1.10 to €1.70 per share, this could raise in the region of €195–€300 million for Aer Lingus.

4.24 Whether Ryanair's shareholding in Aer Lingus is sufficient to achieve a majority at a general meeting will depend in large part on the future of the Irish Government shareholding. We looked at three scenarios in relation to this shareholding:

- (a) the Irish Government retains its 25.1 per cent shareholding in Aer Lingus and votes at all general meetings;
- (b) the Irish Government retains its shareholding but abstains from voting on a particular issue; and
- (c) the Irish Government sells its shareholding (in full or in part).

Our detailed assessment of each of these scenarios is set out in Appendix C and in our section on competitive effects.

4.25 In considering these scenarios, we take into account the evidence from the Irish Government. We note that the Irish Government intends to sell its shares as part of its commitment to sell state assets following the 2010 fiscal support package from the Troika.<sup>38</sup> The Irish Government said that it was willing to sell its shares in Aer Lingus at the right time and at the right price but that it was unlikely to do so while Ryanair continued to be a significant minority shareholder. It also said that it was unlikely to sell its shareholding to multiple buyers, preferring to sell to a group that would drive effective competition on routes between the UK and Ireland. We note that the incentives of Governments are likely to change over time as they react to current events.<sup>39</sup>

4.26 In light of this assessment, we conclude that:

- (a) If the Irish Government retains and votes its shares, it is unlikely that Ryanair *alone* will be able to secure a majority (ie pass or defeat an ordinary resolution) in opposition to the Irish Government, even if turnout by other shareholders falls below current levels.
- (b) Ryanair has historically lacked the support of other shareholders on resolutions at shareholder meetings. If other shareholders were to vote in the same way as Ryanair, it may be possible for Ryanair to achieve a majority in opposition to the Irish Government.
- (c) If the Irish Government were to abstain and turnout was at the average level, Ryanair would secure a majority.
- (d) If, despite the Irish Government's stated preference for selling its stake to a group, it were to sell its shareholding to multiple buyers, Ryanair would most likely be the largest shareholder in Aer Lingus by a considerable margin and could carry a majority in matters requiring an ordinary resolution if turnout of other shareholders was low.

4.27 We found that the situations set out in paragraph 4.26(b) to (d) in which Ryanair could achieve a majority were relatively unlikely to occur. However, we could not dismiss these scenarios altogether. If Ryanair were to achieve a majority at a general meeting there would be major implications for Aer Lingus's commercial policy and

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<sup>38</sup>Troika: European Stability Fund/International Monetary Fund/European Central Bank.

<sup>39</sup> In light of comments in the press stating that the Irish Government had decided against selling its 25 per cent in Aer Lingus, we confirmed in early July 2013 that paragraph 4.25 continued accurately to represent the Irish Government's views.

strategy because Ryanair would then have control over a company decision put to shareholders by way of an ordinary resolution.<sup>40</sup>

### *Board representation*

4.28 Aer Lingus's board structure and membership is set out in Table 1 of Appendix B. Ryanair does not appoint any directors to the board of Aer Lingus and has no power to do so unless it is able to achieve a simple majority at a general meeting. To date, Ryanair told us that it had not sought, and would not seek, to appoint any directors but it has unsuccessfully opposed the election of one of the non-executive directors, David Begg.

### *Distribution and holders of the remaining shares*

4.29 The shareholders of Aer Lingus as at 28 March 2013 are set out in Appendix B. In summary, we have identified the following subsets of investors:<sup>41</sup>

- (a) Ryanair owns 29.82 per cent;
- (b) the Irish Government owns 25.1 per cent;
- (c) four 'strategic investors' own between 1.2 per cent and 3.8 per cent each, and 10.3 per cent in total;
- (d) 14 'financial investors' whose ownership has been disclosed as a result of stock exchange disclosure rules own between 0.4 per cent and 2.1 per cent, amounting to 12.1 per cent in total; and
- (e) the balance of 21.7 per cent of Aer Lingus's shares is held by other investors. Some of these shareholders can be identified individually (eg via Bloomberg), but their holdings are generally below 0.5 per cent each and are not subject to disclosure obligations.

4.30 Given that Aer Lingus's shares are freely traded on the stock market, the pattern of ownership could evolve in the future. We noted, however, that given the large blocks of shares held by Ryanair and the Irish Government, there was a relatively low proportion of shares available for trading and that the volume of trading has declined to low levels (see Appendix C).

### *The status and expertise of the acquirer and its corresponding influence with other shareholders*

4.31 We considered whether Ryanair's industry expertise may influence other shareholders to adopt Ryanair's voting position. We received no evidence to suggest that other shareholders would be particularly influenced in their voting patterns by Ryanair's industry expertise.

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<sup>40</sup> We note that if the exit of the Irish Government led Ryanair to achieve a majority at shareholder meetings on a regular basis, this may confer de facto sole control of Aer Lingus on Ryanair (see paragraph 4.8).

<sup>41</sup> Note, however, that these subsets do not represent concert parties or coalitions.

*Any other special provisions in the constitution of the company conferring an ability materially to influence policy*

*Ryanair's attempts to call EGMs and place items on the agenda of AGMs*

- 4.32 Ryanair, in common with any other shareholder holding at least 5 per cent, can requisition Aer Lingus's management to hold an EGM and, in common with any other shareholder holding at least 3 per cent, can place, or seek to place, matters on the agenda of an AGM.<sup>42</sup> Ryanair has sought to do this itself on four occasions and requested the Irish Government to do so on one occasion (see Appendix C).
- 4.33 The management of Aer Lingus can refuse to hold an EGM or reject proposed resolutions for an AGM following such a request if the subject matter of the proposed resolution(s) is unlawful or is one which, under Irish company law and/or the Articles of Association, is reserved to management rather than shareholders.

*Disposal of Aer Lingus's Heathrow slots*

- 4.34 Aer Lingus's slots at Heathrow Airport are valuable, both in themselves and because of the ability they afford to Aer Lingus to fly its customers to a global hub airport where they can board long-haul aircraft to their ultimate destination. The Irish Government's desire to protect this connectivity at Heathrow led to special provisions being included in Aer Lingus's Articles of Association at the time of its IPO.
- 4.35 The Irish Government considers that Heathrow slots provide a benefit to the Irish economy. In a statement issued on 2 October 2006, the Minister for Transport said that: 'Heathrow Airport, London serves a unique role in ensuring connectivity to/from Ireland. This connectivity is fundamental both to provide connections to and from Dublin as well as to and from the regions.'<sup>43</sup>
- 4.36 Aer Lingus's Articles of Association provide that (with certain exceptions) no slots at Heathrow Airport may be subject to a Disposal Transaction without prior notification to shareholders holding in excess of 10 per cent of the issued share capital. While a short-term lease of a maximum of 36 months in duration is excluded from the definition of a Disposal Transaction, the Articles provide that only one such short-term lease may be in place at any one time. If shareholders amounting to at least 20 per cent of Aer Lingus's share capital so require, the company must call an EGM to vote on the transaction. To proceed, the vote in favour of the sale must be greater than: 100 per cent minus the Minister of Finance's (Irish Government's) holding in per cent, minus 5 per cent, subject to a maximum of 75 per cent. Today, that would mean that more than 69.9 per cent of votes must be in favour of the motion.
- 4.37 Given that Ryanair's shareholding is 29.82 per cent, and a 30.1 per cent vote is needed to block the relevant resolution, Ryanair would be in a position to call an EGM and, based on historical shareholder turnout and likely future turnout, would be able to block the resolution on its own.<sup>44</sup>
- 4.38 Until recently, no attempt to sell Heathrow slots had been made by Aer Lingus since Ryanair acquired its shareholding, although Aer Lingus submitted evidence that, on one occasion, a particular transaction with another airline to exchange Heathrow

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<sup>42</sup> Irish Companies Act 1963, as amended by Shareholders' Rights (Directive 2007/36/EC) Regulations 2009. We note that the 5 per cent and 3 per cent shareholding levels apply to single shareholders or to a group of shareholders.

<sup>43</sup> [http://corporate.aerlingus.com/investorrelations/regulatorynews/2006pressreleases/minister\\_lhr.pdf](http://corporate.aerlingus.com/investorrelations/regulatorynews/2006pressreleases/minister_lhr.pdf).

<sup>44</sup> The only situation in which Ryanair would not be able to block the resolution on its own would be if shareholder turnout was nearly 100 per cent, which is extremely unlikely.



slots [✂] was not progressed when the other airline realized that it would be subject to the approval mechanism set out above and Ryanair would have an effective veto. Aer Lingus recently notified the Irish Government and Ryanair under its Articles of Association about a proposed slot transaction with British Airways; neither Ryanair nor the Irish Government opposed the transaction (see paragraph 7.97(b)).<sup>45</sup>

### *Constraints on Aer Lingus's Management Time*

- 4.39 Aer Lingus told us that Ryanair had sought to use its position as a shareholder to challenge Aer Lingus's management in various ways, including making complaints to regulators, making public statements on the pensions issue, initiating judicial review proceedings and seeking undertakings or commercially sensitive information (see Appendix C).
- 4.40 We note that none of the complaints to regulators or judicial review proceedings was upheld, and none of the attempts to seek undertakings was successful and no commercial information was supplied to Ryanair.
- 4.41 Aer Lingus also put it to us that Ryanair's minority shareholding, combined with its repeated attempts to acquire the whole company, has generated a significant constraint on Aer Lingus's management time. Ryanair said that its activities had been completely consistent with its role of minority shareholder and none of the incidents described above has had any effect on Aer Lingus's behaviour in the marketplace.

### *Conclusion on material influence*

- 4.42 We conclude that Ryanair's 29.82 per cent shareholding in Aer Lingus gives it the ability to exercise material influence over Aer Lingus. We reach this view having regard to all the factors discussed in paragraphs 4.12 to 4.41 and, in particular, Ryanair's ability to block special resolutions and the sale of Heathrow slots. We conclude that these mechanisms are relevant to Aer Lingus's ability to pursue its commercial policy and strategy, in particular, its ability to combine with another airline and to optimize its portfolio of slots, which are relevant to Aer Lingus's behaviour in the market. We discuss the relevance of Ryanair's ability to influence Aer Lingus's commercial policy and strategy and whether it has given rise to, or may be expected to give rise to an SLC in our assessment of competitive effects in Section 7.
- 4.43 As set out in paragraph 4.10, we do not consider it necessary to have concluded whether or not Ryanair has to date exercised material influence over Aer Lingus's commercial policy and strategy. Rather, this is one factor in the CC's assessment of whether or not the acquisition has given rise to, or may be expected to give rise to a an SLC as discussed further in the competitive effects section.
- 4.44 In light of the above, we conclude that Ryanair has acquired the ability materially to influence the commercial policy and strategy of Aer Lingus and that, as set out in paragraph 4.6, this material influence gives rise to legal control for the purposes of the Act.

### *Turnover and share of supply test*

- 4.45 The second limb of the jurisdictional test as to whether a relevant merger situation has been created is whether the turnover or share of supply test is met.

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<sup>45</sup> [www.ise.ie/app/announcementDetails.aspx?ID=11560115](http://www.ise.ie/app/announcementDetails.aspx?ID=11560115).

- 4.46 The turnover test is satisfied where the value of the turnover in the UK of the enterprise being taken over exceeds £70 million.<sup>46</sup> In this instance we have not sought to assess the applicable turnover for each of the years in which Ryanair held a shareholding in Aer Lingus as instead we have been able to rely on the share of supply test.
- 4.47 We find that Ryanair's completed acquisition of Aer Lingus meets the share of supply test set out in section 23(4)(b) of the Act, since Ryanair and Aer Lingus together account for more than 25 per cent of passengers flown between Great Britain and the Republic of Ireland. As set out in paragraph 5.3, the two airlines together carried 82 per cent of all outbound passengers travelling between Great Britain and the Republic of Ireland in 2012 (Ryanair with a share of 49.9 per cent of passengers, Aer Lingus with a share of 31.7 per cent of all passengers).

### ***Timing***

- 4.48 The period of four months (see paragraph 4.2(c)) was suspended under section 122(4) of the Act while the potential application of the EUMR to the minority shareholding was being considered. It was then further extended by both the CAT and the Court of Appeal during the course of an appeal brought by Ryanair in the UK courts against the OFT's decision to investigate the acquisition of the minority shareholding. The Court of Appeal made an order on 24 November 2011 that the four-month time limit be suspended until the determination of Ryanair's appeal.<sup>47</sup> Ryanair's appeal was dismissed by the Court of Appeal on 22 May 2012 and Ryanair and the OFT agreed a further extension for the OFT to consider whether to refer the acquisition to the CC. The reference was made by the OFT on 15 June 2012. We therefore decide that the reference was made within the necessary time period.

### ***Conclusion on relevant merger situation***

- 4.49 We conclude that a relevant merger situation has been created.

## **5. Substitutability and competition between the UK operations of Ryanair, Aer Lingus and their rivals**

- 5.1 In this section we:
- (a) describe the airlines active on routes between Great Britain and Ireland, the principal area of overlap between the UK operations of Ryanair and Aer Lingus (see paragraphs 5.3 and 5.4);
  - (b) consider the markets within which the merger may give rise to an SLC (the relevant markets) (see paragraphs 5.5 to 5.15);
  - (c) assess the strength of the competitive constraint that Aer Lingus imposes on the UK operations of Ryanair, and vice versa (see paragraphs 5.16 to 5.31);
  - (d) assess the strength of the competitive constraint imposed by other airlines (see paragraphs 5.32 to 5.36); and

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<sup>46</sup> Section 23 of the Act.

<sup>47</sup> For the Court of Appeal's reasons for making the Order of 24 November 2011, see judgment dated 21 December 2011 in *Ryanair Holdings PLC v Office of Fair Trading* [2011] EWCA Civ 1579.

(e) consider whether the intensity of competition between Ryanair and Aer Lingus has changed since 2006 (see paragraphs 5.37 to 5.49).

5.2 In carrying out our assessment of substitutability and competition on routes between Great Britain and Ireland, we draw in particular on the evidence and findings from the European Commission's decision on Ryanair's third bid for Aer Lingus, announced on 27 February 2013 (see paragraph 3.7).<sup>48</sup>

### ***Airlines operating routes between Great Britain and Ireland***

5.3 The primary area of overlap between the UK operations of Ryanair and Aer Lingus is on services between Great Britain and the Republic of Ireland. As we set out in Appendix D, Ryanair and Aer Lingus together carried around 82 per cent of all passengers travelling between Great Britain and the Republic of Ireland in 2012. There is also some limited overlap between the carrier's services between Northern Ireland and London, and between Northern Ireland and Portugal.

5.4 In addition to Ryanair and Aer Lingus, we identified a number of other airlines that were active in these areas:

(a) *Aer Arann* was the third largest operator between Great Britain and the Republic of Ireland in 2012. As described in Appendix B, Aer Arann operates a number of services under the 'Aer Lingus Regional' brand. Given the scope of the franchise agreement between Aer Lingus and Aer Arann, we also consider overlap between routes operated by Aer Arann and Ryanair in this section.

(b) *Flybe* is a regional airline, operating scheduled, short-haul services from a number of UK bases. It said that it had a hybrid business model; it had adopted many of the features of the low-frills sector while retaining some features of full-service carriers such as pre-assigned seating. It has been active on the Exeter to Dublin route for around 15 years, and also operates between Southampton and Dublin, Manchester and Knock, Manchester and Waterford, Birmingham and Waterford, Edinburgh and Knock, Glasgow and Shannon and London Gatwick and Belfast.

(c) *British Airways* forms part of the IAG group, together with Iberia. It is the former British flag carrier, with a large network of short- and long-haul services, centred around its London bases at Heathrow and Gatwick. It previously operated a service to Dublin from London Gatwick (withdrawn in 2009), and re-entered the London to Dublin corridor following the acquisition of bmi in 2012. It also operates between London and Belfast.

(d) *CityJet* is a subsidiary of the Air France KLM group. It has a fleet of 33 aircraft, with a network centred on its bases at London City and Paris Charles De Gaulle airports. It has been active on the London to Dublin corridor since 2003.

(e) *easyJet* is a point-to-point low-fares carrier with a large network of short-haul flights across Europe. It runs services between Belfast City airport and Stansted, Luton and Gatwick, and Belfast International and Faro airport.

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<sup>48</sup> The European Commission's decision was published on 30 July 2013. See [http://ec.europa.eu/competition/mergers/cases/decisions/m6663\\_20130227\\_20610\\_3197623\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6663_20130227_20610_3197623_EN.pdf).

## **Market definition**

5.5 In this section, we consider the market definition that we should adopt as a framework for our analysis of competitive effects, and identify the markets within which the transaction may give rise to an SLC (the relevant markets).<sup>49</sup> We first discuss substitutability between air travel and other transport modes, and identify the relevant product market. We then consider substitutability between the airlines' services in terms of the airports served, and identify the relevant geographic markets.

### *Product market*

- 5.6 Both Ryanair and Aer Lingus supply air passenger services. In taking this as our starting point, however, we recognized that airlines differentiate in terms of the services offered to passengers and the customer base targeted. We discuss the substitutability of the service offering of Ryanair and Aer Lingus—and the resulting closeness of competition between them—in paragraphs 5.18 to 5.21.
- 5.7 We considered whether to include any additional forms of transport in our product market. For passengers travelling between Great Britain and the Republic of Ireland, this would most likely be by ferry (with crossings operated between NW England, Wales and Scotland in Great Britain, and Dublin, Belfast and Rosslare in Ireland), in combination with overland transportation from the passenger's origin/destination to the relevant ports.
- 5.8 We noted that travelling using an alternative mode of transport would generally involve substantially longer journey times. For example, the total travel time from central London to central Dublin would be around six and a half hours by train and ferry,<sup>50</sup> compared with around two and a half hours by air.<sup>51</sup> Central Manchester to central Dublin would involve a travel time of approximately two and a half hours by air,<sup>52</sup> compared with five and a quarter hours by train and ferry.<sup>53</sup> Aer Lingus told us that the total travel time by alternative modes of transport remained significantly longer than that by air when taking into account realistic check-in/waiting times. In addition, we saw no evidence of the airlines altering their behaviour in response to the actions of ferry or rail operators, or of the airlines monitoring the activities of ferry or rail operators.
- 5.9 In its investigation, the European Commission concluded that intermodal substitution was not relevant for any of the overlap routes. In line with this conclusion, we found that while an alternative form of transport might present a reasonable alternative for some non-time-sensitive passengers, the degree of substitutability between flying and these other transport modes was limited, and so the strength of any competitive constraint was likely to be weak.
- 5.10 On this basis, we conclude that the relevant product market is the supply of air passenger services.

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<sup>49</sup> CC2, [section 5.2](#).

<sup>50</sup> Assuming 4 hours by train to Holyhead, 2-hour ferry to Dublin, 35-minute bus to Dublin city centre.

<sup>51</sup> Assuming 45-minute train to London Stansted, 1-hour-20-minute flight, 40-minute bus to Dublin city centre.

<sup>52</sup> Assuming 45-minute bus to Manchester Airport, 1-hour-5-minute flight, 40-minute bus to Dublin city centre.

<sup>53</sup> Assuming 2 hours 45 minutes by train to Holyhead, 2-hour ferry to Dublin, 35-minute bus to Dublin city centre.

## Geographic market

- 5.11 A key dimension in which airlines' services are differentiated is in terms of the airports served. We would expect many passengers to be willing to consider using a rival airline's service to/from the same city (whether or not it is the same airport). However, passengers are likely to be less willing to substitute to a route connecting two different cities that are a long way from their intended origin and destination.
- 5.12 In order to identify relevant geographic markets, we use a version of the origin and destination approach, similar to that employed by the European Commission in a number of previous investigations into airline mergers.<sup>54</sup> More specifically, we identify a set of overlap corridors encompassing routes between groups of nearby origin and destination airports, close enough to one another that a significant number of passengers would be likely to consider them substitutable. Following the European Commission, we use as our starting point a 100km/1-hour distance threshold to identify potentially substitutable airports.<sup>55</sup> The full details of our overlap analysis are set out in Appendix D.
- 5.13 We list the overlap corridors that we have identified in Table 1. There are six corridors connecting airports in Great Britain and the Republic of Ireland where services operated by Ryanair and Aer Lingus overlap (encompassing 14 Ryanair routes and eight Aer Lingus routes). Aer Lingus carried a total of 1.47 million outbound passengers on routes on these six corridors in 2012 (around three-quarters of all passengers carried by Aer Lingus from UK airports in the year); Ryanair 1.75 million outbound passengers (12.9 per cent of all passengers carried by Ryanair from UK airports in the year). Total calendar year 2011 revenue for Ryanair on these routes was around €[redacted] million.<sup>56</sup> Aer Lingus total passenger revenue on these routes for calendar year 2011 was around €[redacted] million.<sup>57</sup>
- 5.14 We identify a further five corridors between Great Britain and the Republic of Ireland where Ryanair's services overlap with routes operated by Aer Arann under the Aer Lingus Regional brand. Ryanair carried a total of 0.39 million outbound passengers on these routes in 2012; Aer Arann carried a total of 0.26 million. Finally—looking outside the routes between Great Britain and the Republic of Ireland—we find that both Ryanair and Aer Lingus also operate services between London and Northern Ireland and Northern Ireland and Faro. The extent of overlap here is weaker, given the distance between City of Derry airport (from which Ryanair operates) and Belfast City airport (from which Aer Lingus operates). The airlines carried a combined total of 0.33 million outbound passengers on these two corridors in 2012.

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<sup>54</sup> Including the European Commission's two investigations, in 2007 and 2013, into Ryanair's bids for Aer Lingus.

<sup>55</sup> Road distances and drive-times are calculated using the google maps API.

<sup>56</sup> Total calculated as *totalgrossrev* + *totaladminexcessbag* + *totalotherrev*.

<sup>57</sup> Total calculated as *purepaxrev* + *recoverablerev* + *retailrev*.

TABLE 1 Summary of corridors on which the services of Ryanair and Aer Lingus/Aer Arann overlap

Route	Total number of passengers carried by Ryanair, Aer Lingus and Aer Arann	Share of all passengers travelling on the corridor %			Airport pair?	Other airlines present?
		Ryanair	Aer Lingus	Aer Arann		
<i>Republic of Ireland— Ryanair/Aer Lingus</i> London–Dublin	1,562,819	38.2	43.7	0.9	Yes	BA (10%), CityJet (4%), Flybe (3%)
London–Cork	389,843	44.4	55.6		Yes	
London–Shannon	280,767	53.3	46.7		No	
London–Knock	133,134	70.1	29.9		No	
NW England–Dublin	532,763	72.5	25.8	1.6	Yes	
Birmingham/ East Midlands–Dublin	350,057	64.8	34.7	0.4	Yes	
<i>Republic of Ireland— Ryanair/Aer Arann</i> Glasgow/Edinburgh/Prestwick –Dublin	330,786	56.2	6.2	37.4	Yes	
Bristol/Cardiff/Exeter–Dublin	182,040	61.7		29.9	Yes	Flybe (8%)
NW England–Cork	72,941	47.0		53.0	No	
NW England–Shannon	43,988	36.0		63.9	No	
Birmingham/East Midlands– Knock	36,229	58.5		19.6	No	
<i>Northern Ireland—Ryanair/Aer Lingus</i> London–Northern Ireland	197,580	6.0	11.8		No	easyJet (45%), BA (20%), Flybe (15%)
Northern Ireland–Faro	37,991	11.0	31.3		No	easyJet (49%)

Source: CC analysis of CAA data.

Note: Total passenger numbers and shares of all passengers are given for 2012, and refer to outbound passengers (ie passengers departing UK airports) only.

5.15 Although in most instances we thought that a significant number of passengers would consider the airports within these origin and destination groupings to be substitutable, in some instances the groupings included airports located a significant distance from each other.<sup>58</sup> We did not, however, need to conclude on whether passengers would consider these more distant airports to be substitutable, as this did not affect our conclusions on the competitive effects of the transaction.<sup>59</sup>

### ***The competitive constraint between Ryanair and Aer Lingus***

5.16 In this section, we examine the extent of the competitive constraint that Ryanair imposes on Aer Lingus (and Aer Arann), and vice versa. We begin by considering the closeness of the service offerings of the airlines, then review direct evidence of competition between them, and finally assess whether the airlines would be likely to impose a competitive constraint on each other through potential competition and the threat of entry.

5.17 In our assessment we have regard to the analysis of the European Commission, which found that Ryanair and Aer Lingus are by far the most important carriers

<sup>58</sup> This applies in particular to City of Derry and Belfast airports, Southampton and the London airports, and Exeter and Bristol airports.

<sup>59</sup> Indeed, even looking only at instances where Ryanair and Aer Lingus operate to and from the same airports, we found that Ryanair and Aer Lingus overlap on three routes on which they were both still active in May 2013, between London Gatwick and Dublin, Manchester and Dublin and Birmingham and Dublin. The airlines are the only two operators on each of these routes, and carried a combined total of 1 million outbound passengers in 2012.

operating out of Ireland. It concluded that the two companies are close competitors and exert an important competitive constraint upon each other, referring in particular to the similar business models of the two airlines, as well as the fact that they both enjoy high brand recognition in Ireland and are both particularly well established in Irish airports.

### *Closeness of service offering*

- 5.18 A primary factor in determining the extent of competition between the parties on overlapping corridors will be the extent to which passengers consider the services of the two airlines to be substitutable—ie the extent to which passengers of one company would be willing to switch to the services of the other.
- 5.19 A key dimension in which one airline's offering will differ from another's is in terms of the level of services provided to passengers and the extent to which these services are included in ticket prices.
- 5.20 We provide a comparison of the service offering of the two airlines in Appendix D. We also compare the average prices paid and the journey purpose of the passengers carried by the two airlines. We found that Aer Lingus (which describes itself as a 'value carrier') generally offers more services, charges higher prices, and carries more business passengers than Ryanair (a low-cost carrier).
- 5.21 However, despite these differences, the service offerings of the two airlines are similar in many important respects, and we would expect a significant proportion of passengers to consider the airlines' services to be substitutable. We find that on all corridors both airlines carry significant numbers of business passengers, passengers on holiday and passengers visiting friends and relatives. We therefore find it unlikely that any of these categories of passengers would only consider flying with one of the airlines when travelling between Great Britain and the Republic of Ireland.

### *Direct evidence of competition between the airlines*

- 5.22 We also considered direct evidence of competition between the airlines. This evidence is set out in more detail in Appendix D.
- 5.23 Both Ryanair and Aer Lingus take the behaviour of each other into account in determining their prices. There is strong evidence illustrating that the prices set by one carrier have a direct impact on the prices set by the other. In our view, this demonstrates the competitive constraint that exists between the airlines. We also saw various internal documents prepared by the parties in the course of business which confirmed to us that Ryanair and Aer Lingus monitor each other's behaviour more generally.
- 5.24 In addition, the European Commission in its latest investigation used regression analysis to investigate whether the presence of one of the parties on a corridor has an impact on the fares of the other, and to estimate the magnitude of any such effect. It found that Ryanair's presence on a corridor was associated with a decrease in Aer Lingus's fares, and vice versa, and that these effects were economically and statistically significant, and highly robust to the use of alternative specifications.
- 5.25 We also noted a number of Ryanair promotional campaigns directly targeting Aer Lingus's customers, which also suggested a level of competition between the two airlines.

- 5.26 To summarize, there is a considerable body of direct evidence showing the airlines competing for passengers, and illustrating that their actions have an impact on each other's behaviour.

### *Potential competition*

- 5.27 We considered the extent to which Ryanair and Aer Lingus might impose a competitive constraint on each other via the threat of entry.
- 5.28 The European Commission found that both Aer Lingus and Ryanair exert a significant constraint on each other on a number of routes on which they are not currently both active, including two routes involving a UK airport. Specifically, it found that Ryanair would be the most credible potential entrant on Aer Lingus's route between Cork and Birmingham, and that Aer Lingus would be the most credible potential entrant on Ryanair's route between Newcastle and Dublin.
- 5.29 Our assessment of potential competition is set out in Appendix D. We note that the two airlines have entered or expanded on routes between Great Britain and the Republic of Ireland in competition with each other on various occasions in previous years. Because of their established position in the Irish and UK markets, many of the barriers to entry identified in our section on market entry would be less of a deterrent to new entry by Ryanair and Aer Lingus than to other airlines.<sup>60</sup> We identified a number of routes between Great Britain and the Republic of Ireland on which Ryanair was currently active, but Aer Lingus was not, and a number of routes on which Aer Lingus Regional services operated but on which Ryanair was not currently active. We conclude that Ryanair and Aer Lingus may impose a competitive constraint on routes between Great Britain and the Republic of Ireland on which both airlines are not already active through the threat of entry.
- 5.30 We considered whether Aer Lingus could impose a competitive constraint on Ryanair's other UK services. We noted that Aer Lingus had previously operated from Gatwick and Belfast to various seasonal destinations, and had applied to the European Commission for slots for services between Edinburgh and London which were divested following the BA/bmi transaction. However, given the large number of other airlines active in the UK market, we considered that any competitive constraint exerted by Aer Lingus through the threat of entry on UK routes would be likely to be weak.

### *Conclusions on the competitive constraint between Ryanair and Aer Lingus*

- 5.31 We conclude that Ryanair and Aer Lingus impose a strong competitive constraint on each other on overlap routes between Great Britain and Ireland, and are also likely to impose a competitive constraint—albeit less significant—on each other through the threat of entry on routes between Great Britain and Ireland on which the two airlines are not currently both active.

### *The competitive constraint from other rivals*

- 5.32 In this section, we assess the extent to which other airlines impose a competitive constraint on those routes where Ryanair and Aer Lingus compete for passengers.

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<sup>60</sup> Although we note that airport capacity constraints and the weak economic environment could still deter entry.



- 5.33 The European Commission concluded in its decision that the competitive constraint from other airlines on any of the UK overlap routes would not be strong enough to constrain a merged Ryanair/Aer Lingus.
- 5.34 In general, we would not expect the competitive constraint imposed by other airlines on routes between Great Britain and the Republic of Ireland to be strong. As set out in paragraph 5.3, together Aer Lingus and Ryanair accounted for 82 per cent of all passengers travelling between Great Britain and the Republic of Ireland in 2012, with Aer Arann carrying a further 10 per cent of passengers under the Aer Lingus Regional brand. The only other airlines present are British Airways (carrying 4 per cent of all passengers), Flybe (carrying 2 per cent of all passengers) and CityJet (carrying under 2 per cent of all passengers), none of which has a base at Dublin airport. On 9 out of the 13 overlap corridors identified in Table 1, Ryanair and Aer Lingus are the only airlines present and therefore there will not be any competitive constraint from rival airlines on routes on these corridors.
- 5.35 We looked at the remaining four overlap corridors in more detail (see Appendix D). We found that on the London to Dublin corridor, there was likely to be some constraint from British Airways and CityJet. On the Bristol to Dublin corridor, the competitive constraint from Flybe was likely to be weak. We expected the competitive constraint from other airlines—and in particular easyJet—on overlap routes between London and Northern Ireland, and Northern Ireland and Faro to be strong.

#### *Conclusions on constraint from other rivals*

- 5.36 We conclude that on most overlap corridors, Ryanair and Aer Lingus do not face a competitive constraint from any other airlines. On the London to Dublin and—to a lesser extent—the Bristol to Dublin corridors, there is likely to be some competitive constraint from other airlines. We conclude that there is likely to be a strong competitive constraint from other airlines—and in particular easyJet—on overlap routes between London and Northern Ireland, and Northern Ireland and Faro.

#### ***The trend in competition between Ryanair and Aer Lingus since 2006***

- 5.37 In this section we look at whether the intensity of competition between Ryanair and Aer Lingus has changed compared with the level which existed in 2006. We begin by setting out the findings of the European Commission on developments in competition between the airlines since 2006,<sup>61</sup> before discussing the trend in four dimensions of the competitive offering of Ryanair and Aer Lingus over the period: fares, overlap, frequency and the level of services offered by the airlines. The full details of our assessment are set out in Appendix E.

#### *The European Commission's findings*

- 5.38 As discussed in paragraph 5.17, the European Commission found that Ryanair and Aer Lingus are close competitors and exert an important competitive constraint upon each other. It identified 46 routes—including 12 involving a UK airport—on which the airlines competed vigorously.
- 5.39 It said that its market investigation had not provided material indications that market circumstances had changed since 2007. If anything competition may have increased between the parties. Specifically, in relation to the extent of overlap between the

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<sup>61</sup> The relevance of the European Commission's findings and our duty of sincere cooperation are discussed in Section 7.

parties' operations, it found that the number of routes on which Ryanair and Aer Lingus overlapped increased from 35 in 2007 to 46 in 2012. On almost 85 per cent of these routes (65 per cent in 2007) there were no other scheduled airlines active.<sup>62</sup>

### *Fares*

- 5.40 We were not aware of any evidence suggesting that there had been changes in the way that Ryanair and Aer Lingus monitor and react to each other's fares into account since 2006.
- 5.41 We calculated average fares (using ticket revenue only, excluding revenue from, for example, excess baggage and administration charges) for each month from January 2005 to December 2011 on the routes of Ryanair and Aer Lingus on the six primary overlap corridors. In line with the assessment of the European Commission, we found that [redacted] average ticket revenues per passenger [redacted].
- 5.42 Ryanair argued that the European Commission's econometric analysis showed that Ryanair exerted a stronger competitive constraint on Aer Lingus in 2013 than it did in 2007. In our view, the results of the two analyses showed that Ryanair exerted a strong competitive constraint on Aer Lingus fares in both periods. It was not clear to us, however, that the analysis showed that fare competition between the two airlines had increased since 2006.

### *Overlap*

- 5.43 We also looked at the trend in the extent of overlap between the two airlines' routes over the period. We agreed with the European Commission's findings that the extent of overlap between the operations of the two airlines has increased since 2006. Although the overlap corridors accounting for the great majority of passengers—London, NW England, Birmingham/East Midlands and Edinburgh/Glasgow to Dublin, and London to Cork and Shannon—were active in both periods, the franchise agreement between Aer Lingus and Aer Arann entered into in 2010 had added three additional overlap corridors compared with the situation prior to 2006.<sup>63</sup> In addition, Aer Lingus itself had entered another corridor in competition with Ryanair (between London and Knock), and withdrawn from an overlap corridor (between Newcastle and Dublin) over the period. The total number of passengers carried on overlap corridors declined between 2007 and 2013.

### *Frequency*

- 5.44 We compared the total frequency operated by Ryanair and Aer Lingus on overlap routes in 2006 and 2012. We found that Aer Lingus's frequency on the London–Dublin, London–Cork and London–Knock corridors had increased over the period as a result of its introduction of new services from London Gatwick. There was a slight decrease in Aer Lingus's frequency on other overlap routes. Ryanair's frequency on all of the overlap corridors decreased over the period, most significantly on the London to Dublin and NW England to Dublin corridors. Ryanair attributed this reduction in frequency to a significant reduction in demand for air travel. It said that Ryanair would have been expected to cut capacity between the UK and Republic of Ireland, regardless of its shareholding in Aer Lingus because of the major recessions

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<sup>62</sup> These figures refer to all Ryanair and Aer Lingus routes, not just to routes between Great Britain and Ireland.

<sup>63</sup> Between Bristol and Dublin, NW England and Shannon and Birmingham/East Midlands and Knock.

in the period, and increases in aviation taxes and airport charges. It said that other airlines had also cut capacity between the UK and Republic of Ireland since 2007.

- 5.45 Both Ryanair and Aer Lingus have announced increases in frequencies on certain routes between Great Britain and Ireland in the Winter 2013/14 season.

### *Service offering*

- 5.46 We considered whether there had been any change in the service offerings of the two airlines since 2006. As set out in paragraph 2.14, Aer Lingus was operating a low-fares business model in 2006 but repositioned itself as a 'value carrier' from 2009. Nevertheless, we considered that in many important respects the service offering of the two airlines remains very similar and that the two airlines will impose a strong competitive constraint on each other (see paragraph 5.21). Aer Lingus told us that this repositioning was a reaction to the global economic and financial crisis, and that the repositioning had enabled it to compete more effectively with Ryanair.

### *Other evidence*

- 5.47 In its submission to the OFT,<sup>64</sup> Ryanair also referred to:
- (a) Ryanair internal documents, [redacted]; and
  - (b) Ryanair press releases and print advertising, showing Ryanair targeting Aer Lingus customers in the period since the transaction.
- 5.48 This evidence also suggested to us that there had been a continuation of competition between Ryanair and Aer Lingus since 2006.

### *Conclusion on competition between Ryanair and Aer Lingus since 2006*

- 5.49 We conclude that, in line with the European Commission's findings, competition between Ryanair and Aer Lingus has remained intense since 2006. The extent of overlap between the operations of the two airlines has increased, largely as a result of Aer Lingus's Regional franchise agreement with Aer Arann. We discuss the relevance of these findings to our assessment in our discussion of competitive effects.

## **6. The counterfactual**

- 6.1 In carrying out our competitive assessment, we compare the prospects for competition with the acquisition against the competitive situation in the absence of the acquisition. The latter is called the 'counterfactual'.<sup>65</sup>
- 6.2 The counterfactual is necessarily uncertain since it is not an observable event. As set out in our Guidelines, the CC typically incorporates into the counterfactual 'only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments'.<sup>66</sup>

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<sup>64</sup> Ryanair submission to the OFT on SLC, paragraph 5.19. See [www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus/evidence](http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus/evidence).

<sup>65</sup> CC2, paragraph 4.3.1.

<sup>66</sup> CC2, paragraph 4.3.6.

## ***The views of parties***

- 6.3 Aer Lingus said that the appropriate benchmark for assessing the effects of Ryanair's shareholding was a competitive situation in which Ryanair holds no shares in Aer Lingus. While Aer Lingus believed that in the absence of Ryanair's shareholding it would have been better placed to participate in M&A activity, it could not be certain that such a possibility would have materialized since 2006. In its view, the relevant counterfactual therefore remained a situation in which Ryanair did not own any shares in Aer Lingus, and where Aer Lingus operates independently of any other airline.
- 6.4 Ryanair told us initially that, if it were unable to acquire full ownership of Aer Lingus, 'the appropriate counterfactual is either the breakup of Aer Lingus or its ultimate failure and closure'. Ryanair said that Aer Lingus's cost base could not sustain long-term competition with Ryanair's much lower cost base to/from Ireland. In Ryanair's view, Aer Lingus had no future as an independent airline because of its small scale, its peripheral location and its repeated failure to expand outside Ireland. If Ryanair's offer for Aer Lingus was unsuccessful, Aer Lingus was likely to be acquired by another airline or financial investor that would break up Aer Lingus, sell off its valuable Heathrow slots and transatlantic routes and close its loss-making short-haul routes to the UK and Europe.
- 6.5 Ryanair told us that Aer Lingus would be a potential acquisition target for a financial institution rather than an airline, and most major European flag-carrier airlines including British Airways, Air France and Lufthansa had indicated that they had no interest in acquiring Aer Lingus.
- 6.6 Ryanair also told us that the break-up of Aer Lingus would result in higher value to its shareholders because of 'the continuing concerns about the company's failure to address its pension fund deficit, and the continuing trend of smaller peripheral flag carriers exiting the market over the medium to long term'.
- 6.7 Subsequently, Ryanair told us that it agreed with the first of our counterfactual scenarios (see paragraph 6.8), namely that Aer Lingus would have continued to compete with Ryanair on routes between Great Britain and Ireland, either under independent ownership or in combination with another airline.

## ***Our assessment***

- 6.8 We considered three possible counterfactual scenarios regarding Aer Lingus's competitive strategy on routes between Great Britain and Ireland in the period since 2006 and for the foreseeable future:<sup>67</sup>
- (a) Aer Lingus would continue to compete with Ryanair on routes between Great Britain and Ireland, either under independent ownership or in combination with another airline;
  - (b) Aer Lingus would reduce substantially its services on routes between Great Britain and Ireland, following an acquisition by another airline; and
  - (c) Aer Lingus would withdraw from the airline industry.

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<sup>67</sup> Ryanair told us that the counterfactual scenarios that we have set out were not counterfactual scenarios as envisaged in the CC's Guidelines because none of them was precluded by, or inconsistent with, Ryanair's minority shareholding. We discuss the likely impact of Ryanair's shareholding in our section on competitive effects.

- 6.9 Under all three of the scenarios considered, Ryanair would not own any shares in Aer Lingus.
- 6.10 There is a range of possible ownership structures for Aer Lingus, including its continuation as an independent airline or its combination with another airline. We analyse in detail in Section 7 the likelihood of Aer Lingus being involved in different types of combination absent Ryanair's shareholding and the impact on Aer Lingus's effectiveness as a competitor. For the purposes of our counterfactual assessment, we consider that the relevant question is whether the most likely scenario, absent Ryanair's shareholding, is that Aer Lingus would have remained or would remain active on routes between Great Britain and Ireland, or whether it would have withdrawn, or would withdraw from those routes in particular or from the airline industry more generally (see paragraph 6.8).

### ***Aer Lingus would continue to compete with Ryanair on routes between Great Britain and Ireland***

- 6.11 Under this counterfactual, absent Ryanair's shareholding, Aer Lingus would have continued to compete with Ryanair on routes between Great Britain and Ireland (and would continue to do so for the foreseeable future).
- 6.12 The value of Aer Lingus's network, branding and goodwill is intrinsically connected with its operations in Ireland, and Great Britain is a key market for passengers travelling to and from Ireland (with services to Great Britain making up a significant part of the airline's short-haul operations). We would expect a partner interested in combining with Aer Lingus also to have an interest in its operations between Great Britain and Ireland. The short-haul routes operated by Aer Lingus between Great Britain and Ireland did not—taken as a whole—appear to be less profitable than Aer Lingus's other short-haul routes.<sup>68</sup> More generally, we received no evidence—and saw no reason to expect—that while it was optimal for Aer Lingus to operate these routes at their current level of profitability, this would no longer be the case if it combined with another airline. In our view it was likely that, absent Ryanair's shareholding, Aer Lingus would have continued or would continue to compete with Ryanair on routes across the Irish Sea, whether as an independent airline or in combination with another airline.

### ***Aer Lingus withdrawal from competition with Ryanair on routes between Great Britain and Ireland***

- 6.13 The second counterfactual is the possibility that, absent Ryanair's shareholding, Aer Lingus would have withdrawn, or would withdraw from competition with Ryanair on routes between Great Britain and Ireland, following acquisition by another airline.
- 6.14 If another airline were to acquire Aer Lingus, there might be a review of Aer Lingus's commercial policy and strategy, with a variety of possible outcomes which could include a major change of strategy with respect to the Great Britain–Ireland air passenger services.
- 6.15 In general, for the reasons set out in paragraph 6.12, we would expect a partner interested in combining with Aer Lingus also to have an interest in its operations between Great Britain and Ireland. We considered whether, under one particular

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<sup>68</sup> Ryanair pointed to the submission by Aer Lingus to the European Commission that its [REDACTED]. However, Aer Lingus said that [REDACTED]. We were also conscious that Aer Lingus would derive additional profitability from many of these routes in providing feed for long-haul flights from Dublin.

ownership scenario—a takeover of Aer Lingus by a large network carrier—Aer Lingus might seek to withdraw from routes between Great Britain and Ireland because of pressure to reallocate scarce Heathrow slots to long-haul operations. Airport Co-ordination Limited told us that the general direction of slot trading at Heathrow was from short-haul to long-haul routes, and we were aware of Aer Lingus's submission to the European Commission that in the event that IAG were to acquire its Dublin–London Heathrow routes as part of the remedies package offered by Ryanair to the European Commission, there would be a risk of IAG diverting Heathrow scarce slots to other routes.

- 6.16 However, in our view such an outcome was unlikely because if the Irish Government were to sell its stake to another airline, it would be likely to seek to maintain connectivity with London Heathrow in line with its established policy (see paragraph 4.25). We also noted that since its acquisition of bmi, IAG had increased flights from Heathrow to Dublin from five to eight per day, which did not support the contention that a large network carrier would necessarily seek to withdraw short-haul services in order to use Heathrow slots for long-haul operations.
- 6.17 For the reasons set out in paragraphs 6.12 and 6.16, we do not find it likely that an acquirer of Aer Lingus would substantially change its current strategy with respect to air passenger services between Great Britain and Ireland. On this basis we do not think that this is the most likely counterfactual.

### ***Aer Lingus withdrawal from the airline industry***

- 6.18 Under the third counterfactual scenario, we considered whether Aer Lingus would be likely to withdraw from the industry, absent Ryanair's shareholding.
- 6.19 Aer Lingus is the former Irish national flag-carrier airline and has been a listed public company since 2006 with a clear and consistent strategy of continuing to operate as an airline. Ryanair's initial view on the counterfactual was that Aer Lingus would eventually fail or that it would be 'broken up' to realize a higher value for its shareholders (see paragraphs 6.4 and 6.5), resulting, necessarily, in reduced competition between Ryanair and Aer Lingus.
- 6.20 We reviewed Aer Lingus's recent financial performance, and noted that:
- (a) With the exception of 2008 and 2009, when the Irish economy was in difficulty, Aer Lingus has generated profit before tax and positive operating cash flow each year since 2006.
  - (b) Aer Lingus's results for the calendar year 2012 showed an increase in passenger numbers (by 1.5 per cent to 9.7 million), average yield per passenger (by 7 per cent to €120) and revenue (by 8 per cent to €1.4 billion). Operating profit before exceptional items increased by 41 per cent to €69 million in 2012.
  - (c) Aer Lingus had unrestricted cash of €313 million on its balance sheet at 31 December 2012, and total cash and deposits of €745 million.
- 6.21 Ryanair has not provided any substantive analysis of its claim that the break-up value of Aer Lingus exceeds its value as a going concern. We note that Aer Lingus's management are operating the business on a continuing basis in the interests of all its shareholders. We did not think that this counterfactual scenario was sufficiently likely to warrant further consideration.

## ***Conclusions on the counterfactual***

6.22 We conclude that the appropriate counterfactual is that Aer Lingus, absent Ryanair's shareholding, would have continued or would continue to compete with Ryanair on routes between Great Britain and Ireland, either under independent ownership or in combination with another airline. In the next section we consider whether this competition would have been reduced or would be reduced as a result of the acquisition by Ryanair of a minority shareholding in Aer Lingus.

## **7. Assessment of the competitive effects of the acquisition**

7.1 In this section we assess the competitive effects of Ryanair's acquisition of a minority shareholding in Aer Lingus. We consider whether the acquisition has resulted, or may be expected to result, in a reduction in Aer Lingus's, Ryanair's or both companies' effectiveness as competitors on routes between Great Britain and Ireland.

7.2 We start by discussing the relevance of the European Commission's findings to our own assessment and our duty of sincere cooperation pursuant to Article 4(3) of the TEU (see paragraphs 7.3 to 7.11). We then discuss whether Ryanair's minority shareholding has reduced or may be expected to reduce Aer Lingus's effectiveness as a competitor by influencing the commercial policies and strategies that are available to Aer Lingus (see paragraphs 7.12 to 7.130). Next, we discuss alternative ways in which Ryanair's minority shareholding might affect competition in the market (see paragraphs 7.131 to 7.159). We then consider whether entry or expansion by another airline would be likely to offset any adverse effect of the transaction (see paragraphs 7.160 to 7.175). In the final section we set out our conclusions on the SLC test (see paragraphs 7.176 to 7.188).

## ***Relevance of the European Commission's findings to our assessment***

7.3 Ryanair said that the evidence of competition between Ryanair and Aer Lingus on the routes between Great Britain and Ireland since the transaction (approximately six and a half years) demonstrated comprehensively that Ryanair had not used its minority shareholding to create a lessening of competition. It said that the evidence set out in the European Commission's decision on Ryanair's third bid for Aer Lingus, confirmed that competition between Ryanair and Aer Lingus was intense and had in fact increased since Ryanair obtained its minority shareholding. Ryanair said that, as no relevant factual circumstances had changed since this finding was made, the CC was legally obliged, pursuant to the duty of sincere cooperation, to reach a decision that was consistent with the European Commission's findings. Ryanair stated that it would be inconceivable for the CC to find that the same fact pattern evidenced an SLC between Ryanair and Aer Lingus.

7.4 Aer Lingus said that there could be no conflict between the European Commission's and our findings unless the national authority and the EU institution were applying the same law to the same facts. It said that this was not the case here as the European Commission were considering the application of the EUMR to the public bid and the CC was considering the application of the Act to the minority holding.

7.5 We noted first that it is clear that under the EUMR the European Commission does not have jurisdiction to conduct a review of the competitive effects of Ryanair's

acquisition of a minority shareholding in Aer Lingus,<sup>69</sup> as a result we have a duty under the Act to carry out our own assessment.

- 7.6 The Court of Appeal has recently confirmed that what is required by a Member State to comply with the duty of sincere cooperation under article 4(3) of the TEU is highly fact sensitive and it is for the Member State to choose the most appropriate course of action to take in order to fulfill it.<sup>70</sup>
- 7.7 In the present case, we consider that the appropriate course of action is to take into account the European Commission's assessment of competition between Ryanair and Aer Lingus in making our assessment of competitive effects. It has been helpful to us in understanding the intensity of competition between Ryanair and Aer Lingus and their rivals (and how this has changed over time) (see Section 5) and the likelihood of entry into the Irish market by other airlines. We have not reached any findings that are in conflict with those of the European Commission on these points.
- 7.8 However, we do not agree with Ryanair's submission that we are bound to conclude, on the basis of the European Commission's assessment of that competition, that the acquisition of the minority shareholding has not resulted and will not result in an SLC.
- 7.9 We looked carefully at the evidence of the period since 2006 as presented by the European Commission and gathered by the CC during the course of its inquiry. In particular, in addition to our consideration of competition between the airlines since 2006 (see Section 5), we refer extensively to events in the period since 2006 in our assessment of the different mechanisms by which Ryanair's shareholding in Aer Lingus may affect competition.
- 7.10 In our view, the finding that Ryanair and Aer Lingus compete intensely (and that the extent of overlap between their UK operations has increased since 2006) neither precludes, nor is in conflict with our findings that, absent Ryanair's shareholding, competition during the period since 2006 may have developed differently and could have been more intense. Many of the potential competitive effects of the transaction that we considered would manifest themselves in terms of the absence of an action that might otherwise have been taken by Aer Lingus (for example, Aer Lingus being prevented from combining with another airline or from disposing of Heathrow slots in the context of optimizing its route network and timetable). We therefore cannot determine whether the transaction has reduced competition relative to the counterfactual solely from observing the competitive actions that Aer Lingus and Ryanair have taken in the period since 2006.
- 7.11 In addition, we need to consider not only whether the transaction has, to date, led to a reduction in competition, but also whether competition between the airlines may be affected in the future. The evidence presented in the European Commission's decision, whilst informing our understanding of the current level of competition between the parties, is a factor among others that we have taken into account when assessing how competition between the airlines might develop with and without Ryanair's shareholding in the future. For example, we were also conscious of Aer Lingus's view that its competitiveness would be eroded over time as it faced an inevitable 'cost creep' if its participation in the trend of consolidation in the airline industry were limited, as well as Ryanair's view that Aer Lingus did not have a future as an independent airline.

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<sup>69</sup> See the judgments of the General Court, Case T-411/07 dated 6 July 2010, paragraphs 64 & 78, and the recent decision of the Court of Appeal, [2012] EWCA Civ 1632 at paragraph 60.

<sup>70</sup> *Supra*, paragraph 55.



## ***Effects of the acquisition on Aer Lingus's commercial policy and strategy***

- 7.12 We considered whether Ryanair's minority shareholding would reduce Aer Lingus's effectiveness as a competitor by affecting the commercial policies and strategies available to it. We first considered Ryanair's incentives to use its influence to weaken Aer Lingus's effectiveness as a competitor. We then looked at various mechanisms through which Ryanair's shareholding might influence the commercial policies and strategies available to its rival, considered the likelihood that such effects might arise and assessed the scale of the potential impact on Aer Lingus.
- 7.13 In our assessment, we focus primarily on strategic issues affecting Aer Lingus. Such strategic issues are often long-term, low frequency but high impact in nature. We are also, unusually, considering an acquisition which took place more than six and a half years ago. We are therefore necessarily considering effects over a long period of time, both looking back to 2006 and looking forwards for at least a similar period of time.
- 7.14 In response to our provisional findings, Ryanair said that the CC 'bears an exceptionally heavy burden' of proof in this case because of the recent decision by the European Commission on Ryanair's full bid for Aer Lingus, the fact that this case concerned a minority shareholding, and the six and a half years of history since the minority shareholding was acquired. We disagree. We address the relevance of the European Commission's decision to our case in paragraphs 7.3 to 7.11. The fact that the case concerns a minority shareholding rather than full control does not alter the burden of proof. As set out in paragraphs 7.9 to 7.11, we looked carefully at the evidence of the period since 2006, whilst also considering what might have occurred absent the shareholding and what might be expected to occur in the future.
- 7.15 Ryanair also said that the incentives and perceptions of third parties did not form part of Aer Lingus's own commercial policy and strategy. It referred to the CC's findings in the BSkyB/ITV case,<sup>71</sup> upheld by the CAT,<sup>72</sup> that the ability to block a squeeze-out under a hostile takeover would not form part of the acquired party's strategy (in that case, ITV). We must assess each case on its merits and, as set out in paragraph 8.88, we place particular weight in this case on the impact of Ryanair's minority shareholding on Aer Lingus's ability to pursue any opportunities for inorganic growth, including those which might be initiated by a third party. We therefore consider all ways in which Ryanair's minority shareholding might influence the commercial policies and strategies available to Aer Lingus, including the incentives and perception of third parties.

### ***Ryanair's incentives***

- 7.16 We first considered Ryanair's incentives with respect to its shareholding in Aer Lingus.
- 7.17 As set out in Section 5, we found that Ryanair and Aer Lingus are close competitors, with both airlines' actions having a significant impact on each other, and the two airlines being the only operators present on a number of routes. All else equal, the closeness of competition implies that Ryanair would be likely to benefit significantly from a weakening of Aer Lingus's effectiveness as a rival, as passengers diverting away from Aer Lingus's services would be likely to travel using Ryanair's services

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<sup>71</sup> Competition Commission, *Acquisition by British Sky Broadcasting Group Plc Of 17.9 per cent of the shares in ITV plc*, 14 December 2007, paragraph 6.36.

<sup>72</sup> *Virgin Media, Inc. v. The Competition Commission* [2008] CAT 25, at paragraph 327.

instead. We therefore formed the view that Ryanair would have an incentive to take actions that ultimately had the effect of reducing Aer Lingus's effectiveness when deciding how to exercise the influence afforded to it by its shareholding.

- 7.18 Ryanair, as a partial owner of Aer Lingus, will also have a financial interest in Aer Lingus. Given this, Ryanair might not always take every action that would weaken Aer Lingus's effectiveness as a competitor, irrespective of the cost to itself. Rather, we would expect Ryanair to use its influence in a way that best served its interests, as both a shareholder in and a competitor with Aer Lingus.
- 7.19 Generally speaking, we would expect Ryanair's incentives as a competitor to outweigh its incentives as a shareholder. This is because of the uncertainty and indirectness by which Aer Lingus's profit will flow back to Ryanair (see paragraphs 7.137 to 7.148), and the fact that Ryanair would only bear a share of the cost of any profits forgone by Aer Lingus, in proportion to the value of its shareholding.
- 7.20 Furthermore, we also took into account Ryanair's stated strategy of acquiring the entirety of Aer Lingus (see paragraph 3.11), and its ongoing bids for the outstanding shares in the company. We considered that this strategy could also affect Ryanair's incentives with respect to its shareholding. In particular, Ryanair would have an additional incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor if this would make it easier to acquire the company, and an incentive to oppose any strategies that Aer Lingus might follow that would make it more difficult for Ryanair to acquire Aer Lingus (for instance, certain combinations with other airlines).
- 7.21 We noted Ryanair's submission that when it had opposed Aer Lingus's management, it had done so only to protect the value of its shareholding. It told us that it would not oppose an acquisition by Aer Lingus if it were in the interests of shareholders (see paragraph 7.29), has made various public statements saying that it was willing to consider an offer for its shareholding,<sup>73</sup> and has repeatedly stressed that it would support any Aer Lingus fundraising initiatives. Ryanair also told us that there was no evidence that it would oppose the sale of additional Heathrow slots. It highlighted that it had been willing to divest Aer Lingus's Heathrow slots as part of the commitments proposed to the European Commission and had not opposed Aer Lingus's most recent request to dispose of a slot (see paragraph 7.97(b)).
- 7.22 However, for the reasons set out in paragraphs 7.17 to 7.20 (and in particular given the closeness of competition between Ryanair and Aer Lingus and Ryanair's desire to acquire the entirety of Aer Lingus) we found that Ryanair would have the incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor and we would expect Ryanair to act on these incentives. The incentive to weaken Aer Lingus's effectiveness would not exist for a shareholder which was not in competition with Aer Lingus.

### *Mechanisms by which Ryanair's shareholding could affect Aer Lingus's commercial policy and strategy*

- 7.23 We next considered various ways in which Ryanair's minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy. We recognized that we could not predict with certainty all the ways in which Ryanair's shareholding might affect Aer Lingus's commercial policy and strategy. However, we looked, in particular, at whether it would:

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<sup>73</sup> [www.ryanair.com/en/news/ryanair-statement-on-aer-lingus-2](http://www.ryanair.com/en/news/ryanair-statement-on-aer-lingus-2).

- (a) affect Aer Lingus's ability to participate in a combination with another airline (see paragraphs 7.24 to 7.84);
- (b) hamper Aer Lingus's ability to issue shares to raise capital (see paragraphs 7.85 to 7.92);
- (c) influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow (see paragraphs 7.93 to 7.107);
- (d) influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution (see paragraphs 7.108 to 7.115); and
- (e) allow Ryanair to raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy (see paragraphs 7.116 to 7.125).

*(a) Aer Lingus's ability to participate in a combination with another airline*

7.24 We considered whether Ryanair's shareholding might weaken the effectiveness of Aer Lingus as a competitor by restricting Aer Lingus's ability to manage its costs at a competitive level and/or expand or improve its offering via a combination with another airline. We first set out how Ryanair's minority shareholding might influence Aer Lingus's ability to combine with another airline. We then consider evidence related to the likelihood of Aer Lingus being involved in a combination absent Ryanair's minority shareholding, discussing the general trend in consolidation in the airline industry, the views of airlines, internal documents of Aer Lingus and discussions between Aer Lingus and other airlines since 2006. Finally, we discuss the potential impact of being impeded from combining with Aer Lingus on its effectiveness as a competitor.

7.25 Combinations between airlines are inherently unpredictable and opportunistic, and so it is inevitable that our assessment will require an element of judgement.<sup>74</sup> We do not consider it to be either feasible or necessary to catalogue all potential transactions involving Aer Lingus and another airline and assess the likelihood of each of these having taken place in the period since 2006 or taking place in the foreseeable future. Instead, we take into account a broad range of evidence relating to Aer Lingus including its position in the airline sector and evidence of its discussions with third parties on possible combinations in forming an overall view on the likelihood of Aer Lingus being (or having been) involved in a combination with another airline in the absence of Ryanair's minority shareholding.

*The role of Ryanair's minority shareholding*

7.26 We considered how Ryanair's minority shareholding might affect Aer Lingus's ability to combine with another airline.

7.27 We identified a spectrum of ways in which Aer Lingus and another airline could combine. These ranged from a full merger involving the integration of business activities and assets (including an acquisition of Aer Lingus by another airline, an acquisition by Aer Lingus of another airline, and other combinations based on the relative contribution of Aer Lingus and its merger partner to the enlarged business),

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<sup>74</sup> For instance, we were aware that the two airlines with which Aer Lingus had entered into discussions regarding substantial combinations in 2012 and 2013 were not mentioned as likely combination partners in our discussions with third party airlines which were asked about the likelihood of Aer Lingus being involved in a combination. Indeed one of the airlines, [REDACTED], was not even identified by Aer Lingus in an exercise carried out in 2010 to scope the pool of potential European combination partners for Aer Lingus (see paragraph 7.48).

through a joint venture (with close cooperation but less extensive business integration than a full merger), acquisition of a strategic investment in Aer Lingus via a minority shareholding by another airline, to franchises, codeshares and bilateral alliances with no integration. We set out different possible forms of combination in more detail in Table 1 in Appendix F.

- 7.28 Aer Lingus said that Ryanair's shareholding allowed it to control the destiny of Aer Lingus, making it 'kingmaker'. It told us that because of the minority shareholding, Aer Lingus was known as a target for a Ryanair takeover rather than a successful and profitable airline, and that this was an impediment to partnership negotiations. It said that Ryanair's presence on its share register was considered by potential investors to be a 'poison pill'.
- 7.29 Ryanair told us that it would be open to offers for its shareholding on their merits, and had repeatedly said so in public. Ryanair also said that it would not oppose a proposed acquisition if it were in the interests of Aer Lingus's shareholders, and would support Aer Lingus if it sought to raise capital by taking up its quota of shares in any rights issue. Ryanair said that its shareholding could not prevent Aer Lingus from acquiring another airline, as it could use its cash reserves or debt to finance an acquisition.
- 7.30 Third parties told us that any acquirer of Aer Lingus would be likely to be concerned by Ryanair's minority shareholding. IAG told us that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder. Air France said that Ryanair's presence as an existing shareholder in Aer Lingus was not considered a deterrent to another airline acquiring an interest in the airline. However, there would be concerns over the illiquid share block between the shares held by the Irish Government, Ryanair and employees. Overall, Air France said that it would be difficult, but not impossible, for another airline to take a stake in Aer Lingus given its current share register. Lufthansa said that having a competitor like Ryanair as a shareholder made Aer Lingus's shareholder structure rather challenging and made the airline rather less attractive. Aer Arann told us that a potential suitor would have concerns about acquiring an airline in which the largest shareholder was also a competitor.
- 7.31 We found that Ryanair's minority shareholding would give it the ability to impede possible acquisitions of Aer Lingus by another airline. Significantly, Ryanair could prevent a bidder from acquiring 100 per cent of Aer Lingus by choosing to retain its shares.<sup>75</sup> If Ryanair decided not to sell, an acquirer would need to accept Ryanair remaining as a significant minority shareholder, with different incentives to its own, and with, for example, the ability to block special resolutions and the entitlement to the proportionate share of the dividends and profits of Aer Lingus. In such circumstances, the acquirer's ability to integrate the businesses would be significantly restricted.
- 7.32 We also found that the shareholding would affect Aer Lingus's ability to merge with, enter into a joint venture with, or acquire another airline, by forcing Aer Lingus to seek Ryanair's approval for certain types of transaction. First, as set out in paragraphs 4.20 and 4.21, Ryanair's ability to block a special resolution means that it could prevent a merger between Aer Lingus and another airline via a scheme of

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<sup>75</sup> The 'squeeze-out' provision is only effective with a shareholding of less than 10 per cent. So, even with a 10 per cent shareholding in Aer Lingus, Ryanair would have the ability to prevent an offeror achieving the squeeze-out of minority shareholdings, so an offeror would only be able to secure 90 per cent of the shares.

arrangement<sup>76</sup> or under the Cross Border Merger Regulations.<sup>77</sup> Ryanair could also prevent Aer Lingus from issuing new shares to a potential partner via a private placement and could prevent other forms of corporate restructuring or reorganization (for example, a repurchase of the company's shares, a reduction of share capital, the cancelling of shares or changes to the Articles of Association) which would be required in certain types of transaction.<sup>78</sup> Second, Ryanair could hamper Aer Lingus's ability to issue shares for cash in order to raise the capital needed to acquire or merge with another airline, by defeating the special resolution required to disapply pre-emption rights. This is discussed in more detail in paragraphs 7.85 to 7.92. Third, if Ryanair were able to command a majority in an Aer Lingus general meeting (see paragraphs 7.108 to 7.114) it would be able to block a class 1 transaction (see Appendix C). This would be relevant in a joint venture (for example, a new company is created in which Aer Lingus and a partner own shares) or merger or acquisition discussions where the value of the assets to be acquired by Aer Lingus exceeded the relevant thresholds.<sup>79</sup>

- 7.33 We considered there to be a significant likelihood that potential combinations that, absent the minority shareholding, Aer Lingus might have been or would in the future be involved in would trigger one or more of these mechanisms. We noted that in the context of the discussions between Aer Lingus and each of [X] (see paragraph 7.51) and [X] (see paragraph 7.53) the transactions being proposed would have been likely to involve significant restructuring of Aer Lingus's share capital and/or corporate structure, which would have required the approval of Ryanair. In general terms, the more significant the transaction being contemplated (all other things being equal), the more likely Ryanair's shareholding would be to impede—or give Ryanair the ability to prevent—the combination from taking place, as a larger transaction would be more likely to require a shareholder vote (for example, if it was classified as a class 1 transaction, or required a restructuring of Aer Lingus's share capital or the issuing of shares on a non-preemptive basis).
- 7.34 In addition to these direct effects, we considered that the minority shareholding would be likely to affect Aer Lingus's ability to be acquired, merge with, enter into a joint venture with or acquire another airline even without Ryanair needing to take any particular action for the following reasons:
- (a) Ryanair's influence, combined with its incentives as a competitor to Aer Lingus, would create significant execution risk for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus;
  - (b) potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus if that combination would result in Ryanair appearing on their own share register, given Ryanair's position as an activist shareholder

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<sup>76</sup> A takeover or merger involving an Irish public company may be implemented using the scheme of arrangement procedure under section 201 of the Irish Companies Act 1963. This mechanism allows the buyer to save 1 per cent stamp duty on the offer price, and also provides greater certainty on the timing of the change of control to the extent that the buyer will know that 100 per cent control can be obtained within two days of the court approval. However, this type of scheme of arrangement requires 75 per cent approval of shareholders (by value) in a general meeting and thus could be blocked by Ryanair acting alone.

<sup>77</sup> The cross-border merger mechanism in the European Communities (Cross-Border Mergers) Regulations 2008 can also be used for mergers between companies which are incorporated in the EC. For instance, Iberia and British Airways used the equivalent regulations in Spain and the UK to merge. As with schemes of arrangement, merging via this route allows the buyer to save 1 per cent stamp duty on the offer price as well as achieve 100 per cent control within two days of the court approval. However, this merger mechanism also requires approval by special resolution of the shareholders and thus, in the case of Aer Lingus, could be blocked by Ryanair.

<sup>78</sup> See Appendix C for matters requiring a special resolution.

<sup>79</sup> For example (assuming a share price range of €1.10–€1.70 per share), any transaction valued at €147–€227 million or greater would be a class 1 transaction under the Consideration Test.

and a competitor.<sup>80</sup> This scenario might arise, for example, if an airline merged with Aer Lingus and shares in the respective airlines were exchanged, via a scheme of arrangement (or via the EU Cross-Border Merger Regulation), for shares in a new holding company,<sup>81</sup> or if an acquisition of Aer Lingus was made wholly or partially on a share-for-share basis rather than 100 per cent for cash,<sup>82</sup> or

(c) potential partners might be deterred from entering into, pursuing, or concluding discussions with Aer Lingus by the fear that Ryanair would use its existing shareholding as a platform from which to launch further bids for the whole of Aer Lingus (see paragraph 7.124). Ryanair has stated that it still intends to acquire Aer Lingus (see paragraph 3.11) and has appealed the February 2013 prohibition decision of the European Commission. We note that [§] decided not to continue its discussions with Aer Lingus upon hearing that Ryanair was launching its third bid.

7.35 We thought that Ryanair's shareholding would not directly impede Aer Lingus's ability to enter into less significant forms of cooperation such as codeshares, franchise agreements and alliances. We note that Aer Lingus has been able to enter into a number of such agreements in the period since the transaction took place (see paragraph 2.15).

#### *Consolidation in the airline industry*

7.36 Ryanair highlighted the trend in consolidation in the airline sector in its offer for the outstanding shares in Aer Lingus in June 2012, saying that Europe's airlines were inexorably consolidating into five large scheduled airline groups led by Air France, British Airways, easyJet, Lufthansa and Ryanair.<sup>83</sup> Aer Lingus told us that in the near to medium term there was likely to be a continuing pattern of significant consolidation in the airline industry.

7.37 The general trend of consolidation in the industry was also recognized in our discussions with other airlines, with the desire for revenue and cost synergies, as well as the financial pressures on certain airlines identified among the potential drivers of this trend. We were told by several airlines that consolidation in the European airline sector was part of a worldwide trend of consolidation that would continue in the future, with the US airline industry in particular exhibiting a significant amount of merger and acquisition activity over the previous decade.

7.38 We identified a number of examples of European airline M&A in recent years, including the following:

(a) mergers of large flag-carrier airlines with global networks in Europe, including BA/Iberia in 2011 and KLM/Air France in 2004. Potential cost savings and

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<sup>80</sup> We note that the minority shareholding did not act as an absolute deterrent; discussions between Aer Lingus and other airlines have taken place since 2006 despite Ryanair's minority shareholding (see paragraphs 7.47–7.54).

<sup>81</sup> As considered by Aer Lingus when negotiating with [§] in 2012. It is also the form of combination that led to the creation of IAG in January 2011.

<sup>82</sup> Ryanair has said that in such a scenario its resulting shareholding in the acquiring company would be extremely small, citing as a hypothetical example a takeover of Aer Lingus by IAG on a share-for-share basis, in which Ryanair would end up holding about 4 per cent of IAG. We noted that Ryanair's shareholding could be significantly higher than 4 per cent if a smaller airline than IAG combined with Aer Lingus (For example, Aer Lingus told us that as part of the combination discussions between Aer Lingus and [§] in 2012, they had estimated that Ryanair's resulting shareholding in the combined entity would have been in the region of [10–20] per cent), and might in some circumstances result in Ryanair having material influence over the acquirer, and hence over Aer Lingus.

<sup>83</sup> [www.ryanair.com/doc/news/2012/aerlingus\\_20120619.pdf](http://www.ryanair.com/doc/news/2012/aerlingus_20120619.pdf).

revenue synergies from expanded global networks were a key element of the rationale for both;

- (b) regional consolidation due to financial pressures on the target company, including Lufthansa/Swiss in 2005, and bmi which was acquired by Lufthansa in 2008 and subsequently by IAG in 2012. Cost synergies represented a central plank of the IAG/bmi merger rationale;
- (c) regional consolidation driven by the target company's access to attractive routes, passenger flows or capacity-constrained airports, including Lufthansa/Austrian airlines in 2008 and Vueling/Clickair in 2008; and
- (d) minority shareholding investments by Middle-East airlines: for example, Etihad's purchase of 29 per cent of Air Berlin via a capital increase, and Etihad's acquisition of nearly 3 per cent of Aer Lingus via stock market share purchases.

7.39 We found that there was a pattern of consolidation in the airline industry, for which a primary driving force was the need to exploit economies of scale and contain or reduce the costs per passenger (see paragraphs 7.62 to 7.63). We formed the view that this trend of consolidation involving European airlines was likely to continue in the future.

#### *Views of airlines on the likelihood of a combination involving Aer Lingus*

- 7.40 We considered the views of Aer Lingus, Ryanair and other airlines on the likelihood of Aer Lingus being involved in a combination absent Ryanair's minority shareholding. Further details of their views are provided in Appendix F.
- 7.41 Aer Lingus said that it had been and remained interested in attracting investment, and that its management had identified a need for growth and was actively considering both inorganic and organic options for expansion. Aer Lingus told us that it was constrained by the size of its home market; however, it needed to grow in order to achieve greater scale to avoid the company's cost competitiveness eroding over time. It also said that the financial markets held the view that Aer Lingus's consolidation was necessary. Minutes from a meeting held in [redacted] 2013 where Aer Lingus's board considered the strategic options available to the company following publication of the European Commission's prohibition decision show the board resolving in favour of inorganic growth (provided this was consistent with its revenue model).
- 7.42 Aer Lingus also said that it did not have a weak balance sheet and so was not in the situation of many European carriers looking to consolidate, and that its financial strength could guarantee its independence for a long period of time. It said that rather than being acquired, it might look to acquire another airline.
- 7.43 Ryanair told us that Aer Lingus had no future as an independent airline because of its small scale, its peripheral location and its repeated failure to expand outside of Ireland. It said that Aer Lingus would not be around as an independent airline in five years' time because its cash pile would continue to dwindle, although the time period could be shorter or longer, depending on how the airline dealt with issues such as the pensions deficit and its high overheads. It told us that nobody believed that there was a bright future for peripheral sub-scale carriers in Europe.
- 7.44 Ryanair said that the only long-term future for Aer Lingus was as part of a bigger, stronger Irish airline together with Ryanair. It said that although Aer Lingus had shopped itself around, it had been unsuccessful in finding a partner because no other

airlines were interested in Aer Lingus (despite the fact that Aer Lingus could be relatively easily acquired, given that a prospective buyer would only need to acquire the shares of two shareholders to gain control). It told us that easyJet, Air France, British Airways and Lufthansa had all said in the last five years that they were not interested in acquiring Aer Lingus. Although five years ago they were engaged in pan-European consolidation, they now had much greater global issues to deal with and would not be concerned with a small peripheral Irish airline. Any potential bidder would be more concerned by Aer Lingus's heavy focus on Ireland, limited growth prospects and the deficit in Aer Lingus's pensions fund than by Ryanair's presence on the share register. Ryanair also pointed out that it had received no offers for its shareholding from any airline. It said that it was highly unlikely that any successful airline which Aer Lingus might want to acquire would wish to align its fate with that of Aer Lingus, given the influence of the Irish Government and the unions on the company.

- 7.45 Third parties identified a number of features which could make Aer Lingus an attractive partner for a combination, including its strong financial position, its brand, its attractive slot portfolio and its position in the Irish market. Like Ryanair, however, third parties also identified a number of factors that could limit Aer Lingus's attractiveness, including the pension deficit, the relatively limited scale of Aer Lingus's long-haul operations and the size of the Irish market (in addition to the company's shareholder structure, see paragraph 4.29).
- 7.46 Several parties, including Aer Lingus, told us that, in the short to medium term, a transaction involving Aer Lingus and one of the three large European carriers (IAG, Air France/KLM and Lufthansa) was relatively unlikely, as they were occupied with recent acquisitions. In line with this, from our discussions with [REDACTED].<sup>84</sup>

*Evidence of potential combinations involving Aer Lingus in the period since 2006*

- 7.47 We considered evidence of potential combinations involving Aer Lingus in the period since 2006, including both Aer Lingus's internal assessments of M&A opportunities and evidence of discussions between Aer Lingus and other airlines. Further details of this evidence are provided in Appendix F. We were conscious in assessing this material that any discussion with other airlines or internal analysis of potential combinations would have been carried out in the context of Ryanair's minority shareholding—we were not able to observe what discussions might have taken place or options might have been available had Ryanair not been present on Aer Lingus's share register.
- 7.48 We were aware of various internal Aer Lingus strategy documents from the period assessing possible options for inorganic growth, confirming that Aer Lingus had actively considered combining with another airline. In 2010 Booz & Company presented an M&A Opportunity Assessment to Aer Lingus. This report identified a total universe of 116 merger partners for Aer Lingus and presented the results of a systematic screening exercise. It identified a shortlist of 22 potential partners and identified seven best-fit merger partners for Aer Lingus. We note that since this report was prepared the trend of airline consolidation has continued, reducing the pool of potential merger partners available to Aer Lingus. For example, [REDACTED].
- 7.49 While various documents from 2010 show that Aer Lingus considered acquisition as a desirable route to achieving growth at this time, it appears that in early 2011, the

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<sup>84</sup> We saw a [REDACTED] internal presentation from December 2012 that provided an evaluation of Aer Lingus, in which the conclusion was reached that limited synergies/opportunities meant that it would not be an attractive addition to the [REDACTED] group.



conclusion was reached that the large network carriers were unlikely to attempt a takeover of Aer Lingus 'for the time being'. The documents referred in particular to [REDACTED].

- 7.50 Aer Lingus told us that it had had informal, exploratory contacts with a number of other unnamed potential investors or partners in the period since 2006, and that it had emerged clearly in these contacts that Ryanair was seen as a major deterrent to investment in Aer Lingus. We were aware of discussions that had taken place between Aer Lingus and [REDACTED] between 2010 and 2013 about the possibility of Aer Lingus acquiring [REDACTED] and about the possibility of Aer Lingus acquiring [REDACTED] and with [REDACTED] in 2011 about the possibility of acquiring its [REDACTED]. These transactions did not ultimately proceed for reasons unrelated to Ryanair's minority shareholding. We were also aware of discussions with [REDACTED] in 2012 about the possibility of [REDACTED].
- 7.51 Aer Lingus also described a possible combination between Aer Lingus and [REDACTED] that had been considered in early 2012. The transaction was ultimately abandoned as a result of Ryanair's third bid for the outstanding shares in Aer Lingus. [REDACTED] told us that the shareholding of Ryanair in Aer Lingus was a [REDACTED] consideration when considering what could be achieved as a result of these discussions with Aer Lingus: it was clear that any proposal that Aer Lingus and [REDACTED] developed would need to be acceptable to Ryanair.
- 7.52 In [REDACTED] 2013, Aer Lingus's board considered a strategy document summarizing three possible growth options available to the company: organic growth coupled with restructuring to reduce the cost base; growth as a subsidiary of a larger entity; and inorganic growth through acquisition or partnership. Aer Lingus resolved in favour of the third option (provided this was consistent with its revenue model) and various combinations were explored, including a merger with [REDACTED]; a potential combination with [REDACTED]; and the creation of a new joint venture company with [REDACTED] [to pursue opportunities that were identified for expansion primarily on European routes not presently serviced by either party]. None of these options has, as yet, materialized (although various discussions have taken place), and the submissions of Aer Lingus suggest that the specific [REDACTED] proposals outlined are, for the time being, unlikely to proceed for reasons unrelated to Ryanair's minority shareholding.
- 7.53 In relation to the potential combination with [REDACTED], Aer Lingus internal documents relating to the transaction show that under the combination being discussed, [REDACTED] would have become a large minority shareholder in Aer Lingus. Given this, it is likely that Ryanair's approval would have been required for the transaction to go ahead.
- 7.54 We were told by [REDACTED] that no discussions had taken place with Aer Lingus in relation to [possible combinations] in the period since 2006.
- 7.55 We concluded that there was significant evidence from the period since 2006 that Aer Lingus has wanted to pursue inorganic growth as part of its commercial policy and strategy. The internal documents of Aer Lingus suggested that in 2011 Aer Lingus reached the conclusion that an acquisition by one of the large European network carriers was unlikely to take place. As set out in paragraphs 7.10 and 7.47, we are unable to observe what discussions regarding potential combinations would have taken place since 2006 in the absence of Ryanair's minority shareholding. However, the discussions that have taken place while Ryanair has had its minority shareholding, although not ultimately pursued, suggest that possible combinations arise and other airlines have considered Aer Lingus to be a credible partner. Furthermore, the evidence from Aer Lingus's discussions with [REDACTED] and [REDACTED] about the terms of these possible combinations indicated that Ryanair would be likely to be

able to exert influence over the execution of significant transactions in which Aer Lingus might be involved.

*Other factors affecting the likelihood of Aer Lingus being involved in combinations*

- 7.56 We also considered whether there were any other factors which might affect the likelihood of Aer Lingus being involved in combinations absent Ryanair's minority shareholding.
- 7.57 The Irish Government has announced its intention to sell its shares in Aer Lingus, although it said that the disposal of its shares would only take place at the right time, under the right conditions and at the right price (see Appendix C). We considered that the sale of the Irish Government's shareholding would increase the likelihood of Aer Lingus being involved in a combination with another airline absent Ryanair's minority shareholding, given the possibility that the shareholding could be acquired by another airline.
- 7.58 We also identified two external restrictions which could affect the likelihood of Aer Lingus being involved in a combination with another airline. First, EU ownership rules prevent non-EU airlines from taking a controlling shareholding in EU airlines, and so may narrow the range of combinations that could be possible between Aer Lingus and a non-EU airline to a merger or joint venture, rather than a full acquisition.<sup>85</sup> In addition, any combination would be subject to standard merger control considerations.<sup>86</sup> Nevertheless, given in particular Aer Lingus's internal analysis of potential combination partners and the discussions it has had with other airlines even in the presence of Ryanair's minority shareholding (see paragraphs 7.47 to 7.54 and Appendix F), we believed that potential combination partners existed within the EU,<sup>87</sup> and noted that most European airlines do not overlap significantly with Aer Lingus (and certainly not to the same extent as Ryanair and Aer Lingus overlap).

*Impact on Aer Lingus's effectiveness as a competitor*

- 7.59 We considered whether, by influencing its M&A strategy, Ryanair's minority shareholding might have in the period since 2006 affected, or would in the future be expected to affect, Aer Lingus's effectiveness as a competitor to Ryanair on routes between Great Britain and Ireland.
- 7.60 There are various ways in which Ryanair's influence over Aer Lingus's M&A strategy could affect the airline's effectiveness. Given its incentives as a competitor we would expect Ryanair to be more likely than an independent shareholder to oppose any combination which it expected to strengthen Aer Lingus's position (and, conversely, to support any combination which might result in Aer Lingus competing less strongly with it).

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<sup>85</sup> Under European Law (Article 4(f), Regulation (EC) No 1008/2008 of 24 September 2008), non-European shareholders are currently not permitted to own more than 49 per cent of a European airline. We do not expect this to change in the foreseeable future. The European Commission has agreed bilateral arrangements with countries outside the EU, which apply to all EU-listed airlines.

<sup>86</sup> Since 2004, the European Commission has examined 15 mergers and several alliances in the air transport sector. The recent prohibition of Ryanair's bid for the outstanding shares in Aer Lingus is the third prohibition decision (the previous prohibition decisions being the prohibition of Ryanair's first bid for Aer Lingus in 2007, and the prohibition of the acquisition by Olympic Air of Aegean Airlines in 2011). All the prohibition decisions were related to transactions involving two airlines having large bases at the same 'home' airport.

<sup>87</sup> In addition, the EU ownership rules would not prevent a transaction in which a non-EU airline took a non-controlling stake in Aer Lingus, see for example Virgin's joint venture with Delta airways.

- 7.61 The impact of any particular combination on Aer Lingus would necessarily depend on the identity of the combination partner and the specific nature of the transaction being contemplated. We have not sought to assess the probability of any particular transaction involving Aer Lingus taking place, and we therefore do not seek to carry out an analysis of the impact of any specific combination. Rather, we take into account a range of evidence—particularly relating to the importance of scale to Aer Lingus and to the airline industry more generally—to reach a view on the likely importance of a combination, or sequence of combinations, to Aer Lingus’s competitiveness.
- 7.62 Both Ryanair and Aer Lingus referred to the importance of scale to airlines in order to keep costs down. Aer Lingus told us that in the absence of an ability to build scale, it will face an inevitable ‘cost creep’ over time, eroding its competitiveness.<sup>88</sup> In particular, it said that even if its factor costs (for example, wages) remained constant, it would expect its unit costs to increase over time as a result, for example, of increases in airport charges. This created a need for growth (eg by sharing overheads over larger volumes), in order to reduce costs and remain competitive. Internal strategy documents produced by Aer Lingus confirm the importance it attached to building scale in order to remain competitive, and the need for inorganic growth to achieve this. For example, an internal presentation prepared for Aer Lingus’s board on the company’s five-year plan identified [REDACTED].
- 7.63 We assessed how the scale of its operations might affect Aer Lingus’s effectiveness as a competitor. We considered that Aer Lingus would need a competitive cost base in order to continue to compete effectively with Ryanair. In this regard, we considered that combinations between airlines had the potential to lead to both revenue and cost synergies.
- 7.64 On the revenue side, synergies would be primarily in terms of the benefits associated with larger complementary networks. We were told that some of the revenue synergies associated with combinations between airlines could be achieved via lighter forms of cooperation such as code-shares or bilateral alliances, with the extent of the synergies depending on the depth of cooperation.
- 7.65 Aer Lingus told us that greater revenue synergies would be associated with a full combination rather than looser types of cooperation. Synergies of this type could increase its effectiveness as a competitor by potentially enabling it to sell more connecting itineraries, which would in turn increase traffic, enabling it to offer an enhanced frequency and/or the operation of larger aircraft (with associated lower costs per seat).
- 7.66 In our discussions with airlines we identified a number of possible cost synergies associated with combinations between airlines, including:
- (a) increased bargaining power in procurement, for example with regards to aircraft, ground handling, airport charges, fuel and catering contracts;
  - (b) elimination of duplication in both back office functions (eg finance, legal, HR, IT, sales and marketing) and at airports (eg check-in staff, ground handlers);

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<sup>88</sup> Ryanair said that this was inconsistent with Aer Lingus’s submissions to the European Commission that many of the operational improvements proposed by Ryanair in the context of its third bid for Aer Lingus could be implemented by Aer Lingus if these were thought desirable. However, it is clear that while some types of cost saving could (and indeed have been) be made by Aer Lingus absent a combination, by definition scale efficiencies—which are the focus of this section—will not be possible without growth.

(c) consolidation of maintenance and training programmes and IT systems; and

(d) diversification of operations, and sharing of successful models/expertise within a single organization.

- 7.67 Several airlines gave us examples of cost synergies that had arisen in the context of transactions that they had previously been involved in. For example, IAG gave some examples of the economies of scale associated with the merger between BA and Iberia, and said that the acquisition of bmi had allowed very material cost savings. Flybe told us that its acquisition of BA Connect had allowed it to reduce staff costs and duplication of maintenance, repair and overhaul facilities. Lufthansa said that it had experienced [REDACTED] in recent acquisitions in which it had been involved (see Appendix F).
- 7.68 [REDACTED] Aer Lingus told us that the [REDACTED] transaction could have led to considerable cost savings (in addition to synergies in the areas of [REDACTED] in a short timeframe. [REDACTED] It told us that the synergies associated with the [REDACTED] transaction would have enabled the combined entity to compete more effectively in existing markets, as well as potentially providing a platform for entrance into new markets and routes. Internal documents relating to the proposed combination with [REDACTED] show that Aer Lingus estimated annual cost synergies resulting from the increased scale of the resulting business to be in the range £[30–50] million, with particular savings in the areas of maintenance costs and overhead reductions.
- 7.69 The 2010 M&A Opportunity Assessment prepared for Aer Lingus by Booz & Company evaluated the potential synergies associated with potential merger partners. It estimated indicative revenue and cost synergies in the context of a merger with full integration and a merger in which two brands were retained. Based on the two-brand scenario, the range of annual cost synergies was €[tens of millions] for the various merger scenarios. These cost synergy estimates assumed savings would be achieved in relation to overheads, sales and marketing, maintenance, sourcing, station expenses and fleet optimization. In addition, estimated annual revenue synergies were €[tens of millions].
- 7.70 In its submission to the European Commission on the possible customer benefits of its bid for the outstanding shares in Aer Lingus, Ryanair argued that the acquisition of Aer Lingus would generate substantial cost savings, a significant proportion of which would be derived from economies of scale. Ryanair expected to generate synergies and savings in most cost categories, in particular staff costs, turnaround times, aircraft costs, fuel costs, maintenance costs, airport and handling costs, and distribution and other costs. Overall, Ryanair said that it would reduce Aer Lingus's annual cost base (excluding fuel) by at least [REDACTED] per cent or approximately €[tens of millions]. Ryanair also told us that the discount it received in its most recent aircraft order would be a multiple of anything that Aer Lingus would have negotiated.
- 7.71 Ryanair said that no other party would be able to reduce Aer Lingus's costs per passenger from its current €[REDACTED] to anywhere close to its own costs per passenger of €[REDACTED].<sup>89</sup> It told us that it was inconceivable that the CC could conclude that there would be significant efficiency gains from the combination of Aer Lingus with another, unspecified airline, given that the European Commission was not persuaded on the basis of detailed information that efficiencies would result from the acquisition of Aer Lingus by Ryanair, a close competitor, which also operated out of Ireland and had the lowest cost per passenger in the industry.

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<sup>89</sup> We note, however, the difference in business model between Aer Lingus and Ryanair.

- 7.72 We do not consider that the European Commission's findings regarding counter-vailing efficiencies arising from Ryanair's third bid for Aer Lingus are inconsistent with our own findings on the importance of scale to Aer Lingus in particular and airlines more generally. The European Commission considered the possible efficiencies arising from the merger between Ryanair and Aer Lingus in order to determine whether any such efficiencies were sufficiently verifiable, merger-specific and to the benefit of consumers that they would be sufficient to counteract the substantial competitive harm likely to arise as a result of Ryanair's bid for the entirety of Aer Lingus. It concluded that Ryanair had not provided sufficient evidence to demonstrate that this was the case. In contrast to the circumstances being considered by the European Commission, in the event of a combination between Aer Lingus and another airline of the type we are considering here, we would expect Ryanair to remain as a strong competitive constraint to Aer Lingus, and so efficiencies would ultimately be passed on to customers.
- 7.73 We reviewed Aer Lingus's cost structure (see Appendix F). We considered that, given its cost structure, there was scope for cost synergies to arise from a combination with another airline. We considered an illustrative range of potential annual total cost synergies that might be associated with a combination, [§] and found these to be significant. Assuming that these synergies were sustained over the long term, and given that the Great Britain/Ireland routes represent [20–30] per cent of Aer Lingus's revenue, this would suggest a net present value of cost synergies on these routes of the order of €60–€100 million.
- 7.74 Ryanair told us that the bulk of the cost savings and flexibility advantages of combinations could be achieved through partnerships such as minority investments, franchises, codeshares and bilateral alliances. It gave the example of Aer Lingus's direct involvement in the acquisition of aircraft for Aer Arann, which it said was intended to allow access to lower-cost aircraft and financing. [§]
- 7.75 However, most of the airlines that we talked to told us that the majority of potential cost synergies would be restricted to fuller combinations such as mergers, because such synergies generally required a greater level of integration between the parties' operations. We agreed with this view, and considered that, given the types of economies of scale arising from combinations (set out in paragraph 7.66), a substantial proportion of these cost advantages could only be achieved via significant integration between airlines' operations. We considered that while in some instances it might be possible to achieve similar benefits via a joint venture,<sup>90</sup> significant ventures would likely involve transactions requiring a shareholder vote (for instance the issuance of shares).
- 7.76 Ryanair said that the cost synergies identified by the CC would be unlikely to be realized in the context of an acquisition by Aer Lingus—any airline that Aer Lingus was capable of acquiring would be a small peripheral airline, which would have a negligible impact on Aer Lingus's cost base. We did not agree—while the scope for Aer Lingus to benefit from economies of scale would be greater if it combined with a larger partner, an acquisition of similar sized or smaller airline could also allow Aer Lingus to expand the size of its operations significantly relative to their current scale. Furthermore, we noted that Aer Lingus's strategy could in principle involve several transactions, with a cumulatively significant impact on the airline's size.

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<sup>90</sup> A joint venture between two airlines (whereby costs and revenues on certain routes are shared) can give rise to significant revenue synergies where the two airlines' route networks (and product offerings) are complementary. However, while some cost synergies may be available (if increased traffic density on a route permits the use of larger aircraft, for example) many of the cost synergies available from a full merger are not available in the case of a joint venture.

- 7.77 Ryanair said that even if Aer Lingus merged with another airline, and that merger led to cost and revenue efficiencies, it would not necessarily lead to a more competitive outcome—instead a merger could lead to reduced competition, or Aer Lingus could decide to use any additional profits to pay dividends. It also said that even if Aer Lingus competed more aggressively, there was no evidence to suggest that this would result in increased competition specifically on the Great Britain/Ireland routes.
- 7.78 We note that the merger control regime is in place in order to remedy any combination between Aer Lingus and another airline judged likely to result in an SLC (although in any event the extent of overlap between the operations of Aer Lingus and airlines other than Ryanair is limited). We also considered that the fierceness of competition between Aer Lingus and Ryanair would mean that cost savings arising in the context of a combination between Aer Lingus and another airline would be likely to benefit customers. In particular, given the extent of the constraint imposed on Aer Lingus by Ryanair on its UK routes, we would expect cost savings to allow it to maintain its competitive position in the face of rising costs (maintaining routes that might otherwise be withdrawn), or actively strengthen how fiercely it competes with Ryanair (adding new routes that might otherwise not be served). As discussed in paragraph 6.12, the value of Aer Lingus’s network, branding and goodwill is intrinsically connected with its operations in Ireland, and given this we would expect a partner interested in combining with Aer Lingus also to have an interest in its operations between Great Britain and Ireland.
- 7.79 The submissions of Ryanair and Aer Lingus suggest that scale is important for Aer Lingus’s overall competitiveness as an airline, and we expect this to apply equally to the routes that it operates between Great Britain and Ireland (which make up a significant part of Aer Lingus’s short-haul operations and are core to its business). If achieved, many of the cost synergies discussed above would apply at a group level and so even a combination that did not involve another airline active in Great Britain or Ireland could improve Aer Lingus’s effectiveness as a competitor on routes across the Irish Sea by increasing its overall scale and thus reducing its unit costs.

*Conclusion on the impact of Ryanair’s minority shareholding on Aer Lingus’s ability to combine with another airline*

- 7.80 We found that as a consequence of its minority shareholding Ryanair would be able to impede another airline from acquiring full control of Aer Lingus, and that its shareholding would be likely to be a significant impediment to Aer Lingus’s ability to merge with, enter into a joint venture with or acquire another airline. This would be likely to act as a deterrent to other airlines considering combining with Aer Lingus. The more significant the transaction being contemplated (all other things being equal), the more likely Ryanair’s shareholding would be to impede—or give Ryanair the ability to prevent—the combination from taking place. As discussed in paragraphs 7.16 to 7.22, we considered that Ryanair would have the incentive to use its influence to oppose any combination which it expected to strengthen Aer Lingus’s effectiveness as a competitor, or make it harder to acquire the company itself.
- 7.81 Furthermore, we found that, in the absence of Ryanair’s minority shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in a significant acquisition, merger or joint venture. In reaching this view, we took into account the general trend of consolidation in the airline industry and the need to exploit economies of scale and maintain or reduce costs per passenger, which suggested that a combination involving an airline of Aer Lingus’s size was likely. We also took into account Ryanair’s view that Aer Lingus would be unlikely to have an independent long-term future, and Aer Lingus’s view of the importance of scale to its future competitiveness. The Irish Government’s stated

intention to sell its shares in Aer Lingus at the right time and at the right price also made it more likely that Aer Lingus would be involved in a combination absent Ryanair's minority stake, given the change in ownership this implied.

- 7.82 The views expressed to us by other airlines did not support Ryanair's assertion that Aer Lingus was an inherently unattractive partner, and we considered that while the characteristics of its network might limit its attractiveness to certain airlines, these factors might impact upon the consideration involved in any transaction that took place rather than act as an absolute deterrent.<sup>91</sup> We also considered that the airline's strong financial position and access to Heathrow would be attractive to potential partners.
- 7.83 The extent to which we can draw inferences from evidence of discussions between Aer Lingus and other airlines in the period since 2006 is limited because of the presence of Ryanair's minority shareholding throughout this period. Nevertheless the discussions between Aer Lingus and other airlines which had taken place in the period since 2006 suggested to us that possible combinations arise and other airlines considered Aer Lingus to be a credible partner for a combination. While the evidence that we received suggested that it was relatively unlikely that a large European airline would seek to acquire Aer Lingus in the immediate future (and so going forward a merger or acquisition by Aer Lingus was the most likely form of combination), we considered that an acquisition remained a possibility in the longer term, and might have taken place in the period since 2006 absent Ryanair's minority shareholding.
- 7.84 The scale of any efficiencies—in particular economies of scale—arising from a combination would necessarily depend on the identity of the acquirer and the specific nature of the transaction being contemplated. Nevertheless, in our view Aer Lingus was likely to be at a competitive disadvantage because of its relatively small size, and inorganic growth would be required in order for it to remain competitive. A consequence of Ryanair's shareholding impeding or preventing Aer Lingus from combining with other airlines would be to limit Aer Lingus's ability to increase the scale of its operations and reduce its unit costs. This would have the potential to weaken significantly the effectiveness of the competitive constraint Aer Lingus will impose on Ryanair relative to the counterfactual. Certain synergies would be likely to arise from a substantial combination between Aer Lingus and another airline that would not be achievable via looser forms of cooperation.

*(b) Aer Lingus's ability to issue shares in order to raise capital*

- 7.85 A second way in which Ryanair's shareholding might limit the commercial policies and strategies available to Aer Lingus and reduce its effectiveness as a competitor would be by hampering Aer Lingus's ability to raise capital by issuing shares. This mechanism is discussed in more detail in Appendix G.
- 7.86 As set out in paragraphs 4.17 and 4.18, Ryanair has blocked the special resolution required to permit the disapplication of pre-emption rights at each AGM between 2007 and 2013. We note that there have been no instances since 2006 where Aer Lingus had sought to carry out a rights issue in order to raise capital, but had been unable to proceed due to Ryanair's actions. We considered the likelihood of this occurring in the future.

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<sup>91</sup> We also noted that these factors had not dissuaded Ryanair from seeking to acquire the company, nor IAG or Flybe from presenting themselves as upfront bidders for parts of Aer Lingus in the context of Ryanair's third bid for the entirety of Aer Lingus.

- 7.87 We found that Aer Lingus has limited capacity to increase its current level of debt and the company's management had a clear preference to use equity rather than debt capital. Aer Lingus told us that its headroom for incremental debt was [redacted] and Aer Lingus operated in a commercial environment which was subject to significant volatility and risk of impact by one-off events beyond the control of management.
- 7.88 We considered whether Aer Lingus could use alternative methods to raise new equity capital without needing to pass a special resolution. We noted that Aer Lingus had strong reasons to seek to avoid the additional expense and time needed to undertake a rights issue with full pre-emption rights available to all shareholders around the world and that this would not represent its preferred approach to capital raising. However, we also noted that Aer Lingus may be able to address Ryanair's particular concerns about the risk of a dilution of its shareholding relative to other shareholders, by proposing an alternative special resolution to shareholders that would allow shareholders to approve a rights issue with pre-emption rights available to shareholders in Ireland but not necessarily in overseas jurisdictions where this was impractical. Ryanair has signalled that it would support a resolution on these terms (see Appendix G).<sup>92</sup>
- 7.89 Given Aer Lingus's existing balance sheet strength and forecast financial performance, under circumstances of stable trading, no new debt issuance or acquisition activity by Aer Lingus, we found it unlikely that Aer Lingus would need to raise equity to finance its current operations or its existing plans for a major aircraft replacement programme in the medium to long term.<sup>93</sup> Even after the forecast [redacted] in cash balance over the forecast period by €[redacted] to €[redacted], Aer Lingus would retain a strong balance sheet.
- 7.90 We identified circumstances in which Aer Lingus might need to raise additional equity. We noted that historically Aer Lingus had experienced volatility in its earnings and had experienced periods of restructuring charges, losses and operating cash outflows (for example, in 2008/09 as a result of economic downturn and 2001/02 following the 9/11 terrorist incident in New York) and that macro-economic conditions could result in earnings volatility for airlines generally. We recognized the possibility that there would be a future downturn in the economy as a whole or in the airline industry more specifically, or a specific adverse development for Aer Lingus (such as a court imposed obligation to make a major contribution to the Aer Lingus pension funds).
- 7.91 Most significantly, however, as discussed in paragraph 7.81, we found it likely that, absent Ryanair's shareholding, Aer Lingus would have been, or would be in the future, involved in a significant combination (or combinations) with another airline. If Aer Lingus were making a significant acquisition, or a significant strategic investment, we thought it likely that, in order to fund the transaction, Aer Lingus would need to issue shares for cash.
- 7.92 In summary, we found that Ryanair's ability to block a special resolution gives it influence over Aer Lingus's ability to issue shares and might hamper Aer Lingus's ability to raise capital. Given Aer Lingus's existing balance sheet strength and forecast financial performance, under circumstances of stable trading, no new debt issuance or acquisition activity by Aer Lingus, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term. However, if Aer Lingus

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<sup>92</sup> Aer Lingus told us that the statement in the CC's provisional findings was the first time that Aer Lingus had been made aware of Ryanair's position.

<sup>93</sup> We note that a major aircraft replacement programme was approved by shareholders via an ordinary resolution at the 2008 EGM (with a 64 per cent vote in favour).



needed to increase its share capital in future for a corporate transaction or to optimize its capital structure, Ryanair's ability to restrict it from doing so could cause Aer Lingus to become a less effective competitor on routes between Great Britain and Ireland than it would otherwise be.

*(c) Aer Lingus's ability to manage effectively its portfolio of Heathrow slots*

- 7.93 We considered whether Ryanair's shareholding might weaken the effectiveness of Aer Lingus as a competitor by restricting its ability to manage effectively its portfolio of slots at London Heathrow.
- 7.94 As discussed in Section 5, Aer Lingus operates from London Heathrow to Dublin, Shannon, Cork and Belfast, and these services account for a significant proportion of its operations between Great Britain and Ireland. In order to operate these services, it relies on historic rights to a number of take-off and landing slots at the airport. Heathrow is widely accepted to be capacity constrained, and for this reason Heathrow slots often have significant strategic and financial value. Aer Lingus said that its Heathrow slot portfolio was a major asset, and likely to be worth in excess of €250 million.<sup>94</sup> It said that there were two ways in which it could use its slot portfolio to finance its commercial policy and strategy. First, excess slots could be traded or exchanged with another airline for slots at other airports where Aer Lingus sought to expand its operations. Second, Aer Lingus may be able to obtain debt secured against these slots at a lower cost than unsecured debt.
- 7.95 As set out in paragraphs 4.34 to 4.38, Aer Lingus's Articles of Association give Ryanair, with its current shareholding, the ability to request an EGM and vote against a proposed disposal of its Heathrow slots. Ryanair would be highly likely to have sufficient votes to be able to block such a disposal if it chose to do so.
- 7.96 Aer Lingus said that it had limited flexibility on slot trades. In addition to a pre-existing slot arrangement with British Airways, Article 10 of its Articles of Association allows Aer Lingus to lease a slot (or pair of slots) for up to 36 months without having to inform its shareholders and obtain shareholder approval. Only one such short-term lease can be in effect at any one time and a renewal of a short-term lease (ie beyond 36 months) will also trigger the approval mechanism set out in Article 10.
- 7.97 Aer Lingus told us of two examples where Ryanair had influenced or been in a position to influence its commercial policy and strategy in the period since 2006 as a result of its voting rights over Heathrow slot disposals:
- (a) Aer Lingus said that in 2009 it had been interested in acquiring [X] slots [X] and had entered into negotiations with [another airline] to explore whether it could exchange Heathrow slots [X]. However, Aer Lingus told us that [the other airline] expressed concern when it was made aware that the deal could be brought to an EGM where it would be exposed to Ryanair's veto. As a result, the terms of the exchange were modified to exclude the lease of an additional summer slot pair to [the other airline] in return for a financial payment, allowing the transaction to proceed without triggering the disposal provisions in the Articles of Association.
- (b) In April 2013, Aer Lingus notified the Irish Government and Ryanair of a proposed slot transaction with British Airways which triggered the disposal

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<sup>94</sup> Equity analyst reports support Aer Lingus's valuation of its slot portfolio. For example, a report from Goodbody Stockbrokers dated 15 March 2013 says: 'While it is difficult to value these slots with a great degree of accuracy, recent transactions that we are aware of imply that the portfolio could be worth between €200–€300m at an average of €9–10m per slot.'

provisions in Aer Lingus's Articles of Association. Aer Lingus said that such a transaction would clearly be in the commercial interests of the company as it would otherwise result in the loss of a valuable slot for no consideration. It said that the transaction would facilitate the early return (from summer 2014) of another slot pair currently on lease to British Airways, thereby enabling Aer Lingus to increase the frequency of its Heathrow services. It told us that the transaction had been significantly delayed by the uncertainty caused by Ryanair's bid, and by whether Ryanair would oppose it. Subsequent to Aer Lingus's notification, neither Ryanair nor the Irish Government exercised their rights to call an EGM on the matter.

- 7.98 Ryanair told us that rather than disposing of its Heathrow slots, Aer Lingus had recently sought to acquire a significant portfolio of additional slots at Heathrow (from the IAG/bmi remedy) and was therefore extremely unlikely to seek to dispose of its existing Heathrow slots—a major asset, which it values commercially. It pointed out that Aer Lingus had only taken to shareholders a proposal to dispose of Heathrow slots on one occasion in the period since 2006.
- 7.99 We did not agree that Aer Lingus was extremely unlikely to seek any disposal in the future simply because it had recently sought to acquire additional Heathrow slots. The utility of one slot pair will differ to that of another depending on its timing, and so Aer Lingus may seek to acquire some slots at Heathrow while disposing of others in the context of managing its overall slot portfolio. Moreover, even if Aer Lingus's current strategy is one of increasing its slot portfolio at Heathrow, its position may well change over time—as was the case in 2009, when Aer Lingus was considering disposing of Heathrow slots [X]. Whilst we were only aware of two instances since 2006 where Aer Lingus has considered disposing of slots, this suggested to us that although low frequency, such occasions did arise from time to time as Aer Lingus sought to optimize its route network, and this was likely to occur again in the future.
- 7.100 Ryanair also said that Aer Lingus would be able to optimize its slot portfolio by increasing or decreasing its operations at other London airports, or by using 36-month leases. However, Aer Lingus's Articles of Association only allow it to put into effect one short-term lease at any one time, therefore offering limited flexibility. While Aer Lingus is able to adjust its network and timetable from airports other than Heathrow without Ryanair's approval, its Heathrow services account for a substantial proportion of its operations between Ireland and Great Britain, and therefore Ryanair's shareholding would give it the ability to restrict Aer Lingus's flexibility to manage effectively a significant part of its network and timetable. While in some circumstances Aer Lingus might be able to implement a desired change by adjusting its service from alternative London airports, Heathrow has various features distinguishing it from other airports (for instance its location and the different connections offered), which could make implementing a frequency increase or reduction from an alternative airport a significantly worse alternative.
- 7.101 The Irish Government told us that it had retained a significant minority shareholding in Aer Lingus in part to ensure access to Heathrow for onward connectivity. It would be likely to convene an EGM if the proposed disposal reduced the number of slots such that it was no longer the case that at least four London Heathrow slot pairs were used for services to and from Cork, four (summer season)/ three (winter season) for services to and from Shannon, and sufficient slots pairs for services to and from Dublin such that the interval between services was no longer than 90 minutes. Its decision on whether to oppose a disposal would be made on a case-by-case basis in accordance with these criteria, although would also take into account (for example)

services operated by other carriers on these routes, and services which could be provided via other connecting airports.

- 7.102 Given the Irish Government's position, the potential incremental effect of Ryanair's minority shareholding on Aer Lingus's commercial policy and strategy would be limited to instances where the Irish Government would consent to Aer Lingus disposing of Heathrow slots (assuming that the Irish Government remains on Aer Lingus's shareholder register).
- 7.103 We considered that a number of scenarios existed under which Aer Lingus might seek approval to dispose of Heathrow slots in order to manage its network and timetable effectively, and where the Irish Government would be unlikely to oppose the disposal. In particular:
- (a) Aer Lingus might seek to dispose of a small number of slot pairs in the context of managing its portfolio of slots across London airports (for example, by trading valuable Heathrow slots for slots at another capacity constrained airport). [REDACTED] We considered that the Irish Government would be unlikely to oppose small-scale disposals of this type provided its connectivity criteria continued to be met [REDACTED];<sup>95</sup>
  - (b) Aer Lingus might seek to dispose of a small number of slot pairs if it were no longer efficient to operate services at the existing slot times. The disposal proposed by Aer Lingus in 2013, discussed in paragraph 7.97(b), falls into this category. Again we considered that the Irish Government would be unlikely to oppose small-scale disposals of this type so long as its connectivity criteria continued to be met (as was the case in the transaction that Aer Lingus entered into with British Airways in 2013); and
  - (c) Aer Lingus might seek to dispose of slots if it were seeking to exchange slots for Heathrow slot pairs with different timings held by another airline (for instance if it were seeking to alter the timetable of its Heathrow services). As transactions of this type would not lead to a reduction in frequency on routes between the Republic of Ireland and London Heathrow, it is unlikely that the Irish Government would oppose such disposals.
- 7.104 As discussed in paragraph 4.25, the Irish Government has announced its intention to sell its shareholding in Aer Lingus at the right time and at the right price, and we considered that the likelihood of it disposing of its shareholding would be higher absent Ryanair's minority shareholding. We saw no reason to expect that an alternative independent shareholder would oppose a Heathrow slot disposal proposed by management in the context of optimizing its slot portfolio if this were in the interests of the company, and so Aer Lingus would be likely to have some additional flexibility under this scenario. Given this, the potential incremental impact of Ryanair's minority shareholding on Aer Lingus's commercial policy and strategy would be greater in these circumstances.<sup>96</sup> However, we considered that the degree of additional flexibility available to Aer Lingus would probably be limited, because the Irish Government would be likely to seek to ensure a minimum level of connectivity between the Republic of Ireland and London Heathrow when selling its shareholding.

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<sup>95</sup> Given its current slot portfolio, we estimated that Aer Lingus would be able permanently to dispose of up to two slot pairs (out of a total portfolio of 21 slot pairs in summer 2013) and still retain sufficient numbers to meet the Irish Government's connectivity criteria. We note that such a disposal would require a significant reshaping of its existing schedule.

<sup>96</sup> While Ryanair argued that there was no evidence that the mechanism to protect slots at Heathrow would remain part of Aer Lingus's Articles of Association if the Irish Government sold its shares, we noted that if the Irish Government's shareholding were reduced to zero, the Articles as currently drafted implied that consent from 75 per cent of Aer Lingus's shareholders would be required (and so Ryanair would still be able to block such a transaction). Any amendment to the Articles to remove the mechanism would require a special resolution, which Ryanair would have the ability to block.

7.105 We considered that the potential constraint imposed by Ryanair on Aer Lingus's ability to dispose of its slots could reduce its effectiveness as a competitor by allowing Ryanair to prevent Aer Lingus from optimizing its network and the timetable of its UK services. Specifically, by blocking disposals Ryanair could restrict Aer Lingus's ability to choose the optimal schedule for its flights between London and Ireland (services in competition with Ryanair's own operations), both in terms of the timing of these services and the frequency at which routes were served from different London airports. Given the importance to Aer Lingus of its Heathrow services and the substantial strategic value of the slots, the impact of even a small reduction in flexibility on Aer Lingus's effectiveness as a competitor could be significant.

7.106 We also considered the possibility that Aer Lingus might seek to dispose of a large number of Heathrow slots in order to generate cash rather than to optimize its network or timetable. However, we considered that Aer Lingus was unlikely to seek a significant disposal of this type, given the importance of the London–Ireland routes to Aer Lingus's business, the airline's current cash balances and the Irish Government's likely opposition to any such proposal. However, if Aer Lingus were to seek to dispose of Heathrow slots in order to raise money, this would most likely arise if the airline was facing financial difficulties, in which case an inability to dispose of Heathrow slots could put its services between Great Britain and Ireland at risk more generally. Given this, Ryanair's influence over Aer Lingus's effectiveness as a competitor in such circumstances could be very significant.

7.107 In summary, we found that:

- (a) Ryanair would be able to influence Aer Lingus's ability to dispose of some of its Heathrow slots;
- (b) Aer Lingus would have been likely since 2006, or would in the future be likely to want to sell or lease slots in the context of managing its portfolio of Heathrow slots so as to optimize its route network and timetable; and
- (c) a constraint on Aer Lingus's ability to dispose of its slots could reduce its effectiveness as a competitor by limiting its strategic options. This could increase Aer Lingus's costs and restrict its flexibility with regard to its network and timetable, causing it to be a less effective competitor on routes between Great Britain and Ireland than it would otherwise be.

*(d) Aer Lingus's ability to pass an ordinary resolution*

7.108 Another way in which the minority shareholding might affect Aer Lingus's commercial policy and strategy is if it gives Ryanair the ability to influence the outcome of an ordinary resolution.

7.109 We considered Ryanair's ability to pass or defeat an ordinary resolution in Section 4 and Appendix C. We found that, if the Irish Government retains and votes its shares, it is unlikely that Ryanair alone will be able to secure a majority in opposition to the Irish Government. We also found that, although Ryanair has historically lacked the support of other shareholders on resolutions at shareholder meetings, if it were able to mobilize the support of other shareholders, it would be possible for Ryanair to achieve a majority in opposition to the Irish Government.

7.110 We identified several examples of issues that could be particularly contentious and where other shareholders (eg those with an 'activist' stance) would be more likely to oppose Aer Lingus's management in a shareholder vote—board nominations, a payment to Aer Lingus's pensions scheme, major investments (eg class 1

transactions) and/or a request that the company increases or accelerates the distribution of cash to shareholders, for example through higher dividends and disposal of Heathrow slots and other assets (see Appendix C).

- 7.111 Ryanair told us that if a sufficient number of shareholders feel strongly about a measure proposed by the Aer Lingus Board in the future and they wish to oppose it, this would be entirely due to the content of the proposal, rather than due to Ryanair's shareholding. Nevertheless, we considered that although a resolution might be defeated by other shareholders even absent Ryanair's shareholding, Ryanair would have a significant additional incentive relative to other shareholders to vote on a contentious resolution in a way that adversely affected the company's effectiveness as a competitor. For example, Ryanair might oppose a Board proposal to make a significant capital investment or an investment in another airline (requiring a shareholder vote as a class 1 transaction). In the past, Ryanair has opposed a resolution to purchase a number of long-haul Airbus aircraft, but said that it did so on the grounds that the aircraft were being purchased at the top of the cycle and Aer Lingus was paying too much for them.
- 7.112 If the Irish Government were to abstain from a vote and turnout was at the average level, Ryanair could secure a majority on its own. The Irish Government said that it was unlikely to sell its shares in Aer Lingus while Ryanair continues to be a significant minority shareholder and in the event that it did, it would prefer to sell its shareholding to a group that would drive effective competition on routes between the UK and Ireland. However, in the event that, in future, it chose to sell and its shares were dispersed, Ryanair could become the largest shareholder by a considerable margin, and might be able to carry a majority in matters requiring an ordinary resolution.
- 7.113 As set out in Appendix C, Aer Lingus argued that Ryanair's shareholding put the Irish Government in the position of being the pivotal voter when Ryanair intended to oppose the Aer Lingus Board, which it said increased the pressure on the Government to abstain when the issues being voted on might be of interest to the general public or politically sensitive. We were aware that the Irish Government had not abstained in any votes in the past, and it told us that it would expect to take an active role at shareholder meetings. It said that it would not necessarily preclude voting on potentially sensitive political issues, for example Aer Lingus's pension situation or the appointment of a Ryanair board member. Nevertheless, we thought it likely that the Irish Government might have to abstain in the event of a shareholder vote on a related party transaction.<sup>97</sup> We also noted that, in the future, the (current or future) Irish Government might be unwilling to take a position on a particular issue for political reasons.
- 7.114 If Ryanair were in a position to influence the outcome of a vote on an ordinary resolution, there could be very significant implications for Aer Lingus because of the importance of company decisions put to a shareholder vote (for example, it could allow Ryanair to prevent Aer Lingus from making a payment to the pension scheme, remove or prevent the reappointment of board members, or block a major transaction such as the acquisition of a company or aircraft). Given the importance of such issues, the impact on Aer Lingus's competitiveness in such circumstances could be very far-reaching.
- 7.115 In summary, we found that:

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<sup>97</sup> A major shareholder in a listed company is a related party. Related party transactions where the percentage tests exceed 5 per cent must be approved by a shareholder vote in which the related party does not participate. Source: Irish Stock Exchange, listing rules, sections 8.1.3–8.1.11. [www.ise.ie/ISE\\_Regulation/Equity\\_Issuer\\_Rules/\\_Listing\\_Rules/Chapter\\_8.pdf](http://www.ise.ie/ISE_Regulation/Equity_Issuer_Rules/_Listing_Rules/Chapter_8.pdf).

- (a) Given the stated position of the Irish Government, it was relatively unlikely that Ryanair alone would be able to achieve a majority in a shareholder vote. However, this could occur if other shareholders vote in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government were to sell its shareholding to multiple buyers.
- (b) If Ryanair were to achieve a majority there could be very significant adverse implications for Aer Lingus's effectiveness as a competitor, because of the importance of company decisions put to a shareholder vote by ordinary resolution.

*(e) Aer Lingus's management resources*

- 7.116 We considered whether the minority shareholding might weaken the effectiveness of Aer Lingus as a competitor by diverting management resources from pursuing Aer Lingus's commercial policy and strategy and competing effectively with Ryanair.
- 7.117 As set out in Appendix C, Aer Lingus identified a number of ways in which it said Ryanair had sought to use its position as a shareholder to challenge Aer Lingus's management, including making complaints to regulators, initiating judicial review proceedings, seeking undertakings or commercially sensitive information and significant lobbying campaigns.
- 7.118 In addition, Aer Lingus said that the various takeover bids which Ryanair had mounted since Aer Lingus's IPO had impacted on Aer Lingus's management. It noted that it had been placed in an offer period for 25 per cent of its time as a publicly listed company. It said that in addition to the enormous costs and drain on resources resulting from the bids, the obligations placed on Aer Lingus during the bid periods imposed a very significant burden and restricted its commercial freedom.<sup>98</sup>
- 7.119 Specifically, it said that during the offer periods, Aer Lingus had to abide by restrictions on its activities as set out in the Irish Takeover Panel Rules. It said that this could cause Aer Lingus to avoid certain commercial decisions so as to avoid the time and cost of liaising with the Panel and the risk that onward communication of its intentions by the Panel to Ryanair could damage its commercial interests. It referred in particular to Rule 21, which requires the target company to obtain prior approval of its shareholders before entering into any contract other than in the ordinary course of business, and any action which may result in frustration of the offer. In the context of the most recent bid, Aer Lingus said that it had decided not to pursue, or at least to postpone, certain actions because the Panel would have been likely to consult with Ryanair which might have led to a shareholder vote (for example, implementing a long-term retention incentive for the CEO, entering into a slot disposal transaction with British Airways).
- 7.120 Aer Lingus told us that the professional fees and costs associated with defending the three Ryanair bids were in excess of €40 million. It also said that Ryanair's second bid for Aer Lingus had delayed it from making necessary changes to its operations to react to the economic crisis, and estimated that this had cost the company at least €[REDACTED]. It also referred to the diversion of management time in board meetings, and said that although the company aimed to hold six or seven board meetings a year, it had held 15 Board meetings and 7 Defence Committee meetings in the previous year.

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<sup>98</sup> Aer Lingus initial submission, paragraph 140. See [www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus/evidence](http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus/evidence).

- 7.121 Aer Lingus told us that the minority shareholding makes further Ryanair bids more likely for four reasons:
- (a) it guarantees that Ryanair would not face competition on any bid that it makes—there is no risk of a bidding war;
  - (b) it prevents Aer Lingus from engaging in M&A activity that would have the effect of reducing or eliminating Ryanair’s ability to bid for or effect a full takeover of Aer Lingus;
  - (c) further bids become necessary to justify the initial investment to Ryanair shareholders; and
  - (d) the minority shareholding makes future bids less expensive for Ryanair.
- 7.122 We note that Ryanair’s minority shareholding allows it to request information, call EGMs or propose resolutions at AGMs. We reached the view that the requesting of information would not affect Aer Lingus’s effectiveness as a competitor. Nor did we expect that requesting EGMs or seeking to propose resolutions at an AGM by Ryanair would materially affect Aer Lingus’s effectiveness as a competitor by diverting Aer Lingus’s management from concentrating on its commercial policy and strategy (we consider whether the minority shareholding might affect Aer Lingus’s commercial policy and strategy if it gives Ryanair the ability to influence the outcome of an ordinary resolution in paragraphs 7.108 to 7.115). While we recognized that additional management resources would be required to respond to the various challenges made by Ryanair, we did not consider that Ryanair’s minority shareholding would have a material impact on Aer Lingus’s effectiveness as a competitor on shorthaul routes between Great Britain and Ireland in this way.
- 7.123 We did not consider that Ryanair’s minority shareholding was required for it to lobby against the decisions of Aer Lingus (see paragraph 7.117). While Aer Lingus argued that the minority shareholding allowed Ryanair to lobby more effectively, we did not consider that the distraction of management resources caused by Ryanair’s lobbying would materially affect Aer Lingus’s effectiveness as a competitor relative to the counterfactual.
- 7.124 We did, however, recognize that the minority shareholding would increase the likelihood of further bids by Ryanair relative to a situation in which Ryanair had not owned the shares. With a 29.82 per cent shareholding it would have a smaller absolute number of shares to acquire and there would be a reduced likelihood of a counterbidder. Ryanair said that it continued to want to acquire the whole of Aer Lingus (see paragraph 3.11). We considered that full bids by Ryanair were likely to have impeded, or to impede, Aer Lingus’s commercial policy and strategy.<sup>99</sup> Ryanair pointed to various strategic decisions implemented by Aer Lingus during the most recent bid as evidence that it had followed its normal commercial policy. However, we noted that alternative or additional strategic decisions might have been taken had the company not been in an offer period.
- 7.125 In summary, we found that:
- (a) Ryanair’s requesting of information as a minority shareholder would not affect Aer Lingus’s effectiveness as a competitor. Nor did we expect its ability to call EGMs

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<sup>99</sup> For example, the cessation of discussions with [redacted] when Ryanair’s third bid was launched.

or propose resolutions at an AGM materially to affect Aer Lingus's effectiveness as a competitor by diverting management time; and

- (b) Ryanair's minority shareholding increased the likelihood of it mounting a full bid for Aer Lingus. Any such bid could significantly disrupt Aer Lingus's commercial policy and strategy.

### *Conclusions on the effects of the acquisition on Aer Lingus's commercial policy and strategy*

- 7.126 We found that Ryanair's minority shareholding would have affected or would affect Aer Lingus's commercial policy and strategy and inhibit its overall effectiveness as a competitor, albeit without giving Ryanair direct influence over the company's competitive offering on a day-to-day basis. Given the closeness of competition between Ryanair and Aer Lingus and its stated aim of acquiring the entirety of Aer Lingus, we found that Ryanair had an incentive to use its influence to weaken Aer Lingus's effectiveness that would not exist for a shareholder which was not in competition with Aer Lingus.
- 7.127 In reaching our conclusion, we formed the view that the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline was of particular significance. We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares. We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006 or would be involved in the foreseeable future in the trend of consolidation observed across the airline industry through an acquisition, merger or joint venture. By impeding or preventing Aer Lingus from combining with other airlines, Aer Lingus's ability to increase the scale of its operations and reduce its unit costs would be limited. This would be likely to have reduced or to reduce the effectiveness of the competitive constraint Aer Lingus could impose on Ryanair on routes between Great Britain and Ireland relative to the counterfactual.
- 7.128 In addition, we found that Ryanair's minority shareholding could limit the commercial policies and strategies available to Aer Lingus by limiting its ability to manage effectively its portfolio of Heathrow slots. We also took account of the possibility, albeit relatively unlikely, that Ryanair would, in certain circumstances, be able to pass or defeat an ordinary resolution at an Aer Lingus general meeting (if other shareholders voted in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government's shareholding was dispersed). Given Aer Lingus's existing balance sheet strength and forecast financial performance, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term other than in relation to a corporate transaction or to optimize its corporate structure. However, we note that unforeseen events might arise which would require Aer Lingus to raise equity and noted that Ryanair would be able to impede it doing so by blocking a special resolution. The minority shareholding would also increase the likelihood of Ryanair mounting further bids for Aer Lingus relative to the counterfactual.
- 7.129 We found that the extent of the impact of Ryanair's minority shareholding on Aer Lingus's effectiveness as a competitor was likely to be significant. The importance of scale to airlines was clear from our discussions, with Ryanair itself highlighting Aer



Lingus's small scale as an impediment to its long-term survival. We identified a number of significant synergies that would be likely to arise from a combination between Aer Lingus and another airline, over and above those that might arise via looser forms of cooperation. Given wider trends in the airline industry, we would expect the pressure on Aer Lingus's cost base—and the need for additional scale to remain competitive—to become stronger over time. In addition, given the strategic importance of Aer Lingus's Heathrow slots and the importance of its Heathrow services to its UK operations, there could be a significant impact on Aer Lingus arising from its reduced ability to manage its slot portfolio in the context of optimizing the network or timetable of its UK routes. Additional bids by Ryanair for the outstanding shares in Aer Lingus could significantly disrupt Aer Lingus's commercial policy and strategy. Although relatively unlikely, if Ryanair were to achieve a majority at a general meeting, the implications for Aer Lingus's competitive capability could be very significant because of the importance of company decisions put to a shareholder vote by ordinary resolution.

- 7.130 Overall, while we could not predict with certainty the specific mechanism by which a harmful competitive effect would manifest itself (or would have done in the period since 2006), we formed the expectation, based on the evidence that we had gathered and the various mechanisms that we had assessed, that either in the period since 2006 or in the foreseeable future, Aer Lingus's commercial policy and strategy would have been impeded or would be impeded by Ryanair's minority shareholding. We concluded that the constraints on Aer Lingus's ability to implement its own commercial policy and strategy were likely to make Aer Lingus a less effective competitor than it would otherwise be across its network generally, and specifically as a rival to Ryanair on routes between Great Britain and Ireland.

### ***Other ways in which Ryanair's minority shareholding might affect competition in the market***

- 7.131 We also considered whether Ryanair's minority shareholding would affect competition in the market in ways other than by restricting the commercial policies and strategies available to Aer Lingus. We assessed three possible mechanisms:
- (a) Ryanair's minority shareholding might incentivize the management of Aer Lingus to take into account the interests of Ryanair in its own decision making;
  - (b) Ryanair's minority shareholding would change the incentives of Ryanair such that it competes less fiercely with Aer Lingus; or
  - (c) Ryanair's minority shareholding would increase the effectiveness of any existing coordination between Ryanair and Aer Lingus, or increase the likelihood of coordination between them in the future.

### ***The impact on the incentives of Aer Lingus's management***

- 7.132 In theory, the transaction might affect Aer Lingus's effectiveness as a competitor if Ryanair's shareholding were to change the incentives of Aer Lingus's management, such that they decided that the interests of Aer Lingus were better served by competing less fiercely with Ryanair.
- 7.133 We note that there is no financial incentive for Aer Lingus management to take the impact of its actions on Ryanair—its largest shareholder—into account in setting its own offering. In normal circumstances, we would expect a company to be mindful of the views of its major shareholders. Aer Lingus said that Ryanair's presence might

deter Aer Lingus's management from taking actions that may antagonize its largest shareholder, because of the costs of personal attacks ([~~§~~]), increased workload, stress and uncertainty. There was a tension between the company's natural tendency to listen to its shareholders, and the fact that Aer Lingus and Ryanair are close competitors.

- 7.134 We note the often acrimonious relationship between the management of Aer Lingus and Ryanair, as evidenced by correspondence between the two airlines. We also note that Ryanair does not have board representation. Aer Lingus told us that it had not tempered how fiercely it competed with Ryanair in the period since 2006. We formed the view that the current Aer Lingus management was unlikely to compete less aggressively with Ryanair because of Ryanair's position as its largest shareholder.
- 7.135 We considered whether this was likely to continue to be the case if Ryanair were to retain its shareholding in the future. The composition of management could change over time. Aer Lingus told us that if it must face a future of coexistence with Ryanair, it may find itself reluctantly driven to accommodate the interests of Ryanair. It said that managers did not always act in the interests of the company and that other shareholders might not have the incentive or ability to exercise their rights. In our view, however, management would be expected to act in the interests of the company as a whole, and the duty on Aer Lingus's management not to favour any particular shareholder would be likely to offset any incentives that the management might have to accommodate Ryanair.
- 7.136 We conclude that Aer Lingus does not compete less fiercely with Ryanair in order to avoid antagonizing its largest shareholder and is unlikely to do so in the future.

#### *Ryanair's effectiveness as a competitor*

- 7.137 We next considered whether Ryanair's minority shareholding in Aer Lingus would change Ryanair's incentives with regard to its own commercial decisions, by linking its financial interests to those of Aer Lingus. This could occur if, as a result of its minority shareholding, Ryanair has an incentive to compete less fiercely with its rival because it shares in Aer Lingus's financial success.
- 7.138 In a standard assessment of the unilateral effects of a horizontal merger, two key factors drive the extent of any such change in incentives—the closeness of competition between the merging parties and their respective margins on the overlap products. As we discuss in Section 5, the two airlines compete very closely on a number of overlap routes, and given the scale of their variable margins, we would normally consider that Ryanair would have a significant incentive to compete less fiercely with Aer Lingus (see Appendix I). However, this assumes that Ryanair takes into account the value of its shareholding in Aer Lingus when making decisions about its own commercial policy and strategy.
- 7.139 We would expect Ryanair—as a partial owner of Aer Lingus—to have a financial interest in Aer Lingus's profitability. Ryanair will share in Aer Lingus's financial success through the value of its shareholding (realized on sale), or through any dividends paid by Aer Lingus (see Appendix H).<sup>100</sup>

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<sup>100</sup> We find that the market value of Ryanair's shares in the period December 2012 to July 2013 was between €175 million and €271 million. Aer Lingus did not pay a dividend during its first five years as a listed company; it paid a dividend of €0.03 per share in July 2012 (worth €4.8 million to Ryanair), and a dividend of €0.04 has been approved in 2013 (with a value to Ryanair of €6.3 million). Using the level of these payments as a guide to possible future dividends paid by Aer Lingus, we estimated the

- 7.140 However, unlike mergers often considered by the CC, any increase in Aer Lingus's profits will only flow back to Ryanair indirectly and uncertainly. Furthermore, Ryanair's incentives might be affected by its expressed intention to acquire the entirety of Aer Lingus. We discuss these considerations in the remainder of this section.
- 7.141 Ryanair said that it would not have an incentive to compete less strongly with Aer Lingus in order to avoid damaging its profitability because it lacks access to the information necessary in order to implement profitably a strategy of raising prices. First, it would not know Aer Lingus's profit margins on the overlap routes, and so would not know how to optimize its prices. If it were to raise prices by too much it would risk losing money. Second, it would have no control over Aer Lingus's dividend policy, and so Ryanair would not know whether any additional profits would be converted into dividends or used to compete more aggressively with Ryanair.<sup>101</sup> It said that there were too many factors affecting the value of Aer Lingus's shares to enable Ryanair to have any degree of control over it.
- 7.142 We considered that while the uncertainty and practical difficulties highlighted by Ryanair could reduce the incentive for Ryanair to compete less strongly with Aer Lingus, we did not find that these factors alone would eliminate its incentive to do so. Firms routinely operate in environments characterized by incomplete information,<sup>102</sup> and we considered that Ryanair would be able to estimate the impact of different actions on Aer Lingus's profitability. Despite any uncertainty about the effect of any additional profits made by Aer Lingus or the company's share price, additional profitability would still increase the expected value of Ryanair's shareholding.
- 7.143 More generally, Ryanair said that it did not take Aer Lingus into account in its strategic thinking. It submitted a difference-in-difference analysis showing that, on average, the fares set by Ryanair on overlap routes had not increased by more than fares on non-overlap routes in the period since the transaction took place, from which it concluded that the acquisition of the minority shareholding in Aer Lingus had caused no significant increase in its prices. We agreed that there was no evidence to suggest that Ryanair had increased its fares disproportionately on overlap routes since 2006, although we considered that the results of the analysis should be treated with caution.<sup>103</sup> The analysis is discussed in more detail in Appendix E.
- 7.144 Ryanair also said that it used a compensation scheme [redacted]. Aer Lingus's profits were not taken into account in such a framework. Its business strategy—centred on maximizing load factor—was consistent across all routes. It said that as a matter of common sense the value of Ryanair's shareholding in Aer Lingus was so limited that it could never affect the way in which Ryanair operated its business.
- 7.145 We were not aware of any evidence that Ryanair's approach to setting its fares had changed since the transaction took place. However, while the management [redacted] scheme used by Ryanair may not (at present) explicitly take Aer Lingus's profitability into account, this scheme, or the general framework in which Ryanair's route managers operated, could, in principle, be adjusted to take into account the impact of

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present value of the dividend stream to Ryanair to be in the range of €96 million to €159 million, which is lower than the market value because it does not reflect the potential for capital gains. The present value of Ryanair's share of the Aer Lingus future cash flow is substantially greater than the current market value, and exceeds the historical cost of the shares.

<sup>101</sup> Ryanair SLC submission to the OFT, paragraphs 5.11 & 5.12. See [www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus/evidence](http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus/evidence).

<sup>102</sup> See Salop, O'Brien (2001); *The Competitive Effects of Passive Minority Equity Interests: Reply*, *Antitrust Law Journal*

<sup>103</sup> In particular, given the small number of overlap routes in the sample, it would be difficult to estimate the difference in fares for overlap and non-overlap routes with any precision. Consistent with this, the confidence intervals around most estimates of the relevant coefficient were large and included economically very significant positive and negative effects.

price changes on Aer Lingus. We note that Ryanair and Aer Lingus also compete in other dimensions in addition to fares, and so even if there were no effect on prices, there could, for example, be an effect on frequency. Although Ryanair's general business strategy might be consistent across all routes, many decisions would be taken locally.

- 7.146 The acquisition of the minority shareholding was a first step in Ryanair's bid for the entirety of Aer Lingus, rather than an investment in its own right. Ryanair said that it had retained its minority shareholding because it believed that either it would eventually make a successful bid for Aer Lingus, or it would maximize the value of its shareholding by selling to a company willing to pay a significant premium over the market price to acquire control of Aer Lingus.
- 7.147 We considered that the context within which the transaction had taken place could affect Ryanair's incentives when considering the impact of its own commercial decisions on Aer Lingus. In particular, Ryanair's stated strategy of acquiring the entirety of Aer Lingus might cause it not to be concerned about any adverse impact of its own pricing, capacity and route decisions on Aer Lingus. This could be the case if by competing less strongly, Ryanair risked the price of acquiring the outstanding shares in Aer Lingus increasing or being less likely to be able to acquire the remainder of Aer Lingus at all.<sup>104</sup>
- 7.148 We conclude that Ryanair would not be expected to compete less strongly because of its financial interest in Aer Lingus. In reaching this conclusion, we took into account that the acquisition of its minority shareholding in Aer Lingus was part of Ryanair's overall strategy of acquiring the entirety of Aer Lingus. Any incentive to compete less strongly might also be reduced by the uncertainty and indirectness by which Aer Lingus's profit would flow back to Ryanair.

### *Coordinated effects*

- 7.149 Another possible way in which the transaction might lead to a reduction in competition is if it increases the effectiveness of any existing coordination between Aer Lingus and Ryanair, or increases the likelihood of Ryanair and Aer Lingus coordinating on fares or some other aspect of their offering in the future.
- 7.150 Such an effect could arise if:
- (a) the acquisition increases the benefits of coordination (or reduces the benefits of competing). Because of its shareholding, Ryanair would benefit not only from its own increased profits, but from the higher profits of Aer Lingus that would be achieved in the event that a coordinated equilibrium were reached;
  - (b) the acquisition gives Ryanair a greater range of punishment and reward strategies, improving its ability to maintain a coordinated equilibrium; and/or
  - (c) the acquisition facilitates the flow of information between the two companies, making it easier for them to reach and monitor a coordinated equilibrium.
- 7.151 We note the limited operations of airlines other than Ryanair and Aer Lingus on routes between Great Britain and Ireland (with many routes being duopolies) and the

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<sup>104</sup> We note that Aer Lingus said that the CC had inappropriately dismissed the relevance of a potential future scenario in which Ryanair recognized that its attempts to acquire Aer Lingus were futile, in which case its incentives could change. However, given Ryanair's submissions regarding its ambition to acquire the outstanding shares in Aer Lingus—and its repeated attempts to do so—we did not consider this scenario to be likely in the foreseeable future.

relatively high level of transparency in the key dimensions of competition. These factors would be likely to facilitate the ease with which any coordinated equilibrium could be reached and monitored. As set out in the section on entry, we also identified a number of factors which would be likely to deter entry and expansion by other airlines and so which would ensure the external sustainability of any coordinated outcome.

- 7.152 On the other hand, the asymmetry between the two airlines' cost structures and the differentiation between the airlines' service offering could make coordination more difficult by causing a divergence in the incentives of the two airlines. In addition, the general complexity in pricing—with many passengers paying different fares—could make it difficult for firms to reach and monitor coordination on fares.
- 7.153 Dublin Airport Authority (DAA) told us that it had observed a matching pattern in the taxes and charges imposed by Ryanair and Aer Lingus, whereby one of the airlines would increase its charges and the other would often then match it. It said that at times the airlines had charged exactly the same rate, although this was not always the case. It said that it was not always the same airline that increased its charges first.
- 7.154 It told us that the taxes and charges published by the airlines did not reflect the actual taxes and charges they incurred. The underlying airport services and facilities provided to the airlines were quite different—the cost per passenger was probably 10 per cent different in terms of input costs—and the airlines were earning margins of between 30 and 50 per cent on what were presented to customers as taxes and charges. DAA said that the pattern demonstrated the possibility of cooperation between the airlines, although this was not necessarily evidence that Aer Lingus and Ryanair were coordinating.
- 7.155 We asked Ryanair and Aer Lingus how they set their taxes and charges. Ryanair said that its prices were set with the aim of offering the lowest fares in the market and with the aim of reaching predetermined load factor targets. It explained that the majority of its fares were set at a level that was lower than the combined taxes and charges, so the 'taxes and charges' entry often appeared as 'zero' on the tickets. Ryanair said that it had never sought to coordinate its conduct with Aer Lingus, and that it would be unable to reach such coordination in any event.
- 7.156 Aer Lingus said that it did not impose a mark-up on airport charges, and rejected any suggestion of coordination with Ryanair in the setting of its charges. It said that it applied a cost recovery model in setting its taxes and charges under which it sought to recover all charges imposed by DAA—not only related to the arrival and departure of passengers, but also related to aircraft.
- 7.157 We reviewed Aer Lingus's internal documents relating to how it set its charges. We saw no evidence suggesting that Aer Lingus was setting charges higher than it otherwise would have on the understanding that Ryanair would do the same. Ryanair said that it did not produce any internal documents which related to how it set its charges.
- 7.158 We were not aware of any evidence suggesting that Ryanair and Aer Lingus were coordinating on their core fares or the geographical area of their operations. In general, the relationship between the management of the two companies appeared to be antagonistic, rather than cooperative. We found considerable and sustained evidence of price competition between the airlines, and of airlines' fares reacting to each other (and to the presence of the other airline on a route).

7.159 We found it unlikely that Ryanair's minority shareholding in Aer Lingus would lead to coordinated effects.

### **Market entry/expansion**

7.160 In this section we consider possible entry and expansion by an airline wishing to enter new routes or expand capacity on existing routes between Great Britain and Ireland. We consider:

- (a) the history of entry, expansion and exit (see paragraphs 7.161 and 7.162);
- (b) the views of airlines and airports on likely future entry and expansion (see paragraphs 7.163 and 7.164); and
- (c) the issues which might affect the likelihood, timeliness and scale of entry (see paragraphs 7.165 to 7.173).

We then draw some conclusions on whether entry and expansion would be likely to offset any possible SLC that we might identify. Further details of our analysis of entry are set out in Appendix J.

7.161 In response to a European Commission questionnaire, Aer Lingus said that 'since the 2007 prohibition decision, there has been no entry of note on shorthaul routes out of Ireland. Indeed, the opposite is the case and the level of concentration in the market has increased'.

7.162 We found that Aer Lingus, Aer Arann and Ryanair are the only airlines which have opened and maintained new routes between Great Britain and Ireland in recent years. We found several examples of other airlines which had entered for a few seasons but then exited. British Airways has increased capacity on the London Heathrow–Dublin route following its purchase of bmi.

7.163 We asked airlines and airports for their views on the likelihood and timeliness of entry on routes between Great Britain and Ireland, as well as examining the relevant material submitted to the European Commission. We found that Aer Arann was the only airline which had specific plans to enter or expand on overlap routes in the next few years. Flybe had plans to expand on non-overlap routes between Great Britain and Ireland in the summer of 2013, although in its submission to the European Commission it said that it would consider expanding on overlap routes in response to a significant increase in prices. CityJet said that it might expand on routes from Dublin to Great Britain but that it did not have specific plans, and IAG said that [redacted]. easyJet said that [redacted].

7.164 The airports that responded to us had mixed views on the likelihood of expansion by the airlines on routes between Great Britain and Ireland. DAA said that it was unlikely that there would be substantial and sustained entry by airlines other than Aer Lingus or Ryanair on UK–Republic of Ireland routes. Some airports, including Belfast International, thought a couple of new routes could open while others, including Glasgow Airport, were concerned about the loss of existing services.

7.165 We looked at four main issues that might affect the ability of competitors to enter or expand their capacity on routes between Great Britain and Ireland:

- (a) assets required to enter or expand (see paragraphs 7.166 to 7.170);
- (b) threat of aggressive response (see paragraph 7.171);

- (c) impact of the current and expected economic climate (see paragraph 7.172); and
- (d) impact of taxes and airport charges (see paragraph 7.173).

- 7.166 Looking first at the assets required, we found that obtaining aircraft, pilots and aircrew was relatively straightforward. Aircraft can be purchased and staff can be hired; aircraft and crew are also available through leasing deals.<sup>105</sup> This is consistent with the views expressed by the European Commission in its prohibition decision on Ryanair's third bid for Aer Lingus.
- 7.167 We found that, based on the evidence we received, there were slot and stand capacity issues at Dublin Airport that were likely to act as a barrier to entry at peak morning times. In addition, we found that there were capacity constraints at several UK airports, again particularly in the peak morning periods. We note that, both in order to maximize aircraft utilization and in order to attract business passengers, airlines need to be able to schedule peak morning departures.
- 7.168 With the exception of Ryanair, airlines said that brands played an important part in the competitive process in the airline industry. Both Aer Lingus and Ryanair have well-known brands in Ireland. We therefore found that an airline's ability to compete effectively with Aer Lingus and Ryanair would be limited if it did not have a well-known brand in Ireland. However, we recognize that some airlines may have a well-known brand in the UK and this may offset this disadvantage to some extent, and facilitate entry or expansion for those airlines on routes between Great Britain and Ireland.
- 7.169 We also looked at whether an airline would need to establish a base in order to be an effective competitor. We found that airlines operating from bases benefit from a number of advantages, including economies of scope and scale and more flexibility over flight schedules. Both Aer Lingus and Ryanair operate bases at Dublin and an effective competitor is likely to need to establish a base at Dublin.
- 7.170 We recognize that a competitor which has a base at the other end of a route, for example IAG at London Heathrow would be able to place some constraint on Ryanair and Aer Lingus on routes to that UK airport. However, this constraint could be limited if they do not overnight aircraft in Ireland, because they would not be able to offer early morning peak flights from Dublin, or late night arrivals to Dublin.
- 7.171 We looked at whether the expectation of an aggressive response by existing operators would reduce the likelihood of entry on routes between Great Britain and Ireland. Several airlines said that possible entrants might expect an aggressive response by Ryanair and that this would be likely to deter entry. Such a response would be relevant to entry on all routes between Great Britain and Ireland, although its importance may vary depending on the entrant airline.
- 7.172 We also looked at the extent to which the current and expected economic climate in Ireland and Great Britain is likely to affect entry and expansion decisions and reduce the likelihood of entry. We found that the economic climate and the size of the Irish market might deter entry on routes between Great Britain and Ireland. While the economic climate in Ireland is improving, the responses from airlines suggested that investment in Ireland was still relatively unattractive. This is consistent with the fact that there was no substantial entry on routes between Great Britain and Ireland by

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<sup>105</sup> See, for example, Virgin's wet lease agreement with Aer Lingus.  
[http://corporate.aerlingus.com/investorrelations/regulatorynews/2012pressreleases/RNS\\_re\\_wet\\_lease\\_Final\\_Draft\\_071212.pdf](http://corporate.aerlingus.com/investorrelations/regulatorynews/2012pressreleases/RNS_re_wet_lease_Final_Draft_071212.pdf).

airlines other than Aer Lingus, Aer Arann and Ryanair even when the Republic of Ireland was experiencing strong growth.

- 7.173 Finally, we looked at whether taxes and airport charges might reduce the likelihood of entry on routes between Great Britain and Ireland. We found that the relatively high level of air travel taxes in Great Britain may deter entry by making routes between Great Britain and the Republic of Ireland less attractive to entrants relative to other markets. The evidence on the impact of charges at Dublin was more mixed, but these may also serve to deter entry.
- 7.174 Based on the evidence we have reviewed, including the analysis carried out by the European Commission in its decision to prohibit Ryanair's third bid for Aer Lingus, we conclude that substantial entry on routes between Great Britain and the Republic of Ireland is unlikely due to several factors. These include early morning capacity constraints at Dublin Airport and some UK airports, the importance of establishing a well-known brand and base in Ireland (coupled with the limited extent of possible entrants' existing operations in Ireland), the relative unattractiveness of the Irish market, the potential for an aggressive competitive response by existing operators and the level of taxes and airport charges.
- 7.175 This assessment is consistent with the general pattern of airlines exiting from the market which has been observed in recent years, as well as views expressed by airlines regarding their future entry plans. It is also consistent with the European Commission's findings. We therefore conclude that entry or expansion by other airlines would be unlikely to offset the SLC that we might otherwise find.

### **Conclusions on the SLC test**

- 7.176 As set out in Section 5, in 2012 Ryanair and Aer Lingus together carried 82 per cent of airline passengers (a total of 3.8 million outbound passengers) travelling between Great Britain and the Republic of Ireland. Given the closeness of competition between the two airlines on routes across the Irish Sea, we found that Ryanair would have an incentive to use its influence over Aer Lingus derived from its minority shareholding to weaken its rival's effectiveness as a competitor. Given the large number of passengers travelling between Great Britain and Ireland, any reduction in competition between the airlines would result in significant customer detriment.
- 7.177 In making our decision as to whether Ryanair's minority shareholding has led or may be expected to lead to an SLC, we must satisfy ourselves in accordance with the normal civil standard of proof, ie on the balance of probabilities.<sup>106</sup> We identified various mechanisms through which Ryanair's minority shareholding might impede competition in the relevant markets by influencing Aer Lingus's commercial policy and strategy relative to the counterfactual. We are not required to establish that any individual mechanism is more likely than not to occur before we can take it into account in our overall assessment of the probability of an SLC.<sup>107</sup> Rather, in making our assessment as to whether there has been, or is likely to be an SLC, we must apply the 'probabilistic test' on the basis of a consideration of all relevant evidence in the round.
- 7.178 We formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority

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<sup>106</sup> The applicability of the balance of probabilities test is recognized in the CC2. See also *British Sky Broadcasting Group v Competition Commission* [2008] CAT 25, paragraph [70], *IBA Health v OFT* [2003] CAT 27, paragraph [182], and *IBA* (in the Court of Appeal) per the Vice-Chancellor at paragraph [46].

<sup>107</sup> *British Sky Broadcasting Group v Competition Commission* [2008] CAT 25, paragraph [80].



shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline. We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares (which might be required for a corporate transaction or to optimize its capital structure). We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consolidation observed across the airline industry. Such consolidation has the potential to provide significant benefits to Aer Lingus by increasing its scale and reducing its unit costs, thus enabling it to become a stronger and more effective competitor with Ryanair in the relevant market relative to the counterfactual.

- 7.179 The likely consequence of the impediment to Aer Lingus combining with other airlines has been, or will be, to reduce the effectiveness of the competitive constraint Aer Lingus can impose on Ryanair on routes between Great Britain and Ireland relative to the counterfactual. In our view, given the widely acknowledged importance of scale in this industry, and Aer Lingus's limited opportunities for organic growth, a denial of an opportunity that would otherwise arise for Aer Lingus to achieve greater scale and reduce its unit costs by combining with one or more other airlines could have a significant impact on competition on routes between Great Britain and Ireland. It would not be in Ryanair's overall commercial interests to support a combination of Aer Lingus with another airline (other than Ryanair) that could lead to Aer Lingus becoming a stronger competitor.
- 7.180 In addition, we found that Ryanair's minority shareholding could impede Aer Lingus's ability to manage effectively its portfolio of Heathrow slots, restricting it from optimizing its route network and timetable across London airports. Aer Lingus is in an unusual situation in that its ability to manage, in its own commercial interests, a resource of central commercial importance to its business and physical operations by swapping or selling slots, can be prevented or impeded by its close commercial rival. It is likely that, in the foreseeable future, it will continue to be in Aer Lingus's commercial interests to adjust its existing slot portfolio in the context of optimizing the network or timetable of its UK routes, but in such circumstances Ryanair would have an incentive to prevent or impede such changes where they were likely to strengthen Aer Lingus and enable it to compete more effectively with Ryanair.
- 7.181 We also took account of the possibility, albeit relatively unlikely, that Ryanair would, in certain circumstances, be in a position to pass or defeat an ordinary resolution at an Aer Lingus general meeting (if other shareholders voted in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government's shareholding was dispersed). This would mean that issues of fundamental importance to the airline considered at such meetings could be decided by Ryanair's preferences based on its own commercial considerations as a competitor of Aer Lingus. Given Aer Lingus's existing balance sheet strength and forecast financial performance, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term other than in relation to a corporate transaction or to optimize its corporate structure. However, we note that unforeseen events might arise which would require Aer Lingus to raise equity and noted that Ryanair would be able to impede it doing so by blocking a special resolution.
- 7.182 We also took into account that, notwithstanding the European Commission's recent prohibition decision, the minority shareholding would increase the likelihood of Ryanair mounting further bids for Aer Lingus relative to the counterfactual. This could serve as a serious distraction for Aer Lingus's management resources and could

have impeded, or could impede, Aer Lingus's ability to implement its commercial policy and strategy (including, if its management thought appropriate, by pursuing options involving combination with another airline).

- 7.183 Overall, we recognized that we could not predict with certainty the specific mechanism by which a harmful competitive effect would manifest itself (or may have done in the period since 2006). However, on the basis of our consideration of the above points in the round, we conclude that Ryanair's minority shareholding would have led or would be expected to lead to a reduction in Aer Lingus's effectiveness as a competitor.
- 7.184 In relation to the materiality of that reduction in effectiveness, the importance of scale to airlines was clear from the evidence presented to us, with Ryanair itself highlighting Aer Lingus's small scale as an impediment to its long-term survival. In addition, given the strategic importance of Aer Lingus's Heathrow slots and the importance of its Heathrow services to its UK operations, there could be a significant impact on Aer Lingus arising from its reduced ability to optimize its slot portfolio. The disruption to Aer Lingus's ability to pursue its own commercial policy and strategy from additional bids by Ryanair for the outstanding shares in Aer Lingus would be (and has been) significant. Further, although relatively unlikely, if Ryanair were to achieve a majority at a general meeting, the implications for Aer Lingus's competitive capability could be significant because of the importance of company decisions put to a shareholder vote by ordinary resolution. We therefore found that the impact of Ryanair's minority shareholding on Aer Lingus's effectiveness as a competitor was likely to be material and enduring both across its network generally, and specifically as a rival to Ryanair on routes between Great Britain and Ireland.
- 7.185 In reaching our conclusion, we looked carefully at the evidence of competition during the period since 2006, as well as the prospects for competition in future. Although we found that competition between Ryanair and Aer Lingus has remained intense since 2006 and that the extent of overlap between the airlines has increased, we also took into account the limitations of this evidence for our analysis given the possibility that, absent Ryanair's minority shareholding, competition during the period since 2006 could have developed differently and been more intense. In addition, the intensity of competition between Aer Lingus and Ryanair since 2006 is not necessarily indicative of how Ryanair's minority shareholding will affect competition in the future. For example, we were conscious of Aer Lingus's view that its competitiveness would be eroded over time as it faced an inevitable 'cost creep' if its participation in the trend of consolidation in the airline industry were limited, as well as Ryanair's view that Aer Lingus did not have a future as an independent airline.
- 7.186 In reaching our conclusion, we also recognized that there were a number of other ways in which the minority shareholding might in principle affect competition between Ryanair and Aer Lingus, but where we did not anticipate a reduction of competition to arise. We found that the minority shareholding was unlikely to cause Aer Lingus's management to compete less fiercely with Ryanair in order to avoid antagonizing its largest shareholder; to cause Ryanair to compete less fiercely with Aer Lingus in order to protect the value of its investment; or to lead to coordinated effects.
- 7.187 We found that entry on routes between Great Britain and Ireland was unlikely to offset the adverse effect of the merger on Aer Lingus's effectiveness as a competitor.
- 7.188 We conclude that Ryanair's acquisition of a 29.82 per cent shareholding in Aer Lingus has led or may be expected to lead to an SLC in the markets for air passenger services between Great Britain and Ireland.

## 8. Remedies

- 8.1 Having concluded that the acquisition has resulted, or may be expected to result, in an SLC, we are required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.<sup>108</sup> This section discusses possible remedies to the SLC and its resulting adverse effects.

### **Analytical framework for the assessment of remedies**

- 8.2 The CC, when considering possible remedial actions, is required, in particular to 'have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.<sup>109</sup>
- 8.3 To fulfil this requirement, the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective. The CC will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. The CC may also have regard, in accordance with the Act,<sup>110</sup> to any relevant customer benefits arising from the merger. A detailed description of the factors the CC will examine in determining what remedial action is to be taken can be found in [Merger Remedies: CC Guidelines, CC8](#).

### **Duty of sincere cooperation**

- 8.4 As set out in paragraph 3.7), Ryanair's third public bid for Aer Lingus was prohibited by the European Commission on 27 February 2013. On 8 May 2013, Ryanair filed an appeal to this decision to the General Court. These proceedings are pending.
- 8.5 We considered the applicability of the duty of sincere cooperation with the institutions of the EU pursuant to Article 4(3)<sup>111</sup> TEU in relation to both our substantive assessment and the implementation of remedial action. In paragraphs 7.3 to 7.11 we discussed the relevance of the European Commission's findings to our substantive assessment in this case and concluded that they do not preclude the CC's finding of an SLC. In this section, we consider the application of the CC's duty of sincere cooperation to the implementation of remedial action.
- 8.6 Ryanair stated that the CC must determine (on the facts) whether a particular decision could conflict with a decision of the European Court or European Commission. This assessment may entail a balancing exercise. However, once it is established that a decision could conflict with a decision under EU law, the obligation not to reach a conflicting decision is absolute, being a matter of law under Article 4(3) TEU. Consequently, Ryanair said that, in light of the ongoing EU appeals process of the European Commission decision to prohibit its third bid for Aer Lingus, the CC was prohibited from reaching a decision on any divestment remedy, which must be stayed pending resolution of the EU appeals process.

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<sup>108</sup> The Act, [section 35](#).

<sup>109</sup> The Act, [section 35\(4\)](#).

<sup>110</sup> The Act, [section 35\(5\)](#).

<sup>111</sup> Article 4(3) TEU provides:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

- 8.7 Ryanair stated<sup>112</sup> that the CC had already recognized that it would not proceed to determine any issue of remedy while Ryanair's appeal of the EU Decision was ongoing<sup>113</sup> and would avoid taking a final decision that could conflict with a decision of the European Commission which, Ryanair suggested, must include any appeals of such a decision.<sup>114</sup>
- 8.8 Aer Lingus stated that an order requiring divestment of the minority stake could not create legal conflict with any future decision of the European Commission, first because those two (hypothetical) decisions involved the application of different legal instruments to different facts, and second because Ryanair could reacquire the shares in the context of an approved bid.
- 8.9 We do not agree with Ryanair's submission that the CC is prohibited, by its previous statements or those of the UK courts, from implementing remedial action. We believe that we must carry out a balancing exercise, taking into account all the circumstances of the case<sup>115</sup> in assessing whether Article 4(3) TEU requires us to defer remedial action. We considered the following factors in reaching our decision:
- (a) the lack of jurisdictional overlap between what has been considered by the European Commission and the CC (the European Commission considered only the public bid made to increase Ryanair's shareholding to 100 per cent and not the minority shareholding);
  - (b) the nature and terms of the CC's findings of an SLC;
  - (c) the nature and terms of the European Commission's prohibition decision;
  - (d) the CC's duty under section 41 of the Act to achieve as comprehensive a solution as is reasonable and practicable to any SLC found and any adverse effects arising from it;
  - (e) the likely extent of any harm to competition caused by delaying any action in relation to the SLC found;
  - (f) the nature and scope of the Ryanair appeal against the European Commission's decision;
  - (g) the likelihood that findings of the European Court(s) and/or, on remittal, the European Commission, in relation to the public bid would conflict with the substantive analysis in the CC's report;

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<sup>112</sup> [Response by Ryanair to the Remedies Notice](#), dated 11 June 2013.

<sup>113</sup> Case T-260/13 seeking the annulment of the European Commission's decision of 27 February 2013 in Case COMP/M.6663 - Ryanair/Aer Lingus.

<sup>114</sup> Reference to: the CC's Observations dated 7 January 2013, paragraph 15; [2012] CAT 21, Case No. 1196/4/8/12 between Ryanair Holding plc and the Competition Commission supported by Aer Lingus at paragraph 84; and the CC's skeleton argument before the Court of Appeal—[2012] EWCA Civ 1632, Ryanair Holding plc and Competition Commission and Aer Lingus plc.

<sup>115</sup> See *Ryanair v CC* [2012] CAT 21:

41. Essentially, when and how a stay pursuant to the duty of sincere cooperation ought to be imposed involves – at least in the United Kingdom – something of a balancing exercise (see paragraph [35] of *National Grid*). This exercise may require a more or less complex assessment of numerous interlocking factors and intrinsically involves an element of appreciation and the exercise of judgment.

42. Our conclusion, viewing the matter apart from the *Ryanair C/A Decision*, is that the question of what needs to be done in order to comply with the duty of sincere cooperation is a nuanced one, which is very dependent on the facts of the given case.

- (h) the likelihood that findings of the European Court(s) and/or, on remittal, the European Commission in relation to the public bid would conflict with any remedial action;
  - (i) the ability of the UK competition authorities to revisit any remedies which it has ordered, either under section 92 of the Act or by building into the remedies themselves provision for what should happen in the event that a public bid is approved by the European Commission;
  - (j) the practical impact that divesting all or part of the minority stake would have on Ryanair's ability to launch and successfully complete a public bid in the event that the decision of the European Commission is overturned and the public bid is subsequently approved;
  - (k) any impact of Article 1 Protocol 1 of the European Convention on Human Rights, including whether, and if so, what burden there might be on Ryanair of divesting and reacquiring the minority stake, and/or potentially being unable to reacquire the minority stake, set against the public interest in expediting remedial action, as well as in avoiding further consideration by the CC, as might be required in the event of a delay in implementation;
  - (l) the extent to which any potential impact upon Ryanair should be discounted on the basis that any acquisition was always subject to merger control scrutiny;
  - (m) the practicality of any interim solution (pending the outcome of the European process), such as temporary transfer of Ryanair's shares to a trustee, and or an amended version of the interim order currently in place, and its likely adequacy in preventing harm to competition during any interim period;
  - (n) the conduct of Ryanair in launching multiple bids for some or all of the shares in Aer Lingus, and the timing of those bids or related actions; and
  - (o) the conduct by Ryanair of its proceedings in the European courts and, in particular, the absence of any interim measures being sought or imposed.
- 8.10 We note that the CAT,<sup>116</sup> the Court of Appeal<sup>117</sup> and the General Court<sup>118</sup> have confirmed that the CC has exclusive jurisdiction to analyse the competitive effects of Ryanair's minority shareholding in Aer Lingus.
- 8.11 We also note that we have analysed the impact of Ryanair's minority shareholding in Aer Lingus on the latter's effectiveness as a competitor on routes between Great Britain and Ireland, taking into account the relevance of the European Commission's decision where appropriate. In our view there is no conflict arising from the CC's finding of an SLC and the European Commission's SIEC findings.
- 8.12 We recognize that Ryanair has challenged the European Commission's assessment of the final commitments offered by Ryanair. We are also mindful of the importance of complying with our EU obligations and we have therefore considered the matter with care. However, having had regard to the matters mentioned in paragraph 8.9,

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<sup>116</sup> Ryanair Holdings plc v Competition Commission [2012] CAT 21.

<sup>117</sup> Ryanair Holdings plc v Competition Commission [2012] EWCA Civ 1632 as per Lord Justice Etherton at paragraph 52: 'A Member State's duty of sincere co-operation under Article 4(3) TEU subsists at all times. Whether and when it requires the Member State to take or to desist from taking any particular action, and precisely what is required to fulfill it, are highly fact sensitive. There may be a choice of several different ways, with different timing, to satisfy the duty. Provided that the duty is fulfilled, it is for the Member State to choose the most appropriate course of action to take'.

<sup>118</sup> Cast T-411/07 dated 6 July 2010.

including the grounds of challenge in Ryanair's application to the General Court, we view the prospect of a conflict between the substantive analysis or outcome of the CC's inquiry and that of the institutions of the EU as relatively remote. In our view, the remedial action that we propose taking could not be said to jeopardize the attainment of the EU's objectives.

- 8.13 We considered whether interim arrangements would be effective in mitigating the SLC finding pending the conclusion of the EU appeals process. For the reasons set out in paragraph 8.103, we did not find that interim relief (by way of the current—or supplementary—interim measures) would be effective in addressing the SLC that we had found and hence were not persuaded that delaying the implementation of remedial action was justified.

### ***Remedy options***

- 8.14 In the Remedies Notice (the Notice) we invited views on three remedy options:

- (a) divestiture of the whole of Ryanair's shareholding in Aer Lingus (full divestiture);
- (b) divestiture of part of Ryanair's shareholding in Aer Lingus (partial divestiture); and
- (c) behavioural remedies to accompany a partial divestiture remedy.

- 8.15 We also invited views on other measures—relating, for example, to the purchaser of the divested Aer Lingus shares, the method or the timing of divestiture—that might be needed to make effective a full or partial divestiture of Ryanair's shareholding in Aer Lingus and to ensure that no new competition concerns would arise.

- 8.16 In our guidelines,<sup>119</sup> we state that structural remedies (ie divestitures in the case of completed mergers) are normally preferable to measures that seek to regulate the ongoing behaviour of the relevant parties (behavioural remedies) as behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies and may result in distortions compared with a competitive market outcome.

- 8.17 Against this background, in the Notice we said that we were not, at that stage, proposing behavioural remedies on their own for discussion as none appeared to be appropriate and effective in addressing the SLC that we had provisionally found. However, we said that we were willing to consider any practical alternative remedies that parties considered would remedy the SLC identified and/or the adverse effects.

- 8.18 Following publication of the Notice, Ryanair proposed a number of alternative remedies. We discuss Ryanair's proposed remedies first before considering the proposals contained in our Notice.

### ***Ryanair's proposed remedies***

- 8.19 Ryanair said that the concerns advanced in the provisional findings report rested entirely on speculative and unproven theories that:

- (a) Ryanair might affect Aer Lingus's ability to merge with another airline;
- (b) Ryanair might affect Aer Lingus's ability to issue shares to raise capital; and/or

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<sup>119</sup> CC8, paragraph 1.8(a).

- (c) Ryanair might affect Aer Lingus's ability to manage its slots at Heathrow.
- 8.20 Ryanair said that these concerns did not relate to the existence of its minority shareholding; its minority shareholding was not per se anticompetitive and it had not distorted the structure of the market. Competition between the two airlines had intensified since Ryanair acquired its minority shareholding and therefore this was not a case where the concentration under review raised any structural concern or had any impact on the parties' incentives to compete.
- 8.21 Ryanair said that, as the CC's theories of harm were 'limited to speculation about ways in which Ryanair could exercise voting rights in future',<sup>120</sup> these 'speculative concerns' could be fully addressed by less intrusive measures, such as the ones it proposed, than full or partial divestiture.
- 8.22 Ryanair initially proposed the following remedies:
- (a) an undertaking (or order) preventing it from voting against an acquisition of Aer Lingus by another EU airline, including by means of a scheme of arrangement or a transaction under the Cross-Border Mergers Directive. Ryanair said that this could remove any concern that it could prevent Aer Lingus from being acquired by another airline and was a major concession as it could expose it to the risk of being squeezed out under a scheme of arrangement;<sup>121</sup>
  - (b) an undertaking (or order) preventing it from voting against an acquisition by Aer Lingus, including by public offer or a scheme of arrangement, involving another EU airline (if put to a vote), as proposed by the Aer Lingus board.<sup>122</sup> Ryanair said that this could remove any concern that it could prevent Aer Lingus from acquiring another airline;
  - (c) an undertaking (or order) preventing it from voting against a disapplication of pre-emption rights outside the EU. Ryanair said that this could remove any concern arising from its ability to prevent Aer Lingus from issuing new shares other than on a pre-emptive basis;
  - (d) an undertaking (or order) preventing it from voting against Aer Lingus's board on the disposal of Aer Lingus's slots at London Heathrow. Ryanair said that this could remove any concern that it may have the ability to block the disposal of these slots in the future.
- 8.23 In Ryanair's view, undertakings of this type would raise no specification, circumvention, or enforcement risks, and as the minority shareholding involved no integration or cooperation of the two businesses, there was no risk of behavioural undertakings distorting market outcomes.
- 8.24 Subsequently, and in response to the CC's Remedies Working Paper, Ryanair said that given its proposed binding undertakings above, the CC's only remaining concerns seemed to relate to highly specific ways in which a theoretical acquirer of Aer Lingus might wish to structure a transaction (ie a takeover offer rather than a

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<sup>120</sup> [Response by Ryanair to the Remedies Notice](#), 11 June 2013, paragraph 5.

<sup>121</sup> The squeeze-out procedure is set out in the Irish Companies Act 1963, [section 201](#). We noted that a 'squeeze-out' of Ryanair's shareholding under a scheme of arrangement is technically possible if Ryanair votes in favour of the scheme. To achieve a squeeze-out under a scheme of arrangement, approval is required from a majority in number and 75 per cent by value of shareholders present and voting at the EGM called to consider the scheme of arrangement. The scheme must then be sanctioned by the Irish high court.

<sup>122</sup> Although not suggested by Ryanair, such an undertaking (or order) could presumably be extended to cover voting against an acquisition structured under the Cross-Border Merger Regulation. We therefore took this into account in our assessment.

scheme of arrangement), and concerns that such an acquirer might then have about perceived difficulties in obtaining 100 per cent of the company (if it could not squeeze out Ryanair). Ryanair proposed the following additional remedies in order to remove this perceived concern:

- (a) an undertaking (or order) to accept an offer for its shares if another EU airline achieved acceptances representing more than 50 per cent of Aer Lingus's shares;
- (b) an undertaking (or order) to support a scheme of arrangement involving another EU airline if shares representing more than 50 per cent of Aer Lingus's issued share capital were voted in favour at the shareholders' meeting.

8.25 Finally, Ryanair offered two further additional remedies:

- (a) an undertaking (or order) to extend the remedies set out in paragraphs 8.22 and 8.24 to non-EU airlines, should it at any point in future become legally permitted for a non-EU airline to hold more than 50 per cent of Aer Lingus's shares;
- (b) an undertaking (or order) not to oppose the disapplication of pre-emption rights in the context of a combination between Aer Lingus and another airline.

### *Aer Lingus*

8.26 Aer Lingus said in its response to our Notice that remedies should target a 'high degree of certainty of achieving the intended effect'.<sup>123</sup> Behavioural remedies on their own would be inherently unsatisfactory in the face of Ryanair's likely conduct. Even if Ryanair gave an undertaking not to vote against a merger structured as a scheme of arrangement, for example, it might seek to challenge the scheme in the Irish courts.<sup>124</sup> It also said that Ryanair's proposed remedies were limited in the sense of not including an undertaking to desist from attempting any avoidance mechanisms such as an undertaking not to convene EGMs or propose resolutions which, while not directly opposing the offer or scheme of arrangement, might nevertheless cause the offer or scheme to fail. In its view, Ryanair would be likely to view anything less than a full divestiture as an invitation to continue with its efforts to impede Aer Lingus's management and the package proposed by Ryanair would not, for example, prevent it making further bids for Aer Lingus.

### *easyJet*

8.27 easyJet said that behavioural remedies tended not to work very well. It thought that, if voting rights were to be limited, the potential issues that could arise would need to be predefined and that would be a problem.

### *Air France*

8.28 Air France said, based on the (necessarily limited) information available to it, that it had no difficulty in principle with one airline holding a minority shareholding in another, and that the minority shareholder should be in a position to protect its financial interests. If the minority shareholder had some special rights which meant

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<sup>123</sup> Citing CC8, paragraph 1.8(d).

<sup>124</sup> For example, if a general meeting were to vote in favour of a scheme of arrangement, Aer Lingus told us that Ryanair may well seek to contest the squeeze-out in the Irish High Court by asking the court not to sanction the scheme, citing the legal precedent set out in *Re Hellenic & General Trust Limited* as its basis for doing so.



that Aer Lingus was not totally free to define its strategy on certain important aspects, for example in relation to the disposal of slots at London Heathrow, that was something that would need to be cured through behavioural remedies or, possibly, a partial divestiture such that Ryanair was no longer in a position to influence Aer Lingus's strategy.

### *Discussion on the effectiveness of Ryanair's proposed remedies*

- 8.29 We considered whether any or all of Ryanair's proposals would be effective in remedying the SLC that we have found.
- 8.30 In Section 7 we concluded that one of the mechanisms of particular significance to our SLC finding was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with, or acquiring another airline. We have assessed, in the first instance, whether Ryanair's proposals would be effective in addressing these concerns.
- 8.31 We noted that Ryanair's proposed remedies contained both behavioural and structural elements. As set out in paragraphs 8.22(a), 8.22(b), 8.24(a) and 8.24(b), various elements of Ryanair's proposal are intended to commit it to supporting, or not opposing, certain types of combinations involving Aer Lingus under certain circumstances.
- 8.32 We noted that Ryanair's proposed remedies were limited to certain forms of combination effected through a scheme of arrangement or a general offer and were limited to combinations with other EU airlines (until such time as non-EU airlines are permitted to acquire a majority stake in EU airlines).
- 8.33 However, there are other forms of combination which could still be inhibited by Ryanair notwithstanding these proposed remedies and which would otherwise impact on Aer Lingus's competitiveness on routes between Great Britain and Ireland. For example, Aer Lingus may wish to enter into a partnership with another airline involving representation on the Aer Lingus board and newly issued shares in Aer Lingus which may require shareholder approval under the Listing Rules of the Irish Stock Exchange or Irish company law. This type of arrangement was discussed between Aer Lingus and [redacted] in 2013 as one possible deal structure. Ryanair could vote against the Class 1 transaction approval and block the amendments to the Articles of Association needed to give effect to this type of arrangement. More generally, we also noted that Ryanair could, under certain circumstances, influence Aer Lingus's commercial policy and strategy—including in relation to the pursuit of inorganic growth through combinations—by exercising the deciding vote in the context of an ordinary resolution. Or, it could do so by blocking a scheme of arrangement designed to effect a capital reorganization of Aer Lingus in the context of a combination with a non-EU airline, short of that airline acquiring majority control of Aer Lingus (eg the creation of a new holding company).
- 8.34 We do not consider it to be either feasible or necessary to catalogue all potential future transactions that might involve Aer Lingus and another airline. However, we believe there to be a number of different ways in which a transaction between Aer Lingus and a potential partner might be structured. In reaching our SLC finding, our concerns were not confined to combinations with EU airlines that were effected

through a scheme of arrangement or a general offer, which are the focus of Ryanair's proposals.<sup>125</sup>

- 8.35 For example, in a joint venture (where two airlines pool some or all of their assets but the ownership of each airline remains unaffected) no scheme of arrangement or general offer is involved, and yet a potential partner for Aer Lingus may well be concerned at entering into a joint venture with an airline over which Ryanair would continue to have material influence, including potentially over the operation of the joint venture itself.
- 8.36 The preferred means of implementing a particular combination is likely to depend upon a range of factors specific to the nature of the transaction concerned and the identity of the potential partners. For example, while we note that schemes of arrangement have become a popular means of structuring takeovers in Ireland and have certain advantages (eg saving 1 per cent stamp duty on the transfer of shares to the new owner), they have some potential disadvantages for certain combinations, in terms of the need for active cooperation of the target company's board, the time taken to implement, their inflexibility and need for court approval.<sup>126</sup>
- 8.37 In our view an effective remedy should not focus solely on combinations with EU airlines implemented through schemes of arrangement or general offers but be sufficient to address all possible future forms of combinations open to Aer Lingus and its potential partners. The fact that under Ryanair's proposal, Aer Lingus and potential partners would still be inhibited in the forms of combination that they were able to pursue is, in our view, a substantial shortcoming of this approach.
- 8.38 We next considered whether the continued substantial presence by Ryanair on Aer Lingus's shareholder register could be expected to deter potential partners from entering into, pursuing, or concluding discussions with Aer Lingus even where Ryanair's proposed remedies were in place.
- 8.39 We considered that some potential partners may be deterred from entering into, pursuing, or concluding discussions with Aer Lingus, for fear of having to deal with a substantial Ryanair presence on their own share register post-combination (see paragraph 7.34(b)).
- 8.40 We also formed the view that some potential partners may be deterred from combining with Aer Lingus (short of an acquisition of 100 per cent of Aer Lingus) by the possibility that Ryanair could use its existing shareholding as a platform from which to launch further bids for the whole of Aer Lingus (see paragraph 7.34(c)). We note that [X] decided not to continue its discussions with Aer Lingus upon hearing that Ryanair was launching its third bid (see paragraph 7.51).
- 8.41 Finally, we noted that Ryanair's proposals would require Aer Lingus and potential partners to develop any potential combinations to an advanced stage and secure a high level of shareholder agreement, before Ryanair was required to vote in favour of the combination and/or sell its shares.

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<sup>125</sup> Ryanair's offer to extend its proposed remedies to non-EU airlines only applies to a non-EU airline acquiring majority control of Aer Lingus, if such a takeover ever became legally permitted in the EU. There are other ways in which Aer Lingus might wish to combine with a non-EU airline, short of that airline acquiring majority control of Aer Lingus.

<sup>126</sup> We also note that, while a takeover offer is led by the bidder and control of the target (though not squeeze-out of the minority shareholders) can be obtained if shareholders representing 50 per cent of the target's issued share capital accept the offer, a scheme of arrangement, by contrast, is a process controlled by the target company. Given these factors, the success of a scheme depends largely on the cooperation of the target company's board and its shareholders.

- 8.42 We considered that this aspect of remedy design would increase the perceived execution risk associated with such combinations and that some potential partners may be deterred from entering into, pursuing, or concluding discussions with Aer Lingus by residual uncertainty as to whether, in practice, Ryanair would ultimately support the combination or dispose of its shares. For example, potential partners may perceive a risk that Ryanair could apply to have any CC undertakings or order reviewed on the grounds of a change of circumstances (see section 92 of the Act).<sup>127</sup> The relatively unusual and untested nature of the proposed arrangements may also increase the perception of execution risk—for example, in relation to its proposals in paragraph 8.24(b), it is unclear how Ryanair would know that more than 50 per cent of other shares would be voted in favour of a scheme before the shareholder vote had actually been held, and therefore whether or not to cast its votes in favour of the scheme.
- 8.43 The Irish Government’s perception of the extent to which the undertaking or Order represents an irrevocable commitment by Ryanair to sell its shares is also relevant to the effectiveness of these measures. Given that the free float in Aer Lingus is less than 45 per cent, any requirement for 50 per cent of shareholders to support a transaction would require the Irish Government to commit to sell at least part of its shareholding in advance and to rely on Ryanair’s commitment to vote in favour and/or sell its shares where appropriate. If the Irish Government perceived an inherent risk in this position and decided not to sell all or part of its shares, a potential partner, whether from inside or outside the EU, would not be able to make use of these remedies to conclude a combination with Aer Lingus.
- 8.44 Ryanair told us that any potential partner could rely on its commitment not to oppose a scheme of arrangement and to accept an offer for its shares where more than 50 per cent acceptance was achieved. However, in our view it would not be unreasonable for potential partners to perceive some risk associated with relying on any undertaking or Order, given the residual uncertainty attaching to these proposed measures and their application to unknown future events. As Aer Lingus’s consideration of potential combinations over recent years makes clear, discussions and negotiations about potential combinations involve managing a number of inherent risks—eg legal, financial, strategic, execution—where an adverse outcome will involve significant financial and reputational costs to both parties. Therefore, we conclude that any perception of uncertainty regarding Ryanair’s future conduct undermines the efficacy of Ryanair’s proposed remedies and could deter future combinations involving Aer Lingus.
- 8.45 We decided that the proposals relating to airport slots and voting against pre-emption rights (see paragraphs 8.22(c) and 8.22(d)), might be effective in restricting Ryanair’s ability to prevent Aer Lingus from implementing its strategy in relation to these particular issues. We noted, however, that Ryanair could, under certain circumstances (such as dispersal of the Irish Government’s stake or abstention by the Irish Government on a particular issue), influence Aer Lingus’s commercial policy and strategy by exercising the deciding vote in the context of an ordinary resolution. Ryanair’s proposals would not address the potential harm that could arise to competition in these scenarios.

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<sup>127</sup> Given its current level of shareholding, potential partners may also perceive a risk that Ryanair might seek to challenge a scheme of arrangement during the court approval process. Any shareholder has the right under Irish law to oppose a scheme of arrangement on the grounds that approval of the scheme is not reasonable—see *In the Matter of Colonia Re Insurance (Ireland) Limited and In the Matter of the Companies Act 1963-2003*, [2005] IEHC 115. A shareholder may also contest the squeeze-out as noted by Aer Lingus in footnote 124 above.

## *Conclusion on the effectiveness of Ryanair's proposed remedies*

- 8.46 In a dynamic and uncertain sector such as the airline industry, it is inherently difficult to predict the specific forms of combinations or other matters of strategic importance that might come before the Aer Lingus shareholders in AGMs or EGMs in the future. In Section 7 we found that Ryanair's shareholding constrained Aer Lingus's ability to implement its own commercial policy and strategy in a variety of ways. This makes it inherently difficult to design behavioural remedies that would cater for all eventualities.<sup>128</sup> Looking specifically at the issue of combinations, whilst Ryanair's proposed remedies seek to address some of our concerns regarding certain forms of combinations by way of a scheme of arrangement or general offer, they do not address other forms of combination available to Aer Lingus and potential partners and would, in effect, restrict Aer Lingus's and its potential partner's choice of combination.
- 8.47 We also conclude that Ryanair's continued presence on the share register under certain forms of combinations would be likely to deter potential partners proceeding due to their reluctance to accept Ryanair as a significant minority shareholder, the residual uncertainty and execution risk associated with the measures, and/or their perceived risk of Ryanair using its shareholding to mount a further bid for control of Aer Lingus. We note that Ryanair has said that it still wants to acquire Aer Lingus (see paragraph 3.11).
- 8.48 We considered whether these concerns could be addressed by means of amendments to Ryanair's proposed remedies (such as reducing the applicable acceptance level) or imposing a wider prohibition on voting or application of Ryanair's rights as a shareholder. We took the view that any such amendments could not address all our concerns regarding the range of potential future scenarios and the uncertainty of application of these measures. We considered that a wider prohibition (where, for example, Ryanair was precluded from voting or its shareholding was placed with a hold separate manager or in a voting trust) would be likely to result in a significant distortion to Aer Lingus's corporate governance as a result of having a large non-participative shareholder. Our view is that such a distortion would compromise Aer Lingus's effectiveness as a company and competitor to Ryanair.
- 8.49 In light of the above assessment, we conclude that the remedies proposed by Ryanair would not be effective in addressing the SLC.
- 8.50 We next considered potential structural remedies, in particular full or partial divestiture of Ryanair's shareholding in Aer Lingus.

### **Full divestiture**

#### *Description*

- 8.51 This remedy option would involve Ryanair divesting the whole of its shareholding in Aer Lingus to one or more suitable purchasers. This would remove all possible sources of influence over Aer Lingus, whether from the voting rights associated with the shareholding, the various other rights afforded to shareholders,<sup>129</sup> or its economic interest in the shareholding.

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<sup>128</sup> This difficulty in predefining potential ways in which competition might be harmed was recognized by Aer Lingus and easyjet.

<sup>129</sup> For example, the right of any shareholder holding more than 3 per cent of a company's equity to table a resolution for discussion at a general meeting.

## Views of parties

### *Ryanair*

- 8.52 Ryanair said that any divestiture remedy (full or partial) would be entirely disproportionate, resulting in considerable cost to Ryanair.<sup>130</sup> For a divestiture remedy to be considered proportionate, Ryanair believed that the CC must explain why it had dismissed other possible remedies that would be effective in addressing the theories of harm identified. It submitted that the theories of harm identified by the CC did not allege that there had been a distortion of competitive behaviour in the market or a distortion of the parties' incentives to compete. Rather, according to Ryanair, the CC had based its adverse finding on speculation that Ryanair could exercise its voting rights in a way that discouraged merger activity, prevented Aer Lingus from disapplying pre-emption rights to shareholders outside the EU, or limited its ability to dispose of London Heathrow slots. Even if such theories were accepted (and Ryanair did not accept them), each could be addressed by effective but less intrusive behavioural remedies.

### *Aer Lingus*

- 8.53 Aer Lingus said that full divestiture was the only clearly satisfactory and effective remedy and was likely to be more effective than a partial divestiture, even if the latter were supported by behavioural remedies. It said that Ryanair was likely to interpret anything less than full divestiture as an invitation to continue its efforts to impede Aer Lingus's management. Aer Lingus stated that this case could be distinguished from BSKyB/ITV (in which a partial divestiture of shares was imposed) as, in contrast to the present case, there was no evidence of a campaign being waged by BSKyB against ITV management.
- 8.54 Aer Lingus said that full divestiture would mean that Ryanair would no longer be able to attend general meetings of Aer Lingus or litigate for (alleged) disregard of its shareholder rights. The campaigns mounted by Ryanair around issues such as Aer Lingus's operations out of Shannon, its use of Hangar 6, directors' remuneration and addressing the pensions deficit were all rooted in Ryanair's invocation of its rights and interests as a shareholder. Removing that platform would deprive Ryanair of a key element of its lobbying campaign against Aer Lingus's management.
- 8.55 In Aer Lingus's view, while Ryanair's public campaigns to demean its competitor and lobby the Irish Government against Aer Lingus's interests were all a normal and natural part of the competitive process, Ryanair should not be conceded the advantage of doing so under the guise of a shareholder and asserting that its rights as such were being violated. Aer Lingus stated that while it had succeeded, to date, in resisting Ryanair's lobbying campaigns, defeating litigation and obtaining the rejection of regulatory complaints, it may not always be able to do so. And such lobbying campaigns had at least some level of competitive impact, not least in raising Aer Lingus's costs in addressing and responding to Ryanair's interference.
- 8.56 Aer Lingus also said that there was no de minimis level at which a Ryanair shareholding lost all potency as a basis for interference, and for maintaining the cloud over Aer Lingus's head as 'the company with the troublesome shareholder' and the only level of shareholding at which all such potency disappeared was zero. Aer Lingus suggested that a counterparty in any potential combination with Aer Lingus might be

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<sup>130</sup> Ryanair's submissions on the potential conflict of any remedial action with the European Courts and Commission are covered in paragraphs 8.4–8.13.

concerned at importing Ryanair on to its shareholder register (for example, in a transaction where Aer Lingus shareholders receive shares in the counterparty rather than cash as consideration for the sale of their Aer Lingus shares).

- 8.57 In relation to a combination being proposed under a scheme of arrangement, Aer Lingus said that any shareholder had the right to appear in court and oppose the scheme. In Aer Lingus's view, so long as Ryanair was allowed to retain any shares in Aer Lingus, it would be likely to oppose the cancellation of its shares as part of a scheme of arrangement. Even if it was unsuccessful with this argument before the Irish High Court, any bidder seeking to acquire control of Aer Lingus through a scheme of arrangement would be concerned at the delay and costs involved in such legal action, including potential appeals to the Irish Supreme Court.

*Irish Government (Department of Transport, Tourism and Sport)*

- 8.58 The Department of Transport, Tourism and Sport (DTTS) said that only full divestiture of Ryanair's shareholding in Aer Lingus would be effective in addressing the SLC identified by the CC. The DTTS believed that the European Commission's February 2013 prohibition, against which Ryanair had launched an appeal, would be upheld, and therefore it considered that there was no valid reason for Ryanair to retain its shareholding. It said that retention of the shareholding (and the launch of further public bids) could damage Aer Lingus's commercial policy and strategy and thereby reduce its effectiveness as a competitor in the UK–Republic of Ireland market.
- 8.59 The DTTS said that, while a partial divestment of Ryanair's shareholding might prevent it from exerting its influence through a number of the mechanisms identified (eg blocking special resolutions and blocking the disposal of Heathrow slots), anything short of a full divestment would be likely to have a significant detrimental impact on Aer Lingus's ability to be acquired by, or merge with, another airline and make it more difficult for Aer Lingus to attract a strategic minority shareholding. The Irish Government's overriding concern was that competition be maintained in the marketplace and the DTTS considered that the only effective means of securing this was by a full divestiture of Ryanair's shareholding in Aer Lingus.

*Others*

- 8.60 easyJet said that a full divestiture would be an effective remedy. Air France thought that there was no reason to have a full divestiture and that a partial divestiture or a package of behavioural remedies would be more proportionate.

*Effectiveness of a full divestiture*

- 8.61 Requiring the divestiture of the whole of Ryanair's shareholding in Aer Lingus would result in the two competitors operating independently of one another and would therefore be an effective remedy to address the SLC that we identified.

***Partial divestiture***

*Description*

- 8.62 A partial divestiture would involve Ryanair divesting some, but not all, of its shareholding in Aer Lingus. We invited views on what level of divestiture, short of full divestiture, might be effective in remedying the SLC identified, including whether we should seek to identify a threshold below which Ryanair would be unable to block a

special resolution, prevent Aer Lingus from combining with other airlines, prevent the sale of slots at Heathrow Airport and/or influence Aer Lingus's commercial policy and strategy in other ways.

## *Views of parties*

### *Ryanair*

- 8.63 Whilst Ryanair said that any form of divestiture (full or partial) was disproportionate and inappropriate, for the reasons given in paragraph 8.52, it provided views on the way we had provisionally assessed the relevant threshold for a reduction in its stake to prevent it being able to block a special resolution (see paragraphs 8.73 to 8.83).

### *Aer Lingus*

- 8.64 Aer Lingus said that partial divestiture would not provide as comprehensive and effective a solution as full divestiture. However, if partial divestiture was considered by the CC to be the most appropriate remedy, Ryanair's shareholding would have to be reduced to a level where it no longer increased the likelihood of further bids for Aer Lingus, or deterred counter-bidders.
- 8.65 Aer Lingus said that a holding of 5 per cent or more would be likely to discourage a bid from an alternative acquirer. It also said that while 10 per cent was the strict statutory level for a squeeze-out, some shareholders, for whatever reason, failed to react to papers soliciting a response (a phenomenon sometimes known as the 'dead register'). On average, in recommended public offers in the UK, 5 per cent of shareholders were squeezed out, and in a number of transactions up to 9 per cent had been squeezed out. Aer Lingus had an unusually high number of employees and ex-employees holding shares<sup>131</sup> and investors such as these were more likely to fail to respond to offer documentation.<sup>132</sup> Aer Lingus said that allowing for the existence of this 'dead register', Ryanair's shareholding would need to be significantly less than 10 per cent to be confident that Ryanair could not prevent an acquirer from achieving a squeeze-out of minority shareholders. It said that adopting the average of historic examples of squeeze-out (5 per cent) would not achieve an adequate margin of safety, and that a Ryanair shareholding of 3 per cent could still be sufficient to enable it to prevent a squeeze-out. It also said that a bidder might identify a shareholding block of 3 per cent (or even smaller) as a significant deterrent to making a bid.
- 8.66 Aer Lingus thought that a partial divestiture, say to 5 per cent, accompanied by a restriction on acquiring further shares, might not prevent further stakebuilding by Ryanair in the context of a future bid. A future bid would fall to be considered under the EUMR and Aer Lingus believed that Ryanair might argue that building a further stake at the same time as launching a bid would itself fall under the exclusive jurisdiction of the European Commission,<sup>133</sup> and that this would override any restriction on the purchase of further shares imposed by the CC.
- 8.67 Aer Lingus said that a reduction in its shareholding to below 3 per cent would prevent Ryanair from tabling a resolution at a general meeting, which was important, as any bidder seeking to acquire control of Aer Lingus through a scheme of arrangement

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<sup>131</sup> The former Employee Share Ownership Trust (ESOT) beneficiary shares in the hands of individual current/former employees was 8.9 per cent as of 4 June 2013.

<sup>132</sup> According to Aer Lingus, a significant number of current/former employees could feel conflicted if a bid were likely to result in job losses, meaning that a larger proportion might fail to act either way.

<sup>133</sup> Article 21, EUMR (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>).

would be concerned that Ryanair could attempt to undermine the terms of the merger by proposing additional resolutions at the shareholder meetings required to implement the scheme. It said that similar concerns applied to bids structured other than as a scheme of arrangement (for example, Ryanair could propose a resolution calling for the payment of a mandatory special dividend contingent upon a change of control, which might attract support from a number of shareholders). Aer Lingus also attached weight to 3 per cent being the level of mandatory disclosure, ie the level at which a company building a stake must declare it.

- 8.68 Aer Lingus said that at a 5 per cent shareholding Ryanair could requisition a general meeting, noting that the number of times Ryanair had tried to convene Aer Lingus EGMs was more than all other Irish PLCs had faced cumulatively over the last ten years. It also noted that a shareholder with at least 5 per cent of the issued share capital could apply to the court to set aside a resolution authorizing re-registration of the company as a private company following a takeover, underlining the need to ensure that Ryanair's shareholding should be small enough to ensure that it could be successfully squeezed out. At 5 per cent, Ryanair would be the largest shareholder in Aer Lingus (assuming the Government were to widely dissipate its 25 per cent block), which, according to Aer Lingus, would be 'plainly inappropriate'.
- 8.69 Aer Lingus also analysed the level to which Ryanair's shareholding would have to be reduced in order to ensure that there was no realistic prospect that it could block a special resolution (or a disposal of Heathrow slots). This would depend on both turnout and the number of other shareholders that joined with Ryanair in opposing the motion (see paragraph 8.73). Aer Lingus thought we should assume that the Irish Government's shareholding would be sold to a number of smaller investors who, like other investors, would not all turn out and vote. Aer Lingus considered both historical turnout at its own general meetings (which, for shareholders other than Ryanair and the Irish Government, had been low<sup>134</sup>) and the turnout of shareholders at Irish PLCs generally over a period of years.<sup>135</sup> It similarly considered both historical levels of opposition by its shareholders (other than Ryanair) to management recommendations,<sup>136</sup> and the average levels of such dissent among shareholders of Irish PLCs between 2008 and 2012.<sup>137</sup> It thought that the lowest realistic turnout was in the range 40 to 55 per cent<sup>138</sup> and the highest realistic opposition by other shareholders was at least 6 per cent. According to Aer Lingus's calculations, a shareholding of greater than 4 per cent (on a 40 per cent turnout) or 7.75 per cent (on a 55 per cent turnout) would be sufficient to enable Ryanair to block a special resolution or Heathrow slot disposal transaction.

### *Discussion of the relevant thresholds for a reduction in stake required to remedy the SLC finding*

- 8.70 In our Remedies Notice we consulted on a number of shareholding thresholds and the shareholder rights and influence attached to those thresholds.

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<sup>134</sup> See paragraph 8.73(a).

<sup>135</sup> On average, around 55 per cent.

<sup>136</sup> Up to around 3 per cent.

<sup>137</sup> According to Institutional Shareholder Services (ISS) analysis, average levels of dissent have ranged between 4.1 and 5.7 per cent for Irish PLCs between 2008 and 2012.

<sup>138</sup> The upper end of the range is equal to the average turnout among Irish PLCs over a period of years. To derive the lower end of the range, Aer Lingus assumed that the shares currently held by Ryanair but subject to divestiture, and the Irish Government's shares, were dispersed, and the new holders of those shares had the average turnout rate (55 per cent), while the original shareholders displayed the lowest turnout actually observed among them, ie 23.4 per cent. This gave total turnout of around 40 per cent.



- 8.71 In considering an appropriate threshold, we considered a number of specific commercial and policy issues, including:
- (a) the ability to block a special resolution;
  - (b) voting rights in relation to the disposal of Heathrow slots;
  - (c) the ability to prevent the 'squeeze-out' of minority interests in a public bid for Aer Lingus;
  - (d) the ability to requisition an EGM; and
  - (e) the ability to place items on the agenda of an AGM.

8.72 The relevant thresholds are summarized in Table 2.

TABLE 2 Relevant thresholds of Ryanair shareholding in Aer Lingus

	<i>Relevant threshold</i>	<i>Relevance of voter turnout</i>
Ability to block special resolution	Effective voting power of 25%	Depends on voter turnout
Ability to block disposal of Heathrow slots	Effective voting power of 30.11%	Depends on voter turnout
Squeeze-out in a public offer	10%, less unresponsive shareholders	Not dependent on turnout
Call EGM	5%	Not dependent on turnout
Table resolutions at AGM	3%	Not dependent on turnout
Presence on register	0%	Not dependent on turnout

Source: CC.

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*Ability to block a special resolution or scheme of arrangement*

- 8.73 A special resolution, or a scheme of arrangement, may be blocked by shareholders who account for 25 per cent of votes cast. With its current shareholding of 29.82 per cent, Ryanair can always block a special resolution or scheme if it so chooses. However, alongside the absolute level of Ryanair's shareholding there are three further factors which must be considered to determine the reduction in Ryanair's shareholding required to remove its ability to block a special resolution or scheme of arrangement:
- (a) *Turnout.* Given that not all shareholders exercise their right to vote, Ryanair's effective voting power exceeds its economic interest (ie percentage shareholding). Historically Ryanair and the Irish Government have participated in full (ie 100 per cent of their shares), whereas the average participation by the remaining shareholders is 37.2 per cent (the lowest for any vote at a general meeting being 23.4 per cent and the highest 41.4 per cent).
  - (b) *Voting pattern.* Depending on the nature of the resolution, some shareholders may share the same view as Ryanair about a particular issue; thus a shareholder owning less than 25 per cent of the voting shares may be able to rely on the support of such allies to block a special resolution. The maximum percentage of total shareholders who have previously voted with Ryanair and in opposition to management is 3.14 per cent, although on 12 out of 14 resolutions put to Aer Lingus shareholders since 2007 where Ryanair has opposed Aer Lingus's

management, the number of other shareholders voting with Ryanair and against the Aer Lingus board has been less than 0.3 per cent.<sup>139</sup>

(c) *Irish Government stake.* If the Irish Government abstained or its shares were dispersed and the voting participation of these shares reverted to the average for the other independent shareholders, Ryanair's effective voting power would increase.

- 8.74 We created a model to explore the relationship between Ryanair's shareholding and its ability to block a special resolution (see Appendix L for a description of this model and the calculations used to derive the results).
- 8.75 An important input for this model is the level of turnout of shareholders other than Ryanair and the Irish Government. The evidence suggests that this group has a low propensity to vote compared with other shareholders. We used the average historic turnout of 37.2 per cent (since the dispersal of the ESOT shareholding, see Appendix B) as a lower bound for this parameter, rather than the lowest historic turnout of 23.4 per cent. This is because we might expect a disposal of shares by Ryanair and/or the Irish Government to be made to institutional and/or commercial investors who might be expected to vote more frequently than Aer Lingus's former employees, particularly on important resolutions.
- 8.76 Ryanair said that it was perverse for us to 'rely on the historic turnout of private individuals (37.2 per cent)' in considering scenarios where some of its shareholding and, possibly, the Irish Government's shareholding had been dispersed, as the probable purchasers were likely to be institutional and/or commercial buyers, who were far more likely to vote at shareholders' meetings than private shareholders. We noted that about 10 per cent of Aer Lingus shares are held by current and former employees and that Mr Denis O'Brien holds 3.8 per cent. The majority of Aer Lingus's remaining shares (aside from those held by the Irish Government and Ryanair) are held by institutions. Aer Lingus told us that our consideration of 'average turnout' was reasonable, but that we should also have regard to observed lower turnout to ensure that we were adopting a suitably cautious and conservative approach. Given these views and the historic evidence, we took the view that 37.2 per cent was a suitably conservative lower bound for turnout of other shareholders, though we also conducted a sensitivity check, using our model to explore the implications of higher and lower levels of turnout than this.
- 8.77 Using our model, we created six scenarios to inform our judgement as to how far Ryanair's shareholding in Aer Lingus would need to fall in order to reduce Ryanair's effective voting power to below 25 per cent:
- (a) *Scenario 1.* Ryanair votes alone and all other shareholders who participate in voting, including the Irish Government, vote in the opposite way to Ryanair on a shareholder matter. Based on average turnout since dispersion of the ESOT shares, Ryanair's shareholding would need to be reduced to 15.7 per cent or less for its effective voting power to be less than 25 per cent.
- (b) *Scenario 2.* Ryanair and 3 per cent of total shareholders all adopt the same voting position (eg in opposition to a management recommendation) whereas all remaining shareholders including the Irish Government vote the opposite way (eg in support of a management recommendation). Based on average turnout since the dispersion of the ESOT shares, Ryanair's shareholding would need to be

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<sup>139</sup> As set out in Appendix C, the maximum number of shares cast in the same direction as Ryanair's stance on a resolution is just under 17 million (representing around 3 per cent of the issued share capital of Aer Lingus).

reduced to 12.2 per cent or less for its effective voting power to be less than 25 per cent.

- (c) *Scenario 3.* Ryanair has no support from other shareholders and the Irish Government's shares are dispersed. Based on average turnout, Ryanair's shareholding would need to be reduced to 11 per cent or less for its effective voting power to be less than 25 per cent.
- (d) *Scenario 4.* Ryanair and 3 per cent of total shareholders all adopt the same voting position (eg in opposition to a management recommendation) and the Irish Government's shares are dispersed. Based on average turnout, Ryanair's shareholding would need to be reduced to 7.5 per cent or less for its effective voting power to be less than 25 per cent.
- (e) *Scenario 5.* Ryanair votes in isolation from other shareholders and the Irish Government abstains and these shares are not voted (eg in a related party transaction that occurs in a commercial matter by virtue of its ownership of Dublin Airport Authority). Based on average turnout, Ryanair's shareholding would need to be reduced to 8.3 per cent or less for its effective voting power to be less than 25 per cent.
- (f) *Scenario 6.* Ryanair and 3 per cent of total shareholders all adopt the same voting position (eg in opposition to a management recommendation) and the Irish Government abstains and these shares are not voted. Based on average turnout, Ryanair's shareholding would need to be reduced to 4.7 per cent or less for its effective voting power to be less than 25 per cent.

8.78 The results of this analysis are shown in Table 3.

TABLE 3 Ryanair shareholding corresponding to 25 per cent effective voting power based on turnout of other shareholders

	Turnout of shareholders other than Ryanair & Irish Government	Scenario						per cent
		1 Ryanair without allies, Irish Government votes	2 Ryanair with allies,* Irish Government votes	3 Ryanair without allies, Irish Government stake dispersed	4 Ryanair with allies,* Irish Government stake dispersed	5 Ryanair without allies, Irish Government abstains	6 Ryanair with allies,* Irish Government abstains	
Historical low	23.4	13.2	9.5	7.2	3.5	5.4	1.7	
Historical average	37.2	15.7	12.2	11.0	7.5	8.3	4.7	
Historical high	41.4	16.4	12.9	12.1	8.6	9.1	5.6	
Above average assumption	60	19.5	16.1	16.7	13.3	12.5	9.1	
Full participation	100	25.0	22.0	25.0	22.0	18.7	15.7	

Source: CC calculation.

\*Assumes 3 per cent of total shares vote the same way as Ryanair (16,021,203 shares).

Note: See Appendix L for formulae used to derive the Ryanair shareholding that corresponds to 25 per cent effective voting power.

- 8.79 In addition to their comments about shareholder turnout (see paragraph 8.76), we considered other submissions by Ryanair and Aer Lingus about the inputs to this model and the various scenarios we used the model to investigate.
- 8.80 Ryanair said that the contention that 3 per cent of shareholders might adopt the same voting position as Ryanair was flawed. Although more than 3 per cent had voted with Ryanair on a particular resolution, there was no reliable pattern of shareholders voting the same way as Ryanair to anything like this extent. Conversely, Aer Lingus said we should adopt a more conservative approach to the level of opposition. It thought that a conservative assumption must include a margin above (rather than below) previous observations, and that some new shareholders (ie those who purchase shares sold by Ryanair and/or the Irish Government) could be expected to vote in alliance with Ryanair. Accordingly, alliance with Ryanair should be regarded as a fixed percentage of 'other' shareholders voting, rather than a fixed proportion of total shareholders. In scenarios where the proportion of 'other' shareholders will significantly increase (for example, if Ryanair were required to divest shares, or if the Irish Government decided to sell its shares), this approach would have the effect of increasing the proportion of shareholders assumed to vote with Ryanair.<sup>140</sup>
- 8.81 We considered both of these submissions carefully. While we acknowledged Ryanair's submission that, in most votes put to Aer Lingus shareholders, the proportion of voters who have supported Ryanair's position and opposed the Aer Lingus management has been significantly less than 3 per cent, we nonetheless considered it reasonable to have regard to historically high levels of shareholder opposition when considering remedial action. This is because we need to be confident that a partial divestiture remedy will be resilient and will continue to be effective in a range of possible scenarios. While we understood the logic behind Aer Lingus's submissions that we should base scenarios 4 and 6 on a fixed proportion of 'other' shareholders voting with Ryanair (and hence consider Ryanair having a higher number of supporters in absolute terms), we took the view that the historic maximum of actual votes cast was nonetheless a reasonable figure, based on evidence of past shareholder conduct, to inform our assessment of the level of shareholding that Ryanair would require to block a special resolution. We also noted that Aer Lingus's approach would generate scenarios in which Ryanair was able to block a special resolution, solely by virtue of voting alongside shareholders with a larger collective shareholding than its own. We decided that 3 per cent represented a realistic and conservative parameter for use in the model.
- 8.82 Ryanair said that there was no basis for scenarios 3 and 4, which considered circumstances in which the Irish Government sold part or all of its stake in Aer Lingus. This was because the Irish Government had indicated that it was unlikely to sell its shares for as long as Ryanair retained its current minority stake. Ryanair similarly said that it was irrational to assume, as in scenarios 5 and 6 that the Irish Government would abstain as it had never done so and had stated that it would 'not necessarily preclude voting on politically sensitive issues'.
- 8.83 We did not agree with Ryanair's submission that these scenarios were irrelevant to our consideration of possible remedies. In considering potential remedies, we need to ensure that our remedies are robust and resilient to potential changes to a range of factors, which may include the policy or behaviour of the Irish Government. Moreover we did not consider it appropriate that the Irish Government's concerns about the size of Ryanair's ongoing shareholding should be used as a reason to perpetuate

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<sup>140</sup> For example, under this analysis, were the Irish Government's stake to be dispersed, 4.9 per cent of total shares would be voted against management in addition to those of Ryanair rather than 3.14 per cent (the historic maximum).

that shareholding or to allow Ryanair to retain a larger shareholding than it otherwise might, as Ryanair's submission suggests. We have considered the possibility of Irish Government abstention in the event of a related party transaction (see Appendix C, paragraph 23 et seq). More broadly, while we would generally expect the Irish Government to vote on matters of substance, we cannot foresee the political or other circumstances under which a vote might take place and therefore judge it reasonable to have regard to scenarios in which the Irish Government abstains as well as to scenarios in which it votes its shares.

#### *Ability to block a disposal of Heathrow slots*

- 8.84 We found that, either in the period since 2006 or in the foreseeable future, Aer Lingus would have wanted to manage its portfolio of Heathrow slots in the context of optimizing its network and timetable and that this would have been likely to involve the sale or lease of slots. In certain circumstances, a proposal to sell slots is subject to a vote at an EGM. If the Irish Government retains its current shareholding, a disposal of Heathrow slots can be blocked at an EGM if 30.11 per cent of votes cast oppose the disposal; if the Government no longer owns any shares in Aer Lingus, a disposal can be blocked if 25 per cent of votes cast oppose the disposal. If the Irish Government carries out its intention to sell its shareholding in due course, scenarios 3 and 4 would be relevant to the level of shareholding that would enable Ryanair to block a slot disposal, should an EGM be called to vote on the matter.
- 8.85 If Ryanair's shareholding remained at 10 per cent or more, Aer Lingus would be obliged to write to it if Aer Lingus contemplated the disposal of one or more Heathrow slots (Aer Lingus Articles of Association, paragraph 10(b)). If, within 28 days of receiving this letter, shareholders with a total of 20 per cent or more request it, Aer Lingus must hold an EGM. On this basis, if Ryanair's shareholding was less than 20 per cent, it would not be able unilaterally to convene a shareholder vote in relation to a Heathrow slot disposal.

#### *Ability to prevent a squeeze-out*

- 8.86 We found that Ryanair's shareholding would be likely to be a significant impediment to Aer Lingus's ability to be acquired by another airline. One way in which this could manifest itself is that another airline would be unable to acquire 100 per cent of Aer Lingus (if Ryanair did not wish to sell its shares to it) as it would be unable to force a 'squeeze-out' of Ryanair's minority shareholding. A partial divestiture that resulted in Ryanair holding just under 10 per cent of the issued share capital of Aer Lingus, for example, would not be effective in removing Ryanair's ability to block the squeeze-out of minority interests during a public offer by a third party because of the dead register (see paragraph 8.65).
- 8.87 To be effective in removing Ryanair's ability to prevent a squeeze-out, Ryanair's holding would have to be reduced to a level which, taken together with the likely 'dead register' shares, would not exceed 10 per cent of Aer Lingus's issued share capital. Aer Lingus (see paragraph 8.64) said that 3 per cent would be too high a level to achieve this aim. While the appropriate level to which Ryanair's holding would need to be reduced cannot be mathematically determined, we noted that, on average, 5 per cent of shareholders have been squeezed out in recent UK transactions. We decided that Ryanair's holding would need to be reduced to 5 per cent in order to ensure that there was a realistic prospect that a squeeze-out would be achieved.
- 8.88 We noted that Ryanair had said that a combination could be structured as a scheme of arrangement and also that it had offered an undertaking not to vote against a

scheme of arrangement proposed by the board of Aer Lingus (paragraph 8.22). However, we found (see paragraph 8.33) that not all forms of combination can be structured as a scheme of arrangement, and that schemes of arrangement have some disadvantages as well as advantages (see paragraph 8.36). We also noted that in BSKyB/ITV, the CC had not judged the ability of BSKyB to prevent a squeeze-out to be a relevant consideration in determining the level to which BSKyB should reduce its stake as this was not deemed relevant to the question of material influence in that case; this was upheld by the CAT.<sup>141</sup> However, given the particular weight that we have placed in this case on the impact of Ryanair's shareholding on the ability of Aer Lingus to pursue a strategy of growth inorganically through combinations with other airlines and the variety of ways in which such combinations might take place, we took the view that an effective remedy should enable Aer Lingus to pursue any opportunities for such growth—in whatever form—without being constrained by the presence of a major rival on its share register. We therefore concluded that the ability to achieve a squeeze-out was a relevant factor in our consideration of the level to which Ryanair's shareholding should be reduced in the event of a partial divestiture.

### *Ability to requisition an EGM*

- 8.89 A partial divestiture that resulted in Ryanair holding less than 5 per cent of the issued share capital of Aer Lingus would remove Ryanair's ability to requisition an EGM, but we did not find that its ability to do so materially affected Aer Lingus's effectiveness as a competitor (see paragraph 7.125(a)).

### *Ability to place items on the agenda of an AGM*

- 8.90 A partial divestiture that resulted in Ryanair holding less than 3 per cent of the issued share capital of Aer Lingus would remove Ryanair's ability to place items on the agenda of Aer Lingus's AGM, but we did not find that its ability to do so materially affected Aer Lingus's effectiveness as a competitor (see paragraph 7.125(a)).

### ***Behavioural remedies as an adjunct to a partial divestiture***

- 8.91 We put in place interim measures to regulate the conduct of Ryanair and Aer Lingus during our investigation,<sup>142</sup> though these will expire upon final determination (ie acceptance of final undertakings or issuance of final order).
- 8.92 In our Notice we also invited views on whether, in the event of a partial divestiture, behavioural remedies may also be appropriate. We also considered whether any additional interim measures, which would be behavioural in nature, would be required pending the implementation of any divestiture.

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<sup>141</sup> See the CC's report on the acquisition by BSKyB Group plc of 17.9 per cent of the shares in ITV plc, dated 14 December 2007, paragraph 3.36, and BSKyB Group plc v the CC supported by Virgin Media, Inc [2008] CAT 25, paragraph 327.

<sup>142</sup> [www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/120927\\_ryanair\\_order\\_final.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/120927_ryanair_order_final.pdf) and [www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/120927\\_al\\_undertakings\\_final.pdf](http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/120927_al_undertakings_final.pdf). The Interim Order that applies to Ryanair and the interim Undertakings given by Aer Lingus to the CC restrict either company from taking any action which might prejudice the reference or impede the taking of any action under the Act by the CC or other party which may be justified by the CC's decisions on the reference, including but not limited to any action which might impair the ability or incentive of Aer Lingus to compete independently of Ryanair in any of the markets affected by the acquisition. The Interim Order that applies to Ryanair also has specific restrictions relating to Ryanair's ability to exercise voting rights attached to Aer Lingus shares, disposing of any of its shares, seeking to have any person appointed to Aer Lingus's board of directors and seeking to obtain confidential information.

## Views of parties

### *Ryanair*

- 8.93 Ryanair said that in light of its view that the SLC decision was wrong, and that behavioural remedies alone would be effective, there was no reason for the CC to impose a divestiture remedy and no consideration should be given to behavioural remedies as an adjunct to a partial divestiture. Ryanair stated to us that it had no intention of seeking board representation and that any attempt to obtain an undertaking preventing it from seeking or accepting board representation was irrational and *ultra vires*.

### *Aer Lingus*

- 8.94 Aer Lingus said that remedies should ‘target a high degree of certainty in achieving their intended effect’. Given the likely time and complexity involved in monitoring Ryanair’s compliance with behavioural remedies (and the likely legal challenges that Ryanair would raise to any decision of the Monitoring Trustee), Aer Lingus believed that behavioural commitments could not adequately serve as a complement to a partial divestiture in a way that would provide certainty of removing the SLC. Aer Lingus viewed full divestiture as the only clearly satisfactory and effective remedy (see paragraph 8.53). Aer Lingus also said that a remedy which left Ryanair on the share register with limited or no voting rights would distort the relative voting strength of the remaining shareholders and restrict free-float and liquidity in the shares as well as the ability of Aer Lingus to raise capital.
- 8.95 In the context of a partial divestiture, should that nonetheless be the CC’s preferred remedy, Aer Lingus proposed some accompanying behavioural remedies:
- (a) Ryanair should be prevented from either soliciting or accepting board representation.
  - (b) Ryanair should be prevented from acquiring further shares in Aer Lingus following divestiture (and such a restriction would also be necessary in the case of a full divestiture), save in the case (hypothetical, in Aer Lingus’s view) that Ryanair received clearance under the EUMR for a concentration between Ryanair and Aer Lingus.
  - (c) Ryanair should be inhibited from exercising any rights deriving from its shareholding (extending to, for example, requisitioning of meetings, tabling of resolutions, and litigation in (supposed) vindication of shareholder rights<sup>143</sup>) other than with the consent of a Monitoring Trustee.
  - (d) Any shares remaining after partial divestiture should be placed into a trust.
- 8.96 Aer Lingus also suggested that the CC should prohibit Ryanair from launching a new bid for Aer Lingus for a limited period (three to five years or, if sooner, until a judgment in Ryanair’s favour was obtained from the European Courts) in order to prevent the distraction of management time associated with defending itself against a bid and avoid the restrictions imposed on the company under the Irish Takeover Panel rules

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<sup>143</sup> Aer Lingus pointed out that claims in court relating to alleged oppression of minority shareholders would be likely to prevent any acquirer of Aer Lingus from restructuring the airline or making material synergy gains, as the operating company would have to be retained as a stand-alone subsidiary of the acquiring airline while the matter proceeded through the courts, potentially all the way to the European Court of Justice. It did, however, also accept that it was not generally possible to prohibit the right to appeal to an Irish court.



during a bid period. It was concerned both with the possibility of a new bid being launched before divestiture had taken place, for the 'purely tactical purpose of interfering with the implementation of the CC's report', (and so the prohibition on launching further bids should be included in an extended interim order in addition to the Final Order) and after divestiture, as a strategic device to disrupt Aer Lingus and deter potential acquirers. It said that such an interim bid embargo would not conflict with the EUMR, and in particular the exclusive jurisdiction provision in Article 21(3), as the EUMR only applied once a bid had been launched. It said that the EUMR did not confer any right to make a bid, and the making of bids may be subject to restrictions under applicable national law.

- 8.97 Aer Lingus said that, for completeness, the interim order should also be extended to restrain further purchases of shares by Ryanair, although it conceded that additional purchases prior to divestiture were unlikely, as a shareholding in excess of 30 per cent would require Ryanair to make a mandatory offer under Irish Takeover Rules. It also said that Ryanair's shareholding should be transferred to a Hold Separate Manager, who would be responsible for exercising all shareholder rights associated with the holding.

#### *Our views*

- 8.98 In paragraph 4.28, we noted that Ryanair does not currently appoint any directors to the board of Aer Lingus and has no power to do so unless it is able to achieve a simple majority at a general meeting. As such, the likelihood of it being in a position to appoint any directors is relatively low, particularly in the event that its shareholding is materially reduced by a partial divestiture.
- 8.99 However, we note that if Ryanair did in fact obtain board representation, this would increase its ability to influence Aer Lingus's competitive strategy at any level of shareholding. At present, Ryanair is subject to an interim order that it will not seek or accept board representation, and this will continue until there is a final determination to the reference.<sup>144,145</sup> Ryanair stated that this proposal by the CC had no relationship to any of the CC's theories of harm and therefore it would be *ultra vires* to impose it. It further stated that it had no intention of seeking board representation.
- 8.100 We judged it an appropriate measure to safeguard the effectiveness of any partial divestiture that Ryanair should give undertakings that it will neither seek nor accept board representation. We note that Ryanair stated it has no intention of seeking board representation; nevertheless it has the ability to do so and we therefore decided that such an obligation was necessary to remove any uncertainty in this regard and to prevent the circumvention of the partial divestment remedy. This would be ancillary to the main remedy and would be clear, visible and easily enforceable.
- 8.101 We also consider that any remedial action should be accompanied by a prohibition on the acquisition of shares in Aer Lingus following divestiture to ensure that any divestiture (full or partial) was not immediately circumvented by the acquisition of further shares by Ryanair. This prohibition could be lifted in the event of a successful appeal by Ryanair which resulted in the European Commission's prohibition decision of February 2013 being overturned.

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<sup>144</sup> That is, publication of the final report or, where there is an anticompetitive outcome, until the CC accepts final undertakings or makes a final order.

<sup>145</sup> As per [section 79\(1\)](#) of the Act.

- 8.102 We saw less need for the other proposals put forward by Aer Lingus (see paragraphs 8.95(c), 8.95(d) and 8.96). We judged that, if Ryanair's shareholding was reduced to a sufficiently low level, Aer Lingus would be able to pursue its commercial policy and strategy independently without the need to constrain Ryanair's legitimate exercise of its rights as a shareholder. We considered Aer Lingus's proposals for imposing a prohibition on Ryanair from launching a new bid for Aer Lingus (see paragraph 8.96). We noted that we had not found that the distraction of management time caused by such bids (including the restrictions imposed by the Irish Takeover Panel's rules) contributed to our SLC finding. We also noted that the implications for competition of any future bid would in any case be a matter for the European Commission to review rather than the CC. In the circumstances, we judged that a level of shareholding at around 5 per cent would not provide a sufficient platform for future bids to justify imposing a permanent prohibition on such bids following the reduction of the shareholding.
- 8.103 As discussed earlier in paragraph 8.13 on the CC's duty of sincere cooperation, we also considered whether the current—or supplementary—interim measures would be effective in mitigating the SLC finding pending the conclusion of the EU appeals process such that no action should be taken to implement the remedies pending the outcome of that process. Having had regard to the matters mentioned in paragraph 8.9 and in light of our views set out in paragraph 8.12, we considered that these measures would not be an effective alternative to partial divestiture, as they would not get to the heart of the problems that we have found, particularly in relation to the impact of the shareholding on Aer Lingus's ability to pursue a strategy of inorganic growth through combinations.
- 8.104 In relation to potential extensions to the interim measures<sup>146</sup> that are currently in place (see paragraphs 8.96 and 8.97), we considered whether the additional measures sought by Aer Lingus (see paragraphs 8.95 to 8.97) are necessary to prevent further pre-emptive action following publication of our final report. In particular, we considered whether a temporary prohibition on bidding pending divestment of the partial shareholding was necessary to preserve the CC's ability to implement this remedy effectively. Given that the EC has prohibited Ryanair's two previous bids for Aer Lingus (most recently in February 2013) and that, in any case, the divestment process set out in Appendix K would be able to be adjusted to some extent if there were significant market distortions arising from a further bid, we are not minded to introduce additional interim restrictions on Ryanair or Aer Lingus at this stage. However, we will keep these under review during the remedies implementation stage to ensure our ability to mitigate the SLC finding pending remedy implementation and to implement effectively the remedies identified.
- 8.105 Finally, to avoid circumvention of the objectives of the divestiture, either remedy would need to be accompanied by an obligation on Ryanair after the divestiture to prevent it acquiring further shares in Aer Lingus, unless it had received clearance under the EUMR for a concentration between Ryanair and Aer Lingus.

### ***Assessment of the effectiveness of a partial divestiture***

- 8.106 To be effective in remedying the SLC, a partial divestiture would need to result in a sufficient reduction in Ryanair's shareholding to ensure that Aer Lingus would not be impeded in pursuing its own commercial policy and strategy and thereby avoid harm to competition on the routes between Great Britain and Ireland. To achieve this aim, the shareholding would also need to be at a sufficiently low level to ensure that there

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<sup>146</sup> including any interim measures that are carried across into the Final Order.

was no realistic prospect that Ryanair would be able to block a special resolution or to act in other ways to impede or deter a combination between Aer Lingus and another airline, or otherwise restrict Aer Lingus's ability to compete effectively.

- 8.107 Drawing on our analysis of voter turnout and voting patterns (see paragraphs 8.73 to 8.78), we took the view that Ryanair's stake would need to be reduced to 5 per cent for a partial divestiture to be effective in removing Ryanair's ability to block a special resolution. While a stake at this level might, under some circumstances (eg a combination of historically low turnout, abstention by the Irish Government and significant support from other shareholders), still enable Ryanair to block a special resolution, we judged that such scenarios were sufficiently unlikely to occur in practice for this risk to be tolerable at this level of shareholding. We noted Ryanair's submissions that a higher threshold than 5 per cent would be sufficient to remove its ability to block a special resolution. However, we considered it appropriate to exercise a degree of caution in determining any threshold and judged, looking in the round at a range of potential scenarios, that a threshold of 5 per cent was necessary to ensure an effective solution to the SLC, given the history of voting behaviour and the uncertainty inherent in foreseeing the exact circumstances under which any vote might take place. We also took into account that a shareholding of 5 per cent could remove Ryanair's ability to block the squeeze-out of a minority shareholding during a public offer for Aer Lingus,<sup>147</sup> though the precise threshold at which this would be achieved is difficult to establish with certainty, given the inherent uncertainty as to the size of the 'dead register' at the time of future public offers.
- 8.108 A shareholding of 5 per cent would also remove any realistic prospect that Ryanair could block an ordinary resolution or the disposal of Heathrow slots.
- 8.109 There are other effects of Ryanair's shareholding where it is difficult to ascertain a particular level of shareholding for which such competitive effects would be effectively removed, in particular the disincentive created by Ryanair's presence on Aer Lingus's share register to potential partners for Aer Lingus. Potential bidders may be unwilling, for example, to import Ryanair as a significant participant on to their own share register in a bid for Aer Lingus which is not structured as a 100 per cent cash bid (but is either a combination of cash and equity or 100 per cent equity<sup>148</sup>), or who may be unwilling to countenance the possibility that a bid may be subject to delay and additional cost as a consequence of frustrating action by Ryanair (eg further legal challenges in its capacity as a shareholder).
- 8.110 The impact of such effects would, in our view, be lessened by a reduction in the level of Ryanair's shareholding—in particular, we noted that if Ryanair's stake in Aer Lingus were lower, its corresponding position on a bidder's share register would be smaller. On balance, we took the view that these concerns would also be effectively addressed by a reduction to 5 per cent.
- 8.111 We considered whether it would be necessary to reduce Ryanair's shareholding still further, for example to below 3 per cent—which would remove Ryanair's ability to propose resolutions at an AGM—or entirely, which would remove Ryanair's ability to exercise any rights as a shareholder. We took the view that this was not necessary in order to remedy the SLC that we have found. We did not consider that Ryanair's ability to propose resolutions at an AGM or requisition an EGM, while potentially

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<sup>147</sup> In the event that a suitor launched a conventional takeover offer for Aer Lingus and succeeded in obtaining acceptances from shareholders representing at least 90 per cent of Aer Lingus's share capital, and depending on the number of 'dead register' shares.

<sup>148</sup> In other words, where Aer Lingus shareholders receive either shares in the bidder, or a combination of cash and shares in the bidder, in exchange for their Aer Lingus shares.

disruptive, would materially affect Aer Lingus's effectiveness as a competitor. Nor did we consider the various other ways in which Ryanair might exercise its rights as shareholder owning 5 per cent would have a material impact on Aer Lingus's ability to implement its strategy in competition with Ryanair.

- 8.112 We concluded that a reduction of Ryanair's share to 5 per cent would be effective in remedying the SLC that we have found. Such a divestiture would need to be accompanied by limited behavioural remedies to ensure that Ryanair could not seek or accept board representation or acquire any further shares in Aer Lingus following divestiture. The restriction on the acquisition of shares could be lifted if Ryanair, following a successful appeal, obtains clearance from the European Commission permitting a full takeover of Aer Lingus.

### ***The proportionality of effective remedies***

- 8.113 We concluded that the following remedy options would be effective in addressing the SLC and resulting adverse effects following the acquisition by Ryanair of a 29.82 per cent shareholding in Aer Lingus:

- (a) divestiture of the whole of Ryanair's shareholding in Aer Lingus; or
- (b) partial divestiture to reduce Ryanair's shareholding in Aer Lingus to 5 per cent of Aer Lingus's issued ordinary shares, accompanied by an obligation on Ryanair not to seek or accept board representation in Aer Lingus.

- 8.114 To avoid circumvention of the objectives of the divestiture, either remedy would need to be accompanied by an obligation on Ryanair not to acquire further shares in Aer Lingus, unless Ryanair has received clearance under the EUMR for a concentration between Ryanair and Aer Lingus.

- 8.115 Having identified the two remedy options that would be effective in addressing the SLC, we now consider the general level of restriction and cost that each option would entail and their proportionality. In order to be reasonable and proportionate, the CC will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CC is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CC will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. If remedies extinguish relevant customer benefits, then the amount of benefits forgone may be considered to be a relevant cost of the remedy.

### ***Views of parties***

- 8.116 Ryanair said that it had acquired its shareholding in Aer Lingus at a cost of more than €400 million. At today's market value the shareholding was worth around €270 million (a loss of around €130 million), whilst one year ago it was worth only €150 million (a loss of over €250 million), indicating the volatility of Aer Lingus's share price. Ryanair said that a forced divestiture would entail obvious and significant prejudice. Under a forced sale, it was highly unlikely that the seller would obtain full or fair value for the asset. By contrast, any prospective purchaser had every incentive to game the disposal process to acquire the asset at an under value. Ryanair did not identify any relevant customer benefits.

8.117 Aer Lingus said that the prevailing stock market price of its shares was around €1.60 per share, and this exceeded the book value of the shares on Ryanair's balance sheet. Aer Lingus did not identify any relevant customer benefits.

### *Our views*

8.118 The CC will not, in the absence of exceptional circumstances, take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.<sup>149</sup> We consider that Ryanair will be able to realize a market value for its shares by undertaking the sale process within the divestiture period.<sup>150</sup> We therefore do not consider the cost of divestment, including any loss that Ryanair may incur in selling the shares, to be a relevant consideration in our assessment of the proportionality of different options. Nor do we see any evidence that there would be any relevant customer benefits arising from Ryanair's minority shareholding which would be forgone as a consequence of either of the effective remedies. We therefore did not consider that there were material differences, in terms of relevant costs, between the two remedies that we have provisionally found to be effective.

8.119 A partial divestiture would, however, be less intrusive than a full divestiture because Ryanair would be permitted to retain a proportion of its existing shareholding, should it so wish. Of the two effective remedies that we have identified, partial divestment is therefore the less intrusive and hence more proportionate remedy.

8.120 We considered whether the level of intervention implied by a divestiture of shares of this magnitude was justified, given the nature and extent of the SLC that we have found. We took the view that it would be for the following reasons:

- (a) The routes between Great Britain and Ireland represent a substantial and important market, accounting for 4.7 million UK outbound passenger journeys<sup>151</sup> in 2012 and €[~~3~~] million in revenue in 2011 (see Appendix D). These routes are particularly important to the Aer Lingus business, accounting for approximately [20–30] per cent of its turnover.
- (b) Ryanair and Aer Lingus are by some margin the main operators on these routes, and the only operators on certain corridors. Given this, and the number of passengers travelling between Great Britain and Ireland, any reduction in competition between Ryanair and Aer Lingus on these routes is therefore likely to result in significant customer detriment.
- (c) The restriction imposed by the shareholding on Aer Lingus's ability to pursue its own commercial policy and strategy is significant and affects fundamental aspects of commercial policy and strategy including Aer Lingus's ability to enter into combinations, fund its business and manage its key assets.
- (d) Divestiture is the usual approach to remedying SLC findings arising from anti-competitive mergers and we have found it to be the only effective class of remedy in this case.

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<sup>149</sup> CC8, paragraph 1.10.

<sup>150</sup> In this regard, we observe that the original cost to Ryanair of acquiring the 29.82 per cent shareholding in Aer Lingus was €407.2 million. Based on a share price range of €1.10 to €1.70, the value of Ryanair's shareholding in Aer Lingus is between €175 million and €271 million.

<sup>151</sup> Ryanair and Aer Lingus together account for 82 per cent (3.7 million) of these passengers (see Appendix D, Table 1).

(e) There is no evidence that relevant customer benefits would be lost by a divestiture. We do not judge any losses that Ryanair might crystallize from selling its shares to be a relevant consideration.

8.121 We therefore came to the conclusion that an effective and proportionate remedy to the SLC would be a partial divestiture to reduce Ryanair's shareholding in Aer Lingus to 5 per cent of Aer Lingus's issued ordinary shares, accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares in Aer Lingus (unless clearance is given under the EUMR for a concentration between Ryanair and Aer Lingus).

### ***Remedy implementation***

8.122 We discuss the implementation of the remedy in Appendix K, in particular:

- (a) the divestiture package and the risks associated with its disposal;
- (b) the nature of the divestiture process;
- (c) the identity of the party conducting that process;
- (d) issues relating to purchaser suitability; and
- (e) the timescale that should be allowed for any disposal to take place.

8.123 In summary, we decided that:

- (a) A Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers.
- (b) The divestiture may be implemented via an upfront buyer process to a single purchaser or via a stock market placement of the shares, or by another process identified by the Divestiture Trustee and approved by the CC.
- (c) The Divestiture Trustee will review whether a purchaser satisfies the CC's suitability criteria (see Appendix K), and will consult with the CC as appropriate.
- (d) Ryanair may nominate parties to act as Divestiture Trustee for approval by the CC. The CC may appoint its own choice of Divestiture Trustee if Ryanair is unable to identify appropriate candidates within specified timescales. Ryanair is responsible for remuneration of the Divestiture Trustee.
- (e) The divestiture period is [~~3~~] months from Final Determination.

8.124 Pending the implementation of this divestiture, interim measures should remain in force to ensure that Ryanair is not able to take pre-emptive action and so they will need to be included in the final order (or undertakings) pending the sale of the stake. For the reasons set out in paragraph 8.103, we do not presently consider that these measures need to be substantially amended or supplemented to preserve the CC's ability to implement the remedies identified, although we will keep this under review. Nor do we consider that interim measures would address the SLC findings during an interim period between our final order and the outcome of the EU appeals process.

8.125 We considered whether the fact that Ryanair said that all of its business activities (including in the UK) were carried on by Ryanair Limited (not Ryanair Holdings) meant that any measures should be restricted to certain companies in the Group.

However, taking account of the factual circumstances of the operations of Ryanair and Ryanair Limited set out in Appendix B, we are satisfied that Ryanair Holdings and Ryanair Limited both carry on business in the UK. In the circumstances, we considered that the measures should extend to control the behaviour of all the companies in the Group.

### ***Conclusions on remedies***

- 8.126 We conclude that we should require Ryanair to reduce its shareholding in Aer Lingus to 5 per cent of Aer Lingus's issued ordinary shares. As of the date of this report, this means that Ryanair must divest 132,529,021 ordinary shares in Aer Lingus. This divestiture should be accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares in Aer Lingus (unless clearance is given under the EUMR for a concentration between Ryanair and Aer Lingus). A Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers in a period of [X] months (see paragraph 8.123).
- 8.127 In our judgement this represents as comprehensive a solution as is reasonable and practicable to the SLC that we have found and the adverse effects resulting from it.