

**COMPLETED ACQUISITION BY RYANAIR HOLDINGS PLC OF A MINORITY
SHAREHOLDING IN AER LINGUS GROUP PLC**

Issues statement

6 March 2013

The reference

1. On 15 June 2012, the Office of Fair Trading (OFT) made a reference (the reference) to the Competition Commission (CC) under section 22 of the Enterprise Act 2002 (the Act) concerning the completed acquisition of a minority shareholding in Aer Lingus Group plc (Aer Lingus) by Ryanair Holdings plc (Ryanair). On 18 July 2012 the CC gave notice under section 107 of the Act that it had decided pursuant to section 39(4) of the Act that the statutory reference period should be extended. On 28 February 2013 the CC gave notice that the extension to the statutory reference period had come to an end, and that the revised deadline for publishing its report was 11 July 2013.
2. The CC must decide under section 35 of the Act:
 - (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
3. This issues statement is based on the evidence we have reviewed to date and sets out initial theories of how the completed acquisition might have led or could lead to an SLC. This will provide a framework for our investigation. The issues raised in this document should be seen as topics for investigation and do not represent findings or conclusions. The identification of these issues does not preclude the consideration of other issues that may be identified during the course of our investigation.
4. The remainder of the document sets out key issues for investigation:
 - (a) material influence;
 - (b) the counterfactual;
 - (c) candidate theories of harm of how the completed acquisition might have led or could lead to an SLC; and
 - (d) the constraint from entry and expansion.
5. [Annex A](#) to the issues statement sets out the background to the completed acquisition and how the reference has arisen.
6. To submit evidence, please email Ryanair.Aerlingus@cc.gsi.gov.uk or write to:

Inquiry Manager
Ryanair/Aer Lingus investigation
Competition Commission
Victoria House
Southampton Row
LONDON
WC1B 4AD

by 20 March 2013.

Issues for investigation

7. The CC must decide whether Ryanair's acquisition of 29.82 per cent of Aer Lingus has resulted, or may be expected to result, in an SLC within any market or markets in the UK.

Material influence

8. Under section 35 of the Act, the CC must decide if a relevant merger situation has been created. Under section 23(1) of the Act, a relevant merger situation only arises if enterprises have ceased to be distinct. Under section 26(3) of the Act, this includes the situation where one enterprise acquires the ability materially to influence the policy of another.
9. Accordingly, we will investigate whether Ryanair's acquisition of a 29.82 per cent stake in Aer Lingus during the period 2006 to 2008 has given or will give it the ability to materially influence Aer Lingus' policy.
10. We will examine:
 - (a) the application of company law, stock exchange listing rules, articles of association and corporate governance principles to Ryanair's minority stake;
 - (b) historical patterns of agenda setting and voting at Aer Lingus shareholder meetings; and
 - (c) whether there is evidence that Aer Lingus' commercial strategy is affected by Ryanair's minority stake.

Counterfactual

11. The CC will assess the possible effects of the acquisition on competition relative to the competitive situation absent the merger—the counterfactual. In identifying the appropriate counterfactual, we will consider the situation that would have arisen in the short to medium term if Ryanair had not acquired the minority shareholding. We will assess the extent to which any developments in the competitive situation in the market since 2006 can be considered independent of the acquisition, and so should be included in the counterfactual.

Competitive effects of the acquisition

12. In its decision to refer, the OFT identified 12 routes originating in the UK where Aer Lingus and Ryanair overlap, and so are likely to compete directly for passengers. In addition, the OFT identified a number of Ryanair and Aer Lingus routes on which the

other merging party does not currently operate, but does have significant operations at either the origin or destination airport. The parties may exert a competitive constraint on each other as potential competitors on these routes.

13. Broadly, we will assess whether, as a result of the acquisition, actual or potential rivalry between Ryanair and Aer Lingus on these routes has been or will be diminished and if so, whether this has produced or may be expected to produce adverse outcomes for consumers in terms of price, quality, service or innovation. We have identified three ways in which such an effect might arise.
14. The first potential detrimental effect of the acquisition on rivalry is that it may cause Aer Lingus to become a less effective actual or potential competitor for UK air passengers. We have identified three distinct mechanisms that could lead to this outcome:
 - (a) the rights held by Ryanair as a result of its shareholding could enable Ryanair to weaken Aer Lingus or restrict its ability to follow certain competitive strategies, including its ability to form relationships with other airlines or join airline alliances;
 - (b) Ryanair's shareholding could deter other airlines, or other parties, from investing in Aer Lingus, preventing Aer Lingus from realizing the benefits associated with potential takeovers or outside investments; and
 - (c) the acquisition could alter Aer Lingus' incentives such that it takes the effect of its actions on Ryanair's profitability into account when making decisions about its offering, diminishing competition between the companies.
15. The second potential detrimental effect of the acquisition is that it may cause Ryanair to become a less effective actual or potential competitor. In particular, we will examine whether the acquisition alters Ryanair's incentives such that it takes the effect of its actions on Aer Lingus' profitability into account when making decisions about Ryanair's offering, diminishing the competition between the companies.
16. The third potential adverse effect of the acquisition is that it may increase the likelihood that Ryanair and Aer Lingus avoid competing with each other on some aspects of their service to the companies' mutual advantage, or increase the likelihood that the airlines coordinate their actions in order to raise barriers to entry for other rivals. Accordingly, we will examine if the acquisition causes the conditions for coordination to become more favourable, increasing the effectiveness of any existing coordination between the merging parties, or increasing the likelihood of Ryanair and Aer Lingus coordinating their behaviour in the future.
17. We will consider a number of issues in assessing these theories of harm, including:
 - (a) the extent to which Ryanair has the ability to influence the commercial decisions of Aer Lingus, and the extent to which this has taken place in the past or is likely to take place going forwards;
 - (b) how closely the airlines compete on overlap routes;
 - (c) the extent to which the behaviour of Aer Lingus and Ryanair is constrained by other airlines, or other substitutes to flying; and
 - (d) the relative profitability of the merging parties, and the extent to which Ryanair shares in Aer Lingus' profits.

18. The theories of harm are not mutually exclusive, although factors that make some of the mechanisms more likely to arise may make other mechanisms less likely to arise.

The constraint from entry and expansion

19. We will assess the likelihood of entry or expansion by other airlines, how long that entry or expansion would be likely to take, and whether it would be sufficient to offset any potential SLC.
20. Key factors in this assessment will be:
 - (a) the history of entry, expansion and exit, and in particular any such events that have occurred since 2006 in light of current economic conditions;
 - (b) the strength of barriers to entry related to slots and airport capacity;
 - (c) economies of scale and scope related to establishing a base at a given airport; and
 - (d) the incentives and strategy of possible entrants.

Possible remedies and relevant customer benefits

21. If we consider that the acquisition has resulted, or may be expected to result in an SLC, we will consider whether and, if so, what remedies might be appropriate, and will issue a further statement.
22. In any consideration of possible remedies, we will take into account whether any relevant customer benefits have arisen, or might be expected to arise as a result of the acquisition and, if so, what these benefits are likely to be and which customers would benefit.

Background

1. Ryanair is an airline listed on the Dublin, London and NASDAQ stock exchanges. It operates flights to 27 countries, primarily within Europe. Aer Lingus is the former Government-owned national flag carrier airline of the Republic of Ireland. Aer Lingus operates flights within Europe and to the USA.
2. Aer Lingus was privatized in 2006 with the Government of the Republic of Ireland retaining a 25 per cent shareholding. In 2006 Ryanair through its wholly-owned subsidiary, Coinside Limited, acquired a 19.21 per cent minority shareholding in Aer Lingus in five tranches. On 5 October 2006 Ryanair launched a public bid for the entire share capital of Aer Lingus (the first bid) and on 30 October 2006 lodged with the European Commission a notification of a proposed concentration pursuant to Article 4 of Regulation No 139/2004, the EC Merger Regulation (the Regulation) related to the proposed acquisition.
3. During the first bid period, Ryanair acquired further shares in Aer Lingus and on 28 November 2006 held 25.17 per cent of the share capital of Aer Lingus. On 20 December 2006 the European Commission initiated Phase II proceedings as it considered that the separate acquisition of shares and the first bid constituted a single concentration for the purposes of Article 3 of the Regulation.
4. On 27 June 2007 the European Commission declared the notified concentration to be incompatible with the common market because the notified concentration would significantly impede effective competition in the common market or a substantial part thereof in particular as a result of the creation of a dominant position of Ryanair and Aer Lingus on 35 routes from and to Dublin, Shannon and Cork, and the creation or strengthening of a dominant position on 15 other routes from and to Dublin and Cork (the Prohibition Decision).¹
5. Ryanair lodged an appeal against the Prohibition Decision in the Court of First Instance on 10 September 2007.² Prior to the Prohibition Decision Aer Lingus requested the European Commission to adopt a decision requiring Ryanair to divest itself of the minority shareholding should the concentration be prohibited. In October 2007 the European Commission declined to do so on the grounds that its power to do so arose only where the minority shareholding would put Ryanair in a position to exercise de jure or de facto control over Aer Lingus, and the European Commission had no indication that such circumstances were present in the case. In parallel Aer Lingus had requested the European Commission to adopt interim measures which would prevent Ryanair from exercising its voting rights. This was also rejected by the European Commission.³
6. Following the prohibition decision Ryanair acquired further shares in Aer Lingus. By 28 November 2006 Ryanair had taken its share to 25.17 per cent, then to 29.4 per cent by 20 August 2007 and by 2 July 2008 Ryanair had increased its stake in Aer Lingus to 29.82 per cent.
7. On 1 December 2008 Ryanair announced another offer for the remaining shares in Aer Lingus that it did not already own (the second bid). The second bid was

¹ Decision C(2007) 3104.

² T-342/07.

³ Decision C(2007) 4600 final.

subsequently withdrawn in January 2009 since the Irish government indicated it would not sell its shares. The various appeals by both Ryanair and Aer Lingus in connection with the first bid were concluded on 17 September 2010 with Ryanair retaining its minority shareholding with no interim measures in place. On 30 September 2010 the OFT sent a notice to Ryanair requesting certain information relevant to a preliminary merger investigation.

8. Ryanair contested that the time for such an investigation in the UK had expired and the OFT was out of time. On 4 January 2011 the OFT advised Ryanair that it considered it was not out of time to refer Ryanair's 2006 acquisition of a minority stake in Aer Lingus to the CC pursuant to section 22 of the Act. Ryanair appealed this decision first to the Competition Appeal Tribunal (CAT) which ruled against Ryanair on the issue of the OFT being time-barred and then to the Court Of Appeal⁴ which on 22 May 2012 agreed with the decision of the CAT that the OFT was not time-barred.
9. On 15 June 2012 the OFT made the reference to the CC. On 19 June 2012 Ryanair announced its intention to make a voluntary public offer via its subsidiary, Coinside Limited, to acquire the remaining share capital in Aer Lingus which it does not already own (the third bid). The third bid fell for review by the European Commission under the Regulation. The CC noted this bid, sought submissions from Ryanair and Aer Lingus, and consulted the European Commission. The CC came to the view that, in line with its statutory duty, it should proceed with its investigation, in a manner consistent with its obligations under Article 4 of the Treaty of the European Union (ie the duty of sincere cooperation), and ensure that it did not undermine the ability of the European Commission to complete any inquiries into or take and implement any decisions in relation to a concentration with a community dimension that falls to the exclusive competence of the European Commission under Article 21.3 of the Regulation.
10. On 18 July 2012 the CC gave notice under section 107 of the Act that it had decided pursuant to section 39(4) of the Act that the statutory reference period should be extended.
11. Ryanair applied to the CAT for a review of the CC's decision to proceed with its inquiry whilst the European Commission was undertaking a review of the third bid. Ryanair argued that Article 21.3 of the Regulation applied not just to the risk of conflicting decisions but also to overlapping jurisdictions, and the jurisdiction of the European Commission overlapped with the CC's jurisdiction in this case. Furthermore, the duty of sincere cooperation required the CC to suspend its inquiry in order to avoid a conflict.
12. The CC argued that its jurisdiction did not overlap with that of the European Commission, as the two agencies were looking at separate transactions (the CC is reviewing the minority shareholding, whilst the European Commission was reviewing the acquisition of the whole of Aer Lingus). Furthermore, consistent with recent case law on cases run in parallel at European and UK level, the duty of sincere cooperation did not require the CC to suspend its inquiry immediately, merely to avoid a conflicting outcome.
13. On 8 August 2012 the CAT dismissed Ryanair's appeal. Ryanair appealed the CAT's judgment in the Court of Appeal and on 13 December 2012 the Court of Appeal dismissed that appeal. Ryanair has applied for leave to appeal to the Court of

⁴ CAT [2011] 23 and EWCA [2012] Civ 643.

Appeal's judgment to the Supreme Court, and the outcome of its application is awaited.

14. On 27 February 2013 the European Commission issued a decision prohibiting the third bid.
15. On 28 February 2013 the CC gave notice that the extension to the statutory reference period under section 39(4) of the Act had come to an end, and that the revised deadline for publishing its report was 11 July 2013.