

**RYANAIR'S ACQUISITION OF A MINORITY STAKE IN AER LINGUS**  
**SUBMISSION TO THE OFT ON MATERIAL INFLUENCE**

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**NON-CONFIDENTIAL VERSION**

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## **Introduction**

1. An objective analysis of the facts, supported by five years of evidence of its ownership of a minority (29.8%) stake in Aer Lingus demonstrates that Ryanair does not have the ability materially to influence Aer Lingus' policy. Consequently, the acquisition by Ryanair of a 29.8% share of Aer Lingus' issued capital did not create a relevant merger situation.
2. As a preliminary matter, it is essential to clarify (i) the rationale behind the acquisition by Ryanair of a stake in Aer Lingus and (ii) the reasons for Ryanair's occasional shareholder activism.
3. **Ryanair acquired its stake in Aer Lingus as part of an attempted takeover.** On 27 September 2006, Ryanair began to build a stake in Aer Lingus in order to purchase the company. Ryanair's first offer for Aer Lingus was launched on 5 October 2006 but was blocked by the European Commission on 27 June 2007. Ryanair appealed the Commission's prohibition decision and, whilst its appeal was pending, acquired a further 4.2% stake in Aer Lingus, bringing its total stake to 29.8%. On 1st December 2008, Ryanair announced a second offer for Aer Lingus at €1.40 per share. However, Ryanair withdrew this offer on 23 January 2009 after failing to secure the Irish Government's support. Since 2 July 2008, Ryanair has not sought to further increase its stake in Aer Lingus.
4. Ryanair's two offers for Aer Lingus did not proceed due to the European Commission's prohibition decision and opposition from the Irish Government. However, Ryanair retained the 29.8% stake in Aer Lingus as it believes that it will [CONFIDENTIAL]. Ryanair paid around [CONFIDENTIAL] for this stake (the weighted average cost per share was [CONFIDENTIAL]). By the time Ryanair withdrew its second offer, the stake was worth only [CONFIDENTIAL] and the price of Aer Lingus' shares has continued to fall ever since (the stake's current market value is around [CONFIDENTIAL]).
5. **Ryanair has occasionally been critical of Aer Lingus' performance.** Ryanair has on several occasions over the past five years criticised the strategies adopted by Aer Lingus' board and management and suggested alternative courses of action. In almost all cases Ryanair has been proven right as these strategies (which Ryanair was powerless to influence) have damaged Aer Lingus' earnings and share price. This shareholder activism is justified by the size of Ryanair's stake and the fact that Aer Lingus has recorded cumulative losses of some €154 million during the five years between 2006 and 2010. The price of its shares fell from a peak of €3.275 per share during Ryanair's first offer period to €0.58 per share as of 26 August 2011. In light of these losses, any shareholder having invested almost [CONFIDENTIAL] in the company's shares would have good reasons to question the company's business strategies and to seek to protect the value of its investment.
6. Three additional points deserve to be made with regard to Ryanair's shareholder activism:
  - Shareholder activism is a vital part of modern democratic corporate governance and is actively encouraged by stock exchange regulation. Ryanair has acted as any

large minority shareholder would do in these circumstances and has been proven to be right on many occasions.

- In numerous public statements Aer Lingus' management has emphasised its good working relationship with Ryanair. For example, Christoph Mueller described Ryanair as "*a very professional shareholder*".<sup>1</sup> This measured statement is in stark contrast with the allegations of Aer Lingus' counsel according to which Ryanair is using its stake "*to wage a deliberate campaign of harassment*".<sup>2</sup>
- Being an activist shareholder does not in itself give rise to material influence. Whilst Ryanair would not equate its activism with being "*disruptive*", it is noteworthy that in *BSkyB/ITV* report, the Competition Commission stated that "*although we recognized the argument that BSkyB would also be in a position to act as a disruptive shareholder more generally, we did not attach weight to this in reaching our conclusion*" on material influence.<sup>3</sup> Aer Lingus should not be allowed to misuse competition law in order to eliminate an activist shareholder.

## 1. Executive Summary – Five Reasons Why Ryanair Has No Material Influence over Aer Lingus

7. Ryanair does not have the ability materially to influence policy relevant to Aer Lingus' behaviour in the marketplace for five principal reasons.
8. First, and uniquely to this case, Ryanair has now held its stake for nearly five years. The OFT is therefore able to review evidence of **actual behaviour** of Ryanair and Aer Lingus, which repeatedly demonstrates that Ryanair has not been able to exercise material influence over Aer Lingus. The Board of Aer Lingus has managed the airline in a manner which has not been influenced by the presence or opinions of Ryanair as its largest shareholder. The facts show that the Board and management of Aer Lingus continue its present policy of strenuous opposition to, and independence from, Ryanair. This is a rare case where, as a result of the passage of time from the acquisition to its regulatory analysis, the empirical evidence of strong and committed independence is verifiable and convincing. Against that there is the merely fanciful speculation about risks that may eventuate but are entirely manageable by the Board and management of Aer Lingus.
9. Second, Ryanair does not have any **directors** on Aer Lingus' board nor any ability to appoint such a director. This is important because, under Irish company law and Aer Lingus' Articles of Association, Aer Lingus is "*managed by the directors*", leaving the shareholders with limited powers. The company's board is composed of the

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<sup>1</sup> See "Green Returns", AIRLINE BUSINESS, July 2011, attached as[Annex Removed].

<sup>2</sup> See Cadwalader's letter to the OFT of 15 Aug. 2011.

<sup>3</sup> Cf. Competition Commission, *Acquisition by British Broadcasting Group plc of 17.9 per cent of the Shares in ITV plc*, report sent to Secretary of State (BERR) 14 Dec. 2007 (hereinafter, "*BSkyB/ITV*"), ¶3.62.

appointees of the Irish government, employees of Aer Lingus and Denis O'Brien, who between them control over 40% of Aer Lingus shares.

10. [CONFIDENTIAL] Whilst Ryanair holds 29.8% of the company's issued share capital, it has [CONFIDENTIAL].
11. Fourth, in *BSkyB/ITV*, an ability to block a **special resolution** waiving pre-emption rights was found to give rise to material influence as B SkyB might have *slowed* ITV's ability to raise new equity, for example to finance a strategic acquisition. In that case, ITV did not have large cash reserves, could not access the debt markets whilst retaining its investment-grade credit rating and was likely to require equity funding if it wanted to pursue certain major strategic options. Aer Lingus' situation is very different:
  - (a) Aer Lingus has very large cash reserves – it has gross cash of €25 million – and access to other means of raising capital including aircraft leases and bank lending.
  - (b) In line with guidance from the Irish Association of Investment Managers, Aer Lingus' requests for a waiver of pre-emption rights have all been limited to issuing 5% of the currently issued equity share capital. This would enable it to raise at most €15.49 million,<sup>4</sup> a trivial sum compared to its gross cash of €25 million.
  - (c) Aer Lingus' strategy is to downsize, whilst forming alliances with other airlines, and it is therefore very unlikely to wish to make a large strategic acquisition or other significant investment.
12. Finally, whilst Ryanair has the power to block a **takeover** that is structured as a scheme of arrangement, Aer Lingus is extremely well capitalised and able to implement its commercial strategy without needing a takeover. Moreover, Ryanair has no power to successfully oppose a takeover structured in a more traditional manner as a general offer. Aer Lingus' position is in marked contrast to ITV's, as a takeover might have strengthened ITV's balance sheet and enabled it to implement certain of its strategic options. In any event, Ryanair has publicly stated that it would consider any offer for its stake in Aer Lingus on its merits, and does not rule out disposing of its stake were another airline to come forward with an attractive offer.

## 2. The Material Influence Test

13. Under section 22(1)(a) of the Enterprise Act 2002 (“EA 2002”), the OFT has jurisdiction to investigate if it “*believes that it is or may be the case that ... a relevant merger situation has been created*”. Section 26(3) EA 2002 defines a “*relevant*

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<sup>4</sup> 534m shares in issue x €0.58 share price x 0.05 = €15.49m. Any equity capital raising is likely to be at a discount (estimated at 5%) to the then prevailing share price, which would reduce the sum raised.

*merger situation*” to include a situation in which one person is “able [...] materially to influence the policy of a body corporate”. Several points arise from these provisions.

14. First, the use of the word “**may**” in section 22(1)(a) imports a lower degree of likelihood than the balance of probabilities but excludes the “*purely fanciful*”.<sup>5</sup>
15. The exclusion of the “*purely fanciful*” is material because it is possible that parties urging the OFT to claim jurisdiction to investigate will allow their imaginations to run free, e.g., in identifying situations in which Ryanair’s power to block a special resolution might affect Aer Lingus’ policy relevant to its behaviour in the market place. It is noteworthy that the concerns envisioned by Aer Lingus in its 2007 interim relief application at the EU Court of First Instance (“**CFI**”) (now General Court) were subsequently shown to be without substance, vindicating the President’s decision to dismiss them (see ¶76 below). It is therefore crucial that, in line with its normal practice, the OFT scrutinises speculation in any complaints against that party’s internal documents *and*, further, that it considers whether any internal documents were crafted with a view to potential disclosure in this investigation.
16. When determining whether there is a “*realistic prospect*” that material influence exists, the OFT must, of course, have regard to the evidence available to it. In this case, the facts are unusual. Ryanair has held its minority stake for five years and Aer Lingus has every incentive to provide to the OFT the fullest possible account of Ryanair’s conduct. As a result, the OFT is well placed to make judgements about likely *future* events (such as the likelihood of Aer Lingus needing to raise finance *quickly* through the issuing of new equity in order to implement its commercial strategy) when applying the “*realistic prospect*” test.
17. Second, there is no statutory definition of “**material influence**” but it is clear from section 26(3) EA 2002 that any such influence must relate to “*the policy*” of the target. According to the OFT’s and CC’s *Merger Assessment Guidelines* (the “**Guidelines**”), “[t]he policy of the target includes its strategic direction and its ability to define and achieve its commercial objectives”.<sup>6</sup> The OFT, in considering whether material influence exists, must “conduct a case-by-case analysis, focusing 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 entity in the marketplace”.<sup>7</sup>
18. It is clear from the Guidelines that material influence does not automatically result from one single factor, such as the ability to block a special resolution. Rather the OFT should examine all of the following factors:
  - (i) The absolute and relative size of the acquirer’s shareholding and the distribution and holders of remaining shares. In most cases where material influence was found, the acquirer was by far the largest shareholder. For example, in *BSkyB/ITV*,

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<sup>5</sup> See *Office of Fair Trading v. IBA Health Ltd* [2004] EWCA Civ 142, at 47 and 48.

<sup>6</sup> Guidelines, ¶3.2.8.

<sup>7</sup> Guidelines, ¶3.2.8.

BSkyB's stake was more than twice that of the next largest shareholder and BSkyB could only be outvoted by a coalition of at least four other shareholders.<sup>8</sup> Ryanair's situation is very different as its stake is only marginally larger than the stake held by the Irish Government (see Section 3.1 below) and [CONFIDENTIAL] (see Sections 3.3 and 4.2 below).

- (ii) The influence through board representation. The Guidelines emphasise that this is a particularly important factor (¶3.2.11). Ryanair has not appointed any directors to the Aer Lingus board, has not sought to do so, and has not been able to exercise any material influence through Aer Lingus' board and has no realistic prospect of doing so (see Section 3.2 below). The Board of Aer Lingus is composed of the appointees of the Irish Government, trade unions and Denis O'Brien.
- (iii) The acquirer's ability to block special resolutions. It is clear from the Guidelines and the case law that this ability does not, in itself, give rise to material influence. In *BSkyB/ITV*, after having established that BSkyB was able to block special resolutions, the Competition Commission went on to consider whether that ability "would limit some of ITV's strategic options".<sup>9</sup> It considered that to be the case because "ITV would be likely to need equity funding in order to pursue certain major strategic options in the next two to three years".<sup>10</sup> This issue does not arise in the present case (see Section 3.4 below).
- (iv) The existence of special voting or veto rights attached to the acquirer's stake. No special voting/veto rights are attached to Ryanair's stake (see Section 3.3 below).
- (v) The status and expertise of the acquirer. However, the acquirer's expertise is only relevant if it is of interest to other shareholders.<sup>11</sup> Ryanair's experience as Aer Lingus' minority shareholder shows that the company's board and management, the Irish Government and other large shareholders (such as Denis O'Brien) place no value in Ryanair's expertise and systematically reject Ryanair's advice (see Section 4.2 below).
- (vi) The existence of agreements between the acquirer and the target (e.g., consultancy, specialisation, outsourcing, and financial agreements). Such agreements do not exist between Ryanair and Aer Lingus (see Section 3.5 below).

19. Third, the OFT and the Competition Commission also take into account various **countervailing factors** excluding potential material influence. For example, in *BSkyB/ITV*, the Competition Commission considered, inter alia, "*the presence of other, significant, active shareholders who could collaborate to outvote BSkyB; and the absence of evidence of actual influence being exerted to date*".<sup>12</sup> The facts in that case

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<sup>8</sup> See *BSkyB/ITV*, ¶¶ 3.64 and 3.39.

<sup>9</sup> See *BSkyB/ITV*, ¶3.66.

<sup>10</sup> See *BSkyB/ITV*, ¶3.43.

<sup>11</sup> See *BSkyB/ITV*, ¶3.59.

<sup>12</sup> See *BSkyB/ITV*, ¶3.35.



were different but the principle of countervailing power is applicable in the present case. [CONFIDENTIAL] Over a period of five years, there is no evidence whatsoever of any material influence.

### **3. Ryanair Does Not Have the Ability Materially to Influence Aer Lingus' Policy**

#### **3.1 The Distribution of Shares in Aer Lingus**

20. Ryanair is a minority shareholder in Aer Lingus, holding 29.8% of the company's issued share capital. However, the Irish Government (25.1%), Aer Lingus' third largest shareholder Denis O'Brien (3%) and the company's ESOT / employees (12.5%) between them hold over 40% of the issued share capital [CONFIDENTIAL] (see below at ¶36). The policy of these shareholders was clearly set out by Aer Lingus' chairman, Colm Barrington, when he vowed "*to find a friendly investor who will take a majority stake in Aer Lingus to prevent Ryanair from bidding again*".<sup>13</sup>
21. Since the beginning of the financial crisis, the Irish Government has been contemplating the divestiture of certain State-owned assets. The Report of the Review Group on State Assets and Liabilities (April 2011) recommended the divestiture of the government's stake in Aer Lingus. However, the report suggested that "*[t]he disposal of the Aer Lingus stake is not urgent and the objective should be the realisation of maximum value*". Consistently with the objective of realising maximum value, the report envisages the sale of the stake *en bloc*, and specifically identifies the possibility of a sale to one of the three large European airline groups.<sup>14</sup>
22. In line with the report, Leo Varadkar, Ireland's Minister for Transport, Tourism and Sport, has said that the Irish Government would support a sale of its stake in Aer Lingus "*if Aer Lingus were to decide that its future is to be found in an alliance with a larger airline group*".<sup>15</sup> This implies that the Irish Government is willing to sell its stake *en bloc* as part of a public bid by a larger airline group. Any purchaser would therefore acquire the Irish Government's stake and, presumably, other shares, which would further reduce the importance of Ryanair's stake.
23. Aer Lingus' third largest shareholder is businessman **Denis O'Brien**, who holds 3.3%. He is openly opposed to Ryanair's shareholding and has traditionally voted with the Irish Government, in line with Board recommendations (see below at ¶37).

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<sup>13</sup> See "Ryanair Suffers Double Setback in Aer Lingus Bid", REUTERS, 12 Dec. 2008, attached as [Annex Removed].

<sup>14</sup> See <http://www.finance.gov.ie/documents/publications/reports/2011/revgrpstatassets.pdf>, at 85-87. The Report states: "*[o]ne of these groups could be a bidder for Aer Lingus, and there are other consolidation possibilities*".

<sup>15</sup> See "A Stronger Aer Lingus Says It Is Ready to Fly Solo", NY TIMES, 27 May 2011, attached as [Annex Removed]. Mr Varadkar emphasized that "*[w]e are not in any hurry to sell our stake*". This is not surprising as the sale of the Government's stake in Aer Lingus would not materially reduce Ireland's sovereign debt, which was €148.1 billion at the end of 2010 and was projected to increase to €173 billion at the end of 2011.

24. Formerly, the Aer Lingus Employee Share Ownership Trust (“**ESOT**”) held a 12.5% shareholding in Aer Lingus. However, on 22 December 2010, the shareholding was dispersed when the ESOT transferred its shares directly to the individual beneficiaries of the trust. Therefore, these shares are now distributed among individual shareholders – Aer Lingus’ current and former employees. The ESOT was consistently opposed to Ryanair and the current holders of the former ESOT shares are more than likely to be voting in line with Board recommendations (see below at ¶38).
25. So far as Ryanair is aware, Aer Lingus’ fourth largest shareholder is the asset management business SSgA (Ireland), with a stake of 3.25%. Ryanair understands that four other investment funds hold stakes in Aer Lingus of between 1% and 1.5%. Ryanair does not have access to reliable information regarding the precise size of the stakes held by Denis O’Brien and by financial investors, in particular because these shareholders hold their stakes through a variety of vehicles and funds. This information should be available to Aer Lingus.

### **3.2 Ryanair Has Not Been Able to Exercise Any Influence Through the Aer Lingus Board and Has No Realistic Prospect of Doing So**

26. Ryanair cannot appoint directors to Aer Lingus’ board. This lack of board representation makes it impossible for Ryanair materially to influence Aer Lingus’ policy.

#### **(a) Ryanair Cannot Appoint Directors to Aer Lingus’ Board**

27. Ryanair has no directors on the Aer Lingus Board. It has never sought to have any of its nominees elected to the Aer Lingus Board and does not intend to do so in the future. In order to have a nominee elected, it would be necessary for Ryanair to obtain a simple majority of votes cast at a general meeting. [CONFIDENTIAL] The rules regarding the appointment of Aer Lingus’ directors are summarised in [Annex Removed].
28. The fact that Ryanair cannot exert influence through the Aer Lingus board contrasts sharply with the position enjoyed by the Irish Government, along with the trade unions and Denis O’Brien. There are currently 13 directors on the Aer Lingus Board (the allowed maximum is 15) and the Board is composed of the appointees of the Irish Government, trade unions and Denis O’Brien. The Irish Government has an embedded right in Aer Lingus’ Articles of Association to appoint and remove up to three of those directors.<sup>16</sup> This unique right bestowed upon the Government, another minority shareholder, is just one of the many aspects of the special relationship that exists between Aer Lingus and the Irish Government. The three directors appointed by the Government have been publicly opposed to Ryanair’s involvement with Aer Lingus.

#### **(b) Lack of Representation on Aer Lingus’ Board Severely Limits Ryanair’s Ability to Influence the Company’s Behaviour**

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<sup>16</sup> See Article 93. Articles of Association are attached as [Annex Removed].

29. Because Ryanair is not able to appoint a director to the Aer Lingus Board, it has no ability to influence the behaviour of Aer Lingus. As is typically the case with Irish companies, Aer Lingus' shareholders have little or no involvement in the day-to-day management of the company as they have delegated the management of Aer Lingus to the Board, with only certain matters reserved to the shareholders under Irish law. More specifically, Aer Lingus' Articles provide that "*the Company shall be managed by the Directors who may ... exercise all the powers of the Company as are not by [legislation] or by these Articles required to be done or exercised by the Company in general meeting*".<sup>17</sup> The Articles facilitate further delegation by allowing the Directors to delegate "*any of their powers*" to a managing director, other executive directors, or a Board committee.<sup>18</sup> The Aer Lingus Board has chosen to delegate its powers in this manner by delegating responsibility for the management of the company to the executive management and to Board committees.<sup>19</sup>
30. The Irish High Court recently underscored the limitations that such a structure imposes on the ability of Ryanair to influence Aer Lingus. Ryanair attempted to table two resolutions at Aer Lingus' 2011 Annual General Meeting ("AGM"). The Aer Lingus Board refused to table the resolutions and this decision was upheld by the Irish High Court.<sup>20</sup> The Court noted that "*the division of powers between the board of directors and the company in general meeting depended, in the case of registered companies, entirely on the construction of the Articles of Association, and that, where powers had been vested in the board, the general meeting could not interfere with their exercise*".<sup>21</sup> According to the Court, Ryanair's proposed resolutions concerned two matters which fell within the exclusive competence of the directors: the declaration of a dividend and payments to the company's pension scheme. By the Articles of Association, the Board had been granted exclusive decision-making power for those matters. Therefore, it was not permissible for Ryanair even to seek to invite other shareholders to restrict or fetter those exclusive powers by tabling resolutions for consideration at the AGM.

### **3.3 Ryanair Has Not Been Able to Successfully Oppose any Ordinary Resolution and There is No Realistic Prospect of it Being Able To Do So**

31. Since Ryanair has no representation on the Aer Lingus board, the only way that it might be able to influence Aer Lingus is through votes at shareholders' meetings. However, as discussed in this section dealing with ordinary resolutions and the next section dealing with special resolutions, Ryanair's rights as a minority shareholder are limited and fall well short of any material influence.

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<sup>17</sup> Article 84 (emphasis added).

<sup>18</sup> Article 85.

<sup>19</sup> Aer Lingus' Annual Report 2010, page 28.

<sup>20</sup> Ryanair Limited v Aer Lingus PLC, Judgment of the Irish High Court, 15 Apr. 2011 (McGovern J), not yet reported, transcript attached as[Annex Removed].

<sup>21</sup> See Ryanair Limited v Aer Lingus PLC, ¶18.

**(a) Ryanair Cannot Block Ordinary Resolutions on Its Own**

32. The great majority of matters reserved to shareholders only require the passing of an ordinary resolution, which requires a simple majority of the shares voting at the shareholders' meeting. As a minority shareholder with a stake of 29.8%, Ryanair has over five years not been able to pass an ordinary resolution (which would require more than 50% of the votes cast) or successfully oppose the passage of an ordinary resolution (which would require at least 50% of the votes cast) because it has never been able to muster the requisite percentage of voting shares.
33. So far as Ryanair is aware, average participation in Aer Lingus' general meetings is 76.2% (i.e., total votes cast as a percentage of total issued share capital). This means that on average Ryanair has 39% of the votes cast and is therefore well short of the amount required to pass or block an ordinary resolution.<sup>22</sup> Aer Lingus' voting record available to Ryanair is provided in [Annex Removed]. Ryanair's information on historic voting records is incomplete because Aer Lingus refused to make detailed voting records available to Ryanair.
34. Ryanair does not have any special voting or veto rights that could increase Ryanair's influence with respect to an ordinary resolution. Furthermore, there is no shareholders agreement between Ryanair and Aer Lingus, nor is there any other contractual relationship that would enable Ryanair to block an ordinary resolution.

**(b) Other Large Shareholders Are Opposed to Ryanair**

35. In addition, Ryanair has no support from, or influence over, the other shareholders in Aer Lingus (principally the Irish Government, trade unions and Denis O'Brien, who between them control over 40% of Aer Lingus shares), which makes it impossible for Ryanair to form alliances or coalitions for voting purposes. (This is in marked contrast to the position of BSkyB in respect of its shareholding in ITV.) [CONFIDENTIAL]<sup>23</sup>
36. Aer Lingus' second largest shareholder, the **Irish Government** (25.1% stake) has a special relationship with the company and is firmly opposed to Ryanair's involvement in Aer Lingus:
- There is a special relationship between the Irish Government and Aer Lingus. In its Annual Report for 2010, Aer Lingus stated expressly that "*the government of Ireland is in a position to exercise significant influence over it*".<sup>24</sup> The Board is composed of the appointees of the Irish Government, trade unions and Denis O'Brien. There is an established track record of the Irish Government offering strong support for the Board's strategic decisions. In addition, the Irish

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<sup>22</sup> [CONFIDENTIAL]

<sup>23</sup> [CONFIDENTIAL]

<sup>24</sup> Aer Lingus Annual Report 2010, at 88.

Government has itself repeatedly exercised influence over Aer Lingus' commercial strategy.<sup>25</sup>

- The Government is strongly opposed to Ryanair exercising influence over Aer Lingus. It has rejected two Ryanair bids for Aer Lingus in 2006 and 2008 and has clearly stated its “two-airline” policy, according to which there should be two airlines operating out of Ireland. This policy was first formulated at the time of Aer Lingus' IPO and the Government has repeatedly reiterated this approach.<sup>26</sup>
37. The company's third largest shareholder, **Denis O'Brien** (3.3% stake), is also hostile towards Ryanair's investment in Aer Lingus. Mr O'Brien initially purchased a stake in Aer Lingus in order to frustrate Ryanair's 2006 bid, which he described as a “*disaster*”.<sup>27</sup> In May 2009, Leslie Buckley, a long-standing business partner of Mr O'Brien was appointed a non-executive director on Aer Lingus' Board. It is noteworthy that Mr Buckley was appointed by the Irish Government as one of its three directors. As a result, Mr O'Brien is likely to exercise his voting rights in concert with the Government, given that they have positioned a common ally on the company's Board.
38. Another important shareholder contingent to be considered in the context of ordinary resolutions are the **ESOT's beneficiaries**. Formerly, the ESOT held a 12.5% shareholding in Aer Lingus as a single block. On 22 December 2010, the shareholding was dispersed when the ESOT transferred its shares to the individual beneficiaries of the trust. Although this division means that the shares are no longer voted as a single block, the division is of little significance in practice. [CONFIDENTIAL] Despite the disbandment of the ESOT, Mr Begg was put forward for election to the board at the 2011 AGM. Mr Begg is a General Secretary of the Irish Congress of Trade Unions and acts as a liaison between the Board and ESOT's former beneficiaries (Aer Lingus' unionised employees).

### **3.4 Ryanair's Power to Block a Special Resolution Does Not Confer Material Influence**

39. Ryanair's minority shareholding of 29.8% allows it only to block the adoption of special resolutions. However, this ability does not give Ryanair material influence over Aer Lingus. An exhaustive list of all matters that require approval of the shareholders by means of a special resolution under Irish company law is provided in [Annex Removed]. These matters relate to exceptional events in the company's life. For example, a special resolution is required to modify the company's fundamental

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<sup>25</sup> For example, the Transport Minister asked Aer Lingus to take into account government aviation policy when making the decision in 2009 whether to suspend its Shannon to New York route; as a result, Aer Lingus changed its approach to that issue. See “Shannon-JFK Route ‘Saved’ After Minister's Letter”, IRISH EXAMINER, 23 July 2009, attached as [Annex Removed].

<sup>26</sup> See “Government Would Consider Selling Its Stake in Aer Lingus, Says Minister”, THE IRISH TIMES, 21 Apr. 2011 (Leo Varadkar, Minister for Transport, Tourism and Sport, “*was determined there would be two significant airlines operating out of Ireland*”), attached as [Annex Removed].

<sup>27</sup> See “Aer Lingus: O'Brien €43m Bid to Stop O'Leary”, INDEPENDENT, 18 Oct. 2006 attached as [Annex Removed].

characteristics (name, object, Articles, corporate form); to modify the company's share capital and shareholders' rights; to approve certain exceptional transactions (e.g., purchase of the company's own shares); to modify directors' rights and liabilities; to organise the liquidation and winding-up of the company; and to approve transactions with "connected persons". Ryanair's ability to block special resolutions relating to these matters does not enable Ryanair materially to influence Aer Lingus' policy because these matters do not impact on Aer Lingus' policy relevant to its behaviour in the marketplace. This is demonstrated below with regard to the matters identified by the Competition Commission in the *BSkyB/ITV* case.

40. In *BSkyB/ITV*, the Competition Commission placed weight on the ability of BSKyB to block a waiver of pre-emption rights in finding material influence. This section (i) describes the position in Irish law on the issuing of new equity; (ii) discusses Aer Lingus' attempts to pass resolutions on this topic and Ryanair's response; and (iii) explains why Ryanair's ability to block a special resolution calling for a waiver of pre-emption rights does not enable Ryanair materially to influence Aer Lingus' policy. We also discuss in a separate sub-section the impact of Ryanair's voting rights on Aer Lingus' ability to purchase aircraft.

**(a) Irish Law on Issuing of New Equity**

41. Section 20 of the Companies (Amendment) Act, 1983 provides that "*the directors of a company shall not exercise any power of the company to allot relevant securities, unless the directors are...authorised to do so*". This authority may be provided for in the company's Articles of Association, but in the case of Aer Lingus and most, if not all, publicly listed Irish companies, is not.
42. The other manner in which the directors' authority to allot may be granted is by the company's shareholders at a general meeting. This requires the passing of an ordinary resolution. Any authority may be granted only for a maximum of five years. As discussed further below, this authority has been sought annually by Aer Lingus and granted with the full support of Ryanair.
43. Under the Companies (Amendment) Act 1983, a company may not allot equity securities to a third party without first offering them *pro rata* on the same or more favourable terms to the company's existing shareholders. These **pre-emption rights** are capable of being disapplied by an express provision in a company's Articles of Association. Ryanair believes that no listed Irish public company has such a provision in its Articles of Association. This is likely to be because investors would be loath to invest in a company if their holding could be arbitrarily diluted, and the value of their stake reduced, by the issuing of new shares to a third party.
44. Should a company not choose to disapply pre-emption rights in its Articles of Association, it can seek a special resolution temporarily to disapply them in the specific terms of the resolution. However, the waiver of pre-emption rights is generally deemed to run contrary to the shareholders' rights. In particular, the Irish Association of Investment Managers ("**IAIM**"), the equivalent to the Association of British Insurers ("**ABI**"), in its guidelines on the topic, states: "*The principles of pre-emption laid down in the Companies Act are an important protection of the interests of IAIM members both large and small. The IAIM believe that the fairest and most appropriate course of any company wishing to raise additional equity capital is to*

*offer the shares by way of rights pro rata to [those] of existing shareholders. In this way all shareholders have the choice of subscribing new capital or selling the nil paid rights in the market”.*<sup>28</sup>

**(b) Aer Lingus’ Resolutions on Issuing New Shares**

45. The directors of Aer Lingus have been authorised by the shareholders – fully supported by Ryanair – to issue new shares. This authorisation is for up to an aggregate nominal amount of €8,811,661.45 (176,233,229 shares) representing approximately 33% of the nominal value of the issued share capital of the Company. At Aer Lingus’ current share price of approximately €0.58 per share, this means that the Aer Lingus directors are currently authorised to raise up to €102.2 million via the issue of new shares. Any equity capital raising is likely to be at a discount to the then prevailing share price, which would reduce the sum raised. The Aer Lingus board capped their authority at 33%, as institutional shareholders would be unlikely to approve a broader authority in line with the ABI guidance on the topic.
46. If the Aer Lingus board wish to extend this authority at their 2012 AGM, only an ordinary resolution will be required. The authorised share capital of Aer Lingus is €45,000,000 divided into 900,000,000 ordinary shares. The issued share capital (according to its last published annual report) is €6,702,004.50 divided into 534,040,090 ordinary shares. Therefore, assuming Aer Lingus received the support of shareholders by way of ordinary resolution (something which Ryanair could not successfully oppose), it could raise up to €12 million based on its current share price via the issue of new shares before it would need to increase its authorised share capital. In any event, an ordinary resolution is all that would be required to increase the authorised share capital.
47. Each year since its first AGM as a plc in June 2007, Aer Lingus has requested a waiver of pre-emption rights, but all of the special resolutions that have been tabled have been limited to issuing 5% of the currently issued equity share capital. This limitation to 5% is consistent with the statement on Shareholders’ Pre-emption Rights that was agreed between the IAIM and the Irish Insurance Federation. This statement provides that members will only approve a resolution for annual disapplication, where and only where “*the individual or combined issues do not exceed the greater of IR£1m or 5% of the issued equity share capital at the time such general authority is sought from their members*”.<sup>29</sup> Had such resolution been passed, it would have enabled Aer Lingus to raise up to €15.49 million (based on the current market value of Aer Lingus’ stock). Ryanair has blocked all pre-emption waiver resolutions in order to prevent its investment in Aer Lingus being arbitrarily diluted. However, Ryanair has simultaneously and consistently voted in favour of granting the directors of Aer Lingus the power to allot new shares, which in fact assists Aer Lingus’ ability to raise new capital quickly since Ryanair is clearly willing to subscribe for its share of any such fund raising.

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<sup>28</sup> See <http://www.iaim.ie/default.asp?nc=666&id=15>

<sup>29</sup> See <http://www.iaim.ie/default.asp?nc=666&id=15>

(c) **Aer Lingus' Ability to Raise Funding Is Not Affected by Ryanair's Vote**

48. In *BSkyB/ITV*, the Competition Commission placed reliance, in finding material influence, on pre-emption rights: “[t]he ability to block a waiver of pre-emption rights may be particularly important if the company is looking to raise funds **quickly** to finance a strategic acquisition for example”.<sup>30</sup>
49. This concern about raising funds *quickly* is inapplicable to the present case as it would require evidence that *all* of the following five conditions were met, namely that Aer Lingus:
- (i) might seek to make a major strategic acquisition (or other large capital investment, such as purchasing large numbers of aircraft) as part of its commercial strategy; *and*
  - (ii) could not use its own gross cash to fund the acquisition (or investment) in whole or in part; *and*
  - (iii) could not put in place a banking facility or aircraft leases or issue bonds to fund the acquisition or investment in whole or in part; *and*
  - (iv) would need the €15.49 million that Aer Lingus could have raised had its special resolutions been passed in order to finance the acquisition or investment; *and*
  - (v) would be able to raise equity finance more quickly if rights of pre-emption were waived *and* would need to raise such finance at that greater speed in order to implement its commercial strategy.
50. Any claims that these conditions are met fall firmly within the category of “*fanciful*” (see ¶15 above). In the remainder of the section we will demonstrate that these conditions are not met with respect to a potential large strategic acquisition. In the next sub-section we will show that they are also not met with regard to a large capital investment, such as buying new aircraft.

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<sup>30</sup> *BSkyB/ITV*, ¶3.41 (emphasis added).



51. **First, it is unlikely that Aer Lingus would seek to make a large strategic acquisition.** Aer Lingus is downsizing its operations and has not sought to make any strategic acquisitions in the past five years. According to its most recent Annual Report, in 2010, Aer Lingus reduced its long haul capacity by 24.1% and cut its capacity on short haul routes by 7.8%. The company plans to sell an A330 long haul aircraft in 2011 and has deferred deliveries of any additional long haul A330s until the period 2015-2018. Aer Lingus management informed its shareholders that “*capacity development for 2011 will be flat*” and that “*growth will remain challenging for Aer Lingus for at least the short term*”.<sup>31</sup> A further example of downsizing at Aer Lingus is the company’s intention to remove itself from its current head office building, partly because the building is “*too large for the Group’s requirements following the ‘Greenfield’ cost reduction programme*”.<sup>32</sup>
52. In its Interim Management Statement published on 5 May 2011, Aer Lingus’ CEO, Christoph Mueller, stated: “*we are assessing whether the Greenfield cost reduction programme is sufficient to protect profitability for the future or whether further measures are required*”. A large strategic acquisition would be at odds with an announced strategy of focusing carefully on cost control, and listed companies rarely frustrate their investors by saying that they will run the business in one way and then doing something quite different. Any claims to the contrary fall firmly within the category of “*fanciful*”.
53. **Second, Aer Lingus has gross cash of €25.1 million.** Even if Aer Lingus were to seek to make a large strategic acquisition, its strong cash position means that it is very unlikely to need to raise funds by issuing shares. Aer Lingus reported a gross cash figure of €885 million in 2010, which had risen to €25.1 million on 31 March 2011.<sup>33</sup> Whilst Aer Lingus has finance lease obligations totalling €35 million, only €9 million of those obligations fall due in the next two years.<sup>34</sup> This means that Aer Lingus could fund from its own deposits, cash and cash equivalents an acquisition of €90 million (€25 million minus €35 million) whilst fully providing for its finance lease obligations; and it could fund from its own deposits, cash and cash equivalents an acquisition of €36 million, whilst providing for finance lease obligations falling due in the next two years (leaving later obligations to be funded from future cash flow, new bank borrowings, disposals, or even the issue of new equity through a pre-emption procedure). Aer Lingus’ current market capitalisation (at a share price of €0.58) is around €10 million. It follows that Aer Lingus could fund an acquisition that is larger than its total market capitalisation whilst maintaining cash reserves sufficient to cover *all* of its future finance lease obligations; and it could fund an acquisition that is more than twice its own market capitalisation whilst maintaining cash reserves sufficient to cover all the obligations under its finance lease obligations for the next two years. Companies rarely make acquisitions of targets that are larger than themselves (“reverse takeovers”).

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<sup>31</sup> Aer Lingus Annual Report 2010, at 5, 8.

<sup>32</sup> Aer Lingus Annual Report 2010, at 8.

<sup>33</sup> Interim Management Statement, 5 May 2011.

<sup>34</sup> Aer Lingus Annual Report 2010, at 78-79.

54. There is also no reason to believe that, following the new management's recent restoration of profitability, Aer Lingus' strong balance sheet will weaken in the foreseeable future. Aer Lingus' Chairman recently stated that "*Aer Lingus has one of the strongest airline balance sheets in Europe*".<sup>35</sup> In its Interim Management Statement published on 5 May 2011, Aer Lingus noted that its gross cash balance had increased to €25.1 million as at 31 March 2011 and explained that it did not intend to pay a dividend because "*the Board believes that there is greater scope to sustain shareholder value through balance sheet strength*". As noted above, Aer Lingus expects to make a profit in 2011, despite the exceptional challenges posed by the depressed Irish economy, increasing costs (in particular oil and airport charges) and industrial action at the start of the year.
55. **Third, Aer Lingus can easily obtain debt financing.** Although Aer Lingus does not currently have a debt facility – which is scarcely surprising given its large gross cash position – it could obtain debt finance, whether through a credit facility or the issuing of bonds. This is evidenced by the fact that it has been granted aircraft lease financing, implying that lenders have judged that Aer Lingus is a good credit risk. Moreover, Aer Lingus was profitable in financial year 2010 and expects to be profitable in financial year 2011, despite the exceptional challenges noted above.
56. **Fourth, the special resolution opposed by Ryanair concerned only a limited amount.** As explained above, the special resolutions tabled by Aer Lingus seeking waiver of pre-emption rights would, if passed, have enabled Aer Lingus to raise, at most €15.49 million (based on the current market value of Aer Lingus' stock). This sum is trivial compared with Aer Lingus' gross cash of €25.1 million. Aer Lingus' ability to implement its commercial policy cannot possibly depend on the ability to raise *quickly through the issue of new equity* less than 2% of its gross cash reserves. Any claim to the contrary is purely fanciful.
57. **Finally, the speed with which Aer Lingus can raise equity finance is not compromised.** There is no evidence that Aer Lingus would be able to raise equity finance more quickly if rights of pre-emption were waived *and* would need to raise such finance at that greater speed in order to implement its commercial strategy. In practice, an offer to the existing shareholders is essentially a rights issue (or perhaps an open offer). Such an offer must state a period of not less than 21 days during which the offer may be accepted and the offer cannot be withdrawn before the end of that period. Whilst the minimum statutory period for a rights issue is 21 days, this time only begins to run from the date the offer is made to the existing shareholders. In practical terms, a circular and prospectus would also need to be issued with the offer containing the background to and reasons for the rights issue and details of its terms and conditions. An underwriting agreement would also typically be entered into and an application for listing and admission to trading would need to be made. This would add considerably to the 21 day period and may result in at least a six to eight week process.

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<sup>35</sup> Aer Lingus Annual Report 2010, at 3.

58. Where Aer Lingus could place shares directly with an investor (if pre-emption rights have been waived), the timetable would not need to include this 21 day period, and so could be shorter. However, any investment would still take a number of weeks to document and agree. Therefore, the timing difference, if any, between allotting with or without pre-emption rights in place would be relatively small. Ryanair is willing to subscribe for its shares under any offer to existing shareholders, which would assist fundraising.
59. Moreover, any large strategic acquisition by Aer Lingus would likely require the approval of its shareholders, depending on the application of the class tests in the Irish Listing Rules (see below at ¶71). If shareholder approval were required for a transaction, the Aer Lingus Board would be required to convene a meeting of the shareholders, complying with the applicable notice periods. This procedure would not be any faster than the applicable procedure for compliance with pre-emption rights. Thus, in pursuing a major strategic acquisition, Aer Lingus would not gain any advantage in terms of speed, by offering newly-issued shares to third parties, instead of offering the shares to its own shareholders.
60. It follows from the above considerations that the current position of Aer Lingus is not comparable to ITV's position at the time of the *BSkyB/ITV* decision. ITV's ability to pursue a strategic acquisition was dependent upon its ability to obtain equity funding quickly,<sup>36</sup> whereas Aer Lingus is not so constrained.

**(d) Aer Lingus' Ability to Purchase Aircraft**

61. The conditions resulting from *BSkyB/ITV* are also not met with regard to a large capital investment, such as buying new aircraft. In other words, Ryanair's ability to block a special resolution calling for a waiver of pre-emption rights does not affect Aer Lingus' ability to place multi-billion dollar aircraft orders. It is clear that finance leases are readily available to Aer Lingus and that it is able to upgrade its fleet by relying on finance leases, as would be common in the aviation industry. In 2010, Aer Lingus paid for the delivery of a new Airbus A330 with lease financing of €8.5 million. In 2011, Aer Lingus will incur capital expenditure for aircraft purchases of €103 million, all of which will be financed by new leases. Looking forward, Aer Lingus expects to incur capital expenditure of €639 million for aircraft purchases between 2012 and 2016 and has ordered nine Airbus A350 long-haul aircraft, whose deliveries have been postponed to between 2015 and 2018, or later.<sup>37</sup>
62. The fact that Aer Lingus' shareholders enjoy pre-emption rights could not prevent – and has not prevented – Aer Lingus from entering these transactions with Airbus, nor does it have any impact upon Aer Lingus' capital expenditure commitments. In April 2008, Aer Lingus tabled an ordinary resolution (not a special resolution) seeking approval for a US\$2.4 billion transaction with Airbus for the purchase of 12 aircraft, which was passed despite opposition from Ryanair (this resolution is discussed in Section 4.2(b)below).

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<sup>36</sup> *BSkyB/ITV*, ¶3.43

<sup>37</sup> Aer Lingus Annual Report 2010, at 12.

63. If, notwithstanding its clear strategy of reducing aircraft capacity (see ¶51 above), Aer Lingus wished to *expand* its fleet beyond its existing commitments to buy new aircraft *and* was unable to do so via finance leases, it could do so either by using its surplus cash, or by bank borrowing, or issuing bonds (which were discussed above) or through the issuance of shares. As to the latter, Ryanair has no power to block the issuance of new shares. Its power is limited to blocking the issuance of new shares *unless* they are first offered to all shareholders. Any investment by Aer Lingus in new aircraft will involve very long lead times, as evidenced by the *eight year* time frame discussed in Aer Lingus' Annual Report 2010 (page 14), providing plenty of opportunity for Aer Lingus to invite all of its shareholders to subscribe for new shares in accordance with the pre-emption rights accorded to minority shareholders under Irish law.
64. Finally, whilst Ryanair appreciates that the test for material influence is an objective one, it emphasises that the reason it has objected to the waiver of pre-emption rights has nothing to do with preventing Aer Lingus from raising equity financing for strategic purposes. Ryanair has objected because it otherwise risks its shareholding being diluted.

### **3.5 There is No Agreement for the Provision of Consulting Services Between Ryanair and Aer Lingus**

65. Ryanair does not have any agreements with Aer Lingus regarding the provision of consulting services. Thus, Ryanair could not influence Aer Lingus indirectly by, for example, proposing new strategies or business models. It also reduces the relevance of the “*the status and expertise of the acquirer*” factor under ¶3.2.10 of the Merger Guidelines.<sup>38</sup>

### **3.6 Ryanair's Ability to Block a Scheme of Arrangement or a “Squeeze Out” Does Not Give Rise to Material Influence**

66. As Ryanair's shareholding exceeds 25%, Ryanair has the ability to block a scheme of arrangement in the context of a possible takeover of Aer Lingus. However, this ability does not enable Ryanair materially to influence Aer Lingus' policy because (i) Aer Lingus is well capitalised and has pursued its business strategy over the past five years without being taken over; (ii) Ryanair is not *per se* opposed to a potential takeover of Aer Lingus and has expressed its readiness to sell its stake if the conditions are right; and (iii) a special resolution is not required for a more traditional takeover by way of general offer.
67. **First**, Aer Lingus is well capitalised and able to implement its commercial strategy without needing to be taken over. In the five years since its IPO, it has not put itself up for sale or suggested that a takeover would be necessary for, or helpful to the implementation of, its commercial strategy. Ryanair's stake therefore has no impact on policy relevant to Aer Lingus' behaviour in the market place. Aer Lingus' position is in marked contrast to ITV's, as a takeover of ITV might have enabled ITV to implement certain of its strategic options in particular by strengthening its balance

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sheet. In the case of Aer Lingus, the “market” for corporate control has no impact on the company’s strategic direction, with the consequence that an ability to block a scheme of arrangement does not confer material influence.

68. **Second**, Ryanair is not *per se* opposed to an eventual acquisition of Aer Lingus by a third party. Ryanair’s approach to the future of Aer Lingus and of Ryanair’s minority stake is pragmatic and realistic. Whilst Ryanair continues to believe that a merger between the two companies would generate substantial efficiency gains and consumer benefits, it is of course aware of the Irish Government’s opposition to this project. As a result, Ryanair’s CEO Michael O’Leary repeatedly stated that “*he would have no problem selling Ryanair’s stake to a rival interested in bidding for Aer Lingus in its entirety*”.<sup>39</sup> In a recent interview, Mr O’Leary reiterated that “*we’d consider any offer for our stake on its merits*”.<sup>40</sup>
69. **Third**, Moreover, Ryanair has no power to block a takeover structured as a general offer: at most, its rights affect the structure of any takeover, and not the ability of a bidder to acquire control. A scheme of arrangement is only one way of giving effect to a merger. A potential purchaser could proceed by making a general offer for Aer Lingus and Ryanair could not impede this procedure.
70. Ryanair also has the ability to block a “squeeze out” in the context of a takeover of Aer Lingus. However, an acquisition of control does not require a “squeeze out” of minority shareholders. Moreover, any shareholder having 10% or more of the voting rights in Aer Lingus has the ability to block a “squeeze out”. As a 10% shareholding falls well below the level of shareholding that routinely gives rise to material influence, this indicates that an ability to block a squeeze out is not sufficient in itself to give rise to material influence.
71. For other situations involving a merger, code share or alliance (i.e. where shares in Aer Lingus are not being purchased) shareholder approval by means of an ordinary resolution would be required in certain circumstances, by virtue of the Listing Rules of the Irish Stock Exchange.<sup>41</sup> If the transaction could be classified as a “Class 1 Transaction”, a “related party transaction” or a “reverse takeover,” then shareholder approval would be required. A transaction is a “Class 1 transaction” where, under the gross assets test, the profits test, the consideration test, or the gross capital test, any percentage ratio exceeds 25%.<sup>42</sup> A “related party transaction” is a transaction between the company and a director or substantial shareholder. A reverse takeover arises where under the gross assets test, the profits test, the consideration test, or the gross capital test, any percentage ratio exceeds 100%.<sup>43</sup> In any of these circumstances, Aer

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<sup>39</sup> See “O’Leary Open to Selling Aer Lingus Stake to Rival”, IRISH INDEPENDENT, 20 Oct. 2010, attached as [Annex Removed].

<sup>40</sup> See “A Stronger Aer Lingus Says It Is Ready to Fly Solo”, NY TIMES, 27 May 2011, attached as [Annex Removed].

<sup>41</sup> See Chapter 7 of the Listing Rules of ISE, available at <http://www.ise.ie/Regulation/Company-Listings/Listing-Rules/Listing-Rules1/Chapter-07-Significant-Transactions.pdf>.

<sup>42</sup> Listing Rules of ISE, ¶7.2.

<sup>43</sup> Listing Rules of ISE, ¶7.6.

Lingus would be required to pass an ordinary resolution in favour of the transaction. As mentioned previously, Ryanair does not have the ability to successfully oppose the passage of any ordinary resolution.

72. Aer Lingus also is not prevented from entering partnerships with other airlines. Aer Lingus has recently implemented a number of partnerships and alliances without any difficulty being caused by Ryanair's shareholding (and indeed without consulting its shareholders). For example, on 28 March 2010, Aer Arann began operating certain routes as franchisee for Aer Lingus. It also has entered into codeshare agreements with United Airlines, KLM, British Airways and JetBlue. Aer Lingus is reportedly currently considering whether to rejoin one of the international airline alliances. Ryanair's minority shareholding in Aer Lingus does not impact upon that assessment.

#### **4. The History of Ryanair's Actions as a Shareholder in Aer Lingus Evidences the Lack of Material Influence**

##### **4.1 Introduction**

73. In the preceding sections, we have explained why Ryanair's minority shareholding in Aer Lingus does not give it the ability to exercise any material influence over Aer Lingus. We now turn to an examination of the history of Ryanair's actions as a shareholder in Aer Lingus to demonstrate that, since acquiring a minority stake in Aer Lingus in 2006, Ryanair has been unable to influence in any way Aer Lingus' policy relevant to its behaviour in the marketplace. In *BSkyB/ITV*, the Competition Commission acknowledged that "*the absence of evidence of actual influence being exerted to date*" constituted a countervailing factor in the assessment of the existence of material influence.<sup>44</sup>
74. Before examining the five year history of Ryanair's minority shareholding in Aer Lingus, we would emphasise three important aspects of the present investigation. First, for over four years since June 2007, the exercise by Ryanair of its shareholder rights in Aer Lingus was unconstrained by any regulatory investigation or similar concerns. Second, Aer Lingus' allegations with regard to Ryanair's "interference" have in the past been proven wrong and fanciful (especially in the context of CFI litigation). Finally, Aer Lingus' allegations are regularly contradicted by the statements made publicly by the company's board and senior management.

##### **(a) Ryanair's Behaviour Was Unconstrained by any Regulatory Investigation**

75. Since the expiry of the four-month deadline following the European Commission's decision of 27 June 2007 prohibiting the acquisition of Aer Lingus by Ryanair ("**2007 Decision**"), Ryanair was operating under the belief that the OFT had decided not to (and indeed could not) investigate its minority shareholding in Aer Lingus. This

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<sup>44</sup> See *BSkyB/ITV*, ¶3.35.

belief was reinforced when Ryanair learned that in the summer of 2007, the Commission had confirmed that Member States were free to investigate Ryanair's minority stake and, further, when the President of the General Court confirmed this position in its Order in Case T-411/07 R. Therefore, Ryanair's behaviour as a minority shareholder in Aer Lingus was unconstrained by any concern as to how it could be perceived by the OFT in the context of an eventual merger investigation.

**(b) Aer Lingus' Allegations Have in the Past Been Proven Fanciful**

76. Aer Lingus made multiple allegations in prior proceedings, notably in the context of its application to the President of the CFI for the imposition of preliminary measures in Case T-411/07R regarding the influence of Ryanair. These allegations related to a range of matters, including Aer Lingus' transfer to Terminal 2 at Dublin airport, Aer Lingus' purchase of new Airbus aircraft and Aer Lingus' redevelopment of its Head Office at Dublin airport, all of which are discussed in further detail below. By Order of 18 March 2008, the President correctly dismissed these allegations on the basis that they were merely speculative and, since then, the falsity of each of these allegations has been proven beyond doubt.<sup>45</sup> The main allegations made by Aer Lingus during the CFI proceedings were the following:

- Aer Lingus argued that Terminal 2 (“T2”) at Dublin airport was essential to its expansion plans and feared that Ryanair would “*employ its shareholding in Aer Lingus to further its campaign against Dublin Airport’s Terminal 2*”.<sup>46</sup> Such fears were proven groundless, as Aer Lingus now uses T2 as its base of operations. Ryanair's shareholding in Aer Lingus did not impede or prevent this transition in any way (it is noteworthy that in May 2011 Aer Lingus' Chief Executive described Dublin Airport's T2-related fee increases as “*insane*”).<sup>47</sup>
- Aer Lingus argued that Ryanair might use its shareholding to oppose the decision of Aer Lingus management to order new Airbus aircraft for delivery in the period 2009-2016.<sup>48</sup> Although Ryanair believed that it was unwise to make a €2.4 billion aircraft order at the peak of the cycle in 2008, when prices were at an all time high, Ryanair lacked the ability to prevent the transaction from being consummated (see below at Section 4.2(b)). It is noteworthy that within three months of this EGM approval Aer Lingus announced plans to cut long haul capacity sharply and defer these aircraft deliveries, ultimately to the period 2015-2018.<sup>49</sup>

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<sup>45</sup> See Case T-411/07 R *Aer Lingus Group v Commission* (Order of 18 March 2008 on interim measures) [2008] ECR II-411, ¶¶122-129 (“CFI Order”).

<sup>46</sup> See CFI Order, ¶¶112, 129.

<sup>47</sup> See “Mueller to Push for Cut in ‘Insane’ Passenger Charges”, INDEPENDENT, 7 May 2011, attached as [Annex Removed].

<sup>48</sup> See CFI Order, ¶¶112-113, 127-128.

<sup>49</sup> See “Aer Lingus Cuts Capacity as It Braces for Losses”, FIN. TIMES, 19 June 2008, attached as [Annex Removed].

- Aer Lingus also contended that Ryanair could interfere with a redevelopment of the Aer Lingus head office site at Dublin airport.<sup>50</sup> Again, this was unsubstantiated speculation on the part of Aer Lingus. In fact, Aer Lingus decided not to redevelop their Head Office and instead relocated to Hangar 6.

77. In light of the multiple erroneous claims advanced by Aer Lingus in prior proceedings, it will be important for the OFT to subject to detailed scrutiny any hypothetical scenarios proposed by Aer Lingus in the present proceedings.

**(c) Aer Lingus' Allegations Are Contradicted by its Top Management**

78. Whilst the “material influence” test is an objective one, it is noteworthy that Ryanair’s case is repeatedly corroborated by statements by Aer Lingus’ own management. In particular, immediately following the 2007 Decision, Dermot Mannion, then CEO of Aer Lingus, stated publicly that Ryanair’s shareholding would not cause difficulties for the management of Aer Lingus. The *International Herald Tribune* reported the following:

*“Mannion said he did not expect Ryanair’s stake to represent a significant impediment to managing the company. ‘There are almost no circumstances that I can conceive’ that would require Aer Lingus management to obtain approval from 75 percent or more of its shareholders, he said”.*<sup>51</sup>

79. In a radio interview held on the same day that the Commission adopted the 2007 Decision, Mr Mannion referred to the planned €2.4 billion order of Airbus aircraft by Aer Lingus to illustrate that Ryanair’s shareholding would not allow Ryanair to interfere with Aer Lingus business decisions. Mr Mannion stated that Aer Lingus would need to have the purchase decision “*approved by an emergency general meeting of the company, but we need a majority of only fifty percent and one share to have that approved. Ryanair cannot block or interfere with that transaction*”.<sup>52</sup>

80. Mr Christoph Mueller, Aer Lingus’ CEO since October 2009, has made similar statements. For example, in a recent interview, Mr Mueller described Ryanair as “*very professional shareholders*”. According to Mr Mueller, “*we were able to establish a very professional environment in which we talk to each other*”.<sup>53</sup>

**4.2 A Review of the Long History of Ryanair’s Stake Reveals No Evidence of Material Influence**

81. Because Ryanair is not represented on the Aer Lingus Board, the only means for it to contribute to the company’s corporate governance is through (i) shareholders’

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<sup>50</sup> See CFI Order, ¶111.

<sup>51</sup> “European Commission blocks Ryanair’s bid for Aer Lingus”, INT’L HERALD TRIBUNE, 27 June 2007, attached as [Annex Removed].

<sup>52</sup> “The Right Hook - E.C. Decision on Ryanair Proposed Take-Over of Aer Lingus”, NEWSTALK 106.108 F.M., George Hook, 27 June 2007. A transcript is attached as [Annex Removed].

<sup>53</sup> See “Green Returns”, AIRLINE BUSINESS, July 2011, attached as [Annex Removed].



meetings and (ii) informal advice to the company’s Board and management. These means do not offer Ryanair the ability materially to influence Aer Lingus’ policy.

82. The table below summarises Ryanair’s voting at Aer Lingus’ shareholders’ meetings since 2007. Detailed voting records (based on incomplete information available to Ryanair) are attached as [Annex Removed]. Aer Lingus refused to make detailed voting records available to Ryanair.

<b>AGM/EGM</b>	<b>Resolutions supported by Ryanair</b>	<b>Resolutions opposed by Ryanair</b>	<b>Comments</b>
AGM 2007	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
EGM 2008	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
AGM 2008	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
AGM 2009	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
AGM 2010	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
AGM 2011	[CONFIDENTIAL]	[CONFIDENTIAL]	[CONFIDENTIAL]
TOTAL	[CONFIDENTIAL]	[CONFIDENTIAL]	

\* [CONFIDENTIAL]

83. As shown in the table above, Ryanair supported [CONFIDENTIAL]. It opposed [CONFIDENTIAL]

- [CONFIDENTIAL]
- [CONFIDENTIAL]
- [CONFIDENTIAL]

84. [CONFIDENTIAL]

85. In the remainder of this section, we review the history of Ryanair’s holding since 2007. We demonstrate that Aer Lingus’ management has systematically rejected Ryanair’s advice and suggestions and that there is no evidence of material influence having been exercised. We also refute the allegations made in Cadwalader’s letter to the OFT of 15 August 2011. Whilst some of the examples of “*interference*” listed by Cadwalader are irrelevant (e.g., Ryanair’s second bid for Aer Lingus), the remainder demonstrate that Ryanair has never exercised any influence over Aer Lingus’ policy. In addition to the explanations below, we provide a refutation of Cadwalader’s arguments in [Annex Removed].

86. Ryanair has reviewed its press releases issued between 27 June 2007 (Commission prohibition decision) and 30 September 2010 (OFT questionnaire) and identified 43 which relate to Aer Lingus. [Annex Removed] comprises a summary table together with this comprehensive set of press releases. As can be seen from the summary table, there are no instances arising from these press releases in which Aer Lingus changed its commercial strategy in response to suggestions from Ryanair. Many, but not all, of

the items discussed in the press releases are described in detail above; Ryanair believes that the remainder are self-explanatory, but is ready to provide further information should the Office require it.

**(a) Ryanair Was Unable to Prevent Aer Lingus' Closure of the Shannon-Heathrow Route (cf. ¶¶2-4 of Cadwalader's note)**

87. On 7 August 2007, Aer Lingus announced that it was setting up a new base at Belfast International Airport and that it would begin services between that airport and London Heathrow. In order to operate that new route, Aer Lingus announced its decision to transfer its Heathrow slots from Shannon to Belfast, thereby closing the Shannon-Heathrow route. Ryanair believed that this move would be damaging for the Shannon region. This was also originally the position of the Irish Government. Indeed, during the privatisation of Aer Lingus, the Government stated that it would not allow Aer Lingus to reduce its operations between Shannon and Heathrow.
88. On 13 August 2007, Ryanair requisitioned an EGM so that Aer Lingus shareholders could vote on the Board's decision to close the Shannon route and the planned services for Belfast.<sup>54</sup> Aer Lingus rejected this requisition.<sup>55</sup> On 4 September 2007, Ryanair made a further EGM requisition, proposing a resolution to preserve the Shannon-Heathrow services but it was again rejected by Aer Lingus.<sup>56</sup> Aer Lingus proceeded to close the Shannon-Heathrow route as planned.
89. In parallel, Ryanair learned that Aer Lingus had informed the Irish Minister for Transport of its decision to close the Shannon-Heathrow route earlier than it had informed the other shareholders. By informing one large shareholder (i.e., the Government) of its decision prior to informing other shareholders, Aer Lingus arguably breached EU securities regulation. On 21 August 2007, Ryanair wrote to the Irish Financial Services Regulatory Authority ("IFRSA") calling on it to conduct an investigation into the matter. Ryanair later sought confirmation from the IFRSA that it was investigating the complaint but the IFRSA refused to provide this confirmation. Ryanair therefore commenced a judicial review to compel the IFRSA to investigate its complaint and to make its findings public. On 10 July 2008, the Irish High Court dismissed Ryanair's application.<sup>57</sup>
90. It is clear from the above that (i) Ryanair failed to influence Aer Lingus' decision to abandon the Shannon-Heathrow route, (ii) Ryanair initiated the proceedings against IFRSA in order to protect its shareholders' rights and investigate a potential violation

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<sup>54</sup> See letter of 13 August 2007 from Ken O'Toole to the Aer Lingus Board of Directors, attached as [Annex Removed].

<sup>55</sup> See letter of 31 August 2007 from Laurence Gourley to Ken O'Toole, attached as [Annex Removed].

<sup>56</sup> See letter of 4 September 2007 from Jim Callaghan to the Aer Lingus Board and letter of 17 September 2007 from Laurence Gourley to Jim Callaghan, attached as [Annex Removed].

<sup>57</sup> *Ryanair Holdings Plc v Irish Financial Services Regulatory Authority and Aer Lingus Plc*, [2008] IEHC 231 (2008), attached as [Annex Removed].

of EU securities regulation, and (iii) these judicial proceedings could not in any manner influence Aer Lingus' policy.

**(b) Ryanair Was Unable to Prevent the Order of €2.4 Billion Airbus Aircraft (cf. ¶15 of Cadwalader's note)**

91. In April 2008, Aer Lingus sought to approve a \$2.4 billion order with Airbus for the purchase of twelve aircraft, which would be delivered between 2009 and 2016. Ryanair believed that the timing and the pricing of this order were not in the best interests of Aer Lingus' shareholders because the deal was negotiated during a peak time in the aircraft value cycle. Ryanair urged the Aer Lingus Board and management to cancel or renegotiate the order,<sup>58</sup> but Aer Lingus refused to do so.
92. On 10 April 2008, Aer Lingus held an EGM requesting that shareholders authorise the transaction by ordinary resolution. Ryanair duly voted against the proposal, but was not successful in blocking the resolution. The resolution was passed and the order with Airbus was approved. As things have turned out, Aer Lingus' fleet is now "*larger than we currently require*", and the company is deferring delivery of three aircraft that would otherwise be due for delivery in 2013 and 2014.<sup>59</sup>

**(c) Ryanair's Second Bid for Aer Lingus Has No Bearing on the Issue of Material Influence (cf. ¶7-9 of Cadwalader's note)**

93. In paragraphs 7-9 of its note of 15 August 2011, Cadwalader attempts to use Ryanair's second bid for Aer Lingus and related litigation as an example of "*interference*". This allegation is misconceived. A bid to acquire control cannot confer control or material influence unless and until it becomes successful. Nor can Ryanair's bid be interpreted as an "*interference*" which is part of a "*deliberate campaign of harassment*". Publicly listed companies take the risk that they will be the subject of an unwanted takeover bid. Ryanair's decision to mount such a bid was made in full compliance with the Irish Takeover rules.
94. In ¶¶7-9 of its note, Cadwalader mentions various specific proceedings relating to Ryanair's second bid. None of these proceedings has any relation to Aer Lingus' policy and to its behaviour in the marketplace:
- Proceedings against the Takeover Panel (¶7): on 15 January 2009, Ryanair applied to the Irish High Court for leave to seek judicial review of certain rulings and directions issued by the Irish Takeover Panel, which it believed to be unfair and contrary to the requirements of the Irish Takeover Panel Act 1997 and to certain other rules and principles. The proceedings settled on 18 May 2009 as Ryanair's offer for Aer Lingus lapsed, leaving these issues moot.
  - Aer Lingus' announcement regarding guidance during the takeover bid (¶8): on 22 December 2008, Aer Lingus issued a document to its shareholders outlining why it

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<sup>58</sup> Letter of 7 April 2008 from Jim Callaghan to the Aer Lingus Company Secretary, attached as [Annex Removed].

<sup>59</sup> Aer Lingus Annual Report, 2010, p. 12.

believed Ryanair's Offer should be rejected (the "**Defence Document**"). The Defence Document indicated that business for Aer Lingus was growing and that the airline expected to achieve profit in 2008. This statement contradicted the forecast made in Aer Lingus' interim management statement a month earlier (in which Aer Lingus guided an operating loss for the year). It was further proven wrong in March 2009 when Aer Lingus announced a full year loss after tax of €108 million for FY 2008. [CONFIDENTIAL].<sup>60</sup> Ryanair did not take further legal action in this regard.

- Ryanair's 2009 request for an EGM (¶9): on 6 January 2009, Ryanair requisitioned an EGM after learning that the employment agreements of Mr Dermot Mannion and Mr Sean Coyle, Aer Lingus' CEO and CFO had been modified and both had become entitled to claim very significant sums (€2.8 million in the case of Mr Mannion) from the company if they decided to resign following a change of control. These changes were introduced in response to Ryanair's second bid and seemed to Ryanair clearly to be an attempt to introduce unlawfully a "poison pill" defence against the bid. The changes were not made as part of the normal commercial course of recruiting, retaining and incentivising senior management so as to maximise the performance of the company. Ryanair naturally argued that this amendment violated both the Irish Takeover Rules and the Irish company law.<sup>61</sup> Any other bidder – whether or not it held a minority stake – would have done likewise. On 9 January 2009, following criticisms of these "failure" bonuses by Aer Lingus' other large shareholders (Irish Government and ESOT), Aer Lingus announced that, at the request of Mr Mannion and Mr Coyle, these "golden parachutes" had been removed from their employment agreements. The EGM requested by Ryanair did not take place.<sup>62</sup> There was therefore no vote on the issue.<sup>63</sup>

95. The matters above relate exclusively to Ryanair's takeover attempt and to the tactics employed by Aer Lingus' management to derail this attempt. They are irrelevant insofar as the question of Ryanair's material influence over Aer Lingus is concerned.

**(d) Ryanair Was Unable to Reverse the Trebling of the Remuneration of Aer Lingus Board Members' Fees (cf. ¶¶10-11 of Cadwalader's note)**

96. On 27 February 2009, Ryanair put forward three motions for considerations at Aer Lingus' next AGM. Ryanair proposed to reverse the increase in directors' fees and chairman's fees (from the €200,000 in 2006 to over €700,000 paid to them in 2008), and to stipulate that no further resignation bonuses ("golden parachutes") shall be agreed with directors or senior executives without the prior approval of the company's shareholders in General Meeting. Ryanair believed that this reversal of fee increases

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<sup>60</sup> [CONFIDENTIAL]

<sup>61</sup> See letter from Ryanair to Aer Lingus of 6 January 2009, attached as [Annex Removed].

<sup>62</sup> See Aer Lingus' press release of 9 Jan. 2009, attached as [Annex Removed].

<sup>63</sup> See "Four Aer Lingus chiefs had lucrative exit deals", IRISH TIMES, 16 Jan. 2009, attached as [Annex Removed].

was appropriate to lower Aer Lingus' costs and improve its profitability in the light of the losses reported by the airline in 2008. It also believed that "golden parachutes" violated Irish takeover regulation and company law.

97. Aer Lingus argued that the resolution regarding "golden parachutes" could only be voted at an EGM. However, it agreed to include the two motions regarding directors' and chairman's fees in the AGM's agenda.<sup>64</sup> Rather than voting on the resolutions themselves, Ryanair signed a proxy in favour of the Irish Minister for Transport for the specific purpose of voting on the two resolutions. Naturally, Ryanair urged the Minister to vote in favour of the resolutions.<sup>65</sup>
98. The Minister for Transport declined to vote on behalf of Ryanair.<sup>66</sup> Moreover, the Irish Government appointed the Chairman of Aer Lingus, Colm Barrington, as proxy to vote on behalf of the Government with respect to its shareholding in Aer Lingus and requested that Mr Barrington vote in favour of the Board's resolutions and against Ryanair's proposed resolutions.<sup>67</sup> Ryanair's proposed resolutions were defeated.

**(e) Ryanair Was Unable to End Free Flight Entitlements for Former Directors of Aer Lingus and Politicians**

99. By letter of 5 October 2009, Ryanair urged Aer Lingus to abolish its free flight entitlements for former Board members and various politicians. Ryanair believed that it was appropriate to abolish such concessions in the light of the €100 million losses reported by the airline in 2008 and cut unnecessary expenditure at a time when Aer Lingus employees were to be made redundant. Aer Lingus rejected this request, arguing that the flight concessions were defensible as a matter of "commercial policy". Ryanair strongly disagreed with the merits of the policy and continued to request that Aer Lingus eliminate the concessions in an effort to save costs.<sup>68</sup> Ultimately, Ryanair was unable to persuade Aer Lingus to change its policy on this expense.

**(f) The Hangar 6 Controversy Further Illustrates that Ryanair Has No Material Influence over Aer Lingus (cf. ¶12 of Cadwalader's note)**

100. In February 2009, SR Technics, a Swiss-based provider of MRO (maintenance, repair & overhaul) aircraft services announced that it was closing down its heavy maintenance operations at Dublin airport. Prior to the closure of its operations, SR Technics operated a facility at Dublin airport called Hangar 6. On 26 February 2009,

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<sup>64</sup> See letter of 14 May 2009 from Donal Moriarty to Ryanair, attached as [Annex Removed].

<sup>65</sup> Letter of 28 May 2009 from Michael O'Leary to Noel Dempsey, Minister for Transport, attached as [Annex Removed].

<sup>66</sup> Letters of 2 June 2009 and 4 June 2009 from Noel Dempsey, Minister for Transport to Michael O'Leary, attached as [Annex Removed].

<sup>67</sup> Letter of 4 June 2009 from Julie O'Neill (Secretary General, Dept. of Transport) to Colm Barrington. Letter of 4 June 2009 from Colm Barrington to Julie O'Neill (Secretary General, Dept. of Transport), attached as [Annex Removed].

<sup>68</sup> See correspondence between Michael O'Leary and Colm Barrington, attached as [Annex Removed].

Ryanair contacted the Minister for Enterprise, Trade and Employment with an offer to purchase the Hangar 6 facility in order to open its own MRO operation.<sup>69</sup> Ryanair believed that this investment would save up to 500 engineering jobs at Dublin Airport.

101. However, the Irish Government actively opposed Ryanair's offer and supported the Dublin Airport Authority ("DAA") resistance to it. In November or December 2009, the DAA agreed a lease for Hangar 6 with Aer Lingus (notwithstanding the fact that Aer Lingus had placed all its heavy maintenance in France). Ryanair challenged this decision in several letters sent to the Irish Government in February 2010. The Irish press wholeheartedly supported Ryanair in this controversy.<sup>70</sup>
102. On 24 February 2010, the Irish Parliament's Joint Committee on Transport held a debate regarding Hangar 6, in which Ryanair, Aer Lingus and the DAA representatives took part.<sup>71</sup> During this debate, Michael O'Leary indicated that Ryanair was willing to give the Government a proxy over its shares so that the Government could call Aer Lingus' EGM and decide on Aer Lingus' future presence at Hangar 6. This suggestion was supported by several members of Irish Parliament including Senator Shane Ross and Deputy Frank Feign ("*we can talk until the cows come home but the only way to resolve the issue is through an EGM*"). However, the Government did not take any action, no EGM was convened and Aer Lingus remained in charge of Hangar 6. This controversy further confirms that Ryanair has no influence whatsoever over Aer Lingus' policies, including those relating to airport facilities. (It also illustrates the intensity of competition between Ryanair and Aer Lingus – in this instance, competition for Dublin airport facilities.)

**(g) Ryanair Was Unable to Amend Resolutions Proposed by Aer Lingus at its 2010 AGM (cf. ¶13 of Cadwalader's note)**

103. On 18 June 2010, Aer Lingus proposed five special resolutions and nine ordinary resolutions to its shareholders at its AGM. Ryanair supported all of these resolutions except the following two special resolutions:
- Resolution 6 called for shareholders to waive their pre-emption rights associated with an issuing of new shares in Aer Lingus (this issue is discussed in Section 3.3 above);
  - Resolution 10 called for shareholders to approve amendments to the Articles of Association including a requirement that shareholders give 30 days' notice for tabling a draft resolution at an EGM.
104. By a separate resolution, Aer Lingus was authorised to hold an EGM on 14 or 21 days' notice, depending on the subject matter. Therefore, had Resolution 10 been

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<sup>69</sup> See letter from 26 February 2009 from Michael O'Leary to Mary Coughlan, attached as [Annex Removed].

<sup>70</sup> See "How Politics Scuppered Plan by Ryanair to Create 500 New Jobs", THE SUNDAY INDEPENDENT, 14 Feb. 2010, attached as [Annex Removed].

<sup>71</sup> See the debate's transcript, attached as [Annex Removed].

passed, Aer Lingus could notify shareholders of an EGM at a point in time where the deadline for shareholders to propose a draft resolution for that meeting had already expired. Ryanair believed that such an outcome would be undemocratic and contrary to the spirit of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009.

105. On 25 May 2010, more than three weeks prior to the AGM, Ryanair wrote to Aer Lingus company secretary, Mr Donal Moriarty, expressing concern about Resolution 10 (and indicating that Ryanair would oppose Resolution 6).<sup>72</sup> Ryanair suggested ways in which Resolution 10 could be amended to safeguard the rights of shareholders. Specifically, Ryanair proposed an amendment whereby there would be a 7-day, rather than a 30-day notice period for shareholders to table a draft resolution at an EGM. By letter dated 27 May 2010, Aer Lingus stated that it would not follow Ryanair's suggestions.<sup>73</sup>
106. Despite Aer Lingus' refusal to compromise on Resolution 10, Ryanair continued in its attempts to avoid a situation whereby Ryanair would have no option but to vote against the resolution. Ryanair wrote to Aer Lingus on two more occasions prior to the AGM requesting that Aer Lingus reconsider Ryanair's proposals.<sup>74</sup> However, Aer Lingus remained unwavering in its rejection of Ryanair's efforts. Ryanair finally voted against Resolution 10 in order to protect the rights of all shareholders to propose draft resolutions at future EGMs of Aer Lingus. During the AGM Ryanair invited Aer Lingus to amend the proposed changes to the Articles of Association and put such amended proposal to vote either at the following year's AGM or at a specially convened EGM, where Ryanair would vote in favour of a proposal that did not prejudice shareholders' rights.
107. Ryanair's opposition to Resolution 10 was founded upon Ryanair's interest in maintaining the protection afforded to all shareholders in Aer Lingus' Articles. This opposition cannot be construed as Ryanair having an ability materially to influence Aer Lingus policy because the resolution in question bore no relationship to Aer Lingus' commercial behaviour. Rather, the resolution went solely to the internal procedure for the participation of all shareholders in the corporate governance of Aer Lingus. Because Ryanair was unable to convince the Board to amend this resolution, it was compelled to block the resolution.
108. In its questionnaire of 30 September 2010 (Question 7), the OFT refers to the article published in the *Irish Times* (19 June 2010) with regard to this AGM.<sup>75</sup> That article was misleading in several important respects:
  - Resolution 6: the article incorrectly states that Ryanair voted against a motion "*that would have allowed Aer Lingus to issue new shares*". Aer Lingus is free to

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<sup>72</sup> Letter of 25 May 2010 from Juliusz Komorek to Donal Moriarty, attached as [Annex Removed].

<sup>73</sup> Letter of 27 May 2010 from Donal Moriarty to Juliusz Komorek, attached as [Annex Removed].

<sup>74</sup> See letters of 31 May 2010 and 1 June 2010, from Juliusz Komorek to Donal Moriarty, attached as [Annex Removed].

<sup>75</sup> "Ryanair blocks motions on company rules and shares at Aer Lingus agm", Ciaran Hancock, THE IRISH TIMES, 19 June 2010, attached as [Annex Removed].

issue new shares (and Ryanair voted in favour of Resolution 5 to this effect); Ryanair could only prevent Aer Lingus from obtaining a waiver of pre-emption rights associated with an issue of new shares. Ryanair is opposed to such a waiver because it would leave Ryanair's shareholding vulnerable to dilution and consequent value loss (see also Section 3.3).

- Resolution 10: the article is misleading insofar as it states that Ryanair "*indicated its intentions to Aer Lingus in advance of the agm, thereby ensuring that the motions would not be carried*". As explained above, Ryanair tried to collaborate with Aer Lingus' management by suggesting ways in which Resolution 10 could be amended to safeguard the rights of shareholders. If Ryanair had wanted to simply block the motion, it would have just voted against it at the AGM, without discussing it with Aer Lingus.

**(h) [CONFIDENTIAL]**

109. [CONFIDENTIAL]

110. [CONFIDENTIAL]

111. [CONFIDENTIAL]

**(i) Ryanair Was Prevented From Tabling Resolutions at the Aer Lingus 2011 AGM (cf. ¶16 of Cadwalader's note)**

112. On 15 March 2011, Ryanair wrote to Aer Lingus seeking to table two resolutions at the 2011 AGM of Aer Lingus.<sup>76</sup> The first resolution called for Aer Lingus to declare and pay a dividend of €30 million for the year ended 31 December 2010. The second resolution called for [CONFIDENTIAL] By letter of 28 March 2011, Aer Lingus refused to table Ryanair's proposed resolutions.<sup>77</sup>

113. Under Irish company law, a shareholder of a publicly-traded company has the right to put a draft resolution on the agenda of an AGM provided that the shareholder holds at least 3% of the issued share capital, representing at least 3% of the voting rights of all the members entitled to vote at the meeting.<sup>78</sup> Ryanair satisfies these statutory criteria with respect to Aer Lingus. Accordingly, following Aer Lingus' refusal to place the proposed resolutions on the agenda, Ryanair instituted legal proceedings to compel it do so.

114. By judgment of 15 April 2011, the Irish High Court denied Ryanair's request to compel Aer Lingus to table the resolutions.<sup>79</sup> The Court considered that both

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<sup>76</sup> Letter of 15 March 2011 from Juliusz Komorek to Donal Moriarty, attached as [Annex Removed].

<sup>77</sup> Letter of 28 March 2011 from Donal Moriarty to Juliusz Komorek, attached as [Annex Removed].

<sup>78</sup> Section 132A, Companies Act 1963-2010 (as inserted by Regulation 5 of the Shareholders Rights Directive 2007/36/EC).

<sup>79</sup> Ryanair Limited v Aer Lingus PLC, Judgment of the Irish High Court, 15 Apr. 2011 (McGovern J), not yet reported, transcript attached as [Annex Removed].



resolutions proposed by Ryanair concerned matters that fell within the exclusive competence of the Aer Lingus Board. Regarding the declaration of a dividend, the Board had recommended that no dividend be paid for the year ended 2010. The Court ruled that the shareholders lacked the power to declare a dividend by ordinary resolution that exceeded the amount recommended by the Board. Regarding Aer Lingus' pension scheme, the Board has exclusive power, under the Articles of Association, "*to determine what (if any) pension benefits the Company will provide and to determine what payments are to be made to the Company's pension scheme*".<sup>80</sup> The Court ruled that the shareholders could not, by ordinary resolution at a general meeting, seek to override or fetter that exclusive power.

115. Even if Ryanair's attempts to table the draft resolutions had been successful, this would have meant only that the shareholders of Aer Lingus would have had the opportunity to pass the resolutions by means of a simple majority. As discussed above, Ryanair has no ability to pass an ordinary resolution. Despite this reality, Aer Lingus was still willing to go to court to deny Ryanair its rights as a 3% shareholder to even table these ordinary resolutions for consideration by Aer Lingus' shareholders, further evidence of the strong hostility of Aer Lingus' board to Ryanair. This episode is a graphic illustration of Ryanair's lack of any material influence over Aer Lingus: not only is it unable to pass or successfully oppose ordinary resolutions, it is unable even to get them on the agenda of the shareholders' meeting despite being empowered to do so under Irish company law as a 3% shareholder.

(j) [CONFIDENTIAL]

116. [CONFIDENTIAL]

(k) **Ryanair's Routine Investor Information Requests Do Not Demonstrate Material Influence (cf. ¶¶14 and 17 of Cadwalader's note)**

117. In paragraphs 14 and 17 of its note Cadwalader mentions Ryanair's standard investor/analyst information requests made following routine investor/analyst meetings as examples of "*interference*". These allegations relate to the following requests:

- [CONFIDENTIAL].
- [CONFIDENTIAL].

118. It is standard corporate practice to provide shareholders and analysts with certain financial information. Both Ryanair and Aer Lingus fully understand that Aer Lingus cannot lawfully, and would not, provide to Ryanair information that is price sensitive (since such information must be released to the stock market as a whole in an orderly fashion) or commercially sensitive (under the competition rules).

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<sup>80</sup> Ryanair Limited v Aer Lingus PLC, ¶18

**Schedule of Annexes**

**[ANNEXES REMOVED]**