

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

COMPETITION COMMISSION

AER LINGUS COMMENTS ON THE PROVISIONAL FINDINGS

20 JUNE 2013

C A D W A L A D E R

1. Introduction

1. Aer Lingus welcomes the CC's Provisional Finding that Ryanair's minority shareholding in Aer Lingus may lead to a significant lessening of competition. The CC's detailed and careful investigation has confirmed that Ryanair's minority shareholding is likely to have a significant impact on Aer Lingus' effectiveness as a competitor because:
 - Ryanair's minority shareholding limits Aer Lingus' ability to be acquired by, merge with, or acquire another airline;
 - Ryanair is able to restrict Aer Lingus in issuing shares for cash for a corporate transaction or to optimise its capital structure;
 - Ryanair is able to limit Aer Lingus' ability to optimise its portfolio of Heathrow slots;
 - Ryanair's minority shareholding means it is more likely to mount further bids for Aer Lingus, with attendant significant disruption to Aer Lingus' commercial strategy; and
 - Although relatively unlikely, Ryanair may be able to pass or defeat an ordinary resolution at an Aer Lingus general meeting, which would have significant implications for Aer Lingus' competitive capability.¹
2. Aer Lingus fully agrees with these findings and does not propose to reiterate its previous submissions on these issues. There are however a few – but important – areas in which Aer Lingus respectfully disagrees with the CC's Provisional Findings. The first relates to the CC's provisional view that Ryanair's lobbying actions, and the exercise of its shareholder rights – in particular the right to requisition an EGM and propose resolutions at General Meetings – would not have a material impact on Aer Lingus' effectiveness. The second concerns the CC's provisional conclusions on the shareholding's effects on the Ryanair and Aer Lingus' incentives to compete with one another. This response focuses on these issues. It also details a number of other, more minor, points of disagreement.

¹ Provisional Findings, paragraph 7.159.

2. Lobbying and the exercise of Ryanair's shareholder rights

3. As noted in Aer Lingus' response to the Remedies Notice, Aer Lingus fundamentally disagrees with the notion that Ryanair is equally able to engage in lobbying activities regardless of whether it holds a shareholding in Aer Lingus, and that Ryanair's right as a shareholder to call EGMs or propose resolutions at AGMs do not affect Aer Lingus' effectiveness as a competitor (paragraphs 7.99-7.100 of the PFs). It does so for two reasons:
 - First, Ryanair's lobbying activity is firmly rooted in its status as a shareholder. Without the platform it is provided as a shareholder it would not have the same opportunity and the same narrative to support the lobbying effort. The invocation of its shareholding rights as a righteous justification for its activities enables Ryanair to cloak its commercial interference in a mantle of legitimacy (as "concerned shareholder"). Ryanair is hence able to lobby more effectively and therefore increase the likelihood of a measure being successfully opposed. In particular, Ryanair is able to put the Irish Government in a pivotal voter position.
 - Second, Ryanair's shareholder rights enable it to continue to put contentious matters that would otherwise be decided by management before a shareholder vote, either by requisitioning an EGM (requiring a shareholding of at least 5%) or by being able to add an item to the agenda of a General Meeting or table a resolution (requiring a shareholding of at least 3%).

Lobbying by Ryanair

4. The campaigns mounted by Ryanair, around Shannon, Hangar 6, directors' remuneration and, currently, pensions, are all firmly rooted in Ryanair's pious invocation of its legitimate rights and interests as a shareholder. In the absence of its shareholding, these matters would have been of no concern whatsoever to Ryanair and issues to be determined solely by Aer Lingus management and its Board. The shareholding is pivotal, and firmly geared towards Ryanair's lobbying campaigns against Aer Lingus' management. While it is true that absent the shareholding, Aer Lingus does not expect that Ryanair will cease its public campaigns of harassment against its closest competitor, it would do so without the artificial advantage of being a shareholder and being able to couch its campaigns as such, complaining that its rights as a shareholder are being violated.
5. Such targeted lobbying increases the likelihood of Ryanair being able to influence Aer Lingus' policy. Indeed, Aer Lingus believes that the PFs give insufficient weight to Ryanair's past lobbying campaigns, insofar as these are entirely instructive of Ryanair's intensity of effort going forward. With the exception of the directors' remuneration issue, Aer Lingus has to date succeeded in resisting Ryanair's lobbying campaigns, defeating litigation and obtaining the rejection of regulatory complaints.

As demonstrated in the directors' remuneration issue, it is however not a given that it will always be able to do so.

6. Ryanair has also often sought to put the Irish Government in a *pivotal voter* position, thereby subjecting the Government to increased political pressure.² Under current shareholdings, any time Ryanair intends to oppose the Aer Lingus Board and the remaining shareholders are expected to follow the recommendation of the Aer Lingus Board, the Government's vote will determine whether an ordinary resolution succeeds or is defeated. This increases the pressure on the Government where the issues may be of interest to the general public or politically controversial, such as the promised "job creation" by Ryanair in the Hangar 6 incident or the argued connectivity advantages of the Shannon-Heathrow service for the West of Ireland. Without a shareholding, a public campaign by Ryanair would put less pressure on the Government, as – on its own – the Government's stake is not sufficient to determine the outcome of a shareholder vote. However, if Ryanair were to retain a small but non-negligible holding of (say) between 5% and 10%, the Irish Government may also remain pivotal.³
7. One clear example of Ryanair's lobbying that could *only* arise from its present status as a shareholder relates to the Shannon-Heathrow services. A full summary of this episode was given in Aer Lingus' Initial Submission. In this episode, not only did Ryanair oppose Aer Lingus' management, but it engaged in an intensive lobbying of the government and of other shareholders. It tried to push the Irish Government as a shareholder of Aer Lingus to act in line with Ryanair's position, playing on the loss of local jobs and investment in the Shannon area if Aer Lingus got its way. It tried to gather further support from other shareholders for its motion by suggesting (without any justification) that alternatives it proposed were more profitable for Aer Lingus, playing on Ryanair's own interest as a shareholder to influence other shareholders. Ryanair also attempted to requisition an EGM on the issue; Aer Lingus refused as to

² Ryanair used this approach both in relation to the Shannon-Heathrow route and Hangar 6. See <http://www.ryanair.com/en/news/ryanair-statement-on-aer-lingus-closure-of-shannon-heathrow-route> ("Given that the Irish Government owns 25.3% of Aer Lingus and Ryanair owns 25% of Aer Lingus, Ryanair believes that the Board of Aer Lingus would find it difficult to refuse a joint request from Ryanair and the Irish Government to maintain the "critical" connectivity between Shannon and Heathrow") and Irish Times, *O'Leary gives hangar deadline*, 24 February 2010 ("Ryanair boss Michael O'Leary warned politicians tonight that he needed Hangar 6 at Dublin airport within two weeks before he moved 300 jobs elsewhere in Europe. 'Alternatively, the Government owns 24 per cent of Aer Lingus, I own 29 per cent of Aer Lingus, and I will happily give the Government a proxy over my 29 per cent for the Tánaiste to then call an EGM of Aer Lingus and with our 54% of voting power she can simply instruct Aer Lingus to get the hell out of Hangar 6,' he told the committee.")

³ The Irish Government currently holds 25.11% of Aer Lingus. Ryanair's remaining shareholding in this scenario and other opposition could amount to another 5-10% of shares. Given current turnout of just over 70%, and likely lower turnout if Ryanair's shareholding is dispersed, the Irish Government could be pivotal in determining whether an ordinary resolution is passed or defeated.

do so would have contravened competition law (representing an agreement between competitors).

8. Ryanair would have no business arguing against an Aer Lingus management decision to re-optimize its schedule in this way if it was *not* a shareholder in Aer Lingus. Of course, Ryanair's campaign was (as always) in pursuit of its own interests: not only to embarrass Aer Lingus and to set precedent for future lobbying, but also because either of Ryanair's alternative proposals would have resulted in reduced competition between Aer Lingus and Ryanair on the Dublin – London routes. It also subsequently transpired that Ryanair began to operate routes from Belfast City Airport to London which would be in competition with Aer Lingus' service from Belfast International to London Heathrow. In addition, Ryanair was paying exceptionally low charges at Shannon Airport such that Aer Lingus was effectively subsidising Ryanair, so that this subsidy would be put at risk by Aer Lingus' exit from Shannon.
9. Whilst Aer Lingus has to date been able to resist Ryanair's lobbying on such contentious issues, it is by no means a given that this will continue to be the case, particularly where it can manage to convince the Irish Government to take similar course of action. Moreover, Ryanair's repeated lobbying campaigns of this type, in which it lobbies and pursues its interests as a shareholder, suggest that Ryanair believes it has some (non-zero) chance of success. Accordingly, Aer Lingus submits that the CC should recognise the potential for Ryanair's lobbying, intricately woven with Ryanair's status as a shareholder, to contribute to the identified SLC.

3. Ryanair's shareholder rights

10. With a shareholding of at least 5%, Ryanair has the right to call EGMs; and with a shareholding of at least 3%, it has the right to add an item to the agenda of a General Meeting or to table a resolution. In exercising these rights, it can put contentious, self-serving issues to a shareholder vote where otherwise those issues would be decided under the management's delegated authority.⁴ The ability to force contentious matters to be put before a shareholder vote – that would not otherwise be put before shareholders – unequivocally increases the likelihood of management being unable to determine Aer Lingus' strategy on such matters. In combination with its intensive lobbying, Ryanair may be able to exploit shareholder division and staff discontent on such issues and potentially succeed in passing/defeating a particular resolution.
11. Furthermore, by tabling resolutions, Ryanair can put the Irish Government in a position where it must actively declare its position and cast a vote in resolutions, in situations in which the Government would prefer to "leave the issue to management". It is not difficult to foresee a politically sensitive issue that management and the Irish Government would not seek to put to a shareholder vote, but if Ryanair were able to table a resolution on the issue, the Government would feel obliged to abstain or even vote against management. There is an acute political difference between being able to argue that the decision is one for management and having to actively state one's own position in the face of intense political and public pressure.⁵ For example, Aer Lingus believes that the Government may have felt compelled to abstain or vote against management recommendations in relation to Shannon-Heathrow services or Hangar 6 should they have come to a shareholder vote.⁶ This ability to place the Government in such a position also increases Ryanair's lobbying power.

⁴ Unless something is specifically reserved under the articles of association to the exclusive discretion of the board of directors, such as the recommendation of dividends or the payment of contributions to pension schemes, article 83 of the articles of association provides that "the business of the Company shall be managed by the Directors who may do all such acts and things and exercise all the powers of the Company as are not by the Acts or by these Articles required to be done or exercised by the Company in general meeting" but also provides that this is subject "to any directions by the members given by ordinary resolution, not being inconsistent with these Articles or with the Acts", In addition, Ryanair could table "spoiling amendments" at an EGM held in relation to a scheme of arrangement. See transcript of Aer Lingus response hearing, page 27.

⁵ In relation to the Shannon-Heathrow route, Ryanair stated: *all that is needed to save Aer Lingus's current Shannon-Heathrow services is for Bertie Ahern's Government (acting as a 25% shareholder) to lift a finger and vote in favour of the motion at the EGM. [...] Ryanair wrote to him over one week ago offering to work with the Government to preserve the Shannon-Heathrow route. Despite this crisis in Shannon, Bertie Ahern has ignored Ryanair's letter. **Bertie Ahern's Government cannot ignore this EGM motion.** If the Government, acting as a 25% shareholder in Aer Lingus, simply vote in favour of maintaining the profitable Shannon-Heathrow services, then these can and will continue without affecting any of Aer Lingus's recently announced Belfast-London flights. If Bertie Ahern fails to support this motion, then the extent to which his Government has lied, and abandoned Shannon in favour of Belfast will become apparent to all.* (Emphasis added). See <http://www.ryanair.com/en/news/ryanair-responds-to-aer-lingus-closure-of-shannon-heathrow-route>

⁶ In fact Aer Lingus refused to convene an EGM in relation to the Shannon-Heathrow services, and an EGM was not requisitioned in relation to Hangar 6.

12. Indeed, even with a shareholding of 5% (the threshold at which Ryanair is able to call an EGM) or 3% (the threshold at which Ryanair is able to add an item to the agenda of a General Meeting or table a resolution), it is likely that, should the Irish Government feel compelled to vote with Ryanair, Ryanair could successfully pass/defeat an ordinary resolution.⁷
13. Whilst such a confluence of events may be rare, they would clearly have very significant implications for Aer Lingus. Aer Lingus submits that this is a very similar situation to that considered in the PFs in relation to whether Ryanair would be able to pass or defeat an ordinary resolution (paragraph 7.92). The CC provisionally found that whilst relatively unlikely, Ryanair could pass or defeat an ordinary resolution in certain circumstances, and if Ryanair were to achieve a majority, there could be very significant implications for Aer Lingus. This finding was noted as a relevant factor in the CC's provisional conclusion on the reduction in Aer Lingus's effectiveness due to the shareholding (paragraph 7.159). Accordingly Aer Lingus submits that Ryanair's ability to add an item to the agenda of a General Meeting or table a resolution – and lobby extensively on the matter using its identity as a shareholder – contributes to the SLC.

⁷ The Irish Government currently holds 25.11% of Aer Lingus. Ryanair's remaining shareholding in this scenario and other opposition could amount to another 5-10% of shares. Given current turnout of just over 70%, and likely lower turnout if Ryanair's shareholding is dispersed, this block could pass/defeat an ordinary resolution.

4. Aer Lingus' Pensions Issues

14. A current and pertinent example is Aer Lingus' attempt to resolve the uncertainty related to its pension scheme. Ryanair's lobbying on this issue has been firmly rooted in terms of Ryanair as a shareholder.⁸
15. [CONFIDENTIAL]⁹
16. The fact that this issue will be put to shareholders increases the likelihood of an appropriate solution being rejected. Given the potential for industrial action and consequent significant impacts on Aer Lingus' effectiveness as a competitor should the pensions issue remain unresolved, Ryanair's lobbying and invocation of its shareholder rights have the potential to give rise to an SLC. While market reaction to the proposed solution put forward by the Labour Court has been broadly positive, the outcome of a shareholder meeting remains in doubt assuming that Ryanair will be permitted to vote.

⁸ See e.g. <http://www.ryanair.com/en/news/spineless-aer-lingus-board-roll-over-again-and-again-at-cost-of-600m-euro-and-rising>

⁹ [CONFIDENTIAL]

5. Competition between Ryanair and Aer Lingus

Ryanair's incentive to compete less strongly with Aer Lingus

17. The CC provisionally finds that Ryanair should not be expected to compete less strongly with Aer Lingus because of its financial interest arising from its minority shareholding. The CC appears to recognise the logic that Ryanair *would* ordinarily have the ability and incentive to compete less strongly with Aer Lingus as a result of the shareholding. However, the CC also notes that because Ryanair's ultimate objective is to acquire the entirety of Aer Lingus Ryanair may be inclined to act upon these incentives to soften competition. Softening competition could lead to an improvement in Aer Lingus' performance, which might support the share price, making the acquisition of the remainder of Aer Lingus more costly or reduce the likelihood that it would be able to acquire the remainder of Aer Lingus at all. This latter consideration appears to be the main reason for the CC's provisional conclusion that Ryanair should not be expected to compete less strongly because of its financial interest in Aer Lingus.
18. However, Aer Lingus submits that the CC has inappropriately dismissed the relevance of a potential future scenario in which Ryanair recognises that its attempts to acquire Aer Lingus are futile, and therefore the countervailing incentive *not* to soften competition with Aer Lingus disappears. Given three failed bids, two prohibitions and (thus far) one court judgement upholding a prohibition, most suitors would recognise that hopes of acquisition are very unlikely; Ryanair is not most suitors, but surely must eventually recognise that the competition problems are intractable. Should it do so, Aer Lingus submits that this theory of harm will become very relevant. And it is surely perfectly plausible that Ryanair will eventually come to this point of view (although Ryanair may be unlikely to acknowledge it publicly as it would reduce its ability to disrupt Aer Lingus by launching further bids). This is not inconsistent with the theory of harm that Ryanair's holding makes it more likely that Ryanair will mount further bids for Aer Lingus. Rather, it demonstrates that regardless of Ryanair's intentions, the inherent conflict of interest in holding a minority stake in ones' principal competitor will lead to an SLC.
19. Moreover, a sizeable sell down order by the CC that nonetheless permits Ryanair to retain some stake could, in one permutation of the future, bring Ryanair round to the view that it should drop its ambition to acquire the whole of Aer Lingus. In this scenario, after the imposed sell down Ryanair may retain the remaining shares with the intention to sell at a later date to achieve a better price. In this period Ryanair

would have a strong incentive to compete less fiercely with Aer Lingus in order to support Aer Lingus' share price.¹⁰

Aer Lingus' incentive to compete less strongly with Ryanair

20. The CC also provisionally finds that Aer Lingus does not compete less fiercely with Ryanair and is unlikely to do so in the future; and that it is unlikely that Ryanair's minority shareholding in Aer Lingus would lead to coordinated effects.
21. Whilst Aer Lingus does not compete less fiercely with Ryanair at present because of the minority shareholding, Aer Lingus believes that the CC should take into account a potential future scenario in which Aer Lingus may find itself reluctantly driven to accommodate the interests of Ryanair if it faces no prospect of Ryanair being evicted from its share register. Such considerations also apply to the analysis of the likelihood of coordinated effects in the future.
22. In addition, Aer Lingus believes that the reasoning that "Aer Lingus's management would have a duty to further the interests of the company as a whole, rather than those of any particular shareholder" (paragraph 7.106), leading it to conclude that Aer Lingus would not compete less fiercely with Ryanair, is unrealistic. There is a wide and varied empirical literature showing that managers do not always act in the interest of the company; indeed it is this literature, and the self-interest of managers, that motivates incentive contracts prevalent amongst top management.¹¹ In addition, given their dispersed nature, other shareholders may not have the incentive or ability to exercise their rights to prevent actions which may disadvantage them.¹² Finally, it is not necessarily the case that competing less strongly with Ryanair would be profit-decreasing for Aer Lingus, for example if Ryanair also competed less strongly with Aer Lingus and/or coordination occurred.

¹⁰ Approximately 70% of Aer Lingus' operated short-haul flights in 2012, [CONFIDENTIAL], were on routes on which it competes with Ryanair (as defined by the EC prohibition decision). Thus profitability on routes where it faces Ryanair can have significant impact on Aer Lingus share price.

¹¹ An evaluation of the theoretical literature on this issue in light of the empirical literature on compensation can be found in Prendergarst, C., 1999, "The Provision of Incentives in Firms", *Journal of Economic Literature*, 37: pp. 7 – 63.

¹² For a discussion of consequences of small shareholders inability to effectively monitor the management decisions see Shleifer, A. and R.W. Vishny, 1986, "Large Shareholders and Corporate Control", *The Journal of Political Economy*, 94: pp. 461 – 488.

6. Other comments

- Paragraph 7.122 discusses the value of Ryanair's stake in Aer Lingus in the context of Ryanair's incentives to compete with Aer Lingus. The relevance of this discussion is unclear to Aer Lingus. Ryanair's argument (repeated at paragraph 7.126 of the PFs) that "as a matter of common sense the value of Ryanair's shareholding in Aer Lingus was so limited that it could never affect the way in which Ryanair operated its business" is false as a matter of economics. Discussing different valuation tools in Appendix H to determine the absolute size of benefits of the shareholding to Ryanair, or its size relative to Ryanair's capitalisation, provides an undue credibility to the argument raised by Ryanair. Unilateral effects theory and the pricing pressure tools outlined in Appendix I of the PFs relate to incentives at the margin; the direction or size of those incentives is not related to any aggregate profit, value or dividend measure. Aer Lingus sees no reason why the situation should be different in considering the effect of a partial ownership on Ryanair's own pricing decision. It is not the case that if Ryanair's share of Aer Lingus' profits is "small" relative to the overall size of Ryanair that Ryanair would not take them into account. As a rational profit-maximising agent Ryanair would need to consider that the opportunity cost of carrying one additional passenger on Ryanair aircraft involves a reduction in the financial benefit that would flow from its stake in Aer Lingus (because otherwise the marginal passenger would likely fly with Aer Lingus, increasing Aer Lingus' profits). This is the basis of unilateral effects theory.
- Paragraph 5 could be read as stating that the European Commission had the power to require a divestment but did not require it; in fact the European Commission found that it did not have the power to require Ryanair to divest the minority shareholding. Accordingly the third sentence of paragraph 5 should read: "On 11 October 2007, following an earlier request by Aer Lingus that Ryanair divest itself of the minority shareholding should the concentration be prohibited, the European Commission ruled that the minority shareholding did not constitute a concentration under the EU Merger Regulation (EUMR) and that it therefore did not have the power to require its divestiture."
- Paragraph 4.32 states that the CC did not receive any evidence that other shareholders would be particularly influenced by Ryanair's industry expertise. Aer Lingus submits that the CC has framed the question too narrowly, and that Ryanair's status and lobbying power as a shareholder has the potential to influence other shareholders. Even if the CC finds no evidence of such influence in the past, it should not exclude the possibility that it will occur in the future, for example if Ryanair alights on a cause that is of interest to a particular constituency.

- Paragraph 4.39 details a recent proposed slot transaction. That transaction has now completed. Whilst it was, on this occasion, unopposed by Ryanair, that does not exclude that Ryanair can do so in future. Indeed at present Ryanair is no doubt conscious that its actions are under close scrutiny by the CC.
- Paragraph 4.41 notes that Ryanair was unsuccessful in its complaints, judicial review proceedings, and requests for commercially sensitive information. Aer Lingus notes that the resisting of such attempts consumed time and expense for Aer Lingus and entailed adverse publicity for Aer Lingus. These costs may lead (or may have led) to Aer Lingus holding back from certain actions on another occasion in order to avoid such costs.
- Paragraph 5.30 considers Aer Lingus' UK presence through the narrow lens of direct overlaps with Ryanair. There are however wider benefits to UK consumers of Aer Lingus being an effective and unencumbered competitor, namely through Aer Lingus' provision of connecting feed to other airlines at Heathrow and its status as an anchor tenant of T2; and Aer Lingus' ability to offer competitive services through its Dublin hub, particularly for UK Provincial flights to North America. Where Ryanair's shareholding leads Aer Lingus to be less effective than in the counterfactual, this negatively impacts all travellers to or from the UK on itineraries on which Aer Lingus would provide at least one leg of journey (even though Ryanair itself would only benefit from lower effectiveness of Aer Lingus on the routes on which the two airlines overlap).
- In Paragraph 7.34, Ryanair states that it has received no offers for its shareholding from any airline. However, as recently as this week, Mr O'Leary has been quoted in the Irish press as saying that Ryanair were approached by financial institutional bidders last year¹³. See also an Irish Examiner article dated 30 March 2012,¹⁴ in which Michael O'Leary is quoted as stating that Ryanair had been approached by "about three different airlines and consortia" interested in buying the Government's stake. Whilst these approaches may not have constituted formal offers for Ryanair's stake, it is clear that other airlines have expressed interest in buying stakes in Aer Lingus and have approached Ryanair to discuss this.

¹³ See press articles submitted to the CC by Aer Lingus on 19 June 2013. in particular: "*O'Leary lambasts Aer Lingus as shareholders back Boeing deal*", Irish Independent, 19 June 2013. – "*Mr O'Leary said Ryanair had not had a single bid for its stake in Aer Lingus since it was approached by financial institutions last year and that "if anyone comes along and makes us a reasonable offer, the board will consider it."*

¹⁴ Previously provided as Annex 5 to Aer Lingus' Response to Consultation on Possible Remedies, 11 June 2013.

It is also clear that if Ryanair were to have the power to choose the buyer of its stake in Aer Lingus, it would have the ability to inflict substantial and potentially irreparable harm on its main competitor. If the wrong type of buyer is chosen by Ryanair the potential “cure” of an unfavourable new shareholder who is not encumbered by regulatory scrutiny in the same way that Ryanair currently is, could be even worse for Aer Lingus than the current untenable scenario.

Furthermore Aer Lingus refutes any assertion that Ryanair should be afforded a prolonged divestment period in which to dispose of its shares. This is a transparent attempt by Ryanair to extend the period in which it may use its shareholding as a platform for inflicting further harm on Aer Lingus and deter potential buyers and beneficial strategic partnerships. As submitted at the recent remedies hearing, Aer Lingus has no doubt that it can have the shares placed with institutional buyers and re-establish the previous market structure within months.

- Paragraph 7.68 states that Ryanair has signalled that it would support a special resolution that would allow shareholders to approve a rights issue with pre-emption rights available to shareholders in Ireland but not necessarily in overseas jurisdictions where this was impractical. Aer Lingus notes that Ryanair has never signalled this to Aer Lingus; this statement in the CC’s PFs is the first time that Aer Lingus has been made aware of Ryanair’s purported position. This approach is in stark contrast to the detailed representation made by Ryanair with regard to the resolutions relating to amendments to Aer Lingus’ Articles of Association pursuant to the Shareholders Rights Directive, as a result of which Aer Lingus did split the relevant resolution to facilitate a partial approval.
- Aer Lingus’ submission on remedies noted that the cost of a share placing would be around 0.5% - 1% of the value of the shares. However, as such a cost would fall on Ryanair it is by the CC’s own guidance irrelevant: “for completed mergers, the CC will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.”¹⁵ This approach has been followed in *Sky/ITV* (paragraph 6.69), amongst many others. Any behavioural remedy – which will inevitably require ongoing monitoring and enforcement, no doubt accompanied by litigation from Ryanair – would impose greater relevant costs, particularly on the OFT/CMA and Aer Lingus.

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CC8 – Merger Remedies: Competition Commission Guidelines, paragraph 1.10.

- Ryanair’s submission on remedies¹⁶ proposed various behavioural undertakings. Below we set out our observations on the most comprehensive purely-behavioural undertaking, namely Ryanair vesting all of its shareholder rights to be in a trustee whilst retaining economic interest. To the extent that Ryanair’s proposed undertakings fall short of that extreme, they can only be less effective.

The vesting of full rights in a trustee simply fails to deal with the identified SLC. As outlined at the hearing, it does not address the fact that Ryanair’s shareholding impedes M&A; nor does it remove the increased likelihood of repeated bids by Ryanair.¹⁷ In addition, should Ryanair drop its ambition to acquire the entirety of Aer Lingus, the retention by Ryanair of economic interest in the shares will give Ryanair an incentive to compete less strongly with Aer Lingus.

Furthermore, such arrangements do not meet with the CC’s stated clear preference for a structural remedy, and none of the conditions are present that would suggest a (purely) behavioural remedy is appropriate.¹⁸ The CC’s decision in *Sky/ITV* set out at length the considerable issues with such a construct. Even if (quod non) the CC were to find that such an arrangement was equally effective as full divestiture, the relevant costs¹⁹ of the remedy are clearly greater, as it requires ongoing monitoring and enforcement by the OFT/CMA as well as (no doubt) protracted litigation as Ryanair tests the limits of what will inevitably be an imperfectly specified contract.

¹⁶ Response by Ryanair to the Notice of Possible Remedies, 11 June 2013.

¹⁷ In addition it is entirely unclear how and whether such shares could be consented to a Ryanair offer.

¹⁸ CC8 – Merger Remedies: Competition Commission Guidelines, paragraphs 2.14-2.16.

¹⁹ Not taking into account the cost to Ryanair of divestiture, but having regard to the costs imposed on third parties, the OFT and other monitoring agencies: see CC8 paragraph 1.10.