

RYANAIR/AER LINGUS INQUIRY

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

RESPONSE TO THE PROVISIONAL FINDINGS REPORT

NON-CONFIDENTIAL VERSION

June 19, 2013

CLEARY GOTTlieb STEEN & HAMILTON LLP

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Ryanair/Aer Lingus
Ryanair Response to the Provisional Findings Report

This Response contains Ryanair's written submissions on the Provisional Findings Report published by the Competition Commission (the "CC") on May 30, 2013. Ryanair has submitted a separate response to the CC's Notice of Possible Remedies.

I. Overview

1. The preliminary conclusions contained in the Provisional Findings Report are misguided, unproven, inconsistent with the evidence, and incorrect.
2. The CC bears an exceptionally heavy burden in this case. This is because: (i) there is a recent EU decision confirming that the theory of harm advanced in the Provisional Findings Report is baseless and wrong; (ii) the circumstances in which a non-controlling minority shareholding may raise competition concerns are very unusual; and (iii) unlike virtually every transaction examined in the past by the CC, there are six and a half years of highly relevant evidence bearing directly on the matters under investigation, which confirm that Ryanair has not had influence over Aer Lingus and that competition between the Parties has intensified since the stake was acquired. Consequently, if the CC wishes to entertain Aer Lingus' spurious claims, it is incumbent on it to show, on the basis of clear, consistent, and compelling evidence, a very strong causal connection between Ryanair's shareholding and the alleged substantial lessening of competition ("SLC").
3. The CC fails to discharge this burden because it fails to adduce evidence showing that Ryanair's shareholding constitutes a relevant merger situation, or that it has resulted, or may be expected to result, in an SLC because it lessens competition on routes between Great Britain and Ireland ("GB/Ireland Routes"). On the contrary, there are six and a half years of real world evidence showing that Ryanair has had no ability to influence Aer Lingus and that the intensity of competition between the airlines has actually increased.
4. The CC errs largely because it has been misled by Aer Lingus into believing that Ryanair's shareholding has had (or *could have*) some effect on its conduct (and in turn on competition in the marketplace). The evidence is flatly inconsistent with any such finding, and the CC has therefore rightly rejected two out of the three possible theories of harm advanced by Aer Lingus.¹ The theories rejected by the CC are the

¹ The three theories of harm are described in paragraph 12 of the Summary of Provisional Findings. They are "(a) that the shareholding has or may be expected to reduce Aer Lingus's effectiveness as a competitor because of the influence that it gives Ryanair over its rival, or by affecting the commercial strategies that are available to Aer Lingus, (b) that the change in financial incentives associated with the shareholding has or may be expected to reduce Ryanair's effectiveness as a competitor by giving it the incentive to compete less fiercely with Aer Lingus; and (c) that Ryanair's minority shareholding has or may be expected to increase the effectiveness of any existing coordination between Ryanair and Aer Lingus, or increase the likelihood of coordination between them in the future." At paragraph 15 of the Summary of Provisional Findings, the CC provisionally finds that two of these three theories should be rejected.

standard and primary theories considered in merger control, so their rejection is significant. All that remains are three highly implausible and wholly speculative scenarios as to how Ryanair's minority shareholding *could* be exercised in a way that (at most) *might* have some ill-defined effect on Aer Lingus. There is no evidence that these scenarios are likely to come to pass, still less that they are capable (let alone that they "*could*") materially affect competition on GB/Ireland Routes.

5. Each of the three scenarios identified in the Provisional Findings Report is highly remote and depends on a chain of assumptions that must be assessed in light of the facts and six and a half years of available evidence. Many of these assumptions are not tested or substantiated. For others, the CC has found only that something "*might*" or "*could*" be the case. In each case, the posited scenario depends on a series of unlikely possibilities, each of which must be (but has not been) proven to the requisite standard in order to substantiate an adverse finding. By way of example, the contention that Ryanair's alleged ability to prevent Aer Lingus from selling its Heathrow slots gives rise to an SLC is based on a series of unrealistic assumptions:

- It assumes that Aer Lingus would want to sell its Heathrow slots (when there is no evidence that it does);
- It assumes that the Irish Government would permit Aer Lingus to sell its Heathrow slots (when the evidence is that it would strongly resist any such sale – in fact, the Irish Government included the Golden Share provisions in Aer Lingus' Articles of Association to ensure it could prevent the disposal of Heathrow slots);
- It assumes that Ryanair would oppose any such sale (for which there is no evidence; on the contrary, Ryanair recently assented to a proposal made by Aer Lingus concerning a spare, seasonal pair of its Heathrow slots);
- It assumes that Aer Lingus needs money that could be raised only from the sale of those slots (which is manifestly not the case; it currently has a cash pile of almost €1 billion);
- It assumes that the revenues that would accrue to Aer Lingus from the disposal of Heathrow slots would be used to increase competition on GB/Ireland Routes (when the evidence confirms that the sale of Aer Lingus' Heathrow slots would, if anything, lessen competition between the airlines on these routes);
- It assumes that ownership of the slots has in some fashion held Aer Lingus back from competing with Ryanair (which is plainly wrong given the importance of those slots to Aer Lingus' position on GB/Ireland Routes); *and*
- It assumes that by vetoing the sale of Heathrow slots, competition on GB/Ireland Routes would be significantly reduced (when, as noted, the opposite conclusion is far more credible, namely that obliging Aer Lingus to retain its Heathrow slots (assuming, which is far from shown, Ryanair would do so) would maintain the intense competition that exists today).

6. Each of these assumptions is plainly wrong. Taken together, it is readily apparent that the scenarios identified by the CC are so speculative, so implausible, and so unsubstantiated as to render the CC's findings flawed and unsustainable. There is simply no evidence for the scenarios that have been identified, still less evidence that is "*factually accurate, reliable and consistent*"² in light of the complex and prospective theory of harm. The Courts have correctly applied a rigorous test of rationality when, as contemplated here, the CC is considering the "*seriously intrusive step*" of requiring a divestment.³ The CC fails by a wide margin to discharge its burden to the requisite standard of proof.
7. In short, the CC's preliminary conclusions are not rational or substantiated, and do not withstand critical scrutiny. The CC conflates the material influence and SLC tests and assumes, wrongly, that speculation sufficient (in the CC's view) to demonstrate material influence is also sufficient to meet the much higher evidentiary standard relevant to the assessment of whether there is an SLC. It is not: the legal test, and the quality of evidence that must be adduced to demonstrate an SLC, are separate from, and materially higher than, that needed to show material influence.
8. The Provisional Findings Report fails to take account of the following relevant considerations:
 - First, Ryanair's minority shareholding was not acquired in order to facilitate some complex, anti-competitive scheme to weaken Aer Lingus. As the CC has repeatedly recognised, the Transaction was a by-product of Ryanair's bid for the entirety of Aer Lingus. Ryanair believes strongly that it will be successful in its pending General Court appeal of the European Commission's prohibition decision, and that it will be permitted to bid again for, and obtain the outstanding shares in, Aer Lingus.
 - Second, in the six and a half years during which the situation under review has been in existence, a compelling body of highly probative evidence has accumulated showing that competition between Ryanair and Aer Lingus on GB/Ireland Routes has increased. The CC has failed to identify a single instance in which Ryanair's shareholding has led to an SLC on any route.
 - Third, the CC's Provisional Findings are inconsistent with the detailed recent decision of the European Commission dated February 27, 2013 (the "EU Decision"), which identified "*significant competitive interaction between Ryanair and Aer Lingus*" and determined that [CONFIDENTIAL]⁴ This decision confirms that the minority shareholding has had no anti-competitive effect whatsoever.

² ECJ Case C-12/03 P *Commission v. Tetra Laval* ("*Tetra Laval II*") [2005] ECR I-978, paragraph 39.

³ *BAA Limited v. Competition Commission* [2012] CAT 3, paragraph 20(7).

⁴ EU Decision, paragraphs 624 and 496.

- Fourth, no relevant factual circumstances have changed since the EU Decision was issued, and the CC has not suggested otherwise. The EU duty of sincere cooperation requires the CC to reach a decision that is consistent with the EU Decision. The European Commission concluded that competition between Ryanair and Aer Lingus was so intense that the companies should not be allowed to merge. It would be inconceivable and unlawful for the CC to determine, only a few months later, and absent any material change in circumstances, that the very same fact pattern evidenced an SLC as between Ryanair and Aer Lingus.
- Fifth, the CC has presented no economic evidence to substantiate any of its fanciful theories of harm. This is particularly unsatisfactory in an investigation such as the present one, where there is a wealth of evidence available for any economic analysis. Moreover, the economic evidence available shows that the minority shareholding has not been associated with any SLC, that neither airline's incentives to compete with the other have been adversely affected, and that competition between the airlines has in fact intensified.
- Sixth, there is no allegation (or evidence) that Ryanair's incentives to compete aggressively with Aer Lingus have diminished – the concern generally associated with minority shareholdings. On the contrary, the Provisional Findings Report accepts that Ryanair and Aer Lingus have competed intensely against each other, without any regard for the minority shareholding, and that their incentives have not been affected by that shareholding.
- Seventh, the CC's own counterfactual is that, in the absence of the Transaction, Aer Lingus "*would pursue a broadly similar commercial strategy on routes between Great Britain and Ireland, either as an independent company or in combination with another airline.*"⁵ The counterfactual is not therefore that, absent the minority shareholding, Aer Lingus would have pursued a different (more effective) competitive strategy on GB/Ireland Routes. Rather, the CC posits, without evidence, that Aer Lingus *might* be acquired by another airline and that, following that hypothetical merger, it *might* become a more effective competitor. Setting aside the highly speculative nature of these assumptions, there is no evidence that, even if correct, competition on GB/Ireland Routes would become even more intense. Indeed, based on past experience of airline mergers, the opposite outcome is far more likely.
- [CONFIDENTIAL]

⁵

Provisional Findings Report, paragraph 6.21.

9. Finally, this case is very different from *BSkyB*, the most recent instance in which the CC investigated a minority shareholding.⁶ The *BSkyB* case turned on its own very specific facts, which simply do not apply in the present case.
- Unlike *BSkyB*, Ryanair's shareholding in Aer Lingus was acquired as part of an attempt to acquire the entirety of Aer Lingus, and not for strategic purposes.
 - Unlike ITV at the time of the *BSkyB* investigation, Aer Lingus has huge cash reserves, has no foreseeable need to raise additional cash, and has many other ways of doing so (which, as is undisputed, Ryanair would support).
 - Unlike the situation examined in *BSkyB*, there is six and a half years of evidence that is inconsistent with the notion that the minority shareholding in question has had, or could have, any adverse effect on competition.
10. In short, the theories of harm developed in *BSkyB* cannot simply be read across to the present Inquiry.

Material Influence

11. A determination of material influence requires a detailed assessment of the facts of the specific case. The CC's analysis in the Provisional Findings Report falls well short of this standard. The CC rightly dismisses almost all of the spurious theories conjured up by Aer Lingus. In particular, it recognizes that Ryanair cannot block ordinary resolutions, cannot appoint directors, and has no influence over the board of directors.
12. The CC nevertheless incorrectly and inexplicably concludes that Ryanair has the ability to exercise a material influence over Aer Lingus. This mistaken conclusion is based on two spurious theories, neither of which withstands scrutiny.
13. **The ability to block special resolutions does not confer material influence.** A shareholding above 25% allows the blocking of special resolutions. This alone, however, is insufficient: the CC must also show that doing so would be likely to affect Aer Lingus' commercial policy. In fact, no commercial decisions require a special resolution. The Provisional Findings Report identifies just two instances where Ryanair could block a special resolution, and neither is "*relevant to the behaviour of [Aer Lingus] in the marketplace.*"⁷
- Ryanair could block the disapplication of pre-emption rights to new share issues. Pre-emption rights are a statutory protection, intended to prevent the dilution of a shareholder's financial investment in a company, not a matter of

⁶ Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plus, Competition Commission Report to the Secretary of State, December 14, 2007.

⁷ Joint OFT and CC Merger Assessment Guidelines (CC2/OFT1254), September 2010, paragraph 3.2.8.

commercial policy. The CC has therefore had to create an elaborate theory, entirely inconsistent with the facts, in order to conclude that pre-emption rights amount to material influence. In doing so, the CC has misused the theories developed in *BSkyB*, in disregard of the fact that the facts of the present case are fundamentally different from the very specific and unusual scenario considered in *BSkyB*.

- Ryanair could prevent other airlines from acquiring control of Aer Lingus through a special resolution if (and only if) that acquisition were proposed through a Scheme of Arrangement.⁸ There are more natural ways in which a transaction could be structured, that would not involve a special resolution. More fundamentally, there is no prospect of any such transaction, with or without Ryanair's minority shareholding. Even if there were, it would be irrelevant. The CC's theory is (at best) relevant to the influence (if any) the minority shareholding may have on potential acquirers of Aer Lingus. It does not concern the commercial policy of Aer Lingus itself, which is the relevant issue for the CC's investigation.

14. **The ability to veto a disposal of Aer Lingus' London Heathrow slots does not confer material influence.** The Irish Government included Golden Share provisions in Aer Lingus' Articles of Association that allow it to prevent the disposal of Heathrow slots. Because of the way the Irish Government drafted these provisions, Ryanair could, in theory, act in the same way. The ability to ensure frequent daily flights between Dublin and Heathrow is of strategic importance to the Irish Government⁹ [CONFIDENTIAL]. Ryanair did not seek this veto right, has never used it, and there is no evidence that it would do so (indeed it recently agreed to a disposal of a spare, seasonal pair of Aer Lingus' Heathrow slots to British Airways when so requested by Aer Lingus). Even if it did, Ryanair's position would have no impact on Aer Lingus' ability to determine what routes to fly. Vetoing a disposal of Heathrow slots would, at most, deprive Aer Lingus of the "sale" price. There is no rational basis why Ryanair, with a financial investment in the company, would act in this way. The CC's theory ignores six and a half years of evidence and is predicated, at best, on the assumption that Ryanair would cut off its nose to spite its face.

⁸ Or under the Cross Border Mergers Directive (2005/56/EC of 26 October 2005), a route that, interestingly, has never to date been used in Ireland.

⁹ See "Statement by the Minister for Transport" issued on October 2, 2006, available at http://corporate.aerlingus.com/investorrelations/regulatorynews/2006pressreleases/minister_lhr.pdf, which states that "Heathrow Airport, London serves a unique role in ensuring connectivity to/from Ireland. This connectivity is fundamental both to provide connections to and from Dublin as well as to and from the regions." The statement sets out a minimum level of slots that is "critical to ensuring connectivity to and from Ireland," which includes "four London Heathrow slot pairs for services to and from Cork and that four (summer season) and three (winter season) for services to and from Shannon" as well as sufficient slots to ensure that "passengers from and to Dublin can connect throughout the course of the day with key long-haul destination flights to and from London Heathrow." The Minister for Transport states that "[It] is unlikely to support a proposed disposal of any slot pair relating to services between London Heathrow and Dublin that would result in the interval between air services operated using slots on this route exceeding 90 minutes."

Competitive Effects

15. The conclusion in the Provisional Findings Report that the minority shareholding results in an SLC is unsupported by evidence and disproven by the facts. Ryanair's minority shareholding is as a by-product of its pro-competitive attempt to acquire Aer Lingus by means of a public bid in 2006. It has been in place for six and a half years. There is therefore abundant evidence of its effect (if any) on competition – far more evidence than is typically available in merger investigations.
16. Over that six and half year period, competition between the two airlines has intensified. This is not simply assertion on the part of Ryanair; the European Commission and the CC itself have both reached the same conclusion. Despite these unambiguous findings, the CC has inexplicably concluded that the minority shareholding has or will result in an SLC. Specifically, the Provisional Findings Report focuses on three highly improbable theories of harm, each of which depends on a series of unsubstantiated assumptions:
 - That the minority shareholding *might* prevent Aer Lingus from combining with another airline;
 - That the minority shareholding *might* affect Aer Lingus' ability to raise money; and
 - That the minority shareholding *might* prevent Aer Lingus from disposing of slots at Heathrow airport.
17. **The minority shareholding does not prevent Aer Lingus from combining with another airline.** The CC has not concluded that, absent the minority shareholding, Aer Lingus would merge with another airline. It is therefore meaningless to speculate whether such a counterfactual would be a more competitive or less competitive outcome. Even so, in considering possible airline combinations, the CC has not sought to assess their competitive merits relative to the *status quo*.
18. Moreover, as noted above, the CC's own counterfactual is that, in the absence of the Transaction, Aer Lingus "*would pursue a broadly similar commercial strategy on routes between Great Britain and Ireland, either as an independent company or in combination with another airline.*"¹⁰ Accordingly, the counterfactual is not that, absent the shareholding, Aer Lingus would have pursued a different and more effective competitive strategy. The counterfactual is an unchanged commercial strategy. In this circumstance, it is irrational to conclude that the shareholding has given rise to an SLC.
19. The CC asserts that Aer Lingus would benefit from significant efficiencies from combining with another airline, regardless of the type of combination and regardless of the identity or characteristics of the other airline. These efficiency claims are unspecified, unsubstantiated, and unreliable.

¹⁰ Provisional Findings Report, paragraph 6.21.

20. This lack of evidence is particularly significant in light of the European Commission's assessment of the proposed merger of Ryanair and Aer Lingus. Ryanair and Aer Lingus are close competitors, both operating out of Ireland, with headquarters just across the road from each other. A merger of such close competitors is inherently more likely to result in efficiencies than other possible combinations. Ryanair presented detailed and particularised evidence of expected efficiencies from a merger of the two airlines to the European Commission. [CONFIDENTIAL]
21. By contrast, the CC simply asserts that any combination between Aer Lingus and any other airline would result in efficiencies. It then asserts, again without evidence, that such efficiencies would result in a substantially better competitive position on GB/Ireland Routes. This logical leap is particularly difficult to understand, since Aer Lingus did not make any submissions regarding the competitive effects of the combination on those specific Routes. Not only is this clearly insufficient to prove an SLC on the balance of probabilities, but it is also wrong: any potential acquirer of Aer Lingus will not share the Irish Government's stated aims of protecting connectivity between GB and Ireland. Rather than improving competition on GB/Ireland Routes, an acquisition of Aer Lingus by another airline would almost certainly lead to a change in the routes operated by Aer Lingus (particularly any routes that are unprofitable), including a likely termination of the short-haul routes currently utilizing Aer Lingus' valuable Heathrow slots in order to operate more profitable long-haul routes from Heathrow.
22. **The minority shareholding does not affect Aer Lingus' ability to raise capital.** Aer Lingus has no need to raise capital, as it has close to €1 billion in cash reserves. It has made repeated announcements to its shareholders and the public that it has "*a robust and profitable with...a strong balance sheet*"¹¹ and a "*valuable and profitable business*"¹² with a "*debt maturity profile...spread over several years to 2023*"¹³ and "*significant assets which are not recognised in its financial statements.*"¹⁴ It was recently able to place an order for aircraft worth \$2.4 billion without recourse to shareholders. Nonetheless, if Aer Lingus were to require additional funds, it could raise them in a variety of different ways. By comparison, a rights issue could raise a maximum of around €37 million, which is insignificant for any potential commercial plans of Aer Lingus.
23. Respecting statutory pre-emption rights would nevertheless add only marginal cost and time to a rights issue. As the CC is aware from evidence provided to it, Ryanair has also repeatedly stated that it would support a rights issue (*i.e.*, subscribe to its proportion of new shares), making it easier for Aer Lingus to raise equity capital if needed.

¹¹ Aer Lingus, Reject Ryanair's Offer Presentation.

¹² Aer Lingus Annual Report 2011.

¹³ *Ibid.*

¹⁴ *Ibid.*

24. In any event, Aer Lingus is already able to disapply pre-emption rights outside the EU, which removes any concerns about the cost or timing of a pre-emptive rights issue in non-EU countries. This is confirmed by the legal opinion of A&L Goodbody, a leading Irish corporate law firm. Their opinion is attached at **Annex 1**. This further undermines the CC's theory of harm and demonstrates that the CC's conclusions are erroneous.
25. This further undermines the CC's theory of harm and demonstrates that the CC's conclusions are erroneous.
26. **The minority shareholding does not affect Aer Lingus' ability to trade its Heathrow slots.** There is no reason to believe Ryanair would seek to veto the disposal of Heathrow slots. Even if it tried to do so, it would not result in an SLC. Any proposal to dispose of Heathrow slots for which Aer Lingus has commercial usage would be vetoed by the Irish Government, consistent with its numerous public commitments¹⁵ to ensure frequent daily flights between Dublin and London Heathrow.
27. In light of Aer Lingus' on-going attempts to acquire a significant portfolio of Heathrow slots divested by IAG/bmi, it is highly improbable that it would seek to dispose of any Heathrow slots for which it has commercial usage. Christoph Mueller has said in this regard that *"We are after slots [at Heathrow] in the wake of the proposed acquisition of BMI by IAG or BMI going into receivership...Heathrow has a huge catchment area and we want to pull more transfer traffic to our long haul. We have limited growth opportunities in Ireland but we can compensate the weakness of the Irish market by increasing our transfer passengers."*¹⁶ Aer Lingus' ability to fly to Heathrow is therefore a competitive advantage over other airlines and has no impact on its ability to fly to other London airports (where slots are freely available). If Aer Lingus were to dispose of its Heathrow slots, it would lose this competitive advantage and become a less effective competitor.
28. Reducing Aer Lingus' capacity on routes between Heathrow and Ireland might be expected to reduce competition between Ryanair and Aer Lingus. It is therefore perverse to contend that Ryanair's alleged ability to frustrate the sale of Aer Lingus' Heathrow slots would substantially lessen competition between Ireland and the UK. The opposite conclusion is far more credible.
29. Finally, Article 10 of Aer Lingus' Articles of Association allows Aer Lingus to manage its Heathrow slot portfolio in other ways, *e.g.*, by leasing out certain slot pairs, so the premise that Ryanair's shareholding prevents Aer Lingus from using these slots to generate additional revenue is incorrect.

¹⁵ See "Statement by the Minister for Transport" issued on October 2, 2006, available at http://corporate.aerlingus.com/investorrelations/regulatorynews/2006pressreleases/minister_lhr.pdf

¹⁶ Christoph Mueller to Air Transport World, Aer Lingus eyes bmi Heathrow slots, ATW, May 27, 2012.

30. For these reasons, the Provisional Findings are wrong, cannot be sustained, and Ryanair urges to CC to reflect carefully on the evidence available before issuing its Final Report.

II. The Finding That Ryanair Exercises Material Influence Is Wrong And Not Sustainable

A. Introduction

31. This Section of the Response addresses the CC's provisional finding that Ryanair has acquired material influence over Aer Lingus by virtue of its minority shareholding. As noted above, a determination of material influence requires a detailed assessment of the facts of the specific case, but the CC's analysis in the Provisional Findings Report falls far short of this standard.
32. The CC has rightly dismissed almost all of the theories of material influence considered in its Material Influence Working Paper. In particular, the CC has accepted that:
- Ryanair does not have the ability to block ordinary resolutions;¹⁷
 - Ryanair is unable to appoint board members and has not sought to do so;¹⁸
 - Ryanair's industry expertise does not influence the Aer Lingus board or other shareholders;¹⁹ and
 - Ryanair's theoretical rights to requisition an EGM and table resolutions at General Meetings does not give rise to material influence.²⁰
33. The Provisional Findings Report nevertheless concludes that Ryanair has the ability to materially influence Aer Lingus' commercial policy because Ryanair is able to block special resolutions and could, in theory, veto a disposal of Heathrow slots. For the reasons set out below both of these theories are wrong, unsupported by evidence, and are therefore not sustainable.

B. The Ability To Block Special Resolutions Does Not Confer Material Influence

34. The first theory on which the CC concludes Ryanair has material influence is that on "*Ryanair's ability to block special resolutions ... which are relevant to Aer Lingus's ability to pursue its commercial policy and strategy.*"²¹ Although the ability to block a special resolution has, in past cases, been regarded as an indicator of material

¹⁷ Provisional Findings Report, paragraph 4.28.

¹⁸ Provisional Findings Report, paragraph 4.29.

¹⁹ Provisional Findings Report, paragraph 4.32.

²⁰ Provisional Findings Report, paragraphs 4.33 to 4.34.

²¹ Provisional Findings Report, paragraph 4.43.

influence, it is not dispositive.²² It is also necessary to show that blocking a special resolution would influence the company’s commercial strategy in the relevant market (i.e., GB/Ireland Routes).

35. In the case of Aer Lingus, there are almost no matters that require approval by special resolution; those that do are not matters of commercial policy, but statutory rights designed to protect the financial interests of shareholders. The CC identifies only the disapplication of pre-emption rights and the ability to prevent a shareholder being forced to lose their shares in a Scheme of Arrangement.
36. The CC provisionally concludes that Ryanair’s ability to block a special resolution “gives it the ability to influence possible combinations of Aer Lingus with other airlines through, for example, its ability to prevent a merger with another airline via a Scheme of Arrangement or under the Cross Border Merger Regulations”²³ and that Ryanair “can also prevent Aer Lingus from issuing new shares to a strategic partner,” which would prevent “a transaction structure in which a minority shareholder could acquire an equity stake of up to 33 per cent of Aer Lingus via the issuance of shares [emphasis added].”²⁴
37. It is immediately apparent that the CC is seeking to read across conclusions from its analysis in *BSkyB* to the present case, where the facts are fundamentally different. In *BSkyB*, the Competition Appeal Tribunal (the “CAT”) stated:

*“The reason that this ability is said to lead to material influence is because in the Commission’s opinion a special resolution is likely to be required by ITV in the reasonably near future in order to obtain funding for major strategic options. Without the need for such funding, Sky’s ability to block a special resolution would not give rise to the same degree of influence [emphasis added].”*²⁵
38. Thus, in *BSkyB*, the CAT made it clear that the power to block special resolutions gives rise to material influence only where it affects a commercial decision that is likely in the reasonably near future.²⁶

²² Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plus, Competition Commission Report to the Secretary of State, December 14, 2007, paragraph 3.62.

²³ Provisional Findings Report, paragraph 4.21.

²⁴ Provisional Findings Report, paragraph 4.22.

²⁵ *British Sky Broadcasting Group Plc. v. Competition Commission* [2008] CAT 25, paragraph 146.

²⁶ See also *General Utilities Plc. and The Mid Kent Water Company* (Cm 1125), paragraph 8.25: “we note that there is likely to be a requirement for fund by Mid Kent Water, and it is likely that such funds will need to be raised by the holding company [emphasis added].” (note that in that case other factors indicating material influence were present, including the ability to influence shareholders and the appointment of directors); *Southern Water Plc. and the Mid-Sussex Water Company* (Cm 1126), paragraph 8.23: “Southern has the ability ... to block special resolutions We note that Mid-Sussex has major investment requirements (over £50

39. Pre-emption rights are a statutory protection, common in many jurisdictions, designed to prevent a shareholder who has invested in a company from having its shareholding diluted. They encourage investment. This is uncontroversial. For example, the Explanatory Notes to the UK Companies Act 2006 (which similarly mandates pre-emption rights) state:

“The basic principle is that a shareholder should be able to protect his proportion of the total equity of a company by having the opportunity to subscribe for any new issue of equity securities.”²⁷

40. In the *BSkyB* case, the CC concluded that the ability to delay raising equity finance by means of a rights issue could result in material influence. In that case, the CC’s findings relied heavily on ITV’s poor financial position, the prospect of taking out further debt finance leading to a ratings downgrade (below investment grade), and a range of strategic projects for which ITV was likely to need quick access to finance in the next two to three years.²⁸ None of these factors applies in the present case.

1. Ryanair’s Ability To Block Special Resolutions Does Not Confer Material Influence On Aer Lingus’ M&A Strategy

41. The CC’s provisional conclusion that Ryanair’s ability to block special resolutions confers material influence through giving Ryanair an influence over “*possible combinations of Aer Lingus with other airlines*” rests on a number of highly speculative assumptions. It assumes that:
- (a) Aer Lingus’ commercial strategy is likely to involve entering into a combination with another airline in the reasonably near future;
 - (b) Aer Lingus would engage in such a combination through a Scheme of Arrangement (or under the Cross Border Merger Regulations (a method which has never been used in Ireland)) or by issuing new shares to a partner; and
 - (c) Aer Lingus’ commercial strategy could be materially influenced by Ryanair’s ability to block a combination involving a Scheme of Arrangement (or under the Cross Border Merger Regulations), or issuing new shares to a partner.
42. **The evidence does not show that Aer Lingus would combine with another airline in the reasonably near future.** The CC does not provide evidence that Aer Lingus is likely to enter into a transaction that could be blocked by Ryanair, nor does the CC suggest any timeframe in which such a transaction is likely to occur. On the contrary, the evidence before the CC shows that:

million in the next five years)... We consider that Southern’s ability to block special resolutions is a significant one, given that such resolutions are likely to be needed [emphasis added].”

²⁷ Explanatory Notes to Companies Act 2006, paragraph 866.

²⁸ Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plus, Competition Commission Report to the Secretary of State, December 14, 2007, paragraph 3.43.

- **Aer Lingus is unlikely to acquire another airline in the reasonably near future.** Aer Lingus claims that “*it might look to acquire another airline [emphasis added].*” However, there is no indication of the time frame within which this is likely occur, or indeed any examples of potential targets.
- **Any potential acquisition of Aer Lingus by another company is not properly part of Aer Lingus’ commercial strategy.** The relevant test for material influence is whether Ryanair is able to influence (in a material way) Aer Lingus’ “*behaviour ... in the marketplace,*” including its “*strategic direction and its ability to define and achieve its commercial objectives.*”²⁹ In making this assessment, the CC must take into account those commercial actions which Aer Lingus is likely to want to take in the reasonably near future. The commercial actions that other airlines *may* wish to take – such as launching a takeover of Aer Lingus – are not relevant for this purpose.³⁰ Indeed, in *BSkyB*, the CC considered whether the ability to block a hostile takeover would confer material influence and concluded that it “*did not think this would be the case, since such a takeover would not form part of ITV’s strategy.*”³¹

43. **Ryanair could not block a combination with another airline.** The CC provisionally concludes that Ryanair’s ability to block special resolutions could influence Aer Lingus’ ability to enter into a combination with another airline. The CC itself recognizes that “*there is a spectrum of different ways in which Aer Lingus and another airline could combine [emphasis added].*” Only a limited number of means of entering into a combination *would* require a special resolution: (i) a Scheme of Arrangement; (ii) a transaction under the Cross-Border Merger Regulations; or (iii) issuance of shares to a new partner.³² It is unlikely that a combination would have to be implemented by one of these methods:

- **Aer Lingus could be acquired without a Scheme of Arrangement.** The CC provides no evidence to suggest that a hypothetical transaction would be likely

²⁹ The Merger Guidelines, paragraph 3.2.8.

³⁰ Ryanair notes for completeness that Aer Lingus admits itself that it is unlikely be acquired as it is “*not in the situation of many European carriers looking to consolidate*” owing to its cash position (Provisional Findings Report, paragraph 7.32). Indeed, the evidence provided in Appendix F sets out discussions in which Aer Lingus considered investments in another airline not the other way around. Furthermore, other airlines are not interested in acquiring Aer Lingus. EasyJet, Air France, British Airways, and Lufthansa have all stated in the past five years that they are not interested in acquiring Aer Lingus. There is no evidence that this is because of Ryanair’s shareholding. Rather it is due to the unattractiveness of Aer Lingus as a target.

³¹ Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plus, Competition Commission Report to the Secretary of State, December 14, 2007, paragraph 3.56. The CC concluded in that case that such ability would only be relevant to the question of BSkyB’s ability to influence other shareholders. However, in this case, it is clear that Ryanair does not have any significant influence over other shareholders either as a result of its ability to block a takeover or otherwise.

³² The question of whether Ryanair could prevent Aer Lingus raising cash to finance such a transaction is considered in relation to Ryanair’s ability to oppose the dis-application of pre-emption rights below.

to be structured in this way. Schemes of Arrangement are used for acquisitions when the transaction cannot be achieved in any other way. For example, Ryanair's previous bids for Aer Lingus would not have been implemented by way of Scheme of Arrangement. Indeed, there are many disadvantages to using a Scheme of Arrangement, including cost, the need to achieve a higher percentage of shareholder acceptance to complete the bid, and timing constraints imposed by the statutory court timetable.

- **Aer Lingus could be acquired without a merger under the Cross Border Merger Regulations.** No transaction under the European Communities (Cross-Border Mergers) Regulations 2008 has yet taken place in Ireland. One of the reasons is that such a transaction offers no advantages over a Scheme of Arrangement, while it carries with it the disadvantages of the Scheme as compared to a traditional offer. It is speculative in the extreme to assume that another airline would wish to acquire Aer Lingus in this manner.
- **There is no need to issue new shares.** There is nothing to prevent strategic partners acquiring shares on the open market. Aer Lingus' partner Etihad did not have any difficulties obtaining a 3% share in the company in 2012. Aer Lingus' shares are publicly traded. Even without the shares held by the Irish Government and Ryanair, around 45% of Aer Lingus' shares are available for purchase. When one also takes account of the shares of the Irish Government, it is clear that there is no need for any potential acquirer or partner to subscribe to new shares in Aer Lingus, either to make a minority investment or to acquire control.

44. The CC cannot simply assume that the ability to block a special resolution results in material influence. It has to show a connection between that ability and the company's commercial policy in the relevant market. In this case, the CC has not shown that Aer Lingus' commercial strategy is likely to involve any transaction within the reasonably near future, or, that if it did, Ryanair could hinder such a transaction, or, that if it did, this would influence Aer Lingus' commercial policy on GB/Ireland Routes.

2. Ryanair's ability to require Aer Lingus to respect statutory pre-emption rights does not confer material influence

45. The CC's suggestion that Ryanair could have a material influence on Aer Lingus' commercial policy by requiring it to respect a fundamental shareholder right such as pre-emption rests on number of highly speculative assumptions. The CC's provisional conclusion assumes:

- That Aer Lingus is likely to need to raise capital in the reasonably near future (and that Aer Lingus could not finance such expenditure from existing cash reserves or future profits);
- That if Aer Lingus did need to raise capital, it would need to do so through equity finance; and
- That if Aer Lingus did need to use equity finance, it would need to do so through the disapplication of pre-emption rights.

46. None of these assumptions is supported by the facts:
- There is no evidence that Aer Lingus is likely to enter into a large strategic transaction (as is discussed above).
 - There is no evidence, and the CC has not established, that external shocks are likely to occur.
47. **Aer Lingus does not need to raise finance.**
- Aer Lingus is unlikely to need capital for general corporate purposes as it has “*significant cash balances*.”³³
 - Aer Lingus could fund significant capital expenditure from cash while still providing for its aircraft purchases.
 - Aer Lingus could finance significant capital expenditure from cash while still providing for unforeseen shocks. In particular, Ryanair notes that: (i) recent external shocks (such as the introduction by the Irish Government of its Air Travel Tax of €10 in 2009, now reduced to €3) have not had a material impact on Aer Lingus’ cash position; and (ii) the costs incurred in relation to such unexpected “shocks” in recent years have been very small in comparison with Aer Lingus’ cash reserves.
48. **If Aer Lingus did need to raise finance, it would not need to issue new shares.**
- Aer Lingus has demonstrated that it is able to finance its activities without issuing equity (*e.g.*, its recent \$2.4 billion aircraft order).
 - The Provisional Findings Report provides no reason or evidence for concluding that Aer Lingus would not be able to obtain debt financing in the future, and no evidence that Aer Lingus’ position as regards debt financing is remotely similar to that of ITV at the time of the CC’s investigation.
49. **Aer Lingus would not need to disapply pre-emption rights to raise equity finance.** Aer Lingus could issue shares without the need to disapply pre-emption rights. It is also open to Aer Lingus to take steps that reduce the time and cost of a pre-emptive rights issue.
- Aer Lingus could conduct a rights issue with full pre-emption rights in place. Ryanair has repeatedly confirmed that it would be prepared to take up its quota of shares in the event of a rights issue.
 - The amount Aer Lingus could potentially raise from a rights issue is marginal in comparison with its reserves.

³³ Provisional Findings Report, Appendix G, paragraph 23.

- Aer Lingus' ability to raise equity finance is not compromised by the length of the procedure to conduct a rights issue.
- Aer Lingus could, in any event, disapply pre-emption rights outside the EU, removing the claimed concerns it has in relation to issuing shares in non-EU countries. This is confirmed by the legal opinion of A&L Goodbody, a firm that specialises in Irish corporate law. Their opinion is attached at **Annex 1**.

50. As noted above, the CC cannot simply assume that the ability to block a special resolution results in material influence. It has to show a connection between that ability and the company's commercial policy in the relevant market. In the present case, there is no connection. Indeed, there is no evidence that Aer Lingus is likely to need to raise equity finance in the reasonably near future, or that Ryanair's ability to block special resolutions could influence Aer Lingus' ability to raise such finance, or that any such influence (the existence of which is denied) would influence Aer Lingus commercial policy on GB/Ireland Routes.

C. The Ability To Veto A Disposal Of Heathrow Slots Does Not Confer Material Influence

51. The second theory on which the CC concludes Ryanair has material influence is based on *"Ryanair's ability to block ... the sale of Heathrow slots under the Articles of Association, which [is] relevant to Aer Lingus's commercial policy."*³⁴

52. The Provisional Findings Report recognizes that Aer Lingus has recently sought to acquire a significant portfolio of additional slots at Heathrow³⁵ and is therefore extremely unlikely to seek to dispose of its existing Heathrow slots, which it values commercially. Despite this, the CC inexplicably concludes that *"Aer Lingus may seek to acquire some slots at Heathrow while disposing of others in the context of managing its overall slot portfolio"* but that *"even if Aer Lingus's current strategy was one of increasing its slot portfolio at Heathrow, its position may well change over time [emphasis added]."*

53. This provisional conclusion rests on two highly speculative assumptions, as follows:

- (a) that Aer Lingus' commercial strategy is likely to involve the sale of Heathrow slots in the reasonably near future; and
- (b) if Aer Lingus' strategy did involve such a sale, Ryanair's ability to block it would be able to have a material impact (in particular because the Irish Government would not oppose a sale). These assumptions are unjustified.

54. **Aer Lingus' commercial strategy is highly unlikely to involve disposal of Heathrow slots.** Given the stated position of Aer Lingus' controlling shareholder, the

³⁴ Provisional Findings Report, paragraph 4.43.

³⁵ In particular, slots from the IAG/bmi merger remedy.

Irish Government, in respect of the need to maintain a substantial volume of flights between Ireland and London Heathrow, Aer Lingus will not be allowed to, and is extremely unlikely to attempt to, dispose of its Heathrow slots. The CC fails to provide evidence to the contrary:

- **Aer Lingus' Heathrow slot portfolio is a valuable asset.** As Ryanair has noted in past submissions, Aer Lingus' slot portfolio is a major asset (likely to be worth in excess of €250 million) and Aer Lingus is currently seeking to acquire even more slots. As such, it is very unlikely that Aer Lingus would seek to dispose of such slots in the reasonably near future.
- **Slots at other London airports allow Aer Lingus to adapt its timetables and increase flights to and from London.** If Aer Lingus wanted to optimize its slot portfolio in order to increase flights to London, there are slots available at the other four London airports [CONFIDENTIAL]. Conversely, to reduce frequencies to London, Aer Lingus could discontinue some of its flights to Gatwick or Southend, where it currently operates directly and through Aer Arann.
- **36-month leases allow flexibility in the use of Aer Lingus' Heathrow Slots.** These leases are not subject to approval by the Aer Lingus shareholders and allow Aer Lingus flexibility in respect of its slot portfolio. This is in addition to Aer Lingus' pre-existing arrangement with IAG in respect of a slot pair that had been leased out to IAG prior to Aer Lingus' IPO.
- **Aer Lingus does not need to dispose of Heathrow slots for money.** Aer Lingus has (as is discussed at length elsewhere in this Response) very significant cash reserves of almost €1 billion. There is no reason to believe Aer Lingus is likely to need to sell or mortgage slots to raise cash.³⁶
- **Ryanair would not oppose a sale of slots at Heathrow.** Ryanair did not oppose a recent slot disposal by Aer Lingus to IAG of a spare, seasonal slot pair at Heathrow. Indeed, vetoing a disposal of Heathrow slots would, at most, deprive Aer Lingus of the "sale" price. There is no rational basis why Ryanair, with a financial investment in the company, would act in this way. The CC's theory is therefore predicated, at best, on the assumption that Ryanair would cut off its nose to spite its face.³⁷

55. **The Irish Government would block a disposal of Heathrow slots.** The Golden Share veto rights of disposals of Heathrow slots were put in place by the Irish

³⁶ Furthermore, as noted elsewhere in this response, Aer Lingus claims to be opposed to raising additional debt and so there is no reason to believe that an inability to dispose of Heathrow slots by way of a mortgage or charge would have any effect on Aer Lingus' commercial strategy.

³⁷ Ryanair also notes that it was in fact ready to divest such slots as part of remedies proposed to obtain clearance from the European Commission of its most recent bid for Aer Lingus. As the CC is aware, Ryanair's proposal was vehemently opposed by the Irish Government.

Government to protect Ireland’s connectivity with frequent daily flights to the global hub at Heathrow. The Irish Government has repeatedly confirmed that it would exercise its right to block disposals of Heathrow slots, most recently in order to torpedo Ryanair’s 2012 offer for Aer Lingus, and the evidence provided to the CC clearly shows that the Irish Government will oppose any such disposal. However, while the CC accepts that the Irish Government considers continued access to its slots at Heathrow airport as being of strategic interest to the land, and that any possible Heathrow slot sale may well be opposed by the Irish Government, it also speculates, without reference to any evidence, that the “*potential incremental effect of Ryanair’s minority shareholding would be limited only to instances where the Irish Government consented to Aer Lingus disposing of Heathrow slots.*” There is no room for such speculation where evidence conclusively demonstrates that the Irish government would not consent to Aer Lingus disposing of its Heathrow slots.

- **The CC’s conclusion that the Irish Government would be likely to support slot disposal to optimize Aer Lingus’ slot portfolio is unsupported by evidence and speculative.** The CC provides no evidence other than a bald statement by Aer Lingus that “*Consent was much more likely to be forthcoming if Aer Lingus was simply seeking to optimize its slot portfolio at Heathrow, without significantly lessening its presence at the airport.*”³⁸ This conclusion is therefore speculative on the part of the CC, and contrary to the European Commission’s finding of substitutability between Heathrow, Gatwick, Stansted, Luton and City airports in London.
- **There is no evidence that any purchaser of the Irish Government’s shares would support a disposal of slots.** There is no evidence to suggest that it is likely and certainly no basis for the CC to conclude that “*an alternative independent shareholder would be likely to support a Heathrow slot disposal proposed by management, so long as this were considered to be in the interests of the company.*”³⁹ Such an eventuality is far too remote – the Irish Government told the CC that its Aer Lingus stake was reluctantly indicated as an asset for sale and that the Government has no current plans to dispose of its control over Aer Lingus. Also, the CC has failed to identify any potential purchaser of the Government’s stake.⁴⁰ It is inappropriate and unlawful for the CC to speculate about the motives of an unknown and purely hypothetical future purchaser of the Irish Government’s stake, particularly when this stake will not even be available for sale in the foreseeable future.

³⁸ Provisional Findings Report, paragraph 7.81.

³⁹ Provisional Findings Report, paragraph 7.82.

⁴⁰ See Andrew Parker, “Consolidation: Concentration of carriers puts collapse on Europe agenda.” Financial Times, June 16, 2013., where Willie Walsh, chief executive of IAG, said: “*It’s clear there are a lot of airlines in play. Most of these are peripheral airlines that we can’t see adding any value to the IAG group – or, in all honesty, adding any value to pretty much anybody. So we don’t have any proposals to do anything.*”

- **There is no evidence that the mechanism to protect the slots at Heathrow would remain part of Aer Lingus' Articles of Association if the Government sold its shares in Aer Lingus.** As noted above, the provisions restricting the disposal of Heathrow slots were put in place by the Irish Government in advance of the IPO, as a "Golden Share" mechanism, to achieve its own political objectives. When the Irish Government no longer owns a stake in Aer Lingus, the remaining shareholders may well choose to amend the articles to remove these political provisions. There is no reason to suppose that Ryanair would oppose such an amendment – it has made clear that it is not opposed to a sale of Heathrow slots and offered to divest them to obtain merger clearance from the European Commission.⁴¹
56. This evidence clearly shows that Ryanair would not be in a position to veto the disposal of Heathrow slots, would have no intention or reason for doing so, and (even if it did) preventing a disposal would have no impact on Aer Lingus' ability to determine what routes to fly between Ireland and Great Britain. Vetoing a disposal of Heathrow slots would, at most, deprive Aer Lingus of the "sale" price. There is no rational basis why Ryanair, with a financial investment in the company, would act in this way.
57. For these reasons, the CC has no basis for concluding that Ryanair's theoretical ability to oppose a sale of Aer Lingus' Heathrow slots would confer material influence over Aer Lingus' commercial policy on GB/Ireland Routes.

D. No Other Factors Identified By The CC Confer Material Influence

58. As noted above, the CC's provisional conclusion on material influence relies on "*Ryanair's ability to block special resolutions and the sale of Heathrow slots.*"⁴² None of the 'additional factors' in paragraphs 4.13 to 4.42 of the Provisional Findings Report supports a finding of material influence. For the sake of completeness, Ryanair addresses these points here.
- **Ryanair does not have the ability to block ordinary resolutions.** Ryanair's 29.82% shareholding does not allow it to block ordinary resolutions. Ryanair has never successfully mobilized support from other shareholders to block an ordinary resolution proposed by the Board, even in the case of highly controversial motions, such as the election of Irish trade union boss David Begg to the Board. The Irish Government's share is 25.11% and, as the Provisional Findings Report notes, there are several other investors, including employees and strategic investors (*e.g.*, Denis O'Brien, who has close connections with the Irish Government and whose advisor served on the Aer Lingus Board as a Government-appointed director between 2009 and 2012), who have a history of voting with the Irish Government, against Ryanair.

⁴¹ See Annex 2 to Ryanair's Observations On Material Influence Working Paper of May 3, 2010.

⁴² Provisional Findings Report, paragraph 4.43.

Indeed, the CC rightly concludes that “*the situations in which Ryanair could achieve a majority... were relatively unlikely to occur* [emphasis added].”⁴³

- **Ryanair is unable to appoint board members and has not sought to do so.** The CC does not suggest that Ryanair has any ability to exercise a material influence over Aer Lingus through Board representation. This is clearly correct. Ryanair has no representatives on the Board and cannot appoint directors. It has never proposed a Board director and, as explained at Ryanair’s Main Party Hearing, there are compelling reasons why it would have no desire to appoint a director, even if it were possible.
- **Ryanair cannot influence Aer Lingus by attempting to call General Meetings or to table resolutions.** Ryanair’s inability to requisition EGMs or table resolutions at Aer Lingus’ General Meetings is further evidence that Ryanair had and has no influence over Aer Lingus or its Board. Ryanair, in common with any other shareholder that holds at least 5% of the share capital of Aer Lingus can theoretically attempt to requisition Aer Lingus’ management to call an EGM and all shareholders with at least 3% can seek to place matters on the agenda of an AGM. The CC, rightly, does not find that this confers material influence. Indeed, the evidence of the last six and a half years shows that Ryanair has repeatedly been unsuccessful in its attempts even to call an EGM or to table resolutions.
- **The allegations of “constraints on Aer Lingus’ management time” do not indicate material influence.** The Provisional Findings Report considers whether Ryanair has imposed “*constraints on Aer Lingus’s Management’s Time*” and whether this could give rise to material influence. The Provisional Findings Report fails to indicate how this could give rise to material influence – it simply restates allegations made by Aer Lingus. It would be extraordinary and incorrect for the CC to conclude that any exercise of shareholder rights, such as holding management to account, amounted to material influence for the purposes of merger control. Moreover, the highly stylized and erroneous accounts presented to the CC by Aer Lingus in these proceedings contrast sharply with the measured (and factually accurate) public statements of the current Aer Lingus CEO, Christoph Mueller, who described Ryanair as “*very professional shareholders*” and explained that the two companies had established “*a very professional environment*.”⁴⁴ The CC has also failed to take into account important facts in relation to the occasions on which Ryanair has allegedly constituted a constraint on Aer Lingus’ management’s time.⁴⁵

⁴³ Provisional Findings Report, paragraph 4.28.

⁴⁴ “*Green Returns*,” Airline Business, July 2011.

⁴⁵ In particular, in relation to the alleged ‘incident’ in December 2008, the CC has failed to take into account the fact that this ‘incident’ is not connected with Ryanair’s minority shareholding in Aer Lingus. This ‘incident’ concerned Ryanair’s second bid for Aer Lingus and had no connection with Ryanair’s exercise of its rights as a shareholder. Further, in relation to the alleged ‘incident’ in 2009, the CC has failed to take into

Finally, to the extent Aer Lingus' allegations relate to Ryanair's attempts to acquire the company, they cannot be relevant to the CC's assessment as the ability to make a public bid for Aer Lingus is unconnected to the minority shareholding.

E. Conclusion On Material Influence

59. The CC is required to show that the minority shareholding constitutes a relevant merger situation on the balance of probabilities, by reference to all the evidence available. It has not done so. Tellingly, the CC expressly avoids reaching a conclusion that Ryanair has exercised material influence over Aer Lingus in the past six and a half years.⁴⁶ Since the evidence shows that Ryanair has had no impact on Aer Lingus' commercial policy on GB/Ireland Routes or at all, there is simply no scope for concluding that the minority shareholding confers material influence, and the Provisional Findings must be reversed in the CC's Final Report.

account Ryanair's submissions on this matter. Ryanair has made clear in past submissions that the 'incident' was based on the following events. In its "Defence Document" issued in response to Ryanair's second bid for Aer Lingus, management 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 also proven wrong in March 2009 when Aer Lingus announced a full year loss after tax of €108 million for FY 2008. This demonstrates that Aer Lingus arguably misled the market in its Defence Document, but in any event this matter has no connection with Ryanair's minority shareholding.

⁴⁶ Provisional Findings Report, paragraph 4.44.

III. Ryanair's Minority Shareholding Has Not Led To, And Could Not Lead To, A Substantial Lessening Of Competition

A. Introduction

60. This Section of the Response addresses the CC's provisional conclusion that Ryanair's minority shareholding has resulted in an SLC on GB/Ireland Routes.
61. The CC has rightly dismissed almost all of the SLC theories conjured up by Aer Lingus and entertained in the CC's Competitive Effects Working Paper. In particular, the CC has accepted that:
- Ryanair's shareholding does not allow it to influence Aer Lingus' commercial strategy by exercising the deciding vote on an ordinary resolution;⁴⁷
 - Ryanair's shareholding does not allow it to raise Aer Lingus' management costs or impede its management from concentrating on Aer Lingus' commercial strategy;⁴⁸
 - Ryanair's shareholding does not incentivize the management of Aer Lingus to take into account the interests of Ryanair in setting its commercial policy;⁴⁹
 - Ryanair's shareholding does not change Ryanair's incentives with regard to its own commercial decisions, by linking its financial interests to those of Aer Lingus;⁵⁰ and
 - Ryanair's shareholding does not increase the likelihood of Ryanair and Aer Lingus coordinating on fares or some other aspect of their offering in future.⁵¹
62. The CC nevertheless concludes that Ryanair's shareholding leads to an SLC based on the fanciful and unsubstantiated replacement theories called upon by Aer Lingus that Ryanair's shareholding:
- Affects the ability of Aer Lingus to participate in a combination with another airline;⁵²
 - Hampers Aer Lingus' ability to issue shares to raise capital;⁵³ and

⁴⁷ Provisional Findings Report, paragraphs 7.85 to 7.91.

⁴⁸ Provisional Findings Report, paragraphs 7.93 to 7.100.

⁴⁹ Provisional Findings Report, paragraphs 7.103 to 7.107.

⁵⁰ Provisional Findings Report, paragraphs 7.118 to 7.130.

⁵¹ Provisional Findings Report, paragraphs 7.131 to 7.141.

⁵² Provisional Findings Report, paragraphs 7.15 to 7.64.

- Influences Aer Lingus’ ability to manage its portfolio of slots at Heathrow.⁵⁴
63. For the reasons set out below, none of these theories withstands scrutiny. The CC’s assertion that the minority shareholding has led, or will lead, to an SLC directly contradicts the evidence of the past six and a half years and the recent findings of the European Commission. The CC is therefore in breach of its legal duty to give full and proper consideration to the evidence it has gathered and apply the “probabilistic test,” as well as being in violation of its duty of sincere cooperation despite being fully aware of the legal consequences of this violation.
64. Moreover, the CC has failed to assess the competitive effects of the minority shareholding against its own counterfactual, which is itself insufficiently precise to form a viable frame of reference for its investigation. The CC’s failure to adduce evidence is a particularly grave omission in the context of a minority shareholding investigation, where the chains of cause and effect following the acquisition of the shareholding are, at best, dimly discernible.
65. In any event, the following Sections explain that Ryanair’s shareholding does not affect Aer Lingus’ effectiveness as a competitor in any of the ways envisaged (in fact, the shareholding does not affect Aer Lingus’ effectiveness as a competitor in any way).

B. Competition Between Ryanair And Aer Lingus Since 2006 Has Intensified

66. The CC has concluded that “*absent Ryanair’s minority shareholding, competition during the period since 2006 may have been different and stronger* [emphasis added].”⁵⁵ This statement is inconsistent with the findings of the European Commission and deliberately underplays the Commission’s findings, as actively supported by Aer Lingus itself, as to the extent of competition between the two airlines since 2006, which are binding on the CC.
67. Ryanair has already referred the CC to the findings of the European Commission that are relevant to this investigation.⁵⁶ These findings conclusively show that competition between Ryanair and Aer Lingus has intensified since Ryanair’s acquisition of its minority shareholding. For example, the Commission concluded:

[CONFIDENTIAL]⁵⁷

⁵³ Provisional Findings Report, paragraphs 7.65 to 7.72.

⁵⁴ Provisional Findings Report, paragraphs 7.73 to 7.84.

⁵⁵ Provisional Findings Report, paragraph 7.163.

⁵⁶ See Ryanair’s Letter to CC of March 5, 2013.

⁵⁷ EU Decision, paragraph 478.

And:

[CONFIDENTIAL]⁵⁸

68. The CC's conclusions in the Provisional Findings Report are remarkably inconsistent with these conclusive and unambiguous findings, potentially placing the CC in breach of the EU duty of sincere cooperation. [CONFIDENTIAL]

[CONFIDENTIAL]⁵⁹

And:

[CONFIDENTIAL]⁶⁰

And:

[CONFIDENTIAL]⁶¹

And:

[CONFIDENTIAL]⁶²

C. The CC Must Take Account Of Six And A Half Years Of Evidence

69. A fundamental flaw in the Provisional Findings Report is that it ignores the impact of six and a half years of evidence concerning the effects of Ryanair's minority stake on competition in the market. The Provisional Findings Report states that "*we need to consider not only whether the transaction has, to date, led to an SLC, but also whether an SLC might be expected in the future* [emphasis added]." ⁶³ However, as will be clear from this Response, none of the theories explored by the CC are grounded in the six and a half years of evidence available since Ryanair acquired the minority shareholding.
70. In most merger control matters, the principal difficulty is that competition authorities are required to carry out a prospective analysis that predicts the effect of the merger on competition in the market, but without evidence of the effect it will in fact have. Where a competition authority has access to *ex post* evidence of the effect of a

⁵⁸ EU Decision, paragraph 496.

⁵⁹ [CONFIDENTIAL]

⁶⁰ [CONFIDENTIAL]

⁶¹ [CONFIDENTIAL]

⁶² [CONFIDENTIAL]

⁶³ Provisional Findings Report, paragraph 7.11.

merger, this evidence is clearly a better basis than theory for predicting future behaviour (see *Kerry Foods/Headland Foods*⁶⁴ and *Sony/BMG*⁶⁵).

71. The CAT has recently confirmed this in *BSkyB*,⁶⁶ where it stated that the CC had been correct to give weight to evidence of past voter turnout (over and above an anomalous later General Meeting) to assess the significance of Sky's shareholding. It held that:

*“in the context of an assessment as to whether there is likely to be an SLC in the future, the Commission **must give full and proper consideration to the evidence which it has gathered, and apply the “probabilistic test” at the end-point** [emphasis added].”*⁶⁷

72. This is correct not only in the context of merger review, but as a general point of administrative law. Such existing and probative evidence is not merely a relevant consideration which the decision maker must consider, it must ground the decision itself. Wade & Forsyth makes this point in the following terms:

*“...the limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene [emphasis added].”*⁶⁸

73. In *Mahon v Air New Zealand Ltd* [1984] AC 808, 820G-H, Lord Diplock held that a public authority decision maker “*must base his decision on evidence that has some probative value.*” Sir Christopher Bellamy has made the same point specifically in relation to proceedings before the CAT:

*“[the CAT] has jurisdiction acting in a supervisory rather than appellate capacity to determine whether the **Competition Authority’s conclusions are adequately supported by evidence, that the facts have been properly found, all material considerations have been taken into account and that material***

⁶⁴ See Competition Commission, Completed acquisition by Kerry Foods Limited of frozen ready meals business of Headland Foods Limited, Provisional Findings Report, October 25, 2011, paragraph 7.1.

⁶⁵ Commission decision of October 3, 2007, COMP/M.3333, *Sony/BMG*, 2008 OJ C 94/19, paragraph 527. The Commission adopted the same approach in Commission decision of November 11, 2003, Case COMP/M.2621, *SEB/Moulinex*, 2005 OJ L 138/18.

⁶⁶ *British Sky Broadcasting Group Plc. v. Competition Commission* [2008] CAT 25.

⁶⁷ *Ibid.*, paragraph 80.

⁶⁸ Wade & Forsyth, *Administrative Law* (10th edition, Oxford, 2009).

facts have not been omitted. *So there is a fairly intense review of the facts, also of the procedure and also of the reasoning [emphasis added].”*⁶⁹

74. In this case, the CC has not given any serious consideration to the six and a half years of evidence available. Instead, it has consistently made insupportable claims based on unsatisfactory evidence and, on many occasions, on no evidence whatsoever – claims at all times tailored to Aer Lingus’ pre-determined conclusion that Ryanair should be required to dispose of its shareholding.

D. The CC Is In Violation Of Its Duty Of Sincere Cooperation

75. In addition to the CC’s independent obligation to base its conclusions on the evidence available, it is also obliged by Article 4(3) TEU to act consistently with the findings of the European Commission set out in the EU Decision and avoid taking a final decision which could conflict with a decision of the European Commission. This much has been accepted by the CC.⁷⁰ Nevertheless, the CC has provisionally concluded that “*we do not agree with Ryanair’s submission that we are bound to conclude, on the basis of the European Commission’s assessment of that competition, that the acquisition of the minority shareholding has and will not result in an SLC.*”⁷¹
76. Decisions of the European Commission include findings made by it which were necessary steps (including findings of fact) in reaching the EU Decision.⁷² In this case, each of the Overlap Routes referred to in Table 1 of the Provisional Findings Report was examined by the European Commission in the EU Decision. Detailed findings were made in relation to actual competition on those routes between Aer Lingus and Ryanair, focusing in particular on the six-year period since 2007. The findings of the European Commission clearly show that, even if a relevant merger situation has been created by the minority stake (which was not the case), that has not resulted and may not be expected to result in an SLC. These findings bind the CC and are sufficient to dispose of the current investigation.

⁶⁹ Sir Christopher Bellamy, Competition Law and Economics, Part V: The Judicial Review of the European Commission’s Merger Decisions: the Jurisprudence of the European Courts, Chapter 14: The European Merger Regime From a National Perspective, Competition Law and Economics, International Competition Law Series, Volume 31, Abel M. Mateus and Teresa Moreira eds, (Kluwer Law International, 2007).

⁷⁰ See paragraph 84 of the judgment of the Competition Appeal Tribunal dated August 8, 2012 [2012 CAT 21], and paragraph 82 of the CC’s skeleton argument before the Court of Appeal.

⁷¹ Provisional Findings Report, paragraph 7.8.

⁷² See Ryanair’s Letter to the CC of March 5, 2013.

E. The CC Must Assess the Minority Shareholding Against The Counterfactual

1. The Counterfactual Is Critical To The Assessment of Competitive Effects

77. The CC cannot assess whether the minority shareholding has an adverse effect on competition without first establishing the situation that would otherwise exist, the “counterfactual.” The CAT explained how a counterfactual must be constructed in *Stagecoach*: “*the correct comparison is between the situation post-merger and the situation which, on the balance of probabilities, is the situation which would have developed in the market in the absence of that merger.*”⁷³

78. This legal requirement is reflected in the joint CC/OFT Merger Guidelines, which state:

*“As a Phase 2 body, the CC takes a different approach [from the OFT] since it has to make an overall judgement on whether or not an SLC has occurred or is likely to occur. To help make this judgement on the likely future situation in the absence of the merger, the CC may examine several possible scenarios, one of which may be the continuation of the pre-merger situation; but ultimately only the most likely scenario will be selected as the counterfactual. When it considers that the choice between two or more scenarios will make a material difference to its assessment, the CC will carry out additional detailed investigation before reaching a conclusion on the appropriate counterfactual. However, the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight.”*⁷⁴

79. In the context of a full merger or acquisition, the CC is generally called to assess whether the target company would continue to operate independently on the market, would be acquired by another party, or exit altogether. In the present case, the CC must decide (on the balance of probabilities) what would happen to Aer Lingus if the minority shareholding were not owned by Ryanair and what consequences (if anything) this would have on the strategy of Aer Lingus. Only then can the CC determine whether that counterfactual would be a more or less competitive outcome than the status quo.

2. The CC Must Apply Its Own Counterfactual

80. In the present case, the CC has concluded that “*the appropriate counterfactual is that Aer Lingus, absent Ryanair’s shareholding, would pursue a broadly similar commercial strategy on routes between Great Britain and Ireland, either as an*

⁷³ *Stagecoach Group PLC v. Competition Commission* [2010] CAT 14, paragraph 20.

⁷⁴ Merger Assessment Guidelines (OFT1254/CC2), September 2010, paragraph 4.3.6.

*independent company or in combination with another airline.”*⁷⁵ Accordingly, the CC takes the view that, irrespective of the minority shareholding, Aer Lingus *would* pursue the same commercial strategy on GB/Ireland Routes.

81. The European Commission and CC have both clearly determined that, under the existing commercial strategy, competition between Ryanair and Aer Lingus has been intense, and has in fact increased, over the period since the minority shareholding was acquired. To show that this represents a substantially less competitive outcome than would otherwise have occurred under the same commercial strategy (but without the minority shareholding) would require a compelling factual basis. However, no such factual basis exists and therefore none is provided under the three speculative theories offered by Aer Lingus and the CC.
82. Instead, the CC advances a theory that, absent Ryanair’s minority shareholding, Aer Lingus could somehow be a more effective competitor. The principal mechanism posited in this respect concerns a hypothetical merger with another airline, which, has not been shown by the CC, on the balance of probabilities, to be likely. Assuming for the sake of argument, however, that such a merger was likely, the CC would need to show how Aer Lingus (post-merger) would carry out the same commercial strategy as it does today, but only more effectively.
83. The Provisional Findings Report fails to demonstrate this. At most, the CC has suggested, without evidence, that a merger between Aer Lingus and another airline *could* result in cost synergies, [CONFIDENTIAL]. The CC has not identified what those synergies would be for any hypothetical merger or endeavoured to quantify them or, most fundamentally, shown how those synergies (if they exist at all) could (let alone would) translate into more effective competition on GB/Ireland Routes. This fatally undermines the Provisional Findings.
84. In fact, it cannot be assumed that any airline combination would result in an unchanged strategy. It is more likely that a potential acquirer would have a different commercial strategy for Aer Lingus, including with respect to GB/Ireland Routes, where it is unlikely that any acquirer of Aer Lingus would have the same commitment to those routes, particularly if the Irish Government was no longer a shareholder [CONFIDENTIAL].
85. In short, the CC has concluded that the counterfactual is an unchanged commercial strategy. Applying this counterfactual, the CC must show how a merger with another airline would result in Aer Lingus pursuing the same strategy in a way that would substantially strengthen competition on GB/Ireland Routes. The Provisional Findings Report fails to do so.

⁷⁵ Provisional Findings Report, paragraph 6.21.

F. The CC's Theories Of Harm Do Not Withstand Scrutiny

86. The CC has speculated about a series of mechanisms through which the minority shareholding could make Aer Lingus a less effective competitor. These claims are legally unsustainable; they are in several instances illogical, and in most instances contrary to the evidence available from the past six and a half years. While drip fed to the CC by Aer Lingus, they are contradicted by [CONFIDENTIAL].
87. The absence of evidence in the CC's formulation of its speculative theories of harm is particularly concerning in the present case. As a general rule, the quality of evidence adduced by a competition authority is of paramount importance in merger investigations. As set out in the CC/OFT Merger Guidelines: "*A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers* [emphasis added]."⁷⁶ Moreover, as the courts have recognized, the evidentiary obligation may vary according to the type of merger.⁷⁷
88. In *Tetra Laval II*, the ECJ stated that "*a prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.*"⁷⁸ The ECJ found that where the "*chains of cause and effect are dimly discernible, uncertain and difficult to establish ... the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.*"⁷⁹ The ECJ clarified that the evidence relied upon needs to be "*factually accurate, reliable and consistent,*" should contain "*all the information which must be taken into account in order to assess a complex situation,*" and must be "*capable of substantiating the conclusions drawn from it.*"⁸⁰ The ECJ further recognized that quality of evidence was even more important when considering chains of cause and effect following a merger, which are particularly difficult to establish.⁸¹

⁷⁶ Joint OFT and CC Merger Assessment Guidelines (CC2/OFT1254), September 2010, paragraph 4.1.3.

⁷⁷ See EUSA Tenth Biennial International Conference, "Is the standard of proof imposed by the Community Courts undermining the efficiency of EC merger control? The Sony BMG joint venture case in perspective." May 17-19, 2007 (at <http://aei.pitt.edu/8013/1/rompuy-b-02g.pdf>).

⁷⁸ ECJ Case C-12/03 P Commission v Tetra Laval ("*Tetra Laval II*") [2005] ECR I-978, paragraph 42.

⁷⁹ *Ibid.* paragraph 44.

⁸⁰ *Ibid.* paragraph 39.

⁸¹ *Ibid.* paragraph 44.

89. This case concerns a minority shareholding, and not a full merger. The chains of cause and effect following the acquisition of a minority shareholding are therefore more difficult to establish. Where, as in the UK, merger control captures minority shareholdings, the standard that must be discharged before an adverse finding can be reached is extremely high. The investigating agency must show, on the basis of clear, consistent, and compelling evidence, a strong causal connection between the shareholding and the alleged substantial lessening of competition. The CC has lamentably failed to meet that standard.

G. Ryanair's Shareholding Does Not Affect Aer Lingus' Effectiveness As A Competitor

90. The Provisional Findings Report speculates about three ways in which the minority shareholding allegedly reduces Aer Lingus' effectiveness as a competitor, resulting in an SLC.
91. Table 1 sets summarizes the highly speculative assumptions behind the CC's three theories of harm:

Table 1
SLC Theories of Harm: Speculation vs. Reality

Allegation: Ryanair's Shareholding Affects Aer Lingus' Ability To Participate In A Combination With Another Airline		
Speculation	Evidence?	Reality
Aer Lingus <u>wants</u> to be acquired by another airline.	X	Aer Lingus maintains that it wishes to remain independent for the foreseeable future.
Aer Lingus <u>is able</u> to combine with another airline.	X	There is no evidence of other airlines either wishing to purchase or be purchased by Aer Lingus, which is an unattractive target. Etihad acquired just 3% of Aer Lingus in order to facilitate a partnership on certain routes, and rejected Ryanair's offer to discuss an acquisition of Ryanair's stake in Aer Lingus.
Ryanair is preventing Aer Lingus from combining with another airline.	X	Ryanair has no ability to prevent a combination. Aer Lingus recently entered into combination with Etihad without informing, or needing to inform, Ryanair.
The combination will result in efficiencies.	X	It cannot be assumed synergies would flow from any given combination. [CONFIDENTIAL]
These efficiencies cannot be achieved in other ways.	X	Aer Lingus has continually stated that it can achieve large cost savings by itself and/or through looser forms of cooperation (e.g., code sharing).
The alleged efficiencies would improve Aer Lingus' effectiveness as a competitor.	X	There is no evidence to show how Aer Lingus would use any additional profits (e.g., to pay dividends), let alone how any such profits would improve its effectiveness as a competitor.
The alleged efficiencies would lead to an improvement in competition on GB/Ireland Routes.	X	There is no evidence that efficiencies would lead to an improvement in competition on GB/Ireland Routes specifically or at all. A potential acquirer would likely seek to rationalize the routes it operates instead, [CONFIDENTIAL]
Ryanair's shareholding affects Aer Lingus' ability to participate in a combination with another airline, and this has led or will lead to an SLC on GB/Ireland Routes.	X	Conclusion Based on Facts: Aer Lingus is not prevented from combining with another airline by Ryanair. The CC has not concluded that a merger is the relevant counterfactual. In any event, it is unlikely that a combination would lead to synergies or that any such synergies would increase competition on GB/Ireland Routes.

Allegation: Ryanair's Shareholding Affects Aer Lingus' Ability To Issue Shares In Order To Raise Capital		
Speculation	Evidence?	Reality
Aer Lingus needs to raise cash.	X	Aer Lingus has gross cash of close to €1 billion. It is extremely unlikely it would need to raise cash in the foreseeable future.
Aer Lingus must issue shares in order to raise cash.	X	Aer Lingus could raise substantially more cash in other ways (such as debt) than from a rights issue (which would generate only around €37 million).
Aer Lingus needs to disapply pre-emption rights in order to raise cash through a share issue.	X	Conducting a pre-emptive rights issue is not materially more burdensome than conducting a rights issue with pre-emption rights disapplied.
Aer Lingus cannot reduce the time and cost of a pre-emptive rights issue.	X	A partial disapplication of pre-emptive rights limited to shareholders in countries such as the USA and Canada would avoid all of the alleged costs and time delays as claimed by Aer Lingus.
The cost and/or delay of a pre-emptive rights issue would have an impact on Aer Lingus' ability to compete.	X	There is no evidence that a delay of a few weeks, and the additional cost of £200,000 (or even £500,000), to an airline with annual turnover exceeding €1 billion, would in any way affect Aer Lingus' effectiveness as a competitor.
The cost and/or delay of a pre-emptive rights issue would lessen competition on GB/Ireland Routes.	X	There is no evidence that the cost and/or delay of a pre-emptive rights issue would impact competition on GB/Ireland Routes specifically or at all.
Ryanair's shareholding affects Aer Lingus' ability to issue shares in order to raise capital, and this has led or will lead to an SLC on GB/Ireland Routes.	X	Conclusion Based on Facts: Aer Lingus does not need to raise cash. Even if Aer Lingus would need more cash in the future, there is no evidence that it would need to perform rights issue with dis-applied pre-emption rights, or that any cash generated by this method would improve competition on GB/Ireland Routes.

Allegation: Ryanair's Shareholding Affects Aer Lingus' Ability To Manage Its Portfolio Of Heathrow Slots		
Speculation	Evidence?	Reality
Aer Lingus wants to trade these slots.	X	Aer Lingus is currently seeking to acquire a large number of additional slots at Heathrow. It is extremely unlikely that it will seek to dispose of any Heathrow slots. In fact, over the six and a half years since the IPO, it has only sought to dispose of one pair of Heathrow slots – a spare, seasonal, overnight slot pair – in April 2013.
Ryanair would prevent Aer Lingus from trading its Heathrow slots.	X	There is no evidence that Ryanair would veto a disposal of Heathrow slots. The only time the question has arisen, Ryanair did not interfere with Aer Lingus' decision.
Ryanair's opposition would make a difference to Aer Lingus' ability to dispose of its Heathrow slots.	X	The CC recognised that <i>"the Irish Government would be unlikely to support a large-scale sale of Heathrow slots in order to raise cash."</i> Accordingly, Ryanair's shareholding is of no consequence to this issue.
Aer Lingus' inability to trade its Heathrow slots would reduce its effectiveness as a competitor.	X	Slots are freely available at any of the four London airports [CONFIDENTIAL] and which Aer Lingus could obtain simply by applying for them. It is disposing of its Heathrow slots that would reduce Aer Lingus' effectiveness as a competitor.
Aer Lingus' inability to trade its Heathrow slots would lessen competition on GB/Ireland Routes.	X	There are only three Overlap Routes on which Aer Lingus flies to and from Heathrow. Disposing of Heathrow slots would only reduce Aer Lingus' effectiveness as a competitor on these routes.
Ryanair is able to affect Aer Lingus' ability to manage its portfolio of Heathrow slots, and this has led or will lead to an SLC on GB/Ireland Routes.	X	Conclusion Based On Facts: There is no evidence that Ryanair would oppose Aer Lingus' disposal of Heathrow slots. In fact, on the one occasion that Aer Lingus sought to dispose of Heathrow slots Ryanair has not interfered with the Board's decision. In any event, Ryanair's views would not matter, as the Irish Government is firmly opposed to any such disposal. Furthermore, there is no clear competitive advantage to selling the slots.

1. Ryanair's Shareholding Does Not Prevent Aer Lingus Combining With Another Airline

92. The CC has provisionally found that Ryanair “*would be able to impede another airline from acquiring full control of Aer Lingus, and its shareholding would be likely to be a significant impediment to Aer Lingus’s ability to merge with or acquire another airline.*”⁸² In addition, the CC finds that “*Ryanair’s shareholding could make it more difficult for Aer Lingus to attract an investor seeking to build a strategic minority shareholding in Aer Lingus [emphasis added].*”⁸³
93. The CC is required to carry out a two-stage analysis:
- The CC must first show that, absent Ryanair’s minority shareholding, Aer Lingus would have merged with another airline or will do so in future. This a decision the CC must reach on the balance of probabilities.
 - Only then can the CC consider whether the *status quo* represents a less competitive outcome.
94. The Provisional Finding Report considers three different scenarios: (i) that another airline *might* acquire Aer Lingus, (ii) that Aer Lingus *might* acquire another airline, and (iii) that other airlines *might* invest in Aer Lingus. These are very different situations that cannot simply be lumped together as each of them has potentially different implications for the theory of harm advanced by the CC.
95. In particular, each scenario has different implications for the CC’s claim that a merger might enable Aer Lingus to become a more effective competitor as a result of the efficiencies that would flow from any such merger. The CC/OFT Merger Guidelines provide that any finding that merger-specific efficiencies will enhance rivalry must be “*on the basis of compelling evidence*” that the claimed synergies are timely, likely, and “*a direct consequence of the merger, judged relative to what would happen without it.*”⁸⁴ The CC has failed to provide such evidence in respect of any of the three scenarios, still less show how they would translate (or are capable of translating) into more intense competition on GB/Ireland Routes.
96. The CC’s lack of precision on efficiencies represents a particularly serious omission in this case. The potential for synergies is clearly different when considering: (i) Aer Lingus being acquired by a larger airline; (ii) Aer Lingus acquiring a small peripheral airline; and (iii) another airline taking a minority investment in Aer Lingus. However, the Provisional Findings do not make this distinction. Instead, the CC merely

⁸² Provisional Findings Report, paragraph 7.62.

⁸³ *Ibid.*

⁸⁴ Joint OFT and CC Merger Assessment Guidelines (CC2/OFT1254), September 2010, paragraph 5.7.4.

describes, in general terms, cost and revenue synergies that it says *could* arise from an unnamed airline combination.

97. More fundamentally, although the Provisional Findings Report recounts that “*most of the airlines we talked to told us that cost synergies would primarily be restricted to fuller combinations such as mergers,*”⁸⁵ it reaches no conclusion on the matter, and it certainly does not seek to apply these submissions to the different scenarios at issue, *i.e.*, Aer Lingus acquiring an airline, as compared with Aer Lingus being acquired by a larger airline.
98. There are several logical steps that must be satisfied to substantiate the CC’s theory of harm. As explained below, the CC fails to discharge its burden to the requisite standard in respect of each step, let alone all steps.

(a) **Aer Lingus is not able to combine with another airline**

99. The CC assumes that Aer Lingus is capable of combining with another airline. Regardless of the type of combination the CC is referring to, the evidence in the Provisional Findings Report does not support this conclusion and Ryanair has been refused access to material redacted from the Report, even on the terms of a confidential data-room limited to external advisers.⁸⁶
100. ***Aer Lingus acquiring another airline.*** The Provisional Findings Report has not identified any possible targets that could be acquired by Aer Lingus. There are only four, heavily redacted paragraphs in the main text of the Provisional Findings Report which make reference to “*informal, exploratory contacts with a number of unnamed potential investors*”⁸⁷ or other “discussions” that Aer Lingus had with unnamed airlines. The Provisional Findings Report does not provide any details on the content of the discussions, or even on the stage that was reached in them. These exploratory discussions do not amount to serious evidence of Aer Lingus being able to acquire another airline.
101. In fact, it is very unlikely that any successful airline would wish to align its fate to that of Aer Lingus. The Aer Lingus board of directors is dominated by the Irish Government and the unions, which makes it unattractive for any airline hoping to benefit from improved management strategies. It is inconceivable that the board of directors of any potential target would be in favour of being acquired by an airline with Aer Lingus’ track record, and this would make any attempted acquisition very challenging.
102. ***Aer Lingus being acquired by another airline.*** The Provisional Findings Report does not set out a single example of another airline seriously considering acquiring Aer

⁸⁵ Provisional Findings Report, paragraph 7.60.

⁸⁶ CC letter to Ryanair of June 7, 2013 and CC e-mail to Ryanair of June 12, 2013.

⁸⁷ Provisional Findings Report, paragraph 7.43.

Lingus. According to the Provisional Findings Report, “*Aer Lingus also said that it...was not in the situation of many European carriers looking to consolidate...It said that rather than being acquired, it might look to acquire another airline [emphasis added].*”⁸⁸ The evidence provided at Appendix F to the Provisional Findings Report only sets out discussions in which Aer Lingus considered “*a possible combination,*”⁸⁹ or “*the possibility of...acquiring the other airline,*”⁹⁰ or recorded an “*interest in purchasing [X].*”⁹¹ These are all examples of Aer Lingus wishing to make investments in another airline, and not the other way around. The only example provided by the CC that could plausibly amount to an attempt by another airline to acquire Aer Lingus is the “*possible combination between Aer Lingus and [X] that had been considered in early 2012.*”⁹² However, even in this instance, it is not clear exactly what this “combination” would involve.

103. The past six and a half years show that no airline (besides Ryanair) is interested in acquiring Aer Lingus, even though it is a relatively easy target.⁹³ Ryanair and the Irish Government hold 29.8% and 25.1% of Aer Lingus’ shares, respectively. Any prospective buyer would, therefore, only have to acquire the shares of two shareholders in order to gain control of the company. In September 2011 Ryanair stated in an official announcement that it would consider offers for its stake in Aer Lingus. Shortly thereafter, in February 2012, the Irish Government stated officially that it would sell its 25% stake in Aer Lingus as part of an asset disposal process when market conditions were appropriate. Yet no offer has been forthcoming from any airline.⁹⁴
104. The CC’s hearing with IAG revealed that “*the three main European groupings would probably not be interested in acquiring Aer Lingus at the moment because they were focusing on recent acquisitions. In addition, the major European network carriers primarily made their money on their long-haul rather than short-haul operations.*”

⁸⁸ Provisional Findings Report, paragraph 7.32.

⁸⁹ Appendix F, Provisional Findings Report, paragraph 49.

⁹⁰ *Ibid.* paragraph 57.

⁹¹ *Ibid.* paragraph 63.

⁹² Provisional Findings Report, paragraph 7.44.

⁹³ See Andrew Parker, “Consolidation: Concentration of carriers puts collapse on Europe agenda.” *Financial Times*, June 16, 2013., where Willie Walsh, chief executive of IAG, said: “*It’s clear there are a lot of airlines in play. Most of these are peripheral airlines that we can’t see adding any value to the IAG group – or, in all honesty, adding any value to pretty much anybody. So we don’t have any proposals to do anything.*”

⁹⁴ Michael O’Leary indicated at the 2012 annual general meeting that Ryanair had received approaches from (un-named) financial institutions for the sale of its stake in Aer Lingus. (See <http://www.independent.ie/irish-news/ryanair-may-dump-lingus-stake-if-brussels-blocks-bid-28812712.html>, reported on September 22, 2013, accessed on April 24, 2013.) However, no concrete offers were made and Ryanair understands that these approaches were not made on behalf of airlines interested in continuing to operate Aer Lingus, but rather on behalf of investors with an interest in the airline’s assets.

Given that Aer Lingus's long-haul route network was limited, this would limit the attractiveness of Aer Lingus relative to other possible acquisition targets.”⁹⁵ The CC's hearing with Flybe revealed that “Flybe considered that the relatively small size of the Irish market and Aer Lingus's long-haul strategy would detract from its attractiveness as an acquisition target.”⁹⁶

105. The reality is that major airlines have preferred to acquire more attractive and/or strategic targets with access to attractive routes and potential for growth, such as British Airways' acquisitions of Iberia, bmi and Vueling, Lufthansa's acquisition of Germanwings, Austrian Airlines, SN Brussels and Swiss International Air Lines, and Air France' acquisition of KLM and of a 25% stake in Alitalia.
106. The possibility of another airline purchasing Aer Lingus is further reduced by the provisions of EU Regulation 1008/2008, which require that an EU air carrier must be majority owned and effectively controlled by EU nationals. This limits the number of ordinary shares that may be owned by non-EU nationals to 49.9%. The result is that Aer Lingus can only be acquired by an EU airline, and there is currently no EU airline interested in purchasing Aer Lingus.

(b) Ryanair's shareholding does not prevent Aer Lingus from combining with another airline

107. The CC has provisionally found that Ryanair “*would be able to impede another airline from acquiring full control of Aer Lingus, and its shareholding would be likely to be a significant impediment to Aer Lingus's ability to merge with or acquire another airline.*”⁹⁷ In addition, it provisionally found that “*Ryanair's shareholding could make it more difficult for Aer Lingus to attract an investor seeking to build a strategic minority shareholding in Aer Lingus [emphasis added].*”⁹⁸
108. ***Aer Lingus acquiring another airline.*** As explained above, the CC's evidence of a possible combination is limited to reported preliminary discussions between Aer Lingus and unnamed airlines regarding the possibility of Aer Lingus acquiring another airline. However, the CC has provided no evidence of how Ryanair's shareholding could prevent Aer Lingus from making this acquisition. Instead, most of its analysis explores the impact of Ryanair's shareholding on the ability of *other* airlines to acquire Aer Lingus. The only mention of Ryanair's influence on Aer Lingus acquiring another airline is that “*Ryanair could hamper Aer Lingus's ability to issue shares for cash in order to raise the capital needed to acquire or merge with*

⁹⁵ CC, Summary of third party hearing with International Airlines Group held on 19 March 2013, paragraph 14.

⁹⁶ CC, Summary of hearing with Flybe on 20 March 2013, paragraph 9.

⁹⁷ Provisional Findings Report, paragraph 7.62.

⁹⁸ Provisional Findings Report, paragraph 7.63.

*another airline, by defeating the special resolution required to disapply pre-emption rights [emphasis added].”*⁹⁹ This assertion is unsubstantiated and wrong.

109. Ryanair’s shareholding cannot prevent Aer Lingus from acquiring another airline. Aer Lingus could easily use its cash reserves of close to €1 billion to make the purchase. It could also finance the acquisition through debt.

110. More generally, Ryanair has never been opposed to (or even consulted on) the prospect of Aer Lingus acquiring another airline. If any proposed combination were in the interests of Aer Lingus’ shareholders, Ryanair would not oppose it. As such, there is a complete lack of evidence for the CC’s suggestion that Ryanair is preventing Aer Lingus from acquiring another airline.

111. ***Aer Lingus being acquired by another airline.*** The CC has failed to provide any evidence to show that Ryanair has, or is likely in future to oppose an acquisition of Aer Lingus by another airline. The Provisional Findings Report talks about how, according to Aer Lingus, “*Ryanair’s presence on [Aer Lingus’] share register was considered by potential investors to be a poison pill.*”¹⁰⁰ It then considers the impact of Ryanair’s shareholding on ‘squeeze out’ provisions,¹⁰¹ or a Scheme of Arrangement.¹⁰²

112. The Provisional Findings Report has focused on describing ways in which Ryanair allegedly *could* oppose any such acquisition, but it has not identified any evidence that Ryanair *would*, in fact, oppose it.¹⁰³ Ryanair has stated on several occasions that it would sell its shares in Aer Lingus for the right price. In September 2012, Michael O’Leary said (as reported by Bloomberg) that “*If the Commission turns down this remedies package then we would have to seriously consider exiting our investment in Aer Lingus’... Abu Dhabi-based shareholder Etihad Airways has made no offer for Ryanair’s stake. Should a bid be forthcoming it would be considered, he said, just as would any “very generous offer” for Ryanair itself [emphasis added].*”¹⁰⁴ However, no other airline has shown an interest in purchasing Aer Lingus. This has nothing to

⁹⁹ Provisional Findings Report, paragraph 7.23.

¹⁰⁰ Provisional Findings Report, paragraph 7.18.

¹⁰¹ Provisional Findings Report, paragraph 7.22.

¹⁰² Provisional Findings Report, paragraph 7.23.

¹⁰³ The CC claims that one of the ways in which Ryanair could influence possible acquisitions of Aer Lingus by another airline is by preventing a bidder from acquiring 100% of Aer Lingus by choosing to retain its shares (paragraph 7.22 of the Provisional Findings Report). This ability to block a ‘squeeze out’ in the event of a contested takeover does not give Ryanair the ability to affect Aer Lingus’ strategy. By definition, such an event would not be part of Aer Lingus’ management’s strategy, but rather part of the acquirer’s strategy. *See*, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plus, Competition Commission Report to the Secretary of State, December 14, 2007, paragraph 6.36.

¹⁰⁴ *See* <http://www.bloomberg.com/news/2012-09-21/ryanair-says-revolutionary-antitrust-offer-should-win-aer-lingus.html>, reported on September 21, 2012.

do with Ryanair's shareholding; it is Aer Lingus' small scale, peripheral position, heavy focus on Ireland, and limited growth prospects, combined with a €700m pension fund deficit, that gives potential investors cause for concern.

113. The CC's own investigation has shown that Ryanair's shareholding is not an impediment to an acquisition of Aer Lingus. As a result of its hearing with Air France on April 4, 2013, the CC found that "*Ryanair's presence as an existing shareholder in Aer Lingus was not considered a deterrent to another airline acquiring an interest in the airline.*"¹⁰⁵
114. The CC has therefore failed to provide any convincing evidence for this proposition.
115. ***Another airline investing in Aer Lingus.*** The evidence of the last six and a half years directly contradicts the CC's suggestion that Ryanair's shareholding makes it more difficult for Aer Lingus to attract an investor seeking to build a strategic minority shareholding in Aer Lingus. In early 2012, Etihad built a 3% stake in Aer Lingus, despite Ryanair's shareholding.

(c) There is no evidence that the combination of Aer Lingus with another airline will result in efficiencies

116. The CC has provisionally found that, "*given [Aer Lingus'] cost structure, there seemed to be scope for cost synergies to arise from a combination with another airline.*"¹⁰⁶ The Provisional Findings Report asserts that there *could* be revenue synergies from "*potentially enabling [Aer Lingus] to sell more connecting itineraries,*"¹⁰⁷ and possible cost synergies, including "*increased bargaining power in procurement...elimination of duplication in both back office functions...and airports....consolidation of maintenance and training programmes and IT systems...and diversification of operations.*"
117. The alleged synergies claimed by Aer Lingus in the present investigation, and accepted by the CC, are unsubstantiated, and the CC has simply recited general efficiencies that *may* or *may not* arise in almost any merger, and in almost any industry. [CONFIDENTIAL]
118. Aer Lingus' submissions on efficiencies are flatly inconsistent with the [CONFIDENTIAL]. Aer Lingus stated to the CC that "*it would face an inevitable 'cost creep' over time, eroding its competitiveness.*"¹⁰⁸ Only a few months earlier, [CONFIDENTIAL]:

¹⁰⁵ CC, Summary of third party hearing with Air France and CityJet (a wholly-owned subsidiary of Air France) on April 4, 2013, paragraph 16.

¹⁰⁶ Provisional Findings Report, paragraph 7.61.

¹⁰⁷ Provisional Findings Report, paragraph 7.53.

¹⁰⁸ Provisional Findings Report, paragraph 7.50.

[CONFIDENTIAL]¹⁰⁹

Further in its “Reject Ryanair’s Offer” presentation, Aer Lingus stated that:

*“Ryanair has said that it will encourage Aer Lingus to lower unit costs and review its route network. **We do not need such encouragement from Ryanair.** Since 2009, Aer Lingus’ current management team has focused relentlessly on cost reduction and active route management, transforming Aer Lingus into a leaner, more efficient business. **This focus on cost is critical to Aer Lingus and will continue beyond completion of the existing Greenfield programme** [emphasis added].”¹¹⁰*

119. Given that Aer Lingus’ statements [CONFIDENTIAL] to its shareholders are inconsistent with its submissions to the CC, the CC should carefully consider the weight that should be attached to Aer Lingus’ submissions.
120. Despite the fact that there have been a substantial number of medium to large European airline mergers in the past 10 years, the CC has identified only one example where it is alleged that synergies actually materialised – British Airways/Iberia/bmi.¹¹¹ This merger was particularly likely to result in savings given IAG’s readiness to reduce Iberia’s headcount. The CC’s only other “evidence” of positive efficiencies is *forecasts* for two other mergers: American Airlines/US Airways and Continental Airlines/United Airlines. Leaving aside the fact that the evidence does not reveal whether these mergers in fact resulted in any efficiencies (as forecast), they are very different transactions from a possible combination of Aer Lingus with a smaller European carrier, where it is unlikely the parties would even be based in the same country. Moreover, the CC has not provided any evidence or examples of the routes on which these mergers improved competition.
121. Furthermore, the CC offers no evidence that any of the other major European airline mergers (*e.g.*, Air France/KLM, Lufthansa/Austrian, Lufthansa/Swiss, Lufthansa/SN, Iberia/Vueling/Clickair) delivered cost savings. Costs savings in airline mergers are highly dependent on the identities of the merging parties, as well as the commercial strategy that is followed post-merger. The CC has failed to identify either of these parameters in its analysis of efficiencies and has ignored [CONFIDENTIAL].
122. ***Aer Lingus acquiring another airline.*** The CC has not given any evidence of efficiencies resulting from Aer Lingus acquiring another airline. Even on the CC’s own thin reasoning, the synergies identified in the Provisional Findings Report are

¹⁰⁹ [CONFIDENTIAL]

¹¹⁰ Reject Ryanair’s Offer, Aer Lingus, available at http://corporate.aerlingus.com/media/corporateaerlinguscom/content/pdfs/Day_14_Documentx.pdf.

¹¹¹ The only other evidence provided by the CC with respect to completed airline mergers are projections of efficiencies that were made in connection with two mergers of US airlines. Notably, the Commission refers to a 2010 investor report regarding the Continental Airlines/United Airlines merger, that predicted “net annual synergies of \$1.0-1.2 billion by 2013,” but does not examine whether these efficiencies actually materialized.

unlikely to be achieved through the purchase of a smaller competitor. The general categories of cost synergies identified by the CC (such as increased bargaining power in procurement, elimination of duplication in back office functions and airports, consolidation of training and IT systems, and diversification of operations) are potentially applicable only to the combination of Aer Lingus with a much larger airline. Any airline that Aer Lingus is capable of acquiring would be a small, peripheral airline, which would have a negligible impact on Aer Lingus' cost base.¹¹²

123. ***Aer Lingus being acquired by another airline.*** The CC has not provided any evidence of the efficiencies that could result from Aer Lingus being acquired by another airline. The Provisional Findings Report limits itself to loosely describing possible cost and revenue synergies that *could* result from a combination with another airline.
124. The EU Decision shows the level of precision that is typically necessary for establishing that a merger is likely to result in efficiencies. In the course of its submissions to the European Commission, Ryanair explained that the proposed merger would benefit Aer Lingus in the following specific ways:
- **Reduced Staff Costs:** Ryanair provided precise figures comparing staff costs per passenger between the two airlines.
 - **Improve Turnaround Times and Fleet Utilisation:** Ryanair explained its own turnaround time between landing and take-off is 25 minutes, which is significantly shorter than Aer Lingus' turnaround time.
 - **Lower Aircraft Costs:** Aer Lingus would benefit from Ryanair's ability to secure more competitive terms for new aircraft orders given the combined group's fleet of over 340 aircraft.
 - **Reduce Fuel Costs:** Ryanair provided precise figures comparing fuel costs per passenger between the two airlines.
 - **Reduce Maintenance Costs:** Ryanair provided precise figures comparing the maintenance costs per passenger between the two airlines.
 - **Reduce Airport and Handling Costs:** Ryanair provided precise figures comparing the airport and handling costs per passenger between the two airlines.
 - **Reduce Distribution and Other Costs:** Ryanair provided precise figures comparing the distribution and related costs per passenger between the two airlines.

¹¹² In fact, acquiring an airline that utilises smaller aircraft than Aer Lingus' aircraft would likely increase Aer Lingus' unit costs.

125. As a whole, Ryanair provided a precise amount by which Aer Lingus' cost base would be reduced per year, including the exact level by which Aer Lingus' operating costs (excluding fuel) would be reduced. Ryanair explained the differences in business models between the two airlines, and it gave reasons for why it would be unlikely for Aer Lingus' costs per passenger to be reduced down to Ryanair's absolute levels. Ryanair then proceeded to explain why the quality of Aer Lingus' service would not be impacted by these costs reductions, and why Aer Lingus would not be able to achieve these savings independently of the merger.
126. [CONFIDENTIAL]
127. The CC is fully aware of the evidence provided to the European Commission and its findings on the matter.
128. [CONFIDENTIAL] The CC has not provided any evidence on the type of the airline that would allegedly be combined with Aer Lingus. There is no evidence on the size of the airline, the type of aircraft it would use, the routes it would fly, the airports it would fly to (primary or secondary), or its operating costs per passenger. This is the most basic kind of information necessary to begin assessing any potential efficiency gains. The CC has not provided this evidence because there is none to provide. The reality that Aer Lingus is seeking to skew in order to mislead the CC is that no airline has expressed an interest in acquiring Aer Lingus over the past six and a half years, and no airline is likely to express such an interest. This does not, however, entitle the CC to lower the evidentiary burden for demonstrating merger-related efficiencies.

(d) The alleged efficiencies resulting from the combination of Aer Lingus and another airline can be achieved in other ways

129. The CC has not considered whether the alleged cost and revenue synergies that would result from Aer Lingus combining with another airline could be achieved in other ways. The Provisional Findings Report simply states that "*most of the airlines that we talked to told us that the cost synergies would primarily be restricted to fuller combinations such as mergers, because they generally required a greater level of integration between the parties' operations.*"¹¹³ The CC does not seem to have conducted any independent analysis of this proposition, or even taken a position on this issue.
130. In fact, as Aer Arann told the CC,¹¹⁴ synergies can also be achieved via other forms of cooperation, such as partnerships and agreements with other airlines. Agreements such as minority investments, franchises, code-shares and bilateral alliances can help realise the bulk of the cost savings and flexibility advantages that can result from combining two airlines. This is the reason behind Etihad's multiple investments in airlines such as Aer Lingus (3%), Air Seychelles (40%), airberlin (29%), and Virgin

¹¹³ Provisional Findings Report, paragraph 7.60.

¹¹⁴ Summary of hearing with Aer Arann held on 22 March 2013, paragraph 11.

Australia (9%), none of which have been made with the expectation of merging or integrating the airlines.

131. Ryanair's shareholding has not prevented Aer Lingus from entering into these types of agreements, including partnerships under what Christoph Mueller has termed "open architecture" platforms.¹¹⁵ Aer Lingus has entered into partnerships with the following airlines since the Transaction:

- Aer Arann: Aer Lingus has a franchise agreement with Irish regional airline Aer Arann, extending to 2022, under which Aer Arann operates under the Aer Lingus brand, livery, and flight code.¹¹⁶ This agreement provides that Aer Lingus takes bookings for all Aer Arann flights and retains all revenue until the date of the flight. Aer Lingus has also taken a 33% stake in the company that has been set up to acquire eight ATR aircraft for Aer Arann, which are in turn leased to Aer Arann.¹¹⁷ This agreement is clearly intended to allow access to lower cost aircraft and financing within the Aer Lingus/Aer Arann group.
- United Airlines: In November 2008, Aer Lingus entered into a codesharing agreement with United Airlines. It enabled Aer Lingus to offer customers close to 200 new destinations in the United States and establish an integrated Aer Lingus/United Airlines loyalty scheme.¹¹⁸ The agreement was extended in March 2013 to include additional Ireland/USA routes.¹¹⁹
- Jet Blue: Aer Lingus and JetBlue began referring customers to each other's website in April 2008, thereby providing Aer Lingus customers with access to over 40 U.S. destinations via an integrated on-line booking service. Dermot Mannion, Aer Lingus CEO at the time the arrangement was entered into, explained that the arrangement would "*expose millions of U.S. passengers to the Aer Lingus website and brand and further consolidate aerlingus.com as the premier way to book flights to Ireland from North America.*"¹²⁰ The agreement was upgraded to a full codeshare in April 2013.
- Etihad: In July 2012, following Etihad's acquisition of a 3% shareholding in Aer Lingus, the two airlines concluded an interline and codeshare agreement. This partnership has allowed Aer Lingus to establish an integrated Aer Lingus/Etihad loyalty scheme and access to Abu Dhabi airport and

¹¹⁵ See [CONFIDENTIAL ANNEX 2].

¹¹⁶ <http://www.aerlingus.com/help/help/aerlinguspartnerships/>

¹¹⁷ "Aer Arann takes off with first of new fleet," Irish Independent, April 30, 2013.

¹¹⁸ <http://corporate.aerlingus.com/mediacentre/pressreleases/pressreleases08/title.11178.en.html>

¹¹⁹ <http://corporate.aerlingus.com/mediacentre/pressreleases/title.22321.en.html>

¹²⁰ <http://corporate.aerlingus.com/mediacentre/pressreleases/pressreleases08/title.11207.en.html>

destinations in Australia, Asia, and the Middle East that are served by Etihad.¹²¹ The agreement extends to transatlantic routes, for which Aer Lingus and Etihad have recently obtained US antitrust clearance.¹²²

- Virgin: In December 2012, Aer Lingus and Virgin Atlantic entered into a “wet lease” agreement under which Aer Lingus operates a number of short-haul routes on behalf of Virgin. Aer Lingus provides 4 Airbus A320-200 aircraft and operates 24 flights a day linking Heathrow, Manchester, Edinburgh and Aberdeen.

132. The lesser forms of airline integration, such as the ones described above between Aer Lingus and its partners, can achieve similar cost and revenue synergies as a full merger, and the CC has failed to demonstrate any evidence to the contrary.

(e) There is no evidence that the alleged efficiencies would improve Aer Lingus’ effectiveness as a competitor

133. Assuming that, but for Ryanair’s shareholding, Aer Lingus would merge with another airline, and assuming that merger would lead to cost and revenue efficiencies (or synergies), the CC would still have to explain how these efficiencies will lead to a more competitive outcome than the status quo. It is obvious that not all mergers result in increased competition or provide consumers with the benefits of lower prices and more output. Another possible consequence from a merger is reduced competition, leading to higher prices and reduced output. Even if there is no change in prices or output, Aer Lingus could decide to use any additional profits to pay dividends, instead of improving its product offering or competing more aggressively in the market. Neither Aer Lingus nor any third party has made any submissions regarding the competitive effects of a potential combination, and the CC has not provided any other evidence of what Aer Lingus is likely to do if its financial position is improved as a result of combining with another airline.

(f) There is no evidence that the alleged efficiencies would lead to an improvement in competition on GB/Ireland Routes

134. Even if Aer Lingus decided to use any improvement in its financial position to compete more aggressively in the market, the CC has not provided any evidence to show that this would result in increased competition specifically on GB/Ireland Routes.

135. Aer Lingus operates on 108 routes, across Ireland, the United Kingdom, Continental Europe, and the United States. It flies 44 aircraft and carries approximately 10

¹²¹ <http://www.aerlingus.com/travelinformation/planandbook/etihadcodeshare/>

¹²² <http://www.independent.ie/business/irish/aer-lingus-and-etihad-tighten-links-with-new-us-codeshare-deal-29182660.html>, and <http://www.businesspost.ie/#!story/Home/News/Aer+Lingus%2C+Etihad+codeshare+gains+US+regulatory+approval/id/19410615-5218-5162-71da-ef9260597110>

million passengers each year. The Overlap Routes consist of, at most, 13 routes, on which Aer Lingus carries fewer than two million passengers. The CC would have to provide strong evidence to show that any efficiencies resulting from the combination of Aer Lingus with another airline would translate into increased competition on those specific routes.

136. In fact, it is significantly more likely that a potential acquirer would not operate the same routes that are currently operated by Aer Lingus. Aer Lingus is Ireland's national flag carrier. The Irish Government is one of its primary shareholders, and its dominance of the Aer Lingus board ensures that Aer Lingus conducts its operations in accordance with the Government's political agenda and national aviation policy. The Irish Government has given frequent and unequivocal statements expressing its commitment to maintaining connectivity between GB and Ireland. Aer Lingus' own corporate prospectus warns potential investors of this restriction when it states that:

*"The Minister for Transport considers that four London Heathrow slot pairs for services to and from Cork and that four (summer season) and three (winter season) for services to and from Shannon would each be critical to ensuring connectivity to these airports because this is the minimum necessary to ensure a spread of flights throughout the day. On this basis, the Minister for Finance ...is unlikely to support a proposed disposal of any slot pair such that there would be less than the existing London Heathrow slot pairs that relate to services between London Heathrow and Cork or Shannon and is likely to request the convening of an extraordinary general meeting, as provided for in the Articles of Association, to consider such matter."*¹²³

*"The Minister for Transport considers that the level of slots relating to Dublin that are critical to connectivity is that which ensures passengers from and to Dublin can connect throughout the course of the day with key long-haul destination flights to and from London Heathrow. The Minister for Finance, as a shareholder in the Company, acting on the advice of the Minister for Transport, is unlikely to support a proposed disposal of any slot pair relating to services between London Heathrow and Dublin that would result in the interval between air services operated using slots on this route exceeding 90 minutes (not reckoning any time between the last slot on one night and the first slot on the following day) and is likely to request the convening of an extraordinary general meeting to consider such proposal."*¹²⁴

137. This commitment to Ireland's connectivity prevents Aer Lingus from using its valuable Heathrow slots to operate more valuable long-haul routes. Any potential acquirer would almost certainly not share the Irish Government's agenda, and it would seek to maximise Aer Lingus' profits by withdrawing from or decreasing frequencies on those GB/Ireland Routes that are unprofitable. [CONFIDENTIAL]

¹²³ Aer Lingus, *Initial Public Offering Prospectus*, Section XV, at 5.2(p).

¹²⁴ *Ibid.*

[CONFIDENTIAL]¹²⁵

138. [CONFIDENTIAL]

[CONFIDENTIAL]¹²⁶

139. [CONFIDENTIAL] In the unlikely event that an airline now becomes interested in acquiring Aer Lingus, it is inconceivable that it would enter into a contractual commitment to operate Aer Lingus' current London-Ireland frequencies. Instead, it would likely redeploy Heathrow slots to other, more profitable routes.

2. Ryanair's Shareholding Has No Impact On Aer Lingus' Ability To Raise Finance

140. The CC speculates that a potential way in which Ryanair could use its shareholding to reduce the effectiveness of Aer Lingus as a competitor would be by hampering its ability to raise capital by issuing shares. It provisionally finds that "*if Aer Lingus needed to issue shares for cash in future for a corporate transaction or to optimize its capital structure, Ryanair's ability to restrict its ability to do so could cause Aer Lingus to become a less effective competitor on routes between Great Britain and Ireland than it would otherwise be.*"¹²⁷

141. The only way in which the CC speculates Ryanair could affect Aer Lingus' ability to raise money is by preventing the disapplication of statutory pre-emption rights, which *might* add incremental time and cost to the issuing of new shares. Pre-emption rights are not a competitive or commercial matter. They are a statutory protection to prevent the dilution of shareholders' investments. To characterise the existence of this statutory protection as having a substantial impact on competition on GB/Ireland Routes requires compelling evidence peculiar to the facts of the case. In *BSkyB* the CAT was satisfied that the facts were sufficiently unusual to justify such a conclusion. But the facts are very different in the present case, and evidence of a competitive concern is entirely lacking.

142. The CC makes a number of false assumptions in arriving at this conclusion, none of which are supported by evidence. The reality is as follows:

(a) Aer Lingus does not need to raise cash

143. The CC has not provided any evidence to demonstrate that, on the balance of probabilities, Aer Lingus is likely to require cash in the foreseeable future. In fact, the CC's analysis sets out very clear evidence of the opposite: it explains that "*As at 31 December 2012, Aer Lingus had gross cash of €908.5 million.*"¹²⁸ The Provisional

¹²⁵ [CONFIDENTIAL]

¹²⁶ [CONFIDENTIAL]

¹²⁷ Provisional Findings Report, paragraph 7.72.

¹²⁸ Appendix G, Provisional Findings Report, paragraph 22.

Findings Report also states that the CC “*found it unlikely that Aer Lingus would need to raise equity to finance its current operations or its existing plans for a major aircraft replacement programme in the medium to long term.*”¹²⁹ These are self-evident points, supported by the fact that Aer Lingus was able to place a \$2.4 billion aircraft order without recourse to shareholders after Ryanair took a minority stake in the airline. Aer Lingus itself has made several statements to reaffirm the strength of its balance sheet. For example:

*“Aer Lingus does not need any help from Ryanair to secure its future. In spite of the worst recession in living memory, Aer Lingus is a profitable airline, competing successfully against Ryanair in the Irish market.”*¹³⁰

*“Aer Lingus continues to be a valuable and profitable business. Gross cash balances as at 31 December 2011 were €894.8 million. There is no general corporate debt. The Group’s borrowings are all associated with aircraft asset purchases. Aer Lingus debt maturity profile is spread over several years to 2023. In addition to this substantial statement of financial position strength, Aer Lingus owns significant assets which are not recognised in its financial statements, including an attractive slot portfolio at London Heathrow, JFK and Dublin airports and a globally recognised brand.”*¹³¹

*“Aer Lingus is a robust and profitable airline with a proven business model, a strong balance sheet and an internationally recognised brand. Aer Lingus owns valuable assets, has over €1 billion of gross cash, is increasing its revenues and is engaged in ongoing cost saving initiatives, all of which are delivering enhanced and sustained profitability.”*¹³²

144. The CC has nevertheless “*identified circumstances in which Aer Lingus might need to raise additional equity* [emphasis added].”¹³³ The CC considers it possible “*that there would be a future downturn in the economy as a whole or in the airline industry more specifically, or a specific adverse development for Aer Lingus.*”¹³⁴ The CC has suggested that such an event would lead to Aer Lingus having to call on the company’s cash reserves.¹³⁵

¹²⁹ Provisional Findings Report, paragraph 7.69.

¹³⁰ Aer Lingus Comments on Ryanair’s Response to the Statement of Objections.

¹³¹ Aer Lingus Annual Report 2011.

¹³² Aer Lingus, Reject Ryanair’s Offer Presentation.

¹³³ Provisional Findings Report, paragraph 7.70.

¹³⁴ Provisional Findings Report, paragraph 7.70.

¹³⁵ Appendix G, Provisional Findings Report, paragraph 25.

145. The examples of adverse events that *could* result in significant exceptional cash costs for Aer Lingus suggested by the CC are: “*future economic crashes; fuel price inflation and, related to this, strengthening US\$ trends, acts of terrorism, and extreme meteorological or natural events.*”¹³⁶ Such events are, by their nature, uncertain and highly speculative. However, even over the last ten years, when the airline industry has experienced an unprecedented series of economic and natural shocks, there has been minimal impact on Aer Lingus’ financial position.

146. The “exceptional charges” that Aer Lingus has recognised over the last 12 years are set out in Table 3 of Appendix G. This shows an average “exceptional charge” of approximately €50 million.¹³⁷ Aer Lingus could continue to operate with this level of exceptional charges for decades before needing to raise any additional cash. Even the largest exceptional charge on the table (€140 million in 2008) does not come close to depleting Aer Lingus’ €1 billion cash reserve. Clearly, this evidence does not support the CC’s conclusion.

147. The CC appears to have supported this theory of harm put forward by Aer Lingus purely because it was used in the *BSkyB* case. However, the circumstances of that case were very different. ITV’s ratings were at the lower bounds of investment grade for both Standard & Poor’s and Moody’s. ITV had no cash reserves, and its ability to raise fund through the sale of assets was limited. Moreover, it needed to raise funds to participate in any auction for additional spectrum, and it could only do so through equity funding.

148. In addition to the speculative “shocks” identified in the Provisional Findings Report, the CC also found that “[m]ost significantly... *absent Ryanair’s shareholding, Aer Lingus would have been, or would be in the future, involved in a large-scale combination with another airline. If Aer Lingus were to make a significant acquisition, or a significant strategic investment, we thought it likely that, in order to fund the transaction, Aer Lingus would need to issue shares for cash.*”¹³⁸ This eventuality has been discussed above: not only is any such combination between Aer Lingus and another airline highly unlikely, it would also not require, or benefit from, any cash that could be raised by issuing shares.

(b) Aer Lingus does not need to issue shares in order to raise cash

149. Even if the CC can establish that Aer Lingus would need to raise more cash than it currently has on reserve, there is no evidence that the additional cash has to be raised by issuing shares. In fact, based on the past 10 years of airline consolidation in Europe, it is irrational for the CC to speculate that a merger involving Aer Lingus (if any) is likely to involve the issuing of shares for cash by Aer Lingus. The Provisional

¹³⁶ Appendix G, Provisional Findings Report, paragraph 28.

¹³⁷ Appendix G, Provisional Findings Report, paragraph 26.

¹³⁸ Provisional Findings Report, paragraph 7.71.

Findings Report cites four reasons why Aer Lingus *might* not be in a position to issue additional debt, all of which are entirely speculative. These include:

- (i) *“If the company was not sufficiently cash flow generative or did not expect to be, it would be difficult to raise additional finance or service existing finance.”*¹³⁹ The CC gives no evidence that Aer Lingus is likely to face cash flow difficulties in future, and given the vast cash reserves Aer Lingus currently holds it is irrational for the CC to assume that Aer Lingus will face such difficulties. Furthermore, it is incorrect to simply assume that any cash flow difficulties automatically lead to difficulties in raising additional finance or service existing finance; there are numerous examples of financially weak airlines financing their aircraft fleets. This is because financing is relatively easy to obtain in the airline industry, as debt is secured on the aircraft, and the creditor’s risk is therefore reduced to a minimum.
- (ii) *“In the event of a credit market liquidity crisis.”*¹⁴⁰ The CC gives no evidence of why such a market liquidity crisis is likely to occur in the foreseeable future and it is irrational for the CC to assume that a credit market liquidity crisis is likely. Ryanair has placed a \$15.6 billion Boeing aircraft order earlier this year, and obtained shareholder approval for this transaction on June 18, 2013, on the basis that Directors are satisfied that Ryanair will be able to finance the delivery of these 175 aircraft over the next five years.
- (iii) *“If the company believed that the conditions associated with any debt financing would inhibit the operational flexibility of the business.”*¹⁴¹ The CC gives no evidence of why the conditions associated with debt financing are likely to inhibit the operational flexibility of Aer Lingus. At the very least, the CC must demonstrate the types of conditions that Aer Lingus would have to comply with if it were to seek debt financing, explain how these terms would inhibit the operational flexibility of Aer Lingus and show how that would decrease competition on GB/Ireland Routes. The CC has not provided any such evidence because no such evidence exists – Ryanair’s and other airlines’ continuing ability to finance their fleets disproves Aer Lingus’ spurious claim that the conditions of debt financing could inhibit an airline’s operational flexibility.
- (iv) *“If lending institutions assessed Aer Lingus as a poor credit risk.”*¹⁴² The CC gives no evidence that Aer Lingus is assessed as a poor credit risk, or even below the industry average. This is in stark contrast with the *BSkyB* case, where the evidence obtained by the CC proved that ITV’s ratings were at the

¹³⁹ Appendix G, Provisional Findings Report, paragraph 14(a).

¹⁴⁰ *Ibid.*, paragraph 14(b).

¹⁴¹ *Ibid.* paragraph 14(c).

¹⁴² *Ibid.* paragraph 14(d).

lower bounds of investment grade for both Standard & Poor's and Moody's. In this case, Aer Lingus has not been assessed as a poor credit risk, but the CC has nevertheless concluded that "*it is unlikely that Aer Lingus could sustain a high quality credit rating over time.*"¹⁴³ There is no evidence to support this statement, and it is inappropriate for the CC to attempt to fulfil the role of a credit rating agency. Furthermore, while airlines would generally receive a lower credit rating than utilities providers, this has not prevented airlines to date from financing the global commercial fleet of some 20,000 aircraft, or Boeing from predicting that the global commercial aircraft fleet would double over the next two decades to some 40,000 units, with 35,000 new aircraft delivered, many of which will be debt financed by airlines.¹⁴⁴ Aer Lingus' claims in this respect are spurious but they have sadly led the CC down the *cul-de-sac* of attempting to replicate the *BSkyB* precedent in the present investigation.

150. The amount that Aer Lingus could potentially raise from a rights issue is miniscule by comparison to the amount it could raise through debt (only €37m at today's share value, or around 4% of its gross cash). Moreover, there are other forms of financing in the airline industry, such as asset-backed finance lease debt, which do not require new debt or issuing fresh equity. As recognised by the CC, Aer Lingus has generally relied on leasing agreements to fund aircraft purchases,¹⁴⁵ and there is no reason it cannot continue to finance its operations in this way.

(c) Aer Lingus does not need to disapply pre-emption rights in order to raise cash through a share issue

151. The CC has not provided any evidence that Aer Lingus needs to disapply pre-emption rights in order to raise cash through a share issue. It is perfectly possible for Aer Lingus to conduct a rights issue with full pre-emption rights in place. As Ryanair has repeatedly confirmed, it is prepared to take up its quota of shares in the event of a rights issue. Instead of creating any difficulties, this would facilitate Aer Lingus' ability to raise capital, as it would remove the need for Aer Lingus to underwrite at least 29.8% of the shares issued.
152. The Provisional Findings Report entertains Aer Lingus' baseless claims about the "*incremental time and cost involved in extending a rights issue to all shareholders worldwide.*"¹⁴⁶ Instead of carrying out an independent assessment of this alleged time and cost, the CC has simply replicated the figures that it received from Aer Lingus.¹⁴⁷

¹⁴³ Appendix G, Provisional Findings Report, paragraph 14(d).

¹⁴⁴ Boeing predicts global plane fleet will double over next two decades: http://www.denverpost.com/business/ci_23439663/boeing-predicts-global-plane-fleet-will-double-over.

¹⁴⁵ Appendix G, Provisional Findings Report, paragraph 12(d).

¹⁴⁶ Appendix G, Provisional Findings Report, paragraph 19.

¹⁴⁷ Appendix G, Provisional Findings Report, paragraph 19.

These figures include an alleged 10 week period to obtain a U.S. registration statement, a reconciliation of Aer Lingus' accounts to conform to US GAAP standards, and €0.5m to €1.5m in legal fees (a claim coming from an airline previously quoted to have spent €50m defending Ryanair's 3 bids, now confirming on affidavit that the figure was actually €40m, still the equivalent of a staggering 100,000 hours, or 54 years of work, at €400 per hour).

153. In any event, the figures provided by Aer Lingus are misleading. As explained in Ryanair's response to the CC's questionnaire of March 7, 2013, the duration and costs involved in a fully pre-emptive rights issue vary significantly from one company to another but, as a general rule, it is likely to cost less than £200,000 and be completed in approximately six weeks. This represents a minimal cost and delay for Aer Lingus, and it does not impact its ability to compete on GB/Ireland Routes or in the market generally.

(d) Aer Lingus can reduce the time and cost of a pre-emptive rights issue

154. Even if the CC were to (wrongly) conclude that the time and cost involved in a pre-emptive rights issue would somehow impact competition on GB/Ireland Routes, it would have to show that there is no other way of mitigating these costs. However, the CC itself has noted "*Aer Lingus's observation that it was standard practice for rights issues in the Republic of Ireland or the UK to be conducted on the basis that the company has been permitted by its shareholders to exclude shareholders who may be resident in certain countries (including USA, Canada, Japan, South Africa, and Australia).*"¹⁴⁸ The CC has also recognised that "*Ryanair told us that it would not oppose any disapplication of pre-emption rights limited to other (eg North American) shareholders, and it would support a rights issue.*"¹⁴⁹
155. A partial disapplication of pre-emptive rights limited to shareholders in countries such as the United States and Canada would avoid all of the alleged costs and time delays identified by Aer Lingus. Ryanair has informed the CC, both in writing and during its Main Party Hearing on April 23, 2013, that it would not oppose any such disapplication. The CC has identified no evidence to the contrary (and none exists), and it has further ignored the fact Aer Lingus has never since its 2006 IPO put forward separate resolutions to shareholders in respect of the disapplication of pre-emption rights to, for example, EU and non-EU shareholders, despite this option being readily available to it. This demonstrates that Aer Lingus is not interested in issuing shares for cash and is simply making this frivolous claim now so as to use the CC in its obsessive crusade against Ryanair.
156. Despite all evidence to the contrary, the CC has provisionally concluded that Aer Lingus would be dissuaded from carrying out a rights issue by Ryanair's minority shareholding (and that this would result in an SLC on GB/Ireland Routes).

¹⁴⁸ Appendix G, Provisional Findings Report, paragraph 17.

¹⁴⁹ Appendix G, Provisional Findings Report, paragraph 11.

157. Moreover, this unproven assumption is critical to not one, but two, of the theories of harm in the Provisional Findings Report. If it is clear that Aer Lingus is not restricted in its ability to raise cash through a pre-emptive rights issue, then the CC's arguments in relation to the impact of Ryanair's shareholding on Aer Lingus' ability to raise capital in response to external "shocks" or a possible merger will be even weaker. The CC's theories of harm are generally unsubstantiated, but this is where they are most obviously inadequate. The CC has failed to explain why a partial disapplication of pre-emptive rights would not address Aer Lingus' claimed concerns in relation to the time and cost involved in a pre-emptive rights issue.

(e) The cost and/or delay of a pre-emptive share issue would not have any impact on Aer Lingus' ability to compete

158. Even if there were no way in which Aer Lingus could reduce the time and cost involved in a pre-emptive rights issue, the CC must explain how this would result in a substantially less competitive outcome than the status quo, *i.e.*, how it would result in an SLC on GB/Ireland Routes. The CC provides no such explanation. It is not at all clear that the delay of a few weeks, and the additional cost of £200,000 (or even £500,000) in order to carry out a pre-emptive rights issue would affect Aer Lingus' ability to compete in the market. On the CC's own analysis, the Provisional Findings Report would have to explain how this cost and delay would affect Aer Lingus' ability to acquire another airline, which typically takes place over a period of several months, or its ability to respond to an external shock impacting its cash flow, which could be covered by short-term financing.

(f) The cost and/or delay of a pre-emptive share issue would not lessen competition on GB/Ireland Routes

159. The CC has failed to provide any evidence that any alleged cost and delay of a pre-emptive rights issue would have an impact on Aer Lingus' ability to compete on GB/Ireland Routes specifically. If there is some economic benefit to Aer Lingus in dis-applying pre-emption rights, and if it is true that this benefit cannot be realised in any other way (such as partial disapplication of pre-emption rights), the CC must still show that Aer Lingus would utilise any such benefit to compete more effectively on GB/Ireland Routes. Absent that evidence, it is equally likely that Aer Lingus would direct that benefit to other geographic markets or in other ways, such as paying dividends to shareholders.

3. Ryanair's Shareholding Does Not Affect Aer Lingus' Ability To Trade Its Heathrow Slots

160. Despite the wealth of evidence to the contrary, the CC has claimed that a way in which Ryanair could use its shareholding to reduce Aer Lingus' effectiveness as a competitor would be by using its voting rights to oppose the disposal of slots at London Heathrow. According to the CC, "*any constraint on Aer Lingus's ability to*

*dispose of its slots could reduce its effectiveness as a competitor by limiting its strategic options [emphasis added].”*¹⁵⁰

161. The CC has made a number of unsubstantiated assumptions in arriving at this conclusion, each of which is illogical and contradicted by six and a half years of evidence. The reality is as follows:

(a) Aer Lingus does not want to trade its Heathrow slots

162. Despite the fact that over the past six and a half years Aer Lingus has only once – two months ago, during the CC investigation – sought to dispose of any of its Heathrow slots (and to be precise, a spare, seasonal, overnight pair of slots), the CC has inexplicably found that “*Aer Lingus would have been likely, or would be likely to want to manage its portfolio of Heathrow slots in the context of optimizing its network and that this would be likely to involve the sale or lease of slots.*”¹⁵¹ The CC has not provided any evidence in support of this position. Two claims are made that Aer Lingus allegedly expressed an intention to exchange or dispose of Heathrow slots. The first example concerns an alleged discussion that took place in 2009 between Aer Lingus and another airline to “*explore whether [Aer Lingus] could exchange Heathrow slots [emphasis added].*”¹⁵² No evidence is given that this discussion took place. Ryanair was never asked to consent to a disposal. The second example concerns the recent disposal of a Heathrow slot pair to British Airways, referred to above. Aer Lingus informed the Irish government and Ryanair of this proposed transaction on April 23, 2013, at around the time when the CC was reaching its preliminary conclusions in this Inquiry, and Ryanair did not oppose the disposal.
163. Evidence demonstrates that Aer Lingus is highly unlikely to want to dispose of its Heathrow slot portfolio, despite its self-serving claims to the contrary during the CC investigation. As the CC has recognised, it is “*a major asset, and likely to be worth in excess of €250 million.*”¹⁵³ Aer Lingus has recently sought to acquire a significant portfolio of additional slots at Heathrow (as part of the *IAG/bmi* merger remedy) and is currently pursuing legal proceedings in order to acquire these slots. Christoph Mueller has said in this regard that:

“We are after slots [at Heathrow] in the wake of the proposed acquisition of BMI by IAG or BMI going into receivership...Heathrow has a huge catchment area and we want to pull more transfer traffic to our long haul. We have limited growth opportunities in Ireland but we can compensate the weakness

¹⁵⁰ Provisional Findings Report, paragraph 7.84.

¹⁵¹ Provisional Findings Report, paragraph 7.84.

¹⁵² Provisional Findings Report, paragraph 7.77.

¹⁵³ Provisional Findings Report, paragraph 7.74.

*of the Irish market by increasing our transfer passengers. Our transfer traffic is growing and long haul is doing very well.”*¹⁵⁴

164. Likewise, Aer Lingus has said, [CONFIDENTIAL] that:

[CONFIDENTIAL]¹⁵⁵

165. Aer Lingus is therefore extremely unlikely to seek to dispose of its existing Heathrow slots which it values commercially (as opposed to the surplus summer only overnight slot pair for which Aer Lingus could not find commercial usage and which it therefore disposed to British Airways during the CC investigation). As the Aer Lingus IPO prospectus confirms, any Heathrow slots now acquired by Aer Lingus would not fall within the provisions of the Articles of Association and could be freely disposed of by Aer Lingus without interference by the Government (or anyone else).¹⁵⁶

(b) Ryanair would not prevent Aer Lingus from trading its Heathrow slots

166. The CC has not provided any evidence that Ryanair would oppose the disposal of Aer Lingus’ Heathrow slots. In fact, the evidence presented by the CC and Aer Lingus supports the opposite conclusion: the only time that Ryanair has been asked whether it would exercise its rights to call an EGM in relation to the disposal of a Heathrow slot pair, it confirmed that it would not do so.¹⁵⁷ The CC makes reference to a discussion of Heathrow slots in 2009, where the other airline allegedly “*expressed concern when it was made aware that the deal could be brought to an EGM where it would be exposed to Ryanair’s veto.*”¹⁵⁸ The claimed “concerns” of the unnamed airline regarding Ryanair’s ability to veto the disposal of Heathrow slots are not evidence of the way in which Ryanair would vote at a General Meeting. If these had been serious discussions, Aer Lingus should have asked the Irish Government and Ryanair whether they would exercise their rights to call an EGM, and Ryanair would have confirmed that it would not exercise its right.

167. Moreover, as correctly recognised by the CC, the Irish Government “*retained a significant minority shareholding in Aer Lingus in part to ensure access to Heathrow for onward connectivity.*”¹⁵⁹ The CC further correctly recognised that “*given the*

¹⁵⁴ Christoph Mueller to Air Transport World, Aer Lingus eyes bmi Heathrow slots, ATW, May 27, 2012.

¹⁵⁵ [CONFIDENTIAL]

¹⁵⁶ Aer Lingus, *Initial Public Offering Prospectus*, Section XV, at 5.2(p): “Any new slot (not being part of a swap arrangement) that may be acquired by the Company after the Offer would only become subject to the potential constraints on disposal set out above if the Company decides that any such new slot should be included. Where the Company has decided that any new slot should not be so included then the Minister for Transport will be entitled to disregard any air services being provided using that slot in considering a proposed disposal of any other slot.”

¹⁵⁷ See Provisional Findings Report, paragraph 7.77 (b).

¹⁵⁸ Provisional Findings Report, paragraph 7.77(a).

¹⁵⁹ Provisional Findings Report, paragraph 7.80.

strategic importance that it attaches to them, the Irish Government would be unlikely to support a large-scale sale of Heathrow slots in order to raise cash.”¹⁶⁰ Ryanair’s minority shareholding would, therefore, not have any incremental effect. Aer Lingus’ own prospectus unequivocally sets out the Irish Government’s commitment to connectivity via Heathrow:

“The Minister for Transport considers that four London Heathrow slot pairs for services to and from Cork and that four (summer season) and three (winter season) for services to and from Shannon would each be critical to ensuring connectivity to these airports because this is the minimum necessary to ensure a spread of flights throughout the day. On this basis, the Minister for Finance ...is unlikely to support a proposed disposal of any slot pair such that there would be less than the existing London Heathrow slot pairs that relate to services between London Heathrow and Cork or Shannon and is likely to request the convening of an extraordinary general meeting, as provided for in the Articles of Association, to consider such matter.”¹⁶¹

“The Minister for Transport considers that the level of slots relating to Dublin that are critical to connectivity is that which ensures passengers from and to Dublin can connect throughout the course of the day with key long-haul destination flights to and from London Heathrow. The Minister for Finance, as a shareholder in the Company, acting on the advice of the Minister for Transport, is unlikely to support a proposed disposal of any slot pair relating to services between London Heathrow and Dublin that would result in the interval between air services operated using slots on this route exceeding 90 minutes (not reckoning any time between the last slot on one night and the first slot on the following day) and is likely to request the convening of an extraordinary general meeting to consider such proposal.”¹⁶²

168. However, the CC concludes, without any evidence in support of its conclusion, that *“the Irish Government might support a disposal in the context of an exchange that allowed Aer Lingus better to meet the Irish Government’s transport objectives [emphasis added].”¹⁶³* The CC fails to explain how a disposal of Heathrow slots would help meet the Irish Government’s stated aim of ensuring frequent daily connections to Heathrow. The only evidence cited by the CC is that *“Aer Lingus told us that the Irish Government would not have insisted on an EGM regarding [its discussion of Heathrow slots in 2009], as it would not have given rise to a reduction in services or impacted connectivity via Heathrow.”¹⁶⁴* The only evidence the CC has

¹⁶⁰ Provisional Findings Report, paragraph 7.81.

¹⁶¹ Aer Lingus, *Initial Public Offering Prospectus*, Section XV, at 5.2(p).

¹⁶² *Ibid.*

¹⁶³ Provisional Findings Report, paragraph 7.81.

¹⁶⁴ Provisional Findings Report, paragraph 7.81.

for its position that the Irish Government would support a disposal of Heathrow slots is, therefore, based on Aer Lingus' speculation about what the Irish Government *may* or *may not* have decided in relation to a transaction that never took place, and which was never communicated to the Irish Government or Ryanair.

169. It is particularly concerning that the CC has concluded that “*an alternative independent shareholder would be likely to support a Heathrow slot disposal proposed by management, so long as this were considered to be in the interests of the company.*”¹⁶⁵ The false suggestion is that Ryanair would not support a Heathrow slot disposal in circumstances where it is in Aer Lingus' interest. The CC cannot arrive at this conclusion where it has no evidence of what an alternative shareholder *might* do, without any evidence that Ryanair has, or would ever, oppose a Heathrow slot disposal.

(c) **Aer Lingus' inability to trade its Heathrow slots (if any) would not reduce its effectiveness as a competitor**

170. The CC has given no evidence of the way in which Aer Lingus would be affected as a competitor if it were unable to exchange or dispose of its Heathrow slots, because no such evidence exists. The Provisional Findings Report only states that “[t]he potential constraint on Aer Lingus's ability to dispose of its slots could reduce its effectiveness as a competitor by limiting its strategic options, particularly if Ryanair's influence prevented Aer Lingus from trading its slots in order to optimize its network [emphasis added].” This is a bare assertion that is entirely unsubstantiated.
171. In fact, Aer Lingus' effectiveness as a competitor would remain unchanged if it was unable to trade or exchange its Heathrow slots. Heathrow is the only airport considered by the CC that is slot-constrained. Slots at every other London airport [CONFIDENTIAL], as well as at Southend airport, are freely available, and Aer Lingus is able to acquire them. As things stand, therefore, Aer Lingus already has the flexibility needed to optimise its network, if it indeed requires to so do.
172. Moreover, neither Aer Lingus nor the Irish Government has suggested that Aer Lingus has too many Heathrow slots. The only instance in the past six and half years when Aer Lingus identified a spare slot pair for which it had no commercial use (during the CC investigation), Ryanair did not seek to veto (or even question) this decision. There would be no logical reason for doing so. Vetoing a disposal of Heathrow slots would, at most, deprive Aer Lingus of the “sale” price. There is no rational basis why Ryanair, with a financial investment in the company, would act in this way.
173. The only other way in which Aer Lingus could benefit from a disposal of its Heathrow slots would be by selling them. However, the CC is “*less persuaded that there would be an effect if Ryanair were able to restrict Aer Lingus's ability to dispose of slots in order to unlock their value given Aer Lingus's current share*

¹⁶⁵ Provisional Findings Report, paragraph 7.82.

register, since as long as the Irish Government remained a minority shareholder Aer Lingus's ability to do this was likely to be restricted in any event."¹⁶⁶ Ryanair agrees with this conclusion.

(d) Aer Lingus' inability to trade its Heathrow slots (if any) would not lessen competition on GB/Ireland Routes

174. The CC has not provided any evidence that any impact on Aer Lingus' effectiveness as a competitor resulting from its claimed inability to trade its Heathrow slots would affect GB/Ireland Routes. It is therefore irrational for the CC to arrive at this conclusion. The opposite conclusion is far more credible – a disposal of its Heathrow slots by Aer Lingus would likely reduce its effectiveness as a competitor on the three Overlap Routes involving Heathrow Airport – London to Dublin, London to Shannon, and London to Cork.

4. Ryanair's Shareholding Does Not Affect Aer Lingus' Ability To Pass Or Defeat An Ordinary Resolution

175. Ryanair welcomes the CC's provisional finding that Ryanair is incapable of passing or defeating an ordinary resolution tabled at an Aer Lingus shareholder meeting, and that Ryanair is unlikely to gain any such ability in the future.¹⁶⁷ This is clearly correct.
176. The CC recognizes that if the Irish Government retains its shares, it is highly unlikely that Ryanair acting alone could secure a majority in opposition to the Irish Government. The CC acknowledged that Ryanair has historically lacked the support of other shareholders on resolutions at shareholder meetings, and it is therefore improbable that Ryanair could mobilise other shareholders to vote against a resolution favoured by the Irish government. Ryanair notes the CC's conclusion that "*based on historic voter turnout in the period 2007 to 2013, Ryanair would need the support of an additional 4.5 to 9.6 of effective voting power.*"¹⁶⁸ Given that generally less than 0.01% of Aer Lingus' votes by shareholders other than Ryanair have been cast to oppose motions that Ryanair has opposed, it is exceedingly unlikely that Ryanair could ever pass or defeat an ordinary resolution.
177. The CC correctly found that, even if the Irish Government sold its shareholding, Ryanair would remain incapable of passing or defeating an ordinary resolution. As noted by the CC, the Irish Government is unwilling to sell its shareholding in a fragmented way, and would "*prefer to sell its shareholding to a group that would drive effective competition on routes between the UK and Republic of Ireland.*"¹⁶⁹

¹⁶⁶ Provisional Findings Report, paragraph 7.83.

¹⁶⁷ Provisional Findings Report, paragraph 7.92.

¹⁶⁸ Appendix C, Provisional Findings Report, paragraph 15.

¹⁶⁹ Appendix C, Provisional Findings Report, paragraph 34.

Accordingly, any purchaser of the of the Irish Government's shareholding is likely to vote in the same way as the Irish Government, meaning that Ryanair's position will remain unchanged.

178. The CC also accepts that if a sufficient number of shareholders feel strongly about a measure proposed by the Aer Lingus board and they wish to oppose it, this would be entirely due to the content of the proposal, rather than due to Ryanair's shareholding. However, the CC's claim that "*Ryanair would have a significant additional incentive relative to other shareholders to vote on a contentious resolution in a way that adversely affected the company's effectiveness as a competitor*"¹⁷⁰ is plainly wrong and unsupported by any evidence. The CC has no grounds on which to make such a conclusion; Ryanair's voting record over the past six and a half years clearly demonstrates that whenever Ryanair has opposed a resolution, it has done so to protect the value of its shareholding, including by trying to prevent Aer Lingus from making unsound business decisions (such as the order of 18 new Airbus aircraft for \$2.4 billion at the height of the aircraft value cycle, or the appointment of David Begg, the head of the Irish Congress of Trade Unions, to the Aer Lingus board).
179. In any event, should circumstances ever arise in which Ryanair is able to pass or defeat ordinary resolutions on a regular basis, this would represent a new relevant merger situation.

5. Ryanair's Shareholding Does Not Affect Aer Lingus' Management Resources And Strategy

180. The Provisional Findings Report considers whether Ryanair *might* use its shareholding to reduce the effectiveness of Aer Lingus by taking actions to raise Aer Lingus' management costs or impede its management from concentrating on Aer Lingus' commercial strategy.¹⁷¹
181. Ryanair welcomes the CC's findings that Ryanair's rights as a shareholder do not affect Aer Lingus' effectiveness as a competitor:
- Ryanair has only ever requested high-level information that was otherwise available to investor analysts, shareholders, and the market in general.
 - Calling EGMs is a right which Ryanair would have at much lower levels of shareholding. Ryanair's requests in this regard have not taken up any of Aer Lingus' management resources, since they have never been granted.
182. However, there is no basis for the CC's provisional finding that Ryanair's minority shareholding increases the likelihood of it mounting a full bid for Aer Lingus, or that any such bid would significantly disrupt Aer Lingus' commercial policy.¹⁷² During

¹⁷⁰ Provisional Findings Report, paragraph 7.102.

¹⁷¹ Provisional Findings Report, paragraphs 7.93-7.98.

¹⁷² Provisional Findings Report, paragraph 7.102.

Ryanair's latest offer, however, Aer Lingus followed its normal commercial policy and it has in fact implemented numerous strategic decisions, as explained in Aer Lingus' recent affidavit to the Irish High Court.¹⁷³ Also, as previously recognised by the CC, Aer Lingus would be required to comply with the Takeover Code in relation to any bid, independent of the identity of the bidder or the level of shareholding it held when the offer was made.¹⁷⁴ Accordingly, as the CC has previously concluded, no "*competitive effect associated with Ryanair's ability to bid for Aer Lingus was intrinsically linked to its minority shareholding.*"¹⁷⁵ There is no reason or evidence for the CC to depart from these conclusions in the Provisional Findings Report.

6. Ryanair's Shareholding Does Not Affect The Incentives Of Aer Lingus' Management

183. The Provisional Findings Report considered whether Ryanair's shareholding could change the incentives of Aer Lingus' management, such that they decided that the interests of Aer Lingus were best served by competing less fiercely with Ryanair.
184. Ryanair welcomes the CC's recognition that there is no financial incentive for Aer Lingus' management to take the impact of its actions on Ryanair into account in setting its own offering.¹⁷⁶ The CC has emphasized that Aer Lingus had "*not tempered how fiercely it competed with Ryanair in the period since 2006.*"¹⁷⁷ Ryanair fully supports the CC's conclusion that Aer Lingus does not compete less fiercely with Ryanair in order to avoid antagonizing its largest shareholder, as the Aer Lingus management has a duty "*to the company as a whole, rather than the interests of any particular shareholder.*"¹⁷⁸

7. Ryanair's Shareholding Does Not Affect Ryanair's Incentives to Compete Aggressively Against Aer Lingus

185. The CC considers whether Ryanair would have "*incentives to use its influence to weaken Aer Lingus's effectiveness as a competitor.*"¹⁷⁹
186. Ryanair plainly has the incentive to compete effectively against Aer Lingus, as it has done for the past six and a half years. It would have the same incentive regardless of whether or not it owned a shareholding in Aer Lingus. Its commercial incentives are

¹⁷³ See [CONFIDENTIAL ANNEX 3].

¹⁷⁴ Working Paper, paragraph 66.

¹⁷⁵ *Ibid.*

¹⁷⁶ Provisional Findings Report, paragraph 7.104.

¹⁷⁷ Provisional Findings Report, paragraph 7.105.

¹⁷⁸ Provisional Findings Report, paragraph 7.107.

¹⁷⁹ Provisional Findings Report, paragraph 7.108.

to beat Aer Lingus in the market, as demonstrated by repeated traffic growth offers made by Ryanair in recent years to the DAA, the owner and operator of Dublin, Cork and (until earlier this year) Shannon airports.

187. The CC considers whether, because of such incentives, Ryanair would exercise its minority shareholding in a way that results in an SLC. The evidence shows that it has never done so, and has never been able to exercise any influence over Aer Lingus. Certainly, none of the theories of harm postulated by the Provisional Findings Report have ever materialized in practice.

H. Ryanair’s Shareholding Does Not Affect Ryanair’s Effectiveness As A Competitor

188. The CC considers whether the Transaction *may* result in a lessening of competition if Ryanair’s partial ownership of Aer Lingus changes the incentives of Ryanair by linking its financial interests with those of Aer Lingus. The CC claims that “[t]his could occur if, as a result of its minority shareholding, Ryanair has an incentive to compete less fiercely with its rival because it shares in Aer Lingus’s financial success [emphasis added].”¹⁸⁰
189. Ryanair welcomes the CC’s provisional finding that Ryanair would not be expected to compete less vigorously because of its financial interest in Aer Lingus. As the CC notes, Ryanair did not acquire its shareholding in Aer Lingus to engage in some complex scheme of joint profit maximisation on the Overlap Routes, but rather because it believed that it would be successful in its bid for Aer Lingus.¹⁸¹ Moreover, as the CC notes, “any incentive to compete less strongly might also be reduced by the uncertainty and indirectness by which Aer Lingus’s profit would flow back to Ryanair [emphasis added].”¹⁸² Furthermore, Aer Lingus’ poor record of returning profit to shareholders (it has only twice issued a dividend, of 3 and 4 cent per share, following an order by the Irish Minister for Transport) demonstrates that Ryanair could not expect to be rewarded for competing less fiercely against Aer Lingus.
190. Ryanair stresses that as a matter of common sense, it should be obvious that the value of Ryanair’s shareholding in Aer Lingus is so limited relative to the size of Ryanair’s overall operations that it could never affect the way in which Ryanair operates its business. It is also important to understand that Ryanair’s business model is built around maintaining a high load factor, and not around maximizing yield as is the case with traditional airlines. Ryanair’s route managers are primarily incentivised to achieve load factor targets. Neither Ryanair’s own profit margins, nor Aer Lingus’ profit margins (which in any event are not available to Ryanair) are taken into account when setting fares.

¹⁸⁰ Provisional Findings Report, paragraph 7.118.

¹⁸¹ Provisional Findings Report, paragraph 7.128.

¹⁸² Provisional Findings Report, paragraph 7.124.

I. Ryanair’s Shareholding Does Not Increase the Risk of Coordination

191. The CC considered whether Ryanair’s shareholding in Aer Lingus increases the likelihood of Ryanair and Aer Lingus coordinating on fares or some other parameter of competition in the future.¹⁸³
192. Ryanair welcomes the CC’s provisional finding that Ryanair’s shareholding is unlikely to generate coordinated effects. As the CC has emphasized, there is “*considerable evidence of price competition between the airlines, and of [the] airlines’ fares reacting to each other (and to the presence of the other airline on the route).*”¹⁸⁴

J. No Barriers To Entry Are Present On Any Of The Overlap Routes

193. In the Provisional Findings Report, the CC takes the view that substantial entry is unlikely to take place on the Overlap Routes due to the supposed barriers to entry including: (i) capacity constraints at Dublin Airport; (ii) the need to establish a well-known brand in Ireland; (iii) the need to establish a base; (iv) the risk of Ryanair responding aggressively to entry; (v) the condition of the Irish economy; and (vi) the level of taxes and airport charges in the UK and Ireland.¹⁸⁵ The CC fails to present sufficient evidence for the existence of any of these barriers. Indeed, much of the evidence it does examine in Appendix J to the Provisional Findings Report (which concerns entry) contradicts the CC’s conclusions.

1. There Is No Congestion At Dublin Airport

194. The CC’s findings with respect to congestion contradict the evidence presented in Appendix J to the Provisional Findings Report.
- **Stand capacity.** CityJet and Lufthansa said that stand capacity at Dublin Airport is not limited, and the CC offered no objection to Ryanair’s submission that 86% of pier-served stands were available during the morning peak hours.¹⁸⁶
 - **Slot capacity.** In Appendix J, the CC refers to the ACL’s findings that since 2008, “*no request for slots [at Dublin Airport], even peak morning slots, had been rejected at Dublin Airport.*”¹⁸⁷ The CC notes that initial demand *may* have been above capacity during some hours, but it acknowledges that this is

¹⁸³ Provisional Findings Report, paragraph 7.124.

¹⁸⁴ Provisional Findings Report, paragraph 7.140.

¹⁸⁵ Provisional Findings Report, paragraphs 7.142 to 7.157.

¹⁸⁶ Appendix J, Provisional Findings Report, paragraphs 42 to 44.

¹⁸⁷ Appendix J, Provisional Findings Report, paragraph 51.

the result of airlines overstating their slot requests.¹⁸⁸ This evidence conclusively demonstrates that Dublin Airport is not capacity-constrained. The CC's conclusions, therefore, are not based on factual evidence, but rather on the unsubstantiated claims of a handful of airlines and airport coordinators.¹⁸⁹ In this regard, the CC attaches no weight to the views of Flybe (who said it would be possible to add additional frequencies at Dublin Airport) or Lufthansa (who identified no barriers to entry at Dublin Airport).¹⁹⁰ Furthermore, the CC also ignores the uncontested fact that only five years ago, without the benefit of the new terminal (T2) currently in place, Dublin Airport was capable of processing 30% more passengers and air traffic movements than it currently does. This, [CONFIDENTIAL] are conclusive evidence that Dublin Airport suffers no congestion issues whatsoever.

2. **Brand Awareness Is Not A Barrier To Entry**

195. The CC claims that “*any airline seeking to compete effectively with Aer Lingus and Ryanair would need to build a well-known brand in Ireland.*”¹⁹¹ Without any explanation, the CC finds that the establishment of such brand presence represents a barrier to entry. The CC's findings with respect this matter are groundless:

- Brand awareness is largely irrelevant in a market where consumers are price-sensitive, and where they purchase tickets online (where all prices can be easily compared). The key criterion is value-for-money.
- In any event, the CC does not contest Ryanair's statement that “*little additional investment would be required by airlines entering routes to Ireland.*”¹⁹² The views of CityJet, Flybe, and Lufthansa suggest that creating a strong brand would not be unduly burdensome.¹⁹³
- Moreover, the CC fails to distinguish between Ryanair's and Aer Lingus' brand awareness at different ends of the Overlap Routes. It is likely that, on the UK end of the routes, competitors such as IAG, Jet 2 or Air France/CityJet enjoy brand awareness that is at least on a par to that of Ryanair or Aer Lingus.

¹⁸⁸ Appendix J, Provisional Findings Report, paragraphs 50, 52.

¹⁸⁹ Appendix J, Provisional Findings Report, paragraph 63.

¹⁹⁰ *Ibid.*

¹⁹¹ Provisional Findings Report, paragraph 7.150.

¹⁹² Appendix J, Provisional Findings Report, paragraph 86.

¹⁹³ Appendix J, Provisional Findings Report, paragraph 87.

3. Entrants Could Easily Establish Bases At The Relevant Airports

196. The CC claims that airlines operating from bases benefit from a number of advantages, including economies of scope and scale and more flexibility over flight schedules.¹⁹⁴
197. Base operations are not a barrier to entry for new competitors. In Ryanair's experience, the sunk cost of establishing a base is less than [CONFIDENTIAL], which primarily comprises new base marketing spend. [CONFIDENTIAL]
198. The evidence set out in Appendix J of the Provisional Findings Report is limited to the views of third parties on the benefits of having a base. Otherwise, the CC only considers Flybe's estimate on the cost of establishing a base. No details are provided for this estimate, which makes it impossible for Ryanair to comment on its merits.
199. Finally, even if establishing a base was a barrier to entry, many airlines who could potentially compete with Aer Lingus and Ryanair, such as British Airways, Jet 2, easyJet, Flybe, Air France/CityJet, already have established bases on the Irish or UK end of the Overlap Routes.

4. There is No Risk That Entrants Would Face Aggressive Retaliation From Ryanair

200. The Provisional Findings Report states that several third parties said that carriers *may* be deterred from entering routes on which Ryanair is active for fear of an aggressive response from Ryanair.¹⁹⁵ The CC found that the significance of this alleged barrier to entry is unclear, concluding that its "*importance may vary depending on the entrant airline.*"¹⁹⁶ Ryanair does not engage in retaliatory behaviour designed to deter entry; it simply aims to deliver low fares to customers in line with its business model and reputation as Europe's lowest fare airline. This is a healthy competitive environment, which benefits consumers and is consistent with innovation and new entry.

5. The State Of The Irish Economy Does Not Constitute A Barrier to Entry

201. The CC considers that Ireland is an unattractive market for potential new entrants due to its economic situation.¹⁹⁷ However, the Irish economic situation affects incumbents and new entrants equally, and it therefore cannot properly be characterized as an entry barrier within the meaning of the CC/OFT Merger Guidelines.¹⁹⁸

¹⁹⁴ Provisional Findings Report, paragraph 7.150.

¹⁹⁵ Provisional Findings Report, paragraph 7.153.

¹⁹⁶ *Ibid.*

¹⁹⁷ Provisional Findings Report, paragraph 7.154

¹⁹⁸ Joint OFT and CC Merger Assessment Guidelines (CC2/OFT1254), September 2010, paragraph 5.8.4.

202. The CC's conclusion is, in any event, not grounded on the business realities of the low-fare airline industry. Relatively weak economies have often served as springboards for low fare airlines to begin and grow operations as consumers become more price-sensitive and look for cheaper ways to travel. Both Ryanair and easyJet have seen sustained growth across Europe in recent years in spite of the on-going economic difficulties in the area. A weak domestic economy does not only represent an opportunity for future growth, but it also ensures that airlines have an incentive to lower prices in order to increase consumer demand. Two obvious examples are Ryanair's current plans for expansion in Greece and Ireland. The CC's characterization of the Irish economy as a barrier to entry is therefore misguided.

6. Airport Charges And Taxes Do Not Constitute A Barrier To Entry

203. The CC claims that the high level of air travel taxes in the UK and Ireland *may* deter entry by making routes between Great Britain and Ireland less attractive to entrants.¹⁹⁹ Notwithstanding the dearth of evidence for the presence of such a barrier (the CC itself notes that the evidence of the impact of charges at Dublin Airport was mixed), these costs are borne equally by incumbents and new entrants and, therefore, do not constitute a barrier to entry.²⁰⁰
204. In fact, evidence suggests that the opposite is true. easyJet's recent announcement that it will more than double its passengers at Stansted from 2.8m to 6m has presumably been made possible due to reduced airport charges as airports compete for growth.

7. The Overlap Routes Are Highly Contestable

205. The routes on which Ryanair and Aer Lingus both operate services are highly contestable. Airlines can and do move aircraft between different routes quickly to maximize profits and take advantage of growth opportunities. As explained above, there are virtually no barriers to entry and expansion for an existing carrier on any of the Overlap Routes, and service can be commenced at short notice with miniscule capital expenditure. Slots are freely available at all airports served by Ryanair. Aircraft do not constitute a sunk cost of entry due to: (i) their moveable nature, (ii) an active resale market, and (iii) the possibility of aircraft leasing from third parties. The following factors indicate that entry on the Overlap Routes is likely:
- Air France/CityJet already has an established base at Dublin Airport and is well placed to compete with Ryanair and Aer Lingus (CityJet employs 750 people and has a fleet of aircraft directed from Dublin Airport).
 - All the city-pair airports served by Ryanair and Aer Lingus from Ireland have ample spare capacity and/or airlines that could operate services to Dublin and Cork using existing capacity at these destination airports.

¹⁹⁹ Provisional Findings Report, paragraph 7.155.

²⁰⁰ Joint OFT and CC Merger Assessment Guidelines (CC2/OFT1254), September 2010, paragraph 5.8.4.

206. In sum, even if Ryanair's shareholding were capable of weakening the effectiveness of Aer Lingus as a competitor (which is not accepted), the likelihood of new entry would ensure there is no SLC on GB/Ireland Routes.

K. Conclusion On Substantial Lessening Of Competition

207. The evidence of the last six and a half years clearly shows that the Transaction has not had any impact on the level of competition between Ryanair and Aer Lingus. Competition between these two airlines has intensified over this period, as the European Commission found in the EU Decision. The CC has failed to take account of all the available evidence, including the findings of the European Commission, in reaching its conclusions. Instead, the CC has developed three speculative theories of harm that have no sound evidentiary basis and are inconsistent with the observable market conduct of Ryanair and Aer Lingus. Accordingly, there is no basis for any finding that the minority shareholding results in an SLC, and the Provisional Findings must be reversed in the CC's Final Report.

IV. Conclusion

208. The Provisional Findings Report has arrived at conclusions on Material Influence and SLC that are unsupported by the evidence of the last six and a half years. In fact, there is a large amount of evidence, including the findings of the European Commission in the EU Decision, that directly contradicts the CC's findings.
209. The CC has abandoned the majority of its theories of harm in the course of this investigation. It should be evident from this Response that each of the three remaining theories requires a concatenation of assumptions, all of which are necessary to reach the CC's conclusions, many of which have not even been considered in, or substantiated by, the Provisional Findings Report. The failure to adduce evidence supporting any of the necessary steps in the CC's logic is enough to undermine the whole theory. In fact, the evidence that is available (and was ignored by the CC) does not support any of them.
210. Rather than seeking to reach a conclusion based on the facts of the case before it, the CC has attempted to rescue this investigation by transposing the reasoning of the *BSkyB* case wholesale. This strategy is flawed because the fact pattern of this case is fundamentally different from *BSkyB*, including because Aer Lingus has vast cash reserves, no foreseeable need to raise additional cash and, should the need ever arise, has many ways to raise additional funds (which Ryanair is on record as saying it would support). If the CC's analysis is allowed to stand, it would effectively mean that whenever a company acquires a minority shareholding in a competitor that is sufficient to block a special resolution, there will be a *de facto* SLC finding, regardless of the facts at issue.
211. In light of the information and explanations advanced in this paper, Ryanair requests that the CC consider the submissions in this Response carefully, and reverse its Provisional Findings in its Final Report.

Aer Lingus Group plc

Pre-Emption Rights

Ryanair Limited (**Ryanair**) has consistently voted (at Aer Lingus Group plc (**Aer Lingus**) annual general meetings) in favour of granting the board of Aer Lingus the authority to allot shares on a pre-emptive basis, such that all shareholders in Aer Lingus could participate in a pre-emptive allotment of shares by the company. The board of Aer Lingus was generally and unconditionally authorised at its last Annual General Meeting on 26 April 2013 (with Ryanair's support) to allot shares on a pre-emptive basis up to an aggregate nominal amount of 176,233,229 shares, representing approximately 33% of the nominal value of the issued share capital of Aer Lingus¹. Aer Lingus is therefore currently authorised to conduct a pre-emptive rights issue to all shareholders world-wide up to a maximum of 33% of its issued share capital.

The Irish Companies Acts provide for statutory pre-emption rights to protect all shareholders of Irish companies from dilution, by enabling them to participate in share allotments². Aer Lingus sought authorisation to allot equity securities otherwise than in accordance with statutory pre-emption rights at its recent annual general meeting³. Ryanair voted against this dis-application of pre-emption rights as we understand that Ryanair felt that the waiver resolution and the text of Article 8(d)(i) were too broad. Ryanair is well within its rights as a minority shareholder to retain its right to fully participate in an allotment of shares in Aer Lingus, thus protecting itself from dilution (given Aer Lingus' publicly stated views on Ryanair's shareholding).

Dis-application

However, we understand from the UK Competition Commission's provisional findings report on 30 May 2013 that Aer Lingus is concerned that conducting a pre-emptive rights issue to all of its shareholders, involving the offering of shares into certain non-E.U. jurisdictions (such as USA, Canada, Australia, South Africa and Japan), could be burdensome on the company in terms of complying with the local securities law of these non-E.U. jurisdictions. We understand that Aer Lingus therefore wishes to dis-apply this pre-emption obligation so it would not be required to offer shares into these non-E.U. jurisdictions if/when conducting a rights issue.

Notwithstanding that Aer Lingus' annual report for the year ended 31 December 2012 shows gross cash of €908.5 million on its balance sheet, and that Aer Lingus has access to favourable debt finance markets, such that Ryanair struggles to see why Aer Lingus would need to raise cash through an issuance of share capital, we understand that Ryanair is prepared to offer a solution to address Aer Lingus' (and the UK Competition Commission's) concerns.

We understand that Ryanair would be willing to support special resolutions of Aer Lingus shareholders proposing a disapplication of statutory pre-emption rights for a rights issue, in respect of share allotments outside the European Union (or outside Ireland, if preferred by Aer Lingus and/or the Competition Commission), in countries where an offer would be impractical or unlawful. Such resolutions might follow a similar approach to the first part of the pre-emption disapplication resolution tabled at the company's recent Annual General Meeting⁴.

Specifically, we understand that Ryanair would be willing to consent to a disapplication of statutory pre-emption rights for a rights issue, in relation to shareholders resident outside Ireland or outside the European Union, in countries where an offer would be "impractical or unlawful", consistent with the terms of the first part of Article 8(d)(i) of Aer Lingus' Articles of Association (as set out below), with one modification in the latter case (substituting the word "State" for "European Union"):

"provided that this power (allotment without pre-emption) was limited to:- the allotment of equity securities in connection with a rights issue in favour of ordinary shareholders (other than those holders with registered addresses outside the State (or European Union) to whom an offer would, in the opinion of the Directors, be impractical or unlawful in any jurisdiction)".

The Irish Companies Acts provide that where the directors of a company are authorised to allot shares on a pre-emptive basis under Section 20 of the Companies Amendment Act 1983, the company may by special resolution resolve that statutory pre-emption shall apply to an allotment with such modifications as may be specified in the implementing resolution⁵. Applying this to the Ryanair's proposal, Aer Lingus is authorised to allot shares on a pre-emptive basis under Section 20 of the Companies Amendment Act 1983⁶, and the special resolutions suggested in the following paragraph should (if passed) lawfully modify the Aer Lingus shareholders' statutory pre-emption rights.

If pre-emption rights were to be dis-applied in relation to a rights issue for shareholders resident outside the E.U. (as opposed to outside Ireland) to whom an offer would be in the opinion of the Aer Lingus board be impractical or unlawful, a special resolution would be required to amend the text of Article 8(d)(i) of Aer Lingus' Articles of Association to reflect this approach, and another special resolution would be required under Article 8(d) to authorise the directors of Aer Lingus to allot shares with pre-emption waived on this basis. If pre-emption rights were to be dis-applied in relation to a rights issue for shareholders resident outside the Ireland (as opposed to outside the E.U.) to whom an offer would be in the opinion of the Aer Lingus board be impractical or unlawful, only the latter resolution would be required. We understand Ryanair would be willing to support both of these approaches.

This approach should enable Aer Lingus to conduct a rights issue in favour of ordinary shareholders in such a manner that it would only have to dis-apply pre-emption rights for shareholders outside the European Union/Ireland, in countries where such an offer would be "impractical or unlawful" (which might include non-EU countries such as the US). Ryanair's pre-emption rights, and the pre-emption rights of other ordinary shareholders resident in the European Union/Ireland, would remain intact.

A&L Goodbody

19 June 2013

¹ Resolution 7 at the last Aer Lingus AGM on 26 April 2013

² Section 23(1) of the Companies Amendment Act 1983: a company may not allot any equity securities' to a third party without first offering them pro rata on the same or more favourable terms to the existing holders of the company's "relevant shares".

³ Resolution 8 at the last Aer Lingus AGM on 26 April 2013

⁴ Resolution 8 at the last Aer Lingus AGM on 26 April 2013

⁵ Section 24(2)(b) of the Companies Amendment Act 1983

⁶ The board of Aer Lingus was generally and unconditionally authorised at its last Annual General Meeting on 26 April 2013 (with Ryanair's support) to allot shares on a pre-emptive basis under Section 20 of the of the Companies Amendment Act 1983 up to an aggregate nominal amount of 176,233,229 shares, representing approximately 33% of the nominal value of the issued share capital of Aer Lingus.