

# RYANAIR / AER LINGUS MERGER INQUIRY

## Working paper – Comments on the draft Final Order

### Introduction

1. As part of its original submission to the Competition and Markets Authority (CMA) that there had been a material change in circumstances (MCC) that required a full re-examination of the determinations reached and remedy order in the Competition Commission's (CC) final report dated August 2013 (the Report), Ryanair submitted that whatever the CMA's conclusions on that, it would be impossible for the CMA to impose a divestment order in the form currently envisaged while IAG, and potentially other airlines, were making public offers for Aer Lingus. On this latter point, it made a number of submissions which this paper sets out and addresses.
2. We have considered Ryanair's arguments that there are MCCs that require us to depart from the remedial action identified in the Report and reached a provisional view that there are no MCCs or special reasons for us not to proceed to implement our remedies. We are currently consulting on this provisional conclusion as set out on the [case page](#).
3. In this paper we summarise the submissions made to us on the terms of the draft Final Order, consulted on in November 2013, by Ryanair, Aer Lingus and IAG, and set out our views on its implementation. We have made certain changes to the draft Final Order to reflect some of the comments received now and in response to the original consultation. Since that consultation, the Enterprise and Regulatory Reform Act 2013 has abolished the CC and transferred its functions in relation to this merger inquiry to the CMA. As such, certain of the changes to the draft Final Order reflect the legislative changes. We are also inviting comments on the draft Final Order as set out on the [case page](#).

## **The approach set out by the CC for execution of the divestiture remedy**

4. In this section, we outline the manner in which the CC decided that the divestiture remedy should be carried out. In the Report, the CC decided that:
  - (a) a Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers within a specified period (the divestiture period);
  - (b) the divestiture may be implemented via an upfront buyer process to a single purchaser or via a stock market placement of the shares, or by another process identified by the Divestiture Trustee and approved by the CC;
  - (c) the Divestiture Trustee will review whether a purchaser satisfies the CC's suitability criteria,<sup>1</sup> and will consult with the CC as appropriate;
  - (d) Ryanair may nominate parties to act as Divestiture Trustee for approval by the CC. The CC may appoint its own choice of Divestiture Trustee if Ryanair is unable to identify appropriate candidates within specified timescales. Ryanair is responsible for remuneration of the Divestiture Trustee; and
  - (e) the divestiture period is [X] from final determination.<sup>2</sup>
5. Annex 1 to Appendix K of the Report set out provisions regarding the nomination and appointment of the Divestiture Trustee, as well as the functions of the Divestiture Trustee, that the CC said it expected to see in any final undertakings or order.
6. The draft Final Order follows the provisions set out in Annex 1 to Appendix K. It provides that Ryanair shall appoint a Divestiture Trustee approved by the CMA, under a mandate with terms and conditions also approved by the CMA, to give effect to the obligations set out in the draft Final Order.<sup>3</sup> Within five working days of the date on which the Final Order is made, or within five working days of whichever other date the CMA may determine, Ryanair must submit to the CMA for approval a list of two or more potential Divestiture Trustees, together with the proposed terms and conditions on which the Divestiture Trustee is to be appointed, and a work plan comprising a schedule

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<sup>1</sup> See Appendix K of the Report.

<sup>2</sup> The Report, paragraph 8.123.

<sup>3</sup> Draft Final Order, Article 3.6.

of the steps to be taken to give effect to the Divestiture Trustee Mandate.<sup>4</sup> The draft Final Order then envisages giving Aer Lingus two working days to state whether or not it has any objections to one or more of the potential Divestiture Trustees.<sup>5</sup> Once the CMA has approved any or all of the names on the list of potential Divestiture Trustees and the terms and conditions of appointment, and notified Ryanair accordingly, Ryanair has two working days within which to appoint the Divestiture Trustee.<sup>6</sup> Ryanair shall not take any steps towards the marketing or sale of the shares save at the direction of the Divestiture Trustee.<sup>7</sup>

7. The Divestiture Trustee must consider the most appropriate divestiture process and may choose to recommend to the CMA the disposal of the shares via a sale to an approved upfront buyer, a sale to a number of approved buyers via a stock market placement, or via some other alternative divestiture process that in its written opinion would be a more effective means of giving effect to its mandate. The chosen process must be notified to the CMA within ten working days of its appointment.<sup>8</sup>
8. Where the Divestiture Trustee elects, and the CMA approves, to dispose of the shares via an upfront buyer process, it is for the Divestiture Trustee to identify a suitable potential purchaser and submit the name to the CMA for approval.<sup>9</sup> Where CMA approval is provided, it is for the Divestiture Trustee to determine the timing of the sale (so long as it is within the overall divestiture period) and the Divestiture Trustee has discretion to conduct the sales process.<sup>10</sup>
9. All documents required to give effect to the sale are to be drawn up by the Divestiture Trustee and approved by the CMA. It is also for the Divestiture Trustee to arrange the process for exchanging contracts and other necessary documentation or agreements in order to give effect to the sale.<sup>11</sup>

## **Ryanair's submissions that the CMA's order cannot be implemented in its current form**

10. Ryanair argued that a final order in the form envisaged by the draft Final Order consulted on in November 2013, which set out the terms of the

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<sup>4</sup> Ibid, Article 5.1.

<sup>5</sup> Ibid, Article 5.4.

<sup>6</sup> Ibid, Article 5.5. If none of the potential Divestiture Trustees are approved by the CMA, Ryanair must propose at least two more names to the CMA within five working days (Article 5.7).

<sup>7</sup> Ibid, Article 8.7.

<sup>8</sup> Ibid, Annex 1, paragraphs 4 to 6.

<sup>9</sup> Ibid, Annex 1, paragraphs 11 and 12.

<sup>10</sup> Ibid, Annex 1, paragraph 14.

<sup>11</sup> Ibid, Annex 1, paragraph 17.

Divestiture Trustee's Mandate, would be unworkable while IAG and potentially other airlines were making public offers for Aer Lingus.

11. Ryanair provided as part of its submission, an opinion from Davy Corporate Finance (a corporate finance adviser in Ireland), who noted that a number of difficulties and complexities could arise in the event of any proposed sale of the shares by the Divestiture Trustee in the lead up to a possible offer period, or during an offer period. Ryanair's/Davy's arguments are summarised below.
12. In order to address the points raised by Ryanair we have set out their comments together with the responses we received from Aer Lingus and IAG, where relevant, under the following headings:
  - (a) The position of the Divestiture Trustee.
  - (b) The impact on IAG's offer.
  - (c) The impact on other offers.
  - (d) Other points.

## **Position of the Divestiture Trustee**

### ***Views of Ryanair***

13. Ryanair said that the Divestiture Trustee, along with the CMA, might have to decide whether to sell the shares to IAG (or any other bidder) before the full terms of IAG's offer were known and before Aer Lingus's shareholders indicated whether they would be willing to accept an offer from IAG. Alternatively, if the Divestiture Trustee chose to sell the shares in a stock market placement, the resulting dispersal of the shares could have significant implications for the prospect of any offer being made, and for the success of that offer (if made).
14. Ryanair said that the Divestiture Trustee and the CMA could find themselves in the 'invidious position' of deciding the fate of Aer Lingus, ie determining whether the airline is taken over or not, which of several competing bids is successful, and at what price. This would potentially expose the Divestiture Trustee to significant lobbying and allegations of bias, making the role of Divestiture Trustee unattractive.
15. Ryanair told us the Divestiture Trustee would face complexities associated with the CMA's process for obtaining consent (as well as the overall divestiture period) in the context for prescribed timeframes for offers under the Irish Takeover Rules. For example, it said that Aer Lingus could request the

Irish Takeover Panel to impose a ‘put up or shut up’ deadline on IAG. The Divestiture Trustee would have no involvement in this process but could find the context in which it was attempting to fulfil its mandate to sell the shares materially affected by the imposition of such a deadline.

16. It said the sales process could be impacted by merger control regulation. For example, if the proposed acquisition by IAG triggered an investigation under the European Union Merger Regulation, the operation of EU law could prevent the Divestiture Trustee from selling the shares in a way consistent with the Order.
17. Ryanair said that the Divestiture Trustee may be reluctant to take on a role where it could come into possession of information which would raise insider trading concerns. This risk would be exacerbated if the Divestiture Trustee were engaged while Aer Lingus was the subject of takeover bids and while its shares remained subject to a heightened sensitivity to the behaviour of shareholders in Aer Lingus.
18. Ryanair said that it could be difficult for the Divestiture Trustee to be confident in its ability to fulfil its mandate to procure the best available price in the market in an environment of heightened and exceptional price volatility of Aer Lingus shares.
19. It said that it was possible that a condition of any offer from IAG (or of any undertaking to accept an offer by the Irish Government) would be the approval by independent shareholders (excluding the Irish Government) of specific aspects of the IAG proposal. Such a condition might be required under Takeover Rule 16, which precluded special arrangements (such as the types of commitments on connectivity being proposed by IAG) with a shareholder in an offeree company save with the consent of the Irish Takeover Panel. It said that in such a circumstance, the nature and number of owners of the shares held other than by the Irish Government became very important. As well as having a role in whether the IAG offer was successful, therefore, the Divestiture Trustee (and the CMA) would have a role in whether the Irish state was in a position to receive and benefit from key commitments in relation to connectivity.

### ***Views of Aer Lingus***

20. Aer Lingus said that the contribution from Davy Corporate Finance was confused and confusing in parts, notably where it appeared to contemplate that IAG would separately acquire the Ryanair parcel of shares in advance of any offer or arrangement. It said that accordingly, the supposed difficulties that it canvassed started from a false premise.

21. Aer Lingus said that in substance the Divestiture Trustee, under the CMA's direction, would simply be taking the 'upfront buyer' route. It said the Divestiture Trustee should be empowered to give an irrevocable undertaking in respect of the Aer Lingus shares which must be disposed of by Ryanair and then sell them into the offer, so preventing the risk or Ryanair impeding the merger with IAG. The irrevocable undertaking that was being sought by IAG would only be required to be provided once the full terms and conditions of the IAG offer had been made known. Aer Lingus told us that once this was the case, the Rules of the Irish Takeover Panel would require IAG to proceed with its offer and would not readily allow IAG to make any subsequent alterations to those terms and conditions.
22. Aer Lingus said that the supposed impediments raised by Ryanair, such as risks of insider trading and difficulty in finding a willing trustee, were fanciful. A risk of insider trading pre-supposed that a Divestiture Trustee would be in receipt of inside information and separately want to trade in Aer Lingus shares, or lack proper internal safeguards should another branch of its organisation choose to do so. It said that any hypothetical risk of insider trading would exist equally absent a pending public offer, whatever the method of divestiture followed. Aer Lingus said that there were many candidate trustees, both financial and non-financial institutions, that could perform the role, duly protected by the indemnity which Ryanair was required to give under the draft Order.
23. Aer Lingus said that the CMA had the facility to extend time and give directions to the Divestiture Trustee so as to allow alignment with a merger timetable and process (and this was provided for in the draft Order's definition of 'Trustee Divestiture Period').

## **Impact on the IAG possible offer**

### ***Views of Ryanair***

24. Ryanair told us that IAG had stated that, as a precondition to making any offer, it would require irrevocable commitments from both Ryanair and the Irish Government to accept the offer. IAG confirmed that this position was correct. Ryanair said that if the Divestiture Trustee sold the shares in a stock market dispersal prior to the offer being made, it would be more difficult for IAG to procure irrevocable commitments from a sufficient number of shareholders in a reasonable timeframe to de-risk the offer. This could decrease the likelihood of an offer being made or, if it was made, lower the prospect of the offer being successful.

25. Ryanair said that if the Divestiture Trustee were to sell the shares to IAG (or any other potential offeror) prior to the offer being made, this could also heighten the execution risk. In an offer made by way of a scheme of arrangement, or during the squeeze-out process following a conventional offer, any shares already owned by IAG would have to be disregarded in assessing whether the required majority had been reached (75% in the case of a scheme of arrangement and 90% in the case of a squeeze-out).
26. Ryanair said that if IAG offered binding commitments to the Irish Government (for example on the use of Aer Lingus's Heathrow slots) in exchange for the Irish Government's agreement to sell its shares, the Irish Takeover Panel would be likely to impose a condition of independent shareholder approval of such commitments. If the Divestiture Trustee had sold Ryanair's shares to IAG, these would be excluded from the independent shareholder vote, which would put the deliverability of connectivity and other protections negotiated by the Irish Government on behalf of the Irish people in the hands of financial investors in Aer Lingus. Davy Corporate Finance suggested that this would put the Divestiture Trustee and the CMA in an 'invidious position'.

#### ***Views of Aer Lingus***

27. Aer Lingus said that a process in which the Divestiture Trustee enforced a market dispersal of the shares (as suggested might be the case by Davy Corporate Finance) would not be a sensible approach, but matters would be unlikely to take that course. Even if there were such a dispersal before an IAG bid was made, there would no longer be a reason for IAG to seek an irrevocable commitment from the new fragmented holders of the shares formerly held by Ryanair. Aer Lingus said that a supposed difficulty in obtaining irrevocable commitments from individual shareholders was thus a false problem. Further (as stated in paragraph 20), it was incorrect to contemplate that IAG would separately acquire the Ryanair parcel of shares in advance of any offer or arrangement.

#### ***Views of IAG***

28. IAG told us it would prefer that the CMA refrained from appointing a Divestiture Trustee at this stage to effect the sale of the majority of Ryanair's shareholding and said that instead we should give our consent, under the Interim Order currently in force, to Ryanair granting an irrevocable commitment to accept IAG's proposed offer in respect of the entirety of its shareholding. It said that only if we subsequently ascertained, after having granted such consent, that Ryanair had failed to give such an irrevocable commitment, should we proceed to appoint a Divestiture Trustee.

## **Impact on other possible offers**

### ***Views of Ryanair***

29. Ryanair told us that a sale of the shares by the Divestiture Trustee to a potential offeror might cause Rule 6.1 or Rule 11.1 of the Irish Takeover Code to be engaged. Rule 6.1 states that, where an offeror has acquired shares within three months (or, at the discretion of the Irish Takeover Panel, 12 months) prior to the offer being made, the price per share paid under the offer must not be less than the highest price per share paid as part of the prior acquisition. Rule 11.1 states that, where an offeror has acquired more than 10% of the target company within 12 months prior to making the offer, consideration under the offer must be in cash or accompanied by a cash alternative.
30. Ryanair said that while both these minimum price and form of consideration rules applied equally outside an offer period, they were clearly of more significance during an offer period and at a time when, due to the proportion of the Divestment Shares, the destination of those shares might cause Rules 6 or 11 to be engaged.

### ***Views of Aer Lingus***

31. Aer Lingus said that Ryanair had alluded to a potential for several of the Irish Takeover Rules to be engaged without explaining how this might be so or how this might have a negative impact on the sale of the shareholding by the Divestiture Trustee.
32. Aer Lingus said that should other bids emerge for the airline, the Divestiture Trustee would be able, like any other shareholder, to evaluate offers and to determine how to proceed. The flexibility to accept a higher bid could also be accommodated within the terms of an irrevocable undertaking. It said that it was not correct to maintain that it was somehow improper or invidious for the CMA and the Divestiture Trustee to be put into the position of having to make such a decision.

## **Other points**

### ***Views of Ryanair***

33. Ryanair told us that any involvement of the board of Aer Lingus in the sale of Ryanair's shares by the Divestiture Trustee could compromise the board's

duty to act in the interests of the company as a whole and not to deny shareholders the opportunity to decide on the merits of an offer.

34. Ryanair said that there was accelerated public notification of dealings in securities in Aer Lingus during an offer period. Ryanair said that this would need to be considered in the context of a process for implementing a sale of Ryanair's shares.
35. Ryanair said that given the multiplicity of advisers engaged by IAG, Aer Lingus and the Irish Government during the current run-up to a potential offer by IAG, the pool of firms which could potentially act as the Divestiture Trustee would be significantly diminished.
36. Ryanair said that as brokers and advisers to an offeror or an offeree must withdraw any published forecasts, valuations and other forward-looking material during an offer period, there would be less information and analysis in the public domain with respect to Aer Lingus than would normally be the case. It said this could impact on the Divestiture Trustee in the conduct of its role.
37. Ryanair said that engagement by Aer Lingus with its shareholders, analysts, stockbrokers and others was severely curtailed during an offer period. It said this would also be expected to impact on the Divestiture Trustee in the conduct of its role.

#### ***Views of Aer Lingus***

38. Aer Lingus said that Ryanair stood to achieve a very full price for its shares through the mechanism of selling into IAG's offer. The price had been viewed favourably by commentators and, if the offer succeeded, would be a market validation of the fairness of the price.
39. (As stated in paragraph 22) Aer Lingus told us that there were many candidate trustees who could perform the role.

#### **Our assessment of issues raised in relation to the execution of the divestiture remedy**

40. We acknowledge that there would be heightened public scrutiny of any actions in respect of Aer Lingus that would be in place in the period prior to, and during, an offer by IAG, and there might be potential interactions between a forced divestiture process and the Irish Takeover Code and/or merger control regulation. We bore this in mind when assessing the manner in which the execution of the divestment remedy should occur. As noted in our

introduction, as a consequence of comments received to the first consultation on the draft Final Order and changes brought about under the Enterprise and Regulatory Reform Act 2013, we have made certain amendments to the draft Final Order which is being consulted on. The changes made and the reasons for them are set out in our consultation notice.

41. We noted that many of Ryanair's comments arose from the assumption that the Divestiture Trustee would be likely to sell the shares in Aer Lingus in the period shortly before a formal offer was made by IAG (or some other potential bidder). In our view, this assumption is not correct. Once appointed, the Divestiture Trustee would need to form a view of the market for Aer Lingus shares at that time before putting forward to the CMA its proposals for carrying out its mandate. If it judged that an offer from IAG, or any other potential bidder, was likely to be forthcoming in the near term, and on terms that it considered to be reasonable, then this is a factor that could be taken into consideration in formulating its work plan for our approval.
42. We also noted that many of Ryanair's comments arose from a perceived lack of flexibility in the draft Final Order pertaining to the Divestiture Trustee's ability to fulfil its mandate. We re-examined the draft Final Order and in particular the terms of the Divestiture Trustee Mandate and have highlighted below that flexibility has been built into a number of the key clauses:
  - (a) First, the Divestiture Trustee would be directed by the CMA in the first instance to consider the most appropriate divestiture process by conducting all reasonable enquiries, including holding one meeting with Ryanair and one with Aer Lingus.<sup>12</sup>
  - (b) Second, the Divestiture Trustee shall consult with the CMA on the most appropriate divestiture process and shall not take any action without the written approval of the CMA.<sup>13</sup>
  - (c) Third, where the Divestiture Trustee recommends disposal by means of an upfront buyer process, the CMA shall be consulted and approve such purchasers in advance.<sup>14</sup>
  - (d) Fourth, the Divestiture Trustee shall comply with any written directions or instructions issued to it by the CMA<sup>15</sup> and can seek written directions or

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<sup>12</sup> Paragraphs 4, 5, 6 and 7, Annex 1 to the draft Final Order.

<sup>13</sup> Ibid, paragraph 8, Annex 1.

<sup>14</sup> Ibid, paragraphs 8 and 10, Annex 1.

<sup>15</sup> Ibid, Article 6.3.

instructions from the CMA in order to assist it in the fulfilment of the Divestiture Trustee Obligation.<sup>16</sup>

- (e) Fifth, in terms of timing, if the CMA considers it appropriate and necessary, in the light of circumstances at the time, to defer the appointment of the Divestiture Trustee, the Divestiture Trustee would not need to be appointed immediately upon commencement of the Final Order. Further, the definition of the divestment period allows for its possible extension by the CMA.<sup>17</sup> For example, should Ryanair seek the CMA's consent to enter into an irrevocable commitment to sell its shareholding in the context of a public bid for Aer Lingus, the CMA could consider whether there was a valid reason to defer the appointment of the Divestiture Trustee for a short period of time.<sup>18</sup>
43. It is therefore clear that there is a significant degree of flexibility built into the current draft Final Order to ensure that the remedies implementation process can take account of actual market conditions such as those that might arise from the current proposal from IAG.
44. In light of the above, we are of the view that the terms of the draft Final Order are sufficiently flexible to negate the concerns raised in relation to the appointment of the Divestiture Trustee and the fulfilment of its mandate.

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<sup>16</sup> Ibid, paragraph 19, Annex 1.

<sup>17</sup> Ibid, Articles 5.1 and 1.5 respectively.

<sup>18</sup> The CMA would consider the suitability of the bidder in accordance with its purchaser approval criteria set out in Appendix K of the Report.