

RYANAIR / AER LINGUS MERGER INQUIRY

Provisional decision of possible material changes of circumstances

Introduction

The Competition Commission's investigation and subsequent developments

1. On 15 June 2012, the Office of Fair Trading (OFT) referred the completed acquisition by Ryanair Holdings plc (Ryanair) of a minority shareholding in Aer Lingus Group plc (Aer Lingus) to the Competition Commission (CC) for investigation and report (the Reference). The Reference was made under section 22(1) of the Enterprise Act 2002 (the Act). The CC published its findings on 28 August 2013 (the Report).
2. In the Report, the CC found that Ryanair's 29.82% shareholding in Aer Lingus gave it the ability to exercise material influence over Aer Lingus and concluded that a relevant merger situation had been created. The CC found that Ryanair would have the incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor, which would not exist for a shareholder that was not in competition with Aer Lingus, and that it would expect Ryanair to act on this incentive. The CC assessed the various ways in which Ryanair's minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy relative to the counterfactual and concluded that Ryanair's shareholding in Aer Lingus had led or may be expected to lead to a substantial lessening of competition (SLC) in the markets for air passenger services between Great Britain and Ireland.
3. In order to remedy, mitigate or prevent the SLC or any adverse effect arising from the SLC, the CC concluded that a partial divestiture to reduce Ryanair's shareholding in Aer Lingus to 5% of Aer Lingus's issued ordinary shares, accompanied by an obligation on Ryanair not to seek or accept board representation in Aer Lingus and an obligation on Ryanair not to acquire further shares in Aer Lingus (unless clearance is given under the European Union Merger Regulation (EUMR) for a concentration between Ryanair and Aer Lingus), would be both effective and proportionate. The CC also

concluded that a Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers in the agreed time period.

4. On 23 September 2013, Ryanair filed an application to the Competition Appeal Tribunal (the Tribunal) challenging findings in the Report on six grounds.
5. In its judgment, handed down on 7 March 2014, the Tribunal dismissed Ryanair's challenge on all six grounds. Ryanair appealed the Tribunal's judgment to the Court of Appeal on three of those grounds and on 12 February 2015, the Court of Appeal dismissed Ryanair's application in full on all three grounds and refused Ryanair permission to appeal to the Supreme Court. On 12 March 2015, Ryanair lodged a request with the Supreme Court seeking leave to appeal on all three grounds. The Supreme Court's decision on permission is expected sometime in May 2015.
6. On 1 April 2014, the CC was replaced by the Competition and Markets Authority (the CMA) and the remaining functions of the CC in relation to the Reference were transferred to the CMA.

The CMA's duties to implement remedies and Ryanair's submissions regarding a potential material change of circumstance

7. Where a report has been prepared and published by the CMA that contains a decision that a completed merger would lead to an SLC, then under section 41 of the Act the CMA is under a duty to take such action as it considers to be reasonable and practicable to remedy the SLC and any adverse effects which have resulted from, or may be expected to result from it.¹ That action shall be consistent with its decisions included in the report unless there has been a material change in circumstances (MCC) since the preparation of the report or the CMA otherwise has a special reason for deciding differently.²
8. On 12 February 2015, following the Court of Appeal's judgment and IAG's announcement that it had submitted a proposed offer to the board of Aer Lingus,³ Ryanair submitted an application to the CMA asking for a full re-examination of the determinations reached and remedy set out in the Report.⁴ Accordingly, the CMA has considered the submissions received in order to

¹ Sections 41(1) and (2) of the Act.

² Section 41(3).

³ On 26 January 2015, IAG announced that it had submitted a revised proposal to make an offer for Aer Lingus (following two earlier proposals, on 18 December 2014 and 9 January 2015, both of which had been rejected by the board of Aer Lingus as being inadequate). The following day, the board of Aer Lingus confirmed that it was willing to recommend an offer on the terms proposed.

⁴ Ryanair's submission dated 12 February 2015 at paragraph 7.

determine whether it should exercise its discretion and depart from the findings on remedial action set out in the Report.

9. Ryanair's application submitted that there had been MCCs since publication of the Report that contradicted the CC's conclusions, such that the CMA no longer had the power to impose the divestment remedy. Ryanair also said that a Final Order in the form currently envisaged (requiring a Divestiture Trustee to sell Ryanair's shares in Aer Lingus in a pre-determined manner) would be unworkable while IAG⁵ and potentially other airlines are making public offers for Aer Lingus.
10. The CMA published Ryanair's submission on its website on 3 March 2015 alongside a notice inviting comments on material change of circumstances and/or special reason within the meaning of section 41(3) of the Act. Responses were received from Aer Lingus, IAG and the Irish Department of Transport, Tourism and Sport. These responses have also been published on the CMA website.⁶ The CMA also received a further two responses from Ryanair setting out developments which it said had taken place since its original submission and commenting on the responses the CMA received.⁷
11. This document sets out the possible MCCs put forward by Ryanair, and the CMA's assessment of whether any of these amount to an MCC or special reason for the CMA to depart from its conclusions on remedies set out in the Report. It also refers, where appropriate, to the submissions advanced by other parties who responded to the CMA's notice.

Structure of this provisional decision

12. This document sets out the CMA's provisional decision on whether there has been an MCC since the publication of the Report. The rest of this document is structured as follows:
 - (a) In paragraphs 13 to 21, we summarise the reasons given by the CC in the Report for finding an SLC.
 - (b) In paragraphs 22 to 28, we set out Ryanair's submissions that there has been an MCC since the Report.
 - (c) In paragraphs 29 to 42, we summarise the views of third parties.

⁵ International Consolidated Airlines Group, S.A.

⁶ In the case of Aer Lingus, a non-confidential version of its response.

⁷ Ryanair's submissions dated 17 March and 1 April 2015.

- (d) In paragraphs 43 to 44, we summarise Ryanair's response to the views of third parties.
- (e) Paragraphs 45 to 59 contain our provisional assessment of whether or not there has been an MCC and our provisional decision.

Key factors underlying the SLC decision in the Report

13. In this section, as context for the consideration of the MCCs put forward by Ryanair, we summarise the key factors underlying the CC's finding of an SLC in the Report.⁸
14. In the Report, the CC concluded that Ryanair's 29.82% shareholding in Aer Lingus gave it the ability to exercise material influence over Aer Lingus. It reached this view having regard to a range of factors including, in particular, Ryanair's ability to block special resolutions and the sale of Heathrow slots under the Articles of Association. It concluded that these mechanisms were relevant to Aer Lingus's ability to pursue its commercial policy and strategy, in particular its ability to combine with another airline and to optimise its portfolio of Heathrow slots, and as such a relevant merger situation had been created.⁹
15. The CC assessed the effects of Ryanair's acquisition of this minority shareholding on Aer Lingus's commercial policy and strategy by first considering Ryanair's incentives and thereafter looking at various mechanisms through which Ryanair might influence its rival's commercial strategy. The CC found that Ryanair would have the incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor, which would not exist for a shareholder that was not in competition with Aer Lingus, and that the CC would expect Ryanair to act on this incentive. The CC assessed the various ways in which Ryanair's minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy relative to the counterfactual. The CC recognised that it could not predict with certainty all the ways in which Ryanair's shareholding might affect Aer Lingus's commercial policy and strategy and nor was it required to determine which individual scenarios were more likely than not to occur. Instead, in making its assessment as to whether there had been, or was likely to be an SLC, it applied the 'probabilistic test' on the basis of all relevant evidence in the round.

⁸ For a full statement of the reasoning underlying the CC's finding of an SLC, please refer to the Report.

⁹ Paragraphs 4.42-4.44 of the Report.

16. However, in order to reach an overall view, the CC looked in particular at whether Ryanair's shareholding might:¹⁰
- (a) affect Aer Lingus's ability to participate in a combination with another airline;
 - (b) hamper Aer Lingus's ability to issue shares to raise capital;
 - (c) influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow;
 - (d) influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution; and
 - (e) allow Ryanair to raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy.
17. The CC formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline. The CC identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares (which might be required for a corporate transaction or to optimise its capital structure). The CC found that, absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consolidation observed across the airline industry. By impeding or preventing Aer Lingus from combining with other airlines, Aer Lingus's ability to increase the scale of its operations and reduce its unit costs would be limited. This would be likely to have reduced or to reduce the effectiveness of the competitive constraint Aer Lingus could impose on Ryanair on routes between Great Britain and Ireland relative to the counterfactual.¹¹
18. In addition, the CC found that Ryanair's minority shareholding could limit the commercial policies and strategies available to Aer Lingus by limiting its ability to manage effectively its portfolio of Heathrow slots, restricting it from optimising its route network and timetable across London airports.¹² The CC

¹⁰ *Ibid*, paragraph 7.23.

¹¹ *Ibid*, paragraph 7.178.

¹² *Ibid*, paragraph 7.180.

also took account of the possibility, albeit relatively unlikely, that Ryanair would, in certain circumstances, be in a position to pass or defeat an ordinary resolution at an Aer Lingus general meeting (if other shareholders voted in the same way as Ryanair, the Irish government were to abstain on a vote, or the Irish government's shareholding was dispersed). Given Aer Lingus's existing balance sheet strength and forecast financial performance, the CC found it unlikely that Aer Lingus would need to raise equity in the medium to long term other than in relation to a corporate transaction or to optimise its corporate structure. However, the CC noted that unforeseen events might arise that would require Aer Lingus to raise equity, and noted that Ryanair would be able to impede it from doing so by blocking a special resolution.¹³ The CC also took into account that the minority shareholding would increase the likelihood of Ryanair mounting further bids for Aer Lingus relative to the counterfactual. This could serve as a serious distraction for Aer Lingus's management resources and could have impeded, or could impede, Aer Lingus's ability to implement its commercial policy and strategy.¹⁴

19. The CC therefore concluded that, by limiting Aer Lingus's ability to pursue its independent commercial policy and strategy, Ryanair's minority shareholding would have led or would be expected to lead to a reduction in Aer Lingus's effectiveness as a competitor.¹⁵
20. In relation to the materiality of that reduction in effectiveness, the importance of scale to airlines was clear from the evidence presented to the CC, with Ryanair itself highlighting Aer Lingus's small scale as an impediment to its long-term survival. In addition, given the strategic importance of Aer Lingus's Heathrow slots and the importance of its Heathrow services to its UK operations, there could be a significant impact on Aer Lingus arising from its reduced ability to optimise its slot portfolio. The disruption to Aer Lingus's ability to pursue its own commercial policy and strategy from additional bids by Ryanair for the outstanding shares in Aer Lingus would be (and had been) significant. Further, although relatively unlikely, were Ryanair to achieve a majority at a general meeting, the implications for Aer Lingus's competitive capability could be significant because of the importance of company decisions put to a shareholder vote by ordinary resolution. The CC therefore found that the impact of Ryanair's minority shareholding on Aer Lingus's effectiveness as a competitor was likely to be material and enduring both

¹³ *Ibid*, paragraph 7.181.

¹⁴ *Ibid*, paragraph 7.182.

¹⁵ *Ibid*, paragraph 7.183.

across its network generally, and specifically as a rival to Ryanair on routes between Great Britain and Ireland.¹⁶

21. The CC concluded that Ryanair's acquisition of a 29.82% shareholding in Aer Lingus had led or may be expected to lead to an SLC in the markets for air passenger services between Great Britain and Ireland.¹⁷

The MCCs put forward by Ryanair

IAG's bid undermines the basis for a forced divestiture

22. Ryanair stated that a critical determination in the Report concerned an 'erroneous finding' by the CC that a mechanism of particular significance resulting in the SLC was that Ryanair's shareholding prevented Aer Lingus from merging with, being acquired by, or otherwise entering into combinations with other airlines. It said the CC further found that other airlines were deterred from combining with Aer Lingus, and that this theory of harm was central to the CC's decision that a divestiture remedy was required. Ryanair said that events over the period since mid-December 2014 had vindicated its view that these findings were unsubstantiated and incorrect.
23. Ryanair said that the CC had relied on submissions by IAG that it did not propose to acquire Aer Lingus and that it would 'not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder'. IAG's evidence was especially significant, according to Ryanair, because it was one of the three major airline groups in Europe, operated extensively in the UK and Ireland, had substantial resources and networks, and was an important competitor to Ryanair. It said the competitive and commercial implications of a merger with IAG would therefore be very different from a combination between Aer Lingus and most other airlines.
24. Ryanair said that IAG's approach to Aer Lingus, and the Aer Lingus board's willingness to recommend IAG's most recent proposal, demonstrated conclusively that Ryanair's shareholding in Aer Lingus did not prevent Aer Lingus from merging with, being acquired by, or otherwise entering into combinations with other airlines. It said that this fatally undermined the lawfulness of the CC's proposed remedy. It told the CMA that the Irish government's reaction to events (namely that it was not willing to grant an irrevocable undertaking to sell its shares in Aer Lingus without further concessions from IAG on the use of Aer Lingus's Heathrow slots and further information concerning likely job losses) confirmed what Ryanair had always

¹⁶ *Ibid*, paragraph 7.184.

¹⁷ *Ibid*, paragraph 7.188.

said, namely that it was the Irish government, and not Ryanair, which represented the only obstacle to Aer Lingus's combination with any other airline.

25. Ryanair said that if IAG's attempt to acquire Aer Lingus was ultimately unsuccessful, the CMA would have to reconsider its 'mistaken conclusion' that the impediment to a merger was Ryanair's shareholding, rather than other facts (for example, the policy objectives of the Irish government). On the other hand, if the offer proceeded, this would provide yet more evidence that Ryanair's minority shareholding did not deter potential combinations between Aer Lingus and other airlines. Either way, it was impossible for the CMA to sustain the findings in the Report.
26. Ryanair said that, given that IAG's successive approaches showed that the CC's concerns regarding the impact of its shareholding on the likelihood of future combinations involving Aer Lingus were misconceived, and that the other theories of harm in the Report were, by the CC's own admission, more readily addressed by undertakings not to vote Ryanair's shares on certain matters, it followed that a divestiture remedy could no longer reasonably be considered necessary or proportionate.

The passing of time constitutes an MCC

27. Ryanair said that the conclusions in the Report were based on predictions and hypotheses both about the likelihood of future combinations and Aer Lingus's ability to compete with Ryanair as a minority shareholder. In addition to the IAG bids, the CMA was now able to draw on more than 17 months of real-world evidence and experience since publication of the Report to assess the necessity and appropriateness of a divestiture remedy against Aer Lingus's actual performance with Ryanair as a minority shareholder (restricted in its voting ability in accordance with the interim order in place). Ryanair said that the availability of real evidence in place of predictions and hypotheses must reasonably be regarded as an MCC relative to the position at the time of the Report.

Ryanair's conclusion

28. In conclusion, Ryanair said that circumstances had changed materially since publication of the Report (in August 2013), meaning that the CMA no longer had the power to impose a divestiture remedy. A full re-examination of the determinations reached in the Report, and the remedy order, was required. Ryanair said it was confident that any such re-examination would vindicate its position and cause the CMA to set aside the findings of the CC.

Views of other parties

Aer Lingus

29. Aer Lingus said that the application by Ryanair was little more than a device to achieve further delay. It was based on a deliberate mischaracterisation of the facts and did not begin to provide a plausible basis for re-examining the Report.
30. Aer Lingus said that Ryanair had spent over a year litigating the issue of redactions in the Report, contending that if it had been given information as to the identity of Aer Lingus's supposed merger and acquisition (M&A) partners, it would have been able to undermine the credibility of such supposed suitors. Now, despite being given evidence that a credible player, IAG, wished to merge with Aer Lingus, Ryanair's submission neglected the fact that IAG's interest in Aer Lingus confirmed the CC's finding that Aer Lingus was an attractive merger partner.
31. Aer Lingus told the CMA that there was no basis for Ryanair's claim that IAG's approach to Aer Lingus demonstrated a willingness to proceed 'notwithstanding Ryanair's presence as a minority shareholder'.¹⁸ Public statements¹⁹ and press reports had made it clear that IAG wanted an irrevocable commitment from Ryanair to sell its shares before it would be willing to proceed with a bid for Aer Lingus. It said that IAG's current position was entirely consistent with the evidence which IAG gave to the CC at the time,²⁰ that 'it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder'. It was therefore untrue for Ryanair to assert that 'Ryanair's position has been entirely irrelevant to the events currently unfolding'. Aer Lingus said that IAG's approach did not invalidate the evidence before the CC, or the CC's findings; rather, it validated them. There was no change in circumstances.
32. Aer Lingus said that it was not the CC's contention that Ryanair's stake would definitively prevent all M&A, but only that it would be likely to impede and deter transactions.²¹ There was hard evidence that IAG's proposed transaction would stand or fall on Ryanair selling its shares to IAG.
33. Aer Lingus noted that IAG had made its approach in the period of weeks when Ryanair was confronted with the approaching reality of a compelled sell-down, with the imminence of the decision of the Court of Appeal. It was thus

¹⁸ Ryanair's memorandum to the CMA, paragraph 5.

¹⁹ For example, Aer Lingus's press releases of 26 and 27 January 2015.

²⁰ The Report, paragraph 7.30 and Appendix F, paragraph 22.

²¹ *Ibid*, paragraph 7.80.

the expectation of Ryanair having to relinquish its stake in Aer Lingus which had brought forward a suitor. As anticipation mounted that the impediment was about to be removed, the latent potential for M&A became evident. It said that IAG's approach to Aer Lingus was consistent with and validated the evidence that the CC was able to consider at the time, and in no way contradicted or detracted from it.

34. Aer Lingus said that the CMA should not attach any weight to Ryanair's arguments as to the influence of the Irish government over the outcome. It was true that the Irish government enjoyed material influence over Aer Lingus, just as Ryanair did, and that the Irish government and Ryanair each individually had the ability to impede the proposed transaction. It said that Ryanair's influence was much the more important for the CMA's purposes, since it was Aer Lingus's main competitor.
35. Aer Lingus said that there was no need for the CMA to look at the facts of the last fifteen months as a fresh basis for review. There was no analogy with the BAA²² or Eurotunnel²³ remittal cases; the CMA's conclusion had not been faulted by a court. It said the implication of Ryanair's argument was that parties to any implemented merger, by appealing and provoking delay, could then – simply because of the lapse of time – ask for the conclusions in the original report to be validated against developments in the intervening period. There was no such process or requirement under the statute, but merely the requirement for consideration whether there had been an MCC.

IAG

36. IAG told the CMA that it first seriously contemplated its proposed acquisition of Aer Lingus in August 2014, bearing in mind the prospect of:
 - (a) Ryanair being required to divest its stake in Aer Lingus (down to no more than 5%); and
 - (b) the resolution of certain pension issues at Aer Lingus.
37. IAG said its proposal was conditional on, among other things, the receipt of irrevocable commitments from Ryanair (in respect of its 29.82% shareholding) and the Minister for Finance of Ireland (25.11% shareholding) to accept the offer.

²² BAA Market Investigation: Consideration of possible material changes of circumstances, 19 July 2011.

²³ Eurotunnel/Sea France merger inquiry remittal: Final decision on the question remitted to the CMA by the Tribunal on 4 December 2013 and consideration of possible material change of circumstances under section 41(3), 27 June 2014.

38. IAG reiterated what it had told the CC during the inquiry, namely that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder. It said that, in the absence of support from Aer Lingus's two largest shareholders, it would not be able to meet the 90% acceptance condition to be able to 'squeeze out' any remaining shareholders and take full ownership of Aer Lingus. It said that an irrevocable commitment from Ryanair to sell to IAG the entirety of its shareholding in Aer Lingus was therefore a prerequisite for IAG being willing to proceed with its current proposal to acquire Aer Lingus. Accordingly, IAG was of the view that there had been no MCC since the time of preparation and publication of the Report.

Irish Department for Transport, Tourism and Sport (DTTS)

39. The DTTS said that it considered that the IAG proposal to acquire Aer Lingus confirmed that M&A opportunities existed for Aer Lingus, but that it also confirmed that interest in acquiring Aer Lingus was contingent on Ryanair exiting Aer Lingus's share register. It said that IAG had clearly stated that it was seeking an irrevocable commitment from Ryanair to accept the offer before any formal offer was made.

40. The DTTS said that the Irish government's position regarding the considerations that would be taken into account in making any decision on a sale of its shareholding in Aer Lingus had not changed from what it had told the CC during the inquiry. The Irish government was applying the same considerations in its current consideration of the IAG proposal.

41. The DTTS said that it confirmed that it remained the position of the Irish government that it was unlikely to sell its shareholding in Aer Lingus while Ryanair continued to be a significant minority shareholder.²⁴

42. The DTTS told the CMA that it did not consider that there had been any MCC since the preparation of the Report, and the CMA should therefore proceed with the remedial action it had identified.

Ryanair's response to the views of third parties

43. Ryanair told the CMA that IAG, Aer Lingus and the DTTS wrongly contended, in the face of compelling evidence to the contrary, that there had been no MCC. It said that the very thing that the CC said in its Report was unlikely to happen so long as Ryanair retained its minority shareholding had in fact happened: another airline had announced its intention to acquire Aer Lingus.

²⁴ See paragraph 4.25 of the Report and paragraph 37 of Appendix C.

Ryanair said it was impossible to assert that these events could be anything other than material to the conclusions reached in the Report.

44. Ryanair said that IAG's submission revealed that an important reason behind its decision to launch an offer to acquire Aer Lingus now (but not previously) was that, since publication of the Report, Aer Lingus had resolved its long-running dispute with employees and the unions over its pension deficit. It said this showed the willingness of airlines to consider a merger with Aer Lingus was determined by factors that were completely distinct from, and entirely unrelated to, Ryanair's shareholding. Ryanair said that IAG's submission also explicitly recognised that a Final Order in the form currently proposed would be unworkable at a time when a formal takeover offer was expected in the near future. It said that this, of itself, was evidence that the CMA's remedies had to be revisited. Ryanair said that Aer Lingus's submission, although protesting to the contrary, implicitly acknowledged the same.

Provisional assessment

45. We have carefully considered Ryanair's submission by reference to two main propositions advanced in its application, which are:
- (a) the fact that IAG is willing to make a bid for the entirety of Aer Lingus (and the fact that the Irish Government has so far declined to give IAG an irrevocable commitment in respect of its 25.11% shareholding) 'fatally undermines' the CC's argument that Ryanair's minority shareholding deters other airlines from combining with Aer Lingus; and
 - (b) the passing of time since publication of the Report, and the fact that Aer Lingus has been able to continue to compete with Ryanair during that period despite Ryanair's continued presence as a minority shareholder, in and of itself constitutes a MCC.

We now deal with each of these two propositions in turn.

Does IAG's bid undermine the CC's findings regarding the deterrent effect of Ryanair's shareholding on combinations involving Aer Lingus?

46. The Report noted that there was a move towards consolidation in the airline industry. A similar view has also been expressed by Ryanair, most recently (as far as we are aware) in February 2015.²⁵ The IAG bid for Aer Lingus is

²⁵ 'Michael O'Leary, the outspoken chief executive officer of budget carrier Ryanair Holdings, has predicted an "endgame" of European consolidation in the next half-decade, with weaker airlines going out of business, others merging, and everyone cutting back on short-haul flights. O'Leary's list of the vulnerable includes Scandinavian Airlines, Italy's Alitalia, Germany's Air Berlin, Greece's Olympic Airlines SA, Portugal's Transportes Aereos

consistent with this finding. In the Report the CC found that, absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consolidation observed across the airline industry. The CC's finding in this regard is consistent with IAG's proposal and the statement by the board of Aer Lingus that it would be willing to recommend the offer to the company's shareholders (subject to being satisfied with the manner in which IAG proposed to address the interests of relevant parties). The CC found that Ryanair's shareholding would affect Aer Lingus's ability to merge with, enter into a joint venture with, or acquire another airline, by forcing Aer Lingus to seek Ryanair's approval for certain types of transaction (eg a special resolution to permit a scheme of arrangement; issuing new shares to a potential partner via a private placement; and other forms of corporate restructuring that might be contemplated in the context of a combination).²⁶ The CC concluded that the more significant the transaction being contemplated (all other things being equal), the more likely Ryanair's shareholding would be to impede – or give Ryanair the ability to prevent – the combination from taking place, as a larger transaction would be more likely to require a shareholder vote.²⁷ IAG's contemplated bid for Aer Lingus does not contradict this finding in any way. Our understanding is that IAG intends to bid for Aer Lingus via a conventional open offer rather than, say, a scheme of arrangement. But IAG has stated that it wishes to acquire the entirety of Aer Lingus's share capital; if Ryanair decides not to sell its shares, the bid (as currently contemplated) will fail, as it will not be possible for IAG to initiate squeeze-out procedures with less than 90% of Aer Lingus's shares (see paragraph 38). Ryanair therefore has the ability to prevent the combination from taking place if it so chooses.

47. As an Aer Lingus owned by IAG would potentially be a stronger competitor to Ryanair, Ryanair also has an incentive to block the combination. We would expect Ryanair to have regard to this incentive alongside other factors, including the valuation of its shareholding implied by the IAG bid and the potential outcomes of its ongoing legal challenges to the Report. The CC found that Ryanair's incentives as a competitor would generally outweigh its incentives as a shareholder (where these two roles came into conflict), because of the uncertainty and indirectness by which Aer Lingus's profit would flow back to Ryanair and the fact that Ryanair would only bear a share of the cost of any profits forgone by Aer Lingus, in proportion to the value of its shareholding.²⁸ The possibility of a bid from IAG and Ryanair's

Portugueses -- and Aer Lingus, in which Ryanair has about a 30% stake.', from [Ireland Should Jettison Aer Lingus](#), Bloomberg, 27 February 2015.

²⁶ Report, paragraph 7.32.

²⁷ *Ibid*, paragraph 7.33.

²⁸ Paragraph 7.19 of the Report.

submissions on this point do not change that fundamental assessment of the balance of Ryanair's incentives, which is consistent with recent public statements by Ryanair's Chief Executive that Ryanair wishes to see details of IAG's plans for Aer Lingus, including possible remedies to competition concerns, before it decides whether to accept IAG's offer for its stake.²⁹ Given the above considerations, we took the view that Ryanair has an incentive to block the combination, if the terms on offer from IAG are unattractive to Ryanair from its overall strategic perspective, including its role as a significant competitor to Aer Lingus.

48. IAG told the CC during the inquiry, and has repeated in its response to our consultation on Ryanair's submission, that it would 'not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder'.³⁰ This statement implies that IAG would not usually contemplate buying a 70.18% stake in Aer Lingus, keeping Ryanair as a 29.82% minority shareholder (and, as pointed out in the Report, Ryanair's shareholding is sufficiently large for it to block any attempt at a 'squeeze-out', if IAG so wished).
49. IAG's current actions appear to be consistent with this earlier statement, as it has made it clear³¹ that any bid would be conditional on irrevocable acceptances of its bid by both Ryanair and the Irish government. Assuming that IAG maintains this condition, Ryanair (as well as the Irish government) is in a position to block the attempted combination if either shareholder wishes to do so. The context of IAG's proposal, following the CC's decision to require divestiture of Ryanair's stake to below 5% and in light of the findings of the Tribunal and Court of Appeal dismissing Ryanair's challenges to that decision, are also relevant. The CC's decision and the courts' judgments upholding it (which cannot be characterised as an MCC) have increased the likelihood that Ryanair's shareholding will be sold – and hence that any bid will be successful – relative to a scenario in which the transaction had been permitted.
50. The assessment above strongly suggests that the presence of Ryanair as a significant minority shareholder of Aer Lingus remains a material consideration in relation to the success of IAG's bid for Aer Lingus, as Ryanair retains both the incentive and the ability to impede the transaction. As such, it materially increases the risks to IAG associated with executing this transaction. The fact that IAG chose to make this bid at this time, after the

²⁹ "Our position is that our stake is available for sale if somebody comes up with the right offer ... not just in terms of price but also in terms of what the investor may wish to do with Aer Lingus in the future," Ryanair's chief executive, Michael O'Leary, told reporters in London. "One of the big areas of discussion between ourselves and IAG would be what kind of competition remedies will IAG have to offer up to the European Commission to be able to allow a takeover to take place," he said.', from [Ryanair to demand details of IAG's plans for Aer Lingus](#), Reuters, 3 March 2015.

³⁰ Report, paragraph 7.30.

³¹ See paragraphs 37 and 38.

CC's findings were upheld on appeal, does not undermine or impact on the CC's finding that Ryanair's presence on the Aer Lingus share register gives it the ability to impede combinations with other airlines and that this is likely to act as a deterrent to other airlines considering combining with Aer Lingus.

51. Ryanair has suggested that the real obstacle to Aer Lingus combining with another airline was the influence wielded by the Irish government, in part by virtue of its 25.11% shareholding. The Irish government's position noted in the Report was that the disposal of its shares would only take place at the right time, under the right conditions and at the right price.³² In the Report, the CC noted that when considering whether to sell its shares, the Irish government is expected to take into account three important considerations: (a) ensuring competition is maintained to provide travellers with a choice of airlines for travel to and from Ireland; (b) maintaining good connectivity for Ireland through strong links with Heathrow for onward connections and, separately, the continuance of direct transatlantic services; and (c) obtaining a good price for the shareholding to provide value for the taxpayer.³³ DTTS told us in its response to our consultation that this remained the Irish government's position and that the above considerations were the criteria against which the Irish government was currently considering the IAG proposal. DTTS also confirmed that it remained the position of the Irish government that it is unlikely to sell its shareholding in Aer Lingus while Ryanair continues to be a significant minority shareholder, which is also consistent with the Report's findings.³⁴ In light of this response, the CMA does not consider that the current deliberations by the Irish government on the IAG proposal amount to a change in circumstances since the publication of the Report. Nor does it undermine the CC's findings that Ryanair's shareholding gave it material influence over Aer Lingus's commercial policy and strategy that has led to or would lead to an SLC.
52. While we have focused above on the circumstances of a possible bid by IAG, the CC's findings did not relate to the impact of Ryanair's shareholding on possible combinations with specific airlines. Rather, in addition to the finding that Ryanair's shareholding would affect Aer Lingus's ability to combine with another airline by requiring Ryanair's approval for certain types of transactions, the CC found that Ryanair's influence over Aer Lingus, combined with its incentives as a competitor, would create significant execution risk for airlines considering Aer Lingus as a potential partner, and would therefore be likely to deter some airlines from entering into, pursuing, or concluding discussions with Aer Lingus.³⁵ This remains true. The fact that one

³² *Ibid*, paragraph 7.57 and Appendix C.

³³ *Ibid*, Appendix C, paragraph 36.

³⁴ *Ibid*, Appendix C, paragraph 37.

³⁵ *Ibid*, paragraph 7.34.

particular bidder (ie IAG) is willing to contemplate bidding for Aer Lingus despite the heightened execution risk (and we note that IAG has made it a condition of any bid that Ryanair gives an irrevocable commitment to sell) does not undermine the findings in the Report that some airlines might be deterred from contemplating a combination with Aer Lingus. For example, the Report cited evidence that another airline had broken off negotiations with Aer Lingus in 2013 when Ryanair launched its third bid for Aer Lingus.³⁶ Should the current bid by IAG not succeed, for any reason, then the adverse impact of Ryanair's shareholding on the prospect of other possible combinations would remain while Ryanair remains a significant minority shareholder in Aer Lingus.

53. Given the above assessment, we provisionally decided that the potential bid from IAG, and the Irish government's consideration of it in accordance with the criteria noted during the inquiry, do not materially affect the CC's findings in the Report and therefore do not amount to a change in circumstances that would cause the CMA to re-consider implementing the remedies set out in the Report.
54. Finally, we do not consider that the comments made by IAG and Aer Lingus on the execution of the remedies identified in the Report demonstrate an MCC. We consider that these comments are made with specific regard to the practicalities around the timing and structure of a possible IAG bid and how it could be accommodated within the Divestiture Trustee's mandate and not that the CC's findings on remedies are materially affected by the proposed bid by IAG. We assessed these comments and those made by Ryanair in the context of proposed changes to the draft Final Order consulted on in November 2013. We have [published a working paper](#) that looks at these comments in further detail together with an amended draft Final Order upon which we invite comments.

Does the passing of time constitute a material change of circumstance?

55. Ryanair stated that the CMA was now able to draw on more than 17 months of real-world evidence and experience following the Report to assess the necessity and appropriateness of a divestment remedy against Aer Lingus's actual performance with Ryanair as a minority shareholder. Ryanair said that the availability of real evidence in place of predictions and hypotheses must reasonably be regarded as an MCC relative to the position at the time of the Report (see paragraph 27).

³⁶ *Ibid*, paragraph 7.51.

56. Ryanair did not identify any specific competitive developments during the last 17 months that were materially different from those in the preceding six and a half years except to provide examples of how it considers competition between the airlines has intensified even further. During the CC's investigation, Ryanair similarly argued that the CC should look at the six and a half years of history since the minority shareholding had been acquired (and take into account the European Commission's finding that Ryanair and Aer Lingus competed intensely). In addressing this point in the Report the CC said that it had looked carefully at the evidence of the period since 2006 and noted that it could not determine whether the transaction had reduced competition relative to the counterfactual solely from observing the competitive actions that Aer Lingus and Ryanair had taken in that period. In addition, the CC noted in the Report that it needed to consider not only whether the transaction had led to a reduction in competition but also whether competition between airlines may be affected in the future.³⁷ In conducting this assessment, the CC took into account the general trend of consolidation in the airline industry and the views expressed by Aer Lingus of the importance of scale to its future competitiveness and by Ryanair that Aer Lingus would be unlikely to have an independent long-term future. This view has only recently been repeated by Michael O'Leary (see paragraph 48).
57. In the Report, the CC did not accept the argument that six and a half years of history of competition with Ryanair precluded the CC from finding that absent Ryanair's shareholding competition during the period since 2006 may have developed differently and could have been more intense or that competition between the airlines may be affected in the future.³⁸ Likewise, we have provisionally concluded that to the extent that there has been a continuation of that competition (or even an intensification as noted by Ryanair) between the airlines since the publication of Report this does not materially affect the findings in the Report. Consequently, we provisionally decided that there was no reason why the passage of a further 17 months, in addition to the preceding period over which Ryanair has held its minority shareholding in Aer Lingus, provided any evidence of an MCC such that the CMA should consider departing from the findings in the Report.

Provisional decision on whether there has been an MCC

58. As no party suggested to us that there is any special reason for the CMA to depart from its conclusions on remedies in the Report, nor has the CMA found one to exist, this provisional decision refers only to whether there is an MCC

³⁷ Report at paragraphs 7.9 et seq.

³⁸ *Ibid*, at paragraphs 7.10 and 7.11.

that would cause the CMA to reach a different conclusion on remedies from that set out in the Report.

59. In light of our assessment above, our provisional view is that there are no MCCs that materially affect the CC's findings that require us to consider remedial action that is different from that set out in the Report and that, in line with our duty under section 41 of the Act (see paragraph 7), we will proceed to implement the remedial action identified in the Report.