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BY EMAIL

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Bernard Mew, Esq.
The Competition and Markets Authority
Victoria House, 37 Southampton Row
LONDON WC1B 4AD

Dear Mr Mew,

Response to consultation on provisional decision of possible material changes of circumstances and amendments to the proposed Final Order

Aer Lingus welcomes the provisional decision issued for consultation on 17 April, and the accompanying revised Order and working paper. It is grateful for this opportunity to respond further, but it can do so briefly since it is firmly in agreement with the CMA's views. Aer Lingus' key concern is for the CMA to advance as soon as possible to adoption of the final Order so that a Divestiture Trustee can, should circumstances require, play its part in facilitating IAG's pending bid approach to Aer Lingus.

The false indignation of Ryanair's submissions to the CMA tends simply to confirm that the request for a MCC review is simply a tactical device paving the way for a *fourth* application in the CAT[1]. Ryanair no doubt hopes to contrive yet another prolongation of its unwelcome and anti-competitive presence in the Aer Lingus share register. Aer Lingus is grateful for the robustness of the CC's original report and the continued robust reasoning of the new provisional decision. But the efforts to date of all concerned have not and will not reverse the continuing SLC unless and until there is actual divestment.

The fundamental flaw in Ryanair's arguments remains unchanged. It refuses to engage with the inconvenient fact that IAG's interest in Aer Lingus is conditional on Ryanair's exit.[2] Ryanair's arguments might merit a second look if there were a bidder in the field which had declared its willingness to co-exist with Ryanair as a minority shareholder. But

[1] And inevitably a further round of appeals.

[2] The formal ability to waive the 90% acceptance condition is a standard tem of public offers. Much more important here is IAG's explicit requirement as a term of any offer that Ryanair be a seller.

there is no such bidder. It is an empty debating point for Ryanair to point to the IAG bid interest as a supposed demonstration that Ryanair's presence is not an impediment to third party approaches to Aer Lingus. In fact IAG's clear position, that the deal will fail if Ryanair remains, proves just the opposite.

Aer Lingus notes and supports the findings regarding Ryanair's incentives in the present situation (para. 47 of the CMA's Provisional Decision). This too remains unchanged from the assessment made in the original Report. Mr O'Leary's public comments, as opposed to Ryanair's formal legal submissions, are indeed revealing as to the company's real commercial agenda. The Group saw plainly that Ryanair should be divorced from the divestiture process, and its efforts to gain commercial advantage for itself from the situation underline the desirability of taking the sale out of its hands.

Ryanair has written at great length seeking to position the Government as the key impediment to IAG's approach. This is the written equivalent of a release of chaff.[3] It is true that IAG requires a sale of the Government's shares as well as the Ryanair shares, but the Government has always made it plain – its Two Airline policy – that it will not sell while Ryanair remains.[4]

It is noted in the provisional findings (para. 5) that the Supreme Court (SC) decision on permission-to-appeal is expected sometime in May. However our own very recent soundings with the SC Registry (on 5 May), as reported back to us by the clerks at Brick Court Chambers, are "that it is highly unlikely that an answer will be given until late June but it may not be until July". Aer Lingus asks the Group to proceed at the earliest opportunity to adoption of the Order, without awaiting the SC ruling. Depending on developments (not least the progress of IAG's discussions with Ryanair) it may prove appropriate, after adopting the Order, to suspend the process for appointing the DT; or to appoint a DT but direct it not yet to take action. As the CMA has noted (para. 42 (e) of the CMA's Working Paper), the Order gives the flexibility to adapt the timing as useful. It is Aer Lingus' submission that the CMA should, by early adoption of the Order, put itself in the position to launch the DT on its task at once, in case required. And if Ryanair does indeed intend to litigate further, it will be obliged to begin at once, without the gift of additional delay.

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3 http://en.wikipedia.org/wiki/Chaff_(countermeasure). An aircraft seeking to evade an incoming missile may release a vast number of glittery reflecting objects in the hope of confusing the radar system of an incoming missile.

4 See most recently the DTTS letter of 16 March in response to your MCC consultation.

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Aer Lingus notes the various changes which have been made to the draft Order and appreciates that various of its suggestions have found favour. It is also glad to note that Ryanair has engaged in the consultation on the Order, so that it is no longer in a position to claim – however falsely that might have chimed – that it did not have an appropriate opportunity to comment.

Yours sincerely,

Alec J. Burnside