



## **Final Report of the Hearing Officer<sup>1</sup>**

### **Ryanair / Aer Lingus III**

**(COMP/M.6663)**

#### **Background**

1. On 24 July 2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation<sup>2</sup> by which the Ryanair Holdings plc acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Aer Lingus Group plc by way of public bid announced on 19 June 2012.

#### **The Statement of Objections**

2. The Commission initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation on 29 August 2012 and adopted a Statement of Objections ("SO") on 13 November 2012. Approximately one month prior to the issuance of the SO, on 17 October 2012, Ryanair submitted a package of formal commitments pursuant to Article 8(2) of the Merger Regulation, which the Commission decided not to market test.
3. Aer Lingus, the target of the public bid and thus the other involved party within the meaning of Article 11(b) of the Implementing Regulation<sup>3</sup>, received on 21 November 2012, a non-confidential version of the SO. It immediately expressed concerns about the redaction of the entirety of the section dealing with Ryanair's commitments and the Commission's assessment thereof. Aer Lingus requested to be provided with a copy of the section after DG Competition had rejected it. After having reviewed the reasoned claim, I asked DG Competition to provide Aer Lingus with a non-confidential version of section of the SO on Ryanair's commitments as stipulated by Article 13(2) of the Implementing Regulation. DG Competition then requested Ryanair to provide a less redacted version of the section dealing with commitments, which was subsequently transmitted to Aer Lingus.

---

<sup>1</sup> Pursuant to Articles 16 and 17 of Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

<sup>2</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

<sup>3</sup> Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004, OJ L 133, 30.4.2004, p. 1-39.

4. Ryanair submitted its reply to the SO on 28 November 2012 and Aer Lingus its comments on 30 November 2012. Neither the latter nor the former requested a formal oral hearing.
5. On 14 December 2012, the Commission sent Ryanair a Letter of Facts, to which Ryanair replied on 20 December 2012.

#### **Access to file**

6. The notifying party was recurrently granted full access to the file upon its request via CD-ROMs from November 2012 until February 2013, while Aer Lingus was given access upon request in so far as this was necessary for the purposes of preparing its comments, also on several occasions along the process.
7. In addition, two data rooms on quantitative data were organised in this case, from 21 to 23 and on 27 November 2012. The external economic advisers of both Ryanair and Aer Lingus had separate access to the data, *i.e.* the Commission analysis on the correlation between Ryanair's and Aer Lingus' gross average fares.

#### **Third persons**

8. Three competitors of the merging entities, *i.e.* International Airlines Group SA, Flybe Group plc and Aer Arran, one airport, *i.e.* Dublin Airport Authority, and the Irish Department of Transport, Tourism & Sport demonstrated "*sufficient interest*" within the meaning of Article 18(4) of the Merger Regulation and were, thus, given the opportunity to be heard in writing as third persons.

#### **Commitments**

9. In order to address the competition concerns identified in the SO, Ryanair submitted revised sets of commitments on 7 December 2012, 15 January and 1 February 2013, which were all market tested. The results of the market tests and the Commission's reasons for rejecting the offered commitments were each time explained during State of Play meetings, the last of which took place on 12 February 2013. Moreover, Ryanair was consistently given access to the file allowing it to verify the information underlying the Commission's position.

#### **The procedural rights of the target of the concentration**

10. Aer Lingus, the target company of the hostile take-over, complained about the limited role it has been able to play in an investigation which is central to its independence. The company believes that it has been very far from enjoying an equality of arms. For example, it has not been involved in the pre-notification process, it tended to receive over-redacted documents submitted by the notifying party, it was not offered key documents at the start of Phase II, obtained only limited access to file and was excluded from the dialogue with the Commission on remedies.
11. It is true that target companies do not enjoy the same procedural status as acquiring companies. As Aer Lingus concedes itself, the applicable Regulations ascribe only a limited role to other involved parties. I can thus not find that Aer Lingus has not been able to effectively exercise in this proceeding the rights conferred to it by the applicable Regulations and Best Practices. At the only instance it referred an adverse procedural decision to me for review, I was able to decide in favour of Aer Lingus (see above point 3).

### **The Draft Commission Decision**

12. In my opinion the draft Decision relates only to objections in respect of which the parties have been afforded the opportunity to make known their views. In reason of the highly sensitive nature of certain data originating from the other involved party and a third party, the Commission has requested and obtained a Power of Attorney from the notifying party which allows its external counsels to (i) receive on its behalf the Commission's Decision, on a counsel-only basis, and to (ii) provide Ryanair with a copy of it that has been redacted to exclude the confidential information. Both providers are aware of this limited disclosure and have both given their written agreement.

### **Concluding Remarks**

13. Overall, I conclude that all participants in the proceedings have been able to effectively exercise their procedural rights in this case.

Brussels, 19 February 2013

*(signed)*

Michael ALBERS