

Ryanair/Aer Lingus: Even “low-cost” monopolies can harm consumers

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I. Introduction

The *Ryanair/Aer Lingus* case, which concerned a proposed merger of the two leading airlines operating from Ireland, raised a number of interesting procedural, legal and economic questions and required a particularly careful investigation (2). The Commission found that the acquisition would have led to very high market shares on more than 30 routes from/to Ireland, reducing choice for consumers and exposing them to a high risk of price increases. The merger would have combined two airlines with a similar operation model (“low-frills”) and with a significant presence in particular at Dublin Airport, where they would together account for approximately 80% of European short-haul traffic. Based on these findings, the Commission ultimately prohibited the transaction in June 2007 (3). It was the first prohibition decision since December 2004 and the first time an airline merger was prohibited.

The acquisition of Aer Lingus by Ryanair was in many aspects different from previous airline merger cases, which involved “network” carriers and combined two airlines with operations at different airports, often in different countries. Unlike those rather “complementary” mergers, Ryanair’s proposed acquisition of Aer Lingus would have combined the two by far largest airlines at one and the same airport (Dublin), both operating according to “point-to-point” and “low-cost/low-fares” business models. Although an expansion of Ryanair, the European pioneer for cheap flights, might intuitively sound like being in the interest of consumers, the Commission found that the transaction would not have been a good deal for the affected passengers, since it would have eliminated Ryanair’s only significant competitor on

more than 30 Irish routes (4). Since also a “low-cost” or “low-fares” monopolist ultimately aims at maximising its profits, Ryanair would thus have had the ability and incentive to raise prices (by increasing fares or various associated charges) and/or decrease quality of its services on these routes. This would have had an immediate effect for more than 14 million passengers who are currently flying each year on the routes directly affected by the merger.

The in-depth investigation of the Commission not only made use of the “classic” investigative techniques such as questionnaires and telephone interviews. In addition, the Commission has commissioned a specific customer survey at Dublin Airport, and has complemented its work with a number of detailed econometric analyses which are further described in a separate article in this issue (5).

II. The parties and the transaction

Ryanair is an airline offering point-to-point scheduled air transport services on more than 400 routes across 24 European countries. Ryanair operates more than 75 routes between Ireland (mainly Dublin, but also Shannon, Cork, Kerry and Knock) and other European countries. The company has a fleet of around 120 aircraft and more than 20 bases across Europe, the most important ones being London-Stansted and Dublin.

Aer Lingus is a Dublin-based airline. Like Ryanair, it offers point-to-point scheduled air transport services on more than 70 routes connecting the Irish airports of Dublin, Shannon and Cork with a number of European and several non-European destinations. In addition Aer Lingus offers long-haul flights, mainly to the United States, and cargo transport services and seats to tour operators. Aer Lingus is based principally at Dublin Airport (and to a smaller extent in Cork and Shannon) with a total fleet of 30 short-haul and 9 long-haul aircraft.

(1) Directorate-General for Competition, units D-4, B-1, 02 and F-1 respectively. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

(2) See also the article «Econometric and survey evidence in the competitive assessment of the Ryanair / Air Lingus merger» in this issue of the Competition Policy Newsletter (page 73).

(3) COMP/M.4439 — Ryanair/Aer Lingus, decision of 27.6.2007; see: http://ec.europa.eu/competition/mergers/cases/index/m88.html#m_4439.

(4) It should be noted that the merger would, in addition to *actual* competition on these routes, also have eliminated *potential* competition on a number of further routes.

(5) See also the article “Econometric and survey evidence in the competitive assessment of the Ryanair / Air Lingus merger” in this issue of the Competition Policy Newsletter (page 73).

The transaction concerned a proposed acquisition of sole control by Ryanair of Aer Lingus by way of a public bid for all outstanding shares not already acquired announced on 5 October 2006. The fact that Ryanair's bid had technically lapsed after the opening of the Phase II did not remove the Commission's jurisdiction, since Ryanair had announced to make a new bid should the Commission clear the transaction.

Like in previous airline merger cases, the Commission had to find a meaningful method for the allocation of the turnover of the Merging Parties' in the respective Member States. After a careful assessment of this issue and the different calculation methods, the Commission concluded that the transaction fulfils the criteria of Article 1(3) of the Merger Regulation and thus fell within the jurisdiction of the Commission.

III. Market definition

The activities of Ryanair and Aer Lingus overlap in the field of *scheduled passenger air transport services* within the EEA.

Ryanair is no market of its own

Ryanair argued that due to the specificity of its business model and its extremely low cost basis, its pricing is not constrained by any airline but rather by consumers' overall discretionary spending. While the Commission acknowledged that Ryanair is indeed a "classic" no-frills carrier, the market investigation did not support that Ryanair was not in competition with other airlines. Both airlines are active in the differentiated market for scheduled passenger air transport services, where different airlines operate with a number of different business and service models. Aer Lingus is indeed positioned somewhat more "up-market" than Ryanair, i.e. it provides some additional services (for instance it also flies into more expensive main airports while Ryanair flies only into secondary ones), which is reflected by the fact that Aer Lingus' average fares are higher than Ryanair's. However, both Ryanair and Aer Lingus are considered as "low-frills" carriers by customers, and despite a certain level of product differentiation, both companies currently compete with each other on the affected routes.

Point-to-point services

In line with the previous decision practice of the Commission, the relevant product market was defined as *point-to-point* scheduled air transport services, whereby each route between a point-of-origin and point-of-destination is defined as a separate market (O&D approach). The other option, namely to define an overall market for

short-haul flights from/to Ireland, which would have been based in particular on the supply-side substitutability between different routes from the common base of the parties in Dublin, was not upheld, mainly because the supply-side substitution (switching capacity between routes to/from Dublin by airlines) would not be sufficiently immediate and effective. Further, this market definition would disregard the lack of demand-side substitution between different routes for a large majority of customers. However, the relevant supply side considerations were not disregarded but were addressed within the framework of the competitive assessment of individual routes.

"City-to-city" approach

Ryanair argued that the relevant O&D markets should be limited to airport-to-airport pairs as, according to Ryanair, even in cases where there are more airports in or in the vicinity of a particular city, the customer do not regard these airports as substitutable. By contrast, the Commission's investigation showed that a large number of these airports are regarded by the customers as substitutable and that the relevant O&D pairs should for many routes rather be defined on a *city-to-city* basis. The qualitative ⁽⁶⁾ as well as the quantitative ⁽⁷⁾ analysis confirmed the substitutability of airports for final passengers for 18 out of the in total 20 routes with exclusively city-to-city but not airport-to-airport overlaps. Serving different airports is thus only an element of differentiation between competing airline services within one market and does not justify defining two different markets.

Indirect flights are disregarded

The market investigation also confirmed that *indirect flights* and other means of transport cannot in general be regarded as substitutes for the direct flights of the parties on the overlap routes. Only intra-European flights with their short journey times are affected by the transaction. The Commission also in the past in general excluded indirect flights for these types of routes (subject

⁽⁶⁾ The qualitative analysis focused on a number of factors such as distance and travelling times from the airports to the relevant city, available transport connections, travel costs for different airports, available flight schedules and quality of services at different airports, views of competitors and customers, studies conducted by the airports (if available) or how the relevant airport is marketed by the carriers flying there.

⁽⁷⁾ The quantitative analysis consisted inter alia in the correlation analysis of the parties' fares for flights to different airports over time. In a number of cases, a high correlation between fares for flights to different airports further confirmed the conclusions of the qualitative analysis about airport substitutability.

to some case-by-case exceptions). Further, as this case concerns primarily point-to-point passengers with no (Ryanair) or only limited (Aer Lingus) connecting services, indirect flights are even more unattractive for the customers. In view of the geographic characteristics of Ireland, other means of transport are either not available (e.g. high speed trains) or not competitive with air transport (e.g. bus/ferry).

No significant impact of charter airlines

Ryanair put forward that in particular on the predominantly leisure routes, *charter airlines* provide significant competitive constraints to the services of the parties. However, the market investigation did not confirm that charter airlines would to a significant extent constrain the merging parties on the Irish routes. Charter seats are predominantly sold in Ireland as part of package holidays, are distributed largely through tour operators, provide less flexibility as the flights are often operated only on weekends and only seasonally. In Ireland, unlike in other countries, charter airlines offer only very few so-called “dry seats”, *i.e.* seats that are sold separately and not as part of a holiday package to end customers and are more closer to services offered by the merging parties. The Commission left open whether “dry seats” sold by charter airlines may be considered as belonging to the affected relevant markets as even if “dry seats” sales were taken into account, the competitive assessment of the case would not be affected due to their insignificant volumes.

No separate market for “time-sensitive” passengers

Further, the Commission has in the past cases involving network carriers such as Lufthansa or Air France differentiated between *time-sensitive* and *non time-sensitive* passengers (or business and leisure passengers). However, the market investigation confirmed that the specific characteristics of the merging parties’ operation model, in particular the focus on “low-frills” customers, did not justify defining separate markets in the present case. Even though a certain differentiation of the two customer segments may exist, it was not possible to define two distinct and separate groups of customers, as both merging airlines do not discriminate between these types of passengers (no “business” tickets) and as there is rather a continuum of various passenger types between these two extremes. Therefore, although the overall proportion of more time-sensitive passengers was taken into account in the competitive analysis, there were no distinct markets defined for these groups of passengers.

Conclusion on market definition

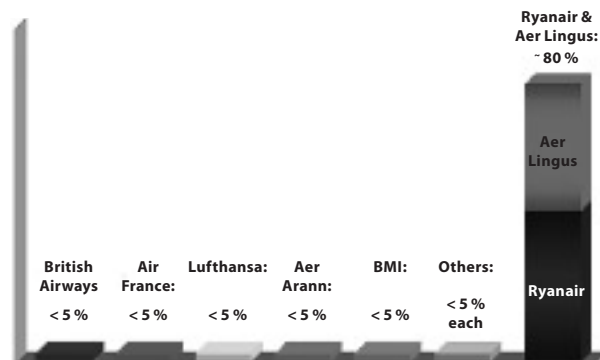
On the basis of this market definition and in view of the flights offered by the merging parties at the time of the Commission decision, the proposed transaction led to actual overlaps between the merging parties in 35 markets defined as individual O&D pairs ⁽⁸⁾. Further, the proposed transaction also raised competition concerns on some other markets where currently only one of the merging parties operates and where the other party is considered as the most likely potential entrant.

IV. Competitive Effects of the Merger

As already mentioned above, the Ryanair / Aer Lingus merger was different from the previous air transport cases assessed by the Commission, combining two “low-frills” carriers concentrating on point-to-point traffic within Europe, with a significant presence at their strong bases at Dublin Airport.

Indeed, Ryanair and Aer Lingus would have together accounted for approximately 80% of European short-haul traffic to and from Dublin post-merger, by far exceeding their next competitors on these routes, as set out in the diagram below:

Graph 1: Shares of European passengers to and from Dublin (2006)



⁽⁸⁾ These routes included direct flights between Dublin and the following cities/airports: Alicante/Murcia, Barcelona/Reus/Girona, Berlin, Bilbao/Vitoria, Birmingham/East Midlands, Bologna/Forli, Brussels/Charleroi, Edinburgh, Faro, Frankfurt/Hahn, Glasgow/Prestwick, Hamburg/Lübeck, Krakow, London (including Heathrow, Gatwick, Stansted, Luton and London City airports), Lyon/Grenoble, Madrid, Malaga, Manchester/Liverpool/Leeds Bradford, Marseille, Milan/Malpensa/Bergamo, Newcastle/Durham Tees Valley, Paris/Beauvais, Poznan, Riga, Rome, Salzburg, Seville, Tenerife, Toulouse/Carcassonne, Venice/Treviso, Vienna/Bratislava and Warsaw. Further the overlap routes include flights between Cork and London (all airports), Cork and Manchester/Liverpool/Leeds Bradford as well as Shannon and London (all airports).

Very high market shares on a large number of routes

Not the least because both airlines operate from the same main airport, Aer Lingus' and Ryanair's operations overlap on an unprecedented large number of individual routes, as shown in the following graph:

Graph 2: 35 direct route overlaps between Ryanair and Aer Lingus (2007)



Ryanair's and Aer Lingus' operations do not overlap only insignificantly on these 35 routes. On the contrary, on all these routes Aer Lingus and/or Ryanair are the strongest airline(s), and the transaction would lead to monopoly on not less than 22 routes, and to very high combined market shares on a further 13 routes, as can be seen from the following table.

Routes	Combined market share
Dublin — Alicante; Berlin; Bilbao/Vitoria; Birmingham; Bologna; Brussels; Edinburgh; Faro; Hamburg/Lübeck; Lyon; Marseille; Milan; Newcastle; Poznan; Rome; Salzburg; Seville; Tenerife; Toulouse/Carcassonne; Venice Shannon — London; Cork — London	100%
Dublin — Glasgow; Malaga; Manchester	[90-100%]
Dublin — Frankfurt; Paris	[80-90%]
Dublin — Barcelona; Krakow; London; Riga; Vienna/Bratislava	[70-80%]
Dublin — Madrid; Warsaw Cork — Manchester	[60-70%]

Despite these high market shares, the Commission has, as in previous airline cases, investigated to what extent these shares do actually translate into a significant impediment to effective competition. Ryanair has indeed provided several arguments why the merger would not lead to competition concerns: It argued that the two merging par-

ties are not the closest competitors as they are different and occupy different spaces in the markets in which they operate. Further, Ryanair argued that there are no significant barriers to entry due to airport congestion and that the position of the merging parties in Dublin and in Ireland in general would not prevent competing airlines from entering the affected markets or even from basing aircraft in Ireland. Ryanair claimed that there are a number of competing airlines which would be able to enter the overlap routes in case the merged entity would increase prices. According to Ryanair these potential competitors do not have to be based at Dublin airport to constitute an effective constraint but could enter the relevant routes either from their existing base at the destination non-Irish airport or even without any base at either end of the route. These arguments were, however, not confirmed by the Commission's in-depth market investigation.

Elimination of competition between the closest competitors on Irish routes

Despite being a former state-owned Irish flag carrier, Aer Lingus has significantly changed its business model recently and has repositioned itself as a "low-frills" airline, focussing on point-to-point services on its short-haul routes. The services included in the Aer Lingus base fare are broadly in line with those included in the Ryanair base fare. Even though there continue to be some differences in the services offered by both carriers, which are also reflected in their different fare level, this does not exclude existence of effective competitive constraints between them. On the contrary, the market investigation confirmed that on the routes where both operate, each of them takes into account the fares and services offered by the other and adjust its operations and fares accordingly. Further, most of the competitors present on the overlap routes are either full-service network carriers or smaller regional airlines, often focusing on business customers, which cannot be considered as close competitors to the parties. Finally, the customer survey conducted as part of the investigation among the passengers at Dublin airport showed that passengers consider the parties to be closer substitutes than other carriers. The investigation has thus confirmed that the services of the merging parties are close substitutes in a differentiated market for passenger air transport services. There is a high degree of competition between Ryanair and Aer Lingus for destinations, capacity, schedules, prices and service to/from Ireland.

The Commission has notably found that both airlines regularly *monitor the prices* of the other on the overlap routes with the help of specialised soft-

ware and adjust their prices in reaction to the price level of the other. This is confirmed by the fact that in marketing campaigns they both present their low fares as a key argument and they often compare themselves to one another. The merger would thus remove the important competitive rivalry between the two parties on a number of routes on which their activities overlap and thus lead to higher prices. This was also confirmed by the Commission's regression analysis which provided additional quantitative evidence about the effect of the presence of Ryanair on Aer Lingus fares.

Apart from competing on direct overlap routes, the fact that both carriers have significant bases at the same airport⁽⁹⁾ leads to a dynamic competitive environment where both carriers frequently enter and exit new routes to/from Dublin. The transaction therefore would not only remove the actual competition between the parties on the overlap routes, but eliminate Ryanair and Aer Lingus as *the most likely potential entrant* on existing routes to/from Ireland currently served by only one of them, i.e. it would remove potential competition between the parties. The merger would remove the competitive rivalry between Ryanair and Aer Lingus on routes to/from Ireland which was at least one of the sources for a major expansion of the Irish short-haul routes in recent years.

Barriers to entry to the affected markets are high

The Commission's investigation confirmed that there are substantial barriers to entry to the routes where the activities of the merging parties overlap. These barriers to entry relate in particular to: (i) a disadvantage of not having large operations ("bases") in Dublin; (ii) significant entry costs and risks for any new competitor in a market which is already served by two strong airlines with well-established brands in particular in Ireland; (iii) Ryanair's reputation to react aggressively to entrants; (iv) capacity constraints at Dublin airport as well as at some destination airports.

The Commission found evidence confirming that a *large base* in Dublin provides important cost advantages and flexibility for any carrier operating routes to/from Dublin. Therefore, removal of Aer Lingus as the main actual or potential competitor of Ryanair based in Dublin would inevitably soften the competitive constraints faced by Ryanair on the Irish routes. None of the other car-

riers would be in a position to effectively replace Aer Lingus with its current flexibility and cost efficiency to compete on a number of routes to/from Ireland. Any new entrant would face a strong and established merged entity with substantial cost advantage which would be able to react quickly to any selective entry on only a few routes.

The *significant entry costs and risks* relate to the fact that Irish intra-European flights are now dominated by Ryanair and Aer Lingus who have well established brands and a portfolio of a large number of routes. Competing against these two brands makes competition much more difficult than in other countries where there are not such two well-established low-frills carriers present with large bases. Further, there are significant shares of Irish-originating passengers on many of the overlap routes. Therefore, any new entrant would have to invest substantial amounts into marketing and promotion in Ireland. In addition, there were several examples of aggressive reaction by Ryanair against new entrants on the Irish markets who were subsequently driven out of the Irish routes. A number of competing airlines thus indicated that, taking into account the limited volume of the Irish market and the investments and risks involved in establishing a presence in this market, they would have better opportunities elsewhere in Europe.

As regards the *capacity constraints* in terms of slots, such constraints played a less prominent role compared to previous air transport merger cases, since in particular Ryanair mainly flies to "secondary", non-congested airports. At some airports, however, congestion was identified as a barrier to entry by the Commission. Notably at Dublin Airport, where the congestion problems were limited to the peak hours of the day, congestion was mentioned as a significant barrier by potential entrants to compete effectively with Aer Lingus and Ryanair in particular on those routes where high frequency services covering peak times of the day are necessary. Further, on a number of these routes, congestion at the destination airports (in particular London, Paris, Frankfurt or Milan) also created a barrier to entry for those carriers which for the supply-side reasons do not have the possibility to efficiently use any possible substitute airport (such as Paris-Beauvais or Frankfurt — Hahn).

Competitors were not likely to replace the loss of competition

In view of the barriers to entry described above, the Commission's market investigation further focused on identifying any carriers which would have the ability and incentive to enter the over-

⁽⁹⁾ At the time of the Commission decision, Ryanair and Aer Lingus based at Dublin airport 20 and 23 short-haul aircraft respectively while the other Dublin based airlines, Aer Arann and Air France/Cityjet, had only 4 and 3 smaller aircraft based in Dublin and several other airlines overnighted only one aircraft each.

lap routes and provide efficient competitive constraints to the merged entity. The Commission has carefully assessed to what extent individual competitors might have the intention and ability to enter into direct competition with Ryanair/Aer Lingus post-merger in case of a price increase. The Commission's investigation showed that there is a likelihood of post-merger entry only on very few routes and that this limited entry would not be likely to provide a significant competitive constraint to the merged entity.

The potential entrants analysed in more detail in the decision include Air France/CityJet, Aer Arann, easyJet, British Airways, bmi/bmibaby, Flybe/BA Connect, SkyEurope, Air Berlin, and Clickair. However, most of these carriers were reluctant to compete directly with Ryanair/Aer Lingus, referring to the above described barriers to entry and difficulties they would face in establishing their operations against the strong position of the merged entity. The investigation clearly showed that no airlines could be expected to enter in competition against Ryanair/Aer Lingus on the short-haul routes to/from Ireland at a larger scale, providing a competitive constraint on the merged entity comparable to the constraint currently exercised by Aer Lingus.

Therefore, the market investigation did not confirm that potential entry or expansion on the individual overlap routes would be likely, timely and sufficient to constitute a competitive constraint for the merged entity and would thus compensate for the loss of the rivalry between Ryanair and Aer Lingus on the affected routes.

Conclusion

The Commission therefore concluded that the transaction would significantly impede effective competition on a large number of routes to and from Ireland.

V. Efficiencies

The Commission has also analysed whether *efficiencies* brought about by the merger might have outweighed its anti-competitive effects. In the most detailed discussion of efficiencies in a merger decision so far ⁽¹⁰⁾, the Commission analysed whether the conditions of the Horizontal Merger Guidelines (i.e. verifiability, merger specificity and benefit to consumers) were met. Ryanair claimed that efficiencies would result essentially from applying Ryanair's low-cost business model and management skills to Aer Lingus. According

to Ryanair, this would enable it to lower Aer Lingus' operating costs towards its own levels. The claimed efficiencies would originate in the fields of aircraft ownership costs, ground operations, staff costs, maintenance costs, airport charges, ancillary sales and distribution efficiencies.

As regards the first criterion (verifiability), the Commission found that Ryanair's efficiency claim was hardly verifiable, mainly because it consisted essentially of a general assertion that Ryanair would transfer its business model and in particular the related cost levels to Aer Lingus, without taking into account implications for product characteristics and revenue of Aer Lingus. With respect to the condition of "merger specificity", the analysis revealed that a number of the claimed efficiencies were not merger specific, since they could be achieved by Aer Lingus even without the merger and did not originate from economic synergies between the two carriers. Finally, the claimed efficiencies would affect primarily Aer Lingus' fixed costs, which makes it uncertain that they would be passed on to consumers. In addition, as indicated in the Horizontal Merger Guidelines, the Commission noted that it is highly unlikely that a merger leading to a market position approaching that of a monopoly, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects ⁽¹¹⁾.

For these reasons the Commission was not in a position to conclude that the merger would give rise to efficiencies that would counteract the identified significant impediment to effective competition.

VI. Proposed remedies

During the Commission's proceedings, Ryanair submitted several sets of remedies aimed at removing the identified competition concerns. Following the model of previous airline cases, Ryanair's commitments mainly aimed at removing entry barriers for other airlines, in particular in the form of the transfer of airport slots. The last set of remedies submitted within the legal deadline of the Phase II proceedings included the following main elements:

- a) Heathrow slots: Ryanair offered to make available slots for the Dublin — London Heathrow route, which were exclusively reserved for British Airways and Air France.
- b) Slots for other routes from/to Dublin, Shannon and Cork: Ryanair offered to make available slots for other overlap routes from and to

⁽¹⁰⁾ See already cases M.4000 — Inco/Falconbridge; M.4057 — Korsnäs/Assidomän Cartonboard; M.3732 — Procter & Gamble/Gillette.

⁽¹¹⁾ See paragraph 84 of the Horizontal Guidelines.

Dublin, Shannon and Cork. With respect to Dublin, these slots would, according to Ryanair, allow airlines to operate with up to [4-8] aircraft based in Dublin. Ryanair further offered to make available an equivalent number of slots at specific destination airports on the overlap routes.

- c) “Up-front buyer” provision: Ryanair offered not to complete the acquisition of Aer Lingus before it has found a competitor/competitors that commit to taking up the slots for the [4-8] based aircraft operation at Dublin.
- d) Fare/brand-related commitments: Ryanair offered to reduce immediately Aer Lingus’ short-haul fares by at least 10%, to eliminate immediately the fuel surcharges Aer Lingus applies on its long-haul flights, to retain Aer Lingus’ brand and to continue to operate Ryanair and Aer Lingus separately.
- e) “Frequency freeze”: Ryanair offered not to increase the number of frequencies on any of the claimed overlap routes in the event of a new entrant to the route, in excess of the frequencies jointly operated by Ryanair and Aer Lingus on each route for a period of six IATA seasons. It also offered not to reduce the frequencies on these routes unless a route is or becomes unprofitable.

Having analysed the proposed commitments and conducted an extensive market test, the Commission concluded that they fall significantly short of remedying the identified competition problems and are, on both formal and substantive grounds, insufficient to remove the competition concerns. The conclusion of the Commission was based in particular on the following considerations:

- It was doubtful whether the instrument of slot remedies is appropriate for the transaction at hand. Indeed, Aer Lingus and Ryanair are low-frill airlines, flying to secondary and often to other non-congested airports. Airport congestion is not the main reason why other airlines do not enter Ireland. A slot based remedy thus failed to address many of the other identified barriers to entry described above.
- The market testing of the proposed remedies clearly showed that the offered remedies are not likely to trigger any substantial entry on the overlap routes. Except for a very limited number of routes, there were no indications that new entry was likely on the basis of the proposed remedies.
- The scope of the commitments was insufficient. Even if, hypothetically, the remedies would have triggered entry to the maximum extent

offered, the scope of such entry would still have been far too small to address the parties’ competitive overlap. The market test confirmed that slots for the offered number of aircraft based in Dublin would not suffice to replace the competitive constraint currently exercised by Aer Lingus. Aer Lingus and Ryanair operate in Dublin with 23 and 20 aircraft respectively. Although Aer Lingus does not only serve the overlap routes with its 23 aircraft, the investigation confirmed that [4-8] ⁽¹²⁾ aircraft would be insufficient to serve all overlap routes from/to Dublin and provide sufficient competitive constraints on the merged entity.

- Slots at some important destination airports were missing from Ryanair’s proposal.
- The commitments did not ensure a significant entry of one single airline with a suitable business model which would ensure that the rivalry between the two most important low-frills carriers operating to/from Ireland eliminated by the merger is restored.
- There were, in addition, significant doubts that Ryanair could legally relinquish Aer Lingus’ Heathrow slots. The airline’s Articles of Association confer certain veto rights to the minority shareholders (including the Irish government or the Aer Lingus employees’ trust), which would enable them to block the slot transfer.
- With regard to the various behavioural commitments offered by Ryanair (10% reduction of Aer Lingus’ fares, abolition of fuel surcharges, frequency freeze, maintaining separate brands), it should be noted that they do not directly address any of the identified competition problems. In addition, they raise numerous questions with regard to monitoring and enforceability. These commitments even contain elements that could lessen, rather than strengthen, competition.
- The content of the commitment proposal contained numerous contradictions and vague or ambiguous formulations which put into question the viability of the commitments as such, since it was doubtful whether the commitments as submitted would be at all workable and enforceable.

At a very late stage of the proceedings (more than four weeks after the legal deadline for commitments) Ryanair submitted a slightly revised set of draft commitments. This text was provided explicitly in “draft” form, without signature and without complying with the necessary formal

⁽¹²⁾ The precise number of aircraft is confidential to Ryanair.

requirements. Following an informal reaction by the Commission to the draft modified remedies, Ryanair chose not to submit them formally. Leaving apart this fact, it must be acknowledged that the Commission can in exceptional circumstances accept modifications of submitted remedies even when a renewed market test is no longer possible. Such commitments must, however, resolve all identified competition problems in a clear-cut fashion. This was not the case as even the modified commitments would clearly have not been sufficient to address all of the identified shortcomings of the previous set of commitments. In particular, the draft modified commitments were still based primarily on slot transfers and did not provide any new elements which would address the other identified barriers to entry and thus enable the Commission to re-evaluate the negative results of the market test as to the likelihood of actual entry. Furthermore, the scope of the guaranteed new entry pursuant to the “up-front buyer” provision was still insufficient. The draft modified remedies also did not provide for the transfer of slots at all relevant destination airports. Additional unre-

solved problems included, in particular, the legal uncertainty with respect to the London Heathrow slots and the unspecific criteria for the upfront-buyer.

For these reasons, the Commission concluded that the commitments offered by Ryanair are not sufficient to remedy the identified significant impediment to effective competition and, thus, cannot render the proposed concentration compatible with the common market.

VII. Conclusion

The Commission thus concluded that the proposed acquisition by Ryanair of Aer Lingus would significantly impede effective competition and declared the concentration incompatible with the common market. In view of the identified negative effects of the transaction and clearly insufficient remedies proposed by Ryanair, the prohibition was the only way how the Commission could ensure that a competitive environment beneficial to passengers on the routes to/from Ireland is maintained.