JUDGMENT OF THE GENERAL COURT (Third Chamber)

6 July 2010 *

In Case T-342/07,

Ryanair Holdings plc, established in Dublin (Ireland), represented by J. Swift QC, V. Power, A. McCarthy and D. Hull, Solicitors, and G. Berrisch, lawyer,

applicant,

v

European Commission, represented by X. Lewis and S. Noë, acting as Agents,

defendant,

* Language of the case: English.

supported by

Aer Lingus Group plc, established in Dublin, represented initially by A. Burnside, Solicitor, B. van de Walle de Ghelcke and T. Snels, lawyers, and subsequently by A. Burnside and B. van de Walle de Ghelcke,

and by

Ireland, represented by D. O'Hagan and J. Buttimore, acting as Agents, and M. Cush S.C, D. Barniville S.C. and N. Travers, B.L.,

interveners,

APPLICATION for the annulment of Commission Decision C(2007) 3104 of 27 June 2007 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.4439 — *Ryanair/Aer Lingus*),

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2009,

gives the following

Judgment

Factual background to the dispute

A — *Parties to the proceedings*

1 Ryanair Holdings plc ('the applicant' or 'Ryanair') is a publicly listed company and in 2006 had a fleet of 120 aircraft (not including the 161 aircraft ordered and to be

delivered over the next six years). Those aircraft were used at that time for scheduled flights to more than 400 destinations in 40 countries, including 75 routes between Ireland (mainly from Dublin airport, but also from Shannon, Cork, Kerry and Knock airports) and other European countries.

2 Aer Lingus Group plc is a public limited company incorporated under Irish law. After it was privatised by the Irish Government in 2006, the State retained 25.35% of the capital and Aer Lingus Group's shares were quoted on the stock exchange on 2 October 2006. Aer Lingus Group is the holding company of Aer Lingus Ltd (together hereinafter referred to as 'Aer Lingus'), an Irish-based airline which provides scheduled flights to or from Dublin, Cork and Shannon airports. In 2006 Aer Lingus operated a short-haul network on 70 routes between Ireland and the United Kingdom and other Member States with a fleet of 28 aircraft (32 as from the end of 2007). Its long-haul fleet of 7 aircraft (9 as from the end of 2007) enabled it to provide services to various destinations in the United States and Dubai.

B — *Administrative procedure*

3 On 5 October 2006 Ryanair announced its intention to launch a public bid ('the public bid') for the entire share capital of Aer Lingus Group. The public bid was made on 23 October 2006.

4 The concentration was notified to the Commission of the European Communities on 30 October 2006.

5 In its decision of 20 December 2006, the Commission stated that the concentration raised serious doubts as to its compatibility with the common market and decided to initiate the detailed examination procedure under Article 6(1)(c) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) ('the merger regulation').

6 On 27 March 2007 a statement of objections was sent to Ryanair under Article 18 of the merger regulation. Ryanair responded to that statement of objections on 17 April 2007.

7 By Decision C(2007) 3104 of 27 June 2007 the Commission declared that the notified concentration was incompatible with the common market (Case COMP/M.4439 — *Ryanair/Aer Lingus*) ('the contested decision').

C — *Content of the contested decision*

8 After pointing out that the notified concentration had a Community dimension (sections 3 and 4 of the contested decision), the Commission explained how the investigation had been carried out (section 5). It noted that the investigation had required several requests for information under Article 11 of the merger regulation, in particular to other scheduled airlines, charter companies, airports and corporate customers, as well as contacts with the slot coordination authorities, civil aviation authorities and transport authorities. The Commission also analysed the correlation between prices in order to define the relevant markets (section 6.3 of, and Annex III to, the

contested decision) and hired an independent consultant to carry out a customer survey at Dublin airport (section 7.3.5 and Annexes I and II). It also examined the econometric observations submitted by Ryanair and Aer Lingus, and carried out two series of price regression analyses to test empirically the likely effects of the concentration (section 7.4.3 and Annex IV).

1. *Relevant markets*

9 As regards the definition of the relevant markets (section 6 of the contested decision), the Commission stated that Ryanair and Aer Lingus both supplied scheduled passenger air transport services in Europe. In accordance with its practice, the Commission essentially examined the substitutability in terms of demand. It defined the relevant markets on the basis of the 'point of origin and point of destination' approach, known as the 'O&D-approach', whereby each route between a point of origin and a point of destination is defined as a separate market. To determine whether a given O&D pair constituted a relevant market, the Commission examined the different possibilities available to consumers for travelling between those two points. It also examined whether the flights departing from Dublin (or from Shannon or Cork, the other two Irish airports used by the parties to the concentration) to two (or more) airports serving the same city were substitutable (section 6.3). In view of the services offered by Ryanair and Aer Lingus, the Commission found that the proposed concentration would lead to horizontal overlaps in respect of 35 pairs of cities which make up the relevant markets (recital 333) and that it might raise concerns in relation to a large

number of pairs of cities which make up the relevant markets where only one of the parties to the concentration operates (recital 334).

2. *Assessment of the effects of the concentration on competition*

10 As regards the assessment of the effects of the concentration, the Commission referred to the analytical framework defined in its Guidelines on the assessment of horizontal mergers under the merger regulation (OJ 2004 C 31, p. 5) ('the Guidelines').

11 irst, the Commission analysed the market shares of Ryanair and Aer Lingus in respect of the 35 routes on which their services overlap. It found that the concentration would create a monopoly on 22 routes and would lead to very significant market shares on 13 others (section 7.2). The Commission also considered that the two companies were 'closest competitors' on all the affected routes (section 7.3) and that, contrary to the statements made by Ryanair, those two companies were competing with each other at that time (section 7.4). The Commission then examined the effects of the concentration on the markets on which Ryanair and Aer Lingus are actual or potential competitors and found that the concentration would eliminate actual competition on 35 routes on which their services overlap and the potential competition on 15 routes on which there is no overlap (sections 7.5 and 7.6).

12 Second, the Commission noted that the 'fragmented customers' of Ryanair and Aer Lingus did not have any 'countervailing buyer power' and only limited or no possibilities of switching suppliers (section 7.7).

13 Third, the Commission examined whether the entry of new competitors onto the market or the expansion of existing competitors was likely to eliminate the anti-competitive effects of the concentration, before coming to the conclusion that that would not be the case (section 7.8).

14 Fourth, the Commission went on to examine on a route by route basis the 35 routes on which the services overlap. It found that the concentration would significantly impede effective competition as a result of the creation of a dominant position on each of the routes (section 7.9).

15 Fifth, the Commission examined whether the gains in efficiency claimed by Ryanair were sufficient to counterbalance the negative effects on competition produced by the concentration. It concluded that that was not the case since those gains were not verifiable, they were not specific to the concentration and they were not likely to benefit consumers (section 7.10).

3. *Assessment of the commitments*

16 The Commission also examined the commitments proposed by Ryanair during the administrative procedure. It considered that they were not sufficiently clear to be implemented and that, in any event, they were not capable of remedying the problems raised in relation to competition (section 8).

17 In conclusion, the Commission considered that the implementation of the concentration would significantly impede effective competition, in particular as a result, first, of the creation of a dominant position on 35 routes from and to Dublin, Shannon and Cork, and, second, of the creation or strengthening of a dominant position on 15 routes from and to Dublin and Cork. It therefore declared the concentration incompatible with the common market (section 9 and the operative part).

Procedure and forms of order sought

18 By application lodged at the Registry of the Court on 10 September 2007, the applicant brought an action for annulment of the contested decision.

19 By order of 12 February 2008, the President of the Third Chamber of the Court granted leave to Ireland and Aer Lingus Group to intervene in support of the form of order sought by the Commission.

20 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure.

21 The parties presented oral argument and replied to the questions put by the Court at the hearing on 6 July 2009.

22 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs;

— order Ireland and Aer Lingus Group to pay the costs occasioned by their intervention.

23 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

24 Aer Lingus Group contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

25 Ireland contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

26 To declare a concentration incompatible with the common market, the Commission has to prove, in accordance with Article 2(3) of the merger regulation, that the implementation of the notified concentration would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

27 Such a decision, adopted on the basis of Article 8(3) of the merger regulation, is based on the outcome of a prospective analysis carried out by the Commission. That prospective analysis consists of an examination of how the notified concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely (see, in relation to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version in OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) ('the previous merger regulation'), and Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 43).

28 Where commitments have been validly proposed by the parties to the concentration during the administrative procedure in order to obtain a decision that the concentration is compatible with the common market, the Commission is required to examine the concentration as modified by those commitments. It is then for the Commission to demonstrate that those commitments do not render the concentration, as modified by the commitments, compatible with the common market (see, to that effect, in relation to the previous merger regulation, Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraphs 63 to 65).

29 In addition, the Court of Justice has held that the basic provisions of the regulation, in particular Article 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Courts of the European Union of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations (see, in relation to the previous merger regulation, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* ('*Kali & Salz*') [1998] ECR

I-1375, paragraphs 223 and 224, and *Commission* v *Tetra Laval*, cited in paragraph 27 above, paragraph 38).

30 Whilst the Courts of the European Union recognise that the Commission has a margin of discretion with regard to economic matters, that does not mean that they must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must they establish, in particular, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, in relation to the previous merger regulation, *Commission* v *Tetra Laval*, cited in paragraph 27 above, paragraph 39, and Case C-413/03 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 69).

31 In addition, according to settled case-law, where the institutions have a power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the Commission to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and also his right to have an adequately reasoned decision (C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Case T-151/05 *NVV and Others* v *Commission* [2009] ECR II-1219, paragraph 163).

32 The parties' arguments must be assessed in the light of those principles governing the Court's review of legality in matters concerning concentrations.

33 The applicant puts forward five pleas in law in support of its application. The first alleges manifest errors of assessment regarding the competitive relationship between Ryanair and Aer Lingus; the second plea alleges manifest errors in the assessment of barriers to entry; the third plea alleges manifest errors of assessment in the route-by-route analysis; the fourth plea alleges manifest errors in the assessment of the efficiencies which would flow from the concentration; and the fifth plea alleges manifest errors of assessment in the analysis of the commitments proposed by Ryanair (see paragraphs 11 and 13 to 16 above).

34 The definition of the relevant markets and the analysis of the customer reactions are not disputed, as such, by the applicant (see paragraphs 9 and 12 above).

A — *The first plea, concerning the appraisal of the competitive relationship between Ryanair and Aer Lingus*

35 The Commission's analysis in the contested decision, which is relevant for the assessment of this plea, comprises the following stages: first, the finding that the concentration would lead to very high market shares on a large number of routes (section 7.2); second, the finding that Ryanair and Aer Lingus are 'closest competitors' on all those routes (section 7.3); third, the assessment of the actual competition between Ryanair and Aer Lingus (section 7.4); and fourth, the effects of the concentration on the actual competition between Ryanair and Aer Lingus and the negative repercussions for customers (sections 7.5 and 7.6). In the course of that analysis, the Commission responded to Ryanair's argument regarding the difference in service which it provides,

namely a low-cost and no-frills service, from that provided by Aer Lingus, namely a 'mid-frills' service (section 7.3).

36 The applicant essentially criticises that aspect of the contested decision by submitting that the Commission overestimated the size of the high market shares held by the parties to the concentration and that it did not produce sufficient evidence to show that, despite their differences, the degree of competitive constraint exercised by Ryanair and Aer Lingus on each other was so significant, and the likelihood of the entry of other airlines so low, that the concentration would significantly impede effective competition on those markets.

37 The Commission, supported by Ireland and Aer Lingus Group, contends that the market shares provide 'useful first indications', which are corroborated by other evidence showing that Aer Lingus is Ryanair's closest competitor on the routes on which their services overlap. The concentration would therefore result in the disappearance of the competitive constraint at present exercised by Aer Lingus on Ryanair.

38 It is necessary for the Court to examine, one by one, the parties' arguments concerning the 'excessive weight' accorded to the market shares, the failure to take account of the 'fundamental differences' between Ryanair and Aer Lingus, the competitive advantage of having a base at Dublin airport, the 'non-technical evidence', the Commission's econometric analysis, the econometric information submitted by Ryanair, the competitive constraints exerted by charter companies, the passenger survey, the survey of corporate customers and, finally, the harm to consumers.

1. *The 'excessive weight' accorded to the market shares*

(a) Arguments of the parties

39 The applicant claims that, in the contested decision, the Commission based its finding on the false premiss that Ryanair and Aer Lingus are 'like for like' carriers, so that it could 'automatically' be inferred from their high market shares that the merger would result in a significant impediment to effective competition. While market shares are relevant to any assessment of a concentration from the point of view of competition, they are only a 'starting point'. To attribute to such market shares a heavy negative presumption regarding the effects of the concentration on competition is to reverse the burden of proof. In any event, that presumption was overturned by the applicant, which established to a sufficient legal standard that there were 'significant differences' between the two companies and low barriers to entry. The services offered by Ryanair and Aer Lingus are 'highly differentiated' and focus on separate categories of passengers. Accordingly, market shares do not in themselves indicate the extent to which the parties exert a competitive constraint on each other. In addition, the presence of only one airline on a given route does not, because of the ease of entry, amount to a dominant position.

40 The Commission, supported by Ireland and Aer Lingus Group, contends that it is apparent from the contested decision that market shares provide 'useful first indications', which are corroborated by other information showing that Aer Lingus is Ryanair's closest competitor on the routes at issue in the present case.

(b) Findings of the Court

41 It is settled case-law that, although the importance of market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position (see, in relation to abuse of a dominant position, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 41, and, in relation to the previous merger regulation, Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 205, and Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 134). That may be the situation where there is a market share of 50% or more (see, in relation to abuse of a dominant position, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60, and, in relation to the previous merger regulation, Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 115).

42 In the present case, it should be noted, first, that contrary to the submissions of the applicant, the Commission did not base its assessment of the effects of the concentration on competition on the notion that it could 'automatically' be inferred from the high market shares that the concentration would result in a significant impediment to effective competition. On the contrary, the Commission expressly stated in the contested decision that both the market shares and the concentration levels associated with them provided 'useful first indications' of the market structure and of the competitive importance of both the parties to the concentration and their competitors (see recital 348 and footnote 364, in which reference is made to point 14 of the Guidelines). An examination of the contested decision also shows that the Commission took care to carry out an in-depth analysis of the conditions of competition by taking account of factors other than just market shares, such as the effects of the concentration on competition between Ryanair and Aer Lingus, the reactions which could be expected from customers and competitors and the actual situation on each route affected by the concentration (see paragraphs 11 to 14 above).

43 It can thus not be claimed that the contested decision is based on findings related solely to the combined market share which Ryanair and Aer Lingus would be likely to hold if the concentration were to be implemented ('Ryanair-Aer Lingus combined' or 'the merged entity'). The Commission examined, simultaneously, the statistics illustrating the situation on the markets affected by the concentration at a given point in time, and dynamic data indicating the likely evolution of those markets if the concentration were to be implemented.

44 That approach is consistent with the analytical approach which the Commission must adopt when assessing the anti-competitive effects of a concentration, in which it examines how the notified concentration could change the factors which determine the state of competition on a given market in order to assess whether it would give rise to a serious impediment to effective competition (see paragraph 27 above).

45 Second, it should be pointed out that in its assessment the Commission could not ignore the importance to be attached to those initial indications, which showed that the implementation of the notified concentration would have enabled Ryanair to acquire extremely high market shares.

46 The Commission identified in the contested decision 35 routes on which the activities of the parties to the concentration overlap. The transaction would create a monopoly on 22 of those routes and would lead to the creation of a very high cumulative market share, more than 60%, on 13 others (see recitals 341 and 342 of the contested decision, in particular table 2 and the corresponding footnotes). In addition, on the routes where Ryanair or Aer Lingus currently operates, the other party to the concentration would represent the most likely potential competitor. Therefore, it is apparent from those findings that the implementation of the concentration would result in the acquisition of very high market shares on a significant number of routes (section 7.2 of the contested decision).

47 The Commission also stressed in the contested decision that, even on the few routes which are not monopolised and on which a certain number of competitors operate, such as the Dublin-London route on which the combined market share of Ryanair and Aer Lingus is in the region of 70 to 80% and on which British Midland Airways (BMI), British Airways and CityJet provide services, the Herfindahl-Hirschmann-Index, which is commonly used by the competition authorities to measure the concentration level on a market by taking account of the respective weight of each of the undertakings on it, was very high (between 6 000 and 6 500), as was the variation in that concentration level before and after the implementation of the concentration (the delta was between 3 000 and 3 500). The concentration level created through that concentration on the 35 routes on which the activities of the parties to the concentration overlap would therefore be very high (recital 342).

48 Thus, on 16 routes, Ryanair and Aer Lingus would hold a cumulative market share of 100%. Those routes are Dublin-Berlin, Dublin-Bilbao (Vitoria), Dublin-Birmingham, Dublin-Bologna, Dublin-Brussels, Dublin-Edinburgh, Dublin-Hamburg (Lübeck), Dublin-Marseille, Dublin-Newcastle, Dublin-Poznan, Dublin-Rome, Dublin-Seville, Dublin-Toulouse (Carcassonne), Dublin-Venice, Shannon-London and Cork-London.

49 On six other routes, namely Dublin-Alicante, Dublin-Faro, Dublin-Lyon, Dublin-Milan, Dublin-Salzburg and Dublin-Tenerife, Ryanair-Aer Lingus combined would hold a total market share of almost 100%, but would not reach that level because charter companies also sell 'flight only' tickets.

50 On the most important route, Dublin-London, which alone represents 30% of passengers transported by aeroplane between Ireland and the other Member States of the Union, the market share of the merged entity would be in the region of 70 to 80%.

51 On the other routes, the combined market share would also be very high. On the Dublin-Manchester route, for example, the combined market share would be in the region of 90 to 100%, the only competitor on that route being Luxair which operated a service to and from Luxembourg via Manchester.

52 Anyone wishing to travel to one of the destinations cited above has a choice, the extent of which is easy to measure, prima facie, both before and after the implementation of the concentration. Very often, that element of choice would disappear purely and simply if Ryanair were to take over Aer Lingus, as their total market share would amount to 100% or almost 100%.

53 In the light of those findings, which are not disputed as such by the applicant, the Commission was rightly able to find that the acquisition of very high market shares as a result of both the implementation of the concentration and the concentration level associated with it were relevant indicators of the market power which would have been acquired by Ryanair-Aer Lingus combined.

54 Those findings had to be duly taken into account by the Commission and constitute, as such, elements enabling the finding that, save in exceptional circumstances, those extremely high market shares constituted, in themselves, evidence of the existence of a dominant position (see paragraph 41 above).

55 In that regard, the Commission cannot be accused of having failed to have regard to the burden of proof in finding, as set out in the heading of section 7.2.2 of the contested decision, that '[t]he very high market shares on all overlap routes constitute evidence of a dominant position.'

56 It should be noted that, contrary to what the applicant claims, the impact of that evidence on the evaluation of competition was by no means regarded as automatic. It is apparent from the contested decision that such evidence could have been dismissed if those 'useful first indications' of the market structure and of the competitive importance of both the parties to the concentration and their competitors were contradicted by the other information available in the case. The Commission thus clearly set out its approach in the contested decision by stating that it '[had] carefully analysed whether there [were] circumstances which might exclude a dominant position in the present case despite the high market shares' (recital 351). That analysis was made in sections 7.3 to 7.8, in relation to the assessment of the relevant factors in general terms, and in section 7.9, in relation to the route-by-route analysis.

57 It is from that point of view that it is necessary to examine the arguments raised by the applicant to contest the importance given to the market shares which Ryanair-Aer Lingus combined would have held.

58 First of all, in relation to the routes on which Aer Lingus and Ryanair both operate at present, the applicant submits that the services offered by those operators are 'highly differentiated' and thus actually target separate categories of passengers. In that regard, it should be noted that the issue of the differentiation of the services is the question of their varying degree of substitutability for the customers concerned. In the contested decision, the Commission rejected the applicant's claim in that regard (section 7.3). In the Commission's view, even supposing that the applicant's claim were founded, the possible differences between the services offered by Ryanair and Aer Lingus would not eliminate the risk that a concentration between those two operators would significantly impede effective competition on the relevant markets. The applicant's argument regarding service differentiation will be examined below (see paragraph 61 et seq. below).

59 Second, as regards the routes on which only one of those companies operates at present, the applicant submits that the mere fact of operating on a route does not give rise to a dominant position in so far as it would be easy for other airlines to enter the market. That argument relates to the issue of entering the market and will be addressed in the examination of the second plea in law, which is devoted to that issue.

60 Therefore, it is only if those arguments were upheld by the Court that it could be found that the applicant is right to dispute the importance to be attached to the market shares which would have been held by the merged entity. At this stage in the analysis, the Commission cannot however be criticised for having taken account, in the contested decision, of the size of the market shares and the concentration levels in relation to the various relevant markets.

2. *The failure to take account of the 'fundamental differences' between Ryanair and Aer Lingus*

61 The applicant essentially submits that, as its services differ from those of Aer Lingus, the two airlines are not in competition to such a degree that the concentration would significantly impede competition. It claims that, in the contested decision, the Commission could not have concluded the contrary since it failed to establish that Ryanair and Aer Lingus were close competitors.

62 It is necessary for the Court to assess, one by one, the arguments of the parties relating to the use of the 'closest competitors' concept and the 'automatic' inference that there are significant competitive constraints, the arguments relating to the 'fundamental

differences' concerning operating costs, prices charged and service levels, and those relating to the difference between the destination airports.

(a) Reliance on the 'closest competitors' concept and the 'automatic' inference that there are significant competitive constraints

Arguments of the parties

63 The applicant maintains that the Commission was guilty of a 'fundamental fallacy' in considering that, if it can be shown that Ryanair and Aer Lingus are 'closest competitors', it 'automatically' follows that they are close competitors exercising significant competitive constraints on each other without there being any need to examine the closeness of that competitive relationship. However, Aer Lingus's range of services is not substitutable for that of Ryanair, but is closer to that of traditional full-service airlines. 'Significant differences' between the two companies enable Aer Lingus to charge substantially higher prices than those of Ryanair. The closeness of the competitive relationship between Ryanair and Aer Lingus should therefore be analysed in order to determine its effects on actual competition. If, as the applicant claims, their services are substantially different, Ryanair and Aer Lingus cannot be regarded as 'adequate substitutes', even where they are the only two airlines serving a given route. In other words, the passengers concerned may choose not to travel rather than to opt for the other airline.

64 The Commission, supported by Ireland and Aer Lingus Group, contends that, in the contested decision, it analysed in detail the competitive relationship between the two airlines before finding, to the required legal standard, that Ryanair and Aer Lingus were close competitors that constrain one another in terms of competition and that those constraints would disappear if the concentration were implemented.

Findings of the Court

65 In the applicant's view, even assuming that Aer Lingus and Ryanair could be regarded as 'closest competitors" on all of the routes at issue, none the less, as a result of the 'fundamental differences' which exist between them, the Commission could not take that finding and infer 'automatically' from it that the two companies exercise a significant competitive constraint on each other and that the concentration would remove those constraints, without examining the closeness of that competitive relationship.

66 Before examining the arguments relating to the differences alleged by the applicant and their impact on the competitive relationship between Ryanair and Aer Lingus (see paragraph 70 et seq. below), it must be noted at the outset that the analysis carried out by the Commission in the contested decision is not the same as the one described by the applicant.

67 That analysis is divided into two stages. First, the findings made by the Commission on the competitive relationship between Ryanair and Aer Lingus result from lengthy discussion (sections 7.3 and 7.4 of the contested decision). In that discussion the Commission examined in detail the arguments put forward by Ryanair, and set out

in the present action, concerning the service differentiation. Next, contrary to what the applicant claims, the assessment in the contested decision of the effects of the concentration on competition was not carried out 'automatically' on the basis of the mere finding that Ryanair and Aer Lingus are 'closest competitors'. The Commission carefully set out in the contested decision the reasons why the concentration would significantly impede effective competition in the common market on the 35 routes on which the services overlap and on the 15 routes operated by Aer Lingus on which the services do not overlap (sections 7.5, 7.6 and 7.9).

68 Consequently, as is the case with the importance to be given to the cumulative market shares (see paragraph 58 above), it is the response to the applicant's arguments relating to the alleged impact of the service differentiation on the competitive relationship between Aer Lingus and Ryanair (see paragraph 70 et seq. below) which will enable the Court to determine whether or not the conclusions drawn by the Commission in its assessment of the effects of the concentration on competition are well founded.

69 In any event, since the service differentiation alleged by Ryanair was examined in the contested decision, it can thus not be claimed in this case that the Commission 'automatically' inferred from the finding that Ryanair and Aer Lingus are 'closest competitors' on all of the relevant routes that the two airlines exercised a significant competitive constraint on each other which the concentration would eliminate and there was no need to examine the closeness of that competitive relationship.

(b) The 'fundamental differences' concerning operating costs, prices charged and different service levels

Arguments of the parties

70 First, the applicant maintains that the difference between its operating costs and those of Aer Lingus shows that neither company exerts significant competitive constraints on the other. Ryanair's lower cost base allows it to charge significantly lower prices than Aer Lingus and, thus, to serve a separate segment of the market. The Commission failed to analyse the impact of that difference on competition. Moreover, after observing that Aer Lingus's operating costs are in line with those of low-fares carriers such as easyJet or Virgin Express, the Commission was not entitled to infer therefrom, in section 7.3.3 of the contested decision, that Aer Lingus was 'among the closest competitors of Ryanair even in terms of unit costs'. Reliance on that notion of 'closest competitors' derives from an analytical error. Moreover, the Commission includes Aer Lingus's long-haul flights in the calculation of Aer Lingus's average operating costs. Since operating costs per kilometre are substantially lower on long-haul flights than on short-haul flights, their inclusion has the effect of significantly understating Aer Lingus's average costs per kilometre for the purpose of comparison with low-cost carriers that operate only on short-haul routes. Furthermore, if, as the Commission contends, Aer Lingus's average costs are comparable to those of low-cost carriers and only 50% or so higher than Ryanair's, Aer Lingus should be able make substantially higher profits than Ryanair, because its average fare is over 100% higher than Ryanair's. In reality, Ryanair is far more profitable than Aer Lingus.

71 Second, the applicant emphasises the difference between its prices and those of Aer Lingus. That difference is the result of the difference in the two companies' costs and demonstrates a 'high level of differentiation'. The Commission was wrong to consider, in recital 371 of the contested decision, that a price difference of EUR 30 is not significant, given that the average price of a Ryanair ticket is EUR 41. Ryanair's lower prices, being less than half of Aer Lingus's, enable it to attract customers who, in the absence of such moderate prices, would not fly at all. The Commission should have inferred from this that Aer Lingus exercised no competitive constraint on Ryanair. In recognising in recital 413 of the contested decision that Ryanair's prices were on average lower than those of Aer Lingus, the Commission should have concluded that the two companies targeted two entirely separate segments of the market. Moreover, Ryanair and Aer Lingus operate on the basis of very different business models. Aer Lingus may indeed have moved away from the business model of the traditional full-service airline by adopting some of the traits of low-fare carriers. However, it continues to use primary airports and offer certain services that allow it to charge significantly higher fares than those of Ryanair. Aer Lingus customers are thus prepared to pay a supplement over the fares of its low-price competitors in order to get a wider range of services.

72 Third, the applicant claims that it is apparent from recital 367 of the contested decision that Ryanair is a 'no-frills' airline and Aer Lingus is a 'mid-frills' airline and the Commission attempts to minimise the impact of that difference on the degree to which the two companies compete. The Commission failed to analyse the extent to which those differences matter or to put forward convincing evidence to demonstrate why those significant differences are irrelevant for determining the existence of a significant impediment to effective competition. Such differentiation was evidenced by the statements of Aer Lingus and the Irish Government prior to the public bid, before

the Government and the company 'did a U-turn', claiming that Aer Lingus was a low-fares carrier.

73 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicants' arguments by referring to the contested decision.

Findings of the Court

74 Although, in the contested decision, the Commission recognised the existence of differences between Ryanair and Aer Lingus, it did not draw the same conclusions as the applicant. Those differences did not prevent the Commission from finding that, of all the competitors which operate on the various routes affected by the concentration, Aer Lingus was Ryanair's biggest and closest competitor.

75 As regards the difference in the operating costs of Aer Lingus and Ryanair, the latter reiterates its argument that the difference in costs enables it to serve a separate segment of the market. In the applicant's view, the Commission should have analysed the impact of that difference on the competitive relationship between the two airlines.

76 However, it is apparent from the contested decision that the Commission recognised that Ryanair's operating costs were lower than Aer Lingus's, but also noted that, in relation to the other airlines, Aer Lingus's costs were generally very low and situated the

airline in the group of low-cost carriers rather than in the group of network airlines (see section 7.3.3, in particular recital 374).

77 The Commission thus set out in the contested decision the reasons why it considered, in the light of the information available, that Ryanair's operating costs per kilometre were lower than 4 cents, whereas Aer Lingus's were almost 5.9 cents. The Commission acknowledged that Ryanair's objection that those figures also included Aer Lingus's long-haul flights (which generally have lower operating costs per kilometre) was justified. However, it pointed out that 87% of Aer Lingus's passengers travelled on short-haul flights and that the alternative figure put forward by Ryanair of almost 8 cents per kilometre was not substantiated (see section 7.3.3 of the contested decision, in particular recitals 375 and 377).

78 In any event, it is apparent from graph 1 set out in recital 375 of the contested decision that the operating costs per kilometre of a network airline (such as British Airways, Air France or Lufthansa) are almost 12 cents whereas those of Virgin Express or easyJet are in the region of 7 cents and just over 6 cents respectively. The margin defined by the Commission and Ryanair, of between 5.9 and 8 cents per kilometre, thus situates Aer Lingus in the same group as Virgin Express or easyJet, whose operating costs are 'lower' (recital 375) or 'significantly lower' (recital 376) than those of large network airlines (a difference of at least 4 cents per kilometre), even if they are 'higher' or 'significantly higher' than Ryanair's (a difference which varies between 2 and 4 cents per kilometre).

79 Consequently, although there is a difference in operating costs between Ryanair and Aer Lingus, as the Commission recognised in the contested decision, that still does not support the applicant's claim that the Commission could not consider that Aer Lingus and Ryanair are 'closest competitors', since Aer Lingus's operating costs are actually lower than those of the network airlines and neither Virgin Express nor easyJet are in competition with Ryanair on the routes on which their services departing from Ireland overlap (recital 376 of the contested decision).

80 That observation is also supported in the contested decision by the finding that the evolution of Aer Lingus's unit costs over time further highlights its 'gradual migration' from a traditional to a low-cost business model (see recital 378, in particular graph 2 on Aer Lingus's operating costs over time from 2001 to 2005).

81 In addition, although, as pointed out by the applicant, low operating costs have an impact on the profitability of the undertaking (see paragraph 70 above), that still does not lead to the conclusion that the services which it offers are not in competition with those of Aer Lingus. The latter offers higher-end services while attempting to bring its business model into line with Ryanair's cost structure, which differentiates it further from the cost structure of network airlines.

82 As regards the difference between the prices charged by Ryanair and those charged by Aer Lingus, the applicant submits that the difference is such that the Commission should have inferred from it that Aer Lingus did not exert a competitive constraint on it. According to the applicant, an average price difference of EUR 30 is significant, since the average price of a Ryanair ticket is EUR 41. In addition, Ryanair's lowest

prices, which are less than half the price of Aer Lingus's, enable the applicant to attract customers who would not travel by aeroplane if such prices were not available.

83 Just as it recognised that there was a difference in the operating costs, the Commission recognised in the contested decision that there was a difference between the average prices charged by Aer Lingus and those charged by Ryanair. That point is not disputed by the parties.

84 However, it should be pointed out that, in the contested decision, the Commission stated, first, that although the prices charged by Aer Lingus were generally higher than those charged by Ryanair that was not always the case and, second, that the price comparison was made more delicate by the fact that it was difficult to know which taxes and charges had been taken into account in the calculation of the average price of short-haul flights indicated by Ryanair, of EUR 41 for 2006, when, for Aer Lingus, an average price was given of EUR 91, or of between EUR 65 and 75 before charges and taxes (see section 7.3.2, in particular recital 371 and footnotes 385 and 386).

85 In the light of the above, it should be noted that the dispute relating to the average prices charged by Ryanair and Aer Lingus concerns the consequences of that price difference. Although the applicant claims that the price difference enables the finding that Aer Lingus does not exert a competitive constraint on Ryanair, the Commission considers that it is apparent from the analysis of the prices charged that Aer Lingus is closer to Ryanair than any of the other competitors operating on the routes on which their services overlap could be (see recitals 368 to 370 of the contested decision in relation to the assessment of the economic model, which is then reproduced in recital 371 in relation to the comparison of average prices in the following terms: '[t]he

same consideration applies to the fact that Aer Lingus's average prices are higher than Ryanair's prices').

86 As regards the competitive constraint exerted by Aer Lingus, that issue is dealt with in section 7.4 of the contested decision, which concerns the competition between the parties to the concentration at the material time, and in sections 7.5, 7.6 and 7.9, in which the Commission examines the effects of the concentration on competition. That issue is thus not dealt with in section 7.3, in which the Commission set out the reasons why it considered that Ryanair and Aer Lingus were 'closest competitors' on all of the relevant routes.

87 Consequently, the findings made in recital 371 of the contested decision provide a basis for the Commission's conclusion in section 7.3 in the sense that it is apparent from the information set out therein that the prices charged by network airlines, communicated by Ryanair, which offer a full on-board service are much higher that those charged by Aer Lingus (EUR 216 for Air France, EUR 225 for Lufthansa and EUR 268 for British Airways). Ryanair's and Aer Lingus's prices are indeed 'well below the price level of the competitors they face on the respective routes' (recital 371). The Commission also explained that the difference in prices charged by Ryanair and those charged by Aer Lingus made it necessary to take account of some quality advantages associated with Aer Lingus's service, such as the fact that it serves primary airports, offers business lounges and higher service orientation (recitals 371 and 372). The analysis made in the contested decision of the prices charged by Ryanair and Aer Lingus thus provides a basis for the Commission's conclusion that Ryanair and Aer Lingus are 'closest competitors' on all of the relevant routes.

88 According to the applicant, such an analysis is not compatible, however, with the finding made in the second sentence of recital 413 of the contested decision, which states:

'The factors detailed above [in relation to the customer perception of Aer Lingus and Ryanair (section 7.3.5)] clearly indicate that Ryanair and Aer Lingus are close competitors. The Commission nevertheless acknowledges that Ryanair has on average lower prices than Aer Lingus, and that, at least hypothetically, it would be possible that Aer Lingus and Ryanair serve two entirely separate consumer segments.'

89 That reference to a possible segmentation of demand on the basis of the prices charged does not, however, lead to the conclusion that Ryanair and Aer Lingus are not close competitors. The concept of 'competitor' is to be assessed on the basis of the information available in the case. Various factors are put forward by the Commission in support of that finding, with which it concludes section 7.3 of the contested decision. It should be noted, for example, that, on the 22 routes on which Ryanair and Aer Lingus are the only airlines in operation, at present there are no other airlines in a position to offer scheduled air transport services. On those markets, whose definition is not disputed as such by the applicant (see, however, in relation to the argument concerning destination airports, paragraph 95 et seq. below), Aer Lingus thus remains Ryanair's closest competitor. The issue of entries onto the market will be examined along with the second plea in law, which is devoted to that issue.

90 As regards the difference in the level of services, the applicant's argument merely reiterates a difference already known to the Commission and which is referred to in the contested decision. For example, in recital 367, although the Commission regarded Ryanair flights as 'no-frills' flights and Aer Lingus's services as 'mid-frills', it stated

immediately afterwards that, for the purposes of the contested decision, 'both airlines [could] be considered "low-frills" carriers', since following the latest adaptations of Aer Lingus's service model, the services included in the Aer Lingus base fare are broadly in line with those included in the Ryanair base fare and in stark contrast to traditional 'full service airlines such as British Airways or Lufthansa'.

91 In its written submissions the applicant recognises, inter alia, that 'Aer Lingus may indeed have moved away from the business model of the traditional full-service airline by adopting some of the traits of low-fare carriers' (see paragraph 71 above). That point was confirmed at the hearing.

92 In any event, the evolution of Aer Lingus's unit costs over time further highlights its 'gradual migration' from a traditional to a low-cost business model (see paragraph 80 above) and the services which Aer Lingus provides are situated, at the very least, between those provided by Ryanair and those provided by network airlines which offer a full on-board service.

93 Consequently, even if Aer Lingus does not have the very low operating costs of Ryanair, does not charge the same prices as Ryanair and does not offer as few services, the fact remains that Aer Lingus is restructuring its business model to resemble that of its competitor.

94 Therefore, the applicant does not show to the required legal standard that the Commission wrongly concluded in recital 431 of the contested decision that Aer Lingus and Ryanair were 'closest competitors' on the relevant routes out of Ireland. That conclusion may thus be taken into consideration in the examination of the effects of

the concentration on competition and the criticisms advanced by the applicant on this point must be rejected (see paragraphs 58 and 63 above).

(c) The difference between the destination airports

Arguments of the parties

95 First, the applicant claims that Ryanair and Aer Lingus use fundamentally different types of airport. Aer Lingus uses primary airports that are closer to city centres and offer better services and are therefore more expensive than secondary airports. Secondary airports, used by Ryanair, enable it to keep its costs low and prevent it from competing against Aer Lingus for passengers wishing only to use primary airports. By acquiring Aer Lingus, Ryanair would be in a position to compete in the primary airports. According to the applicant, the Commission failed to produce clear and convincing evidence to show that Aer Lingus flights to primary airports and Ryanair flights to secondary airports exercised significant competitive constraint on each other. The data relied on in the contested decision do not support the conclusion that those flights are sufficiently close substitutes to require them to be included in the same market. Moreover, the Commission used the information available 'in a highly selective and inconsistent manner'. Having been unable to find any uniform set of criteria, it instead assembled several different criteria and then foraged among those numerous indicators to find any criterion to justify a finding that the primary and secondary airports were in the same market. The Commission ignored or distorted

the opinions of Birmingham and Vienna Airports and of the UK Civil Aviation Authority in order to conclude that primary and secondary airports are substitutable. It thus did not use reliable evidence or robust methodology. Furthermore, although the Commission presented the responses of competitors to claim that those airports were substitutable, those responses demonstrate on the contrary that there was no clear and convincing evidence on that point (see response of British Airways and the situation of the London airports). It was unclear from the table addressed to the competitors whether respondents were expected to mark airports as suitable for each type of passenger or as substitutes for each other. In some cases, airlines made a mark against only one of the airports in each city pair, highlighting the confusion.

96 Second, the applicant claims that the Commission's use of airport catchment areas as a basis for determining whether flights to different airports belong to the same market is flawed. The Commission uses an unsubstantiated 'rule of thumb' which defines an airport's catchment area as the area within either 100 kilometres or within a one hour drive from the airport (recital 83 of the contested decision). That rule is 'far too vague to be useful', in so far as it fails to recognise the actual distribution of passengers within the area and is unrealistic in the context of routes between Ireland and the United Kingdom, where all the flights are no more than one hour. The Commission thus worked on the false assumption that passengers 'would bypass their nearest airport, drive for an hour and then catch a flight of perhaps 50 minutes or so'. Moreover, the calculation of the time necessary to reach an airport by public transport or by car, set out in recital 78, takes no account of the various delays or of the cost associated with using public transport. Finally, the Commission does not take account, in recitals 114 to 116, of the real figures for the specific airports in question, in particular regarding the data from the UK Civil Aviation Authority.

97 Third, the applicant criticises certain assessments or findings set out in the contested decision. First of all, it complains that in recital 92 the Commission took into account the marketing practices of Ryanair whereby it presents Ryanair flights as substitutes for flights to primary airports. The marketing labels used by an undertaking for its products do not, in its view, constitute a sufficiently safe or sound basis for defining markets. For example, Vienna and Bratislava Airports cannot belong to the same market simply because Ryanair markets its service to Bratislava as a service to 'Bratislava (Vienna)'. Next, the applicant claims that in recital 99 the Commission should not have used the concept of 'airport system' referred to in Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8) to support the view that certain airports are substitutable. That system was not designed for the purpose of market definition and the recasting of Regulation No 2408/92 and its associated regulations should end that approach to airport systems. The applicant also submits that the Commission's price analysis is 'flawed' and does not provide reliable grounds for the conclusion that Aer Lingus flights into primary airports and Ryanair flights into secondary airports are 'close substitutes'. The analysis provides no way to identify whether co-movement of prices is due to substitutability or to common influences. Finally, the applicant maintains that the passenger survey is 'seriously flawed' both in terms of the design of the questions and the sampling techniques employed. It was not designed to measure substitutability between airports, since passengers were never asked whether they envisaged flying to different destination airports. In numerous cases, the data relied on by the Commission in that regard actually indicate the opposite conclusion.

98 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

Findings of the Court

99 In its written pleadings the applicant reiterates the arguments which it raised during the administrative procedure to criticise the definition of the relevant market on the basis of the city of origin and the city of destination. Those arguments were examined and dismissed by the Commission in the contested decision and their mere repetition before the Court cannot, for the reasons set out below, suffice to call that analysis into question.

100 As regards the complaint that the Commission failed to produce clear and convincing evidence to show that Aer Lingus flights to primary airports and Ryanair flights to secondary airports exercised significant competitive constraint on each other, it should be pointed out that that complaint essentially amounts to a criticism of the Commission's use of the market as defined in the contested decision in order to assess the effects of the concentration on competition within the relevant markets. The applicant recognises this implicitly when it claims that the data relied on in the contested decision 'do not support the conclusion that those flights are sufficiently close substitutes to require them to be included in the same market' (see paragraph 95 above).

101 In that regard, it should first be noted that the scope of that complaint needs to be put into perspective in the light of the fact that, on 16 of the 35 relevant routes, Ryanair and Aer Lingus serve the same airports (recital 71 of the contested decision). Therefore, that complaint concerns only 19 of those 35 routes (that is 54.2% of them) and thus has no relevance to the other 16 routes affected by implementation of the concentration.

102 In relation to those 19 routes, the applicant merely complains that the destination airports are different but without seeking to refute, in concrete terms, the reasoning set out in the contested decision in relation to the impact of that difference on both the definition of the market and the assessment of the effects of the concentration on competition. The Court points out that, in the contested decision, the Commission noted that the markets for passenger air transport could be defined on the basis of individual routes or a bundle of routes, to the extent that there is substitutability between them according to the specific features of the case (recital 55 and the case-law cited in footnote 53, in particular Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraphs 54 to 61).

103 In that regard, it should be noted that the Commission drew up, first of all, an analytical framework for the definition of the relevant market for the various relevant routes, irrespective of whether airport pairs or city pairs were being analysed (section 6.3.3 of the contested decision). The different criteria used to characterise the substitutability of scheduled air transport services departing from different airports are set out in recital 99. Those criteria are as follows: distances and travelling times using the indicative benchmark of 100 km or one hour driving time, the views of competitors, the views of the airports concerned and of Member States' civil aviation authorities, the estimated proportion of leisure passengers on a route, the so-called 'airport system' pursuant to Annex II to Regulation No 2408/92, marketing practices, whether transport services exist between the secondary airports and certain cities, and the result of the Commission's price correlation analysis for 17 city-pair routes out of Dublin.

104 Next, the Commission analysed in detail the relevant market on each of the routes at issue (section 6.3.4 of the contested decision). For each of the cases in which it found there to be substitutability, the Commission applied various criteria on the basis of

the information available. In its view, the choice of passengers to opt for one airline or the other is the result of a combination of those factors.

105 On the other hand, the Commission came to the conclusion on various occasions that flights to different destination airports situated close to the same city did not fall within the same market. In recitals 178 to 183 of the contested decision, the Commission essentially considered, in particular, that Rennes and Nantes Atlantique airports were not substitutable for the following reasons: they were slightly outside the benchmark of 100 km or one hour driving time, Ryanair does not market its service to Nantes with reference to Rennes, and vice-versa, there are no significant differences between the two airports which would be an incentive for passengers located in Rennes to travel to Nantes for a flight, and vice versa, and the available data was not sufficient for the Commission to conduct a meaningful price correlation analysis. The mere fact that Aer Lingus regards Rennes and Nantes Atlantique airports as substitutes was not sufficient, in the Commission's view, to conclude that they are substitutable. In recitals 197 to 203, the Commission also made a distinction between Amsterdam Schiphol and Eindhoven for the same reasons as those given in relation to Nantes Atlantique and Rennes airports and because it had considered in an earlier decision that there was a low degree of substitutability (Commission decision of 22 September 1997, Case COMP/M.967 — *KLM/Air UK*, paragraph 24).

106 In addition, it should be noted that the point of view of the airports is also given at various points in the contested decision (see, for example, recitals 132, 145 and 151), as is the point of view of the UK Civil Aviation Authority (see, for example, recitals 128 and 138). As regards the reference to the distinction between time-sensitive and non-time-sensitive passengers made by the UK Civil Aviation Authority, the Commission gave several reasons in the contested decision why that distinction could be regarded as irrelevant in this case (recitals 85 and 316 to 319).

107 In particular, the Commission stated, in a convincing manner, that that formerly clear distinction between the two categories of passenger had become increasingly blurred. That tendency had already been referred to by the Commission in previous cases (Cases COMP/M.3280 — *Air France/KLM* and COMP/M.3770 — *Lufthansa/Swiss*, referred to in footnote 329 of the contested decision) and was confirmed in the responses to the questionnaires sent to competitors on 6 November 2006 (the responses referred to in footnote 328), which the applicant in the present case does not dispute. The responses of the corporate customers during the Commission's investigation show that the best fare criterion is also quite important. In the order of importance expressed by those customers, that criterion ranked above the criterion of closeness of airport to final destination and below that of best time, which has become less absolute in the light of the high number of flights often provided by no-frills airlines (recital 316 of the contested decision).

108 In addition, as regards the opinions of Birmingham airport (recital 138 of the contested decision) and Vienna airport (recital 223), the applicant does not state how exactly those opinions were distorted. In addition, at the hearing the applicant expressly waived its right to expand on that argument. Those opinions, which do not come to the conclusion that there is substitutability, are faithfully reproduced in the contested decision and the Commission was also in possession of other information capable of supporting the conclusion which it arrived at in the contested decision. The technique used by the Commission of bundling evidence to assess a concentration may, of course, include positive and negative factors. The conclusion which the Commission arrived at following its analysis of the various factors taken into consideration cannot be called into question simply because a negative factor also emerges from the investigation. That factor is duly noted and was taken into account by the Commission and, contrary to what the applicant asserts without demonstrating its assertion in any other way, was not distorted.

109 In addition, contrary to what the applicant claims, it is apparent from the response given by British Airways to the questionnaire sent by the Commission that, as regards the London airports, 'there [was] very significant overlap in the catchment areas and all London airports [could], and do, compete with each other for both [long-haul] and [short-haul] traffic'. It is also apparent that, as regards the other airports on the list set out in question 22 of that questionnaire, British Airways considers that it 'would generally conclude that all of the airports listed do compete for all passengers'. As regards the claim that the responses of the competitors do not show that all the primary and secondary airports were substitutable, in relation to London in particular, the responses of Ryanair's competitors on that route prove the contrary.

110 As regards Ryanair's criticism in relation to the use of a 'rule of thumb' to define the catchment zones of airports in order to determine the relevant markets, the Commission acknowledges the approximate nature of that rule in the contested decision (recital 83: 'It should, however, be noted that the Commission uses the 100 km [or] 1 hour-"rule" only as a first "proxy" to define a catchment area. Due to the specificities of the respective airport and other evidence, the catchment area may be wider in reality and will therefore be discussed in greater detail on a case by case basis in the individual airport pair analysis').

111 In response to Ryanair's criticism in that regard concerning the statement of objections, the Commission noted in the contested decision that the 100 km or one hour driving time benchmark was a proxy based on the results of the view of airports on what they considered to be a reasonable catchment area (recital 85). It is apparent from the responses to the questionnaire sent to the airports that the catchment area which airports present to airlines is at least 100 km or one hour driving time if not more (recital 82). In addition, as stated by the Commission in response to the arguments raised by the applicant in its written pleadings, the fact that the duration of

flights on routes between Ireland and the United Kingdom is relatively short does not alter that assessment in any way. In many cases, there are special bus services which link secondary airports to the city centre with a timetable which is adapted to the flight times. The Commission's approach is consistent with the reply of the UK Civil Aviation Authority.

112 In the light of the above factors and explanations, the Commission cannot be criticised for having used the 100 km or one hour driving time benchmark in defining the catchment areas of the airports.

113 As regards the criticism that in recital 92 of the contested decision the Commission took into account the way in which Ryanair markets itself by presenting its flights as alternatives to flights to principal airports, it must be noted that such marketing was just one of the many factors which were taken into account. Such a practice is intended to make it easier for customers who might be interested in booking a flight with Ryanair to identify the flight destinations available. That cannot be called into question merely because Ryanair asserts, without any other demonstration, that the names under which it markets its services to certain airports do not constitute a sufficiently certain and solid basis on which to define markets. That assertion cannot suffice to deny that element any relevance in the set of factors used by the Commission. As regards the example of Vienna and Bratislava referred to by the applicant, the Commission based its assessment also on other factors and not just Ryanair's marketing practice. It also examined the indicative benchmark of 100 km or one hour driving time, the point of view of the national authorities and of the competitors and

the results of the customer survey (section 6.3.4.15). In addition, the Commission based its findings, in its route-by-route analysis (section 6.3.4), on the 100 km or one hour driving time benchmark, on the point of view of the national authorities and of the competitors and the results of the customer survey. The Commission's assessments in that regard are always based on the use of a set of factors which it sets out and analyses individually.

114 In relation to the criticism regarding the reference made, in recital 99 of the contested decision, to the 'airport system' used in Regulation No 2408/92 to support the finding that certain airports can be regarded as substitutable, it is apparent from that recital that the fact that the airports at issue belong to an 'airport system' within the meaning of Regulation No 2408/92 provides 'supplementary evidence which supports the finding that airports listed under that regulation belong to the same conurbation and can be considered substitutable from the demand side'. In Regulation No 2408/92, which was in force at the time the contested decision was adopted, the airport system is defined as meaning 'two or more airports grouped together as serving the same city or conurbation, as indicated in Annex II'. Therefore, the fact that two or more airports are mentioned in Annex II as an airport system may be taken into account when determining whether those airports serve the same destination, which is a factor indicating that those airports are substitutable for passengers wishing to travel to a given destination. That assessment cannot be called into question by the fact that the Commission took the initiative to clarify and simplify the rules on traffic distribution between airports serving the same city or conurbation, its proposal to that effect having since been adopted by the European Parliament and the Council of the European Union. In Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (OJ 2008 L 293, p. 3), which, since the adoption of the contested decision, has repealed Regulation No 2408/92, reference is still made to the principle of traffic distribution between airports serving the same city or conurbation, even if the expression 'airport system' is no longer used.

115 In relation to the criticism of the price correlation analysis carried out during the administrative procedure, it should be noted that the Commission recognises that the price correlation does not prove that two airports fall within the same market. However, the Commission correctly submits that such a factor, together with others, constitutes a relevant factor for the analysis. According to the contested decision the Commission's analysis is an 'empirical analysis' (recital 121). The footnote under recital 121 also states the following:

'It is important to note with respect to all the analysed city pairs that the Commission has taken the economic evidence on price correlation into account as additional elements that support its view. … This is because prices movements may be influenced by other factors which can lead to low price correlation.'

116 That is the context in which the assessments made in the contested decision on the basis of the results of the 'empirical analysis' of the price correlation must be taken into account. The Commission can thus not be criticised for having set out the reasons why the price correlation analysis could lead to limited results while stressing at the same time that those results, as limited as they might be, could none the less be taken into consideration under certain conditions.

117 In those circumstances, the applicant does not show precisely how the Commission exceeded the limits of its powers of appraisal of economic situations (see paragraphs 31 and 32 above). The criticism made in that regard by the applicant is general and fails to take account of the use made by the Commission of the results of the price correlation analysis.

118 In relation to the criticism of the results of the passenger survey, it should be noted that that point was also raised by the applicant in the context of another argument and will be examined with that argument (see paragraph 202 et seq. below). In any event, it is apparent from recital 94 of the contested decision that the Commission was fully aware of the limits of the customer survey carried out at Dublin airport, since the survey was carried out primarily with the aim of testing Ryanair's claim that, from the perspective of the consumer, Ryanair and Aer Lingus were not in competition. The sample of routes included all London airports and a limited number of routes where the parties to the concentration offered flights to various airports close to the same city. The Commission considered that, where passengers considered an airline travelling to a different airport as an alternative it could be inferred that the passenger air transport services in question were likely to exert a competitive pressure on each other. In that regard, the Commission stated that 'such evidence [was] of an indirect nature since respondents to the … questionnaire were not asked to explicitly state whether they would consider travelling to a different airport'. In recital 122 of the contested decision, that survey is also referred to as 'indirect evidence'. In footnote 91, the Commission also stated that the customer survey only included a subset of the routes where the parties to the concentration serve different airports and that, consequently, the survey was 'informative' only for those routes. That is the context in which the assessments made in the contested decision on the basis of the results of the customer survey must be taken into account. The Commission can thus not be criticised for having set out the reasons why the customer survey had certain limits but stating at the same time that its results were none the less of some value for the relevant routes.

119 In those circumstances, the applicant fails to show how the Commission exceeded the limits of its power of appraisal of economic situations. The criticisms made in that regard by the applicant are general and fail to show how, in the context of those

arguments, the design of the questions and the sampling techniques employed were 'seriously flawed'.

3. The competitive advantage of having a base at Dublin airport

(a) Arguments of the parties

120 The applicant denies that the fact that Ryanair and Aer Lingus have bases at Dublin airport means that they can be regarded as closest competitors. According to the applicant, the place where the aircraft is based is entirely irrelevant to passengers and is of relatively little significance to the airlines. An airline with a base at the other end of a route might be a credible competitor to Ryanair. For example, BMI, with a base at Heathrow airport and with an aircraft based overnight at Dublin airport, is a closer competitor to Aer Lingus than Ryanair on the Dublin-London (Heathrow) route, since Ryanair does not even operate flights to Heathrow.

121 The Commission disputes that line of argument and claims that airlines do not normally start operations on a route unless that route is linked to a base.

(b) Findings of the Court

122 In recitals 380 to 399 of the contested decision the Commission set out the reasons why having an important base at Dublin airport corroborated the finding that the two companies are 'closest competitors'. According to the contested decision, such a base enables airlines to realise cost savings due to economies of scale and scope and allows for increased flexibility to adjust to fluctuations in demand, since those advantages are proportionate to the size of the base. The Commission stated that the majority of carriers use base airports (recitals 393 and 394) and dismissed the observations made by Ryanair during the administrative procedure, to the effect that, first, competitors which base their aircraft overnight at Dublin airport should be regarded as being equally as close to Ryanair as Aer Lingus is and, second, it is not really relevant whether the base is located in Ireland or at the other end of the route (section 7.3.4).

123 In that regard, it should be noted that the arguments raised by Ryanair in the context of this application merely reiterate the observations which it made during the administrative procedure, but do not call into question the validity of the Commission's reasoned findings in the contested decision dismissing those arguments.

124 It is apparent from the analysis set out in the contested decision that it is rare for carriers which operate on routes not to use a base airport; it grants them an economic advantage. The fact that both Ryanair and Aer Lingus have an important base at Dublin airport thus had to be taken into consideration in so far as that enables these two companies, among others, to benefit from similar advantages (sections 7.3.4.1 and 7.3.4.2). For the reasons set out in the contested decision, this situation is not

comparable to that of competitors which base their aircraft overnight at Dublin airport, in particular given the significant differences in terms of economies of scale and scope which a base airport provides (section 7.3.4.3), nor to that of competitors which have a base at the destination airport, because of the particularities of Dublin airport (section 7.3.4.4).

125 As regards the latter point, the applicant's arguments are not sufficient to call into question the analysis set out in recitals 404 to 407 of the contested decision, at the end of which the Commission considered that the increased flexibility of having a base at Dublin conferred a specific advantage to the parties to the concentration. The following factors were taken into consideration in that regard:

— on 12 of the routes on which the services of the parties to the concentration overlap without constituting a monopoly, the remaining competitors do not necessarily operate their routes from a base (recital 405); that enables the finding that those competitors exert less pressure on Ryanair in terms of competition than Aer Lingus does;

— some of the cost savings are more significant at Dublin airport than elsewhere because there is an asymmetry of traffic origination on many of the routes on which the services overlap (on at least 15 of the 35 routes, the majority of the customers

originate in Ireland) (recital 406); that explains how a base at Dublin airport is more advantageous than a base at the other end of the route;

— carriers with a base at the destination airport would normally only operate one route into Dublin, which reduces their degree of commitment to routes from and to Dublin (recital 407). To be as profitable as possible and to ensure a maximum number of rotations in a day, the equipment, the maintenance and the crew need to be situated at Dublin airport, from where the majority of customers depart, rather that at the other end of the route;

— carriers with a base at the destination airport have performed poorly with a low market share. On at least 9 of the 35 routes on which the services overlap, a competing carrier has left the route, unable to compete with Aer Lingus and Ryanair (recital 408). By examining the past situation it is possible to assess what might happen in the future.

126 None of the arguments raised by the applicant in its criticism of the contested decision in that regard is sufficient to call into question the Commission's conclusion and the evidence relied on in support of that conclusion. It has not been established that the Commission erroneously assessed the competitive advantage for the parties to the concentration of having a base at Dublin.

127 Consequently, the Commission set out to the required legal standard in the contested decision how the fact of having an important base at Dublin airport amounted to a considerable advantage in respect of the routes to and from Dublin and the predominantly Irish customers who travel on those routes.

4. *The* '*non-technical evidence*'

(a) Arguments of the parties

128 The applicant acknowledges that it competes with Aer Lingus for a limited group of passengers, just as it does with other network carriers such as Air France, Lufthansa and British Airways. The 'non-technical evidence' put forward by the Commission in its statement in defence thus simply reflects such competition. The yield management systems and monitoring of market developments are standard practices in the airlines sector and their use by Ryanair and Aer Lingus does not therefore establish that they exercise 'significant competitive constraints on each other'. Ryanair monitors the fares of all airlines and not just those of Aer Lingus. Such monitoring puts Ryanair in a position to respond in those 'rare cases where Aer Lingus or other [airlines] offer lower promotional fares'. Moreover, if the similarity of the yield management systems meant that there was intense competition between Ryanair and Aer Lingus, then that would be borne out by the Commission's econometric results, and that is not the case. Furthermore, although the applicant does not deny that it occasionally adjusts its fares in response to a specific promotion or that it occasionally engages in advertising campaigns that include comparative advertising, it states that those promotional activities concern both Aer Lingus and all the other flag carriers. According to the

applicant, those examples do not however constitute the kind of 'accurate, reliable and consistent evidence' that the Commission must produce. If Aer Lingus exercised any competitive constraint on Ryanair, the evidence would show that Ryanair systematically offers lower fares when Aer Lingus is present on a route. However, Ryanair's econometric evidence categorically refutes any such hypothesis. Finally, the applicant claims that the Commission cannot base its findings on Ryanair's internal documents, which are only of 'anecdotal nature'. The extracts relied on by the Commission do not prove that Ryanair and Aer Lingus exercise 'significant competitive constraints on each other'. In some cases, those discussions are not focused on Aer Lingus but on the general situation on a given route. The Commission can thus not rely on those documents to claim that the two airlines compete closely and to consider that the other flag carriers which are cited in those documents do not compete with Ryanair.

129 The Commission contends that the fact that Ryanair and Aer Lingus are the only two firms in the market for 22 routes on which their services overlap and have very high combined market shares for another 13 routes logically implies that the two airlines exercise competitive constraints on each other. That is confirmed, it submits, by the fact that Ryanair and Aer Lingus use similar yield management systems, that they both regularly monitor the competitive behaviour of their main competitors and adjust their prices accordingly, and that they routinely publish advertisements in which they compare one another's services and fares. In addition, the internal documents of Ryanair contain clear evidence that Ryanair and Aer Lingus are in competition with one another. The contention on which Ryanair has built its case, namely that in view of its low-cost model competitors do not materially affect its competitive behaviour, is baseless.

(b) Findings of the Court

130 In reading the conclusion that Ryanair and Aer Lingus are in competition on certain routes on which their services overlap (section 7.4 of the contested decision), the Commission notes the existence of several items of evidence set out in the contested decision, which have not been challenged by the applicant in its application. That evidence concerns:

— the use, 'like many other carriers', of similar yield management systems: a system that tracks the booking status of each flight and a revenue management system (recitals 438 to 443);

— the use of the same price comparison software tool (QL2) which allows them to monitor the competitive behaviour of competitors and to adapt to reflect demand (recitals 444 and 445);

— the mutual monitoring by Ryanair and Aer Lingus of their promotions and respective advertising campaigns and their reactions to each other's promotions (recitals 448 and 449);

— the references made to Aer Lingus in the context of Ryanair's board meetings in relation to the development of the market shares and the competitive relationship (footnote 471 to recital 446 and footnote 474 to recital 448).

131 On the basis of that evidence, the Commission made the following finding: Ryanair's and Aer Lingus's fares are directly influenced by the fares of their main competitor, since Aer Lingus and Ryanair each take account of the fares charged by the other when determining fares for a given route (sections 7.4.1 and 7.4.1.2) and the parties to the concentration react to each other's promotions and advertising campaigns (section 7.4.2).

132 The applicant does not dispute the 'non-technical evidence' cited by the Commission in the contested decision. It does essentially submit, however, that that evidence is not sufficiently conclusive to be taken into account and that, at any rate, conclusions should be drawn solely from the 'technical evidence' resulting from the various econometric analyses carried out during the administrative procedure. The applicant also submits that the 'non-technical evidence' does not, in any event, enable the finding to be made that the parties to the concentration exert 'significant competitive constraints on each other'.

133 First of all in that regard, the Commission was able to rely on the existence of similar yield management systems, on the monitoring of the competitive behaviour of competitors, on the reactions of one of the parties to the concentration to the promotions carried out by the other or on the monitoring of competitive behaviour of Aer Lingus which is evidenced in the internal documents of Ryanair. The Commission was perfectly entitled to take that evidence into account in the set of factors which it used to evaluate the competitive situation.

134 The fact that some of that 'non-technical evidence' concerns both the competitive relationship between Ryanair and Aer Lingus and that between Ryanair and all the other airlines is immaterial, inasmuch as it is the competitive relationship between

Ryanair and Aer Lingus, the parties to the concentration, on the routes where they both operate, which is being examined by the Commission at that stage of its analysis.

135 In addition, the Commission did not rely on the abovementioned evidence to establish that they exerted 'significant competitive constraints on each other', but to establish that the parties to the concentration were currently competing with one another (heading of section 7.4 of the contested decision; see also paragraph 131 above). It is thus not necessary to determine whether that evidence may be criticised since it could not support a conclusion which was not arrived at in the contested decision.

136 Furthermore, the applicant's assertion that the 'non-technical evidence' cannot be taken into account unless it is supported by 'technical evidence' cannot be upheld. There is no need to establish such a hierarchy. It is the Commission's task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation. It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted. That examination and the associated reasoning are subject to a review of legality which the Court carries out in relation to Commission decisions on concentrations. It is thus in that context that it is necessary to examine the applicant's arguments relating to the conclusions which should have been drawn by the Commission with regard to the various econometric analyses carried out during the administrative procedure and the impact which those conclusions should have had on the evaluation of the competitive situation (see paragraph 181 below).

137 Consequently, particularly in the light of the fact that the applicant's observations are general, inasmuch as the applicant merely states that the evidence on which the Commission based its findings is valid for both Aer Lingus and all of its other competitors but without taking account of the Commission's finding that, for the routes examined in the assessment of the effects of the concentration on competition, Aer Lingus is

Ryanair's closest competitor, it must be held that the applicant has not succeeded in calling into question the validity of the Commission's findings in the contested decision.

138 Those items of evidence, and in particular the extracts of the discussions held during Ryanair's board meetings in relation to Aer Lingus that are in the file, are particularly important in that they corroborate the findings made at the stage of the analysis of the market shares and the degree of concentration and precede the analysis of the econometric information. They were taken into account as part of the set of factors used by the Commission to examine the effects of the concentration on competition.

5. The Commission's econometric analysis

(a) Arguments of the parties

139 The applicant states that econometric analysis helps to 'avoid speculative debates' about the significance of differences in overall price levels, operating costs, service quality, and base location in terms of the competitive assessment. There are numerous flaws in the econometric analysis carried out by the Commission in accordance with the 'fixed-effects' (or 'panel-data') method. In relation to Aer Lingus's impact on Ryanair fares, the Commission cannot find evidence for any such relationship. That is consistent with Ryanair's contention that its pricing policy is driven by its 'desire

to expand its low-costs format' into new markets and new routes and is not 'materially affected' by competitor activity. The Commission purports to find a 'systematic relationship' relating to the two separate sets of models that look, respectively, at the 'presence' and 'frequency' of Ryanair, claiming that as Ryanair frequency increases by 1%, Aer Lingus fares would fall by 0.025% (that is to say, a tiny amount) and that Ryanair's presence on a route would cause Aer Lingus to charge marginally lower fares (between 5 and 8% lower) than those which it would otherwise apply. Despite those figures which indicate only limited competition, the Commission overstated the true competitive impact of the airlines on one another.

140 First, as regards the claimed 'frequency' effect on fares, the applicant maintains that the Commission's presentation is 'highly misleading'. While the impact noted by the Commission might be statistically significant, its actual significance in economic terms is immaterial. The Commission, failing to mention in the decision one of the errors that it initially committed, maintains that if Ryanair were to withdraw completely from all overlap routes and give up all its profits on those routes, there might be an increase of 10 to 12% in Aer Lingus fares. That result would be 'highly unlikely' given that Ryanair committed to not reducing its frequency on the overlap routes and would be based on a 'highly misleading interpretation', since the models used are not capable of measuring the impacts of such large shifts. Moreover, frequency regression shows that even large changes in Ryanair's frequency have only a minor impact on Aer Lingus's fares.

141 Second, with regard to the 'presence' regression, according to the applicant, the Commission's econometric analysis showed that Aer Lingus's fares were 5 to 8% lower on routes where Ryanair was present than on those where Ryanair was not present.

Ryanair typically accounts for half of the capacity on any such route. Consequently, if there were a very substantial withdrawal of capacity by Ryanair, this would have only a relatively small impact on Aer Lingus's fares. Such a small impact on fares arising from such a large presence is not indicative of Ryanair being a significant competitive constraint on Aer Lingus.

142 Third, theoretically speaking, the Commission's models produce a result which is in direct contradiction with economic principles. Thus, it is wrong to consider that increasing capacity leads to higher fares, holding other factors constant. A well known economic principle is that to sell more, the price must fall.

143 Fourth, the applicant claims that the Commission's findings are not robust to small changes in the way in which the seasonal effects were taken into account in the model used. Fares on a route may differ systematically according to the month on the basis of factors which do not affect the impact of competition on fares. An empirical model aimed at explaining fares should take account of seasonal effects, even if there is no 'concrete' way of doing so. In the present case, the Commission assumed that every month in every year was different but that all routes were affected in a similar way in a given month. Thus, in December for example, the Commission assumed that routes serving winter sports stations experienced an increase in demand similar to that of routes serving summer resorts, which is manifestly incorrect. The report of RBB Economics of September 2007, which provides economic criticism of the contested decision and which is attached to the application as an annex, thus shows that, if the seasonal effect was modelled in a reasonable but different way, the Commission's finding that Ryanair had a systematic effect on Aer Lingus's fares would no longer be valid. The seasonal effects were not correctly modelled.

144 Fifth, the applicant claims that the Commission applied inconsistent standards in accepting or rejecting factual evidence. In that regard, the applicant refers to RBB Economics Critique of September 2007. The econometric analysis undertaken by the Commission does not clearly show that Ryanair and Aer Lingus react to each other's promotions. Therefore, it must be considered that such reactions to promotions are either too rare or too limited to be categorised as significant competition between the parties to the concentration.

145 The Commission, supported by Ireland and Aer Lingus group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

146 The applicant disputes the price regression analysis undertaken by the Commission in accordance with the so-called 'fixed-effects' method. It submits that there is no evidence resulting from that analysis with which to assess the impact of Aer Lingus on Ryanair's prices and that confirms its assertion that it is not influenced by the activity of its competitors. Therefore, in its view, the Commission overestimated the actual competitive impact which the airlines have on one another.

147 Also in relation to that point, the applicant reiterates the arguments which it raised during the administrative procedure and which were examined and rejected in the contested decision. In that regard, it is necessary to refer to the content of the contested decision to understand the role played by the price regression analysis during the detailed investigation phase. That role must be assessed in the light of the

case-law on the Commission's margin of discretion with regard to economic matters (see paragraphs 29 and 30 above).

148 The Commission set out in recitals 450 to 488 of the contested decision the results of the price regression analysis which it undertook by using the cross-section regression technique proposed by Ryanair (section 7.4.3.1 of the contested decision) and those obtained by using the fixed-effects regression technique which it favoured (section 7.4.3.3). Those results led it to the conclusion that its analysis confirmed that there was significant competitive interaction between Ryanair and Aer Lingus (heading of section 7.4.3).

149 In recital 450, the Commission began by stressing that it 'believe[d] that the factors described in the previous [recitals] provide[d] sufficient proof that Aer Lingus and Ryanair compete with each other'. The price regression analysis was carried out in order to enable the Commission to test and assess the econometric observations submitted by Ryanair and Aer Lingus, and to evaluate what the likely impact of each of them on the other's fares might be.

150 According to recital 452 of the contested decision, that price regression analysis aimed to test:

— whether the presence of one of the parties to the concentration on the route was associated with a statistically and economically significant reduction in the fares of the other;

— whether the parties to the concentration exerted on each other a stronger competitive constraint than any other existing competitor;

— whether the existence of an actual or potential competitor with a significant presence at the destination airport on a route originating in Dublin had a significant impact on the prices of the parties to the concentration;

— whether a stronger presence of one of the parties to the concentration (in terms of number of frequencies) had a more pronounced effect on the other's fares.

151 As is apparent from the contested decision, the cross-section regression technique examines the differences in prices across a number of affected routes at a given point in time (recital 453). It involves comparing fares charged on routes where there is competition with those charged on routes where there is no competition. The fixed-effects regression analysis examines the differences in fares on the routes concerned over a given period, in this case January 2002 to December 2006 (recital 482). It involves comparing the fares charged on a given route during the periods when there is competition with those charged during periods when there is no competition.

152 As regards the fixed-effects regression analysis, the Commission stated that a panel regression with route specific fixed-effects could mitigate the omitted variable bias that affects cross-section regressions. It considered that that method was 'the most suitable to assess the competitive constraint exerted by Ryanair on Aer Lingus' (recital 477 of the contested decision).

153 The parties' arguments relating to the cross-section regression analysis are referred to and assessed below (see paragraph 183 et seq. below). Only the fixed-effects regression analysis will be assessed in the present considerations.

154 In order to criticise the fixed-effects regression analysis carried out by the Commission, the applicant raises a certain number of arguments, which need to be examined in the logical order adopted in the contested decision, in which the Commission first considered the presence specification (see recital 482 of the contested decision) before examining the frequency specification (see recital 485).

155 As regards the effect of 'presence' on fares, the applicant submits that the analysis undertaken by the Commission showed that the fares charged by Aer Lingus on the routes on which Ryanair also operates were 5 to 8% lower than those which Aer Lingus charges on the routes on which Ryanair does not operate. It claims that, since Ryanair generally accounts for half of the capacity on each of the routes concerned, if Ryanair were to withdraw a very substantial proportion of its capacity, Aer Lingus's fares would only be slightly affected. Such a mild impact from such a significant presence does not indicate that Ryanair exerts a significant competitive restraint on Aer Lingus. In addition, the applicant claims that the Commission failed to prove the impact that Aer Lingus has on Ryanair's fares (see paragraphs 139 and 141 above).

156 First of all, the Commission considered that the fixed-effects regression did not provide reliable estimations of the possible impact of Aer Lingus's presence on Ryanair's fares. In that regard, it stated that there was an insufficient number of instances of Aer Lingus exiting or entering a route on which Ryanair was already present (recital 486 of the contested decision). The applicant does not dispute this.

157 It must therefore be noted that the Commission recognised in the contested decision that it was not in a position to provide econometric evidence of the impact of Aer Lingus's presence on Ryanair's fares and that this could be explained by the reason given above. However, the Commission took care to emphasise that 'this neither validate[d] nor refute[d] the hypothesis that Aer Lingus exerts a competitive constraint on Ryanair's prices'. The Commission supported that statement by noting that 'the evidence presented in [section 7.4.2 of the contested decision] [made] it clear that Ryanair as well as Aer Lingus permanently monitor their own load factor and each other's prices and adjust prices accordingly' (recital 486 and footnote 487, in which reference is made to section 7.4.2, relating to the fact that each of the parties to the concentration reacts to the other's promotions and advertising campaigns).

158 The applicant thus merely reiterates, in that regard, a point made in the contested decision, but that does not enable the inference to be made that there are no competitive constraints between the parties to the concentration. The lack of sufficient information on the number of instances of Aer Lingus exiting or entering a route where Ryanair is already present can be explained by an objective reason, which the applicant does not dispute, and does not suffice for a claim that the competitive constraint between the parties to the concentration which may be inferred from other evidence set out in the contested decision was overestimated by the Commission.

159 Second, the Commission stated in the contested decision that, as there are many instances of Ryanair entering or exiting routes on which Aer Lingus was already present, the fixed-effects regression analysis was very well suited to assess whether Ryanair's presence is 'negatively associated' with Aer Lingus prices (recital 483). The applicant does not dispute this point either.

160 The fixed-effects regression analysis made it possible, inter alia, to validate the hypothesis that 'depending on the specification, … Ryanair's presence is associated with Aer Lingus charging around 7-8% lower prices when considering city-pairs reflecting the Commission's retained market definition and around 5% lower prices when considering airport-pairs'. In the Commission's view, that effect is economically and statistically significant in all of the tested regressions (recital 485 of the contested decision). The applicant, by contrast, claims that this indicates only limited competition.

161 The applicant thus does not criticise those results as such, but merely their significance. The applicant's statements in that regard do not indicate in what respect the effect of its presence on Aer Lingus's fares could not be regarded as economically and statistically significant, as claimed by the Commission.

162 In that regard, a 7 to 8% price influence appears significant at first sight. That effect is also likely to be underestimated, since it is an average which does not take particular account of the routes on which the concentration would lead to the creation of a monopoly. Similarly, as stated in recital 488 of the contested decision, the comparison made by the Commission does not take account of the influence on Aer Lingus's fares of Ryanair's presence as a potential competitor on routes out of Dublin (section 7.6). On those routes, it is in fact likely that Aer Lingus would charge lower fares than it would charge if Ryanair did not have a base at Dublin airport. The applicant can thus not merely challenge the significance attributed to the effect found on the ground that, in its view, it is not significant enough in economic terms.

163 In addition, it is important to bear in mind the role given to the fixed-effects regression analysis in the evaluation of the competitive situation. The Commission thus stated in the contested decision that that analysis confirmed and complemented the conclusions derived from the qualitative evidence, namely that Ryanair and Aer Lingus are

close competitors. It stated that those results were also in line with the opinion of the majority of the people surveyed during the customer survey, from which it is apparent that the parties to the concentration are 'closest competitors' where other airlines operate on the route. It concluded, in that regard, that [t]he fixed effects regressions therefore provide[d] clear and convincing evidence that Aer Lingus's prices are currently constrained by competition from Ryanair (recitals 489 and 490 of the contested decision). That is the context in which the role given to the fixed-effects regression analysis should be assessed. It is apparent from this that it is less the intensity of the competition between Ryanair and Aer Lingus which is emphasised in the contested decision than the fact that the two companies are 'closest competitors' and that Ryanair exerts a competitive restraint on Aer Lingus. The results obtained by the Commission pursuant to the presence specification support the latter two assessments.

164 Consequently, the applicant fails to show how the Commission exceeded the limits of the discretion in relation to economic matters that it enjoys under the case-law.

165 As regards the effect of 'frequency' on fares, the applicant submits that the presentation made in the contested decision is 'highly misleading', in so far as, even if the impact established by the Commission was statistically significant, its economic significance would be negligible. It also claims that the Commission also omitted to mention in the contested decision an error which was initially committed during the administrative procedure and reached a 'highly unlikely' conclusion. In addition, the frequency regression shows that even large changes in Ryanair's frequency would only have a minor impact on the fares charged by Aer Lingus (see paragraph 140 above).

166 In that regard, it should be noted that a different specification from the initial presence specification, examined above, was used by the Commission in its analysis of the fixed-effects regression, namely the frequency specification. That specification aims to test whether the number of frequencies of one of the parties to the concentration on a given route is associated with the other party charging lower fares (recital 482 of the contested decision). The Commission expressly pointed out in the contested decision that the effect generated by the regressions based on frequency made it possible to add to the robustness of the results derived from the presence specification (fourth indent of recital 485). In its view, the effect on fares indicated by the frequency specification thus provides an additional element with which to check the 'robustness' of the effect obtained by using the presence specification.

167 In that context, the Commission concluded that measuring, as a proxy, Ryanair's degree of presence in terms of the frequency of flights on a route made it possible to confirm that Ryanair exerted a competitive constraint on Aer Lingus. The Commission also stated that '[d]epending on the specification the price effect of the merger implied by the Commission's frequency regressions is around 5-6% (on average over all routes) or 10-12% (if only overlap routes are considered)' (fourth indent of recital 485 of the contested decision).

168 The Commission's analysis cannot be called into question by the applicant's assertion that the Commission's presentation is 'highly misleading' and its result 'highly unlikely'. In support of its claim that the Commission's presentation is 'highly unlikely', the applicant submits that it gave a commitment not to reduce its frequencies on the routes on which their activities overlap following the implementation of the concentration. However, that commitment, which applies to the future, does not affect the results of the econometric analysis carried out by the Commission on the basis of data covering the period from January 2002 to December 2006. At that stage of the analysis, the Commission merely set out the various elements which it took into

consideration in the set of factors used in reaching the conclusion that the parties were competing with one another at the time (section 7.4 of the contested decision).

169 In claiming that the presentation is 'highly misleading', the applicant submits that the models used are not capable of measuring the impact of such significant changes. In the applicant's view, the Commission offers an 'alternative and misleading interpretation' of the frequency regression by trying to calculate the expected price increase if Ryanair were to cease to exist on all the routes on which Aer Lingus operates. In that regard, it refers to point 290 of Annex IV to the contested decision. However, in that annex, the Commission set out the reasons why it used the hypothesis criticised by the applicant. In the present case, it was the adoption, by analogy, of the method used by the economic experts involved in *FTC* v *Staples/Office Depot* in the United States (see points 288 to 290 of Annex IV to the contested decision and the references made to the publications in footnote 87 of that annex). The applicant thus cannot simply state that that hypothesis constitutes an 'alternative and misleading interpretation' of the frequency regression without commenting on the reasons given by the Commission for using that hypothesis in this case. Account must also be taken of the accessory role which the Commission attributed to the analysis of the effect of frequency on fares, which is referred to only to confirm that Ryanair exerts a competitive constraint on Aer Lingus and to confirm the reliability of the results obtained from the use of the presence specification in any case (see paragraphs 166 and 167 above). Whether they stem from the use of the presence specification or the frequency specification, those results play only a limited role in the evaluation of the competitive situation (see paragraph 163 above).

170 Consequently, the applicant fails to show how the Commission exceeded the limits of the power of appraisal of economic situations which it enjoys under the case-law.

171 As regards the complaint concerning the error initially committed by the Commission, it should be pointed out that that error is apparent from point 64 of Annex IV to the statement of objections sent during the administrative procedure, in which the Commission stated the following:

'… This approach … allows us to interpret the coefficient of the frequencies variable as the elasticity of fares with respect to the number of monthly frequencies that a rival offers [on] the route. For example, if the coefficient is 0.02, this means that a 1% increase in a rival's monthly frequencies leads to a 2% increase in fares.'

172 In the second sentence the Commission should have written 'if the coefficient is 2'. None the less, that error is not serious. It concerns a hypothetical example used to illustrate the functioning of a coefficient in the application of the frequency specification. That error is unrelated to the Commission's interpretation of the actual results. Moreover, the error was not concealed, but expressly referred to in the contested decision (points 285 and 286 of Annex IV thereto). Furthermore, the error does not relate to the presence specification, which is regarded as being more relevant (see paragraph 166 above).

173 The Commission can thus not be accused of having carried out an erroneous analysis in the contested decision on the basis of a minor error, which appears to be a slip of the pen at an earlier stage.

174 As regards the argument that the Commission's models are in contradiction with economic principles since they lead to the paradoxical result that a growth in capacity leads to higher fares (see paragraph 142 above), it should be noted, as the Commission does, that since capacity is determined before fares in the passenger air transport

sector, the econometric criteria used restore the link between fares and anticipated demand once capacity has been determined (and not actual demand). The applicant's argument thus does not take account of the characteristics which are specific to the sector at issue, in which decisions regarding capacity display certain particular features.

175 In its argument alleging that the Commission's findings are not robust to small changes in the hypotheses underlying the model used, the applicant states that the Commission assumed that every month in every year was different but that all routes were affected in a similar way in a given month. In the applicant's view, if the seasonal effect was modelled in a reasonable but different way, the Commission's finding that Ryanair had a systematic effect on Aer Lingus's fares would no longer be valid (see paragraph 143 above).

176 It should be noted in that regard that the fixed-effects regression analysis carried out by the Commission involves looking into the differences on the various routes which affect fares and do not vary over time. In Annex IV to the contested decision the Commission set out the reasons why it considered that the results obtained were robust to the introduction of other control variables in relation to supply and demand factors, which might vary over time and depending on the route. It stated that the use of fixed-effects in time enabled satisfactory control of seasonality and exogenous shocks for any given month. Those results would even be robust to the use of alternative models to take account of seasonality, as proposed by Ryanair during the administrative procedure (points 255 to 267 of Annex IV to the contested decision).

177 Thus, the applicant merely asserts that another approach to the seasonal effects could modify the results obtained. However, reference is made to that approach in Annex IV to the contested decision and the applicant does not state how the comments made by the Commission in that regard are erroneous.

178 Consequently, the applicant fails to show how the Commission exceeded the limits of the power of appraisal of economic situations that it enjoys under the case-law.

179 In response to the argument alleging the application of inconsistent standards in accepting or rejecting factual evidence (see paragraph 144 above), it should be noted that, in the contested decision and in Annex IV thereto, the Commission carried out a detailed examination of all of the econometric data submitted by the parties and of the observations which they were able to make on their own data. The Commission also performed further tests and extensions of the baseline regressions included in the statement of objections in order to address those observations (see point 7.3 of Annex IV to the contested decision which is devoted to those observations).

180 In the light of that examination, and in the light of the fact that, in its remarks in that regard, the applicant merely reiterates the complaints set out elsewhere on the different aspects of the fixed-effects regression analysis carried out by the Commission, it must be found that the applicant fails to show how the Commission exceeded the limits of the power of appraisal of economic situations that it enjoys under the case-law.

181 As regards the claim that the econometric analysis carried out by the Commission does not clearly show that Ryanair and Aer Lingus react to each other's promotions, it must be pointed out that that was not the purpose of the analysis (see paragraph 150 above). In the part of the contested decision relating to promotions and advertising campaigns the Commission did not base its findings on the analysis of the fixed-effects regression, but on the analysis of Aer Lingus's and Ryanair's advertising strategy (see section 7.4.2 and the numerous references made in footnotes 474 to 477 to the press releases and internal documents of Ryanair and Aer Lingus's response to a questionnaire of the Commission). The conclusions drawn by the Commission in that part of the contested decision thus cannot be called into question, as such, by the results of an econometric analysis whose purpose was not to examine that issue.

182 It is therefore apparent from the examination of the content of the contested decision and Annex IV thereto that none of the arguments raised by the applicant is capable of calling into question the validity of the Commission's conclusions, whether that be in relation to the method used, the results obtained or the use of those results in the contested decision in the assessment of the effects of the concentration on competition.

183 In any event, the results of the regression analysis undertaken by the Commission were used only to confirm and complement the conclusions drawn on the basis of the qualitative evidence that Ryanair and Aer Lingus are close competitors.

6. The econometric analyses submitted by Ryanair

(a) Arguments of the parties

184 The applicant maintains that the Commission chose to ignore econometric data submitted by it in the administrative procedure. That data was designed to test whether the presence of Aer Lingus on a route would constrain Ryanair from charging higher fares. That evidence comprised cross-section information, comparing one route with another, from over 300 routes throughout Europe, as well as a panel model. According to the applicant, both those elements consistently showed that Ryanair is not constrained in setting fares by the presence of Aer Lingus on a route. Ryanair's evidence has a number of advantages over the Commission's own model (economic critique of RBB Economics of September 2007).

185 First, Ryanair's cross-section model uses information concerning the routes on which it operates. The applicant claims that that information was dismissed by the Commission 'on theoretical grounds', based on the fact that it was not directly related to Ireland, the departure country of the routes affected by the concentration, and that there was a possibility that 'unobserved differences' across routes may influence results. In its view, both objections are clearly unfounded because Ryanair operates the exact same business model across Europe, without making any distinction between Irish and non-Irish routes, and the objection regarding 'unobserved differences' applies to the Commission's own model as well, in that the Commission has admitted to a 'selection problem' and an 'endogeneity-of-frequency problem'.

186 Second, it claims that Ryanair's panel regression effectively controls for demand fluctuations that significantly affect the fares on a route. That feature was superior to the Commission's models, which are most likely to have failed to account adequately for demand factors. The Commission, in principle, acknowledges the benefits of that demand 'proxy' at route-level but arbitrarily chooses to disregard it on a theoretical possibility that the variable may 'fail in some' circumstances. Moreover, in relation to Ryanair's finding of the absence of a significant Aer Lingus effect on Ryanair fares, the Commission contends that a 'failure to prove a statistical link is not equivalent to proving that no such link exists' (recital 476). Therefore, the Commission has set an impossible standard for Ryanair to reach.

187 Third, the Commission labels Ryanair's econometric approach as 'unconventional', even though it is the same method as that applied by the economists whose work is the basis for the Commission's analysis (points 117 and 288 of Annex IV to the contested decision).

188 As a result, Ryanair's data are based on more solid models than those of the Commission, are more representative of the Ryanair business model, are capable of dealing with demand fluctuations and are more 'robust' to changes in the modelling assumptions. The Commission's own econometric analysis, moreover, does not contradict the conclusion drawn from that data that Ryanair is not constrained in terms of competition by Aer Lingus.

189 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

190 The applicant submits that the Commission could not dismiss its econometric data as it did for the reasons set out in the contested decision (section 7.4.3.1 and point 5 of Annex IV in relation to the cross-section regression analysis; section 7.4.3.2 and point 6 of Annex IV in relation to two-stage regressions).

191 In that regard too, the applicant is reiterating arguments which it raised during the administrative procedure and which were examined and rejected in the contested decision. On that point, reference needs to be made to the contested decision to understand the role played by the price regression analysis during the detailed investigation phase. That role is to be assessed in the light of the case-law on the margin of discretion that the Commission enjoys with regard to economic matters (see paragraphs 29 and 30 above).

192 It should be noted, first of all, that the Commission carried out a detailed examination in the contested decision of the two econometric studies provided by Ryanair. Thus, in dismissing the cross-section regression analysis, the Commission stated that Ryanair was attempting to establish whether its own fares were lower on the routes on which it was in competition with Aer Lingus and that Ryanair claimed to show that this was the case on analysing the fares on 313 European routes on which it operates and then concluded that there was no statistically significant association between the presence of Aer Lingus and Ryanair prices on a given route (recitals 457 to 459). The Commission refused to accept that this finding provided evidence that Aer Lingus did not exert a competitive restraint on Ryanair for the following reasons: first, the results of the study were 'not robust', that is to say they would not hold if the underlying assumptions were slightly changed, and certain specific technical problems rendered

those results unreliable; second, comparing the different routes (cross-section method) is problematic since the characteristics of the routes are not taken into account; and third, the data set out is not confined to routes from and to Dublin, but includes a large number of European routes which are neither from nor to Dublin (recitals 460 to 462 and point 5.2 of Annex IV).

193 To rectify those problems as far as possible, the Commission carried out its own cross-section analysis of the routes from and to Dublin. It claims that the results obtained did not confirm Ryanair's findings. They showed that Aer Lingus's fares were lower on the routes on which Ryanair operates and that Ryanair charged lower prices when in competition with Aer Lingus. However, for technical reasons, the Commission found in the contested decision that no definitive conclusion could be drawn either from Ryanair's cross-section analysis or from its own (recitals 463 to 468).

194 In addition, contrary to what the applicant claims, the Commission did not arbitrarily reject, in the contested decision, its two reports relating to two-stage regressions (also called 'panel regression'). Those reports were carefully examined and they were not used as evidence for the reasons set out in recitals 473 to 475 and in point 6 of Annex IV. In particular, the Commission stated that the method used by Ryanair de facto reduced the panel approach to a simple cross-section analysis. The error which led the Commission to reject both Ryanair's cross-section analysis as well as its own analysis, namely the failure to take sufficient account of the characteristics of the routes, also invalidates Ryanair's two-stage regression analysis. The Commission also stated that, by choosing a complex two-stage method and grouping data on routes from Ireland, Ryanair increased the likelihood that its regression would not produce statistically significant results.

195 It is thus apparent from the examination of the contested decision and Annex IV thereto that none of the arguments raised by the applicant is capable of affecting the validity of the Commission's conclusions that, first, neither Ryanair's nor its own cross-section analysis was robust to the necessary standard (recital 468) and, second, Ryanair's two-stage regression analysis did not have sufficient probative value to establish that Ryanair was not constrained at all by Aer Lingus in terms of competition on routes out of Ireland (recital 476).

7. *The competitive constraints exerted by charter companies*

(a) Arguments of the parties

196 The applicant claims that charter airlines would exert a competitive constraint on the merged entity 'in the context of, for example, sun and ski destinations'. By excluding, in section 6.7 of the decision, charter airlines from the relevant market, the Commission committed an error. The major part of charter seat capacity is made available to the market through tour operator package holidays. In the decision, the Commission dismisses the relevance of those seats on the ground that '[t]he market for sales of seat packages to tour operators is a market which is upstream to the market for seat sales to individuals' (recital 299). However, customers booking flights on charters from tour operators could as easily book with scheduled flights on carriers such as Ryanair (see Commission decision of 4 May 2007, Case COMP/M.4601 — *KarstadtQuelle/MyTravel*). The Commission also indicates in the contested decision

that [t]he fact that tour operators are negatively affected by low-frills carriers does, however, not mean that these tour operators exert any competitive pressure on the Merging Parties' (recital 308). However, any negative effect that tour operators have felt from low-cost carriers almost certainly results from 'disintermediation' (that is to say, consumers having chosen to book independent holiday trips abroad instead of buying a package tour). If, as is likely, tour operators react to the loss of sales by dropping their prices to fill their charter aircraft, the fact of doing so will cause some consumers to switch back from low-cost scheduled carriers to the tour operators' products. In other words, tour operators are likely to exert some constraints on scheduled carriers where the latter fly consumers to holiday destinations.

197 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

198 The applicant submits that charter airlines would exert a competitive constraint on the merged entity 'in the context of, for example, sun and ski destinations'. Those airlines should thus have been taken into account in the definition of the relevant market and the assessment of the effects on competition.

199 However, in that criticism the applicant merely reiterates the facts examined by the Commission in section 6.7 of the contested decision, in which it concluded, first, that 'most of the services offered by charter airlines [were] not in the same market as scheduled air transport services (package holiday sales, seat sales to tour operators)' and, second, that '[the issue of] whether or not dry seat sales [were] part of the same relevant market [could be left open], because this would not change the competitive assessment' (recital 311). The latter conclusion is based on the observation, which is not disputed by the applicant, that charter airlines, in offering very few 'dry seat' tickets on the routes at issue, would not exert a significant competitive constraint on Ryanair-Aer Lingus combined (recital 306).

200 The reasons set out in the contested decision are sufficient to establish the Commission's conclusion. In addition, the applicant does not show that the taking into account of charter airlines affected the Commission's assessment of the state of the competition.

201 Consequently, that argument of the applicant must be rejected.

8. *The passenger survey*

(a) Arguments of the parties

202 The applicant complains that 'excessive weight' was given to the Commission's passenger survey purportedly establishing that Ryanair and Aer Lingus compete with one another more than they do in reality. That survey was 'deficient and defective' in numerous respects, which are elaborated upon in detail in York Aviation's report of September 2007, annexed to the application.

203 First, the applicant maintains that the passenger survey was designed so poorly that questions were 'ambiguous and misleading'. The Commission could not have reasonably ignored those ambiguities in a case where one of the key issues to be decided is whether a given secondary airport is a close enough substitute for a particular primary airport. In that regard, the Commission itself noted that the survey was not designed to measure airports substitutability.

204 Second, the applicant alleges the following major flaws regarding the conduct of the survey. First of all, the scale of the survey was too small to be representative of the overall population, which makes the results unreliable. Only one of the 50 or so airports in question (namely Dublin) was involved in the survey (and not Cork, Shannon, or United Kingdom or continental European airports) which means that the number of non-Irish originating passengers was likely to be seriously understated to the extent to which passengers considered non-Irish carriers as substitutes on routes between Dublin and the United Kingdom or continental Europe. Next, while it may have been possible, in principle, to conduct the survey on a self-completion basis, this became manifestly inappropriate in the light of the ambiguous and/or misleading wording of the final questionnaire (see question 8 of the questionnaire, on

substitutability) and was inconsistent with good practice. Similarly, because of the times at which the survey was conducted, there was inconsistent coverage over the course of the day and the week, which undermines the reliability of the results (for example, the Dublin-London (Heathrow) route, on which many business passengers travel, was surveyed at the weekend, when they are less likely to travel). Furthermore, the questionnaire was only distributed in English, which meant that the proportion of non-English speakers (for example, overseas residents and some migrant workers in Ireland) was reduced and the likelihood that the questionnaire would be misinterpreted was increased.

205 Third, the applicant observes that the subsequent analysis of the survey results was equally 'manifestly flawed'. In particular, a 'reasonable decision-maker' could not have drawn the inferences which the Commission did without first weighting the results in the way described by Ryanair, namely as set out, in the York Aviation report of September 2007.

206 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

207 In the contested decision, the Commission referred to a passenger study carried out by its staff before concluding that it was apparent that the passengers flying from or to

Dublin considered Aer Lingus and Ryanair to be 'closest competitors' (section 7.3.5 of the contested decision, in particular recital 416 and footnote 450, point 3, of Annex I and table A.4.5 of Annex II). The results were analysed on the basis of unweighted data (section 7.3.5.1), unweighted data by route category (section 7.3.5.2), and weighted data, and remain significant (recital 428). The Commission claims that those results are also confirmed by another survey carried out by Aer Lingus (recital 430).

208 As regards the complaints relating to the design of the survey and the questions asked, it should be noted that the Commission pointed out in recital 419 of the contested decision what was the primary goal of the survey, namely to validate or refute the applicant's claim that Ryanair and Aer Lingus are not considered to be substitutes by their respective customers on routes out of Dublin. Therefore, the Commission was rightly able to consider that asking passengers directly whether they had considered Aer Lingus or Ryanair when choosing their flight on a particular route out of Dublin was the best way to avoid a biased response to the question seeking to test Ryanair's claim that the parties to the concentration do not exert a competitive constraint on each other. The applicant can thus not criticise the choice of such a question.

209 Similarly, it cannot be claimed that the scale of the survey was too small to be representative since the Commission collected roughly 2 500 responses to a questionnaire which was specially designed for this case and was in line with a request which had been made to that effect by Ryanair. The other criticisms made by the applicant in relation to the survey, namely that it was carried out on a weekend, in English, only in Dublin and by using a self-completion questionnaire technique, were addressed in Annex I to the contested decision which gives details on the passenger survey (recital 415) and in the context of which the Commission essentially stated, convincingly, that those particularities could be explained by the fact that time was too limited to carry out a survey on a wider scale, over a full week, in several languages, in the

other airports and without using the self-completion questionnaire technique, which is common practice in the air transport industry in any case.

210 In response to the claim that the results of the survey were based on unweighted data, it must be pointed out that, following Ryanair's response to the statement of objections, the Commission weighted the results in the way suggested by Ryanair and found that the main conclusions did not differ. That was set out in recitals 426 to 430 of the contested decision and has not been challenged by the applicant in the context of the present application.

211 Consequently, in the light, in particular, of the fact that the applicant's observations are general, and since it merely asserted that it would have been possible to carry out a more exhaustive survey but without taking account of contingencies related to the time-limits laid down in the area of control of concentrations, it must be found that the applicant fails to demonstrate to the required legal standard that the abovementioned findings of the Commission are erroneous.

9. *The survey of corporate customers*

(a) Arguments of the parties

212 The applicant claims that the Commission failed to act as an 'independent, diligent and objective fact-finder' when evaluating the results of the survey of corporate

customers (in particular as regards the responses to questions 15, 19 and 21 of the questionnaire). It acted selectively and inconsistently in relying on those results to support its view that 'there is still some differentiation in terms of brand and service offering between Aer Lingus and Ryanair' (recital 366 and footnote 377 of the contested decision), but in failing to take account of it elsewhere, for example regarding airport substitutability, on the ground that those responses were 'of limited value for certain aspects of the investigation' (recital 97). By choosing to ignore those responses for the analysis of the closeness of the competitive relationship between Ryanair and Aer Lingus, the Commission failed to take account of the opinion of firms which did not consider Ryanair and Aer Lingus and the airports they serve to be close competitors. According to the Commission, the views of large corporate customers are not 'necessarily representative' of the views of the customers of Ryanair and Aer Lingus because they may generally be more time-sensitive and many have special deals (corporate deals) with network carriers that make them biased vis-à-vis such carriers (recital 414). Those statements are unsupported and eliminate a highly important category of passengers, notably, in the case of Aer Lingus, time-sensitive passengers. By excluding such data, the Commission overstated the degree to which Ryanair and Aer Lingus compete, particularly on those routes where time-sensitive passengers travelling on business represent a significant percentage of the total passengers. For example, between June 2005 and 2006, Microsoft booked 3 268 flights from Dublin to London (Heathrow) on Aer Lingus but only 34 flights from Dublin to London (Stansted) on Ryanair.

213 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

214 The applicant criticises the Commission's use of the responses of corporate customers to the survey which was sent to them. Although some of those responses were used in the contested decision, for example in finding that there was still some differentiation in terms of brand and service offering between Aer Lingus and Ryanair (recital 366), others were not taken into account in so far as they were regarded by the Commission as being of limited value, in particular in so far as concerns airport substitutability (recital 97). The Commission provided a certain number of explanations in that regard in recital 414 of the contested decision.

215 It seems perfectly conceivable that the responses of passengers or competitors to some questions will be more relevant or more convincing than the responses given to other questions. The Commission can thus not be accused of having acted incoherently or unreasonably on the sole ground that it attached less importance to the responses which it considered to be less relevant.

216 In the present case, the applicant cannot overlook the reasons set out in the contested decision in support of the Commission's assertions there regarding the results of the survey of corporate customers (recitals 36, 97 and 414). In that regard, the finding that the views of large corporate customers are not necessarily representative of the views of the customers of Ryanair and Aer Lingus because they may generally be more time-sensitive and many have deals with network carriers cannot be classed as an unsubstantiated hypothesis. Corporate customers are generally more time-sensitive than other passengers and many companies have deals with one or more airlines.

217 The fact that a corporate customer booked a significantly higher number of flights with Aer Lingus to London (Heathrow) than with Ryanair to London (Stansted) does not constitute strong evidence that the two services are not substitutable, since that customer had an agreement with Aer Lingus which explains why it preferred to fly with that airline at that time. In addition, sales made as part of a corporate contract represent less than 5% of Aer Lingus's total turnover (footnote 331 of the contested decision), with the result that the majority of its passengers do not benefit from such a contract. In any event, it is apparent from the responses of the corporate customers that roughly 80% of the participants of the survey indicated that they considered Ryanair and Aer Lingus to be close competitors on routes to and from Ireland (response to question 2 of the questionnaire).

218 None of the arguments raised in that regard by the applicant thus makes it possible to call into question the analysis made in the contested decision. The reasons given by the Commission in recital 414 in support of its decision not to take account of certain results of the survey of corporate customers are founded to the required legal standard.

10. *The harm to consumers*

(a) Arguments of the parties

219 The applicant maintains that the Commission did not demonstrate in the contested decision that the alleged elimination of effective competition between Ryanair and

Aer Lingus would harm consumers by leading to increased fares and/or a reduction in the number of flights (recital 491). The Commission's regression analysis is 'seriously flawed' and does not support that conclusion. Moreover, the Commission ignored extensive analysis to show that fares on routes where there is only one carrier are not higher than on routes where there are multiple carriers. Nor did the Commission establish in the decision that the expansion of flights and opening of new routes were due to the competitive relationship between Ryanair and Aer Lingus (recital 493).

220 Moreover, as regards potential competition between Ryanair and Aer Lingus on the 15 routes on which currently only one of the two airlines is active (recitals 498 to 540 of the contested decision), the applicant maintains that the Commission overstated the competitive constraint that the airlines exert on each other and understated the competitive constraint exerted by third parties and their ability to enter those routes. In particular, the Commission wrongly claimed that Ryanair and Aer Lingus enjoyed specific advantages with respect to Irish routes that would make entry by third airlines 'unlikely'. The Commission failed to prove, to the requisite standard, that the concentration would lead to a significant impediment of effective competition through the elimination of potential competition on the 15 routes identified by the Commission.

221 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

222 As regards harm to consumers, the applicant merely reiterates the content of the contested decision and submits that it is not sufficient to establish the Commission's conclusions.

223 In the contested decision, the Commission did however explain in detail why the concentration would eliminate current competition between Ryanair and Aer Lingus to the detriment of customers, both on the routes on which the services of the two parties to the concentration overlap (section 7.5) and on those on which only one of the airlines is present (section 7.6). A route-by-route analysis was also undertaken in the contested decision and the Commission came to the same conclusions (section 7.9).

224 In its reasoning, the Commission noted that the barriers to competition and thus the harm to consumers would result from the disappearance of the competitive relationship between Ryanair and Aer Lingus and from the fact that no remaining competitor or potential entrant would be in a position to compete effectively with the merged entity. Aside from the effects on prices, since the entity resulting from the concentration would no longer be subject to the same pressure which previously existed between Ryanair and Air Lingus, the concentration would also have repercussions on the quality of the offer and choice made available to customers.

225 As regards the submissions relating to the econometric analysis, both in relation to the Commission's study and the applicant's analyses, those arguments have already been examined above. Given that the applicant does not put forward anything new in that regard, reference should be made to the findings made above on that point (see paragraphs 138 to 194 above).

226 None of the arguments raised by the applicant thus enables the analysis set out in the contested decision to be called into question.

227 It is apparent from all of the above that the first plea must be rejected in its entirety.

228 As this conclusion has an impact on the assessment of the analysis of the effects of the concentration on competition, it is none the less necessary to examine the other three pleas in law, which concern that issue.

B — *The second plea, regarding assessment of barriers to entry*

229 After having assessed the situation as regards current competition on the relevant markets and having set out the reasons why the concentration would eliminate current competition between the parties to the concentration to the detriment of customers, the Commission examined the issue of the extent to which a new entrant might constrain the conduct of the merged entity (section 7.8 of the contested decision). The Commission noted that, for an entry to be regarded as a sufficient competitive restraint on the parties to the concentration, it had to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the concentration (recital 545 of the contested decision and footnote 547, in which reference is made to point 68 of the Guidelines).

230 The Commission's analysis in the contested decision, which is relevant for the assessment of this plea, comprised the following stages: first, the finding that regulatory barriers do not play an important role as barriers to entry (section 7.8.2); second, the findings of the existence of barriers to entry related to Ryanair's and Aer Lingus's 'strong position' with large bases in Ireland (section 7.8.3); third, the finding that entry costs and risks would be significant in a market already served by two strong airlines with well-established brands (section 7.8.4); fourth, the finding that the risk of 'aggressive retaliation' by Ryanair-Aer Lingus combined is high (in the context of that examination the Commission referred to the entry attempts of easyJet, MyTravelLite and Go Fly (section 7.8.5)); fifth, the finding that competitors considered other markets more attractive than the small Irish market (section 7.8.6); sixth, the finding that airport congestion constitutes an additional barrier to entry, both at Dublin airport and certain destination airports (section 7.8.7); and seventh, the finding that the strong position of the merged entity at Dublin Airport might hinder further expansion by competitors (section 7.8.8).

231 In conclusion in that regard, the Commission considered that there were a number of significant barriers to entry in relation to the operation of flights from or to Dublin in competition with Ryanair-Aer Lingus combined. Those barriers go well beyond the problem of the partly congested airport and are linked, in particular, to the well-established position of Ryanair and Aer Lingus at their home base. The investigation showed that, as a result of those barriers, entry was not likely, and even unlikely, on almost all of the routes on which their services overlap. In the absence of potential entrants on the vast majority of the routes on which the services overlap and given that competitors have unanimously indicated that they would not even consider entering in direct competition on a significant scale with the merged entity (in particular by opening a base at Dublin), the Commission concluded that entry was not likely, timely and sufficient to constitute a sufficient competitive constraint on the entity

resulting from the concentration and defeat the likely anti-competitive effects of the proposed concentration (recital 784 of the contested decision).

1. *The significance to be attributed to the lack of entry of new competitors on the relevant markets*

(a) Arguments of the parties

232 First of all, the applicant agrees that for entry to be regarded as a sufficient competitive constraint, it must be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the proposed concentration (recital 545 of the contested decision). However, the applicant submits that the Commission made several manifest errors of appraisal in its assessment of whether those conditions were met in this case and in its conclusion that entry was not likely, timely and sufficient to constitute a sufficient competitive constraint on the merged entity and defeat the likely anti-competitive effects of the proposed concentration (recital 784). In the applicant's view, the proposed concentration would not significantly impede effective competition because the threat of entry would offset any loss of competition resulting from the concentration. It emphasises, in that regard, that it does not disagree with the Commission regarding the fact that, following the concentration, entry would become 'unlikely' on numerous routes.

233 In fact, according to the applicant, the fundamental point in dispute is the significance to be attributed to the lack of entry. Whilst the Commission considers that it must mean there are barriers to entry, the applicant contends that the lack of entry is accounted for by the presence of an efficient airline on those routes that serves consumers so well that there is no scope for profitable entry. The assessment of the alleged anti-competitive effects and that of barriers to entry are closely linked and therefore a new entry is relevant only to the extent to which it is considered necessary to offset the competitive constraints that allegedly would be lost as a result of the concentration. However, the Commission significantly overstated the competitive constraints that allegedly would be lost as a result of the concentration and therefore also considerably overstated the degree of entry required to offset that loss. In a liberalised market, characterised by multiple potential entrants, the mere threat of timely entry is sufficient to prevent the entity resulting from the concentration from benefiting from the disappearance of the alleged competitive constraints. The Commission is therefore wrong to insist on the need for an entry that is 'timely' and 'certain' or to consider that entry onto only some of the 50 routes affected by the concentration would not be of sufficient scope to offset the alleged anti-competitive effects.

234 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

235 To accept the arguments raised by the applicant as a preliminary point, the Court would essentially have to reverse the conclusion which it reached following the examination of the first plea.

236 It is true, as the applicant points out, that the assessment of the alleged anti-competitive effects and the assessment of the barriers to entry are closely linked. In that regard, it is important to note that the applicant shares the Commission's view that the arrival of an entrant is relevant at a theoretical level when its entry offsets the competitive constraints that it is thought would be eliminated as a result of the concentration. It is from that perspective that the Commission examined, in section 7.8 of the contested decision, the issue of the entry of new competitors onto the relevant markets.

237 However, following the examination of the first plea, the Court has upheld the Commission's findings relating, first, to the assessment of the current level of competition between Ryanair and Aer Lingus and, second, to the effects of the concentration on that competition.

238 In that regard, the starting point for the issue of the entrance of new competitors onto the relevant markets is a situation where the new entrant is seeking to access the market on which the merged entity would be present, and where that entity, as has been noted above, would eliminate current competition between the parties to the concentration to the detriment of customers.

239 Consequently, the mere 'threat' of an entry, on which the applicant relies, is not sufficient. Its explanation that there are no entrants because of its efficiency on the relevant routes and because of customer satisfaction, which rule out any prospect of an entrant being profitable on those routes, is also not sufficient. What counts is the prospect of an entrant which offsets the anti-competitive effects specifically established in the contested decision at that stage of the assessment.

2. *Entries and withdrawals in the air transport sector*

(a) Arguments of the parties

240 The applicant maintains that the existence of the barriers to entry referred to by the Commission is contradicted by the lively entry and exit characterising the air transport sector in Europe since it was deregulated (see the York Aviation entry and exit report of 31 July 2008 relating to entries and exits in the European air transport sector). The sector is characterised by dynamic competition and a low level of barriers to entry, as illustrated by Ryanair's 'meteoric expansion' in Europe. Moreover, several competition authorities have taken the view that market shares should not necessarily be regarded as demonstrating the existence of barriers to entry. Those authorities have observed that there were numerous entries and exits in the air transport sector, thus creating a threat of entry in all cases where there are no airport or slot constraints (see, for example, Commission decision of 11 February 2004, COMP/M.3280 — *Air France/KLM*). Moreover, it is not correct to claim that airlines do not enter the markets on which Ryanair is already present: from April 2003 to October 2006 there were 63 examples of entry on city pairs and 9 on airport pairs, including entries in Ireland (see the RBB Economics report of 20 February 2007 relating to barriers to entry).

241 The Commission contests that line of argument. It contends, in particular, that *Air France/KLM* is to be distinguished from the present case for the following reasons: first, the slot divestiture proposed by the parties to that concentration on the Paris-Amsterdam route was only one of several remedies applied; the entity resulting from that concentration was facing competition from high-speed trains; and various competitors had expressed an interest in entering the affected market or applied for slots on that route.

(b) Findings of the Court

242 The applicant contests the Commission's analysis in the contested decision in relation to the issue of the entry onto the markets at issue, by submitting that the air transport sector in Europe has been characterised by lively entry and exit since it was deregulated.

243 That argument is too general to illustrate how exactly the Commission's analysis was erroneous. That analysis does not relate to the air transport sector, but focuses, in particular, on the 35 routes on which the services out of Ireland of the parties to the concentration overlap. The particularities of those routes and of the airlines present on them were set out in the contested decision, in which the Commission highlighted the advantage of having a base in Ireland, the awareness of the brands Ryanair and Aer Lingus on those markets, several failed attempts to enter the market, and the fact that the competitors unanimously indicated that they would not even consider entering into direct competition on a significant scale with the merged entity. The evaluation of the competition and the entries was thus based on a targeted assessment on the affected markets and not on the air transport sector in general.

244 Moreover, the information extracted from the RBB Economics report referred to by the applicant does not support that claim (see RBB Economics report of 20 February 2007 on barriers to entry). It is apparent from the table in Annex III to that report (recent examples of entries in competition with Ryanair) that the majority of the examples cited in relation to routes out of Ireland (Dublin, Cork and Shannon airports) were failed entry attempts in so far as the airline was no longer present on the route the same month a year later (on the Cork-London route (bmibaby); on the Dublin-London route (CityJet); on the Dublin-Bristol route (Air Southwest); on the Dublin-Glasgow route (British Airways); on the Shannon-London route (easyJet)) or Aer Lingus entries (the Dublin-Bristol and Dublin-Liverpool routes). There were only

three exceptions (the Dublin-London route, operated by Air France and referred to in the contested decision; the Dublin-Malaga route, operated by Spanair; and the Dublin-Faro route, operated by TAP Portugal, with no indication as to whether it was still present the following year). All of the other examples relate to destinations which did not have Dublin, Cork or Shannon airports as their place of departure or arrival. Of all the competitors which are present on the market, it is thus Aer Lingus which exerted the most pressure on Ryanair in terms of competition on the 35 routes on which the services of the parties to the concentration overlap. The other recent cases of entry remain marginal.

245 Consequently, it cannot be found that the existence of the barriers to entry referred to by the Commission in the contested decision is contradicted by the lively entry and exit which characterises the air transport sector in Europe since it was deregulated.

3. *The taking into account of the Ryanair economic model*

(a) Arguments of the parties

246 The applicant criticises the Commission for failing to evaluate entries in the context of the economic model (low cost/low fares) used by it. Barriers to entry are defined as factors 'that make entry impossible or unprofitable while permitting established undertakings to charge prices above the competitive level' (Commission discussion

paper on the application of Article 82 EC, paragraph 38). The lack of actual entry onto the routes out of Dublin on which Ryanair operates is not a sign of high barriers to entry or a failure of the competitive process. Rather, it shows that Ryanair is offering such competitive prices and capacity on those routes that other airlines consider that it would make no sense to enter because they would not be able to compete with Ryanair on price and that there is not enough demand to justify additional capacity. If Ryanair were to change its economic model by charging 'higher prices above the competitive level', nothing would prevent third airlines from entering the routes on which Ryanair operates. In that regard, the applicant maintains that the Commission chose to ignore or dismiss evidence showing that, on the routes on which it is the only carrier, the prices which it charges are as low as, or lower than, those which it charges on routes on which it is has competitors (see RBB Economics 'economic critique of September 2007). Moreover, it was necessary to take account of Ryanair's wish to keep Aer Lingus as a 'separate and distinct brand. Thus, the purpose of the transaction was to enter a different segment of the market and compete with 'full-service' airlines, not as a low-fares carrier but by offering services similar to those of a full-service airline but at lower prices. That objective would indeed be more easily achieved through a merger with an existing flag carrier than by establishing a new airline and a new brand, particularly in the light of the shortage of slots at main airports.

247 The Commission contends that the definition cited by the applicant, although valid to assess the conduct of an undertaking in relation to Article 82 EC, is not directly applicable to the control of concentrations. The relevant benchmark for mergers is whether entry onto the market would prevent prices from rising above their level prior to the concentration. Moreover, the fact that Ryanair regularly generates high profits contradicts its claim that it maximises passenger growth by not charging high prices where it is the sole operator. Furthermore, no carrier other than Aer Lingus has

a comparable cost base and committed assets similar to those of Ryanair with a view to competing on routes out of Dublin. A destination-end entrant also faces higher 'opportunity costs' of entry than Aer Lingus because it has more options to deploy aircraft on less cost-competitive routes. Entry against the lowest cost operator in the market is risky and potentially unprofitable when measured against the necessary investment. Precisely the combination of sunk investment and potentially low revenue streams constitutes a barrier to entry.

(b) Findings of the Court

248 As regards the analysis of barriers to entry, it is necessary to place oneself in a situation where the Commission is examining whether the entry of new competitors may be regarded as a competitive constraint which is sufficient to prevent or thwart the potential anti-competitive effects of the concentration. In the present case, those anti-competitive effects result from the disappearance of the competitive relationship between Ryanair and Aer Lingus, which would strengthen Ryanair's market power on a significant number of routes. The applicant's complaints in relation to that part of the assessment were examined and rejected as part of the examination of the first plea. They also form part of the route by route assessment in the context of the third plea.

249 In that regard, the applicant's argument that the lack of entry onto the routes which it operates out of Dublin shows that its fares and capacity are so competitive that no competitor considers that it would make sense to compete is not relevant for the

analysis. Even if it were well founded, that argument refers to a competitive situation in which Aer Lingus is present as a competitor of Ryanair or represents the most likely potential competitor. However, it is not the current situation which is relevant at this stage of the analysis, but the situation which would result from the concentration on the routes dominated by Ryanair-Aer Lingus combined.

250 Similarly, the applicant's assertion that it does not envisage charging prices higher than required to remain competitive following the implementation of the concentration — as it claims is apparent from the fact that on the routes on which it is the only carrier at present the prices which it charges are as low as, or lower than, those which it charges on routes on which it has competitors — cannot cast doubt on the Commission's analysis of the barriers to entry. As the Commission maintains, the control of concentrations differs from the control of the abuse of a dominant position in that it focuses on the control of market structures and not on the control of companies' conduct. The control of concentrations aims, on the basis of a prospective analysis of the market structures, to prevent the implementation of a transaction which would significantly impede effective competition in the common market or a substantial part thereof, in particular by the creation or strengthening of a dominant position. As regards prices, the relevant criterion is thus whether the entry onto the market of a new competitor is capable of preventing prices increasing above their level prior to the concentration. The price criterion is not the only one which may be taken into consideration, since the implementation of the concentration may also affect available capacity, choice, quality of service and innovation.

251 If Aer Lingus did not exist, the temptation would be great for Ryanair to maximise its profits to take account of the lack of competitive pressure resulting from the acquisition of its main actual or potential competitor on the relevant markets. Ryanair's intentions in relation to the use of Aer Lingus or its former pricing practices to not

affect the credibility of that structural risk, which is apparent from the analysis of the anti-competitive effects connected with the elimination of competition between the parties to the concentration.

252 Consequently, it is apparent from the above that the Commission cannot be accused of having wrongly analysed the competitive situation by not taking sufficient account of Ryanair's economic model in its assessment of the likelihood of entries onto the relevant markets.

4. *Advantages related to holding a base airport in Ireland*

(a) Arguments of the parties

253 First of all, the applicant disputes that the 'strong position' held by it and Aer Lingus is attributable to their large bases in Ireland. The Commission failed to offer a definition of what constitutes a base and merely claims that Ryanair's and Aer Lingus's strong presence in Dublin gives them an advantage over rival airlines. The alleged advantages are Ryanair network advantages but not base advantages. Moreover, the Commission gave great weight to the answers of competitors and interested third parties

to the base questionnaire, in particular the Irish Department of Transport, which opposed the concentration. The Commission also denied the relevance of the evidence provided by Ryanair to disprove the existence of any base advantage for Ryanair in Dublin or to compare the situation with that at Charleroi and Hahn (see the report of RBB Economics of 20 February 2007 on barriers to entry, and the note from Ryanair's Deputy Chief Executive on the economics of an airline base, of 28 November 2006). The Commission thereby reversed the burden of proof and thus failed to act as an 'objective and impartial decision-maker'.

254 First, the applicant denies the existence of any economies of scale at base level. The calculation of cost savings made by Aer Lingus, dated 19 February 2007, to which the Commission refers in footnote 414 of the contested decision, derives from assumptions. Aer Lingus, nearly all of whose fleet is based at Dublin, could not draw a distinction between economies of scale that relate to the size of the fleet and those that relate to the size of the base. In fact, customer services and ground handling facilities can be subcontracted without difficulty at Dublin airport without that penalising the airlines that have no base there. Ryanair itself resorts to subcontracting of that kind for ground handling services. The Dublin Airport Authority plc (which manages Dublin, Cork and Shannon airports) does not offer Ryanair better terms of access to check-in facilities than it does to other companies and information desks can be shared with other carriers without difficulty. As regards disruption, the applicant states that it 'rotates' four spare aircraft across all of its 23 bases. Therefore, any cost savings from pooling spare aircraft relate to the fleet and not to the base. As regards slots and stands, the applicant observes, first, that Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1) requires that new entrants are favoured over incumbents when new slots are allocated. Furthermore, incumbents and entrants are on an

equal footing as regards the allocation of stands and previous presence at an airport does not give an airline an advantage over an entrant. The applicant also denies that it has a 'stronger negotiation position' with airports and regulators, contrary to what is stated in recital 383 of the contested decision. Ryanair does not benefit from size-related discounts at Dublin airport, nor expects to do so as a result of the concentration. In terms of the benefits of dealing with suppliers, Ryanair's most important elements of cost are network-wide and are not determined at airport level.

255 Second, the applicant maintains that it has no unique competitive advantage at Dublin as a result of its size, contrary to the statement in recital 384 of the contested decision. For example, Ryanair manages 6 daily rotations on its one Cork-based aircraft, whereas it only achieves an average of 4 on its 19 Dublin-based aircraft. Its costs at various departure airports, where Ryanair merely flies one or two flights on a daily basis, are also comparable to the costs at its bases, or in some cases are lower. Furthermore, other airlines can divert aircraft from existing routes or add further aircraft and use their bases at the other ends of Dublin, Shannon and Cork routes to compete with the merged entity. Ryanair also claims that it has demonstrated that increasing the number of its aircraft based at Dublin leads to no noticeable impact on operating costs. Finally, the fact that Ryanair voluntarily operates flights to Dublin from the other end of the route is hardly commensurate with there being an advantage at Dublin.

256 Third, the applicant asserts that it does not have the capacity to react more quickly to demand shifts as a result of larger operations from one airport, contrary to what is stated in paragraphs 389 to 392 of the contested decision. Carriers without a base in Ireland have the same access to information as those who do have one. Moreover, seasonal effects are also easily predictable for every airline. Finally, charter airlines provide an effective competitive constraint in the high season and one-off events. For

example, even though they do not have a base at Dublin airport, those companies are capable of providing flights during the winter period when there is snow and it is of little importance whether they offer several flights per day throughout the year.

257 Fourth, the applicant considers that competitors with a Dublin base would exert a constraint on the merged entity, contrary to the view set out in recitals 555 to 560 of the contested decision. It is wrong to consider that, as a result of different business models and current operations of insignificant size, CityJet and Aer Arann could not further expand their services at Dublin to offer an even greater competitive constraint on the entity resulting from the concentration. The Commission focuses too much on Aer Arann's numerous business customers, without paying sufficient attention to its rapid growth in recent years and its willingness to compete aggressively with Ryanair. Moreover, companies which leave aircraft overnight at Dublin airport also constitute a constraint, contrary to the Commission's contention in recitals 400 and 560 of the contested decision. An airline does not in fact need to operate a base in order to provide morning and evening flights.

258 Fifth, according to the applicant, competitors with a base at the other end of a Dublin route would exert a competitive constraint on the merged entity. Because Ireland is in fact a 'net tourist destination', the majority of passengers originate outside Ireland, at least on routes for which actual data are available. According to the Commission's logic, being based in Ireland would actually be a disadvantage. The applicant also observes that, if most airlines serving Dublin do not have a base there, it is because they do not regard it as useful.

259 Sixth, the applicant states that companies operating non-base point-to-point routes, or so-called 'W routes', exert an effective constraint on certain routes. Such routes are viable even if only one or two round trips are made between non-based destinations, this being the way in which Ryanair operates on certain routes.

260 The Commission disputes that line of argument by referring to the contested decision. It recognises that economies of scale may arise at network and fleet levels. EasyJet is the only low-frills airline operating on a similar scale to Ryanair. However, Ryanair cannot deny the existence of economies of scale from operating a base or a network without contradicting its own arguments concerning efficiency gains.

(b) Findings of the Court

261 In the course of its analysis of barriers to entry, which is at issue in this plea, the Commission examined the '[e]ntry barriers related to Ryanair's and Aer Lingus's strong position with large bases in Ireland' (section 7.8.3 of the contested decision). In the Commission's view, the fact that Ryanair and Aer Lingus operate from the same base at Dublin airport and that they are also present in Cork and Shannon is one of the reasons why the two airlines are 'closest competitors' on the routes from and to Ireland (recital 552). In that regard, it is apparent from the Commission's previous decisions that the economies of scale resulting from the flexibility of resources at a base and the possibility of spreading fixed costs over many routes constitutes a barrier to entry in

that 'a carrier with an established base of operations at a particular airport will benefit from clear cost advantages.' That role of barrier to entry is reinforced in the present case because of the combination of two carriers with such a strong presence at one and the same airport (recital 553 and footnote 557).

262 In that context, the Commission examined in the contested decision the circumstances in which other operators could replace the competitive constraint which would disappear as a result of the concentration and to what extent the lack of a base at Dublin airport could constitute a barrier to entry. It examined three scenarios: that of an entrant which establishes a base at Dublin airport, that of an entrant which already has a base at the other end of the route and that of an entrant which enters on a route by route basis without a base at either end of the route (recital 554 and sections 7.8.3.1 to 7.8.3.5). The Commission concluded that there were not sufficient indications that a new carrier would enter with a base in Dublin, Cork or Shannon (section 7.8.3.2) and that destination-based entries and entries not based on a destination airport are in general not sufficient to replace the competitive constraint exerted by the parties on each other prior to the proposed concentration (section 7.8.3.5, in particular recital 584).

263 The complaints made by the applicant against that assessment concern either the earlier finding that Aer Lingus and Ryanair operate with a large base at Dublin airport and that this grants them a competitive advantage (section 7.3.4 of the contested decision) or, in a cursory manner, the Commission's finding in its analysis of the barriers to entry that competitors which already have a base at Dublin airport would probably not be in a position to exert an effective constraint on the parties to the concentration, and the conclusions which were drawn from that (sections 7.8.3.1 and 7.8.3.2).

264 It should be noted, at the outset, that the applicant's complaints regarding the competitive advantage enjoyed by Aer Lingus and Ryanair as a result of having a base at Dublin airport were examined and rejected by the Court in its examination of the first plea. They will also be examined in the route by route assessment under the third plea. The following analysis thus applies only to the criticism of the evidence relied on by the Commission in the contested decision as a basis for its analysis of the barriers to entry associated with the 'strong position' of Ryanair and Aer Lingus in Ireland.

265 Thus, as regards the claim that the Commission failed to define the term 'base' (see paragraph 253 above), it is sufficient to note that there is such a definition, for example in recital 44 of the contested decision, in which the term 'base' is used to characterise airports on which airlines base their aircraft and on which they concentrate their operations, offering mainly flights from and to these 'base' airports. That concept was explained in detail in section 7.3.4 of the contested decision.

266 As regards the claim that the Commission gave greater weight to certain information and thus reversed the burden of proof (see paragraph 253 above), it is sufficient to note that this claim is not supported by any further evidence. The applicant cannot merely state, in a general manner, that the Commission gave significant weight to the responses provided by competitors and third parties, in particular the Irish Transport Ministry, which was opposed to the concentration, and that it denied the relevance of the information to the contrary which Ryanair submitted during the administrative procedure. In the absence of explanations as to how exactly the findings in the contested decision on the basis of evidence obtained during the investigation stage are called into question by the opposing evidence produced by Ryanair, such a claim must be rejected.

267 In relation to the economies of scale (see paragraph 254 above) and the capacity to react to demand (see paragraph 256 above), the applicant's complaints must be put into perspective. The Commission does not dispute that Ryanair's network, which comprises 23 bases, provides it with significant advantages. However, the Commission's analysis concerns the advantages granted, in the present case, by having a base at Dublin and being present in both Cork and Shannon. It is those barriers to entry which are examined and not the interest in having a network with numerous bases, like those of Ryanair and easyJet in Europe. In that regard, the Commission notes in the contested decision that there are two main advantages in having a base at an airport: first, it allows a carrier to benefit from certain cost advantages and, second, it increases the carrier's flexibility to react more quickly to shifts in demand (recital 555).

268 Unlike Ryanair's claim that any operator could enjoy the same advantages as it does at Dublin airport, the Commission's analysis on that point is not theoretical. In particular, the Commission actually examined the situation of the two other competitors which have a base at Dublin airport, that is CityJet with three aircraft and Aer Arann with four aircraft, versus Aer Lingus's 22 short-haul aircraft and Ryanair's 20. It noted that those competitors had not developed their bases significantly in recent years and did not intend to do so for their own reasons (recitals 556 to 558). The Commission also noted that any expansion at Dublin airport would increase problems of slot congestion at that airport and may also give rise to slot congestion at some of the destination airports (recital 559). The Commission further stated that it was apparent from the analysis which it carried out during the detailed investigation phase that none of the airlines listed by Ryanair as potential competitors would open a base in Ireland in the event of a price increase after the implementation of the concentration (recital 562 and footnotes 563 and 564 of the contested decision). A number of the competitors cited by Ryanair have now in fact withdrawn over the past few years from the routes which they operated to Dublin (such as British Airways from the Dublin-London (Heathrow) route and Alitalia from the Dublin-Milan route). The applicant's arguments on that point (see paragraph 257 above) merely reiterate the content of

the contested decision and assert that it is erroneous, but do not explain how the activities of CityJet and Aer Arann would develop, even though convincing reasons are given in the contested decision to explain that that would not be the case.

269 In relation to the impact of scheduled airlines or charter airlines having an aircraft parked overnight at Dublin for a season or throughout the year (see paragraphs 256 and 257 above), the Commission rightly noted in the contested decision that the advantages which those companies enjoy were not comparable to those inherent in operating a base, in particular as regards the flexibility of switching between routes, redeployment of aircraft, minimising disruption costs, exchange of crews, customer care and brand awareness (recital 560). It is those advantages of operating a base which are important in this case and not the possibility of offering flights to any particular destination by operating an aircraft.

270 In relation to the use of the aircraft (see paragraph 255 above), the applicant criticises an analysis undertaken by the Commission when examining its competitive relationship with Aer Lingus (recital 384 of the contested decision). The difference in the level of use of an aircraft based at Cork and those based at Dublin is not relevant to the assessment of the advantage from having the use of a base at Dublin as such. However, it is that advantage which the Commission is highlighting in the contested decision (recital 552 et seq.).

271 As regards the cases of entry onto the market via a base airport situated at the other end of the route or via a route which does not have a base (see paragraphs 258 and 259 above), the applicant's arguments merely reiterate the findings made in the contested decision but are not capable of calling them into question. Those arguments are essentially theoretical and do not provide a response to the specific elements referred to

in the contested decision to reach the conclusion that potential entrants with a base at the other end of a route face disadvantages (section 7.8.3.3) and that new point-to-point entry on a non-base route is unlikely (section 7.8.3.4).

272 It follows from the above that the applicant's arguments criticising the analysis of the barriers to entry represented by the advantages linked to the operation of a base airport in Ireland must be rejected.

5. *Costs and risks related to an entry on the market*

(a) Arguments of the parties

273 The applicant denies that its brand and marketing techniques, and those of Aer Lingus, may constitute a competitive advantage. Ryanair's rapid expansion in recent years is clear evidence that pre-existing brand recognition is irrelevant to the ability to enter a new market. Similarly, easyJet's successful entry onto French domestic routes shows that home carriers do not have any advantage on that basis. Search engines and comparison websites facilitate the work of new entrants and, in any event, marketing costs are very low when compared with the number of routes or passengers transported.

274 The applicant also claims that the air transport sector in Europe is a paradigm case of a market that has low barriers to entry because potential sunk costs are low. Those costs are not very high given the many leasing and other financial arrangements available in the industry. In that regard, the 'opportunity costs' of aircraft and additional investments in new aircraft, which the Commission refers to in recital 621 of the contested decision, are not potential sunk costs. The aircraft concerned can be easily sold or leased on secondary markets. It is incumbent on the Commission to demonstrate the existence of sufficiently high sunk costs to amount to a barrier to entry.

275 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

276 In the contested decision, the Commission considered that entry costs and risks were significant 'in a market already served by two strong airlines with well-established brands' (section 7.8.4). Together the two airlines represent 68% of total passenger traffic and 80% of the main intra-European short-haul passenger traffic from and to Ireland.

277 In dismissing Ryanair's observations on that point, the Commission stated that, as is apparent from the Guidelines (point 71(c)) and its previous decisions in the passenger air transport sector, Ryanair's established position could constitute a barrier to entry. Both Aer Lingus and Ryanair have an 'established position' in Ireland, which

constitutes a significant advantage as a result of the experience acquired on the Irish market, of the brand-awareness related to that position and of the fact that entry would require high marketing costs (recitals 588 to 591 and sections 7.8.4.1 to 7.8.4.3 of the contested decision).

278 As regards the advantages related to the brand and to the marketing costs, the applicant's arguments stress either the particular situation of Ryanair, whose established position is rightly emphasised by the Commission in the contested decision, or the situation on a market other than the Irish one. However, it is unlikely that another airline could achieve the same results as Ryanair without a significant investment. Similarly, with regard to the comparison made with the situation of easyJet in France, it should be noted that the Commission stated in the contested decision that that airline had not succeeded in entering the Irish market (recital 635 et seq.). Those arguments thus do not call into question the Commission's conclusion in the contested decision that an entrant would have to incur increased marketing costs to be able to compete with the merged entity, which would have two brands which are very well known in Ireland.

279 In relation to the Commission's assertion that entry onto the market entails a risk of sunk costs for competitors (section 7.8.4.4 of the contested decision), the applicant's arguments are too general to call their validity into question. In particular, it was not the Commission's task in the present case to show, in a general manner, that the sunk costs were high enough to constitute a barrier to entry. The Commission was only required to explain why certain sunk costs represent barriers to entry which might dissuade a potential entrant from entering into competition with the merged entity. It is perfectly admissible to take account of such a dissuasive effect in the analysis of barriers to entry.

280 On that point, the contested decision contains sufficient evidence to support the statements made therein. Thus, the Commission was right to state in the contested decision that an entry in Ireland required considerable expenditure in order to establish a brand capable of competing with Ryanair and Aer Lingus and to gain access to new customers. That expenditure represents the main cost incurred in opening a route, as is stated in the interview cited by the Commission in the contested decision (footnote 610). Other sunk costs are necessarily linked to the additional investments involved in the purchase, leasing or deployment of an aircraft from one route to another, and the installation and functioning of that aircraft and the associated services (recital 621).

281 It is apparent from the above that the applicant's arguments criticising the analysis of the barriers to entry represented by the costs and risks of market entry must be rejected.

6. *Ryanair's reputation as a barrier to entry*

(a) Arguments of the parties

282 The applicant states that its aggressive low-fares policy as a result of its reduced costs does not constitute a barrier to entry, contrary to the Commission's findings in recitals 624 to 660 of the contested decision. Ryanair's conduct is that of an operator developing normally in a liberalised market. Moreover, the Commission failed to establish any actual consumer harm by demonstrating that Ryanair charges

supra-competitive prices once a competitor exit has occurred. In fact, consumers are better served after the exit of a competitor than before its entry. Finally, numerous airlines have succeeded in basing their aircraft at airports where Ryanair already had a significant base, such as at Charleroi airport.

283 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

284 The Commission stated in recitals 624 to 660 of the contested decision how the risk of 'aggressive retaliation' by Ryanair-Aer Lingus combined was high if a potential competitor were to seek to enter onto one of the routes affected by the concentration (section 7.8.5). That conclusion is based on the results of the Commission's investigation showing that Ryanair has a reputation for engaging in aggressive competition where an airline tries to enter the Irish market, in particular by lowering its prices temporarily and expanding its capacity in order to drive out the new entrant on routes to or from Ireland (recital 625 and footnote 615).

285 In response to Ryanair's argument, raised during the administrative procedure, that the risk of 'aggressive retaliation' by Ryanair-Aer Lingus combined was not relevant for potential competitors since Ryanair would charge the same low prices in any case, regardless of whether a competitor is active on the same route or not, the Commission stated in the contested decision that it was apparent from the investigation that Ryanair takes into account the pricing policy of its competitors and acts accordingly (recitals 627 to 634). On that point, the Commission gave several detailed examples concerning easyJet's entry attempt (section 7.8.5.1), MyTravelLite's entry attempt (section 7.8.5.2) and Go Fly's entry attempt (section 7.8.5.3).

286 It must be found that the applicant's arguments concerning that analysis merely reiterate its previous arguments raised during the administrative procedure and rebutted in the contested decision. In that decision the Commission set out to the required legal standard the evidence supporting its conclusion that Ryanair systematically reduces prices and increases frequencies when competitors enter the Irish market. As stated in the contested decision (section 7.8.5.4), the risk of aggressive retaliation would be even greater following the concentration, since Ryanair-Aer Lingus combined would be the dominant operator on literally all routes from and to Ireland. In building up a reputation for deterring the entry of competitors, Ryanair creates a de facto barrier to entry for new competitors.

287 The debate in that regard does not concern Ryanair's pricing policy, but the classification of its aggressive reputation as a barrier to entry and, from that point of view, the grounds set out in the contested decision are sufficient to establish how Ryanair's past conduct is liable to dissuade potential competitors from entering a market on which it is present.

288 Consequently, the arguments relating to the analysis of the effect of Ryanair's reputation on the arrival of potential competitors must be rejected.

7. *Timeliness of entry*

(a) Arguments of the parties

289 The applicant states that the Commission indicated in paragraph 308 of the statement of objections that 'opening a new route from a new airport can take between 3 and 12 months' and that '[t]o secure profitability it may take up to 12 months'. However, rather than viewing this entry as timely, in line with the two-year period set out in the Guidelines, the Commission erred in the contested decision in viewing this as support for the existence of high barriers to entry.

290 The Commission argues that the precise time at which entry should take place depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants.

(b) Findings of the Court

291 Point 74 of the Guidelines, entitled 'Timeliness', referred to by the applicant, states the following:

'The Commission examines whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants. However, entry is normally only considered timely if it occurs within two years.'

292 The applicant merely cites paragraph 308 of the statement of objections, without referring to the content of the contested decision, in submitting that the time required to enable an entry from a new airport and to ensure its viability was not correctly taken into account by the Commission in the contested decision.

293 In that regard, it should be noted that the assessment of the barriers to entry on the market depends on the characteristics of that market and the capabilities of the potential entrants.

294 In relation to timeliness of entry, in the Guidelines the Commission refers to a period which should not normally exceed 2 years and, in the statement of objections, to a

period of between 3 and 12 months. Ryanair states that it needs just a few weeks to open a route. In reality, that time-limit depends on the situation being examined.

295 Thus, in the Guidelines, the Commission is, in any event, merely providing an analytical framework which it may apply, further develop and refine in individual cases (point 6 of the Guidelines). In the present case, the period set out in the statement of objections relates to an entry at a new airport, whereas the period referred to by Ryanair is in line with the reputation of that airline. Those periods are neither contradictory nor do they show that the Commission carried out an erroneous assessment in the contested decision.

296 In the analysis of the barriers to entry in the contested decision, the Commission essentially concentrated on the likelihood of serious entries onto the affected routes and on the question whether such entries were of sufficient importance to dissuade or thwart the anti-competitive effects of the concentration. That analysis was undertaken in the light of the specific characteristics of the market and the players on that market. The applicant fails to state in what way that analysis is based on an erroneous assessment of the notion of timeliness of entry, or even how the analysis could be altered.

297 Consequently, the argument relating to the timeliness of entry must be rejected.

8. *The existence of more profitable routes outside Ireland*

(a) Arguments of the parties

298 The applicant maintains that it is at least as profitable to operate on routes from Dublin 'as on those from Eastern Europe or Scandinavia', contrary to the Commission's contention in the contested decision (recitals 661 to 669). Marketing costs are not higher in Ireland than elsewhere. Moreover, some 90 airlines, many of which are recent entrants, are at present using Dublin airport. Nor is it necessary for Ireland to have secondary airports, because those of Dublin, Cork and Shannon are easily accessible for low-frills operators. Several airlines (British Airways, CityJet, Lufthansa, BMI, easyJet, TAP Portugal and SkyEurope Airlines) have declared their willingness to enter the market represented by Dublin airport, but the Commission omitted or ignored that information. The buoyancy of the Irish economy facilitates such entry.

299 The Commission submits that, in recitals 663 to 668 of the contested decision, it presented empirical evidence to the effect that competitors considered the Irish market to be an unattractive one to enter and thus would not be likely do so.

(b) Findings of the Court

300 In the contested decision, the Commission states that it was apparent from its investigation that many competitors considered that the Irish market was not particularly attractive and that many potential competitors had indicated that they would rather seek to open new routes to destinations other than Ireland (recital 663).

301 In the contested decision, the Commission gave several reasons to explain that result:

— entering the market would require significantly higher marketing costs than entry on other markets where there are no strong low-cost carriers with a strong base (recital 664);

— the Irish market is regarded as a relatively small market, with only four million inhabitants, which is not even half of the population of the 'greater London area' (recital 665);

— the 'small Irish market' is in general not expected to be the fastest growing and most profitable market in comparison with the markets in 'Eastern Europe' or 'Scandinavia' (recital 666);

— the geographic situation of Ireland does not favour new entry but rather discourages it (recital 667);

— the incentives of a network carrier operating a route between Dublin and its hub are different from those of a point-to-point carrier, which reduces the competitive constraint; network carriers use these operations mainly to transport passengers in transit to their hub, from which they will fly to their final destination, whereas point-to-point carriers primarily seek to maximise the use of their aircraft on point-to-point routes (recital 668);

— for low-frills operators, Ireland has the disadvantage that is has no secondary airports in the Dublin area (recital 669).

302 The arguments raised by the applicant are unable to undermine that analysis. Thus, the applicant's statement that it is at least as profitable to operate on routes from Dublin 'as on those from Eastern Europe or Scandinavia' is not sufficient to call into question the statements made by the potential competitors on the issue of Dublin entry (see, for example, footnotes 666, 668 and 669 of the contested decision). Similarly, the assertion relating to marketing costs does not take account of the particular situation of Ryanair on the Irish market, which has already been examined (see paragraphs 277 and 278 above). The examples of recent entry given by Ryanair were analysed and rebutted to the required legal standard by the Commission in recital 633 of the contested decision (see paragraph 244 above). Moreover, although the buoyancy of the Irish economy is taken into account by carriers, it is an element which remains susceptible to change in accordance with the general economic situation.

303 It is apparent from the foregoing that the Court must reject the arguments raised by the applicant to dispute that, for certain competitors, routes operated 'from Eastern Europe or Scandinavia' are more profitable than those operated from Dublin.

9. *Airport congestion*

(a) Arguments of the parties

304 The applicant disputes that alleged congestion at Dublin airport constitutes a barrier to entry. In practice, the periods of limited slot availability amount to approximately one hour in the morning for departing aircraft and one or two short periods of up to half an hour for arriving aircraft in the late afternoon and evening. Airports commonly exhibit such busy periods yet still sustain substantial opportunities for growth. For competing airlines to be able to achieve three to four daily turnarounds, it is sufficient that they operate services to Dublin from bases at the other end of the route, avoiding those periods when the runways at Dublin are very congested. Moreover, the considerable increase in the number of passengers at Dublin has occurred despite the airport's capacity, which the Dublin Airport Authority regarded as constrained. The capacity of the airport should increase as a result of its current large scale development programme and capacity remains available on routes, even in the short term. In any event, to the extent that slot congestion was a problem, it could easily

be resolved by slot commitments, as has been the case with numerous other airline mergers cleared by the Commission in the past.

305 The Commission, supported by Ireland and Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

306 In the contested decision, the Commission stated that airport congestion constituted an 'additional important barrier to entry', both in terms of the need for sufficient terminal space and runway capacity, the use of which is subject to the allocation of a limited number of slots (section 7.8.7, in particular recitals 670 and 671).

307 The Commission also analysed the capacity constraints at Dublin Airport (section 7.8.7.1 of the contested decision). It noted that the investigation had shown that potential entrants were dissuaded by the runway congestion at peak times and the lack of stands. Those problems are unlikely to disappear in the near future given that the construction of a new runway is not planned before 2011 or 2012, which does not enable potential competitors to enter the market quickly. The situation at airports

other than Dublin was then examined (section 7.8.7.2) and was detailed route by route (section 7.9).

308 Finally, the Commission pointed out that airport congestion played a dissuasive role as a deterrent factor for potential entrants, in respect of time-sensitive passengers and business passengers (which, according to the Commission, account for 20 to 30% of all passengers) as well as leisure passengers (section 7.8.7.3 of the contested decision).

309 The Court finds in that regard that the arguments raised by the applicant to criticise that analysis were rebutted to the required legal standard during the administrative procedure. The Commission thus explained in the contested decision how the congested runways at Dublin airport during peak times and the difficulties related to the lack of stands posed problems for potential entrants wishing to operate on routes from or to that airport, even if they had a base at the other end of the route. In the contested decision, the Commission also stated that the capacity of Dublin airport will not be increased in the short-term as Ryanair claims. The issue of the relevance of the slot commitments will be assessed as part of the examination of the fifth plea, which deals with that aspect of the analysis.

310 It is apparent from the above that the arguments relating to airport congestion must be rejected.

10. *The position of Ryanair-Aer Lingus combined at Dublin airport*

(a) Arguments of the parties

311 The applicant maintains that the entity resulting from the concentration would not have increased bargaining power in the consultation process for airport charges, airport facility allocation or expansion (recitals 701 to 708 of the contested decision). The Commission for Aviation Regulation, which is entirely independent of both Ryanair and Aer Lingus, decides upon the level of charges which the Dublin Airport Authority can levy at Dublin airport for the facilities required by all users. Moreover, Ryanair has a history of disputes with the Dublin Airport Authority and there is no reason to believe that the merged entity would have any increased chance of influencing expansion plans. The applicant also alleges inconsistencies on the part of the Commission in the contested decision, since, on the one hand, it asserts that having a large base at Dublin is key to achieving operational efficiencies and, on the other hand, it claims that Ryanair's threat to withdraw many flights, and thereby give up those alleged advantages, is credible.

312 The Commission disputes those arguments, as they fail to take account of the situation which would result if the concentration were to be implemented.

(b) Findings of the Court

313 In the contested decision, the Commission examined the position which the merged entity would hold at Dublin airport, inasmuch as that entity would combine the two airlines which are by far the largest users of that airport (section 7.8.8).

314 In accordance with point 36 of the Guidelines, that market power was examined by the Commission in order to evaluate whether the merged entity could use that power to hinder entry or expansion by competitors (recital 701 of the contested decision). Following that examination, the Commission considered that the fear of Ryanair's competitors that the merged entity would use its majority within the Dublin Airport Coordination Committee (within which Ryanair-Aer Lingus combined would hold the majority of votes by operating more than 56% of 'air transport movements') and its unique strong position at Dublin airport to influence the regulator, in such a way so as to organise the airport in accordance with Ryanair's requirements, was not unfounded. The Commission concluded its analysis by stating that the concentration would enable the new entity 'to increase its weight' in the consultation process for airport charges, airport facility allocation or expansion plans. This may make the entry or expansion of its competitors more difficult (recitals 706 to 708).

315 The arguments raised by the applicant to dispute that analysis fail to call its validity into question. In the contested decision, the Commission set out to the required legal standard the reasons why the merged entity would have increased market power enabling it to influence decisions relating to certain aspects of the management of Dublin airport. In particular, the Commission provided several examples in the contested

decision of the possibility of the new entity obtaining preferential airport charges (recital 702).

316 Consequently, the arguments relating to the position of Ryanair-Aer Lingus combined at Dublin airport must be rejected.

317 It is apparent from all of the above that the second plea must be rejected in its entirety.

318 As this conclusion has an impact on the assessment of the analysis of the effects of the concentration on competition it is none the less necessary to examine the third and fourth pleas, which concern that issue.

C — *The third plea, concerning the route-by-route competitive analysis*

1. *Admissibility*

(a) Arguments of the parties

319 The Commission, supported by Ireland and by Aer Lingus, submits that the arguments put forward in connection with the third plea are inadmissible. At the stage of

the application, a reference to the arguments expounded in the first two pleas and to an annexed report is not sufficient to meet the requirements of Article 44 of the Rules of Procedure of the General Court. The arguments put forward in the reply are much more detailed than those put forward in the application, and the second York Aviation report was submitted at a very advanced stage of the procedure. In any event, the Commission contests the probative value of the York Aviation reports, which present a 'misleading' picture of its use of that evidence. A number of types of evidence used in the York Aviation tables are relevant for market definition purposes rather than for assessing the situation as regards competition.

320 The applicant submits that the route-by-route analysis made in section 7.9 of the contested decision is vitiated by three major errors. The analysis is based on the 'general errors' identified in connection with the first and second pleas. It is also based on evidence which is not robust and does not take account of evidence produced by Ryanair in the administrative procedure. The Commission thus wrongly excluded from its analysis all traditional national flight carriers as irrelevant to its assessment of the consequences of the merger, even though one or more is already present and competing on several of the 35 overlap routes. As an annex to the application, the applicant submitted a first report, the York Aviation report, dated September 2007, which summarises the data used for each of the routes concerned and the main criticisms made by Ryanair of the way in which the Commission used them. The applicant also argues that it would have been impossible to engage in a detailed rebuttal of the route-by-route analysis in the application without exceeding the page limit which an application before the Court should not as a general rule exceed. As an annex to the reply, the applicant submitted a second York Aviation report in order to further illustrate its arguments.

(b) Findings of the Court

321 In the application, the third plea is presented under five points, which essentially refer to the arguments put forward in the first and second pleas and refer generally to the first York Aviation report of September 2007. The applicant's submissions merely observe that it was impossible for it to respond to the Commission's route-by-route analysis in view of the Practice Directions to parties under which the maximum number of pages for the application is to be 50 and may be exceeded only in cases involving particularly complex legal or factual issues (see paragraph 10 of the Practice Directions to parties). It was only at the stage of the reply that the applicant disputed in detail the route-by-route analysis made by the Commission in section 7.9 of the contested decision in respect of each of the 35 relevant markets. The applicant referred, as regards that point, to the second York Aviation report without providing any reasons to explain the submission of that report at that stage of the procedure.

322 It follows from the foregoing that, even though the arguments put forward in respect of that point are those which have already been set out in the first two pleas or in the first York Aviation report (in particular the arguments in that report in Section E, headed 'Route-by-route analysis of the Commission's use of evidence'), the application contains a summary of the third plea, in accordance with Article 44 of the Rules of Procedure. That line of argument is referred to and expanded on in the reply in the light of the observations made on that point by the Commission in the defence.

323 As set out in paragraph 329 et seq. below, the applicant's arguments seek, in essence, to call in question the Commission's findings in the contested decision as regards the definition of the market as a point-to-point routes market (and not an airport-to-airport market, like, for example, that constituted by the Dublin-London (Stansted) route or the Dublin-London (Heathrow) route), the weight to be given to connecting

passengers (like, for example, those whose actual destination is New York on the Dublin-New York, via London, route), the taking into account of the role played by business passengers or those who are time-sensitive and the possibility of an entry into the relevant market to compete with the merged entity (with the effect which the reputation of the companies in question in Ireland, the presence of a base at one of the points on that route or the specific features of the airports in question may have).

324 Those arguments, which are put forward in summary form in the application and expanded on in the first York Aviation report of September 2007 as well as in the reply, incorporate the applicant's general assessment, relied on in the application, that the Commission made errors in its analysis of the competitive relationship between Ryanair and Aer Lingus and in the examination of possible entries into the various markets following the concentration.

325 Consequently, it must be held that the arguments set out in the application as regards the third plea meet the requirements of Article 44 of the Rules of Procedure and that they could be expanded on in the reply in the light inter alia of the statements in the first York Aviation report of September 2007, which was submitted as an annex to the application.

326 Incidentally, it must be pointed out that the applicant needs that line of argument to obtain the annulment of the contested decision. The analysis of a given route may in itself justify the Commission's decision to prohibit the transaction in the light of the criterion set out in Article 2(3) of the merger regulation. The creation of a dominant position which would have the effect of significantly distorting genuine competition on one of those routes is itself sufficient to make the transaction incompatible with

the common market, subject to the outcome of the analysis of the efficiency gains and commitments carried out in connection with the fourth and fifth pleas.

327 As regards the second York Aviation report, which was submitted to further illustrate the applicant's arguments, it is clear that, as the Commission claims, that report was submitted in support of the line of argument expanded on in the reply as a supplement to the application and the first York Aviation report, without any reason being given for the delay in the submission of that report relating to the content of the route-by-route analysis in the contested decision.

328 Consequently, in accordance with Article 48(1) of the Rules of Procedure, the Court will not take account of the content of the second York Aviation report in its assessment of the arguments of the parties.

2. *Substance*

(a) The Dublin-London link

Arguments of the parties

329 The applicant maintains that for the Dublin-London route, which accounts for about 30% of the passenger market between Ireland and the other Member States of the

Union, with about 320 weekly rotations, 100 of which are effected by bmi, British Airways and CityJet, the Commission did not produce evidence permitting the inference that those competitors were not in a position to exert a 'competitive constraint' on the merged entity.

330 As regards bmi, which has a market share of 10 to 20% and, according to the contested decision, is its and Aer Lingus's main competitor on the Dublin-London route, the applicant submits that the Commission has failed to explain the significance of the fact that bmi is able to offer its passengers connections through its hub at Heathrow (recital 795 of the contested decision). In fact, just as in the case of Aer Lingus, most bmi passengers are not connecting passengers. Similarly, the Commission did not explain why the fact that bmi offers economy class and business class means that it does not compete with Aer Lingus, which offers only a single class. According to the applicant, such a difference is indeed of little importance on such a short flight and no comparison of the fares between bmi's economy class and Aer Lingus's single class was undertaken by the Commission. Moreover, the fact that Aer Lingus has twice as many rotations as bmi and carries twice as many passengers is of no importance, since bmi is in a position to use the large number of slots it has at Heathrow Airport in order to use on the Dublin-London route slots previously used for less profitable routes.

331 As regards British Airways, which operates some 26 or 27 weekly rotations to Gatwick Airport from Dublin, the applicant notes that the Commission did not consider whether the criteria it used, which are the same as those it set out with regard to bmi, actually matter for passengers on that route. Moreover, by taking the view that British Airways is less competitive with Aer Lingus because it does not serve the same London airport (Gatwick instead of Heathrow Airport), the Commission is contradicting its own view that the relevant markets are city pairs.

332 As regards CityJet, the applicant claims that the fact that that airline uses smaller aircraft, because of the shorter runways at London City Airport, which cannot be used by Aer Lingus and Ryanair aircraft, is not relevant to the competition analysis. The question is, rather, whether the CityJet product is sufficiently competitive to constitute an alternative on that route. In so far as both CityJet and Aer Lingus and Ryanair carry a large number of business customers, it is of little importance that only CityJet carries a majority of more time-sensitive business passengers. In fact, the Commission took the view, in recitals 312 to 331 and 800 of the contested decision, that there is a single market for airline passengers, with no distinction as to whether or not passengers are time-sensitive. Because CityJet, Ryanair and Aer Lingus carry as many business passengers as leisure passengers, CityJet exerts a competitive constraint with regard to those passengers.

333 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

Findings of the Court

334 In the contested decision, the Commission analysed the effects of the concentration on competition as regards the Dublin-London route (recitals 791 to 810 of the contested decision). It came to the conclusion that 'the proposed transaction would significantly impede effective competition as a result of the creation of a dominant position on [that route]' (recital 810).

335 As regards that issue too, the applicant reproduces the line of argument put forward during the administrative procedure, which was rejected in the contested decision. That line of argument, which is superficial and fragmented, cannot suffice to call into question the reasoning set out by the Commission in the contested decision on the basis of the results obtained during the administrative procedure.

336 It must be pointed out that the first factor taken into consideration in the contested decision was the size of the aggregate market share of the parties to the concentration, which was 79% for summer 2006 if all passengers were taken into consideration or 81% if connecting passengers were excluded. The aggregated market share based on aircraft capacity and not on the number of passengers carried was 76% for winter 2006-07 and 79% for summer 2007 (recitals 792 to 794). As is stated in the contested decision (footnote 802), such a market share in itself constitutes evidence of a dominant position on the market (see, to that effect, as regards the former merger regulation, *General Electric* v *Commission*, paragraph 41 above, paragraph 115; see also point 17 of the Guidelines).

337 It is clear that the applicant does not put forward any specific arguments as regards that market share. The arguments set out previously in that regard in the first plea have already been rejected (see paragraphs 39 et seq. above). The line of argument put forward in the third plea as regards the Dublin-London route must therefore be considered in a context in which the implementation of the transaction would make it possible for Ryanair-Aer Lingus combined to hold an extremely large market share of about 80%. As the applicant points out, that market is particularly significant since it accounts in itself for about 30% of the passenger market between Ireland and the other Member States of the Union (see paragraph 329 above).

338 The second factor taken into consideration by the Commission in the contested decision relates to the marginal role likely to be played by the three competitors on that route. It considers that none of those competitors would be capable of counterbalancing the anti-competitive effects connected with the disappearance of Aer Lingus, Ryanair's closest competitor in respect of flights on the Dublin-London route.

339 As regards bmi, which holds a market share of 12 to 16%, according to the data taken into consideration, the Commission stated that there were a number of differences between that carrier and Aer Lingus. bmi is a network carrier which operates out of London Heathrow Airport, even though the majority of its passengers on the Dublin-London route are not connecting passengers (their final destination being London and not any other destination), and offers a full service with both economy and business class, whereas Aer Lingus is a point-to-point low-frills carrier operating a single class cabin (recital 795). It is true that the Commission stated that Aer Lingus also carried connecting passengers on the basis of its code-sharing agreement with British Airways on this route as well as business passengers or time-sensitive passengers (recitals 795 and 799), but the cost structures of those undertakings are different, those of Aer Lingus being closer to those of Ryanair than to those of bmi.

340 The Commission also stated that Aer Lingus carried twice as many passengers as bmi and operated almost twice as many rotations per week (recital 795). As the Commission stated in the contested decision, in assessing barriers to entry, an expansion of its business activities to Dublin Airport is not intended by bmi and would furthermore give rise to significant difficulties on account of the location of Dublin Airport or the risk of retaliation (recitals 760 and 764).

341 The same is true as regards the two other competitors on the market, namely British Airways and CityJet. As is apparent from the contested decision, those companies are not in such close competition with Ryanair as Aer Lingus is (recital 802). British Airways is a full-service network carrier and CityJet is a carrier offering flights aimed at business passengers to an airport situated near London city centre. Those specific features mean that the business model and competitive capacity of those undertakings is unlike those of Ryanair-Aer Lingus combined. Furthermore, both British Airways and CityJet have stated that the strengthening of their presence at Dublin Airport is not one of their priorities (recital 748 as regards British Airways and recital 718 as regards CityJet).

342 It is in that respect the Commission was able to conclude in the contested decision that both the competitors currently present on the market and capable of increasing their capacity in that market and the potential competitors capable of entering that market did not provide a 'sufficient competitive constraint' on the merged entity (recitals 804 to 809). In that regard, it must be pointed out that the marginal role of the three competitors referred to in the contested decision is not challenged by the applicant, which merely reproduces the analysis set out in the contested decision before concluding that it is wrong to maintain that those competitors are not in a position to exert 'competitive constraint' on the merged entity (see paragraph 329 above). That is not however what the Commission stated in the contested decision. It merely stated that the current and potential competitors are not capable of providing a 'sufficient competitive constraint' on that entity.

343 Consequently, having regard to the fact that its observations are superficial and fragmented, the applicant has not proved to the requisite legal standard that the Commission's analysis as regards the Dublin-London route is unfounded. In essence, the applicant merely maintains that the Commission did not produce evidence permitting the inference that the three competitors examined in the contested decision,

representing around 20% of the market share, were not in a position to exert a 'competitive constraint' on the merged entity which would control around 80% of that market, even though the Commission set out in the contested decision the reasons why those competitors were not in a position to compete effectively with that new entity on account of the difference in business models, barriers to entry and the extension of capacity, and their other priorities for development.

(b) The Dublin-Birmingham, Dublin-Edinburgh, Dublin-Glasgow, Dublin-Manchester and Dublin-Newcastle routes

Arguments of the parties

344 The applicant points out that the Commission considered that Aer Lingus and Ryanair would not face significant competitive constraints from other airlines on the Dublin-Birmingham, Dublin-Edinburgh, Dublin-Glasgow, Dublin-Manchester and Dublin-Newcastle routes, which account for around 3 million passengers a year. The reasons put forward in the contested decision are as follows: the business model is not appropriate (such as that of BA Connect, bmi, Air Malta, Hapag Lloyd Express, KLM, Lufthansa, Loganair, Luxair and CityJet (recitals 816, 817, 835, 841 and 852)); the business model is the same but the airline voluntarily discontinued operations on the relevant route (such as MyTravelLite, Go Fly, Brymon Airways, which became BA City Express and then BA Connect, and Gill Airways (recitals 812, 816, 821, 830 and 840 to 848)); the airline has 'been scarred by a previous encounter with

Ryanair — and not with Aer Lingus' (such as easyJet and bmibaby (recitals 812, 816, 857, 862, 867, 878 and 880); the airline flies mainly business class and its aircraft are too small (such as CityJet and Luxair (recitals 825, 831, 832, 834, 835, 841, 852, 874, 880 and 882)); Dublin Airport is not part of the strategic focus of the airline even though it has aircraft based at relevant United Kingdom airports (such as BA Connect, Flybe, easyJet, Loganair, Globespan, Jet2 and Monarch (recitals 825, 834, 843, 852 and 882)); the airline did not confirm it would enter a given route (such as BA Connect, Flybe, Loganair, Globespan, bmibaby, Monarch and Jet2 (recitals 825, 834, 843, 852 and 882)) or has expressly told the Commission that it would not enter a route flown by Ryanair (such as Aer Arann (recital 826)); entry on a substantial scale, or expansion of frequencies by existing operations, would be required but would not be possible owing to airport congestion (as regards CityJet (recitals 815 to 817, 824, 826, 833, 842, 851, 860 and 870)) and/or would require substantial investment into brand awareness and marketing of its flights in Ireland (as regards BA Connect, Flybe, Globespan, easyJet and Monarch (recitals 816, 825, 843 and 882)).

345 The applicant accuses the Commission of being 'inconsistent' in its analysis of those routes. On the one hand, where competitors have a significant presence at an airport, the Commission regarded their presence as of no direct relevance for the assessment of competition on routes flown by Ryanair (recital 825 and footnote 864). The Commission also dismissed the presence of competitors who operate bases or hubs at those airports as insignificant for the route-by-route analysis on the ground that it is apparent from its investigation and their own statements that they invariably lack sufficient abilities or incentives to enter the route in question (recitals 816, 825, 834,

843, 852, 862, 872 and 882). On the other hand, where the combined Ryanair/Aer Lingus presence at an airport is significant — as at Birmingham or Edinburgh — the Commission argued that this was a problem in the light of barriers to entry, such as the absence of bases for competitors, the need for 'substantial investments into brand awareness and marketing' where carriers have no existing operations at an airport, and the shortage of available peak-time slots or limited access to infrastructure (contact stands) (recitals 816, 817, 826, 843, 844 and 882).

346 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

Findings of the Court

347 In the contested decision, the Commission analysed the effects of the merger on competition as regards various routes from Dublin to cities in the United Kingdom other than London.

— The Dublin-Birmingham route

348 As regards the Dublin-Birmingham route (recitals 811 to 819 of the contested decision), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route. The Commission also referred to the unsuccessful attempt of MyTravelLite to enter that market in 2003-2004, the absence of any attempt of that kind since then (recital 815) and bmibaby's exit following the entry of Ryanair (recitals 812 and 816).

349 Similarly, the Commission set out the reasons why the carriers with a presence in one of the two airports which serve Birmingham (BA Connect, easyJet, Flybe, bmi, bmibaby, Monarch, Thomsonfly) are not capable of providing a sufficient competitive constraint on the merged entity by entering the Dublin-Birmingham route following the transaction (recital 816). The applicant reproduces, without disputing them, the reasons referred to by the Commission, which relate to the existence of barriers to entry to Dublin Airport or to the intentions expressed by those carriers, which have priorities other than the Irish market. In that regard, it must be held that those reasons are, in themselves, sufficient to substantiate the findings which the Commission arrived at in the contested decision.

350 Furthermore, it cannot be claimed, as the applicant does, that the Commission was 'inconsistent' in its analysis in so far as it differentiated between, on the one hand, the specific situation of Ryanair and Aer Lingus at Dublin, and also at Birmingham as regards Ryanair (recital 816), and, on the other, the situation of the other carriers at the destination airport. Ryanair's argument as regards the possibility of competing with the merged entity from bases held at the destination airport was examined and rejected by the Commission in respect of each route concerned (see recital 825 as regards the Dublin-Edinburgh route and footnote 864 under that recital, in which the

Commission extends that finding to all the other routes). The applicant's claim must therefore be rejected as regards all the routes in respect of which Ryanair maintains that there is such inconsistency.

351 As regards the specific situation of CityJet, which has aircraft based in Dublin and also overnights aircraft at Birmingham and could be tempted to fly the Dublin-Birmingham route, on which there is significant business traffic, the Commission found that, to compete with Ryanair and Aer Lingus, CityJet would need to operate a high frequency service with all the peak times covered, which cannot be considered likely due to the slot constraints at peak times at Dublin Airport and the lack of contact stands (recital 817). In that regard, it must be pointed out that those reasons are not disputed by the applicant either and that they are, in themselves, sufficient to substantiate the findings which the Commission arrived at in the contested decision.

352 Lastly, in the contested decision the Commission rejected Ryanair's argument that airlines which have no aircraft based in Birmingham (Air Malta, Hapag Lloyd Express, KLM and Lufthansa) could be tempted to fly from that destination to Dublin, from which they would also fly, but to other destinations, without having any aircraft based there. According to the Commission, entry to a route without a base at either end of that route is in general less efficient and as such rather uncommon. Furthermore, those carriers are rather full-service network carriers and would be unlikely to significantly constrain the merged entity (recital 817). In that regard, it must also be pointed out that those reasons are not disputed by the applicant either and that they are, in themselves, sufficient to substantiate the findings which the Commission arrived at in the contested decision.

— The Dublin-Edinburgh route

353 As regards the Dublin-Edinburgh route (recitals 820 to 828 of the contested decision), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route. The Commission also referred to the unsuccessful attempt of Go Fly to enter that market in 2001-2002 and the absence of any attempt of that kind since then. It also stated that that route was very busy, with 5 rotations per day being operated by the parties to the concentration (recital 824).

354 Similarly, the Commission set out the reasons why the carriers with bases or hubs at Edinburgh Airport (BA Connect, easyJet, Flybe, Loganair and Globespan) are not capable of providing sufficient competitive constraints on the merged entity by entering the Dublin-Edinburgh route following the transaction (recital 825). The applicant reproduces, but does not dispute, the reasons given by the Commission, which relate to the existence of barriers to entry at Dublin Airport or to the intentions expressed by those carriers, which have priorities other than the Irish market. In that regard, it must also be held that those reasons are, in themselves, sufficient to substantiate the findings which the Commission arrived at in the contested decision.

355 As regards the specific situation of CityJet, which has aircraft based in Dublin and also overnights aircraft at Edinburgh and could be tempted to fly the Dublin-Edinburgh route, on which there is significant business traffic, the Commission set out the same reasoning as that which it expounded regarding the Dublin-Birmingham route (recital 826). That reasoning is not disputed by the applicant and it must be held that it is sufficient to substantiate the finding which the Commission arrived at in the contested decision.

— The Dublin-Glasgow, Dublin-Manchester and Dublin-Newcastle routes

356 The Dublin-Glasgow and Dublin-Manchester routes are characterised by the quasi monopoly which the merged entity would have and the Dublin-Newcastle route would result in a monopoly by Ryanair-Aer Lingus combined. As regards the Dublin-Glasgow route (recitals 829 to 837 of the contested decision), Ryanair-Aer Lingus combined would have a 96 to 99% market share, its sole competitor being Loganair which holds a 1 to 4% market share and offers indirect flights via Londonderry (Go Fly having entered that route in 2001 before exiting after six months of operation in 2002). As for the Dublin-Manchester route (recitals 838 to 846), Ryanair-Aer Lingus combined would have a 98 to 99.6% market share, its sole competitor being Luxair which holds a 0.4 to 2% market share and offers flights from Luxembourg to Dublin, via Manchester. As regards the Dublin-Newcastle route (recitals 847 to 854), Ryanair-Aer Lingus combined would have a 96 to 99% market share, its sole competitor being Loganair, which holds a 1 to 4% market share and offers indirect flights via Londonderry (Brymon Airways, which became BA City Express and then BA Connect, having entered that route in 2001 before exiting in 2003 and Gill Airways having entered it in January 2001 before ceasing its operations in September of the same year).

357 On that point, the Commission also rejected in the contested decision the arguments put forward by Ryanair during the administrative procedure as regards potential entrants which have a base at the destination airport or CityJet (see, *mutatis mutandis*, paragraphs 352 and 355 above). In that respect, it must be pointed out that the Commission's reasoning is not called into question by the applicant and be held that it is sufficient to substantiate the findings which were arrived at in the contested decision.

(c) The Shannon-London and Cork-London routes

Arguments of the parties

358 The applicant submits that the Commission modified the scope of the geographic market to suit its needs. For the purposes of its assessment of existing competition, it included all London airports in the relevant market. On the other hand, in assessing potential entry, it asserted that Luton and London City Airports are not substitutes for Heathrow, Gatwick or Stansted (recitals 860 and 870 of the contested decision). Moreover, the Commission was wrong to gauge the potential for entry on the basis of the limited number of rotations currently operated by the airlines Wizzair, bmibaby, CentralWings, Jet2, Malev and Air Southwest (recital 873).

359 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

Findings of the Court

360 As regards the Shannon-London route (recitals 855 to 864 of the contested decision), Ryanair-Aer Lingus combined would have a 100% market share (easyJet having withdrawn from that market in October 2006 following the arrival of Ryanair in reaction to the entry of easyJet to the Cork-London and Knock-London routes).

361 As for the Cork-London route (recitals 865 to 876), Ryanair-Aer Lingus combined would have a 100% market share (easyJet having withdrawn from that market in October 2006, bmibaby having exited in January 2005 from that route on which it had been operating since March 2004 and City Flyer Express having operated on that route only until October 2001).

362 On that point, the Commission also rejected in the contested decision the argument put forward by Ryanair during the administrative procedure as regards potential entrants which have a base at the destination airport. That reasoning, which is based on the strong presence of the parties to the concentration in Ireland and on the specific features of certain London airports, cannot be called into question by the applicant's arguments. Contrary to what the applicant maintains, the substitutability of London airports from the demand side does not mean that their specific features may not be taken into account from the supply side when it is the capacity of a carrier to establish itself at a destination which is being assessed. The reasoning set out by the Commission in the contested decision is not therefore contradictory on that point.

363 The Commission was also right to find that the carriers which could enter those routes by operating 'a W-route' without a base at one or other of the destinations (Wizzair, bmibaby, CentralWings, Jet2, Malev and Air Southwest) were not likely to compete efficiently with the merged entity.

364 Consequently, the findings that the proposed transaction would significantly impede effective competition as a result of the creation of a dominant position on the Shannon-London and Cork-London routes are not called into question by the applicant's arguments.

(d) The Dublin-Frankfurt, Dublin-Paris, Dublin-Madrid, Dublin-Brussels, Dublin-Berlin and Dublin-Hamburg (Lübeck) routes

Arguments of the parties

365 The applicant criticises the Commission for excluding the following companies from its analysis: Lufthansa as regards the Dublin-Berlin, Dublin-Frankfurt and Dublin-Hamburg (Lübeck) routes on the ground that point-to-point passengers carried on that route clearly form only a minor part of that company's activities (recitals 913, 951 and 962 of the contested decision); CityJet for the Dublin-Paris route on the ground that it concentrates on higher-yield business customers (recital 1017); Iberia for the Dublin-Madrid route on the ground that its business model is based on full-service network operations (recital 984); Brussels Airlines, KLM and also VLM, Transavia and Airlinair, for the Dublin-Brussels route (recital 936). In the applicant's view, it is 'not credible' for the Commission to maintain that those carriers would not be able to respond effectively to a price increase by the merged entity, particularly because they already operate on the routes in question.

366 The Commission, supported by Ireland and by Aer Lingus Group, dispute the applicant's arguments by referring to the contested decision.

Findings of the Court

367 Even though the reasoning followed by the Commission in examining each route is quite similar, each of them has a certain specific feature which must be borne in mind, particularly as regards competitors or airlines which are capable of entering those markets to compete with the merged entity.

— The Dublin-Berlin and Dublin-Hamburg (Lübeck) routes

368 As regards the Dublin-Berlin route (recitals 908 to 915 of the contested decision), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route. The Commission also referred to the presence on that market of Lufthansa, which exited from it in October 2000. It pointed out that there were barriers to entry connected with congestion at Dublin Airport, even though they might be less marked in that case on account of the limited number of frequencies and the smaller share of time-sensitive passengers than elsewhere.

369 As for the Dublin-Hamburg (Lübeck) route (recitals 956 to 964), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route. The Commission also referred to the presence on that market of Lufthansa, which exited from it in October 2000, and of Hapag-Lloyd Executive, which entered that market in April 2004 and exited from it in January 2006. It pointed out that there were barriers to entry connected with congestion at Dublin Airport, even though they might be less marked in that case on

account of the limited number of frequencies and the smaller share of time-sensitive passengers than elsewhere.

370 Similarly, the Commission set out the reasons why the carriers with bases at Berlin (Lufthansa, Air Berlin, Germanwings, easyJet) or Hamburg-Lübeck (Lufthansa, Air Berlin, Germanwings) are not capable of exerting a sufficient competitive constraint on the merged entity by entering the Dublin-Berlin or Dublin-Hamburg (Lübeck) routes following the transaction (recitals 913 and 962). The applicant merely states in that regard that, so far as concerns Lufthansa, it is 'not credible' for the Commission to maintain that that carrier would not be able to respond effectively to a price increase by the merged entity (see paragraph 365 above). It must, however, be pointed out that the Commission stated a number of perfectly credible reasons in that regard. It found, first, that Lufthansa was a traditional network carrier operating a hub and spoke system different from the point-to-point low-frills models of Ryanair and Aer Lingus and, secondly, that, given its exit from the market in 2000 (when there was no other competitor at that time), Lufthansa would thereafter no longer be likely to be willing to enter those markets when confronted with a new powerful entity with a different costs structure.

— The Dublin-Brussels route

371 As regards the Dublin-Brussels route (recitals 931 to 938 of the contested decision), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route. The Commission also referred to the presence on that market of Sabena (now Brussels Airlines), which

exited from it in November 2001. It pointed out that there were barriers to entry connected with congestion at Dublin Airport and the rather 'thick' nature of that route.

372 Similarly, the Commission set out the reasons why the carriers with bases at Brussels (Brussels Airlines, KLM and VLM) or at Eindhoven in the Netherlands (Transavia and Airlinair), which is not regarded as a substitutable airport for Brussels airport, are not capable of exerting a sufficient competitive constraint on the merged entity by entering the Dublin-Brussels route (recital 936). The applicant merely states in that regard that it is 'not credible' for the Commission to maintain that those carriers would not be able to respond effectively to a price increase by the merged entity (see paragraph 365 above). It must, however, be pointed out that the Commission stated a number of perfectly credible reasons in that regard. It found that Brussels Airlines and KLM were primarily full-frills, network carriers with a business model different from that of Ryanair and Aer Lingus, that VLM was focused on serving business customers using smaller aircraft which made it possible to land at London-City Airport and that Transavia and Airlinair operated to Eindhoven and not Brussels.

— The Dublin-Frankfurt route

373 As regards the Dublin-Frankfurt route (recitals 948 to 955 of the contested decision), the parties to the concentration had a 59 to 87% combined market share in terms of capacity in summer 2006, whether or not connecting passengers are taken into account. The market share of the competitor Lufthansa thus fluctuated between 13 and 41% when connecting passengers were taken into account.

374 In that regard it must be pointed out that in the contested decision the Commission set out the reasons why Lufthansa would not be capable of competing effectively with the merged entity on that market. In the contested decision the Commission stated that Lufthansa's business model is clearly different from Aer Lingus and Ryanair. Furthermore, it stated that Lufthansa operated a high frequency service with schedules accommodated according to the departure/arrival waves at Frankfurt Airport. The Commission also stated that it is apparent from the results of the customer survey that more Aer Lingus or Ryanair customers had considered the other Irish company as a substitute for a Dublin-Frankfurt flight than they had Lufthansa. The applicant cannot therefore claim that the Commission purely and simply excluded Lufthansa from its analysis on the ground that point-to-point passengers carried on that route form only a minor part of that company's activities (see paragraph 365 above).

— The Dublin-Madrid and Dublin-Paris routes

375 As regards the Dublin-Madrid route (recitals 981 to 989 of the contested decision), the parties to the concentration had a 66 to 75% combined market share in terms of capacity in summer 2007, whether or not connecting passengers are taken into account. The market share of the competitor Iberia thus fluctuated between 25 and 34% when connecting passengers were taken into account. The Commission also mentioned the presence on that market of Spanair, which exited from it in October 2006. It also stated that there were barriers to entry connected with congestion at Dublin Airport, even though they might be less marked in that case in so far as it is not a high frequency route.

376 As regards the Dublin-Paris route (recitals 1014 to 1021), the parties to the concentration had a 61 to 80% combined market share in summer 2006, whether or not connecting passengers are taken into account. The market share of the competitor

CityJet thus fluctuated between 20 and 39% when connecting passengers were taken into account. No other carrier has entered that market in recent years.

377 In that regard it must be pointed out that in the contested decision the Commission set out the reasons why Iberia, so far as concerns the Dublin-Madrid route (recital 984), and CityJet, so far as concerns the Dublin-Paris route (recital 1017), would not be capable of competing effectively with the merged entity. The Commission stated that Iberia could not be considered to be a close competitor to the parties to the merger due to its business model based on full-service network operations, including a significant proportion of connecting passengers on that route. Furthermore, the Commission stated that CityJet is primarily focused on feeding the medium and long-haul services of Air France at Roissy-Charles-de-Gaulle Airport. The applicant does not dispute that reasoning in itself and solely criticises its credibility without any other details. The applicant cannot therefore claim that the Commission purely and simply excluded those two companies from its analysis (see paragraph 365 above).

(e) The Dublin-Milan and Dublin-Rome routes

Arguments of the parties

378 The applicant maintains that the Commission is wrong to exclude Alitalia as a potential competitor to the merged entity on the grounds of its recent exit from the

Dublin-Rome and Dublin-Milan routes and its financial difficulties (recitals 1011 and 1041 of the contested decision). Similarly, the Commission wrongly dismisses any competitive threat from that full-service network carrier. The Commission has failed to produce any evidence that Alitalia could not easily resume flights to Dublin in the event of a price increase by the merged entity, in so far as Alitalia has numerous aircraft based in Rome and Milan.

379 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

Findings of the Court

380 As regards the Dublin-Milan route (recitals 1006 to 1013), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route (100% combined market share having been forecast for summer 2007). The Commission also referred to the presence on that market of Alitalia, which exited from it in October 2006 a few months after Ryanair entered that route. It pointed out that there were barriers to entry connected with congestion at Dublin Airport at peak times.

381 As regards the Dublin-Rome route (recitals 1036 to 1043), the implementation of the transaction would have the effect of creating a monopoly which would eliminate all existing competition on that route (100% combined market share having been forecast for summer 2007). The Commission also referred to the presence on that market of Alitalia, which exited from it in October 2005 before briefly re-entering in summer

2006. It pointed out that there were barriers to entry connected with congestion at Dublin Airport at peak times and the development of that route.

382 Similarly, the Commission set out the reasons why the carriers with bases at Milan or Rome (Alitalia, Air One, easyJet and MyAir) would not be capable of providing sufficient competitive constraints on the merged entity by entering the Dublin-Milan and Dublin-Rome routes (recitals 1011 and 1041). The applicant merely states in that regard that the Commission was wrong to find that Alitalia was not capable of competing effectively with the merged entity on account of its financial difficulties and its full-service airline business model. It must however be stated that those reasons can justify the conclusion which the Commission drew from them in the contested decision.

383 It follows from all of the above that the arguments put forward by the applicant as regards a number of routes analysed in the contested decision are not capable of calling into question the Commission's finding that the implementation of the proposed transaction would significantly impede effective competition on those routes as a result of the creation of a dominant position.

384 Furthermore, it must be pointed out that the dominant positions which the proposed concentration would give rise to on those routes are monopolistic, quasi monopolistic or very significant and are sufficient, in themselves, to validate at this stage of the analysis the Commission's finding that the implementation of the concentration should be declared incompatible with the common market.

385 Consequently, it must be held, subject to the analysis of efficiencies and commitments in the context of the examination of the fourth and fifth pleas, that the Commission was right to declare that the proposed concentration is incompatible with the common market.

D — *The fourth plea, concerning the assessment of the efficiency claims*

386 It should be noted at the outset that according to recital 29 in the preamble to the merger regulation:

'In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.'

387 The guidance of the Commission referred to in recital 29 of the merger regulation is set out in points 76 to 88 of the Guidelines. Point 78 of the Guidelines states that for the Commission to take account of efficiency claims in its assessment of the concentration and be in a position to reach the conclusion that, as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific

and be verifiable. These conditions are cumulative and will be examined below in the order adopted by the Commission in the contested decision.

388 The analysis carried out by the Commission in the contested decision, which is relevant in assessing this plea, takes the form of the following stages. First, the Commission set out the arguments submitted by Ryanair during the administrative procedure in terms of which the concentration would not give rise to any risk for competition on account of the efficiencies connected with the application to Aer Lingus of Ryanair's low-fares business model. Those efficiencies would derive from cost savings relating to staff costs, aircraft ownership costs, maintenance costs, airport charges, ground operational costs and distribution costs. According to Ryanair, those efficiencies cannot be obtained by any alternative transaction and would not be achieved by the two companies individually in the absence of the concentration. Those efficiency gains would be passed on to consumers in terms of reduced fares, higher frequencies and more routes for passengers, and also in terms of better quality products and services, without affecting Aer Lingus's quality of service (section 7.10.2 of the contested decision). Aer Lingus's analysis is also set out in the contested decision (section 7.10.3).

389 Secondly, the Commission stated that it is apparent from the principles set out in recital 29 of the merger regulation and in the Guidelines that, to counteract the negative effects of a merger on consumers, the resulting efficiency gains need to be verifiable (namely reasoned, quantified and supported by internal studies and documents if necessary), likely to benefit consumers and could not have been achieved to a similar extent by means that are less anti-competitive than the proposed concentration (merger specificity). Those three conditions (verifiability, consumer benefit and merger specificity) are cumulative (sections 7.10.1 and 7.10.4 of the contested decision).

390 Thirdly, the Commission took the view that Ryanair's efficiency claims were not verifiable because they were in essence based on the general claim that Ryanair would be able to transfer its business model, and in particular the related cost levels, to Aer Lingus without the offsetting of downgrades in product characteristics and revenue having been sufficiently taken into account. Several of Ryanair's efficiency claims also rely on assumptions which cannot be independently verified (section 7.10.4.2 of the contested decision). The contested decision also contains an assessment of the specificity of the concentration (section 7.10.4.3) and of benefits to consumers (section 7.10.4.4).

391 The Commission concluded, in recital 1151 of the contested decision, that the efficiencies claimed by Ryanair were not sufficiently verifiable and were not merger specific. According to the Commission, even if those two conditions had been satisfied those efficiencies would have affected Aer Lingus's fixed (aircraft operating) costs, which makes it uncertain that they would have benefited consumers. Lastly, the Commission referred to point 84 of the Guidelines which states that '[i]t is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects'.

392 In essence, the applicant criticises that aspect of the contested decision by submitting that, despite any anti-competitive effects, the merger would give rise to efficiencies. Those efficiencies would be verifiable, merger specific and beneficial to consumers. Accordingly, the criteria laid down in point 76 et seq. of the Guidelines have been complied with and therefore the Commission should have declared the merger compatible with the common market. In general, the applicant criticises the Commission for dismissing specific evidence produced by it and basing its decision on

'speculation' from Aer Lingus. Not only is Ryanair a point of reference for achieving efficiencies, but Aer Lingus could not have known the cost savings which Ryanair would have achieved and Aer Lingus had an incentive to downplay the efficiencies resulting from the concentration in order to defend itself against Ryanair's bid and not admit its own inefficiency. The applicant also criticises the Commission for applying an 'unreasonable and wrong standard' as to the amount of efficiencies that Ryanair would have to show, relying on point 84 of the Guidelines, which sets out a negative presumption against efficiency gains in the case of a market position approaching that of a monopoly. In the present case, Ryanair submits that the proposed concentration does not create a monopoly.

393 The Commission, supported by Ireland and by Aer Lingus Group, observes that, since the merger would result in a position close to a monopoly, it is highly unlikely that it could be declared compatible with the common market on the ground that the efficiency gains generated would counteract its potential anti-competitive effects. In any event, the three criteria to be considered are not fulfilled: the efficiencies alleged by Ryanair are not verifiable or merger-specific and would not be of benefit to consumers.

1. *The verifiability of the alleged efficiency gains*

(a) Arguments of the parties

394 First, the applicant contests the Commission's assertion that its efficiency claims are based on very strong assumptions (recital 1133 of the contested decision). 'Very

detailed calculations' were provided to the Commission, based on 15 years experience in Europe using over 130 aircraft on over 500 routes. Ryanair was therefore in the best position to offer 'sound, reliable and verifiable calculations', unlike the Commission, which has no experience of running airlines, and Aer Lingus, which has a poor track record in regard to efficiency. Even if there had been a margin of error in those calculations, the outcome, namely efficiencies amounting to EUR 221.7 million, could not be dismissed outright. The applicant also criticises the requirement laid down in recital 1133 of the contested decision that it should have provided documents dated prior to the concentration which objectively and independently assessed the scope for efficiency gains. Efficiencies exist whether they are put in writing before or after a proposed concentration is announced. Such a requirement is impossible to satisfy because bidders may often obtain better access to the target's books only after the public bid is announced.

395 Second, the applicant observes that the Commission bases its claim that efficiencies cannot be verified on the proposition that Ryanair will be able to 'fully' transfer its business model to Aer Lingus without offsetting downgrades in product characteristics. The Commission thus clearly admits a difference between Ryanair's business model and that of Aer Lingus. That statement however misses the point since Ryanair did not intend to 'fully' transfer its business model to Aer Lingus, but only to continue a differentiated service, enhancing Aer Lingus's position in terms of efficiencies and lower costs.

396 Third, the applicant maintains that the Commission's reference, in recital 1134 of the contested decision, to Ryanair's acquisition of Buzz does not support the Commission's case. Aer Lingus's fleet is much larger than Buzz's fleet and therefore the savings on fuel, maintenance and replacements would be larger, not smaller than those which

that acquisition made possible. Moreover, as it did in the case of Buzz, Ryanair could replace the aircraft in question and negotiate better leasing terms than those that Aer Lingus has.

397 Fourth, the applicant states that it gave irrevocable commitments, in connection with its public bid, that it would reduce Aer Lingus's fares, eliminate fuel surcharges by specified amounts, retain frequencies and enhance service. Only efficiencies would have enabled it to satisfy those commitments, whilst ensuring its profitability. The Commission was therefore not entitled to assert, in recital 1135 of the contested decision, that it did not have any verifiable data that the efficiencies can be realised as regards the three fundamental points for consumers, namely fares, flight frequencies and quality of service for each route.

398 Fifth, the applicant insists that the merged entity would have the ability to achieve savings in regard to advertising costs because of increased network-wide buying power following the transaction.

399 Sixth, the applicant criticises the Commission for not acknowledging the relevance of Ryanair's ability to use its options to buy or lease Boeing 737s to replace high cost Aer Lingus aircraft leases. The Commission regarded it as 'no more than a rent transfer' (recital 1137 of the contested decision). In the absence of a concentration, Ryanair's operations would not require it to exercise all those options. Accordingly, if it exercised those options in favour of Aer Lingus, Ryanair would not bear any 'opportunity cost'. The Commission has not established that the terms of the contracts concluded with Boeing enabled Ryanair to exercise those 'unwanted options' and resell

the aircraft on the open market, or that Ryanair would actually choose to use the options so as to compete with Boeing in the market for new aircraft. Such conduct would not be 'feasible or commercially sensible.' The Commission was also wrong to take the view, in recital 1138 of the contested decision, that Ryanair's calculations as regards aircraft ownership costs were 'particularly optimistic', thus failing to take seriously Ryanair's experience in that area.

400 Seventh, the applicant insists that it was wrong for the Commission to 'assume', in recital 1139 of the contested decision, that some of the airport charge savings must arise from Ryanair's relocating Aer Lingus flights from high cost primary airports to lower cost secondary airports. Ryanair in fact demonstrated that the prospective airport cost savings did not rely on lower costs from Dublin Airport or from changing Aer Lingus destination airports. The rationale of the merger is to operate Aer Lingus aircraft at primary airports. Moreover, contrary to Aer Lingus's assertions in recital 1118 of the contested decision, Ryanair achieves 25 minute turnaround times at Dublin Airport, even though it is a primary airport, whereas Aer Lingus operates on the basis of 40 to 55 minute turnarounds. Those times are also achieved in busy airports such as Birmingham and Manchester (see York Aviation's note of 19 January 2007 on turnaround efficiencies).

401 Eighth, the applicant claims that the Commission erred in its understanding of Irish company law because, under that law, Ryanair would control Aer Lingus once it acquired more than 50% of the shares. The 'hostile nature' of the takeover, referred to in recital 1140 of the contested decision, would then be an irrelevance and the Commission wrongly supposed that integration of the two undertakings would be made more difficult if Ryanair controlled less than 100% of Aer Lingus's shares.

402 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

403 In the contested decision, the Commission stated that Ryanair's efficiency claims were not verifiable because they were in essence based on the general claim that Ryanair would be able to transfer its business model, and in particular the related cost levels, to Aer Lingus without the offsetting of downgrades in product characteristics and revenue having been sufficiently taken into account. The Commission also took the view that several of Ryanair's efficiency claims also relied on very strong assumptions which cannot be independently verified (section 7.10.4.2).

404 According to the Commission, the condition concerning the verifiability of the efficiency gains, which is set out in the Guidelines, is not therefore met. That is disputed by the applicant, which submits eight heads of claim on that point.

405 As regards, first, the assessments by the Commission in the contested decision of the data provided by Ryanair (recital 1133; see paragraph 394 above), it must first of all be borne in mind that the Commission considered that 'several of Ryanair's efficiency claims rel[ied] on very strong assumptions which cannot be independently verified'. The Commission also stated in the contested decision that '[t]here appear[ed] not

to exist business documents, dated pre-merger, which objectively and independently assess the scope for efficiency gains from acquiring Aer Lingus'. Against that background, the Commission stated that it 'consider[ed] that such documents are critical to show, first, that Ryanair's business model is different, non-replicable and superior to that of Aer Lingus and, secondly, that its cost structure can be successfully replicated in Aer Lingus post merger'. Such statements may be understood as meaning that the notifying party may be required to produce data which comply with the above definition of documents whose submission is regarded as 'critical' by the Commission.

406 However, it is apparent from point 86 of the Guidelines that efficiencies have to be 'verifiable' so that the Commission can be reasonably certain that the efficiencies are 'likely' to materialise and be substantial enough to counteract a merger's potential harm to consumers. That point in the Guidelines also states that the more 'precise and convincing' the efficiency claims are, the better the Commission can evaluate the claims. In that regard point 86 in the Guidelines states that, where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be 'quantified' and that, when the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a 'clearly identifiable' positive impact on consumers, 'not a marginal one'. The condition relating to the verifiability of efficiencies does not therefore require the notifying party to provide data capable of being independently verified by a third party or documents, dated pre-merger, which serve to objectively and independently assess the scope for efficiency gains generated by the acquisition.

407 That interpretation is reinforced by a reading of point 87 of the Guidelines, from which it is apparent that most of the information allowing the Commission to assess efficiencies is solely in the possession of the parties to the concentration and that it is, therefore, incumbent upon the notifying parties to provide in due time the relevant information.

408 Similarly, the non-exhaustive list of evidence relevant to the assessment of efficiency claims in point 88 of the Guidelines includes evidence of various kinds, and does not stress that it must be capable of being independently verified or dated pre-merger. That list refers, in particular, to internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.

409 The possibility of independently verifying the assumptions on which Ryanair's efficiency claims rely was not therefore required by the Guidelines, which set out the guidance of the Commission applicable in that regard. In any event, in the present case, the Commission was not therefore entitled to reject the data submitted by Ryanair solely on the ground that they relied on very strong assumptions which could not be independently verified. Likewise, the Commission was not entitled to require a particular type of document, such as documents, dated pre-merger, which objectively and independently assess the scope for efficiency gains generated by the acquisition, to dispute the relevance of information deriving from another type of document which might be provided.

410 Against that background, Ryanair was entitled to submit to the Commission its own data about the efficiencies expected from the merger, without necessarily having to rely on an assessment capable of being independently verified by a third party or carried out before the merger was announced. Business life does not always allow such documents to be produced in due time and the documents used by an undertaking to initiate a public bid, whether they come from that undertaking or from its advisers, are by nature likely to be of some relevance as regards substantiating efficiency claims.

411 It must however be pointed out that the Commission specifically examined whether Ryanair's efficiency claims were 'verifiable', in the sense that they made it possible for it to be reasonably certain that the efficiencies were likely to materialise and be substantial enough to counteract the concentration's potential harm to consumers. The Commission stated in recital 1133 of the contested decision that, in the light of Ryanair's efficiency claims, 'the proposition that Ryanair w[ould] be able to fully transfer its business model, and in particular the related cost levels to Aer Lingus without offsetting downgrades in product characteristics and revenue appear[ed] highly optimistic'. The Commission stated that 'Ryanair present[ed] no objective or convincing evidence in this respect other than a general confidence in "Ryanair's more ruthless management style"'.

412 That criticism of the data provided by Ryanair calls into question their capacity to show that the efficiencies claimed are capable of counteracting the negative effects that the transaction could otherwise have on competition. Point 87 of the Guidelines states that it is incumbent upon the notifying parties to provide that evidence. Those efficiencies have to be 'quantified' or, at the very least, 'clearly identifiable', as is apparent from point 86 of the Guidelines.

413 In the absence of information proving that the expected efficiencies as a result of the transfer to Aer Lingus of Ryanair's business model took into consideration the downgrades which would be the result of giving up Aer Lingus's business model, the Commission was entitled to call into question the verifiability of the efficiency claims. On this point too, the applicant merely claims in its written pleadings that its business model is superior to that of Aer Lingus and that that would give rise to efficiencies amounting to EUR 221.7 million (recital 1106 of the contested decision and in particular table 3). Those figures are disputed by the Commission. In recitals 1135 and 1140, the Commission also stated that Ryanair had not demonstrated that it could reduce Aer Lingus's costs without offsetting reductions in service quality.

414 Consequently, since Ryanair has not stated how the Commission's reasoning is wrong as regards its failure to demonstrate that it could reduce Aer Lingus's costs without offsetting reductions in that undertaking's service quality, it must be held that the Commission was entitled to call into question the verifiability of the efficiency claims in the light of the data provided by Ryanair on that point.

415 As regards, secondly, the effect on the analysis of the difference between Aer Lingus's and Ryanair's business models, Ryanair maintains, in essence, that the Commission did not take into account its intention to continue a differentiated service and not to 'fully' transfer its business model to Aer Lingus (recital 1133 of the contested decision; see paragraph 395 above).

416 That head of claim does not take into account the fact that the Commission did indeed take into consideration the applicant's premiss. Its doubts as to the verifiability of the efficiency claims in the light of the data provided by the applicant are as follows:

either Ryanair fully implements its business model in which case it is necessary to take into consideration the downgrades in product characteristics and revenue resulting from Aer Lingus's business model when assessing Ryanair's efficiency claims, or Ryanair retains the product characteristics and revenue resulting from Aer Lingus's business model, as it states is its intention, in which case the efficiencies will necessarily be fewer than those resulting from a complete transfer of Ryanair's low-cost and low-fares service model. It is on that lack of precision affecting the data provided by Ryanair that the Commission correctly based the reasoning that it followed in the contested decision.

417 As regards, thirdly, the reference in the contested decision to the events following the acquisition, by Ryanair, of the airline Buzz, a subsidiary of KLM (recital 1134; see paragraph 396 above), it must be pointed out that the parties agree that that acquisition was not of the same kind as the planned acquisition of Aer Lingus. That is exactly the finding set out in the contested decision which notes the differences between those two transactions (disappearance of the Buzz brand, withdrawal of its aircraft and discontinuation of most of its services). Ryanair's efficiency claims on the basis of that example are therefore based on the assumption that Ryanair's business model will be fully transferred to the undertaking acquired.

418 Concerning, fourthly, the scope of the applicant's commitments, in connection with the public bid, to reduce Aer Lingus's fares, eliminate fuel surcharges, retain frequencies and enhance service (recital 1134 of the contested decision; see paragraph 397 above), as the Commission states in its written pleadings, without being challenged on that point by the applicant, a promise to behave, for an undefined and potentially very short period of time, in a certain way cannot be regarded as an efficiency, nor as proof of the existence of an efficiency.

419 As regards, fifthly, efficiencies relating to possible reductions in advertising costs (recital 1136 of the contested decision; see paragraph 398 above), the criticism made by the applicant does not call into question the scope of the concerns set out in the contested decision. If Ryanair plans to maintain the Aer Lingus brand and quality differentiation, it will continue to be necessary for Aer Lingus to follow its own, differentiated marketing strategy. Indeed, it may be necessary to maintain advertising expenditures in order to ensure that consumers do not confuse the two airlines.

420 As regards, sixthly, aircraft ownership costs (recitals 1137 and 1138 of the contested decision; see paragraph 399 above), the Commission took the view in the contested decision that, as regards the use of the options held by Ryanair to buy aircraft at below market prices, the probable assumption is that Ryanair would exercise that option to renew its own fleet of aircraft. If Ryanair intended to secure an immediate profit by selling new aircraft to another airline or to transfer those options to Aer Lingus to renew that airline's fleet of aircraft, the opportunity cost of the aircraft's alternative use would be exactly equal to the claimed efficiency, which would cancel it out. The Commission also stated that, even if those two assumptions were not to be borne out, the assumptions under which aircraft ownership costs are quantified seemed 'particularly optimistic', in so far as they were based on the possibility of realising the book value of Aer Lingus's fleet.

421 he applicant's criticisms do not call into question the merits of that analysis. The possibility of not exercising those options does of course exist, but Ryanair would lose any benefit of it. As regards the applicant's wish that the Commission establish that the terms of the contracts concluded with Boeing enabled Ryanair to exercise those 'unwanted options' and resell the aircraft on the open market, or that it would actually choose to use those options so as to compete with Boeing in the market for new aircraft, it is difficult to understand why the Commission should be required to do

so. The Commission merely refers to the various courses of action open to Ryanair if it decided to exercise those options and points out that those options were initially conceived to renew Ryanair's fleet. Lastly, the applicant does not state why the Commission's criticism as regards the optimistic nature of realising the book value of Aer Lingus's fleet is wrong merely on account of its experience in that area.

422 As regards, seventhly, airport charges and ground operations costs (recital 1139 of the contested decision; see paragraph 400 above), it must be pointed out, as did the Commission, that the Commission merely stated in the contested decision that 'cost reductions from merely switching Aer Lingus services to secondary airports would in themselves not constitute efficiencies'. That may be understood by means of the example given by the Commission, which observes that Ryanair has claimed inter alia that it had an agreement with Bergamo Airport under which that airport charged Ryanair a passenger cost significantly below that which it charged Aer Lingus to operate to Milan. Bergamo is, however, a secondary airport not served by Aer Lingus, so the claimed efficiency could be realised only by diverting Aer Lingus's current flights to Milan-Linate and Milan-Malpensa to Bergamo. Having regard to the need for that change in Aer Lingus's services, the Commission was right to dispute in the contested decision the existence of such an efficiency.

423 As regards, eighthly, the effect of a greater or lesser controlling interest on the part of Ryanair in Aer Lingus (recital 1140 of the contested decision; see paragraph 401 above), the Commission was right to find, in essence, in the contested decision that an interest of less than 100% would make it more difficult to achieve the claimed efficiencies having regard to the 'hostile nature' of the notified concentration. The opposition likely to be shown by Aer Lingus's shareholders which do not accept Ryanair's takeover, some of which, like Ireland or Aer Lingus's staff may have a significant holding

in Aer Lingus, means that certain decisions that Ryanair may make to reduce costs could be delayed or called into question.

424 It follows from the foregoing that the applicant's heads of claim relating to the verifiability of the efficiency claims must be rejected.

2. *The merger-specific nature of the efficiency claims*

(a) Arguments of the parties

425 The applicant rejects the Commission's assertion that certain efficiency gains, such as the reduction in staff costs, improved aircraft utilisation and reductions in fuel and distribution costs, 'are likely to be not merger specific' and could be obtained by Aer Lingus independently of the merger (recitals 1143 to 1145 of the contested decision). The applicant acknowledges that Aer Lingus has reduced its unit costs since 2001, but observes that according to that company's most recent interim report, its costs are rising. Moreover, Aer Lingus's costs remain substantially higher than those of Ryanair, and the gap is widening. Without the merger, Aer Lingus could not benefit from the economies of scale associated with acquisition by Ryanair. Given that Aer Lingus has not substantially increased its aircraft ownership over the past five years, it must be reasonable to presume that Aer Lingus could not and would not grow rapidly to achieve a scale similar to that of Ryanair. Certain non-scale related efficiencies, such as fast turnaround times at Dublin Airport, are to a large degree merger-specific,

since Aer Lingus has not attempted to achieve shorter turnaround times (see Ryanair's response of 25 January 2007 to the Commission's request for information under Article 11 of the merger regulation). Contrary to the Commission's assertions, Ryanair's alleged competition with Aer Lingus did not in itself provide incentives for Aer Lingus to remain an efficient operator.

426 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

427 It is apparent from point 85 of the Guidelines that efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified concentration and cannot be achieved to a similar extent by less anti-competitive alternatives. In those circumstances, the Commission deems the efficiencies to be caused by the concentration and thus to be merger-specific. It is for the parties to the concentration to provide in due time all the relevant information necessary to demonstrate that there are no less anti-competitive, realistic and attainable alternatives than the notified concentration. The Commission only considers alternatives that are reasonably practical in the business situation faced by the parties to the concentration having regard to established business practices in the industry concerned.

428 In the contested decision, the Commission stated that a number of efficiencies claimed, such as the reduction in staff costs, improved aircraft utilisation and reductions in fuel and distribution costs, could also be achieved by Aer Lingus independently of the proposed concentration (section 7.10.4.3).

429 To dispute that claim, the applicant merely states that it is apparent from Aer Lingus's most recent interim report of 30 August 2007 that that airline's costs are rising and that they are, in any event, higher than its own. The proposed concentration would make it possible for Aer Lingus to benefit from greater economies of scale than those which it could attain if there were no concentration.

430 However, the applicant's first argument cannot be accepted inasmuch as the Commission cannot be criticised for not having taking into consideration, with a view to the adoption of the contested decision on 27 June 2007, results which were published only on 31 August 2007. Consequently, as the applicant indeed concedes, the Commission was entitled to base its finding in the contested decision on the fact that 'since 2001 Aer Lingus ha[d] built a significant track record of reducing unit costs'. Furthermore, the argument relating to economies of scale, put forward by Ryanair, does not call into question the merits of the Commission's argument, which focuses more on the efficiency of the price-quality combination chosen by Aer Lingus.

431 Accordingly, the heads of claim relating to the merger specificity of a certain number of efficiency claims must be rejected.

3. *Consumer benefit*

(a) Arguments of the parties

432 The applicant submits that the Commission accepts the link between fixed entry costs into a route and the yield levels at which entry becomes profitable, as well as the increase in competition to which such entry tends to give rise for a given route (recital 1147 of the contested decision). The Commission was therefore wrong to consider that 'the claimed fixed cost efficiencies would not affect Ryanair's price-setting decisions on existing flights' (recital 1148). By so doing, the Commission takes no account of the fact that, in the airline industry, fixed costs rapidly feed through to marginal output and frequency decisions. Ryanair has a demonstrable track record of low operating costs, of reducing operating costs and of passing these lower costs on to consumers in lower fares. Moreover, in the aviation industry, suppliers have to make frequent and short-term adjustments to capacities and schedules, which the cost structure of Aer Lingus would not permit. The Commission was also wrong to say that 'any consumer benefit would therefore not be immediate but conditional on a chain of events and thus considerably less certain than the price effect of a marginal cost reduction (which would create immediate incentives for price reductions)' (recital 1148). The Commission does not give reasons or provide evidence for that assertion and it runs contrary to Ryanair's actual experience.

433 The Commission, supported by Ireland and by Aer Lingus Group, disputes the applicant's arguments by referring to the contested decision.

(b) Findings of the Court

434 As regards consumer benefit, point 79 of the Guidelines states that the relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.

435 In that regard, it is apparent from point 80 of the Guidelines that mergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers. For example, cost savings in production or distribution may give the merged entity the ability and incentive to charge lower prices following the merger. In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers. Cost reductions which merely result from anti-competitive reductions in output cannot be considered to be efficiencies benefiting consumers.

436 Furthermore, it is apparent from point 84 of the Guidelines that the incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. As

regards that point, the Guidelines state that it is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

437 In the contested decision, in response to Ryanair's claim that reductions in aircraft operating costs affect the airline's 'marginal' decision whether or not to operate a flight on a certain route, the Commission accepted that lower fixed entry costs into a route lowered the yield levels at which entry becomes profitable, and that such entry tended to increase competition for a given route (recitals 1146 and 1147).

438 The Commission then examined the degree of certainty and timeliness with which those benefits would be passed on to consumers and stated that the claimed fixed-cost efficiencies would not affect Ryanair's price setting decisions on existing flights. According to the Commission, any consumer benefit would materialise only when and if Ryanair opted to increase frequencies on existing routes or opened a new route that was not viable before the fixed-cost reduction but became so after the concentration. Even if the claimed efficiencies were realised, any consumer benefit would therefore not be immediate but conditional on a chain of events and thus considerably less certain than the price effect of a marginal cost reduction, which would create immediate incentives for price reductions (recital 1148).

439 Furthermore, the Commission stated that as Ryanair only argues that Aer Lingus's costs can be brought down towards its own levels, there would be no change compared to the pre-merger situation since Ryanair's 'hurdle yield' and the scope of

potential profitable routes would not change, even if all claimed efficiencies were realised (recital 1149). By contrast, on existing overlap routes, the immediate effect of the concentration lies in the internalisation of Ryanair's and Aer Lingus's pricing and output decisions. Assuming profit maximising conduct, the merged entity would have an incentive to raise prices on these routes due to the very high combined market shares and any transfer of passengers between the Ryanair and Aer Lingus brands would largely remain within that entity, in particular on the routes moving from duopoly to monopoly (recital 1150).

440 The Commission conceded that, theoretically, that effect could be counteracted if and when fixed-cost efficiencies made it profitable for Ryanair to add extra frequencies to the affected routes, which would in turn put downward pressure on prices. However, it found that given the extremely high combined market shares, often approaching monopoly levels, and the fact that the claimed efficiencies apply largely to the Aer Lingus brand, it is highly unlikely that the price-reducing effect of such efficiencies would be sufficient to reverse the price increase resulting from the horizontal overlap and consequent loss of competition (recital 1150).

441 In that regard it must be pointed out, as did the Commission, that Ryanair does not dispute the assessment that any efficiencies are unlikely to be passed on to consumers in view of the very high market shares of the merged entity on most overlap routes. Therefore, even if Ryanair's claim that all cost savings are used to lower fares further in order to drive higher volumes were to be established, Ryanair's actual priority is still probably that of maximising profit. On markets where all competition is

eliminated as a result of the merger, it is likely to be much more profitable not to pass on to consumers the claimed reduction in Aer Lingus's fixed costs.

442 Consequently, the complaints relating to consumer benefit must be rejected.

443 It follows from the above that the applicant's complaints relating to the verifiability and merger specificity of the efficiencies and to consumer benefit must all be rejected. Therefore, since the applicant has not shown that the Commission's analysis in the contested decision is incorrect as regards the three cumulative conditions established to define the circumstances in which it may take account of efficiency claims in assessing a merger, the fourth plea must be rejected in its entirety.

4. *Conclusion in respect of the analysis of the effects of the transaction on competition*

444 It is apparent from the analysis of the first four pleas that none of the arguments put forward by the applicant is capable of calling into question the findings made by the Commission in the contested decision according to which the implementation of the merger would significantly impede effective competition as a result of the creation of a dominant position on a number of routes from or to Dublin, Cork and Shannon.

445 Those dominant positions are monopolistic, quasi monopolistic or very significant and are sufficient, in themselves, to validate the Commission's finding that the implementation of the merger should be declared incompatible with the common market.

446 The fifth and final plea, relating to commitments, must now be examined.

E — *The fifth plea, concerning the assessment of the commitments*

1. *Preliminary considerations*

447 It is appropriate to note the analytical framework applicable to commitments before examining the content of the commitments at issue in the present case.

(a) The framework for analysing commitments

448 The purpose of the control of concentrations is to provide to the undertakings concerned the authorisation which is necessary and preliminary to the implementation of any concentration having a Community dimension. As part of the arrangements for control, those undertakings may submit commitments to the Commission in order to obtain a decision finding their concentration to be compatible with the common

market (Case T-212/03 *My Travel* v *Commission* [2008] ECR II-1967, paragraphs 116 to 118).

449 Depending on the stage which the administrative procedure has reached, the commitments proposed must allow the Commission either to form the view that the notified concentration does not raise serious doubts as to its compatibility with the common market at the stage of the preliminary examination (Article 6(2) of the merger regulation) or to respond to the objections sustained during the detailed investigation (Article 18(3), read together with Article 8(2) of the merger regulation). Those commitments therefore make it possible to avoid the initiation of a detailed investigation phase or a subsequent decision declaring that the concentration is incompatible with the common market (see *My Travel* v *Commission*, paragraph 448 above).

450 Article 8(2) of the merger regulation allows the Commission to attach to a decision declaring a concentration compatible with the common market in accordance with the criterion laid down in Article 2(2) of the regulation conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market (see *My Travel* v *Commission*, paragraph 448 above).

451 Having regard both to the significance of the financial interests and industrial or commercial stakes inherent in that type of transaction and to the powers available to the Commission in the field, it is in the interest of the undertakings concerned to facilitate the work of the administration. For the same reasons, the Commission must display the utmost diligence in performing its supervisory duties in the field of concentrations (see, as regards the former merger regulation, *My Travel* v *Commission*, paragraph 448 above, paragraph 119).

452 It must also be noted that, in the context of merger control, the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the common market (see, as regards the former merger regulation, *General Electric* v *Commission*, paragraph 41 above, paragraph 555).

453 It must be held in that regard that commitments proposed by one of the parties to a merger will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the remedies resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future (see, as regards the former merger regulation and having regard to the fact that the remedies suggested in the present case are not all of a structural nature, *General Electric* v *Commission*, paragraph 41 above, paragraph 555).

454 Furthermore, it is apparent from Article 19(2) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing the merger regulation (OJ 2004 L 133, p. 1) that commitments offered by the undertakings concerned pursuant to Article 8(2) of the merger regulation are to be submitted to the Commission within not more than 65 working days from the date on which proceedings were initiated. Where the period for the adoption of a decision pursuant to Article 8(2) of the merger regulation is extended, the period of 65 working days is automatically extended by the same number of working days. In the present case, the period provided for in Article 19(2) of Regulation No 802/2004 expired on 3 May 2007 (recital 1237 of the contested decision).

455 As regards commitments which are submitted out of time, it is apparent from point 43 of the Notice on remedies acceptable under the former merger regulation and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3) ('the notice on remedies'), whose approach was adopted by the Commission in the present case as regards the merger regulation and Regulation No 802/2004, that the parties to a notified concentration may have such commitments taken into account subject to two cumulative conditions, namely, first, that those commitments clearly and without the need for further investigation resolve the competition concerns previously identified and, secondly, that there is sufficient time to consult the Member States on those commitments (see with regard to the former merger regulation *EDP* v *Commission*, paragraph 28 above, paragraph 163, and *My Travel* v *Commission*, paragraph 448 above, paragraph 127).

(b) Description and assessment of the 3 May 2007 commitments

456 In recital 1153 of the contested decision, the Commission stated that, during the administrative procedure, Ryanair submitted a number of sets of commitments: on 29 November 2006, the 'Initial Phase I Commitments'; on 14 December 2006, the 'Modified Phase I Commitments'; on 17 April 2007, in reply to the statement of objections, the 'Initial Phase II Commitments'; and on 3 May 2007, according to the Commission, the 'Final Commitments' ('the 3 May 2007 commitments').

457 The Commission stated that the 3 May 2007 commitments took the form of several documents, namely, first, a 'commitments letter' which contained a description of the commitments proposed and general comments on the investigation and on the appropriateness of those commitments and, secondly, an Annex which is aligned to

the commitments format of the Commission's model texts and describes 'the details of the proposed mechanics of Commitment No 2' (recital 1162).

458 According to the description in the contested decision (recital 1164), the content of the proposed commitments can be summarised by distinguishing slot-related commitments (the first four measures) from non slot-related commitments (the last two measures):

— first, Ryanair committed to make available slots for the London-Heathrow route under a so-called 'leasing arrangement', as those slots were exclusively reserved for British Airways and Air France (see also footnote 1410 which accompanies recital 1164);

— secondly, Ryanair also committed, if necessary, to make available slots for other overlap routes from and to Dublin (allowing airlines, according to Ryanair, to operate with a certain number of aircraft based in Dublin) and also offered to make available an equivalent number of slots at specific destination airports on the overlap routes, if necessary;

— thirdly, Ryanair committed to make available slots for overlap routes from and to Cork and Shannon if necessary. (This involves daily slots at Cork and Shannon, an equivalent number of slots at London-Stansted for flights to London-Stansted

and slots relating to the Cork and Liverpool routes in order to facilitate entry on the Cork-Manchester and Cork-Liverpool routes);

— fourthly, in the 'Commitments Letter', Ryanair offered 'not to complete the acquisition of Aer Lingus' before it had found a 'buyer' that committed to taking up the slots to operate the aircraft based at Dublin;

— fifthly, Ryanair committed to reduce Aer Lingus's short-haul fares by at least 10% immediately, to eliminate the fuel surcharges Aer Lingus applies on its long-haul flights immediately, to retain the Aer Lingus brand and to continue to operate Ryanair and Aer Lingus separately;

— sixthly, Ryanair committed (i) not to increase, in excess of the frequencies jointly operated by it and Aer Lingus, the frequencies of flights on any of the overlap routes concerned 'in the event of a new entrant to the route' for a period of six International Air Transport Association (IATA) seasons after completion of the merger and (ii) not to reduce the frequencies on those routes 'unless a route is or becomes unprofitable' (frequency freeze).

459 The Commission then stated that it had sent a non-confidential version of the 3 May 2007 commitments together with a questionnaire to third parties in order to allow them to express their views and to clarify certain factual issues (for example, as regards the sufficient scope of the remedy or the likelihood of entry triggered by those commitments) (recital 1165).

460 Lastly, the Commission set out the results of the assessment of the 3 May 2007 commitments (recitals 1166 to 1234) before concluding that they '[were] not sufficient to remedy the identified significant impediment to effective competition and, thus, [could not] render the proposed concentration compatible with the common market' (recital 1235).

461 First, the Commission stated that the 3 May 2007 commitments were formulated in an unclear and often contradictory manner (section 8.2.1 of the contested decision). According to the Commission, the 3 May commitments were not sufficiently clear to be implemented or enforced as they do not satisfy the minimum conditions established by the notice on remedies and in *General Electric* v *Commission*, paragraph 41 above, paragraph 555.

462 The Commission's observations on that point relate to the format of the commitments (section 8.2.1.1), the lack of clarity of the commitment relating to the 'up-front buyer' (section 8.2.1.2), the mechanics of the slots divestiture (section 8.2.1.3) and the description of 'Commitment No 1' (section 8.2.1.4).

463 Secondly, the Commission examined the substance of the 3 May 2007 commitments before concluding that they could not eliminate the competition problems identified (section 8.2.2). In essence, the Commission criticised the fact that the proposed commitments did not constitute a business divestiture, which is necessary in the present

case, but mainly an 'access remedy' which was defined following the model of previous airline cases. The following grounds are elaborated on in the contested decision:

— as regards the slots package for the overlapping routes from and to Dublin, Cork and Shannon (section 8.2.2.1), the Commission's market investigation and the results of the market test of the 3 May 2007 commitments showed that there were no indications of sufficient entry on the vast majority of the identified routes and that that offer of slots will not restore competition on a large number of the more than 30 affected overlap routes. The Commission thus stated that the 'up-front' proposal cannot remedy the missing perspective of entry (recitals 1197 and 1198), that the scope of the proposed commitments was insufficient as airport congestion was not the main barrier to entering into direct competition with Ryanair-Aer Lingus combined (recitals 1199 to 1206), that the commitments do not relate to slots at important destination airports such as Roissy-Charles-de-Gaulle, Frankfurt am Main, Brussels, Milan-Linate or Milan-Malpensa (recitals 1207 to 1209), that the commitments could only provide for 'fragmented' entry which is less likely to restore effective competition (recitals 1210 to 1212) and that the commitments disregarded the operating model of the entrant (recitals 1213 to 1215);

— as regards the slot package for the Dublin-London (Heathrow) route (section 8.2.2.2), the market test confirmed the Commission's analysis that British Airways and Air France, as well as at least one other competitor, were interested in obtaining these slots and in expanding their existing operations on that route. Although, due to the exclusivity clause concerning British Airways and Air France, the offered slots would not lead to new entries, the Commission acknowledged that that offer of slots, should they actually be divested, would most likely lead to expansion by competitors on that route which could constrain Ryanair-Aer

Lingus combined on the Dublin-London route to a certain extent (recital 1216). However, the Commission expressed doubts as regards the sufficiency and effectiveness of those commitments for a number of reasons: the lack of clarity as to whether those airlines could offer low-fares services comparable to those offered by Ryanair that would be capable of substituting for the disappearing competitive pressure from Aer Lingus to a sufficient extent (recital 1217), the uncertainty as to whether the flight frequencies offered to the two airlines concerned is sufficient to impose effective competitive constraints on the merged entity (recital 1218) and the lack of clarity of the commitments (recital 1219);

— as regards the non slot-related commitments (section 8.2.2.3), consisting of an immediate reduction of at least 10% in Aer Lingus's short-haul fares, the immediate elimination of the fuel surcharges Aer Lingus applies on its long-haul flights, a 'frequency freeze' and the retention of separate operations and brands, the Commission stated that they did not directly solve any of the competition problems identified and that they gave rise to numerous questions relating to monitoring and the workability of that monitoring.

464 Furthermore, the Commission observed that it was unclear whether the proposed commitments could be implemented without the consent of other Aer Lingus shareholders (section 8.2.2.4). In particular, it found that there were serious legal doubts as regards the possibility of Ryanair's disposing of Aer Lingus's slots at Heathrow, given that Aer Lingus's Articles of Association confer certain rights of veto on the Irish Government, which would make it possible for it to block the transfer of the slots.

(c) Description and assessment of the draft commitments of 1 June 2007

465 The Commission pointed out that, on 29 May 2007, a meeting was held in the form of a conference call in which Ryanair was informed about the results of the market test of its commitments and the Commission's preliminary assessment of the 3 May 2007 commitments (recital 1153). The Commission stated that on 1 June 2007, following that meeting and subsequent additional discussions, Ryanair submitted, in draft form, revised commitments which are referred to as the 'draft modified final commitments' in the contested decision ('the draft commitments of 1 June 2007'). The Commission explained that, according to Ryanair, the proposed modifications aimed at 'addressing' the identified shortcomings of the 3 May 2007 commitments (recital 1236).

466 In the contested decision, the Commission stated that the draft commitments of 1 June 2007 had been provided explicitly in draft form, without signature and without complying with the formal requirements necessary pursuant to Article 20 of the Regulation No 802/2004. The Commission therefore found that, since Ryanair had not formally submitted new commitments, it was not obliged to assess them in the contested decision (recital 1237).

467 In any event, according to the Commission, even if the draft commitments of 1 June 2007 had been formally submitted, they would still not have been sufficient to allow it to conclude, on the basis of information already available, that they fully and unambiguously resolved the competition concerns identified. The Commission noted that the period for submitting commitments in line with Regulation No 802/2004

had expired on 3 May 2007. Furthermore, according to the Commission, although it may, in exceptional circumstances, accept amendments to remedies submitted even if a new market test is no longer possible, those commitments must resolve specifically all the competition problems identified (recital 1237). The Commission pointed out, in particular, that the draft commitments of 1 June 2007 were still based on slot transfer and did not provide any new elements which could address the other identified barriers to entry and thus enable it to re-evaluate the negative results of the market test as to likelihood of an actual entry. Furthermore, according to the Commission, the scope of the guaranteed new entry was still insufficient as the commitments provided only for one new 'up-front' entrant with a greater, but still insufficient, number of aircraft. Furthermore, the Commission pointed out that the draft commitments of 1 June 2007 did not provide for the transfer of slots at all relevant destination airports, in particular not for slots at congested airports, and that other unsolved problems related, in particular, to legal uncertainty with respect to the London-Heathrow Airport slots and the implementation of the 'up-front' provisions (recital 1238).

468 The Commission therefore concluded in the contested decision that, even if the draft commitments of 1 June 2007 had been formally submitted, they would clearly not have allowed it to determine with the required degree of certainty and without the need for another market test that such commitments, once implemented, would sufficiently resolve the identified competition concerns caused by the proposed concentration (recital 1239).

469 To dispute that analysis, the applicant states, in essence, that it offered five sets of commitments during the administrative procedure, on 29 November and 14 December 2006, 17 April, 3 May and 1 June 2007 respectively. The last two sets of commitments consisted of (i) behavioural commitments comprising a 10% reduction in the Aer Lingus tariff, elimination of Aer Lingus's fuel surcharge, maintenance of frequencies

on existing routes unless they become unprofitable and no increase of frequencies on routes on which a new entrant operates; (ii) commitments concerning slot divestiture at Dublin, allowing one or two competitors to base a substantial number of aircraft there (with a distinction between the Dublin-London (Heathrow) route and other routes), at Shannon and at Cork; and (iii) an 'up-front buyer' commitment, under which the merger would proceed only if there was a purchaser for the Dublin slots.

470 As regards the last set of commitments, the applicant refers to a meeting with the Commission on 1 June 2007, at which the Commission proposed modifications to the 3 May 2007 commitments to address the shortcomings identified. According to the applicant, those modifications concerned the need for it to propose within six months after the adoption of the contested decision (with a possible extension of six months) an 'up-front buyer' which would immediately base a substantial number of aircraft at Dublin. In response, Ryanair gave a commitment to find an 'up-front buyer' for the Dublin-London (Heathrow) slots, which would base two aircraft at Dublin, and another for the other slots, which would base half the substantial number of aircraft envisaged by the Commission there. Ryanair also committed to make available to the 'up-front buyer' for the Dublin slots, at any time during the first three years, additional slots needed to reach the substantial number of aircraft demanded by the Commission and to give preference for the acquisition of the Dublin slots to the entrant acquiring the Heathrow slots. Moreover, Ryanair gave a commitment to find the 'up-front buyer' within a period of six months after lodging a new bid for Aer Lingus and to lodge such a new bid within six months of the adoption of the contested decision, with a possible extension of six months. The contested decision does not make it possible to understand how the difference between the modifications requested by

the Commission and the modifications made by Ryanair could lead to the conclusion that the last set of commitments was not satisfactory (recital 1238).

471 The Commission, supported by Ireland and by Aer Lingus Group, states that, in order to restore effective competition, the commitments proposed must eliminate the anti-competitive effects resulting from the elimination of actual and potential competition between Ryanair and Aer Lingus on all 50 of the markets affected. In that regard, the Commission set out in the contested decision the reasons why the commitments submitted on 3 May 2007, the last day of the period provided for in Article 19(2) of Regulation No 802/2004, displayed formal shortcomings and were not such as to eliminate the competition problems identified (recitals 1167 to 1234). As regards the draft commitments of 1 June 2007, which were submitted after the expiry of the period provided for in Article 19(2) of Regulation No 802/2004, the Commission set out the reasons why it was not possible to conclude that the modified concentration was compatible with the common market (recitals 1236 to 1239). In any event, the applicant cannot maintain that the Commission should have examined the differences between possible suggestions from its departments and the draft commitments of 1 June 2007. The only relevant question is whether the Commission could find, without making a manifest error of assessment, that the proposed concentration, as modified by the commitments validly offered by Ryanair, significantly impedes effective competition in the common market.

472 It is against that legal and factual background that the arguments of the parties must be examined.

2. *Absence of formal shortcomings affecting the commitments of 3 May 2007*

(a) Arguments of the parties

473 The applicant maintains that the Commission cannot assert that the 3 May 2007 commitments were not validly submitted (recitals 1167 to 1182 of the contested decision) and that it is not required to assess them. Since the content of those commitments was analysed in the contested decision, it cannot be alleged that they could not be analysed. In that regard, the applicant denies the existence of the formal shortcomings identified in the contested decision. The format of those commitments was identical to that used for the commitments of 29 November 2006, 14 December 2006 and 17 April 2007. The only new elements were the commitment to seek an 'up-front buyer', as demanded by the Commission, and the additional slots at Cork and Shannon. Since the Commission did not raise any objection in the administrative procedure as to the format of those sets of commitments, it could not then criticise Ryanair for the use of a commitments letter and an explanatory Annex for the 3 May 2007 commitments (recital 1168). Furthermore, the Commission cannot criticise Ryanair for not having consulted it before lodging the 3 May 2007 commitments (footnote 1404 under recital 1161), in so far as those commitments correspond to the previous ones and a discussion had already taken place without the Commission ever having raised any formal complaints. The Commission cannot moreover criticise Ryanair for failing to use the non-obligatory model text adopted by it.

474 In any event, the applicant emphasises that the Commission did not take account of the fact that it had clarified a number of alleged ambiguities cited in the contested decision and that any remaining alleged inconsistencies could not in any event have prevented the adoption of the commitments.

475 As regards the statement in recital 1173 of the contested decision that there were doubts concerning the approval of the 'up-front buyer', the applicant points out that it agreed to include that condition at the request of the Commission and that it included the approval provision in the reformulated draft versions. As regards the assertion in the same recital that the time-limit for implementing the 'up-front buyer' solution was not defined, the applicant states that it subsequently clarified that time-limit and it explained to the Commission the relevant Irish takeover rules.

476 As regards the assertion in recital 1174 of the contested decision that there was a contradiction between the 'up-front buyer' solution referred to in the 'commitments letter' and the time-limit on the slots transfer provided for in clause 3 of Annex 1 to that letter, the applicant observes that it subsequently deleted that clause to avoid any doubt in respect of the duration of its commitments.

477 As regards the assertion made in recital 1175 of the contested decision that it was unclear whether the 'up-front buyer' solution concerned only Dublin slots or slots at Shannon and Cork as well, Ryanair made it clear that that solution referred only to Dublin slots.

478 With regard to the statement made in recital 1176 of the contested decision, that the 'up-front buyer' solution was unclear as to whether the transfer of slots was to different airlines or to only one, Ryanair had stated that that commitment applied to 'an airline or airlines that wished to secure slots in order to base aircraft in Dublin', thus

referring, potentially, to a number of airlines. That is confirmed by the revised provisional versions of the 3 May 2007 commitments, submitted on 25 and 30 May 2007.

479 As regards the assertion in recitals 1177 and 1178 of the contested decision that the commitment concerning the transfer of slots was not clear, as evidenced by the terms 'allocated from time to time so as to comply with the Articles of Association of Aer Lingus (as amended from time to time)' or 'binding leasing agreement', the applicant observes that those terms were clarified, as was the general issue of slot divestments, in its letter dated 15 May 2007. Moreover, in response to the Commission's request for information dated 25 May 2007, Ryanair provided further clarification and also attached the opinion of an Irish Senior Counsel.

480 As regards the assertion contained in recital 1179 of the contested decision that the 3 May 2007 commitments did not express a clear intention to make available slots at destination airports, the applicant submits that that is not a formal but a substantive issue.

481 As regards the assertion in recital 1180 of the contested decision that it was ambiguous 'whether new entrant(s) could use the offered slots (except the Heathrow slots) for any route or whether the use is restricted to the overlap routes', the applicant clarified that alleged ambiguity by stating repeatedly that the slots could be used to serve any route, without restriction, from Dublin, including the overlap routes. The Commission's allegation appears to be based only on the wording of clause 2.15(iii) of Annex 1 to the 'commitments letter', which was subsequently removed.

482 As regards the allegation in recital 1179 of the contested decision that Ryanair's definition of 'relevant airport pairs' in the 3 May 2007 commitments did not correspond to the pairs listed in the statement of objections, the applicant explained that it had omitted two destinations (namely Bologna and Salzburg) because those two routes were seasonal only, but that did not change the intention to cover all the routes. To dispel all doubt in that regard, Ryanair included those two destinations in the subsequent texts of the commitments.

483 As regards the allegation in recital 1179 of the contested decision that the total number of slots to be released at Cork and Shannon was unclear, the applicant emphasises that that information was clearly contained in the 'commitments letter'. Moreover, Ryanair confirmed those numbers in a letter and in the draft commitments of 1 June 2007.

484 As regards the allegation in recital 1181 of the contested decision that the Commission was not apprised of the details of implementation of the behavioural remedies offered under commitment No 1, the applicant submits that it had clarified how monitoring would take place. The Commission did not provide a meaningful response to that explanation, asserting that it merely amounted to a modification of the commitments and it was under no obligation to accept it. In order to dispel any doubt, Ryanair included explicit reporting provisions in its subsequent submissions.

485 As regards the allegation in recital 1182 of the contested decision that the 'inconsistency and lack of clarity' of the remedies proposed, perceived 'by some competitors' as an obstacle to the viability of the commitments, were apparent from the responses of 'some' competitors to question No 5 of the May 2007 market testing questionnaire concerning clarity of the slot transfer remedy, the applicant submits that the Commission could not have properly formed such a conclusion. First, only 20 competitors

responded to that questionnaire, nine of which did not respond to question No 5. As regards the 11 competitors who replied to the question, three did not actually address the question asked, three (LTU, Aer Arann and Clickair) commented positively on the clarity of the commitments and only five, of which two were anonymous, expressed reservations about the clarity of the slot transfer remedy. No other details of any alleged 'inconsistencies "or "lack of clarity' have been identified by the Commission.

486 The Commission, supported by Ireland and by Aer Lingus Group, observes that it was for Ryanair to put forward commitments that were comprehensive and effective from all points of view to enable it to conclude, with certainty, that it would be possible to implement the commitments and that the new commercial structures resulting from them are sufficiently workable and lasting to ensure that the concentration would not significantly impede effective competition. Ryanair did not consult the Commission before submitting the 3 May 2007 commitments, or even the previous commitments. The Commission never stated that any of the commitments were sufficiently clear and precise to be implemented. Ryanair cannot claim to have entertained any legitimate expectations on this point. The slot-related and behavioural elements of the 3 May 2007 commitments did not correspond to those contained in previous commitments. In any event, the 3 May 2007 commitments were not sufficiently clear and precise to be implemented.

487 Furthermore, the Commission could not take into account informal clarifications submitted subsequently which, likewise, lacked clarity and precision. After the deadline for submitting commitments, the Commission could only accept modified commitments in exceptional circumstances if those modifications clearly removed all existing competition concerns without the need for a market test. However, following the submission of the 3 May 2007 commitments, Ryanair provided a number of informal explanations, some of which contradict the terms of the 3 May 2007 commitments, and reformulated draft versions of those commitments on 25 and 30 May 2007. None

of those explanations was properly formalised. Moreover, the explanations were not sufficient to address all the formal shortcomings identified in the contested decision. Aer Lingus also indicates that Ryanair emphasised on 8 May that 'to clarify, the Heathrow slots are not exclusive[ly] to British Airways and Air France', before observing on 11 May that 'these slots are exclusively reserved for British Airways and Air France'. The Commission also noted that at least 7 of the 10 competitors of Ryanair that answered the market test questionnaire believed the 3 May 2007 commitments were not sufficiently clear, which is enough to support the statement in the contested decision that the inconsistency and lack of clarity of the 3 May 2007 commitments is an obstacle to their viability.

(b) Findings of the Court

488 It is apparent from the contested decision (see paragraphs 460 to 464 above) that the commitments proposed by Ryanair in the period established for that purpose by Article 19(2) of Regulation No 802/2004, which ended on 3 May 2007, were not regarded by the Commission as satisfactory to deal with the competition problems identified at that stage. That finding is based on two reasons which are set out in the contested decision. First, 'the [3 May 2007] Commitments fail to meet the requirements in terms of legal clarity and coherence in order to be acceptable to dismiss the identified competition concerns' (recital 1182). Secondly, irrespective of the 'formal shortcomings' identified in section 8.2.1 of the contested decision, 'the [3 May 2007] Commitments would not be sufficient to remove all the identified competition concerns' (recital 1234).

489 The arguments submitted by the applicant are not capable of calling the Commission's finding into question.

490 First, as regards the formal shortcomings listed by the Commission in the contested decision as regards the 3 May 2007 commitments, the applicant submits that they cannot be relied on, because an analysis of the content of those commitments was made in the contested decision.

491 It is, however, apparent from just reading the contested decision that that analysis of their content was carried out independently. In recital 1166, the Commission therefore stated that those commitments were 'not only … formulated in an unclear and often contradictory manner (see section 8.2.1), their substance [was] also not sufficient to resolve the identified competition concerns (see section 8.2.2)'. That analysis of their content is explained by the Commission's intention of informing Ryanair of the results of its market test regarding the 3 May 2007 commitments in order to explain what form the final offer of commitments might take.

492 The applicant cannot therefore dispute the existence of the formal shortcomings identified in section 8.2.1 of the contested decision as regards the format used to submit the commitments, the lack of clarity of the commitment relating to the 'up-front buyer' of the slots, the mechanics of the divestiture of those slots and the monitoring of the behavioural commitments, just because a substantive analysis was carried out, as that analysis was carried out for the sake of completeness and on the assumption that those commitments had been submitted in a way which ensured that they could be implemented.

493 Secondly, the applicant cannot rely on the Commission's attitude towards the commitments which had previously been submitted. The format used by the applicant had been used in the past only for the submission of the 17 April 2007 commitments, which were part of the response to the statement of objections, at a time when the assessment of the effects on competition had not yet been finalised. Although it is possible to accept that, in the latter context, the applicant may call into question the conclusions of such an assessment by disputing the existence of competition concerns, it could not include statements or opinions on the Commission's analysis in an offer of commitments such as the 3 May 2007 commitments, since that offer had to express an intention to eliminate the problems identified at that stage in return for an approval decision. In the event of disagreement on the commitments desired by the Commission, the parties to the transaction may always refuse to propose them and bring an action before the Court to challenge any prohibition decision adopted in respect of their transaction.

494 Furthermore, by contrast with the previous proposals, some of the 3 May 2007 commitments were new, like the commitment relating to the 'up-front buyer', which the Commission stressed in particular in the contested decision was too vague in the light of its previous practice on that issue (recital 1172 and footnote 1428). That practice requires inter alia a clear and precise clause which actually makes the implementation of the merger conditional on the implementation of the corresponding commitment.

495 Thirdly, the applicant cannot seek to call into question the finding that the 3 May 2007 commitments have formal shortcomings by relying, as noted in paragraphs 474 to 485 above, on information and clarifications provided subsequently in response to requests from the Commission. That information is part of another context, that of the final offer of commitments, and not that of the Commission's assessment of the

form and clarity of the commitments submitted by Ryanair at the end of the procedure laid down for that purpose by Regulation No 802/2004.

496 Consequently, the applicant does not put forward any arguments capable of calling into question, to the requisite legal standard, the Commission's assessment in the contested decision that the 3 May 2007 commitments had formal shortcomings such that it was unable to conclude, with certainty, that it would be possible to implement them and that the remedies resulting from them would be sufficiently workable and lasting to ensure that the impairment of effective competition which those commitments were intended to prevent would not be likely to materialise in the relatively near future.

497 It is thus now necessary to examine the applicant's arguments concerning the draft commitments of 1 June 2007. The arguments relating to the substantive assessment of offers of commitments made to the Commission will be examined in that context.

3. *Absence of formal shortcomings affecting the draft commitments of 1 June 2007*

(a) Arguments of the parties

498 The applicant maintains that the Commission was wrong to assert, in recitals 1236 and 1237 of the contested decision, that the draft commitments of 1 June 2007 were not validly offered and that it was not required to evaluate them. Since the content

of the draft was analysed in the decision, it cannot be alleged that it could not be analysed. According to the applicant, the letter which it sent to the Commission on 1 June 2007 was submitted 'in draft form' to allow the Commission to make any final drafting amendments that might be required to ensure that the commitments were clear, unambiguous and consistent throughout the document. If the Commission considered that the label 'draft' and the absence of a signature were formal shortcomings that prevented it from assessing the substance of the 1 June commitments, it was incumbent upon the Commission to inform Ryanair accordingly, and it failed to do so. Thus, the Commission's letter to Ryanair of 4 June 2007 merely indicated that the draft commitments of 1 June 2007 were insufficient to remedy the alleged competition concerns identified at that stage, without mentioning that the Commission considered that it was not obliged to assess them on the ground that they had been offered in draft form. By acting in that way, the Commission infringed the principles of good administration and protection of legitimate expectations.

499 The Commission, supported by Ireland and by Aer Lingus Group, observes that unsigned commitments that are explicitly submitted in draft form cannot be considered as commitments that the undertakings concerned have 'entered into vis-à-vis the Commission' within the meaning of Article 8(2) of the merger regulation. Such commitments can be changed or revoked by the undertaking that offered them. In any event, even if the draft commitments of 1 June 2007 had been formally submitted, they would not have allowed the Commission to determine with the required degree of certainty that they would resolve the identified competition concerns without the need for a further market test. Moreover, the applicant cannot invoke the principle of good administration, as such, in support of its claims that the Commission should have assessed the draft commitments of 1 June 2007 and the Commission never gave Ryanair any assurance that it would assess all the draft commitments in the contested decision.

(b) Findings of the Court

500 Like the 3 May 2007 commitments, the draft commitments of 1 June 2007 were rejected by the Commission in the contested decision for two reasons (see paragraphs 466 and 467 above).

501 First, the Commission stated in the contested decision that the draft commitments of 1 June 2007 '[had been] provided explicitly in draft form, without signature and without complying with the formal requirements necessary pursuant to Article 20 of … Regulation … No 802/2004'. It found that '[s]ince Ryanair ha[d] not formally submitted new commitments, the Commission [wa]s not obliged to assess them in the present decision'. The Commission stated in particular that it 'could not make an authorisation conditional on compliance with such draft commitments' (recital 1237).

502 Secondly, the Commission noted that '[i]n any event, even if the Draft … Commitments [of 1 June 2007] had been formally submitted, they would still not have been sufficient to allow the Commission to conclude, on the basis of information already available, that they fully and unambiguously resolve[d] the competition concerns identified' (recital 1237, which refers to paragraph 43 of the Notice on remedies and to *EDP* v *Commission*, paragraph 28 above, paragraphs 161 to 163).

503 As regards the first reason which the Commission advanced for rejecting the draft commitments of 1 June 2007, it is apparent from the very wording of that document that it is a mere draft and not a version which is capable of binding Ryanair as is,

however, required at that stage of the procedure. Therefore, even though the document is headed 'Legally binding commitments by Ryanair to the European Commission', it is presented in the form of a 'draft' and the space left for the signature of Ryanair's Chief Executive has been left empty. The covering letter signed by Ryanair's Chief Executive also states that that document is in draft form in order to allow for any final drafting amendments that may be required by the Commission to ensure that those commitments are clear, unambiguous and consistent throughout the document. However, the Commission is not in a position to provide such details at that very advanced stage of the procedure, where the final offer of commitments must not only be binding on the party offering them, but also sufficient in itself, in the sense that the Commission must be able to assess it without again having to seek the opinions of third parties on its content.

504 Furthermore, the fact that an analysis of the content of the draft commitments of 1 June 2007 was carried out 'in any event' cannot be interpreted as meaning that this in effect allows the applicant to refrain from submitting legally binding commitments to the Commission at the final stage of the procedure.

505 Consequently, the applicant does not put forward any arguments capable of calling into question, to the requisite legal standard, the Commission's assessment in the contested decision that the draft commitments of 1 June 2007 did not allow it to conclude, with certainty, that it would be possible to implement them and that the remedies resulting from them would be sufficiently workable and lasting to ensure that the impairment of effective competition which those commitments are intended to prevent would not be likely to materialise in the relatively near future.

506 The assessment of the applicant's arguments in respect of the substantive examination of the 3 May 2007 commitments and the draft commitments of 1 June 2007 will thus be carried out for the sake of completeness, as was the case in the contested decision.

4. *Substantive assessment of the 3 May 2007 commitments and the draft commitments of 1 June 2007*

(a) Arguments of the parties

507 The applicant criticises the Commission for overstating the competitive constraint which it and Aer Lingus exercised on each other and for incorrectly assessing the threat of entry capable of preventing exploitation of a monopoly in an anti-competitive manner (see the Guidelines and *easyJet* v *Commission,* paragraph 102 above, paragraph 202). By relying on an incorrect analysis of the effects of the merger on competition, the Commission disproportionately required Ryanair to find an 'up-front buyer' with a base of a substantial number of aircraft at Dublin in order to compete immediately with the merged entity. No airline could simultaneously base such a number of aircraft at a single airport and offer services on all 35 overlap routes within six months. Many of those routes are characterised by overcapacity and the time frame of six months would not have been sufficient to transfer the necessary number of slots to the new entrant, given the timing under the IATA slot transfer procedures.

508 The applicant submits that it is not for the parties to a concentration to prove that the commitments offered remedied the competition concerns identified by the Commission. On the contrary, it is incumbent on the Commission to prove that the transaction, as modified by the commitments, would lead to a significant impediment of effective competition (*EDP* v *Commission*, paragraph 28 above, paragraphs 63 and 77). However, the Commission did not undertake a global assessment of the merger, as modified, even though that is required in paragraph 77 of the *EDP* v *Commission* judgment, paragraph 28 above. Moreover, as regards the commitments proposed after the expiry of the time-limit laid down in Article 19(2) of Regulation No 802/2004, it is clear from paragraphs 161 to 163 of *EDP* v *Commission*, paragraph 28 above, that the Commission is required to take account of them only if they clearly, and without further consultation, resolve the competition concerns. Contrary to what is stated in recital 1237 of the contested decision, that rule does not apply to the draft commitments of 1 June 2007, since they responded to specific suggestions by the Commission made on the basis of its assessment of the 3 May 2007 commitments.

509 In essence, the applicant considers that the transfer of slots and the behavioural commitments were sufficient to eliminate any problem of competition. Thus, the transfer of London-Heathrow slots, 'the most valuable slots in the industry', 'would most likely lead to expansion by competitors on this route' (recital 1216 of the contested decision). The making available of slots for other routes from Dublin, Shannon or Cork would have enabled any airline to enter any of the overlap routes or any route of its choice, if necessary basing aircraft in Ireland. The 'frequency freeze' would have made certain that, in the event of additional demand on a route, Ryanair would not be able 'to snap' that demand away from a competitor. The commitment not to reduce frequency unless a route was unprofitable means that, even if there were no new entry on a particular route, the combined capacity of Ryanair and Aer Lingus would make it difficult to increase prices while maintaining an acceptable load factor. The reduction

of Aer Lingus's fares by 10% immediately following completion of the merger would have brought immediate savings to consumers. Those commitments were in line with the commitments that the Commission had accepted in its decision of 11 February 2004 (Case COMP/M.3280 — *Air France/KLM*) which concerned carriers with far more market power than Ryanair.

510 First, as regards the slot commitments, the applicant submits that the Commission erred in finding that they were not appropriate. The Commission posed the wrong question in its market testing. It should have asked whether competitors would be willing to enter routes if the merged entity was not devoting sufficient capacity to a route or was charging significantly higher fares than pre-merger. Moreover, several competitors declared that, while they did not have immediate plans to enter, they would consider entry if it was commercially attractive. Accordingly, the fact that no competitor answered that it would enter the overlap routes indicated that the competitors believed that the concentration would not have any anti-competitive effects. It was therefore unreasonable for the Commission to require that the commitments actually trigger entry. Such a requirement punishes Ryanair on the grounds that it is 'highly efficient' and offers such low prices that no airline wished to compete with it even on 'monopoly' routes. The applicant adds that the Commission could not rely on the responses to question 6 in the questionnaire addressed to competitors in the market, regarding entries, in order to assess the 3 May 2007 commitments. In any event, the commitments concerning the Dublin slots are sufficient to remedy the problems identified. The Commission provides no evidence as to why a new entrant must be able to operate immediately on all overlap routes with the same frequencies that Aer Lingus currently operates in order to be an effective competitive constraint (recitals

1200 to 1206). The notions of 'critical size' and 'required degree of competition' used in that regard are not defined by the Commission.

511 Second, with regard to slots at destination airports, the applicant maintains that the Commission is wrong to claim that the slot commitments were insufficient because of lack of precision on that point. Aer Lingus has only a limited number of slots at primary airports and Ryanair could not give them up without undoing the whole rationale for the merger and significantly weakening the ability of Aer Lingus to compete with network carriers. The latter have more than sufficient slots available at the primary destination airports. In most cases, they are dominant at their major hub airports. They do not therefore need additional slots in order to be able to enter routes from their home airports to Dublin or expand their operations on those routes. Those slots would merely make those companies more dominant at their home airports and undermine the competitive threat that the Aer Lingus brand could pose for them. That is not necessarily the case as regards low-fares carriers, which serve or can serve the same secondary airports as those to which Ryanair flies and which do not have any constraints as regards slots. In this context, it is wrong for the Commission to invoke the theory of city pairs and insist that the new entry must be a low-fares airline, and then require Ryanair to give up slots at primary airports. The Commission's reference to the difference between demand and supply substitutability (recital 1208 of the contested decision) only serves to gloss over that 'apparent contradiction' in its reasoning. As regards market testing concerning destination airports, the responses by competitors must be read with great caution, as many of them would face greater competition if the concentration were approved. The only relevant question is whether access to the slots held by Aer Lingus at certain major airports is essential for entry in the event that the merged entity abuses its position. Thus, British Airways

did not consider access to slots at primary airports to be essential on the ground that all those cities have other airports that are not slot constrained and the EU slot regulations provide for 50% of new capacity to be allocated to new entrants.

512 Third, with regard to fragmented entry, the applicant criticises the Commission for taking account of that element in recitals 1211 and 1212 of the contested decision. The draft commitments of 1 June 2007 specifically provided that the airline which takes the Heathrow slots would get priority for the Dublin slots. Moreover, to demonstrate that 'fragmented entry' would be a problem, the Commission relies only on a broad reference to the answers to question 2(b) of the market testing questionnaire and a reference to a 'critical mass', an unidentified term taken from LTU's response to the market testing (recital 1212). However, only 15 of the 20 participants in the market testing answered the question concerning 'fragmented entry'. Moreover, as in other cases, the Commission failed to acknowledge that important potential entrants, in this case British Airways, SAS, Flybe, Air Baltic and Clickair, made statements directly contradicting the Commission's conclusions. Certain responses even suggest that entry by a single entrant would be bad for competition. The only relevant question, which should have been asked, is whether entry, be it fragmented or by a single competitor, would be a sufficient constraint on the merged entity in the event of the latter raising prices. The question whether entry by a single entrant would be a stronger competitive force than entry by more than one entrant is not the right question.

513 Fourth, with regard to the operating mode of the new entrant, the applicant claims that the Commission seems to assume that the new entrant must follow exactly the same business model as Aer Lingus. However, the applicant states that Aer Lingus exercises no material competitive constraint on Ryanair and that, in any event, there is no evidence that another carrier, irrespective of its business model, could not exercise

significant competitive constraint. Moreover, the rationale of the transaction being to make Aer Lingus more efficient so that it can compete with the network carriers, expansion or entry by another network carrier such as British Airways or Air France would have easily provided consumers with an alternative to Aer Lingus. The Commission cannot, on the one hand, require Ryanair to refer to the business model used by a new entrant and, on the other hand, simply require that the proposed commitments allow the entry to the market of certain carriers who are in a better position than others to succeed in exerting a constraint on the merged entity.

514 Fifth, with regard to the commitments concerning London Heathrow slots, the applicant claims that the Commission questioned their usefulness on the ground that they would be reserved to British Airways and Air France. However, that is not the case, Ryanair having indicated in writing, on 1 June 2007, that those slots could be taken up by any airline with an existing Heathrow infrastructure. In any event, the Commission did not discharge the burden of proof which it bears by simply calling in question the usefulness of slot divestiture. It was also wrong to assert, in recital 1217 of the contested decision, that those two companies could not make up for the disappearance of competitive pressure from Aer Lingus to a sufficient extent. In fact, British Airways and Air France, being among the most powerful competitors in Europe, have been operating in Ireland for decades and know the Irish market well. British Airways already code-shares with Aer Lingus on that route and Air France has an airline, CityJet, based at Dublin. Similarly, the Commission has not in any way proved, in recital 1218 of the contested decision, that, if the slots were split between two very powerful carriers, the concentration, as modified by the commitments, would significantly impede effective competition on the Dublin-London (Heathrow) route. Moreover, since there is limited substitutability between the London airports, according to the applicant, that route operated by Aer Lingus does not serve to exercise any material constraint on Ryanair's operations to the other London airports. Finally, by just mentioning the 'risk of a legal dispute' regarding the possibility of Ryanair

transferring Heathrow slots without the consent of other Aer Lingus shareholders, the Commission did not take account of a legal opinion by an Irish counsel to the effect that such a transfer would be possible.

515 Sixth, with regard to behavioural commitments, the applicant states that the commitment of the 10% reduction of Aer Lingus's fares was easily verifiable because Aer Lingus publishes its average fare in its annual report. The Commission is wrong to ask Ryanair to specify whether the reduction of fares covers all overlap routes. It is virtually impossible to increase the fare on the overlap routes and still achieve a 10% overall reduction on all short-haul routes. Similarly, although the Commission observes that it cannot anticipate what a competitive price is, the fare reduction would bring about significant and realisable benefits. The 'frequency freeze' in the event of a new entrant was to address the Commission's claims regarding Ryanair's alleged aggressive response to new entrants, a reaction consisting in increasing frequencies on routes where another airline enters. Further, the commitment not to decrease frequencies was to address the concern that Ryanair would reduce capacity on the overlap routes and thus be able to increase prices. By committing itself to retaining the combined capacity on the overlap routes, Ryanair would not be able to increase prices and still maintain an acceptable load factor, which is crucial to its business model.

516 Seventh, with regard to the matter of the 'up-front buyer', the applicant observes first of all that that course of action was never followed in any previous airline cases. Such a requirement is also unnecessary and disproportionate. In view of the fact that Ryanair was offering the lowest fares in the market and that many overlap routes did not generate sufficient demand to add a third carrier, it would be commercially very difficult to find an 'up-front buyer'. The only solution would be for Ryanair and Aer

Lingus to abandon those routes or enter into an illegal price fixing agreement with the 'up-front buyer'. Moreover, the 'frequency freeze' would have the effect that new entrants would not be dissuaded from entering overlap routes by the risk of Ryanair's increasing the frequencies on those routes. With the exception of the Heathrow slots, the Dublin slots and those of most other airports around Europe (with the exception, perhaps, of the other main congested airports) have no inherent value and would not therefore be attractive to another airline. Finally, the Commission was wrong to consider that the 'up-front buyer' commitment was insufficient because of its limited scope and the fact that it would lead to 'fragmented entry' (recital 1238 of the contested decision). That commitment, enhanced in the draft commitments of 1 June 2007, was based on the request to that effect from the Commission. The applicant also criticises the Commission's wish that it should bear the risk that no 'up-front buyer' might be found within the required time frame.

517 The Commission, supported by Ireland and by Aer Lingus Group, states that it examined and rejected the 3 May 2007 commitments on the basis of the following findings: the slot remedies were not appropriate since they were not likely to trigger any substantial entry on the overlap routes (recitals 1186 to 1196 of the contested decision); the 'up-front' proposal could not remedy the missing perspective of entry (recital 1197); the scope of the commitments was insufficient (recitals 1199 to 1206); commitments for slots at important destination airports were missing (recitals 1207 to 1209); the commitments could only have led to entry by several airlines (fragmented entry) (recitals 1210 to 1212); the commitments disregard the operating model of the entrant (recitals 1213 to 1215); the commitments concerning the London Heathrow slots could not remedy the competition concerns on the Dublin-London market

(recitals 1216 to 1219); the additional commitments could not eliminate the impediment to effective competition (recitals 1220 to 1226).

518 In particular, the Commission considers that access remedies can only be acceptable in circumstances where it is sufficiently clear that there will be actual entry of new competitors that would address the identified competition concerns (recital 1188). The basic aim of commitments is to ensure competitive market structures and it is plain that a mere threat of entry by a competitor is insufficient to achieve that aim save in quite exceptional circumstances. It is well established that demand substitution constitutes the 'most immediate and effective disciplinary force' on the suppliers of a given product or service, in particular in relation to their pricing decisions, whereas the competitive constraints arising from potential competition are in general less immediate and in any case require detailed analysis. The Commission notes that in this case the relevant markets are not characterised by 'proven ease of entry' but rather by a 'pattern of exit of competitors other than Aer Lingus'. The Guidelines do not indicate that a merger which culminates in the creation of a monopoly does not significantly impede effective competition if there is a sufficient threat of entry of new competitors. The *easyJet* v *Commission* judgment, paragraph 102 above, is no authority for that proposition either. In that case, the Court found that it was not necessary to identify the new entrant by name since various competitors had expressed an interest in entering the affected markets following the commitments and actual entry of a new competitor could therefore be considered very likely. In the present case, on the contrary, the entry of a new competitor is not likely at all, for the reasons set out in section 7.8 of the contested decision, and the fact that none of the competitors that replied to the market test indicated that they would enter any of the overlap routes (recitals 1190 to 1196), with the possible exception of Air France and British Airways expanding their operations on the Dublin-London route, which the Commission found to be insufficient to eliminate the concerns on that route (recitals 1216 to 1219). It is precisely because of the missing perspective of entry that the Commission suggested informally to Ryanair that it consider proposing an 'up-front solution'. The fact that this may have been the first airline merger in which the Commission

made such a suggestion and that Ryanair may have considered it difficult or impossible to adhere to are both irrelevant. This concentration is different from previous airline mergers in that it involves two point-to-point airlines that both operate with a significant number of aircraft out of the same airport on a large number of overlapping routes. On the other hand, in contrast to previous cases, airport congestion is not the main barrier to entry in this case. The Commission emphasises that it cannot accept commitments which only partially resolve those competition problems merely because the notifying party cannot agree to other commitments.

(b) Findings of the Court

519 The draft commitments of 1 June 2007 followed in-depth discussions between the Commission and Ryanair on the content of the 3 May 2007 commitments and the ways to remedy the problems identified. It is appropriate, in that regard, to refer to the arguments put forward by Ryanair in respect of the content of the meeting of 1 June 2007 (see paragraph 470 above) and the content of the recorded conference call which took place between Ryanair and the Commission on 29 May 2007.

520 Notwithstanding that information as to what was regarded as necessary to authorise the transaction, the applicant — by its own admission (see paragraph 470 above) — submitted a final offer of commitments which did not address the Commission's demands as regards the substantial number of aircraft to be based at Dublin within

six months after the adoption of the contested decision, with a possible extension of six months. Ryanair's offer accepted the principle of immediately basing at Dublin half of that substantial number of aircraft plus two aircraft assigned to the London-Heathrow routes within a period of six months after the lodging of a new bid, which would be lodged within six months of the adoption of the contested decision, with a possible extension of six months.

521 Moreover, in the context of the remedies proposed in the present case, namely in essence the acquisition of slots by one or more players, Ryanair assumes that Ryanair-Aer Lingus combined would not pose any competition concerns as long as it allowed new entrants or present players as regards the London-Heathrow route to acquire slots to develop their market shares. The Commission regarded that measure as insufficient to call into question the anti-competitive effect represented by the disappearance of Ryanair's main competitor. At the hearing it thus stated that, rather than wishing to secure acceptance of the principle of the creation or strenghtening of the dominant position of Ryanair-Aer Lingus combined on such and such a route, by taking the view that a hypothetical competitor would establish itself or develop its market share merely because slots were offered, Ryanair should, in the present case, have forgone part of its market share for the benefit of its competitors.

522 In that regard, it must be pointed out that, unlike previous mergers in the passenger air transport sector (such as those which were at issue in Air France/KLM and Lufthansa/Swiss), the Commission could not be satisfied in the present case that mere slots would ensure access to a route. This is not a transaction involving active operators which have a home airport in different countries. Ryanair and Aer Lingus operate from the same airport, Dublin Airport, where they have significant advantages which could not easily be countered by competitors.

523 Furthermore, the results of the market tests showed that current and potential competitors were not ready to compete with the merged entity on all of the routes affected by the transaction. Even on the Dublin-London (Heathrow) route, the interest of certain airlines, some of which were already present on that route, was not borne out by a firm undertaking in that respect, which could have been submitted by Ryanair to substantiate its commitment relating to the 'up-front buyer'.

524 At this stage of the proceedings, for the reasons correctly stated in the contested decision as regards the 3 May 2007 commitments, and having regard to the information provided by the draft commitments of 1 June 2007, the applicant has not put forward any arguments capable of calling into question, to the requisite legal standard, the Commission's assessment in the contested decision that the draft commitments of 1 June 2007 did not allow it to conclude, with certainty, that it would be possible to implement them and that the remedies resulting from them would be sufficiently workable and lasting to ensure that the impairment of effective competition which those commitments are intended to prevent would not be likely to materialise in the relatively near future.

525 The fifth plea must therefore be rejected both as regards the formal validity of the offers submitted to the Commission in the course of the administrative procedure and as regards the substantive assessment of the content of those offers.

526 In view of all of the foregoing considerations, the action brought by Ryanair must be dismissed.

Costs

527 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

528 Since Ryanair has been unsuccessful, and the Commission and Aer Lingus Group have applied for costs, Ryanair must pay the costs incurred by the Commission and by Aer Lingus Group in addition to its own costs.

529 The first subparagraph of Article 87(4) of the Rules of Procedure provides that the Member States which intervened in the proceedings are to bear their own costs. Accordingly, Ireland is to bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders Ryanair Holdings plc to bear its own costs and to pay the costs incurred by the European Commission and Aer Lingus Group plc;

3. Orders Ireland to bear its own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 6 July 2010.

[Signatures]

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