Neutral citation [2014] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1219/4/8/13

7 March 2014

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR JOHN BEATH
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

COMPETITION COMMISSION

Respondent

- and -

AER LINGUS GROUP PLC

Intervener

Heard at Victoria House on 12-14 February 2014

JUDGMENT

APPEARANCES

Lord Pannick QC, Mr. Brian Kennelly and Mr. Tristan Jones (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared for the Applicant.

Mr Daniel Beard QC, Mr. Rob Williams and Miss Alison Berridge (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. James Flynn QC and Mr. Daniel Piccinin (instructed by Cadwalader, Wickersham & Taft LLP) appeared for the Intervener.

1. Ryanair Holdings Plc ("Ryanair") holds a 29.82% minority stake in Aer Lingus Group plc ("Aer Lingus"). In its final report dated 28 August 2013 ("the Final Report") the Competition Commission ("the CC") concluded that this stake gave Ryanair material influence over Aer Lingus and resulted in a substantial lessening of competition ("SLC") within the meaning of section 35 of the Enterprise Act 2002 ("the Act"). The CC pursuant to sections 35(3)-(4), 41(2) and 84 decided to impose a final order requiring Ryanair to divest itself of the majority of its holding, by reducing its stake to no more than a 5% holding. The CC directed that the disposal be through a sales process under a divestiture trustee.

2. By the present application Ryanair seeks to challenge the lawfulness of the Final Report on various grounds. It seeks an order that all or part of the Final Report and decision to impose a final order be quashed by the Tribunal exercising its judicial review function under section 120 of the Act. The structure of this judgment is to set out the background to this matter (Part 1), the legislative provisions and framework applicable (Part 2), the Final Report (Part 3), before dealing with each of the six grounds of challenge (Part 4). The grounds of challenge (as set out in Ryanair's Notice of Application, as refined by its skeleton argument) are as follows:

   (1) The CC's decision to require divestiture is contrary to the EU law duty of sincere cooperation. Ryanair's third bid for Aer Lingus was rejected by the European Commission on 27 February 2013, and Ryanair's appeal against that decision is now pending before the General Court. If the General Court decides in Ryanair's favour, the European Commission may decide that Ryanair is entitled to acquire Aer Lingus. A divestiture order now would undermine any ruling that Ryanair is entitled to acquire Aer Lingus. If this ground of challenge is upheld, Ryanair seeks an order quashing the decision to impose a divestiture order without waiting first for the outcome of the EU procedure.

   (2) It was procedurally unfair to keep secret from Ryanair material allegations and evidence which the CC relied upon in reaching its decision. Ryanair

should in fairness have been given an opportunity to make submissions upon them. If this ground of challenge is upheld, Ryanair seeks an order quashing the entire Final Report.

(3) The CC erred in law in failing to show a causal link between the alleged material influence and the finding of an SLC. Instead, its finding of an SLC was based in large part on factors other than the material influence which it had identified. If this ground of challenge is upheld, Ryanair seeks an order quashing the SLC finding and the proposed remedies.

(4) The SLC finding is irrational. The finding rests on highly speculative theories of harm, and the evidence does not support a conclusion on the balance of probabilities that the alleged merger situation would result in an SLC. As with (3) above, Ryanair seeks an order quashing the SLC finding and the proposed remedies.

(5) In any event, the divestiture remedy and the immediate appointment of a divestiture trustee are disproportionate, given Ryanair's willingness to offer undertakings which are equally (or more) effective but less intrusive, and less destructive of Ryanair's interests.

(6) Fundamentally, the CC does not have jurisdiction to impose requirements on Ryanair, an Irish company which does not carry on business in the UK, to do things or to refrain from doing things outside of the UK.

PART 1: THE BACKGROUND

3. The background to the application goes back to 2006 when Ryanair made its first bid for the entire issued share capital of Aer Lingus. Ryanair and Aer Lingus are well known to be rival airlines both based in Dublin, Republic of Ireland. They operate on quite a number of common routes. Ryanair's shares are listed on the Irish and London Stock Exchanges.

4. In October 2006, Aer Lingus was the subject of an IPO, which left the Irish Government (through the Minister of Finance) post-privatisation with a holding just over 25%. The shares in Aer Lingus were admitted to the Irish and London

Stock Exchanges on 2 October 2006. Between 27 September and 5 October 2006 Ryanair (through Coinside Limited, being a subsidiary of Ryanair Limited) acquired a 19.21% stake in Aer Lingus. On 5 October 2006, Ryanair announced its intention to launch a public bid and this was made public on 23 October 2006. Ryanair notified the European Commission of this bid in accordance with Article 4 of Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EUMR") on 30 October 2006. During the bid period, Ryanair acquired further shares and, by 28 November 2006, had acquired 25.2% of Aer Lingus.

5. On 20 December 2006, the European Commission adopted a decision under Article 16(1)(c) EUMR initiating phase II proceedings. In its decision, the European Commission found that the acquisitions of shares already undertaken by Ryanair and the public bid constituted a single concentration for the purposes of Article 3 EUMR. Ryanair's bid had contained the standard term that the bid would lapse if there was a reference to a merger authority in either the UK or European Union. Hence it flowed from this decision that Ryanair's bid lapsed.

6. Following its investigation of the concentration, the European Commission adopted Decision C(2007) 3104 on 27 June 2007 declaring the concentration to be incompatible with the common market ("the Prohibition Decision") pursuant to Article 8(3) EUMR. The European Commission found that the notified concentration would significantly impede effective competition in the common market or a substantial part thereof within the meaning of Article 2(3). The conclusions noted in particular that this was a result of the creation of a dominant position of Ryanair and Aer Lingus on 35 routes from and to Dublin, Shannon and Cork, and the creation and strengthening of a dominant position on 15 other routes from and to Dublin and Cork.

7. During the proceedings before the European Commission, Aer Lingus submitted that the European Commission should require Ryanair, pursuant to Article 8(4) EUMR, to divest itself of its minority stake already acquired. By letter dated 27 June 2007, the European Commission informed Aer Lingus that it had no power to require Ryanair to divest itself of the minority stake under Article 8(4) as Ryanair did not have control over Aer Lingus within the meaning

of Article 3(2). On 11 October 2007, the European Commission adopted Decision C(2007) 4600 making a formal decision that it could not order Ryanair to divest the minority stake ("the Interim Measures Decision").

8. Both Ryanair and Aer Lingus appealed to the Court of First Instance (now the General Court). Ryanair launched its application on 10 September 2007 to set aside the Prohibition Decision. Aer Lingus launched its application on 19 November 2007 to set aside the Interim Measures Decision. On 18 March 2008, the President of the Court of First Instance dismissed an application by Aer Lingus for interim measures and suspension of the Interim Measures Decision: Case T-411/07 R, *Aer Lingus Group plc v. Commission* [2008] ECR II-411.

9. By 2 July 2008, Ryanair's stake in Aer Lingus had increased to 29.8%. The whole stake had been acquired at a cost of €407.2 million. On 1 December 2008, Ryanair announced a second bid for the entire issued share capital of Aer Lingus, which it subsequently abandoned on 23 January 2009.

10. On 6 July 2010, the General Court issued its two judgments in respect of the challenges by Aer Lingus and Ryanair respectively. In Case T-411/07 *Aer Lingus Group plc v. Commission* [2010] ECR II-3691, [2011] 4 CMLR 358 it rejected Aer Lingus's challenge to the Interim Measures Decision that the European Commission had no jurisdiction to take measures in respect of Ryanair's minority stake, on the basis that such interest did not amount to control. In the absence of control, there was no implementation of a concentration for the purposes of the EUMR. It followed that the European Commission had been correct to decide it had no power under Articles 8(4) or 8(5) to require Ryanair to divest its minority shareholding. The General Court noted:

> "64. …the acquisition of a shareholding, which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration which is deemed to have arisen for the purposes of that regulation. On that point, European Union law differs from the law of some of the Member States, in which the national authorities are authorised under provisions of national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense.

…

> 91. …Where there is no concentration with a Community dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect."

11. In Case T-342/07, *Ryanair Holdings plc v. Commission* [2011] 4 CMLR 245, the General Court rejected Ryanair's challenge to the European Commission's Prohibition Decision that the planned takeover of Aer Lingus by Ryanair was incompatible with the common market. It upheld the European Commission's assessment of the closeness of the competition between the two airlines in relation to a number of routes, and the way in which the concentration would adversely affect competition. It affirmed the European Commission's assessment of barriers to entry, its point-to-point route analysis, and its consideration of claimed efficiencies. It held that the European Commission was entitled to not accept the remedies proposed by Ryanair.

12. Neither judgment was appealed. This left open the situation for the Office of Fair Trading ("OFT") to commence its own investigation into Ryanair's minority stake in Aer Lingus. On 30 September 2010, the OFT sent a notice under section 31 of the Act to Ryanair requiring it to produce specified information which the OFT considered relevant to a preliminary merger investigation. It stated that it considered that the statutory time limit for making a reference to the CC under section 22 had not expired due to the operation of sections 122(3) and 122(4) as a reference could not have been made whilst the European Commission investigation under the EUMR and any appeals were pending. At the request of Ryanair, the OFT made a formal decision on the limitation issue on 4 January 2011. Ryanair's appeal to the Tribunal on the limitation issue was dismissed in its decision *Ryanair Holdings Plc v. Office of Fair Trading* [2011] CAT 23 given on 28 July 2011. The Tribunal concluded (at [134]):

> "(a) the Ryanair Appeal and the Aer Lingus Appeal [to the General Court] each give rise to potential conflicts with a decision taken pursuant to (or with the outcome of) a reference to the Competition Commission under section 22 of the Act, and those potential conflicts were such that the duty of sincere cooperation under Article 10 EC required the UK merger control authorities to avoid them. In the case of the Aer Lingus Appeal, the potential conflicts also included a risk of infringement of article 21(3) of the Merger Regulation.

(b) Subsection 122(4) of the Act is the means provided by Parliament for enabling the OFT to comply with the duty of sincere cooperation and avoid the risk of impermissible conflicts with article 21(3) of the Merger Regulation and/or between decisions taken (or to be taken) under the EU merger control system (including, where relevant, judgments of the EU courts) and decisions of the UK competition authorities, whilst preserving the possibility of a reference under section 22 pending the final resolution of the EU process.

(c) For the purposes of subsection 122(4), a reference under section 22 could not have been made earlier than 17 September 2010, and Ryanair is not entitled to any of the relief sought in paragraph 38 of the Notice of Application."

13. A further appeal to the Court of Appeal was dismissed on 22 May 2012 in *Ryanair Holdings Plc v. Office of Fair Trading* [2012] EWCA Civ 643. In its judgment the Court of Appeal accepted that the duty of sincere cooperation necessarily required the OFT to desist from making any reference to the CC during the period of the appeals of Ryanair and Aer Lingus to the General Court. Ryanair's application for permission to appeal was refused by the Supreme Court on 1 June 2012.

14. On 15 June 2012, the OFT referred Ryanair's minority stake in Aer Lingus to the CC under section 22 of the Act for its investigation. The Terms of Reference were as follows:

"1. On 15 June 2012, the OFT sent the following reference to the CC:

1. In exercise of its duty under section 22(1) of the Enterprise Act 2002 ("the Act") to make a reference to the Competition Commission ("the CC") in relation to a completed merger, the Office of Fair Trading ("the OFT") believes that it is or may be the case that:

(a) a relevant merger situation has been created in that:

(i) enterprises carried on by or under the control of Ryanair Holdings plc (Ryanair) have ceased to be distinct from enterprises previously carried on by or under the control of Aer Lingus Group plc (Aer Lingus); and

(ii) as a result, the conditions specified in section 23(4) of the Act will prevail, or will prevail to a greater extent, with respect to the supply of scheduled airline services between the UK and the Republic of Ireland measured by number of passengers;

(b) the creation of that situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods and services, including the provision of scheduled airline services on a number of direct routes between cities in the UK and cities in Ireland where either:

(i) Ryanair and Aer Lingus overlap in the provision of services (these routes being: Manchester (Liverpool) – Dublin; Birmingham (East Midlands) – Dublin; London-Cork; London-Shannon; London-Knock; and London-Dublin); or

(ii) Ryanair operates on the route and Aer Lingus is a potential entrant onto the route (these routes being: Dublin-Newcastle and Knock-Bristol).

2. Therefore, in exercise of its duty under section 22(1) of the Act, the OFT hereby refers to the CC, for investigation and report within a period ending on 29 November 2012, on the following questions in accordance with section 35(1) of the Act:–

(a) Whether a relevant merger situation has been created; and

(b) If so, whether the creation of that situation has resulted or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services."

15. The CC having commenced its investigation, on 19 June 2012 Ryanair announced its intention to make a public bid for the entire share capital of Aer Lingus. The next day it informed the CC of its third public bid and invited it to at least stay the investigation. On 10 July 2012, the CC informed Ryanair and Aer Lingus of its decision to continue its investigation. On the same day it issued a notice under section 109 of the Act requiring the provision of information and production of documents. By an application dated 13 July 2012, Ryanair applied to the Tribunal for an order pursuant to section 120 of the Act that the CC's decision to continue its investigation be quashed or stayed and that the decision to issue the section 109 notice be similarly quashed or stayed.

16. On 24 July 2012, Ryanair notified the European Commission of a proposed concentration by which it would acquire all of the remaining 70.18% shares in Aer Lingus not already owned by Ryanair. The notification did not claim that the acquisition of the minority stake in 2006 to 2008 was part of any proposed concentration. By letter dated 26 July 2012, the European Commission confirmed to the CC that the minority shareholding was not part of the concentration notified on 24 July 2012 that the European Commission would be examining under the EUMR. The letter concluded:

"In our view, as a matter of Union law, parallel procedures by the European Commission and the Competition Commission are not excluded. However, national competition authorities should not, on the basis of their national law,

take decisions that would compromise decisions or possible decisions by the European Commission under the EU Merger Regulation."

17. Ryanair's appeal against the CC's decision to continue its investigation and issue a section 109 notice was heard by the Tribunal on 27 July 2012. On 8 August 2012, the Tribunal issued its decision in *Ryanair Holdings Plc v. Competition Commission* [2012] CAT 21. The Tribunal rejected Ryanair's contention that the duty of sincere cooperation required the CC to stay its own investigation of the minority stake whilst the European Commission considered the proposed concentration in the form of a bid by Ryanair to acquire the remainder of the shares in Aer Lingus. In dismissing Ryanair's application, the Tribunal held:

> "82. This is not a case of "overlapping jurisdictions" as that term is used by the Chancellor in the Ryanair C/A Decision. In this case, there is no prospect – even contingently – of the exclusive jurisdiction conferred on the European Commission by Article 21 of the EC Merger Regulation extending to the Minority Holding. As is common ground, whilst the shares which are the subject of the Public Bid amount to a concentration with a Community dimension, and so fall within the EC Merger Regulation, the Minority Holding does not. This fact distinguishes the present case from that before the Court of Appeal in the Ryanair C/A Decision: there Ryanair's minority shareholding in Aer Lingus was part of the same concentration with a Community dimension as Ryanair's first public bid, with the result that the entire concentration – including the minority holding – was subject or potentially subject to the EC Merger Regulation.
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> 83. This is a case where there are parallel or concurrent jurisdictions:
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> (1) In the case of the Public Bid, the European Commission has exclusive jurisdiction.
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> (2) In the case of the Minority Holding, the European Commission has no jurisdiction, and the matter falls within the purview of the OFT and the CC. There is no prospect, as regards the Minority Holding, of Article 21 applying, let alone reviving.
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> 84. Accordingly, we reject Ryanair's contention that, as a matter of law, the duty of sincere cooperation precludes the CC from taking any further steps in the Investigation. Of course, as Mr Beard Q.C., for the CC, accepted, the CC remains subject to the duty of sincere cooperation and must avoid taking any final decision in respect of the Minority Holding which would, or could, conflict with the European Commission's ultimate conclusion on the compatibility of the Public Bid with the common market. That does not mean that the CC is precluded, as a matter of law, from taking any further steps in the Investigation."

18. On 29 August 2012, the European Commission announced that it had initiated proceedings in relation to the third bid under Article 16(1)(c) EUMR and consequently, under the terms of Ryanair's formal offer, the bid formally

lapsed. On 27 September 2012, the CC issued an interim order under section 81 of the Act ("the Interim Order") which provided that, except with the prior consent of the CC, Ryanair should not prior to the conclusion of the CC's investigation take any action which may prejudice the reference or impede the taking of any action under the Act by the CC.

19. The Court of Appeal, in its judgment given on 13 December 2012 in *Ryanair Holdings Plc v. Competition Commission* [2012] EWCA Civ 1632, rejected Ryanair's appeal from the Tribunal's decision on the issue of quashing or staying the CC's decision to proceed with its investigation and issue a section 109 notice. In dismissing Ryanair's appeal, Etherton LJ (with whom Pill and Lewison LJJ agreed) observed:

> "60. First, it is common ground in this court (although it was not before the CAT) that the EC's jurisdiction does not extend to Ryanair's minority shareholding. Whatever the EC decides, or any court on appeal from the EC's decision holds, the UK has exclusive jurisdiction to consider the competition implications of Ryanair's minority shareholding. Article 21(3) has no application. Secondly, even if there is a theoretical possibility that the analysis and decision of the Competition Commission on Ryanair's minority shareholding could be relevant to, and even inconsistent with, those of EC on its investigation of the public bid, and vice versa, all parties before us appear to be in agreement that (subject to some exceptional and unforeseen circumstances) the EC's decision will in fact be delivered first. That is due to extension of the Competition Commission's timetable for carrying out its investigation caused by Ryanair's non-compliance with the section 109 notice. Thirdly, in any event, even if the Competition Commission's investigation were to be completed and its report published first due to the Competition Commission's statutory duty to complete its investigation within the time specified in EA ss.38 and 39, and it found that there was an anti-competitive outcome and proposed remedial action, the Competition Commission would not be bound to implement the remedial action immediately. The Competition Commission would have power under EA s.41(3), if it saw fit in the circumstances then prevailing and taking into account its duty of sincere co-operation, to defer such remedial action until the publication of the results of the EC's investigation and to re-consider remedial action in the light of the reasoning and decision of the EC."

20. The Supreme Court refused Ryanair permission to appeal on 25 April 2013 from this decision of the Court of Appeal. In refusing permission to appeal, the Supreme Court observed:

> "(2) in relation to the point of European Union law said to be raised by or in response to the application it is not necessary to request the Court of Justice to give any ruling because the application of the duty of sincere co-operation is a matter for domestic courts. The European legal principle is clear, and its application fact-specific. Further and in any event the Competition Commission

has on the face of it sufficient powers to react to any Court of Justice decision over-ruling the European Commission and permitting a 100% bid."

21. Following on from the Court of Appeal judgment of 13 December 2012, on 19 December 2012 the CC wrote to Ryanair informing it of its intention to proceed with the gathering of information for the purposes of its inquiry. It requested a response to its section 109 notice. The CC's investigation proceeded in the normal way with extensions to the inquiry period ending up with a revised date of 5 September 2013 for publication of the CC's Final Report.

22. On 21 December 2012, Ryanair made a formal complaint to the European Commission contending that the CC had breached its duty of sincere cooperation under Article 4(3) of the Treaty on European Union ("TEU") by imposing the Interim Order on Ryanair on 27 September 2012 whilst the European Commission was conducting its own merger investigation. This complaint was rejected by the European Commission by letter dated 13 November 2013.

23. On 27 February 2013, the European Commission adopted Decision C(2013) 1106 declaring the proposed concentration in relation to Ryanair's third bid to be incompatible with the internal market pursuant to Article 8(3) EUMR. As with Decision C(2007) 3104 in relation to the first bid, the European Commission found that the notified concentration would significantly impede effective competition in the internal market or a significant part thereof within the meaning of Article 2(3) EUMR as a result of the creation of a dominant position of Ryanair and Aer Lingus on 46 routes from and to Dublin, Shannon, Cork and Knock. The European Commission concluded that the commitments offered by Ryanair were not able to remedy the identified significant impediment to effective competition ("SIEC"), and thus could not render the proposed transaction compatible with the internal market. On 8 May 2013, Ryanair lodged an appeal with the General Court against the European Commission's decision. Lord Pannick QC, who appeared for Ryanair in these proceedings, confirmed that Ryanair's grounds of appeal before the General Court are limited to a challenge to the European Commission's rejection of the commitments proposed by Ryanair. No date has yet been set for the oral hearing and no judgment is anticipated for some time.

24. Following the European Commission decision in respect of the third bid, the CC on 6 March 2013 published an issues statement on its website. Appendix A of the Final Report summarised the course of the CC's inquiry in the following terms:

> "7. We collected evidence from Ryanair, Aer Lingus and a range of third parties and sought verification of the evidence received. During our inquiry, the main parties drew our attention to numerous press articles mentioning Ryanair, Aer Lingus, the Irish Government or other third parties. In general we sought parties' views and relevant documents directly on matters of relevance to our inquiry rather than relying on the information contained in press articles. We gathered oral evidence through hearings with selected third parties. Summaries of third party hearings are on our website.
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> 8. Non-confidential versions of Aer Lingus's initial submission and submissions made by Ryanair to the OFT on material influence and the SLC question were posted on our website. We visited Aer Lingus and Ryanair in Dublin. We also held hearings with Aer Lingus and Ryanair.
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> 9. During the course of our inquiry, we sent Ryanair, Aer Lingus and certain third parties extracts from working papers and draft reports for comment, and considered a number of submissions from those parties."

25. On 30 May 2013, the CC published its provisional findings report and notice of possible remedies (issued under rule 11 of the Competition Commission Rules of Procedure 2006). The provisional findings report had excluded from the published version information which the inquiry group considered should be excluded having regard to the considerations set out in section 244 of the Act. Ryanair submitted a detailed response to the provisional findings report (19 June 2013) and a response to the notice of possible remedies (11 June 2013).

26. On 20 June 2013, a hearing was held between the CC and Ryanair. Ryanair followed this up by submitting four papers on 25 June 2013 relating to matters raised at the hearing. The CC published its remedies working paper on 10 July 2013, to which Ryanair submitted a detailed response on 22 July 2013.

27. Ryanair's solicitors during the period of the inquiry sought further disclosure of information (including names of third party airlines which had provided information to the CC) and documents. Whilst some additional information was provided, Ryanair was not satisfied with the extent of disclosure and claimed that it was prejudiced in its ability to respond to the provisional findings report and other material provided by the CC. Further, Ryanair raised issues as to the

duty of sincere cooperation and proposed behavioural remedies (with Ryanair offering various undertakings) in lieu of divestiture of shares.

28. On 28 August 2013, the CC issued its Final Report, which is summarised in Part 3 of this judgment.

29. Ryanair's challenge to the Final Report was submitted by way of its Notice of Application dated 23 September 2013. At the case management conference ("CMC") on 10 October 2013, the Tribunal gave directions as to pleadings and evidence. Aer Lingus was given permission to intervene. The Tribunal directed that the CC disclose a further version of the Final Report, unredacting certain parts in Section 7 and Appendix F, in a way which preserved the confidentiality of names of various airlines in particular. The reasons are set out in the Tribunal's ruling, *Ryanair Holdings Plc v. Competition Commission* [2013] CAT 25. Whilst Ryanair was given the opportunity to make a properly formulated application for disclosure of documents, this was not pursued. Following disclosure of the Final Report with parts unredacted, on 31 October 2013 Ryanair submitted a supplement to the Notice of Application in respect of Ground 2 and Ground 4. The Defence of the CC and the Statement of Intervention of Aer Lingus were served on 13 and 27 November 2013 respectively. Ryanair filed its Reply on 18 December 2013.

30. The appeal was heard over a period of three days from 12 to 14 February 2014. There was no oral evidence. However, both Ryanair and Aer Lingus served a limited amount of witness evidence. Ryanair served a statement from Mr Alan Casey on the IAIM Shareholder Pre-Emption Guidelines, which was not referred to during oral argument at the hearing and was of marginal relevance to the live issues on the application. Some reliance was placed by Ryanair on the statement of Mr Juliusz Komorek (Ryanair's Director of Legal & Regulatory Affairs), as to the impact of the divestiture remedy and procedure as well as on the issue of whether Ryanair carries on business in the UK. As noted at paragraphs 238 and 239 below, the Tribunal took account of this statement. Aer Lingus relied on a statement of Mr Stephen Hegarty (a partner of Arthur Cox, solicitors) which responded to Mr Komorek's statement, primarily on the issue of whether Ryanair carries on business in the UK. The Tribunal took account of

this statement on that issue to the extent described at paragraphs 238 and 239 below.

PART 2: THE LEGISLATIVE FRAMEWORK

31. Section 22 of the Act deals with the circumstances in which the OFT is to refer a completed merger to the CC. In general, the OFT is required by section 22(1) to make such a reference if it:

> "believes that it is or may be the case that—
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

32. As noted at paragraph 14 above, the OFT made such a reference in these proceedings on 15 June 2012.

33. Where the OFT has made a reference under section 22 of the Act, the CC is required by section 35(1) to decide the following questions:

> "(a) whether a relevant merger situation has been created; and
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> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

A "relevant merger situation"

34. The expression "relevant merger situation" (for the purposes of both sections 22 and 35) is explained in section 23 of the Act. The first necessary component of a relevant (completed) merger situation is that two or more enterprises have "ceased to be distinct enterprises" at a time or in circumstances falling within section 24. The second necessary component of this test is that one of the alternative tests set out in subsections 23(1)(b) and 23(2)(b) is satisfied:

    (1) subsection 23(1)(b), read together with section 28, sets out a "turnover test", which is satisfied if the value of the turnover in the UK of the enterprise being taken over exceeds £70 million;

(2) subsection 23(2)(b), read together with subsections 23(3) to (8) sets out a "share of supply test", which – put broadly – is satisfied if 25% of all of the goods or services of a particular description supplied in the UK (or a substantial part of it) are supplied by or to the same person, or by or to the persons by whom the enterprises concerned are carried on.

35. The test of when two enterprises "cease to be distinct" is set out in section 26, which provides as follows:

> "(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control).
>
> (2) Enterprises shall, in particular, be treated as being under common control if they are—
>
> (a) enterprises of interconnected bodies corporate;
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> (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or
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> (c) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.
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> (3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it.
>
> (4) For the purposes of subsection (1), in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if—
>
> (a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or
>
> (b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy."

36. It is not in dispute in these proceedings that Ryanair's acquisition of its 29.82% stake in Aer Lingus amounted to a relevant merger situation. As noted at paragraph 51 below, the CC found that Ryanair and Aer Lingus had ceased to

be distinct for the purposes of section 26(3) of the Act, by virtue of Ryanair's ability to exercise material influence over the policy of Aer Lingus. Further, the acquisition was found to meet the "share of supply" test in section 23(4)(b) of the Act.

A "substantial lessening of competition" and appropriate remedial action

37. The expression "substantial lessening of competition" is not itself defined in the Act. However, the CC has – pursuant to section 106 of the Act – published guidance which explains its understanding of that expression (see, in particular, Part 4 of the joint OFT and CC "Merger Assessment Guidelines" (CC2 (Revised) and OFT 1254, published September 2010)). Further, the Tribunal has given some guidance as to the meaning of "substantial" in *Global Radio Holdings Limited v. Competition Commission* [2013] CAT 26.

38. At paragraph 7.188 of its Final Report, the CC concluded that Ryanair's acquisition of a 29.82% shareholding in Aer Lingus has led, or may be expected to lead, to an SLC in the markets for air passenger services between Great Britain and Ireland. The CC's conclusions on the SLC test are set out at Final Report, paragraphs 7.176 to 7.188, and are summarised at paragraphs 63 to 84 below. In these proceedings, Ryanair challenges both the rationality of the CC's findings in relation to the alleged SLC, and the existence of a necessary "causal link" between the relevant merger situation identified by the CC and the SLC.

39. If the CC decides that there is an "anti-competitive outcome" (i.e. that a relevant merger situation has resulted, or may be expected to result, in an SLC within any market or markets in the UK for goods or services), it is obliged by section 35(3) of the Act to decide the following additional questions:

> "(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and

> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

In deciding those questions, the CC is directed to have regard to "the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it" (section 35(4)) and may have regard to "the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned" (section 35(5)).

40. Section 41 of the Act provides for remedial action where the CC has decided that there is an anti-competitive outcome. Section 41(2) states:

> "The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition."

Section 41(3) stipulates:

> "The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) … unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently."

Like sections 35(4) and 35(5), sections 41(4) and 41(5) direct the CC to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable and specifically empower it to have regard to the effect of any action on customer benefits.

41. Sections 82 to 84 of the Act identify the final powers of the CC, in accordance with section 41. Section 82 allows the CC to accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings. Section 84 allows the CC to make a final order, which may contain anything permitted by Schedule 8 of the Act, and any supplementary, consequential or incidental provision as the CC considers appropriate.

42. In this case, the CC considered certain undertakings proposed by Ryanair for the purposes of section 82 of the Act, but ultimately decided to adopt a final order under section 84 of the Act. The CC's conclusions on remedies are set out in section 8 of the Final Report and summarised briefly at paragraphs 85 to 88 below.

43. Section 86 of the Act provides, in the relevant part, that an enforcement order (including a final order of the CC made under section 84) may:

> "extend to a person's conduct outside the United Kingdom if (and only if) he is—
>
> (a) a United Kingdom national;
>
> (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
>
> (c) A person carrying on business in the United Kingdom."

44. At paragraph 8.125 of the Final Report, the CC concluded that Ryanair was a person carrying on business in the UK.

Consultation and confidentiality

45. As noted by the Tribunal in *Groupe Eurotunnel SA v. Competition Commission* [2013] CAT 30 ("*Eurotunnel*") at paragraph 195, the Act makes provision both for the CC to consult with persons interested in a merger reference, and for the protection of confidential information supplied to it in connection with such a reference. Paragraphs 196 to 204 of that judgment set out in some detail the relevant statutory provisions that apply to these parallel duties to consult and to protect confidential information.

Review in the Tribunal

46. Section 120 of the Act allows a person aggrieved by a decision of the CC to apply to the Tribunal for a review of the decision. In determining such an application, the Tribunal is to apply "the same principles as would be applied by a court on an application for judicial review" (section 120(4)).

47. It appeared to be accepted before us that the Tribunal's judgment in *BAA Ltd v Competition Commission* [2012] CAT 3 ("*BAA*"), which related to an

application under section 179 of the Act, identified the relevant principles that apply in the context of a review under section 120 of the Act. At paragraph 20 of that judgment, the Tribunal stated as follows:

> "20. Section 179(4) of the Act provides that on an application to it for review of a decision of the CC the Tribunal "shall apply the same principles as would be applied by a court on an application for judicial review." There were no major differences between the parties as regards the approach that these principles require on the part of the Tribunal, but there were potentially significant differences of emphasis. In our judgment, the principles to be applied are as follows:
>
> (1) Sections 134(4) and (6) and 138(2) and (4) of the Act (set out above), read together, require that any remedies that the CC recommends or adopts must be reasonable, practicable and – subject to those parameters – comprehensive;
>
> (2) In light of the relevance of the Convention right in Article 1P1 in this context, section 3(1) of the HRA requires that sections 134 and 138 should be read and given effect in a way compatible with that Convention right, which means that any such remedies must satisfy proportionality principles. Also, the CC accepts in its published guidance that any such remedies must satisfy proportionality principles (paragraph 4.9 of the Competition Commission Guidelines on Market Investigation References, June 2003). There was common ground as to the formulation of the proportionality test to be applied by the CC in taking measures under the Act (and by the Tribunal in reviewing its actions):
>
> > "… the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued" (*Tesco plc v Competition Commission* [2009] CAT 6 at [137], drawing on the formulation by the Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food, ex p. Fedesa* [1990] ECR I-4023, para. 13)
>
> In addressing proportionality, the following observation of the Tribunal at para. [135] of its judgment in *Tesco* should particularly be borne in mind:
>
> > "[C]onsideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the AEC and

its detrimental effects on customers, and if so what measure, having regard to the need to achieve as comprehensive a solution to the AEC and its effects as is reasonable and practicable."

(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the

public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion "reasonably, carefully and in good faith", but will include examination "whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'" (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as "relevant and sufficient" depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body "is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion": Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA is essentially equivalent to that given by the ordinary domestic standard of rationality. However, we also accept Mr Beard's submission that even if the standards required of the CC by application of Article 1P1 regarding its investigations and the evidential basis for its decisions were more stringent than under the usual test of rationality, the CC would plainly have met those more stringent standards as well;

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality

approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt;

(8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to

> assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

> In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

PART 3: THE CC'S FINAL REPORT

48. As noted at paragraph 28 above, the CC published its Final Report on 28 August 2013. In this Part of our judgment, we briefly summarise the CC's findings in the Final Report, which are set out in eight main sections, and supplemented by a further twelve appendices to the Final Report.

49. Sections 1 to 3 of the Final Report set out the essential background to the merger reference, in particular the terms of reference, industry background, the merger parties, and defines the relevant acquisition that the CC is considering as part of the reference, namely the acquisition by Ryanair of the minority shareholding in Aer Lingus.

Relevant merger situation – Ryanair's ability to exercise material influence over the policy of Aer Lingus

50. In section 4 of the Final Report, the CC addressed the first of the key statutory questions that it is required to decide under section 35 of the Act, namely whether a relevant merger situation has been created. Although there is no dispute in these proceedings that a relevant merger situation was created by Ryanair's acquisition of its minority shareholding in Aer Lingus, certain parts of the CC's conclusions in section 4 of the Final Report bear emphasis.

51. Having concluded that each of Ryanair and Aer Lingus were "enterprises" for the purposes of the Act (Final Report, paragraph 4.4), the CC found that Ryanair and Aer Lingus had "ceased to be distinct enterprises" for the purposes of section 26 of the Act, by virtue of Ryanair's ability to exercise material influence over the policy of Aer Lingus.

52. In arriving at this conclusion, the CC considered various factors which may suggest that an acquisition of a minority shareholding confers material influence on the holder, such as level of shareholding, voting and attendance patterns, distribution of other shareholdings, the status and expertise of the acquirer and its corresponding influence, other special provisions in the constitution of the company, and constraints on management time. These factors were considered at Final Report, paragraphs 4.12 to 4.41 in the particular context of Aer Lingus's corporate structure and shareholdings, and evidence of attendance and voting patterns amongst Aer Lingus's shareholders, including Ryanair (considered in more detail in Appendix C of the Final Report).

53. At paragraphs 4.14 and 4.15, the CC noted that, both as a matter of Irish company law and as a result of certain provisions specific to Aer Lingus's Articles of Association, certain resolutions required the support of at least 75% of the members voting at a general meeting or extraordinary general meeting ("EGM"). In particular, provided that it exercised its votes, a shareholder with a shareholding of more than 25% would always be able to block a special resolution (Appendix C of the Final Report identifies the specific matters requiring a special resolution under company law). Thus, Ryanair's 29.82% shareholding is sufficient to block the passing of special resolutions. At paragraph 4.17, the CC noted that during the period 2007 to 2013 Aer Lingus's shareholders had considered 33 special resolutions. Ryanair had successfully opposed 13 of the 33, including special resolutions in relation to the disapplication of pre-emption rights in each of the years 2007 to 2013.

54. At Final Report, paragraphs 4.20 and 4.21, the CC noted that Ryanair's 29.82% shareholding thus gave it the ability to prevent Aer Lingus from merging with another airline via a scheme of arrangement or under Directive 2005/56/EC on cross-border mergers of limited liability companies ("the Cross Border Mergers

Directive"). It would also be able to block a special resolution in relation to the disapplication of pre-emption rights, and thus could prevent Aer Lingus from issuing new shares to a strategic partner via a private placement.

55. The CC noted further at Final Report, paragraphs 4.22 to 4.27, that although the situations in which Ryanair could achieve a majority at a shareholders' meeting (and thus defeat an ordinary resolution) were relatively unlikely to occur, they could not be altogether dismissed. The CC noted that in the period 2007 to 2013, Aer Lingus's shareholders had considered 76 ordinary resolutions. Ryanair opposed four of these, but was not successful in any of the challenges.

56. The CC noted, more specifically, at Final Report, paragraphs 4.34 to 4.38, that Aer Lingus's Articles of Association make specific provision (at the insistence of the Irish Government) for voting in connection with a "Disposal Transaction" in relation to Aer Lingus's slots at Heathrow Airport. The CC concluded that Ryanair would be in a position to block such a resolution.

57. The CC concluded as follows in relation to material influence at Final Report, paragraphs 4.42 to 4.44:

> "4.42 We conclude that Ryanair's 29.82 per cent shareholding in Aer Lingus gives it the ability to exercise material influence over Aer Lingus. We reach this view having regard to all the factors discussed in paragraphs 4.12 to 4.41 and, in particular, Ryanair's ability to block special resolutions and the sale of Heathrow slots. We conclude that these mechanisms are relevant to Aer Lingus's ability to pursue its commercial policy and strategy, in particular, its ability to combine with another airline and to optimize its portfolio of slots, which are relevant to Aer Lingus's behaviour in the market. We discuss the relevance of Ryanair's ability to influence Aer Lingus's commercial policy and strategy and whether it has given rise to, or may be expected to give rise to an SLC in our assessment of competitive effects in Section 7.
>
> 4.43 As set out in paragraph 4.10, we do not consider it necessary to have concluded whether or not Ryanair has to date exercised material influence over Aer Lingus's commercial policy and strategy. Rather, this is one factor in the CC's assessment of whether or not the acquisition has given rise to, or may be expected to give rise to [an] SLC as discussed further in the competitive effects section.
>
> 4.44 In light of the above, we conclude that Ryanair has acquired the ability materially to influence the commercial policy and strategy of Aer Lingus and that, as set out in paragraph 4.6, this material influence gives rise to legal control for the purposes of the Act."

58. The CC concluded, further, that the acquisition met the "share of supply" test in section 23(4)(b) of the Act (Final Report, paragraph 4.47) and that, by dint of the suspension of the ordinary four month period, the reference on 15 June 2012 had been made within the necessary time period set out at section 24 of the Act (Final Report, paragraph 4.48).

Market definition and the counterfactual

59. In section 5 of the Final Report, which similarly appears not to be challenged in these proceedings, the CC considered the markets within which the merger may give rise to an SLC, and assessed the strength of the competitive constraint that Aer Lingus imposes on the UK operations of Ryanair (and vice versa), whether the intensity of competition between the airlines has changed since 2006, and also the strength of the competitive constraint imposed by other airlines.

60. At Final Report, paragraph 5.10, the CC concluded that the relevant product market was the supply of air passenger services and, at paragraphs 5.11 to 5.15, the CC outlined its approach to the definition of the relevant geographic market, by reference to certain "corridors" connecting airports in Great Britain and Ireland where services operated by Ryanair and Aer Lingus overlap.

61. The CC found that Ryanair and Aer Lingus impose a strong competitive constraint on each other on these overlap routes and are also likely to impose a competitive constraint – albeit less significant – on each other through the threat of entry on routes between Great Britain and Ireland on which the two airlines are not currently both active (Final Report, paragraph 5.31). Further, on most overlap corridors, the CC found that Ryanair and Aer Lingus do not face a competitive constraint from any other airlines (Final Report, paragraph 5.36). At paragraph 5.49, the CC concluded that, in line with the findings of the European Commission, competition between Ryanair and Aer Lingus has remained intense since 2006.

62. The CC outlined its chosen counterfactual at section 6 of the Final Report, which is not directly or specifically challenged in these proceedings. At paragraph 6.22, the CC concluded as follows:

> "We conclude that the appropriate counterfactual is that Aer Lingus, absent Ryanair's shareholding, would have continued or would continue to compete with Ryanair on routes between Great Britain and Ireland, either under independent ownership or in combination with another airline. In the next section we consider whether this competition would have been reduced or would be reduced as a result of the acquisition by Ryanair of a minority shareholding in Aer Lingus."

Assessment of the competitive effects of the acquisition

63. The CC's assessment of the competitive effects of Ryanair's acquisition of a minority shareholding in Aer Lingus, set out in section 7 of the Final Report, begins with a discussion of the relevance of the European Commission's findings to the CC's assessment, and the duty of sincere cooperation under Article 4(3) TEU. After summarizing the positions of Ryanair and Aer Lingus, the CC stated as follows at paragraphs 7.5 to 7.11 of the Final Report:

> "7.5 We noted first that it is clear that under the EUMR the European Commission does not have jurisdiction to conduct a review of the competitive effects of Ryanair's acquisition of a minority shareholding in Aer Lingus; as a result we have a duty under the Act to carry out our own assessment.
>
> 7.6 The Court of Appeal has recently confirmed that what is required by a Member State to comply with the duty of sincere cooperation under article 4(3) of the TEU is highly fact sensitive and it is for the Member State to choose the most appropriate course of action to take in order to fulfill it.
>
> 7.7 In the present case, we consider that the appropriate course of action is to take into account the European Commission's assessment of competition between Ryanair and Aer Lingus in making our assessment of competitive effects. It has been helpful to us in understanding the intensity of competition between Ryanair and Aer Lingus and their rivals (and how this has changed over time) (see Section 5) and the likelihood of entry into the Irish market by other airlines. We have not reached any findings that are in conflict with those of the European Commission on these points.
>
> 7.8 However, we do not agree with Ryanair's submission that we are bound to conclude, on the basis of the European Commission's assessment of that competition, that the acquisition of the minority shareholding has not resulted and will not result in an SLC.
>
> 7.9 We looked carefully at the evidence of the period since 2006 as presented by the European Commission and gathered by the CC during the course of its inquiry. In particular, in addition to our consideration of competition between the airlines since 2006 (see Section 5), we refer extensively to events in the period since 2006 in our assessment of the different mechanisms by which Ryanair's shareholding in Aer Lingus may affect competition.
>
> 7.10 In our view, the finding that Ryanair and Aer Lingus compete intensely (and that the extent of overlap between their UK operations has increased since 2006) neither precludes, nor is in conflict with our findings that, absent Ryanair's

> shareholding, competition during the period since 2006 may have developed differently and could have been more intense. Many of the potential competitive effects of the transaction that we considered would manifest themselves in terms of the absence of an action that might otherwise have been taken by Aer Lingus (for example, Aer Lingus being prevented from combining with another airline or from disposing of Heathrow slots in the context of optimizing its route network and timetable). We therefore cannot determine whether the transaction has reduced competition relative to the counterfactual solely from observing the competitive actions that Aer Lingus and Ryanair have taken in the period since 2006.
>
> 7.11 In addition, we need to consider not only whether the transaction has, to date, led to a reduction in competition, but also whether competition between the airlines may be affected in the future. The evidence presented in the European Commission's decision, whilst informing our understanding of the current level of competition between the parties, is a factor among others that we have taken into account when assessing how competition between the airlines might develop with and without Ryanair's shareholding in the future. For example, we were also conscious of Aer Lingus's view that its competitiveness would be eroded over time as it faced an inevitable 'cost creep' if its participation in the trend of consolidation in the airline industry were limited, as well as Ryanair's view that Aer Lingus did not have a future as an independent airline."

64. At Final Report, paragraph 7.12, the CC outlined the structure for its later analysis and conclusions:

> "7.12 We considered whether Ryanair's minority shareholding would reduce Aer Lingus's effectiveness as a competitor by affecting the commercial policies and strategies available to it. We first considered Ryanair's incentives to use its influence to weaken Aer Lingus's effectiveness as a competitor. We then looked at various mechanisms through which Ryanair's shareholding might influence the commercial policies and strategies available to its rival, considered the likelihood that such effects might arise and assessed the scale of the potential impact on Aer Lingus."

65. The CC then went on, at Final Report, paragraphs 7.16 to 7.22, to consider Ryanair's incentives with respect to its shareholding in Aer Lingus, forming the view (at paragraph 7.17) that Ryanair would have an incentive to take actions that ultimately had the effect of reducing Aer Lingus's effectiveness when deciding how to exercise the influence afforded to it by its shareholding. More generally, the CC stated that it would expect Ryanair's incentives as a competitor to outweigh its incentives as a shareholder (Final Report, paragraph 7.19), and that – in light of its stated strategy of acquiring the whole of Aer Lingus – Ryanair would have an additional incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor if this would make it easier to acquire the company (Final Report, paragraph 7.20). The CC found at paragraph 7.22:

> "… for the reasons set out in paragraphs 7.17 to 7.20 (and in particular given the closeness of competition between Ryanair and Aer Lingus and Ryanair's desire to acquire the entirety of Aer Lingus) we found that Ryanair would have the incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor and we would expect Ryanair to act on these incentives. The incentive to weaken Aer Lingus's effectiveness would not exist for a shareholder which was not in competition with Aer Lingus."

66. The remainder of section 7 is spent examining the mechanisms by which Ryanair's shareholding could affect Aer Lingus's commercial policy and strategy. In particular, the CC considered whether Ryanair could:

    (1) affect Aer Lingus's ability to participate in a combination with another airline;

    (2) hamper Aer Lingus's ability to issue shares to raise capital;

    (3) influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow;

    (4) influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution; and

    (5) allow Ryanair to raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy.

67. We briefly summarise below the CC's conclusions in relation to each of these mechanisms.

(a) Aer Lingus's ability to participate in a combination with another airline

68. The CC introduced its analysis of this first mechanism in the following terms, at Final Report, paragraphs 7.24 and 7.25:

> "7.24 We considered whether Ryanair's shareholding might weaken the effectiveness of Aer Lingus as a competitor by restricting Aer Lingus's ability to manage its costs at a competitive level and/or expand or improve its offering via a combination with another airline. We first set out how Ryanair's minority shareholding might influence Aer Lingus's ability to combine with another airline. We then consider evidence related to the likelihood of Aer Lingus being involved in a combination absent Ryanair's minority shareholding, discussing the general trend in consolidation in the airline industry, the views of airlines, internal documents of Aer Lingus and discussions between Aer Lingus and other

> airlines since 2006. Finally, we discuss the potential impact of being impeded from combining with Aer Lingus on its effectiveness as a competitor.
>
> 7.25 Combinations between airlines are inherently unpredictable and opportunistic, and so it is inevitable that our assessment will require an element of judgement. We do not consider it to be either feasible or necessary to catalogue all potential transactions involving Aer Lingus and another airline and assess the likelihood of each of these having taken place in the period since 2006 or taking place in the foreseeable future. Instead, we take into account a broad range of evidence relating to Aer Lingus including its position in the airline sector and evidence of its discussions with third parties on possible combinations in forming an overall view on the likelihood of Aer Lingus being (or having been) involved in a combination with another airline in the absence of Ryanair's minority shareholding."

69. The CC then went on, between paragraph 7.26 and 7.35, to consider how Ryanair's minority shareholding might affect Aer Lingus's ability to combine with another airline, noting the views of Ryanair, Aer Lingus, and other airlines and returning to its analysis in section 4 of the Final Report in relation to the types of decisions that were capable of being blocked by dint of Ryanair's shareholding.

70. The CC noted, at paragraphs 7.36 to 7.39, the trend of consolidation in the airline industry, for which a driving force was said to be the need to exploit economies of scale and contain or reduce the costs per passenger, and that this trend was likely to continue.

71. The CC then set out, at paragraphs 7.40 to 7.46 of the Final Report, a summary of the views that had been expressed by Ryanair, Aer Lingus and other airlines on the likelihood of a combination involving Aer Lingus. This was followed – at paragraphs 7.47 to 7.55 – by the CC's summary of evidence of potential combinations involving Aer Lingus in the period since 2006, including both Aer Lingus's internal assessments of M&A opportunities and evidence of discussions between Aer Lingus and other airlines. These sections of the Final Report were supplemented by the further details in Appendix F, and parts of their content are redacted.

72. We will return to the CC's conclusions in relation to this particular mechanism in more detail in Part 4 below. However, we set out below the CC's key conclusions on this issue, taken from paragraphs 7.80 to 7.84 of the Final Report.

"*Conclusion on the impact of Ryanair's minority shareholding on Aer Lingus's ability to combine with another airline*

7.80 We found that as a consequence of its minority shareholding Ryanair would be able to impede another airline from acquiring full control of Aer Lingus, and that its shareholding would be likely to be a significant impediment to Aer Lingus's ability to merge with, enter into a joint venture with or acquire another airline. This would be likely to act as a deterrent to other airlines considering combining with Aer Lingus. The more significant the transaction being contemplated (all other things being equal), the more likely Ryanair's shareholding would be to impede—or give Ryanair the ability to prevent—the combination from taking place. As discussed in paragraphs 7.16 to 7.22, we considered that Ryanair would have the incentive to use its influence to oppose any combination which it expected to strengthen Aer Lingus's effectiveness as a competitor, or make it harder to acquire the company itself.

7.81 Furthermore, we found that, in the absence of Ryanair's minority shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in a significant acquisition, merger or joint venture. In reaching this view, we took into account the general trend of consolidation in the airline industry and the need to exploit economies of scale and maintain or reduce costs per passenger, which suggested that a combination involving an airline of Aer Lingus's size was likely. We also took into account Ryanair's view that Aer Lingus would be unlikely to have an independent long-term future, and Aer Lingus's view of the importance of scale to its future competitiveness. The Irish Government's stated intention to sell its shares in Aer Lingus at the right time and at the right price also made it more likely that Aer Lingus would be involved in a combination absent Ryanair's minority stake, given the change in ownership this implied.

7.82 The views expressed to us by other airlines did not support Ryanair's assertion that Aer Lingus was an inherently unattractive partner, and we considered that while the characteristics of its network might limit its attractiveness to certain airlines, these factors might impact upon the consideration involved in any transaction that took place rather than act as an absolute deterrent. We also considered that the airline's strong financial position and access to Heathrow would be attractive to potential partners.

7.83 The extent to which we can draw inferences from evidence of discussions between Aer Lingus and other airlines in the period since 2006 is limited because of the presence of Ryanair's minority shareholding throughout this period. Nevertheless the discussions between Aer Lingus and other airlines which had taken place in the period since 2006 suggested to us that possible combinations arise and other airlines considered Aer Lingus to be a credible partner for a combination. While the evidence that we received suggested that it was relatively unlikely that a large European airline would seek to acquire Aer Lingus in the immediate future (and so going forward a merger or acquisition by Aer Lingus was the most likely form of combination), we considered that an acquisition remained a possibility in the longer term, and might have taken place in the period since 2006 absent Ryanair's minority shareholding.

7.84 The scale of any efficencies—in particular economies of scale—arising from a combination would necessarily depend on the identity of the acquirer and the specific nature of the transaction being contemplated. Nevertheless, in our view Aer Lingus was likely to be at a competitive disadvantage because of its

> relatively small size, and inorganic growth would be required in order for it to remain competitive. A consequence of Ryanair's shareholding impeding or preventing Aer Lingus from combining with other airlines would be to limit Aer Lingus's ability to increase the scale of its operations and reduce its unit costs. This would have the potential to weaken significantly the effectiveness of the competitive constraint Aer Lingus will impose on Ryanair relative to the counterfactual. Certain synergies would be likely to arise from a substantial combination between Aer Lingus and another airline that would not be acheivable via looser forms of cooperation."

(b) Aer Lingus's ability to issue shares to raise capital

73. At Final Report, paragraphs 7.85 to 7.92 and the supporting Appendix G, the CC considered a second way in which Ryanair's shareholding might limit the commercial policies and strategies available to Aer Lingus and reduce its effectiveness as a competitor, namely by hampering its ability to raise capital by issuing shares.

74. Having referred back to its analysis in Section 4, and considered the likelihood of Aer Lingus carrying out a rights issue in order to raise capital, the CC concluded as follows in relation to this second mechanism at paragraph 7.92 of the Final Report:

> "7.92 In summary, we found that Ryanair's ability to block a special resolution gives it influence over Aer Lingus's ability to issue shares and might hamper Aer Lingus's ability to raise capital. Given Aer Lingus's existing balance sheet strength and forecast financial performance, under circumstances of stable trading, no new debt issuance or acquisition activity by Aer Lingus, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term. However, if Aer Lingus needed to increase its share capital in future for a corporate transaction or to optimize its capital structure, Ryanair's ability to restrict it from doing so could cause Aer Lingus to become a less effective competitor on routes between Great Britain and Ireland than it would otherwise be."

(c) Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow

75. At Final Report, paragraphs 7.93 to 7.107, the CC considered whether Ryanair's shareholding might weaken the effectiveness of Aer Lingus as a competitor by restricting its ability to manage effectively its portfolio of slots at London Heathrow.

76. Having considered the specific provisions of Aer Lingus's Articles of Association (see paragraph 56 above), Aer Lingus's existing ability to optimize its slot portfolio, and the views of each of Aer Lingus, Ryanair and the Irish Government, the CC concluded, at paragraph 7.107 that:

> "(a) Ryanair would be able to influence Aer Lingus's ability to dispose of some of its Heathrow slots;
>
> (b) Aer Lingus would have been likely since 2006, or would in the future be likely to want to sell or lease slots in the context of managing its portfolio of Heathrow slots so as to optimize its route network and timetable; and
>
> (c) a constraint on Aer Lingus's ability to dispose of its slots could reduce its effectiveness as a competitor by limiting its strategic options. This could increase Aer Lingus's costs and restrict its flexibility with regard to its network and timetable, causing it to be a less effective competitor on routes between Great Britain and Ireland than it would otherwise be."

(d) Ryanair's influence over Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution

77. At Final Report, paragraphs 7.108 to 7.115, the CC considered whether Ryanair's minority shareholding could affect Aer Lingus's commercial policy and strategy if it were to give Ryanair the ability to influence the outcome of an ordinary resolution.

78. Referring back to its analysis at Section 4 and Appendix C of the Final Report, the CC noted that there were circumstances in which Ryanair could secure a majority vote of Aer Lingus's shareholders. However, this was stated to be relatively unlikely, unless (i) other shareholders voted in the same way as Ryanair; (ii) the Irish Government were to abstain on a vote; or (iii) the Irish Government were to sell its shareholding to multiple buyers. It concluded, however, that if Ryanair were to achieve a majority, there could be very significant adverse implications for Aer Lingus's effectiveness as a competitor, because of the importance of company decisions put to a shareholder vote by ordinary resolution.

(e) Ryanair's ability to raise Aer Lingus's management costs or impede its management from concentrating on commercial policy and strategy

79. At Final Report, paragraphs 7.116 to 7.125, the CC considered a final mechanism by which the minority shareholding might weaken Aer Lingus's effectiveness as a competitor, namely by diverting management resources from pursuing Aer Lingus's commercial policy and strategy and competing effectively with Ryanair. The CC referred to evidence from Aer Lingus on this issue, both as regards the ways in which it said that Ryanair had used its position as a shareholder to challenge Aer Lingus's management, and as regards the increased likelihood (as a result of the shareholding) of Ryanair making further bids for Aer Lingus.

80. Although the CC concluded that certain of the mechanisms available to Ryanair as a minority shareholder, namely the ability to request information, call an EGM, or propose resolutions at an AGM, were unlikely materially to affect Aer Lingus's effectiveness as a competitor, its shareholding increased the likelihood of it mounting a full bid. The CC concluded that such a bid could significantly disrupt Aer Lingus's commercial policy and strategy.

The CC's conclusions on the SLC test

81. Having considered Ryanair's incentives, and each of the five mechanisms discussed above, the CC set out – at paragraphs 7.126 to 7.130 of the Final Report – its overall conclusions on the effects of the acquisition of Ryanair's minority shareholding on Aer Lingus's commercial policy and strategy:

> "*Conclusions on the effects of the acquisition on Aer Lingus's commercial policy and strategy*
>
> 7.126 We found that Ryanair's minority shareholding would have affected or would affect Aer Lingus's commercial policy and strategy and inhibit its overall effectiveness as a competitor, albeit without giving Ryanair direct influence over the company's competitive offering on a day-to-day basis. Given the closeness of competition between Ryanair and Aer Lingus and its stated aim of acquiring the entirety of Aer Lingus, we found that Ryanair had an incentive to use its influence to weaken Aer Lingus's effectiveness that would not exist for a shareholder which was not in competition with Aer Lingus.
>
> 7.127 In reaching our conclusion, we formed the view that the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being

acquired by, merging with, entering into a joint venture with or acquiring another airline was of particular significance. We identified a number of ways in which the minority share-holding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares. We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006 or would be involved in the foreseeable future in the trend of consolidation observed across the airline industry through an acquisition, merger or joint venture. By impeding or preventing Aer Lingus from combining with other airlines, Aer Lingus's ability to increase the scale of its operations and reduce its unit costs would be limited. This would be likely to have reduced or to reduce the effectiveness of the competitive constraint Aer Lingus could impose on Ryanair on routes between Great Britain and Ireland relative to the counterfactual.

7.128 In addition, we found that Ryanair's minority shareholding could limit the commercial policies and strategies available to Aer Lingus by limiting its ability to manage effectively its portfolio of Heathrow slots. We also took account of the possibility, albeit relatively unlikely, that Ryanair would, in certain circumstances, be able to pass or defeat an ordinary resolution at an Aer Lingus general meeting (if other share-holders voted in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government's shareholding was dispersed). Given Aer Lingus's existing balance sheet strength and forecast financial performance, we found it unlikely that Aer Lingus would need to raise equity in the medium to long term other than in relation to a corporate transaction or to optimize its corporate structure. However, we note that unforeseen events might arise which would require Aer Lingus to raise equity and noted that Ryanair would be able to impede it doing so by blocking a special resolution. The minority shareholding would also increase the likelihood of Ryanair mounting further bids for Aer Lingus relative to the counter-factual.

7.129 We found that the extent of the impact of Ryanair's minority shareholding on Aer Lingus's effectiveness as a competitor was likely to be significant. The importance of scale to airlines was clear from our discussions, with Ryanair itself highlighting Aer Lingus's small scale as an impediment to its long-term survival. We identified a number of significant synergies that would be likely to arise from a combination between Aer Lingus and another airline, over and above those that might arise via looser forms of cooperation. Given wider trends in the airline industry, we would expect the pressure on Aer Lingus's cost base—and the need for additional scale to remain competitive—to become stronger over time. In addition, given the strategic importance of Aer Lingus's Heathrow slots and the importance of its Heathrow services to its UK operations, there could be a significant impact on Aer Lingus arising from its reduced ability to manage its slot portfolio in the context of optimizing the network or timetable of its UK routes. Additional bids by Ryanair for the out-standing shares in Aer Lingus could significantly disrupt Aer Lingus's commercial policy and strategy. Although relatively unlikely, if Ryanair were to achieve a majority at a general meeting, the implications for Aer Lingus's competitive capability could be very significant because of the importance of company decisions put to a shareholder vote by ordinary resolution.

7.130 Overall, while we could not predict with certainty the specific mechanism by which a harmful competitive effect would manifest itself (or would have done in the period since 2006), we formed the expectation, based on the evidence that

> we had gathered and the various mechanisms that we had assessed, that either in the period since 2006 or in the foreseeable future, Aer Lingus's commercial policy and strategy would have been impeded or would be impeded by Ryanair's minority shareholding. We concluded that the constraints on Aer Lingus's ability to implement its own commercial policy and strategy were likely to make Aer Lingus a less effective competitor than it would otherwise be across its network generally, and specifically as a rival to Ryanair on routes between Great Britain and Ireland."

82. In a further section, from paragraphs 7.131 to 7.159 of the Final Report, the CC then considered other ways in which Ryanair's minority shareholding might affect competition in the market, in particular by reference to three further mechanisms, namely whether Ryanair's shareholding:

(1) might incentivise Aer Lingus's management to take account of Ryanair's interests in its own decision making;

(2) would change Ryanair's incentives such that it competes less fiercely with Aer Lingus; or

(3) would increase the effectiveness of any existing coordination between Ryanair and Aer Lingus, or increase the likelihood of coordination between them in the future.

83. Having considered each of these issues, the CC concluded that the minority shareholding would not be expected to weaken the level of competition between Ryanair and Aer Lingus, and that it was unlikely to give rise to coordinated effects. At paragraphs 7.160 to 7.175, the CC considered possible market entry and expansion on the relevant corridors, and concluded that substantial entry on these routes was unlikely to occur, and was thus unlikely to offset the SLC that the CC might otherwise find.

84. At Final Report, paragraphs 7.176 to 7.188, the CC summarised its earlier findings in section 7, and stated its overall conclusion at 7.188:

> "We conclude that Ryanair's acquisition of a 29.82 per cent shareholding in Aer Lingus has led or may be expected to lead to an SLC in the markets for air passenger services between Great Britain and Ireland."

Remedies

85. Having outlined the CC's analytical framework for the assessment of remedies, the CC revisited the issue of the duty of sincere cooperation at paragraphs 8.4 to 8.13 of the Final Report:

> *"Duty of sincere cooperation*
>
> 8.4 As set out in paragraph 3.7, Ryanair's third public bid for Aer Lingus was prohibited by the European Commission on 27 February 2013. On 8 May 2013, Ryanair filed an appeal to this decision to the General Court. These proceedings are pending.
>
> 8.5 We considered the applicability of the duty of sincere cooperation with the institutions of the EU pursuant to Article 4(3) TEU in relation to both our substantive assessment and the implementation of remedial action. In paragraphs 7.3 to 7.11 we discussed the relevance of the European Commission's findings to our substantive assessment in this case and concluded that they do not preclude the CC's finding of an SLC. In this section, we consider the application of the CC's duty of sincere cooperation to the implementation of remedial action.
>
> 8.6 Ryanair stated that the CC must determine (on the facts) whether a particular decision could conflict with a decision of the European Court or European Commission. This assessment may entail a balancing exercise. However, once it is established that a decision could conflict with a decision under EU law, the obligation not to reach a conflicting decision is absolute, being a matter of law under Article 4(3) TEU. Consequently, Ryanair said that, in light of the ongoing EU appeals process of the European Commission decision to prohibit its third bid for Aer Lingus, the CC was prohibited from reaching a decision on any divestment remedy, which must be stayed pending resolution of the EU appeals process.
>
> 8.7 Ryanair stated that the CC had already recognized that it would not proceed to determine any issue of remedy while Ryanair's appeal of the EU Decision was ongoing and would avoid taking a final decision that could conflict with a decision of the European Commission which, Ryanair suggested, must include any appeals of such a decision.
>
> 8.8 Aer Lingus stated that an order requiring divestment of the minority stake could not create legal conflict with any future decision of the European Commission, first because those two (hypothetical) decisions involved the application of different legal instruments to different facts, and second because Ryanair could reacquire the shares in the context of an approved bid.
>
> 8.9 We do not agree with Ryanair's submission that the CC is prohibited, by its previous statements or those of the UK courts, from implementing remedial action. We believe that we must carry out a balancing exercise, taking into account all the circumstances of the case in assessing whether Article 4(3) TEU requires us to defer remedial action. We considered the following factors in reaching our decision:
>
> (a) the lack of jurisdictional overlap between what has been considered by the European Commission and the CC (the European Commission considered

only the public bid made to increase Ryanair's shareholding to 100 per cent and not the minority shareholding);

(b) the nature and terms of the CC's findings of an SLC;

(c) the nature and terms of the European Commission's prohibition decision;

(d) the CC's duty under section 41 of the Act to achieve as comprehensive a solution as is reasonable and practicable to any SLC found and any adverse effects arising from it;

(e) the likely extent of any harm to competition caused by delaying any action in relation to the SLC found;

(f) the nature and scope of the Ryanair appeal against the European Commission's decision;

(g) the likelihood that findings of the European Court(s) and/or, on remittal, the European Commission, in relation to the public bid would conflict with the substantive analysis in the CC's report;

(h) the likelihood that findings of the European Court(s) and/or, on remittal, the European Commission in relation to the public bid would conflict with any remedial action;

(i) the ability of the UK competition authorities to revisit any remedies which it has ordered, either under section 92 of the Act or by building into the remedies themselves provision for what should happen in the event that a public bid is approved by the European Commission;

(j) the practical impact that divesting all or part of the minority stake would have on Ryanair's ability to launch and successfully complete a public bid in the event that the decision of the European Commission is overturned and the public bid is subsequently approved;

(k) any impact of Article 1 Protocol 1 of the European Convention on Human Rights, including whether, and if so, what burden there might be on Ryanair of divesting and reacquiring the minority stake, and/or potentially being unable to reacquire the minority stake, set against the public interest in expediting remedial action, as well as in avoiding further consideration by the CC, as might be required in the event of a delay in implementation;

(l) the extent to which any potential impact upon Ryanair should be discounted on the basis that any acquisition was always subject to merger control scrutiny;

(m) the practicality of any interim solution (pending the outcome of the European process), such as temporary transfer of Ryanair's shares to a trustee, and or an amended version of the interim order currently in place, and its likely adequacy in preventing harm to competition during any interim period;

(n) the conduct of Ryanair in launching multiple bids for some or all of the shares in Aer Lingus, and the timing of those bids or related actions; and

(o) the conduct by Ryanair of its proceedings in the European courts and, in particular, the absence of any interim measures being sought or imposed.

8.10 We note that the CAT, the Court of Appeal and the General Court have confirmed that the CC has exclusive jurisdiction to analyse the competitive effects of Ryanair's minority shareholding in Aer Lingus.

8.11 We also note that we have analysed the impact of Ryanair's minority shareholding in Aer Lingus on the latter's effectiveness as a competitor on routes between Great Britain and Ireland, taking into account the relevance of the European Commission's decision where appropriate. In our view there is no conflict arising from the CC's finding of an SLC and the European Commission's SIEC findings.

8.12 We recognize that Ryanair has challenged the European Commission's assessment of the final commitments offered by Ryanair. We are also mindful of the importance of complying with our EU obligations and we have therefore considered the matter with care. However, having had regard to the matters mentioned in paragraph 8.9, including the grounds of challenge in Ryanair's application to the General Court, we view the prospect of a conflict between the substantive analysis or outcome of the CC's inquiry and that of the institutions of the EU as relatively remote. In our view, the remedial action that we propose taking could not be said to jeopardize the attainment of the EU's objectives.

8.13 We considered whether interim arrangements would be effective in mitigating the SLC finding pending the conclusion of the EU appeals process. For the reasons set out in paragraph 8.103, we did not find that interim relief (by way of the current—or supplementary—interim measures) would be effective in addressing the SLC that we had found and hence were not persuaded that delaying the implementation of remedial action was justified."

86. Thereafter, the CC proceeded to consider three remedy options on which it had consulted in its notice of possible remedies, published on 30 May 2013, namely full divestiture, partial divestiture or partial divestiture accompanied by behavioural remedies. At paragraphs 8.19 to 8.49 of the Final Report, the CC specifically considered certain behavioural remedies proposed by Ryanair (set out at paragraphs 8.22 to 8.25 of the Final Report), concluding at paragraph 8.49 that such remedies would not be effective in addressing the SLC.

87. For each of its own remedy options, the CC proceeded to consider the question of whether such remedies were effective in addressing the SLC and the resulting adverse effects. Having done so, it concluded that only full or partial divestiture would be effective remedies. It then went on to consider the proportionality of the effective remedies that it had identified, concluding that a partial divestiture to reduce Ryanair's stake in Aer Lingus to 5% would be an effective and proportionate remedy.

88. The CC considered how its chosen remedy should be implemented at paragraphs 8.122 to 8.125 and Appendix K of the Final Report. Having considered the divestiture package and the risks associated with its disposal, the nature of the divestiture process (and the identity of the party conducting that process), issues relating to purchaser suitability, and the timescale that should be allowed for any disposal to take place, the CC decided as follows (at paragraph 8.123 of the Final Report):

> "(a) A Divestiture Trustee should be appointed from the outset to sell the divestiture package to suitable purchasers.
>
> (b) The divestiture may be implemented via an upfront buyer process to a single purchaser or via a stock market placement of the shares, or by another process identified by the Divestiture Trustee and approved by the CC.
>
> (c) The Divestiture Trustee will review whether a purchaser satisfies the CC's suitability criteria (see Appendix K), and will consult with the CC as appropriate.
>
> (d) Ryanair may nominate parties to act as Divestiture Trustee for approval by the CC. The CC may appoint its own choice of Divestiture Trustee if Ryanair is unable to identify appropriate candidates within specified timescales. Ryanair is responsible for remuneration of the Divestiture Trustee.
>
> (e) The divestiture period is [✂] months from Final Determination."

PART 4: RYANAIR'S GROUNDS OF CHALLENGE

Ground 1: duty of sincere cooperation

89. Ryanair contends that the CC's order to divest its shareholding in Aer Lingus, leaving it with a maximum holding of 5%, is contrary to the EU law duty of sincere cooperation embodied in Article 4(3) TEU. Although its third bid for the remainder of the issued share capital of Aer Lingus was rejected by the European Commission on 27 February 2013, this is the subject of an appeal to the General Court. If the General Court decides in Ryanair's favour, and remits the matter to the European Commission for re-examination pursuant to Article 10(5) EUMR, the European Commission may subsequently decide that Ryanair is entitled to bid for the shares in Aer Lingus that it does not already hold. It is said that a divestiture order by the CC would undermine any ruling by the European Commission that Ryanair may acquire Aer Lingus because, as a practical matter, it would be significantly easier to acquire the balance holding a

29.82% stake than a 5% stake. With only a 5% stake it was suggested in Ryanair's skeleton argument that it would be more difficult, perhaps impossible in practice, for Ryanair to acquire Aer Lingus if permitted to do so by the European Commission. During oral argument, Lord Pannick for Ryanair did not put his case so high as impossibility.

90. The duty of sincere cooperation has already been an issue in relation to proceedings at earlier stages on applications by Ryanair. First, in relation to the limitation issue, as referred to in paragraphs 12 and 13 above. Secondly, in relation to the CC's decision to continue its investigation even though Ryanair's third bid was being considered by the European Commission, as referred to in paragraphs 17, 19 and 20 above. Whilst these decisions contain useful statements of principle, they do not address the factual scenario before us.

91. The duty of sincere cooperation is embodied in Article 4(3) TEU, which provides:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

92. Articles 4(1), 5(1) and 5(3) TEU recognise that the Union and the Member States have differing competences. They provide:

> "4(1) In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States."
>
> "5(1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> …
>
> (3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States,

> either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."

93. The duty of sincere cooperation may, at its starkest level, relate to situations where there are overlapping jurisdictions. This may arise where, for example, issues under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") are being considered by the European Commission (or on appeal from the European Commission to the General Court), but there are also cases before the national courts of Member States raising the same questions. This was the situation in the leading cases of *Delimitis v. Henninger Bräu AG* [1991] ECR I-935, [1992] 5 CMLR 210 and *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369. *Delimitis* was a case which concerned what is now Article 101 TFEU (ex Article 85 EEC). At that time, exemption decisions under (then) Article 85(3) EEC were a matter for the European Commission. In that case the national court was considering whether arrangements infringed Article 85(1) EEC. At paragraph 47, the ECJ stressed the need to avoid a decision which may conflict with one of the European Commission:

> "47. It now falls to examine the consequences of that division of competence as regards the specific application of the Community competition rules by national courts. Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85(1) and 86, and also of Article 85(3). Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission."

94. The ECJ accepted that there may be circumstances where the risk may be so low, that the national court may continue and rule on the issue. At paragraphs 50 and 52, it stated:

> "50. If the conditions for the application of Article 85(1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the exemption regulations

> and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85(3).
>
> …
>
> 52. If the national court finds that the contract in issue satisfies those formal requirements and if it considers in the light of the Commission's rules and decision-making practices, that that agreement may be the subject of an exemption decision, the national court may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure. A stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of Articles 85(1) and 86."

95. *Masterfoods* concerned the application of what are now Articles 101 and 102 TFEU (ex Articles 85 and 86 EEC). As noted by the Tribunal at paragraph 37 of its judgment in *Ryanair Holdings Plc v. Competition Commission* [2012] CAT 21, the essence of the decision is that where national courts (or another authority of a Member State) have the jurisdiction to make a decision in circumstances where the European Commission has a concurrent jurisdiction in respect of the same parties and the same subject-matter at the same time, such that there is a risk that the national competition authority may reach a decision that will prove contrary to a future decision of the European Commission (or, on appeal, a future decision of the courts of the European Union), then it is incumbent on the national competition authority to ensure that such a conflict does not arise. The ECJ held as follows:

> "49. It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, to that effect, Case C-2/97 *IP v Borsana* [1998] ECR I-8597, paragraph 26).
>
> ...
>
> 51. The Court has held, in paragraph 47 of *Delimitis*, that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Articles 85(1) and 86 and Article 85(3) of the Treaty.
>
> 52. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot

take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance.

53. In that connection, the fact that the President of the Court of First Instance suspended the application of Decision 98/531 until the Court of First Instance has given judgment terminating the proceedings before it is irrelevant. Acts of the Community institutions are in principle presumed to be lawful until such time as they are annulled or withdrawn (Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 48). The decision of the judge hearing an application to order the suspension of the operation of the contested act, pursuant to Article 185 of the Treaty, has only provisional effect. It must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

54. Moreover, if a national court has doubts as to the validity or interpretation of an act of a Community institution it may, or must, in accordance with the second and third paragraphs of Article 177 of the Treaty, refer a question to the Court of Justice for a preliminary ruling.

55. If, as here in the main proceedings, the addressee of a Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision pursuant to that article, it is for the national court to decide whether to stay proceedings until a definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling.

56. It should be borne in mind in that connection that application of the Community competition rules is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Community Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty.

57. When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted."

96. In *Masterfoods*, in his Opinion, the Advocate General stressed the need to examine the limits of the binding authority of the decision of the national court and the content of the European Commission's decision. At paragraphs 15 and 16 he stated:

"15. The following introductory remarks must be made with regard to the question of when there is a conflict or the risk of a conflict between, on the one hand, a decision of the Commission applying Articles 85(1) and 86 of the EC

> Treaty to a specific dispute and, on the other, the decision of a national court on the same question.
>
> 16. In order to establish such a form of conflict, a connection between the legal problem which arises before the national courts and that being examined by the Commission is not in itself sufficient. Nor is the similarity of the legal problem where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts. The Commission's decision may provide important indications as to the appropriate way to interpret Articles 85(1) and 86, but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions. Such a risk only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds and operative part of the Commission's decision. Consequently the limits of the binding authority of the decision of the national court and the content of the Commission's decision must be examined every time."

97. The CC placed emphasis on these passages from the Opinion of the Advocate General in its submissions. However, the decision on whether the duty is engaged and how any conflict or potential conflict is to be dealt with is very fact-sensitive. The ECJ did not itself adopt this reasoning expressly in its judgment, and hence caution should be taken before concluding that the circumstances set out by the Advocate General are determinative of what needs to be shown before a conflict is deemed to arise.

98. *Masterfoods* was considered in *National Grid Electricity Transmission Plc v. ABB Ltd* [2009] EWHC 1326 (Ch). In that case, the European Commission had issued a decision that there had been infringements under (ex) Article 81 EC by various parties. Those parties were made defendants in proceedings in the High Court seeking damages for infringements, relying on the decision. The decision itself was on appeal for annulment before the Court of First Instance. It was common ground that the High Court proceedings should be stayed pending the conclusion of the annulment proceedings and any appeal. The issue was until what stage should a stay be imposed. The Chancellor in his judgment imposing a stay quoted from paragraphs 55 to 58 of *Masterfoods*. He then went on to state at paragraph 24:

> "At one stage counsel for Areva submitted that the terms of paragraph 58 of the ECJ's judgment in *Masterfoods* required the national court to abstain from any further proceedings in the action save any which could properly be described as "interim measures to safeguard the interests of the parties pending final judgment". He submitted that any requirement for service of defences, disclosure of documents or other normal interlocutory steps in preparation for a trial were

> outside the scope of what the ECJ considered to be permissible. I reject that submission. First, the terms of paragraphs 55 and 57 show that it is for the national courts to decide when to stay its proceedings. The object is to avoid any decision running counter to that of the Commission or the community courts. Paragraph 58 deals only with the position when the national court has stayed the proceedings. It says nothing about the obligations of the national courts before that stay has become effective. Indeed it would be contrary to the very division of functions to which the ECJ referred in paragraphs 47 to 49 to conclude that it had the jurisdiction to interfere with the procedures of the national courts in areas where there was no risk of conflicting decisions. Given that objective it is for the national court to consider, in accordance with its own procedures, how best to achieve it."

99. The Chancellor at paragraph 37 agreed with the defendants' submission that he could not prejudge the outcome of the applications to the Court of First Instance or of any subsequent appeals.

100. In the first Ryanair application to the Tribunal and subsequent appeal to the Court of Appeal, what was being considered were overlapping jurisdictions. This was because, in examining the first bid, the European Commission was considering as one concentration not only the shares that Ryanair was bidding for, but also the minority shareholding that Ryanair had already acquired. This is evident from paragraph 134 of the Tribunal's judgment (set out at paragraph 12 above) and paragraph 38 of the Chancellor's judgment in the Court of Appeal (with which Hughes and McFarlane LJJ agreed) which provided:

> "It is, in my view, clear that both ECMR and the Enterprise Act confer extensive powers of investigation on, respectively, the Commission and the OFT and Competition Commission both before and after a notification or reference is made. Although not looking for quite the same thing, those respective bodies would be investigating the same events. The definition of a 'concentration having a community dimension' contained in ECMR, for which the Commission would be looking, is not the same as a 'merger situation' as defined in the Enterprise Act which would concern OFT. Accordingly, there could be no question of the conclusions of one being adopted without further enquiry by the other. There is, however, considerable overlap in the exercise of the two jurisdictions. The processes of an OFT investigation with a view to possible referral to the Competition Commission, and of any enquiry by that Commission before its decision are, in both cases, intensive. They are likely to involve extensive gathering of information from third parties as well as from the companies directly concerned, working papers submitted for comment, oral hearings, and detailed examination of the internal workings of the companies. They may involve proposals as to remedies and oral hearings directed to enquiring into them. The 'Issues Paper' which has now been provided by OFT to Ryanair in the present case is an example. There is no occasion here to publish its detailed contents, but it runs to 224 paragraphs and traverses such matters as shareholder voting patterns, capitalisation, the Articles of Association and restrictions on airport slot disposal, the catchment areas of airports, route

> comparisons, competition and efficiency incentives and the level of present or anticipated co-ordination. All this is under intensive investigation, and preliminary views are being expressed, before there is even a reference to the Competition Commission, let alone an enquiry by it. It is, to my mind, self-evident that concurrent investigations in the UK and in Europe would be both oppressive and mutually destructive. I accept, therefore, that the duty of sincere cooperation does go beyond avoiding inconsistent decisions and extends to overlapping jurisdictions."

101. In the second Ryanair application to the Tribunal and subsequent appeal to the Court of Appeal, the situation under consideration was not of overlapping jurisdictions. The shares already held by Ryanair did not form part of the concentration being considered by the European Commission in respect of the third bid. This was emphasised at paragraph 82 of the Tribunal's Judgment (set out at paragraph 16 above) and paragraph 60 of the Court of Appeal decision (set out at paragraph 18 above).

102. The focus of the second Ryanair application and appeal was whether the CC should continue with its investigation whilst the European Commission's own investigation was ongoing. It was held that for the CC to continue investigating the minority shareholding whilst the proposed concentration involving the bid for the majority of the shares in Aer Lingus was being considered by the European Commission did not in itself involve a breach of the duty of sincere cooperation. At the time it was envisaged that the decision of the European Commission would be issued prior to any final determination by the CC. It was recognised that once the European Commission's decision had been given, the CC would need to assess its impact and not act in a way, as far as remedies were concerned, which would conflict with the European Commission's assessment. As Ryanair summarised matters at paragraph 55(1) to (3) of its skeleton argument:

> "1. In its letter to the Tribunal of July 26, 2012 (written at the request of the CC), DG Competition explained that the CC was entitled to continue an investigation into the minority shareholding under UK law, but warned that "*national competition authorities should not, on the basis of their national law, take decisions that would compromise decisions or possible decisions by the European Commission under the EU Merger Regulation.*"
>
> 2. In oral submissions to the Tribunal, Mr Beard QC for the CC stated: "*[the CC] would want to ensure that no concrete steps were taken in relation to remedies that compromised – I think that was the work the Commission used in its letter – the outturn that the Commission might take.*"

> 3. In its judgment of 8 August 2012, the Tribunal stated at [84]: "*Of course, as Mr Beard QC, for the CC, accepted, the CC remains subject to the duty of sincere cooperation and must avoid taking any final decision in respect of the Minority Holding which would, or could, conflict with the European Commission's ultimate conclusion on the compatibility of the Public Bid with the common market. That does not mean that the CC is precluded, as a matter of law, from taking any further steps in the Investigation.*""

103. In the Final Report, the CC took account of the European Commission's decision of 27 February 2013. It concluded at paragraph 7.7 that it had not reached any findings on the competition between Ryanair and Aer Lingus, which were inconsistent with the European Commission's findings. It was not suggested before us that there was any conflict between the divestiture remedy imposed by the CC and the European Commission's decision to in effect block Ryanair's bids due to the anti-competitive effects found by the latter.

104. The CC went on to consider the issue of the duty of sincere cooperation in some detail at paragraphs 8.4 to 8.13 of the Final Report, cited in full at paragraph 85 above.

105. As to the CC's analysis, we note the following:

    (1) Whether or not the divestiture remedy is in conflict or potential conflict with the duty of sincere cooperation is ultimately one for this Tribunal on the challenge before it.

    (2) We accept that there is no conflict arising from the CC's finding of an SLC and the European Commission's SIEC findings.

    (3) Paragraph 8.9 of the Final Report is unsatisfactory in that whilst it identifies a list of factors, it did not go on to state what weight it placed on these factors individually.

    (4) Whilst we accept that there may be a balancing exercise in determining how to avoid a conflict or potential conflict, if there is in fact a real conflict (rather than a remote possibility) then, in general, a decision or step must not be taken. Whilst there may be cases where it is appropriate to proceed even where a real conflict or a potential conflict arises, this is only likely to arise in exceptional circumstances, such as in *British*

Aggregates Association & Ors v. HM Treasury [2013] EWCA Civ 720. In that case, such exceptional circumstances arose from the lengthy period of a stay (11 years) that had applied in the Court of Appeal while the matter (giving rise to the conflict) was before the EU institutions.

(5) We accept and it is common ground that in this matter there is no overlapping jurisdiction between the EU institutions and the CC. That is because it is abundantly clear from the position taken by both the CC and the European Commission, and confirmed by this Tribunal and the Court of Appeal in the earlier *Ryanair* proceedings, that each institution is acting within its respective area of jurisdiction. In particular, the minority stake which is the subject of the CC's decision is not a "concentration with a Community dimension" and thus the jurisdiction of the European Commission pursuant to Article 21(3) EUMR is not engaged.

106. The conflict or potential conflict relied upon by Ryanair on its application centres on the divestiture remedy. It is said that divestiture would conflict with a potential decision by the European Commission (assuming Ryanair succeeds in the General Court) that the acquisition of the remainder of the shares by Ryanair should be permitted. The two key elements to Ryanair's reasoning were as follows:

(1) If Ryanair's shareholding is reduced to 5% it would be much harder for it to launch a fourth bid for the remainder of the shares.

(2) It would not be in accordance with the European Union's objectives for the CC to impose a remedy which makes it much harder to succeed in relation to a bid which has been cleared by the European Commission, which may be the ultimate outcome of the appeal before the General Court and any reconsideration by the European Commission in the light of any successful appeal.

107. From the outset, it should be stressed that the CC in its Final Report and remedies has already taken into consideration the possibility that the European Commission may allow, at a future date, a bid. The obligation on Ryanair not to

acquire further shares in Aer Lingus is subject to the proviso "unless clearance is given under EUMR for a concentration between Ryanair and Aer Lingus."

108. We accept that it is harder and potentially more expensive for a bid for the entire issued share capital to proceed when Ryanair has only a 5% shareholding as opposed to its current holding of 29.82%. As the CC itself noted at paragraph 7.124 of the Final Report:

> "We did, however, recognize that the minority shareholding would increase the likelihood of further bids by Ryanair relative to a situation in which Ryanair had not owned the shares. With a 29.82 per cent shareholding it would have a smaller absolute number of shares to acquire and there would be a reduced likelihood of a counterbidder…"

109. Where the parties diverge on this application is whether, if a bid for the majority shareholding is allowed by the European Commission, it is a European Union objective that the bid takes place and is not in practice hampered or made more difficult by the CC in respect of the minority shareholding which is in its province. In this regard all parties placed reliance on the provisions of the EUMR.

110. The EUMR includes the following recitals:

> "…
>
> (2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.
>
> (3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.
>
> (4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.
>
> (5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

…

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

…

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

…

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time."

111. Ryanair relies on the recitals in support of its submission that as reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and other matters in recital (4), once a notified concentration has been declared compatible within the meaning of Article 8(1)

or 8(2) EUMR, then it is part of the European Union's objectives that the bid should be allowed to proceed without hindrance. We do not agree with this analysis. The EUMR relates to the control of concentrations falling within the relevant thresholds. It does not cover the minority stake held by Ryanair which falls within the CC's jurisdiction. The EUMR is concerned with ensuring the competition is not distorted by concentrations. Whilst it prohibits mergers which may be harmful, it is not a European Union objective promoted in the EUMR that a proposed concentration which has been cleared does in fact take place. In giving clearance under Article 8(1) or 8(2), the European Commission is not finding that an acquisition should or must take place. Bids may not in fact proceed or they may not be accepted.

112. Some reliance was placed by Ryanair on the previous statements of the Tribunal, the courts and the CC in the earlier stages of the CC's inquiry. These are referred to in paragraphs 12 to 20 above. We do not find that these in any way bind the CC or this Tribunal. They were focusing on the situation prior to the decision of the European Commission and the CC's Final Report.

113. We find that there is no breach of the duty of sincere cooperation in the proposed divestiture order of the CC. The CC is concerned with Ryanair's minority holding and is mandated to take steps to reduce the SLC identified as a result of that holding. It has not prohibited Ryanair from making any bid which may be cleared in the future by the European Commission. To have to await the long process of the completion of the appeal to the General Court and any remission for further consideration by the European Commission would be most unsatisfactory given that Ryanair acquired most of its current holding as long ago as 2006. The 29.82% holding which is the subject of the CC's Final Report and proposed divestiture order is a separate matter to the shareholding which Ryanair seeks to acquire and is the subject-matter of the EU process.

114. Ryanair invited us to make a reference to the Court of Justice of the European Union in the event that we do not consider the matter to be *acte clair*. The decisions of the ECJ in *Delimitis* and *Masterfoods,* as well as various decisions of this Tribunal, High Court and Court of Appeal referred to in this judgment, are clear and provide a framework for deciding this ground. We accept that

there is no directly analogous case, but this is not surprising. The authorities mainly relate to direct conflicts where there is concurrent or overlapping jurisdiction. In the current situation, there are distinct jurisdictions where the European Commission and the CC are looking at different shareholdings.

Ground 2: procedural fairness

115. Ryanair contends that it was not accorded procedural fairness during the CC's inquiry as it was not provided with certain evidence or information, without which it was not able to respond effectively to the allegations or case being made. In its skeleton argument, Ryanair submitted that the material, as a minimum, should have been provided to advisers within a confidentiality ring. This primarily relates to information which was redacted from Section 7(a) and Appendix F of the Final Report, which was not provided to Ryanair during the process which concluded with the issuing of the Final Report. The primary focus during the course of the application before the Tribunal was in relation to the identity of various airlines referred to in redacted passages. The Final Report itself does refer to the views expressed and evidence given to it by a number of airlines which had been specifically identified, namely Aer Lingus, Ryanair, IAG, Lufthansa, Air France, easyJet, Flybe and Aer Arann. However, certain passages referring to discussions that had taken place between Aer Lingus and other airlines since the IPO were redacted to protect the identity of the airlines concerned and the confidentiality of those discussions.

116. Fairness is an evolving concept. What may have appeared fair at one time or in a particular circumstance, may now be regarded as unfair as the importance of procedural fairness has developed. It is a basic principle of administrative law recognised in many reported decisions. In *O'Reilly v. Mackman* [1983] 2 AC 237 at 279F-G, Lord Diplock rightly emphasised the fundamental nature of the right afforded by the rules of natural justice or fairness, namely to have afforded to the person concerned "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it."

117. In the context of enquiries by the CC, procedural fairness does not necessarily require the production of the underlying evidence obtained by it. It is for the

CC to assess the evidence it acquires, including as to its reliability, relevance and weight. Much of what the CC receives may be highly confidential. The CC needs to rely upon the evidence and information provided by third parties, who may be unwilling to come forward or be forthcoming if commercial secrets or sensitive negotiations are made public or available to a competitor.

118. The Act contains specific provisions for the protection of confidential information and for the CC to consult with persons interested in a merger reference such as Ryanair in the present case. Section 104 sets out the duties of the relevant authorities, which includes the CC, when considering mergers covered by section 35, in the following terms:

> "(1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers it likely to be adverse to the interests of a relevant party.
>
> (2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
>
> (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
>
> (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to –
>
> (a) any restrictions imposed by any timetable for making the decision; and
>
> (b) any need to keep what is proposed, or the reasons for it, confidential …".

119. As regards the need to protect confidentiality referred to in section 104(4)(b), Part 9 of the Act has specific provisions in relation to restrictions on disclosure. Section 238(1) defines "specified information" as including information coming to the CC in connection with the exercise of any of its functions under Part 3 of the Act, which deals with mergers. Thus much of the information gathered by the CC as part of the inquiry is specified information. In view of the description of the material which Ryanair claims should not have been withheld (primarily information from airlines supplied to the CC), it is appropriate to proceed on the basis that it falls within the definition of specified information. The contrary was not suggested during the hearing.

120. Section 237 contains a general prohibition on disclosure which is subject to various exceptions. Section 237(1) and (2) provide:

> "(1) This section applies to specified information which relates to –
>
> (a) the affairs of an individual;
>
> (b) any business of an undertaking.
>
> (2) Such information must not be disclosed –
>
> (a) during the lifetime of the individual, or
>
> (b) while the undertaking continues in existence,
>
> unless the disclosure is permitted under this Part."

There follow various provisions which permit disclosure, which may be summarised as follows:

(1) Where the information has previously, and properly, been disclosed to the public (Section 237(3));

(2) Where the disclosure is consented to (Section 239);

(3) Where the disclosure is required for the purpose of an EU obligation (Section 240);

(4) Where the disclosure is for the purpose of facilitating the CC's functions (Section 241);

(5) Where the disclosure is done in connection with civil proceedings (Section 241A) or criminal proceedings (Section 242) or to an overseas public body (Section 243).

121. In addition, Section 237(5) provides that nothing in Part 9 affects this Tribunal. This leaves open the possibility that, where the CC has not provided disclosure of information to a party under investigation during the course of that investigation, on an application to the Tribunal, the Tribunal may order disclosure to the extent necessary and appropriate having regard to the relevance of the material to the application and the confidentiality of the material.

122. For the purposes of this judgment, the relevant disclosure gateway is that provided by section 241 (Statutory Functions), which provides:

> "(1) A public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment.
>
> (2) If information is disclosed under subsection (1) so that it is not made available to the public it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose mentioned in that subsection. …".

The CC's duty to consult under section 104 is a function of the CC within the meaning of section 241(1).

123. The considerations relevant to disclosure of specific information by the CC are specified in section 244, which provides:

> "(1) A public authority must have regard to the following considerations before disclosing any specific information (within the meaning of section 238(1)).
>
> (2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.
>
> (3) The second consideration is the need to exclude from disclosure (so far as practicable) –
>
> (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
>
> (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.
>
> (4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure."

124. Guidance has been issued in the form of the Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (April 2013) ("the CC7 Guidance"). The CC7 Guidance explains the CC's transparency aims and the statutory framework relating to the CC's handling and disclosure of information. Paragraph 2.1 states that the CC aims to be open and transparent in its work while, as

appropriate, maintaining the confidentiality of information that it obtains during its inquiries. Paragraph 2.2 contains a useful set of reasons why transparency facilitates inquiries. In particular:

> "(a) First, it is a means of achieving due process and of ensuring that by having a better understanding of the CC's analysis affecting them, the main parties in inquiries are treated fairly.
>
> (b) Secondly, it enables other interested persons, such as consumers and their representative bodies, suppliers and customers and other persons who may be affected by the CC's decision, to understand the issues that the CC is considering and then to form effectively their input to the process.
>
> (c) Thirdly, transparency helps main parties and other interested persons when they are providing the CC with information, including identifying inaccuracies and incomplete or misleading information.
>
> (d) Fourthly, as a result of the above, the effectiveness, efficiency and quality of CC inquiries and decisions are improved."

125. Paragraph 4 of the CC7 Guidance summarises the statutory framework under Part 9 of the Act. In the context of section 244, paragraphs 4.4 to 4.6 of the CC7 Guidance provide:

> "4.4 If any of these information gateways apply and before disclosing any specified information, the CC must have regard to three considerations:
>
> (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the CC thinks is contrary to the public interest;
>
> (b) the need to exclude from disclosure (so far as practicable):
>
> (i) commercial information whose disclosure the CC thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
>
> (ii) information relating to the private affairs of an individual whose disclosure the CC thinks might significantly harm the individual's interests; and
>
> (c) the extent to which the disclosure of the information mentioned in (b)(i) or (ii) is necessary for the purpose for which the CC is permitted to make disclosure.
>
> 4.5 These three considerations apply on each occasion that the CC is considering disclosure of specified information: for example, in correspondence, at hearings and in a disclosed or published document. The Act does not contain specific provision for excisions from reports, save in some cases concerning public interest considerations.

4.6 The CC will give special consideration to the potential harms associated with disclosure where 'sensitive information' is concerned, sensitive information being information referred to in the first and second of the considerations (ie 4.4(a) and (b)). The CC's processes provide persons with the opportunity to state a view on the sensitivity of the information they have provided (see Part 9). It is the Group's responsibility to consider whether the disclosure of the information claimed by a party to be sensitive would in fact harm a person. If harm or potential harm is established, the Group will go on to consider whether the circumstances of the case merit disclosure of the information in any event."

126. The approach to disclosure of information received during inquiries or reviews is set out in paragraph 5 of the CC7 Guidance, paragraphs 5.1 to 5.3 of which provide:

"5.1 When determining how best to achieve the transparency aims of the CC (see paragraph 2.2), Groups must have regard to the statutory framework (see Part 4) and the CC's Rules and guidance published by the CC or the CC Chairman relating to the CC's process and conduct of investigations.

5.2 Additionally, Groups should have regard to:

(a) the desirability of Groups taking a consistent approach when applying the principles of disclosure;

(b) the desirability of avoiding unnecessary burdens on business, the need to conduct investigations effectively and efficiently, the need to reach properly reasoned decisions within statutory and administrative timescales;

(c) the need to disclose information supplied to the CC so that interested persons (main parties or other interested persons) are able to comment on matters affecting them and so that they can draw to the CC's attention any inaccuracies, incomplete or misleading information;

(d) the need to protect some information provided to it in the course of its inquiries or reviews and the importance of maintaining the CC's reputation for doing so;

(e) the CC's analysis as it affects them; and

(f) the desirability of making sufficient information available to the public so that the public may become aware of the main issues arising in inquiries and reviews and are in a more informed position to provide information to the Group.

These considerations may inform the Group as to whether particular information should be disclosed, to whom and the manner of disclosure.

5.3 For the most part these factors will not be in conflict with the CC's transparency aims and its statutory functions. However, when decisions are finely balanced, Groups should pay particular attention to the need to achieve due process."

127. Much of the material redacted in Section 7 and Appendix F of the Final Report relates to information provided by Aer Lingus and other airlines about discussions for combinations or at the least the possibility of combinations. Paragraph 6 of the CC7 Guidelines deals with the handling and disclosure of information received by the CC. Paragraphs 6.12 to 6.14 are informative as to the CC's approach to information received in the course of hearings, meetings and telephone conversations. They provide:

> "6.12 During inquiries or reviews there will be numerous oral communications between a party and the CC including hearings, meetings and telephone conversations. The purpose of such communications and the nature of the information exchanged will vary, and these factors will be relevant to the consideration of whether any disclosure is necessary. For example, communications concerned with the administration and conduct of the case will seldom, if ever, merit disclosure. In contrast, hearings are occasions on which submissions relevant to the CC's analysis are made by main or third parties, so that it is necessary for Groups to consider the appropriateness of disclosing the content of hearings and the manner of that disclosure.
>
> 6.13 For hearings with main or third parties held by Groups or CC staff, Groups should consider whether any points arising should be disclosed to another main or third party. Generally, when hearings are held in private (including joint hearings), transcripts or notes prepared of the hearings should not be disclosed except to the parties in attendance. However, Groups should consider the need to disclose key arguments by providing a summary of the key points (such an approach would help ensure consistency with the approach to written submissions (see paragraphs 6.4 to 6.8)). In contrast, the transcripts of round-table hearings with experts should be disclosed and may often be suitable for publication.
>
> 6.14 When preparing summaries of key points, Groups should have regard to the need to exclude confidential information. Generally, summaries should be disclosed through publication. However, there may be occasions when it is not appropriate to disclose the summaries due to the sensitivity of the information or the identity of the person providing evidence (or both). The information may, for example, refer to a party's future business strategy. In such circumstances, Groups will need to consider whether alternative means of disclosure of the key points raised is appropriate."

128. The CC uses its publication of provisional findings and notices of possible remedies as a means of complying with its duty to consult. Paragraph 7.1 provides:

> "7.1 The CC's Rules require the CC to publish a number of documents, notably the provisional findings and notice of possible remedies, during an investigation. Additionally, the CC has developed a practice of consulting on its provisional decision on remedies (usually through disclosure to the merger parties in merger inquiries and publication in market investigations). The disclosure of provisional findings and a provisional decision on remedies is the main means by which the

CC ensures due process and fulfils its duty to consult on certain decisions under section 104 of the Act. When reviewing remedies, the CC similarly publishes a provisional decision either before or as part of publishing a notice of intention to vary or terminate undertakings or orders."

129. Paragraph 9.7 of the CC7 Guidance gives examples of information the disclosure of which may be harmful. It provides:

> "9.7 The following are examples of information the disclosure of which may be harmful or which may need to be protected. In such cases, if a Group considers that disclosure is necessary, it will need to consider the manner of disclosure:
>
> (a) financial information or data relating to a business that is less than two years old;
>
> (b) responses to surveys (in aggregate or individually) the disclosure of which could be harmful to a firm or individual or where the identity of the person providing the information should be protected;
>
> (c) information relating to the future strategy of a business or information relating to the past strategy of a business; and
>
> (d) information which, if disclosed, may adversely affect the competitive process in the market."

130. As to the manner of disclosure of information, paragraphs 9.14 and 9.15 of the CC7 Guidance provide:

> "9.14 Groups will often have to consider how information contained in any disclosed documents should be presented or how access should be allowed to confidential information in order to provide protection. There are a number of possible ways in which confidential information may be protected including:
>
> (a) provision of ranges as an alternative to providing exact figures (for example, when indicating market shares (see paragraph 9.16));
>
> (b) provision of aggregated data as an alternative to individual responses or data (for example, by aggregating sales or purchase figures or by providing a summary of responses from customers);
>
> (c) provision of aggregated summaries of submissions and responses to questionnaires;
>
> (d) excision of the confidential information from documents (for example, of names, locations and data) when the information excised is not material to the CC's inquiries or its decision or where the excision does not affect the comprehension of the document for the reader concerned;
>
> (e) anonymizing the information;
>
> (f) disclosure to one or more parties but without publication;

(g) disclosure subject to restrictions (for example, disclosure to parties' professional advisers subject to receipt of undertakings); and

(h) use of a data room (for example, when a Group considers that access to specific data should be provided but that the sensitivity of the information concerned necessitates additional safeguards to protect the information (see paragraphs 9.17 to 9.19)).

9.15 Of the forms identified in paragraph 9.14, the first four methods will be the usual approaches to take. The sixth, (f) is generally applicable when a Group considers it necessary to disclose a working paper (or part of a working paper) to a party for reasons of due process, and the information is pertinent to one party only. This may also be the method deployed when a Group is concerned that wider publication could be harmful to the functioning of the market."

131. The extent of the duty to disclose as part of the duties to consult and procedural fairness has been considered in some detail by the Tribunal in *BMI Healthcare Ltd v. Competition Commission* [2013] CAT 24 ("*BMI*") and *Eurotunnel*. It is not necessary to set out in this judgment the various dicta in the numerous cases on the subject in other contexts. Nevertheless, the six general principles as to the requirements for a fair hearing of Lord Mustill in *R. v. Home Secretary, ex parte Doody* [1994] 1 AC 531 at 560 are a useful starting point:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

132. *BMI* considered the CC's market investigation jurisdiction, which like section 104 (merger investigations) contains at section 169 a duty to consult in respect of such investigations. We agree with the approach set out in paragraph 39 of that judgment, which set out a number of clear propositions as to the correct

approach. That paragraph set out seven propositions as follows (we have added the references to section 104):

> "39. We consider the following propositions to be clear:
>
> (1) The starting point in considering the Commission's duty to consult must be the Act, which deals expressly with the Commission's responsibilities in this regard, and which also makes provision for the protection of confidential information. ... Sections 169(2) and (3) [104(2) and (3)] of the Act require the Commission to consult before making a decision, and to give reasons for that decision before it is made, but in neither case is this obligation absolute. It is qualified ("so far as practicable"), in particular by the Commission's duties in relation to specified information ….
>
> (2) However, as is clear from section 241, the protection of specified information can give way "for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act", and one of the functions of the Commission is the Commission's duty to consult under section 169 [104] of the Act.
>
> (3) The Act thus establishes both the duty to consult and the duty to protect confidential (specifically, "specified") information. Section 244 … then describes three conditions to which the Commission should – "so far as practicable" – have regard "before disclosing any specified information".
>
> (4) The Act thus contains a fairly comprehensive code dealing with the duty to consult and the duty to protect confidential information. There is nothing in the Act which obliges the Commission to withhold material that ought to be disclosed pursuant to the Commission's section 169 [104] duty to consult, simply because that would involve the disclosure of specified information. But, conversely, the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult. We consider that the Act contains a perfectly clear and workable code. Although we have had in mind the statement in *Lloyd v. McMahon* [1987] 1 AC 702-703 that "it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness", we do not consider it necessary to imply into the Act anything by way of additional safeguard. The provisions of the Act are, in themselves, quite sufficient for this purpose.
>
> (5) The Commission's guidance in relation to confidential information as set out in the CC7 Guidance is entitled to great weight. None of the Applicants criticised this guidance, and it appears to set out a rational and helpful approach to dealing with specified information.
>
> (6) Moreover, whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the Commission's approach in any given case is entitled to great weight. The consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances. It is the Commission, and not the Tribunal, that stands in the front line when assessing such matters, and the Tribunal should be slow to second-guess decisions of the Commission, in

particular as to how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R. v. Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

> "Mr Buckley argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached."

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight".

(7) Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the "gist" of the case which he has to answer, what constitutes the "gist" of a case is acutely context-sensitive. Indeed, "gist" is a peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the "gist" of the Commission's reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission's practice, described in paragraph 7.1 of the CC7 Guidance, of disclosing its provisional findings as part of its consultation process. This point is well-illustrated by the approach taken by the Court of Appeal in *R (Eisai Limited) v. National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved "a remarkable degree of disclosure and of transparency in the consultation process" (at [66]), nevertheless procedural fairness required the release of still more material - in this case, the release of a fully executable version of an economic model used by NICE, and not merely a "read only" version – so that consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision (see [49])."

133. In the course of submissions, Lord Pannick referred to *Al Rawi v. Security Service* [2012] 1 AC 531 at [93]. He accepted that the requirements set out in *Al Rawi* (concerning a closed material procedure in a criminal trial) should not be applied in full in the present case. However we agree with the sentiment in that case and *R (Osborn) v. Parole Board* [2013] 3 WLR 1020 at [65-68], that

one of the reasons why fairness may require disclosure to a person who may be affected by a decision, is to enable that person to have a proper opportunity to respond, challenge and correct.

134. We accept that once it has been determined by the CC that fairness does require disclosure, then disclosure should be made whether directly to the person affected or to his representatives in some form (including by way of confidentiality ring or data room process). If the material is so sensitive that no such disclosure can be made, then it should usually follow that the CC should not rely upon such material in its decision.

135. In the process leading to the Final Report and in the Final Report itself, we are satisfied that the CC carefully considered the statutory framework, the CC7 Guidance, the submissions on behalf of Ryanair, and concluded what could properly be disclosed. Lord Pannick did not suggest that the CC was obliged to disclose all the underlying evidence. He accepted that the provision of the gist was in general sufficient. At the CMC on 10 October 2013, we directed that the CC serve into a confidentiality ring a further version of the Final Report unredacting various passages in Section 7 and Appendix F specifically mentioned in Ryanair's Notice of Application. This was subject to the proviso that the CC was not required to disclose the names of the airlines in the redacted passages or information which would tend to disclose their identity. Following this process, Ryanair submitted a supplement to the Notice of Application in respect of Ground 2 and Ground 4 on 31 October 2013. Ryanair contended that the provision of the partially unredacted Final Report did not enable Ryanair to make further significant submissions. In essence the thrust of Ryanair's complaint was that, without the disclosure of the names of the individual airlines, whether to its lawyers in a confidentiality ring or better to itself, it was not in a position to make effective representations.

136. In its skeleton argument, Ryanair highlighted specific passages from the Final Report where it contends material should have been disclosed: Section 7, paragraphs 7.48, 7.50, 7.51, 7.52, 7.68; Appendix F, paragraphs 49, 54, 57-77. Lord Pannick argued that the CC relied on the redacted matters in support of three conclusions, namely that:

(1) Ryanair's shareholding would be likely to act as a deterrent to other airlines considering combining with Aer Lingus (paragraph 7.80);

(2) In the absence of Ryanair's minority shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable time in the future, in a significant acquisition, merger or joint venture (paragraph 7.81);

(3) A consequence of Ryanair's shareholding impeding or preventing Aer Lingus from combining with other airlines would be to limit Aer Lingus's ability to increase the scale of its operations and reduce its unit costs, having the potential to weaken significantly the effectiveness of the competitive constraint Aer Lingus will impose on Ryanair relative to the counterfactual (paragraph 7.84).

137. In essence, Lord Pannick submitted that without knowing the identity of the airlines in question, Ryanair was unable to make any comment on the credibility of the posited combinations or the likely competitive consequences of such combinations.

138. Lord Pannick placed some reliance upon the fact that Ryanair had sought disclosure of the redacted material at the administrative stage leading up to the Final Report and had suggested that the material could be protected by a confidentiality ring. These points are indeed relevant if it is decided that it was in fact necessary as a matter of procedural fairness for disclosure to have been made.

139. We are satisfied that the CC did in fact disclose in broad terms the gist of the information which was redacted. The critical question is whether it ought to have disclosed the names of the relevant airlines. We have decided that it was not in fact necessary.

140. First, the CC did in fact disclose a great deal of information. The redactions went no further than was necessary to protect the confidentiality of very sensitive commercial matters between airlines who were competitors or potential competitors of Ryanair.

141. Secondly, the submissions of Ryanair fail to take into account the nature of the case being made in the Final Report. The CC was not suggesting that any particular combination or form of combination was likely. Its finding of an SLC in the sense found in Section 7(a) (limiting the ability of Aer Lingus to participate in a combination with another airline) was based on a number of factors, mostly undisputed, namely:

(1) Ryanair's incentives as a rival airline which was keen to acquire Aer Lingus;

(2) Ryanair's ability to act on those incentives by virtue of its shareholding;

(3) The desirability for Aer Lingus to consolidate and its stated objective to achieve inorganic growth;

(4) The trend in the airline industry for consolidation;

(5) Aer Lingus was a credible partner for consolidation;

(6) The anticipated cost savings and synergies that would result from a consolidation.

142. Thirdly, it is correct that some reliance was placed in the report on the views of unnamed airlines about possible combinations and cost savings/synergies. However, this reliance was relatively limited to supporting the suggestion that possible combinations arise and other airlines considered Aer Lingus to be a credible partner (paragraphs 7.55 and 7.83) and that there may be cost synergies. We do not consider that Ryanair was unable to respond to the gist on those points without knowing the identity of the airlines. Ryanair was able to submit and did submit that Aer Lingus was an unattractive partner for any airline (apart from Ryanair itself).

143. Fourthly, turning to the information specifically relied upon in Ryanair's skeleton argument, we did not consider that procedural fairness dictated that the information be disclosed, even to advisers within a confidentiality ring. Whilst we took account of the views of the CC on what fairness required, we reviewed

the matter on the basis of our own views as to what fairness required and what constituted a sufficient gist in the circumstances. In particular:

(1) The Booz & Company report referred to at paragraph 7.48 did not need to be disclosed. This was a report commissioned by Aer Lingus in 2010. The gist of the report was provided. In paragraph 7.48 of the Final Report, the CC was not itself making a finding that there were in fact 22 potential partners. What the existence of the report did indicate was that the Aer Lingus board did assess the possible options.

(2) Paragraphs 7.50 and 7.51 refer to discussions between Aer Lingus and other airlines. The majority appear to have not been proceeded with for reasons unconnected with Ryanair, and hence would have been of limited relevance. It was for the CC to assess this evidence as to its reliability and relevance. Sufficient of the gist was provided to Ryanair for it to understand the case it had to meet, and for it to make representations to the CC.

(3) Paragraph 7.51 refers to a discussion with an unnamed airline which was abandoned as a result of Ryanair's third bid. Ryanair complains that, without knowing the identity of the airline, it is impossible to verify the information. We do not consider that in the context of a merger inquiry, it was necessary to permit Ryanair to conduct an exercise of vetting or verifying the information received by the CC on every aspect or point of detail, particularly where the information relates to highly sensitive and confidential dealings not involving Ryanair itself. Ryanair did not need this type of detail in order to respond to the suggestion that Aer Lingus was interested in pursuing inorganic growth and was a credible partner for a combination.

(4) Paragraph 7.52 refers to a strategy document considered by the Aer Lingus board in 2013. Given that the report noted that the proposals outlined were unlikely to proceed for reasons unrelated to Ryanair's shareholding, we consider that no further disclosure was necessary.

(5) Paragraph 7.68 refers to Aer Lingus submitting that there could be cost synergies in a transaction with an unnamed airline. The CC was not suggesting that any particular transaction would occur or any specific level of cost savings would be achieved. Ryanair did not need to know of the identity of the airline.

(6) Appendix F, paragraph 49 refers to an unnamed shareholder who has stated that Aer Lingus might be an attractive investment due to its Heathrow slots and that Ryanair's and the Irish Government's shareholdings in Aer Lingus might be an inhibiting factor to any potential acquirer. Ryanair suggests that it would be impossible to know whether such unnamed shareholder might have their own reasons for wanting to persuade the CC to find against Ryanair. We find that Ryanair did not need to know the identity of the shareholder. It was quite open to it to challenge the propositions made. Further, the CC would have been aware of the need to evaluate the evidence and submissions it received, including as to reliability and the potential for bias.

(7) Appendix F, paragraph 7.54 refers to Aer Lingus's board minutes in 2013 which referred to specific opportunities under review. The key point drawn from this in paragraph 7.41 in Section 7 was that the board was in favour of inorganic growth. Ryanair neither needed the board minutes, nor the names of the airlines, to know or respond to the gist.

(8) Appendix F, paragraphs 57 to 77 refer to discussions regarding combinations with five unnamed airlines. The gist was provided and Ryanair did not need to be provided with the names of the airlines to respond. These discussions were relevant to the issue of whether or not Aer Lingus was a credible combination partner, a matter on which Ryanair was able to and did make submissions.

144. We therefore take the view that, taking into account the matter globally, and in relation to each of the specific matters relied on by Ryanair, Ryanair was informed of the gist of the case which it was required to answer, and was in a

position to make worthwhile representations in answer to the case it had to meet.

Ground 3: the CC erred in failing to appreciate the need for there to be a causal connection between the alleged material influence and the SLC

Ryanair's submissions

145. By its third ground of review, Ryanair contended that the CC erred in law by failing to appreciate the need for a causal connection between Ryanair's acquisition of material influence over Aer Lingus and the alleged SLC. Ryanair submits that the CC instead wrongly relied on various ways in which Ryanair's minority stake may result in an SLC but which have nothing to do with its alleged material influence.

146. In its Notice of Application and skeleton argument, Ryanair presented certain examples which it suggests show that the CC wrongly relied on evidence of factors that have nothing to do with the alleged material influence. In particular, it pointed to evidence cited at paragraphs 7.30 and 7.34(b) of the Final Report, and in Appendix F, which suggested that it was the mere fact of Ryanair's shareholding, and Ryanair's position as an "activist shareholder", that deterred other airlines from entering into combinations with Aer Lingus. Ryanair submitted that the CC should instead have considered whether potential investors were deterred by Ryanair's ability to exercise material influence over Aer Lingus.

147. Ryanair submitted that this error has particularly serious consequences in relation to the CC's principal theory of harm, namely the contention that the Ryanair minority stake is likely to dissuade investors and acquirers from entering into combinations with Aer Lingus. In Ryanair's submission, the CC failed – in formulating that core theory – to have regard to the need to establish a causal connection between the alleged material influence and the alleged SLC.

148. Ryanair submitted that, even if some of the mechanisms identified by the CC did satisfy Ryanair's test of causal connection, the CC's assessment was still flawed insofar as it identified mechanisms which did not. The CC did not find

that those mechanisms, taken alone, would lead to an SLC. At the hearing, Lord Pannick submitted that the case of *R (FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444 ("*FDA*") set out (in particular at [67] to [69]) the approach that the Tribunal must follow in such circumstances, in order to determine whether the CC's decision can stand, notwithstanding these errors. This test requires the Tribunal to ask itself three questions: first, whether the CC has taken into account an irrelevant fact; second, whether that fact played a significant part in the decision-making exercise; third, if it did, was it inevitable that the CC's decision would have been the same without this material?

The Tribunal's analysis and conclusions

149. We have identified at paragraph 33 above the relevant statutory questions that the CC is required to answer pursuant to section 35 of the Act, namely: (1) whether a relevant merger situation has been created and, if so, (2) whether the creation of that situation has resulted, or may be expected to result, in an SLC.

150. This test essentially requires, as Mr Beard QC, for the CC, correctly stated at the hearing, an assessment of "the world without the [relevant merger situation] and the world with the [relevant merger situation]." This echoes the language of the CC's Merger Assessment Guidelines at paragraph 4.3.1, which states that the application of the SLC test involves "a comparison of the prospects for competition with the merger against the competitive situation without the merger", and paragraph 6.1 of the CC's Final Report.

151. Ryanair's submissions under this ground require the application of a rather different test, namely whether there is a connection between one element of the identified relevant merger situation – whether two enterprises have ceased to be distinct by virtue of one being able to exercise material influence over the other – and the SLC.

152. As the CC and Aer Lingus both pointed out, such an approach would preclude the CC from taking account of effects that flow from the creation of a relevant merger situation, but which are not specifically linked to the mechanism by which one enterprise obtains control over the other. Counsel for the CC and Aer Lingus both posited examples of consequences flowing from a relevant

merger situation which would be relevant to the SLC analysis, but which had nothing to do with the ability to exercise material influence, for example:

(1) The possibility that an acquiring company will, due to its interest in the acquired company, itself behave differently. This was an issue explicitly addressed by the CC in the Final Report in relation to Ryanair's own behaviour, at paragraphs 7.137 to 7.148.

(2) Coordinative effects, where other market players tacitly coordinate their behaviour and reduce the quality of their offering, or increase their prices, because they are feeling less competitive pressure overall. Similarly, this was an issue considered by the CC in this case, at paragraphs 7.149 to 7.159 of the Final Report.

(3) Vertical foreclosure effects, for example where an acquirer ceases, post-merger, to supply competitors of the acquired entity. Such effects, similarly, cannot be said to flow directly from the ability to exercise material influence.

153. In our view, the CC applied the correct approach, by seeking to compare the situation where the relevant merger situation prevailed with a situation where it did not. This exercise does not require the CC to limit itself to the examination of competitive effects which are causally connected to the mechanism by which two or more enterprises cease to be distinct, in this case Ryanair's ability to exercise material influence over the policy of Aer Lingus.

154. We have considered the specific passages that were drawn to our attention by Ryanair (to which we refer at paragraph 146 above). Notwithstanding that much of this content is simply a summary of views that were expressed to the CC (as with paragraph 7.30 and the passages relied upon in Appendix F), rather than specific conclusions of the CC itself (as with paragraph 7.34(b)), we do not find that any of these passages demonstrate that the CC had addressed itself to the wrong legal test. In the circumstances, there is no need for us to go on to consider Lord Pannick's submissions in relation to the application of the test laid down in *FDA*. Nevertheless we note that the finding at paragraph 7.34(b), objected to by Ryanair, is only a subsidiary point which does not go to the CC's

core findings. It only deals with one indirect effect of Ryanair's holding. Had it been necessary to decide the issue, we would have found that, even had there been an error, it did not play a significant part in the CC's decision and it is inevitable that the CC's decision would have been the same without this material and in particular the findings at paragraph 7.34(b).

Ground 4: the SLC finding

155. Ryanair's fourth ground of review is a challenge to the reasonableness of the CC's finding that Ryanair's material influence would lead to an SLC. The CC found on the balance of probabilities that the five mechanisms that it identified would lead to an SLC. The relevant principles on such a challenge are set out at paragraphs 46 and 47 above, which refer to the Tribunal's decision in *BAA* at [20], and also at paragraph 158 below.

156. In considering this challenge we bear in mind that the remedy imposed by the CC following on from the SLC finding is one which engages Ryanair's rights under Article 1 of Protocol 1 of the European Convention on Human Rights ("A1P1") as the CC has directed the disposal of shares owned by Ryanair. We have therefore considered with some care the findings made and the evidential basis said to support those findings. The CC as the evidence-gathering entity and the decision-maker has the advantage of reviewing all of the evidence, hearing witnesses from various airlines and the benefit of considering all the material during the course of its inquiry. This Tribunal has not seen the underlying material, apart from what has been contained within the hearing bundles. However, we do note that the CC did not accept all of the submissions of Aer Lingus and appears to have examined matters in a critical and careful way.

157. At paragraph 7.23 of the Final Report, the CC listed five specific ways in which Ryanair's minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy. The CC looked at whether it would:

    (1) affect Aer Lingus's ability to participate in a combination with another airline (see paragraphs 7.24 to 7.84);

(2) hamper Aer Lingus's ability to issue shares to raise capital (see paragraphs 7.85 to 7.92);

(3) influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow (see paragraphs 7.93 to 7.107);

(4) influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution (see paragraphs 7.108 to 7.115); and

(5) allow Ryanair to raise Aer Lingus's management costs or impede its management from concentrating on Aer Lingus's commercial policy and strategy (see paragraphs 7.116 to 7.125).

158. Ryanair seeks to challenge the conclusions reached by the CC on each of those findings as well as the overall conclusion that there was a SLC as a result. Before dealing with each of the five mechanisms it is important to note that it is not necessary for the CC to show that each element led to an SLC, so long as the overall conclusion as to an SLC can be properly supported: *British Sky Broadcasting Group plc v. Competition Commission* [2008] CAT 25 at [75, 80 and 82], and [2010] EWCA Civ 2 at [69]. We also bear in mind that, in considering Ryanair's challenge, the Final Report should be read as a whole and should not be analysed as if it were a statute: *Tesco plc v. Competition Commission* [2009] CAT 6 at [79] ("*Tesco*"). We also take account of the Tribunal's remarks at paragraph 45 of *Stagecoach Group Plc v. Competition Commission* [2010] CAT 14:

> "…the hurdle that Stagecoach has to overcome in order to make good its challenge under Ground 2 is a high one. Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is "in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review"..."

(a) Impediment to combinations

159. The main mechanism relied upon by the CC was in relation to a possible combination. The conclusions on this issue are set out in full at paragraphs 7.80 to 7.84 of the Final Report, and were based on the matters set out at paragraphs 7.24 to 7.79 and Appendix F.

160. Before the Tribunal, Ryanair essentially repeated the points that it made to the CC as to why it contends that it is extremely unlikely that this mechanism would cause an SLC.

161. The first reason advanced by Ryanair, is that it is extremely unlikely that, absent Ryanair's minority stake, Aer Lingus would have or will combine with another airline. Ryanair pointed out that the CC's evidence demonstrated that it was extremely unlikely that there would be any interest from the large European carriers. In the Final Report, the CC took account of this (paragraph 7.83) and noted the possibilities of combinations not involving a major European carrier. The mere fact that a combination with a major European carrier may have been unlikely does not mean that it was unreasonable for the CC to conclude that, absent Ryanair's minority stake, Aer Lingus may have participated since 2006 in the trend of consolidation in the industry. The CC relied on various factors set out in the Final Report which are a sufficient basis for its finding. These include the trend of consolidation in the industry, Aer Lingus's own desire for inorganic growth, consideration of Aer Lingus by various other airlines as a potential combination partner, the scope for cost synergies and economies of scale arising from a combination, and the discussions that had taken place since 2006. Ryanair submitted both before the CC and us that Aer Lingus was not an attractive combination partner. Ryanair pointed to discussions with airlines for possible combinations which did not go ahead for reasons unconnected with Ryanair's minority holding (paragraphs 7.50 and 7.52). Whilst it may well be that for many airlines a combination with Aer Lingus would not be a suitable fit and hence unattractive, we are unable to state that the CC's findings are unreasonable or wholly unsupported on the evidence.

162. The second reason advanced by Ryanair, is that for this mechanism to apply in practice, it would need to be shown that any combination which might

otherwise occur (or have occurred) will be (or has been) prevented by Ryanair's alleged material influence. The CC did not show nor need or seek to show that as a result of Ryanair's minority holding that any specific combination had been or would be prevented. To a certain extent this reason overlaps with Ground 3 already considered above.

163. The third reason advanced by Ryanair is that the CC failed to show that any combination would have led to efficiencies. It pointed to the European Commission's finding that Ryanair had not demonstrated that a merger with Aer Lingus would have led to efficiencies which would have offset any anti-competitive effects. The CC took into account Ryanair's views on the matter (paragraphs 7.74 to 7.79) and did not agree with them. The CC did not seek to demonstrate that any particular combination would have or will occur. However, its finding of cost synergies has some basis in that it reviewed Aer Lingus's cost structure and concluded that there was scope for very significant cost synergies (paragraph 7.73; Appendix F, paragraphs 94 to 96). Ryanair itself accepted that scale is important for Aer Lingus's overall competitiveness as an airline (paragraph 7.79). We do not find any inconsistency between the CC's finding as to potential cost synergies to be had from a combination and the European Commission decision in relation to Ryanair's third bid. The European Commission rejected Ryanair's claim that a takeover by it would lead to increased efficiency, but this was on the basis that Ryanair had not submitted sufficient evidence to support its claim that either these efficiencies would materialise or be sufficient to counteract the competitive harm likely to arise from the transaction.

164. The fourth reason advanced by Ryanair is that for this mechanism to result in an SLC, it needs to be shown that these efficiencies would lead to substantially greater competition between Great Britain and Ireland. We find no basis for a challenge to the CC's express finding on this issue at paragraph 7.79 of the Final Report. The CC was entitled to take the view that many of the cost synergies identified would apply at a group level, and so even a combination that did not involve another airline active in Great Britain or Ireland could

improve Aer Lingus's effectiveness as a competitor on routes across the Irish Sea by increasing its overall scale and thus reducing its unit costs.

(b) Aer Lingus's ability to raise equity

165. The second mechanism found by the CC related to Aer Lingus's ability to raise equity. It found that Ryanair's ability to block a special resolution disapplying pre-emption rights might hamper Aer Lingus's ability to raise capital. Ryanair's contention that this is improbable is based on two points it made both to the CC and to this Tribunal.

166. First, Ryanair pointed out that Aer Lingus has large cash reserves and therefore does not need to raise cash. However, the CC in fact noted that it was unlikely that Aer Lingus would need to raise equity in the medium to long term subject to a proviso. The proviso concerned a situation where Aer Lingus needed to increase its share capital in the future for a corporate transaction or to optimise its capital structure (paragraph 7.92 of the Final Report).

167. Secondly, Ryanair stated that it has offered to undertake to support a resolution disapplying pre-emption rights to shareholders outside of Ireland (paragraph 7.88 of the Final Report). This at best goes to remedies, but we note that this would still permit Ryanair to block any raising of capital by Aer Lingus requiring a special resolution, which it would have an incentive to block if it was part of a transaction envisaging a combination with another airline.

168. We consider that this finding ties in with the first mechanism found by the CC as it is in the context of a combination that a need to raise equity is most likely to be relevant in practice.

(c) Heathrow slots

169. The CC found that Ryanair's shareholding would enable it to influence Aer Lingus's ability to manage effectively its portfolio of Heathrow slots, and this could have an impact, in particular by limiting Aer Lingus's strategic options and thus reducing its effectiveness as a competitor (paragraph 7.107 of the Final

Report). The basis for this conclusion is the analysis at paragraphs 7.93 to 7.106 of the Final Report. Ryanair disputes this finding on three grounds.

170. First, it is said that there is no evidence that Aer Lingus wants or will want to trade its Heathrow slots. This point was considered and rejected by the CC in the Final Report (paragraphs 7.98 and 7.99). The Heathrow slots are extremely valuable and whilst there has been limited activity in relation to trading of Heathrow slots by way of acquisition or disposal, it was not unreasonable for the CC to conclude that such transactions do arise from time to time as Aer Lingus seeks to optimise its route network, and this was likely to occur in the future.

171. Secondly, it is said that the Irish Government would be likely to block the disposal of slots if their disposal would undermine its connectivity criteria. The CC identified three scenarios under which Aer Lingus might seek approval to dispose of Heathrow slots in which the Irish Government would be unlikely to oppose their disposal (paragraph 7.103 of the Final Report). Ryanair contends that each of the three scenarios are, themselves, highly unlikely. We do not consider that it can be said that the CC's findings are either unreasonable or unsupportable. In April 2013 there was a disposal of Heathrow slots by Aer Lingus, which had not been opposed by Ryanair. Given the importance of the Heathrow slots, there is nothing irrational in finding that Aer Lingus may wish to rebalance its portfolio in the future, particularly in the event of a combination.

172. Thirdly, it is said that there is no evidence that Ryanair would prevent Aer Lingus from trading its Heathrow slots. It is correct that Ryanair did not oppose the April 2013 disposal. It has also offered to undertake not to oppose a disposal, which primarily goes to remedy. However, we are unable to find the CC's finding and approach to be either unreasonable or lacking any basis. Ryanair's presence may deter such disposals and it would have an incentive to deter or block disposals which may strengthen Aer Lingus as a competitor.

(d) Ordinary resolutions

173. The fourth mechanism considered by the CC relates to Ryanair's ability to block ordinary resolutions. The CC concluded that given the presence of the Irish

Government and its stated position, it was relatively unlikely that Ryanair alone would be able to achieve a majority in a shareholder vote. However this could occur if other shareholders vote in the same way as Ryanair, the Irish Government were to abstain on a vote, or the Irish Government were to sell its shareholding to multiple buyers. The CC noted that if Ryanair were to achieve a majority, there could be very significant adverse implications for Aer Lingus as a competitor, because of the importance of company decisions put to a shareholder vote by ordinary resolution (paragraph 7.115 of the Final Report). Ryanair state that the scenarios where it might be in a position to block ordinary resolutions are speculation by the CC. Whilst we do not agree that the CC's analysis is simply speculation, the significance of this as a mechanism resulting in an SLC should not be overstated. The CC is not suggesting that in current circumstances, with the Irish Government holding a significant stake, Ryanair on its own is likely to block an ordinary resolution. It has not blocked any since 2006. Whilst it may in certain circumstances be possible in the future for Ryanair to block an ordinary resolution and this may if it occurs have a significant impact, we do not consider that this is a weighty factor in support of an SLC. We do not find the CC's assessment of this mechanism to be unreasonable or unsupported, so we find that the CC was entitled to take it into account as a part (albeit not a major one) of its overall assessment of an SLC.

(e) Ryanair making bids for Aer Lingus

174. The fifth mechanism considered by the CC was that Ryanair might make further bids for Aer Lingus, which could significantly disrupt Aer Lingus's commercial policy and strategy (paragraph 7.125(b) of the Final Report). Ryanair contends that this is not based on evidence or rests on speculation. We find that there was ample basis for the CC's conclusions. In particular, the CC had evidence that as a result of the third bid, discussions with an airline ceased and it was possible that during the offer period alternative or additional strategic decisions might have been taken as suggested by Aer Lingus (paragraphs 7.119 and 7.124). Ryanair has already made three bids and its stated objective is to acquire the entire issued share capital of Aer Lingus. Thus there may well be further bids by Ryanair in the future.

175. We therefore find that the CC's conclusion that there is an SLC is one it was entitled to reach. We find no basis for overturning this conclusion on the grounds put forward by Ryanair.

Ground 5: the divestiture remedy

176. In its Final Report, the CC imposed a remedy of divestiture of the majority of Ryanair's holding in Aer Lingus down to a maximum of 5%. It decided that a divestiture trustee should be appointed from the outset to sell the divestiture package to suitable purchasers. The CC rejected the option of seeking to address the SLC that it had identified by way of behavioural remedies alone.

177. In its fifth ground, Ryanair contends that the proposed divestiture order is disproportionate. The contention breaks down into five parts:

(1) The CC erred in identifying the legitimate aim.

(2) The remedies proposed by Ryanair would be sufficient to remedy the SLC found by the CC, such that the divestiture order is more than is necessary to meet the legitimate aim.

(3) The adverse effects of the divestiture order on Ryanair are disproportionate to the aim pursued.

(4) It is disproportionate to impose the divestiture order without first waiting for the outcome of the EU process.

(5) The appointment of a divestiture trustee is disproportionate.

Legal framework

178. Under section 35(3) of the Act, once the CC has found a relevant SLC it is obliged to decide on whether action should be taken under section 41(2) for the purposes of remedying, mitigating or preventing the SLC. The CC is directed by section 35(4) to have regard to the need to achieve as comprehensive solution as is reasonable and practicable to the SLC and any adverse effects resulting from it. The final powers of the CC are set out in sections 82 to 84, in

accordance with section 41. The relevant provisions are summarised in paragraphs 39 to 43 above.

179. Pursuant to section 106 of the Act, the CC has issued Merger Remedies: Competition Commission Guidelines (November 2008) ("the CC8 Guidelines"). The purpose of the CC8 Guidelines is to explain the CC's approach and requirements in the selection, design and implementation of remedies in merger inquiries. Paragraphs 1.6 and 1.7 set out the objectives of remedial action as follows:

> "1.6 Where the CC concludes that a relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC), it is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC. The CC is also required to decide whether such action should be taken by itself or recommended for others, such as Government, regulators or public authorities. In either case, the CC must state in its report the action to be taken and what it is designed to address.
>
> 1.7 The Act requires that the CC, when considering these remedial actions, shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'. To fulfil this requirement, the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective. The CC will seek to ensure, as outlined in paragraph 1.12, that no remedy is disproportionate in relation to the SLC and its adverse effects. The CC may also have regard, in accordance with the Act, to any relevant customer benefits arising from the merger. In the following paragraphs we consider these factors and their interaction in greater detail."

180. Paragraph 1.8 goes on to explain that the CC will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. One of four dimensions involved in assessing the effectiveness of a remedy is acceptable risk profile, in particular:

> "(d) Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CC will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects."

181. The CC must go on to consider the cost of remedies and proportionality. Paragraphs 1.9 to 1.13 of the CC8 Guidance provide:

> "1.9 Having considered the effectiveness of remedy options, the CC will then consider the costs of those remedies that it expects would be effective in addressing the SLC and resulting adverse effects. In order to be reasonable and proportionate the CC will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CC is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CC will seek to ensure, as outlined in paragraph 1.12, that no remedy is disproportionate in relation to the SLC and its adverse effects.
>
> 1.10 The costs of a remedy may be incurred by a variety of parties including the merger parties, third parties, the OFT and other monitoring agencies. As the merger parties have the choice of whether or not to proceed with the merger, the CC will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than costs that will be imposed by a remedy on third parties, the OFT and other monitoring agencies. In particular, for completed mergers, the CC will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy as it is open to the parties to make merger proposals conditional on competition authorities' approval. It is for the parties concerned to assess whether there is a risk that a completed merger would be subject to an SLC finding and the CC would expect this risk to be reflected in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the CC will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered in selecting remedies.
>
> 1.11 The costs of a remedy may arise in various forms. Remedies may result in costs through distortions in market outcomes. This is more likely to be the case where behavioural remedies are used which intervene directly in market outcomes, especially over a long period. Remedies may also result in significant ongoing compliance costs. The CC will endeavour to minimize such costs, subject to the effectiveness of the remedy not being reduced, and will have regard to the costs of the OFT and other monitoring agencies in ensuring compliance. If remedies extinguish relevant customer benefits then, as we discuss in 1.15, the amount of benefits foregone may be considered to be a relevant cost of the remedy.
>
> 1.12 In exceptional circumstances, even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects (for instance if the costs incurred by the remedy on third parties were likely to be greater than the likely scale of adverse effects). In these exceptional circumstances, the CC would not pursue the remedy in question.
>
> 1.13 In unusual situations it is possible that all feasible remedies will only be partially effective in remedying an SLC. In such cases the CC will select the most effective remedy or package of remedies that is available provided that the costs of this remedy are not disproportionate (as described above) in relation to the SLC."

Divestiture remedies are dealt with in some detail in Part 3 of the CC8 Guidance.

182. There have been a number of cases where divestiture remedies have been considered by the Tribunal. In *British Sky Broadcasting Group plc v. (1) Competition Commission (2) Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25 ("*BSkyB*"), the CC had found that the acquisition by BSkyB of 17.9% of the shares in ITV plc had resulted in an SLC, and recommended partial divestiture of shares down to a 7.5% holding. The Secretary of State issued a decision following the recommendation contained in the CC's report. The Tribunal rejected Sky's contention that the recommended remedy was disproportionate and irrational. Whilst *BSkyB* was concerned with section 47 as opposed to section 35, the principles as to remedy considered in that case are, at least in broad terms, applicable here. The Tribunal in *BSkyB* considered the margin of assessment available to the CC in connection with its selection of remedy at paragraphs 284 to 287 of the judgment as follows:

> "284. It is not in dispute that the Commission and the Secretary of State have a margin of assessment with regard to appropriate action for remedying the SLC created by a merger (see, to that effect, *Somerfield* (above) at paragraph [88]).
>
> 285. In deciding what remedy to recommend to the Secretary of State the Commission is required by subsection 47(9) of the Act in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and consequent adverse effects on the public interest.
>
> 286. The CC Guidelines state that the Commission's starting point will normally be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of an RMS (paragraph 4.23). The CC Guidelines further state that remedies that aim to restore all or part of the market structure prior to a merger are likely to be a direct way of addressing the adverse effects (ibid).
>
> 287 In *Somerfield*, in the context of the selection of a remedy for SLC under subsections 35(3) and 35(4) of the Act (which are expressed in very similar terms to subsections 47(7), (8) and (9)), the Tribunal said:
>
> > "… in our view, it is not unreasonable for the CC to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question." (paragraphs [98]-[99])."

183. The Tribunal recognised that the CC has to exercise its judgment in deciding whether partial divestiture was the appropriate remedy (at [293] and [302]):

> "293. These arguments fall to be considered in the light of the Commission's statutory obligation to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to remedy the SLC and its adverse effects on the public interest. The Tribunal considers that in the light of this obligation the Commission was clearly entitled to consider whether and if so at what level a partial divestiture would ensure that there would be *no realistic prospect* of Sky being able to exercise material influence over ITV's strategy. We agree with the Commission that this is not simply a matter of calculation, but includes a significant element of judgment on the part of the Commission.
>
> …
>
> 302. Whether a remedy, structural or behavioural, will provide as comprehensive a solution as is reasonable and practicable to address the SLC together with any adverse effects resulting from it, must be examined by the Commission on a case-by-case basis in the light of the available evidence and using the experience and knowledge of the members. The fact that behavioural remedies typically require ongoing monitoring and enforcement, and the associated risks, are relevant considerations for the Commission. Despite the general concerns about such remedies outlined in the CC Guidelines, the Commission did not dismiss the voting trust or undertaking not to vote out of hand but rather assessed them in the light of the facts of this case."

184. Sky argued that the proposed remedy was disproportionate and the CC should have accepted its proposed remedies. The Tribunal rejected these arguments in the following terms (at [306] to [308]):

> "306. The main thrust of Sky's challenge to the Commission's reasoning on this issue concerned the view (expressed at paragraph 6.69 of the Report) that the costs which Sky would incur if required to dispose part of its shareholding in ITV were irrelevant. At the hearing Sky referred to *Interbrew* (above) in which Moses J. said:
>
> > "… in the instant case, I do not think that a question of balance arose. There will be cases where it is necessary to consider whether a remedy is disproportionate in the sense that the advantages to be gained are outweighed by the detriment to the one against whom the measure is directed. But in this case no such issue required consideration. This was not a case where the Commission took the view that the divestment of Whitbread with Stella Artois would be an effective remedy but that the divestment of Bass Brewers would be more effective. Rather, the majority of the Commission took the view that the divestment of Whitbread with Stella Artois would not be an effective remedy for the reasons it gave at 2.214. In those circumstances it availed Intrebrew nothing to contend that the remedy was disproportionate. No question of weighing the advantage of divestment of Whitbread with Stella Artois against the detriment to Interbrew of the divestment of Bass arose."

> 307. This authority provides no support for Sky's argument which in our view is misconceived. The Commission expressed its conclusions on proportionality at paragraphs 6.67 to 6.71 of the Report. It stated that when choosing between remedies which the Commission considers would be equally effective it would choose the remedy that imposed the least cost or that is least restrictive. In the present case the Commission took the view that the full or partial divestiture of Sky's shareholding in ITV would be an effective remedy. As between those remedies the Commission concluded that partial divestiture was the more proportionate because it was less intrusive in that it required Sky to divest a smaller proportion of its shareholding.
>
> 308. Having already concluded that neither of Sky's proposed remedies would be an effective remedy there was no need for the Commission to examine the proportionality of those remedies vis-à-vis the divestiture remedies or at all. In those circumstances it does not assist Sky to contend that the partial divestiture remedy was disproportionate when compared with its own proposals. As in *Interbrew*, no question arises of weighing the merits of either of the behavioural remedies against the cost to Sky of the partial divestiture or its shareholding in ITV. In any event, the Commission noted that Sky's proposals would themselves be likely to be far from cost-free in view of the monitoring and enforcement requirements and other implications set out in the Report."

185. We agree with the approach of the Tribunal in *BSkyB*. The CC has a wide margin of appreciation in the selection of the remedy which it considers would be effective in remedying the SLC found. In general it is not obliged on proportionality grounds to select a remedy which is not effective to remedy the SLC. Proportionality is most relevant when looking at remedies which would be effective. Whilst significant costs may be incurred as a result of divestiture, these may have to be borne if behavioural or other structural remedies would not be effective.

186. The parties agreed that the four-fold approach to proportionality in *Tesco* is applicable in the present case. In that case, the Tribunal summarised the principles as follows:

> "136. A useful summary of the proportionality principles is contained in the following passage from the judgment of the ECJ in Case C-331-88 *R. v. Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, paragraph [13], to which we were referred by the Commission:
>
> > "By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

> 137. That passage identifies the main aspects of the principles. These are that the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued."

187. In *BAA*, the CC had issued a market investigation report on the supply of airport services by BAA in the UK. It found an adverse effect on competition and required that BAA divest itself of certain airports. We have already quoted at paragraph 47 above paragraph 20 of the judgment of this Tribunal which sets out the relevant principles on proportionality. We adopt and follow that analysis.

Approach of the CC

188. We have described the broad framework of the CC's remedies process at paragraphs 85 to 88 above. As far as the consideration of particular remedies was concerned, the CC broadly followed the steps outlined below.

189. First, the CC discussed a set of remedies proposed by Ryanair. These remedies are set out at paragraph 8.22 of 8.25 of the Final Report. Ryanair initially proposed four remedies:

(1) an undertaking (or order) preventing it from voting against an acquisition of Aer Lingus by another EU airline, including by means of a scheme of arrangement or a transaction under the Cross Border Mergers Directive;

(2) an undertaking (or order) preventing it from voting against an acquisition by Aer Lingus, including by public offer or a scheme of arrangement, involving another EU airline (if put to a vote), as proposed by the Aer Lingus board;

(3) an undertaking (or order) preventing it from voting against a disapplication of pre-emption rights outside the EU;

(4) an undertaking (or order) preventing it from voting against Aer Lingus's board on the disposal of Aer Lingus's slots at London Heathrow.

190. Subsequently, and in response to the CC's remedies working paper, Ryanair proposed the additional following remedies:

(1) an undertaking (or order) to accept an offer for its shares if another EU airline achieved acceptances representing more than 50% of Aer Lingus's shares;

(2) an undertaking (or order) to support a scheme of arrangement involving another EU airline if shares representing more than 50% of Aer Lingus's issued share capital were voted in favour at the shareholders' meeting;

(3) an undertaking (or order) to extend the remedies set out above to non-EU airlines, should it at any point in the future become legally permitted for a non-EU airline to hold more than 50% of Aer Lingus's shares;

(4) an undertaking (or order) not to oppose the disapplication of pre-emption rights in the context of a combination between Aer Lingus and another airline.

191. The CC set out its conclusions in relation to the effectiveness of Ryanair's proposed remedies at paragraphs 8.29 to 8.49 of the Final Report, concluding at paragraph 8.49 that such remedies would not be effective in addressing the SLC. In particular, the CC found that it was difficult to predict the specific forms of combination or other matters of strategic importance that might come before Aer Lingus's shareholders and that it was (in consequence) difficult to cater for all eventualities, as Ryanair's proposed remedies sought to do. Further, the CC found that Ryanair's continued presence on the share register would deter potential partners.

192. The CC went on to consider potential structural remedies, in particular full and partial divestiture. In relation to the latter, the Final Report contains a discussion of the relevant thresholds for a reduction in stake required to remedy the SLC finding, concluding at paragraph 8.112 of the Final Report as follows:

> "We concluded that a reduction of Ryanair's share to 5 per cent would be effective in remedying the SLC that we have found. Such a divestiture would need to be accompanied by limited behavioural remedies to ensure that Ryanair could not seek or accept board representation or acquire any further shares in Aer

Lingus following divestiture. The restriction on the acquisition of shares could be lifted if Ryanair, following a successful appeal, obtains clearance from the European Commission permitting a full takeover of Aer Lingus."

193. The CC then went on to consider the proportionality of the effective remedies that it had identified, concluding as follows at paragraphs 8.118 to 8.121 of the Final Report:

> "8.118 The CC will not, in the absence of exceptional circumstances, take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy. We consider that Ryanair will be able to realize a market value for its shares by undertaking the sale process within the divestiture period. We therefore do not consider the cost of divestment, including any loss that Ryanair may incur in selling the shares, to be a relevant consideration in our assessment of the proportionality of different options. Nor do we see any evidence that there would be any relevant customer benefits arising from Ryanair's minority shareholding which would be forgone as a consequence of either of the effective remedies. We therefore did not consider that there were material differences, in terms of relevant costs, between the two remedies that we have provisionally found to be effective.
>
> 8.119 A partial divestiture would, however, be less intrusive than a full divestiture because Ryanair would be permitted to retain a proportion of its existing shareholding, should it so wish. Of the two effective remedies that we have identified, partial divestment is therefore the less intrusive and hence more proportionate remedy.
>
> 8.120 We considered whether the level of intervention implied by a divestiture of shares of this magnitude was justified, given the nature and extent of the SLC that we have found. We took the view that it would be for the following reasons:
>
> (a) The routes between Great Britain and Ireland represent a substantial and important market, accounting for 4.7 million UK outbound passenger journeys in 2012 and €[ ] million in revenue in 2011 (see Appendix D). These routes are particularly important to the Aer Lingus business, accounting for approximately [20–30] per cent of its turnover.
>
> (b) Ryanair and Aer Lingus are by some margin the main operators on these routes, and the only operators on certain corridors. Given this, and the number of passengers travelling between Great Britain and Ireland, any reduction in competition between Ryanair and Aer Lingus on these routes is therefore likely to result in significant customer detriment.
>
> (c) The restriction imposed by the shareholding on Aer Lingus's ability to pursue its own commercial policy and strategy is significant and affects fundamental aspects of commercial policy and strategy including Aer Lingus's ability to enter into combinations, fund its business and manage its key assets.
>
> (d) Divestiture is the usual approach to remedying SLC findings arising from anti-competitive mergers and we have found it to be the only effective class of remedy in this case.

(e) There is no evidence that relevant customer benefits would be lost by a divestiture. We do not judge any losses that Ryanair might crystallize from selling its shares to be a relevant consideration.

8.121 We therefore came to the conclusion that an effective and proportionate remedy to the SLC would be a partial divestiture to reduce Ryanair's shareholding in Aer Lingus to 5 per cent of Aer Lingus's issued ordinary shares, accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares in Aer Lingus (unless clearance is given under the EUMR for a concentration between Ryanair and Aer Lingus)."

194. The CC's approach to the implementation of its chosen remedy is summarised at paragraph 88 above.

Ryanair's challenge

195. We now turn to each of the five parts of Ryanair's challenge to the remedies proposed in the Final Report. We bear in mind that care must be taken both by the CC and this Tribunal in considering the remedy of divestiture in view of the fact that a divestiture order is a seriously intrusive step and engages Ryanair's A1P1 rights. However, in respect of those rights, we note two matters: first, on a divestiture of its holding and provided the process is a fair one and properly carried out, Ryanair would receive the market value of its shares on disposal. This would thus involve a restructuring of its asset portfolio as between shares and cash. Secondly, this is unlike the situation in *BAA*, which was a market investigation, where the assets concerned had been acquired in circumstances where, at the time of acquisition, a risk of divestiture would not necessarily have been foreseeable. In a relevant merger situation, parties may acquire shares knowing that there is at least a risk of an adverse finding by the CC, which may lead to a need for divestiture (see paragraph 214 below).

Identification of the legitimate aim

196. Ryanair submitted that the CC erred in identifying the legitimate aim. The legitimate aim is specified in section 35(4) of the Act, namely the achievement of as comprehensive a solution as is reasonable and practicable to the SLC. The action under section 41(2) must be to remedy, mitigate or prevent the SLC concerned.

197. Ryanair argued that in deciding whether a proposed remedy is sufficient to solve the SLC concerned, the CC should ask itself whether the SLC finding would stand if the proposed remedy were in place (i.e. the remedies proposed by Ryanair by way of undertakings, described at paragraphs 189 and 190 above). Ryanair relied upon paragraph 8.37 of the Final Report in support of its contention that the CC had asked itself the wrong question. In that paragraph the CC considered that the remedy should be "sufficient to address all possible future forms of combinations open to Aer Lingus and its potential partners".

198. We find no flaw in the CC's approach. The CC found there to be an SLC primarily on the basis of Ryanair's ability to impede Aer Lingus's participation in a combination with other airlines. The CC addressed the SLC it had found. It looked for a comprehensive solution to the problem. Potential combinations could take many forms and the CC was concerned that the remedies and undertakings proposed by Ryanair would not cover all eventualities. It is clear from paragraph 8.36 of the Final Report that the CC was concerned to impose a remedy which should protect Aer Lingus's ability to participate in combinations regardless of how a deal may be structured. As the CC noted in the second sentence of paragraph 8.37:

> "…The fact that under Ryanair's proposal, Aer Lingus and potential partners would still be inhibited in the forms of combination that they were able to pursue is, in our view, a substantial shortcoming of this approach."

Ryanair's remedies

199. Ryanair submitted to the CC and to this Tribunal that the remedies that it proposed would be effective in addressing the SLC. Ryanair challenged all of the concerns raised by the CC, which were that:

(1) The undertakings offered by Ryanair did not cover all possible combinations (paragraphs 8.31 to 8.37 of the Final Report).

(2) The presence of Ryanair as a shareholder could deter potential partners (paragraphs 8.38 to 8.40).

(3) There may be a perceived execution risk (paragraphs 8.41 to 8.42).

(4) The Irish Government's perception of the extent to which the undertaking or order represents an irrevocable commitment to sell its shares (paragraph 8.43).

200. As to (1), it is fair to state that the principal ground on which the CC rejected Ryanair's proposed remedies was that they did not address all forms of possible combinations. Two forms of combinations are referred to at paragraph 8.33 of the Final Report, which were not addressed in Ryanair's proposals. Ryanair contends that these could have been addressed by a revision to its proposed remedies.

201. We consider that the CC acted in a reasonable and proportionate manner in rejecting the remedies proposals of Ryanair. It was entitled to reach its conclusions based on the remedies proposed, which is what it did. The CC was faced with the difficulty that the forms of combinations were various and hard to predict. As found by the CC at paragraph 8.46 of the Final Report:

> "8.46 In a dynamic and uncertain sector such as the airline industry, it is inherently difficult to predict the specific forms of combinations or other matters of strategic importance that might come before the Aer Lingus shareholders in AGMs or EGMs in the future. In Section 7 we found that Ryanair's shareholding constrained Aer Lingus's ability to implement its own commercial policy and strategy in a variety of ways. This makes it inherently difficult to design behavioural remedies that would cater for all eventualities. Looking specifically at the issue of combinations, whilst Ryanair's proposed remedies seek to address some of our concerns regarding certain forms of combinations by way of a scheme of arrangement or general offer, they do not address other forms of combination available to Aer Lingus and potential partners and would, in effect, restrict Aer Lingus's and its potential partner's choice of combination."

202. The CC was entitled to impose a remedy which would result in no realistic prospect of an SLC materialising. The CC may opt for one-off structural remedies, which are more likely to be comprehensive and do not need ongoing monitoring. The CC8 Guidelines at paragraph 1.8(a) explain why in general structural remedies are to be preferred to behavioural remedies. In the present case, we do not consider the choice of structural remedy to be unreasonable or disproportionate.

203. As to (2), the CC found that the presence of Ryanair on the share register post-combination might act as a deterrent. In particular, in the Final Report, the CC considered as follows:

> "8.38 We next considered whether the continued substantial presence by Ryanair on Aer Lingus's shareholder register could be expected to deter potential partners from entering into, pursuing, or concluding discussions with Aer Lingus even where Ryanair's proposed remedies were in place.
>
> 8.39 We considered that some potential partners may be deterred from entering into, pursuing, or concluding discussions with Aer Lingus, for fear of having to deal with a substantial Ryanair presence on their own share register post-combination (see paragraph 7.34(b)).
>
> 8.40 We also formed the view that some potential partners may be deterred from combining with Aer Lingus (short of an acquisition of 100 per cent of Aer Lingus) by the possibility that Ryanair could use its existing shareholding as a platform from which to launch further bids for the whole of Aer Lingus (see paragraph 7.34(c)). We note that […] decided not to continue its discussions with Aer Lingus upon hearing that Ryanair was launching its third bid (see paragraph 7.51)"

204. Ryanair challenged this finding on the basis that there was no evidence that, with all the various Ryanair proposed remedies in place, a potential partner would be deterred by these considerations. The remedies proposals were put forward in the context of the inquiry, it was not incumbent upon the CC to go out and make specific enquiries of airlines as to how they might react to such proposals. The CC was entitled to use its own experience and knowledge of business and management to form its assessment. It was a rational assessment that it was entitled to reach.

205. As to (3), the CC found that there was a perceived execution risk at paragraphs 8.41 and 8.42 of the Final Report, which provided as follows:

> "8.41 Finally, we noted that Ryanair's proposals would require Aer Lingus and potential partners to develop any potential combinations to an advanced stage and secure a high level of shareholder agreement, before Ryanair was required to vote in favour of the combination and/or sell its shares.
>
> 8.42 We considered that this aspect of remedy design would increase the perceived risk associated with such combinations and that some potential partners may be deterred from entering into, pursuing, or concluding discussions with Aer Lingus by residual uncertainty as to whether, in practice, Ryanair would ultimately support the combination or dispose of its shares. For example, potential partners may perceive a risk that Ryanair could apply to have any CC undertakings or order reviewed on the grounds of a change of circumstances (see section 92 of the Act). The relatively unusual

> and untested nature of the proposed arrangements may also increase the perception of execution risk – for example, in relation to its proposals in paragraph 8.24(b), it is unclear how Ryanair would know that more than 50 per cent of other shares would be voted in favour of a scheme before the shareholder vote had actually been held, and therefore whether or not to cast its votes in favour of the scheme."

206. Ryanair contended that the CC's concerns were entirely speculative. However, we do not consider it fair to describe the CC's assessment and concerns as speculative. The CC was entitled to find that these concerns represented real possibilities.

207. As to (4), the CC relied upon the Irish Government's perception of a risk in the following terms at paragraph 8.43 of the Final Report:

> "8.43 The Irish Government's perception of the extent to which the undertaking or Order represents an irrevocable commitment by Ryanair to sell its shares is also relevant to the effectiveness of these measures. Given that the free float in Aer Lingus is less than 45 per cent, any requirement for 50 per cent of shareholders to support a transaction would require the Irish Government to commit to sell at least part of its shareholding in advance and to rely on Ryanair's commitment to vote in favour and/or sell its shares where appropriate. If the Irish Government perceived an inherent risk in this position and decided not to sell all or part of its shares, a potential partner, whether from inside or outside the EU, would not be able to make use of these remedies to conclude a combination with Aer Lingus."

208. Ryanair submitted that this concern was ill-founded. It would not expect the Irish Government irrevocably to commit to sell its shares before Ryanair had voted in favour of a scheme or sold down its own shares. Any agreement by other shareholders would be conditional upon Ryanair's agreement. We do not find the CC's assessment to be unreasonable. The CC was entitled to find that perceived execution risks could act as a deterrent. Ryanair does not challenge the finding at paragraph 8.44 which stresses the need to avoid uncertainty in the following terms:

> "8.44 Ryanair told us that any potential partner could rely on its commitment not to oppose a scheme of arrangement and to accept an offer for its shares where more than 50 per cent acceptance was achieved. However, in our view it would not be unreasonable for potential partners to perceive some risk associated with relying on any undertaking or Order, given the residual uncertainty attaching to these proposed measures and their application to unknown future events. As Aer Lingus's consideration of potential combinations over recent years makes clear, discussions and negotiations about potential combinations involve managing a number of inherent risks – e.g. legal, financial, strategic, execution – where an adverse

> outcome will involve significant financial and reputational costs to both parties. Therefore, we conclude that any perception of uncertainty regarding Ryanair's future conduct undermines the efficacy of Ryanair's proposed remedies and could deter future combinations involving Aer Lingus".

Proportionality to the aim pursued

209. Ryanair contends that the proposed divestiture order would produce adverse effects disproportionate to the aim pursued within the meaning of aspect (4) of the proportionality test in *Tesco* at [137] (cited at paragraph 186 above). The premise of the argument is that the proposed remedies would meet all of the CC's concerns. This premise was not accepted by the CC and we have declined to set aside the CC's findings on that aspect.

210. Ryanair has identified two particular adverse consequences that would arise from a divestiture as proposed by the CC. First, if Ryanair's shareholding were reduced to 5%, this would make it far more difficult, if not impossible for Ryanair to launch a successful bid for the entire issued share capital of Aer Lingus. Secondly, Ryanair will incur a substantial loss on the sale. It acquired its holding at a cost of over €400 million and at the date of the decision it was worth €270 million. With a volatile share price, the shares should not be sold within a tight timetable.

211. We accept that the divestiture order would have a major impact on Ryanair's property rights. The divestiture may well make it harder for Ryanair to launch a successful bid as the CC appears to have itself recognised at paragraph 7.124 of the Final Report. With a 29.82% holding as currently held by Ryanair, it would have a smaller number of shares to acquire and a reduced likelihood of a counterbidder, than with the proposed holding of only 5%. In that sense, it does make a successful bid harder and possibly more expensive.

212. In general by permitting the sale of the shares at fair market value, the CC satisfies the proportionality test in *Tesco* as recognised by the Tribunal in *BAA* at [76] and upheld by the Court of Appeal ([2012] EWCA Civ 1077) at [29] to [30]. The CC has found that this partial divestment mechanism will be an effective remedy to deal with the SLC identified. We do not consider the fact that the remedy may make it harder for Ryanair to launch a successful bid in the

future to be a criterion which overrides the need for the remedy proposed by the CC.

213. As regards the loss on the sale, so long as Ryanair is given the opportunity for fair market value to be raised through the divestiture remedy, then the requirements of *Tesco* are satisfied. The merger control regime contemplates that assets may be ordered to be disposed of. Ryanair is given value in return for its assets. We endorse the reasoning of Sullivan LJ in *BAA* at [30] (with whom Mummery and Rimer LJJ agreed) which dismissed a not too dissimilar argument by BAA:

> "30. I respectfully endorse the Tribunal's reasoning in that paragraph of its judgment. BAA's contention that the Tribunal erred in its approach to the assessment of proportionality ignores the fact that proportionality is not to be assessed in a vacuum. Whether a remedy under section 138 of the Act is proportionate must be considered in the context of the statutory scheme as a whole. In accordance with the statutory scheme in the Act, it has been decided that there is an AEC, that action should be taken to remedy it, and that the only effective remedy is a requirement that BAA sells Stansted. That requirement is in the public interest. It is inherent in such a statutory scheme that in order to secure the public interest, BAA will lose its freedom of choice as to whether and when to sell its asset. In that context, providing the timing of the compulsory sale is "calibrated", so as to ensure that BAA does have a proper opportunity to market its property and obtain a fair market price, the remedy will be proportionate. BAA's submission boils down to the proposition that in addition to the period which will give it a proper opportunity to obtain the market value for its asset, it would be disproportionate not to give it a further period referred to by Mr Green during the course of his submissions as "market value plus", in which to market its asset. It is then submitted that the cost to BAA of the loss of this extended period ("the time cost") should be factored into the proportionality balance. But the underlying premise that BAA should be given an extended "market value plus" period in which to market its asset is simply a thinly disguised way of asserting that BAA should not be compelled to sell its asset at a time that is not of its own choosing. But that is precisely what is required in the public interest by this statutory scheme. In obtaining the market value for its property, BAA will be in the same position as the owner of any commercial premises whose property is compulsorily acquired in the public interest under a compulsory purchase order, for example for the construction of a new airport. In neither case, compulsory acquisition or compulsory sale at market value, can it be said that the measure which is required to be taken in the public interest is disproportionate."

214. The costs which Ryanair relies upon were in reality avoidable. It acquired the shares for the purposes of launching a bid for Aer Lingus's shares. It must have appreciated that there was at least a risk that the bid would be blocked by EU merger control. It also took the risk that UK merger control would be applied to

the minority shareholding. The CC8 Guidance makes clear at paragraph 1.10 that since the cost of divestiture is avoidable, the CC will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered in selecting remedies. We find no basis for holding that the CC should have found exceptional circumstances here.

Proportionality pending EU ruling

215. Ryanair contends that it would be disproportionate for the CC to order divestment pending the outcome of the EU process. Although the European Commission has in effect rejected Ryanair's third bid on 27 February 2013, Ryanair's appeal to the General Court is pending. If the General Court decides in favour of Ryanair, the European Commission may (on a subsequent reconsideration) ultimately decide that Ryanair may acquire Aer Lingus.

216. Ryanair has held a substantial minority shareholding since 2006. Since then it has launched three bids for Aer Lingus. Any judgment on its appeal to the General Court is unlikely before the end of 2015. It is not possible to predict with any degree of certainty how long the EU process will ultimately take. Having identified an SLC and the need for a divestment remedy, and satisfied itself that there was no risk of conflict with an objective of the EU due to the distinct jurisdictions of the CC and European Commission in this respect, we consider it entirely reasonable for the CC not to await the final result of the EU process. This is reinforced by the CC's finding that there was no effective remedy which could be maintained in the interim (paragraph 8.103 of the Final Report).

Divestiture trustee

217. No divestiture trustee has yet been appointed. In due course the CC will need to consult with Ryanair on the identity and terms of reference for the divestiture trustee. The CC8 Guidance at paragraph 3.26 sets out the CC's general approach to the use of divestiture trustees as follows:

> "3.26 If the merger parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then, unless this period is extended by the CC, an independent divestiture trustee may be mandated to dispose of the

package within a specific period (the trustee's divestiture period) at the best available price in the circumstances, subject to prior approval by the CC of the purchaser and the divestiture arrangements. If the CC has reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period, the CC may require that a divestiture trustee is appointed before the end of the initial divestiture period, or in unusual cases, at the outset of the divestiture process. The role of a divestiture trustee is distinct from that of a monitoring trustee, but the two roles may be performed by the same person".

218. In the present case, the CC decided that a divestiture trustee should be appointed from the outset for the reasons set out at Appendix K, paragraphs 38 to 42 of the Final Report, which state as follows:

> "38. The appointment of a Divestiture Trustee is generally used by the CC as a fall-back option if a party has not completed the divestiture at the end of the divestiture period, or in other relevant circumstances where the CC has reason to be concerned that an effective divestiture would not be completed, e.g. within the permitted time. The possibility that a Divestiture Trustee may be appointed after an initial period creates an incentive for a party to take appropriate actions to implement the remedy promptly. The CC's guidelines regarding Divestiture Trustees state that its mandate would be to dispose of the package within a specific period (the Trustee's Divestiture Period) at the best available price in the circumstances, subject to prior approval by the CC of the purchaser and the divestiture arrangements.
>
> 39. If Ryanair were to be permitted to manage a divestiture for an initial period, we were concerned that there would be a material risk that Ryanair would be incentivized to undermine the effective implementation of this remedy, for example by placing shares with unsuitable purchasers. We regarded this point as important, given the significance of competition between Ryanair and Aer Lingus. For example, Ryanair may seek to sell its shares to parties who were not independent of it, or to a purchaser or purchasers whose intention, in purchasing the shares, was to break up Aer Lingus, sell off its Heathrow slots or use them for purposes other than flights between Great Britain and Ireland, and/or take some other action the effect of which would be to reduce competition between Ryanair and Aer Lingus on routes between Great Britain and Ireland.
>
> 40. We have considered whether the CC might oversee a sale process and appoint a Monitoring Trustee to assist in reviewing the conduct of the sales process and ensuring that there were no unnecessary delays in a process managed by Ryanair. However, the sale of a minority stake in a listed company raises particular difficulties for this type of monitoring arrangement. This risk would be very difficult to manage, particularly in the context of a stock market dispersal (ie Process Option 2). In addition, it would be hard for the CC or a Monitoring Trustee to distinguish between a legitimate delay in Ryanair's process (eg to target an appropriate window for a stock market placement during the divestiture period) and an intentional delay to place the shares (eg to retain them without an intention to implement the remedy). This in turn restricts the ability of the CC to intervene before the end of the divestiture period (by appointing a Divestiture Trustee) if the latter were to be the case. Given this, the safest and most transparent way to manage this risk would be for the sale to be conducted by an independent party with no vested interest other than performing its mandate.

> 41. We also considered whether the appointment of a Divestiture Trustee at the outset of the process would result in material detriment to Ryanair. We note that this divestiture remedy does not involve the sale of a business, in which the vendor might be best placed to market it on the basis of its knowledge and understanding of it. A parcel of shares is being sold and the sale would most likely be conducted by a financial adviser. As the financial adviser would be mandated to achieve the best available price in the market, we did not consider that Ryanair would suffer material detriment in terms of the proceeds realized for its shares as a consequence of that adviser being mandated by the CC rather than Ryanair. Further, we would expect that the professional fees for a Divestiture Trustee would be broadly equivalent in magnitude to those that Ryanair would pay if it were to appoint its own financial adviser to run the sale process. There is therefore unlikely to be any material incremental cost to Ryanair of the CC's decision to appoint a Divestiture Trustee.
>
> 42. For these reasons we decided to require a Divestiture Trustee from the outset of the divestiture process."

219. Ryanair challenges the reasons given by the CC for the appointment of a divestiture trustee on a number of grounds. First, it is said that there was no basis for the finding at Appendix K, paragraph 39, that if Ryanair were to be permitted to manage a divestiture for an initial period, the CC was concerned that there would be a material risk that Ryanair would be incentivised to undermine the effective implementation of the remedy, for example, by placing shares with unsuitable purchasers. Ryanair said that this would be most unlikely as with up-front sales the CC approves the purchasers, stock market disposal would be managed by an investment bank, and finally Ryanair could give undertakings to comply with the CC's suitability requirements. Whilst these factors may well mitigate the risks, the CC was entitled to take a cautious approach to eliminate the risks so far as practicable. The CC's approach cannot be described as unreasonable or lacking in foundation, especially given the incentives it found Ryanair had, and particularly given its continued desire to acquire the entire issued share capital of Aer Lingus.

220. Secondly, Ryanair disputes the CC's assessment at Appendix K, paragraph 40 of the Final Report as to the practical difficulties with a monitoring trustee. We see no basis for challenging the clear and rational assessment of the CC in that paragraph.

221. Finally, Ryanair in its application relied upon a report of Morgan Stanley submitted to the CC to the effect that significant volumes of shares may be best

sold by way of a book-builder or placement agent with an incentive to achieve as high a price as possible. This is commonly achieved by getting the bank to underwrite the sale. It was said that a divestiture trustee would not have the same incentive. In its Defence, the CC asserted that there was nothing to prevent Ryanair from appointing a divestiture trustee on similar terms to those on which an investment bank would be appointed. At the hearing we made it clear that we saw no reason to consider that the CC might resile from that position. Hence the concern identified by Ryanair should not materialise and can be dealt with in the consultation process between Ryanair and the CC on the identity of and terms of reference for the divestiture trustee.

Ground 6: territorial jurisdiction

222. By its sixth ground of review, Ryanair submitted that the CC had no jurisdiction to impose requirements on it (Ryanair Holdings plc) on the basis that it does not carry on business in the UK. At the hearing, Lord Pannick explained that he was not going to develop this ground of review in oral submission, but emphasised that Ryanair was not abandoning the point, in particular given that the Court of Appeal will imminently consider the same legal principles in an appeal brought by Akzo Nobel NV against the Tribunal's judgment of 21 June 2013 in *Akzo Nobel NV v Competition Commission* [2013] CAT 13 ("*Akzo*"), and Ryanair may wish to revisit this issue in the event that it seeks to appeal this judgment. However, Lord Pannick accepted that, on the basis of the principles hitherto established, Ryanair could not succeed on this ground.

223. Given that we have been asked to rule on this ground of review, which has expressly not been abandoned by Ryanair, we do so below.

The CC's approach

224. The CC's conclusions on the question of whether Ryanair carries on business in the UK are set out at Final Report, paragraph 8.125, as follows:

> "We considered whether the fact that Ryanair said that all of its business activities (including in the UK) were carried on by Ryanair Limited (not Ryanair Holdings) meant that any measures should be restricted to certain companies in the Group. However, taking account of the factual circumstances of the operations of Ryanair and Ryanair Limited set out in Appendix B, we are

satisfied that Ryanair Holdings and Ryanair Limited both carry on business in the UK. In the circumstances, we considered that the measures should extend to control the behaviour of all the companies in the Group."

225. At paragraphs 21 to 25 of Appendix B, the CC deals with the question of carrying on business in more detail (the findings here are supplemented by footnotes, which refer to various documents of the Ryanair Group):

> "21. Ryanair is managed as a single business unit which is active in the provision of air passenger services and other airline-related activities, including scheduled services, car hire, Internet income and related sales to third parties. Ryanair operates a single fleet of aircraft that is deployed through a single route scheduling system. The Chief Executive Officer of Ryanair, Michael O'Leary, is the Company's Chief Operating Decision Maker and the only executive director, who makes decisions directly related to airline operations by Ryanair including those in, to and from the UK. The board of Ryanair has delegated responsibility for the management of the group to the CEO and executive management.
>
> 22. The board of Ryanair is responsible for the leadership, strategic direction and overall management of the Ryanair Group. The board's primary focus is on strategy formulation, policy and control and has a formal schedule of matters specifically reserved for its attention, including matters such as appointment of senior management, approval of the annual budget, large capital expenditure and key strategic decisions.
>
> 23. We have reviewed minutes of board meetings of Ryanair Holdings plc which indicate that the board is provided updates on, inter alia, fuel requirements, the purchasing of aircraft, new routes and bases, customer service complaints, changes in the UK Air Passenger Duty, market shares on Dublin–UK routes, outsourcing of future staff requirements, safety protocols for all Ryanair pilots and on-board electronic point-of-sale systems. In addition, we note that the board unanimously approved management to proceed with the aforementioned outsourcing and sale systems projects.
>
> 24. Ryanair's operations serving Great Britain and Ireland are operated by Ryanair Limited, its wholly owned subsidiary incorporated in Ireland and the only operating company within the Ryanair Group. The management of Ryanair Holdings and Ryanair Limited are integrated, with the two companies having the same directors, executive officers and registered address. The Chief Executive Officer of Ryanair Limited is Michael O'Leary. The UK/Ireland operations are not managed separately nor is there a separate management team from the rest of Ryanair's airline oper-ations. Ryanair Limited advertises and sells flights to UK consumers through its website (www.ryanair.com). It has eight bases of operations in the UK: Bristol, Glasgow (Prestwick), Leeds Bradford, Liverpool, London (Luton), London (Stansted), Manchester and Nottingham East Midlands.
>
> 25. Coinside Limited (Coinside), a subsidiary of Ryanair Limited, acquired Ryanair's shareholding in Aer Lingus over the period 2006 to 2008. These shares are now held by Ryanair Limited. Coinside also made the most recent public bid on behalf of Ryanair for the outstanding 70.18 per cent Aer Lingus shares not already owned by Ryanair."

Ryanair's submissions

226. Although Ryanair accepts that the CC would have jurisdiction to address its remedy to Ryanair's subsidiary, Ryanair Limited (which company holds the shares in Aer Lingus through its subsidiary, Coinside Limited), Ryanair submitted that the CC only has jurisdiction to address its remedy to Ryanair if it can be shown that Ryanair itself carries on business in the UK, given the terms of section 86(1) of the Act (cited at paragraph 43 above). In its notice of application, Ryanair cited the Tribunal's treatment of this issue in *Akzo*.

227. Ryanair pointed to the CC's conclusions on this issue at Appendix B of the Final Report, paragraphs 21 to 25. Ryanair submitted that the CC had erred by proceeding on the basis that it was sufficient to show that the Ryanair Group is managed as a single business unit, when there is no such "single economic unit" exception to the ordinary principles of corporate personality. Further, the CC failed to address the two questions identified at paragraph 109 of *Akzo*, where the Tribunal stated:

> "Consideration of that issue raises two questions in the context of section 86(1)(c): first, what activity of the parent company constitutes the carrying on of a business and, secondly, is that activity carried on in the United Kingdom? We are, of course, mindful of the fact that these questions cannot simply be answered by reference to the exercise of control over a subsidiary's business: were that approach to be adopted, it would be a clear breach of the *Salomon* principles. It is a question of fact and degree in each case whether the activities of the parent company are such as to be treated as carrying on business activities that are properly attributable to it as a legal person."

228. As regards the first question in *Akzo*, Ryanair submitted that, whilst the CC described various activities carried on by members of the Ryanair Group, the CC had failed clearly to identify which business activity is to be attributed to the parent company as opposed to the subsidiary. The CC erroneously concluded that the companies' management was integrated, that the companies' activities could be attributed to a single "unit" and that decisions of that "unit" could be attributed to Ryanair. Further, the CC failed to take account of a distinction from *Akzo*, namely that the Ryanair Group does not operate on the basis of functional units without their own legal personality. Rather, the business of the Ryanair Group is, according to the Notice of Application, "carried on exclusively within the confines of Ryanair Limited", and any supervisory

relationship between Ryanair Limited and Ryanair is consistent with what the Court of Appeal described as "common in the case of any parent-subsidiary relationship" in *Adams v Cape Industries plc* [1990] Ch. 433 (CA) at 538C-D.

229. As regards the second question in *Akzo*, Ryanair submitted that the CC had also failed to consider whether Ryanair's activities were carried on in the UK, and that none of the activities identified by the CC which might conceivably be attributed to Ryanair are carried on in the UK. In this regard, the onus is on the CC to demonstrate that Ryanair itself carries on business in the UK, and it is not sufficient to point to the mere fact that a subsidiary is to some extent controlled by its parent, that it engages in conduct which has consequences in the UK, or that its business includes the strategic management of a subsidiary which does carry on business in the UK.

230. In the alternative, Ryanair submitted that the CC's conclusion on this issue was irrational and unsupported by the evidence. As Ryanair noted at paragraph 186 of its Notice of Application:

> "…The management of the Ryanair Group bears no similarity to that discussed in [*Akzo*]. The key feature of that case was that the group's business was managed through business units that did not correspond to legal entities. It was because those units had no legal personality that it could be said that the companies acted as a single economic entity. In the present case, however, Ryanair is managed and acts through legal entities. Its structure is entirely conventional, with a holding company which sits above the group's activities and a subsidiary which acts as the operating company."

231. Ryanair then went on (also in paragraph 186 of its Notice of Application) to list a number of alleged errors in the CC's assessment of particular factors which were said to demonstrate that Ryanair was managed as a single business unit. Ryanair submitted that, for the reasons outlined above, there was no rational basis for attributing to Ryanair any activity conducted in the UK.

The Tribunal's analysis and conclusions

232. Ryanair's submissions under this ground appear to assume that the CC engaged in a rather complex exercise, involving the attribution of particular activities of Ryanair Limited to Ryanair, leading to the conclusion that Ryanair carries on business in the UK. However, the reality is rather more straightforward, and the

CC's primary conclusion on this issue (at paragraph 8.125 of the Final Report, cited in full at paragraph 224 above) was stated briefly, by reference to the statutory test under section 86(1) of the Act.

233. In our view, the CC correctly addressed its mind to the questions outlined at paragraph 109 of *Akzo*. However, there was no further question of whether the activities of Ryanair Limited should be attributed to Ryanair, on the basis of the CC's prior conclusion that Ryanair itself carried on such activities, based on the CC's findings at paragraphs 21 to 25 of Appendix B to the Final Report, which were taken from Ryanair's own public materials and statements.

234. Thus, notwithstanding Ryanair's submission that the CC has unlawfully sought to look behind the corporate veil, a feature which in its view distinguishes this case from the facts of *Akzo*, the CC had concluded from the facts that the activities of each company were not as clearly delineated as suggested by Ryanair, and that the factors outlined in paragraphs 21 to 25 of Appendix B were sufficient to establish that Ryanair itself carried on business in the UK. We are unable to identify any error of law in the CC's assessment of its statutory jurisdiction in this regard.

235. In our view, the principles considered in *Akzo*, which were based on rather different facts, are of limited relevance only, but for the avoidance of doubt we consider that the CC properly considered and answered the questions identified by the Tribunal at paragraph 109 of *Akzo*. Further, on the basis of Mr Beard's helpful explanation of the scope of Akzo Nobel NV's appeal to the Court of Appeal, it seems unlikely that the Court of Appeal's conclusions will prove relevant to our conclusions in this case.

236. It follows from the above that we also dismiss Ryanair's alternative submission that the CC's conclusions in this respect were irrational and unsupported by the evidence. It is clear from the material cited in the footnotes to paragraphs 21 to 25 of Appendix B, and from paragraphs 262 to 272 of the CC's Defence, that the CC's conclusion was supported by evidence, and that the evidence was drawn from public materials issued by Ryanair itself, such that the CC's

conclusion on this issue, which was consistent with that evidence, cannot be said to be irrational.

237. Both Ryanair and Aer Lingus sought permission to admit further evidence in relation to the extent of Ryanair's business activities in the UK. Ryanair sought to admit a witness statement from Mr Juliusz Komorek, who is the Company Secretary and Director of Legal & Regulatory Affairs at both Ryanair and Ryanair Limited. Aer Lingus sought to admit a witness statement from Mr Stephen Hegarty, a partner at Irish law firm Arthur Cox.

238. To the extent that such evidence has potential relevance to a question of the CC's jurisdiction, we have decided to admit this evidence on the basis that it is relevant, relates to a jurisdictional issue, and it would be fair in all the circumstances to exercise our discretion under rule 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) to admit it. We do not consider it fair to admit Ryanair's evidence on the issue, without also admitting Aer Lingus's evidence as well. Whilst we have considered this evidence carefully, we note that this new evidence is presented in the context of an investigation where the CC was inevitably required to decide the section 86 question, and the parties had ample opportunity to make submissions on this question while the matter was live before the CC (notwithstanding Mr Komorek's claim – at paragraph 12 of his witness statement – that the CC never explicitly asked Ryanair to submit evidence on this issue).

239. As far as the value of this evidence is concerned, we find that Mr Komorek's witness statement is descriptive only, and does not engage with (or explicitly contradict) the CC's findings at the relevant paragraphs of Appendix B of the Report. Mr Hegarty's witness statement appears to advance additional bases on which Ryanair can be said to carry on business in the UK. In particular, it refers to the facts that Ryanair has a listing on the London Stock Exchange (which until 2012 was a Primary Listing and is now a Standard Listing); it has granted share options to Ryanair Limited's employees; and Ryanair has given a guarantee under section 17 of the Irish Companies (Amendment) Act 1986 in respect of all of Ryanair Limited's liabilities and contractual undertakings arising in respect of its previous financial years up to 31 March 2012. We have

already concluded above that the CC did not err in its assessment of its jurisdiction to impose a remedy on Ryanair on the basis of the material before it. Nevertheless, we consider that the matters relied on by Aer Lingus amount to additional evidence, which support the CC's finding that Ryanair carries on business in the UK.

CONCLUSION

240. For the reasons set out above, we unanimously dismiss Ryanair's application for review.

Hodge Malek QC | Professor John Beath | Margot Daly

Charles Dhanowa OBE, QC
(*Hon*)
Registrar

Date: 7 March 2014