Neutral citation [2012] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1196/4/8/12

Victoria House
Bloomsbury Place
London WC1A 2EB

8 August 2012

Before:
MARCUS SMITH Q.C.
(Chairman)
DR. CLIVE ELPHICK
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

B E T W E E N:

RYANAIR HOLDINGS PLC

Applicant

- and -

COMPETITION COMMISSION

Respondent

- supported by -

AER LINGUS GROUP PLC

Intervener

Heard at Victoria House on 27 July 2012

JUDGMENT

APPEARANCES

Lord Pannick Q.C. and Mr. Tristan Jones (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared for the Applicant, Ryanair Holdings plc.

Mr. Daniel Beard Q.C. and Ms. Alison Berridge (instructed by the Treasury Solicitor's Department) appeared for the Respondent, the Competition Commission.

Mr. James Flynn Q.C. and Mr. Daniel Piccinin (instructed by Cadwalader, Wickersham & Taft LLP) appeared for the Intervener, Aer Lingus Group plc.

I. INTRODUCTION

1. On 15 June 2012, the Office of Fair Trading (the "OFT") referred to the Competition Commission (the "CC") the completed acquisition by the Applicant, Ryanair Holdings plc ("Ryanair"), of 29.82% of the share capital of Aer Lingus Group plc ("Aer Lingus"). This was done pursuant to section 22 of the Enterprise Act 2002 (the "2002 Act"). We shall refer to this reference as the "OFT Reference".

2. Pursuant to the OFT Reference, the CC began an investigation (the "Investigation").

3. On 19 June 2012, Ryanair announced its intention to make a public bid for the entirety of Aer Lingus' share capital (the "Public Bid"). On 20 June 2012, Ryanair informed the CC of the Public Bid, and invited the CC, at the very least, to stay the Investigation, given the Public Bid. Subsequently, the CC met representatives of Aer Lingus (on 21 June 2012) and Ryanair (25 June 2012) to further consider the implications of the Public Bid. On 25 June 2012, the CC requested submissions on a number of topics regarding the effect of the Public Bid on the Investigation, and both Ryanair and Aer Lingus made submissions to the CC. On 22 June 2012, Ryanair also met with the European Commission to discuss the Public Bid. On 5 July 2012, it submitted a draft Form CO (the formal notification document) to the European Commission. The process before the European Commission is continuing (see Case COMP/M.6663).

4. On 10 July 2012, the CC informed Ryanair and Aer Lingus of its decision to continue the Investigation, thereby rejecting Ryanair's submissions that the Investigation should be halted. A copy of that decision (the "Decision") is appended hereto as Annex 1.

5. Pursuant to the Investigation:

   (1) On 10 July 2012, the CC issued to Ryanair a notice under section 109 of the 2002 Act, requiring the provision of information and production of

documents (the "Section 109 Notice"). The Section 109 Notice required a response from Ryanair on or before Tuesday 17 July 2012.

(2) Ryanair was also asked to respond to a merger inquiry market questionnaire. This asked 31 questions, and required responses (depending on the question) by 18 July, 25 July or 1 August 2012.

6. By an application dated 13 July 2012 (the "Application"), Ryanair applied to the Tribunal for:

(1) An order pursuant to section 120 of the 2002 Act that the CC's decision to continue with the Investigation be quashed or stayed and that the decision to issue the Section 109 Notice similarly be quashed or stayed.

(2) Interim relief pursuant to Rule 61 of the Competition Appeal Tribunal Rules 2003, S.I. No 1372 of 2003 (the "2003 Tribunal Rules") suspending the Investigation, including the Section 109 Notice, pending determination of the application under section 120.

7. At a hearing on 16 July 2012, the application for interim relief was stayed generally, but upon the basis of an indication by the CC that (without prejudice to the merits of the application for interim relief) it was not minded to impose financial penalties under section 110 of the 2002 Act in relation to Ryanair's non-compliance with the Section 109 Notice from the date when the information was due to be provided (i.e. 17 July 2012) until seven days after the Tribunal has handed down this Judgment.

8. This Judgment is concerned solely with the application for an order pursuant to section 120 of the 2002 Act that the CC's decision to continue with the Investigation be quashed or stayed and that the decision to issue the Section 109 Notice similarly be quashed or stayed.

II. SECTION 120 OF THE ENTERPRISE ACT 2002

9. Section 120 of the 2002 Act provides, to the extent material, as follows:

> "(1) Any person aggrieved by a decision of the … [CC] under this Part in connection with a reference or possible reference in relation to a relevant

merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.

(2) For this purpose 'decision' –

(a) does not include a decision to impose a penalty under section 110(1) or (3); but

(b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.

…

(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review."

10. It was common ground that the Decision is a reviewable decision under section 120 of the 2002 Act and, by virtue of section 120(4), the Tribunal is required to determine this application applying the same principles as would be applied by a court on an application for judicial review.

11. It is unnecessary, in this Judgment, to recite the traditional grounds on which an administrative act or decision can be called into question by judicial review. Ryanair's case (which we describe in greater detail below) was that the Decision was wrong as a matter of law. No other ground of review was advanced. Since the Tribunal, when applying judicial review principles, does not generally allow any margin of discretion to a decision-maker in relation to questions of law, it follows that the Tribunal's task is simply to decide whether or not Ryanair's legal contentions are right or wrong.

III. RYANAIR'S CONTENTIONS

12. In paragraph 1 of the Application, Ryanair states:

> "This application raises a single ground of review. The … CC … has erred in law in deciding to continue its investigation into Ryanair's acquisition of a minority stake in Aer Lingus notwithstanding the overlapping and parallel investigation into Ryanair's bid for the entirety of Aer Lingus by the European Commission …"

13. More specifically, Ryanair asserts that:

(1) The Public Bid will give rise to a concentration with a Community dimension within the meaning of Article 1 of Council Regulation (EC)

No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation" or "ECMR"): see paragraph 2 of the Application.

(2) The announcement of the Public Bid triggers the exclusive jurisdiction of the European Commission under Article 21 of the EC Merger Regulation; and that "[t]his exclusive jurisdiction extends to Ryanair's minority stake in Aer Lingus": see paragraph 2 of the Application.

(3) The announcement of the Public Bid triggers the duty of sincere cooperation under Article 4(3) of the Treaty on European Union (whereby "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties") and that the duty of sincere cooperation, as a matter of law, precluded the CC from taking any further steps in the Investigation: see paragraph 3 of the Application.

14. These three points are considered in turn below.

IV. DOES THE PUBLIC BID GIVE RISE TO A CONCENTRATION WITH A COMMUNITY DIMENSION?

15. Articles 1 and 3 of the EC Merger Regulation defines the nature of "concentrations with a Community dimension". Ryanair positively contends that the Public Bid will give rise to such a concentration (see paragraph 2 of the Application). In the Decision, the CC proceeded on the basis of an assumption "that the bid will give rise to a concentration with a [C]ommunity dimension" (see paragraph 3 of the Decision), and this was the position of both the CC and Aer Lingus in the hearing before us.

16. We understand that the European Commission is also proceeding on the basis that the Public Bid meets the criteria for a concentration with a Community dimension.

17. In these circumstances – but without deciding the matter, as this is a matter for the European Commission – we proceed on the basis of an assumption that the

Public Bid qualifies as a concentration with a Community dimension within the meaning of the EC Merger Regulation, thus triggering the exclusive jurisdiction of the European Commission. The question for this Tribunal is the extent of that jurisdiction and its consequences, if any, for the Investigation.

V. WHAT IS THE EXTENT OF THE EUROPEAN COMMISSION'S EXCLUSIVE JURISDICTION?

(1) Ryanair's contention

18. Ryanair contends that the decision to continue with the Investigation infringes the exclusive jurisdiction of the European Commission, which is conferred by Article 21 of the EC Merger Regulation. This provides (so far as material) as follows:

> "2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.
>
> 3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension."

19. Essentially, Ryanair contended (in paragraphs 2 and 38 of its Application) that "[t]his exclusive jurisdiction extends to Ryanair's minority stake in Aer Lingus", and that for this reason the CC had "erred in law in deciding to continue its investigation into Ryanair's acquisition of a minority stake in Aer Lingus".

(2) The jurisdictions to supervise and control mergers

20. As is well-known, the supervision and control of mergers within the European Union and its Member States operates at two levels. At the European Union level, there is a jurisdiction exercisable by the European Commission under the EC Merger Regulation. At the Member State level, in the United Kingdom there is a jurisdiction exercisable by the OFT and the CC under the 2002 Act. These jurisdictions, although similar, are not the same. As the CC noted in paragraph 14 of its written submissions, "[i]n deciding whether a transaction such as a minority stake qualifies for review, the UK regime … applies a test of "material influence". This contrasts with the European regime which is only triggered by

an acquisition of "decisive influence". The UK's test is more expansive, and applies for example at lower levels of shareholding than the EU test".

21. Article 1(1) of the EC Merger Regulation provides that the Regulation "shall apply to all concentrations with a Community dimension as defined in this Article". It is unnecessary, for the purposes of this Judgment, to articulate the precise, detailed (and lengthy) definition of "concentrations with a Community dimension" contained within the EC Merger Regulation. What is important to note is that:

    (1) The EC Merger Regulation identifies, very precisely, the types of concentration to which it applies, and it labels these, as we have noted, "concentrations with a Community dimension".

    (2) All of the parties before us, including, most importantly, Ryanair, accepted that whilst the Aer Lingus shares which were the subject of the Public Bid (i.e. the 70.18% of shares not held by Ryanair) did amount to a concentration with a Community dimension and so fell within the European Commission's exclusive jurisdiction under the EC Merger Regulation, the 29.82% of the share capital (which we shall refer to as the "Minority Holding") did not constitute a concentration with a Community dimension – either by itself or as a part of the Public Bid.

    (3) The CC and Aer Lingus accepted (indeed, contended) that the Minority Holding fell within the OFT's and CC's merger jurisdiction under the 2002 Act, and that, following the OFT Reference, the CC had a statutory duty to proceed with the Investigation. Ryanair, of course, did not accept this, for the two reasons already touched upon:

        (i) First, Ryanair contended that the CC was precluded from investigating the Minority Holding by Article 21(3) of the EC Merger Regulation; and

        (ii) Secondly, even if Article 21(3) did not apply, then (as a matter of law) Ryanair contended that the Investigation could not proceed

because of the effect of the duty of sincere cooperation arising from Article 4(3) of the Treaty on European Union.

(3) "One-stop shop" and the exclusivity provisions in the EC Merger Regulation

22. Recital (8) to the EC Merger Regulation provides that:

> "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."

23. The provisions of Article 21 – the relevant parts of which we have set out in paragraph 18 above – implement this "one-stop shop" system by providing, subject to review by the Court of Justice, for a "sole" jurisdiction on the part of the European Commission (Article 21(2)) and – more pertinently for present purposes – by enunciating a rule that "[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension" (Article 21(3)).

(4) The extent of the exclusivity provisions in the EC Merger Regulation

24. Ryanair contended that "[p]roperly construed, Art. 21(3) ECMR operates to prevent the CC examining the minority stake even if the minority stake is not formally part of the same concentration for the purposes of Art. 3 ECMR as the public bid" (paragraph 42 of the Application). This was said to be in order to secure the objectives of the "one-stop shop" regime, and to ensure the swift and certain allocation of jurisdiction between the European Commission, on the one hand, and the national competition authorities of the Member States of the EU ("NCAs"), on the other. This, to quote from paragraph 44 of the Application, is "to avoid [the] duplicative and possibly inconsistent review of the same concentrations and to ensure that the [European] Commission alone has jurisdiction to examine and assess concentrations that meet the ECMR's jurisdictional tests".

25. Ryanair's point was that the European Commission's investigation of the Public Bid under the EC Merger Regulation would inevitably require it to take account of the Minority Holding, which is the subject of the Investigation by the CC. The Application noted:

> "45. The notified concentration will be the merger of two previously independent undertakings by way of Ryanair's acquisition of control over 70.2% of Aer Lingus shares. It is clear that this concentration must be notified under the ECMR because the applicable thresholds are met. In assessing the compatibility of that proposed combination with EU competition rules, the Commission will necessarily take into account the fact that one of the merging undertakings already holds 29.82% of the other.
>
> …
>
> 47. Accordingly, even if the acquisition of the minority stake is, as a formal matter, not treated under Article 3(1) ECMR as being part of the same concentration as that notified, the Commission's investigation of the notified concentration will necessarily encompass the implications of Ryanair owning the minority stake."

26. The CC, supported by Aer Lingus, contended that its "jurisdiction over the minority stake is distinct from, and independent of, the European Commission's jurisdiction over the public bid, and is therefore unaffected by [Article] 21(3) [ECMR]" (paragraph 24 of the CC's written submissions). The short point was that the exclusivity conferred by Article 21 was the same in extent as the jurisdiction conferred on the European Commission by the EC Merger Regulation – that is, a jurisdiction to examine "concentrations with a Community dimension".

27. We accept this submission. We consider that Article 21 confers exclusivity on the European Commission only to the extent that the European Commission has jurisdiction under the EC Merger Regulation. Article 21(3) means what it says: "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension" (emphasis added). Where the European Commission does not have jurisdiction, because there is no Community dimension to the particular concentration, merger investigations by one or more NCAs are not precluded.

28. Thus, in this case, the European Commission's jurisdiction extends only to the shares that are the subject of the Public Bid, and ability of the OFT and the CC

to investigate this concentration is precluded by Article 21(3). The European Commission has no jurisdiction over the Minority Holding and, as regards this concentration, the OFT's and the CC's jurisdiction is unaffected by Article 21(3).

29. Lord Pannick Q.C., who appeared for Ryanair, sought to persuade us that a purposive construction of Article 21 of the EC Merger Regulation favoured Ryanair's contention. He submitted that it was necessary to construe Article 21 widely, so as to ensure that a genuine "one-stop shop" system prevailed. This was because, he submitted, the shares forming the Minority Holding are inextricably linked to the shares which are the subject of the Public Bid under consideration by the European Commission, so that the "one-stop shop" objective of the EC Merger Regulation required an interpretation of Article 21 that would preclude them from being considered at the same time by different authorities.[1]

30. We reject this contention. The "one-stop shop" referred to in Recital (8) is a reference to exclusivity in relation to those concentrations where the European Commission has exclusive jurisdiction. As the concluding sentence of Recital (8) provides, "[c]oncentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States". That is exactly what the Minority Holding is: a completed acquisition not covered by that Regulation.

VI. THE DUTY OF SINCERE COOPERATION

(1) The duty stated

31. It was common ground between the parties that the announcement of the Public Bid triggered the duty of sincere cooperation under Article 4(3) of the Treaty on European Union (whereby "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the

[1] At times, Lord Pannick contended that since to own 100% of the shares in Aer Lingus entailed owning 29%, it was not possible to separate the two. That does not necessarily follow. A consideration of a 100% acquisition of Aer Lingus might conclude that such a holding was beneficial and pro-competitive. On the other hand, a consideration of a substantial minority holding might equally conclude that such a holding was not beneficial and brought with it no competitive advantages. There would be no inconsistency between these conclusions. It follows from this that the appropriate remedies in these two cases (e.g. divestment) might well also be different.

Treaties"). The real issue between the parties lay in the consequences of this fact.

32. Article 4(3) of the Treaty on European Union provides:

> "3. 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."

(2) Ryanair's contentions

33. Ryanair's contention that the duty of sincere cooperation precluded, as a matter of law, the continuation of the Investigation, was based upon the decision of the Court of Appeal in *Ryanair Holdings plc v Office of Fair Trading* [2012] EWCA Civ 643 (the "*Ryanair* C/A Decision"). Essentially, Ryanair contended that the *ratio decidendum* of this decision was that:

(1) The duty of sincere cooperation extended to cases of "overlapping jurisdictions" (see paragraph [38] of the *Ryanair* C/A Decision).

(2) That, in cases of "overlapping jurisdictions", the duty of sincere cooperation necessarily required (i.e. as a matter of law) the OFT (which was the Respondent in that case) to desist from making any reference whilst the jurisdictions overlapped (see paragraph [40] of the *Ryanair* C/A Decision). Ryanair contended that, in that case, the duty of sincere cooperation was a "bright line" duty, such that there could be only one proper response in a case of "overlapping jurisdictions", namely to desist in making any reference.

It was contended that this was a case of "overlapping jurisdictions" and that there was no material difference between the making of the OFT Reference (which was before the Court of Appeal) and continuation of the Investigation (which is before us now). Accordingly, so Ryanair contended, this Tribunal was

bound by the Court of Appeal's holdings on points of law, and had no choice but itself to hold that the duty of sincere cooperation precluded the continuation of the Investigation. The Tribunal is, obviously, bound by the Court of Appeal's holdings on points of law: neither the CC nor Aer Lingus sought to suggest otherwise. The CC and Aer Lingus did not, however, accept Ryanair's description of the *ratio* in the *Ryanair* C/A Decision.

(3) The contentions of the CC and Aer Lingus

34. The CC and Aer Lingus contended that Ryanair's submissions fundamentally misunderstood the *ratio* of the *Ryanair* C/A Decision in that:

    (1) The nature of the duty of sincere cooperation required a NCA, such as the CC, to consider all of the relevant facts before deciding how best the duty could be fulfilled. It certainly could not be said that the duty of sincere cooperation was a "bright line" duty such that in the present case it could be said that (inevitably) there could be only one lawful response, i.e. to stay the Investigation.

    (2) The meaning given to the term "overlapping jurisdiction" by the Court of Appeal meant that the present case was most definitely not a case of "overlapping jurisdictions".

(4) The nature of the duty of sincere cooperation

35. Article 4(3) of the Treaty on European Union is one of those provisions of EU law that has changed designation and numbering several times, but which has otherwise remained in substantially the same form. In the case law cited below, which refers to Article 4(3) in its various guises, we replace references to former provisions stating the duty with a reference to Article 4(3), noting the change by the use of square brackets.

36. In Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, [2000] ECR I-11369, the Court of Justice held as follows:

    "49 It is also clear from the case-law of the Court that the Member States' duty under [Article 4(3) TEU] is to take all appropriate measures, whether general or particular, to ensure fulfillment 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 authorities of Member States including, for matters within their jurisdiction, the courts …
>
> …
>
> 51 … 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 …
>
> 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.
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> …
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> 56 It should be borne in mind … 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 upon 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."

37. *Masterfoods* was a case concerning what are now Articles 101 and 102 of the Treaty on the Functioning of the European Union. Nothing turns on this: the duty of sincere cooperation operates generally. 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 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 NCA may reach a decision that will prove to be contrary to a future decision of the Commission (or, on appeal, a future decision of the courts of the European Union), then it is incumbent on the NCA to ensure that such a conflict does not arise.

38. The sort of conflict that the duty of sincere cooperation requires national authorities to avoid was helpfully articulated by Advocate General Cosmas in the opinion he delivered in *Masterfoods* on 16 May 2000. The Advocate

General said (omitting footnotes, although these are, in themselves, highly instructive):

> "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 … 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 101 and 102 TFEU], 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."

39. In *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 (Ch), the Chancellor (sitting at first instance) provided valuable guidance as to how the duty of sincere cooperation should operate in a case where inconsistent decisions between national authorities and EU authorities could be anticipated. The Chancellor's starting point was *Masterfoods* (paragraph [20] of the decision). He held that the duty of sincere cooperation required that a trial before a national court should not be fixed until some appropriate time after the exhaustion of all rights of appeal in respect of an EU decision (paragraph [23]). In that way, there would be certainty at the EU level, and the national court could follow the European lead.

40. However, precisely how the duty of sincere cooperation might be satisfied depended on the facts of the individual case:

> "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 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 procedure 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."

41. Essentially, when and how a stay pursuant to the duty of sincere cooperation ought to be imposed involves – at least in the United Kingdom – something of a balancing exercise (see paragraph [35] of *National Grid*). This exercise may require a more or less complex assessment of numerous interlocking factors and intrinsically involves an element of appreciation and the exercise of judgment.

42. Our conclusion, viewing the matter apart from the *Ryanair* C/A Decision, is that the question of what needs to be done in order to comply with the duty of sincere cooperation is a nuanced one, which is very dependent on the facts of the given case. Ordinarily – and without, for the moment, considering the *ratio* of the *Ryanair* C/A Decision – we would very much doubt whether a decision by a NCA such as the CC to continue or not continue with proceedings before it could, without more, be considered to amount to an error of law. (We say nothing about other possible heads of review. It may be that a decision by the OFT or the CC to proceed with an investigation could be criticized as irrational or disproportionate. But no such contentions were advanced by Ryanair before us in this case.)

43. This conclusion, however, is expressly subject to the *Ryanair* C/A Decision, on which Ryanair placed much emphasis, and to which we now turn.

(5) The *Ryanair* C/A Decision

44. The *Ryanair* C/A Decision considered the same Minority Holding (subject to immaterial changes in the precise level of share ownership over time) in Aer Lingus that is presently the subject of the Investigation. It is critical to an understanding of the *Ryanair* C/A Decision to set out the factual background against which that decision was made in some detail.

(i) The factual background to the Ryanair C/A Decision[2]

Ryanair's concentration with a Community dimension

45. Between 27 September and 5 October 2006 Ryanair acquired a 19.2% shareholding in Aer Lingus. On 5 October 2006 Ryanair announced its intention to launch a public bid for the entire share capital of Aer Lingus. The public bid was made on 23 October 2006. At the end of October, Ryanair notified its concentration to the European Commission in accordance with article 4(1) of the EC Merger Regulation.

46. By 28 November 2006, Ryanair had acquired up to 25.2% of the equity in Aer Lingus.

47. In that instance, the shares which were the subject matter of the public bid, with Ryanair's 25.2% holding in Aer Lingus, together formed part of the same concentration with a Community dimension. On 27 June 2007, in paragraph 12 of Decision C(2007)3104 (Case COMP/M.4439 *Ryanair/Aer Lingus*, the "Prohibition Decision"), the European Commission stated that, in the circumstances, Ryanair's acquisition of its 25.2% holding formed part of the same "concentration" as the public bid examined by it:

> "As Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than 10 days before the launching of the public bid, and the further 6% shortly thereafter, and in view of Ryanair's explanations of the economic purpose it pursued at the time it concluded the transactions, the entire operation comprising the acquisition of shares before and during the public bid period as well as the public bid itself is considered to constitute a single concentration within the meaning of Article 3 of the Merger Regulation."

48. It is, accordingly, clear that the European Commission's exclusive jurisdiction pursuant to Article 21 of the EC Merger Regulation extended to both the shares that were the subject of the public bid and to the 25.2% holding, since they formed part of the same concentration.

The Commission's consideration of the Ryanair concentration

[2] Much of this factual background is helpfully set out in paragraphs [2] to [24] of the Tribunal's decision in *Ryanair Holdings plc v Office of Fair Trading* [2011] CAT 23 (as well as in the materials submitted by the parties). The following paragraphs draw extensively on the narrative contained in the Tribunal's earlier decision, large parts of which are used more-or-less verbatim.

49. On 20 December 2006, the European Commission decided to initiate "Phase II" proceedings under the EC Merger Regulation in order to investigate the compatibility of the concentration with the common market. Accordingly, Ryanair's public bid lapsed.

50. On 25 January 2007, Aer Lingus made the first of several requests to the European Commission to require Ryanair to divest its minority shareholding and to take the necessary interim measures under Articles 8(4) and 8(5) of the Merger Regulation. Aer Lingus made a further request in the same terms on 7 June 2007.

51. On 27 June 2007, the European Commission issued the Prohibition Decision (which has already been referred to in paragraph 47 above) declaring that the concentration whereby Ryanair would acquire sole control of Aer Lingus was incompatible with the common market and was, therefore, prohibited. On the same day, the Deputy Director-General of the European Commission's Directorate-General for Competition wrote to Aer Lingus stating that the European Commission did not have the power under Article 8(4) of the EC Merger Regulation to order Ryanair to divest the minority shareholding or to adopt interim measures under Article 8(5). This was despite the fact that the concentration before the European Commission included this minority shareholding. The last two paragraphs of that letter read as follows:

> "Please note that this position is without prejudice to the powers that Member States may have after the adoption of [the Prohibition Decision] to apply their national legislation on competition to the acquisition of Ryanair's minority shareholding in Aer Lingus.
>
> This letter does not constitute a decision of the Commission. It reflects the opinion of the services in charge of Merger Control in the Directorate-General for Competition, which cannot bind the Commission itself."

52. On 12 July 2007, Aer Lingus sent a memorandum to the European Commission, the Irish Competition Authority, the OFT and the German Bundeskartellamt ("BKartA") (one or more of whom it apparently considered to have jurisdiction), inviting those authorities to reach a common position as to the authority competent to act in relation to Ryanair's minority shareholding in Aer

Lingus. Part of this submission referred to the points made by the Deputy Director-General in her letter of 12 July 2007 and stated that:

> "Aer Lingus maintains that it was and is open to the Commission to act under Art 8(4) [of the EC Merger Regulation] and regrets that it has not done so. Aer Lingus reserves the possibility to challenge this interpretation before the CFI [now General Court]."

53. On 3 August 2007, the European Commission's services reiterated the conclusion that it did not have power to order Ryanair to divest its shareholding.

54. Also on 3 August 2007, the OFT wrote to the solicitors for Aer Lingus setting out its view that it was prevented by Article 21(3) of the EC Merger Regulation from taking action in relation to the minority shareholding. The OFT's letter stated:

> "The OFT considers that it is prevented by Article 21(3) [of the EC Merger Regulation] from applying national legislation on competition to the 25.22 per cent minority stake held by Ryanair in Aer Lingus. In our view, Article 21(3) [of the EC Merger Regulation] precludes the OFT's merger jurisdiction in circumstances where (1) the Commission expressly defined the relevant shareholding as part of the concentration with a Community dimension in its Article 6(1)(c) and 8(3) decisions; and (2) the Commission reviewed the concentration in its entirety, including the minority stake. This conclusion is underlined by the likelihood that Ryanair will challenge the [Prohibition Decision] before the CFI [now the General Court] – and/or, as you indicate in your submission, that Aer Lingus will itself seek relief before the CFI [now General Court] – creating a risk of inconsistent outcomes if the OFT were to have parallel jurisdiction at this time."

55. On 6 August 2007 the BKartA wrote to the solicitors for Aer Lingus stating that it would not take any action in relation to Ryanair's minority shareholding. The BKartA considered that the question of whether Article 21(3) of the EC Merger Regulation excluded national law ultimately remained "unclarified". The BKartA saw no reason to institute its own proceedings as long as the Prohibition Decision was still pending before EU Courts. The BKartA specifically pointed out that this approach would avoid the "risk of mutually contradictory decisions being [adopted] under national and EU merger control law".

56. The same month Ryanair acquired further shares in Aer Lingus, taking its overall shareholding to 29.4%.

57. On 17 August 2007, Aer Lingus again asked the European Commission to act under Articles 8(4) and 8(5) of the EC Merger Regulation in respect of

Ryanair's minority shareholding or to state formally that it did not have the power to do so. At the same time, Aer Lingus asked the European Commission to take a formal position on the effect of Article 21(3) of the Merger Regulation as regards that shareholding.

The Ryanair Appeal

58. On 10 September 2007 Ryanair began proceedings in the Court of First Instance (now the General Court) for annulment of the Prohibition Decision. Ryanair submitted that the European Commission had committed manifest errors of assessment in relation a number of matters (the details of which do not matter for present purposes). We shall refer to this challenge as the "Ryanair Appeal".

The Aer Lingus Appeal

59. On 11 October 2007, in relation to the request by Aer Lingus that the European Commission act under Article 8(4) of the EC Merger Regulation, the Commission adopted Decision C(2007)4600, holding that it did not have the power under that provision to order divestment of the minority shareholding (the "Interim Measures Decision", to use the term used by the Court of Appeal in the *Ryanair* C/A Decision). The European Commission stated (at paragraph 12):

> "… The Commission's competence is limited to situations in which the acquirer has control over the target … In the present case … Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration."

60. In relation to Aer Lingus' request for the European Commission to take a position on the interpretation of Article 21(3) of the EC Merger Regulation, the European Commission observed that this was a provision of EU law that imposed an obligation on the Member States, and did not confer any specific duties or powers on the European Commission. The European Commission stated that it lacked the power to adopt a legally binding interpretation of a provision of EU law addressed to Member States. It continued (at paragraph 23):

> "Should Aer Lingus be of the opinion that a national competition authority is obliged to act with respect to Ryanair's minority shareholding pursuant to its national

legislation on competition, Aer Lingus has the opportunity to pursue this matter before that authority and/or the competent national court. If a national court considers that an interpretation of Article 21(3) of the EC Merger Regulation is necessary to enable it to give judgment, it may request the Court of Justice to give a preliminary ruling pursuant to Article [267 TFEU] in order to clarify the interpretation of that provision …"

61. On 19 November 2007, Aer Lingus appealed to the Court of First Instance against the Interim Measures Decision (Case T-411/07), submitting that the European Commission had both misconstrued and misapplied Articles 8(4) and 8(5) of the EC Merger Regulation, and arguing that the European Commission had acted in breach of Article 21(3) of the EC Merger Regulation by failing to assert its exclusive jurisdiction and instead leaving open the possibility of intervention by Member States. We shall refer to these proceedings as the "Aer Lingus Appeal".

The Aer Lingus application for interim relief

62. On the same day, 19 November 2007, Aer Lingus also applied to the Court of First Instance for interim measures and for the suspension of the operation of the Interim Measures Decision.

63. On 18 March 2008, the President of the Court of First Instance (now the General Court) made a reasoned Order rejecting Aer Lingus' application for interim relief: Case T-411/07R *Aer Lingus Group plc v Commission* [2008] ECR II-411. The President stated that:

"101 As far as the operation of Article 21 is concerned, it should be pointed out, first, that Article 21(3) must be read in conjunction with Article 21(1). Article 21(1) provides that the Regulation alone is to apply to concentrations having a Community dimension as defined in Article 3 of the Regulation. In this light, in circumstances such as those in the present case, where a concentration has been notified, declared incompatible with the common market by the Commission and on this basis the public bid was abandoned, no concentration with a Community dimension as defined in Article 3 is in existence. Nor can a concentration with a Community dimension be contemplated by the parties in these circumstances, since any such concentration would be in violation of an existing Commission decision. On this basis, as the Commission sets out in its written observations, Article 21(3) cannot be said, prima facie, to apply since there is no concentration in existence, or contemplated, to which the Regulation alone must apply. The remaining minority shareholding is, prima facie, no longer linked to an acquisition of control, ceases to be part of a 'concentration' and lies outside the scope of the Regulation. Accordingly, Article 21, which under recital 8 to the Regulation is aimed at ensuring that concentrations generating significant

> structural changes are reviewed exclusively by the Commission in application of the 'one-stop shop principle', does not in principle, under these circumstances, prevent the application by national competition authorities and national courts of national legislation on competition.
>
> 102 In this respect, the fact that the Commission's decision finding the concentration incompatible with the common market is being challenged before the Court of First Instance makes no material difference, since, on the basis of Article [278 TFEU], actions before the Court of Justice do not have suspensory effect. In addition, if the relevant national competition authorities were deterred from taking definitive measures by considerations relating to procedural economy, it would be open to such authorities to adopt interim measures to address any concern which they might identify pending judgment by this Court."

64. The President's decision is significant in two respects. First, it is authority for the proposition that where a concentration comprises, in effect, two elements, here a public bid and a minority shareholding, if the Commission determines that the public bid is incompatible with the common market, so that the public bid cannot proceed, then:

    (1) That part of the concentration comprising the public bid effectively ceases to exist (the bid itself having lapsed with the commencement of the Phase II investigation); and

    (2) The minority shareholding element, unless <u>in itself</u> capable of amounting to a concentration with a Community dimension, cannot any longer be (part of) a concentration with a Community dimension, and so falls outside the scope of the EC Merger Regulation.

65. Secondly, it makes clear that this is the case even if the Commission's decision regarding the concentration is being appealed, because such challenges do not, of themselves, have suspensory effect.

<u>Ryanair's second proposal to acquire Aer Lingus</u>

66. Ryanair made a further acquisition of shares in Aer Lingus on 2 July 2008, taking its stake to 29.8%. This was followed, on 8 January 2009, by a further proposal by Ryanair to acquire control of Aer Lingus, which was notified to the European Commission, but subsequently withdrawn 15 days later.

Determination by the General Court of the Ryanair and Aer Lingus Appeals

67. On 6 July 2010 the General Court dismissed, in separate judgments, the Ryanair Appeal (Case T-342/07 – *Ryanair Holdings plc v Commission* [2011] 4 CMLR 245) and the Aer Lingus Appeal (Case T-411/07 – *Aer Lingus Group plc v Commission* [2011] 4 CMLR 358). The Court's conclusions were as follows:

(1) As regards the Ryanair Appeal, the General Court dismissed all of Ryanair's challenges to the European Commission's assessment of the closeness of the competition between Ryanair and Aer Lingus and the way in which the concentration would significantly impede effective competition.

(2) As regards the Aer Lingus Appeal, the General Court endorsed the European Commission's view that the minority shareholding did not give Ryanair control of Aer Lingus. In the absence of control, there had been no implementation of a concentration for the purposes of the EC Merger Regulation. It followed that the European Commission had been correct to decide that it had no powers under Articles 8(4) or 8(5) thereof to require Ryanair to divest its minority shareholding. In its judgment, the Court observed:

> "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
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> …
>
> 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."

68. The period for appealing against either judgment on a point of law to the Court of Justice expired on 17 September 2010. Neither judgment was appealed.

(ii) The state of play on 17 September 2010

69. To recap, the position as at 17 September 2010 was that:

(1) From September/October 2006, there was a concentration with a Community dimension comprising:

(i) Ryanair's public bid for just under 75% of Aer Lingus' shares; and

(ii) Ryanair's minority holding in Aer Lingus, comprising just over 25% in Aer Lingus (see paragraphs 45 and 48 above).

(2) Accordingly, from that point in time, the provisions of the EC Merger Regulation, including the exclusivity provisions contained in Article 21 of that Regulation, applied to this concentration. These provisions, of course, precluded a NCA taking any steps in relation to this concentration.

(3) This concentration continued at least until June 2007, when the European Commission (in the Prohibition Decision) declared the concentration whereby Ryanair would acquire sole control of Aer Lingus incompatible with the common market and therefore prohibited (see paragraph 51 above).

(4) At this point in time, it might well be said (as indeed, Ryanair contended subsequently[3]) that the Article 21(3) exclusivity ceased. For present purposes, we simply note this possibility. An alternative possibility would be that Article 21(3) persisted until some or all of the legal processes arising out of Ryanair's concentration had concluded. These legal processes comprised:

(i) The Interim Measures Decision (see paragraph 59 above), whereby the European Commission decided that it did <u>not</u> have power to order Ryanair to divest itself of its minority shareholding.

[3] See paragraph [70] of *Ryanair Holdings plc v Office of Fair Trading* [2011] CAT 23, the decision under appeal in the *Ryanair* C/A Decision.

(ii) The Ryanair Appeal, which was determined by the General Court in July 2010, with the time for appealing expiring in September 2010 (see paragraphs 58, 67(1) and 68 above).

(iii) The Aer Lingus Appeal, which was also determined by the General Court in July 2010, with the time for appealing again expiring in September 2010 (see paragraphs 61, 67(2) and 68 above).

(iii) The OFT investigation into the Ryanair Minority Holding

70. On 30 September 2010, the OFT sent a notice under section 31 of the 2002 Act to Ryanair requiring it to produce specified information which the OFT considered to be relevant to a preliminary merger investigation. The OFT's position was that its investigation was in time because it could not have been commenced until the appeals to the General Court had ended. As has been noted, this occurred on 17 September 2010, when the time for appealing had expired.

71. Ryanair did not accept the OFT's position. Ryanair's contention was that the OFT's investigation was out of time. Before the Tribunal, it was contended that time for purposes of a merger investigation under the 2002 Act began to run from the date of the Prohibition Decision (see paragraph [70] of the Tribunal's decision). Before the Court of Appeal, it was contended that time began to run from the date of the Interim Measures Decision (see paragraph [26(1)] of the *Ryanair* C/A Decision).

72. The question before the Tribunal and the Court of Appeal was thus whether the OFT had become time-barred from referring the Minority Holding, because the OFT had failed to commence its investigation within the time-constraints laid down in the 2002 Act. The questions arising were:

(1) First, whether, and if so to what extent, section 122(4) of the 2002 Act could operate to stop the time limits that would otherwise apply from running. On this point, the Tribunal held (*Ryanair Holdings plc v Office of Fair Trading* [2011] CAT 23 at paragraph [134(b)]) that:

> "Subsection 122(4) of the [2002] 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 decision of the UK competition authorities, whilst preserving the possibility of a reference under section 22 pending the final resolution of the EU process."

The Court of Appeal agreed with this conclusion (paragraph [43] of the *Ryanair* C/A Decision), which was in any event not seriously contested (paragraphs [26(3)] and [43] of the *Ryanair* C/A Decision).

(2) Secondly, whether the statutory time limits were extended because the duty of sincere cooperation precluded the OFT from making a reference under section 22 of the 2002 Act until 17 September 2010, when the time allowed for appealing the General Court's judgments expired. Both the Tribunal and the Court of Appeal found that the time limits had been extended (see paragraph [134(c)] of the Tribunal's decision and paragraph [42] of the *Ryanair* C/A Decision).

73. Clearly, the first of these questions does not arise here, and need not be considered further. There is no question, following the Court of Appeal's judgment in the *Ryanair* C/A Decision, but that the OFT Reference has been made within time. The question before us is whether, the OFT Reference having been made, the CC is precluded, by the duty of sincere cooperation, from proceeding with the Investigation. On this point, Ryanair placed considerable reliance on the *Ryanair* C/A Decision. It is to that decision that we now turn.

(iv) The Ryanair C/A Decision

74. In the *Ryanair* C/A Decision at paragraph [38], the Chancellor of the High Court (with whom Hughes and Mcfarlane LJJ agreed) stated:

> "It is, in my view, clear that both ECMR and the Enterprise Act confer extensive powers of investigation on, respectively, the [European] 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." (Emphasis added.)

75. Again, in paragraph [40], the Chancellor stated that "[t]he duty of sincere cooperation, which had existed at all material times, necessarily required OFT to desist from making any reference during that period", i.e. the period between the issuance of the Prohibition and Interim Measures Decisions, and the General Court's judgments in the Ryanair and Aer Lingus Appeals.

76. Ryanair contended that the case now before us was a case of "overlapping jurisdictions", and that the decision of the Court of Appeal amounted to an unequivocal holding of law that where a case of "overlapping jurisdictions" arose, the OFT (and, so, the CC) was obliged as a matter of law to stay any investigation it was conducting and await the outcome of the EU consideration of the Public Bid.

77. The CC and Aer Lingus disputed this reading of the *Ryanair* C/A Decision. The CC and Aer Lingus contended that, when the Chancellor was referring to "overlapping jurisdictions", he was referring to a case where, albeit that the Article 21(3) exclusivity arising out of the EC Merger Regulation might have lapsed, it might (depending upon future decisions of the EU Courts) revive. In such a case, were the OFT (or the CC) to proceed with its own merger investigation before the matter had conclusively been determined at a European level, then there was at least a risk (depending on the future outcome of the judgments of the EU Courts) that such an investigation would encroach upon

the European Commission's revived exclusive jurisdiction under the EC Merger Regulation.

78. It is perhaps best to illustrate this by reference to the facts before the Court of Appeal in the *Ryanair* C/A Decision:

(1) As we have noted (see paragraph 49 above), Ryanair's concentration ended with the Prohibition Decision.

(2) At that point in time, at least on the basis of the concessions made by the OFT and Aer Lingus, the European Commission's exclusive jurisdiction under Article 21(3) of the EC Merger Regulation ended. On this basis, the OFT would be able to begin its own investigation into Ryanair's 25.2% minority shareholding under the 2002 Act.

(3) At that point in time (June 2007), the European Commission had yet to determine whether or not it had the power to order Ryanair to divest itself of its minority shareholding in Aer Lingus. By October 2007, the Interim Measures Decision had been issued, determining that the European Commission had no such power (see paragraph 59 above) above. But, had the European Commission reached a contrary conclusion, namely that it did have power under the EC Merger Regulation, to order divestment, it is obvious that the OFT investigation into that shareholding, and the European Commission's jurisdiction over it, would overlap. Exactly the same would be true had the Aer Lingus Appeal succeeded.

(4) The position is even more stark if the Ryanair Appeal is considered. Had that appeal been successful, then the issue of Ryanair's concentration in Aer Lingus would have been re-examined by the European Commission pursuant to Article 10(5) of the EC Merger Regulation. There can be no question but that the European Commission's exclusive jurisdiction under Article 21(3) of the EC Merger Regulation would have revived. Had the OFT, prior to such a decision, commenced its own investigation, then the effect of such a decision would have been to cause OFT to act in breach of Article 21, and infringe jurisdiction exclusively belonging to the European Commission.

79. In short, the CC and Aer Lingus contended that a case of "overlapping jurisdictions" could only arise where, because of on-going proceedings before the European Commission and EU Courts, Article 21 was contingently applicable, depending on the outcome of proceedings before the EU Courts. In such a case, any investigation by the OFT (or the CC) conducted prior to exhaustion of the European process would run the risk (depending on how the final European decisions went) of interfering with a jurisdiction belonging exclusively to the European Commission. It was for that reason, *pace* the CC and Aer Lingus, that the Chancellor held that the duty of sincere cooperation required NCAs not to conduct investigations until the European process had exhausted itself.

80. We consider that the CC and Aer Lingus are plainly right in their reading of the *Ryanair* C/A Decision, and that Ryanair's reading of that decision places far too wide a meaning on the term "overlapping jurisdictions" as that term was used by the Chancellor. This is clear when the decision is read as a whole:

(1) In paragraph [26(1)] of the *Ryanair* C/A Decision, the Chancellor recorded a proposition made by Ryanair that Article 21 of the EC Merger Regulation ceased to apply when, on 11 October 2007, the European Commission held in the Interim Relief Decision that it had no power to order Ryanair to divest itself of its minority shareholding.

(2) This was a proposition from which neither the OFT nor Aer Lingus dissented. The Chancellor, plainly, had some doubts. In paragraph [29] he stated:

> "Neither OFT nor Aer Lingus challenged this submission. Each of them accepted that the Prohibition Decision and/or the Interim Measures Decision terminated the application of Article 21 notwithstanding that the time for an appeal against each of them had not expired. I have considerable doubt whether that concession is rightly made. The decisions in question were to the effect there was no concentration with a community dimension. Each of them was subject to appeal to the General Court. Accordingly the appeal would determine whether or not Article 21 as a whole applied. The idea that pending such an appeal a member state is free, subject only to the duty of sincere cooperation, to apply its own competition legislation is surprising. The mere fact that a pending appeal does not, of itself, have any suspensory effect cannot alter the fact that the right of appeal exists. Until all rights of appeal have been exhausted there can be no certainty. If pending such an

> appeal a national body seeks to apply its national competition legislation to the same circumstances as are the subject matter of the appeal and the appeal is successful then that Member State will have infringed Article 21(3). It cannot be a defence that the judgment of the court of appeal came later for that judgment would, when given, be 'ex tunc', that is to say speaking of the time when the relevant acts occurred. Nor could the Member State plead ignorance for that is no defence. I can see much to commend an argument to the effect that Article 21 applies to alleged concentrations having a Community dimension unless and until it is conclusively determined that no such concentration exists. If that is correct then Article 21(3) applies until the Court of Justice has declared in some form that it does not and any time for appealing has expired."

(3) Because the point was not argued before him, the Chancellor accepted – but expressly without deciding whether it was correct – Ryanair's proposition. For present purposes, what matters however, is that the Chancellor was considering the duty of sincere cooperation in a context where the operation of Article 21(3) had (by virtue of the assumption he was required to make) lapsed but where it might, in the future, revive. If it did so, and a NCA like the OFT had begun its own investigation in the meantime, revival of the Article 21(3) exclusivity would immediately give rise to an infringement by the United Kingdom of Article 21(3) of the EC Merger Regulation.

(4) It is for that reason that the Chancellor expressed himself so emphatically as regards the duty of sincere cooperation in the context of "overlapping jurisdictions". This is clear from his conclusions:

> "40. I prefer the submissions of counsel for OFT and Aer Lingus. If the appeals of either or both Ryanair or Aer Lingus had succeeded there would have been an immediate clash of jurisdictions. The success of the Ryanair [A]ppeal would, on any view, have confirmed the application of Article 21 so that all steps taken by the OFT and Competition Commission under the reference assumed to have been made by OFT in the period the appeal was pending would have infringed Article 21(3). The duty of sincere cooperation, which had existed at all material times, necessarily required OFT to desist from making any reference during that period …
>
> 41. So also in the case of the Aer Lingus [A]ppeal, if the appeal were allowed it would establish that the Commission, not OFT had both the power to impose interim measures pending the resolution of the Ryanair [A]ppeal and the jurisdiction under Article 8(4) in respect of Ryanair's minority holding in Aer Lingus. In such circumstances any interim measures taken by OFT or the Competition Commission would have been to usurp, to that extent at least, the exclusive jurisdiction of the Commission. Once again, the due performance of

> the duty of sincere cooperation would have called for a period of abstention on the part of the OFT and Competition Commission and there would be no occasion to read down or disapply any provision of the Enterprise Act.
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> …
>
> 43. … The direct cause of this impediment [viz, the fact that the OFT Reference could not have been made until the Ryanair and Aer Lingus Appeals were finally determined] was the duty of sincere cooperation. The duty arose because of the ECMR, in particular, Article 21. Therefore, section 122(4) [of the 2002 Act] applied." (Emphasis added.)

81. In short, both the Ryanair and the Aer Lingus Appeals had the potential for causing the Article 21 exclusive jurisdiction to revive, which would have given rise to an infringement of the EC Merger Regulation had the OFT proceedings (and any CC proceedings arising out of them) already been on foot.

(6) Conclusion

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.

83. This is a case where there are parallel or concurrent jurisdictions:

(1) In the case of the Public Bid, the European Commission has exclusive jurisdiction.

(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.

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.

VII. CONCLUSION

85. For the reasons given in this Judgment, it is our unanimous conclusion that Ryanair's application for the CC's decision to continue with the Investigation to be quashed or stayed and for the decision to issue the Section 109 Notice similarly to be quashed or stayed, is rejected.

Marcus Smith Q.C. Clive Elphick Dermot Glynn

Charles Dhanowa
Registrar

Date: 8 August 2012

ANNEX 1

Decision of the Competition Commission
addressed to Ryanair and Aer Lingus dated 10 July 2012

COMPETITION COMMISSION

To:
Nicholas Levy of Cleary Gottlieb for Ryanair and
Alec Burnside of Cadwalader for Aer Lingus

From: Simon Polito
Group Chair

[redacted]

Date: 10 July 2012

Dear Mr Levy and Mr Burnside,

Ryanair / Aer Lingus Inquiry

Thank you for your submissions regarding the question of whether the CC has jurisdiction to proceed with the reference referred to below and related issues. The CC has now considered the views expressed and has decided how it should proceed.

It may be helpful to restate the background.

1. On 15 June 2012 the OFT referred to the CC under section 22 of the Enterprise Act 2002 ("EA") the completed acquisition by Ryanair ("RA") of 29.82% of the share capital of Aer Lingus ("AL") for investigation ("the reference").

2. The effect was to place a statutory duty on the CC to decide under section 35 EA whether a relevant merger situation has been created; and 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; and under section 38 EA to prepare and publish a report on its decisions within the time period permitted by section 39 EA. If the report contemplates the CC taking remedial action, it will then have a duty to take remedial action under section 41 EA, subject to there not being any material change of circumstances or special reason for deciding differently. The EA imposes no specific time period for the taking of remedial action.

3. On 19 June 2012 RA announced an intention to make a public bid to acquire the remainder of the share capital of AL. For the purpose of considering the CC's duty in respect of the reference, it is assumed that the bid will give rise to a concentration with a community dimension.

Against this background, the CC has decided as follows.

4. The CC does not consider that it should suspend the reference as a result of either the announcement of an intention to make a bid, the making of such a bid or notification to the European Commission ("EC") in due course, because:

    a. The General Court has previously confirmed that RA's then 29.82% shareholding in AL did not confer control within the meaning of the ECMR, indicating that its acquisition in itself did not amount to a concentration with a Community dimension.

    b. The CC has been in contact with the EC, who informed us that they would not at this stage anticipate that examination of the concentration resulting from any new bid would extend to consideration of the existing minority stake RA hold in AL which is the subject of the reference to the CC.

c. The CC has a statutory duty to proceed with its investigation of the reference.

5. The CC recognises its obligations under Article 4.3 of the Treaty on European Union, in particular, that it must not undermine the ability of the EC to complete any inquiries into or take and implement any decisions in relation to a concentration with a community dimension that falls to the exclusive competence of the EC under Article 21.3 EMCR. The CC does not believe that these obligations currently prevent it pursuing the reference and believes that it should continue with its inquiries where this is practicable. Equally it does not prevent the EC from pursuing its own inquiries or implementing any resulting decisions.

6. The CC also recognises the desirability of seeking reasonably to minimise the burden that overlapping inquiries by the CC and EC might place on parties and third parties. The CC believes, however, that, with cooperation by the parties and between the authorities, it should be possible to avoid parallel inquiries being "oppressive or mutually destructive." It intends to continue to work with DG Comp to see how the two authorities may best cooperate.

7. Accordingly, in the circumstances of this reference, the CC intends to proceed with the reference and expects parties to cooperate and to supply the documents and information necessary for it to do so.

8. The CC also sought your views on the application of section 77 EA. Contrary to the submissions of AL, the CC does not consider section 77(2)(b) EA applies to prevent RA making its public bid. It does not consider the bid is an arrangement in consequence of the acquisition of the current shareholding and does not therefore intend to take enforcement action under section 95(2) EA as suggested by AL.

9. With respect to section 77(2)(c) the CC will keep under review the question whether any further steps would constitute a transfer of ownership or control in the enterprises ceasing to be distinct.

10. The CC is considering whether it is appropriate to seek interim undertakings from RA and AL under section 80 EA for the purpose of ensuring that no pre-emptive action is taken that might prejudice the reference regarding the minority acquisition or impede the taking of any action which may be justified by the CC's decisions on the reference. The CC does not intend that any such undertakings should prevent the conduct by the EC of any inquiries or resulting action it may approve or require in relation to the concentration with a community dimension.

Yours sincerely

Simon Polito
Chair