Neutral Citation Number: [2012] EWCA Civ 643

Case No: C3/2011/2506/OTTRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Mr Justice Barling, Mr Blair QC and Mr Mather
2011 [CAT] 23

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2012

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HUGHES
and
LORD JUSTICE MCFARLANE

- -

Between :

RYANAIR HOLDINGS PLC	**Appellant**
- and -	
THE OFFICE OF FAIR TRADING	**1st Respondent**
- supported by -	
AER LINGUS GROUP PLC	**2nd Respondent**

- -
- -

Lord Pannick QC and Brian Kennelly (instructed by **Covington & Burling LLP**) for the **Appellant**
Daniel Beard QC and Julian Gregory (instructed by **the General Counsel, the Office of Fair Trading**) for the **1st Respondent**
James Flynn QC, Kelyn Bacon and Daniel Piccinin (instructed by **Cadwalader Wickersham & Taft LLP and Linklaters LLP**) for the **2nd Respondent**

Hearing dates : 24 - 25 April 2012

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Judgment

The Chancellor :

Introduction

1. This appeal concerns the interaction between the merger jurisdiction exercisable by the European Commission ("the Commission") under the EC Merger Regulation 139/2004 ("ECMR") and the similar jurisdiction exercisable by the Office of Fair Trading ("OFT") and the Competition Commission under the Enterprise Act 2002. At the risk of oversimplication:

   (1) Article 21 of the former confers exclusive jurisdiction on the Commission in relation to any 'concentration with a community dimension' and prohibits any Member State from applying its national legislation thereto.

   (2) Ss.22 to 24 of the latter requires the OFT to refer to the Competition Commission any 'merger situation' that may be expected to result in a substantial lessening of competition arising within the previous four months.

   (3) But s.122 of the latter enables the OFT to make a reference later than four months after the merger situation had arisen if "it could not have been made earlier" because of the ECMR or something done under it.

   The question in this case is whether in the circumstances I shall relate OFT was entitled to refer to the Competition Commission a relevant merger situation which had arisen more than four months before because it had been the subject matter of an exercise of the Commission's jurisdiction under ECMR.

2. Both the appellant, Ryanair Holdings plc ("Ryanair"), and the second respondent, Aer Lingus Group plc ("Aer Lingus"), are well known air lines. In each case their shares are quoted on the London Stock Exchange. Between 27th September and 5th October 2006 Ryanair acquired 19.2% of the issued share capital of Aer Lingus. On the latter date Ryanair publicly announced its intention to bid for the outstanding 80.8%. Such bid was duly made by Ryanair on 23rd October 2006. Its terms included the usual term that the bid would lapse if there was a reference to a merger authority in either the UK or the European Union. On 30th October 2006 Ryanair lodged with the European Commission ("the Commission") a notification under Article 4 of ECMR of its proposed concentration by acquiring the issued share capital of Aer Lingus. By 28th November 2006 Ryanair had increased its holding in Aer Lingus to 25.2%.

3. By its decision made on 20th December 2006 the Commission concluded that the activities of Ryanair had given rise to a single concentration for the purposes of Article 3 ECMR and initiated 'Phase II' proceedings. One consequence of that conclusion was that Ryanair's bid for the remaining share capital in Aer Lingus lapsed. By a further decision ("the Prohibition Decision") made by the Commission on 27th June 2007 it was declared, pursuant to Article 8(3) ECMR, that such concentration was incompatible with the Common Market and therefore prohibited.

By an application made to the Court of First Instance on 10th September 2007 Ryanair sought the annulment of the Prohibition Decision.

4. In the meantime on 25th January and 7th June 2007 Aer Lingus asked the Commission to require Ryanair to divest itself of the shares in Aer Lingus it had already acquired and to take interim measures under the ECMR to ensure that it did. On the same day as the Prohibition Decision was made, namely 27th June 2007, the Commission indicated to Aer Lingus that now that the proposed merger of Ryanair with Aer Lingus was prohibited the Commission had no power to order Ryanair to divest itself of the shares in Aer Lingus it had already acquired, but suggested that the relevant body in the UK might. In the light of that response, on 12th July 2007, Aer Lingus wrote to various national merger authorities, including the first respondent, the OFT, inviting them to agree which of them had the power to require Ryanair to divest itself of the shares it held in Aer Lingus. In its reply dated 3rd August 2007 OFT indicated its belief that Article 21(3) ECMR precluded it from doing so. On 17th August 2007 Aer Lingus invited the Commission (1) to open proceedings against Ryanair under Article 8(4) ECMR, (2) to adopt interim measures under Article 8(5) to prevent Ryanair from exercising the voting rights of the shares it had acquired and, alternatively, (3) to state formally that it did not have the power to adopt such measures. On 11th October 2007 the Commission formally determined ("the Interim Measures Decision") that it did not have power to open proceedings against Ryanair or to order Ryanair to dispose of its holding in Aer Lingus but formally determined that it did not have the power to interpret Article 21 ECMR in the manner Aer Lingus sought, namely as enabling it to take interim measures. On 19th November 2007 Aer Lingus appealed against this determination. In addition it applied for the suspension of the Interim Measures Decision and for interim measures to be imposed by the Court of Justice so as to prevent Ryanair exercising the voting and other rights conferred by its holding in Aer Lingus. Its application for interim measures was rejected by the President of the General Court on 18th March 2008. He did so on the basis that Aer Lingus had not established a prima facie case [99] and [107] nor had it established the necessary degree of urgency [115]. On 6th July 2010 the General Court dismissed both the application of Ryanair to annul the Prohibition Decision referred to in paragraph 3 and the appeal of Aer Lingus from the Interim Measures decision. There was no further appeal against either decision. Accordingly proceedings in the Court of Justice of the European Union came to an end but Ryanair still had its minority stake in Aer Lingus, by then increased to 29.8%.

5. On 30th September 2010 OFT gave notice to Ryanair under s.31 Enterprise Act 2002 seeking information from Ryanair to enable it to determine whether a merger situation had arisen such as it was required to refer to the Competition Commission. Ryanair objected on the ground that the time within which OFT might have made such a reference had expired on 28th October 2007. OFT disagreed and on 7th January 2011 Ryanair applied to the Competition Appeal Tribunal ("CAT") for a declaration that the time within which OFT might refer any merger situation arising from the acquisition, actual or proposed, by Ryanair of shares in Aer Lingus had expired.

6. That application was heard by CAT on 10th and 11th March 2011. On 28th July 2011 CAT dismissed the application. Paragraph 134 of its decision contains a helpful summary of its reasons in these terms:

> "For the reasons given above, the Tribunal unanimously concludes that:
>
> (a) the Ryanair Appeal and the Aer Lingus Appeal [to the General Court] each gave 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 [Enterprise] 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."

Ryanair now appeals with the permission of Davis LJ. Respondent's notices have been issued by both OFT and Aer Lingus.

7. In order to address the arguments presented to us it is necessary to consider the detailed provisions of both ECMR and the Enterprise Act and the reasoning of CAT in its decision under appeal.

ECMR

8. The purpose of ECMR was to provide a 'one stop shop' system of merger control in respect of concentrations the impact of which would be felt beyond the borders of any one member state (see recitals (8), (14) and (18)). The Regulation applies to all concentrations with a community dimension. The concept of a community dimension is defined in Article 1. A concentration is defined in Article 3. Article 2 requires the Commission to appraise such concentrations with a view to establishing whether or not they are compatible with the common market. In short a concentration, as defined in Article 3, is "deemed to arise where a change of control on a lasting basis results from" a merger of two or more previously independent undertakings or the acquisition by one of direct or indirect control of another. Control is widely defined in Article 3.2 to 3.5. A community dimension, as defined in Article 1, is based on turnover. Article 2.3 requires the Commission to declare as incompatible with the common market:

> "A concentration which would significantly impede effective competition in the common market or in a substantial part of it in particular as a result of the creation or strengthening of a dominant position.."

9. Articles 6 to 8 deal with the examination by the Commission of concentrations notified to it under Article 4, its powers and decision in relation thereto. Thus Article 7 precludes the further implementation of the concentration notified to the Commission pending the conclusion of the Commission. Article 8 confers wide powers on the Commission to require concentrations to be dissolved and empowers it to take interim measures. Article 9 enables the Commission to refer a notified concentration to the competent authority of a Member State. Article 10 sets time limits within which the Commission must complete its tasks. Article 16 provides that the Court of Justice should have unlimited jurisdiction to review decisions of the Commission in respect of fines or periodical payments ordered by the Commission.

10. Article 21 is, so far as relevant, in the following terms:

> "Application of the Regulation and jurisdiction.
>
> 1. This Regulation alone shall apply to concentrations as defined in Article 3…
>
> 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…"

11. It is also relevant to the issues on this appeal to consider certain provisions of the Treaties. The duty of sincere co-operation referred to by CAT in paragraph 134(a), quoted above, was at the time Ryanair acquired its minority shareholding contained in Article 10 of the EC Treaty. In that form it provided:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from any action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

This was re-enacted in the Treaty on European Union Article 4.3 in these terms:

> "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."

It was common ground before us that though the wording was different the content of the obligation was the same.

12. I should also refer to some provisions of the Treaty on the Functioning of the European Union. Article 263 confers jurisdiction on the Court of Justice to review the legality of all acts of, among others, the Commission. An application for that purpose is to be commenced within two months of the publication of the measure. If the action is well founded the Court of Justice is to declare the act concerned to be void (Article 264). The Commission would then be obliged to take the necessary measures to comply with the judgment (Article 266). Articles 278 and 279 provide:

> "278. Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.
>
> 279. The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures."

Enterprise Act 2002

13. The provisions for the regulation of mergers in this jurisdiction which do not have a community dimension are contained in Part 3 Enterprise Act 2002. S.23 provides that a "merger situation" is created if two or more enterprises have ceased to be distinct enterprises, as defined in s.26, at a time or in circumstances falling within s.24 and the turnover of the enterprise being taken over exceeds a specific amount. The relevant time limit is imposed by s.24 in these terms:

> "(1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if-
>
> > (a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day; or
> >
> > (b) notice of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be distinct enterprises has not been given in accordance with subsection."

14. S.22(1) provides:

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the [Competition] Commission if the OFT 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.

A similar duty is imposed by s.33 in relation to anticipated mergers. It provides:

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the [Competition] Commission if the OFT believes that it is or may be the case that-
>
> > (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

> (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

15. OFT is entitled to request the production of information in relation to completed mergers under s.31. In the case of both types of merger ss.35 and 36 specify the questions to be decided by the Competition Commission. S.38 provides for the Competition Commission to make reports. S.39 imposes time limits for those reports. The primary time limit for which s.39(1) provides is 24 weeks from the date of the reference. If there are special reasons so to do that period may be extended by 8 weeks, s.39(2). If the delay is due to the failure of a specified person to provide information then time may be extended until that information has been supplied, s.39(4).

16. Chapter 4 deals with the powers of the OFT and the Competition Commission. Ss.71 to 76 provide for the position before any reference is made. S.71 empowers it to seek and accept undertakings to prevent preemptive action. In the absence of an undertaking s.72 confers on OFT wide powers to prevent preemptive action by prohibition or the imposition of obligations. Ss.77 to 81 impose certain statutory obligations where a reference has been made. Ss.82 to 84 deal with final orders. Ss.92 and 93 impose obligations on OFT to police undertakings and orders. S.103 imposes on OFT a duty of expedition in order to prevent or remove uncertainty.

17. S.122 is headed "Primacy of Community Law". Subsections (3) to (5) are in the following terms:

> "(3) The duty or power to make a reference under section 22 or 45(2) or (3), and the power to give an intervention notice under section 42, shall apply in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within section 24 if the condition mentioned in subsection (4) is satisfied.
>
> (4) The condition mentioned in this subsection is that, because of the European Merger Regulations or anything done under or in accordance with them, the reference, or (as the case may be) the reference under section 22 to which the intervention notice relates, could not have been made earlier than 4 months before the date on which it is to be made.
>
> (5) Where the duty or power to make a reference under section 22 or 45(2) or (3), or the power to give an intervention notice under section 42, applies as mentioned in subsection (3),

> references in this Part to the creation of a relevant merger situation shall be construed accordingly."

18. There is no doubt that when OFT sought information from Ryanair under s.31 on 30th September 2010 it was more than four months since Ryanair's acquisition of a minority stake in Aer Lingus made on 6th October 2006. Accordingly, it was out of time for making a reference under s.22 unless it was entitled to rely on the provisions of s.122(4). Prima facie that would not have been a problem but for the fact that on 27th June 2007 the Commission had declared the concentration arising from Ryanair's acquisition of shares in Aer Lingus and its offer to acquire the remainder to be incompatible and therefore prohibited.

The Decision of CAT

19. CAT recorded in paragraph 70 that it was the submission for Ryanair that on the making of the Prohibition Decision on 27th June 2007 the provisions of Article 21(3) ECMR automatically ceased to have effect with the consequence that it was no longer a bar to a merger reference under s.22. Accordingly, even if OFT had been precluded by Article 21(3) from making a reference before that date it could have done so, but did not, at any time in the ensuing four months. OFT and Aer Lingus responded, as recorded by CAT in paragraph 69, that such a step remained prohibited by Article 21(3) until 17th September 2010 when the time for appealing against the decisions of the General Court made on 6th July 2010 expired. The reason on which OFT and Aer Lingus relied was not that the operation of Article 21(3) continued until the time for appealing had expired but because the duty of sincere cooperation imposed by the Articles I have referred to in paragraph 11 above required OFT to avoid the risk of clashing jurisdictions and conflicting decisions. It is now accepted that such risk or the duty of sincere cooperation sufficiently arises from ECMR or something done thereunder to come within s.122(4).

20. In paragraphs 72 to 106 CAT considered in detail and at length the existence and extent of risk in respect of both the Aer Lingus appeal and the Ryanair appeal. It considered that such a risk existed in relation to both. In relation to the Aer Lingus appeal it concluded (paragraph 90):

> "Accordingly, had the domestic merger rules been applied before the Aer Lingus Appeal was finally resolved, this would have given rise to a *risk* that the OFT/Competition Commission would be infringing Article 21(3) of the Merger Regulation. That risk would continue at least until the Aer Lingus Appeal (and any subsequent appeal to the ECJ) had been determined. …we are of the view that the risk here was of such a nature as to trigger the duty of sincere cooperation under Article 10 EC,

> with the result that the OFT/Competition Commission were under an obligation to avoid the risk."

21. CAT then considered an argument of counsel for Ryanair to the effect that Article 242 (now Article 278 quoted in paragraph 12 above) entitled and required all concerned to act on the basis that, absent some interim measure, the decision under appeal was valid and binding. CAT rejected this argument on the grounds set out in paragraph 91 in these terms:

> "[The Article]'s effect is merely to make clear that a measure which is the subject of an action for annulment is not suspended pending the outcome of the appeal, so that for example any mandatory provisions of the challenged measure must be complied with, subject to the grant of interim relief. The duty of sincere cooperation is engaged by virtue of the *uncertainty of ultimate outcome* which an appeal to the General Court may generate. This uncertainty is not affected by Article 242, which does not relate to the outcome of an appeal."

22. CAT also considered that the risk of a clash of jurisdictions and inconsistent decisions existed in relation to the Ryanair appeal too (paragraphs 93 to 96). It noted that the European and domestic systems are not identical but rejected (paragraph 97) a submission to the effect that such differences precluded the risks on which OFT and Aer Lingus relied. They concluded (paragraph 102):

> "…the fact that the two merger regimes differ in the respects relied upon by [Counsel for Ryanair] would not exclude the risk of infringement of Article 21(3) of the Merger Regulation or the risk of inconsistent assessments and/or outcomes sufficient to engage the Article 10 EC duty, in the event that domestic merger rules were applied before the Ryanair Appeal and the Aer Lingus Appeal had been finally determined."

They expressed their final conclusion in substantially the same terms in paragraph 106.

23. CAT then turned to what was required of the OFT in order to comply with its duty of sincere cooperation. Ryanair had submitted that performance of the duty did not predicate withholding a reference under s.22. It was suggested that the reference could have been made but the procedure in the Competition Commission later

suspended to avoid any real risk of conflict then apparent. This was rejected by CAT for at least three reasons. First, as stated in paragraph 115:

> "..once the OFT has set the statutory procedure in motion by making a reference under section 22, the Competition Commission must continue to the end of the process.."

Second, any impediment to suspending the procedures in the Competition Commission would not be read down under the principles of **Factortame** if there were other ways of avoiding the conflict (paragraph 117). Third, the management of the risk of conflict between the jurisdictions provided by Parliament was s.122(4).

24. CAT concluded in paragraph 125:

> "It follows that in our view subsection 122(4) 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. Where subsection 122(4) applies it also has the effect of preserving the possibility of a reference under section 22 pending the final resolution of the EU process."

25. Ryanair also submitted that even if s.122(4) might apply in principle it could not do so on the facts of this case because more than four months had elapsed between the Prohibition Decision made on 27th June 2007 and the appeal of Aer Lingus against the Commission's determination that it had no power to order interim measures on 19th November 2007. CAT observed that this submission could not be conclusive because of its decisions in relation to the Ryanair appeal. In any event it rejected it on the ground that (paragraph 130):

> "The circumstances here are such that the OFT had very good reason to believe, and did believe, that a relevant appeal to the General Court was highly likely to be commenced. Indeed the OFT informed Aer Lingus of that belief (see letter quoted at paragraph 11 above). If a competent authority of a Member State reasonably believes that the particular circumstances are such that if it applies domestic merger rules a risk of impermissible conflict would be likely to arise, it is difficult to avoid the conclusion that, in the light of the duty of sincere cooperation, it ought not to apply those rules until it knows the expected event (*in casu* a challenge by Aer Lingus to a decision of the Commission) is not in fact going to occur. If we are right in this regard the impediment to a section 22 reference arose sometime in July/August 2007 or at the latest on 11 October

> 2007. In those circumstances the relevant uncertainty (and the impediment under subsection 122(4) of the Act) persisted until 17 September 2010, when the time for appealing against the General Court's judgment expired."

CAT then dealt with issues not now material and concluded with the summary I have quoted in paragraph 6 above.

The submissions of counsel and my conclusion

26. Counsel for Ryanair submits that the decision of CAT is wrong. He summarised his submissions in the form of four propositions, namely:

> (1) The jurisdiction of the Commission in relation to Ryanair's proposed takeover of Aer Lingus under ECMR terminated on its Interim Measures Decision made on 11th October 2007 with the consequence that thenceforth Article 21 ceased to apply.
>
> (2) Although the duty of sincere cooperation continued, because of the rights of appeal available to both Ryanair and Aer Lingus, and was the only European law constraint on OFT, it did not preclude OFT from making a reference under s.22 Enterprise Act 2002 of Ryanair's proposed takeover of Aer Lingus to the Competition Commission as the risk of conflict did not arise at that stage.
>
> (3) S.122(4) does not apply because for either or both the preceding reasons there was nothing to preclude OFT making the necessary reference within the four month period.
>
> (4) The submissions for Ryanair are to be preferred because the consequence will be that OFT will have power to take any necessary interim steps; by contrast neither national authorities nor the Commission will enjoy such powers if the contrary submission is accepted.

27. I note that the first proposition differs from that made to CAT in that reliance is now placed on the Interim Measures Decision made on 11th October 2007; before CAT it was the Prohibition Decision made on 27th June 2007. In support of his first proposition counsel for Ryanair drew our attention to the views of both the Commission and the President of the General Court as supporting it. Both appear from the judgment of the President (to be found in [2009] 4 CMLR 1244) given on 18th March 2008 on the application for interim measures made by Aer Lingus on 19th November 2007 referred to in paragraph 4 above. The views of the Commission are summarised in these terms in paragraph 79:

> "Thirdly, the Commission submits that once the single concentration defined during the administrative procedure is broken up, Article 21(3) of the Regulation no longer precludes

> the Member States from applying their national legislation on competition to such a minority shareholding."

28. In paragraphs 101 and 102 the President said:

> "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 242 EC, 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."

29. 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 on appeal came later for that judgment would, when given, be 'ex tunc', that is to say speaking of the time when the relevant events 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.

30. Nevertheless neither respondent felt able to adopt this argument. If it were to be considered in proper detail it would require argument which we have not had. Further, in the light of the observations of the President I have just quoted, it would be necessary to consider if there should be a reference to the European Court of Justice on the meaning and application of Article 21. Accordingly I accept for the purposes of this appeal (but do not decide

31. the correctness of) the first of the four propositions advanced by counsel for Ryanair.

32. In support of his second proposition counsel for Ryanair referred us to the source of the obligation of sincere cooperation in the Articles I have quoted in paragraph 11 above. Counsel for Ryanair accepted that OFT was subject to that duty but submitted that it did not preclude a reference under s.22 Enterprise Act even if, later, it would necessitate some suspension of the activities of OFT or the Competition Commission to await the outcome of the appeals. He relied on three authorities, namely **MTV Europe v BMG Records (UK) Ltd** [1997] 1 CMLR 867; **Masterfoods Ltd v HB Ice Cream Ltd** [2000] ECR I-11369 and my judgment in **National Grid Electricity Transmission plc v ABB Ltd** [2009] EWHC 1326.

33. In **MTV Europe v BMG Records (UK) Ltd** [1997] 1 CMLR 867 MTV complained to the Commission that certain recording companies and their royalty collection society had infringed Articles 85 and 86 (now Articles 101 and 102 TFEU). There

were also proceedings brought in the High Court by the collecting society against MTV to recover royalties alleged to be due and proceedings brought by MTV against the recording companies and the collecting society. Those defendants applied for a stay of the proceedings until the Commission had determined the complaint. The judge concluded that the action should be allowed to proceed until the stage of setting down and granted only a limited stay. The defendants appealed on the basis that a stay should be granted so as to preclude preparations for trial also. Counsel for the appellant relied on the judgment of the Court of Justice in **De Limitis v Henninger Brau AG** [1991] 1 ECR 935. The appeal was dismissed. Sir Thomas Bingham MR explained in [28]:

> "There is, in my judgment, nothing which suggests that in a case where the answer is not clear in favour of the plaintiff or the defendant, the national court must at once stay the proceedings pending a decision by the Commission. The Court's concern is to avoid inconsistent decisions. There is no ground for seeking to prohibit the preparation of an action for trial so long as it does not lead to a decision in advance of a decision by the Commission."

34. This conclusion is supported by the later decision of the Court of Justice in **Masterfoods Ltd v HB Ice Cream Ltd** [2000] ECR I-11369. In that case proceedings in the Republic of Ireland brought by Masterfoods were followed by a complaint by Masterfoods to the Commission in relation to the same conduct by the defendants in the action. The Supreme Court of the Republic granted a stay and referred certain questions to the Court of Justice. In paragraphs 55 to 57 the Court of Justice ruled:

> "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."

Thus it is clear from paragraph 55 that it is for the national court to decide what steps are required by way of sincere cooperation.

35. In **National Grid Electricity Transmission plc v ABB Ltd** [2009] EWHC 1326 I sought to apply those principles. In paragraph 24 I said:

> "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."

36. In the light of those authorities counsel for Ryanair submitted that it is for the national court to determine what is required to satisfy the duty of sincere cooperation and that it did not necessitate OFT refraining from making any reference at all. He submitted that a reference could be made and pursued so long as the Competition Commission abstained from reaching any conclusion before the Court of Justice had reached its conclusion and ensured that any conclusion arrived at thereafter was consistent with the decision of the Court of Justice.

37. These submissions are challenged by counsel for OFT and for Aer Lingus. They contend that the duty of sincere cooperation must extend to avoiding any risk of a clash of jurisdictions, not only inconsistent final conclusions. They contend that the

submissions for Ryanair take too limited a view of what the duty of sincere cooperation requires. They support the reasoning and conclusions of CAT.

38. 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.

39. Counsel for OFT and Aer Lingus also rely on the provisions of the Enterprise Act to which I have referred. They point out that they lay down a strict timetable from initial reference to final conclusion without any power comparable to that of a court to stay proceedings at any stage if it thinks fit. There is no point short of a decision by the Competition Commission at which the process could be halted in the manner suggested by Ryanair. Moreover by then the exercise of UK jurisdiction over matters which will also be directly relevant in Europe, if jurisdiction there be established, has in any event been extensive. For this reason, if no others, the three cases relied on by counsel for Ryanair are distinguishable. The response of the latter is to suggest that the provisions of the Enterprise Act imposing a timetable should be 'read down' under s.2(1) European Communities Act 1972 as "subject to the requirements of EU law" and if that is not sufficient disapplied altogether under **Factortame.** The riposte of counsel for OFT and Aer Lingus is to point out that s.122(4) is the mechanism provided by Parliament for resolving potential clashes of jurisdiction or inconsistent decision. In those circumstances, so they contend, there is no occasion to read down or disapply any provision of the Enterprise Act.

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 appeal 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. If there was no such reference then there would be no occasion to read down or disapply any provision of the Enterprise Act. The consequences of the OFT's self-denial would have been dealt with in accordance with s.122(4).

41. So also in the case of the Aer Lingus appeal, 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 appeal 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.

42. If, by contrast the appeals were unsuccessful and the time for any further appeal had expired then the risk of conflicting jurisdictions in respect of the proposed takeover of Aer Lingus by Ryanair would disappear. In those circumstances the OFT's duty of sincere cooperation would cease to apply leaving it free to make such investigations or references it wished. Accordingly, I conclude that so long as the appeals of Ryanair and Aer Lingus were pending and, after their conclusion, the time for any further appeal still running the duty of sincere cooperation applied. Its due observance required OFT to desist from making any reference or, subject to the possibility referred to in paragraph 43 below, taking any other action under the domestic legislation. Thus, while I accept the first part of the second proposition advanced by counsel for Ryanair I reject the suggested consequence that "it did not preclude OFT from making a reference under s.22 Enterprise Act 2002 of Ryanair's proposed takeover of Aer Lingus to the Competition Commission as the risk of conflict did not arise at that stage". A risk did arise and the duty of sincere cooperation required OFT to avoid it by refraining from making any reference until all appeals had been dismissed.

43. I turn then to the third submission. Counsel for Ryanair accepted that if either of his first two propositions was rejected then s.122(4) applied. I agree. In the view I have taken a reference of a merger situation in respect of Ryanair's proposed takeover of Aer Lingus could not have been made until both the Ryanair and Aer Lingus appeals had been finally determined. The direct cause of this impediment was the duty of

sincere cooperation. The duty arose because of the ECMR, in particular, Article 21. Therefore s.122(4) applied.

44. The fourth submission of counsel for Ryanair suggested that the consequence of a conclusion upholding the decision of CAT was that neither OFT nor the Commission would have jurisdiction to impose interim measures while the appeals from the Prohibition Decision and the Interim Measures Decision were pending. Appeals to the consequences of an adverse decision should be regarded with caution because the consequences are often assumed not established. CAT expressed doubts in paragraph 105 of its decision whether the views expressed by the President in the Interim Measures Decision went as far as counsel for Ryanair contended. It is at least possible that an order made by OFT under s.72 Enterprise Act expressly to preserve the position pending the decision of the Court of Justice on the appeals would be regarded as consistent with, indeed an implementation of, the duty of sincere cooperation. Such a course seems to be envisaged in the concluding sentence of paragraph 102 of the President's judgment quoted in paragraph 28 above and would not predicate that OFT was free to make a reference. Second, even if the dilemma is real it is for the European Union in consultation with the Member States, not this court, to resolve it.

45. For all these reasons I consider that the decision of CAT was correct for the reasons it gave. In those circumstances it is not necessary to consider the further or additional reasons raised in their respective respondents' notices by either OFT or Aer Lingus. I would dismiss this appeal.

Lord Justice Hughes

46. I agree.

Lord Justice McFarlane

47. I also agree.