IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1174/4/1/11

Victoria House
Bloomsbury Place
London WC1A.2EB

Thursday, 10 March 2011

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)
MICHAEL BLAIR QC
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

OFFICE OF FAIR TRADING

Respondent

- supported by -

AER LINGUS GROUP PLC

Intervener

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H E A R I N G (DAY 1)

APPEARANCES

Mr. John Swift QC, Mr. Alistair Lindsay and Mr. Josh Holmes (instructed by Covington & Burling LLP) appeared for the Applicant, Ryanair Holdings plc.

Mr. Daniel Beard and Mr. Julian Gregory (instructed by the General Counsel, Office of Fair Trading) appeared for the Respondent, Office of Fair Trading.

Mr. James Flynn QC and Ms Kelyn Bacon (instructed by Linklaters LLP) appeared for the Intervener, Aer Lingus Group plc.

THE PRESIDENT: Mr. Swift, good morning.

MR. SWIFT: Good morning, sir. Good morning, members of the Tribunal.

THE PRESIDENT: Before you start, I have just two pleasant duties. First of all to welcome the MA students from City University who are here to listen to the case, so welcome, I hope you find it interesting. The second matter, Mr. Beard is to congratulate you on your recent appointment to Silk, it is very well deserved and presumably this is one of your first appearances since then?

MR. BEARD: Yes, I think there are still three weeks before Her Majesty can realise the error of her ways! (Laughter)

THE PRESIDENT: There is still time. I hope I have not missed anyone else out who has taken Silk. Mr. Swift?

MR. SWIFT: May it please the Tribunal, I would also like on behalf of the front row to add our congratulations to Mr. Beard, without commenting on the nature of his client's case today. (Laughter).

THE PRESIDENT: You are going to do that in a minute presumably?

MR. SWIFT: Representations: I appear for Ryanair together with Mr. Lindsay and Mr. Holmes, counsel on my right Mr. Beard QC and Mr. Julian Gregory for the OFT, Mr. James Flynn QC and Miss Kelyn Bacon for Aer Lingus, together with Mr. Alec Burnside and Mr. Eamonn Doyle of Linklaters.

The Tribunal will have before it three bundles, the core bundle and two authorities. I trust they came through all right?

THE PRESIDENT: They did and they have been very carefully nurtured ever since, there have been additions and subtractions and so they are well honed.

MR. SWIFT: Timing.

THE PRESIDENT: Yes, we are assuming, because we have very helpful written submissions – quite a lot of them – and is there any reason why we are not going to finish today?

MR. SWIFT: I expect to be two hours. Mr. Beard says he expects to be one to one and a half hours, Mr. Flynn 45 minutes.

THE PRESIDENT: So we are on the cusp, are we?

MR. SWIFT: Well, I am in the hands of the Tribunal, if you want me to move on faster I am happy to move on faster.

THE PRESIDENT: Well, as I say, we have quite a long skeleton ----

MR. SWIFT: We have long skeletons.

THE PRESIDENT: And we have read those.

MR. SWIFT: May I start with what I call a "prologue". In this appeal there is one question before the Tribunal which is: was the time bar decision of the OFT on 4th January 2011 lawful or unlawful? If unlawful it must be annulled. The answer is, in our submission, it is unlawful, and there is a very simple route for the Tribunal to adopt to arrive at that conclusion. It lies in the OFT's decision to let the four months run post 27th June 2007, which was the date of the European Commission's prohibition of Ryanair's proposed acquisition of Aer Lingus, pass without making any reference to the Competition Commission if the statutory conditions were met. This was not an omission in the sense of doing nothing, it was a decision that there was a legal prohibition against the OFT making such a reference.

The OFT took that decision in August 2007, and it took it against the clearest advice from the Director General of Competition European Commission that there was no such prohibition. He did not tell anybody about it other than Aer Lingus or the Competition authorities.

I do not know why the OFT gambled in such a way in relying on its own judgment. It may have been expecting a legal challenge from Aer Lingus, but none came. It gambled and, in my submission, it lost. It was put on notice by the order of the President of the General Court in March 2008 that the President agreed with everything the Commission had been telling the OFT in the summer of 2007.

THE PRESIDENT: It would be too late by then anyway, would it not?

MR. SWIFT: Yes.

THE PRESIDENT: The four months that you rely on would have expired anyway by then.

MR. SWIFT: That was the first time it is being told by somebody other than DG Comp that there was no prohibition.

What the Tribunal is now seeing is an *ex post* rationalisation by the OFT to seek to justify the decision that it took in August 2007. In my submission, it is a peculiarly unattractive position for any domestic regulator to take. It relies on an ability to maintain a total silence as to its intentions over a period of three years from the prohibition decision and then to launch an inquiry in September 2010 using its s.31 powers under Enterprise Act against a company which had reason to believe that time had run out long before against the OFT.

Moreover, it relies on an argument which places itself in the position of a Member State owing Treaty obligations to the Community institutions. Yet it comes before this Tribunal with no backing from the European Commission and on the authority of a line of cases which cannot be force fitted into the context before this Tribunal.

In my submission, I have to say that in respect of the OFT's conduct since the summer of 2007 it has behaved erratically, without transparency and, above all, unlawfully in claiming a jurisdiction now that it should have, and could have, exercised in the four month period after the European Commission prohibited Ryanair's acquisition of control over Aer Lingus.

Erratic – why? A wilful disregard of the clearest advice given to it by the European Commission in the summer of 2007.

No transparency – why? Failing to put Ryanair on notice within the four month statutory deadline that it would exercise its jurisdiction to make a reference to the Competition Commission after the exhaustion of any appeals that appeared to the OFT likely to be made against the European Commission's decision.

Unlawful – not just once but twice. Once in 2007 and again in 2011 asserting a right to exercise jurisdiction on the basis of Article 10 of the Treaty. It is not, in my submission, a good record.

THE PRESIDENT: Can I just ask you, what does all that go to? Am I right in understanding that it is more or less common ground that we are dealing with a binary point of law? Either there is a time bar that applies or it does not.

MR. SWIFT: Yes.

THE PRESIDENT: Do those points go to anything?

MR. SWIFT: Yes, they do.

THE PRESIDENT: To the time bar?

MR. SWIFT: Yes, they do.

THE PRESIDENT: As opposed to how people have behaved?

MR. SWIFT: Yes, they go to the time bar. They say that there was no legal prohibition operating against the OFT from 27th June for the following four months. Because the OFT did not take a decision during that period it lost the jurisdiction and it cannot resurrect it.

THE PRESIDENT: No, I follow that, yes. But the transparency in all the other points do not actually affect ----

MR. SWIFT: Well no, transparency goes to a separate point. Transparency goes to a point that if the OFT is relying for the first time on a new argument, an argument that was never before put to Ryanair or anybody else, and it comes three and a half years later in September 2010 and says: "This is the general principle, and moreover I am applying it in your case", then it has a duty of fairness, and a duty in accordance with legal certainty to make its marker within the four month period. It cannot come along three and a half years after the event

and say: "We now have a right to argue a quite separate case under Article 10 of the Treaty. That is why transparency is relevant to the exercise of power.

THE PRESIDENT: Well you are going to have to explain that to me a bit more because I understood we were dealing with either there is a time bar or there is not, not with another ground of challenge to the time bar decision that even if they are right and they are not time barred they cannot do it, they cannot refer to the Commission because they have acted unfairly or in a way that lacks transparency, that is the point. I just want to be sure if you are raising another ground or whether you are just, quite understandably, that is your case, saying that things should haven panned out differently.

MR. SWIFT: We can come to it later on, but we are saying that there are three grounds on which the OFT cannot support its argument under Article 10 of the Treaty. The first is what I might call the 'aspects of law' and that is that *Masterfood* does not apply and there are no risks of conflict or inconsistency; those points together. There is a separate argument that says: "In the interests of legal certainty you, the OFT, are time barred because you should have signalled your intention to take this step within the four month period after 27th June 2007", that is in the skeleton, that is the argument which we are making. In other words, that says whatever the merits that the OFT may have in advocating this policy that Article 10 acts as a prohibition in the circumstances of this case it is not open to the OFT to argue that point.

THE PRESIDENT: Well that is not in your notice of appeal. Your notice of appeal, just looking at a summary, says they are time barred. It does not say that even if they are not time barred they cannot argue the point because of the way they have behaved. As I read it, anyway, there is a binary question of law, and I thought that was common ground, that it was a question of law as to whether they are time barred or not.

MR. SWIFT: The question of law also involves the question of the principle of legal certainty.

THE PRESIDENT: Anyway, sorry, you carry on Mr. Swift, we will come to it.

MR. SWIFT: Still in my prologue, as it were, the principle for which the OFT contends is as follows: that with effect from the decision of the Commission in 2007 prohibiting Ryanair from acquiring control of Aer Lingus, the OFT would have been in breach of Article 10 EC (now Article 4 TEU) had it made a reference of the minority stake to the CC or taken any steps in relation thereto until the expiry of appeals from that decision and appeals against any later decision that the OFT considers might also have a bearing on its jurisdiction. Whatever the legal inferences to be drawn from the OFT's conduct in this case, it is at least, in my submission, relevant to track through the process from 2007 until the decision to

exercise of s.31 powers in September 2010, because the first time this principle emerges is 17th November 2010. No prior advice under sections 122(1) and 122(2) of the Enterprise Act, and I will come to that, no warnings or notices to Ryanair over a four year period and, indeed, not even the bare bones of an Article 10 justification when the OFT resumed, well started its procedure in September 2010.

Yes, our submission is, and I thought that we had set it out in the skeleton, that if the OFT is going now to come to the Tribunal to argue that it is not time barred, which is a "yes" or "no" answer, it should have made a decision within four months so that everybody who might be affected by that decision would know where they were. As it is we know that Ryanair made a further acquisition of shares in 2008.

Briefly, going back to the single simple issue, the OFT was under a duty to take a decision within a tightly prescribed timetable, established by Parliament, it decided not to use its powers of investigation thus disabling it from being in a position to make reference to the CC. Limitation periods set by Statute are the bedrock of the principle of legal certainty, affecting the rights of individuals and the institutions of the State. Colloquially, this issue is known as "use it or lose it".

In this case, in my submission, by reason solely of its own misjudgement in 2007, the OFT lost their jurisdiction and in those circumstances the time bar decision should be quashed.

The structure of the opening is as follows. It is in five parts. Part 1 describes some key features of the legal and factual matrix of this appeal, Part 2 addresses the reasoning in the OFT time bar decision of 4th January 2011 and the development of that reasoning in grounds 1 and 2 of the OFT's defence. Part 3 is directed to the OFT's case on the interpretation of Article 21(3) ECMR, that is its third ground, a point which was not relied on in the time bar decision which is, strictly speaking, in my view inadmissible, but which we will address. Part 4 is directed at the points made by Aer Lingus. We found it extremely difficult to interweave our comments on the Aer Lingus intervention because they do appear to be striking out on an entirely separate argument from that advanced by the OFT, and Part 5, if I get there, consists of some concluding remarks.

So, can I just start with some brief preliminary observations that may or may not strike a chord with the Tribunal. The Tribunal may have asked itself when reading the pleadings and, in particular, the OFT skeleton: "Why is it that the OFT is arguing strenuously for a position in which it is depriving a Member State of its powers for a prolonged period of time rather than, as one might have expected, arguing even more strenuously for its entitlement to use those powers to investigate whether or not there is cause for concern

arising from the acquisition by Ryanair of the minority stake?" Indeed, one might have thought that it would be Ryanair arguing all these points if the reference had been made. The OFT would have been arguing that it would be failing in its duties were it not to launch an investigation into matters falling within the exclusive jurisdiction of the Member State. I make the point because one of the gaps in the whole of the context here is that, whereas the Tribunal might have expected some guidance from the OFT in relation to the exercise of its powers in circumstances of this kind under s.122(1) of the Enterprise Act 2002, there was none.

Had the OFT gone out to consultation with a policy statement along the lines that it is now advocating – that it is precluded through a duty of sincere co-operation from carrying out any investigation under s.31 of the Act until the merging parties have exhausted all rights of appeal; and that until then there would be no use of any domestic regulatory powers at all - that policy would have been called into question as one that raises questions as to whether it is compatible with the OFT's duties under domestic law.

However, we are where we are. The matter is now firmly before the Tribunal. We are rejecting the policy as unlawful, but, in my submission, its defects would have been more effectively exposed had there been proper consultation before any such decision of policy had found its way under s.122(1).

May I now turn to Part 1 of the structure and set out very briefly the legal matrix and make some points as I go along. This means taking the Purple Book. This is the glossy Purple Book. The first stopping point is para.166 which is on p.126 of the Purple Book. That takes one to s.22 of the Enterprise Act, which will be familiar to the Tribunal. Just emphasising, the OFT has a duty to refer. The test for making a reference as to whether it is or may be the case that the relevant merger situation has been created and an SLC has, or may be expected to result.

Then s.23 on the opposite page: s.23(1)(a) and 24 impose the four month limit for making a reference to the Competition Commission, from the date on which completion of the transaction is made public.

Then s.26 on the following page, the three levels of influence that can give rise to a relevant merger situation: material influence, *de facto* control, legal control moving to a higher level of influence can give rise to a relevant merger situation. There are three points. First of all, the UK operates a voluntary merger control regime, parties to mergers which qualify for a review do not have to notify the OFT. Secondly, four months is a short deadline. We know from the White Paper that the statutory maximum timetables were introduced "to ensure a

more certain and predictable mergers framework for business in line with best practice overseas". That is the quotation from the Government White Paper preceding the Enterprise Act. The short deadline is consistent with the fact that mergers are dealt with as a matter of some urgency by the OFT, the Competition Commission, the Tribunal and the EU Commission.

The General Court also acts fairly quickly if the case is expedited, but if it is not the case may take up to seven years at the General Court stage. We refer to possibly nine years. I think it is Aer Lingus's pleading that says that it is all *in terrorem*, but in fact the reality is that once there is an appeal into Luxembourg at the General Court and the Court of Justice there is a very substantial delay.

The final point is the OFT and the Competition Commission, as the Tribunal well knows, have distinctive features under the current UK merger regime. You may have seen from the OFT's skeleton that the OFT, in our submission, has continually elided the functions of the OFT and the CC and presented them as though they were a single unified body. That is simply not the case under the present regime whatever may happen in the course of 2011, which we know is under consultation.

May I now take the Tribunal on to p.188 and para.278 of the Enterprise Act, which is where we find s.122.

> "(1) Advice and information published by virtue of section 106(1) …"

The Tribunal will recall that 106(1) of this Act places the OFT under a duty as soon as reasonably practicable after the passing of the Act to prepare and publish general advice and information about the making of references by it.

> "… shall include such advice and information about the effect of Community law, and anything done under or in accordance with it, on the provisions of this Part as the OFT or (as the case may be) the Commission considers appropriate.
>
> (2) Advice and information published by the OFT by virtue of section 106(1) shall, in particular, client advice and information about the circumstances in which the duties of the OFT under sections 22 and 33 do not apply as a result of the [EC Merger Regulation] or anything done under or in accordance with them."

Two points arise: first of all, the OFT, as you know, has not published any advice covering cases such as the present. Secondly, and more important for this purpose, we emphasise the distinction drawn between Community law in sub-section (1) and the EC Merger Regulation or anything done or in accordance with it in sub-section (2).

Can I just take you to s.129(1), which is at para.284, you will see that "Community law" is defined as meaning:

> "(a) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and
>
> (b) all the remedies and procedures from time to time provided for by or under the Community Treaties."

We say that Article 10 would fall within the definition in para.(a). Appeals to the General Court and the Court of Justice would fall within the definition of para.(b). Our case is that neither Article 10 EC nor appeals to the EU courts fall within the definition of the EC Merger Regulation or anything done under or in accordance with it.

If we go back a couple of pages, s.122(3) and (4) are yet again an indication of the triumph of the draftsman's art. Under (3):

> "The duty or power to make a reference under section 22 … 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 [EC Merger Regulation] 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 …"

that is not relevant –

> "… could not have been made earlier than 4 months before the date on which it is to be made."

Making sense of that, and we can make sense of it, the triggering event is the EC Merger Regulation or anything done under or in accordance with it. This is the same phrase that we saw in s.122(2), and it sits in conspicuous contrast to the use of Community law in sub-section (1). We say that Parliament evidently had in mind that s.122(4) should have a narrower scope than Community Law. We say that Parliament did not intend s.122(4) to be a mechanism to deal with Article 10 EC or appeals to the EU courts, both of which are matters of Community law and not EC Merger Regulation.

The second component is the prohibition condition, or as Aer Lingus calls it, the ECMR impediment. That is that the triggering event prohibited the OFT from making a reference. The language of sub-section (4) is that a reference could not have been made. So the prohibition condition in s.122(4) is satisfied only if there is a legal bar on the OFT making a

reference to the Competition Commission. It does not confer a discretion on the OFT as the OFT appears to be suggesting. If s.122(4) had been intended to allow the UK Competition authorities to give effect to Article 10 EC it would have said so.

There are two more points on 122(4). The OFT says that 122(4) can be re-fashioned as a tool to enable the OFT to give effect to Article 10 by using the *Marleasing* duty for consistent interpretation. But our submission is that that duty does not extend to re-writing s.122(4) to give it a completely different meaning, *contra legem*. The OFT's case involves the Tribunal re-writing 122(4) to add in a reference to community law and to re-work a provision which extends time in the specific circumstances set out in that sub-paragraph that is covered by the ECMR into a much wider duty upon the OFT to stay its hand for a prolonged and uncertain period. Our reading is that s.122(4) is a timing provision. It is designed to prevent the OFT from being time barred if the one stop shop provisions in Article 21(3) ECMR operate. In saying this I am simply echoing the explanatory notes to the Act contrary to the OFT defence at para.92 which state, and I quote

> "Sub-sections 3-5 also ensure that a reference can be made under the domestic regime following delay arising from the operation of the ECMR",

which takes me on to the ECMR. And, for that, I would ask the Tribunal to go ahead to para.4300 in the Purple Book and to p.1330, that is where the ECMR, that is where regulation 139/2004 EC starts.

Very briefly, three aspects of ECMR that are of the most immediate relevance to this case. First, what is the test? On the one hand, if you go to Article 3(1) which is at p.1336 para.4304, this applies the test of control, the defining of "concentration". And it is common ground that the test for control of the ECMR is set at a higher level than the "material influence" test in UK law, with the consequence that a transaction may give rise to material influence in the UK without amounting to a concentration for the purposes of ECMR. Then on the other hand there is Article 1 which defines a community dimension. Those are several turnover tests and there is no need to take the Tribunal to that.

Second, whether the Commission's power, if it finds that a concentration having a community dimension is likely to lead to an "SLC" or significant impediment to effective competition. Then you go to para.4309 and Articles 8(3) and (4). The power to prohibit the merger is in Article 8(3) and then to order a sell down in a case of a concentration that has already been implemented is in Article 8(4).

The third point is to look at Article 21(3) itself which is at paragraph 4323 p.1247. This is the embodiment of the one stop shop principle which says that:

> "No member state shall apply its national legislation of competition to any concentration that has a community dimension".

So, pausing there briefly, it is common ground that, for so long as Article 21(3) of the ECMR prohibited the OFT from carrying out an investigation of the minority stake, s.122 of the Enterprise Act prevented time from running against the OFT. It is also common ground that Article 21(3) operated to prevent the OFT from investigating the minority stake up until the date of the prohibition decision on 27th June 2007. So, the issue is, the "wider issue", as you put it, sir, "Was the OFT prohibited by Article 21(3) ECMR after June 2007?"

And our case is very straightforward. Once the Commission took its prohibition decision in June 2007 and the public bid fell away, all there was left was the minority stake. The minority stake did not give rise to control for the purposes of the ECMR. Nobody has suggested otherwise. And, since control is essential in order to establish a concentration with a Community dimension, otherwise referred to as a "CCD", there was no such CCD on 27th June 2007. And, returning to the wording of 21(3) there was from that point:

> "no prohibition of a member state applying its national competition legislation to the minority stake".

And the final step in the argument is that, once Article 21(3) ceased to apply, the prohibition condition of s.122 was no longer satisfied, and the four month period under national law for making a reference began to run.

Now, before we leave the authorities, may I take you from the Purple Book into the bundle of authorities at tab.2, this is the Official Journal of the European Union, 29th December 2006. You will see at the first main page Article 10 which provides that:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out this Treaty or resulting from 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".

Pausing there, reference has been made to Article 4(3) of the TEU at the time of the OFT's decision in 2011, which is in materially the same terms as Article 10 of the EC Treaty. So, the essential question on Article 10 is whether if the OFT permits the investigation 2007 this could jeopardise the attainment of the objectives of this Treaty. I will come back to that.

However, if you turn two pages to Article 242 in the same tab, Article 242 provides that:

"Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended".

This, we say, reflects the principle of presumed validity. And we say that the existence of this principle helps to explain why the Court of Justice has given Article 10 EC a narrow construction. It is only in the specific circumstances identified in what I may call "the *Masterfoods* line of cases", that the bringing of an appeal requires a national authority to stay or suspend an investigation. When that line of cases does not apply, and assuming that the President of the General Court has not granted interim relief in respect of the decision on the challenge, the EU Commission's decision is of presumed validity, and everyone is entitled to act on the basis of that decision, that is the EU Commission decision. And we say that the policy reasons for this are that it discourages the bringing of spurious appeals and keeps the administration working. In our submission the OFT is giving such a broad interpretation to the *Masterfoods* line of cases that they struggle to find any meaningful role for the principle of presumed validity, and the principle of presumed validity in this case applies with effect from the decision of the Commission on 27th June 2007; and this principle is an important provision as emphasised by the President of the General Court in the *Aer Lingus* appeal. So, that is my brief overview of the legal framework within the legal, as with a legal context by reference to which this Tribunal will have to decide this primary issue. We will obviously come to the case law later.

Now, the factual matrix. On the factual matrix, I would ask the Tribunal to have before it the core bundle. This is where, hopefully, I can move again at some speed because the correspondence between Aer Lingus, the European Commission, the OFT and Aer Lingus and the Commission has been put before the Tribunal from the very early documents. But if my learned friend wants me to highlight anything in particular I will do so. But, moving through this with some speed —

THE PRESIDENT: Yes, well, speaking for myself, I have read the correspondence, but do highlight it.

MR. SWIFT: I am going to highlight, yes. I am not proposing to take the Tribunal to tabs.12, 13 and 14, which are all the later Aer Lingus submissions to the authorities. But if I could ask the Tribunal to look at tab.15, this is a letter from the deputy director general of DG COMP, written on the same day as the prohibition decision. And, just reminding the Tribunal what the first paragraph is:

"We refer to your previous correspondence, notably your letters of 7 June and 25 June 2007, regarding the question whether Ryanair should be ordered to divest its minority shareholding in Aer Lingus after a prohibition decision in the above-mentioned case".

And they say:

"On the basis of Council Regulation (EC) No 139/2004 (the EC Merger Regulation), we would consider that the Commission does not have the power to order Ryanair to divest its minority shareholding of 24.22% in Aer Lingus or to abstain, now that the proposed merger is prohibited from exercising its voting rights".

And then on the first paragraph on p.2:

"Please note that this position is without prejudice to the powers that Member States may have, after the adoption of today's 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".

There are two points to note in relation to that letter, contemporaneous with the Commission decision. The first is that when Miss Calvino referred to "after the adoption of today's decision", there was no suggestion by her or her team that the powers of the Member States to investigate under national competition law were in any sense in abeyance because of the likelihood of appeals being brought, quite the contrary. She rather suggested that the powers operated with immediate effect. Secondly, the formulation at the top of p.2 tracks in materially identical terms the language of Article 21(3).

The next memoranda is the following tab, which is tab.16, and this is the memorandum from Aer Lingus's solicitors to DG Comp and to the national merger authority including the OFT. If one goes to p.2 and looks at section A, in the first paragraph:

"Aer Lingus has previously submitted its view that the Commission should require the divestment of the Ryanair stake by way of action under Art.8(4) ECMR. However in announcing the prohibition decision under Art.8(3) Commissioner Neelie Kross stated publicly as follows:

'the Commission is not in a position under Article 8(4) of the EC merger regulation to require Ryanair to divest its minority shareholding, which is, by the way, not a controlling stake'"

And then, later on that page, they refer to the letter from Miss Calvino:

> "Aer Lingus maintains that it was and is open to the Commission to act under Art.8(4) and regrets that it has not done so. Aer Lingus reserves the possibility to challenge this interpretation before the CFI".

On p.2 at section B Aer Lingus refers to Miss Calvino's letter and this is what they say:

> "I note that this statement directly reflects the terms of Art.21(3) ECMR, which provides that: 'No Member State shall apply its national legislation on competition to any concentration that has a Community dimension' and that by this statement the Commission explicitly opens the way for the Member States to apply their national laws on competition to the minority shareholding. In particular the Commission's letter makes it apparent that the minority shareholding is not at this point, following the blocking of the public offer to be considered to form part of a concentration over which the Commission has exclusive jurisdiction.
>
> The issue here is not one of *national* law but rather a point of EC law, namely the interpretation of Article 21(3) ECMR, and accordingly there is a need for common position, not only as a matter of coherent enforcement action but indeed as a requirement of Article 10 of the EC Treaty. Since the Commission, as guardian of the Treaty, has already taken a position on this point. I respectfully invite the several national competition agencies (both the Bundeskartellamt and OFT have raised this as a preliminary issue) to liaise directly with the DG Competition, and indeed each other, on this issue so as to ensure a clear and common position."

THE PRESIDENT: So they are reserving their right to challenge but they are saying in the meantime you should sort it out with the national authorities?

MR. SWIFT: Well they are saying pretty firmly that what we have here is a position in which the Commission, as guardian of the Treaty, has already taken a position on this point. That is the critical position in my submission, whatever the views that other national authorities may have been taking. I have already referred to two, namely the OFT and the Bundeskartellamt.

THE PRESIDENT: Yes.

MR. SWIFT: The Aer Lingus solicitors, and this is not a technical point, it is a point of substance, make the point that the Commission's letter tracks the language of Article 21(3) and that this is a statement from the Commission as the guardian of the Treaty. If the Tribunal could keep their place in tab 16 and turn for a moment to the Aer Lingus skeleton argument which is at tab 6, and if you go to para. 12 of that skeleton, this is under the broad

heading "The interpretation of Article 21(3) ECMR". After para.11 Aer Lingus says as follows:

> "In fact, the Commission gave no such guidance", that is as to the interpretation of Article 21 ECMR. "What it did, as set out in Aer Lingus' statement of intervention was to (i) pronounce both informally and formally on the application of Article 8(4) ECMR … (ii) give informal guidance on the Member States' powers to take action, without *any* specific reference to either Article 3 or Article 21(3) ECMR".

I do not want to score points but, in my submission, that is highly disingenuous. Aer Lingus' solicitors recognised at the time that the Commission did have Article 21(3) well in mind and I would not be making that sole reference unless I was going to take the Tribunal to two other passages in that skeleton argument.

If I could take the Tribunal back to tab 16, while keeping the place in tab 6 – in fact, I have already read this, this is the position about the Commission as guardian of the Treaty and plainly Aer Lingus has taken the position that the Commission's letter of 27th June should be accorded significant respect representing the position of the guardian of the Treaty. If you go back to tab 6 at the same place, and look at footnote 10, we see that they are saying:

> "Ryanair's suggestion that these letters are 'of significant persuasive authority' is not understood. Since the letters do not express any explicit view as to the interpretation of either Article 3 or Article 21(3) ECMR, they are not authority for anything."

THE PRESIDENT: Well, I suppose strictly speaking that is right, is it not. They are the Commission officials speaking for the Commission – sorry, are you talking about the Commission's letter now?

MR. SWIFT: Yes.

THE PRESIDENT: They are just the Commission official's views. They seem to be pretty clearly views that Art.21(3) no longer bites, but of how much authority they are, I suppose that is a matter of debate.

MR. SWIFT: Well we know it is not a decision of the Commission as such, it has been referred to as a decision. All I was seeking to suggest was that when one considers Aer Lingus' position on this appeal generally one would have to take into account it is saying one thing in 2007 and saying quite different things in the course of these proceedings.

THE PRESIDENT: Well, I suppose it is a matter of law and inevitably people are going to think up new points are they not and arguments as to why their interpretation of the law is correct.

Ultimately, we have to decide what the right interpretation is. One could not claim that the parties before you here have been persistent and every possible point has been taken, it is ultimately apparently a question of law.

MR. SWIFT: As you say, Sir, this is a question of law, but if you just look briefly back in tab 16, under para. C "Application of National Merger Control", the final paragraph. This is where Aer Lingus is arguing that a merger situation qualifying for investigation exists.

> "It would follow from the Commission's letter of 27th June that the four month period within which reference may be made to the Competition Commission began to run following adoption of the prohibition decision and expiry of the European Commission's exclusive jurisdiction under the ECMR."

And then they cite sections 122(3) and (4) of the Act, and go on to say:

> "Until that moment the reference could not have been made, since the European Commission was seized of exclusive jurisdiction under the ECMR in relation to the combined stake-and-offer. Accordingly we respectfully submit …"

- bearing in mind that this is a memorandum that goes to all the authorities.

> "… we respectfully submit that the OFT should now fulfil its duty to make a reference to the Competition Commission."

In the interim they are calling on the OFT to obtain appropriate undertakings from Ryanair as set out therein.

Those were Aer Lingus' views, the Aer Lingus skeleton asserts that interpretation of s.122(4) is a matter that was not discussed, or even touched on in Aer Lingus' correspondence with the OFT; those who settled that pleading could not have looked too closely at that memorandum of 12th July.

Now let us go to the decision of the Office of Fair Trading, which is at tab 17, and this is the decision of 3rd August. Again, I am sure the Tribunal will be familiar with it, I am just proposing to go to the first paragraph. This is a letter to Mr. Burnside of Linklaters:

"We refer to your submission of 12 July" – that is the one we have just been looking at at tab 16.

> "We have been in contact with our colleagues in the European Commission, the Bundeskartellamt and the Irish Competition Authority. We are, however, responding to your submission separately. Your submission raises mixed questions of national and European law. Each authority is ultimately obliged to reach its own view on these issues, and may be answerable in separate judicial

systems in relation to them. We set out the OFT's position below. This is without prejudice to the views that may be taken by other authorities."

But Mr. Pritchard …, I had better say "the OFT", there is no point in getting down to individuals here it is an OFT letter, the OFT emphasises that the decision is really one that is amenable to judicial review, indeed, appears almost to be inviting such a challenge. Then it was decided not to take up the invitation and brought no challenge in respect of what I would call the "ECMR bar" decision as opposed to the "time bar" decision.

Then the OFT gives its reasons for its decision, and in my submission this is unequivocal:

"Article 21(3) 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 that concentration in its entirety, including the minority stake."

The reason I have taken the Tribunal to the correspondence and, in particular, the letter from the European Commission of 27th June, is that the OFT's position is clearly directly contrary to that taken by the European Commission in the correspondence which was already before the OFT, and no reasons were given to Mr. Burnside as to why the OFT disagreed with the European Commission who Mr. Burnside already described as the "guardian of the Treaty". In view of points that have been taken by the OFT it is true that the OFT also referred to what it described as the likelihood of appeals by Ryanair and/or Aer Lingus as "underlining" the soundness of the position which it was taking, and I quote again: "creating a risk of inconsistent outcomes" with the OFT were they to have parallel jurisdiction at this time. That is not a separate, self-standing ground for the decision. The OFT was reading Article 21(3) ECMR as excluding the jurisdiction of the OFT for ever.

THE PRESIDENT: I am not sure, look at the next paragraph:

"Given the operation of Article 21(3) ECMR the OFT considers that it is currently prevented from taking any action …"

MR. SWIFT: The word "currently" is found there, there are adverbs in there, but whether the position is unequivocal, as we submit, or whether it is ambivalent, there is no doubt that Ryanair was not informed of this decision. Ryanair was not in the loop. If this decision meant that Ryanair would revisit the minority stake in the event that each of Ryanair's and Aer Lingus' appeals to the General Court failed, it would have been expected to put Ryanair on notice, indeed, to publish its policy more widely, but it did not. The obvious reason: it was precluded for ever and any consequences in relation to Ryanair shareholding fell to be

considered by the European institutions. This decision appeared to be relevant only to Aer Lingus' right to challenge it. If there was a decision that had then or in the future any prospective adverse effect on Ryanair's position that decision should have been communicated to Ryanair, it was not. That is in strong support of our argument that the OFT had decided it was going to stay away from that jurisdiction for ever.

That is our position.

Just turning over to tab 18, this is the letter from the Commission to Aer Lingus of 3rd August, so it is the same date as the OFT letter to Aer Lingus. This is very much a reiteration of the points that we have seen before. If we look at the top of the second page the Commission is repeating its view, its conclusion that without prejudice to the powers that Member States may have to apply their national legislation. The Commission now adds a new point, a further point, that this statements takes into consideration the entirety of the scheme of provisions of the EC Merger Regulation – in other words, the Commission is taking full account of the EU Merger Control regime as a whole.

Then again, the Commission explains its statement on the powers of the Member States, takes into account "the presumption of validity of the Commission's decision" – that is the prohibition decision. In my submission, that can only mean that the Commission has addressed its mind to the possibility of appeals being taken and its view that such appeals did not affect the competence of the Member States to apply their national merger control laws. Why else would the Commission refer to the presumption of validity in this context?

Then at the conclusion at the top of p.2, the Commission adds a further qualification, its view about the applicability of national merger control law is:

> "… without prejudice to the question of whether Member State authorities would be entitled to exercise discretion not to open or pursue national proceedings during a pending court case."

This appears to be a nod in the direction of the German competition authority, which is relying on procedural economy as a reason for not pursuing any investigation. "Procedural economy" is a concept far different from a breach of Article 10 of the Treaty.

Just for completeness I refer the Tribunal to tabs 19 and 20. These are letters to Aer Lingus from two other national authorities.

Then in tab 21 (we are pretty well through now) we have Linklaters' letter of 17th August in which they say in the second paragraph:

> "We further take from these letters that Member State authorities are not prevented by Article 21 from applying their national legislation on competition

> to that minority shareholding. Unfortunately, this view is not shared by the relevant Member States which have indicated in writing on 3 August (OFT) and 5 August that they believe themselves to be unable to act."

Going back, rather than take the Tribunal to it, may I just say, for your note, because I want to move speedily, the Commission's, what we call the "no power decision" is found at tab 11, and I am just summarising what was said there rather than taking the Tribunal to it, and what they said is, and this is a decision that was then appealed by Aer Lingus, that the Commission is concerned that it has no power to act under Article 8.4 of the ECMR. It considers whether it has the power to take a decision on the proper interpretation of Article 21.3, and the constraints that impose some Member States, and it concludes at para.25 that it lacks the power to do so.

It says, and this is a decision of the commission – so we are now beyond the services – at para.23, for your note:

> "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."

This is on 11th October 2007, this is within the four month period that is then running against the OFT under s.122. In other words, Aer Lingus could have brought a judicial challenge in the UK against the OFT's ECMR prior decision as the OFT had effectively invited Aer Lingus to do, and the Commission is effectively saying, "That is your route if you wish to have the conclusive interpretation of the meaning of Article 21.3 by going in that direction", instead of which, for some reason, unexplained in any document before this Tribunal, Aer Lingus failed to do so and went off in an entirely different direction in respect of the Commission's decision of 11th October 2007.

Paragraph 23 reads as follows, and let me read it into transcript:

> "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 234 of the EC Treaty in order to clarify the interpretation of that provision and to ensure a consistent

> interpretation of the EC Merger Regulation. Where such a question is raised in a case pending before a national court against whose decisions there is no appeal, that court is obliged to refer the matter to the Court of Justice."

That is the route which the European Commission is inviting Aer Lingus to take.

That is how things stood in 2007.

In 2008 Ryanair increased its shareholding in Aer Lingus and the relevance of this incremental acquisition is as follows, as is familiar to this Tribunal, whether minority stakes do or do not give rise to a material influence creating a relevant merger situation under UK merger law depends in particular upon the absolute and relative size of their shareholdings. Purchasers in the open market are plainly at the risk of the purchaser, but only if the purchaser is made aware of the policies of the regulatory authorities at the time of purchase. We are now talking about the year 2008. There had been no further statement from the OFT since the exchanges in the summer of 2007, and, in my submission, Ryanair was perfectly entitled to assume that the OFT's position remained that which it had stated unequivocally in August 2007.

Both Aer Lingus and the OFT suggest in their skeletons that Ryanair was well aware of the possibility of divestment because of Aer Lingus's appeal against the decision of the European Commission. Not so. Ryanair and Aer Lingus were both aware by March 2008, and the shareholding was not acquired until July 2008, that in the view of the President of the General Court Aer Lingus did not even have a *prima facie* case on that issue. The Aer Lingus case appeared hopeless, as it turned out to be.

Sir, briefly, may I ask you go to the authorities. We are now in March 2008. This is where the President of the Court made observations, and this is authorities bundle 1, tab 9. I would simply refer the Tribunal to paras.101 and 102, which are at p.14 of the 19 page order. It is probably better if the Tribunal were to read it to itself. There are two points being made by the President. The first is two-thirds of the way down:

> "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."

Then they deal specifically with the challenge:

> "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 such authorities to adopt interim measures to address any concern which they might identify pending judgment by this Court."

That is what the President said.

We are now in March 2008 and the OFT still maintained its silence. It said and did nothing. It made no public statement so far as I am aware commenting on the order of the President which appeared flatly contradictory to the position that it had taken in August 2007.

Then two years pass, and again, without notice from the OFT, on 6th July 2010 the General Court dismissed Ryanair's appeal. Ryanair has contended, as the Tribunal will be aware, that there were errors in the Commission's reasoning in respect of the consequences of the acquisition of full control over Aer Lingus. The same court dismissed Aer Lingus's appeal on the grounds that Article 8.4 of the ECMR did not empower the Commission to divest a minority stake where there had been no implementation of concentration, and observing in broadly the same terms as the President that some national authorities, and identified the UK in particular, had the jurisdiction to consider the impact of minority stakes on markets.

Again, really just for your note, this is in tab 10 of the bundle of authorities, the relevant paragraphs are 64, and then the concluding paragraph, 91. In 64 they say:

> "It is apparent from the above that 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.."

The references to paras.21 and 49 refer to a case which is very, very familiar, the *BSkyB* decision of the Competition Commission as appealed to the Tribunal.

Then at 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."

That is where we were on 6th July 2010.

Could I then invite the Tribunal to go back to the core bundle and turn to tab 22. We have referred to this letter and, in my submission, accurately as a letter that came out of the blue. You have to bear in mind that there has been no correspondence between the OFT and Ryanair since the acquisition. Ryanair acquired its minority stake in October 2006, so for a period of four years plus, no notice to Ryanair about 3rd August decision, no public statement about the effect on the OFT's jurisdiction after the decision of the President in July 2008, nothing said to anybody. Then this comes out of the blue. It came 13 days after the date on which the OFT had concluded that the time for appeals against both decisions of the General Court had lapsed. So decision on July 6th, then there is time for appeal. The OFT then awaits the exhaustion of the appeals process, does not say anything to Ryanair. We know that Aer Lingus was in some form of correspondence with the OFT, but there is nothing on the file about that.

This is the s.31 notice. Would the Tribunal look through briefly to the annex. This is an OFT information request. There is a substantial volume of information requested from Ryanair going back for a period of three years and to be supplied within a period of 14 days. As to the jurisdiction issue, if one turns to p.3 of the letter the Tribunal will see the second bullet on that page, the fourth total bullet. After making some previous observations on s.26 to which Ryanair could have no objection, it then says:

> "… sections 122(3) and 122(4) of the Act provide that the duty or power to make a reference under section 22 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 …"

and then, and I pause:

> "… where the OFT could not refer a merger to the CC because of processes taking place under or in accordance with the EC Merger Regulation."

Put rhetorically, and indeed we did more than put it rhetorically, Ryanair then engaged in correspondence with the OFT, "What is the basis of this statement? You do not refer to the construction of s.122(4), you do not refer to the ECMR, save in the preceding paragraph, you certainly do not refer to Article 10."

We have a further silence from the OFT until finally in the course of the correspondence it appears that the OFT is or may be relying on the duty of since co-operation. This is the first time this has been put forward. Then we have the time bar of 4th January 2011.

Just concluding on part one, on the legal factual matrix on Ryanair's main case, leaving aside grounds one and two, the OFT's starting proposition on 3rd August 2007 was that it was precluded for all time from exercising any statutory powers in respect of the minority stake. The current position is not that. The current position is that its jurisdiction has been postponed or suspended until the outcome of the appeals.

I summarise Ryanair's main proposition. After 27th June 2007 the way was clear for the OFT to exercise jurisdiction in respect of the minority stake. The four month period of time ran against it from that date. It said it had no power, but it is no longer coming to the Tribunal to defend that position, save in respect of a quite separate argument under the ECMR, which is ground three.

The General Court said on two occasions it had the power once the decision had been made, because the minority shareholding would no longer be considered as part of a concentration with a Community dimension. So on every occasion the Commission's merger services pointed to the conclusion which the General Court arrived at without any hesitation.

Also, we say, if the OFT wished to retain the possibility of doing what it is doing now, it should have made a decision within the statutory four month period that as a result of the operation of Article 10 it would be postponing or suspending its domestic jurisdiction awaiting the outcome of all the appeals however long they took. That is a separate argument under Article 10. In terms of the construction of s.122(4) and the legal prohibition, the ECMR did not impose a legal prohibition on the OFT's exercising jurisdiction under the domestic merger provisions of the Enterprise Act with effect from 27th June 2007. That is clear. As I said at the beginning, the OFT took a gamble and it failed, and it cannot go back on that.

I am now proposing to move to grounds one and two of the OFT. Is it convenient to take a five minute break?

THE PRESIDENT: Certainly, if you would like one, yes.

MR. SWIFT: Otherwise I will continue.

THE PRESIDENT: Would you like a break?

(Short break)

MR. SWIFT: Part 2 concerns the Article 10 issue. As you said, Mr. President, in your opening, there has been a considerable amount of written exchanges on the legal issues arising under

the Article 10, and I am relying essentially on what is argued in our skeleton which forms also part of our reply to the defence. So, we are making three points on the Article 10 issue. First the test is whether the ability of the OFT to make a reference depended on the validity of the European Commission decisions, taking account of the appeals. The argument is that the OFT's decision to exercise jurisdiction under the Enterprise Act 2002 does not depend upon the validity of the European Commission's decisions in June 2007. That is the first one. The second is, if we are wrong on our first point, or whether we are wrong or we are right, is there a real risk of conflict in this case that was capable of engaging Article 10? If there is no real risk of conflict or inconsistency, then Article 10 has no application at all, and points 1 and 2 are connected. The third, if we are wrong on the first and second points - in other words, if the OFT can sustain a legal argument before this Tribunal that, as a matter of policy, it is entitled to act in this way for future cases - is that it is nevertheless barred from acting in this particular case by reason of a breach of the duty of legal certainty. That was a matter which you raised with me at the outset. It is a separate ground for our argument and in my submission it was fully set out in paras.65-70 of our skeleton, and it is a live issue and one that should be considered by this Tribunal.

The first proposition, what is the test? I have not referred the Tribunal to the time bar decision itself, which is a very brief decision, but my recollection is that the only case that is referred to in the time bar decision to justify the OFT's decision is that of *Masterfoods*, and so it makes sense to go to *Masterfoods* briefly. That is found at authorities bundle 1, tab.17. The page reference is 11430. I am not proposing to go through a detailed or any summary of the facts in *Masterfoods*. I want to go directly to what we say is the test, and see how that test has been followed in the leading House of Lords decision of *Crehan v Inntrepreneur*. If you go, first, to para.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".

Then they go on in a very important paragraph:

> "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".

So, this paragraph is dealing with a situation in which (a) there is an existing EU Commission decision; and (b) a pending, ie a future appeal against that decision to EU courts. And the test for identifying a risk of conflict asks whether the outcome of the national dispute depends on the validity of the Commissioner's decision.

Now, as I understand the OFT's case, they disagree. They say in their skeleton, at para.22A for your note, that dependency is not a requirement of the duty of sincere cooperation, not least because there may be no existing EU decision. But the hypothesis that they raise does not apply in this case because there is, or was, an existing EU Commission and there are appeals to the EU court, just as in *Masterfoods*. So, the principles identified in *Masterfoods* are therefore applicable, even though we are dealing with the decision of a national authority rather than an actual court.

THE PRESIDENT: And there is no issue on that. It is common ground, is it?

MR. SWIFT: No issue on that.

THE PRESIDENT: It applies just as much.

MR. SWIFT: Yes. How does the Tribunal decide whether the test is satisfied? We say the Tribunal should test for conflict by examining the binding authority of the national authority, which is essentially, what is the decision that takes legal effect within national law, like a potential reference to the Competition Commission or an investigation under s.31 of the Act — and compare that with the grounds and operative parts of the EU Commission's decisions and the power of the EU courts on the appeals. Now, before we go and, as it were, lay one decision, the national decision, against the other, to see whether there is a degree of dependency, let me take the Tribunal to one very important authority first, and in respect of this let me go first in the same case to what the Advocate General said at para.16 of his opinion and that is the same tab.17 and it is at p.11376.

THE PRESIDENT: Yes. I am just reading para.16.

MR. SWIFT: Well, it starts under A — "When does a risk of inconsistent decisions arise?"

THE PRESIDENT: Yes.

MR. SWIFT: So, that would be on point. I will read it quickly:

"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 [what they were doing in that case with] Articles 85(1) and 86, but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions".

Then this is the passage:

"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 [he says] 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".

And there is a footnote, and my learned friend Mr. Beard was rather critical about our reference to this footnote. But the footnote is interesting. He says:

"I do not deny that, in cases where the similarity of the subject matter of the Commission's decision and that of the decision of the national court is more obvious, the adoption of conflicting solutions by those two bodies does not further the uniform application of Community law. They are not, however, cases of unmixed conflict between the Community and the national decision. Any other interpretation to the effect that the above risk of giving contradictory decisions was limited more broadly would result in the national court being overly bound".

It is a pretty clear statement that national courts have got control over their own jurisdiction and should be determining the matters that come before them, unless there is this clear risk of conflict such as to engage the operation of Article 10.

The OFT, as I suggested, casts doubt on whether the Advocate General's opinion should carry much weight, but his observations were expressly adopted by the House of Lords in *Crehan*. I would ask the Tribunal to go to para. 42 of Lord Hoffmann's judgment which is on p.15 of 23 page judgment. The whole of Lord Hoffmann's speech is of relevance and I would invite the Tribunal to read the whole of it and obviously also the speech of Lord Bingham, but the important note to make here is that all the judges in the House of Lords agreed with what Lord Hoffmann said. Again, I leave the Tribunal to read it, but the starting point is when Lord Hoffmann says:

"The potentiality for conflict between decisions of the Commission and the national courts is a matter on which the Court of Justice and the Commission itself have provided fairly detailed guidance."

Then he cites *Delimitis* and then at para. 44 he says:

"This is a useful caution, so far as it goes, but leaves open the question of what counts as a conflicting decision. The comments of the Court of Justice have to be read in the context of the situation of potential conflict which arose in that case."

Then if we go to para.46, he refers to "… the Commission issued a Notice on Cooperation", after *Delimitis* and the provisions in that notice; and then at para.48 he says: "The matter was taken further by the decision of the Court of Justice in *Masterfoods*". Then Lord Hoffmann sets out the facts as they were in *Masterfoods* and then at para. 49:

"Advocate General Cosmas, starting from the proposition that it was necessary to avoid conflict between the decisions of Community institutions and national courts, discussed the question of what counted as a conflict, at para. 16. There could be no risk of conflict, he said, where:

"where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts."

All I am substituting here is the OFT for the expression "national courts". Then, again, Lord Hoffmann cited the Cosmas example as helpful. Then at para. 52, and this again is a para. 16 point, he repeats what the Advocate General Cosmas said as to where a risk of conflict arises. Then Lord Hoffmann goes on to consider other interesting matters. The Tribunal should accept that as the most authoritative statement of the highest court in this country as to what is the test. It is dependent on the validity of a decision under challenge, and in inspecting that the Tribunal should look with considerable care to make sure that the national authority and the national court is not deprived of the jurisdiction which it would ordinarily have, that is Cosmas. We have applied this methodology in our skeleton and for your note we have set this out at paras. 47 to 55 – I do not propose to take you to it. We say that the OFT's decision to make a reference or not to make a reference to the CC did not depend on the European Commission's decisions, or the outcome of either of the appeals, and this is the short and simple answer to the OFT's case on Article 10, they do not bring themselves within the strict principles of *Masterfoods* as applied and endorsed by the House of Lords in *Crehan v Inntrepreneur*.

THE PRESIDENT: Can we just explore that for a second? I think one of the potential conflicts that are referred to by the OFT is where the matter gets to the CC, the CC say "This minority shareholding should be divested", or would say that ----

MR. SWIFT: I am just going to come on to that.

THE PRESIDENT: Are you? Are you going to deal with it?

MR. SWIFT: Yes.

THE PRESIDENT: So you are going to come on to the potential conflicts?

MR. SWIFT: Yes. The first is the principle. We are saying that it is a 'narrow' principle, it is a strict principle, and if it is something falling outside this element of dependence on validity then the national court, in this case the national authority, continues to act.

THE PRESIDENT: So now you are going to go on to why this power was not dependent on the validity of this Commission decision?

MR. SWIFT: Yes, let me deal with it. So, more generally there are a number of possible outcomes in respect of the exercise of jurisdiction by the OFT in the first instance, the exercise of s.31 powers, bearing in mind the decision taken by the OFT was not to exercise any powers at all. It said that to Aer Lingus. "We cannot help you, we are not going to make a reference", so they are not even going to ask the questions that they are now doing after their letter of 30th September 2010. They are not determining the conditions that would apply in respect of whether there is a duty to make a reference, for example: is there a serious likelihood, or may it be the case that there is a relevant merger situation? This answer did not even go that far. That is the proposition they are contending for. My learned friend Mr. Beard has adopted this very attractive metaphor that the OFT is the only competition authority that has the power to put the brakes on, nobody else has. The problem with the OFT is they did not even switch on the ignition. After that I am going to make no other references to motor car analogies because they always break down! (Laughter) I could not resist that one.

So what we are saying is: yes, the OFT has pointed to all the possible risks but these are just possibles. The other possible outcomes are: the OFT decides that there is no risk of a relevant merger situation. The OFT decides that even if there is an RMS there is no risk of an SLC, when it goes to the Competition Commission, the Competition Commission will decide – as this Tribunal well knows – that there are knotty issues in respect of the issue about whether there is a relevant merger situation. If there is no relevant merger situation then there is no jurisdiction to proceed to an SLC. What the OFT is concentrating on is the possible risk of only certain outcomes, and those principal risks are said by the OFT to arise at the Competition Commission stage.

Our first point, is that that is irrelevant. It is not the job of the OFT to say that conflict crystallises at the point where the OFT takes the decision. The OFT is the gatekeeper. The OFT has the sole authority within the United Kingdom merger jurisdiction of deciding whether the matter should go to the CC or not. It is a very, very powerful power that it has.

It is different from that of the CC. We would say if there is no risk of a conflict at the stage of making a reference, then on the facts of this case Article 10 has no application.

The other thing we say is you can raise any number of possible outcomes if the CC were to investigate within the six month period, 24 weeks period plus the extra one. There are a number of possible outcomes. It is common ground between the OFT and ourselves that one of the key issues here is whether the CC has its own inherent power to stay those proceedings if or when, in its view, a conflict were to crystallise. You will recall in one of the decisions, the decision of the Vice-Chancellor in the *National Grid* case, the Vice-Chancellor is urging the parties to continue with the litigation, we only stop when the risk crystallises.

In my submission, if Article 10 applies the CC must be considered to be in broadly the same position as a surrogate of the Member State as the OFT. They are both carrying out statutory functions in respect of competition matters, obviously they are not on all fours with the provisions of the Treaty, but let us assume for this purpose – which is not in dispute – at some stage there might be a rubbing off, where there is suddenly a risk of a dependency. What the OFT is saying is that the Competition Commission or the courts, or this Tribunal have no means of securing that the Member State does not commit a breach of its obligations under Article 10. They say that our proposition is bizarre, the autonomous power to stay, but to the extent that we are allowing Article 10 to pervade the exercise of statutory powers and merger jurisdiction - and this is the first time (so far as I am aware) that it has ever been suggested - then it must follow that the better route and the more proportional route is that the Competition Commission is allowed to decide when or if the conflict arises and then to take the appropriate decision. The OFT's case is that in some way it is responsible for all possible outcomes that may occur, even though it cannot predict what those outcomes may be. They are saying that in those circumstances, only the OFT through the exercise of its powers under s.122 should act. It is a crucial point and, in my submission, it is perfectly consistent with the relationship between national law and Community law, that in those circumstances the Competition Commission has got the power to defend the Member States from being in breach.

The alternative, that it is only because of s.122, does not fit with Article 10 at all, as I said in my opening, that only the OFT can do it. That is our main point. This Tribunal should not concern itself with a lacuna of power, there is the ability of the CC to avoid circumstances in which a Member State may be in breach of Article 10. It is not a matter that needs to concern you, so long as you are satisfied that the CC, as a national authority, is under a

duty, or may be under a duty under Article 10. Even if it is under a duty then it must follow they would have the necessary powers to avoid that conflict.

THE PRESIDENT: So it is under strict time limits, is it not, up to a point?

MR. SWIFT: Up to a point. As you well know, Sir, in your decision on *Tesco*, you met some pretty spurious arguments – I was not involved – by those acting for Tesco who said that once the Tribunal has quashed a decision of the Competition Commission you could not refer it back on a ground of error; and that you could not make a remittal because the Competition Commission would be out of time. It is a terrible argument and this is a similar kind of argument.

THE PRESIDENT: Supposing that was because there had been a quashing. Supposing the Competition Commission is just sitting there just working away on the reference and discovering whether there is an RMS or SLC, and then it suddenly said: "Oh my goodness me, there is a risk now of conflict, they are about to give judgment", or whatever. Has it got the power, as it were, to extend its own timetable and stop working? Alternatively, can it go ahead on the basis that it is only making recommendations and findings, and nothing will bite until it starts on remedies. When it gets to remedies, what is the position on remedies? Has it then got more of an open-ended time to deal with remedies, it is not under the constraints of the ----

MR. SWIFT: Remedies, absolutely. Remedies precisely because as we know since the Enterprise Act 2002 it has become the decision maker, and enforcer in respect of remedies, then plainly there will be a suspension, there may be a suspension during appeal; the *BAA* case is a classic example when the ----

THE PRESIDENT: That was with the intervention of the Tribunal in that case, but off its own bat what would be the right approach?

MR. SWIFT: In my submission it has the power to do anything which it regards as reasonable, which includes the power to suspend the time, and that is inherent in the stay. The fact that this is coming before this Tribunal as a new point does not mean that somehow it should not be grasped. It seems to me so long as we are bringing Article 10 within the processes that we are looking at here, it must follow that there is some inherent jurisdiction that the Competition Commission has similar to that of the High Court which is to stay or otherwise suspend its proceedings.

THE PRESIDENT: On the basis that it is a public body, it is an emanation of the State, it cannot act contrary to relevant principles of Community law?

MR. SWIFT: Indeed, when I said: "We are where we are", that terrible cliché, earlier on, the problem for this Tribunal is that neither the OFT nor the Competition Commission actually sat down and decided what they should be doing in respect of s.122(1) and s.122(2) and the relationship between Community law on the one hand and ECMR on the other. This is why it is a task for the Tribunal and it is wide open for you. My main submission, and I believe it is a strong submission, is that where a duty arises – and we assume that a duty will apply to the Competition Commission - the mechanism must exist so as to avoid a breach by the Member State of its own Article 10 duty.

MR. BLAIR: So may I just ask this: is it part of your case that the statutory provisions that limit the length of time that the Competition Commission can use up have to be read down in some way by reference to the European Treaty? Or do they just disappear?

MR. SWIFT: Plainly, there must be some provision whereby the Competition Commission must be allowed to stay it. So they would say "Yes, there must be some form of a stay just as there is the form of stay at the national court", it must follow. It must follow that the domestic rules must always yield to the primacy of Community law.

MR. BLAIR: So the parliamentary limit of, whatever it is, two months is ignored?

MR. SWIFT: It is ignored, I would say that the general rules of the supremacy of EU law, when they are relevant to the decision making domestic sacrifice, must take precedence.

MR. BLAIR: So they are overridden by European law?

MR. SWIFT: They are overridden by European law, and it would not be the first time this has happened, which at the extent that European law can overrule the provisions of an Act of Parliament, the provisions of EU law, it seems to me, are well capable of imposing upon a national authority, a duty to stay proceedings, in which case the national authority would not then be in breach of its own domestic jurisdiction if it imposed that stay.

THE PRESIDENT: *Factortame* is called to mind here, I cannot remember now, I am sure someone will tell us what the position is in relation to Article 10, whether it has direct effect in that sense, but presumably it would be a last resort. What you are talking about is setting aside, effectively disapplying a Statute and presumably one would only do that if there were no other mechanism for giving effect to directly effective Community law, which might be a point that is made on the other side that there is a mechanism and you have to do it through the medium of reading, interpreting 122.

MR. SWIFT: That is my point. One can chase down a whole number of alleys as to the circumstances – and this is essentially in connection with the Ryanair appeal – the supposed

conflicts at the level of the CC, it is quite different from the implication of the Aer Lingus appeal, it is quite separate. The Aer Lingus appeal was always a one-off.

THE PRESIDENT: Anyway, it was my fault for raising this point, but your answer to it is that there is nothing to stop EC from ----

MR. SWIFT: I am very glad you did, the fact that it took me out of my order is neither here nor there, it is a key point because this is what the OFT says, this is the main obstacle in the Ryanair case. You do not have the means to secure compliance by the Member State with that duty because the OFT says: "because we are the gatekeepers, we have s.122". If the OFT says: "In addition, Article 10 has in a sense a direct effect, it imposes a direct duty on the OFT irrespective of s.122" then that should apply *mutatis mutandis* to the Competition Commission.

THE PRESIDENT: This is all aside from Article 21(3) is it not? Article 21(3) applies, of course, at any stage if that applies there is no question, that stops everything happening at the national level.

MR. SWIFT: Yes. But we are in a position now of saying the OFT got it wrong on Art.21(3). They got it wrong, it is irreversible, the only way they can protect their position on the binary time bar issue is making a successful case under Article 10.

May I just reflect on the order? (After a pause) What I would prefer to do, rather than engage with every aspect of the defendant's skeleton, is to move on and see to what extent these matters become live. I am considering, for example, the OFT skeleton at para. 10: if the Ryanair appeal had succeeded it knew that it was likely, if not certain that a further bid would be cleared by the Commission. So this is one of the possible outcomes, we say "No, it cannot possibly be right. If Ryanair had notified a fresh concentration, the EU Commission would have examined it in the light of the EU Court's judgment, Ryanair might have obtained approval, or it might not, it cannot be said to be certain or likely they would. There is a whole number of possible outcomes, but the key position here is that to protect the position of the Member State, the CC must have that inherent jurisdiction.

One of the key issues to give power to this Tribunal is the economic consequences in the market of the acquisition of a minority stake may be entirely different from the economic consequences of the acquisition of full control. There could be no effect, there could be no relevant merger situation. If there were a relevant merger situation it could be that there would be no adverse economic effects at all. That would have been the issue to be determined by the OFT or by the Competition Commission. We should not allow this smoke screen of potential conflict to cloud the clear distinction between the two separate

investigations into the economic effect of a minority shareholding on the one hand and full control on the other. That is what the OFT proposal to you is.

THE PRESIDENT: The obvious one is that the CC when they look at it say: "We think this minority shareholding is bad and should go". At the same time the court implies, or says: "We have looked at that Commission decision banning the control", and says: "No, that will be fine from a competitive point of view". Those are, it seems to me, the obvious types of conflict that could arise.

MR. SWIFT: It is not a conflict.

THE PRESIDENT: Why is that not a conflict?

MR. SWIFT: It may be said to be an obvious type of conflict but the fact is that it is equally possible that the Competition Commission has decided that there is no risk to the public interest. What the OFT is saying is: "We should be able to pre-judge either outcomes and stop either result". What we are saying is that in the event that there were a conclusion that the minority stake did operate against the United Kingdom public interest, that is a finding. The finding stays there, and it stays there probably until such time as there is then some outcome from the decision of the General Court.

What you have, and this is to the advantage of the United Kingdom, you have a finding of the economic consequences of the acquisition of a minority stake within a reasonable time after that stake had been acquired. You have a body, a fact finding body like the Competition Commission that can look at things as they are, reasonably quickly after the acquisition, as opposed to what is considered now, which is looking at now, high minority stake ----

THE PRESIDENT: I see that comparison, but what I am asking about is the position where they make that assessment about the minority holding at some point when the General Court is looking at 100 per cent control for example, and finds there is nothing wrong in this in the circumstances with 100 per cent control, how does that live with the CC's hypothetical finding that a minority control has to go for competition reasons?

MR. SWIFT: Well you would say that would be the point at which the conflict crystallises.

THE PRESIDENT: Where, at which point?

MR. SWIFT: The finding.

THE PRESIDENT: At the point where the CC makes that finding, when it is plain that the other finding is pending, that being the more likely scenario, that they would do it before the general court I think on the timing here; I do not know whether that is right or not but let us assume for the moment that the CC would naturally get to its finding first and let us assume

it found that the minority shareholding had to be divested and then sits down and waits at that point for the general court which then finds that 100 per cent control is fine.

MR. SWIFT: Yes, it would then be very difficult to argue that if 100 per cent control of Aer Lingus would not operate against the competition rules of the Treaty and therefore would not create a significant impediment to effective competition in any relevant product or geographic market. The United Kingdom national authority would be saying "Never mind, we think the minority stake does." It is commonsense.

THE PRESIDENT: Exactly, do you not have the situation that has to be avoided then, you have a conflicting finding.

MR. SWIFT: What you are losing is the entire ability to enter into an investigation that may not produce that outcome at all. It may produce the outcome ----

THE PRESIDENT: Yes, certainly, yes. There may be completely consistent findings.

MR. SWIFT: The minority stake does not act against the interest of the United Kingdom, but full control might act against the interests of the Community. What you are stopping is any kind of investigation by the expert body that is supposed to be doing this on the basis there might be one outcome. Mr. Mather?

MR. MATHER: In the case we are just talking about, in one case it is too late, the conflict, as the President said, has arisen. In other case you are postulating it may mean that an authority cannot take an investigation to a particular level, but it is not too late the conflict has been avoided, so that would seem the better outcome, would it not?

MR. SWIFT: The better outcome?

MR. MATHER: In terms of avoiding the conflict and maintaining the primacy of European law?

MR. SWIFT: In my submission there is no suggestion that what the OFT is doing or could do could, in any way, threaten the primacy of European Community law. It is precisely because the Competition Commission were it to be in that position, would be able to take a decision to avoid that conflict. What I am saying is in a situation of this kind, which is unprecedented, it is going a long way to allow the OFT to suspend all investigations for all time until the outcome of an unknown appeals process, especially when it is dealing with a quite separate set of economic circumstances, and we are going back to *Masterfoods* and *Crehan*; it does not depend upon the validity, the making of the reference.

My general point throughout is that we do not see the foreseeability of the risk of harm – this is the second ground.

THE PRESIDENT: Is that because you do not see what I have just put to you as being a conflict? You do not see those two findings, the hypothetical findings, as being a conflict because ----

MR. SWIFT: Well as matters stand they are not, the United Kingdom authority is taking a decision in respect of a separate legal analysis, in respect of a separate economic circumstance. The European Commission is taking a position under the Treaty, which is being appealed to the General Court in regard to the interpretation of the Treaty.

THE PRESIDENT: Managing a potential conflict, I thought your point was more that the potential conflict can be managed without barring the reference, you do not have to bar a reference to manage that conflict, because the CC can get a long way down the road before it has to make findings.

MR. SWIFT: Well you brought me on to the management of conflicts and I said I would deal with it out of order. The first point is on the principle, the second is if you look at the matters this is not a case where there is likely to be a real inconsistency, or real conflict. If there is then the CC can deal with it at that stage. That is my point.

Those are the matters, in my submission, that appear to arise from the hypothesis that you would have parallel proceedings if Ryanair were to be appealing the decision of the Commission to the General Court.

There is a quite separate argument which is brought by OFT and Aer Lingus. There is another conflict problem, and that arises out of the Aer Lingus appeal.

THE PRESIDENT: Do not worry too much about the time, Mr. Swift, I can see you are worrying about it but we are not going to hold you to the minute of what you said.

MR. SWIFT: I can deal with this by 1 o'clock, but I will have to go over.

THE PRESIDENT: Yes.

MR. SWIFT: The Aer Lingus appeal. The OFT at para.17 of its skeleton for your note relies on the Aer Lingus appeal as follows: Aer Lingus argues that if its interpretation of Article 8(4) of the ECMR was correct, national authorities would not have jurisdiction to apply national competition law to the minority shareholding. The OFT says that if this argument had succeeded, clearly the action of the OFT and the CC could have conflicted with EU law. So the OFT relies on the Aer Lingus appeal in support of its argument that it was prohibited from exercising any powers under national law, even though the Aer Lingus case, as the Tribunal knows, has nothing whatsoever to do with Article 10 of the Treaty. Aer Lingus does not go down that route at all.

Aer Lingus relies on the appeal, as I understand it, for a quite different purpose, namely that the arguments raised in the pleadings covered the interpretation of ECMR Article 21.3, and therefore the findings of the General Court represented more than observations, a decision.

Both are wrong, in my submission, and they confuse arguments as they were presented on the appeals on the Aer Lingus case with the reasoning in the decision appealed from. There is a distinction and it is important to maintain the jurisdiction of the national court and the national authorities, and here I am on *Masterfoods* again, except in those circumstances where the decision of the national court or the authority depends on the validity being appealed.

I referred before to the "no power" decision at tab 11 of the core bundle. I do not need to take the Tribunal back there, but its operative part consists of what it calls two rejections. First, it rejects a request to open proceedings under Article 8.4. It decides that on a proper interpretation and application of that Article there has been no implementation of a concentration with a Community dimension. Therefore, it has no powers to consider remedial action of the kind set out in that Article. You will remember I took the Tribunal to that. In the event there would be an implementation to the concentration, the European Commission has powers such as divestment.

The OFT has a different decision to make, whether to investigate a minority shareholding which, with effect from June 27th 2007, is agreed not to b e a concentration of the Community dimension because there is no control. If one looks at what Advocate General Cosmas said, approved by the House of Lords, the issues are not the same.

The second rejection by the European Commission is in respect of Aer Lingus's requests that the Commission should give an interpretation of what Article 21(3) of the ECMR says. Far from raising a *Masterfoods* type of conflict, the Commission declined to give the interpretation. It said, and you will recall that passage, "We are not in the business of giving interpretations of Article 21(3) of the ECMR". That is for the Member States, which include for this purpose, the OFT – it is for the OFT to form a judgment, and if Aer Lingus wishes to appeal that judgment then that may finish up before the European Court of Justice on an interpretation.

What Aer Lingus seeks to do is to weave in to this argument what it argued on the appeal, and indeed what the European Commission was, itself, arguing. This is set out in annexes to the Aer Lingus skeleton. The fact that Aer Lingus may have wanted to argue a particular point or the European Commission might have wanted to advance possible interpretations of Article 21(3) is not to the point. The critical point here is in the four month period after the prohibition decision of 27th June. Was there an appeal? Plainly not. Aer Lingus had not appealed within the four month period. Was there a likelihood of an appeal to give rise to the conflict? No, because the situation had to be looked at at that time, and the situation

had to be looked at by reference to the operative decision of the European Commission decision of 11th October 2007. Who knows who is going to plead what? The pleadings were not known until some time in 2008, well outside the four month period.

If we can look at this in the round, the Tribunal will have seen the background that I explained in the first part, the various positions taken by Aer Lingus, the consistent position taken by the Commission's Legal Services, the consistent position taken by the OFT that it had no power, that it was legally prohibited, I would suggest that when the Tribunal considers its conclusions it is frankly alarming to think that (a) having pressed the OFT to take action in 2007 based on the advice of the Commission's Legal Services, (b) Aer Lingus then having failed to do what the European Commission told it it should be doing (para.23 of its decision), (c) it then does a complete U-turn and accuses the European Commission of a failure to act under Article 84, (d) requests an interpretation which it knows the Commission cannot give, then all that results in the OFT escaping from the error it made in August 2007 kept alive by an appeal which is directed to achieve an entirely different result. This is assuming that the Tribunal were to find in our favour. The mere making of an appeal by Ryanair against the Commission's decision does not preclude the OFT from carrying out its investigative powers under the relevant sections of the Enterprise Act. It would be a very, very bizarre result, and it is not necessary for the Tribunal to accept that.

The final point, and it is the point that you raised with me, Sir, at the beginning, that if this a binary issue why should the Tribunal be concerned in any way with the OFT's conduct since the events of the summer of 2007 and in particular whether it is relevant to maintain the complete silence and only announce this intention to use s.31 powers on 30th September 2010. The matter is set out in paras.65 to 70 of our skeleton. It does engage the principles of legal certainty and, in my submission, on the facts of this case the OFT, if it wishes to make this case, is under an obligation to take action promptly. The last authority on this that I would like the Tribunal to look at is in authorities bundle 1, tab 25. This is the *Uniplex* case. I would ask the Tribunal to go to para.39. This is a perfectly well known proposition but it is a useful place to find it:

> "The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations …"

see, to that effect the two cases which they refer to there.

My submission is that by advancing a novel argument on Article 10 of the Treaty in which there had been no prior public statement by this regulatory authority that it would seek to engage that Article, and in circumstances in which it maintained a complete silence thus allowing Ryanair to increase its shareholding, it is in flat breach of the principle of legal certainty. This is a novel area, there is nothing in any published documents to indicate that the OFT will take this line so as to put companies such as Ryanair on notice. In my view, that is a separate ground for annulling the time bar decision, that the OFT has not acted in accordance with the principles of legal certainty, and what it is seeking to do now is to combine the principles and their application without any prior notification to anybody concerned. In my view, that is not just grossly unfair, it is unlawful.

THE PRESIDENT: That would be a point of English public law, would it not?

MR. SWIFT: Yes, it would.

THE PRESIDENT: Community law would not be engaged in that?

MR. SWIFT: Community law is certainly suggesting that since the principle of legal certainty has been derived from Community law then it is an obligation under national law. Yes, it would be. It is a combined principle of Community law and national law, especially when you are relying upon a duty which is imposed on a Member State under a provision of the Treaty.

Sir, the three points under the first and second grounds are that the OFT has construed *Masterfoods* without proper reference to the strict limitations imposed by the House of Lords in *Crehan*; secondly, there are no obvious risks of conflict or inconsistent outcomes when a national authority is considering the economic consequences of a matter that falls exclusively within the jurisdiction of that Member State and when the European Commission and the courts are concerned with the application of a different test; thirdly, if, contrary to our view, conflicts might arise at the Competition Commission stage they can be managed by the Competition Commission; fourthly, irrespective of all those considerations, the OFT in the circumstances of this case is in breach of the duty of legal certainty by maintaining a three and a half year silence without disclosing the principles it was proposing to apply to Ryanair.

Those are my submissions on grounds one and two. I shall take no more than 15 minutes after the brief adjournment in dealing with grounds three and four.

THE PRESIDENT: Just before you sit down, while I think about it, on your last point their case – just remind me – is that they have an obligation to refer? The obligation under s.22 is revived, and obviously they are not time barred. It is not exercise of power, they have to?

MR. SWIFT: Yes, this is a hybrid. Section 122(4) never goes away. The four month period is there. It is just that there was a duty to postpone or suspend – they use different language – until such as what Aer Lingus calls the "ECMR impediment" goes away. Then s.122(4) kicks in again, so the four month period starts there.

THE PRESIDENT: Your last point means that the principles of legal certainty, and so on, fairness, etc, cancel out what would otherwise be an obligation, a statutory obligation, on them to make the reference?

MR. SWIFT: My point is a more simple one. It is saying that if you are going to rely on this principle of law that entitles you, maybe seven years on after a decision, suddenly to pounce on an individual corporation and say, "You are now within my jurisdiction because I have not looked at you for the past seven or nine years because of a risk of conflict", it is just offensive to common sense and principles of justice to enable a regulatory authority to get away without having it posted as a principle that it will apply in the enforcement of ----

THE PRESIDENT: I understand the grounds, I am just trying to see how that fits together with what, unless I am mistaken, I thought was an assumed obligation, a statutory obligation, to make the reference. In other words, their decision to make the reference, or to investigate it, is nevertheless trumped by the way the lack of transparency, the legal certainty problems, and all the rest of it. I am just trying to understand it.

MR. SWIFT: My point is this, and we are into an area that, as far as I can see, has never been explored before. The OFT has a double failure. First of all, it did not take a decision in respect of the ECMR, other than the decision that it was legally prohibited. If he is going to rely on another ground, he has got to take a decision within the four month period that that is what he is going to do in the event that the conditions then allow it to.

THE PRESIDENT: Yes. We can come back to it later. I will say five past two.

(Adjourned for a short time)

THE PRESIDENT: Mr. Swift, over the adjournment I had a look at the notice of application to see if my memory was faulty. There is not a breath in there of your free-standing point on the public law question of whether, even if the OFT are not time-barred as a matter of law, nevertheless the time-barred decision should be quashed for the reasons that you were outlining. It is not there. I see that Mr. Lindsay is nodding. I may have missed it obviously, but I thought I should tell you that is how I see it. It all seems to be dealing with the legal issue, which I thought, leaving aside the stopping/unstopping the clock question, that was originally going to have to be looked at, that went away, did it not?

MR. SWIFT: That went away, yes.

THE PRESIDENT: We are left with a time bar decision. As far as I can see, the grounds that you raise in relation to the time bar decision in the notice of application are all related to the legal issue of whether they are time barred or not.

MR. SWIFT: The matter was, as I have said, raised fairly and squarely in the reply to the defence.

THE PRESIDENT: You cannot do that without applying to amend your notice of application. I am not at all sure that you would have been given it if you had applied. Leave that on one side, it is not there, there has been no application to amend. It is not as though it is a trivial add-on, it is quite a big issue. It means looking at all the facts and weighing them all up.

MR. SWIFT: I must say, I was not aware until you raised the point with me this morning, Sir, that this was regarded as an issue that the OFT and Aer Lingus regarded as improper for me to raise.

THE PRESIDENT: I do not know what they will say about it. I am just telling you how we see it at the moment.

MR. BEARD: If it assists at all, I do not want to leave anyone with undue anticipation, the OFT does say that this was not raised at all in the notice of application, and to say that it is raised squarely in the skeleton is not correct. There are various scatterings of references to legal certainty issues, and so on. We had understood those as being deployed to try and bolster the central legal ground.

THE PRESIDENT: I have to say, that was rather my impression when I read the skeleton.

MR. BEARD: As the Tribunal indicates, the position would be rather different. The OFT's approach to this matter and the sort of material that would need to be adduced would have to be very different. It is not a matter that can be dealt with on the hoof, and it should not be dealt with on the hoof. As the exchanges between you, Mr. President, and Mr. Swift indicated, it is necessary that a proper formulation of the impact of this public law argument upon the statutory framework is required. There is not a breath of that anywhere. So we would need to be able to see that in order to get to grips with the legal gravamen of the argument and also consider what sort of evidential material would be required. We would strongly object to that being made as a separate ground.

THE PRESIDENT: As I understand it, this point arose originally as a fairly crisp point of law and the OFT were persuaded to separate it off from other points so that it could be heard as a preliminary issue. That is the basis upon which we have gone forward. I did note that there were things in the skeleton that touched on, as it were, the fairness and the kinds of point you were talking about this morning, but it did not, I must say, occur to me that it was

going to be a free-standing ground of challenge to the decision, even if they were not time barred.

MR. SWIFT: There it is. The application went in, of course, within three days of the contested decision.

THE PRESIDENT: Yes, it is very full and very helpful.

MR. SWIFT: It was raised fairly and squarely in the skeleton as a third ground, and I would have expected to have had a very clear indication from counsel and those instructing him that they were proposing to address you on the ground that this was not an arguable case.

THE PRESIDENT: In the light of what Mr. Beard says, it is not something that they are conceding. It will have to be the subject of an application.

MR. SWIFT: We follow that. We do find it extraordinary that the OFT after a period of three and a half years can advance an entirely new argument without putting any person on notice that that was its policy and its intended application. It was a self-standing point of a plain breach of legal certainty, which is a stand alone point.

THE PRESIDENT: We will leave you to consider whether to take it forward in any other way. I am not inviting an application to amend because we have got enough to deal with, but obviously I cannot stop you applying.

MR. SWIFT: May we consider that and take instructions.

THE PRESIDENT: Yes.

MR. SWIFT: I have come to the end of grounds one and two, and if I may, after dealing with part three, which is the OFT ground three and Aer Lingus, I might want to just come back very briefly with some references in our skeleton argument on what I call the five alleged risks of conflict, rather than going into them in detail. Everybody is conscious that under the dialogue and exchange of views between the Tribunal and counsel, I may not have put the case precisely as it is put in the skeleton argument, but briefly we are saying that the decision that was required of the OFT did not raise a risk of conflict or inconsistent outcome, and that is our case that is put in the alternative, did the OFT misinterpret the *Masterfoods* case? I did not want there to be a sense that counsel for Ryanair has made some kind of concession which is contrary to the arguments being made in our pleadings. Part three, the OFT's third argument is that Article 21(3) ECMR prohibited the UK from applying the Enterprise Act 2002 to the minority stake before the expiry of the appeal periods. The principal argument is the outcome of the appeals to the General Court might have meant that the minority stake might be a concentration within Community dimension.

There are three preliminary points. First, as the Tribunal will be aware, the OFT only wants to run this ground three in the event that the Tribunal is against it on grounds one and two. The second is, strictly speaking, ground three is inadmissible because there is no basis for ground three in the OFT's time bar decision. This is a new argument that has been developed after the receipt of our notice of application, and it smacks a bit of desperation. However, we are not arguing that it is inadmissible and we should not deal with it, we are prepared to deal with it, but it does come to this Tribunal with a distinct lack of credibility attached to it. If there was any serious point in this it would have been raised in the time bar decision itself and this Tribunal is very familiar with arguments that are put in the pleadings that are not based on decision and they have not been thrown out.

The third oddity about ground three is that although it is put as an argument in support of the time bar decision, nevertheless the Tribunal, if it is not clear on the point, might wish to make a reference. As we said in our skeleton, we are not entirely clear what the OFT is proposing in the case of that alternative. In our submission, it is clear, there is no need for a reference, but no doubt Mr. Beard will elaborate on that. So it is a new point.

In our submission, the point is completely without merit so let me take it very simply. First of all, Article 21(3) ECMR says that Member States shall not apply national competition legislation to any concentration that has a Community dimension; it does not say any transaction that might be a concentration of the Community dimension, or any transaction that might be considered by the OFT under certain circumstances to be. It is just plain language, any concentration that has a Community dimension. So that gloss is not open to the OFT.

Secondly, as I said in opening in my part one, the European Commission's decisions opened the way for the OFT to investigate those decisions with presumed validity. The President of the Court did consider the position in the event of appeals being made. It was quite clear to him that an appeal against the decision did not allow the national authority to maintain the argument that there was still legal prohibition. So I do not know how they get round the very clear statements from the President and the General Court. Neither of them suggested that Article 21(3) ECMR would have prevented the OFT from investigating pending the outcome of the appeals.

Fourthly, there is a tension, in my submission, between the OFT's argument that it could win on Article 21(3), even if it loses on its grounds one and two in respect of Article 10, because one is dealing with the risks of conflict arising in possible appeals. The Court of Justice has dealt with this issue through its judgment in the *Masterfoods* line of cases. If the

OFT loses on *Masterfoods*, so it loses on grounds one and two, there is no reason to develop what I might call a son of *Masterfoods* by rewriting the text of Article 21(3) ECMR. In other words, there is nothing in this new point. It seems to be due more to the inventiveness of counsel after receiving our notice of application than have any ground in the time bar decision itself, and the Tribunal should spend little time on that issue.

Part four, Aer Lingus's cases, as developed now in its skeleton at paras.5 and 25, is a very interesting one. As we understand it, the Aer Lingus case is as follows: the prohibition condition applied from 2007 because the OFT concluded in 2007 that it was barred by Article 21(3) from investigating Ryanair's acquisition of a minority stake, but the prohibition fell away when the General Court ruled, in effect, that the OFT's position was incorrect.

We find this, as we understand it, an extraordinary proposition. It seems to boil down to this: if the OFT decision is "incorrect", and they use the word "incorrect", that is an error of law. How can an error of law serve to extend time under s.122 which asks whether a reference to the Competition Commission could not be made? There is either legal prohibition or there is not.

Aer Lingus adopts this argument of the prospective effect of the General Court's decision. Once the General Court has decided that there was no prohibition it did not apply at the time, in 2007, it applies with effect from July 6th 2010. That proposition is alien to the jurisprudence of this country – they quote no authority for it . Could I take you to what I believe is a very clear authority. It is a new authority, but the Tribunal have had it, it is the case of *Biggs v. Somerset County Council*, a decision of the Court of Appeal in 1996. It is a very strong Court of Appeal, Lord Justices Neill, Auld and Sir Ian Glidewell. The passages I ask the Tribunal to go to are at p.742G to H:

> "The decision in the *EOC* case was declaratory of what the law has always been ever since the primacy of Community law was established by s.2 of the 1972 Act. Indeed as Mummery J pointed out, Mrs. Biggs [the applicant] relies on the retrospective effect of the *EOC* case. Accordingly, since 1 January 1973, and certainly since the decision of the Court of Justice in *Defrenne v. Sabena*, there was no legal impediment preventing someone who claimed that he had been unfairly dismissed from presenting a claim …"

They go on.

At 743B:

"The fact that after 1 January 1973 Acts of Parliament and other UK legislation might have to yield to provisions determined by a different and superior system of law was, I suspect, fully appreciated only by a comparatively small number of people. But in my view it would be contrary to the principle of legal certainty to allow past transactions to be reopened and limitation periods to be circumvented because the existing law at the relevant time had not yet been explained or had not been fully understood."

So the law is what the law is and what the law has been. The decision of the General Court was declaratory of the position. So we simply do not understand the jurisprudence which Mr. Flynn is seeking to introduce into the English law, and no doubt he will be explaining that. There is a similar point in *BCL Old*. This is an authority that we refer to in our notice of application. I simply draw the attention of the Tribunal to it. We say, that being the case, if the OFT got it wrong in 2007 it got it wrong. That is a decision which it and those dependent on it have got to live with. It cannot be in some way updated with prospective effect by a decision of the General Court.

Moreover, nor do the General Court's judgment set aside any EU Commission decision of presumed validity that serve to prevent time from running under s.122. Aer Lingus raises an entirely hypothetical case in its intervention at para.36, and then they go on to claim, wrongly, that there is common ground between Aer Lingus and ourselves and some inexorable link between this hypothetical and the present case.

THE PRESIDENT: You are doing this by reference to their skeleton or their statement of intervention?

MR. SWIFT: Yes, the skeleton at 24(c), that there is a crucial distinction between the ECMR impediment arising from an EU Commission decision of presumptive validity. That is the hypothetical case. The claimed impediment here, which is an error of law, by a national competition authority. There is no common ground between Aer Lingus and Ryanair on this issue.

The Aer Lingus case is an odd one. They claim to be intervening in support and yet they adopt an entirely separate argument which so far as I can see is not even responded to as helpful by the OFT, so they do not seem to be assisting the OFT in this matter. Moreover, and no doubt this is a matter that can be clarified by counsel for the Office of Fair Trading and Aer Lingus, if the Aer Lingus position is correct, and that is that the Office of Fair Trading has what they call the "ECMR impediment", has been raised with effect from July 6th 2010 as a result of the decision of the General Court, what if Ryanair had appealed from

the decision of the General Court? I do not know whether Aer Lingus's case is that in those circumstances Aer Lingus reverts to the position that it adopted back in 2007, and that is that the OFT should be investigating the minority stake. If that is its argument then it is entirely inconsistent with the argument of the OFT that all proceedings have got to await the outcome of all appeals by Ryanair.

I should respond just to three of the other points that were raised so that it is on the record. Aer Lingus accepts that it could have challenged the OFT's decision in 2007 that it would never have power to review the minority stake that we discussed this morning, but says, in effect there was no point, being an appeal it would have led to the same delay and uncertainty. That is in their skeleton at 26(f).

In fact, there is a big difference between Aer Lingus appealing and their not doing so. First, if they had appealed successfully the Tribunal, when remitting the case to the OFT, could have extended the four month period because your power arises under s.120(5)(b), and we referred to what the Tribunal did in the *Tesco* case this morning. It does not arise under s.122. So by not appealing the four month period expired without the CAT having any power to extend time. You recall that this is what the European Commission was saying in its decision of 11th October, "This is what you can do, you Aer Lingus, you can go to the national authority, ask them to take a decision and appeal that through the courts". They did not. So not only did the OFT fail to act, Aer Lingus failed to act.

Secondly, and this is not a point of transparency, it is a point of reality, if Aer Lingus had brought proceedings Ryanair would have been on notice of the issues and could have sought to intervene.

Thirdly, any reference by the CAT to the ECJ would actually have raised the relevant issues, which are the Article 21(3) issues, which were never the subject of a proper interpretation by the General Court itself. As the OFT has pointed out the article 21 issues are peripheral to the Aer Lingus appeal if they were not included in the no power decision. The decision that Aer Lingus took has had its own consequences. It could have taken the decision, the appeal, that the European Commission was inviting it to do, but it did not. It is not the same thing at all as bringing this appeal against the European Commission.

Aer Lingus also attacks our argument that legal certainty requires limitation periods to be certain and specified in advance. We do not say the limitation period must be a set period of months or years, a limitation period, as I say, that runs from the date of knowledge of a fraud, concealment or mistake before the handing down of a judgment meets the requirements of legal certainty. One which depends on the exercise by the OFT of its

judgment about the likelihood of appeals clearly does not, nor does which turns on whether an error of law was made on reasonable grounds – that is the point I made before. If it is an error of law, it is an error of law; it is incorrect or it is correct. There is no scope for the OFT saying it was uncertain and now that the uncertainty has been clarified we can update this with prospective effect. Nor, as I have said, do I understand that the OFT even bothers to accept that argument.

I have dealt with the other point about Aer Lingus's claims that we were disingenuous in respect of our arguments that we made on the incremental acquisition of shares in 2008 because we knew the correctness of their position was pending before the European court. I have taken it very briefly, and I will listen with interest as to how the OFT and Aer Lingus develop those points under what I call part three and part four, but, in my submission, the key issues before this Tribunal are not in part three and part four. They are in what I call part one, which was the "use it or lose it" decision under the failure properly to consider ECMR; and ground two is the Article 10 case.

In summary, I would just remind the Tribunal of our argument that the events of 2007 were critical, that it was plainly open to the Office of Fair Trading to take a decision that there was no legal prohibition arising from ECMR, and its decision that it would not act was irrevocable and it has lost that jurisdiction for ever unless — unless — it can establish its new route under Article 10, and I would regard the point on my first part as being self-evidently correct. The OFT was wrong, there was no legal prohibition under s.122(4) arising from the ECMR. It took a decision, had a choice, it gambled, took the wrong decision; and we are really back now to whether the OFT can sustain its arguments on Article 10. Leaving aside the third ground which is — I am not going in that direction at the moment — so the two grounds, the first is did the OFT, when it took its time bar decision on January 4th 2011, ever say to itself "The principles that bind us are those that are set by the House of Lords in *Crehan v Inntrepreneur*, in particular the judgment of Lord Hoffman with which all the judges agreed, and the critically important para.16 of Advocate General Cosmas's opinion". One might have thought from the defence from the defence, that the OFT had not applied its mind to that critically important principle, that is one based on the, where the decision depends upon the validity of the other decision. It is not a question of whether matters overlap, whether there is a rub-off, it is whether there is a dependence, and we say they did not apply their minds to that. There is nothing in the time bar decision that indicates they were anywhere near it. There is simply a footnote to *Masterfoods*. And when you look, sir, when the Tribunal looks carefully at Advocate

General Cosmas, at what Lord Hoffman said, then in my submission the *Masterfoods* principle does not apply in this kind of case, because the gaps are there. This leads to the second argument about the risk of conflict.

May I place on the record that in our skeleton, in para.56 onwards, we deal, or try to deal, with the alleged five risks of conflict. My principal point is this: that the OFT and the Competition Commission are dealing with a legislative scheme of control which is quite different from the system of control which is being adopted at the EU level. It is designed for the protection of the interests of the UK and UK markets, it is a separate legal structure and the only decision that the OFT could have taken had nothing at all to do with Ryanair's acquisition of control over Aer Lingus in the sense in which control is understood by the Treaty. It is dealing only with a separate legal and economic analysis of whether the minority stake gave rise, first of all, to a relevant merger situation and, if it did, gave rise to an SLC. Those matters were plainly within the jurisdiction and the power of the Competition Commission. Plainly. The Commission would have formed its own view on the evidence put to it and would have applied its own tests. What the OFT is saying to you is that it was under an impediment imposed by Article 10 of the Treaty never to allow that separate system of adjudication and control to exist until some uncertain time in the future when the economic circumstances might be entirely different, in which the relationship between the parties and their shareholdings might be entirely different, and where the marketplace may be entirely different; and they are saying that this is a policy which is imposed on the OFT by the Community. It does not stack up, in my respectful submission. There is no risk of the conflict or the inconsistent outcomes as clearly identified must be the case in the *Masterfoods* case. You start by looking at the two decisions and how they match, but these decisions are different. What the OFT is doing is speculating about a series of possible outcomes that might come as a result of the lawful exercise by domestic bodies of a jurisdiction which they and they alone have at a time when they could lawfully do it. And when we said that there must be a very compelling case for that, my submission to this Tribunal is Article 10 does not provide that compelling case.

If the Tribunal endorses the OFT's approach it will not only encourage perverse appeals, but also encourage people to stay as long as possible outside the jurisdiction of the domestic authority, postpone appeals as far as they can; and, in the meantime, whatever public interest adverse effects are being caused by an ability materially to influence are never being investigated. Why should that be the policy that this Tribunal will endorse in this case? It is an abdication of responsibility by the OFT under a last minute attempt to rescue

the position from which it had involved itself in 2007. It is without merit as a matter of law, without credibility and, in my submission, should be rejected by this Tribunal.

THE PRESIDENT: Just so that we are absolutely clear, or I am, others may be already — is it your submission that the two, the CC doing its job and the general court doing its job, there was no realistic possibility of a conflict?

MR. SWIFT: Yes. Absolutely right, because they are concerned with entirely separate legal systems.

THE PRESIDENT: Yes. So, it is not — as I understand it your fallback point is that if there was, it could be managed down the road.

MR. SWIFT: That is a fallback point.

THE PRESIDENT: Yes.

MR. SWIFT: That is the fallback point. But the first of my two grounds is that the OFT have not understood properly *Masterfoods* and *Crehan v Inntrepreneur*; they have not tested this with the rigour that they should have done; they have not applied *Masterfoods* to the circumstances of this case. There is also no real risk of conflict or inconsistent outcome, and that must be the starting point. That, I would have thought, would be the commonsense approach of anybody looking at it, to say "We have two separate systems of control", and moreover the only system of control which the OFT was capable of investigating was the minority stake. Where is the *Masterfoods* principle? When you look at what the Advocate General Cosmas said, or Lord Hoffman said, this is precisely an area where national authorities should be exceptionally reluctant to refrain from doing what Parliament expects them to do within the timetables set by Parliament.

THE PRESIDENT: Thank you, Mr. Swift.

MR. BEARD: Mr. Chairman, members of the Tribunal, I am going to focus on the first argument in the defence and skeleton. After one or two brief remarks on the statutory framework, I will deal with it in three parts: why a conflict is possible in this case; why there is a duty to avoid conflict - the duty of sincere cooperation; and why s.122(4) therefore applies. I will then briefly deal with the second argument, the third argument, and some additional points that have been made by Mr. Swift along the way.

Now, Mr. Swift has already taken you to some of the provisions within the European merger control regime. I may touch on one or two a little later, but I will not take the Tribunal back to those now. Nor will I work through the framework of investigation and consideration that exists in domestic law. I think it is accepted on all sides that there are very strict timetables that exist within the domestic merger control regime, so the OFT has

to consider a case and refer it within a maximum of four months. Then, once a merger has been referred to the CC under s.122, the Enterprise Act requires that the CC publish its report within 24 weeks, just for your note that is s.39(1). That end date can be extended by four weeks, but for special reasons; but, again, it is a drop dead date at the end of that. The important point to note and it will arise later in relation to issues concerning stays, and son, the Competition Commission report must answer the questions specified in s.35, and it is just worth turning that up in the Purple Book, it is at p.135. The point is, in s.35(1) the Commission is mandated to decide the following questions: whether an RMS (relevant merger situation) is being created; and if so, whether the creation of that situation has resulted or may be expected to result in a substantial lessening of competition, SLC. So, there is no ducking it. The statutory mandate has to answer these questions. And then not only does it have to answer those questions, but furthermore it is under a duty pursuant to s.41 to deal with any SLC situation that it identifies:

"Sub-section 2 applies where a report of the Commission has been prepared and published under s.38 within the period the Commission shall take action as it considers reasonable and practicable", and that is because it will be required to publish its report pursuant to s.38 and identify remedial steps to be taken. And those will have to be identified in the report. And all of those steps, the identification of the RMS if there is one, the identification of an SLC if there is one, the identification of remedial steps to be taken if there are any — those all have to be done within the statutory timetable. And, as we know, the range of remedies that are available to the CC are many and multifarious, and certainly involve the possibilities of divestment amongst other matters. And so, that really takes us to the meat of this case because, having those strict statutory timetables on which we are agreed, and it being agreed that in the statutory framework the only braking mechanism is s.122(4), the question then arises, "How does s.122(4) work?" And it is clear, both from the explanatory notes and indeed the statement of the proposer of the amendment to the Enterprise Act that introduced this provision, what it is for. Lord Sainsbury said in very exceptional circumstances it is possible that a merger case, handled initially in Brussels, therefore by the Commission, can fall subsequently to domestic jurisdiction. It is important that the domestic authorities are not time barred from considering cases that may have been delayed by European Community Merger Regulation proceedings. In many ways that —

THE PRESIDENT: Is that in your skeleton?

MR. BEARD: Yes, it is, it is quoted in the skeleton and the defence.

THE PRESIDENT: Yes.

MR. BEARD: I am sorry. I will provide the reference.

THE PRESIDENT: No, do not worry.

MR. BEARD: So, what we have is effectively the beginning and the end of that case is encapsulated there. That is what 122(4) is to deal with, it is to deal with delays arising from EU merger control proceedings. That is what it does, and our first argument shows how it does that in three parts. There was a risk of conflict between the EU institutions and UK institutions. The UK institutions are under a duty to avoid such conflict and the mechanism for doing that is s.122(4). Mr. Gregory, kindly and very efficiently, says that the quote is at the defence, para.94.

THE PRESIDENT: Thank you.

MR. BEARD: Now, why a risk of conflict existed in this case, well, we have heard something of the history of proceedings from Ryanair. Of course, wholly dispassionate as Mr. Swift always is in these matters, and no doubt we will hear an account from Mr. Flynn in due course, but in the meantime and as a way of short circuiting discussions about the background facts, can I commend the chronology of matters that are found at para.18 of the Defence (and just for your notes that is in core bundle tab.2 at p.9). Without wanting to go through that in any detail, it is there for the Tribunal to refer to and, I hope, assist. What we see from there is the progress of Ryanair, building its shareholdings, making a public bid, notifying the matter to the European Commission, a decision from the Commission, the prohibition decision, and then two sets of appeals flowing from that — the Ryanair appeal and the Aer Lingus appeal. And the crucial thing is that it is in relation to those appeals that jurisdiction on practical conflicts might have arisen if UK merger control proceedings had run their course before the appeals had been concluded.

Now, just to be clear, the OFT of course recognises that parallel proceedings can reach consistent outcomes. The crucial issue here is that they might not, and if a conflict is a realistic possibility, then there is a need to deal with it. And of course there is the additional point that you do not actually want two bodies dealing with matters overlapping, because of course it is a grotesque waste of money and resources, apart from being a conflict of jurisdiction. This issue is in many ways best illustrated by some examples. The simplest example in some ways is to say if, following on from the Commission prohibition decision the OFT had made a reference in relation to the existing minority shareholding at that time, the CC might well have concluded that the shareholding did amount to a relevant merger situation and did give rise to a substantial lessening of competition. Now, the CC would have to have reached that conclusion in its report published within 24 weeks of the

reference. It would then have had to deal with a range of remedies and make the statements about remedies in that report including ordering Ryanair to divest its shares. And, given the statutory time limits and the reality of non expedited appeals in Luxembourg, the CC would almost certainly have reached its conclusions and published its report prior to the conclusion of any EU appeals that were running.

MR. PRESIDENT: I am sorry to interrupt. It could have, as it were, paused at that stage, could it not? It has got out of the compulsory timetable, as it were, by the time it publishes its report. So it could, as it were, make its findings. I am just thinking aloud. It could make its findings and recommendations for remedies, but say it is all subject to "We are not going to go any further at this stage, it is all subject to what the general court does".

MR. BEARD: There are two issues that arise there. First of all, the CC is mandated under the statutory scheme as I have already indicated, to make those findings of substantial lessening of competition if there is one in its opinion, and so what it would be doing is making a binding finding at that point as to the status of the minority shareholding so, even just focusing on the SLC finding, and I will come on to this in a moment, but what you would have is a situation where there would be a substantial lessening of competition finding whilst the question of whether or not there was a significant impediment to competition was still being considered out in Luxembourg. So, you could plainly have a conflict in the approach that was being taken by the CC in making a legally binding finding in its report and what was going on in Luxembourg.

It would also, because it is required to make recommendations in relation to remedies, and it is more than making recommendations in the old FTA sense, because there is no minister here, they are then executed by the CC, and in those circumstances what you would have is a situation where the CC was dealing with these matters, reaching a resolution, and it is mandated under the terms of the provisions of the Act "to put in place by reason of statutes, the remedial conclusions that it considers to be reasonable and practicable to remedy, mitigate, or prevent the substantial lessening of competition". So there you have a requirement on the CC to actually carry out remedies and fix stuff. And what will be then being said is, "Oh well, you have got the somehow supervening European condition which then reads this down", so you are being required to read down a provision in the statute in order to achieve the end that we say is achieved by s.122(4).

But, more than that, you are getting yourself into a horrible problem here. Because the CC is a body that has to discharge its functions within a statutory timetable, that drops the portcullis on any further consideration over the competition issues. Now, deferring

remedial treatment in circumstances where we recognise the appeal process could run on, would leave a horrible situation with the CC, where the CC reaches its conclusions within six months, 24 weeks, and then says, "Well, you know, clearly major SLC issue here. There is no way that Ryanair can hang on to these shares" just hypothetically, it is a very clear case, they decide. "We want divestment very quickly here because this is important". Somehow you have to read down the duty that the CC has —

THE PRESIDENT: So, you say the time you have got —

MR. BEARD: If it can, then another two years.

THE PRESIDENT: When you have got the findings, it is already too late.

MR. BEARD: It is already too late.

THE PRESIDENT: You have got the conflict.

MR. BEARD: Exactly. And if one looks at the timings as well, you have a structural problem here. Because what you have is a situation where, if you then said, "Oh, well, we will make the remedies conditional on whenever the thing comes back from Luxembourg, you could end up with a substantial gap between the findings on the competition issues and the remedial consequences.

Now, before someone says, "Ah, but there is s.41(3) of the Enterprise Act which says that the decision of the Commission under sub-section (2) shall be consistent with its decisions as included in its report by virtue of s.35(3) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently", so there is a provision there and actually, it is very very rarely used, but it is actually being used at the moment in relation to *BAA*. Because, of course, in *BAA* what happened was - it is in relation to market investigation, not a merger - but there you had a situation where a decision of CC and market investigation obviously overturned on the basis of bias by this Tribunal; went up to the court of appeal; the Court of Appeal said, "Actually, it can stand". Then an issue arises, should the remedies that were set out in the report previously, which was obviously some time before the proceedings, should they stand? Well, there you have got a situation where the CC is dealing with its competition findings but seeing whether or not there are changes of circumstances in relation to remedies. But, it is only in relation to the remedial matters that 41(3) deals. And what you would have here is a potentially conflicting decision on the competition analysis as well. So, you would have a conflict on the basis on which the Commission had reached its report findings, and you would not be solving that, and there is not a statutory mechanism to solve that. So, you have got two reasons why you have got a real problem

here. One is the conflict arises as soon as the report is taken and the matters are dealt with, the questions are answered, the remedies prescribed because that is what statute now requires of them. There is no minister sitting there who could fudge the thing and let it drift. That is not open. Instead, what you have got is a strict arrangement and even if you started saying, "Oh well we will make them conditional", you have got a proper difficulty with how that works thereafter.

Now, none of this has been discussed in any skeleton arguments. It is not something that has been raised by Ryanair and so to some extent these are slightly Ad hoc submissions, but I hope that they assist the Tribunal in dealing with where you get these concrete conflicts between the two regimes.

THE PRESIDENT: I suppose it could be said anyway, just having a finding in itself —

MR. BEARD: Well, it is a legally effective finding.

THE PRESIDENT: Yes.

MR. BEARD: The point I am making is it is a legally effective finding of SLC. So, your legal position has changed. You are now subject to an SLC finding. Furthermore, you are not just subject to an SLC finding, you are subject to a remedies finding, because that has to be made too. So, your legal position had substantively changed, even if you put in some kind of trickle tone thereafter, and it does not work, it is not consistent with a statutory framework. You have to read it down. If you are in the world of reading down, there are better places to be doing some reading down, as we will come on to. So, I hope that deals with that particular question.

Perhaps it is just worth, then, looking at two appeals, just very briefly, to think about where the conflicts actually arise. If we look at the Ryanair appeal, let us assume that Ryanair had been successful. So Ryanair turns up and says, "We don't like this prohibition decision. You say we're not allowed to bring the public bid and take our shareholding in Aer Lingus up to 100 per cent and that is wrong, Commission, you got that fundamentally wrong". In other words, the 25 per cent minority plus the 75% bid which the Commission held to be a single concentration, together a single concentration, which gave rise to a significant impediment to competition, that conclusion was wrong. When I emphasised the words "single concentration" just for your notes, the extract of the Commission decision is found in the core bundle at tab.10 and it is para.12. And, to interpolate, it may well be that that sort of language is what led the OFT and others to have concerns about whether or not Article 21(3) applied in relation to this matter.

But, leave that to one side. You have an appeal brought by Ryanair against the Commission's prohibition decision, and it is worth just looking very briefly at the grounds that the appeal was brought on. And if the Tribunal would just turn up authorities bundle 1, tab.7, I am just going to zoom through this.

If one looks at tab.7 this is the report of the *Ryanair* judgment that came out on 6th July 2010. I will not go through the background, but if one turns on to para.35, p.6 of 92, you can see there the first plea. It concerns the appraisal of the competitive relationship between Ryanair and Aer Lingus. And then you have discussion of that ground that was raised by Ryanair, and there is a very detailed consideration of these matters by the court. One goes on, and that continues right through to p.37 of 92, where we get on to the second plea, and that is regarding assessment of barriers to entry. So, the first ground is all about the competitive relationship between the two merging entities, was the merger going to lose competition in the market. The second is a challenge saying, "Well, actually, there are low barriers to entry here. The Commission got it wrong. There was lots of potential competition. Anyone could have come in and Ryanair therefore taking over Aer Lingus was not creating any significant impediment to competition. Then we roll on through to p.52 of 92, the third plea, and this is a route by route competitive analysis because those members of the Tribunal that have had the pleasure of dealing with airline tractions will know that often in relation to the market assessment of airline tractions, what is assessed is the degree of concentration and impact on origin and destination pairs. It is relatively easy to see why that is the case — if you want to fly to Malaga it is not necessarily the case that Milan is going to be a substitute for you, and therefore competition on that route is important to you, not on other routes, and so on. In any event, the third plea concerns route by route competitive analysis.

And then one turns on to p.63. The fourth plea is concerning efficiency claims. Another standard head in merger control cases where two entities are coming together and saying, "Well, actually, by bringing them together we are going to generate all sorts of efficiencies and they are going to feed through to consumers. This is a marvellous and wonderful thing, this is what competition is all about".

And then the final plea is found on p.73 of 92 and that is concerning the assessment of commitments, because in fact Ryanair came forward with various proposed commitments to deal with putative concerns that the Commission had and the Commission said they are not sufficiently specific, they are not adequate for purpose, and rejected them. But what one can see by that very brief run through the grounds is that what Ryanair was looking for was

confirmation from the court that the Commission had got its competition analysis wrong, not just in relation to part of the shareholding or just the public bid, it was the whole nature of this transaction which was the single concentration identified by the Commission.

All of its arguments I have referred to were all admissible and were carefully considered by the court and clearly it did not just bring that challenge for fun, it brought the appeal because it clearly thought that the outturn would impact on the findings made by the Commission if it were dealing with these matters subsequently.

If we think about that, whilst these rulings were being confirmed or modified by the court what would the CC have been considering? Obviously it would be considering whether there was a relevant merger situation, in other words whether the minority shareholding in question crossed the material influence threshold, which is the lowest level of control for merger control within the UK. Mr. Swift referred to the three levels of control: *de facto* control, de jure control, material influence. Here we would probably be dealing with a material influence case and then we would be asking ourselves, if we were the CC, whether or not the minority shareholding gave rise to a substantial lessening of competition and what would you have been considering as the CC at that point. It is precisely the same issues that the Commission had raised and were before the court in the appeals – competitive constraints, barriers to entry, route overlaps, efficiency benefits and, of course, if at any point Ryanair were to propose any sort of undertakings then similar issues might arise as arose in relation to the EU commitments.

It is true, as Ryanair has said, that there is a difference between significant impediment to competition assessment, and substantial lessening of competition assessment. You can tell that because the words are different, but when it actually comes to considering what is relevant and how you assess those issues, what you take into account is it is the same. So the fact that there are slightly different legal schemes does not mean that you do not get any conflict, you plainly do.

Mr. Swift, this afternoon, has commented on what his case is on conflicts but actually he put the matter perfectly this morning. He said: "It is very hard to argue that if the court said "100 per cent is not a significant impediment to competition" then the UK Competition Commission could not say "Never mind", and just carry on as if the matter did not raise any concerns. That is the conflict potential here. You could not possibly just be saying: "Never mind", you have precisely the same issues before two different institutions. The Tribunal has already recognised, Mr. Chairman, that you raised earlier, you could have the Competition Commission reaching definitive conclusions on the extent and nature of

competition between Ryanair and Aer Lingus and taking remedial action as appropriate. Meanwhile the court says: Actually, the Commission got it wrong, its analysis is flawed, its competition analysis is flawed, it approached the issues in the wrong way, the basis for finding an SIC was unfounded, there was good reason to consider that the proposed full take over should have been permitted to go ahead. You have a straight conflict there. So that is the Ryanair appeal situation.

Then we turn to the Aer Lingus appeal, the appeal in relation to the Article 8(4) decision.

THE PRESIDENT: Could that have helped you on its own? Let us suppose that Ryanair had not appealed within the two month period – I am just trying to remember the timings?

MR. BEARD: It is less than four months after the decision, if that helps.

THE PRESIDENT: Is it?

MR. BEARD: Yes, if that is the question. There are some interesting, shall we say, questions about how 122(4) works in relation to prior periods and so on because of its precise wording, but that is not the subject of the issues here and the point you have is you have a situation where an appeal was being brought at a time within the period of the relevant reference test. Furthermore, the uncertainty was clear for much sooner than that.

THE PRESIDENT: The Ryanair one was brought within – clearly it had to be.

MR. BEARD: So was the Aer Lingus one.

THE PRESIDENT: The Aer Lingus one was as well – within the same four months? I do not think so, was it?

MR. BEARD: The Aer Lingus appeal, I will just take you to the skeleton if that assists?

THE PRESIDENT: Well may be your chronology.

MR. BEARD: If one goes to tab 2, para. 18.

THE PRESIDENT: 27th June is the European Commission.

MR. BEARD: Yes.

THE PRESIDENT: So four months from 27th June, is 27th July, 27th August, 27th September, 27th October.

MR. BEARD: But what was crucial was that the decision taken by the Commission fell within the four months. It occurred on 11th October.

THE PRESIDENT: Right.

MR. BEARD: In fact, there was uncertainty prior to that point, because what you had was Aer Lingus was concerned about what the prohibition decision given in June had properly articulated, so what was being said by Aer Lingus is: "We are not clear about the terms of the prohibition decision on Article 8(4) we think you should be able to divest", and it was

pursuing that through correspondence, some of which is in the bundle. There you have a situation where clearly there was an argument being raised by a party about the question whether or not a divestiture of that minority shareholding should be made. Then what you have is a decision on 11th October.

THE PRESIDENT: So that is the Aer Lingus decision.

MR. BEARD: Then it is subsequently appealed in November within the time frame.

THE PRESIDENT: Yes, and as you rightly say that is within four months, 27th June.

MR. BEARD: Also, it is part of the same process, so when one is talking about the uncertainties created and the dangers of tension arising what one has is a situation where Aer Lingus is highlighting the difficulties that arose throughout that period and saying: "We think you should have ordered divestments of the minority shareholding" i.e. precisely the same clump of shares it would then fall for the domestic authorities to deal with. The Commission then takes its decision saying: "We are confirming that we are not going to order divestment, but Aer Lingus has made it clear that it wants to challenge that, so the OFT knows at that point, and anyone who is interested in this matter knows at that point that there is a question about whether or not the approach adopted by the Commission implicitly in the prohibition decision and made explicit in the 11th October decision is lawfully correct or, whether in fact as Aer Lingus alleges, it should all be dealt with by the Commission and it should be considered whether or not there should be divestment at a European level.

So these arguments are developed and fleshed out at para. 78 of our defence on p.30, but the point is that you cannot somehow say: "Actually, one can ignore the position in relation to the Aer Lingus appeal here because plainly the uncertainty that pertained to the retention by Ryanair of the minority shareholding was something that Aer Lingus was pursuing and was seeking to ensure that there was a crystallised decision by the Commission that it could then appeal, and it did so within the relevant four month time limit. Indeed, Mr. Swift this morning did not pursue that issue at all in any event. In answer to the Tribunal's question, yes, you do have to consider the Aer Lingus appeal and the conflicts arising from it.

As I say, after some too-ing and fro-ing Aer Lingus asked for a confirmatory decision, he got that in the form of the 8(4) decision. Now, how does one then deal with the 8(4) decision itself.

Clearly the appeal in relation to the 8(4) decision raises a straightforward conflict between the position of any UK merger authority dealing with that minority shareholding and the European authorities and institutions dealing with that question, because what is being said

by Aer Lingus is that you, the Commission, should deal with that minority shareholding whilst in any investigation at a UK level it would be the UK authorities dealing with precisely the same chunk of shares. There is no way out of this for the domestic authorities save by s.122(4). That was a straight forward conflict, there is not a clearer conflict that could possibly be identified, and since the EU courts had decided that consideration of the minority shareholding could fall within the Commission's jurisdiction, if that had been the outcome of the appeal, on remittal the Commission might well have concluded that European law did not require all or part of the minority shareholding to be sold, whereas the CC could be considering divestment. So as well as the jurisdictional clash that is straightforwardly arising you have these practical issues arising again, whereby the EU Commission could be saying one thing and the EC something completely different, and it could be in both directions. The European Commission could say: "We do not think there is any need for a divestment of this, although we have a power to make that sort of order, whereas the CC are saying it should be divested, or it could be the other way around. But clearly you have those potentials for a straight forward practical conflict.

Ryanair has tried to suggest that these conflicts are fanciful. It is just difficult to understand why they are fanciful, it is entirely straightforward why those conflicts exist and could arise. We are not saying that they must arise, we recognise it is entirely possible that both institutions could deal with matters in precisely the same way but you would still there have a conflict of jurisdiction between two people dealing with the same matter should not occur in this system, and furthermore you do have a real risk of practical as well as jurisdictional conflict arising.

So when we ask ourselves the first question: is there a real risk of conflict here, the answer is plainly "yes" both in terms of jurisdiction and practical consequence, and that is just wholly unsurprising, because in both sets of procedure it is the same minority shareholding that is part of the consideration.

THE PRESIDENT: This point is not dependent on Article 21(3) is it?

MR. BEARD: No, this is all to do with Article 10. So identify potential conflicts, then say if there are duties to avoid conflicts that is the duty under Article 10, duty of sincere co-operation, straightforwardly "yes" is the answer to that. The nature and effect of Article10 has been described in our defence. It requires that Member States shall take all appropriate measures – a very general term – to ensure fulfilment of obligations arising out of the Treaty or resulting from action taken by the institutions, and the general obligation is to facilitate again a general term, the achievement of the Community's tasks, and importantly

Member States shall abstain from any measure which could jeopardise the attainment of the objectives of the Community.

It was summed-up rather nicely by John Temple-Lang in an article he wrote a little while ago about Article 10's predecessor, Article 5, it was just a re-numbering issue. He said that the best way of summarising the duties arising is by saying that national authorities have two principal duties, a duty when necessary to make Community institutions, laws and policies work the way they are intended to work, and a general duty which applies in every case not to interfere with the way that they are intended to work – very general duties. Indeed, he has written a subsequent article saying that Article 10 EC is the most important general principle of Community law; we are not sure that that necessarily takes matters much further forward, but it is worth referring just briefly to the successor to Article 10, which is Article 4(3) of the Treaty of the European Union, which is found in the Authorities bundle at tab 3.

THE PRESIDENT: You accept that this is not the one that was ----

MR. BEARD: We accept that that was not applicable at the time, because this is the post-Lisbon version. The only point I am going to make is simply that there is no good reason to think somehow the duty of sincere co-operation got hugely inflated by the Treaty of Lisbon.

THE PRESIDENT: They use the same words, do they not?

MR. BEARD: Well it does not quite use the same words, and that was all I was going to point out that para. 3 of Article 4 says: "Pursuant to the principle of sincere co-operation", so it is saying: "This is what the sincere co-operation principle is":

> "… the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties."
>
> Member States shall take any appropriate measure, general or particular, to ensure the 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."

So it is very similar wording being maintained, but what one sees is a very general tenor to that wording. What Mr. Swift has tried to do this morning, and what Ryanair have tried to do in their notice of application in their skeleton is try and pare this matter down by what they refer to as "limiting principles", try to make it as narrow as possible. What is clear

from the simple wording of these treaty provisions is that is not what the duty of sincere co-operation is about.

THE PRESIDENT: Presumably we have to pay some attention to what European Court said in *Masterfoods* and ----

MR. BEARD: Yes, absolutely, absolutely, no doubt about that, and I am going to come on to *Masterfoods* and *Crehan* and *Delimitis*.

Two points to note: what we have here is a situation where allowing UK merger authorities to consider matters which might actually be for the Commission plainly interferes with the way the EU law system is intended to work. Allowing the institutions of Member States to take decisions with legal effects which were in conflict with decisions and actions of the EU institutions is contrary to that principle, and it really does not require any great sophisticated analysis or reasoning to see that and it is vindicated in *Masterfoods* and the other case law.

It is worth stressing that the duty is not limited to avoiding conflicts with existing Commission decisions. It is plain that duties under Article 10 arise where the risk is that national action might conflict with a future European determination, including a future decision of the Commission or a future judgment of the general court or the ECJ, overturning an existing Commission decision. Those sorts or risks actually arose in cases such as *Delimitis*, which is at authorities 1, tab 14, *MTV Europe*, which is at authorities 1, tab 29, and *National Grid* which is in authorities 2 at tab 38. In our skeleton argument we have set out some of the key propositions that one can find from these cases. Lord Bingham, Master of the Rolls (as he then was):

> "Article 10 cases are based on the extreme undesirability of inconsistent decisions as between the Commission on one side and national bodies on the other which undermines legal certainty and infringes the integrity of the Community legal order."

Lord Justice Millett in the same case:

> "Article 10 requires national bodies to avoid the risk of reaching a decision which conflicts with a ruling or future ruling of a Community institution."

And the Chancellor in National Grid, para. 23:

> "It is clear from paras. 55 and 57 of *Masterfoods* that this court should take all the steps required to ensure that the trial does not come on before all appeals to the CFI and, if brought by any party, to the ECJ have been finally concluded.
>
> The object is to avoid any decision running counter to that of the Commission or the community courts."

And all of those cases were cases in which the European jurisprudence *Delimitis* and *Masterfoods* were considered and, just in passing, in relation to the *National Grid* case, it is said by Ryanair that somehow this suggests that the world can roll forward and you can carry on investigations and litigation and then stop it when the point comes that a clash will arise.

The real issue here is that the court has a discretion how to manage the stages in its litigation processes so it can stop matters later on. The whole point here is the statutory scheme does not allow that, you have a statutory framework of timetabling, there is not a general discretion of case management – precisely what the Chancellor was relying on in *National Grid*. So those authorities are clear, the principle is a general one.

It is worth going back to two of the cases I have referred to, I think, *Delimitis*, which is in authorities 1 at tab 14. The copy I have starts with Advocate General Van Gerven, but it is the judgment to which I would refer the Tribunal starting on p.991. Under the heading:

> "The jurisdiction of the national court to apply Article 85 to an agreement not enjoying the protection of an exemption regulation."

Then at para. 43 the court summarises the question referred, and then in para. 44 it stresses that the Commission is responsible for implementation of Community policy but then at para. 45 recognises that it does not have exclusive competence. It should be stressed that this was a case at the time when national authorities did not have the exemption power, and what is now 101(3).

Paragraph 46 refers to the exemption regulation, and then para. 47:

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

Then at para. 48:

> "As the Court has consistently held, national courts may not, where the Commission has given no decision under Regulation no 17, declare automatically

void under Article 84(2) agreements which were in existence prior to 13 March 1962 when the regulation came into force."

Then over the page, para. 50:

"If the conditions for the application of Article 85(1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision the national court may continue with the proceedings …"

so if there is no real risk of conflict. Then at paras. 53 and 54 it says that if there is a real problem then you send the matter out on a reference.

THE PRESIDENT: "… scarcely any risk".

MR. BEARD: Yes, I am sorry, "scarcely", I am not trying to gloss it.

THE PRESIDENT: No, I am just repeating it to myself. So there is an assessment to be made, a risk assessment.

MR. BEARD: It is if the risk exists then what you have is a situation where, if you have such a risk existing then the EC would operate in relation to *Delimitis*.

THE PRESIDENT: And all this is in the context of the national court taking a view, is it not? Taking a view at what point it needs to stop, and in all these cases the national court has much more flexibility than you are arguing the OFT had.

MR. BEARD: Yes. Perhaps we can move on to *Masterfoods* at tab 17. It starts with a very large print version of Advocate General Cosmas' opinion, which is understandable given the emphasis that has been placed on it.

THE PRESIDENT: Welcome, I must say – you need a magnifying glass for some of the documents.

MR. BEARD: The only problem is that the footnotes are almost invisible in places in it and since Mr. Swift is relying on footnotes in it, it is useful to be able to see them. I will start with the judgment, since that is what the key authority is, rather than the Advocate General's opinion, and I will not rehearse, but it is instructive if one turns over to the first page of the judgment – it is at the bottom of the page, 11412 is where it starts. Then if one turns over two pages to 11415, the disputes in the main proceedings are set out.

There was a warm rivalry between HB and Masterfoods. Whether or not anyone draws any analogies between the situations in this case I think would be invidious, but nonetheless, Ireland was something of a battleground in relation to ice cream freezers in shops and there was an argument that HB's exclusivity clauses, which meant it controlled those freezers were contrary to competition law and Masterfoods objected to them. Initially, the Irish High Court granted an injunction to HB saying that it could enforce the exclusivity clause.

This was a matter that was appealed up to the Supreme Court by Masterfoods – one can see this from paras. 7 and 9. In parallel with those proceedings at para. 10 matters there were complaints lodged with the Commission, so you had a series of issues. There were proceedings in Ireland, there were the Commission proceedings, the Commission eventually reached views on various matters, they were then appealed up to the Court of First Instance (as it then was) and then one can see at p.11419 the questions that were then referred by the Supreme court asking about how to deal with these matters, and whether or not it should stay its own proceedings. The instructive part of the judgment is then found at para. 45 onwards where the court deals with the division of labour between the Commission and national courts and that refers to *Ufex* and *Delimitis*, and clearly heavily relies on *Delimitis* in para. 47. It goes on through para. 48. Paragraph 49:

> "It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the treaty is binding on all the authorities of the Member States."

And then when we go over the page to para. 53. What is instructive about para. 53 is that Mr. Swift said that a Commission decision has provisional validity unless it is suspended by the Court. That is not actually right. As para. 53 makes clear in this case a decision under appeal to the Court of First Instance was, in fact, suspended by the President, so actually you had a situation where the decision the Commission was saying that these arrangements, the exclusivity clause arrangements, were unlawful and anti-competitive was actually suspended in these proceedings, and the court said that that does not actually matter. There is still a presumption of validity, even though they are actually suspended by the court, so Mr. Swift was not correct in his point in that regard, but the fact that the matter was suspended made no difference to the way in which the court then went on to deal with matters, it is said that was irrelevant whether or not it was suspended. It went on to consider how you should deal with these situations and in para. 56 it says:

> "It should be borne in mind in that connection that application of the Community competition rules is based on an obligation of sincere cooperation …"

and so on. Paragraph 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."

Mr. Swift places an awful lot of weight on when the outcome of the dispute before the national court depends on the validity of the Commission decision and said that this notion of dependency is crucial to the idea of Article 10 applying. That is not what the court is saying at all here. What it is saying is that in this case clearly the outcome of the court proceedings in the national courts did depend on a Commission decision, that does not mean that you read it back round and say you have to constrain the principles of Article 10 by reference to simple dependency.

It makes it clear that where there is a problem then there should be a stay put in place, and that is again consistent again with all of the way in which *MTB* and *National Grid* and the other national cases that we have referred to in our skeleton and from which I have quoted deal with *Masterfoods*. They recognise that there is a degree of flexibility about the way that this principle must operate, and it is not limited in the way in which Mr. Swift has suggested. He actually does not rely on the judgment so much as the opinion of Advocate General Cosmas, and in particular he relies on paras. 15 and 16 of Advocate General Cosmas' opinion, which set out Advocate General Cosmas' general approach in relation to these matters. I would just invite the Tribunal briefly to read through those once again, you may be familiar with them because Mr. Swift took you to them. It is well worth then looking at the footnote, such as, for instance:

"When national courts are examining the legality of an exclusivity clause in respect of the use of ice cream freezer cabinets, and the Commission is assessing an exclusivity agreement on the use of a newspaper distribution network".

Well, that is pretty straightforward, one can see why. You could say, "Well no, you do not just halt the national court proceedings because the Commission is dealing with newspaper networks".

And then when we read on:

"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 court".

So Mr. Swift seems to place lots of weight on this notion of complete identity. But then it is worth reading the footnote again:

"Such as, for instance, the case in which the national courts are examining the legality of an exclusivity agreement in respect of the use of ice cream freezer cabinets between particular

company and retailers 1, 2 and 3 in Ireland whilst the Commission is monitoring a similar agreement in respect of the same products in the same market between another company [so a different company] and retailers 4, 5 and 6".

Again, you can see why the Advocate General is saying, "Well, just hang on a minute". You know, these two things, they are sufficiently different so you have not got an issue here. You have not got the relevant conflict to engage the requirements of what is now Article 10.

And the same is also true of the footnote in para.7 which we deal with at para.70 of our defence. We are not saying that any old discussion that happens to have some sort of common legal element in national courts and European institutions means the national proceedings grind to a halt. We are not saying that at all. What we are saying here is the minority shareholding was at issue in the European appeals procedures. That same minority shareholding is the minority shareholding that it is being suggested that the UK merger authorities should have been scrutinising. It is the same matter. It is under different legal regimes. It is under different circumstances. We do accept that. But, as I have already articulated, both the *Ryanair* appeal and the *Aer Lingus* appeal highlight why there is a problem in relation to these matters.

And so just, finally, to deal with Mr. Swift's points on *Crehan*, which is at bundle 2, tab.34. Now, unfortunately we only have the BAILLI print-outs of this, so we do not have a handy head note or summary. But what was going on in this case was that there was a dispute between Inntrepreneur and Mr. Crehan, infamously, and the Commission had made a factual assessment of the UK beer market in its Whitbread Bass v Scottish & Newcastle decisions. Now, it is pretty obvious which parallel is going to be relevant in Advocate General Cosmas's taxonomy of cases. It is the one about different companies dealing with different matters. So, different companies, different retails, they are not binding. And, interestingly, the sections of the *Crehan* judgment that Mr. Swift took you to, he skipped over para.50. Page 17 of 23.

THE PRESIDENT: I think I have got it, there is just a quote from Cosmas, is there?

MR. BEARD: Sir, it is quoting that footnote to which I took the Tribunal.

THE PRESIDENT: Yes.

MR. BEARD: It is saying where you have got different subject matters, different companies, different retailers, then this duty does not apply. And that is precisely what you have in *Crehan*. You have a Commission decision in relation to a different set of brewers who necessarily have different tied houses, and you have a dispute between Mr. Crehan and Inntrepreneur. There is no surprise that in *Crehan* the court concludes that the duty of

sincere cooperation does not operate to stop procedures rolling or indeed, as was actually at issue here, the extent to which the Commission decision was binding in relation to these findings. And, just in relation to *Crehan*, I would highlight the fact that there are some instructive quotes from Lord Bingham earlier in the judgment. In particular, at paras.5 and 11, I will not take the Tribunal through them now, but those are instructive in relation to the application of the duty of sincere cooperation.

So, with respect to Mr. Swift, he has hugely over-sold *Crehan* and Advocate General Cosmas. It is not surprising that he does not refer to the judgment in *Masterfoods* or the judgment in *Grid* or *MTV* in any detail. Those are the judgments that talk about the breadth and flexibility of the principle which fits entirely with the basic wording of the principle as articulated in the treaty at Article 10 and now in Article 4(3).

The one other point I would mention in relation to the duty of cooperation and the *Masterfoods* line of case law is that it is instructive, just for your notes, to look at paras.22-24 of Advocate General Cosmas's analysis, because there he talks about the difficulties and differences of carrying out a comparison assessing uncertainty where you are dealing with a future decision of the European institution and a past decision of a European institution. It is obviously much easier to deal with a past decision. It is made. There is no uncertainty about it. When you are dealing with future decisions much greater problems arise, and therefore you have to deal with those matters using the duty of sincere cooperation much more carefully.

THE PRESIDENT: Just remind me, Mr. Beard, because it was past in the *Crehan*, it was a past decision, is that a different issue? You are either bound, or you are not by something that is already there.

MR. BEARD: Yes.

THE PRESIDENT: If you are not bound, do you have to worry about the duty of sincere cooperation?

MR. BEARD: No, you do not, really. And to that extent Lord Hoffman's comments are slightly obiter, which is why I refer to the fact that this case, *Crehan*, was really about the binding effect.

THE PRESIDENT: Yes.

MR. BEARD: But, I am not trying to shy away from dealing with Lord Hoffman's comments, I am just pointing out that actually they do not take Mr. Swift, even as obiter dicta, as far as he wants them to go. They are certainly no authority for the extraordinary limiting *Crehan* principles that he wants to apply to this general duty.

And I have dealt in passing with the issue of presumption of validity. None of these cases depended on the presumption of validity. If, what Mr. Swift and Ryanair say about the presumption of validity were true, in other words the Commission decision is presumed to be binding, and then just rolls forward no matter whether or not you have to appeals, the outcome in cases like *Masterfoods* and *National Grid* just do not make any sense because if those prior Commission decisions were binding and unimpeachable for the purposes of national proceedings, then these questions about stays and so on simply would not arise. The truth is that those cases recognise that where you have appeals against presumptively valid decisions, the world is different. There is a degree of uncertainty and that degree of uncertainty has to be managed in line with the duty of sincere cooperation.

That takes me on, then, to s.122(4). Given that the UK was under a duty to avoid the potential conflicts with future European bid terminations, how were the UK competition authorities to comply with that duty? The straightforward answer is clearly the application of s.122(4). It was the relevant braking mechanism. It stopped the risk of collision. Article 10 meant those brakes had to be applied. And they were only released when the court in Luxembourg concluded its judgment and there was not any further scope for appeal. Article 10 prevents the OFT from acting where to commence the domestic merger process would produce a real risk of conflicting outcomes. And that would have been the case in relation to the *Ryanair* and *Aer Lingus* appeals. As a result of the situation was that 122(4) operated so as to extend time because a reference could not have been made prior to the lapsing of the appeal date in relation to the *Ryanair* and *Aer Lingus* appeals, and that is it. So, what is Ryanair's response to this? Well, it has got two points. The first is the OFT can make reference because it is only the CC that really creates the problem. The second is, if there is a problem with the CC reaching a conflicting decision, a sort of magic stay of proceedings could have been made by the OFT or the CC or someone else. Obviously Ryanair do not use the word "magic" and I interpolate, but nonetheless both of these are bad arguments.

On the first point, as set out in our defence, in particular at paras.40-50 domestic merger control simply cannot be broken down into discrete chunks as Ryanair proposes. There is only one point in the statutory scheme that enables the brakes to be applied. That is by the OFT by the application of s.122(4). The scheme is phase 1 and phase 2. It is divided between two different bodies, but the obligation, the duty of sincere cooperation is upon Member States, and these public bodies both are subject to the duty and, most importantly, the statutory interpretation must be conducted in the light of that obligation. And, as I say,

there is no provision in the statutory scheme apart from 122(4) which allows UK merger proceedings to be stayed.

THE PRESIDENT: So, Mr. Beard, what, hypothetically speaking, if it had gone to the CC, what would the CC do to comply with its duty?

MR. BEARD: If it had gone to the CC, then we recognise that if you have a situation where there are no other measures of domestic law that enable you to deal with the problem, then the impact of European law is that you must take measures to ensure that you are not conflicting with European law. There is no doubt about that. We have made our position absolutely clear. We could not do anything else. After all, the whole debate in *Factortame* which, we have included the relevant judgments in tabs.26-27 was all about how, if there were no mechanism in domestic law, and carrying on in that way will leave you in breach of European law, you have to do something about it. And in that case, of course, it was imposing interim measures on the Crown which were prohibited under domestic law. But the point here is, you do not get that far. It is only if you have made some catastrophic mistake that you end up in a situation where you create that conflict because you have not operated 122(4).

THE PRESIDENT: But, assuming one had got to that point, it would be by way of one of these magic stays or some other such technique.

MR. BEARD: Well, we do not really know how it worked at that point. Mr. Swift was pressed a little on this, and the mechanism by which you operate it is difficult because you do have to end up disapplying statutory provisions in order to make this work. And obviously the Tribunal referred to cases such as, or rather Mr. Swift referred to cases such as *Tesco.* *Tesco* is very very different, because there you have a situation where there was an appeal against a decision and it was, the question being raised in *Tesco* was whether the power under s.179 to review meant that the Tribunal had a power to remit and set a timetable for dealing with those matters. Now, there is no real dispute that if you could bring matters before a court or a Tribunal under a regime where the Tribunal or the court — and I am cautious to say that because of course this Tribunal is a statutory-type Tribunal, so it is not clear where this Tribunal gets such stay powers, you might end up down in Fleet Street trying to deal with these matters. What you have is a situation where you do not have a mechanism for the CC to be turning up before the court and saying, "Well, actually, there is going to be a car crash here with European institutions. We would like you to make a declaration against us". It just does not exist, this system, and what it shows is why 122(4) is pivotal in this scheme.

THE PRESIDENT: And, just concluding on that and related points, one of Mr. Swift's arguments was that it would be fairer to Ryanair in such circumstances to make the reference and let the CC deal with it, because otherwise there is such a long delay and things come out of the blue. How would you address that?

MR. BEARD: The first point is that it is irrelevant for the purposes of the construction of 122(4), and I will just come on to *Land Oberosterreich*, which sets out why it is you should not ever get to a situation where you are relying on the magic effect of European law if you can avoid it. So, this question of fairness is spurious in those circumstances. But, in any event this question of fairness, it is very difficult to get one's arms round here, because what you are talking about, remember, is a situation where Ryanair is now protesting that it would be very nice to have been dragged before the CC through the expense, pain and suffering of a CC inquiry in circumstances where it was parallel appealing against the very basis of the assessment that was causing the difficulties and leaving the minority shareholding putatively for the CC to consider. I am just guessing, but at that point I wonder whether the fairness appraisal that Ryanair might articulate might be a little different from the one it articulates now. In those circumstances, I think one has to be extraordinarily cautious about at what point you are assessing this notional question of fairness in any event. That is a secondary issue, and it does not result in the sort of legal certainty that Ryanair is saying it is fair that it should achieve, because if the only solution were to be that the CC reaches a conclusion and somehow builds in to its remedies conclusion a sort of permanent triple device that waits until the appeals are dealt with in Luxembourg, then actually Ryanair is left with precisely the same level of uncertainty about what is going to happen as it would be if the CC inquiry had not commenced, because you are not going to end up with the sort of situation where the matter is resolved prior to the outturn of the appeal process.

The real problem here is that appeals in Luxembourg take a very, very long time. We do not have a magic solution for that. We can understand why Ryanair are frustrated about it. Very many parties that end up in the Luxembourg are very frustrated about those timings but that is not something that the OFT can solve, nor is it something that changes the way in which the interpretation of s.122(4) should be undertaken.

If I may, authorities bundle 1, tab 24: I just wanted to take the Tribunal to the *Land Oberösterreich* case. Here we have got a case in a rather different context to do with authorisations for nuclear power generation, and what was going on here, which is described from para.38 through to 43, is that the Land Oberösterreich, which is adjacent to the Czech Republic, was complaining about the way in a Czech nuclear power station was

operating, and there were certain prohibitions that applied in relation to suing Austrian electrical generators for concerns about emissions, and so on, that did not apply in relation to Czech plants. So what was being said was that this was contrary to principles of non-discrimination on the basis of nationality. In any event, you can see from paras.50 to 51 what questions were being referred for a preliminary ruling.

Those questions are some of the longest reference questions I have seen. They run up to para.54 ----

THE PRESIDENT: They go on for three pages.

MR. BEARD: -- and the relevant ones are at 54.1(f), 2(f), 3(d) and 4(a) to (c). Thankfully, the court digested rather more tersely when one turns on to para.137 of the judgment.

> "As evidenced by question 1(f), question 2(f), question 3(d) and question 4(c), the national court also asks what are the likely consequences of possible non-compliance with Community law of the interpretation currently applied by the national courts in relation to the legislation at issue in the main proceedings.
>
> In that regard, it must be borne in mind that, according to settled case law which has developed in relation to Article 10 EC, which is also applicable in respect of Article 192 EA …"

because this was case brought under the European Atomic Energy Convention, but 192 is the same as Article 10 within that Treaty –

> "… the duty imposed on Member States by those provisions to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of Community law is incumbent on all the authorities in Member States, included for matters within their jurisdiction, the courts. When applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law. Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereby on individuals, if necessary disapplying any provision if its application would, in the circumstances of the case, lead to a result contrary to Community law."

THE PRESIDENT: That is *Marleasing* and then *Factortame*?

MR. BEARD: That is it, *Marleasing* and then *Factortame*. If you have got a statutory provision sitting in your legislative screen that can deal with this, you should be bending that, if you

have to bend it, before you start making up magic remedies further down the line. Ryanair has just got the approach wrong.

What we have there is a clear reason why in this case you have a conflict, you have a duty to avoid the conflict, you have means to avoid that conflict because of the operation of 122(4), which means that 122(4) must apply here. That is the issue.

There is a miscellany of points that I will try and pick up relatively quickly. In the notice of application, with less force in the skeleton and even less force today, Ryanair have suggested that the appeals in question are not in accordance with matters under the ECMR. Because they are not in accordance with matters under the ECMR 122(4) does not apply. If you remember, the terms of 122(4) itself provide that the condition mentioned in this sub-section is that because of the ECMR, or anything done under or in accordance with (and I interpolate) it, the reference, or, as the case may be the reference under s.22 to which the intervention notice relates, could not have been made earlier than four months before the date on which it was to be made. So they are saying 122(4) does not apply anyway because the appeals in question were not in accordance with the ECMR. They say that, in fact, they are in accordance with the Treaty but not the ECMR. That is just without any merit.

The simply point is that clearly the OFT is not saying that the appeals have been brought under the ECMR, they have been brought under the terms of the Treaty and the relevant statutes of the court, but they are being brought in accordance with the ECMR, and the ECMR, as we have set out in our defence at paras.80 to 82, anticipate appeals and discusses how they would fit in with the overall ECMR scheme. Recital 17 says that:

> "… the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice."

Article 10(5):

> "Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to 6(1) …"

I will not read the rest out.

Article 13(4) of the ECMR ----

THE PRESIDENT: What paragraph of your skeleton is that?

MR. BEARD: The defence, 80 to 82. Today Mr. Swift came up with an additional argument which says that there is an enormous gulf between the definition of Community law and the term "ECMR" in the relevant provision of the Enterprise Act. He referred to the fact that at

122(1) advice or information shall include such advice or information about the effect of Community law, and he says, well, that is very different because there is a term in 122(4) referring to the ECMR, and the two terms are separately defined in 129. Community law means all rights and powers under the Treaties; ECMR means the ECMR. We agree with that, there is no issue. Community law is bigger than the ECMR, we entirely accept that. What he does not ever deal with is the fact that the words there are "in accordance with the ECMR". It can be under Community law and in accordance with the ECMR. That is the end of that issue.

There are one or two other miscellaneous points. The judgment that Mr. Swift relied on in the *Aer Lingus* appeals, he tried to place weight on the President's Order in the General Court's judgment in the *Aer Lingus* case. Could we turn up authorities 1, tab 10. This is the judgment of the General Court, so obviously it is a final judgment and it is this which we should place weight upon. What we have got here is the consideration of Aer Lingus's appeal, and I will obvious to Aer Lingus any issues as to the precise nature of the appeal. The paragraph that Mr. Swift places weight on is para.91 which is at p.13 of 14:

> "… the applicant's arguments in the present case invite the Court to examine a hypothesis which is invalid in so far as the application of Article 8(4) and (5) of the merger regulation is not based on erroneous conclusions as claimed by the applicant (see paragraph 55 above). 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."

We take no issue at all with that sentence.

If there is a minority shareholding then the minority shareholding can be dealt with by domestic law, because it will not cross the decisive control threshold. It will not be a concentration with a Community dimension. We are dealing with a different issue here. We are dealing with a situation where that question is under challenge and there is uncertainty about that matter. This judgment does not deal with it.

Indeed, it is instructive to look at 91. It says it is dealing with the "conclusions as claimed by the applicant (see paragraph 55 above)". If you go back to para.55, which is on p.9, what you can see is quite a complicated argument being run. Effectively, what is being said by Aer Lingus here is that if there is a breach of Article 8(4) and 8(5), there is also a breach of 21(3), because if you have got a situation where the 8(4) power allows the Commission to require divestment, which is what Aer Lingus was saying on its appeal, the Commission

made a further error because it failed to make clear to the world and the authorities that it was dealing with these matters under 8(4) and therefore 21(3) applied and no one should touch it. So it is a parallel appeal, it is not an additional appeal in this regard. There are parallel breaches being alleged. What is crucial is there is nothing in here about why 21(3) might or might not operate in relation to uncertainties due to the appeals themselves. The point being made and the point that is being assessed by the court in 91 by reference to para.55 is this parallel breaches argument that was being dealt with.

As I say, the OFT takes no issue with the Court's judgment in that regard and considers that it does not create any difficulty in relation to the overall analysis. It is plain that there was no suggestion that Article 10 was in play, was being discussed, was being considered by this Court or indeed, importantly, by the President upon whom also Mr. Swift relied.

There are two things to say about the President's decision. One is that of course the points are not raised there. Ryanair now says, "If it was such a good point, someone would have raised it". I think the history of proceedings does not necessarily prove that in litigation. There are often good points that are not necessarily raised because they are not germane to the particular issues that are being the focus of the claim before that court. So the President was not dealing with that.

Equally, in relation to the President's Order, what the President was considering was again the argument that was run by Aer Lingus about the idea that there were parallel breaches, 8(4) and Article 21(3) at the same time. It is true that at the end of his judgment in relation to these matters – so after he has dealt with the 21 parallel breach point in 101 – he then does talk about issues that appear to concern proceedings on appeal existing and how those might be dealt with. Those comments are obiter in these circumstances. They are certainly not matters that were the subject of any argument, and they certainly do not make out the points that are being put forward by Ryanair as the basis upon which somehow Article 10 should be read down. There is nothing there about Article 10, nor of course is there anything about how these matters apply in relation to 122(4).

THE PRESIDENT: Is that the paragraph where he says "*prima facie*"?

MR. BEARD: Yes. He talks about *prima facie* there is an issue in relation to these matters. At the end he talks about, if national competition authorities were deterred from taking definitive measures there could be the possibility of interim measures being taken. So even there, even when the issue is not before him, he is recognising that there might actually be some sorts of problems there. Of course, the difficulty we have here is we do not have an alternative interim measures mechanism, we have 122(4). That is the way we deal with

these problems. It may not be the most beautiful creation of statute, but it is the one that exists, and we therefore have to deal with it on that basis.

Again, the terms of the judgment of the General Court, which is the important one, we entirely accept. The obiter comments of the President, as we say, do not take Ryanair anywhere near far enough forward.

There are various other points that Ryanair has made which I hope I have dealt with or touched upon along the way. Ryanair argues that the merger control regimes are supposed to operate under tight timetables and therefore our interpretation of 122(4) undermines that scheme. As I have already adverted to, the delays flow not from the way in which the OFT operates, but from the existence of the very long appeal process that operates in Luxembourg. When the matter is in our hands we do operate relatively quickly. Indeed, part of Mr. Swift's other criticisms were that supposedly we pounced. Actually, what we did was we sent out a standard inquiry letter. That is how the OFT also operates in relation to merger control. It does not issue general warnings or general discussions in relation to transactions it is going to consider under its four month reference process.

THE PRESIDENT: Can I just nail down on how this works with Article 122. The duty of sincere co-operation raises a problem in this situation.

MR. BEARD: The potential conflict raises the problem.

THE PRESIDENT: Yes, the potential conflict raises a problem. Section 122(4) may deal with other issues too.

MR. BEARD: Yes, it may do.

THE PRESIDENT: Pure 21(3) issues.

MR. BEARD: These are not 21(3) issues, these are Article 10 issues.

THE PRESIDENT: I know, but it may deal with 21(3).

MR. BEARD: Certainly, yes.

THE PRESIDENT: It might be said that that is what it is there for. There is an issue because there is a potential conflict. The OFT says, "My goodness me, what do we do, there is nothing else here that stops us having to make a reference which then crystallises that risk, therefore we must, as there is nothing else that we can do or indeed anybody can do, we must interpret the compulsive words in there as being reflected in Article 10".

MR. BEARD: Yes we take it in two stages. The first argument is Article 10 says, "You must avoid conflicts, we have detected a conflict, we are under an obligation to avoid that as a Member State". The mechanism by which that can be done is 122(4). That means we could not make a reference consistent with the duty under Article 10. So you do not need to

gloss the language of 122(4) in order to reach the conclusion. There is a conflict, Article 10 says you have to avoid it. If Article 10, a Euro duty, says you have to avoid it, that means you cannot make a reference if that is leading to the very conflict that you are concerned about. You do not need to gloss it. That is why we have the first argument.

The second argument is, if it was the precise terminology of 122(4) which was causing you the difficulty then you have to read it down because that is what you do if there is any problem with the precise terminology of the statutory provision that provides you with this stay mechanism to comply with Article 10.

That is why we separated the two out into the first argument and the second argument.

What we are saying is that we think, on the face of it, "could not" is fulfilled here. If there were any doubt about that, then you must read down 122(4) to enable compliance with the Article 10 duty.

We raise issue of general domestic statutory interpretation as reinforcement of that. That is why we say there are two arguments. One is straightforward, no glossing of text, Article 10 fulfils the requirements; if there is any doubt about it you do have to gloss the text, you certainly do not turn to magic. We have ways of dealing with these problems.

That is effectively arguments one and two dealt with.

THE PRESIDENT: It does not stop you investigating, does it, or does it?

MR. BEARD: Yes, it does stop you investigating.

THE PRESIDENT: No, you, the OFT, rather than the CC, does it stop you investigating?

MR. BEARD: Yes, it does stop you investigating, because once you start the process then we have to reach a conclusion by the end of the four month period. If we reach a conclusion of reference, we then start the CC going. It is effectively a "snowball rolls". This is why the problem exists.

THE PRESIDENT: So you cannot actually have a half way house.

MR. BEARD: No, you cannot have a half-way house. You need different statutory provisions.

You can see how you could build a statute that offered half-way houses and different provisions down the road and discretions to the Competition Commission, for example, but those just do not exist. That is the problem here. If they existed the whole argument would be different.

THE PRESIDENT: I do not mean to interrupt for more than a moment, but just for the sake of the shorthand writers, they need to know basically how long we are going on tonight. It seems to me, looking at the time, we are not going to finish tonight.

MR. BEARD: I was trying very hard to rattle through so that we could do.

THE PRESIDENT: Would you agree, we are probably going to have to come back tomorrow. Sitting until five is not going to do it, is it?

MR. BEARD: I should not be more than about five or ten minutes longer.

THE PRESIDENT: You have got five or ten minutes more. Mr. Flynn?

MR. FLYNN: If we were going to finish tonight I could try to rattle through what I have got to say and Mr. Swift could reply. If we are definitely going over then ----

THE PRESIDENT: What is your sort of rough time?

MR. FLYNN: My rough take was something like half an hour.

THE PRESIDENT: It sounds as though it would be kinder to all concerned if we were to sit for some of tomorrow morning.

MR. FLYNN: In that case we will let Mr. Beard finish and knock off for tonight, as it were?

THE PRESIDENT: Probably, yes. I am sorry, Mr. Beard, yes?

MR. BEARD: I was actually just tidying up. I was dealing with the point about timeframes where Ryanair has argued that merger control regimes operate under tight timetables and so the interpretation of 122(4) that we are developing is contrary to that. I was just pointing out that it is not the OFT's approach that creates the difficulty, it is the time that the appeal mechanism works. None of this changes the proper analysis of Article 10 and 122(4) in any event. Those duties and statutory provisions exist. We act as quickly as we possibly can under strict statutory timetables once the thing starts rolling.

In terms of issues of legal certainty, as I have already indicated, if this is being run as a separate ground it would be wholly inappropriate for it to be pursued. In so far as it is saying that the difficulty arises that merging parties do not quite know where they are in relation to matters at certain times, that is true to a limited extent but that does not suggest that anything that was done here was done in any way incorrectly, because what you had here was a situation where the OFT set out its position back in 2007 – and I will briefly go through that letter in a moment – and then it left the matter whilst the appeals were pending, and it did not deal with it further, and it was only when they concluded that it became engaged again and it used its ordinary procedure of sending out an inquiry letter at that point. It is not a question of pouncing, it is the fact that it could not do anything else in the meantime. The idea that it should have been doing a running commentary as judgments came out or submissions were made before the Luxembourg courts is somewhat surprising.

THE PRESIDENT: I suppose you could have said, "We will have to revisit this again in the light of the judgments when they come out".

MR. BEARD: What difference would any of this make? The point is that you have got a situation where the OFT sets out in a letter in 2007 two views effectively. Mr. Swift put it as "ambivalent". That was precisely right. There were, to give them the Latin origin, two strengths to the OFT's position. One was that 21(3) applies in perpetuity to this because it was a single concentration dealt with by the Commission. The court subsequently said the OFT was wrong on that. It clearly said in its letter as well that it was concerned about the uncertainties that arose by reason of the appeals, and that is precisely the issue that then comes back to life after those appeals are concluded. That is what we are dealing with today.

I will take the Tribunal briefly to the letter, if I may. It is at tab 17 of the core bundle. Mr. Swift referred to the second substantive paragraph on the first page. It sets out:

> "… Article 21(3) of the ECMR precludes the OFT's merger jurisdiction …"

That is saying for all time because it was a single concentration considered by the Commission. It explains in the prior paragraph why it is that it is not agreeing with the stark view of the Commission in relation to those matters. It also says:

> "This conclusion is underlined by the likelihood that Ryanair will challenge the Commission's Article 8(3) decision before the Court of First Instance."

Mr. Swift says, "This means as it was underlined, it is all conjoined", but the issue is there. What is being said is that Aer Lingus and Ryanair will seek relief creating a risk of inconsistent outcomes if the OFT were to have the parallel jurisdiction.

Then it goes on, if one reads the remainder of the letter, those terms are consistent with and rely upon the fact of inconsistency and uncertainty that we have at that time as the OFT in relation to these matters, because we are talking about things such as the appropriate body to be pursuing interim measures and noting the difficulties that arise given the fact that challenges have been suggested, and the same is true in relation to issues to do with pre-emptive action in 2.

So there is no doubt that there are, as Mr. Swift put it, and there is an ambivalence about this letter, two lines that are being adopted there. The OFT makes no bones about the fact that the court has subsequently said that the first of those was wrong. It accepts that. That is the interpretation of 21(3).

It is, of course, beautifully ironic that actually Ryanair thinks that the OFT was right about that first argument. You can tell that because of footnote 19 of its notice of application. It says:

> "Ryanair has reserved its position on the question of whether, since the European Commission had reviewed its minority stake under the ECMR, the OFT was (and is) prohibited from carrying out an investigation into the acquisition of the minority stake by reason of Article 21(3) of the ECMR. Ryanair has, in its submissions to date, focused on the time bar issue as it believes that this argument involves a narrow point of construction that is sufficient to dispose of the case quickly. However, for the avoidance of doubt, if the time bar issue is decided against Ryanair, it will argue this point."

So Ryanair's view was actually that the OFT was right. It is just that the court disagreed with both of us.

We are not shy of the fact that there were two reasons. We are not shy of the fact that we got one of them wrong. What we say is that in the circumstances that does not have any impact on the proper interpretation of the position now. In that connection, it is just worth highlighting the fact that a number of suggestions have been made that somehow we have been acting in a way that is not transparent and is silent. That is not right. The manner in which the OFT has operated is to set out its position at the time when these issues were raised and then when they were being dealt with by the appeal courts we did not engage with them, we did not run a running commentary, and then when it came to the situation subsequently we set out our position clearly in our inquiry letter that we were engaging with matters directly , and we wanted information and we were carrying out our investigation under the ordinary scheme post-122(4). Ryanair then immediately began to say on what basis is that? That was fully spelled out to Ryanair very quickly. There was a discussion about whether an exceptional process should be followed here of separating out jurisdiction as an issue because the OFT made it very, very clear that it does not separate out jurisdiction in its first stage decision making, because otherwise there is a real risk that you can have litigation in relation to jurisdiction started within these tight time frames for review, and so this is an exceptional circumstance. The OFT recognise the exceptionality of the case coming after three years and in those circumstances was willing to put in place a decision that could then be brought before this court for the streamline challenge to which Ryanair referred in the footnote to which I have referred.

THE PRESIDENT: And that was done because of stopping the clock, that was possible for that reason because of stopping the clock.

MR. BEARD: It was possible because of stopping the clock. There are a range of issues because obviously if an appeal is brought before this Tribunal then we are in *Tesco* territory, as it

were, in terms of timings so things change potentially because you are coming under s.120, so I do not want to say that it was all to do with the s.25 stopping the clock.

THE PRESIDENT: Let us leave that one.

MR. BEARD: Yes. So the idea that the OFT has changed its position is wrong and, in any event, it does not change the legal analysis now. The fact that this comes some long time after the initial transaction is again a function of the appeals process, there is nothing that can be done about that, it is an important part of the integrity of the Community legal order that these sorts of appeals are available. We have to leave it to the courts in Luxembourg to manage their processes, it may be frustrating, that is the way that these things go.

Finally, I have dealt with arguments one and two, the only other issue is the third argument which has been set out in the defence and in the skeleton argument. Mr. Swift suggested that the third argument was a testament to the creativity of counsel because it clearly had never been raised previously. I think it is just worth correcting that, because it is not actually correct.

I would ask the Tribunal to take the core bundle at tab 7. This is the time bar decision itself which was sent on 4th January, the subject of this appeal. If one turns on to footnote 8, which is a footnote to para. 11, I invite the Tribunal to read that footnote.

THE PRESIDENT: (After a pause) Yes.

MR. BEARD: So far from it being a case where this just arose subsequently, it was actually set out in the time bar decision because that is effectively an articulation of the third argument. It is plainly put forward in the alternative. It is only if this Tribunal decides that the OFT should have commenced any investigation back in 2007 and now is long out of time in relation to these matters, that you even have to begin to engage with the third argument and the proper interpretation of Article 21(3) because the first two arguments are based on conflict, Article 10, the operation of 122(4). The third argument says that actually, Article 21(3) itself is not as straightforward as everybody is assuming, it is actually a lot more complicated to interpret Article 21(3) in these sorts of circumstances and, in fact, if you read Article 21(3) properly, what it would actually cover are cases where there was a real risk of a finding of a concentration with a Community dimension, and if you are concerned with real risk cases Article 21(3) would be applying prior to the Commission's decision and pending any appeals. So that is the argument that is being raised. In other words, Article 21(3) on its face says that no Member State shall apply its national legislation on competition to any concentration that has a Community dimension, and what is said here is the minority shareholding does not have a Community dimension and therefore Article

21(3) does not apply and you could therefore have rolled the matter forward. But the difficulty you have is actually the term "concentration" that is used in Article 21(3) is not as straightforward to interpret as one might think, because if one takes the situation prior to a Commission decision you have a situation where there is a transaction, it may be notified, but actually there is no finding of a concentration with a community dimension and, indeed, it might transpire to be the case that there is not one at all. No one suggests that national authorities should be able to look at transactions at that time, because the Commission is actually thinking about them.

THE PRESIDENT: Well is that not exactly the same situation by analogy, or at least a very close analogy to the situation where, before Regulation 1 of 2003, an agreement was notified to the Commission, and one of the cases you have just showed us the court says that while the Commission is looking at whether there should be an individual exemption the national court should not be applying Article 8(5)(1) as it as?

MR. BEARD: Yes, we do not have any problem with that because that is saying that Article 10 operates. Remember, this argument only runs where the Tribunal has decided Article 10 does not apply.

THE PRESIDENT: Yes, but why? Why is this an alternative argument, and not a cumulative argument? Why could Article 10 equally apply here?

MR. BEARD: Well if Article 10 equally applies here, we do not need the third argument. It is only if Article 10 does not apply that you have a problem. We say Article 10 would apply throughout. This is why we say it is only in the alternative, it is only if the Tribunal is going down the route of saying: "Actually, Article 10 does not do what we say it does, that you get to this problem with Article 21(3), because what we are saying is: "Even if we were wrong about all the stuff to do with Article 10, the assumption by Ryanair that 21(3) is terribly straightforward is just wrong, it is not as straightforward as Ryanair suggests by any manner of means, and that pre-decision situation is an example of the problem, because what you have there is a situation where no one has made a finding that there is a concentration with a Community dimension, so does it mean that the national law cannot apply at that stage. Everyone says: "Yes, that must be right", but that is not actually what 21(3) says, and there are other examples of that, because in fact if you think about a public bid, in fact what a public bid is, is an intention to create a concentration, it is not actually a concentration until you get the shares. That is specifically dealt within Article 4 of the Merger Regulation says that for the purposes of this regulation the term 'notified concentration' shall also cover intended concentrations. So a notified concentration is

going to be covered. Notified concentration is a term used repeatedly through the merger regulation. Is it a term used in Article 21(3)? No, it is not. The term used in Article 21(3) is "concentration", and interestingly in Article 4 it says; "For the purposes of paras. 4 and 5 of this Article, the term 'concentration' includes intended concentrations within the meaning of …" the second subparagraph. That would be fine, but it is subparagraphs 4 and 5 of Article 4, so what you are having to do is read that definition across into 21(3). We are not saying that you cannot do that, at all, but what we are saying is that you cannot just take Article 21(3) on its face, and actually, as we have set out in our defence, and in our skeleton argument the difficulty is that Ryanair sitting back and saying: "It is all terribly straightforward, all you have to do is look at Article 21(3) and that runs from the time when the prohibition decision is made and everything is clear and hunky-dory, you do not have to worry about anything." That is not right. It is true that comments made by the general court in the Aer Lingus appeal and the President, suggest that Article 21(3) must apply in the period prior to the Commission decision and we do not take any issue with that. But, the idea that it is straightforward to interpret these matters is far, far from clear.

We say that if you were to reach a conclusion that Article 10 was not operating as we said, you will have to engage with how does Article 21(3) operate here? What we have said is: if the way you interpret Article 21(3) to cover the prior period before the Commission decision is to say: "It covers any situation when there is a real risk that there is going to be a concentration with a Community dimension", or "A transaction might be a concentration with a Community dimension", and that is how Article 21(3) operates and then it covers all intended concentrations and so on.

If you interpolate those words and read down 21(3) in that way, you are going to get the effect that the where you have appeals from a Commission decision the same issue arises, and actually you would have 21(3) applying during the course of the relevant appeal period. That would mean that again you would have a situation where the time for making a reference did not run until the appeal period has elapsed. So that is all we are saying here, we do not say you need to decide this, but we do not think it is right that this Tribunal should be in a position where it is just assumed that Article 21(3) is entirely straightforward to interpret because it is not. It is for that reason that we set out the third argument in the alternative.

In the circumstances, I think I have covered the majority of the points on the third argument that are set out in the defence. I have also dealt with, I hope, setting out the first and second argument which can be seen effectively as two sides of the same coin and, as I say, I have

already emphasised the point that the OFT is very keen to emphasise in connection with this case that a special procedure was taken in relation to separating out the jurisdictional issue, and it would be very concerned that in any judgment the Tribunal might make it should not be suggested that the OFT should, or it would be proper for it to in other cases, separate out jurisdictional issues during the course of any investigation, that would create very substantial problems, and as it set out in its relevant letters this is an exceptional circumstance.

Unless I can assist the Tribunal further, those are the submissions of the Office.

THE PRESIDENT: Thank you very much. There might be a question.

MR. BLAIR: I am interested in what Mr. Swift had to say about start off and then wait and see if the conflict arises in practice, and we have your submissions as to how you are unable to cope with that, thank you, and we have your submissions as to how the Competition Commission is also unable to cope with that. Just to be sure, is it the fact that Ministers have no executive power to solve a wait-and-see certainly since they lost their normal power to intervene? My reading of it is that they can start things but they cannot stop things through executive power?

MR. BEARD: I am not sure, I am going to be cautious here, they can certainly start things. Ministers get involved where there are public interest issues in merger control and that can be in a range of circumstances, for example, probably the most topical one is in the Newscorp/Sky merger procedure, which is a particularly odd one because the competition issues were dealt with at European level, Mr. Cable then decided that there was a European intervention notice that was to be issued. Mr. Cable was then indisposed in dealing with matters thereafter and it transferred over to the Minister for Culture, Media and Sport, who is now dealing with matters. He is therefore dealing with merger control issues under the merger regulation but only in relation to plurality matters. In those cases it is not clear that there is a specific timetable although there are various statutory minima for consultation and so on, and so I would be circumspect about making any generalised statement about the extent to which Ministers are constrained in taking decisions at particular times in relation to public interest cases. There tends to be in the frameworks for dealing with public interest matters, a range of time limits within which reports have to be made and minimums for consultation, but for the timing of actual decisions thereafter I would need to go and check, but my recollection is those are not specified in quite the same way.

MR. BLAIR: And this may not be a public interest case anyway.

MR. BEARD: If it is not a public interest case then there is no intervention by Ministers so it does not arise.

MR. BLAIR: And you could not make it a public interest case just because of the duty of sincere co-operation I assume?

MR. BEARD: No, because the public interests are specified in the Act. There used to only be defence and then it was extended to cover media plurality and then during the course of the financial crisis at the time of the Lloyds/HSBOS merger an urgent additional public interest measure was passed in relation to financial stability. Now, there are some slightly odd provisions that allow you to add in new public interest when a merger is happening because you are really concerned about it, which is what actually happened at Lloyds/HBOS, but I think that is a very different world from the one that we are dealing with, and I am not sure in those circumstances it sheds any light on where we are with the statutory timetable.

MR. MATHER: In the defence, and you helpfully drew our attention to this, at para.94, you are talking about the legislative history about s.122 and it seems so suggest, the quotation from Lord Sainsbury, that there was a previous regime set out in regulations. Can you help us at all on that? Is there any further clarification?

MR. BEARD: I think that is not quite right. This is a matter on which Aer Lingus may address the Tribunal. They have made submissions and included material under the Fair Trading Act, it was part of the reason why I skated over relatively quickly the domestic statutory interpretation arguments conscious of time. Mr. Flynn will deal with it, but I think it is not right to say it was regulations, I think it was primary statutory provisions, but I leave that to Mr. Flynn.

MR. FLYNN: Well I am not proposing to go into it at length now, Sir, but if you wish to look at it overnight it is para.22 onwards of our statement of intervention, and I think regulations is an old term for statutory instrument, is it not, so I think it was in regulations, but that is how it was done.

MR. BEARD: Yes, the statutory history of 122(4) is not happy, it clearly got missed in the first draft of the Enterprise Act and someone noticed this, hence the statements from Lord Sainsbury proposing it somewhat late in the day.

MR. MATHER: And I noticed Lord Sainsbury concluded by saying: “It will ensure that the impact is clear from the face of the Bill”. (Laughter).

MR. BEARD: The sense of irony that our politicians have is a wonderful thing.

THE PRESIDENT: We will carry on at 10.30, and hopefully we will be able to finish reasonably easily in the course of the morning, will we? Thank you very much.

(Adjourned until 10.30 a.m. on Friday, 11th March 2011)