IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1174/4/1/11

Victoria House
Bloomsbury Place
London WC1A.2EB

Friday, 11 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 2)

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: Good morning. Mr. Beard, just before Mr. Flynn starts, we have got a couple of short questions, if we may. I think Mr. Blair has got one first.

MR. BLAIR: Mr. Beard, I apologise, I have not yet seen the transcript though I know it has been circulated this morning, and it may be that this question would be answered if I had had a chance to read the transcript. I am puzzled about why you see your third ground of defence as subsidiary to and arising only in the event of your failing on your first two grounds – in other words, why is Article 21(3) part of the mix alongside Article 10? Why are not both equally relevant to the issue about inability to act for the purposes of s.122(4)?

MR. BEARD: Both of them are relevant to acting under s.122(4). The reason we structured the arguments as we have done is because what is said is that Article 21(3) is in terms that means that its operation came to an end at the time of the prohibition decision. That is the point that is put by Ryanair. We put our argument forward in relation to Article 10 saying, "Okay, Ryanair, if you are right on that, how does 122(4) work, given the operation of the duty of sincere co-operation?" The reason that we take that line is because, of course, there are indications from the court talking about what time it is that Article 21(3) ceased to operate in this case. Therefore, rather than leading out saying, "Look, this is all complicated, all being dealt with under 21(3)", where issues as to the interpretation of 21(3) arise which may well require a reference, we say that actually there is a way through this which we have been analysing in relation to the duty of sincere co-operation which does not require any of that, you just apply Article 10. That is why we have structured the arguments as we have done. That is not to say that if 21(3) applies then 122(4) would also operate, because that is also true.

MR. BLAIR: So they are not really arguments in the alternative, they do both seem to overlap to some degree, but one is more difficult than the other in terms of the possibility of a reference?

MR. BEARD: Certainly the Article 21(3) argument would create more problems in relation to a reference. There is no doubt about it. The OFT does look at this looking at the broader duty and not just focused on the narrow terms of 21(3) because that broader duty applies to the UK and all of its institutions. Therefore, that must be applied.

If we thought that one could deal with this case just by reference to 21(3) without a reference then, yes, there would have been sense in having that argument up front first.

THE PRESIDENT: We are talking about reference to the ECJ?

MR. BEARD: Yes.

THE PRESIDENT: Not the ----

MR. BEARD: I am sorry, that was sloppy of me.

THE PRESIDENT: There is another sort of reference.

MR. BEARD: I am sorry; I am just dealing within the parameters of Mr. Blair's question, which I do not think was talking about the domestic stage of reference.

MR. BLAIR: Reference up.

MR. BEARD: Reference up, or across or wherever, yes.

MR. BLAIR: Thank you very much, I will study the second transcript as well as the first.

THE PRESIDENT: I just have a quick question, something I touched on yesterday which I am not sure I quite understood and it is probably my fault. One of the points made against you in the notice of appeal is that the Aer Lingus appeal was irrelevant because on any view it was brought too late and I know you answered something I raised in connection with that aspect, but I did not have the timing in mind then. Supposing the Ryanair appeal had not happened, how would the Aer Lingus appeal be able to affect – because if the Ryanair appeal was left out of the picture you would have had a four month period or not?

MR. BEARD: Well "not", because ----

THE PRESIDENT: Would you still have to wait for the two months – well, just forget Ryanair altogether.

MR. BEARD: Yes, you would have had to have waited two months to see whether or not there was going to be an appeal of two months and ten days for distance under the Rules, but yes – sorry, the Rules of the European Courts, although the statutory deadline in the statute is two months they add ten days.

THE PRESIDENT: For distance.

MR. BEARD: For distance, so you would have two months plus 10 days.

THE PRESIDENT: Sorry, can we start again? It is my fault.

MR. BEARD: I am sorry.

THE PRESIDENT: We are assuming that as of 27th June, or whatever date it was, time begins to run. We are assuming there is not an appeal – Ryanair is out of the question.

MR. BEARD: Yes. Ryanair only gets out of the question once the appeal period has lapsed though because you do not know what the position is until the two months and ten days. I suppose in theory you could have a situation where Ryanair had turned up on day one after the judgment and said: "We are so convinced by the unimpeachable conclusions of the court that there is no prospect there is a reasonable and rational company that we would ever want to bring the appeal".

THE PRESIDENT: Yes, I suppose it is too hypothetical to say "Imagine a decision on 27th June that did not involve Ryanair", because 27th June was about ----

MR. BEARD: Yes, it just becomes very difficult to run these arguments. I think perhaps what you are pointing towards is the fact that there was a second decision generated. The point here is that is intimately connected with the prohibition decision and it was clear to all involved that that was a particular concern in relation to the prohibition decision, because what was effectively being said by Aer Lingus, and I have no doubt Mr. Flynn will come to this in due course, that Aer Lingus are saying that that minority shareholding should be divested and so there was an argument that that was a point that could have been taken on appeal against that decision. Aer Lingus said it is not clear in that decision, there has not been a finding. It then wrote to the Commission, it got the staff letters back, presumably Aer Lingus may have said: "We will go off and appeal a staff letter", at that point no doubt the Commission would be deeply concerned about these matters because it does not want its staff letters appealed, and then says: "Okay, we will give you a decision on this and that will mean that you have something you can properly appeal", but it is intimately connected with the prohibition.

THE PRESIDENT: I see that, but what I do not really see is why it matters because if you were right in saying the possibility of a Ryanair appeal, which actually did take place within the four months, is sufficient to engage the Article 10 obligations which then trigger the s.122 issue. Why do we even need to worry about it?

MR. BEARD: No, you do not. If you reach the conclusion that the Ryanair appeal does give rise to the sufficient conflict, which is what we have said, then all of this is just extra baggage.

THE PRESIDENT: It might underline or reinforce what you say is the uncertainty and the conflict risk.

MR. BEARD: Quite so. The reason we deal with it is because Ryanair in its skeleton said, "Actually, you cannot rely on the Aer Lingus decision at all and the Ryanair decision does not give rise to a conflict". We thought we have got to deal with both of them and give a proper account of the way these things work. So that was what we did in our submissions and I hope that was what we amplified and tried to clarify yesterday in oral submissions, that there are conflicts arising from both, and both are relevant. But you are quite right, you do not need to worry about the Aer Lingus appeal if the relevant conflict arises as we say it plainly does in relation to the Ryanair appeal. No issue arises.

THE PRESIDENT: If no possible conflict arose under the Ryanair – from the very moment that the prohibition decision was given it was quite clear that no appeal could actually give rise

to a conflict, then do you accept in those circumstances that you would be in difficulties relying upon Aer Lingus?

MR. BEARD: No, we say then you do have the ability to rely on Aer Lingus because it has generated the uncertainty because that decision was intimately connected with ----

THE PRESIDENT: No, hang on, I am just thinking of the timing here.

MR. BEARD: From the point of view of the OFT looking at this, if you have got a situation where Aer Lingus is going to the Commission and saying, "You got it wrong and should have ordered the divestment of that minority shareholding". The Commission makes a decision saying, "No, we disagree with you", and Aer Lingus is making it clear that it is going to appeal that decision.

THE PRESIDENT: That decision was within the four months.

MR. BEARD: That was all within the four months.

THE PRESIDENT: You say it is not the appeal within the four months that matters, it is the decision ----

MR. BEARD: Yes, it is the uncertainty that is created.

THE PRESIDENT: -- giving rise to the possibility of an appeal.

MR. BEARD: We canvassed these issues in our defence in paras.77 and 78. Just as a little coda, because we did not want to get into all of this yesterday, again, life is actually slightly more complicated than it has seemed on the pleadings, because it is worth recalling that under s.29 of the Enterprise Act if you increase your holding steadily over time within a period of two years the OFT can commence an investigation at a point during the two years, taking into account all the previous minority shareholdings. Ironically, in this case where you had a situation where 20 per cent was bought some time ago and then there were incremental increases over a long period, actually the time within which an investigation could be carried out by the OFT long passed over these various periods. That is not something that we have dealt with in submissions in the defence or in the skeleton argument, but I think it is right that the Tribunal should not go away from this thinking that actually there is some sort of precise moment in relation to multiple transactions as well. So life would become more complicated then in dealing with the Aer Lingus issue. We have said that it is plain and simple here, prohibition decision, being under attack from Ryanair and Aer Lingus, the fact that an ancillary decision was then taken that confirmed the outturn of that prohibition decision does not change anything, it was all at a point when, in reality, there was a great deal of uncertainty and it plainly gave rise to conflicts. It would be quite wrong for us to be,

in those circumstances, in the position to begin an investigation and reference and therefore 122(4) operates by dint of Article 10 EC.

THE PRESIDENT: Thank you, Mr. Beard. I am sorry, Mr. Flynn.

MR. FLYNN: Good morning to the Tribunal, not at all, sir, that is a helpful exchange. I will probably come back a little more on the Aer Lingus side of things in due course, but that is certainly a helpful exchange.

Sir, obviously Aer Lingus comes at this case from a slight different perspective from Ryanair, but we do accept that it has been going on too long. A significant competitor of ours has been allowed to be a significant shareholder as part of a takeover plan that was prohibited on competition grounds and that stake has so far been immune from scrutiny. That has arisen because there was doubt over the respective competences of the Community competition authorities and the national competition authorities, despite Aer Lingus's best efforts to get those doubts clearly resolved at an early stage. Our submission is that those doubts have now been resolved. This is precisely the sort of situation that s.122(4) is intended to cater for, and the OFT's processes should resume without further delay.

It is significant that Ryanair criticises the OFT for the position that it took on the prohibition decision being issued in June 2007. It says it took the wrong position. We will come back to that because we say it is a position that it was fully entitled to take and a reasonable one. But it is of note that that position is one which Ryanair itself adopted, endorsed and submitted as the correct one to the Court of First Instance, as it was in those days. We quote the relevant part of their pleading in para.16 of our statement of intervention where before the Court of First Instance Ryanair argued that:

> "… the Commission and not the national competition authorities had jurisdiction over all the steps of the planned acquisition of Aer Lingus by Ryanair (Article 21(3) Merger Regulation). In particular, the NCAs [national competition authorities] of those Member States where the acquisition of a non-controlling stake in a company above a certain threat may be considered a concentration pursuant to national competition law could not apply their national competition laws to the minority shareholdings in Aer Lingus …"

Over the page:

> "While Ryanair believes that this continues to be case even after the Commission's Merger Decision of 27 June 2007, in particular as this Decision is not definitive because Ryanair challenged it in time before the CFI. Ryanair submits that the question whether NCAs have regained jurisdiction over the

> acquisition of Ryanair's minority shareholding in Aer Lingus is outside the scope of the proceeding before this Court."

So it is endorsed the position that the OFT took in that letter to Aer Lingus. Furthermore, it says that that is a position which it maintains. It maintains it in these proceedings before the Tribunal, as we pointed out in our skeleton referring to footnote 19 of the Ryanair notice of application. Perhaps you do not need to turn it up, but I can read out that footnote. It is on p.19, if you are turning it up:

> "Ryanair has prepared its application on the basis that the interpretation of the ECMR adopted by the General Court in the decisions … was correct. Ryanair has reserved its position on the question of whether, since the European Commission had reviewed its minority stake under the ECMR in [the prohibition decision], 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."

In other words, it is prepared to argue, wherever that argument may take place, that the OFT was actually right in 2007.

A preliminary point, just out of interest the press reports this morning that Commissioner Almunia at a conference yesterday announced an investigation into the "enforcement gap" as he calls it – or perhaps it is the journalist's phrase - in the ECMR in relation to its inability to look at significant minority shareholdings and that those escape scrutiny under the regulation as it stands. In our submission this case shows at least that that enforcement gap does not apply in the United Kingdom.

Our submissions complement those of the OFT. We do not repeat what they say; we support them and we add our tuppence-worth. I am not going to repeat everything in our statement of intervention and skeleton either, you will be glad to hear, but the fact that we take a more developed line on the interpretation of s.122 does not mean that we are not supporting the OFT or that this is not a proper intervention contrary to what Mr. Swift said yesterday and has said in their pleadings, and we set out the position in para. 22 of our skeleton.

The nature of our complementary submissions is to say to the Tribunal that in addition to what the OFT has to say about Article 10 and how that is to be construed and applied, in

addition to that and in any event you can get the same result that the OFT is in time by construction of the domestic legislation. We say you stand back and you ask yourself what s.122, particularly para. 4 is designed to do. The section acknowledges the primacy of Community law, the exclusive jurisdiction of the Commission over concentrations with a Community dimension, duties of Member States to avoid conflict with EU objectives or the exercise of exclusive powers, that is the background, if you like, to the section; none of that needs actual implementation. What s.122 is seeking to do, we say, is to provide a workable means of ensuring the one-stop shop principle whilst – and this is the vital part of it, it is almost the main part of it – preserving the ability of the United Kingdom Competition authorities to revive, their powers to revive so that they can intervene in appropriate cases once the risk of conflict has gone away or, as we have put it, once the ECMR impediment has been lifted, that is really what it is about. Obviously, we say this is an appropriate case for such intervention.

We lay stress on the fact that this is a domestic provision, and if I just make a few points on that. First, we say that whether the OFT is now in or out of time at this stage is a matter of pure indifference to the Community legal order. The risk of conflict, or the breach of the one-stop shop principle has been avoided.

Secondly, we say that section s.122 is the United Kingdom's chosen means, the statutory means by which such conflict is to be avoided. Much of Ryanair's argument, as presented by Mr. Swift yesterday says that s.122 does not really do the trick, it is not apt, or the conflict is not acute enough to engage Community law problems, but then recognises that when you do get to the stage of acute conflict you have to invent some other mechanism, the "magic" dust we were talking about sprinkling over the Competition Commission's processes so that at some point it has to slam the brakes on. Why should that be, why should some imaginary extra statutory procedure be dreamt up when we have a provision in the Enterprise Act which is meant to achieve precisely that effect. It is worth remembering that this is a section that bites on the OFT. Under Mr. Swift's construct the OFT would have to trust the Competition Commission to invent this extra statutory mechanism and decide to ignore its statutory timetable in the face of some potential acute conflict with Community law principles. What happens under s.122 as we say it operates is that the power to refer lapses while there is an ECMR impediment, and then revives so that the four month timetable continues to run once the impediment has been lifted.

As a practical matter it is most unlikely that Ryanair itself would have preferred to go through the time and expense of a Competition Commission inquiry while its appeal was

pending in Luxembourg, an inquiry that might get stopped in its tracks close to the end of it. We say there is just no need for this theory of what you yesterday called "a last resort", the UK has chosen another means. One might also question the legality of a parallel investigation anyway when you consider that the whole aim of Article 21(3) of the merger regulation is to prevent, as it says, the application of national competition legislation to concentrations with a Community dimension, you are not meant to have two shops open at the same time so conducting, as it were, a full merits review under the Competition Commission processes while there was still an issue of Community competence is something which is arguably not even open to the authorities.

Thirdly, we say the statutory provision s.122(4) is very broadly phrased. We say that the objective is pretty clear, and Lord Sainsbury made it clear, nobody is going to say that this is a masterpiece of legal drafting but it is clearly intended to embrace a wide variety of situations and avoid problems. We have said in our statement of intervention and skeleton that it is not really reasonable to expect a precise enumeration of the situations in which that conflict or difficulty might arise, but in the normal case it is not terribly difficult to work out what is a concentration with a Community dimension but there are borderline cases, there are borderline jurisdictional cases. In those circumstances this section is there to cover them, but if you tried to sit down with a cold towel over your head and work out what those situations might be, you would have been pretty lucky to come up with this one and you would certainly have missed plenty of others. So we say the fact that this section is broadly phrased is deliberate. It is not even terribly legalistic. When you think about it it says because of the EC Merger Regulation or "anything done under or in accordance with it". That is a wide phrase and we say deliberately so.

To take an example, and Mr. Beard said yesterday that it was possible – I think this was towards the end of his address when he was into the arguments on interpretation of Article 21(3) itself – and he said it might be that Article 21(3) falls to be interpreted as covering not only concentrations with a Community dimension, but situations where there is a real risk that the transaction constitutes a concentration with a Community dimension and that everyone sort of agrees without knowing what the legal principle is, and that Member States should not interfere when there is a real risk of something being a concentration with a Community dimension. People notify transactions to the Commission on Form CO which turn out in the event, for example, to fall below the turnover thresholds, they are not always straightforward to apply and the accounting information may not be available and it may simply turn out that a notified transaction has not got the Community dimensions. Such

cases do arise in practice and the enumeration of the decisions that the Commission can take at the end of phase I in the Merger Regulation under Article 6(1)(a), the first of those is that indeed the transaction is not concentration within the meaning of the regulation. These things do happen.

Anecdotally, I was involved in a case of a hostile bid in Spain, the bidder took the view that the transaction was purely domestic, two Spanish companies – the gas company bidding for the electricity distribution company . The target which did not want to be taken over took the view that if you applied particular rules to calculating its turnover it was above the two-thirds rule, so it was actually with Community dimension and it tried to get the Commission engaged in that. In those circumstances, can the Member States' authorities blaze ahead in something which is – or maybe in fact will turn out not to be – something that they have jurisdiction over? We say in those situations of doubt whatever the interpretation to be given to Article 21(3), s.122(4) will avoid that conflict and that is what it was designed to do. Here, I think in answer to Mr. Mather's question yesterday about the legislative history we do set out the precursors to s.122(4), (paras 22 et seq of our statement of intervention). I am not going to bore the Tribunal with those now but a similar provision with the different language and different times that applied was brought into the Fair Trading Act regime, and we quote the relevant paragraph and we quote at para. 26 of our statement of intervention the explanatory note to that regulation saying that it enables a merger reference to be made later than the time limit in the relevant provision of the then Fair Trading Act if it is made within six months (as it was in those days) of the removal of any restriction on the making of the reference created by the merger regulation. That, we say is illustrative also of the aims of the successor provision, possibly brought in a little hastily, as Mr. Beard said yesterday, but it is a broadly phrased term aiming at preserving the powers to Act when a restriction created by the merger regulation has been removed.

Then in para. 28 we point out that at the same time, and really in the same vein amendments were made to the Fair Trading Act regime now carried over into the Enterprise Act in relation to merger notices. The Tribunal is aware and Mr. Swift said it yesterday that in this country under the Enterprise Act it is still a voluntary notification regime for mergers, unlike the Community regime you do not have to notify, but if you choose to you can do it either informally which allows for appropriate discussion with the Office of Fair Trading or you can do it – I say "informally", that is probably not the right way of putting it – without a timetable. You approach the OFT and tell them the plan and you have the discussion or, you can use a merger notice, that is a choice, but if you use the merger notice the OFT is on

a statutory timetable. The purpose of the provision of what is now 99(5)(d) of the Enterprise Act is to allow the OFT to say: "I am sorry, but we are not going to be stuck by that timetable because we consider – we may be wrong – but we consider that the transaction that you have notified to us on the merger notice should actually be reviewed by Brussels; it is a concentration with Community dimension which we cannot look at." It might be wrong it might be right but at least they are not to be bound by the statutory timetable at that point while that issue is being sorted out, and that is the same managing of conflicts and avoiding being on a scheduled conflict that we say operates also in s.122(4) in a more general context because of course the merger notice procedure is not greatly used because parties do not really like putting the OFT on the strict grid of the timetable, and I think the OFT likes it even less than the parties do.

The next point we make on the interpretation of s.122 is the circumstances we say in which the OFT's powers revived do not have to be precisely co-terminus with what Article 21(3) actually requires, or what is incumbent on the Member State through Article 10 provided conflict, or trampling on exclusive prerogatives is avoided, Community law has no objection to it. We set out some principles which we say apply to the interpretation of s.122(4) at paras. 30 onwards of our statement of intervention, and perhaps if I can just go through those quickly, not taking up too much of the Tribunal's time but just to recall those to you, p.13 of our statement of intervention.

We start at para. 30 saying that it is a matter of domestic statutory construction to see how the section can sensibly have been intended to work. Then we set out what are our five propositions. First, that the ECMR impediment is not precisely defined by reference to any legal bar in the ECMR or elsewhere. It is broadly defined, as I have said, and we say, contrary to what is said there against us, that must include a situation where an appeal has been brought against a Commission decision. We say that is pretty plainly something that is done under or in accordance with the merger regulation.

THE PRESIDENT: Because of or only under or in accordance with?

MR. FLYNN: Well it is either because of, under or in accordance with.

THE PRESIDENT: I just wonder whether you could place any reliance on "because of"?

MR. FLYNN: We say the regulation itself refers to the possibility of decisions being reviewed should that be necessary but it is plainly something, as I said, not even a terribly legalistic phrase: "because of, under or in accordance with", it is an extremely wide formulation and this is unquestionably something which is connected with the EC Merger regulation and what flows from it, the principle issue being the borderline of competence between the

Commission and the Member State authorities, and I would not want to pin it to whether this is under or in accordance with or by virtue of or anything else, but the connection it seems to me is pretty hard to dispute.

Frankly, I have probably covered a great deal of this and I will not take up the Tribunal's time by going over it all in great detail. I think an important matter which we address in the third of our propositions, para. 34 is that the OFT may well be called upon to take a view on its competence under Article 21(3) in the absence of a decision from the Commission and will have to exercise its own judgment, that is where we see the force of the reference in the merger notice provisions, the fact "the OFT considers …" or, in the previous version: "It appears to the Director General that …" these are matters on which the OFT may have to take a view. The question is, is it reasonable for it to consider in particular circumstances that it is prevented by Article 21(3) from having jurisdiction over the transaction, and it would be defeating the purpose of the provision to say that if it happened to get it wrong while seeking to avoid conflict and trampling on the Commission's exclusive competence it then ran out of time once the matter was clarified. I think the whole aim of the provision is to allow those conflicts to be managed and to be resolved without preventing the UK authorities from subsequently acting once it is clear that they are free to do so.

The fourth proposition makes the appeal point again because we say, and I come back to the facts of this case that the risks of conflict were pretty evident, and the risk of conflict between two decisions and appellate bodies is referred to in our final, which is the fifth proposition in 36 on prospectivity, which I will also come back to.

On the facts of this case we say that there evidently was a conflict first with the Ryanair appeal. If Ryanair had successfully appealed against the prohibition and in the meantime – as you said, Sir, it would have been in the meantime – in the meantime there had been a Competition Commission report ordering divestment of the minority shareholding, or at least finding there was a problem with it then the risk of conflict there is pretty obvious. The Commission and the Competition Commission would have been looking at the same matters.

We know as far as the four month period is concerned, obviously the Ryanair appeal was lodged within that period. We lay stress also on the importance of the Aer Lingus proceedings which is the subject of your discussion with Mr. Beard before I stood up. The background as I have already said is that Aer Lingus was seeking to obtain a sort of co-ordinated position, an agreed position between the merger control authorities on their respective competencies, and that effort was not successful. As you will have seen from the

correspondence, the Commission was reluctant to give binding or explicit guidance. We think that the references in our skeleton and statement of intervention are quite accurate. The Commission seemed in its staff letters reluctant even to mention Article 21(3) which is the point we have made, obviously their language tracked it, they did not want to refer to it. In terms of the conflict, just to recall the chronology, the Commission issued that letter, what I think Mr. Swift called the "no power" letter, the one that said it could not view the minority shareholding on 27th June, the same day as the prohibition decision. So its position was out there – I am sorry, is it being said I am wrong?

THE PRESIDENT: I think there is an issue as to whether actually that letter dealt with that point as opposed to the Ryanair point.

MR. FLYNN: The "Ryanair point"?

THE PRESIDENT: It may be worth just glancing at it again because it was something I think that was raised yesterday.

MR. SWIFT: If I may interrupt to intervene, the reason I am shaking my head somewhat vigorously is that so far as I am concerned the decision of 27th June 2007 is the prohibition decision. It is true that on the same date, 27th June, Miss Calvino wrote to Linklaters expressing a view, that, as far as I am concerned and what I thought was Aer Lingus' case, does not represent the "no power decision" – that decision had to wait until 11th October.

MR. FLYNN: We are not disagreeing. I said that a letter was issued on the same date as the Ryanair prohibition decision, to make that clear the staff letter was issued on 27th June saying the Commission had no power to deal with the minority shareholding under Article 8(4) of the Merger regulation. Linklaters immediately engaged and continued their discussion, and you have seen the several submissions that were made up until then.

THE PRESIDENT: That led to the October decision?

MR. FLYNN: Via another letter in August that led to a formal decision on 11th October. That is within the four months of the prohibition decision. Just to clear up any doubt, the challenge before the Court of First Instance came just after that time, in November of that year. We say that nothing turns on the fact that that challenge, the actual appeal, was lodged outside the four month period because, as Mr. Beard was saying to you earlier, it was evident that, if you like, the issue was out there ----

THE PRESIDENT: The issue arose.

MR. FLYNN: -- the risk of conflict, the doubt, was there, and the intention to challenge. I think I am not revealing any confidences to say that what Mr. Beard hazarded might be the case, namely that the Commission preferred there to be a formal decision to appeal rather than

have its staff letters appeal to the Court of First Instance, was precisely why that decision was issued. If the Commission had not said that it would do that then Aer Lingus would have brought an earlier challenge. That issue of the correct approach to Article 8(4) was really out there from the date of the prohibition decision, from the date on which the Commission confirmed their position on 27th June.

That is why we say nothing turns on the fact that the Ryanair appeal, itself, was brought outside the four month limit, even if we were in the hypothetical case, which we are not, that there was no Ryanair appeal which plainly does raise pretty square the potential conflict between the respective authorities.

By the by, and I think it probably is by the by, Ryanair was obviously on notice of the OFT's involvement and its dialogue with Aer Lingus from December 2007 at the latest when it intervened in the Aer Lingus appeal. So the share purchases that were made in July 2008, which Mr. Swift referred to, were on notice that that dialogue was open. Mr. Beard has referred to the powers in the Enterprise Act for the OFT to investigate subsequent shareholdings if the thresholds are triggered.

In the circumstances, we say where the Commission would not – it said it could not - give guidance and reach a clear view on the distribution of competences, and in other circumstances in these rare case (or rare-ish cases) where the borderline between competences is fuzzy, we say that the OFT does have to take its own position on Article 21(3), and there was recognition of that from Mr. Swift yesterday, recognition that the OFT, as one of the national authorities, has to take its own view, even in the light of, as I understood what was said yesterday and I think it is right, a contrary view from the Commission.

As I said really in opening, the view that the OFT took, it cannot be said before this Tribunal to be an unreasonable one. Firstly, it was shared by the Bundeskartellamt in the letter which you have seen at tab 19 of the core bundle – a very similar position taken there, and also it is one which, as I said, Ryanair itself has advocated in front of the European Court and is prepared to argue again. So it is clearly a reasonable position.

We went over yesterday the terms of that letter and probably nothing is gained by poring over it as if it were a statute, but as you said yesterday, Sir, it does use the word "currently" in relation to their view. It uses the phrase "at this time", and it refers to the uncertainty introduced by the facts of the appeals. So whether the OFT's position is bifurcated, one that it thought that it was right that it could never look at this, but it might be proved wrong, or whether there is some ambiguity in what it is saying, we probably do not need to resolve.

Ultimately, I think, as was said yesterday, the question now is whether it is in time today, not the position that it took then. Perhaps none of us have been totally consistent in the positions that we have taken, although probably all consistent in the objectives that we were seeking to ensure, and in Aer Lingus's case that was prompt action by whichever authority happened to be the competent one.

The point of the Aer Lingus appeal is that the very issue of competence over the minority shareholding was the subject matter of the proceedings before the Court of First Instance and was the subject matter of the dispute between the Commission and Aer Lingus. The Ryanair appeal concerned who had jurisdiction over the same transaction, but the Aer Lingus appeal specifically concerned the competence of the national authorities against the Community authorities in relation to the minority shareholding. If Aer Lingus had succeeded, if Aer Lingus's appeal had been allowed, then it would have been the position that the Commission had jurisdiction over the minority shareholding, not the national competition authorities. In those circumstances, we say it is entirely reasonable for the OFT to have said, "We cannot act while this is going on, we are prevented from acting while these appeals are on foot". There is no Commission decision to the contrary, and it was entitled to take the position that that issue was before, as it were, a higher authority in the hierarchy.

It is possible, as has been said, that Aer Lingus could have sought to appeal the OFT's position in its letter of June 2007, and, as we have said, if that had happened plainly you would have been in the situation where the case would have had to have been stayed, potentially referred to Luxembourg, whilst waiting the decision from the Court of First Instance, and the delays would have been longer.

If, in fact, a reference had been made to the Competition Commission while the Ryanair appeal had been on foot, one imagines that the same thing would have happened. Ryanair might have decided that they were prepared to pay the expense and go through the pain, as I think it was described, of a length Competition Commission inquiry. It is equally likely that they would have tried to stop it, which would have raised those same issues and led to the same sort of delays. So there was no short cut to be had there. We say it was entirely reasonable, and the way the section is intended to operate, for the OFT to say, "We are impeded from acting".

As to the effect of the judgment – this is the prospective point – we have explained, I think, in our pleadings what we mean by this. Of course we accept that the judgments of the Community courts have declaratory effect – in other words, they say the position is and

always was that the law is to be interpreted in this way – but what Community law does not say in those circumstances is, having determined that Member States are free to act, say, in relation to the minority shareholdings if their law so provides, for how long or with what limitation period you are free to act. Section 122(4) is, we say, a special provision of national law. It is effectively a national limitation rule. It says that the period lapses while there is an impediment and it revives from the time when that impediment is lifted. It was lifted, we say, when the General Court judgment became definitive, when the appeal period expired. In other words, the relevant question under s.122 is when did the position become clear, when was it clarified, when was the risk of conflict or the ECMR impediment lifted, not what actually was the position back in 2007 or when the Merger Regulation was adopted?

That is why we make the analogy to the Limitation Act provisions. In mistake of law cases, for example, your claims can go back – your tax claim, or whatever, if you have made a mistake of law – many years. This is a different provision. We are not aligning ourselves on the Community law provision. We are saying there was an impediment due to risk of conflict, lack of clarity, whatever, that has now been lifted. It is perfectly competent for Member States to provide in effect that their national deadlines are suspended while a matter is being clarified in front of a court, whether that is the national court or indeed the Community court. There is no EC rule against that just because their judgments have declaratory effect.

We understood Ryanair in their skeleton, particularly para.98, to accept that principle. It is worth maybe just pointing to it, if I may, just so that I do not misquote Mr. Swift. It is tab 4 in the core bundle, para.98, which is on p.47, where they say that we raise:

> "… for discussion a hypothetical case in which the EU Commission had ruled that there was a 'concentration'[and that decision was appealed and the EU courts ruled that the transaction did not involve a 'concentration'. Aer Lingus asks whether the OFT might then investigate the transaction, or whether it would be time barred. Aer Lingus implies that the logical consequence of Ryanair's case is that such an investigation by the OFT would be time barred. This is wrong. There would be no time bar in this hypothetical case."

We understood that to mean that once the position is clarified in the courts ----

THE PRESIDENT: Time starts running.

MR. FLYNN: Then time starts running.

THE PRESIDENT: There is a discussion about whether interim relief made any difference. It is the uncertainty, it is not the fact of whether the thing has been suspended. The point that you are relying on and Mr. Beard is relying on is the risk of ultimate conflict, and neither interim relief nor the retroactive effect, as it were, of a declaration of law can affect that.

MR. FLYNN: That is it in a nutshell, Sir, and that is why we say you do not look at exactly what are the boundaries of Community law here, what is the effect of a judgment, what is the effect of interim relief, you are on a broader question which is how do you avoid the – I had better not get into the motor metaphors – crash, how do you avoid the collision? The chosen mechanism in this case is s.122(4). You could have designed others, you could have maybe designed them better, but we say this is what we have got, it is the one that needs to be applied. It works perfectly well. The shame of it, as I say, from Aer Lingus's perspective is that it has taken a long time to resolve the doubts. We say that the doubts now have been resolved and there should not be further delay.

We essentially submit that Ryanair have had a good run for their money but their stake should no longer be immune from review by competent authorities and that this can be achieved through a domestic provision which has a perfectly sensible genesis and purpose, perfectly comprehensible from its provision, and you do not need to go into, as I say, the sort of boundaries of what is required by Article 21(3), or what is precisely the UK's obligation under Article 10, when you have this provision which is there to avoid it. So any question of a referable issue is, we think, wholly unnecessary and scaremongering.

THE PRESIDENT: It is quite difficult to avoid having to look at 21(3) and possibly Article 10, because all that 122(4) does is to say, "Because of something happening", and you have then got to say, "What could be happening?"

MR. FLYNN: What could be happening, but what could have been happening here is, as we have said, you could have been in a situation where the national authority has effectively jumped the gun only to be told either that the transaction was one which should not be prohibited and fell within the jurisdiction of the Commission or that they were not entitled to look at the minority shareholding at all. Either the Commission was, or nobody was. Any of those could have happened and in those circumstances we say it is appropriate for the OFT to regard itself as unable to proceed.

THE PRESIDENT: This may be coming back to something that Mr. Blair was raising, but to what extent do you need to worry about sincere co-operation? Is it not all wrapped up in Article 21(3)? Whether you or Mr. Swift is right about whether it is a legal bar at this stage

is another matter. It is really 21(3) that is at the heart of what Member States' authorities have to worry about, is it not?

MR. FLYNN: I do not think we would disagree with that. Section 122 is focused on the Merger Regulation and it is focused on it because that lays down different competences for different authorities.

THE PRESIDENT: Miss Bacon wants to make a point.

MR. FLYNN: (After a pause) I am no doubt going radically off piste. I think probably more eloquently than I was saying it or I will say it now, but not unfortunately at dictation speed, essentially this is to do with the respective competences of the Member State and the Commission authorities, so it is about 21(3), but what s.122 does is avoid you having to decide exactly how that plays out. You can wait for the matter to be clarified. It is a buffer, if you like, it is a safety zone. As I have already said, it is not an implementation of 21(3), it is something designed to cater for the fact that it is there. It is designed to ensure that the UK authorities do not rush in where they are not allowed to and do things which ----

THE PRESIDENT: And do not lose out by not doing so.

MR. FLYNN: And preserve their powers to act when they are free to do so, and to the extent that they are free to do so. That is really what it is there for. That is why we come at it, I suppose, from the national law perspective. We say you look at the section and what it is there for, and it is not telling you to find out precisely what you are allowed under 21(3) and then do it, or do not do it. At the point of acting the OFT may have to take a view, as we have said, and if that view then turns out to be wrong then the impediment may be lifted at a later stage. That is what we say happened here. The OFT took the view that the question of its jurisdiction was a live one and was in front of the Community courts, which obviously bind in these circumstances, and in those circumstances it was prevented from acting, and its ability to act revived once the position had been made definitive by those rulings.

THE PRESIDENT: Mr. Blair has a question.

MR. BLAIR: Mr. Flynn, I am just interested to test the width of your proposition, if I may. You put your money basically on s.122(4). You said it worked perfectly well. I think it was established in questioning yesterday that there were some cases where s.122(4) might not be able to resolve the conflict between the two authorities, particularly when the circumstances were the other way round. If the 90 per cent bid came in while the 22 per cent bid was already being investigated. At that point I think Mr. Beard implied that magic dust might have to be invented. Are you also of that view, or do you think that s.122(4) does the whole trick for the UK?

MR. FLYNN: I think it depends on the circumstances, does it not, sir. If there had been an acquisition of shares, taking it possibly over the material influence threshold, in the market and the OFT processes had followed within the normal timetable and there were a reference and then there were a full takeover bid, you might be in a different situation. That might be a circumstance, I suppose, in which it was appropriate for the Commission reference to be laid aside as no longer relevant. You would probably be into different statutory provisions at that point. You can imagine a situation where a transaction of one particular form takes place and then it is morphed into something else. That might not be a s.122(4) case, because at that point the reference had been made.

If you take an incremental shareholding, so someone starts with 5, they get to 10, they get to 15, and the OFT starts to get interested, and while they are in their four month period of thinking about it a full takeover bid is launched, at that point again they would probably stop and say, "This appears to us to be a CCD which goes to the Commission".

So it might not be a case of s.122(4) in all those circumstances. We say that certainly in this case it is, and you do not have to explore the outer boundaries of this any more than, as I said, it is possible to prescribe with accuracy all the situations which it might have to cover, any more than Article 21(3), of course, itself lays down a full and complete code of how Member States are meant to react in the borderline situations. That is why we say there is some wisdom in the wider formulation of s.122(4), why it is broader than Article 21(3) because of the Merger Regulation or anything done in accordance with it. It is there to cater for the fact that there may be difficulties and uncertainties which could lead to being on a collision course, if that is helpful.

THE PRESIDENT: It would be quite interesting to know at some stage what possible statutory provisions there are instead of magic dust. If the CC could be in a position where you just have to lay down tools because of something that has happened, obviously s.122 cannot help then because that is only to do with the period before a reference is made. It is inconceivable, that sort of situation.

MR. FLYNN: Of course it is not inconceivable that while a Competition Commission reference is on foot something else happens. That is not inconceivable, and maybe one does have to go then either to magic dust or maybe there are ----

THE PRESIDENT: I suppose Mr. Swift could say if it is so simple, that is such a simple solution there, why cannot it be a simple solution here? Why do you have to treat it as being covered by s.122?

MR. FLYNN: That is a question of subsequent events, I think, rather than, as I said earlier, having two shops open at the same time. There may be ways of catering for those situations. Without archival interest in the Enterprise Act I probably cannot help you on my feet.

THE PRESIDENT: Mr. Beard probably knows.

MR. FLYNN: I am sure he does, that is why he got Silk.

THE PRESIDENT: Or Miss Bacon does.

MR. FLYNN: Unless I can help further, those are my submissions.

THE PRESIDENT: Thank you very much. Mr. Swift, are you okay to bash straight on?

MR. SWIFT: I am ready to go, yes. I am not going to cover all the issues that were raised by Mr. Beard yesterday or by Mr. Flynn this morning. I have listened very carefully to Mr. Flynn's submissions, and I do believe that we have answered them in our skeleton and in the presentation that I was making yesterday.

One point I should make is this: in relation to para.98 of our skeleton, I simply ask the Tribunal to read on when you come to consider it to para.99, which makes our position abundantly clear.

Can I get to what we regard to be the big issue in this case, this appeal, and that is the Article 10 defence. We have said really what we have to say on Article 21(3) ECMR and the effects of the two decisions of the General Court. We have also listened to what Mr. Beard has said, and I am not proposing to go back to the ECMR. I want to concentrate on Article 10, because this case raises big questions about the proper interpretation of EU law and UK law that have not previously been addressed by courts or tribunals. I am going to be very brief on this, but I want to make a very important, in my view, introductory statement. When the Tribunal comes to consider its decision in this case you have a choice. You can rule that the OFT is out of time or it is not out of time. The issue, as you said yesterday, is binary. The consequences of holding that the OFT is in time, and I am talking about the Article 10 approach, are serious. I put it as high as undermining the integrity and application of the UK merger control regime. The OFT is arguing for a chance of investigation of Ryanair's minority stake, but its arguments mean that it is powerless in future circumstances to protect the United Kingdom public interest against what I would call bad mergers at the material influence stage.

By making the United Kingdom legal order on mergers in respect of controls of minority stakes subordinate to and mixed up with a Community legal order in respect of CCDs

(concentrations with a Community dimension) it emasculates the UK system without jeopardising any of the objectives of the Treaty.

Let me take this slowly because this is extremely important. Mr. Beard began by identifying risks of conflict and only then turned to consider the case law on the duty of sincere co-operation. For your note, that is yesterday's transcript at p.48. This is the wrong way round. This is not just moving the furniture around, it is important. You can only identify what are relevant risks of conflict after considering what the duty of sincere co-operation actually requires.

If one looks at the case law – and Mr. Beard referred to several other cases yesterday – it is clear that the cases in which the duty has been found to apply are different from the present case. They all involve the application by relevant national authorities, indeed the courts, of the same provisions of EU law which have been made by EU institutions or are in contemplation. So the same legal provisions are being applied at both levels.

By contrast, this case concerns the application by the national merger control authority of national law, the UK Merger Rules in the Enterprise Act. They have different legal provisions from those applied by the European Commission in the decisions under appeal to the General Court, as Mr. Flynn helpfully reminded the Tribunal this morning when he referred to a recent speech by Mr. Almunia.

So what does the case law tell us about the proper legal test for determining whether or not there is a relevant conflict? Mr. Beard argued, and this is transcript p.59, that the duty of sincere co-operation was a broad and flexible principle. He did not accept the limiting principles that we have identified as emerging from the case law. We say that is to ignore the clear principles expounded in *Masterfoods* and endorsed by the House of Lords in *Crehan*. Paragraph 57 of *Masterfoods* will not go away. Paragraph 57 explains that the duty applies:

> "When the outcome of the dispute before the national court depends on the validity of the Commission decision."

Mr. Beard suggested that para. 57 does not supply the test. He says that simply reflects the situation before the Court of Justice in that case. The Commission does not agree. May I ask you to turn to authorities bundle 2, tab 43 and look at the Commission notice on co-operation between the Commission and the Courts? It is para. 13 and it begins on p.56. If you read down from the beginning of para. 13, you will see about half way down there is a sentence beginning:

> "However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should 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."

There we find, in the co-operation notice of 2004 which is the one which superseded the one that was considered by the House of Lords in *Crehan*, the principle, the dependence on the validity of the decision as the test. If one goes again, back to *Crehan* and what Lord Hoffmann was saying, with whom the rest of the Members of the House of Lords agreed, para. 16 of what Advocate General Cosmas said cannot be ignored, it provides further guidance.

Mr. Beard referred to some footnotes, giving examples of cases involving different factual scenarios – fine; but he did not seek in any way to dissent from the clear statements in the text of para.16, in which Advocate General Cosmas makes it clear that a strong connection is required for a relevant risk of conflict to arise. Similarity of subject matter is not enough. You will recall the statement about a policy decision being taken within the European Court of Justice that national institutions should not be "overly bound", and the OFT's case ignores this warning. Those are the principles, now is there a relevant risk of conflict?

Mr. Beard said (transcript p.53) there was clearly a relevant risk of conflict. He did a rapid survey of the Ryanair appeal to the General Court and alleged that we have the same type of issues here – competitive conditions, assessment of individual routes, he referred to Malaga and Milan or wherever it was; we are all familiar with the origin and destination markets. He referred to efficiencies which would arise both before the Commission and the UK merger authority so as to give the impression that whatever the UK merger authority was doing was trespassing slap bang in the middle of what the European Commission was doing and what the European Court was doing. Not so.

The issues of law and fact that arise before the European Commission when appraising Ryanair's public bid are quite different, and therefore different in the General Court from those that would confront the UK merger control authorities when applying the Enterprise Act to Ryanair's minority statement.

You recall the reference of Advocate General Cosmas to the "factual and legal matrix". The factual and legal matrix within the UK merger control jurisdiction is quite different

from the factual and legal matrix that applies in Europe. So in the UK the first question when we are considering the minority stake is whether there is a relevant merger situation, in other words material input. I am going over ground I have already dealt with but it is very important I should do so. The issue of material influence does not arise under EU merger control law. The test for a concentration requires control which is a higher test. If one looks at and compares what the General Court was doing, it was concerned essentially with a predictive analysis of what the consequences would be in the event that Ryanair were to acquire full control of Aer Lingus. That is not the predictive analysis which takes place in respect of an analysis of a material influence. There may be consequences, it may be forward looking but it is dependent upon an entirely different factual base, remembering these distinctions of Advocate General Cosmas and Lord Hoffmann are referring to. It is not just a different legal system, it is a different factual matrix. So read what one likes into the General Court's assessment of Ryanair's appeal, but matters that were being considered by the CC if it ever went there, and this is not, I may say, Ryanair dependent, this would apply in the case of A and B or C and D, where A made a bit, had a minority shareholding and the minority shareholding was being investigated.

The Competition Commission is not bound by the findings of fact, that is trite law – it is in the *General Electric* case, authorities bundle 1, tab 21. The factual appraisal is going to be different and the legal matrix is different. This is the starting point. We also know that the Office of Fair Trading's case is that the principal risks of conflict would arise at the CC investigation, and you put certain hypotheses to me yesterday. They really concentrate in their case on what would happen if the Competition Commission completed its inquiry and found that the minority stake operated the United Kingdom public interest which would or might require the divestment of that minority stake and, at the same time, Ryanair was pursuing an appeal before the General Court that the European Commission was in manifest error in drawing the conclusions that it did that Ryanair should be prohibited from acquiring full control.

May I ask you to look at what we said in our notice of application at para. 71, at the first tab in the core bundle. This is our notice of application so we are dealing with the time bar decision, and we are dealing with a whole series of hypotheses, and at 71(e) we say:

> "Moreover, *even if* one goes further still for the sake of argument (i.e. looking beyond the OFT's decision whether to make a reference to the Competition Commission, notwithstanding the terms of s.122 of the Act and the methodology identified by the Advocate General) …"

- that is a reference to Advocate General Cosmas.

> "… if a reference had been made to the Competition Commission, Article 10EC would not have prohibited *the Competition Commission* from carrying out an investigation and, if it found an RMS and an SLC, imposing remedies. The Competition Commission's remedies would have been imposed applying a different legal test to a very different set of facts at a different time from the European Commission (i.e. not an 'unmixed conflict'). This is the normal position with the acquisitions of minority stakes which do not confer control …"

On reflection I should have been stronger in the arguments I was making yesterday, and this goes back to why we are saying that if the Tribunal accepts the propositions of the OFT it stops the complete process from OFT level to CC level in determining whether or not (what I call) a bad merger is giving rise to distortions of competition within relevant markets within the UK. So I am assuming on this hypothesis that there is a harm being suffered ultimately by consumers within the United Kingdom.

The OFT test is: "We cannot intervene. We cannot do anything, we cannot even investigate and certainly the Competition Commission cannot investigate because they do not have any powers." The OFT says that it has to put the brakes on before anything starts – and this is hypothetical, I am talking about A and B, not Ryanair and Aer Lingus – and in the meantime you have a situation in which the material influence is being used in a malign way so as to advance the interests of the acquiror, or the owner, and to distort conditions from competition. The test is, according to the OFT, "We cannot do anything. We cannot do anything because there is an Article under the Treaty which says we would be in breach of our duty of sincere co-operation if we sought to intervene in any way, so we are not going to do it."

THE PRESIDENT: Mr. Swift, that is a problem that arises anyway under Article 21(3), is it not? The vice that you have pointed to now is something which is just one inevitable result of the split jurisdiction and the fact that if the Commission is looking at it the CC cannot, even though what is going on is going on.

MR. SWIFT: I am not sure there is a read across. I want to concentrate simply on the way the OFT is putting its case, and is saying that you must avoid any conflict, that is the duty of co-operation. What I am saying is if you apply the United Kingdom merger control system as it is meant to be applied (and we say it should be applied) what the OFT is asking this Tribunal to do is to exempt it from any domestic duty so long as there is an appeal by the owner – leave aside the Aer Lingus appeal at the moment – which could be prolonged for, I

will say nine years but say six years, the length of time does not really matter, we know that there are delays in Brussels. I say that this risks undermining the integrity of the system. You will remember when I started yesterday saying it is an odd position for the OFT to be advocating. You would have thought that as the sole domestic authority responsible for the enforcement of competition law in this country it would not be taking a back seat and saying: "We have to wait until the outcome of appeals", knowing by then the process to be adopted in Luxembourg can largely be controlled by the owner, and the appellant. That, in my submission, is an outcome which is a direct result of the test which the OFT is asking you to apply in this case, and which does not, in my submission, make sense in terms of policy or in terms of law. Yesterday we were concentrating more on: what if the conflict were identified at the CC stage, and we have had this expression – I want to avoid – 'magic dust', OK I have said it, but I am talking really about the autonomous power of a representative Member State to control its processes so it does not engage the Member State in breach.

Before we get to hypothetical questions of 'magic dust' what is it that would stop the Competition Commission from saying: "It is my duty as a statutory body to take this process through and see it through to the end and impose the remedies." Mr. Beard was suggesting yesterday that it could go so far, it could take a decision, but it could not go on. My point at para. 71(e) is: what is to stop it going on? It would then be promoting the interests of the United Kingdom as it saw them, and how could it possibly be said to be jeopardising the objectives of the Treaty when under the Treaty the Commission and the courts are examining the consequences of mergers under a different legal order?

THE PRESIDENT: Can I ask you something about that, because it is important. Is it not the case arguably that the conflict here which is the cause for concern if Mr. Beard and Mr. Flynn are right which may give rise to the duty of sincere co-operation, it is not just a conflict that people are looking at the same thing and may reach inconsistent decisions, which is what we have majored on, but is actually a conflict with Article 21(3) regardless of whether they are looking at different tests in their own different legal regimes. We have sitting there Article 21(3) which says that if the Commission's competence trumps the national competence, now even though looking at arguably different things. Is that not another dimension to the potentiality of conflict?

MR. SWIFT: I really do submit that we are getting into such complicated areas here. The Article 21(3) "one stop shop" principle assumes that once one institution, the European Commission, no longer has the exclusive competence then the OFT will, it just moves like

that. There is no lacuna, no gap, there is an immediate transfer of power to the OFT, that is exactly what the Commission's merger services were saying in 2007, they could not have put it clearer: "It is now over to you, there is no bar". There was no ECMR impediment from that date, otherwise we get the most extraordinary position. It really is going back to this critical point. If the suggestion is if the United Kingdom authorities responsible for merger control cannot control malign effects on competition because the owner of that share is taking appeals under a different provision of the law to the European Court then that is a very severe consequence for the United Kingdom and this country. The point that I am making from this, and I do not need to make it at length, is that whatever the position is about autonomy, whatever the position about s.122, there was a strong case for the United Kingdom being allowed to say: "We will take this through to the end. We must require divestment because in our view that is the only way the United Kingdom public interest can be protected", and then doing it. Then if, at the end, the European Court comes out with something else then we will see, but the fact is they have done their job and the European court has done its job, and we should be very, very careful before bringing in some rule of pre-emption so as to disapply that process going ahead. That, of course, is entirely consistent with the other argument I have been making, which is when you are dealing with predicting various outcomes under the United Kingdom merger regime, you do not know at the beginning what is going to result, so you can have a position in which my company A, the owner of the minority shareholding, says: "This does not amount to a merger situation. I should be entitled to make that case to the authorities once you have jurisdiction, for reasons of legal certainty, I want it cleared up." The OFT says: "No, we are not going to allow you to do that; we are not even going to investigate it ourselves. We have to stop applying the brakes." That carries with it very serious consequences for the United Kingdom public interest, and when the Tribunal comes to consider its choice I submit, with the greatest respect, you should think long and hard before you allow that consequence to flow.

MR. MATHER: Could I just test that a little, Mr. Swift, by comparison with preliminary rulings in the European court, would you extend your argument to that if there was a lengthy delay likely before the European Court could give a preliminary ruling, do you think that should deter the UK national court or other body from making such a reference?

MR. SWIFT: I am not suggesting either in respect of preliminary rulings, the interpretation of the Treaty, or indeed follow-on actions where the national court quite rightly is under a duty to stay its proceedings, there was only going to be a length of time in which there may be certain consequences. What I would say in the particular circumstances of this case you do

not need to go in that direction As I said yesterday, if this policy, which is now being introduced by the OFT for the first time, had been put out to consultation these are precisely the arguments that would have been made against it. The risk here is that this Tribunal, without having any proper responses to consultation may be taking a decision which will turn out to be extremely bad for the United Kingdom public interest. That is the main point I am making, because that is the consequence of what the OFT is arguing for. If this Tribunal has any doubt as to whether that should be the consequence of interpreting Article 10, as Mr. Beard contends that it should be applied, I would strongly suggest that you consider yourselves making a possible reference to the court on this issue.

MR. MATHER: So putting it positively, what does the "duty of sincere co-operation" mean? How is it limited?

MR. SWIFT: The "duty of sincere co-operation" is precisely as expressed by the House of Lords in *Crehan*. It is in those cases where one decision is dependent upon the validity of another decision. So you need to have an identity of fact, and you need to have an identity of legal matrix. That is what the jurisprudence has been leading to. Of course the jurisprudence is in respect of an action taken by a national authority which might in some way cut across or run counter to a decision of the European Commission or the European Court on a matter involving the interpretation of the Treaty. This is what it is all about. The Member State is under a duty to abstain from jeopardising the objectives of the Treaty. It is nothing to do with the Member States not being allowed to protect the interests of their consumers in their own markets.

MR. MATHER: Just to help me clear my mind a little further, and I know this is going on to some of the other arguments, s.122(4) is headed "Primacy of Community Law". How do you interpret that in the two possibilities: one, that it is interacting with Article 10; and the other that it can be wholly construed in a domestic manner?

MR. SWIFT: We have said that s.122(4) is a pretty simple proposition to read. It simply describes, in a sense, when the legal prohibition applies, it is directed to ECMR Art.21(3), it is pretty clear. There have been lots of issues raised this morning and yesterday about the doubts and uncertainties. The European Court, the General Court made it clear what the consequences of it are. You cannot fit Article 10 within s.122(4) without grossly distorting the ordinary meaning of that section. If you want to bring in Article 10, if you do in those circumstances, it applies directly on a Member State. The OFT may say, "We can only do it through s.122". That leaves open the question, if the conflict, so-called, arises at the

Competition Commission level they have not got to s.122. They need some autonomous link.

I am saying something quite different and much more positive this morning than I said yesterday, and that is to confirm what I said after the adjournment yesterday, there is no conflict. You have two separate legal orders. If you start to combine the two legal orders and think that one is subordinate to the other, you are going to produce seriously adverse consequences for the United Kingdom.

That was really the main thrust of what I was proposing to say in reply.

THE PRESIDENT: Thank you very much, Mr. Swift.

MR. BEARD: Sir, just two points. A question was posed earlier, and I have just checked and taken instructions. As far as we are aware, there are no provisions in the Enterprise Act that enable the CC unilaterally to slow or stop the process. So far as we are aware, no one in these proceedings has adverted to any such provisions. The only one is 122(4), which, as has been indicated, does apply to the OFT.

The only other matter is obviously you have our submissions on *Crehan* and *Masterfoods*. Mr. Swift in reply referred to one new document that he had not referred to previously, the Commission notice on co-operation, which he relied on, para.4. It is just worth noting that it is the co-operation notice between the Commission and the courts of the EU Member States in the application of Articles 81 and 82. So it is just dealing with those competition provisions. It is not dealing more generally with the whole notion of co-operation between institutions in relation to other legal provisions at all.

MR. MATHER: Just to be clear on that, it is not a binding instrument, is it? It is at tab 43. It says that it is issued in order to assist national courts. It does not bind the national courts, nor does it affect the right and obligations of the Member States.

MR. BEARD: No, but that is true of all guidance from the Commission. Courts can override it. We are not suggesting that you should just ignore Commission guidance. The point is being made that precisely the same legal provisions would be being applied by the EU institutions and the national institutions, 81 and 82, which is why you had the language in *Masterfoods*, because that was precisely what was going on there. You had precisely the same legal provisions applying, and you have our submissions that the duty of sincere co-operation goes further than that.

MR. BLAIR: May I ask a small question. It is not concerned with your central proposition in reply, for which thanks.

MR. SWIFT: I am always worried about your small questions, Mr. Blair!

MR. BLAIR: You do not know how worried I am about them! The other advocates mentioned this morning that there had been a new acquisition of shares in July 2008, and therefore suggested that the OFT got a fresh right to investigate the shareholding by your clients, which would have lasted until November 2008. I imagine that you accept that that is so, but would submit that that was equally something that should have happened at the time and could not have been prolonged?

MR. SWIFT: Yes, that is our position.

MR. BLAIR: Thank you.

THE PRESIDENT: Thank you all very much. We will take our time to think about it.