Neutral Citation Number: [2015] EWCA Civ 83

Case No: C3/2014/1376

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Mr Hodge Malek QC, Professor John Beath and Margot Daly
Case Number: 1219/4/8/13 : [2014] CAT 3

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2015

Before :

LORD JUSTICE LAWS
LORD JUSTICE PATTEN
and
LORD JUSTICE FLOYD

- -

Between :

RYANAIR HOLDINGS PLC	**Appellant**
- and -	
THE COMPETITION AND MARKETS AUTHORITY	**First Respondent**
- and -	
AER LINGUS GROUP PLC	**Second Respondent**

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- -

Lord Pannick QC, Mr. Brian Kennelly and **Mr. Tristan Jones** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) appeared for the Appellant
Mr Daniel Beard QC, Mr Rob Williams and **Miss Alison Berridge** (instructed by the **Treasury Solicitor**) appeared for the First Respondent
Mr James Flynn QC and **Mr Daniel Piccinin** (instructed by **Cadwalader Wickersham & Taft LLP**) appeared for the Second Respondent

Hearing dates : 26 and 27 November 2014

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Approved Judgment

Lord Justice Patten :

Introduction

1. Ryanair Holdings Plc ("Ryanair") is the holder of 29.82% of the issued share capital of Aer Lingus Group plc ("Aer Lingus"), the Irish national carrier. Most of the minority stake (some 25.2%) was acquired between September and November 2006 when Ryanair launched its first public bid to acquire Aer Lingus. The bid contained the standard term that it should lapse on any reference to a second phase investigation by a merger authority in the UK or the EU. This occurred when the European Commission initiated phase II proceedings under Article 6(1)(c) of Council Regulation 139/2004 of 20 January 2004 ("EUMR").

2. The European Commission subsequently declared that the bid (together with the acquisition of the 25.2% minority stake) would significantly impede effective competition in the common market within the meaning of Article 2(3) EUMR and that the concentration composed of the bid and the minority stake was incompatible with the common market pursuant to Article 8(3) EUMR.

3. Aer Lingus sought from the European Commission a direction under Article 8(4) EUMR requiring Ryanair to divest itself of the 25.2% stake it had built up. This was resisted and the European Commission eventually decided in October 2007 that it had no power to make an Article 8(4) direction because Ryanair did not have control over Aer Lingus within the meaning of Article 3(2) EUMR. There were appeals by both Ryanair and Aer Lingus against the various determinations by the European Commission. Ryanair applied to set aside the Commission's Article 8(3) determination of incompatibility. Aer Lingus challenged the European Commission's decision that it had no power to make a divestiture order. An attempt by Aer Lingus to obtain an order for interim measures was dismissed by the President of the Court of First Instance on 18 March 2008: see Case T-411/07 R, *Aer Lingus Group plc v. Commission* [2008] ECR II-411.

4. The appeals by Ryanair and Aer Lingus were ultimately disposed of in two judgments of the General Court issued on 6 July 2010: see Case T-411/07 *Aer Lingus Group plc v. Commission* [2010] ECR II-3691, [2011] 4 CMLR 358; Case T-342/07 *Ryanair Holdings plc v. Commission* [2010] ECR II-000, [2011] 4 CMLR 245. The General Court rejected both appeals. It held that, absent control, there was no power under Article 8(4) to require Ryanair to divest itself of the minority stake it had acquired. Any further action in that respect would be a matter for the national authority applying its own competition law. In relation to Ryanair's appeal, the General Court affirmed the European Commission's assessment of the effects of the bid on competition. Neither judgment was appealed.

5. By then Ryanair's holding in Aer Lingus had increased to 29.82%. The additional shares were acquired in July 2008. On 1 December 2008 Ryanair launched a second takeover bid but this was abandoned in January 2009.

6. Following the judgments in the General Court, the Office of Fair Trading ("OFT") began its own investigation in relation to Ryanair's retention of its minority stake. There was a preliminary skirmish about the time limit for a reference to the Competition Commission ("CC") under s.22 of the Enterprise Act 2002 ("the Act")

which ended with the decision of this Court in *Ryanair Holdings Plc v. Office of Fair Trading* [2012] EWCA Civ 643 that the duty of sincere co-operation under Article 10 EC (as implemented by s.122(4) of the Act) required the UK competition authority to avoid any potential conflicts with the appeals to the General Court (including a risk of infringement of Article 21(3) of the Merger Regulation) by postponing a reference under section 22 until after the conclusion of the appeals. The minority holding was, as I have said, part of the concentration notified to the European Commission and also the subject of the OFT's own-initiative investigation.

7. Ryanair's minority stake in Aer Lingus was referred for investigation to the CC on 15 June 2012. The reference was in these terms:

> "1. On 15 June 2012, the OFT sent the following reference to the CC:
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> 1. In exercise of its duty under section 22(1) of the Enterprise Act 2002 ("the Act") to make a reference to the Competition Commission ("the CC") in relation to a completed merger, the Office of Fair Trading ("the OFT") believes that it is or may be the case that:
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> (a) a relevant merger situation has been created in that:
>
> (i) enterprises carried on by or under the control of Ryanair Holdings plc (Ryanair) have ceased to be distinct from enterprises previously carried on by or under the control of Aer Lingus Group plc (Aer Lingus); and
>
> (ii) as a result, the conditions specified in section 23(4) of the Act will prevail, or will prevail to a greater extent, with respect to the supply of scheduled airline services between the UK and the Republic of Ireland measured by number of passengers;
>
> (b) the creation of that situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods and services, including the provision of scheduled airline services on a number of direct routes between cities in the UK and cities in Ireland where either:
>
> (i) Ryanair and Aer Lingus overlap in the provision of services (these routes being: Manchester (Liverpool) – Dublin; Birmingham (East Midlands) – Dublin; London-Cork; London-Shannon; London-Knock; and London-Dublin); or

> (ii) Ryanair operates on the route and Aer Lingus is a potential entrant onto the route (these routes being: Dublin-Newcastle and Knock-Bristol).
>
> 2. Therefore, in exercise of its duty under section 22(1) of the Act, the OFT hereby refers to the CC, for investigation and report within a period ending on 29 November 2012, on the following questions in accordance with section 35(1) of the Act:–
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> (a) Whether a relevant merger situation has been created; and
>
> (b) If so, whether the creation of that situation has resulted or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services."

8. Ryanair's response to the reference was to announce that it intended to make a third public bid for Aer Lingus. It invited the CC to stay the investigation. When this was refused Ryanair applied to the Competition Appeal Tribunal ("CAT") for an order under s.120 of the Act quashing or staying the investigation. In the meantime, Ryanair had notified the European Commission of the third bid for the remaining 70.18% of Aer Lingus. The concentration notified did not include the existing minority stake but was confined to the bid for the balance of the shares. The Commission confirmed by letter that in these circumstances there was no reason to stay the continuation of the CC investigation provided that the national authority took no decisions which would compromise possible decisions by the Commission under the EUMR.

9. On 8 August 2012 the CAT dismissed Ryanair's appeal against the CC's decision to continue its investigation: see *Ryanair Holdings Plc v. Competition Commission* [2012] CAT 21. It said:

> "82. This is not a case of "overlapping jurisdictions" as that term is used by the Chancellor in the Ryanair C/A Decision. In this case, there is no prospect – even contingently – of the exclusive jurisdiction conferred on the European Commission by Article 21 of the EC Merger Regulation extending to the Minority Holding. As is common ground, whilst the shares which are the subject of the Public Bid amount to a concentration with a Community dimension, and so fall within the EC Merger Regulation, the Minority Holding does not. This fact distinguishes the present case from that before the Court of Appeal in the Ryanair C/A Decision: there Ryanair's minority shareholding in Aer Lingus was part of the same concentration with a Community dimension as Ryanair's first public bid, with the result that the entire concentration – including the minority holding – was subject or potentially subject to the EC Merger Regulation.

> 83. This is a case where there are parallel or concurrent jurisdictions:
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> (1) In the case of the Public Bid, the European Commission has exclusive jurisdiction.
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> (2) In the case of the Minority Holding, the European Commission has no jurisdiction, and the matter falls within the purview of the OFT and the CC. There is no prospect, as regards the Minority Holding, of Article 21 applying, let alone reviving.
>
> 84. Accordingly, we reject Ryanair's contention that, as a matter of law, the duty of sincere cooperation precludes the CC from taking any further steps in the Investigation. Of course, as Mr Beard Q.C., for the CC, accepted, the CC remains subject to the duty of sincere cooperation and must avoid taking any final decision in respect of the Minority Holding which would, or could, conflict with the European Commission's ultimate conclusion on the compatibility of the Public Bid with the common market. That does not mean that the CC is precluded, as a matter of law, from taking any further steps in the Investigation."

10. On 29 August 2012 the European Commission announced that it had initiated proceedings in relation to the third bid under Article 6(1)(c) EUMR with the result that the bid lapsed. On 13 December 2012 this Court dismissed Ryanair's appeal against the decision of the CAT: see *Ryanair Holdings Plc v. Competition Commission* [2012] EWCA Civ 1632. On 27 February 2013 the European Commission (Decision C(2013), Case M.6663) declared that the third bid was incompatible with the internal market pursuant to Article 8(3) EUMR on the ground that the notified concentration would significantly impede effective competition in the internal market or a significant part thereof because of the dominant position (which it would lead to) of Ryanair and Aer Lingus on 46 routes from and to Dublin, Shannon, Cork and Knock. Ryanair lodged an appeal to the General Court from this decision on 8 May 2013 which, as far as we are aware, has yet to be heard.

11. The CC published its provisional findings report and notice of possible remedies on 30 May 2013. Ryanair submitted a detailed response to the report on 19 June 2013 and its response to the notice of possible remedies on 11 June 2013. On 20 June 2013 there was a hearing before the CC following which Ryanair submitted four additional papers dealing with matters raised at the hearing. The CC published a remedies working paper on 10 July 2013 to which Ryanair responded on 22 July 2013.

12. During this process Ryanair sought further disclosure from the CC including the identities of the third party airlines who had provided information to the CC about the effect which Ryanair's minority stake was likely to have on the ability of Aer Lingus to enter into combinations with other airlines. These names were not disclosed. On 28 August 2013 the CC produced its Final Report.

13. It will be necessary to refer to parts of the Final Report in greater detail when I come to consider the three grounds of appeal on which Ryanair now relies. But by way of introduction a relatively brief summary will suffice. It is important to re-emphasize that the reference to the CC was limited to the acquisition and retention by Ryanair of its 29.82% stake in Aer Lingus and is not concerned with any of the three takeover bids. It therefore concentrates on the influence which a stake of that size gives Ryanair in relation to the business of Aer Lingus and the likely effects of this on competition.

14. On a reference to the CC (now the Competition and Markets Authority ("CMA")) under s.22 the question which the CC was required to decide under s.35(1) of the Act was:

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

15. A relevant merger situation occurs when two or more enterprises have "ceased to be distinct" and the turnover or share of supply tests set out in s.23(1) are satisfied. In this case it is common ground that there was a completed relevant merger situation within the meaning of s.35(1)(a) by virtue of Ryanair's acquisition of its minority stake. What is in dispute is whether s.35(1)(b) is also satisfied. If that question is decided in the affirmative then there is what is described in s.35(2) as an anti-competitive outcome which brings into play the provisions of s.35(3) and (4):

> "(3) The CMA shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—
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> (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
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> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

> (4) In deciding the questions mentioned in subsection (3) the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

16. The duty to remedy the effects of a completed merger is dealt with in s.41:

> "41. Duty to remedy effects of completed or anticipated mergers
>
> (1) Subsection (2) applies where a report of the CMA has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
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> (2) The CMA shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
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> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
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> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
>
> …..
>
> (4) In making a decision under subsection (2), the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

17. To achieve this the CMA may accept an undertaking under s.82(1) or, in the absence of adequate undertakings, make final orders under s.84. These may include an order for the sale of any part of the undertaking or assets: see Schedule 8, paragraph 13(1)(a).

18. The CC found that the two companies had ceased to be distinct enterprises for the purposes of the Act as a result of Ryanair's ability to exercise material influence over the policy of Aer Lingus and that this therefore amounted to a relevant merger situation. Ryanair with a holding of 29.82% could block special resolutions at general meetings of Aer Lingus and could prevent Aer Lingus from merging with another airline either within a scheme of arrangement or under Directive 2005/56/EC on cross-border mergers. Some of Aer Lingus's most valuable assets are its Heathrow landing slots. Under its Articles of Association they cannot be disposed of except by way of a resolution passed at an EGM which can be called by members holding at least 20% of the shares. At such a meeting the special provisions governing the disposal of the landing slots mean that at least 69.9% of the votes must be in favour of

the disposal. The CC therefore concluded that Ryanair could, if it wished, requisition an EGM and block any resolution to dispose of the slots.

19. On material influence, it said in paragraphs 4.42 and 4.43:

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

20. It therefore turned to consider whether this had resulted or might be expected to result in a substantial lessening of competition ("SLC") within any market for goods or services. Its conclusion (set out in paragraph 7.188 of the Final Report) was that:

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

21. Central to this conclusion was the CC's assessment that Ryanair's incentives as a competitor were likely to outweigh its incentives as a shareholder:

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

> …
>
> 7.17 As set out in Section 5, we found that Ryanair and Aer Lingus are close competitors, with both airlines' actions having a significant impact on each other , and the two airlines being the only operators present on a number of routes. All else equal, the closeness of competition implies that Ryanair would be likely to benefit significantly from a weakening of Aer Lingus's effectiveness as a rival, as passengers diverting away from Aer Lingus's services would be likely to travel using Ryanair's services instead. We therefore formed the view that Ryanair would have an incentive to take actions that ultimately had the effect of reducing Aer Lingus's effectiveness when deciding how to exercise the influence afforded to it by its shareholding.
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> …..
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> 7.20 Furthermore, we also took into account Ryanair's stated strategy of acquiring the entirety of Aer Lingus (see paragraph 3.11), and its ongoing bids for the outstanding shares in the company. We considered that this strategy could also affect Ryanair's incentives with respect to its shareholding. In particular, Ryanair would have an additional incentive to use its influence to weaken Aer Lingus's effectiveness as a competitor if this would make it easier to acquire the company, and an incentive to oppose any strategies that Aer Lingus might follow that would make it more difficult for Ryanair to acquire Aer Lingus (for instance, certain combinations with other airlines)."

22. In reaching this conclusion the CC rejected the argument that the existence of strong competition between the two airlines was sufficient in itself to preclude the finding of a likely SLC:

> "7.10 In our view, the finding that Ryanair and Aer Lingus compete intensely (and that the extent of overlap between their UK operations has increased since 2006) neither precludes, nor is in conflict with our findings that, absent Ryanair's shareholding, competition during the period since 2006 may have developed differently and could have been more intense. Many of the potential competitive effects of the transaction that we considered would manifest themselves in terms of the absence of an action that might otherwise have been taken by Aer Lingus (for example, Aer Lingus being prevented from combining with another airline or from disposing of Heathrow slots in the context of optimizing its route network and timetable). We therefore cannot determine whether the transaction has reduced competition relative to the counterfactual solely from observing the competitive actions that Aer Lingus and Ryanair have taken in the period since 2006.

> 7.11 In addition, we need to consider not only whether the transaction has, to date, led to a reduction in competition, but also whether competition between the airlines may be affected in the future. The evidence presented in the European Commission's decision, whilst informing our understanding of the current level of competition between the parties, is a factor among others that we have taken into account when assessing how competition between the airlines might develop with and without Ryanair's shareholding in the future. For example, we were also conscious of Aer Lingus's view that its competitiveness would be eroded over time as it faced an inevitable 'cost creep' if its participation in the trend of consolidation in the airline industry were limited, as well as Ryanair's view that Aer Lingus did not have a future as an independent airline."

23. One of Aer Lingus's major concerns was that Ryanair's minority stake was likely to impede the chances of the airline entering into some sort of combination or alliance with other airlines. The evidence was that the general trend in the industry was towards consolidation which can bring economies of scale and reduce per passenger costs. Although the impetus for particular mergers or combinations varied from case to case, the evidence from other airlines was that the trend was worldwide and would continue in the future. The CC therefore considered Aer Lingus's ability to enter into some form of combination with another airline. It set out its approach to this issue and the questions it raised in paragraphs 7.24 – 7.25 of the Final Report:

> "7.24 We considered whether Ryanair's shareholding might weaken the effectiveness of Aer Lingus as a competitor by restricting Aer Lingus's ability to manage its costs at a competitive level and/or expand or improve its offering via a combination with another airline. We first set out how Ryanair's minority shareholding might influence Aer Lingus's ability to combine with another airline. We then consider evidence related to the likelihood of Aer Lingus being involved in a combination absent Ryanair's minority shareholding, discussing the general trend in consolidation in the airline industry, the views of airlines, internal documents of Aer Lingus and discussions between Aer Lingus and other airlines since 2006. Finally, we discuss the potential impact of being impeded from combining with Aer Lingus on its effectiveness as a competitor.
>
> 7.25 Combinations between airlines are inherently unpredictable and opportunistic, and so it is inevitable that our assessment will require an element of judgement. We do not consider it to be either feasible or necessary to catalogue all potential transactions involving Aer Lingus and another airline and assess the likelihood of each of these having taken place in the period since 2006 or taking place in the foreseeable future. Instead, we take into account a broad range of evidence relating

> to Aer Lingus including its position in the airline sector and evidence of its discussions with third parties on possible combinations in forming an overall view on the likelihood of Aer Lingus being (or having been) involved in a combination with another airline in the absence of Ryanair's minority shareholding."

24. The CC concluded that Ryanair's minority shareholding did give it the ability to prevent a range of possible combinations involving Aer Lingus by another airline and could also impede a joint venture:

> "7.30 Third parties told us that any acquirer of Aer Lingus would be likely to be concerned by Ryanair's minority shareholding. IAG told us that it would not usually contemplate buying a controlling interest in an airline with a significant ongoing minority shareholder. Air France said that Ryanair's presence as an existing shareholder in Aer Lingus was not considered a deterrent to another airline acquiring an interest in the airline. However, there would be concerns over the illiquid share block between the shares held by the Irish Government, Ryanair and employees. Overall, Air France said that it would be difficult, but not impossible, for another airline to take a stake in Aer Lingus given its current share register. Lufthansa said that having a competitor like Ryanair as a shareholder made Aer Lingus's shareholder structure rather challenging and made the airline rather less attractive. Aer Arann told us that a potential suitor would have concerns about acquiring an airline in which the largest shareholder was also a competitor.
>
> 7.31 We found that Ryanair's minority shareholding would give it the ability to impede possible acquisitions of Aer Lingus by another airline. Significantly, Ryanair could prevent a bidder from acquiring 100 per cent of Aer Lingus by choosing to retain its shares. If Ryanair decided not to sell, an acquirer would need to accept Ryanair remaining as a significant minority shareholder, with different incentives to its own, and with, for example, the ability to block special resolutions and the entitlement to the proportionate share of the dividends and profits of Aer Lingus. In such circumstances, the acquirer's ability to integrate the businesses would be significantly restricted.
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> 7.32 We also found that the shareholding would affect Aer Lingus's ability to merge with, enter into a joint venture with, or acquire another airline, by forcing Aer Lingus to seek Ryanair's approval for certain types of transaction. First, as set out in paragraphs 4.20 and 4.21, Ryanair's ability to block a special resolution means that it could prevent a merger between Aer Lingus and another airline via a scheme of arrangement or under the Cross Border Merger Regulations. Ryanair could also prevent Aer Lingus from issuing new shares to a potential

> partner via a private placement and could prevent other forms of corporate restructuring or reorganization (for example, a repurchase of the company's shares, a reduction of share capital, the cancelling of shares or changes to the Articles of Association) which would be required in certain types of transaction. Second, Ryanair could hamper Aer Lingus's ability to issue shares for cash in order to raise the capital needed to acquire or merge with another airline, by defeating the special resolution required to disapply pre-emption rights. This is discussed in more detail in paragraphs 7.85 to 7.92. Third, if Ryanair were able to command a majority in an Aer Lingus general meeting (see paragraphs 7.108 to 7.114) it would be able to block a class 1 transaction (see Appendix C). This would be relevant in a joint venture (for example, a new company is created in which Aer Lingus and a partner own shares) or merger or acquisition discussions where the value of the assets to be acquired by Aer Lingus exceeded the relevant thresholds."

25. But that left the question whether some form of combination was likely to occur; in other words whether Aer Lingus was an attractive partner if otherwise available. For this purpose, the CC took into account the views of other airlines and the evidence of potential combinations involving Aer Lingus in the period since 2006. The evidence of Aer Lingus was that it had always been and remained interested in attracting investment and that its management had identified a need for growth to achieve greater scale and promote cost competitiveness. In this it was constrained by the size of its home market. It could, however, afford to remain independent. Ryanair's evidence was that Aer Lingus had no future as an independent airline and that its only long-term future lay as part of a larger Irish airline in combination with Ryanair. It had been unsuccessful in finding another partner because no other airlines were interested in Aer Lingus.

26. It was therefore highly relevant for the CC to consider what evidence there was from other airlines. This is summarised in paragraphs 7.47 – 7.55 of the Final Report and includes references to discussions with other airlines between 2010 and 2013, some of which were said not to have proceeded to an acquisition or other combination due to the existence of Ryanair's minority holding. In the Report the names of these other airlines are redacted and their identity was not disclosed to Ryanair during the hearings before the CC.

27. The CC concluded based on this evidence that the minority stake was a significant impediment or detriment to some form of combination with another airline and that, but for its existence, there was or would have been a real likelihood of such a combination taking place:

> "7.81 Furthermore, we found that, in the absence of Ryanair's minority shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in a significant acquisition, merger or joint venture. In reaching this view, we took into account the general trend of consolidation in the airline

> industry and the need to exploit economies of scale and maintain or reduce costs per passenger, which suggested that a combination involving an airline of Aer Lingus's size was likely. We also took into account Ryanair's view that Aer Lingus would be unlikely to have an independent long-term future, and Aer Lingus's view of the importance of scale to its future competitiveness. The Irish Government's stated intention to sell its shares in Aer Lingus at the right time and at the right price also made it more likely that Aer Lingus would be involved in a combination absent Ryanair's minority stake, given the change in ownership this implied.
>
> 7.82 The views expressed to us by other airlines did not support Ryanair's assertion that Aer Lingus was an inherently unattractive partner, and we considered that while the characteristics of its network might limit its attractiveness to certain airlines, these factors might impact upon the consideration involved in any transaction that took place rather than act as an absolute deterrent. We also considered that the airline's strong financial position and access to Heathrow would be attractive to potential partners.
>
> 7.83 The extent to which we can draw inferences from evidence of discussions between Aer Lingus and other airlines in the period since 2006 is limited because of the presence of Ryanair's minority shareholding throughout this period. Nevertheless the discussions between Aer Lingus and other airlines which had taken place in the period since 2006 suggested to us that possible combinations arise and other airlines considered Aer Lingus to be a credible partner for a combination. While the evidence that we received suggested that it was relatively unlikely that a large European airline would seek to acquire Aer Lingus in the immediate future (and so going forward a merger or acquisition by Aer Lingus was the most likely form of combination), we considered that an acquisition remained a possibility in the longer term, and might have taken place in the period since 2006 absent Ryanair's minority shareholding."

28. The CC then turned to the question of remedies which again brought into consideration the duty of sincere co-operation. Ryanair took a preliminary objection to the CC reaching a decision on the divestiture of the whole or part of its minority stake until after the conclusion of its appeal to the General Court against the determination of the European Commission that the third bid for Aer Lingus was incompatible with the internal market pursuant to Article 8(3) EUMR. It contended that if the appeal is successful and a bid for the remaining shares in Aer Lingus is allowed by the European Commission to proceed Ryanair would be in a significantly worse position if its bid had to commence from a holding of as little as 5% as opposed to the 29.82% which it currently owns. Aer Lingus's submission was that a divestiture order could not conflict with any further decision of the European

Commission (including as a result of the current appeal) because the two decisions had a different legal and factual basis and because Ryanair could in any event re-acquire the shares were it permitted to go ahead with a bid.

29. The CC rejected the suggestion that it should refrain from making any divestiture order until the General Court has decided whether a bid for the remaining shares would be a breach of EU competition law. In the Final Report it emphasizes the separate nature and focus of the two investigations which I referred to earlier and the duty under s.41 of the Act to achieve as comprehensive a solution as is reasonable and practicable to the SLC which it has found to exist. It concluded:

> "8.10 We note that the CAT, the Court of Appeal and the General Court have confirmed that the CC has exclusive jurisdiction to analyse the competitive effects of Ryanair's minority shareholding in Aer Lingus.
>
> 8.11 We also note that we have analysed the impact of Ryanair's minority shareholding in Aer Lingus on the latter's effectiveness as a competitor on routes between Great Britain and Ireland, taking into account the relevance of the European Commission's decision where appropriate. In our view there is no conflict arising from the CC's finding of an SLC and the European Commission's SIEC findings.
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> 8.12 We recognize that Ryanair has challenged the European Commission's assessment of the final commitments offered by Ryanair. We are also mindful of the importance of complying with our EU obligations and we have therefore considered the matter with care. However, having had regard to the matters mentioned in paragraph 8.9, including the grounds of challenge in Ryanair's application to the General Court, we view the prospect of a conflict between the substantive analysis or outcome of the CC's inquiry and that of the institutions of the EU as relatively remote. In our view, the remedial action that we propose taking could not be said to jeopardize the attainment of the EU's objectives.
>
> 8.13 We considered whether interim arrangements would be effective in mitigating the SLC finding pending the conclusion of the EU appeals process. For the reasons set out in paragraph 8.103, we did not find that interim relief (by way of the current—or supplementary—interim measures) would be effective in addressing the SLC that we had found and hence were not persuaded that delaying the implementation of remedial action was justified."

30. As to remedy, the CC decided that the undertakings offered by Ryanair (which included it not voting against an acquisition of Aer Lingus, the acquisition by Aer Lingus of another airline, or the disposal of its Heathrow landing slots) would not be effective to deal with the SLC. It concluded that the only effective remedy would be full or partial divestiture of the minority stake. In terms of which of these would be

proportionate as well as effective, Aer Lingus maintained that only full divestiture would provide a satisfactory remedy. Even the retention of a 5% stake was likely to deter interest from alternative bidders for the airline.

31. In the end, the CC concluded that a reduction of Ryanair's holding to 5% would be effective:

> "8.106 To be effective in remedying the SLC, a partial divestiture would need to result in a sufficient reduction in Ryanair's shareholding to ensure that Aer Lingus would not be impeded in pursuing its own commercial policy and strategy and thereby avoid harm to competition on the routes between Great Britain and Ireland. To achieve this aim, the shareholding would also need to be at a sufficiently low level to ensure that there was no realistic prospect that Ryanair would be able to block a special resolution or to act in other ways to impede or deter a combination between Aer Lingus and another airline, or otherwise restrict Aer Lingus's ability to compete effectively.
>
> 8.107 Drawing on our analysis of voter turnout and voting patterns (see paragraphs 8.73 to 8.78), we took the view that Ryanair's stake would need to be reduced to 5 per cent for a partial divestiture to be effective in removing Ryanair's ability to block a special resolution. While a stake at this level might, under some circumstances (eg a combination of historically low turnout, abstention by the Irish Government and significant support from other shareholders), still enable Ryanair to block a special resolution, we judged that such scenarios were sufficiently unlikely to occur in practice for this risk to be tolerable at this level of shareholding. We noted Ryanair's submissions that a higher threshold than 5 per cent would be sufficient to remove its ability to block a special resolution. However, we considered it appropriate to exercise a degree of caution in determining any threshold and judged, looking in the round at a range of potential scenarios, that a threshold of 5 per cent was necessary to ensure an effective solution to the SLC, given the history of voting behaviour and the uncertainty inherent in foreseeing the exact circumstances under which any vote might take place. We also took into account that a shareholding of 5 per cent could remove Ryanair's ability to block the squeeze-out of a minority shareholding during a public offer for Aer Lingus, though the precise threshold at which this would be achieved is difficult to establish with certainty, given the inherent uncertainty as to the size of the 'dead register' at the time of future public offers.
>
> 8.108 A shareholding of 5 per cent would also remove any realistic prospect that Ryanair could block an ordinary resolution or the disposal of Heathrow slots.

8.109 There are other effects of Ryanair's shareholding where it is difficult to ascertain a particular level of shareholding for which such competitive effects would be effectively removed, in particular the disincentive created by Ryanair's presence on Aer Lingus's share register to potential partners for Aer Lingus. Potential bidders may be unwilling, for example, to import Ryanair as a significant participant on to their own share register in a bid for Aer Lingus which is not structured as a 100 per cent cash bid (but is either a combination of cash and equity or 100 per cent equity), or who may be unwilling to countenance the possibility that a bid may be subject to delay and additional cost as a consequence of frustrating action by Ryanair (eg further legal challenges in its capacity as a shareholder)

8.110 The impact of such effects would, in our view, be lessened by a reduction in the level of Ryanair's shareholding—in particular, we noted that if Ryanair's stake in Aer Lingus were lower, its corresponding position on a bidder's share register would be smaller. On balance, we took the view that these concerns would also be effectively addressed by a reduction to 5 per cent.

8.111 We considered whether it would be necessary to reduce Ryanair's shareholding still further, for example to below 3 per cent—which would remove Ryanair's ability to propose resolutions at an AGM—or entirely, which would remove Ryanair's ability to exercise any rights as a shareholder. We took the view that this was not necessary in order to remedy the SLC that we have found. We did not consider that Ryanair's ability to propose resolutions at an AGM or requisition an EGM, while potentially disruptive, would materially affect Aer Lingus's effectiveness as a competitor. Nor did we consider the various other ways in which Ryanair might exercise its rights as shareholder owning 5 per cent would have a material impact on Aer Lingus's ability to implement its strategy in competition with Ryanair.

8.112 We concluded that a reduction of Ryanair's share to 5 per cent would be effective in remedying the SLC that we have found. Such a divestiture would need to be accompanied by limited behavioural remedies to ensure that Ryanair could not seek or accept board representation or acquire any further shares in Aer Lingus following divestiture. The restriction on the acquisition of shares could be lifted if Ryanair, following a successful appeal, obtains clearance from the European Commission permitting a full takeover of Aer Lingus."

The appeal to the CAT

32. Ryanair challenged the decision of the CC on six grounds, only three of which are relevant to this appeal. In summary, those three grounds were:

(1) it was procedurally unfair for the CC to have refused to disclose to Ryanair (or its external lawyers) the material allegations and evidence relied upon by the CC in reaching the conclusion that Ryanair might affect Aer Lingus's ability to participate in a combination with another airline. Particular weight was attached to the evidence of other airlines but their identities and the underlying evidence were withheld from Ryanair despite its requests for their disclosure. It was therefore denied a fair opportunity to respond;

(2) the decision to require divestiture of all but 5% of the minority stake involved a breach of the duty of sincere co-operation under Article 4(3) of the Treaty on European Union ("TEU") because of a material risk of conflict between the order and a future decision of the European Commission (following the appeal to the General Court) that Ryanair should be permitted to bid for 100% of Aer Lingus; and

(3) The divestiture remedy was disproportionate and was imposed by the CC on the basis of a misdirection as to the degree of risk of an SLC occurring that has to be found before a remedy can be imposed and which dictates the type of remedy required.

33. The CAT rejected all of these challenges to the findings of the CC and the divestiture order. Ryanair now appeals to this Court on the three grounds summarised above.

(1) Procedural unfairness

34. Ryanair maintains that it was denied a fair hearing by the CC because it (or at least its lawyers) were not given the identities of the airlines which the CC found would have been likely to have entered into some form of combination with Aer Lingus but for the impediment created by Ryanair's minority stake in the company. Lord Pannick QC for Ryanair submitted that, in its assessment of the risk of an actual or likely SLC, the CC placed considerable weight on Ryanair's ability to deter other airlines acquiring or entering into some form of joint venture with Aer Lingus. In paragraph 7.178 of its Final Report it said:

> "We formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline. We identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares (which might be required for a corporate transaction or to

> optimize its capital structure). We found that absent Ryanair's shareholding, it was likely that Aer Lingus would have been involved in the period since 2006, or would be involved in the foreseeable future, in the trend of consolidation observed across the airline industry. Such consolidation has the potential to provide significant benefits to Aer Lingus by increasing its scale and reducing its unit costs, thus enabling it to become a stronger and more effective competitor with Ryanair in the relevant market relative to the counterfactual."

35. Since Ryanair's case was that the prospect of Aer Lingus entering into such a combination would have been remote to non-existent regardless of the existence of Ryanair's shareholding, the evidence of the other airlines that they would otherwise have been interested in Aer Lingus as a partner was, he said, highly material. But the identities of most of the airlines in question and the underlying evidence were withheld from Ryanair and its professional advisers despite their requests for disclosure. These included proposals for some kind of confidentiality ring which would have protected any commercially sensitive material.

36. Lord Pannick submitted (and I accept) that there is no doubt that the evidence provided by the third party airlines was extremely influential in relation to the CC's findings about the likelihood of a combination. Mr Beard QC for the CMA does not seriously suggest the contrary. Although that evidence seems to have fallen short of identifying any particular combination with a particular airline and was of course directed to what the airline might have done in the counter-factual situation of Ryanair not holding its stake in Aer Lingus, it was relied upon by the CC as supporting the potential for such a combination in those circumstances. The consequence of the non-disclosure, says Lord Pannick, was that Ryanair was unable to make effective submissions on the credibility of the evidence and the likelihood of any such combination and was seriously prejudiced in the result. If the CC was not prepared to disclose the names and other information, it should not have relied upon the evidence in reaching its conclusions on this issue.

37. During the course of his submissions, Lord Pannick was able to provide some clarification as to what exactly his client and its advisers did and did not see. Aer Lingus's evidence about the relevant negotiations was provided to the CC in written form and was elaborated upon at oral hearings at which neither Ryanair nor its lawyers were present. Ryanair did, however, receive summaries of the written material submitted by Aer Lingus and either saw or had the opportunity to respond to all of the material contained in paragraphs 7.40 – 7.84 and Appendix F to the Final Report. This included references to Aer Lingus's strategy documents relating to potential partners (but not the names) and intermediate discussions with third party airlines on possible combinations in the 2010-2013 period. The strategy documents indicated that Aer Lingus, for its part, wished to pursue a strategy for expansion through an acquisition, merger or some other kind of joint venture. Lord Pannick's concession that Ryanair was aware of the substance of this material extends to the content of the evidence of other airlines summarised in paragraphs 7.82 – 7.83 of the Final Report quoted earlier. His complaint is limited to the fact that Ryanair was not given the names. The same goes for the contents of Appendix F which includes further details of the gist of the discussions with other airlines and the prospective

synergies involved but again, for the most part, without the identification of the airlines involved.

38. The CAT spent some time analysing the provisions of the Act which deal with the disclosure of confidential or commercially sensitive information. Section 237 of the Act restricts the disclosure of specified information relating to the business of an undertaking except insofar as permitted under the Act. The provisions of s.237 have no application to the CAT (see s.237(5)) but do apply to the CMA. Information is specified within the meaning of s.237 if it comes to a public authority "in connection with the exercise of any function it has" under Part 3 of the Act which is the Part dealing with mergers and the duty to make references: see s.238(1). Disclosure is, however, permitted when it is for the purposes of "facilitating the exercise by the authority of any function" it has under the Act. This must include the CMA's duty to consult parties whose interests are likely to be adversely affected by a decision which the authority is due to make: see s.104.

39. There was therefore no statutory bar on the disclosure of the names by the CC but it was required before making any disclosure to consider whether disclosure would be contrary to the public interest (s.244(2)); whether it might significantly harm the legitimate business interests of the undertaking to which it related (s.244(3)(a)) and the extent to which disclosure was necessary for the purpose for which the authority is permitted to make the disclosure (s.244(4)). The CMA accepts that if the sensitivity of the information would justify it being withheld under s.244(3) but its disclosure is necessary for the purpose of carrying out the consultation exercise under s.104, then the proper resolution of that conflict should ordinarily be achieved by the CMA not relying upon the evidence for the purpose of determining the reference. This view was endorsed by the CAT in paragraph 134 of its judgment with which I agree. The common law principle of fairness which the Court is required to apply to test the legality of the proceedings conducted by the CC is therefore accommodated within the statutory framework governing disclosure through the focus of what is necessary for those proceedings to be fairly and effectively concluded. The task of the CAT was therefore to determine whether a fair process has been followed in circumstances where the consultation exercise has been carried out without the disclosure of the names. This requires an objective analysis of the process but one which admits only of a single answer: see *R (Osborn) v The Parole Board* [2013] UKSC 61 at [65].

40. Although not subject to the restrictions imposed by s.237 of the Act, the CAT has of course to apply this principle of fairness to its own proceedings. For the purpose of the CAT hearing, some limited additional disclosure was made subject to a confidentially ring comprised of Ryanair's lawyers. But the names of the third party airlines remained anonymised. Nothing therefore in the appeal process itself operated so as to affect the relevant question on this appeal which is whether the CC adopted a fair procedure as part of the consultation exercise. The disclosure of the names to Ryanair's lawyers in the confidentiality ring would not have assisted Ryanair because the information could not have been disclosed to their client. Unless therefore the hearing before the CC was procedurally unfair, the point goes nowhere.

41. The CMA's response to Ryanair's procedural challenge is that Ryanair did not require to know the names of the airlines involved in order to meet Aer Lingus's case that the minority stake was a significant impediment to some form of union or collaboration with a third party. Aer Lingus's stated aim of expanding through the medium of

merger, acquisition, joint venture or any other type of combination with another airline was a matter of record based on its own internal documentation, the gist of which was communicated to and known by Ryanair. Nor was it seriously suggested that there were no economic benefits to be gained by operating in conjunction with one or more other airlines.

42. In my view no further disclosure was necessary in order for Ryanair to address that evidence. Similarly it had no difficulty in being able to respond to the reasons why it was said that the presence of Ryanair as a significant minority shareholder was likely to deter potential merger partners. Paragraphs 7.26 – 7.35 are simply an analysis of how Ryanair could, if it chose, use its shareholding to frustrate a merger, joint venture or other combination. The identity of the potential combination partner is immaterial to this analysis. The same points can be made about paragraphs 7.36 – 7.46 which deal in general terms with the trend towards consolidation in the airline industry.

43. The case against Aer Lingus was not that it did not have such commercial objectives but rather that it was unlikely ever to be able to achieve them due to its own inherent unattractiveness as a combination partner. Ryanair's case that it was materially prejudiced by non-disclosure of the names is therefore limited to the section of the Final Report between paragraphs 7.47 and 7.79 where the CC reviews the evidence from other airlines and the conclusions which follow in paragraphs 7.80 – 7.84.

44. Mr Beard's submission, which I accept, is that Ryanair did not need to know the names of the airlines in order to make out its own case on the likelihood of any combination. It is not suggested that the discussions referred to by Aer Lingus did not take place but neither was it suggested by the CC that they ever led to a particular proposal with an identified airline which was in some way frustrated by Ryanair. This is made clear by paragraph 7.61 of the Final Report where the CC say:

> "The impact of any particular combination on Aer Lingus would necessarily depend on the identity of the combination partner and the specific nature of the transaction being contemplated. We have not sought to assess the probability of any particular transaction involving Aer Lingus taking place, and we therefore do not seek to carry out an analysis of the impact of any specific combination. Rather, we take into account a range of evidence—particularly relating to the importance of scale to Aer Lingus and to the airline industry more generally—to reach a view on the likely importance of a combination, or sequence of combinations, to Aer Lingus's competitiveness."

45. The CC's analysis of the likelihood of an association is therefore based on its survey of trends in the industry; Aer Lingus's own stated commercial objectives; and the CC's own assessment of the attractiveness of Aer Lingus. The existence of tentative discussions with other airlines undoubtedly supports the CC's own view that Aer Lingus was not perceived in the industry as a commercial pariah and was relied on to that extent. But it was not the only evidence and Ryanair did not need to know the identity of the airlines who participated in the discussions in order to be able to address the issue of whether Aer Lingus was in fact an attractive partner in the context of industry trends at the time. The substance of the discussions was disclosed.

46. The CAT said:

> "139. We are satisfied that the CC did in fact disclose in broad terms the gist of the information which was redacted. The critical question is whether it ought to have disclosed the names of the relevant airlines. We have decided that it was not in fact necessary.
>
> 140. First, the CC did in fact disclose a great deal of information. The redactions went no further than was necessary to protect the confidentiality of very sensitive commercial matters between airlines who were competitors or potential competitors of Ryanair.
>
> 141. Secondly, the submissions of Ryanair fail to take into account the nature of the case being made in the Final Report. The CC was not suggesting that any particular combination or form of combination was likely. Its finding of an SLC in the sense found in Section 7(a) (limiting the ability of Aer Lingus to participate in a combination with another airline) was based on a number of factors, mostly undisputed, namely:
>
> (1) Ryanair's incentives as a rival airline which was keen to acquire Aer Lingus;
>
> (2) Ryanair's ability to act on those incentives by virtue of its shareholding;
>
> (3) The desirability for Aer Lingus to consolidate and its stated objective to achieve inorganic growth;
>
> (4) The trend in the airline industry for consolidation;
>
> (5) Aer Lingus was a credible partner for consolidation;
>
> (6) The anticipated cost savings and synergies that would result from a consolidation.
>
> 142. Thirdly, it is correct that some reliance was placed in the report on the views of unnamed airlines about possible combinations and cost savings/synergies. However, this reliance was relatively limited to supporting the suggestion that possible combinations arise and other airlines considered Aer Lingus to be a credible partner (paragraphs 7.55 and 7.83) and that there may be cost synergies. We do not consider that Ryanair was unable to respond to the gist on those points without knowing the identity of the airlines. Ryanair was able to submit and did submit that Aer Lingus was an unattractive partner for any airline (apart from Ryanair itself)."

47. I think this is an accurate analysis of the relevant parts of the Final Report and in my view it discloses no error of principle. The non-disclosure of the names of the other airlines did not make the consultation process procedurally unfair to Ryanair.

(2) Legitimate aim

48. The second ground of appeal challenges the CC's determination that a divestiture of all but 5% of the minority stake was the only remedy effective to remove or prevent an SLC. As explained earlier, the CC, having found that a relevant merger situation had been created, was required by s.35(1)(b) of the Act to decide whether it had resulted or might be expected to result in an SLC. It is common ground that the actual or prospective existence of an SLC is a matter to be determined on the balance of probabilities (see *BSkyB v CC* [2010] EWCA Civ 2) and the CC directed itself accordingly in paragraph 7.177 of its Final Report. I have already summarised the reasons why it concluded that an SLC had resulted or was likely to result from the merger situation which existed.

49. A positive finding in respect of an SLC requires the CMA to decide whether and, if so, what action should be taken to deal with the anti-competitive outcome: see s.35(3)-(4). That action must be what is required "for the purpose of remedying, mitigating or preventing" the SLC or its adverse effects and s.35(4) requires the Commission to have regard to the "need to achieve as comprehensive a solution as is reasonable and practicable" to the SLC. The objective set out in s.35(3) is repeated verbatim in s.41(2).

50. The CC in its Final Report noted that Ryanair had offered undertakings including ones not to vote against any acquisition of or by Aer Lingus involving another airline or against a scheme of arrangement. The CC accepted that these might be effective to deal with acquisitions but that they would not extend to other forms of combinations such as a partnership which would not necessarily involve a scheme of arrangement:

> "8.34 We do not consider it to be either feasible or necessary to catalogue all potential future transactions that might involve Aer Lingus and another airline. However, we believe there to be a number of different ways in which a transaction between Aer Lingus and a potential partner might be structured. In reaching our SLC finding, our concerns were not confined to combinations with EU airlines that were effected through a scheme of arrangement or a general offer, which are the focus of Ryanair's proposals.
>
> 8.35 For example, in a joint venture (where two airlines pool some or all of their assets but the ownership of each airline remains unaffected) no scheme of arrangement or general offer is involved, and yet a potential partner for Aer Lingus may well be concerned at entering into a joint venture with an airline over which Ryanair would continue to have material influence, including potentially over the operation of the joint venture itself.

> 8.36 The preferred means of implementing a particular combination is likely to depend upon a range of factors specific to the nature of the transaction concerned and the identity of the potential partners….
>
> 8.37 In our view an effective remedy should not focus solely on combinations with EU airlines implemented through schemes of arrangement or general offers but be sufficient to address all possible future forms of combinations open to Aer Lingus and its potential partners. The fact that under Ryanair's proposal, Aer Lingus and potential partners would still be inhibited in the forms of combination that they were able to pursue is, in our view, a substantial shortcoming of this approach."

51. It concluded that the only remedy which would cater for all possible forms of combination would be a divestiture order: see 8.106 – 8.112 quoted in paragraph 31 above.

52. Ryanair submitted to the CAT that this was a flawed approach to the determination of a remedy because the only legitimate purpose of the remedy imposed under the powers in s.41(2) was one which removed the *probability* of an SLC; not *all possibility* of an SLC which is the test which the CC adopted. If the undertakings proposed by Ryanair would be effective to make an SLC no longer probable then the statutory duty under s.41(2) went no further.

53. The CAT rejected this argument:

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

54. Lord Pannick said that this ground of appeal raises a short point of statutory construction in relation to ss.35 and 41 of the Act. Section 35(2) requires the CMA to decide whether an SLC *has resulted* or *may be expected to result* from the merger situation. Once the CMA decides on the balance of probabilities that there is or will be an SLC then the duty to impose a remedy extends no further than to what is

necessary to remove that probability: not to ensure that there is no realistic prospect of an SLC.

55. He submits that the s.35 gateway which requires the CMA to find the probability of an SLC occurring cannot have been intended to permit it to order a remedy which removed any possibility of such an outcome. He poses the example of a minority stake of, say, 19% which would not make an SLC a probable outcome even though it might be a theoretical possibility. If at 20% an SLC becomes probable then, on the CAT's analysis, the CMA could order total divestiture to remove any possibility of an SLC even though to remove the probability of such an outcome a reduction of only 1% would be required.

56. Divestiture is also said to include an engagement of Ryanair's rights under Article 1 of the First Protocol to the ECHR which again militates against a construction of ss.35 and 41 that goes further than is necessary to deal with the mischief with which the Act is concerned.

57. My own view is that this argument confuses the standard of proof necessary to establish the risk of an SLC and therefore the CMA's duty to intervene with what the CMA is required to do in remedial terms in that situation. Section 35 does not say, and in my judgment does not mean, that all that the CMA is concerned with is the probability of an SLC and what is necessary to reduce the risk of an SLC into something less than a probability which is Ryanair's argument. What the CMA has to decide on the ordinary civil standard of proof is whether an SLC has or may be expected to result. Once it has reached that conclusion then the action which it has to take must be such as to *remedy* or *prevent* the SLC concerned. It is not at that stage in the exercise concerned with weighing up probabilities against possibilities but rather with deciding what will ensure that no SLC either continues or occurs. Section 35(4) confirms this.

58. In this case the undertakings offered by Ryanair did not cover all possible forms of combination. Since the CC had concluded that some form of joint venture (not limited to an acquisition) was a realistic possibility in the current market, it seems to me that their findings should properly be read as a determination that an SLC in the form of Ryanair being able to deter almost any kind of joint venture was a probability and not a mere possibility. In their view the risk was not theoretical but real. But what the Final Report clearly does contain is a finding that, in order to prevent an SLC in that form, only the divestiture order would suffice. On the proper construction of s.41(2) there was therefore nothing unlawful about the order which was made. The duty imposed on the CMA is to take the action which it considers reasonable and practicable to remedy or prevent the SLC: not merely to lessen the chances of it occurring. The order satisfies the legitimate aim of the Act and was neither *ultra vires* nor disproportionate.

(3) Duty of sincere co-operation

59. Ryanair contends that the CC's direction for the divestiture of all but 5% of the minority stake in Aer Lingus involved a breach of the duty of sincere co-operation set out in Article 4(3) TEU as follows:

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

60. Article 4(3) is expressed in very general terms but Ryanair contends that included in the duty is an obligation to avoid making decisions which would or could conflict with a potential decision of the EU: in this case the future decision of the European Commission on Ryanair's bid for Aer Lingus assuming that Ryanair is successful in its pending appeal to the General Court. The reduction of its shareholding to 5% might make the completion of a future bid both difficult and unnecessarily expensive.

61. The CC treated this question as a balancing exercise involving a consideration of fifteen factors including the lack of jurisdictional overlap between the European Commission and the CC; the nature and scope of the appeal to the General Court; the likelihood of a conflict between the decision on the appeal and the CC's own findings; and the practical effect of divestiture on Ryanair's ability to launch a further bid: see paragraph 8.9 of the Final Report.

62. On appeal the CAT accepted that paragraph 8.9 of the Final Report was unsatisfactory because it did not go on to state what weight the CC had attached to the various factors it had identified. It also said that even if there was a balancing exercise to be carried out in order to determine whether a conflict existed, the duty of sincere co-operation required the CC to desist from taking a decision if a real conflict would be created. On that issue, the CAT accepted (in paragraph 108) that it would be harder and potentially more expensive for a bid to proceed if the minority stake had been reduced in the meantime to 5%. But it rejected the submission that it was an EU objective that the bid should take place and not be hampered or made more difficult by the interim actions of the CC. Having considered the recitals to the EUMR, it said:

> "111. Ryanair relies on the recitals in support of its submission that as reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and other matters in recital (4), once a notified concentration has been declared compatible within the meaning of Article 8(1) or 8(2) EUMR, then it is part of the European Union's objectives that the bid should be allowed to proceed without hindrance. We do not agree with this analysis. The EUMR relates to the control of concentrations falling within the relevant thresholds. It does not cover the minority stake held by Ryanair which falls within the CC's jurisdiction. The EUMR is concerned with ensuring the competition is not distorted by concentrations. Whilst it prohibits mergers which may be

> harmful, it is not a European Union objective promoted in the EUMR that a proposed concentration which has been cleared does in fact take place. In giving clearance under Article 8(1) or 8(2), the European Commission is not finding that an acquisition should or must take place. Bids may not in fact proceed or they may not be accepted.
>
> 112. Some reliance was placed by Ryanair on the previous statements of the Tribunal, the courts and the CC in the earlier stages of the CC's inquiry. These are referred to in paragraphs 12 to 20 above. We do not find that these in any way bind the CC or this Tribunal. They were focusing on the situation prior to the decision of the European Commission and the CC's Final Report.
>
> 113. We find that there is no breach of the duty of sincere cooperation in the proposed divestiture order of the CC. The CC is concerned with Ryanair's minority holding and is mandated to take steps to reduce the SLC identified as a result of that holding. It has not prohibited Ryanair from making any bid which may be cleared in the future by the European Commission. To have to await the long process of the completion of the appeal to the General Court and any remission for further consideration by the European Commission would be most unsatisfactory given that Ryanair acquired most of its current holding as long ago as 2006. The 29.82% holding which is the subject of the CC's Final Report and proposed divestiture order is a separate matter to the shareholding which Ryanair seeks to acquire and is the subject-matter of the EU process."

63. At the outset Lord Pannick accepted that this is not a case of overlapping jurisdictions. The CMA and the European Commission are concerned with different matters. The Commission is concerned with the competition consequences of a bid by Ryanair for the remaining shares in Aer Lingus. The reference to the CC related only to the effects on competition of Ryanair continuing to hold 29.82% of the shares. The potential for conflict, were the European Commission to re-consider and permit a future takeover bid, is therefore limited to the practical difficulties in terms of cost and the acquisition of shares which would result from a reduction in the holding to 5%.

64. Lord Pannick submits that the CAT was wrong to construe the EUMR as not including as one of its objectives the facilitation of compliant mergers. He relies on recitals 2-5 which state:

> "(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy

> with free competition. These principles are essential for the further development of the internal market.
>
> (3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.
>
> (4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.
>
> (5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it."

65. Article 2(2) and (3) of the EUMR also state:

> "2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
>
> 3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

66. Lord Pannick submitted that the phrase "compatible with the common market" in Article 2(2) indicates that a merger with no anti-competitive consequences is to be treated as an EU objective. I disagree. Read with recitals (2) and (3), it seems clear to me that the objective of the EUMR is to promote competition. Mergers which do not have an adverse effect on competition are therefore *pro tanto* compatible with a common market based on the principle of competition. But, although therefore compliant, they are not in themselves part of that objective.

67. It is not therefore necessary to consider what seems to me to be the more fundamental question of whether the duty of sincere co-operation can have any application at all to what everyone concedes are not overlapping jurisdictions. It seems to me at least arguable that Article 4(3) TEU is seeking to avoid conflicting decisions on the same subject-matter between member states and the institutions of the EU: not the avoidance of collateral damage which is sometimes the consequence of separate hearings in relation to different competition issues affecting the same party.

68. The CAT was therefore right to reject this challenge to the divestiture order and I see no need to refer this question to the ECJ.

Conclusion

69. For these reasons I would dismiss Ryanair's appeal.

Lord Justice Floyd :

70. I agree.

Lord Justice Laws :

71. I agree that this appeal should be dismissed for the reasons given by Patten LJ. I would add only this. The terms of TEU Article 4(3) apparently create obligations which are so general and open-ended as to raise real concerns for the protection of legal certainty and therefore the rule of law.